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## Articulating the history and major departure points evident in post-apartheid South African national water policy and law

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## ABSTRACT

Governance of the water sector in South Africa has reflected the political changes taking place in society. For instance, due to apartheid policies of segregation, inequality of access to water resources marks South Africa's history in a very profound way and redistribution of rights to water to redress the results of past discrimination became an explicit purpose of the post-apartheid water governance policy and legislative regime. In this paper, we articulate the history and major departure points evident in post-apartheid South African national water policy and law. This includes documenting and reflecting on most of the available information that shows how the new water policy and law were developed. Findings from the study show that the key players active in the water law review process deliberately took into account the political goals and dynamics of power asymmetry within which the law was being articulated. Therefore, the water law as it stands today and in the past must be understood within the context of the socio-economic and political landscape that has prevailed in South Africa at different historical junctures. We contend that a detailed examination and articulation of the history and major departure points evident in post-apartheid South African national water policy and law enables practitioners and scholars to better understand the main motivations behind the water sector reforms and the then prevailing thinking behind the policy and legislation eventually promulgated. The present water law must be understood in the context of these reforms and the objectives they sought to achieve.

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### 1. Introduction

The demise of Apartheid and the election of the first non-racial and democratic government in South Africa in 1994 remains a major landmark for political and socio-economic development in the country. Since then, public policy reform discourses have gained more visibility in various sectors of the economy (water sector included). Inequality of access to water resources marked South Africa's history profoundly. The apartheid lawmakers harnessed the law, and the water, in the interests of the mostly white dominant class and groups who had privileged access to land and economic power (see MacKay et al., 2003; Schreiner et al., 2004; Pienaar and Van der Schyff, 2007). Thus, the resulting body of laws and policies and the varied forms of infrastructure that were developed to harness water for multiple social practices over time

constitute a complex political ecological terrain that was very difficult to redress (ibid). Illustrating the extent to which ownership and access to water resources was skewed, a study by Versfeld (2003) concluded that 95% of water for irrigation was primarily used by large-scale white commercial farmers, while smallholders had access to the remaining 5%.

The current vision for water governance in South Africa is, therefore, a product of radical changes in the national socio-economic and political environment (Tewari, 2009). Redistribution of water rights to redress the results of past discrimination became an explicit purpose of the post-apartheid water governance policy and legislative regime (see MacKay et al., 2003; Gowlland-Gualtieri, 2007; Woodhouse, 2008). The desired reforms in the water sector were translated, first into a statement of policy (the White Paper on a National Water Policy, 1997) and then into necessary legislative instruments, namely, the Water Services Act (1997) and the National Water Act (1998). This ambitious water legislation was designed to promote equity, sustainability, representativeness and efficiency through decentralization of water

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management, new local and regional institutions, water users' registration and licensing, and the emergence of a water rights market (Backeberg, 2005). Therefore, the new water policy and law represented a fundamental legal reform in the country as it shifted the focus of formal water control from riparian water title holders, largely consisting of the white minority, to the new government as the custodian of the nation's water resources. Government is now the manager of the nation's limited water resources and not an administrator of a system of rights as in the past.

Before the White Paper on a *National Water Policy (1997)* and the *National Water Act (1998)* were promulgated, a comprehensive review of the water law was carried out. The review process made use of water law principles that needed to be institutionalised in order to achieve the desired water vision. It is a truism that after more than a decade of implementation of the water reforms, South Africa is reaching a turning point. Various reviews of the reform implementation process already show that reform objectives are not being realised (Cousins, 2005; Chikozho, 2008; Pollard and Du Toit, 2012; Schreiner, 2013; Movik, 2014). A perception that the contemporary appropriateness of the constitutional and legislative arrangements that were initially expected to correct historical imbalances in the means of production need a re-assessment is gaining ground (see Backeberg, 2005; Kepe and Tessaro, 2014; Movik, 2014). Persisting high levels of inequality, unemployment and poverty in South Africa have renewed political pressure to quicken the pace of land and water reforms (Cousins, 2005). This pressure remains a stark reminder of the original motivations that led to the reforms being initiated in the first place.

A 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 at the design stage of the reforms. Arguably, the new water policy regime is still to achieve its stated objectives. The responsible authorities do not seem to have the necessary information and access to readily available options to ensure effective implementation of water sector reform processes. Therefore, in this paper, we seek to revisit the baseline motivations and objectives of water law reform in South Africa in order to inform these options.

Our articulation of these historical dimensions provides information that enables better appreciation of the importance of the new water institutions that have emerged in the reform process as well as the challenges and opportunities that they now face. The paper articulates the history and major departure points evident in post-apartheid South African national water policy and law by documenting and reflecting on most of the available information that shows how the new water regime was developed. The paper is intended to enhance the ability of water sector practitioners and scholars to focus on the fundamentals of water reform and re-assess targets missed and values lost along the way. This may enable national and local level actors to craft more robust policies and institutions for water sector reform. Therefore, the paper contributes to the search for more effective reform implementation approaches that address real-felt needs on the ground.

In the paper, we neither purport nor intend to carry out a comprehensive review of the water policy and law reform implementation process, as this is a task beyond our main objectives. In any case, several studies and published scientific articles have already addressed in detail the strengths and weaknesses of the reform implementation process to-date (see MacKay and Ashton, 2004; Backeberg, 2005; Muller et al., 2009; Swatuk, 2010; Pollard and Du Toit, 2012; Schreiner, 2013). Therefore, we limit ourselves

to the articulation and synthesis of information relating to the major legal debates, sources of information, and actors that influenced the formulation of a new water law in the country. We identify major departure points from the previous law of 1956 and articulate how the different elements were debated together with the main driving factors for the reform.

## 2. Methodology

The paper is one of the outputs from an applied qualitative research project commissioned by the Water Research Commission of South Africa in 2012 that entailed gathering both primary and secondary data to enable the development of a relatively comprehensive narrative of the historical dimensions of South African water policy and law reform. An extensive review of the existing literature; government documents, policy and statutory instruments; and reports of discussions held during the review of the water policy and legislation was done to provide a base for the narrative. An extensive search, compilation, review and synthesis of documents at the National Archives, the Department of Water Affairs and Sanitation (DWAS), the Parliament, and Water Research Commission (WRC) libraries was carried out. Our main period of interest in terms of gathering relevant documentation covered the 1994–1998 when the new water policy and law were promulgated.

Interviews were held with 30 experts purposively selected from the water sector, in order to understand the reform process. We used semi-structured questionnaires as interview guides. These interviews yielded data and information that gave us a deeper understanding of the law review process and its outcomes. Some of the interviewees provided us with more documents containing information pertaining to the water law review process. The experts had either been actively involved in the water law review process or (through their well-known public service activities, research and scholarship) were deemed to have intimate knowledge of the process leading to the review and the major debates that were encountered during the process. The key informant interviews were held either through face-to-face meetings, on skype, or through the telephone. During the study, workshops and meetings were also held with key stakeholders in the sector and the Project Reference Group to test our findings, get some feedback, and validate the research findings. For analysis, various themes were subsequently identified to categorize the data gathered into specific knowledge streams that enabled development of the narrative.

## 3. Legal history theory and the South African water law review process

Legal history helps us better understand and explain socio-economic and political transformation processes in society. In the paper, we define legal history as the study of how law evolves and why it changes over time (see Pienaar and Van der Schyff, 2007; Lerner, 1997). Therefore, we adopt an analytical framework which is deeply imbedded in legal history to establish the baseline motivations for reform as reflected in the dominant discourses and information sources used during the review of the water law. We begin by assuming that the legal history of the water sector in South Africa is closely connected to the democratic transition process beginning in 1994. This period also coincided with the spread of the integrated water management (IWRM) concept in the developing world, which ushered in a new approach to the management of water resources. In this process values of equity, efficiency and sustainability were, and continue to be, held in high esteem (GWP, 2000). Assessing the legal history of water law in South Africa enables us to record the progression of the law and the motivations

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