

## INTRODUCTION: PUBLIC VALUES AND PUBLIC PARTICIPATION IN DECISION-MAKING IN TIMES OF PRIVATISATION

*Ellen Hey and Andria Naudé Fourie*

Privatisation poses challenges to the manner in which public values, such as accessibility, affordability, reliability, safety and sustainability, can be secured. In liberal societies the state, legitimised through democratic elections (input legitimacy) and the rule of law upheld by courts (output legitimacy), was traditionally regarded as the entity responsible for securing such values – although these values were perceived rather thinly. During the second half of the 20<sup>th</sup> century, with the role of the state expanding and public values conceived more thickly, the perception emerged that democratic elections and courts upholding the rule of law were not sufficient for legitimising the exercise of public power by states and that concerned members of the public should play a direct role in securing public values. As a result, public participation in the *national context* – here defined as consisting of the following elements: transparency (including access to information), public participation in decision-making, and access to courts or court-like institutions – emerged as a tool for securing public values, as well as checking, and thereby legitimising (input legitimacy), the exercise of public power by the state.

In the mean time, numerous international and European instruments formulated the right to public participation at the national level of decision-making, in particular concerning decision-making related to environmental issues – as conceptualised by the Rio Declaration on Environment and Development and Agenda 21, both adopted at the 1992 United Nations Conference on Environment and Development, and further concretised by the Aarhus Convention.<sup>1</sup> In addition, in response to calls for greater accountability and legitimacy, as well as the growing awareness of the link between public participation and development effectiveness, multilateral development banks (MDBs) adopted various operational standards at the international level – applicable to themselves as well as their (public and private sector) borrowers, including enforcement mechanisms such as the World Bank's Inspection Panel and the International Finance Corporation's (IFC) Compliance Advisory Ombudsman.

Privatisation challenges the conventional conceptualisation of 'public values and public participation' because neither the state nor international institutions such as the MDBs are longer the decision-makers *par excellence* in their respective governance systems. We therefore submit that the manner in which public participation is conceptualised requires rethinking, in particular with respect to the relationships between private actors delivering what were hitherto conceived as public services (e.g., water delivery, rail services) and public actors (the state as well as international actors).

This issue of the *Erasmus Law Review* addresses the why, what and how of public participation in the national context, as supported by international legal instruments and operational standards formulated by MDBs. We focus on how this notion is being challenged by privatisation; as well as responses to mitigate potential adverse effects of privatisation on the scope of public participation. In essence, the contributions in this issue address two objectives: first, to attain an overview of (relatively unknown) applicable rules and regulations as reflected in international law regarding public participation; and, second, to ascertain if and how these rules and regulations are capable of addressing privatisation.

The contribution by Jeroen Temperman sets the scene by providing a broad analysis of public participation standards contained in and developed on the basis of international human rights instruments. His analysis shows how public participation standards are evolving from an initially narrow focus on democratic rights to direct participation

<sup>1</sup> 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

in decision-making procedures; although the international human rights system has not been very explicit in dealing with the challenges posed by privatisation – the work of the Committee on Economic, Social and Cultural Rights being a notable exception, which he also emphasises. The analysis problematises privatisation in the human rights context, showing how it might create instances where state actors may *de facto* not be in a position to respect, protect or fulfill human rights, even though they are the *de jure* duty bearers under international law.

Temperman concludes that ‘privatisation affects the enjoyment of the right to public participation itself’ and ‘might also impact on other substantive rights’. However, he poses that ‘mainstreaming participatory rights with socio-economic rights’ may provide an answer to privatisation’ since it potentially holds the key to ameliorating the adverse effects of privatisation, albeit within certain limits – such as the ‘contracting out’ of education to ‘(private) religious institutions’.

Jonas Ebbesson notes the evolution of two parallel phenomena – ‘the expansion of participatory rights in environmental decision-making; and expanded privatisation of natural resources, services and control functions relating to the environment’ – and asks the pertinent question if and how these two trends can be reconciled. In many respects, the model for participation set up by the Aarhus Convention, which is the focus of his analysis, is an answer to this question. Ebbesson highlights the Aarhus Convention’s broad functional notion of ‘public authority’ as the main reason for its ‘fair degree of resilience to the adverse impact of to privatisation’. However, his analysis also points to specific instances under which the scope of the Convention’s public participation standards might be vulnerable to erosion.

Ebbesson concludes, therefore, that negating the adverse effects of privatisation in the environmental context ‘not only depend[s] on the Aarhus Convention standards and concepts’, but also on the resilience of the ‘domestic legal framework surrounding privatisation’, such as the extent to which ‘domestic regulations, procurement contracts and other normative structures frame the duties and expectations of the private entity in charge of the service or function.’

The final contribution by Daniel Bradlow and Megan Chapman highlights the impact of privatisation on public participation from a different perspective, namely through the continued increase of private sector lending by MDBs such as the World Bank Group, the Inter-American Development Bank, the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development. They note that MDBs are increasingly placing the responsibility for ‘compliance and the details of implementation on the borrower – whether private or public sector’, making the need for clear standards on public participation even greater. Through a systemic and comparative analysis, their article takes stock of the various public participation standards developed – and increasingly harmonised – by the MDBs in the context of private sector lending, focusing on information disclosure, community consultation, grievance procedures, and enforcement mechanisms – thereby echoing the Aarhus Convention model.

What makes these standards of particular interest is that they are applicable to both the MDB and its borrower. In case of privatisation and a private sector borrower, they thus create ‘legally relevant’ relationships at the international level between three categories of non-state actors – international institutions, individuals and private corporations. Bradlow and Chapman also acknowledge the broader ramifications of MDBs as ‘creators of evolving international standards and norms’ on public participation adding that the MDBs ought to pay closer ‘attention to other, more formal sources of international and domestic law on public participation’ in developing and interpreting their policies and standards.

These three contributions to this issue of the *Erasmus Law Review* illustrate that concerns regarding the realisation of public values and public participation in times of privatisation cut across what were traditionally perceived of as distinct functional areas of international law (e.g., human rights law, environmental law and development law). In addition, the contributions illustrate that the smooth interplay between national and international law is of the essence if public values and public participation are to be realised. While privatisation raises some concerns when it comes to realising public

values through public participation, the contributions also illustrate that such concerns can be addressed. The Aarhus Convention and, in particular, the standards developed by MDBs are relevant in this context. The standards developed by MDBs furthermore illustrate that there is a space shaped by law, what one might refer to as ‘common public space’, that is shared by individuals and groups in society, international organisations (i.e., MDBs) and private actors, as well as traditional public sector actors such as states. That space is neither national nor international and cannot be defined strictly in terms of human rights law, environmental law or development law. Further research will be required in order to develop our understanding of the ‘common public space’ notion; however, the three contributions to this issue of the *Erasmus Law Review* explore some of its contours.