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"With Water We Will Wash Away the Past" – The Elusive Promise of Redressing Water Inequalities in Post-Apartheid South Africa

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ABSTRACT: Water issues in South Africa have been a subject of fascination for numerous scholars around the world. Its ground-breaking National Water Act 36 of 1998 (NWA), promulgated during the democratic political transition, was meant to introduce a complete overhaul of the water sector and ensure access to water for all. In a society haunted by a long legacy of racial discrimination and exploitation, water was deemed to bring about a process of reconciliation. The NWA quickly became one of the cardinal policy reforms of the newly elected African National Congress (ANC). Twenty-five years after its adoption, however, the results are disappointing. While access to drinking water for previously discriminated-against populations was dramatically improved (especially in urban areas), the same cannot be said of access to water for productive use. Indeed, regarding the water allocation reform in rural South Africa, 'water apartheid' is still alive and well. In their accounts of the failure of the reform, scholars often blame politicians and political elites for their supposed lack of willingness to follow up on the intentions of the progressive Act. In the tradition of public policy analysis, I concentrate on the policy side rather than on the politics to explain the failed promise of the water allocation reform. Reviewing the law implementation process, I analyse how policy objectives have been filtered through state departments' organisational culture and professional routines and operationalised on the ground through technical policy instruments. Ultimately, I shed light on how, despite new political principles and dispensations that claim the contrary, it has been possible to reproduce racial inequality and to further entrench inequalities inherited from the past. I show that this has been done by concealing water grabs from political attention through resorting to discreet policy instruments and practices that obscure the critical question of water sharing.

KEYWORDS: South African National Water Act, implementation, policy review, policy instruments, water allocation redistribution, South Africa

INTRODUCTION:

In South Africa, the existence of long-lasting colonial and apartheid rules that reserved land for a white minority is a well-known historical fact. What may constitute an even more striking benchmark of spatial and social injustice is the fact that the country has also suffered from a very skewed distribution of water resources, especially in rural areas where, "1.2% of the population controls 95% of water used" (van Koppen and Schreiner, 2014: 64). With the end of apartheid in 1994, the new government inherited a backlog of 14 million people who lacked access to piped water¹ (DWA, 2006). In 1996, two years after South Africa's first democratic elections, a very progressive "right to water" – that is, a right to access sufficient water – became enshrined in the new constitution (Section 27, RSA 1996).

In a society haunted by a long legacy of racial discrimination and exploitation, water was deemed to bring about a process of reconciliation. The poet Antjie Krog beautifully coined the words, "With water we will wash away the past", which were included in the preamble to the 1997 *White Paper on a National*

¹ This was about one-third of the population; the rest at least had access to water within 200 metres of their household.

Water Policy for South Africa. The then Minister of Water Affairs and Forestry, Kadar Asmal, was willing to champion a complete overhaul of the water sector. The National Water Act 36 of 1998 (NWA) became one of the cardinal policy reforms of the African National Congress (ANC) once they were elected to power, and it carried a new official Department of Water Affairs (DWA) slogan: "some, for all, for ever".

South Africa's groundbreaking legislation received international acclaim for its progressive nature on both social and ecological accounts. Indeed, it was globally considered to be a pioneering document in water reform in terms of transformative justice, prioritising "basic human needs" ("human reserve") in the allocation of water resources. It also aimed to protect aquatic ecosystems ("ecological reserve") by retaining a minimum instream flow into every significant water course. Only the human and ecological reserves enjoyed a recognised *right* to water, with allocation to them being prioritised; all other uses would be required to obtain authorisation. Kadar Asmal claimed that South Africa's new policy enshrining a human and ecological water reserve was a world first (Asmal et al., 2011), and influential global leaders in the water sector agreed that it was a "landmark policy that would revolutionize society's relationship with rivers" (Postel and Richter, 2003).

More than 25 years after its adoption, however, taking stock of the results of such an inspiring water reform proved less flattering. On the positive side, there have been major achievements over those years; by the mid-2000s – 10 years ahead of schedule – South Africa had already met its United Nations Millennium Development Goals in the water sector, and in 2008 the Minister of Water Affairs and Forestry declared that, since 1994, nearly 19 million people (of a population of nearly 50 million) had been supplied with water (Hendricks, 2008). By 2008, having spent R18 billion on fast-track water services programmes (equivalent to EUR 1 billion today), the DWA had managed to build sufficient infrastructure to supply water to 95% of the population;² however, an assessment of the reliability of the service³ or the quality of the water might paint a slightly different picture. Indeed, since the advent of democracy the reliability of water services has tended to decrease, with the speed of deterioration even increasing over the past few years. According to the National Water and Sanitation Master Plan (DWA, 2019), in 2018 only 65% of South Africans had access to safe and reliable water services; the document goes on to say that huge disparities still exist today in that only 60% of rural residents have reliable access to safe water, compared to 84% of urban dwellers (Republic of South Africa, 2019). Still, such progress in domestic water access should not be downplayed, especially given another impressive achievement: the introduction in 2001 of a policy on "free basic water" that promised a monthly supply of 6 kilolitres of potable water per household at free of charge.⁴

An examination of the water allocation reform under the NWA shows a less positive side. The slow pace of this reform has particularly affected emerging rural black farmers, and water legislation has yet to ensure their sufficient access. Only 24% of water has been formally allocated to Historically Disadvantaged Individuals (HDIs)⁵ and only 5% of all water is being effectively used by them. By the early 2010s, Movik (2012: 145) noted that the allocation reform programme had reached a deadlock and that, "settling land claims has become the main vehicle of redistributing water, rather than through the water allocation reform itself". In other words, most of the progress in reforms came as a (positive) side effect of another policy reform. This is problematic because the land redistribution policy process does not cover the whole country equally; for instance, some of the most affluent agricultural areas in the Western Cape province have rarely been the subject of land claims. Many academic works have thus emphasised

² For access to piped water inside dwellings, however, the percentage dropped to 60% of households (Stats SA, 2022: 73).

³ A reliable water service means a household has clean drinking water for 300 days a year, with any interruption not lasting longer than two consecutive days.

⁴ In August 2002, the DWA published a *Free Basic Water Implementation Guideline for Local Authorities*.

⁵ An HDI is a South African citizen who, due to the apartheid policy that was in place, had no voting rights in national elections prior to the introduction of the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). The designation of HDI pertains mainly to: 1) black, coloured and Indian individuals; 2) women, and/or 3) individuals with a disability.

that, despite new political priorities and new legislation, there continues to be a distressing degree of inequity in water use and water governance in rural areas (see, for example, Lanari et al., 2021; Marcatelli, 2021). How can we explain that the new democratic regime achieved a resounding success with its human-rights-based approach to water but that water allocation reform is still a major disappointment? Our paper sheds a new light on that paradox, mainly by using a public policy analysis framework to emphasise the critical importance of the implementation stage (and not only the decision-making stage) within the public policy process (Pressman and Wildavsky, 1973). A closer scrutiny of the implementation stage enabled us to pay particular attention to the way in which public policy objectives are being operationalised through technical policy instruments that often play a critical role in enacting (or blocking) policy change (Hall, 1993). Ultimately, I intend here to reactivate an old debate within political science around the relative importance of policy vs politics as *explanans* (determiners) of policy change; included in this debate is an effort to determine which has more influence over policy change: political elites and decisionmakers at top management levels or civil servants and street-level bureaucrats.

POLICY OVER POLITICS: IMPLEMENTING POLITICAL OBJECTIVES THROUGH TECHNICAL POLICY INSTRUMENTS

According to the public policy instrumentation school promoted by Lascoumes and Le Galès (2007), public policies are defined as much by their technical instruments as by their political orientation and official goals. For these authors, there is only a partial correspondence between the decisionmakers' original intention and what public policies effectively turn out to be once implemented. In this approach, technical policy instruments represent an interesting entry point to studying *effective* change (or lack thereof) in public policies, as they allow for the discreet shaping of policy to one's own benefit (Bourblanc, 2011). Lascoumes and Le Galès (2007) show that policy instruments are not neutral technical means for achieving a clear policy objective; rather, they are institutions in the sociological sense as they are bearers of values that are fuelled by a particular interpretation of the 'social' and by precise notions of the mode of regulation envisaged (ibid: 4). Very often, such values are the ones that are endorsed by the implementing agents, and this approach thus shifts the focus from politics to policy. More precisely, it puts the emphasis on implementing agents within the state who are responsible for operationalising the law and its policy objectives and translating them into concrete reality on the ground through the use of technical policy instruments; the professional culture and routines of these implementing agents thus can tremendously shape what in effect comes out of political decisions.

The public policy instrumentation approach thus invites us to consider the effects of the interactions among the social, cognitive and material dimensions of policy instruments. This approach resonates with works in political ecology that have also long recognised how strongly the material and the political are intertwined within environmental issues. This is particularly true in water. In South Africa, the political ecology of water benefits from a rich tradition of critical scholarship whose work has focused on how deeply state and society are intertwined with the provision of water and sanitation services (Rodina and Harris, 2016). Von Schnitzler (2013), in particular, demonstrates how, in the transition from the apartheid regime to a neoliberal one after 1994, installing a water meter in households was a way to make liberal citizens out of colonial subjects. Recognising that Neo-Marxian and Gramscian approaches have dominated the field, Hellberg (2014) opted for a Foucauldian approach to governmentality, here understood as "the organized practices (mentalities, rationalities, and techniques) through which subjects are governed" (Hellberg, 2014: 227). She describes how, in practice, government is put to work by a variety of techniques that range from biopower over populations to "the governing of the self" (ibid) and that they thus govern not only water *uses* but water *users*. She particularly analysed the implementation of the right to basic water, showing "how water performs a function in constituting both life and lifestyles" (ibid).

Compared to studies of water for domestic use, fewer political ecology works have investigated water *resources* (Bourblanc and Blanchon, 2019). Among their small number is the work by Shahid et al. (2024). They blame the *creation* (not just reproduction) of new inequalities on technological infrastructures and political economy factors such as the complex and geographically dispersed global production network (GPN). According to those authors, "such outcomes of agrarian transformation are not simply a case of the stubborn prevailing of past inequalities, but rather (...) a result of the 'adoption' of these arrangements by neoliberal regimes". Among the small number of scholars investigating water resources is Marcatelli, who has been studying how inequalities are being reproduced and social relations of power further entrenched in rural areas. She analyses how, "the physical, material reality of water inequality [is] brought together with that of biopolitical power and the way this is represented and legalised in judicial and political systems" (Marcatelli and Büscher, 2019: 764). Interested in the political economy of water in South Africa, Marcatelli (2021) posits that a neoliberal biopolitics of water is reflected in the country's water reform, whose *de facto* aim is, "advancing the commodification of water resources and services" (ibid: 11). From this premise, she intends to show how structural "liquid violence" is legitimised in practice on a regular basis – legitimised in the sense of "rendered normal, natural" (ibid: 120). In her view, liquid violence has been "supported and enabled by the state".

One may wonder, however, how such residual racism could persist within the state apparatus despite the "transformation" process the state went through in order to become more representative of the racial diversity within its society (Chipkin, 2008). The DWA itself underwent a massive replacement of civil servants by cadres loyal to the ANC; this process mirrored what had occurred in the late 1940s when the Afrikaner-dominated National Party took over a state apparatus that was perceived to be dominated by British elites (Hyslop, 2005; Posel, 1999; Swatuk, 2010). Numerous accounts have emphasised how the DWA was perceived by white irrigators to be far less amenable to their interests after the 1998 water reforms (de Lange, 2004). Realising that we lacked part of the explanation here, my aim was to open the black box of the state.

Political ecologists have long been criticised for endorsing a rather monolithic view of the state (Kull, 2019; Barone and Mayaux, 2019). Against such oversimplification, I intend to explore another type of explanation which lies in state capacity, that is, in its organisational culture, routines, preferred practices and instruments. In other words, through a political sociology approach, my aim is to take public administrations more seriously, even though such attention is still quite rare on the African continent. Considering that organisations and institutions do indeed matter, I apply a public policy analysis to the process of water allocation reform.

Embracing such a public policy analysis perspective, Movik's thorough analysis of the drafting of the 2014 Water Allocation Reform (WAR) policy is of particular interest. Inspired by works on problem framing by Hajer (1993) and Fischer (2003), Movik studies in particular what she calls the "allocation discourses" that led to a paralysis of water allocation reform. She posits that, "the notion of redistribution became hinged on the capacity to use water efficiently" (Movik, 2012: 140). Lanari et al. (2021), investigating the export-oriented fruit industry in South Africa's Western Cape province, also underlined the power of dominant narratives and their mythical 'trickle-down effect'. According to these narratives, the expansion of global production networks is accompanied by economic growth that benefits even the most vulnerable populations; this, in turn, legitimises unequal water allocation. Movik identifies a framing process that places social equity and redistribution targets under the tutelage of the overriding principle of 'efficiency'. In her opinion, "through the emphasis on scarcity and making efficient use of scarce resources", protagonists achieved "closure" around particular policy solutions (Movik, 2012).

In the early 2010s, however, when Movik published her thesis on the Inkomati Basin, implementation of WAR was still underway. The implementation stage of policies is a major sequence in the public policy analysis approach (Pressman and Wildavsky, 1973). I thus argue that, in fact, two principles were in balance in the drafting of the policy: economic growth and equity. Which principle eventually prevails is decided as the public policy unfolds on the ground during its implementation process. The same tensions

between conflicting principles exist in another piece of legislation, the Water Services Act 108 of 1997. This Act recognised both the right to water and the full cost recovery of water, and yet did not prevent major progress in access to water for domestic use. What counts is how these principles are played out in practice. To this end, we need to include the whole policy-making process; in order to examine how the unresolved tension between principles was dealt with by the implementing agents, we need to focus on not only the decision-making stage but also on the implementation stage.

The rest of the paper is organised into three main parts. In the first part, I refer to the drafting period of the NWA. I show how access to water for domestic use captured most of the attention from the new political dispensation and how, in the early years, it almost ignored other aspects of reform including water as a resource for productive use. I evoke early political intentions and contrast them with the structure and organisational culture of the DWA, showing how the two were not well aligned. This explains the delay in implementing the NWA's water allocation reform component, which persisted until the mid-2000s when responsibility for drinking water access was transferred to the municipalities. I then draw attention to the unwavering commitment to water allocation reform over the years at the highest political levels, including among ANC politicians and political elites within the ministries.

In the second part of the paper, I focus on the Water Allocation Reform implementation stage, post-2006. I consider the technical policy instruments and practices that regulate – and sometimes restrict – the use of water resources. I essentially centre the analysis around one policy instrument, water licencing, and the practical modalities, policy principles and doctrine that accompany it. I show that – as is usually the case with implementation – the devil is in the details. I unpack various mechanisms behind the water licencing process and demonstrate how a technocratic approach has been used to obscure reform policy priorities. I particularly emphasise how the old guard in the DWA has been using technical argumentation to delay, and then to de facto neutralise, the transformative effects of WAR. Ultimately, I show that this is not a story about vested interests populating decision-making arenas or actors dominating institutions; rather, it is about technical devices and policy instruments performing to invert policy priorities.

In the last section of the paper, I provide one striking illustration of such an inversion. I show how commercial farmers managed to de facto privatise and commodify their water allocation in a way that went against the spirit of the new law which defended a public trust doctrine. I thus conclude that during the implementation stage, DWA civil servants, through the use of specific policy instruments and practices, not only organised the paralysis of the water redistribution process but actually contributed to the overturning of the NWA's political objectives.

This paper is based on a research inquiry that was conducted during a long-term appointment of the author at the University of Pretoria (2010-2024). The enquiry had multiple aims, including: 1) to analyse the implementation of the NWA and its various provisions in different parts of South Africa and to particularly look at the process of establishing Catchment Management Agencies; 2) to study the regulatory process of compulsory licencing (Tosca Molopo, Crocodile, Mhlatuze); 3) to analyse the determination of environmental flows (Inkomati River Basin); 4) to look at water restriction policies during drought episodes (Western Cape Water Supply System); and 5) to study the (political and racial) transformation process within the Department of Water Affairs, *among others*. The main methods used were a case study approach, a review of secondary and grey literature (that is, an analysis of policy documents) and the collection of field data (field observations). Semi-structured interviews were conducted with senior executives in different ministries (the Ministries of Water Affairs, Environmental Affairs, Agriculture, Cooperative Governance and Traditional Affairs), as well as with provincial ministry officials, on-site extension officers, representatives of agricultural interest organisations, board members of water users associations and river basin organisations, representatives of irrigation boards, commercial and emerging farmers, tribal authorities, representatives of NGOs, scientists, provincial and municipal politicians, water experts and agricultural consultants.

A CLASH BETWEEN POLITICAL OBJECTIVES AND THE ORGANISATIONAL CULTURE OF THE DEPARTMENT OF WATER AFFAIRS

Isolating water service provision within the Ministry (1994-2006)

Kadar Asmal was moved, first and foremost, by social concern about imbalances in access to water; this concern was directed at providing clean *drinking* water for all, more than at the provision of agricultural water. Prior to 1994, water supply and sanitation had never been a national function, and larger municipalities had their own water engineering services. It was only under independent black governments that the DWA would come to assist smaller towns or former homelands. This new focus within the DWA was thus met with reluctance, if not hostility, by the existing staff. The vast majority of the staff were civil engineers by training and were motivated more by their perception of bulk water projects as their hydraulic mission (Molle et al., 2009; Bourblanc, 2017) than by the strong social component of their newly defined mission; in other words, they wanted to focus on building dams, not reticulation networks.⁶ Likewise, the amalgamation within the DWA of staff operating 369 major water schemes covering basic services in these disenfranchised rural areas caused a certain friction and suspicion, as did the new differences in social and racial background. DWA career civil servants were also not keen on dealing with new and under-capacitated local government structures that have been created *ex nihilo* in 2001 in most parts of the country.⁷ DWA civil servants had been cultivating a reputation of excellence and perceived that this reputation needed to be safeguarded.

As a clear sign of such reluctance, from the outset water supply had been established as a separate function and operated as such.⁸ According to DWA technical staff, what constituted the department's legitimate identity had to be ring-fenced and protected from political interference that was fixated on water for domestic use; thus, immediately after the transition in 1994, a chief directorate was created within the DWA which was responsible for community water supply (today called Water Services Macro-Planning). Long before the NWA came into force, this directorate had already begun working on presidential lead projects. In the DWA hierarchy, however, the chief directorate represented a lower level of management; it was not a branch like Constructions or Water Resource Planning, which were headed by a deputy director-general. Believing that water services was not the core business of the DWA, no one was willing to join; thus a few less-popular DWA senior officers had to be forcefully reassigned there.⁹ According to one interviewee, "we were kind of like (...) looked down upon as being not really engineers and kind of playing games guys, like we'd got into the political space and we were working with a bunch of activists".¹⁰

Their budget came directly from the cabinet and their mandate from an ANC internal task team. From the beginning, the unit's main task was to assist local municipalities, while in around 2006 it began to assist Water Service Authorities (WSAs) with their water services development plans, in what were mostly newly created municipalities. Most of the local municipalities were indeed under-capacitated. With all the attention now being directed at providing potable water, however, the DWA has suffered from a kind of mismatch between the new political emphasis on the 'small water cycle' (water delivery) and the historical focus of the Department's staff on the 'large water cycle' (overall resource management and

⁶ From an interview with the DWA Water Services Director, Pretoria, November 2016.

⁷ Responsibility for water and sanitation services began to be handed over to local municipalities from 2006 under the Water Services Act 108 of 1997; this was achieved with the help of major government funding in the form of Municipal Infrastructure Grants.

⁸ Interview with ex-DWA Director-General, 2015, Pretoria.

⁹ Interview with an ex-DWA Chief Director of "community water supply" who was one of the main authors of the National Water Resource Strategy-2, February 2020, Pretoria.

¹⁰ Interview with a senior officer, Water Services Macro-Planning division, DWA, Pretoria, February 2020.

planning). Right from the beginning there was almost no relationship between the two – at least no real coordination mechanism – and decisions and data from water resource planning were not shared across directorates and units. Even 30 years later there is still little or no integration, apart from the conscientious individuals who walk to the water resource planning offices to ask for information on the state of water resources in a particular area.¹¹ As a result, several drinking water supply projects got stuck because officials realised too late that no bulk water had been provisioned and made available by resource planning. There are also instances where poor areas have been bypassed by major waterworks that were reticulating water to distant mining companies. The De Hoop Dam and Lebalelo scheme (Limpopo) are cruel illustrations of projects that shockingly overlooked the need to supply water to the local rural population.

Leaving water resource regulation out of political scrutiny

Because South Africa is a water scarce country, its water resources must often be transferred over long distances, which requires proper planning by the Chief Directorate: National Water Resources Planning. Despite its high profile, water resource planning has long remained under the radar of political scrutiny and consequently has continued its business as usual. Since the Water Act No. 54 of 1956, its traditional mission has been to provide water for irrigation (in particular for intensive farming), industry (especially gold mining), energy production, and big cities. Rural areas were not its core focus, neither was defending the interests of small-scale agriculture. Without political motivation, the water allocation reform process barely got started within the ministry.

The NWA drafting team could also be accused of overlooking aspects of water access for productive purposes. Minister Asmal, a former law professor, focused mainly on access to water for domestic use as a basic human right, and the legislation drafting team, likewise, was composed mainly of lawyers and drinking water supply specialists (De Coning and Sherwill, 2003). No specific attention was paid to the practical aspects of water resource management or to water for productive purposes. This is consistent with the ANC's naïve conception of land reform. It was not that the ruling party favoured the urban poor over the rural poor; rather, it was because the ANC was, in essence, an urban party that was suspicious of rural political dynamics. Traditional elites with influence over rural areas – who in the province of KwaZulu-Natal had even formed an opposing political party, the Inkatha Freedom Party – have long been their political rivals if not enemies, with a set of political assassinations to their credit.

In rural areas, as a result, access to water – especially for productive purposes – had been almost entirely overlooked by both political elites and senior administrative staff. This was the case at least up until 2006, when the DWA officially transferred the management of the drinking water supply to local governments and Water Service Authorities (WSAs), which allowed it to turn its attention to another urgent matter: the redistribution of water rights in rural areas.

Renewed concern for water resource redistribution in rural areas by political elites (2006-present)

Over the years, there has been a succession of different policy strategies attesting to the high-profile political objective of redressing racial and gender imbalance. This had been defined as the third-most important objective; it came after the obligation to respect the human and ecological reserve and abide by international treaties, but before strategic uses such as hydroelectricity and, more importantly, before all the other uses of water for productive purposes. Reflection on a water allocation reform policy began in 2003 with the creation of an expert panel. At the Water Summit in 2005, the then Minister of Water Affairs and Forestry Buyelwa Sonjica launched the Water Allocation Reform (WAR) programme, declaring a "WAR on poverty". The WAR strategy that was published in September 2008 set ambitious goals: 30%

¹¹ *ibid.*

of allocable water was to be handed over to HDIs by 2014 and 60% by 2020. Already at that time, however, the then senior manager of Water Allocation at the DWA feared "a lack of [the] committed departmental high-level support" that was needed to guide the WAR programme and supervise the operational details of its rollout (Seetal, 2006: 448). Indeed, little effort was dedicated to ensuring progress of reform on the ground. This was at least partly because of a lack of leadership continuity, as the political grip on the department has impacted senior management positions and has led to a high turnover of directors-general over the past 15 years. The succession of acting-DGs has not helped ensure the minimum stability that the DWA needs to fulfil its mandate.

In the 2010s, policymakers reasserted their pro-poor inclination, with a particular focus on the rural poor. Indeed, in rural areas where the vast majority of the poor population are still subject to the legacy of apartheid, there is no other economic activity apart from agriculture. In these areas, water is thus a strategic resource that is critical to both daily human needs and economic activities. Political pressure mounted to achieve results in both land and water reform; this resulted in water resource management again becoming very closely linked to issues of poverty eradication for the ruling party, which reasserted the relationship between water and economic development.¹² In 2011, under the Jacob Zuma presidency, the National Development Plan 2030 strongly emphasised the capacity of agriculture to "create more jobs for every R1 million invested" and announced an additional 500,000 hectares (Ha) to be put under irrigation. Aligning with its new vision, the government's objective was to make sure that a "developmental state is not simply hostage to market forces and vested interests" (Republic of South Africa, 2010: 28). In its second National Water Resource Strategy (NWRM – 2), released in 2013, it explicitly set out a "new paradigm for water management in South Africa – Developmental Water Management"; this was within the context of a developmental state, "which takes, as a central premise, that water plays a critical role in equitable social and economic development, and that the developmental state has a critical role in ensuring that this takes place".

In May 2023, taking stock of the WAR stalemate, the DWA introduced another initiative on its transformation agenda, once again trying to achieve more equitable sharing of water resources. It submitted a draft revision of the regulations for the licencing process in the NWA. In particular, it proposed to impose new conditions on applicants who wished to take, or store, more water; it stipulated that the granting of such a water licence would be conditional on the applicant transferring to black farmers up to 75% of its shares in the agricultural business. Following a huge outcry from AgriSA, the main commercial farmers union, the DWA backpedalled. Under pressure from the union's threat to challenge the political decision in court, the DWA clarified that the transformation requirements would only apply to applications for new water use licences; this limited the measure to only 1.5% of the remaining water resources.¹³

In summary, after having politically neglected the importance of redressing inequalities in access to water *resources*, successive ministers and executive managers revisited the topic, although to no avail. In the following section, we will see that the high technicality of the matter was a major obstacle to achieving progress.

TECHNICAL POLICY INSTRUMENTS AND THE TECHNOCRATIC GAME SERVING (WHITE) COMMERCIAL FARMERS' INTERESTS

As a result of their early political neglect of the issue, ANC decisionmakers had a tendency to leave discussion of the more mundane and technical aspects of water resource management to agricultural

¹² This link was first introduced in 1997 in the NWA white paper.

¹³ In July 2022, the National Water Resource Strategy–Third Edition confirmed that 98% of all the water available nationally had already been allocated, leaving little water available for new (black) entrants into the agriculture sector, who had still not really been served (see *infrastructurenews*, 2024).

water experts who had a skewed view of water management and particularly of allocation reform. Indeed, when the time came to begin a process of water use rights reform whose objective was to redress historical racial inequalities in water access, ANC decisionmakers failed to recruit senior staff who would be loyal to HDI farmers' interests. Later on, renewed political interest around WAR proved insufficient to overcome the lack of expertise on a highly technical subject. The unexpected consequence of the lack of water expertise within the ANC has been that the debate moved to a technocratic arena. This left ample manoeuvring room to implementing officers who had a bias towards protecting white farmers' water 'rights'. The skewed nature of the technical policy instruments deployed to operationalise policy objectives was also a major contributor to the neutralisation of the more radical provisions of the WAR programme.

In the following subsections, I concentrate on one particular policy instrument, water licencing policy. It is deployed around three practical modalities: water licencing for already existing water uses prior to 1998 (mainly white farmers); licencing for new water users post-1998 (mainly black emerging farmers); and water licencing after 1998 for already established (white) farmers who were willing to increase their water allocation. I first focus on how the complicity of implementing officers with white farmers in the interpretation of the regulations allowed the latter to escape the law. We will first see how – with the assistance of ideologically aligned civil servants and agricultural experts – supporters of commercial farming interests have managed to create the conditions for lasting exemption from the licencing process, hence not completely moving away from their (private) riparian rights. Second, we will describe how, managing to evade the attention of political elites, they were able to neutralise the most transformative aspect of the NWA through overly complex technical argumentation and using seemingly neutral policy instruments. Third, we will see how they succeeded in tweaking the equity definition so that white farmers who were willing to increase their water allocation were able to benefit from the HDI administrative category.

De facto perpetuation of the abolished riparian rights

Despite the general recognition of a riparian rights regime inspired by Roman and Dutch law, in 1997 the principle of a water permit system was not new. In 1910, the Union of South Africa established a Department of Irrigation and passed the Irrigation and Conservation of Waters Act No. 8 of 1912 which was dedicated to agricultural use. A new water act, Water Act No. 54 of 1956, provided a shift in mandate and rebranded the public administration in charge as the Department of Water Affairs. Against the backdrop of a rapidly developing and modernising economy, the government intended to take back control of water resources from riparian property owners, especially those making claims that were seen to be excessive. Alongside the riparian rights principle, it therefore partly reintroduced the principle of *dominus fluminis* ("custodian of the river") that had prevailed in the Cape Colony prior to British Annexation at the turn of the 19th Century (Tempelhoff, 2017: 197). This was the beginning of the recentralisation of South Africa's water resources under the auspices of the DWA; the state began to manage water in the public interest, striving to meet the demand of new economic activities in the context of rapid urbanisation and industrial development. The DWA thus took responsibility for providing bulk water to various sectors, establishing areas where water was government controlled, particularly in water-stressed basins. It also got involved in the construction of water infrastructure such as large dams and irrigation schemes, and brought under direct state supervision the irrigation boards and water boards that supplied water for urban and industrial purposes (Tempelhoff, 2017: 198). Beyond the areas where water was under government control, riparian rights could remain in place; however, if riparian owners wished to store water they would first have to apply for authorisation from the state and withdrawals would be capped. The DWA was the authority administering these water permits. With the 1998 National Water Act, the water permit system was extended to *all water abstractions*. In a semi-arid country like South Africa, where water is a strategic and increasingly scarce resource under mounting competition from different sectors, the state's efforts to regulate it were not new. The licensing process associated

with WAR could thus have appeared as merely the continuation of this trajectory; however, the political objectives assigned to the WAR and its licencing process – which had primarily been conceived as the main vehicle for achieving equity (Movik, 2012) – were not always shared by DWA civil servants. This explains why the road to a complete water licencing system has been fraught and plagued with major pitfalls.

As explained above, the human right to water had been the cornerstone of the NWA. Focused on this, policymakers somehow overlooked other crude inequalities in water access to, for instance, agricultural water. Because of such imprecision from the NWA concerning how to define environmental justice, a policy programme related to how to conceive the WAR had to be devised; this took place between 2003 and 2008, with a WAR strategy published in September 2008. In order to be able to pass his radical water reform programme in 1998, Kadar Asmal had to make concessions; he agreed to a blanket exemption from the authorisation process that covered *all* existing agricultural uses. The exemption, however, was meant to be temporary and all these uses would eventually have to be properly licenced. Indeed, the idea of a temporary exemption for existing agricultural uses had to do with the need to uphold the economy and to avoid any disruption of food production. Such temporary exemption was a widespread practice during the political transition. To make sure that the racial and gender transformation agenda would be gradual, a 'sunset clause' was adopted by public administrations; this functioned as a way to ensure the continuity of state action within public bureaucracies and a smooth and peaceful political transition. It guaranteed that white civil servants loyal to the previous government would not be pushed to the exit too soon. Their eventual replacement would be phased over a 10-year period.

From the very start, during the drafting of the WAR programme, there were proponents who called for keeping such exemptions "forever" (Movik, 2014). The advocates of an indefinite exemption strived to introduce a kind of conditionality that was linked to equity objectives, which should be examined in the light of economic rationality. Indeed, some of the drafters of the WAR programme warned that to address equity needs one must, "[take into] consideration that many existing lawful water users are making productive, efficient and beneficial use and are contributing to socio-economic stability and growth" (Movik, 2014: 191). Against all expectation, however, no fundamentals of economic efficiency (such as tariff incentives) ever applied to such use, nor did the price of irrigation water – a tenth of the price set for industrial or domestic water – ever reflect the scarce nature of the resource;¹⁴ there was also never any criteria that precisely defined this "productive, efficient and beneficial" use. Anderson et al. (2008) evoked a project that was conducted on behalf of the DWA and funded by the UK Department for International Development in which indicators had to be developed in order to monitor progress on WAR. Among the criteria approved by the DWA, the authors mentioned three key components of WAR: allocations should be equitable, sustainable, and efficient and effective. Each of these had their own set of supporting variables; these included: percentage of reserve requirement met; percentage of allocation to blacks and women; and (for the 'efficient and effective allocation' component) "contribution to GDP per cubic meter of registered water" and "contribution to employment per cubic meter of registered water". The project started in 2006 and was supposed to be concluded by 2009, however it was suspended early due to a shortage of funds and was subsequently deprioritised. Since then, no attempt has been made to measure 'economic growth' against a precise set of indicators, nor has the progress of WAR been measured. Rather than composing a cohesive policy narrative, the 'economic growth' rationale was essentially an opportunistic argument, to be shifted as needed. More recently, the rationale of economic growth for the country as a whole has tended to be increasingly diluted into the mere economic sustainability of individual commercial farming businesses. With officers in charge of implementing the licencing process in Catchment Management Agencies (CMAs), the lack of a time limit on licence exemption has been definitely enshrined; this is the case despite persistently diverging interpretations by the national office in Pretoria of what the NWA actually says. According to a CMA

¹⁴ Interview, CMA Institutional and Stakeholder Relations Manager, Western Cape, April 2023.

water use specialist, "that's just my common sense of interpreting the Act. The Act says that you've got water that belongs to the property, which was part of an economic, sustainable business. You can't change that to 20 years [authorization (...)] you can imagine] the economic disaster [otherwise]?"¹⁵

Compulsory licencing (NWA, Section 43(1)) represented another possibility for getting rid of the 'existing use' exemption and starting the redistribution of water rights. Again, its redistributive potential never really materialised or reached the implementation phase. Indeed, this policy instrument was meant to address situations of water-stressed catchments in which all existing uses would have to be revoked and a reallocation process would have to take place.¹⁶ Three sub-catchments where over-allocation was suspected had been selected as urgent projects and pilots to test a methodology.¹⁷ The projects started in early 2003, but some were never completed. Msibi and Dlamini (2011) note a lack of "social justice training" for the staff involved in the instruction of applications.

Indeed, even newly recruited (ANC-aligned) DWA staff were not in favour of compulsory licencing, which they perceived as a radical and work-demanding administrative process.¹⁸ A more pragmatic way to deal with the equity agenda appeared to be, instead, reducing *unused* existing water quota by applying the principle of 'use it or lose it'.¹⁹ That approach was perceived to make the administrative and juridical red tape more manageable, that is, permanently removing unutilised water quotas and transferring them into a common pool. Indeed, very often in the past farmers have over-declared water quotas – water being extremely underpriced. This was done in anticipation of future development on their farm, when the water would be put into production (and irrigation) once they obtained the capital needed to invest. In other areas, over-declaring water rights had been strategically used to limit the impact of regulatory restrictions during drought episodes, as farmers would be restricted on the basis of their over-inflated declared quotas. That was precisely the case in Mhlatuze where compulsory licencing could be accelerated as the catchment was only 'paper stressed';²⁰ in other words, it was estimated that sugarcane irrigators in the north-eastern part of KwaZulu-Natal province had registered up to 60% more water than they had ever used. Still, officers of the DWA regional office proved themselves to be lenient and only curtailed them by 40%; this constituted, *de facto*, the legalisation of a 20% water allocation increase during the compulsory licencing process, when it was meant to actually conserve enough water for adequate redistribution to the rural poor.

In some areas, this inability to recover water and renegotiate water uses through compulsory licencing had tremendous repercussions. In Mpumalanga province, for instance, where another priority compulsory licencing project (Crocodile River) was located, a former director at the DWA regional office noted as early as 2006 that, in that province, the DWA had been, "holding back some 18,000 ha of applications from emerging users because there is insufficient water".²¹ Indeed, as the system was already fully allocated, the ineffectiveness of the compulsory licencing process meant that no water redistribution was possible even for priority users such as emerging farmers.

As a result of these intertwined administrative mechanisms around licencing, such as the compulsory licencing process and the 'use it or lose it' doctrine, temporary licence exemptions were *de facto* transformed into permanent use rights, against the spirit of the law that sought to abolish riparian

¹⁵ Interview, CMA water use specialist, Western Cape, March 2024.

¹⁶ In the mid-2000s, 11 out of 19 water management areas in South Africa were considered to be water stressed, especially because an initial (desktop) estimation of environmental flows had been set quite high with an average of 20% of the mean annual runoff.

¹⁷ The list evolved over time but mainly included: Crocodile (Inkomati), Mhlatuze, Tosca Molopo, and Jan Dissels (Olifants-Doorn).

¹⁸ See also the recent work by Zane et al. (2024) on the socio-economic impacts of water reallocation through compulsory licencing.

¹⁹ Interview with the Deputy Director of Water Quantity Management, DWA Gauteng regional office, Pretoria, January 2011.

²⁰ Interview with the official responsible for compulsory licencing, DWA KwaZulu-Natal regional office, Pretoria, March 2011.

²¹ WAR presentation to the parliamentary Portfolio Committee on Water Affairs and Forestry, 23 August 2006.

rights.²² On the other hand, the full force of the law applied to new (post-1998 NWA) water users who would require full authorisation. This mainly concerned emerging black farmers; by contrast, the vast majority of white irrigators escaped the law and only needed to go through a simple registration process to declare their previously existing water uses. We will see in the next subsection that black farmers had to undergo an overzealous and lengthy administrative licencing process before being allowed to use water for irrigation.

Neutralising the transformative agenda through a burdensome administrative licencing process

Since white farmers had managed to permanently secure their water rights, it was no longer a question of redistribution but rather of determining how much water was left in the system to be allocated to emerging farmers. This took a considerable amount of time as it depended on an extremely complex calculus that required very detailed information. Basic domestic water did not require lengthy calculation, as a simple per-household formula was applied. For WAR, it was a different story; previous water use did not have to be authorised, but at the very least it had to be *verified* to avoid farmers inflating their previous water entitlements. I argue that officials in the DWA created an overly complex policy procedure that was intended to require the help of consultants. Indeed, in the 1990s and 2000s, the post-apartheid South African state underwent a transformation process that triggered a lot of criticism and affected its capacity (Picard, 2005). As a consequence, several public bureaucracies had to outsource their work to consultants; these were usually former senior staff from ministries, who had been replaced by a deployment of ANC cadres. The DWA, in particular, had a long tradition of resorting to consultants, even more so after the late 1960s (Bourblanc, 2018).

First, ecological flows had to be determined and, at the very least, a desktop assessment was required.²³ Resorting to consultants, however, proved to be very problematic as they had an interest in further complicating the tasks, prolonging projects, and securing profitable new markets for themselves (Bourblanc, 2015). Sometimes the delay was due to the difficulty of appointing the appropriate consultants, with issues concerning the racial compliance of applicants; the new DWA management felt that affirmative action policies around the employment of civil servants were being undercut by bringing in mainly white-owned consulting companies to do the DWA's work.²⁴ This further slowed implementation of water allocation reform.

Second, previous water use (termed 'existing lawful uses') had to be established and, for these to be determined, a qualifying period between 1996 and 1998 was adopted. The objective of establishing such a qualifying period before the Act was promulgated was to check and confirm not only how much water had been registered but how much had actually been used. The task of checking and confirming these 'existing lawful uses' only started around 2005,²⁵ and was not an easy task. Historically, the DWA did not have records of water use; only irrigation boards had such records, as, over the years, the DWA had been encouraged to delegate control of agricultural water.²⁶ The irrigation boards, which were mainly composed of white irrigators, did not want to collaborate,²⁷ so the DWA recruited consultants to do the job. The process of checking and confirming was resource intensive and generally very costly. The DWA had to check the accuracy of water use claims by established farmers who, fearing future difficulties in obtaining permits to expand under the new water redistribution agenda, tended to register more water

²² See also Bosch and Gupta (2023) on the difficulty of the South African government's struggle to get this water back.

²³ Interview with the DWA Gauteng regional office Deputy Director of Water Quantity Management, Pretoria, January 2011.

²⁴ Interview with ex-DWA Deputy Director General, Pretoria, February 2015.

²⁵ Interview with DWA Gauteng regional office Deputy Director of Water Quantity Management, January 2011.

²⁶ The DWA had to service different sectors, not only the agriculture sector.

²⁷ Interview with attorney and Kaap Rivier Valley Irrigation Board chairperson, Barberton, June 2010.

than they actually used (Bourblanc and Blanchon, 2017).²⁸ Further delays were caused by efforts to reconcile farmers' declarations with the results of consultants' audits. By the late 2000s, with the water legislation under review, there were talks about changing the Act and scrapping the whole checking and confirmation process to avoid further delays in water reallocation (Movik, 2009: 28), however this did not happen. A simple strategy would have been to stop overcomplicating things and reverse the burden of proof, leaving it to farmers to prove they really had used that volume of water. Instead, DWA civil servants involved in the licencing instruction's process remained overall very accommodating. On top of it, inexperienced new DWA staff as well as top management personnel allowed themselves to be convinced by the old guard that very sophisticated technological and administrative infrastructure was needed to assist with licencing; this, they were made to believe, included satellite images, geographic information system (GIS) data, satellite-based weather data, and the South Africa-based SAPWAT modelling (Soil and Water Assessment Tool) of crop irrigation requirements. This corresponded to a gatekeeping strategy of the old guard within the DWA. By refining the models in a way that required a highly detailed level of information and expertise, they made sure that every existing water use that had been identified would now have to go through them and be vetted by them; this represented both a tactic for preserving the status quo and one that ensured the survival in the DWA of both themselves and the policy network of (white) engineering consultants to whom they used to outsource work (Bourblanc, 2018). In the end, van Koppen and Schreiner (2014: 64) risked raising the uncomfortable question of whether the water licencing system "may have contributed to the reinforcement of inequality".

Given the lengthy process required to issue licences for use of 'new water' (post-1998), the DWA agreed that in some parts of the country the process should be speeded up to save time and money. Again, however, only the already well-endowed white irrigators benefitted. In the affluent export-oriented fruit industry in the Breede Valley (Western Cape), for instance, an unchecked allocation procedure was adopted that was based on the hectares of land owned by the farmer. A standard and rather generous volume was attributed to each hectare the farmer owned, based on the assumption that it had always been irrigated.²⁹

Van Koppen and Schreiner (2014), fearing that administrative red tape and long timeframes for issuance of licences would deter illiterate incumbents from applying, had long been calling for use of the "general authorization" (Schedule 1) clause in the NWA³⁰ to circumvent the cumbersome licencing process for small-scale agricultural use. The general authorisation clause was a provision meant to speed up the licencing process. Opponents of such a solution, however, strategically invoked environmental sustainability to prevent redistribution. They argued that general authorisation was intended for river basins that were not water-stressed, which already represented more than half the catchments in the country.³¹

Avoiding or stretching the category of Historically Disadvantaged Individuals as commercial farmers see fit

For so many years, white farmers' interest groups managed to counter all the initiatives and policy dispositions that the DWA devised in order to implement their redistribution agenda; each time, they managed to hold on to what they considered to be their water rights. Commercial farmers did manage to save water more generally through precision irrigation and more efficient water use, following Water

²⁸ The former regional director, Mpumalanga regional office, mentioned possible unlawful use, with a 30,000 Ha increase between 1998 and 2004 (from a WAR presentation to the parliamentary Portfolio Committee on Water Affairs and Forestry, 23 August 2006).

²⁹ Interview with a water specialist and Breede Valley Municipality opposition councilor, Worcester, March 2024.

³⁰ Schedule 1 applies to water use for growing food in home gardens, not commercially.

³¹ Civil servants failed to recognize that the redistributive agenda in water-stressed areas was supposed to be tackled through another policy mechanism called "compulsory licencing"; as we have already seen, however, in practice this mechanism was almost never used.

Conservation and Water Demand Management programmes; even then, however, they succeeded in proportionately and unconditionally increasing the amount of their land under irrigation (van Rooyen and Versfeld, 2010). They ignored every opportunity for giving back a small part of their water allocation to HDIs; when it suited their interests, however, they did not hesitate to promote the HDI rhetoric to justify increasing their own water allocations.

Indeed, after 1998, every established white commercial farmer who wanted to increase their water uptake was required to obtain the proper authorisation; this involved the implementation of a Black Economic Empowerment (BEE) policy that was linked to the agriculture sector. Where no HDI would personally gain access to water, the white commercial farmer would have to demonstrate how the HDI would nonetheless benefit from the use of their own extra allocation. One example that can be cited is from a large WUA that was involved in a project to increase the yield of the major Brandvlei Dam, in Western Cape province. In the early 2000s, the idea was to raise the inlet canal leading to the government-run water infrastructure. The project was completed by 2008, but the use of that extra water had to be properly licenced. Thus, to be able to benefit from the extra yield that they had managed to squeeze from the dam, white farmers groups spotlighted historically marginalised people in their licence application project; however, they wanted to select their own HDI candidates instead of letting the national office choose allegedly politically well-connected candidates who would not necessarily have agricultural experience. Their project proposal was met with suspicion by senior DWA officials, who then refused to authorise the distribution of this new water to the emerging farmers selected by the WUA. The water thus remained in the dam for more than 15 years. AgriSA, which represents white commercial farmers, lobbied the opposition-run provincial government to intervene in favour of their project, and eventually a resolution was reached whereby the extra water could be used. In March 2024, after several rounds of advertisement for the distribution of that extra water, the allocation process was reaching finalisation. The Catchment Management Agency (CMA) received 105 licence applications. In the meantime, however, through a series of participatory workshops with stakeholders who allegedly came from different backgrounds, the CMA had drawn up its own 'bottom-up' equity strategy which defined how the extra water that was destined to be used by established white farmers could still serve the redistribution agenda. One of its most striking measures was that it exempted some commercial farmers from official equity criteria when applying for more water; as a CMA water specialist put it, "[up to] around about 40 hectares of water (...) they are really small farmers. It's like maybe a family farm. They are not big. It's just sustainable, it's just to keep them above breathing. And the 40 hectares will just be able to just give them a boost".³²

In other words, defining the economic viability of the commercial farm in terms of farm size (hectares) had now become part of the legitimate criteria governing the application of the equity policy, or more precisely, how to suspend it. This interpretation of Section 27b (NWA) of the licencing process was now very much at the discretion of CMA officials and was not necessarily shared with other CMAs. This interpretation was recently captured in the CMA's Catchment Management Strategy, a document that was sanctioned by the national office after more than a year of back and forth interactions. As one interviewee put it, "there have been a lot of convincing, a lot of presentations, it took time, more than a year to convince [the DWA national office in] Pretoria [of this new strategy]".³³

Concerning the rest of the applicants, no strict criteria were actually defined. It was sufficient to demonstrate how former HDIs might *somehow* benefit. As stated by a water specialist in the Western Cape, "if it's a small volume of water or a small established farm, we would like to see within the

³² Interview with a CMA water use specialist, Western Cape, March 2024. The new DWA equity policy related to equitable shares in the ownership of the farming business would only apply to the above categories. According to the CMA strategy, the threshold would be 50% Broad-Based Black Economic Empowerment (B-BBEE) if you are applying for the equivalent of irrigating 70 hectares or more, and 30% B-BBEE in the application if you are applying for 50 hectares or more.

³³ Interview with a CMA water use specialist, Western Cape, March 2024.

management structures people coming up and being skilled and transformed into a better situation than what they would have been 20 years ago".³⁴

Even 'indirect benefits' might be considered. As further stated by a CEO of a WUA, "[it] can be upliftment of people on the farm, training, (...) contributing towards the schooling of the farm workers' children and all those sorts of things that actually do make a practical difference".³⁵

Apart from this proactive initiative around the equity policy for new water licences requested by white commercial farmers, there had also been pragmatic adjustments of the HDI category itself. Indeed, as the redistribution agenda was making little progress, over the years it appeared easier to adapt the criteria that defined the victims of 'past inequalities' in order to give the illusion of progress, rather than to actually act on redressing such inequalities. A water specialist who had been consulting on the compulsory licencing process at Clanwilliam Dam in Western Cape province remarked that it had been a "challenge to measure HDI". There were allegedly no takers or suitable candidates for the water volumes that had been set aside for emergent farmers during the compulsory process. This is not surprising. Agriculture in the Western Cape is the most capital-intensive in the country; in a very competitive market with no state subsidies, there is a high cost of entry for newcomers into this highly skilled commercial activity (O'Laughlin et al., 2013). Ultimately, only a handful of applicants – if any – qualified for 'HDI water' and a more accommodating definition of HDI thus began to prevail. For a CMA official, the same dilemma applied when it came to creating an 'inclusive' governing board at the CMA level or even to transforming an irrigation board into a more racially representative WUA. No HDI candidate with farming experience could be found in the river catchment. Since Section 27(b) mentions "past racial and gender discrimination", a white farmer's wife with a privileged background became eligible for HDI status, although it was questionable whether they had in fact suffered from legal or economic discrimination.

TRADE RATHER THAN TRANSFORM

The pinnacle of this effort to disarm the reform was reached when commercial farmers eventually legally secured the ability to transfer the 'water rights' onto which they had been holding, thereby opening the possibility of trading water. After blocking the transformation agenda for so many years, they finally obtained what they had wanted for so long: the equivalent to what had been granted in the land reform, that is, financial compensation in exchange for the redistribution of water rights. They used juridical expertise to achieve their objective.

Over the years, they had won most of the court cases against the DWA, even for blatantly unlawful use of water. In the early years, the DWA would lose because it did not respect the correct procedure or because it failed to notify the illegal user following due process. As it was put at the time, "we are learning by doing, unfortunately". In the early 2010s, acknowledging a "capacity problem", the objective was to "beef up [the] Regulation, Compliance, Monitoring and Enforcement unit".³⁶ Fifteen years later, the juridical expertise in the DWA, and even in parastatals such as CMAs, is still perceived as insufficient. As an example of this, despite having supplied the DWA with all the evidence necessary to prove that a particular farmer had been repeatedly using four times his water quota, members of a prominent negatively impacted WUA resolved to take the offender to court themselves, using the WUA's own financial resources.³⁷

³⁴ *ibid.*

³⁵ Interview with the CEO of a major WUA, Western Cape, March 2024.

³⁶ Interview with the Deputy Director of Water Quantity Management, at the DWA Gauteng regional office, Pretoria, January 2011.

³⁷ Interview with the CEO of a major WUA, Robertson, March 2024.

With respect to the substantive interpretation of the NWA's provisions, DWA expertise was also lacking. In 2011, for instance, the High Court overturned a DWA decision to block a transfer of water rights on account of racial equity,³⁸ the Court stating that the need for affirmative action represented just one among several other principles that should be taken into consideration, including socio-economic impacts and beneficial uses. Despite the defendant's failure to tangibly demonstrate "beneficial use of water in the public interest", the DWA did not manage to convince the Court that such 'beneficial use' was a loose concept that lacked a precise definition.

What constitutes an even more major turning point has been the recent Constitutional Court judgement³⁹ to dismiss opposition to permanent transfers of water entitlements. Indeed, over the years, the DWA had periodically demonstrated its reluctance to authorise transfers to third parties, but there had been no outright refusal. In the same way as for temporary transfers within the same irrigation board, it was difficult for the DWA to interfere in what is considered to be WUAs' own business.⁴⁰ The slow progress of WAR, however, eventually motivated the DWA to stop accepting such transfers. If the DWA seemed unable to bring about water allocation redistribution on the ground, perhaps it could disrupt the business of already established irrigation farmers to a point where they would be forced to negotiate and agree on concessions on the subject of water redistribution to HDIs. On 19 January 2018, the director-general of the DWA issued a circular in that direction which was immediately challenged in court. In its submission to the Constitutional Court, the DWA contended that the wealthy should not be allowed "to sell water". As they put it, "very wealthy farmers, who are largely white, have created an enclave within which a scarce national natural resource is traded, thus perpetuating the imbalances of the past. This infringes the right to equality". At the end of this juridical battle, however, the DWA doctrine against trading of water entitlements was definitively defeated, with the Constitutional Court decision contesting the DWA's legal interpretation of the Act. In order to prove its point in front of judges who usually are clueless about agricultural and water matters, the DWA needed agricultural expertise; however, for ideological reasons, DWA in-house agricultural experts were not willing to assist in taking water away from (white) commercial farmers. As for the newly recruited DWA staff, they tended to be more admin employees without technical expertise in either agricultural or water matters (Bourblanc, 2018).

This Constitutional Court judgement signalled to previous rights holders the lucrative possibility of trading the water rights they had not used;⁴¹ furthermore, these potential transactions provide an additional motivation to hold on to previous rights. One could also argue that it changes the spirit of the law that excluded the possibility of financial compensation.⁴² Authors such as Pienaar and van der Schyff (2007) contend that the conversion of exclusive use rights into licences does not represent an expropriation of property for the benefit of another individual (as it does in land reform), but is rather a deprivation in the name of the public interest, which does not justify compensation. Acknowledging that DWA officials were powerless to achieve water allocation redistribution or prevent water trading, the Minister of Water and Sanitation published a National Water Amendment Bill on 17 November 2023 which was intended to provide clearer definitions of the NWA's guiding principles and to "prohibit undesirable consequences of private water trading" by more clearly ruling out this possibility within the NWA. The Bill now awaits cabinet and parliamentary approval.

In the end, we can conclude that the white minority, in their efforts to hold on to water rights and privileges, applied the same logics to water as they did to land issues. Their mantra of "no redistribution

³⁸ The lawsuit entitled *Goede Wellington Boerdery (Pty) Ltd. vs the Minister of Water and Environmental Affairs* was heard in the Gauteng North High Court on 2 August 2011.

³⁹ Case CCT 387/21, decided on 15 March 2023.

⁴⁰ Temporary transfers of rights were allegedly allowed under the previous Act, providing it was approved by the irrigation board and remained within the remit of the irrigation boards that receive a bulk allocation and manage it on behalf of its members (that is, as long as they only concerned the irrigation board allocation).

⁴¹ Interview with the CEO of a major WUA, Western Cape, 29 April 2022.

⁴² Section 4(4) of the NWA.

without compensation" ignored the fact that, since the NWA, water is no longer theirs but is rather a public good, and that the DWA has become the custodian and "public trustee of the nation's water resources" (Section 3, NWA 1998).

CONCLUSION: ENTRENCHING WATER GRABBING THROUGH DISCREET POLICY INSTRUMENTS

In a post-apartheid South Africa, access to water has been prioritised because of its critical role in the transformation of society. At least in the early years, supplying water for domestic use achieved major improvements in impoverished areas; however, access of black South Africans to water for productive purposes still lags behind. In reviewing the abundant academic literature on South African water reform, it appeared that resorting to explanations in terms of narrative politics was a common trend and that the reference to water efficiency would have triumphed over equity imperatives. I have shown, on the contrary, that racial inequalities in access to agricultural water have never been legitimised, even measured against neoliberal or economic imperatives. Over the years, successive ministers have lamented the persistent lack of equity in the use of water resources. Despite their sustained efforts, however, water allocation reform has made very little progress, and 'water apartheid' is still alive and well in rural South Africa.

This paper has sought to unravel the paradox of an unrelenting post-apartheid persistence of racial inequality by shifting the attention from the political to the policy level. Through an investigation of the implementation phase of the reform, the paper examines the day-to-day functioning of the Department of Water Affairs, its organisational culture, and its policy instruments. It demonstrates how ANC political elites have fallen into the trap of allowing a technocratic approach to water allocation reform. Ultimately, I have shown how structures of domination managed to reproduce themselves through technical procedures and devices, concealing water grabs from political attention using discreet policy instruments that obscure the critical question of water sharing and, ultimately, further entrench inequalities inherited from the past.

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