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LICENCE TO CONTROL: IMPLICATIONS OF INTRODUCING
ADMINISTRATIVE WATER USE RIGHTS IN SOUTH AFRICA

Synne Movik and Fieke de Jong

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1

INTRODUCTION

1.1 Trends in Water Reform

There has been a pervasive global trend in recent years towards bringing water increasingly under State control through the imposition of administrative water use licences. A key driver of water licensing efforts is the perception that water is growing scarcer and hence needs to be more efficiently allocated and managed. The notion of Integrated Water Resources Management (IWRM) has become hugely influential. The basic idea of the IWRM principles is that water should be managed holistically rather than according to sectoral boundaries, that management should be carried out at the lowest appropriate level (the principle of subsidiarity), and that water should be treated as an economic good.¹ Hence, many countries' water reforms have concentrated on redefining their water management systems in accordance with hydrological rather than political boundaries, and introducing new sets of administrative and often tradable use rights. Some of the countries that have introduced administrative water rights systems include Chile (1981), Mexico (1982), Mozambique (1991), Uganda (1995), Ghana (1996), Tanzania (1997/2002), Zimbabwe (1998), South Africa (1998), Kenya (2002) and Swaziland (2002).² South Africa's water legislation – National Water Act 1998 (hereafter the Act) – is regarded as being among the most notable for its sophistication and progressive nature. A key feature of the South African legislation was the emphasis on

administrative use rights facilitating reallocation of water in order to even out the inequalities of the past. Whereas the principles of allocation were set out in the Act, a more practically-oriented policy was needed to flesh out in detail exactly how these principles were to be translated into practice in order to facilitate reallocation. The first official version of the Water Allocation Reform (hereafter WAR) was published in 2006.³

However, implementing legislation based on administrative water rights can be potentially problematic due to the complexity of the hydrological system and the capacity needs demanded by a relatively centralised system. The gist of South Africa's National Water Act was that the authority to allocate licences would be transferred to the level of Catchment Management Agencies (hereafter CMAs), thus lifting some of the responsibilities of the central administration and making the local organisations more flexible and responsive through local control. However, it has proved very difficult to set up CMAs and there are only three CMAs in South Africa to date, none of which has been given the full powers of licensing. This paper aims to describe the practical implications of passing a system of administrative use rights into law. It focuses on the nature of licensing, the rationale for introducing them, and experiences with implementation. An overview of the South African context outlining the socio-economic and historical contexts of water rights evolution is provided. The paper then moves on to discuss the rationale of the new legislation and its implementation.

2

WATER REFORM IN THE SOUTH AFRICAN CONTEXT

2.1 Colonial Legacy

South Africa's history of colonialism and apartheid has left a long-lasting legacy of inequality and deep

1 See for instance R. J. Boroto, *A Collaborative Effort Towards Implementing IWRM: A Southern African Perspective* (Paper presented at the International Conference on IWRM, Kyoto, 6-9 December 2004) and Global Water Partnership, *Integrated Water Resources Management* (Stockholm: Global Water Partnership, TAC Background Papers no. 4, 2000).

2 See B. Van Koppen, 'Dispossession at the Interface Between Community-based Water Law and Permit Systems' in B. Van Koppen, M. Giordano & J.A. Butterworth eds, *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (Wallingford, Oxfordshire: CABI, 2007).

3 The Water Allocation Reform policy was intended as a means to flesh out the principles of the National Water Act and to provide clearer and more practical guidelines on how water rights should be redistributed.

social divisions which will take a long time to mend. First the Dutch arrived in the 17th century, and then early in the 18th century came the British and a protracted struggle for power and dominion ensued. This eventually led to the Boers⁴ gaining political power, the British gathered economic clout and the original inhabitants were made aliens in their own country. Systematic legislative discrimination started in the early 20th century with the passing of the notorious 1913 Land Act.⁵ In 1948 the Nationalist Party came to power with D.F. Malan as the prime minister, marking the beginning of more than forty years of apartheid, a segregationist philosophy that delimited people's opportunities in society by their skin hue. The Bantu Authorities Act was passed in 1951,⁶ along with a spate of other repressive legislations and regulations, and the upshot of this was that people of African origin were squeezed into designated reserves which made up a mere 13 percent of the total land area. They were also banned from leaseholding on farms, effectively undermining a nascent African peasantry.⁷ The Boers continued the practice established by the British of indirect rule by placing chiefs amenable to the regime in power in the homelands.⁸ The homelands were deprived of basic services enjoyed in the Republic of South Africa, such as water supply and electricity.⁹ When South Africa became a democracy under the

leadership of Nelson Mandela in 1994, it was a country racked by deep social divisions, mistrust and high levels of poverty and inequality. Given the highly skewed distribution of resources and services, the new government's priority was clearly to fill the gaps and craft a strategy of reconstruction and development. However the Reconstruction and Development Policy (hereafter RDP) rather quickly gave way to the new macro-economic strategy of Growth Employment and Redistribution (hereafter GEAR), which was of a much more neoliberal bent than the RDP. This led to the government facing the challenge of reconciling a 'social, rights-based, gap-filling and developmental approach with an approach based on productivity and efficiency'.¹⁰ Water was high on the political agenda, in particular water services, and so the Water Services Act was passed in 1997 followed by the National Water Act in 1998. In order to understand the new legislation and in particular the concept of administrative use rights compared with previous doctrines, it is necessary to take a brief look at how the concept of rights evolved over time in the South African context.

2.2 Evolving Concept of Rights

The National Water Act, in a way, brought to culmination the trend of increasing state control in South African water law. From the early days of Dutch settlement there grew a form of hybrid Roman-Dutch law, which distinguished between water that was *res privatae* (seasonal streams), *res omnium communes* (running water), and *res publicae* (perennial streams).¹¹ Flowing water was essentially *dominus fluminis* meaning 'in the public domain' – the actual ownership of water was unclear. Some argued that it belonged to the citizens in common property while others held that it was the property of the State.¹² With the advent of the British,

4 'Boer' means 'farmer' in Dutch, and the Dutch colonists and their descendants were called by this name. The term 'Afrikaner' included also the French and German settlers who spoke Afrikaans, which derives primarily from Dutch.

5 Black (or Natives) Land Act No. 27 of 1913 (commenced 19 June 1913). Black Africans were no longer able to own or even rent land outside of designated reserves.

6 Black (Bantu) Authorities Act No 68 of 1951 allowed for the creation of traditional tribal, regional and territorial authorities initially run by the Native Affairs Department, but with the promise of self-government in the future.

7 See C. Bundy, *The Rise and Fall of the South African Peasantry* (London: James Currey, 1988).

8 See M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Mountain Publishers, 1996) and B. Oomen, *Chiefs! Law, Power and Culture in the Post-apartheid Era* (Oxford: James Currey, 2005).

9 R. Levin & D. Weiner, *'No More Tears...' Struggles for Land in Mpumalanga, South Africa* (Trenton, NJ and Asmara, Eritrea: Africa World Press, 1997).

10 S. Perret, 'Water Policies and Smallholding Irrigation Schemes in South Africa: A History and New Institutional Challenges' 4 *Water Policy* 283-300 (2002).

11 H. Thompson, *Water Law: A Practical Approach to Resource Management and the Provision of Services* 26 (Cape Town: Juta & Co. Ltd., 2006). The distinctions are not clear-cut among authors and thus the notions of 'public' and 'private' waters remain open to interpretation depending on the particular context.

12 See Thompson, note 10 above at 27.

however, the Roman-Dutch doctrine was gradually undermined and gave way to the principle of riparianism, which held that those individuals owning land adjacent to a river also derived usufructuary rights to water. The volume abstracted, diverted or impounded was determined according to reasonableness, which regulated the common use of property.¹³ Riparianism became the dominant doctrine, ousting the *dominus fluminis* principle, and formed the cornerstone of the Irrigation and Conservation of Water Act 8 of 1912.¹⁴

However, a new water law was passed in 1956,¹⁵ as it was recognised that the 1912 Irrigation Act had its limitations in particular since it, as the name implies, mainly dealt with irrigation. It did not pay much heed to the water needs of industries, as well as tackling the increasing competition in water-stressed basins. Stressed basins were designated Government Water Control Areas (hereafter GWCA) and users were required to have a permit that put a cap on withdrawals. This permit, however, was not tradable.¹⁶ What effectively happened with the introduction of the 1998 Water Act was that the whole country was declared a GWCA, and all major users (over and above small-scale and low-impact use) had to be issued with permits.

An important point to note is the fact that both the reasonable use of the riparian doctrine and the permits issued by the government in GWCA were *usufructuary* rights – they did not represent ownership rights *per se*, but rather use rights in property which were constrained by the interests of others. Only in cases of conflicts would local courts negotiate between the parties.

2.3 The 1998 Water Act and Rationale for Introducing Administrative Rights

With the coming of democracy in 1994 and the end of apartheid, it was clear that South Africa's society was in need of a major revision of its water laws. Perhaps the most important change brought about by the 1998 Water Act 1998 was the introduction of the public trust doctrine and a concomitant shift from user-user to State-user relations in terms of water use rights. Another major change was that the new water law was demand-driven rather than supply-driven. These and other changes in the new legislation are largely based on the dominant policy discourse of Integrated Water Resources Management (hereafter IWRM) and have as their overarching aim the redress of past inequalities whilst simultaneously achieving efficient and sustainable water use. This policy discourse has been dominant since the 1990s, the period during which the new water legislation in South Africa was passed. The emphasis on integration has resulted in a shift towards water management according to catchment boundaries rather than political boundaries as was the case in the previous legislation. Furthermore, the aim of IWRM is to create an optimal balance between the three pillars of equity, efficiency and sustainability, and the idea of IWRM has been described as a 'nirvana concept'¹⁷ as a shift towards one of the aims will result in a disruption of the balance. The influence of the IWRM policy discourse on the design of the new water legislation and service provision is reflected through the water use rights categories that are described in the Act as well as in the more decentralised approach to service provision.

13 *Id.*, at 31. Another author (Tewari) holds that though the *dominus fluminis* invokes absolute ownership, it seems rather that the Roman-Dutch judicial praxis was somewhat ambivalent with regard to ownership. See D. Tewari, 'A Detailed Analysis of Evolution of Water Rights in South Africa: An Account of Three and a Half Centuries from 1652 AD to present' 35(5) *Water SA* 693-710 (2009).

14 This Act among other things distinguished between 'normal flow' and surplus flow'. Normal flow was the actual and visible flow where direct irrigation could be practised without storage. Surplus flow was water in a stream which was not normal flow. The distinction was made to accommodate irrigators who wished to use more than their reasonable share of river water by impounding flood water.

15 Water Act 54 of 1956.

16 Though it was prohibited to transfer quotas or permits, the exception was contiguous riparians, who could freely deal with their allocated reasonable share of riparian rights. Transfer of rights from riparian to non-riparian owners was also prohibited. However, a drought in the 1980s prompted illicit trade in quotas on the Crocodile and Orange rivers. See R. M. Armitage, An Economic Analysis of Surface Irrigation Water Rights Transfers in Selected Areas of South Africa (Pretoria: Water Research Commission, WRC Report no. 870/1/99, 1999).

17 F. Molle, 'Nirvana Concepts, Narratives and Policy Models: Insight from the Water Sector' 1 *Water Alternatives* 131-156 (2008).

While South Africa's water legislation was organised according to political boundaries before the promulgation of the new Water Act, the country is now divided into nineteen Water Management Areas (hereafter WMA) in line with hydrological boundaries. The intention is that these areas would ultimately be managed by CMAs and replace the regional offices of the Department of Water Affairs (hereafter the Department). Whilst some CMAs have already been set up, in most areas the regional offices are still in charge of water management, and so there is currently an ongoing discussion in terms of restructuring the institutional set-up and having fewer CMAs that cover several WMAs. The main idea behind creating CMAs is to bring about decentralisation of water management with the idea of a more participatory way of governing water in accordance with the principle of subsidiarity. However, the most influential change is the fact that the authority over water resources is now firmly vested with the State. Water allocation is supposed to be carried out according to the principles of equity, efficiency and sustainability, taking into consideration the quantity of water abstracted as well as the scale and impact of use. The only right in the Water Act is the Reserve,¹⁸ which consists of two parts, the ecological reserve and the basic human needs reserve. The ecological reserve is defined as the quantity of water that is necessary to preserve the ecological quality of the rivers, and fluctuates between ten and thirty per cent of Mean Annual Runoff (MAR) in the various WMAs.¹⁹ The basic human needs reserve is defined as 25 litres per capita per day, delivered within 200 metres of a household. The Reserve plays an important role in the water legislation as water can only be allocated to other categories of water use after the requirements for the Reserve are fulfilled. Over and above the Reserve, four other water authorisation categories exist, namely: Schedule One, General Authorisation, Existing Lawful Use and Licences.

Schedule One can be described as small quantities of water use, mainly for domestic use with little

18 The Reserve is the only right to water in the sense that no water can be allocated to other water uses and users before the requirements for the Reserve are met. See DWAF, Guide to the National Water Act 24-25 (Pretoria: Department of Water Affairs, 2006).

19 Statistics South Africa, Quarterly Labour Force Survey, Quarter 1, 2011 (Statistics South Africa., 2011).

probability of negative impacts. An important characteristic of Schedule One water use is that it is the only category of water use that does not require authorisation and can consequently be used free of charge. General Authorisation (hereafter GA) refers to water use involving larger quantities which might have a negative impact on the resource. GAs can be used for specific types of water use as well as specific categories of water users and can therefore provide an authorisation for more than one water user at the same time. The category of Existing Lawful Use (hereafter ELU) covers water use that has lawfully taken place two years prior to the promulgation of the Water Act. This category primarily consists of commercial farmers and due to South Africa's history of racial segregation, this group is largely made up of white males. For instance, in the Limpopo Water Management Area, 80 percent of the registered existing water use is by white farmers.²⁰ Though the category of Existing Lawful Use is also supposed to cover customary use, there is very little clarity on what constitutes customary use and little knowledge about the extent and nature of such customary use in the South African context, and how it should be understood and defined within the new legislation. Licences are required for all other water users that involve large volumes of water with a higher risk of a negative impact on the resource. The intention is that Existing Lawful Uses will eventually have to be converted into licenses as well, following revision of the extent of water use mainly carried out as part of the compulsory licensing process.

3

THE NATURE OF LICENSING

3.1 Shifting Property Relations

As was outlined above, existing lawful users did not have ownership rights but they did have clearly

20 F. de Jong, Water Allocation Reform through Licensing: The Effect of Neoliberalism on Access to Water for Historically Disadvantaged Individuals, Limpopo Province, South Africa (Wageningen: Wageningen University, MSc Thesis, 2010).

specified use rights that derived from their land ownership. As such it is easy to understand the confusion with respect to private ownership as in effect private land ownership determined water access. Riparian rights were exercised across the board; only in the GWCAs were permits also issued to users. Cases of conflicts were dealt with by the local Water Courts. It has been argued that the imposition of a regime of licensing amounts to an expropriation of existing rights. Pienaar and Schyff argue that rather than expropriation, the conversion of existing rights into licenses constitutes a deprivation in that it constrains existing use rights through the imposition of the public trust doctrine.²¹ However, while compulsory licensing does not represent expropriation, the case should be made on the grounds that water users did not actually have exclusive property rights to water through the previous legislation either. Riparians had usufructuary rights and the concept of 'reasonableness' meant that these rights were not rights of ownership as such but rather correlative rights that were exercised with due regard to other users in the 'closed commons'. With respect to permits, the same holds true as permits were issued by the government and thus subject to government regulations.

The major point to note here is how the shift to administrative rights in theory shifts authority from user-user – where each user was responsible for adhering to the principle of reasonable use so as not to cause harm to his or her fellow irrigators – to State-user relations – where users have to adhere to rules set by the Government. With the imposition of administrative water use, the granting of licences was no longer derived from a legal basis of land ownership (which was highly discriminatory) but from the discretion of the State in terms of considering the eligibility of individual applicants to hold a licence. Thus, rather than individuals being mutually responsible water users, the feeling among some irrigators now was that instead of the prospect of stealing water from their neighbours through abstracting over and above what was considered the reasonable flow, through exceeding their licensed

use or engaging in illegal use, they were no longer cheating their neighbours (considered morally objectionable) but the government.²²

On the other hand, those not yet having undergone licensing – by far the majority – and who continue to enjoy the privilege of drawing water from the rivers to water their crops and other uses, fall under the category of 'existing lawful use'. There was controversy around the idea of existing lawful use as well since many stakeholders justifiably felt that it would imply a continuation of existing patterns of power and privilege in the basin. The Department argued that it would be too costly to revoke all the existing use rights and that it would cause a barrage of cases to be brought against the State. Hence the idea of letting existing use rights carry over into the new legislation was sustained. What this means in practice is that existing users are not regulated like licence holders. The licence holders are in theory subjected to review of their licence every five years and have to comply with specified conditions and terms of use set out in the application guidelines. However, in practice, very little monitoring is taking place due to capacity constraints and the review process is mainly an administrative 'paper' monitoring process. Hypothetically, a breach of these conditions may result in the reduction or full revocation of the licence. But the Department has no such mandate over existing lawful users until such a time as they will be converted into licensed users, which in effect means that they become *fortified* rights.

Though (compulsory) licensing has been a slow process, some licences have been transferred to Historically Disadvantaged Individuals (HDIs), a term that came into use after the fall of the apartheid

21 *Ibid.*

22 The Water Administration and Measurement System (WAMS) effectively releases farmers from having to cooperate with one another, and water theft under this new system, according to one commercial farmer 'feels more like 'stealing from the Government.' See P. Waalevijn, *Squeezing the Cow* 55 (Wageningen: Wageningen University, MSc Thesis, 2002).

regime.²³ However, people who have received licences under the new regime do not feel that it has provided them with any advantages. On the contrary, they observe that their fellow water users continue to draw water as before whereas they, who now possess licences, have to pay fees and comply with the conditions in the licence in order to be able to continue with their use. This feels unfair and also relates to the shift in authority. The licence holders feel that the State is controlling their water and asking them to pay for something that previously was free. An additional difficulty with licensing is the issue of targeting and standards for when one is obliged to apply for a licence.²⁴ Among the different departmental offices, and even amongst various officials within the same office, licensing is dealt with in manifold ways. This has ultimately led to a situation in which water users are often incorrectly targeted. As a result some water users, who would basically fall in the Schedule One category, are made to apply for a licence and consequently have to pay for this licence when issued.

23 Though the term is an attempt at avoiding the old regimes' crude classification according to colour, it is still problematic in that it designates a group in line with a vague sense of historical disadvantage, and thus includes anyone who could have been said to suffer under the previous regime. The problem with such a classification is only too clear in the increasing allegations of 'capitalist cronyism' levelled at those who have benefited from affirmative action programmes such as the Black Economic Empowerment strategy. It fails to adequately distinguish those in real need of affirmation and empowerment, and voices have been raised that perhaps it would be better to devise some sort of criteria according to income levels, to avoid the sort of class gap that is now becoming more and more evident in the modern South Africa. See N. Alexander, *Racial Identity, Citizenship and Nation Building in Post-Apartheid South Africa*, Edited version of a Lecture delivered at the East London Campus University of Fort Hare, 25 March 2006, available at [http://www.ufh.ac.za/faculties/ssh/docs/Alexander%20\(Harold%20Wolpe%20\)Racial%20Identity,%20Citizenship%20and%20Nation%20Building%20in%20PASA.doc](http://www.ufh.ac.za/faculties/ssh/docs/Alexander%20(Harold%20Wolpe%20)Racial%20Identity,%20Citizenship%20and%20Nation%20Building%20in%20PASA.doc).

24 As there is no quantitative specification as to when one is obliged to apply for a licence, and guidelines to assist both water users and Departmental officials have only been introduced from 2004 onwards there remains a lack of clarity related to when one is obliged to apply for a licence.

3.2 Technological and Administrative Infrastructure Needed to Support Licensing

With the introduction of administrative water rights, as well as the shift towards full-cost recovery of diverse water uses, infrastructure to cater for this system had to be introduced as well. Hence several systems have been introduced to register the various water use authorisations over time. The Water Authorisation Registration and Management System (hereafter WARMS) is the oldest and most influential of these systems and it is used as a monitoring tool by the Department. In addition to these registration systems, which are linked to the billing system,²⁵ a number of technical procedures are in place. The most extensive of these technical procedures is the Reserve determination – which is necessary to determine the amount of allocable water, and also the Validation and Verification process – which is an auditing process of the actual water use in various WMAs. What these systems and procedures entail, who executes them and in what way they influence the implementation of WAR and in particular licensing will now be described.

WARMS was the first system in which water users and their water use were registered.²⁶ WARMS is used to provide information for the Systems, Applications and Products in Data Processing (SAP) of the Department in order to assist with the billing of water users. All water use above the basic human needs reserve and Schedule One category water use has to be registered in WARMS and the users will be billed for this water use. However, the system does not only provide information for the billing of water users. It also provides information for the water use in the various WMAs and is therefore essential for the management of the resource by the Department. As a consequence, it is extremely important that all water users that fall in the General Authorisations, Existing Lawful Use and Licensing

25 Water is billed according to the water use registered in WARMS and water charges differ between the different sectors of water use, such as irrigation, industry, etc.

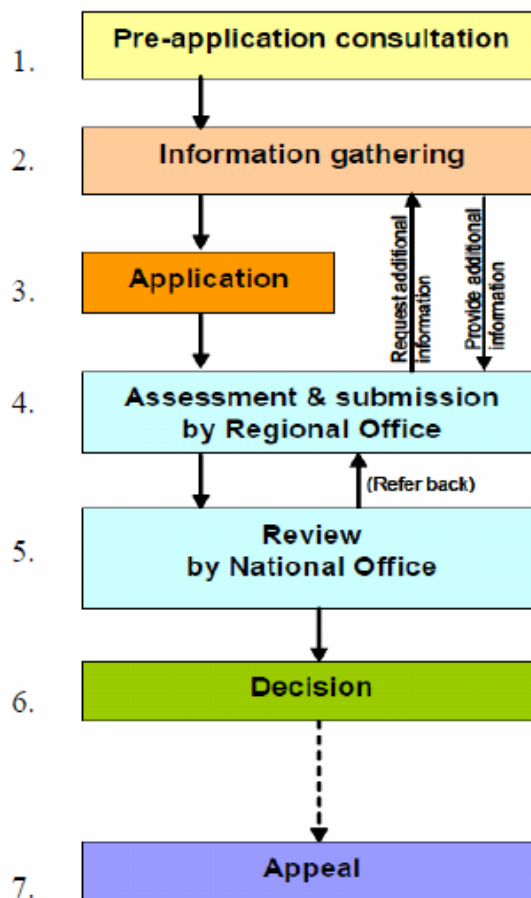
26 Any existing water use had to be registered in WARMS, regardless of whether it was an existing lawful use or not. Registered users were then issued with a Registration Certificate.

category register their water use to get a complete overview of the water that is used in a WMA. Registration in WARMS should be undertaken by the water users themselves, which has proved to be a vast and time-consuming undertaking. A lack of clarity and unfamiliarity with water registration has led to a situation in which many water users have not yet registered their water use and many of those who did, registered their water use incorrectly. To deal with this, a Validation and Verification process is being conducted in order to rectify these problems, which will be explained below.

The Water Use Licence Application Tracking System (hereafter WULATS) was introduced in 2007 to assist the Department with mapping the licence

application process. This system has facilitated the digitalisation of licence applications and has hence enabled several officials in different national and regional offices to work on the same application at the same time in order to speed up the process. This speeding up was necessary since the process has evolved very slowly since the Act's promulgation in 1998. The reasons for this delay in implementation are not only related to the highly administrative and bureaucratic character of licensing but also the influence of political decisions. The different steps that have to be followed in order to apply for a licence are described in the schematic figure below.

Schematic overview of the water licence application process



Source: DWAF workshop Roodeplaat, April 2009.

Water licensing is mainly used for new, productive water use and is seen as the only water use authorisation that can be used in order to (re)allocate water in stressed catchments. As eleven out of the nineteen catchment areas in South Africa are characterised as water stressed, licensing is potentially the most important tool in the Water Allocation Reform. In order for someone to apply for a licence, they first have to consult with an Area or Regional Office official from the Department in order to determine the water use category within which their water use should be authorised. If the water use falls into the licensing category, the applicant and the Department official have to gather information related to the water use, the catchment area as well as the Reserve for the area in order to determine the amount of allocable water in the area in which the water use will take place. When all the information, such as title deed, application forms concerning the water use, technique used to capture the water, risk assessment and reserve determination, is gathered by the applicant and the Department official, and once payment for the application is received, the application is filed into WULATS. From this point onwards, the application is reviewed at the Regional Office level and it is later sent to the National Office for final decision. At the Regional Office, a draft licence, referred to as a discussion document, as well as a Record of Recommendation and the conditions that are attached to the water use, are compiled. These documents are discussed and if need be amended at Regional level in a Water Use Authorisation Assessment Advisory Committee (WUAAAC) before being sent to the National Office for review. The review in the National Office mainly consists of a technical assessment of the water use described in the licence application as well as a verification of the application with the set policy. The policy guidelines for licensing are in large part described in section 27 of the Water Act and include the socio-economic as well as technical and ecological considerations that have to be taken into account in order to authorise or decline the licence application. After the decision has been made at National Office, the applicant as well as other water users that might be affected by the authorisation of the water use can file a written appeal within 30 days

of the decision after which the Water Tribunal²⁷ will decide on the matter.

The highly bureaucratic and complex administrative process of applying for a licence is in large part related to the perception that water in stressed catchments can only be allocated through the formal authorisation of a licence. Therefore the amount of allocable water in a specific area is of major importance. This makes determining the quantity of allocable water a prerequisite to move forward in the licensing process and WAR in general. Since the (initial) registration process has led to wrongly filed water registrations and the fact that it did not reach many new water users, it is necessary to validate and verify the current water use. The Validation and Verification process does not only map the quantity of water that is currently used in various WMAs, it also looks at the lawfulness and hence registration in WARMS of water use. This process is predominantly technical in nature as it makes use of satellite images and different databases, such as WARMS and SAPWAT,²⁸ to validate and verify water use. Mainly because of the technical nature of the process, it has been outsourced to various consultancy agencies that report back to the Department. As the results of the Validation and Verification process are still preliminary and the process has still not been conducted in many WMAs, it is difficult to come to an overall conclusion on the outcome of the process. However, for the Limpopo Water Management Area, several

²⁷ The Water Tribunal was established in 1998 and replaced the Water Courts. It is an independent body established to resolve water disputes which has jurisdiction in all the provinces. Members are appointed by the Minister on the recommendation of the Judicial Service Commission, and must have knowledge of law, engineering, water resource management or related fields. See Western Cape Government, Public Information - The Courts of South Africa, 23 February 2011, available at http://www.westerncape.gov.za/eng/pubs/public_info/C/32303#9.

²⁸ SAPWAT is a database that makes use of different climatic zones and the irrigation requirements in these zones according to evapo-transpiration of specific crops. Therefore, SAPWAT can be used to make calculations related to the water uptake of a specific water user given the crop use and area under irrigation. See www.sapwat.org.za/.

conclusions can be drawn from the preliminary results. The overall conclusion for the WMA in Limpopo is an over-registration of water use. This means that water users have registered more water than is actually taken up by them. Furthermore some unlawful (and therefore unregistered) use is detected in various areas. One would think that these results would lead to a positive adjustment of the quantity of allocable water and hence more water would become available for allocation to new water users. However, the Reserve has not yet been determined in many parts of the country. Consequently the water that seemed to be available for allocation will in large part be taken up by the only water right in the Water Act, that is, the Reserve. These results therefore point in the direction that in order to accomplish the aims set out in the Water Act as well as the WAR, reallocation of water should take place. This reallocation is at present mainly conducted through compulsory licensing, a process in which all water use authorisations in an area are reviewed and redistributed among the different water users and uses.

Compulsory licensing is a process in which all water users in a specific area have to apply for a licence in order to continue or start their water use. Once the applications have been made, the Department will consider these applications. This consideration and the eventual allocation proposal by the Department are influenced by the impact of the water use on the equity, efficiency and sustainability aims in that region. At the time of writing, the compulsory licensing process is being conducted in three areas in the country, namely the Inkomati, Jan Dissels and Mhlathuze catchments, and it will eventually be conducted country wide. Compulsory licensing is a very lengthy process, mainly because of the administrative burden on the Department and partly because applicants can appeal to the Water Tribunal if they are not satisfied with the proposed water allocation. Both issues create a delay in the run up towards a final allocation schedule and eventual replacement of the old water use authorisations with licences. That the licensing process is very time and resource consuming is demonstrated by a runtime of 5.7 years to complete a licence application instead of the target of a five months procedure time, derived from a sample of 23 licences in the WULATS

database. This timeframe has resulted in a backlog, mainly at the regional offices, and has hence caused a serious delay in the implementation of WAR. In addition to this, even though the process has picked up speed over time, one can only imagine the timeframe of a compulsory licensing process if the runtime of one licence is 5.7 years. Unfortunately the existing time frame of (compulsory) licensing is not the only difficulty faced by the Department and water users in the implementation of WAR. The implications of WAR for water users have been far-reaching and pose the question if the implementation of the reform, mainly through licensing, is facilitating the aim of redress of past inequalities.

3.3 Implications for Users

Licensing is seen as the core tool in WAR and the results of licensing are therefore most influential in reaching the target of (re)allocation of water to HDIs. By 2024, 60 percent of the allocable water should be in the hands of black water users, with a fifty-fifty divide between men and women.²⁹ However, the progress of WAR has been slow. In the Limpopo WMA, for example, seventy licenses have been issued in the period between 1998 and mid-2009. Thirty-nine of these licences have been issued to HDI category licence holders and with this result Limpopo is one of the WMAs with the highest quantity of redress of past inequalities. However, the results on paper do not represent the realities on the ground where little redress seems to have taken place. The main issue that causes trouble in the implementation of the licensing process, in addition to the administrative burden for the Department, is the shift from user-user to State-user relations concerning water issues. Where water users have in the past been used to negotiating their water use with other water users in their area and in addition to this have derived their right to use water by investing in water infrastructure, they now have to apply for a water use allocation by the State, for which they consequently have to pay. Interviews with eighteen out of the 39 HDI category water users has pointed

²⁹ See DWAF Chief Directorate, *Water Use – Water Allocation Reform Strategy 4-5* (Pretoria: Department of Water Affairs, 2008).

out that this shift is not only seen as unfair, but more importantly as illegitimate in the sense that they do not understand why they have to register and pay for water to which they created access themselves by investing in water infrastructure and unfair because others, such as neighbours, who make use of the same resource but who have not registered their water use are not obliged to pay for water use. Furthermore, wrong targeting of water users for licensing has caused difficult situations at the grassroots level. Some water users who only use water for self-sufficiency purposes and often do not have the financial means to invest in infrastructure have been issued a licence and consequently have to pay for water that they are unable to access.³⁰

Part of the impasse in WAR and the licensing process is attributable to the shift in rationale that has taken place in the early phases of the implementation of the reform. This rationale has been largely influenced by the shift from a neo-Keynesian towards a neoliberal macro-economic policy, and consequently from a policy with the aim to redress past inequalities towards a policy that is mainly focussed on efficient and productive water use. This shift is translated into WAR by the perception of ELUs as highly efficient water users, whilst new water users – those that are targeted by the reform – are seen as less efficient and sometimes even wasteful water users.³¹ The effect of this perception is that reallocation of water is seen as a last resort in order to work towards the target of WAR. As little water is available for allocation, as is demonstrated through the outcome of the Validation and Verification process, reallocation of water from ELUs to the new HDI category of water users is a prerequisite for the progress of WAR and hence for the redress of past inequalities. It can consequently be stated that if the reallocation of water from ELUs to the new HDI category of water users does not take place, the skewed division of the old water legislations is partly transferred into the new water legislation.

³⁰ See de Jong, note 20 above at 81-82.

³¹ See DWAF, *A Strategy for Water Allocation Reform in South Africa 6* (Pretoria: Department of Water Affairs, 2006).

4

DISCUSSION AND CONCLUSION

One of the main features of the legislative reform - the shift in authority - has been emphasised in the preceding sections. Defining the State as the public trustee of the nation's water resources essentially meant the culmination of State authority over the entire nation's freshwater. The Water Act was heavily influenced by the IWRM principles as well as the idea of decentralised management, or subsidiarity, which resulted in the objective of establishing 19 WMAs and the intention to establish as many CMAs country-wide. For different reasons, including capacity constraints, only three CMAs have been established. And whilst the core idea was that the Department of Water Affairs would delegate the responsibility of issuing licences to the CMA, this has not happened yet and the CMAs still feel that they are on a 'tight leash'. Hence, the aim to decentralise has not really materialised and what is in place is a top-down, cumbersome and resource-intensive system that is not conducive in practice to the principle of subsidiarity. Apart from capacity constraints limiting the establishment and running of CMAs, some stakeholders are also arguing that there is a political issue in that the national Department is loath to devolve too much power to the CMAs as they fear that there will be problems in dealing with local vested interests.

The concept of ELUs was intended by the lawmakers as a means of easing the shift from the old to the new legislation. However, given the drawn-out nature of the reform process and the tendency to favour ELUs as being more productive and efficient, such users have effectively become entrenched. The efforts that have been undertaken to cut back on ELUs have often met with fierce challenges and the Department has frequently been taken to court where it has lost the majority of cases. In addition, the attempts to actually determine the extent of lawfulness of existing users through the Validation and Verification process are proving to be very difficult and time-consuming. Most of the ELUs are white commercial farmers, who mainly tend to carry on as before and who are well

networked and informed and thus able to challenge any attempts at curbing their use.

HDI's meanwhile tend to be viewed as potentially ineffective and unproductive water users, and though they are supposedly the ultimate beneficiaries of the Water Allocation Reform, they are yet to reap the benefits. Many HDI's feel that the process of registration and licensing is unfair and arbitrary as the process includes some and excludes others, who are left to carry on as they please. There is an issue of targeting here as many of the users that have been required to register are only using relatively small amounts of water and could thus have been covered by Schedule One or the General Authorisations rather than the individual licensing system. Moreover, there has been extensive discussion in terms of authority over resources at the local level between the local land authorities (the Department of Agriculture and Land Affairs) and the water authorities, which creates confusion for local potential water users. The Act was not written with the needs of small-scale agricultural water users in mind. Many farmers lack small-scale infrastructure to enhance their water security. On their own, licences will not enhance water security; infrastructure will. A 'secure' right to water is meaningless without the means to create access to, store or contain the water over which one has a use right. A complicating factor is the lack of clarity regarding customary rights. How are customary rights to be understood and defined, and how are they practised? The lack of empirical information on customary rights and the sense that many water users derive from apartheid era schemes rather than from evolving local practices opens up the scope for discussing how the term 'customary' should be understood in South Africa, and the potential possibility of realising legal pluralism. In countries where legal pluralism works, such as Indonesia, it is often as a consequence of quite distinct community practices and local institutions that have evolved over a long time. The history of segregation, forced migration and uprooting in South Africa meant that such practices often did not have the time to evolve in a continuous fashion, raising the issue of how the term 'customary' should actually be conceptualised.

Overall, whilst South Africa's legislation is certainly progressive on paper, it has proved far more difficult

to actually put it into practice. This paper argues that instead of focusing too much on licensing all users over and above Schedule One and on controlling all aspects of the water cycle, emphasis should be shifted towards more flexible, less resource-intensive arrangements, and using resources that already exist at the local level. There is a need to make the administrative use rights system less rigid and to delegate more real decision-making authority. Tisdell argued that administrative rights systems are the most just and efficient ways of allocating water.³² However, that is only true if the necessary political will and administrative capacity to carry it out in practice is present. In the case of South Africa, the capacity constraints and tendencies to favour existing users, combined with the resource-intensive means of ecological classification, means that the goals of efficiency, equity and sustainability in water allocation are not necessarily achieved with the current system. Therefore, a more flexible, less resource-intensive system that fits with actual capacity and takes people's local needs into account is required.

32 J. G. Tisdell, 'Equity and Social Justice in Water Doctrines' 16 *Social Justice Research* 401-416 (2003).

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