‘Liquid Justice’: Perceptions of Justice in South Africa’s Water Allocation Reform Policy

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ABSTRACT

This paper examines the multiple meanings of justice embedded in the notion of environmental justice. It uses research on South Africa’s Water Allocation Reform to explore how ideas of justice have shifted in the course of crafting the policy. South Africa’s reform efforts are part of a global trend that vests the ultimate authority over water resources with the State, which provides it with a large degree of discretion in allocating use rights to resources. Drawing on discourse analysis and interviews with key stakeholders, the paper demonstrates how the early versions of the policy were characterised by desert-oriented and utilitarian conceptions of justice, which then shifted to an explicitly egalitarian perspective in the final version. In the early versions, existing users were portrayed as unilaterally beneficial and productive, and the process of redistribution as a risky venture that could lead to environmental degradation and the economy being undermined, whilst failing to acknowledge the waste and pollution of existing users. The paper highlights the importance of unpacking key concepts and understanding how particular framings of human-nature relations influence ideas of justice, and how these shift over time.

Keywords: environmental justice, water allocation reform, policy discourses, South Africa

INTRODUCTION

Environmental justice is not only about the distribution of environmental bads. It is also about the distribution of environmental goods, such as e.g. water resources. Much of the literature on environmental justice has focused exclusively on the distribution of bads, and environmentalism in general has been more preoccupied with reducing the amount of waste generated by industrial production, rather than with the distribution of environmental goods – green politics has been the politics of ‘reducing aggregates rather than distributing disaggregates’ (Dobson 1998: 13). But what would a just distribution of environmental goods look like? Justice is a contested term (Walker and Bulkeley 2006), and is open to a variety of often contradictory understandings that in turn rest on particular conceptions of the environment and human-nature relations. This paper draws on the South African Water

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Allocation Reform policy papers to examine how the idea of justice is conceptualised with respect to water (re-)distribution. Due to its long legacy of colonialism and apartheid, South Africa suffers from a severely skewed distribution of natural resources, including land and water. When the first democratic elections were held in 1994, one of the first priorities was to get in place new water policies and legislation that would deal with the backlog in water services, and facilitate the redistribution of water resources in order to even out the existing inequalities. Land was another politically highly contested issue, and the land reform processes have been fraught with multiple difficulties (see e.g. Bernstein 1997; Hall 2004; Claassens 2005; Cousins 2007).

Environmental justice is often conceptualised as the struggle of particular individuals or groups of individuals against the avoidance of hazards, or to gain access to particular resources. The environmental justice movement offers rich examples of such struggles (see e.g. Hofrichter 1993; McDonald 2002; Ruiters 2002; Agyeman, Bullard et al. 2003; Pellow 2007). Attention has naturally been directed towards the physical manifestation of environmental injustices. However, less attention has been given to the processes of policymaking that provide the space for such injustice to materialise. This paper, therefore, addresses policy formulation – in this case the South African water allocation reform policy – in order to tease out how justice is understood and presented. Policies are not value-neutral (Fischer and Forester 1993; Gasper and Apthorpe 1996), and particular understandings and assumptions will influence policy-making; certain framings and assumptions shape the way use rights to water and the mechanisms of distribution are conceptualised, which are not necessarily made explicit in the policy process. Questions that emerge, then, relate to how guidelines and principles are interpreted and formulated in water allocation policy, what perspectives do these interpretations give rise to, and how is justice conceptualised?²

The paper is structured as follows. First I review and discuss briefly the concept of environmental justice, in particular teasing out the different understandings of the term ‘justice’, and argue the case for drawing on a pluralistic notion of justice in order to understand different perceptions. I then go on to present the South African case study, providing a brief account of the historical context, before describing the case of the water allocation reform in more detail. The main points are then summarised, and the future prospects commented upon by way of conclusion.

**INTERROGATING THE NOTION OF ‘JUSTICE’ IN ENVIRONMENTAL JUSTICE**

Environmental justice is often portrayed as an issue of how environmental ‘bads’ are distributed; how burdens of pollution and the location of waste dumps and industrial complexes are disproportionally located (Freudenburg 2006). The initial focus of the environmental justice movement, which emerged as a force to be reckoned with in the US with the Love Canal case (Szasz 1994), was on inequity in the distribution of environmental bads (Schlosberg and Carruthers 2010). The ‘environmental’ in ‘environmental justice is

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² These questions were addressed through careful perusal of the consecutive versions of the water allocation reform strategy in combination with interviews with key policymakers and informed individuals, as well as participatory observations in relevant meetings and seminars both internally at the Department of Water Affairs and Forestry and at other venues. The information was gathered during an 11-month stay in South Africa in 2006, with two follow-up visits in 2009 and 2010. Having Dr. Barbara van Koppen, a senior researcher at the International Water Management Institute as a key contact, and using the ‘snowballing’ technique, It was very informative and helpful to meet and discuss with many of the key policymakers, academics and practitioners working on water allocation issues in South Africa, and to gain first-hand access to the drafts of the water allocation reform policy and other relevant documents and datasets.
often understood to be a question of environmental *quality* or the degradation or despoliation of nature (Agyeman, Bullard et al. 2003). Environmental justice movements have often revolved around the struggles of individuals or communities to avoid being burdened with hazardous waste such as toxic chemicals (Hofrichter 1993; Madhiliba 2002; McDonald 2002). In such terms, the injustices committed are often understood as the exploitation of weaker groups’ vulnerability and lack of voice. Minority and lower-income groups are disproportionately subjected to environmental burdens (Konisky 2009), though there has been considerable controversy in terms of the methods and empirical foundations of this claim (Ringquist 2005). Justice in this context, then, is viewed as communities’ and individuals’ rights not to suffer from negative impacts on health, and justice is often couched in the language of human rights, as the right to a healthy environment, and emphasising the procedural aspects of justice, such as the right to information and the opportunity to participate in decision-making (UNECE 1998). Following on from the human rights perspective, environmental justice can also be understood more broadly in terms of human capabilities, as disenfranchised individuals and communities gaining voice and empowerment, thus increasing their capabilities and overall welfare (see also e.g. Munton 2003; Dodge 2009).

With respect to environmental goods, justice is not merely about ensuring everyone’s access to a healthy environment and the basic requirements necessary to sustain life – e.g. the human right to water – but also about the distribution of resources over and above the demands of basic needs satisfaction (which reflects the notion of a human development approach to resources such as water). But what exactly *is* a just distribution of natural resources? What constitutes a just distribution is not straightforward (see e.g. Dobson 1998); there is a need to identify the different strands of thought in order to understand the various ways of conceptualising justice. Justice is not one unified concept; rather, the idea of justice can be understood in multiple, often contradictory, ways. As Walker and Bulkeley (2006) point out, there are different understandings of what justice is, depending on one’s conception of what is to be distributed – whether it is ‘primary goods’ in the Rawlsian sense, opportunities (in the libertarian tradition, see e.g. Roemer 1998), or resources, as Dwarkin (2000) advocates.

More recently, Sen has argued that justice is not one unifying, universal idea; there can be competing, but equally legitimate, claims to justice (Sen 2009). To accommodate such competing claims, Sen argues the case for introducing a comparative and pluralistic conception of justice that contrasts with the conventional theories that he calls ‘transcendental institutionalism’ (ibid: 5). Sen develops an alternative theory that opens up for plural understandings of justice, and this theory is captured in a striking and effective simile of three children who all lay claims to a flute. One child claims it on the basis of being poor, a claim striking and effective simile of three children who all lay claims to a flute. One child claims it on the basis of being poor, a claim egalitarians will sympathise with. Another child lays claims to the flute on the grounds that she is the one who made it, so she should have a right to it as the fruit of her work. This view, the libertarian view, is based on the notion of ‘desert by labour’. The last child argues that since she is the only one who can actually play the flute, she should have a right to it on that

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4. This idea is rooted in Locke’s notion that just acquisition implies mixing one’s labour with something in order to acquire property rights to it. Social scientific research shows that lay people regard desert as the principle of justice, see Freiman, C. and S. Nichols (2011). "Is Desert in the Details?" *Philosophy and Phenomenological Research* 82(1): 121-133.
account. What Sen calls the ‘hedonistic utilitarian’ will probably side with her, since she will derive the most enjoyment and utility from having it. At the risk of oversimplification, a pluralist conception of distribution of use rights to resources would involve either that rights be distributed as equitably as possible (egalitarian), that distribution should be according to the most efficient outcome (utilitarian), or that rights should be distributed to those that have worked the most for it (desert by labour). What becomes of interest is to see how such competing claims play out in policy discourse, which ones end up ‘winning’ and which are marginalised, what assumptions underpin the different framings and how these are influenced by the broader socio-economic and political context at the national and global scales. Though such competing claims may be regarded mainly as issues of distributive justice, a strict distinction between ‘distributive’ and ‘procedural’ justice is not helpful. Treating procedural and distributive justice as two distinct and dichotomous entities fails to deal with the questions of who is defining ecological risks, and what procedures can allow new participants to redefine risks? (Forsyth forthcoming 2012). This is an important observation, and key to the argument of this paper. Other dimensions of procedural justice, such as representation, is of course also hugely important, and there is a growing literature on the role of participation in South African water resources management (e.g. Schreiner and Van Koppen 2002; Wester, Merrey et al. 2003; Anderson 2005).

THE STATE AS TRUSTEE: THE EMERGENCE OF ‘ALLOCATION DISCOURSES’

The emphasis on ‘integration’ and ‘holism’ has led to the increasing centralisation of authority over water resources in recent years, even in the face of efforts to decentralise and devolve power to lower levels (Burchi 2004; Van Koppen and Shah 2005). Associated with centralisation has been the institutionalisation of administrative water use rights, with the State taking on the role of trustee, or in some cases outright owner, of national water resources (Burchi 2004). When the State has the ultimate authority over water resources, this implies that it has the discretion of defining benefits and risks, including ecological risks, with respect to conceptualising use rights to water and associated regulatory measures. This is in contrast to previous doctrines such as riparianism, where owners of land adjacent to a flowing river derived property rights to water from their landownership, or prior appropriation, which is based on the principle of first-come, first-serve. The State thus has the authority to allocate water use rights; to formulate principles and guidelines and make judgements on who should have water and on what basis.

Such principles and guidelines are formulated through policy processes. Whereas environmental justice movements have concentrated on the nature of local communities’ struggles to avoid hazards or to gain access to natural resources, more subtle struggles are played out at the level of policy formulation that give rise to particular discourses. ‘Discourse’ in the Foucauldian sense, is used to refer to ‘the general domain of all statements, sometimes as an individual group of statements, and sometimes as a regulated practice that accounts for a number of statements’ (Foucault 1989: 80). More specifically, policy discourse refers to the vocabularies and concepts used in policy formulation. Such vocabularies and concepts represent a form of power, in that they constrain, but also enable, particular ways of acting and being (Foucault 1980; Foucault 1991). Policymakers, as the agents of discourse production, will always highlight some features and downplay others; they will frame issues in particular ways, creating categories and labels that open up some avenues for action, whilst

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closing down others. The notion of ‘allocation discourses’ refers to the ways in which categories of users are portrayed and particular arguments marshalled to make the case for conditions and allocation mechanisms that favour this set of users rather than that. What particular perceptions of justice are to be found in such discourses, and how are these perceptions linked to the way in which resource users are framed?

THE SOUTH AFRICAN CONTEXT

A brief history

The framing of a policy issue always takes place within a ‘nested context’ (Rein and Schön 1993: 154) and is part of a broader historical, political and economic setting. Thus, before turning to the water legislation and policy formulation process, a brief overview of the historical and socio-economic context is in order.

The injustices of modern-day South Africa must be understood in terms of how it is rooted in more than 300 years of colonialism and oppression that began in 1652 with the arrival of the Dutch. Half a century later came the British, and a protracted struggle for dominion began. The British gained the upper hand in economic terms, whereas the Dutch – or the Boers, as they became known – possessed the political clout. The first explicitly racist policies that were the precursors to the apartheid regime were enacted in the early twentieth century. The most notorious example was the 1913 Land Act, which reserved 87 per cent of the country’s land for white people. It became illegal for blacks to reside or engage in any productive activities outside these areas, and they basically served as labour reserves for the mining industry, the commercial agricultural sector, and the white suburbs. A cadre of migrant workers was created, which formed the basis for an extremely exploitative labour-migration system that enabled South Africa to engage in an intensive wealth-accumulation strategy. The discrimination and inequity characterising access to land was also reflected in the distribution of water resources. The 1956 Water Act was founded on the doctrine of riparianism, which implied that only those individuals owning land adjacent to the river were entitled to ‘reasonable use’ of water. Most of the riparian landowners were white farmers, who enjoyed generous government subsidies, and became what Bate and Tren (2002: 260) call ‘welfare farmers’, giving rise to a featherbedded and rather inefficient agricultural sector.

In 1994, apartheid as a system finally ceased to exist, and the nation began the laborious process of reimagining itself as a democratic and non-discriminatory ‘Rainbow Nation’ under the powerful leadership of its first elected president, the revered and respected Nelson Mandela. The Constitution of 1996 enshrined equality and respect as cornerstones of the new democracy, and reforming the country’s various legislations, particularly those governing resource access, became a key concern. The ANC’s election manifesto, the Reconstruction and Development Programme (RDP) aimed at redressing past inequities through socio-economic and institutional reform (Villa-Vicencio and Ngisi 2003). The RDP emphasised basic service provision and argued that the State needed to be restructured in order to facilitate a more equitable distribution of resources and deal with the socio-spatial distortions of the apartheid era (see also Bond and Khoza 1999; Maharaj and Ramutsindela 2002). However, this was rather rapidly replaced by the Growth, Employment and Redistribution policy (GEAR), a macroeconomic strategy that emphasised liberalism, deregulation and giving a loose rein to market forces (Villa-Vicencio and Ngisi 2003). In the RDP, the notion of Black
Economic Empowerment (BEE) was initially conceived of as a means to facilitate redistribution of productive resources to those groups that had been oppressed and disadvantaged under the apartheid regime. Over time, however, it evolved into a process that was more concerned with how black people could access the returns of higher economic growth rates (through e.g. the preferential granting of shares) rather than with real redistribution of productive assets (Ponte, Roberts et al. 2007). This rendered the BEE initiative vulnerable to criticism that it was enriching a small and politically well-connected elite, rather than a broad swathe of previously disadvantaged individuals (Tangri and Southall 2008).

Creating a new water legislation

The 1996 Constitution explicitly endorsed water as a human right, a concept further embedded in the subsequent Water Services Act (1997) and National Water Act (1998). The main thrust of the Water Services Act was to extend basic services to the millions of people that had lacked access during the reign of apartheid, and vested the main responsibility for water services delivery with local authorities. Whilst there has been an impressive record in terms of expanding service delivery since 1994, questions still remain about the long-term sustainability of service delivery. The National Water Act established a new institutional set-up that was designed along hydrological rather than political boundaries, and demarcated the country into 19 Water Management Areas (WMA), each of which was to have its own Catchment Management Agency. However, more than 12 years after the promulgation of the Act, there are still only 3 functional CMAs, and they have yet to be delegated full powers, which is largely due to capacity constraints and lack of human resources (Anderson 2005). A whole new set of water use rights was created, to replace the old hybrid system of riparian rights. The new categories included the Reserve, which involves the retention of a minimum quantity of water in river systems to meet ecological requirements and basic human needs. Then there were so-called Schedule One uses, which encompassed small-scale uses of negligible impact (such as water for domestic use and livestock watering, homegardening, etc). General Authorisations could be given to uses that were more voluminous, but still low-impact, and could be issued e.g. to a specific community or group of people or in a particular geographical area. All other uses were required to have a licence, i.e. a time-bound (maximum 40 year), tradable use right issued by the Department in accordance with specific conditions. However, an exemption was made from this requirement for users that had been exercising water use rights two years prior to the Act being promulgated (the ‘qualifying period’), and hence a category of Existing Lawful Uses was created to cover such uses, but with the ultimate intention that they would eventually be converted into licences as well. The National Water Act was lauded internationally as a highly sophisticated piece of policy, perhaps too sophisticated in light of the available capacity to implement it.

The Water Allocation Reform: WAR in the making

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6 However, the Reserve did not make an explicit prioritisation of the human needs above the ecological reserve. Furthermore, the attempts to determine the Ecological Reserve has met with multiple difficulties and has significantly delayed the progress of reform.

7 Tradable licences are a form of property right where part of the authority reverts to the state through the use of time-limits. See e.g. Larson, B. A. (2003). Property rights and environmental problems. Aldershot, Ashgate.
The overt aim of the National Water Act (NWA)\(^8\) was to redress past inequities through redistribution of formal water use rights, primarily through the process of ‘compulsory licensing’, which essentially entailed calling for all present and potential users to apply for a licence in water-stressed basins. But the legislation did not deal specifically with how water rights should be allocated in practice (Perret 2002). It spoke vaguely of achieving ‘optimal allocation of water resources’, and encouraging the ‘beneficial use of water for the public good,’ but it was by no means unanimously agreed upon how these concepts should be interpreted and implemented. Since the NWA did not spell out in detail how redistribution should be carried out in practice, a more pragmatic and practice-oriented policy to guide allocation reform was needed, and work on putting together such a policy, the Water Allocation Reform (WAR), began in 2003. An Expert Panel was created that consisted of lawyers, environmental advisers, representatives from the Department of Water Affairs and Forestry (DWAF), the Water Research Council and NGOs. After a number of revisions, what was then considered to be the final draft was completed and made official policy in November 2006.

In what follows, an analysis is provided of how users, and associated ecological risks, were described in the successive drafts of the policy. Specifically, it is shown how the case was made for particular patterns of allocation and the ways in which notions of different aspects of justice, such as equity, utility and desert, were perceived.

**Portraying existing and potential users**

The Water Allocation Reform largely centred on two main categories of users, that of *Existing Lawful Uses* (ELUs) and *Historically Disadvantaged Individuals* (HDIs). Whereas the term Historically Disadvantaged Individuals came into use after the end of apartheid, and reflected the democratic government’s goal of addressing inequalities through affirmative action, the concept of Existing Lawful Uses was a new creation of the legislation. It was coined by one of the lawyers involved in drafting the National Water Act 1998. During an interview with one of the drafters of the National Water Resources Strategy on 5\(^{th}\) May 2006, he related how he and the DFID consultant working on WAR had convinced the Director, Water Allocations of the need to stick to existing lawful uses:

> With [regard to] existing lawful uses, [the DFID consultant] and I convinced him [the Director, Water Allocations] that he couldn’t declare existing legal uses null and void. It would screw up the economy.

Though made out to be almost self-explanatory by drawing on discourses of economic disruption if not maintained, the idea of retaining existing lawful uses was quite controversial. One of the senior members of staff in the Water Research Commission stated that ‘when I heard that they [the drafters] were going to protect the rights of existing users, it made me almost sick’ (interview 20 April 2006), as the worry was that defining users as ELUs would hamper redistribution efforts (Schrreiner and Van Koppen 2002).

The notion of Historically Disadvantaged Individuals was an attempt at avoiding the old regimes’ crude classification according to skin colour. It is regarded as problematic in that it

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\(^8\) The drafting of the water legislations and water reform was supported by the Department of International Development (DFID), UK.
designates a group bounded by a sense of historical disadvantage, and thus theoretically includes anyone who could have been said to suffer under the previous regime. Some argue 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 (e. g. Alexander 2006). While it is certainly true that there are new divides opening up in South African society that run more along class lines than along racial ones, there can be little doubt that the term Historically Disadvantaged Individuals derived in the main from oppression based on race.

Given this background, how were the concepts of ELUs and HDIs constructed in the successive policy drafts? And how were ecological risks and causal links portrayed? The early drafts of the policy emphasised the importance of maintaining ELUs. In the section on ‘principles to guide water allocation’ in the draft dated January 2004, the following was stated:

Existing lawful uses will only be curtailed as a last resort and only after all other options to find water for the poor and BEE have been exhausted.
Existing lawful uses of water will not be curtailed unless there are clear procedures and support programmes established to promote the productive use of water by emerging users.
No existing lawful consumptive use of water will be completely curtailed.

These principles were merged into one overarching principle in later versions:

It is critical to address equity needs, but attempts to deal with this must be balanced with the consideration that many existing lawful water users are making productive, efficient and beneficial use and are contributing to socio-economic stability and growth.

In the first draft of the paper, the idea of users having made ‘productive and efficient use’ is underscored by the observation that:

Many existing users have made significant investments to make productive use of the water; irrigation is providing food security and contributing to the economy, while mining and industrial uses are providing employment opportunities.

The emphasis on existing lawful uses making investments draws upon the ‘desert by labour’ principle, and the utilitarian aspect is highlighted through the statement that existing lawful uses are ‘beneficial’ and ‘productive’. Whilst it is certainly true that many existing users have worked hard and feel they deserve their claim to water, this rendition marginalises the larger history of acquisition. Moreover, the construing of existing users serves to promote a picture of their being singularly productive, but no conditions of efficiency or sustainability are imposed on them. Existing lawful uses are not subject to specific conditions - only if they are converted into a licence - and this effectively renders ELUs a form of ‘fortified’ right. Hence, these statements suppress the notion that existing users can be both wasteful and polluting (Hirsch 2005), as well as the fact that both agriculture and mining were in decline and shedding jobs at the time (Garduño and Hinsch 2005). Environmental effects are neglected; such as pesticides and fertilisers in agricultural runoff, and hazardous acid mine drainage from the mines. The policy contains what Freudenburg (2005: 91) calls a ‘privileged account’, and
involves a double diversion - the first involves disproportionality, through the privileged access to use rights and resources, and the second involves distracting attention away from potential environmental pollution. The latter point reflects Forsyth’s concern concerning how ecological risks are defined, and by whom.

For instance, mining has been a cornerstone of South Africa’s socio-economic history since gold was discovered in the Midrand in the 1880s (Ruiters 2002; Turton, Schultz et al. 2006), and formed a pillar of the country’s wealth accumulation strategy, facilitated through the exploitative labour-migration system. Extraction of minerals is often extremely polluting and has a huge environmental impact, which is externalised since the companies have no interests in undermining their profitability and competitive edge in the global market.9 This is particularly worrying since most mining activities in South Africa occur in the upper reaches of water catchments, and there is little doubt that mining has contributed in part to creating the current water problems. The closure of mines represents a serious potential environmental hazard, as mine water seeps into the ground and leads to underground aquifer contamination (Limpitlaw, Aken et al. 2005; Salgado 2009). The industry is characterised by an enormous gap between the rhetoric and actual practices (Ruiters 2002). This was evident in the Inkomati catchment, where farmers in the upper reaches of the Komati River worried about the potential spillage of toxic waste such as sulphuric acid from the Komati mine (farmer, Upper Komati, interview 25 August 2006).

Thus, the fact that existing users are part of the problem is not acknowledged. Rather, existing lawful uses are presented as unilaterally productive and beneficial. Though reference is made to the issues mentioned above in the National Water Resources Strategy and other documents, the Water Allocation Reform paper fails to mention it at all.

In all versions of the policy paper, the following is found:

If reallocations occur too quickly, the country will suffer economic and environmental damage as emerging users struggle to establish productive uses of the reallocated water.

Emerging users are here construed as being more apt to create both economic disruption and environmental damage as they ‘struggle to establish productive uses of the reallocated water’. It is intriguing to observe that the potential destructive capacity of ‘emerging’ users is highlighted, whilst neglecting to mention the problem of pollution from e.g. mines. Existing users are implicitly beneficial, whereas the emerging users – i.e. HDIs – represent a potential ecological risk. In what particular ways this risk might be manifested is not specified, and so the reader is left to make his or her own conjectures. The argument that ‘environmental damage’ will occur as ‘emerging users struggle to establish productive use,’ implicitly draws on a larger meta-narrative of environmental myths, a politicised framing of causal links in human-nature relations (Adger, Benjaminsen et al. 2001; Forsyth 2003; Forsyth 2008). In this case, the meta-narrative is the ‘poverty-environment-degradation’ hypothesis, which has gained a firm grip on the imagination of both international development agencies and policymakers (see e.g. Angelsen and Vainio 1998), and which often disregards the potential

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9 Powerful multinational corporations dominate the mining industry, and given the emphasis on globalisation and integration with international markets that became evident in ANC economic policy shortly after transition, these companies enjoyed a great deal of leverage in terms of influencing economic policies. South Africa’s major mining companies, such as De Beers and Anglo American, have relocated their assets overseas and are listed at foreign rather than national stock exchanges.
environmental threat posed by the practices of existing users (see e.g. Duraiappah 1998). The narrative of ‘existing lawful uses making productive and beneficial use of water’ posits putative causal links (Roe 1991) in that it predicts ‘environmental degradation’ and ‘social instability’ if water is taken away from existing lawful uses.

Moreover, there is a strong emphasis on the capacity for productive use on the part of HDIs. The January 2005 version contains the following passage:

…it [is] recognised that the water allocation process, while providing water to the rural poor, should not fall into a ‘sustainable poverty’ trap, which only provides water for small-scale livelihoods support, or for small-scale commercial gains. The water allocation process will therefore also seek to facilitate Black Economic Empowerment by promoting larger scale productive use by emerging users.

The use of ‘trap’ as a metaphor is a strong rhetorical device, rhetoric being, in the words of Watson (1995: 806) ‘all about using language to persuade.’ The term was later removed, and in the March 2006 version, the above passage has changed to read:

In supporting the provision of water for uplifting the poor, the water allocation process must aim at providing water for subsistence purposes and sustaining basic livelihoods. Furthermore, it must also start people along the journey to becoming commercial and competitive users in their own right. The water allocation process must therefore support and facilitate Broad-based Black Economic Empowerment by encouraging and supporting larger-scale productive commercial uses of water wherever these opportunities exist.

Clearly, a concession has been made in terms of acknowledging that water for subsistence needs does not necessarily represent a ‘poverty trap’. But the subsequent sentence emphasises the idea of starting people ‘along the journey to becoming commercial and competitive users in their own right.’ Potential water users will be judged on their capacity to make productive use, here meaning economically productive use.

These policy paper passages serve to do three things: they construe particular stereotypes of existing and potential users; privilege certain accounts over others by suppressing alternative readings about pollution and productivity (Freudenburg 2005); and they link up the potential for reallocation with the productive capacity of emerging users. The claims of HDIs to greater access to water is linked with their capacity for productive use. Greater equity can thus only be achieved through either HDIs gaining capacity to use water productively, or by getting access to ‘benefits accruing from water’ through being employed by someone who uses water productively. Drawing on Sen’s simile of the three children mentioned earlier, this would be akin to saying that the poor child who lays claim to the flute on account of being poor, must first learn to play it. Given the absence of a coherent agrarian strategy and the uncertainty of the land reform, specifying productivity as a condition on which rights can be attained and coupling this with a cumbersome administrative process, gaining access to water resources will pose a challenge for HDIs.

**Impasse and revision**
After the final version of the WAR policy was published in 2006, the process of carrying out compulsory licensing began in three selected pilot catchments. The first step involved validating and verifying the lawfulness of existing uses. This, however, was highly problematic, as it was difficult to accurately determine historic abstraction rates based on models of crop-water requirements. Added to that was the fact that land had been sold off or bought and merged with existing land, which rendered the status of their riparian water rights unclear. These difficulties contributed to the reform efforts ending in a temporary impasse (see Movik 2012 for details). Meanwhile, a backlog of licence applications was accumulating, and the problem of illegal water use, particularly with regard to mines, kept growing.

A strongly revamped version of the Water Allocation Reform was put forward in September 2008, which set quantified targets for redistribution: 30 per cent of water resources are to be in black hands by 2014, and 50 per cent by 2024. This is a highly ambitious policy, which is much more explicitly egalitarian than the 2006 strategy. The references to ‘ecological risks’ associated with HDIs are completely absent from the new version, which suggests that there has been a substantial change in the way ecological risks are perceived. At the same time, awareness grew of the pollution risks posed by existing users, in particular mines. But the revised WAR policy, which isn’t even available on the Department’s website, was more or less ‘crowded out’ by the new strategy of Water for Growth and Development (WfGD) launched in March 2009. The WfGD framework was developed over two years in consultations with key players in the water sector and focuses first and foremost on the idea of hydrological security, and the overall emphasis is on growth, rather than broad-based development and more equal sharing of resources.

CONCLUSION

Environmental justice refers to people’s ability to enjoy a healthy environment and to be protected from environmental bads such as hazardous waste, but also encompasses the distribution of environmental goods such as water. However, over and above ensuring that everyone has access to sufficient resources to sustain life, there is little consensus in terms of what comprises a just distribution of natural resources. There may be different perceptions of what constitutes a just distribution that are equally plausible (Sen 2009). Such perceptions will be influenced by how human-nature relations are framed, and thus it becomes important to understand how such framings shape conceptions of justice – who should have access to resources, based on what reasons or principles?

In the case of South Africa, legislative reform following the demise of the apartheid regime rendered the State the trustee of the nation’s water resources, and gave it the power to decide on distributional issues and to engage in the creation of a Water Allocation Reform policy. The ANC’s initial Reconstruction and Development Policy, which was geared towards increasing social welfare and redistribution of resources, was ditched in favour of the more neoliberal-oriented macroeconomic GEAR strategy that focussed on efficiency and utility.

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10 The Inkomati, the Olifants and the Mhlatuze Water Management Areas.

11 A meeting between the Department of Water Affairs and the Parliamentary Monitoring Group in August 2010 highlights the worries with regard to water pollution, and the PMG is very critical of the Department’s failure to deal more effectively with the extent of pollution and illegal abstractions, see http://www.pmg.org.za/report/20100811-departement-water-affairson-blue-scorpions-setting-compliance-and-enfo
These political constellations were to some extent mirrored in the Water Allocation Reform. The level of protection afforded the so-called Existing Lawful Uses during the drafting process was prominent, through the direct and indirect invocation of the notions of utility and desert. There was a marked shift when the policy was fundamentally rewritten in 2008, but the more egalitarian focus was overshadowed by the Water for Growth and Development strategy. The kind of development strategy South Africa should pursue is a deeply contested issue, and despite President Jacob Zuma’s professed poverty focus, the current government has been blamed for failing to deal adequately with the issue of agrarian transformation and rural poverty.

It is not very groundbreaking to observe that politics influence policy discourse. What is interesting, however, are the ways in which particular resource users are portrayed in policy discourse, and how perceptions of justice in the initial versions of the reform were grounded in highly politicised and simplistic framings of present and potential resource users and their impact on the environment, and how this underwent a marked shift with the 2008 version of the policy that de-linked the association between emerging users and ecological risk. Justice is complex, and trying to determine what is considered a just distribution of resources is fraught with intense difficulty, as desert, utility and equality all influence the conception of justice. This paper has not been concerned with trying to determine what a just solution might look like in the South African context, but rather has sought to unpack some of the assumptions that drive contestations over justice with respect to water resources.

For example, in the early versions, existing users were favoured as they were made out to be the ones that would guarantee the greatest common gain for society as a whole, appreciated in economic terms, while redistribution became hinged on the capacity of potential users to use water efficiently. Equity thus became contingent on the ability to engage in efficient and productive use. Even if this may seem commonsensical at first, it arises out of particular framings, which in turn point to equally commonsensical solutions. By questioning the manner in which the problem is framed in the first place, this also opens up the achieved ‘closure’ (Fischer 2003; Stirling 2005). The emphasis on efficiency as a precondition for achieving more equitable distribution did not take into account the broader picture of the history of acquisition, failing to factor in the larger processes of colonial and apartheid dispossession and how present water users came to acquire their water use rights. Drawing on Sen’s example of the three children again, it means that the two children claiming the flute on the basis of utility and desert respectively don’t acknowledge the fact that the flute was stolen from the ancestors of the poor child.

The insistence that emerging users should only receive water provided they could demonstrate that it would be put to effective and productive use also did not acknowledge the lack of conditions of efficiency that were afforded the white farmers who received land after the Second World War, and the emergence of ‘featherbedded’ agricultural practices. What is the justice, then, in terms of imposing such conditions on the historically disadvantaged individuals? This is further exacerbated by the wider socio-economic context and the emphasis on competition and deregulation voiced in the embracing of the macro-economic GEAR policy. An emerging farmer embarking on ‘the path to becoming commercial and competitive,’ as expressed in the Water Allocation Policy, would find this increasingly difficult in the current climate of de-regulation of the agricultural sector. Hall (2004: 220) argues that ‘the state’ s support of an emerging class of black commercial farmers now sits uneasily with its removal of subsidies and other support, which have combined to produce a
uniquely hostile environment for new entrants into agriculture’. The overall macroeconomic policy conditions, the emphasis on deregulation and letting the markets have a loose rein implies that it is difficult for the State to follow up on its promises of support to establish a cadre of commercial black farmers and entrepreneurs – it is extremely difficult for the poor child to learn to play the flute under such conditions.

Further, the emphasis on the beneficial and productive uses of ELUs downplayed their negative impacts, particularly in terms of pollution from the mining industry. The fact that such pollution represents a profound environmental injustice in that it disproportionately affects poor and vulnerable people and further constrains their capabilities is not made mention of at all. On the contrary, it was the potential users that were represented as a potential risk to cause environmental damage and undermine the economy. The conceptions of justice in the early versions of the water reform policy thus mainly revolved around the ideas of efficiency and productivity as qualifying the egalitarian claims on justice.

With the radically revised Water Allocation Reform Strategy in 2008, there is a profound shift from the utilitarian/desert perspective to a much more egalitarian one. However, this new version of the reform strategy has to contend with many of the same issues that faced the previous efforts. The fact that funding for allocation reform came to an end in 2007, coupled with a string of crises at the management level of the Department in subsequent years, have not helped (see Movik 2012 for details). Whereas the land and water reform processes have largely been two quite detached processes (ibid.), increasingly the land reform process, with its own complex dynamics, is acting as a vehicle for water allocation, but the lack of a comprehensive agrarian strategy and the uncertainties surrounding the future of land reform efforts is not making co-ordination of reforms easy.

The South African water allocation reform encompasses and highlights the multiple dimensions of environmental justice, both in terms of the human rights perspective (the right to water as a basic necessity of life), the right to a healthy environment, and in terms of distribution of resources. What is particularly interesting in the South African context, is the kind of 'double diversion' that occurred in terms of environmental justice, where previously disadvantaged users suffered both from the lack of access to resources, and from the pollution generated by existing users. This double diversion can ultimately be traced to the predominance of global forces that emphasise productivity and profitability, which results in the strict conditions applied to prospective users that they should make productive use of water, as well as strengthening the incentive of existing users, both lawful and non-lawful, to disregard environmental externalities such as water pollution in the interest of cutting costs. Hence, questions of environmental justice need to take a broad view, both encompassing the rights-based approaches and the distributive dimensions. With respect to the latter, while there may be multiple, and sometimes equally legitimate, claims to justice based on desert, utility and equality, the legitimacy of such claims are rooted in certain understandings of the merit of particular resource users’ practices; understandings that in turn are shaped by global norms of competition and economic sustainability. It is thus important to interrogate the legitimacy of contesting claims to justice by laying bare the assumptions on which they are based.

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