A Compendium of the South African Water Law Review Post-1994

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SECTION 1: INTRODUCTION AND BACKGROUND

1. Introduction

The demise of Apartheid and the election of a new non-racial and democratic government in South Africa in 1994 remains a landmark for most development discourses in the country. Since then, public policy reform discourses have gained more visibility in various sectors of the economy (water included). The desired reforms in the water sector were translated, first into a statement of policy (White Paper on a National Water Policy, 1997) and then into legislative instruments, namely, the Water Services Act (1997) and the National Water Act (1998). This report constitutes the final deliverable for Water Research Commission (WRC) Project K5/2250: *"A Compendium of the South African Water Law Review Post-1994".* The study was commissioned by the WRC in 2013. The study was informed by the understanding that the effective management and sharing of South Africa's water resources today needs to be linked to appropriate evidence-based information sources that reflect the socio-economic and political realities of the society.

1.1 Background to the study

Before the National Water Policy (1997) and the National Water Act (1998) were produced, a comprehensive review of the water law was carried out. The main goal of this study, as specified in the terms of reference, was to locate, collect, collate and document all information (oral and written) in the public domain and state archives related to the water law review process which led to the development of the White Paper on a National Water Policy (1997) and the National Water Act (Act 36 of 1998) in South Africa. A detailed examination and documentation of such information enables practitioners and scholars to better understand the main motivations behind the reforms and the then prevailing thinking behind the policy and legislation that was finally promulgated. As implementation of the reforms unfolds today, there is a need to institutionalise the principles and arguments used during the development

stages as these reflect the original vision and the arguments leading to the concretization of that vision.

The study was informed by the view that legal history is important for the South African water sector. Due to the loss of institutional memory in the water sector, sometimes difficult questions are now asked. For example, why do we need catchment management agencies? What was the thinking behind establishing water user associations? Indeed, what was the major rationale for changing water institutions and insisting on water re-allocation in South Africa after 1994?

Any attempt to answer these questions will reveal that the South African water law history is closely connected to the democratic transition in South Africa during which values of equity, efficiency and sustainability were and continue to be held in high esteem. It is also set in the wider context of the anticipated socio-economic changes in society post-1994. Therefore, if questions arise today regarding the extent to which change in the desired direction has occurred or been hindered in the South African water sector post-1994, it will be necessary to re-visit the then prevailing baseline motivations and objectives of reform during the design stage or law review process. This study articulates the baseline motivations and objectives as reflected in the dominant discourses and information sources used during the review of the water law. Therefore, documenting the legal history of water law in South Africa enables scholars to record the evolution of the water law and the motivations for this evolution with a view to better understanding the origins of the various principles enshrined in the law and policy and how these may be better addressed in the foreseeable future.

As the Research Team explored and documented the historical dimensions of water law in South Africa, the data and information collected enabled a better appreciation of the importance of the institutions that have emerged in the reform process as well as the challenges and opportunities that they face. An investigation of the relevant literature and available knowledge showed that the present water policy and legal system in South Africa are not separate from its past. It is a product of

long-ranging historical processes that we must understand today. Therefore, we considered it appropriate for the nation to pause and reflect on the results of the reform implementation processes, in order to learn and talk about all that has happened so far and determine the extent to which the water reform vision is being pursued as originally envisaged, in upholding the values and principles upon which the reform was based. Knowledge generated through this study is intended to inform and build the capacity of stakeholders and decision-makers in the water sector to improve implementation of reform efforts. Knowledge products from the study also directly contribute to the search for more effective reform implementation approaches that address real/felt needs in the water sector.

1.2 Goal of the study

The main goal of the study was to locate, collect, collate and document all information (oral and written) in the public domain and state archives, related to the water law review process which led to the development of the White Paper on a National Water Policy (1997) and the National Water Act (Act 36 of 1998) in South Africa.

1.3 Specific objectives

i) To review all available sources of information related to water law review in South Africa;

ii) To identify major departure points from the previous law of 1956 and document how the different elements were debated and in the process, analyse and profile the main driving factors for the water reforms;

iii) To source and document all major discussion documents prepared for the above purpose including oral knowledge;

iv) To produce a Compendium of all the intellectual material used in developing the National Water Act, (Act 36 of 1998) and produce a final Research Report. The Compendium is in the form of a USB flash drive.

1.4 Methodology

The study was an applied qualitative research project that mainly relied on gathering and review of existing documents and literature, policy and statutory instruments, reports of discussions held during the review of the water policies and legislation, and critical assessment of current institutional arrangements for implementing water reforms in South Africa. The study also built on previous studies commissioned by the WRC to explore related issues, for example, WRC Report. No TT232/04 and No. 1842/1/11. The WRC and the Project Reference Group provided guidance in terms of other relevant research reports and documents that would likely yield the required information. The researchers gathered and categorized documents relevant to the water policy and law review into various themes that made understanding the legal history of water in South Africa easier.

An extensive search for documents, administrative records and various reports in the State Archives, Department of Water and Sanitation, the Parliament of South Africa and WRC library was carried out to build the required database for the study. Copies of all documents identified were made and, where necessary, converted into electronic form. An analytical process was done to review the available information and identify the major departure points of the new water law from the previous law of 1956, documenting how the different elements were debated together with analysing the main driving factors for the reform. Through this analysis, major points of deviation in interpretation of key issues, water reform implementation, and debates began to emerge.

More than 20 purposively selected respondents in the water sector were interviewed to gain their perspectives as experts and key actors in the sector to provide a deeper understanding of the major processes and debates that preceded the water law review as well as to widen our search for relevant resource material. The WRC and the Project Reference Group were consulted to assist in identifying appropriate respondents, with a major preference for those who had actually been involved in the water law review process in one way or another. Various themes

were developed to categorize and analyse the data gathered. A workshop was held with stakeholders currently active in the water sector to validate the results of the study and disseminate the information synthesized. An exploration of the legal history of water in South Africa, gap analysis and identification of appropriate institutional forms was used to develop a scientific paper for publication.

1.5 Specific research methods and steps followed

(i) Detailed assessment of the legal history of water law in South Africa: this stage was mainly constituted by a broad review of the relevant literature, legislation, policy documents and subsequent identification of major departure points from the previous South African water law of 1956 and documenting how the different key components were debated during the law review process;

(ii) Mapping and contacting potential key respondents to set up interviews: these were mainly individuals and institutions who played a key role in shaping the water reform debates and processes in South Africa prior to the promulgation of the new Water Policy and Water Act. A preliminary list of individuals that the Research Team and the WRC believed to have relevant knowledge and memories of what transpired during the water law review process was developed. This list was regularly updated during the study and used to contact specific experts in the sector who could articulate some of the key debates and processes that constituted the water law review;

(iii) Setting up appointments and carrying out open-ended interviews with key respondents to get a deeper understanding of the process and major debates preceding promulgation of the new water policy and law: the initial key respondents also assisted in the identification of other potential respondents and sources where more information and documentation could be obtained. The interviews provided a good opportunity for the key respondents to share their experiences related to their main role in the reform process, other key individuals who played an important role during the process, and specific

events, committees and situations that were critical to the shaping and realization of the reform agenda. The key respondents were also requested to provide the Research Team with any relevant documents in their personal archives/libraries that could help in articulating the pre-reform debates and water law review processes;

(iv) Carrying out an extensive search for relevant documentation in libraries and archives: the study team gathered documents and reviewed all available sources of information related to water law in South Africa;

(v) Detailed assessment, capturing and mapping the chronology of events that shaped water reforms in South Africa, including the prominent characters, contributors, findings and decisions, while identifying the interactions between and among various players within the water resource management fraternity during that time;

(vi) Developing thematic areas and categorizing data gathered for analysis, synthesis and production of the Compendium;

(vii) Creating the platform and uploading all documents gathered during the study:

1.6 Major sources of information used during the study

Relevant information was traced through five distinct sources. These are presented below:

(i) Interviews with key respondents and notes taken during the water law review period: A total of 26 key respondents were interviewed and their memory of the water law review process was priceless. The information captured from the interviews indicated that most of the targeted respondents were able to recall key stages in the law review process, the role-players involved and the main debates engaged in. Substantially, hard-copy and electronic documents from the respondents' personal archives were acquired and duplicated. The

'remembered' information captured from the interviewees and the documents that they shared with the research team were quite informative. The initial list of key respondents contacted pointed the Research Team in new directions in terms of other relevant sources of information.

(ii) *National archives:* When the project commenced, the research team had high hopes that most of the documentation we needed would be readily available at the National Archives in Pretoria. This assumption proved incorrect as most of the water-related documents filed in the National Archives were only those produced well before the review process began. This discovery enabled the research team to discount the National Archives as a source of information for the study and concentrate elsewhere to locate the required documents.

(iii) *Department of Water and Sanitation (DWS):* The research team found out that only a few relevant documents were filed in the DWS library. For example, documents produced during the water law review process and published by the then Department of Water Affairs and Forestry, such as the one entitled "*You and Your Water Rights"* and *"Water Law Principles*", among others, were quite informative. However, the DWS library did not have as many relevant documents and information as had been originally assumed. The library staff members indicated that they did not have many relevant records in their library or offices. Neither did they have the documents on the website because a system of documenting the institutional memory had never been developed and established before the year 2012. However, a new unit had just been established in the department called *Policy and Strategy*, to start archiving such documents whenever they are located. The recommendation from DWS staff members interviewed was for the research team to find 'old guys' in the Department who might have some institutional memory to share with others. They also indicated as a matter of fact that during the water law review period, everyone in the Department who was involved did what they had to do in their office and when they left the Department, they just left with their knowledge and relevant documents. The absence of relevant documents in the National Archives and the limited documentation we found in the DWS library probably

indicates that most of the key players filed the relevant documents in their own personal archives instead of public spaces.

(iv) *Online resources:* The internet proved to be a very good information repository (including the online National Library) and source of documents relevant for this study. The research team searched extensively, downloaded and filed (electronically) quite a substantial number of documents relevant to the study.

(v) *New water archive:* During the study, we discovered that the School of Basic Sciences at the North-West University was in the process of developing an archive of national water-related documents, including documents on water resource management and policy development processes. Discussions with the contact person for that initiative revealed that the project was at a very preliminary stage and would, therefore, not yield much information for the research team.

(vi) *Library of Parliament:* The study team sent some team members to the Library of Parliament in Cape Town as a potential source of information and data. They managed to locate and collect some relevant documents from there.

1.7 Study challenges and limitations

While most of the targeted respondents were quite eager to contribute to the project and actually cooperated with the study team, there were a few who were not so willing to cooperate or share with us the documents and information they possessed. They felt that they needed to protect their 'intellectual property' and have exclusive rights to use the documents they have in future. These individuals' contribution would probably have gone some way in enriching the data that we eventually gathered. However, since this was only applicable to a very few individuals, the research team was still able to gather most of the relevant documents and insights from elsewhere. We are convinced that we managed to put together and analyse a relatively comprehensive set of documents that provides a good picture of the post-1994 water law review process in South Africa.

1.8 Study outputs and deliverables

After 2 years of data gathering and write-up, the study resulted in the production of the following outputs:

i) Report on detailed methodology for the study;

ii) Report on sources of information on the water law review and interviews with key respondents;

iii) Report on major departure points from the previous national water law of 1956 and categorisation of thematic groupings for the data analysis;

iv) Annual reports;

v) 1 Scientific paper submitted to the kournal '*Physics and Chemistry of the Earth*';

vi) 2 Conference presentations: 1 presentation was made at the Water Institute of Southern Africa (WISA) 2014 conference in Nelspruit to validate the study findings and share research results with the stakeholders. Another presentation was made at the Annual WaterNet Regional Symposium 2015 in Mauritius to present the draft journal paper and enable subsequent publication;

vii) USB flash drive containing the Compendium of water law review in South Africa post-1994;

viii) Final research report.

1.9 Capacity building

We recruited and supported 2 black female post-graduate students as Research Assistants right from the beginning of the project. One student completed her Master's Degree in Agricultural Economics during the duration of the project while the other started and continued her PhD in Environmental Studies while working on the project. As part of the capacity building process, these students were exposed to the basics of data gathering, analysis and report writing.

SECTION 2: LEGAL HISTORY OF WATER IN SOUTH AFRICA

2. Introduction

It is quite easy to imagine that the subject of legal history is the preserve of scholars from the law fraternity. Yet this is not necessarily the case. Scholars and practitioners interested in policy and legislative reform often engage with legal history in some way. This study was guided by a conceptual framework that views legal history as one of the main pillars that help in improving the understanding and explaining of socio-economic and political transformation processes in South Africa. This is an analytical framework deeply embedded in legal history. We used it to re-establish the baseline motivations for reform as reflected in the dominant discourses and information sources used during the review of the water law. This section briefly traces and articulates the legal history of the water sector in South Africa. Our brief from the WRC was to focus mainly on how the legislation has evolved over time from the Apartheid era through the democratic transition period until 1998 when a new water act was promulgated, rather than on how water reform and policy implementation has performed on the ground after 1998. Therefore, in data gathering and analysis, we limited ourselves mainly to the pre-1998 period.

2.1 The essence of legal history

Legal history may be defined as the study of how law evolves and why it changes over time (see Pienaar & Van der Schyff, 2007; Lerner, 1997). Legal history teaches us about the contingency of law and its fundamental shaping by other historical forces (Phillips, 2010). It teaches us that law is not a set of abstract ahistorical and universal principles existing in a vacuum. Rather, it is formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those particular societies (ibid). This suggests that history is more than an explanation of past developments. Rather, it is an essential form of understanding the society around us and aspects of it remain embedded in every part of the society.

During the study, we began by assuming that the legal history of the water sector in South Africa is closely connected to Apartheid policies and, subsequently, the democratic transition process that began in 1994. It became clear to us that in this process, values of equity, efficiency and sustainability were, and continue to be, held in high esteem. We were convinced that assessing the legal history of water law in South Africa would enable us to record the evolution of the law and the motivations for this evolution, with a view to better understanding the origins of the various principles enshrined in the policy and legislation that was subsequently promulgated and how these may be better addressed in the foreseeable future. As Turton et al. (2007) point out, given the historic experience of Apartheid, an analysis of this process is useful, because it shows how water sector reform is a key element in the attainment of social justice and historic equity between different groups. Therefore water policy and legislative reform in South Africa are closely associated with a major transitional period in the political power-base of the country (Findlater et al., 2007).

During the study, we acknowledged that legal history cannot and does not necessarily give us all the answers to key questions of the day in the South African water sector. Rather, it helps to inform us about the thinking behind the reforms and its applicability today so that we can make better decisions in the near future. As Movik (2014) points out, the framing of a policy issue always takes place within a 'nested context' and is part of a broader historical, political and economic setting. We argue that the present water policy and legal system in South Africa certainly do not exist in isolation from the past. It is a product of long-ranging historical processes that we must understand today. It is, therefore, wise to pause and reflect on the results of the South African water reform implementation processes, in order to learn and talk about all that has happened so far and determine the extent to which the sector is pursuing the water reform vision as originally envisaged, as well as the values and principles upon which the reform was based.

As we explored and documented the historical dimensions of water law in South Africa, we generated data and information that enable a better appreciation of the

importance of the institutions that have emerged in the reform process as well as the challenges and opportunities that they face. Current technical approaches to water reform in various parts of the world often treat the processes as if they are taking place on a blank slate in which the state holds all water rights and can unilaterally allocate those rights as it wishes (Bruns and Meinzen-Dick, 2005). Yet in all cases, some form of institutional arrangements for accessing and allocating water already exist and this knowledge of the past is required for people to better understand the present and future realities (Lerner, 1997). We contend that, in studies of this nature, it is important to deploy historical and contextual methodologies and approaches that enable the creation of narratives of policy continuity and change, clearly revealing the influence of various factors and actors on the policy process. Such methodologies stand a good chance of demonstrating how ideas are used, ignored or reinterpreted to shape policy as well as how various actors and targeted actions could contribute to policy implementation more effectively.

This perspective resonates soundly with the view of Movik (2014), who states that in water policy processes (including the one that has taken place in South Africa), subtle struggles are played out at the level of policy formulation that give rise to particular discourses. We are convinced that within this complex landscape, the socio-economic, political, and structural dimensions of local and national development are recognised as diverse, dynamic and overlapping. They are certainly not only limited by macro-level political and economic structures but also by the basic assumptions underlying them. These assumptions may include the need to address resource sustainability, equitable distribution, and re-allocation, as is the case in the South African water sector. Policy networks and actors in the sector are acutely aware of these assumptions and the motivations behind them, even though specific blueprints for reform implementation may not be readily available to them. Thus legal history enables us to unravel specific policy positions that key actors align themselves with during the policy and law review process as they advance certain ideas that challenge the status quo.

2.2 Legal history of the South African water sector

Water development in South Africa has been driven mainly by political ideology and rising demand for limited resources, forcing major changes in policy and institutional capacity over time. Historically, water legislation, management and resource development created the water-related infrastructure and economic systems to which modern management practices must be adapted (see Findlater et al., 2007). Therefore, the development of water law in South Africa is woven with the fabric of both economic and political colours and should be understood within the context of conquest and Apartheid colonization processes (see Tewari, 2009). Understanding the historical pattern of development and the evolution of water legislation, key actors, their roles and responsibilities provide context to the challenges facing the implementation of the progressive principles of the 1996 South African Constitution and the 1998 National Water Act (Findlater et al., 2007).

Indeed, a detailed investigation of the relevant literature indicates that South Africa's water law comes out of a history of conquest, subjugation and expansion. The colonial and Apartheid lawmakers harnessed the law, and the water, in the interests of a white dominant class and groups who had privileged access to land and economic power. Gaps in access to water widened significantly. For instance, 95% of water for irrigation was primarily used by large-scale commercial farmers, while smallholders had access to the remaining 5% (Versfeld, 2003). According to Woodhouse (2008), inequality of access to water resources marks South Africa's history even more profoundly than inequality of access to land. It is for this reason that the new government was confronted with a situation in which the majority of people in South Africa were excluded from the land and denied access to water for productive use and the benefits from the use of the nation's water. As a result, inequality of access to water resources marks South Africa's history distinctly. Therefore, redistribution of water rights to redress the results of past discrimination emerges as an explicit purpose of the post-Apartheid water governance policy and

legislative regime (see Woodhouse, 2008; MacKay et al., 2003; Gowlland-Gualtieri, 2007).

It is clear from the foregoing that the vision for water management in South Africa is the product of radical changes in the social, political and water policy environments. For example, the riparian principle which provided the basis for water allocation made some sense while the country needed to encourage landowners to use water to develop their land and contribute to broader national economic growth. It provided landowners with security and guarantees of access to water for use on their land. Such a riparian system would certainly make less sense in a situation where access to the resource is broadened to include previously disadvantaged groups as well as aspiring new users who do not necessarily have riparian access (MacKay et al., 2003). At the same time, the government in 1994 was faced with inherently contradictory objectives of redistributing water and land without necessarily disrupting productivity on the commercial farms, discouraging foreign investment or creating much uncertainty among private investors (Saleth & Dinar, 2000). Consequently, water policy and law in South Africa represent the complex interplay between multiple interests, priorities, and approaches that are not always compatible (Derman et al., 2000). The reform process itself became a site of contestations, tensions and conflicts between values and principles embedded in neo-liberal economic thinking and more welfarist concerns embedded in the push to protect the human right to water and ensure historical redress (Derman and Hellum, 2003).

The contents of the documents we gathered during this study enabled us to reach the conclusion that achieving the water vision outlined in policy and legislation requires dramatic changes in the way in which water resource managers conduct their business every day. There is a need for new institutions, tools, different mind-sets and a robust implementation plan. As implementation unfolds, there is a need to institutionalise the principles and arguments used during the law review stages as these reflect the original vision and the arguments leading to the concretization of that vision. It is a truism that after more than a decade of implementation of the

water reforms, South Africa is reaching a turning point. The prevailing public mood is not necessarily one of celebration or commemoration of events leading to independence in 1994. Rather it is one of a re-assessment of the contemporary appropriateness of the constitutional and legislative arrangements that were initially expected to correct historical imbalances in access to various means of production (water included).

Persisting high levels of inequality, unemployment and poverty in South Africa have renewed political pressure to quicken the pace of land and water reforms. This pressure remains a stark reminder of the original motivations that led to the reforms being initiated in the first place. Another commonly held belief is that the measure of policy and legislative implementation is often the extent to which it successfully achieves its objectives (Gowlland-Gualtieri, 2007). Therefore, if questions arise regarding the extent to which change in the desired direction has occurred or been hindered in the South African water sector, it would be important to re-visit the prevailing baseline motivations and objectives set at the design stage. Understanding the legal history of water in South Africa facilitates this re-visit.

SECTION THREE: FINDINGS OF THE STUDY

3. Introduction

During the study, the research team managed to collect a considerable number of documents that address the baseline motivations for legal reform in the water sector of South Africa. We subsequently developed a Compendium of water law reform and uploaded its contents on a USB flash drive. This section briefly describes the contents of the drive.

The Compendium has 13 categories, each containing the relevant documents specific to the category theme. There are documents that could not be included on the Compendium for copyright reasons, and these documents are listed in a file that is included in the Compendium. Nevertheless, most of these documents are mostly freely available online and can be downloaded without difficulty. An index to the compendium files is provided, and it specifies each document's title, author (where relevant) and year of production, to give users a quick reference to the items in each category. The major outputs of the study are also provided in a separate folder titled 'Main Project Outputs'. The 13 categories are as follows.

(i) First category of the Compendium

Section 1 of the Compendium mainly serves to introduce the project, its rationale and intended outcomes. It contains documents that provide a general overview of the motivations for water law review and reform in South Africa and a few selected readings on theoretical dimensions of the concept of 'legal history' to help in increasing understanding about the concept and how it has come to influence change in South Africa and other parts of the world (including its importance in law and society). The section also contains documents that relate directly to the history of water law in South Africa, including some of the reports produced under this project.

(ii) Second category of the Compendium

Section 2 of the Compendium contains selected readings and documents focusing on legal aspects of water law reform in South Africa. This is a category intended to showcase the main debates and deliberations undertaken that reflect key actors' thoughts regarding the need to change the water law, and the main sections of the water act that were at the centre of the pre-water law review discussions. A key thread running through most of the documents in this category is their relevance to the 28 principles that were eventually used to guide the reform of the water policy and law in South Africa. These principles were also expressly intended to ensure that the emerging water law would be consistent with the values enshrined in the Bill of Rights as it is articulated in the RSA national Constitution. Ultimately, this category indicates how the law reviewers envisaged the determination of the rights and obligations of all parties and public and private interest with regards to water. From the documents in the category, some of the main motivations for water reform are immediately discernible.

(iii) Third category of the Compendium

In a relatively semi-arid country such as South Africa, it is necessary to recognise the unity of the water cycle and the interdependence of its elements, where evaporation, clouds and rainfall are all linked to groundwater, rivers, lakes, wetlands and the sea, and where the basic hydrological unit is the whole catchment. Thus, *Section 3* of the Compendium contains selected readings and documents that directly speak to the discourses on the water cycle in South Africa. The documents reveal the main discussions and debates held pertaining to the need to manage water in an integrated manner, taking into account all the various components that constitute the hydrological cycle and the variable, uneven, and unpredictable distribution of water across the country.

(iv) Fourth category of the Compendium

The main objective of managing national water resources is to achieve optimum, long-term, environmentally sustainable social and economic benefits for society from the use of the water. This category contains documents that reveal the main

debates raised during the water law review process to address this objective. Therefore, the category speaks directly to issues such as the requirements for ensuring that all people have access to water in sufficient quantities and quality; the reliability of water required to maintain the ecological functions on which humans depend; the need to avoid a situation where human use of the available national water, individually or cumulatively, compromises the long-term sustainability of aquatic and associated ecosystems; and the international water management obligations that arise in this context. Specific water management approaches to be deployed to ensure the realisation of these intentions were thus discussed at length. This includes discussions about how to supply and manage various sub-sets of the water sector such as domestic water requirements, agriculture, and raw water.

(v) Fifth category of the Compendium

During the water law review process, it was acknowledged upfront that the government is the custodian of the nation's water resources, as an indivisible national asset. Guided by its duty to promote the public trust, the government has ultimate responsibility for and authority over water resource management, the equitable allocation and usage of water, and the transfer of water between catchments, as well as over international water matters. Thus, this category contains documents that address discussions around the institutional set-up (administrative and organizational structures and institutions) that was required to make management and governance of the water sector effective.

It is clear from the documents available that the appropriate institutional framework for water management was debated at length in various fora until consensus was reached. It is also clear that the water governance and management framework was expected to be as simple as possible, pragmatic, and easily understandable. It was supposed to be self-driven and minimize the necessity for regular state intervention in water management affairs. Thus it was agreed that responsibility for the development, apportionment and management of available water resources was to be delegated/devolved to a catchment management agency or other appropriate

structure at the regional level in such a manner as to enable all stakeholders and interested parties to participate in the governance and management of the resource.

(vi) Sixth category of the Compendium

In most countries, the right of all citizens to have access to basic water services (water supply and sanitation) necessary to afford them a healthy environment on an equitable and economically and environmentally sustainable basis is considered non-negotiable. It lifts the need for sufficient domestic water supply to the top of the priority table. This category focuses on and contains documents that articulate the main debates held to address domestic water supply issues. Within this context, there was an expressed need to ensure that the interests of the individual consumer and the wider public are protected and the broad goals of public policy promoted. Water services provision at the local level was delegated to local authorities while the national government department retained the overall policy formulation and implementation responsibilities. In essence, the water services were to be regulated in a manner which is consistent with and supportive of the aims and approaches of the broader local government framework and mandate. In addition, while the provision of water services is an activity distinct from the development and management of water resources, water services were to be provided in a manner consistent with the national goals of water resource management. This category contains selected readings and documents that discuss water services in South Africa and beyond.

(vii) Seventh category of the Compendium

Any public policy and law reform process ultimately lends itself to the articulation of a number of priorities that guide the reforms. As the custodian of the nation's water resources, the national government is always expected to ensure that the development, apportionment, management and use of those resources is carried out using the criteria of public interest, sustainability, equity and efficiency of use in a manner which reflects its public trust obligations and the value of water to society while ensuring that basic domestic needs, the requirements of the environment and

international obligations are met. All these values ultimately determine the prioritization framework that emerges from the reform process.

This section contains selected readings and documents on water management priorities as defined in the South African water law review context. The documents in this category show that those involved in the water law review process agreed that water resources should be developed, apportioned and managed in such a manner as to enable all water-use sectors to gain equitable access to the desired quantity, quality and reliability of water. Conservation and other measures to manage demand would also be actively promoted as a preferred option to achieve these objectives. As a result, one finds that a large section of the discussions held during the law review process were dominated by the need to minimise water pollution while maintaining reasonable flows (an environmental reserve) within the river system to continuously maintain the basic ecological functions of the system. During the discussions, there were repeated calls and emphasis on the need to maintain healthy river ecological systems.

(viii) Eighth category of the Compendium

The water law review process was executed through a number of teams that were categorized as committees and/or working groups. These teams had the express mandate to address specific sub-sections of the water policy, law and reform implementation process. This category contains documents that reveal the main teams, committees and working groups that led the review process and some of the major debates that they engaged in.

(ix) Ninth category of the Compendium

Irrigated agriculture is a major water consumer in South Africa as it is in other countries. It uses over 70% of the raw water available annually in the country. Due to the skewed nature of land and water ownership in favour of white commercial farmers during Apartheid, redistribution of water for agriculture emerged as a hotly contested agenda item among the water law review teams and interested stakeholders. This category, therefore, contains documents that explore the

discussions and contributions made to directly, and indirectly, address irrigated agriculture during the water reform process in South Africa. From the documents, it is clear that debates about irrigated agricultural water management and water re-allocation were as politically charged and hotly contested as they have since been in post-Apartheid public policy and water law transformation.

(x) Tenth category of the Compendium

During the data collection phase, the research team sought to document the opinions of experts in the water sector, especially those who were intimately involved in the water law review processes. These opinions were mainly obtained through a review of grey literature, statements made to newspapers and interviews with the key experts. This section, therefore, contains documents revealing experts' opinions and pieces/commentaries on various sub-sections of the water policy and law.. All these reveal the individual opinions and perceptions of various experts in the water sector with regards to the water law and the need for reforms. From the available documents, it is quite clear that the need for equity in the sector and redressing ownership of and access to water stands out as a key feature of the debates made during the water law review process.

(xi) Eleventh category of the Compendium

The water law review process was a long and involving one, and included establishing what stakeholders across the whole country felt about the water sector, collating and synthesizing their views for further discussion in the working groups. As a result, a protracted public participation process was conducted in all of the provinces. This was mainly constituted by workshops held in various parts of the country to review the water policy and legislation. This category contains documents (especially workshop reports) that demonstrate the public participation processes conducted and the main views emanating therefrom.

(xii) Twelfth category of the Compendium

Benchmarking in development processes has become accepted practice. The water law review process was informed by lessons from other countries that had

undergone water sector reforms, particularly guided by integrated water resource management approaches. In this category, there are documents that highlight the main international water reform experiences that were used by the key actors as benchmarks against which to peg the South African water law review. International study tours organized by the relevant government departments and technical contributions by international water resources management consultants also added to the international flavour of the water law review processes.

A sub-theme that cuts across almost all accounts of water law review and reform in the various countries that South Africa was benchmarking itself against is that water is a public good, either with ownership vested in the State, or with the State acting as custodian of water resources and bound to act in the public trust in the development, management and allocation of the water. This perspective determined the specific outcomes of the water law review. Closer analysis of the reforms also reveals that the changes in the water sector that took place in South Africa and the rest of the continent in the early 1990s were part of broader global water resource management paradigm shifts aimed at ensuring self-sustainability in the water sector, re-distribution of the resource, equitable allocation, decentralized and participatory management, and integrated water resource management.

(xiii) Thirteenth category of the Compendium

Ever since the water sector reforms were initiated and implemented, there have been many reviews of the process and its outcomes. Indeed, most of the reviews focus on the strengths and weaknesses of the reform agenda and implementation process and then try to proffer recommendations for better implementation. This category contains documents that give accounts of the water sector reform process and post-implementation evaluations. For our purposes, major interest was certainly ***not*** on broad and general reviews of the reforms per se. Rather, the documents in this collection were selected on the basis that they speak directly to the original motivations for reform and, in several cases, retrospectively describe what happened during the water law review processes. They are, therefore, mostly water

sector reform accounts that are written in an historical fashion and provide details that are relevant to the discussions held during the pre-reform phase.

3.1 The water law review process

Officially, the water policy and law review process began in May 1994 when the newly appointed Minister of Water Affairs officially announced the review programme and appointed a National Water Advisory Council to start the process (De Coning & Sherwill, 2004). However, some respondents in our survey indicated that the water law review period actually started in 1989, initially driven by some forward-looking scientists in the then Department of Water Affairs and Forestry (DWAF) who felt that there was a need to reform the sector taking into account the increasing scarcity of the resource. However, soon after 1994, the water law review process was initiated more systematically by the then Minister of Water Affairs, Honourable Prof Kader Asmal. The Minister was a human rights lawyer by training and well-travelled academic with a long-term national water development and management vision. As such, he was a hands-on minister who worked overtime to have the new water policy and law finalized in his first term.

Minister Asmal invited to the process the best legal minds available locally and internationally at that time, to push the agenda for water sector reform forward. He appointed two national committees and several task-teams to oversee the process. A massive public consultation process was also initiated as an integral part of the policy development process. Besides other consultation processes and internal working groups within the then DWAF, at least 32 workshops were held countrywide to consult stakeholders and get feedback. During this period, major debates during the workshops and meetings were mainly centred on:

- The public trusteeship of national water resources (as opposed to the riparian principle);
- The quantification, and administration of the ecological reserve;
- Understanding of the basic human requirements for water;

- Introduction of compulsory licensing of water use, and the legality of existing lawful water use;
- The division of water law into the water resources bill and the water services bill; and
- Contestations arising from the impact of re-allocation on the agriculture and mining sectors (how to ensure equity without disadvantaging existing users).

From March 1995, a thorough review, headed by a Water Law Review Panel (which consisted of a scientific and legal research team) was undertaken, and new Fundamental Principles and Objectives for the new water law were formulated. At the same time, a Water Law Steering Committee headed by the Director-General of Water Affairs and Forestry was also studying the implementation options for these new Principles and Objectives. Technical task teams within the department were set up for this purpose. A major national water law review conference was organized and held in October 1996, in East London, to further concretize the agenda for water policy and law reform.

In November 1996, a set of 28 water law principles arising from the extensive review process were finally approved by the Cabinet of the Republic of South Africa. These principles became the basis for the White Paper on a National Water Policy that was launched in April 1997, and the guiding principles of the new water law, which was written from October 1996 and approved in August 1998. This was a unique process for two fundamental reasons. First, the process was all-inclusive and deliberately sought to involve all South Africans in discussions that informed the drafting of the law. And second, these basic principles led to the development of a conceptual framework that informed public debate. We have already indicated that the main motivations behind water policy and legislative reforms directly speak to the historical trajectories of inequitable development that characterized the country for a long time under Apartheid. As such, the 28 principles marked an important departure from the previous law of 1956. The review process itself was very democratic, and the consistent emphasis on public consultation indicated

seriousness on the part of the government to achieve the desired objectives of equity and sustainability.

3.2 Legislation that shaped water rights prior to 1998

The previous water law was expressed through two successive legislative regimes, namely, the Irrigation and Conservation of Water Act, 1912; and the Water Act of 1956. The Irrigation and Conservation of Water Act, 1912, was a compromise between the Northern and Southern provinces of South Africa and it favoured the northern conditions. It established riparian water rights as well as the distinction between public and private water. The idea of public water and its classification into the normal flow (which would be divided between the riparian owners), and surplus flow (where, in flood times, riparian owners could take as much surplus water as they were able to use beneficially), was introduced in the 1912 Water Act. However, it became inadequate to cope with the growing socio-economic and industrial processes in the country and was replaced by the Water Act of 1956. The 1956 Water Act managed to harmonise water regulation in the interests of the economic heavyweights (agriculture, mining and industry) and partially entrenched the riparian rights. It also brought back the dominus fluminis (absolute ownership) doctrine that gave the state control over water resources through the establishment of government water control areas. The state appropriated more powers over private rights to public and private water. These powers have been widely expanded in subsequent amendments. The provisions of the 1956 Water Act dealing with water rights were based on the following two cornerstones:

i) The distinction between two categories of water, namely private and public water, which was retained and refined from the 1912 Act. Public water was defined as any water flowing or found in or derived from a public stream (the bed of a natural stream of water which flows in a known and defined channel if the water therein was capable of common use for irrigation on two or more pieces of land riparian thereto which the subject of separate original grants were). Private water was defined as all water which had risen or fallen naturally on any land or naturally drained or was led on to one or more pieces of land

which were the subjects of separate grants, but was not capable of common use for irrigation purposes. Furthermore, whenever an owner of land obtained, by artificial means, a supply of water on his land, which is not derived from a public stream, such water was deemed to be private water. In addition, public water consisted of normal flow and/or surplus water.

ii) The second cornerstone was that the rights to use water were determined differently, depending on the type of water available. The right to use public water was divided into agricultural, urban, and industrial purposes. A riparian owner was permitted to use water for the purposes of agricultural and urban use only. Groundwater could also be classified as public and private. Groundwater not defined as either public or private was subjected to common law principles. In an area not declared a government water control area, the owners of the riparian land had the rights to share public water for irrigation and urban purposes. Furthermore, the owners of the land on which private water was found had the sole and exclusive use and enjoyment of that water. However, in an area declared a government water control area, the right to use the water was vested in the Minister of Water Affairs. Declaring an area a government water control area did not affect the rights to private water.

3.3 Water rights under democratic rule

The Constitution of the Republic of South Africa (of 1996) ushered in two central provisions that arguably form the backbone of water law in the country. The Constitution contains a Bill of Rights (Chapter 2) intended to ensure the rights of individuals to a clean environment and safe water, The first provision (section 24) gives individuals a right to a safe environment that is not harmful to their health and wellbeing, and to have the environment protected through reasonable legislative and other measures that prevent pollution, ecological degradation and secure ecologically sustainable development. The second (section 27), provides for access to health care services and sufficient food, water and social security. The right to water is provided for in section 1(b) as follows: ‘Everyone has the right to have access to

sufficient food and water'. More importantly, The Constitution stipulates that the state 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

It must also be noted that Schedule 4A to the Constitution provides for the functional areas of concurrent national and provincial legislative competence, whereas Schedule 4B affords local government executive authority with regards to the provision of water and sanitation services. In other words, the water cycle is administered by two separate spheres of government, that is, the national government which is responsible for the management of water resources, and local government, which is responsible for water services with national government playing a regulatory and oversight role. The new water principles must be seen within the context of these constitutional provisions. We discuss the major departure points within the framework of these principles. It is also important to note that the main principles of the National Water Act (1998) are premised on democracy, equity and sustainability. The cornerstone principles are as follows:

- All water is a common resource, the use of which should be subject to national control and held in the public trust.
- There is no ownership of water anymore, but only the right for environmental and basic human needs for authorization for its use. There shall be no authorization in perpetuity.
- The objective of managing the quantity, quality and reliability of the nation's water resources is to achieve optimum long-term environmentally sustainable social and economic benefit for society from the use.
- The quantity, quality and reliability of water required to maintain the ecological functions depended on by humans shall be reserved, as will the water for basic human needs.

3.4 Major departure points

Since the 28 principles approved by the Cabinet in 1996 underpin the water law reform in South Africa, we articulate the major departure points according to the

major themes under which the principles have been grouped. From the interviews conducted, as well as the existing body of documents analysing the review process, we managed to identify and categorize the major departure points according to six main sub-themes, namely, legal aspects of water; the water cycle; water resource management approaches; water resource management priorities; water institutions; and water services.

(a) Sub-Theme 1: Legal Aspects of Water

This sub-theme covers Principles 1 to 4. It symbolized the evolutionary step taken in redefining access to and use of water as critical in establishing equity. As a result, five major changes were made to the previous regime as follows:

(i) *Definition of water use:* The Water Act of 1956 specifically provided for three uses of water (agricultural industrial and urban) and the authorisation of private and public water use (by the Minister), with a focus on stream flow abstraction and regulation of water regulated activities. The 1998 National Water Act, on the other hand, identifies 11 uses of water needing authorization, including groundwater and non-consumptive uses like recreation and streamflow diversion. Under the current legislation, the full range of activities which may impact on the availability, reliability, quality and sustainability of water resources are recognized, and can, therefore, be managed and controlled. A much wider range of water uses can be subjected to economic instruments such as charges, tariffs, incentives and penalties, potentially increasing the recovery of the costs of controlling and administering these diverse water uses and of managing water resources generally;

(ii) *Water use rights*: The discarding of private and public water doctrine in favour of a more sustainable, new management paradigm of public trusteeship effectively abolished riparianism. The right to use water is no longer determined by land ownership, but by classification and authorisation to use water. The riparian principle comes from Europe where wetter climatic conditions provide abundant,

constant freshwater flow throughout the year. However, the semi-arid climate of South Africa makes the riparian principle unsuitable;

(iii) *Authorization of water use*: The previous regulation was only on public water for recreational, administrative and other uses, while the use and enjoyment of private water were vested in the owner of the land on which such water was found, provided that the upstream owner does not limit the downstream owners' fair share to water arising upstream. State controls applied only to the water outside of riparian rights. The new regime distinctly observes three categories. First is Schedule 1, Authorisation, which is for reasonable domestic use, and does not attract any tariffs or charges. Second is the General Authorisation, where water use is authorised for a group or groups of water users, as long as certain minimum requirements are met, and third is full water use licensing. The criteria for evaluation of water licences, contained in section 27 of the 1998 Act, includes a consideration of the need to redress past inequalities, the impact of the proposed water use on existing water uses, the social economic impact of the proposed water use, the investment to be made and beneficial use of water in the public interest (i.e. the most desirable combination of social, economic and environmental objectives). Some key respondents stated that both systems allowed the use of water according to how the water was classified but the 1956 Act's allocation is, however, arbitrary, whereas the 1998 Act recognises more categories of water uses and provides for certain water uses to be prioritised. Predictably, this shift was problematic as agricultural and industrial users felt that they were being expropriated;

(iv) *Trading of water rights*: In the previous law, the riparian principle allowed the owner to dispose of water rights the way it would any property, subject to authorisation in certain cases (for example, within an area declared as a government water control area). It is possible to trade water rights in the new regime according to the terms of the provisions of the 1998 Act in section 25(2). Before such trading can take place, however, the extent and legality of the

water use to be traded must be confirmed by the responsible authority. After such confirmation is completed, an application is made for a licence to transfer the water use, whole or partial, temporary or permanent, to the buyer. The 1998 Act, therefore, introduces strict requirements related to water trading in particular, to achieve equity and sustainability objectives, not merely for efficiency purposes;

(v) *Existing lawful water use*: The progressive provision of the 1998 law is that it recognizes previous water use. Any water use declared as an existing lawful water use in terms of sections 32 and 33 of the 1998 Act is per definition an existing lawful water use, and in terms of section 35 a person or his/her successor in law may continue an existing lawful water use, subject to the conditions and obligations attached to that use until such time that the use is replaced by a licence, or subject to any prohibition or limitation set in terms of the Act. Existing lawful use refers to any water use authorised in terms of any Act that was applicable immediately prior to the implementation of the National Water Act. Legal water uses, therefore, include Water Court awards, allocations within government water control areas, quota allocations in government water schemes and irrigation boards, valid servitude stipulations, riparian right claims, etc. The use of underground water (boreholes) outside the underground government water control areas was legal to the extent that the water was used productively before the new law came into effect.

(b) Sub-Theme 2: The water cycle

This sub-theme covers Principles 5 to 6. It acknowledges that the fragmented approach to water resource management characteristic of the 1956 water governance regime needed to be addressed. It thus abolished the distinction between private and public water. It considers water as an indivisible national asset that should be viewed within the confines of the entire hydrological cycle, that is, surface, ground and atmospheric water.

(c) Sub-Themes 3 and 4: Water resources management – approaches and priorities

Sub-themes 3 and 4 cover Principles 7 to 21. These sub-themes changed approaches and priorities for the management of water resources in four major ways:

(i) Classification system:This was provided for to allow the protection and efficient use of water. The Reserve is the only right to water under the 1998 Act and has priority over all other water uses. A recurring point from the respondents interviewed is that the classification system and the determination of the Reserve introduced by the 1998 National Water Act serve as a mechanism to try to balance protection and development, whereas a priority for the 1956 Act was to preserve agricultural water use rights. The 1956 Act was much more focused on the control of water resources than the protection of water resources. The 1998 Act allows strategic decisions to be taken which recognise the true value of water resources, and that the decisions about trade-offs are consistent and transparent to all, being encapsulated in the class assigned to a particular water resource;

(ii) The basic human needs reserve: the national government is mandated to reserve or ensure the provision of sufficient water in water resources to enable service providers to meet basic human needs (25 litres per person per day within 200 m of their home). Water for basic human needs has the highest allocation priority in South Africa – guaranteed as a right in the Constitution as stated previously. The 1956 Act did not prioritise water for basic human needs but rather ensured water for commercial agriculture;

(iii) The ecological reserve: While the previous regime did not recognise aquatic ecosystems at all, the new policy achieved a distinguished success by appreciating the ecological reserve. The ecological reserve and the reserve for basic human needs together form the legally recognised 'Reserve' which has the highest allocation priority and which may not be allocated for other uses. The link between protection of the aquatic environment and sustainability of water resources was made in 1990 and articulated in the South Africa Water Quality

Guidelines in 1996 and found its way into the principles in 1996. The ecological reserve and what it represents lay at the heart of the sustainability debate. The protection of aquatic ecosystems is considered to be an essential factor in maintaining the full suite of ecosystem goods and services, to which all people in the country have a right and on which many people depend for subsistence livelihoods. Other priorities acknowledged in this sub-theme include: water to meet international obligations, water use of strategic importance such as that for electricity generation, inter-catchment water transfers and a contingency to meet projected future water needs.

(d) Sub-Theme 5: Water institutions

This sub-theme covers principles 22 to 24. It moved water resource management away from a centralised bureaucratic system that was inaccessible to the majority of the population and did not allow ordinary people to participate effectively in water management decisions. Thus, decentralization and public participation are now one of the cornerstones of the 1998 Act. The Constitution of the Republic of South Africa of 1996 even requires that people should be able to participate in decision-making and the subsidiarity principle requires functions that can be more efficiently and effectively carried out by lower levels of government to be delegated to the lowest appropriate level. The introduction of water management areas, managed by catchment management agencies and water user associations, is meant to allow for localised decision-making around the management of water resources. A major departure from the 1956 Act is that the management of natural resources can only contribute to sustainability if local people are involved in and take ownership of the development of local solutions and options for resource protection, management and allocation. Since hydrological boundaries do not coincide with political boundaries, this concept was problematic and demarcation of the new water management areas became a heavily contested and debated component of the reform process.

(e) Sub-Theme 6: Water services

This sub-theme covers Principles 25 to 28. Under this theme, the notable change was in the economic instruments for water management. Previously, the pricing of water was inconsistent and did not reflect the real cost of managing water resources and supplying water, nor the scarcity value of raw water. The capital costs of government water schemes, supplying mainly agricultural water users but also some urban bulk water suppliers and industrial users, were financed by the state, and even operation and maintenance costs were often not fully recovered from water users. In general terms, water itself attracted little or no charge, although the cost of water infrastructure was passed on to water users. The cost of government's activities related to management of raw water sources, such as administration, pollution control and planning, were funded from the central treasury. The 1998 law provides that beneficiaries of the water management system should contribute to the cost of its establishment and maintenance. The principle behind the pricing policy for water is that people should now pay for water at a rate which reflects value and scarcity, with the exception of the water required to meet basic human needs.

3.5 Key insights from the study

- The water law review period was mainly undertaken between 1989 and 1998, initially driven by some forward-looking scientists in the Department of Water Affairs & Forestry and then, soon after 1994, more systematically by the then Minister of Water Affairs, Honourable Prof Kader Asmal. Minister Asmal was a human rights lawyer and well-travelled academic with a long-term national water development and management vision. As such, he was a hands-on minister who worked overtime to have the new water policy finalized in his first term. He invited to the process the best legal minds available locally and internationally at that time, to push the agenda for reform forward.

- The process was overseen by two established committees – the policy and strategy committee and the drafting committee.

- A massive feedback and public consultation process were integral to the policy development process. At least 32 workshops were held countrywide, besides other consultation processes and internal departmental working groups.

❖ Major debates noted so far in the policy development process were on:

- The public trusteeship of national water resources (as opposed to the riparian principle);
- The quantification, and administration of the ecological reserve;
- Understanding of the basic human requirements for water;
- Compulsory licensing of water use, and the legality of existing lawful water use;
- The separation of legislation: the water (resources) bill and water services bill; and
- Contestation of the new policy mainly by the agriculture and mining sectors (how to ensure equity without disadvantaging existing users)

SECTION FOUR: DISCUSSION AND CONCLUSION

4. Introduction

In this project, we gathered documents that enabled us to trace the trajectory of water law reform in South Africa with major emphasis on changes in legislation over time. It is clear from this trajectory that those leading the agenda for reform were concerned with the development of an effective framework of national water law as the absolutely essential ingredient for the achievement of water security, ecosystem conservation, and equitable sharing of the resource, without sidelining the economic development potential that water provides. Thus the law that replaced the 1956 Water Act was crafted bearing in mind that water allocation and use must reflect the broader economic, social and physical context of the country and region.

4.1 Water law review outcomes

In light of the significance of the principles used to craft the water law after the review, we used the water law principles approved by Cabinet in 1996 to articulate the major departure points that were debated. From the interviews conducted, as well as the existing body of knowledge analysing the 1996 policy formulation process, we explored the major debates with reference to the six major themes of reform, namely, legal aspects of water, the water cycle, water resource management priorities, water resource management approaches, water institutions and water services. We concluded that the principles with the most far-reaching implications on society are:

- Principles 3 and 4, which led to the abolition of riparian water rights and private ownership of water;
- Principle 7, which establishes “environmentally sustainable social and economic benefit” as a key criterion for water resources management and allocation decisions;
- Principle 16, which provides for the use of economic instruments in the management; and

- Principle 24, which states that beneficiaries of the water management system should contribute to the cost of its establishment and maintenance.

There are also five significant features of the new policy and legislation, which affected the management of water resources at national and local levels. These are: the broad definition of water use; the provisions for equity of access to water and the benefits of water use; the provisions for ensuring ecologically sustainable development and use of water resources; new institutional structures and mechanisms for devolving decision-making down to the lowest possible level and the introduction of new economic instruments and new water pricing provisions. In essence, all these principles are intended to enable the realization of equity, efficiency and sustainable water use. There was an articulated and explicit intention to balance the use and protection of water resources.

Our analysis of the water law review process and outcomes enabled us to reach the conclusion that the National Water Act ushered in a significant break with past practices that were anchored in the 1956 Water Act. Thus, the water law reforms were clearly intended to positively change society and the economy at both the national and local levels. An expanded understanding of 'water' was combined with an extensive, centralised, forward planning process as well as an open textured water management and governance institutional structure with the potential for progressive devolution of certain functions to the catchment level. Social and environmental reform priorities were crystallised in specific provisions establishing a commitment to the ecological reserve, equity-based pricing mechanisms, and ensuring access to water for domestic uses.

4.2 Conclusion

During the study, we gathered and categorized a fairly substantial amount of documents (in both electronic and hard copy form), as originally envisaged, leading to the development of the Compendium. Interviews were carried out with selected key respondents across the country, as well as outside South Africa, and very useful insights were derived from these interviews. We are convinced that these insights

together with the various reports produced during the project and the Compendium itself provide a sufficiently detailed narrative revealing the main motivations and outcomes of the water law review process. The project also actively involved two post-graduate students registered at the University of Pretoria. One of them has already completed her studies. Therefore, our capacity-building mandate was fulfilled as expected and both students gained substantive experience on how to carry out social science research and fieldwork.

Overall, the trajectory of water law reform in South Africa indicates that water development in the country has been driven mainly by political ideology and rising demand for limited resources, forcing major changes in policy and institutional capacity over time. Therefore, the development of water law in South Africa is inter-woven with the fabric of both economic and political colours and should be understood within the context of conquest and Apartheid colonisation processes. Understanding the historical pattern of development and the evolution of water legislation, key actors, their roles and responsibilities provides context to the challenges facing the implementation of the progressive principles of the 1996 South African Constitution and the 1998 National Water Act.

The reform process itself became a site of contestations, tensions and conflicts between values and principles embedded in neo-liberal economic thinking and more welfarist concerns embedded in the push to protect the human right to water and ensure historical redress. Nevertheless, the products that emerged from these contestations were variously described as ground-breaking and ‘world-class'. The doctrines and principles that were adopted and constituted into the NWA are quite noble. Yet conversations around the effectiveness of the implementation process for the NWA are not so noble. Therefore, there is a need to revisit the baseline motivations and main objectives of water law reform in South Africa. Articulation of these historical dimensions enables a better appreciation of the importance of the institutions that have emerged in the reform process as well as the challenges and opportunities that they now face.

It is also apparent that the water law review process and its outputs are quite remarkable (also considered ‘world class’) for their articulation of principles designed to achieve a broad range of socio-economic and environmental protection goals. But, as is the case with many other reform processes throughout the world, the litmus test for these changes in legislation is the extent to which they are effectively implemented, leading to change that addresses real/felt needs on the ground. This also suggests that no matter how good the blueprint for water law reform is, its implementation in South Africa requires a separate well-thought-out plan that ensures the realization of the main motivations and original goals for reform.

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