

## Legal Framework, South Africa:

Until fairly recently, the domestic legal framework for management of water resources in South Africa rested upon the Water Act of 1956. Private and public water were classified separately, following the apartheid riparian principle, interlinking an incurative colonial system of ownership of land with water resources, dealt with under separate specific rules. This applied to both ground (private) and surface water (semi-private) resources<sup>1</sup>. Normal and 'surplus' surface flows were defined with surplus, for example flood water, allocated according to the capacity of individual riparian owners to retain the resource<sup>2</sup>. Another feature of the 1956 legislation was the issuance of water licensing in perpetuity. During apartheid, the riparian principle facilitated agricultural development (for white farmers), illustrated by the fact that the statutory Irrigation Boards were placed under the administration of the Department of Agriculture<sup>3</sup>. Following the democratic reforms, the Department of Water and Forestry (DWAF) has the mandate to limit and control land uses that could impact upon water availability<sup>4</sup> and to allocate water rights for fixed periods that may not exceed 40 years<sup>5</sup>.

South African law is one of the few that acknowledge water as a human right<sup>6</sup>. Contemporary water reforms place equity and sustainability at the centre of integrated water resource management, attempting to redress the historic legalised exclusion of the majority of South Africans. In this respect, the political landscape of water is largely synonymous with problems surrounding the issue of land reform. The National Water Act (36 of 1998) formalises the free basic water access rights contained in the Water Services Act (108 of 1997) in the innovative provision for a national water reserve – for basic human need and ecological integrity - that overrides existing riparian rights<sup>7</sup>. Theoretically this prioritises basic human need over any other water use, although all water utilisation in the 2 years prior to the legislation was deemed lawful<sup>8</sup>. A recurrent theme within the legal framework is the duty of consultation with and participation of local communities, with reference to the Bill of Rights laid down by the Constitution (Act 108 of 1996). How far this translates into real access to the entitlements still varies massively.

The recent Strategic Framework for Water Services summarises the policy evolution within the water sector since the 1994 White Paper. This includes addressing the backlog of non-service provision/access, free basic water, enhancing service provision, decentralisation, national government commitment to funding, and international cooperation. All institutional structures have a mandate to be representative of the local communities, and

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<sup>1</sup> Stein (2002) *Chapter 9: Water sector reforms in Southern Africa: Some case studies*. In Turton, A., and Henwood, R. (2002) (eds) *Hydropolitics in the Developing World: A Southern African Perspective*. Pretoria: African Water Issues Research Unit

<sup>2</sup> GeoData Institute (2001) *Water Resource Based Institutional Structures in the IWRMS Study Nations: South Africa, Swaziland, Zimbabwe*. University of Southampton.

<sup>3</sup> DWAF (1994) *Water Supply and Sanitation Policy White Paper*

<sup>4</sup> Republic of South Africa National Water Act 36 of 1998, section 36, 37, 38, 39.

<sup>5</sup> *Ibid*, section 28,1(e)

<sup>6</sup> Muller, M., and Lane, J. (2002) *The National Water and Sanitation Programme in South Africa: Turning the Right to Water into Reality*. Water and Sanitation Programme-Africa Region

<sup>7</sup> Stein (2002) *Chapter 9: Water sector reforms in Southern Africa: Some case studies*. In Turton, A., and Henwood, R. (2002) (eds) *Hydropolitics in the Developing World: A Southern African Perspective*. Pretoria: African Water Issues Research Unit

<sup>8</sup> Schreiner, B., and Van Koppen, B. (2003) *Catchment Management Agencies for poverty eradication in South Africa*. *Physics and Chemistry of the Earth* 27, 969-976

are encouraged to attain a minimum target of 30 percent female workforce. Local government holds delegated responsibility for ensuring water and sanitation services, and there is support available to financially weaker local authorities<sup>9</sup>, in the form of municipal infrastructure grants, local government equitable share, and capacity building grants<sup>10</sup>. Water charges are applicable for all services above the basic minimum<sup>11</sup>, with legal obligations towards a socially equitable stratification of the charging mechanisms. Statutory catchment authorities have a delegated mandate for water resource management and licensing in 19 areas<sup>12</sup>, (see Figure 1). This step towards devolution aims to increase the participation of 'local' communities in water resource management, an ambitious task, even before consideration is given to international resources which comprise two thirds of South Africa's river basins<sup>13</sup>.

All 19 areas have completed integrated water resource plans, which form part of the Integrated Development Plans that municipalities have to prepare in terms of the Municipal Systems Act (32 of 2000)<sup>14</sup>. Existing irrigation boards, and subterranean water control boards and water boards established for stock watering (under 1956 Act) have to be transferred to water user associations<sup>15</sup>. Water user associations are provided for in an attempt to increase stakeholder engagement between users and agencies, as voluntary associations with statutory functions<sup>16</sup>. This is the key mechanism where historically elite domination of public institutions can be challenged<sup>17</sup>, although structural barriers to participation remain prevalent. The structural barriers to wider participation are also relevant to the independent water tribunals that provide for appeals against certain decisions made by water authorities, and potentially can be taken as far as the high court<sup>18</sup>.

With regard to the interaction of water policy with other legislation, a synopsis can be found in Chapter 3 part 5 of the Proposed National Water Resource Strategy (2002). In summary, DWAF is legally bound to ensure that all water resource management actions are fully compliant with the provisions of the National Environmental Management Act (107 of 1998), and the Environmental Conservation Act (73 of 1989). DWAF is represented on the National Disaster Management Advisory Forum<sup>19</sup>, and under the Promotion of Access to Information Act (3 of 2000), Catchment Management Agencies, and Water User Associations are obliged to publicise disaster related water information, especially actual or potential emergency situations<sup>20</sup>.

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<sup>9</sup> DWAF (1997) Water Services Act, section 64

<sup>10</sup> DWAF (2003) Strategic Framework for Water Services.

<sup>11</sup> 25 litres of water per person per day, not more than 200 metres walking distance from household, consistently available, basic minimum sanitation entails a well constructed ventilated pit latrine. DWAF, (1994) Water Supply and Sanitation White Paper

<sup>12</sup> Established by Government Notice number 1160

<sup>13</sup> DWAF (2002) Proposed First Edition National Water Resource Strategy, chapter 3, part 5.2.10

<sup>14</sup> DWAF (2002) Proposed First Edition National Water Resource Strategy, Chapter 3, part 5.4

<sup>15</sup> DWAF (1998) National Water Act, chapter 8

<sup>16</sup> Hamann, R., and O'Riordan, T. (undated) South Africa's Policy Transition to Sustainability: Environmental and Water Law: [http://www.thewaterpage.com/SAPolicyEnv\\_and\\_water.htm](http://www.thewaterpage.com/SAPolicyEnv_and_water.htm)

<sup>17</sup> Schreiner, B., and Van Koppen, B. (2003) *Catchment Management Agencies for poverty eradication in South Africa*. Physics and Chemistry of the Earth 27, 969-976

<sup>18</sup> Bond, P., and Stein, R. (2000) *Environmental and Water Management Law in Post-Apartheid South Africa*. Background Research Series; Municipal Services Project

<sup>19</sup> DPLG (2002) Disaster Management Act (57 of 2002) 5, 1(b); Government Gazette number 24252

<sup>20</sup> DWAF (2002) Proposed First Edition National Water Resource Strategy, Chapter 3, part 5.3.5

South Africa has ratified the SADC Shared Watercourse Systems Protocol, which was signed in August 1995. The governing principle of the Protocol mandates the utilisation of transboundary watercourse resources without prejudice to sovereign rights. Other principles include respect for general or customary international law, a balance between social requirement and promotion of the environment as a source of sustainable development, co-operation in relation to infrastructural/technological development of the watercourse, free exchange of information, and equity of use. The Protocol was revised in 2000, partially as a result of the UN Convention on the Law on Non-Navigational Uses of International Watercourses in 1997, although navigation is included in the SADC Protocol. South Africa has also ratified the revised Protocol, which further defines, elaborates, and inserts terms and concepts (for example ecological protection, and disaster management)<sup>21</sup>. South Africa cooperates on the management of transboundary waters multilaterally through SADC and also on a bilateral and tripartite basis with bordering countries.



Figure 1: Catchment Management Areas<sup>22</sup>

<sup>21</sup> Ramoeli, P. (2002) *The SADC Protocol on Shared Watercourses: History and current status*. In Turton, A., and Henwood, R. (2002) (eds) *Hydropolitics in the Developing World: A Southern African Perspective*. Pretoria: African Water Issues Research Unit

<sup>22</sup> DWA, (1999) Government Gazette, 1 October 1999, Number 20491