

# **The Rule of Law as a Pre-requisite for Public Policy Implementation: The Case of Free Basic Water Service Delivery in Ingquza Hill Municipality**

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## **Abstract**

The stimulus for service delivery transformation in South Africa, has been through a myriad of new service delivery policies that identify targets, responsibilities and provide for the creation of new institutional mechanisms which seek to restore balance. While much has changed, twenty-five years into democracy, South Africa remains a highly polarised society, with one of the highest levels of income inequality in the world. Within the context of good governance, considering the role of the rule of law in ensuring that equitable delivery of services takes place through policy implementation, is critical. This paper seeks to examine the relevance of the rule of law in the context of service delivery policy implementation, and reflects on the case of Free Water Service delivery in Ingquza Hill Local Municipality, a rural area in South Africa. The paper concludes that while governance mechanisms provide clear guidelines for the rule of law and how policy ought to be implemented, the implementers of policy have poor policy knowledge, which in turn impacts on the extent to which the gap between the haves and have-nots can be closed. Within the context of this case study, the principles of the rule of law, namely, legality, equality and acknowledgement of the rights of citizens, are being fettered. Unequal access to water persists despite the prevalence of rule of law. The article concludes by calling for a transition beyond the elements of good governance towards a capable state.

**Keywords:** rule of law, governance, water service delivery, a capable state, Ingquza Hill Municipality

## **Introduction**

In the post-apartheid period, the South African government was challenged to administratively join eleven homelands, four independent states, six self-governing territories, and the rest of South Africa (Alessandro 2015:113). There was a fragmented, unequal approach to service provision, with limited or no services being available in the former black urban and rural areas, where lack of co-ordination, separate institutional structures and poor legislative frameworks were prevalent. Part of the post-apartheid challenge has been to create an impartial and equal service delivery system which seeks to restore human dignity to those previously disadvantaged groups, while balancing the global calls for good governance in their implementation processes. This paper seeks to interrogate the notion of the rule of law and further shows the relationship to governance and public policy implementation. The case study reflects on the perceptions of senior government officials and councillors in the Ingquza Hill Local Municipality in order to offer an example of the kinds of experiences contributing to both success and failure in promoting the rule of law within the South African public policy implementation context. The paper concludes that while the three principles of the rule of law (as described by Dicey), can be found in the content of policy, the issue of policy knowledge, together with resource constraints, are the major inhibiting factors impacting the delivery of water services in the Ingquza Hill Municipality, and the public policy implementation process in general. Given the rural nature of this municipality, one can assume that similar municipalities experience similar realities.

## **Methodology**

The interpretative, qualitative methodological approach was adopted for this paper. In adopting this methodology, primary and secondary data was used as the basis for the analysis. The findings of semi-structured interviews, conducted by one of the authors as part of her Masters research, was used as the source of primary data. The study in question investigated implementing the Free Basic Water Service Policy in Ingquza Hill Municipality. Here, the rule of law was one component of the investigation through an interrogation of the levels of policy knowledge held by public officials, and is of relevance for this paper. A total of 13 semi-structured interviews of key informants were conducted, based upon their potential to elicit deeper commentary on the situation without

bias (Taylor & Bogdan 1998:65; Kothari 2004: 40). These included senior officials in the Inguza Hill Local Municipality, the Municipal manager and ward councillors. Secondary data was sourced from published books, government reports and relevant legislative frameworks. Thematic content analysis was adopted based upon the key principles of the rule of law.

## **The Rule of Law**

The Rule of Law broadly refers to the authority to act. Mohamed Sayeed & Mantzaris (2017) note that the principle of the rule of law forms the basis for examining, evaluating and commenting on the integrity and legitimacy of the state. Further, Mohamed Sayeed & Pillay (2013: 87) point out that the ‘application of the rule of law entrenches the acceptance of the authority in place by the society’ and that ‘it indicates the continuation of an authorized set of regulations, methods, and procedures which in themselves act as a safeguard against the unethical use of government authority and lawlessness’.

One of the earliest documented writings related to the notion of the rule of law can be found in the work of Dicey in the late 1880s. Dicey’s interpretation presents a doctrine, or a guide, for considering political morality, where morality refers to the extent to which a public official is able to act within strict sets of guidelines. Dicey, in his doctrine, argued that a national constitution must be guided by three main principles, namely, legality, equality and the acknowledgement of the rights of citizens. The principle of legality provides that no person should be denied their rights as a result of the decisions made by office bearers. This principle highlights the importance of the rules and regulations in fulfilling mandates. The principle of equality provides that no person is above the law. It is important to note here that the principle of equality before the law is a fundamental principle of the South African Constitution and provides that government is obligated to act. The third principle identified by Dicey, is that the rights of citizens must be protected by way of action, as described by Beinart (1962). Mathews (1983) went even further than Beinart and interpreted Dicey’s exposition of the rule of law as necessitating the protection of ‘basic civil liberties of persons, conscience, speech, movement, meeting and association’. While some of Dicey’s original ideas in his doctrine are considered to be outdated, the fundamental principles relating to the rule of law still guide the shape and form of most constitutional democracies (Devenish 2004). Further, they have relevance in terms of the

value they add with regard to the imperative for political action to respond to the needs of citizens (Jennings 1959; Devenish 2004).

The rule of law is thus related to the ability to act in terms of the law, as opposed to merely having laws in place. This in turn supports the idea by Aristotle that government by laws is more important than government by men. Here, the assumption is that the law will always precede the opinions and actions of men. Mathews (1983) notes further that it is only in a country where the rule of law means more than formal, legal validity, will civil society be able to enjoy the benefits and protection from official tyranny and abuse. Hayek (in Hamowy 1971: 351) goes further by noting that the rule of law means that people do not have to answer to the arbitrary decisions of governmental officials; instead, they guide their actions by what is defined in the law. Devenish (2004:677-678) notes that the idea of the rule of law has become a universally accepted concept and that the concept of the rule of law is a fundamental value that underlies ‘an open and democratic society based on dignity, equality and freedom’, and must be promoted when interpreting the provisions of the bill of rights. These are critical factors that are embodied in more contemporary discussions about public policy implementation and government functionality, more commonly associated with the notion of governance.

## **Public Policy, the Rule of Law and Governance**

There are numerous definitions of public policy. Some authors refer to these as the norms and principles regulating government action, while others emphasize the position adopted by government regarding particular issues. The definition by Dye (2013:45) encapsulates the many perspectives. Dye (2013:45) indicates that public policy is ‘about what governments want to do, why it does it and what difference it makes’. This definition emphasizes that public policy reflects the choices made by government to respond to a problem or issue. Malone and Cochran, cited in Puentes-Markides (2007:4), indicate that understanding public policy allows one to understand the political decision-making that takes place towards meeting the needs of society. Birkland cited in Puentes-Markides (2007: 4) further indicates that the term is about the statements that the government makes stipulating what it intends to do or not to do. Public policy is thus a reflection of commitment by government to responding to issues, which in turn is an extension of the commitments expres-

sed in the Constitution. In other words, public policies provide the basis for the application of the principles of the rule of law entrenched in the Constitution.

Policy implementation is the stage at which government puts policy into action (Lipsky 1980:7; Hill & Hupe 2009:99; De Coning & Cloete 2006:35). Here, public servants are tasked with the implementation of policies in order to respond to the needs of citizens, in an equitable manner, while respecting the roles and responsibilities for which they have been employed. Essentially, policy implementation is where more visible effects of the rule of law in action can be experienced.

In an era of good governance, where governance refers to refers to the policies that are made; the levels of effectiveness with which they are carried out; the rules and qualities of systems; the levels of cooperation to enhance legitimacy and effectiveness, and the attention to new processes and public-private arrangements in the attempt to address socio-economic issues, the need to function within the rule of law is a basic requirement for effective and efficient government. While ‘good’ governance ought to be participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable, inclusive and following the rule of law, the extent to which the implementers of policy are able to effectively function ultimately determines the extent to which the rule of law prevails. Further, ethical governance and successful service delivery policy implementation have a common foundation, built on ethics, trust and the fight against corruption (Mungiu-Pippidi 2013: 104 - 105). Combined, the issues of the rule of law, governance and ethics are important issues for consideration in any interrogation of the rule of law and policy implementation. These formed key themes in examining water service delivery in the current case study.

## **Water Service Delivery in South Africa**

### **Background**

Prior to 1994, the Republic of South Africa was divided administratively ‘as a result of its policy of eleven homelands, four independent TBVC states, six self-governing territories, and the rest of South Africa itself’ (Alessandro 2015:113). This situation resulted in a fragmented approach to service provision, with limited or no services being available in the former ‘black’ urban and rural areas (Department of Water Affairs and Forestry 2002:2). According to the Department of Water Affairs and Forestry (2002:3), these

problems were part symptomatic of a lack of coordination and responsibility due to the proliferation of institutional structures that existed at that time and the apartheid policies which entrenched the rationale to develop services in the interests of the minority white population. The post-1994 period witnessed radical transformation of the public policy frameworks in providing the context for an equitable, inclusive service delivery process. The idea behind this transformation was to provide guidelines which enforced the rule of law as a key factor for the public policy implementation process in the country. Based upon an interpretation of the principles of the rule of law, Devenish argued in 2004 that credible policy is necessary for the achievement of socio-economic justice in a post-apartheid South Africa, where the rule of law becomes the precursor for government action. He noted further that these need to be sound policies that allow for the rule of law to prevail. The discussion now examines the basic provisions for water service delivery in South Africa.

### **The Rule of Law and the South African Constitution**

Section 1 of the Constitution of South Africa prescribes that the rule of law be the principle that guides all other values embodied in the Constitution. The Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa (Act 108 of 1996:13) sets out the rights of all South Africans including ‘the right to dignity and the right to equality’. Section 27 subsection 1(b) states that ‘everyone has the right to sufficient food and water’. Chapter 2 of the Constitution, entrenches basic rights on citizens. As a result, the Constitution compels action in relation to Dicey’s three principles, namely, legality, equality and acknowledgement of the rights of citizens. Hence the South African government is compelled to take practical and legislative procedures to accomplish the realization of the right to water within its available resources. This right to water was seen in post-1994, as a high priority of transformation (Alessandro 2015:115).

### **Water Policy in South Africa**

The Water Services Act (Act 108 of 1997) outlined the various mechanisms that ensured that citizens have access to a basic water supply and sanitation. The policy primarily sought to address the backlogs in basic water and sanitation services. The Act prescribed regulations that entrenched the right to basic water services. Thus, the rules related to water in South Africa are driven

by the National Water Act in that they sought to provide a coherent and all-inclusive water services policy in post-apartheid South Africa. The Act is extensive as it outlines rules for the protection, water use and management of water within the state. The National Development Plan and the Sustainable Development Goals further support the delivery of water services in an equitable manner.

## **The Role of Sub-national Government**

Often described as the lowest level, or level closest to the people, Reddy (2015:34) notes that local government is the sphere of government that directly interacts with citizens on issues that affect their lives. It is at this level that the effect of the principle of acknowledgement of rights, as described by Dicey, is possible. The Republic of South African Constitution 1996 (Act 108 Section 153:88) clearly articulates the responsibilities of sub-national government. This includes ‘promoting social and economic development, promoting a safe and healthy environment, and lastly, encouraging the involvement of the community in the matters of the municipality’ (RSA 1996:88). The Municipal Systems Act 32 of 2000 (section 77:46) allows municipalities to decide on the level of the service to provide and whether to provide services directly to the community or to explore alternative mechanisms. This Act allows a municipality to improve and expand the delivery of services by improving its own ability to do so. Further, the Act gives power to municipalities to adjust resources towards improving the skills needed in a municipality to be able to deliver services to the people effectively and efficiently. Reddy (2015) emphasises, in this regard, that local government has a responsibility to fulfil the legislative mandate of extending services to people, and that it must be held accountable should it not deliver. It must be noted here that there is a growing movement towards holding government to account for its actions or lack thereof. According to Lennan and Munslow (2014:67), ‘their agencies are no longer deemed innocent until proven guilty or seen as essentially being instrument of the public interest’. This is further supported by Buhlungu, Daniel, Southall & Lutchman (2005:49).

## **Free Basic Water Strategy**

In 2001, the Department of Water Affairs and Forestry launched a Free Basic Water Strategy as part of its contribution to alleviate poverty within the

country. This strategy formed the basis of the Government's Community Water Supply and Sanitation (CWSS) programme, which primarily focussed on service delivery in the poor rural areas and extended access to basic water supply and sanitation services to all in the country (Alessandro 2015:116). According to the Department of Water and Forestry (DWAF Report 2002:30), the Free Basic Water Policy is the 'agreed minimum standard of water supply services essential for the consistent supply of an adequate quantity and quality of water to households, including informal households, to support personal hygiene'. The Free Basic Water Policy was proposed to make sure that no-one is deprived of access to water supply, based on an inability to afford it. The responsibility for the implementation of the strategy was handed to sub-national government or municipalities (Asha & Madzivhandila 2012), with national and provincial government being obligated to provide support at the local level (DWAF 2002: 3). For rural municipalities, an Indigent Policy further guides the delivery of water services.

An Indigent Policy is a legal imperative, which provides a tool developed make sure that all people who are regarded as indigent have access to basic services, as defined in the Constitution of the Republic of South Africa, Act No 108 of 1996. In this regard, municipalities are required to develop this policy as it will speak directly to the needs of people through its policy implementation strategies (DPLG cited in Constantinos 2011:53). The policy should outline steps it will make use of in terms of the pricing of water, which must be in line with the national standards (DPLG 2005: 38).

One can surmise that there are policies in place that protect the rights of citizens with regard to water access, and that these rights are further supported by a legislative framework for government to acknowledge these rights through a service delivery system. While elements of the principles of legality, equality and the acknowledgement of the rights of citizens are present in the policy, evidence suggests that the government is failing to adequately respond to the need for basic water and sanitation services in terms of the implementation of these public policies. This article will now examine the case of Inqguza Hill, a rural municipality in the Eastern Cape of South Africa.

## **Water Policy Implementation Challenges in the Eastern Cape**

Census 2011 outlined that there is still a significant gap between urban and rural service delivery (Census 2011:45). It further outlined that urban service



delivery continues to be the priority for government to the disadvantage of rural areas. In 2002, the South African government committed itself to eradicate basic water supply backlogs by 2008, and sanitation backlogs by 2010 (DWAF2002:2). This has not happened. A report on the status of water and sanitation services in South Africa outlined a number of anomalies in service delivery (DWAF 2012:28). These include that ‘service provision in rural settlements was frequently found to be costlier than in the more densely populated urban settlements’; the growth of urban informal settlements; poor strategic planning across government departments, and poor management as key inhibiting factors to effective and efficient service delivery (DWAF 2012:28). The report in 2012 further highlighted that an estimated 1.4 million households had no access to any form of water and sanitation service within the country, and that 3.8 million households have poor access that is at risk of failing. Municipalities in the Eastern Cape dominated in both these categories. This situation has somewhat improved. The most recent General Household Survey (Statistics SA 2016) indicated that the Eastern Cape has the lowest percentages of households (75,7%) with access to improved drinking water sources. However, it must be noted that it is also the province which reported the largest percentage increase from 2002, when 60,9% of households reported accessing improved drinking water sources. While nationally and provincially, improved access can be reported, the rural communities in the Eastern Cape continue to be amongst the group with poor access to water services (Statistics South Africa 2016). There are a number of factors that contribute to the extension of waters services to communities in the Eastern Cape. Most of the municipalities in the Eastern Cape are rural, and like Inqguza Hill, have no history of service delivery, high levels of poverty and are geographically difficult to access. The Municipalities are more often than not staffed by poorly qualified and inexperienced staff. Further, rural municipalities, given their history, have no revenue collection process. This impacts on the ability of municipalities to create a pool of revenue from which services can be extended to those who need it. Additionally, corruption and financial maladministration cannot be ignored as contributing factors to poor water service delivery policy implementation. There are several recent cases where officials have been arrested for fraud amounting to over R300 million in the Eastern Cape (SABC News Online: 18 January 2018). In one case made public through the Office of the Public Protector, the memorial services for the late Nelson Mandela, R350 million was mis-spent on t-shirts and transport (R News 2018). This

money was earmarked for water service delivery and infrastructure development in the province.

## **Water Service Policy Implementation in Inqguza Hill Municipality**

It is the vision of the Inqguza Hill Municipality to create ‘a developmental, economically viable and responsive municipality where communities enjoy equitable access to services in an environmentally sustainable manner’ (IDP 2015:6). The Municipality’s mission is ‘to facilitate the promotion of sustainable development by ensuring service delivery in a just, equitable manner, focusing on infrastructural, social services through a skilled, accountable, responsive administration that prioritizes community needs and good governance’ (IDP 2015:6). These objectives are in line with the need for municipal structures to be geared towards the acknowledgement of the rights of citizens. In this context, addressing issues related to the improvement of the quality of life by providing citizens with a safe and secure environment without any personal threats, has relevance (Denhardt & Denhardt 2000). The mission and vision clearly reflect that the municipality, at least strategically, recognises its role in this regard. Combined with the policy frameworks for water service delivery, the municipality clearly has the necessary frameworks for policy implementation. Despite these clear statements, there is a growing mistrust by citizens of government. This is part of the challenge presented to government by citizens to act responsibly, and to display the highest levels of political morality and ethical behaviour (Reddy 2016). An estimated 69.2% of residents in Inqguza Hill do not have access to water (Statistics South Africa 2016). The respondents in the empirical study reflected limited understanding of policy related to water service delivery. Very limited knowledge was displayed even over the names of the policies that guide their functionality, while some respondents indicated that they do not know of any policy that guides service delivery within the municipality. This reality, while shocking, indicates a clear breach of the provisions of the Constitution, which requires that public officials have adequate policy knowledge to be able to actively engage in the delivery of services. The Municipality has an Indigent Policy in place which seeks to clarify and secure the rights of individuals to basic services, as well as the public right to a healthy and sustainable environment. The policy outlines that it aims to benefit all indigent people residing within the boundaries of Inqguza

Hill Local Municipality (Indigent Policy 2012:3). There is no definition of 'Indigent people' within the policy (Ingquza Hill Local Municipality Indigent Policy 2012:3), which would make the identification of those requiring assistance particularly problematic. It is important to note here that despite the policy being in place, the respondents indicated that there is no implementation of the Indigent Policy nor the Free Basic Water Services Policy. There are thus clear inconsistencies between policy and practice.

The Municipality has a committee in place to administer the implementation of water services, which signifies that there is an attempt to be accountable. This is despite reports of under-performance being documented in relation to service delivery and poor administration (The Auditor General Report 2012/2013). The respondents indicated that the Municipality does not have a Water Sector Plan to guide the delivery of water services. This is emphasized in the Municipality development plan (Ingquza Hill Local Municipality IDP 201/2015). The issue of backlogs, poor financing and management were also identified by the respondents as key issues affecting water service delivery. These challenges have been attributed to the inheritance of a system that was doomed from the onset. Given the absence of a plan for implementation, there are no key indicators that can be referred to as signs of success or failure. Respondents emphasized that the lack of skills that should enable public officials to function effectively impedes any attempt at improving efficiency. While policy implementation is 'about the process of change and putting into action decisions made to address certain problems or issues through policy' (Matland 1995:56), in the absence of these steps, the municipality is not addressing any problems. According to Levitt (1980:45), failure in a policy is mostly resulted to the failure of implementation. While the mission and vision of the Municipality identify the delivery of services as key in the development of the municipality, in the absence of plans of action, they are failing to implement in terms of the principles of the rule of law. Further, in this context, the ability to acknowledge the rights of citizens is challenged, if not absent.

It is important to note here that citizens are not silent in their experiences. The increase in public protests, in this municipality (SABC News 2018) and in South African in general (Reddy 2016), have shown that citizens are unhappy with the functionality of government, and are willing to express this discontent. The Municipality recently witnessed a number of public protests. In one incident, local building contractors protested over corruption in the tender process (*Despatch Live* 20 May 2018). Another incident

witnessed the damage of a major water pipeline (*R News* 2018) and brought on further protests.

Matha (2018) concluded that based upon the failure to implement policy in line with the needs of citizens, the municipality had adopted a non-viable top-down approach to policy implementation, where the policy identifies the ideal and is not related to the context of the citizens. This disconnect is highlighted by Parsons (1995: 467) as a weakness of the top-down approach to policy implementation, as it does not ‘take into account the role of other actors in the implementation process’. Parsons (1995:461) further notes that policy implementation is where change becomes visible and that this change allows one to understand ‘the micro-structure of political life, meaning that it looks at how organisations inside and outside the political system conduct their affairs and interact with one another’. Within this context, it is important to note that the Inqguza Hill Municipality is one of the few municipalities of the Eastern Cape who have produced a clean audit.

### **Moving beyond Governance to the Notion of a Capable State**

In establishing what is meant by a ‘capable state’ it is essential to consider the contributions of the capability approach to the idea of government and governance, which was made popular by the work of Amartya Sen and Martha Nussbaum. The approach presents a normative framework which accommodates the evaluation and assessment of the arrangements for social and individual wellbeing, which includes consideration of the policy arrangements for social change. The approach thus has relevance in arriving at what is a ‘capable state’, as the approach calls for consideration of the systemic processes or policies required to encourage the development of capabilities by citizens and the developmental impact thereof. A capable state would thus be one which goes beyond good governance by taking actions to improve performance and service delivery at all levels of government, by becoming more capable. The idea of a capable state in South Africa is not new. The National Development Plan (NDP) speaks directly to the need to develop the ‘capacity of the state, and promoting leadership and partnerships throughout society’ (RSA, National Planning Commission 2011: 61). This idea has resonated in literature since the dawn of democracy in South Africa. The rationale behind Reconstruction and Development was essentially about improved service delivery, coupled with a plethora of government policies to

realize this. The country's more recent history of poor performing municipalities, unqualified audits by the Auditor General, and even qualified audits in the face of poor service delivery as in the case of Inqguza Hill Municipality, reinforces the need to look beyond the law, to the practice, implementation and even reprimand for poor performance. In other words, seeking a capable state requires that effective state institutions are measured by their capacity to deliver what they have been mandated to deliver. The reality is that a capable state cannot be constructed without, first and foremost, an ethical political leadership that understands and is committed to the national interest.

Mukhoni Ratshitanga (2020) recently highlighted that this notion of a capable state 'has been identified so many times before' but that it has not been met with political will and meaningful action. The reality is that while South Africa has strong legislative frameworks, these need to be paired with government officials who have a willingness to act, to deliver goods and services to the citizenry effectively and efficiently, and most importantly, requires officials to take responsibility for the powers which are bestowed upon them. This is echoed by Palmer, Moodley and Parnell (2017) in their book *Building a Capable State: Service Delivery in Post-Apartheid South Africa*, wherein they reflect on years of empirical research into the functionality of the state, and conclude that in terms of the legislative frameworks, South Africa is a capable state, but that this is thwarted by state capture, poor implementation of policies, and a lack of accountability among other issues. The potential to be a capable state, they argue, starts with legislative frameworks, which are in place. We are thus at the starting block, however, delivering on promises made since 1994, requires a move beyond rhetoric to one of action if the race is to be completed.

## Conclusion

Despite provisions for law, equity, protection of rights and access to water, these rights have not been effectively extended to civil society for a range of reasons. These include poor policy knowledge on the part of implementers of policy, a lack of human and financial resources and the absence of action plans necessary for policy implementation. From the current case study, there is quite clearly a gap between policy and the policy implementation process, more commonly referred to as the implementation gap (Mohamed Sayeed & Pillay

2013: 98; Kanyane 2010: 77; Brynard 2007: 357; Madue 2008: 197). Given the challenges being faced within the province and the municipality itself, the policy needs to be strengthened with resources (both human and financial), effective management and administration, and the enforcement of the principles of the rule of law in terms of the way in which the water service delivery policy is implemented. There needs to be recognition of the conditions of the citizens, with public officials acting within the ambit of the law, if effective change is to be witnessed in this municipality.

The case study reflects that, despite the legal guidelines being in place through policies and strategies, the lack of knowledge of these together with a lack of resources, impedes the ability for the rule of law to achieve its intended outcome, namely, equality and acknowledgement of the needs of communities. It is clear that public officials remain limited in their capabilities to effectively implement policy and impede effective public policy implementation. A move towards focussing on capacity and not cadre deployment can no longer be avoided.

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