

## WATER POLICY

### Water policy is hindering agricultural transformation, study shows

*Lauded as one of the most progressive Constitutions in the world, South Africa's supreme law has not fully achieved its mandate to advance human rights and freedoms. The enormously unequal distribution of water for agriculture, almost 25 years since the onset of democracy, is one of the clearest examples of how the imbalances created by apartheid persist, reports Petro Kotzé.*



According to the National Water Sanitation Master Plan (NWSMP) published in 2019 by the Department of Water and Sanitation (DWS) after extensive consultation with all stakeholders in the water sector, it is estimated that a mere 5% of agricultural water is estimated to be used by emerging. A major hurdle to reversing this disparity is the failure of Irrigation Boards (IBs) to transform into Water User Associations (WUAs), the vehicles for the historically disadvantaged to participate in the water allocation process.

A recent Water Research Commission (WRC) funded study investigated the challenges obstructing this transformation, and found a host of other complex issues at play, including

acknowledgment of existing lawful use, ironically provided for in the renowned National Water Act (NWA) of 1998 which is supposed to achieve equitable allocation of water to all. "To understand how we got here, we need to understand where we come from," says Bongani Msimang, MD of Boloka Development, the consultancy that conducted the study.

Inequitable water allocation in South Africa stems back to the 17<sup>th</sup> century, he points out, when European settlers came into the country. "That political dispensation ushered in a way in which water was managed according to the aspirations of those who came at the time."

### Water, land and the law

Writers such as Guelke & Shell (1992) have traced the South African history of water giving narratives of dispossession that have lasted for centuries. When the Dutch East India Company arrived at the Cape of Good Hope in 1652, they developed water laws to serve the interests of the white settlers, based on Roman-Dutch Law, a legal system developed in the Netherlands. Land and water resources were taken from Khoikhoi pastoralists and it became difficult for them to sustain themselves in a land in which access to limited water resources was necessary for survival.

The settlers did not attempt to create a uniform policy for water use between the new arrivals, and native communities. Water use entitlements started to be officially allocated by the colonial government around the 1760s.

When the British government took over in 1805, new laws were introduced. A key change, that still heavily impacts water management in South Africa today was the dissolution of state control of water for the riparian principle. Landowners who had perennial streams passing through their land now had the first right to use the water for productive purposes. "These water rights were inextricably aligned to land ownership," Msimang points out and, very few black people could then own land. "Ultimately, this entrenched a huge era of inequity inequality in terms of water management and the usage of water," he notes.

Irrigation districts and, within them, irrigation boards to manage irrigation water along river courses were officially established within the Cape Colony with the promulgation of Act 8 of 1897. Water courts to preside over disputes were established soon after, with Act 40 of 1899 of the Cape Colony. The promulgation of the Cape Irrigation Act of 1906 further cemented the riparian principle.

Soon after, the new Union of South Africa's Irrigation and Conservation of Waters Act in 1912 preluded the beginning of a new era in water management within South Africa. Later, a change of government in 1948 kickstarted serious water resource development projects for economic development, followed by several new Acts written by the newly elected Nationalist Party. The most relevant of these was the Water Act of 1956. This law entrenched riparian rights and cemented inequalities in water access across races. It ingrained the legal right of a large portion of South Africa's water resources to be used by a minority of water users. The law did not afford black communities the same level of access to potable water and sanitation. It was based on total disregard and discrimination, Msimang says. Irrigation boards were again established under Section 79 of the Water Act No. 4 of 1956.

The era saw substantial resources pumped into commercial agriculture and the development of large government irrigation schemes. Concurrently, the handful of South Africans privy to the necessary land and water benefited hugely from the government's unwavering support.

Water policy was next reviewed for a new, democratic South Africa, and to reflect the new Constitution of 1997. The White Paper for National Water Policy for South Africa was published in

the same year, with the objectives to promote equity and access to water; to ensure benefit for all South Africans; and, to address the needs and challenges of water management. The riparian principle was abolished. Instead, water was to be allocated based on the promotion of equitable social and economic development. The national government became the custodian of water as a national resource.

The NWA of 1998 was a fundamental reform of the law relating to South Africa's water resources. At the time, it was hailed by the international water community as one of the most progressive pieces of water legislation in the world, and a major step forward in the translation of the concept of integrated water resources management (IWRM) into legislation.

Based on the principles of IWRM, the Act calls for the establishment of Catchment Management Agencies (CMAs) through which water resource management is delegated to the catchment level, with the involvement of local communities. IBs were to be (mostly) replaced with WUAs, which are defined as cooperative associations of local individual water users who wish to undertake water-related activities for their mutual benefit.

Yet, almost 25 years later, little of the Act's ambition for transformation in the irrigation sector has been fully achieved. Only about 50% of the roughly 279 irrigation boards in existence in 1998 have transformed into WUAs, Msimang says. Furthermore, none of the targets for water allocation to historically disadvantaged individuals (HDIs) set in the Water Allocation Reform Strategy of 2008 have been remotely reached. The figure of 5% in 2022 falls woefully short of the projected 30% by 2014, 45% by 2019, and 60% by 2024. Furthermore, the commercial farmers that use 95% of the allocated agricultural water, own 70% of commercial farms.

### Hurdles to transformation

The study found multiple probable causes of Water Allocation Reform (WAR) not being achieved as planned. For one, there is a lack of institutional capacity to plan and implement the programme. "There was an inability within the department to manage the processes related to transformation," Msimang says. For example, the department did not have adequate capacity in terms of staff to evaluate or respond to the many proposals and business plans necessary to establish WUAs submitted to them.

In turn, only two catchment management agencies (CMAs) have been formed and are operational in the country and they also have not been delegated full operational powers in crucial activities such as water use licensing, which is still centralised.

Furthermore, the legal framework involved is complex. There were insufficient guidelines in terms of what the transformation of irrigation boards meant, for example, the implications for property ownership, assets and liabilities. More reasons include weak cooperation between the different government departments and the administrative burden of water use applications.

Msimang adds that, even among those IBs that transformed in terms of principle and practice, many still operate as IBs. "They





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have not necessarily assumed or embraced the principles that are important for transformation,” he says. Most management committees, for example, are still dominated by white males and they still operate along the same lines. “In most, the only thing that has changed is the name.”

However, a large part of the challenge lies in the NWA of 1998 itself, in which a number of loopholes opened up the way to blocking transformation. One is the NWA’s recognition of Existing Lawful Use (ELU), intended as a transitional arrangement at the time. ELU meant that a water user did not need to apply for a new water license (except in water-stressed catchments) if they could prove existing water rights were in place during the two years before the new Act commenced (thus, from 1996 to 1998). In other words, farmers with water quotas and pumping permits granted to them under the 1956 Act, could continue under the same conditions.

Though these users did not need to reapply, they had to register ELU. However, historically disadvantaged individuals who were denied any formal water right before 1998 were supposed to obtain licenses for pre- and post-1998 water uses. Over and above that, Msimang explains, “many black people did not even understand all these processes and were not aware that they needed to register, even though they had land and they used water.” Most commercial farmers, however, many with easy access to information, networks and the necessary exposure and access to these processes, registered their ELU.

Today, ELUs still authorise huge volumes of water used in the country. The NWA actually entrenched the status quo in terms of water rights, Msimang says, with far-reaching impact in terms of the water available for re-allocation that he thinks what not

appreciated by legislators at the time. “How then,” he asks, “will you achieve equity, if all the water is already allocated lawfully to commercial irrigation farmers who mostly happen to be white, through existing lawful use?” You’ve enacted in your law that water belongs to them, unless of course you can conduct the Verification and Validation process so that all water not allocated can be determined and re-allocated to achieve better equity, he says.

A second loophole is that, according to the NWA of 1998, an IB will continue to exist until it has been declared a WUA or until it has been “disestablished in terms of the law by or under which it was established.” In this case, it is the Water Act of 1956, which recognises riparian rights. “There’s a disparity today in terms of motif and intention,” Msimang explains, “because the 1956 Act established irrigation boards for a particular purpose, and to favour a particular race but the new law says you can only disestablish them in accordance with the 1956 law under which they were established.”

The challenges are exacerbated by the slow restitution of agricultural land. Membership of WUAs generally reflects land ownership and water use but, according to The Institute for Poverty, Land and Agrarian Studies, more than 70% of commercial farms in the country are estimated to be owned by white farmers with about 39 000 white commercial farmers and 5 300 black farmers (according to the African Farmers Association of South Africa). Most of the black commercial farmers have relatively smaller farms. Logically, WUA governance is thus often focused on white commercial farmers’ interests. On top of this, some landowners traded away their existing lawful water use rights, so that the water allocation was not transferred to land reform beneficiaries.

The impact of the delay has been “huge”, Msimang says. “There has been little transformation since 1994.” In many areas that he’s visited, emerging farmers are not included in the water management structures. In some places, meetings and statements are in Afrikaans, which the emerging farmers cannot understand. Many emerging farmers do not understand how the water charges work and are developed, and thus have built up debt. As a result many of them lose their farms or lease them back to commercial farmers because of accumulated debt and inability to farm due to high input costs, including electricity for their water pumps. Even those that do have land, do not necessarily have access to water.”

### A realistic look at the future

The study has identified a number of recommendations and solutions.

The most important message is that a legislative review process is critical, Msimang says. “Without it, we will not be able to circumvent some of the provisions that are entrenching the disparity in terms of water use and allocation.

Then, for holistic transformation, there must be closer collaboration between government departments. Also, water reform goes hand in hand with land reform. Education and awareness of the challenges that the water sector is facing in relation to transformation are just as important, Msimang says. “A lot of support is required to ensure that emerging farmers are at the same level, or that they are brought to the same level as those that have already existed for that long in that space.” Furthermore, the establishment of water management institutions like CMAs must be fast-tracked. And, when institutions are developed, it is important to understand that the institutions are developed to serve the interest of all South Africans for whom these institutions are developed.

According to the final report, *Strengthening the knowledge base and capacity to support the transformation of Irrigation Boards to Water User Associations*, “the institutional arrangements

for water management within agriculture have for long been centred on irrigation infrastructure and not water as a resource. Transformation of IBs to WUAs accords us an opportunity to work the institutional arrangements around managing water as a shared resource.”

The researchers concluded that IWRM must be revisited. According to the report, “important decisions on water re-allocation should consider the implications of relationships between water users in a catchment, especially where historical water use differences exist in order to achieve equity and redress within the water sector.

Last, the focus must change from managing the water supply to managing the increasing water demands. It’s imperative that all water users conserve the water they use.

The study results will inform the development of a Transformation Charter to address inequality within the water sector. Lessons from the work will also contribute to guidelines for the transformation of Irrigation Boards into WUAs, to be used by the Department of Water and Sanitation (DWS) and its partners.

### References

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