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Operationalising hybrid water law for historical justice

A study funded by the Water Research Commission explored the legal tools available to implement the hierarchy of water allocation priorities in the National Water Resource Strategy to redress past injustices in access to water resources.

Background

Promoting equitable access to water and redressing the results of past discrimination are key considerations of the 1998 National Water Act (NWA), in line with South Africa's Constitution. However, despite the legislation containing the necessary legal tools to achieve these stated goals, it has not yet made a substantial impact in delivering redress for past injustices in the allocation of water resources.

Some of these tools remain unused or underused. New approaches are also possible within the existing legislative regime, such as 'hybrid water law' that combines elements of customary and statutory law. This provides a long overdue recognition of living customary water tenure that has governed self-supply by Africa's rural majority since time immemorial. The hybrid approach also enables better

alignment between water law and other legislation, in particular constitutional rights and land legislation.

A project funded by the Water Research Commission (WRC) and implemented by the International Water Management Institute (IWMI), Department of Water and Sanitation (DWS), Inkomati-Usuthu Catchment Management Agency (IUCMA), and Water Integrity Network (WIN) sought to fill this gap. The study set out to interrogate how existing legal tools in the NWA (the Reserve, Schedule One, General Authorisations, Existing Lawful Use and Water Use Licences) can operationalise the hierarchy of water allocation priorities (Box 1) outlined in the National Water Resources Strategy (NWRS). This framework makes adequate provision for equitable water resource allocation for historical justice, but has only partially been operationalised through the suite of existing legal tools.

Box 1: National Water Resource Strategy 2nd edition (2013) Water Allocation Priorities

The second edition of the NWRS seeks to advance equitable access to water by putting in place clear priorities for allocating water resources when choosing between competing uses.

Priority 1

The highest priority is water for the Reserve. The first objective (Basic Human Needs Reserve) is to ensure that sufficient raw water is available to provide for the basic needs of people. Currently this is set at 25 litres per person per day. The second objective (Ecological Reserve) is ensuring sufficient water of an appropriate quality to sustain healthy aquatic ecosystems.

Priority 2

South Africa is committed to managing shared river basins in line with the SADC Revised Protocol on Shared Watercourses and specific agreements with riparian states. The second-highest priority therefore is meeting international requirements in terms of these agreements.

Priority 3

The third highest priorities are accorded to the allocation of water for poverty eradication, the improvement of livelihoods of the poor and the marginalised, and uses that will contribute to greater racial and gender equity.

Priority 4

The fourth highest priority is for water uses that are

strategically important to the national economy (e.g. electricity generation), as described in Section 6(1) (b)(iv) of the NWA, and must be authorised by the Minister.

Priority 5

The fifth priority will be water used for general economic purposes, including commercial irrigation

and forestry. Demand will reflect the value of water in particular economic sectors and will encourage uses that create employment, contribute to the economy and are efficient.

All five priorities must give effect to allocations that promote equity.

Approach

To assess the potential of these measures in the context of a stressed catchment, the Inkomati catchment was used as a laboratory to develop a Conceptual Implementation Plan in consultation with DWS and the IUCMA. This entailed a thorough review and analysis of the legal framework, academic literature and Inkomati catchment water use records, and interviews with officials and other stakeholders at national and catchment level.

Field research focused on the Sabie sub-catchment, which includes parts of the former Lebowa and Gazankulu

homelands. The plan indicates practical and actionable ways to interpret existing legal tools in the catchment context. The findings and recommendations are scalable nationwide, to move the needle towards better meeting the objectives of the Constitution and NWA.

Several policy recommendations are summarised in this brief, that could support planners, policymakers and regulators to better protect and augment pre- and post-1998 water uses by priority 1 and 3 users (the large majority of Historically Disadvantaged Individuals [HDIs]) and curtail uses by the lowest priority 5 Historically Advantaged Individuals (HAIs) where necessary.



Current disparities in volumes of water accessed by the different water users.

Findings and policy recommendations

Redressing historical injustice translates into more water uptake by HDIs (Priority 1 and 3 users) during droughts or for new abstraction infrastructure development. This inevitably implies that water resource entitlements from the HAIs as Priority 5 users are to be regulated and curtailed. This holds for both ELUs and post-1998 water uptake.

Priority 1 and 3 users

pre-1998 ELU: protect

post-1998: expand

Priority 5 users

pre-1998 ELU: curtail

post-1998: regulate, refuse

Figure 1. Conceptualisation of distributive water reform in the National Water Resource Strategy.

In order to protect and prioritise access to water resources by HDIs, the conceptual implementation plan proposes:

Redefining and enforcing the Basic Human Needs Reserve to include water used to realise the constitutional right to food. This reinvigorates the purpose of the Basic Human Needs Reserve for broad water resource allocation, which is lost in its current form. It implies expanding the Basic Human Needs Reserve to encompass micro water uses currently considered under Schedule One, which typically provide such food security. By elevating Schedule One uses to the strong entitlement of the Basic Human Needs Reserve, the problem that Schedule One uses are invisible and a weak right is solved as well.

Recognising and prioritising living customary water tenure in former homelands that governed lawful use before the 1998 NWA and continues to govern new water uptake for self-supply. In the “sharing out” of these

collectively held water resources, water uses in former homelands should have a higher priority than HAIs using water upstream or downstream.

In the Sabie sub-catchment, this suggests that priority 3 water uses in the former Lebowa and Gazankulu should take precedence over the priority 5 upstream forestry companies and downstream tourism industry.

More research is needed to better understand the ‘sharing in’ of water resources within former homelands, and the hybrid interface between customary and statutory law.

Elevating thresholds of General Authorisations for small and medium-scale HDI users to prevent current administrative discrimination. In former homelands, thresholds should be set in dialogue, respecting customary norms that align with the Constitution. These thresholds should also be elevated in former white areas, while ensuring small-scale HDI users are not disadvantaged because of disproportionate administrative requirements.

Where it may be necessary to dislodge water resources from HAIs to enable equitable reallocation, recommended actions that are already being implemented or are intended include:

Ending unlawful water uses, including ongoing pre-1998 uses that have not been certified as ELU and unauthorised post-1998 water uptake. Targeted measures to curb unlawful uses would free up water for reallocation to HDIs. Many high-impact users start to use water without a licence in the hope of regularising this use at a later stage.

Curbing ELUs by implementing the use-it-or-lose-it principle. Water uses that are not exercised should revert to the public trust for re-allocation. This includes HAIs’ private transfers (trade) that currently even monetize and hoard entitlements to this public trust for profits. The implementation of this policy position will require amendment of the NWA.

Declaring a moratorium on registration of new ELUs. Section 33 of the NWA provides for the recognition of ELUs that were not necessarily exercised in the qualifying period but would have lawfully taken place. This provision has however been exploited by some users.

Expediting compulsory licensing. This is a key tool in the NWA to legally convert ELU to water use licences and enable equitable redistribution of water. Being cognisant of the delays and challenges associated with this process, it is even more prudent to ensure that when the process is

initiated, it is carried out expeditiously to achieve the desired redistributive outcomes.

Refusing, or strictly regulating, HAIs' post-1998 water uptake. Large volumes of water are still being licensed to individuals as rapid administrative acts ('an administrative

water grab'), without adequately accounting for impacts on HDIs' existing or future water uses. Targeting licences of limited duration at the relatively few high-impact users with strict due diligence and conditions enables swift revisions when water becomes needed for re-allocation.



Proposed operationalisation of existing legal instruments to implement the NWRS.

Conclusion

The study conceptualises redress for historical justice in the context of water stress as an inevitable zero-sum situation, with different implications for each of the legal domains of water use entitlements. It argues that the Reserve and uses that contribute to improved gender and racial equity and livelihoods should be protected and expanded whereas old order rights, in the form of ELU, should be curtailed or strictly regulated.

To access the report,
Operationalising hybrid water law for historical justice (WRC Report no. 3040/1/22),
link: <https://bit.ly/3Cy6SNT>