The allocation of water management powers and functions under South Africa's federal constitution – theory, process and practice

Professor Mike Muller Graduate School of Public and Development Management Wits University South Africa

Managing the transition to federalism

- How the water sector located itself in South Africa's new federal political dispensation
 - Context
 - Process
 - Outcomes

Historical context

- Water resource development to support territorial occupation (agriculture) and economic expansion
- Legislative basis a mixture of Roman Dutch and English (temperate climate) with little indigenous law
- Systematic exclusion of black South Africans from political process and dispossession from land resulted in dispossession from water and from the benefits of its use

Political context 1990-94

- 1990 1994 fundamental review of political system
- Extensive Multi-party negotiating process addressed (inter alia)
 - Fundamental rights
 - Federal structure, to meet minority demand
 - Demarcation of local and provincial governments
- New constitution negotiated (interim 1993, final 1996)
 - Required powers and functions to be determined
 - "right to sufficient water" introduced in 1996 final
- Regional relations from hostility to historic solidarity

Water management context in 1990

- Approaching full utilisation in key catchments
- Transition from agriculture to urban industrial priorities underway
- Dependence on IB transfers well established
- Challenges
 - Basic services high priority but low resource demand
 - No local government structures in many places
 - Environmental protection a growing priority
 - Rivers shared with neighbours to be formalised

The water reform process

- Other sectors, negotiating forums
- Water sector elected to develop policy options rather than seek to negotiate.
- "Standing committee on water and sanitation"
- Process included:
 - "Democratic Movement (majority parties), Central Government, Local and Regional Government (minority parties), water industry parastatals, organised professions, research organisations, development funding and non-government service organisations."
- Priority to water supply and sanitation services but mindful of WRM issues

The process - SCOWSAS

MISSION STATEMENT

"The Standing Committee for Water Supply and Sanitation is a broadly based forum to develop policy options and to promote appropriate strategies to improve water supply and sanitation on an integrated, affordable, acceptable and sustainable basis for all communities in a situation of increasing needs and limited resources."

Made recommendations to appropriate sessions of MNP

The recommendation of the Standing Committee is that certain functions be retained at the <u>first tier</u> or national level, namely:

- National water and sanitation legislation;
- operation of multi-regional and international water schemes;
- international water relations;
- inter-regional water resource planning and development;
- inter-regional conflict mediation;
- long-term national water resource planning; and
- national water information system and research.
- In addition, new functions have been identified including:
 - establishment of national water supply and sanitation standards
 - promotion of the establishment of water and sanitation institutions
 - assumption of residual responsibility for water supply and sanitation management
 - administration of state funding assistance
 - national performance auditing

At the <u>second tier</u> level, organisations would be required to perform other functions, including:

- management of water resource systems to assure bulk water supplies within a region
- abstraction, treatment and bulk distribution of water
- identification and control of waste water discharges into river systems and management of water quality
- bulk collection and treatment of wastewater
- support to local authorities in the direct provision of water supply and sanitation systems.
- At <u>third tier</u> level, it is envisaged that local government organisations will provide the reticulation and sanitation services required.

Submission addressed WRM boundaries:

- From this description it will be seen that the second tier agencies have a key role to play in the overall management of the water resources within their given region. The view of the Standing Committee is that their effectiveness in the performance of these duties will be substantially affected by the boundaries within which they work.
- 12.Many of the functions which second tier agencies will be called upon to perform are related to actions within naturally defined river catchment systems. Any division of major catchments whether longitudinally (by placing boundaries along rivers) or horizontally (by drawing boundaries across rivers) will mitigate against effective resource management by a second tier agency. This is because the agency will have no control over the actions of other agencies across the river or upstream of it.
- 13. It is thus the view of the Standing Committee that regional boundaries be set with proper regard to the location of catchment boundaries and the impact on water usage and water quality should boundaries be set that contravene these criteria.
- 14.Should this not be possible, the Standing Committee believes it is important to ensure that the allocation of powers and functions to second tier water management agencies should be separate from the attribution of powers and functions to regional government.

• 16. Further, within the context of criteria 1.2 (administrative considerations), 1.3 (the need to rationalise existing structures) and 1.4 (the necessity of limiting financial and other costs) the Standing Committee believes that it would be appropriate for the Commission to draw attention of the MNP to the special needs of the water and sanitation sector when powers and functions are allocated between central and regional governments.

Constitutional outcomes

- The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - Non-racialism and non-sexism.
 - Supremacy of the constitution and the rule of law.
 - Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
- Bill of Rights

24. Environment.-Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

- 27. Health care, food, water and social security.-(1)
 Everyone has the right to have
- (1) access to –
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Constitutional outcomes

- SCHEDULE 4
- FUNCTIONAL AREAS OF <u>CONCURRENT NATIONAL AND PROVINCIAL</u> LEGISLATIVE COMPETENCE
- PART A
- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment

The following local government matters :

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services
- Municipal public transport
- Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to
- administer functions specifically assigned to them under this Constitution or any other law
- Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping
- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Outcome

- Functions that were not listed became, by default, matters of exclusive national competence
- Confirmed by legislation:
 - 1997 Water Services Act
 - Regulated water supply and sanitation by local govt.
 - Focus on duty to provide for access to basic services for all
- 1998 National Water Act
 - National management of water resources including
 - Establishment of stakeholder based administrations in catchment related "water management areas"
 - National water resource strategy for adaptive management
 - Reserve for basic human needs and environment
 - Abolition of permanent water allocations

Outcome

- Avoided two potential pitfalls
- "Federalisation" of water into provincial boundaries
 - See India, USA, Australia for the consequences ...
- "Balkanisation" of inter-connected systems into separate river basin administrations