

# REDRESSING RACIAL INEQUITIES THROUGH WATER LAW IN SOUTHAFRICA: INTERACTION AND CONTEST AMONG LEGAL FRAMEWORKS

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## Abstract

During the apartheid era in South Africa, control over water was unequally partitioned between the white Republic of South Africa and the black Homelands, which were reserves created for Africans by the white state. In the former, which controlled the bulk of water available in the country, riparian rights were granted mainly to high-volume users with the relevant state department playing an overseeing role. In the latter, the Homeland governments held some responsibilities for water management while delegating others to communal authorities like traditional chiefs. After the end of apartheid, a radical and far-sighted National Water Act was promulgated, which seeks to redress the race and gender inequities of the past in the arena of water management. This paper focuses primarily on how the Act tries to redress racial inequities. It demonstrates how the implementation of this pro-poor act has come up against barriers imposed by the de facto persistence of the legal framework that governed the white areas. At the same time, the implementation of this act in the former Homelands seeks to reconcile old and new governance forms. The paper suggests that a more integrated vision of water management is needed, with a more pro-active interpretation of the law in favour of the poor. This will enable the new law to achieve its stated ends, viz., the redress of past inequities and the alleviation of poverty through better water management in river basins.

## 1. Introduction

South Africa, in the apartheid era prior to 1991, was a country riven by formal racial divisions. Under a comprehensive official policy of racial segregation and in an attempt to create a society of whites only, the government of South Africa broke off its association with the British Commonwealth and created a white republic in 1961.<sup>1</sup> Simultaneously, in an attempt to confront the reality of a black majority within its borders, the republican government instituted a program of “Separate Development” through which it carved out a number of black states inside its own boundaries.

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<sup>1</sup> Although this date does not mark the beginning of the various segregationist policies pursued by the white state, the unilateral declaration of a republic does herald the removal of what it perceived as a last check to the execution of its policies. As far back as 1913, it had created “African Reserves” under the Native (now ‘Black’) Land Act, which not only stipulated that blacks could only own land within specifically demarcated territories and but also denied them access to even sharecropping arrangements in areas outside these reserves. In 1948, racist policies got a boost with the election of the exclusively-Afrikaner National Party. Forced removals of blacks from so-called white areas to the reserves, later termed Homelands, started only after 1961 (Ross 1999).

Comprising no more than 13.5 % of the country's area, these ten arbitrarily-created administrative territories—called *Bantustans* or Homelands—were allegedly the original areas of settlement of what the state had identified as the country's nine main African ethnic groups. Within these territories, several of which were highly fragmented, black Africans could aspire to self-rule (Ross 1999:135).<sup>2</sup> [MAP 1: South Africa pre-1994, showing the Homelands] In reality, these areas—whose nominal autonomy went unrecognised internationally—served merely as dumping grounds for blacks who were deemed in excess of numbers acceptable within the white republic. They acted as dormitories from where black men commuted to work in white South Africa while the women, most of whom stayed behind, were relegated to the roles of procreators of a future labor force and caregivers for the sick and elderly (Omer-Cooper 1994: 193-221). Moreover, these areas were rendered economically unviable given that forced removals led to huge population densities that often far exceeded the land's carrying capacity (Ross 1999: 126, 145-148). Hence, the new multiracial government of South Africa, which was elected to power in 1994, continues to be confronted by the institutions put in place by its predecessor.

Under apartheid, the open embodiment of racism in law carried over into the water sector as well. As a result, control over water in contemporary South Africa can be understood as the interaction and contest among three formal legal systems, besides several informal ones as well. The three formal systems are: 1) the apartheid-era laws, enforced within the white republic; 2) the former Homelands laws; and 3) the post-apartheid laws. Although superseded by the laws of the democratic South Africa, the two legal systems of the apartheid era continue a de facto existence in certain respects.

During the apartheid era, the white government, large-scale farmers, and mining-, forestry-, and tourist-companies established well-defined formalized law and well-organized institutions, based on riparian rights, which ensured their permanent access to the country's scarce water resources. In contrast, in the Homelands, water was one of the subjects falling under the jurisdiction of the Homeland governments, who partially relegated control over water to local chiefs and tribal councils. The National Water Act of 1998, formulated during and immediately after the political changes that led to the democratic election of the new government, broke radically with previous policy. In principle, at least, the Act shifted the locus of formal water control from riparian titleholders, consisting largely of the white minority, to the nation's new government, in particular the Minister of Water Affairs and Forestry, who was deemed the custodian of the nation's water resources. The Act is not only widely recognized as the most comprehensive water law in the world, but also specifies, more clearly than any other comparable document, that water is essentially a tool to move society towards social and environmental justice and poverty eradication. The redress of race and gender inequities from the past is its overriding aim.

The first years of implementation of the National Water Act highlight how most of the former white powers, who are generally 'high-volume water users' with vested interests, attempt to define and use the new legal instruments for their (continued) de facto control over water. By contrast, the Department of Water Affairs and Forestry (DWAF), in the spirit of the Act, seeks to *regulate* water use and water

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<sup>2</sup> In fact, four of the ten Homelands achieved "independence" from the Republic of South Africa, while the others were considered as being on the path to such self-determination when liberation from white rule was achieved.

control by these high-volume users and to enforce better sharing of water and water-related benefits with the historically disadvantaged and mostly poor black population.

On the other hand, in its direct interaction with the poor, DWAF promotes water development for domestic and productive purposes. It also fosters poor men's and women's empowerment and a stronger voice for them in decision-making over water, both within communities and in interactions between poor communities and high-volume users. In doing so, DWAF seeks to be reconciled with the previous formal law in the ex-Homelands, which vested local resource management authority in only the traditional chiefs. However, the new Constitution and the National Water Act recognize the primacy—especially for the provision of domestic water supply—of the new, democratically elected Local Governments, which are frequently at loggerheads with the traditional chiefs (RSA 1998b: 56, 58). Nevertheless, the de facto influence of traditional rulers continues.<sup>3</sup>

Thus, DWAF's ultimate aims to improve access to and control over water by poor rural women and men and to reallocate water and water-related benefits from the high-volume water users to the poor are to be realized at the interface of, on the one hand, the National Water Act and, on the other, de facto continuing water laws that governed both the former white RSA and the former Homelands.

This paper analyzes these interactions and contests between the three formal legal systems in further detail, highlighting how the various challenges in realizing these ultimate aims are typical manifestations of legal pluralism. As background information, a brief picture is provided of the links between water and poverty in South Africa (Section Two), the historical roots of the two formal legal systems of the apartheid era (Section Three) and the formulation process and contents of the National Water Act of 1998 (Section Four). The interactions between these three legal systems during implementation are illustrated for two important aspects of the National Water Act.

The first is DWAF's current interpretation of the concept of 'basic human needs' at the new interface between DWAF and the historically disadvantaged communities (Section Five). A second aspect is DWAF's approach in establishing Catchment Management Agencies, which highlights how the vested powers seek to use the new law for their own advantage and DWAF's responses to this. The paper elaborates upon the case of the CMA of the Olifants River Basin, a water-stressed basin that has been designated as the second pilot basin for CMA establishment in South Africa (Section Six). From these examples it emerges that the Act itself potentially provides for radical changes, but that the ultimate achievement of these aims depends largely upon DWAF's interpretation of the Act in further regulating the control over water of the high volume users and in crafting new partnerships with the black population, building upon local water tenure arrangements from the old era.

## **2. Poverty and Water in South Africa**

As a legacy of the Apartheid regime, poverty is widespread and inequities are huge in South Africa. Almost 50% of South Africa's population is income poor, spending less than 353 Rand (USD 60) per adult equivalent per month.<sup>4</sup> More than

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<sup>3</sup> This is over and above the fact that, subject to certain restrictions, traditional leaders may also participate constitutionally in Local Governments (RSA 1998b: 56). However, the extent of overlap between their mandate in customary matters and the issues that fall within their jurisdiction as ex-officio members of Local Government councils is not known.

<sup>4</sup> From 1999 to 2002, the dollar value of R 353 has fallen from \$ 60 to about \$ 30.

one quarter, or 10-12 million people, are without clean water. South Africa ranks as low as 31 among all 48 Sub-Saharan African countries in terms of the performance of its rural water supply sector. Unemployment rates in 1999 were 52% for African women between 15 and 65 years, and 37% among men in the same age group (Statistics South Africa 1999). Seventy per cent of the poor live in rural areas. In no other country in the world is income distribution as unequal as in South Africa. The distribution of land resources is also highly skewed with 13% of the population—who are white—owning 87% of available land (Lahiff 1999; Cousins 2000). Inequities in access to water may even be wider, as fragmentary evidence shows. As much as 95% of water for irrigation is used by large-scale farmers, while smallholders only have access to the remaining 5% (de Lange 1998). In the Mhlathuze Basin in KwaZulu Natal Province, a mere 10% of the population has access to more than 97% of available water resources, and only a very small part of the benefits from the bulk of the water that this minority uses trickles down (Steyl et al. 2000).

The linkages between water and poverty are multiple. Poverty is defined as a state and process of multi-dimensional deprivation, affecting economic, health-related, psychological, socio-cultural, legal, and political facets of wellbeing (World Bank 2000/2001). Water deprivation is intrinsic to poverty. Lack of access to safe and nearby drinking water and proneness to water-borne diseases are widely recognized as poverty dimensions per se. While water is essential for crop cultivation, livestock, fisheries, small industries, and other components of rural people's diversified livelihood strategies, poor people often lack the assets and technologies to harness water to these ends. Even though the scale of their enterprises is typically small, the poor even lack access to the small quantities of water that could considerably increase enterprise productivity and reduce their vulnerability to droughts and climatic changes. Moreover, if there is competition over water—whether within communities or between communities and external high-volume users, from local to basin level—the poor are easily ousted by more powerful, high-volume users. Poor people's marginalization from the public governance structures through which these conflicts can be mediated reinforces their exclusion.

The relations between water and poverty also imply that water resources development, management and control can contribute to poverty eradication if it boosts water demand and control among the poor and more equal sharing of the benefits from water with the wealthy water users. This would improve the wellbeing of the poor in terms of health, incomes, assets, resilience against adversities, and socio-political and legal inclusion in governance structures—in general, it would ensure them a greater say over their own lives. Thus, granting South Africa's poor control over water is DWAF's endeavor under the National Water Act. It bears repeating that, in South Africa's water sector, the fault line between rich and poor closely mirrors that between white and black users, respectively.

### **3. Pluralistic Water Law under the Apartheid Regime**

#### *Apartheid Government Law*

In order to better appreciate current changes, a sketch is given of the two separate legal systems in existence before 1994. Jurisdiction over water followed the geographical segregation of the apartheid regime. The Department of Water Affairs and Forestry served the former white Republic of South Africa (RSA). Here, water rights were primarily vested in riparian right holders. Commercial farmers, an

important constituency of the apartheid government, were well served by DWAF through highly subsidized scheme and dam development. Gradually, however, DWAF started shifting its focus to other important water users, such as power generation and industries, and also intensified water quality management. By the mid-1980s, the first basin studies were undertaken, in collaboration with consulting firms that accumulated expertise for the area in which they were active. The first ideas for Catchment Management Agencies also originate from that period (DWAF 1986; Johan van Rooijen, personal communication 2001).

Among the water users in the white RSA, a considerable degree of self-management had crystallized. Democratically elected Irrigation Boards managed large-scale irrigation schemes and their representatives participated effectively in national farmer organizations. Portions of rivers, in which farmers had built weirs, were governed collectively. Large-scale water users also started to organize at basin level. For example, in 1992, the Olifants River Forum was initiated to promote better coordination between mines and a national park downstream of the Olifants River and the upstream mines, industries and the country's largest electricity generation company—all in common pursuit of a 'healthy river'.

### *Homelands Law*

In the former Homelands, formal water authority was vested in the Homeland governments, which were represented at the community level by tribal chiefs and councils.<sup>5</sup> Each Homeland government implemented its control over water and delegated managerial responsibilities in its own way. As documentation and analysis of these various formal legal systems has been extremely limited, only broad and impressionistic remarks can be made here. Generally, these governments undertook some rural drinking water supply schemes. Within rural communities, chiefs and their headmen were the main contact persons for the Homeland government and any other outsiders intervening in issues concerning water supply facilities. Specific tasks, such as the operation and maintenance of water supply systems were usually delegated to members of the tribal council, who then formed the relevant committees.

Most Homeland governments also initiated state-subsidized irrigation schemes in collaboration with Development Corporations (parastatal organizations investing in rural development). These schemes were usually the only effort to improve agricultural development and, for that matter, access to irrigation water in the Homelands. These endeavors were dominated entirely by outside agencies, with neither any formal power for the local chiefs and councils nor any empowerment of the farmers themselves, the majority of whom were women. Formal ownership and management of land and water in these irrigation schemes and sometimes also the management of farming and water management operations, credit provision, and marketing remained with these parastatals. Formal water rights for irrigation schemes

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<sup>5</sup> These repressive governments were, for the most part, puppet states of the white RSA. With its backing, they dismantled the structures of traditional chiefdoms as they had existed for centuries and replaced them with their minions who were hardly accountable to the local communities they were in charge of administering (Ross 1999: 127, 135-136, 177). Therefore, as chiefs became salaried government officials, staying in office at the whim of a government that was beholden to the white South African state, they also risked losing their legitimacy to rule in the eyes of their followers. This nexus between Homelands governments and the apartheid state explains some of the animosity people feel towards chiefs even today and may also explain the attempts made by the post-1994 governments to replace the authority of the chiefs with that of newly-instituted Local Government councils, which consist mainly of elected representatives.

were also in the governments' or agencies' names. However, chiefs played important de facto roles in land reallocation. The domination of the state and of parastatals in these irrigation schemes became particularly evident when the new government suddenly withdrew support in the late 1990s, as a result of which, most of these irrigation schemes collapsed in whole or in part.<sup>6</sup>

Mines intending to operate in territories of specific chiefs also approached them for permission. Even where Homeland governments gave them formal permission, none of the concomitant responsibilities were adhered to. The mines, which considered both land and water resources in the Homelands as open access resources, took this as a *carte blanche* to pollute such resources without taking on the commitment to clean up.

*Informal Law or Local Water Tenure*

While most questions about the formal water law in the ex-Homelands are yet to be answered, even more study is required to understand the informal arrangements within black rural communities that governed water development and management. As the authority of chiefs typically concerned all resources of the community, the ultimate say over water infrastructure development, such as small reservoirs for use by humans and livestock, water allocation, and water pollution issues also fell to the chief and the tribal council. Anecdotal evidence describes how chiefs set and enforced rules to solve problems of water pollution, or convened meetings to resolve conflicts between users of water for domestic purposes and irrigators. These practices and norms were embedded in a particular cosmology that regarded water as a powerful resource.<sup>7</sup> This comprehensive set of socio-political arrangements of rules, norms as well as practices of water use and control that prevail in poor rural communities can be called "local water tenure", analogous to the much more common concept of local land tenure, which often derived from the same sources of authority (cf. Cousins 2000).

Every outsider with the conventional sectoral approach to water issues has overlooked the fact that local water tenure is intrinsically integrated. In poor rural communities, the same water source is often used simultaneously for (unpiped)

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<sup>6</sup> Up till now, the government has done little to reinstall farm support systems and to accord farmers formal title to water and land rights. In some cases, large-scale farmers, white or sometimes black, have used this legal impasse to occupy the collapsed schemes and start cultivating, using the idle irrigation infrastructure and extracting water without any payment. In one such case, a white farmer took over a large tract of land in the Flag Boshielo (former Arabie) scheme in the Olifants Basin by paying a substantial bribe to the local chief and petty amounts as 'land rent'—but only for the first year—to the farmers that occupied the land previously. In order to cultivate this land, this farmer brings along his own laborers but also creates limited unskilled agricultural employment for some laborers from the area. This minimal 'gain' divides the local population and blocks any attempts at effective protest against his *modus operandi*. The provincial government sued the farmer in a court case over the land issue. But despite two years having passed, the case has seen no progress. Meanwhile, DWAF, too, has been lax about levying the necessary water charges.

<sup>7</sup> One such belief concerns the Mother River Serpent. She is claimed to own the water and live in water bodies, such as dams, streams or groundwater. Above all, the Mother River Serpent needs to be kept content. Polluting water or, reportedly, drilling modern boreholes are said to anger her and cause her to move away leaving chaos—in the form of tornados or heavy flooding—in her wake, which in turn adversely affects the existing water body or water course. Traditional healers and prophets are said to stay for long periods in deep waters to commune with her and acquire powerful knowledge. Some of these traditional healers and 'rainmakers' were renowned for their knowledge about the weather and seasons and consulted about the right time to start cultivation. Further, some springs were considered sacred places that could not be accessed by ordinary people.

drinking water, other domestic uses and a diverse range of productive purposes. Sanitation and waste management often directly affect other water sources as well. Water development, for example, with government aid, for one group of villagers easily detracts from the welfare of other users and may jeopardize the fulfillment of people's basic needs. In short, water tenure in rural communities is conceived of—if only in practice—as integrated water resources management.

#### 4. The National Water Act (1998)

##### *Context*

The transformation of the above-mentioned legal systems was a fundamental part of the political events arising out of the end to the apartheid era in 1994 (de Lange 2001). Under the leadership of the then Minister of Water Affairs and Forestry, a process was launched to incorporate public views nation-wide and to harness global knowledge for the formulation of the National Water Act, which was finally promulgated in 1998. These globally recognized 'best principles for integrated water management' include the integration of surface and groundwater management, the gradual decentralization of water management to the lowest appropriate level and self-financing of water management by user groups, public participation and community involvement, the preservation of water for ecological purposes, and the shift from administrative to hydrological basin boundaries for water management, ultimately to be implemented by Catchment Management Agencies.

In promulgating the new law, the government abolished the former system of permanent riparian rights and took over water management authority as the custodian of the nation's water resources. With the abolition of the Homelands, DWAF's jurisdiction became countrywide. As custodian, the government *guarantees* water provision for uses stipulated in the National Water Reserve, which encompasses a basic human need and an ecological component. For any other use, the government *authorizes* water use without any guarantee, although international obligations and strategically important uses are prioritized. Authorizations take the form of either licenses,<sup>8</sup> general authorizations or, for minor uses, permissions under the so-called Schedule One. The Act also introduces water demand management and efficient water use in order to reduce people's water use and free up water for others.

Since 1994, DWAF has also become responsible for rural water supply. While former Homeland governments had experience with rural water supply, including reticulation, this was a new task for DWAF, because until then it had only supplied bulk water to municipal water boards in the white areas, which then took care of reticulation. A special organization, the Mvula Trust, was established to give DWAF, at least temporarily, the necessary institutional and technical support. In the longer term, the democratically elected Local Governments are expected to take up the responsibilities of providing water services nation-wide. As water supply services had a high political priority for the new government, a special Water Services Act was already promulgated in 1997 (RSA 1997).

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<sup>8</sup> Licenses are granted for a maximum limit of 40 years, but can be revised every five years. Pre-1994 'permits' are gradually being changed into licenses, provided water is available or can be exchanged with others who are willing to give up a part or all of their allotment. All who want to engage in new water uses have to apply for licenses, which are only issued under similar conditions. Requests for licenses by historically disadvantaged water users receive priority. 'Stream flow reduction activities' by large-scale forestry estates are also being licensed.

South Africa's new Local Government not only plays a new role in domestic water supply in the ex-Homelands, but also in other aspects of integrated water resources management. Constitutionally, the Local Government is already responsible for water supply reticulation, sanitation and storm water management (RSA 1998b: 58). A step that has been taken more recently is to include water for agricultural uses in the mandate of Local Governments. Indeed, water for small-scale agriculture is now being considered in the Integrated Rural Development Plans of those Local Governments that are targeted by the President's new Integrated Sustainable Rural Development Strategy of 2001. The formal role of Local Governments in the new Catchment Management Agencies is stipulated in the Act, but its precise meaning and its de facto implementation are yet to crystallize.

The capacities of the nascent Local Government are still fragile. After two rounds of national elections since 1994 and stabilized administrative boundaries since 2000, this democratically elected, party-bound layer of government is still 'finding its feet', especially in poor rural areas where no such structure previously existed. Depending on the area in question, this equitable governance body continues to be challenged either by the traditional, black authority structures or the former white municipality leaders, both of whom remain more powerful de facto. The questions of how these new governance layers concur with or contest, first, local water tenure arrangements embedded in the traditional power structures; second, attempts of the former vested white powers to continue their own de facto control of water; and, third, DWAF's own responses, are probably the most critical to answer whether or not the goals of the Act—to redress inequities from the past—will be achieved.

#### *Contents of the National Water Act*

A closer look at the contents of the National Water Act (1998a) highlights components that are most relevant for the question of how the Act can potentially transform society and what may thwart its stated objectives.

*a. Redress of Inequities of the Past based on Race and Gender:* The basic human right that —'Everyone has the right to have access to sufficient food and water'— is firmly rooted in Section 27 of the new Constitution of South Africa (RSA 1994) and subsequently enshrined in the National Water Act. Throughout the Act, the principle of 'redress of racial and gender inequities from the past' is mentioned as a main criterion for South Africa's new integrated water resources management.

*b. Basic Human Water Needs:* The National Water Act stipulates that the government must allocate a Reserve for basic human consumption needs before any other use. A similar priority allocation is made for the Ecological Reserve.

*c. Demographic Representation:* According to the National Water Act, governance bodies should be representative in terms of including sections of the population that were previously unrepresented in governance forums—especially, blacks and women. The Minister of Water Affairs and Forestry has far-reaching powers to ensure demographic representation in new legal governance structures such as CMAs.

*d. Cooperative Governance:* A general government policy in South Africa, which is crucial for rectifying race and gender inequities through water law, is the emphasis on

strong horizontal and vertical ‘Cooperative Governance’. This entails, first, cooperative governance *within* government agencies, in this case coordination between the various divisions within DWAF, such as Water Supply, Water Quality, Groundwater, Catchment Management Agencies, Resource Planning, Modeling, etc. Such integrated water service delivery is especially important in rural areas where similar water sources are used for multiple purposes and uses by the one often directly affect uses by others. More coordination and synergy among the various divisions of DWAF would improve service delivery and better ensure that the still unmet domestic and productive water needs of the poorest are taken into consideration.

Second, the South African constitution requires Cooperative Governance *among* the various government agencies. This is pivotal for pro-poor water development and management for productive uses. High-volume users have already succeeded in establishing large-scale and profitable enterprises. They obtained access, often in the past with considerable state support, to the range of production factors that make a water-related enterprise profitable. In contrast, poor people tend to lack access to the range of inputs, skills, technologies and markets that render a water-related enterprise more profitable, or else they pay relatively more for these inputs and services. Moreover, pro-poor water reform without, for example, effective land reform will have only a limited impact. Poverty is multidimensional and warrants an integrated approach.<sup>9</sup>

Another major issue in Cooperative Governance for pro-poor water management and control, from the local to basin level, is the already mentioned role of the Local Government.

*e. Compulsory Licensing for Water Reallocation:* The legal tool in the National Water Act that allows reallocation of water from high-volume users to poor water users is termed Compulsory Licensing. DWAF can call for ‘compulsory licensing’ where and when needed. A project of compulsory licensing concerns all water users in a specific area. It cancels all existing licenses and replaces these on the basis of a new allocation schedule. Redressing race and gender inequities from the past is a key criterion for such a reallocation. This is the case, even if the reductions result ‘in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used’. Normally in such a situation, a person may claim ‘compensation for any financial loss suffered in consequence’ through the Water Tribunal [National Water Act, Sections 22 (6 & 7) and 43 to 48].<sup>10</sup> The inclusion of this clause weakens the possibility of reallocating water. Fortunately, there is a safeguard built into the Act that exempts the payment of this compensation application of this compensation if it is to “(i) provide for the Reserve; (ii) rectify an over-allocation of water use from the resource in question; or (iii) rectify an unfair or disproportionate water use”. It is vital that this safeguard be implemented effectively.

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<sup>9</sup> An example of improved collaboration between the Department of Water Affairs and Forestry and the National and Provincial Departments of Agriculture is the drafting of a new national policy to mainstream the marginalized through agricultural water use through an integrated approach that also encompasses access to land, markets, credits, skills development, and so on. Links are being established with the Integrated Rural Development Program—established by Presidential decree—which is to be implemented through the Local Government.

<sup>10</sup> Marna de Lange (2001) analyzes the process of formulation of the Water Act, mentioning: ‘Initially, the Minister was opposed to any form of compensation for reduced or lost water allocations. However, in meetings with the Minister and through the press, the agricultural sector pointed out that this would be unconstitutional, a position that was confirmed by constitutional lawyers advising the Minister.’

While the above-mentioned elements of the Act potentially foster the transformation of South African society towards greater equity, the status quo of the apartheid era remains unaltered in two important ways.

*a. Existing lawful use:* the National Water Act recognizes all existing lawful water use in the two years preceding the promulgation of the Act as lawful, and, hence, also accepts the inequities prevailing at that time.

*b. Composition of the Civil Service:* Nation-wide, there were no retrenchments in the government administrative services in the new dispensation, resulting in the new approach to water resources management being implemented by many of the officials responsible for executing the previous, inequitable legislation.

The compromises between changing and maintaining the status quo undoubtedly contributed to what is probably the most remarkable achievement of the formulation of the National Water Act, which is that most of the highly diverse stakeholders in this 'Rainbow Nation' not only endorsed the law but also take great pride in this unique piece of legislation.

## **5. Implementing the Protection of Basic Human Water Needs**

An issue that illustrates the challenge of finding an unprecedented complement between the pro-poor formal law of South Africa and local water tenure is the protection of poor people's basic human water needs. The National Water Act interprets 'Basic Human Water Needs' guaranteed in the National Water Reserve as needs only for domestic purposes. The government took the *policy* decision to guarantee domestic water provision for 25 liters per person per day and committed itself to the provision of the infrastructure required to bring this quantity of water sufficiently near to poor people's homes. In 2000, the government further committed itself to ensure that these minimum quantities of domestic water supply, which equal 6000 liters per household per month, were to be delivered for free. Larger quantities are to be charged according to stepped tariffs. The government's commitment for the infrastructure development and the organization of delivery of free basic water is major and DWAF is engaged in massive efforts to achieve a minimum state of welfare that is still a distant ideal for millions of poor black South Africans.<sup>11</sup>

Water for productive purposes that help income-poor women and men to improve the harvests of their homestead gardens or fields, their poultry and livestock enterprises or small crafts, is not covered in the National Water Reserve. Even Schedule One, which stipulates small water uses that are permissible under any condition, without any need for registration, authorization, or payment—even in the river (sub-)basins that are declared as being 'water-stressed'—is not clear on whether such uses for basic income needs are permitted. 'Schedule One Water Uses' concern water used for reasonable domestic use, livestock other than feedlots, and 'small

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<sup>11</sup> DWAF's efforts to provide a basic quantity of domestic water for free and also improve sanitation were the main argument for the weekly paper 'Mail and Guardian' (February 2002) to recognize the Minister of Water Affairs and Forestry as one of the best performing ministers in the cabinet. Yet, in some of DWAF's national water resource planning exercises, the National Water Reserve for basic human needs for so-called 'Class A' people are set at 300 liters per person per day. This water allocation to the wealthy minority has undoubtedly as high a de facto priority as water allocated to the poor.

gardening not for commercial purposes'. However, farming and gardening by poor farmers are often market-oriented for at least a part of the harvest, and are activities that are certainly expected to become even more so in the near future.

An option that is currently considered is to amend Schedule One in the National Water Act to explicitly allow the use of low volumes of water for commercial purposes, say, on areas less than two hectares or for an income around or slightly above the poverty line.

Obviously, the matter of the protection of poor people's rights to water for productive purposes is only of immediate importance in water-stressed (sub-) basins where there is competition for the small quantities of water that those who already have or who hope to obtain the required infrastructure, use to irrigate small portions of their homesteads or use for other productive purposes. As their numbers grow, the competition with the few high-volume users present is likely to become fiercer. Protection of their water rights (as an amended National Water Reserve would give) rather than just permission without any guarantee (as an amended Schedule One would give) probably makes a difference. In any case, whenever decisions about the interpretation of the text of the National Water Act are taken, the communication of this decision to the rural poor is essential. Currently, virtually none of them is even aware of the possible implications of the National Water Act for their rights to water for productive uses.

Situations of water stress prevail in South Africa. DWAF has already identified 80 (sub-)basins where water stress is so high that Compulsory Licensing within the coming decade is warranted. The first pilot project is currently being prepared. In these areas another dimension becomes relevant, which is the risk of introducing new inequities because of the legal tools used. The recognition of "existing lawful use" as the starting point of formal water rights not only recognizes the current existing inequities in water use, but also favors those who had written documents, such as permits recognized under the apartheid law in the white areas. These provide much stronger proof of existing lawful water use than what the inhabitants of the ex-Homelands can verify. At best, they can refer to notions of use and quantity embedded in what are typically verbal contracts or local water tenure arrangements. Moreover, tracing millions of low-volume water users for formal registration and authorization through licensing would be a logistical nightmare. Legal tools, such as (compulsory) licensing, that are highly effective and indispensable to regulate a small number of high-volume users are inappropriate to even know the quantum of current water use by a majority of small-scale users let alone to provide any legal protection against the efforts of the high-volume users to wrest control over scarce resources.

## **7. Implementing Catchment Management Agencies**

*CMAs in the National Water Act*

A second illustration of the interactions between the old and new formal legal systems in South Africa, which is already being implemented, is the establishment of Catchment Management Agencies. In compliance with the National Water Act, the Minister of Water Affairs and Forestry has started the process of establishing CMAs in the 19 Water Management Areas of South Africa. [MAP 2: 19 WMAs in South Africa] Gradually, he will assign considerable water resource management powers that are currently held by the DWAF to these new governance structures. The CMA

is supposed to compile the Catchment Management Strategy (CMS), and, ultimately, also to carry out functions such as water resources planning in the catchment, registration, water charge collection, water authorization, and licensing (including compulsory licensing). Public participation in the establishment process and fair representation in the future Governing Board and activities of the CMAs are legally required. In the Governing Board, the interests of water users, potential water users, local and provincial government and environmental interest groups will be represented. CMAs are to become self-financing.

This change from a centralized management approach based on command and control from the nation's capital to a decentralized participatory model based on cooperative governance and coordination through CMAs is major (Muller 2001). Parallel to the process of establishing CMAs in the Water Management Areas, DWAF itself is being reorganized. The remaining national functions of DWAF are being defined, and preparations have started in restructuring DWAF regional offices into technical support structures of the CMA in the new Water Management Areas. As long as CMAs are still being established and are maturing, DWAF continues to carry out all functions not yet taken up by the CMAs themselves.

The focus of the rest of this paper is on the formal establishment process of the CMA in the highly water-stressed Olifants Basin, the nation's second pilot basin for this process. The Olifants River has its source in Gauteng province and passes through Mpumalanga and Limpopo Provinces into the Kruger National Park, before entering Mozambique and joining the Limpopo River. [MAP 3: Lepelle/Olifants River Basin.] More than three million people live in this water-stressed basin. The majority of them are poor. Many of these poor live in the congested former Homelands. The process of CMA establishment is driven by the DWAF Regional Office in Mpumalanga (Ligthelm 2001). The establishment of the CMA in the Olifants Basin is especially informative because two approaches were developed and implemented that are highly contrasting, and, yet, both are defensible under the National Water Act as long as the interpretation of the Act remains open and unspecified. Similar processes that are currently occurring in some five Water Management Areas elsewhere in South Africa are beyond the scope of this paper.

#### *Formulation of a technical proposal for CMA establishment*

The first approach in establishing the CMA in the Olifants Basin highlights how the processes through which those who dominated in water control during the apartheid era basically continue their power although attempts are made to ensure legitimacy by nominally including historically disadvantaged individuals.

An earlier attempt to even reinforce control was rejected by DWAF. This is that the aforementioned Olifants River Forum—comprising the white-dominated mines, tourist industry, the public sector electricity supply company and industries throughout the Olifants River Basin—proposed that they themselves would constitute the CMA and would then take the process from there. This was suggested as soon as the new governance structures of CMAs were adopted in the deliberations over the National Water Act. However, DWAF rejected this proposal as it wanted the future CMA to be inclusive from the start.

DWAF launched the process of establishing a CMA in the Olifants Basin in mid-1999 by appointing technical consultants who, in the past decade, had accumulated technical knowledge of this basin. These consultants had also begun quantifying the Ecological Reserve for this basin. As stipulated in their Terms of

Reference, the main purpose was to submit a formal proposal for a CMA to the Minister and assist DWAF in establishing representative catchment management structures. Two rounds of public meetings were held in five places in the basin, in order to inform and consult people who would be affected. Written invitations for these public meetings were sent not only to all contacts of DWAF and the consultants but also to new local governments, tribal authorities, traditional healers, etc. Although new contacts between DWAF and rural communities were established in this way, it was unsystematic. Local Governments, that at the start of the process were still very recent, had no special role, but this oversight of Local Government officials continued in later phases even though they had become much better consolidated by then.

The first round of public meetings, in which 655 people participated, consisted primarily of information provision about the concepts of basin-level management and CMAs with public participation. After the first round of open consultations, DWAF and the consultants decided to add a second round in order to publicize the ideas that they had developed for the future structures of the CMA.

In both the first and the second rounds, the emphasis was on information provision. In all public meetings, the main language was English with translators only providing summarized translations in local languages on request. The consultants were the main authors of a first-draft, incomplete proposal that was finalized by mid-2000. This was made up largely of technical information and water use projections that were essentially already available before the process of establishing CMAs started. In this draft, it was admitted that no attention had been paid to poverty issues.

Although the historically disadvantaged rural communities were certainly interested in establishing contacts with DWAF, often for the first time in history, they were also quite critical of DWAF and the consultants. Frustration regarding English being the main language; suspicion about the dominance, again, of white consultants as perceived process drivers and the ones earning high salaries from a process that is seen as being very expensive; negative feelings after the consultants' explanation of the Ecological Reserve, 'as if they find fish more important than our lives'; complaints about a lack of time for proper preparation and discussion and inadequate explanations of what the issues really are—these were all drawbacks of the process as perceived by the black participants themselves. They were, in particular, dissatisfied about the way in which the drinking water supply issue was handled. Invariably, participants raised their pressing problems in this regard during the meetings. However, for these and similar problems, the officials from DWAF and the consultants referred people to other divisions within DWAF, explaining that the CMA was one of the many parallel processes in which DWAF interacts with the public and, thereby, tries to avoid an inter-division duplication of tasks.

The first round of public consultations was also used to invite volunteers from the historically disadvantaged communities to take their places in a so-called Stakeholder Reference Group. This Stakeholder Reference Group, consisting in part of the former contacts of the consultants and DWAF, discussed the CMA proposal more in-depth. However, while the white participants of the Stakeholder Reference Group were well organized and reported back to those they represented, the black participants were invited in an ad hoc manner, without being required to represent a constituency or report back to it. So black participants of the Stakeholder Reference Group were unable to give mandated perspectives and regretted that there was no opportunity to interact with a constituency and ensure an input mandated by them.

After a long delay, in February 2002 a final meeting with the Stakeholder Reference Group was held. However, even at this meeting, the participation of stakeholders was little more than nominal. Problems from the previous meetings had not been properly addressed. Moreover, the wishes of many poor stakeholders for a more integrated approach to water management by the CMA were peremptorily disregarded.

The process also ended up disappointing the self-organized high-volume water users and others who had worked closely with DWAF before 1994, but for different reasons. Their hope that a reliance on formerly collected technical expertise and the new public space for catchment management would easily enable them to continue exerting a strong de facto voice in water management is at least partly vanishing. This trend was true of both the Olifants basins and the adjacent Inkomati Basin, which was the first pilot project where a similar approach of formulating a proposal, led by technical consultants, had been adopted. In the Inkomati, for example, an active proponent of the National Water Act and strong defender of the interests of large-scale farmers in the Inkomati already since the formulation of the Act acknowledged that the public (read “white”) participation expected through CMAs was a major reason to endorse the Act then. However, later she felt that the expectations raised had been in vain (Pieter Waalewijn, personal communication, 2001).

#### *Bottom-up Institution-building for River Basin Management*

A problem that the DWAF Regional Office identified early on in the above-mentioned first approach of CMA establishment was that small-scale irrigators risked being overlooked. Whereas large-scale farmers were well organized and represented in the CMA process, the many small-scale irrigators were typically unorganized and had no avenue through which to voice their interests. Therefore, a parallel process of consultations in the Olifants Basin was initiated just after the first round of public meetings. This was a bottom-up reconnaissance of small-scale water users’ needs and their suggestions for ways to ensure their effective voice, for example, through Small-scale Water Users Forums. The lead implementer of the process was a black community development activist. Local Governments and NGOs facilitated the logistics of the meetings. Her network of contacts throughout the basin originated from her rural development activities during and after the anti-apartheid struggle.

Nine day-long workshops were held in the local language with a total of 365 participants attending. These generated overviews of the problems participants experienced with regard to water, including drinking water—often given top priority—but also rainfed and irrigated agriculture, and disputes with large-scale users on water allocation. The debates also encompassed issues indirectly related to productive water use, such as the lack of markets, inputs and training for both irrigated and rainfed agriculture, and frustrations about the slow pace of land reform. Concrete suggestions to organize multi-tiered Small-scale Water Users Forums for effective representation in the future CMA Governing Board and Committees were made. Moreover, broad technical support and exchange through the CMA was proposed to also address development issues that were less directly related to water. The report on these workshops (Khumbane, de Lange and Sibuyi 2000) is included in the final technical proposal compiled by the consultant.

In her approach, bottom-up institution building for pro-poor river basin management is fundamentally redressing social inequities from the past, in which water is one of the factors. Cooperative governance is intrinsic part. There is also

continuity. After submitting the report, the community development activist continued working on water-related and other issues in poor communities.

A first component of this approach is stimulating poor people, especially women, to use *more water more productively*, for example through water harvesting for homestead gardening and tree cultivation for food security.

Secondly, where needed, she mediates between communities and DWAF to solve disputes, such as excessive groundwater abstraction by mines, which dries up boreholes for domestic water supply in neighboring communities. Wherever high-volume water users already recognize the need to improve social justice in their localities, this willingness is being harnessed by the facilitator into an encompassing process of dialogue between the non-poor and poor for better sharing of water, water-related benefits as well as other benefits. The black Local Governments are to be brought on board, primarily to be empowered vis-à-vis the high-volume water users. The latter approach is underway with the owner of the largest citrus orchard of the southern hemisphere, and certainly the largest water user in the Olifants River Basin.

Thus, control over water and other resources, established during the apartheid era, is gradually being transformed into a more equitable sharing of benefits and decision-making with the black rural poor. DWAF stimulates this latter initiative, which falls directly under the mandate of establishing a publicly governed CMA in the Olifants River Basin.

As mentioned, there was a lag between the second and third meetings of the Stakeholder Reference Group in the Olifants Basin. The reason was that the Mpumalanga Regional Office and the consultants preferred waiting for the final response of the national Department of Water Affairs and Forestry to the first formal proposal for the Inkomati basin. Earlier, DWAF commented on the lack of sufficiently inclusive public participation and the lack of attention to poverty issues, which necessitated considerable revision of the Inkomati proposal. A final decision is yet to be taken. This is also the case for the composition of the new Governing Board for the Inkomati CMA. The Minister is likely to use his powers to ensure a more representative composition than the race and gender composition of those who were leading the process till today. A major task that the national Department of Water Affairs and Forestry envisages is to further specify performance requirements that can serve as checks and balances for the new CMAs.

## 6. Conclusions

Although the process of establishing a CMA in the Olifants River Basin at the interface of the former formal water law, the new National Water Act, and local water law in poor rural communities—formerly formal water law in the Homelands—has only just been initiated, some conclusions can tentatively be drawn.

First, the contest at the interface of the different legal systems in crafting new pro-poor river basin management institutions at the lowest tiers takes the form of unprecedented dialogues among parties disparate in terms of wealth and power, on issues directly and indirectly related to water. These inequities exist between communities and high-volume users, but also within communities. DWAF's and others' roles are to level the playing field by stimulating information provision, social facilitation, dispute resolution, capacity building, etc. It has become clear that technical experts lack such skills, and, hence, cannot effectively lead the establishment of CMAs. Their narrow focus on water as a 'neutral' natural resource

misses the social and political forces that drive the distribution of water and water-related benefits, and hence the opportunities to redress current inequities.

At the interface between DWAF and high-volume users, DWAF has effective legal tools to regulate water use by high-volume users, such as individual registration and licensing and demand management. A specific issue in establishing CMAs is preventing high-volume water users from ‘cherry picking’ of water management tasks. Their ability to immediately take over (and finance!) important water management tasks is strong. But the risk is real that they would mainly capture the tasks and authority in water management that would most benefit them—such as water authorization, licensing and compulsory licensing, and fee setting and collection—while leaving the more complicated tasks that are in the public interest—such as combating pollution and ensuring the redress of inequities—to DWAF.

At the interface of the National Water Act and local law, on the other hand, blends of both legal frameworks are probably most effective in combating water deprivation. Even though there is currently little organized knowledge on local law, and little awareness among policy makers that there are such laws, much can probably be learned from a community’s own integrated approach to accommodating multiple water uses and needs.

The institutional fragmentation of DWAF into various divisions—in effect, an abrogation of the principle of Cooperative Governance—may be effective for better-off areas, where domestic water supply is well catered for. However, in poor rural areas, domestic water needs are still largely unmet and the various water sources are used for multiple ends so a more integrated service delivery is warranted.

A second domain where it is important to consider local law regards the managerial roles that DWAF vests in the Local Government. These roles need to be somehow compatible with the roles of the traditional authorities. The challenge is, evidently, to empower the poorest members of the village vis-à-vis these traditional authorities but also to ensure accountability and transparency by Local Governments. One option is that villagers themselves are entitled to choose their own management form.<sup>12</sup> In both domains, Cooperative Governance within DWAF and among DWAF and other agencies through the new CMA structures from local to basin level could play a crucial role, both in fostering the required integrated approach and in ensuring an effective Local Government.

Lastly, blends between local law and the National Water Act may appear fruitful because legal tools that are useful in regulating high-volume users are not necessarily appropriate and could even be counterproductive if they are applied in the same way to the millions of very small-scale users. A better understanding of local notions of registration of use, legitimacy of use, allocation principles, dispute resolution mechanisms, and communities’ collective rights vis-à-vis outsiders according to local law could inform policy makers to specify new regulations that effectively empower poor people.

In all domains, only DWAF’s strong, effective steering role in crafting CMAs that build upon local law can lead to inclusive, bottom-up river basin organizations that contribute to achieving ‘Enough for All Forever’.

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<sup>12</sup> Empowering villagers to choose their own management forms is also proposed for communal land tenure (Cousins 2000).

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