Return of the Leviathan? ‘Hydropolitics in the developing world’ revisited

Synne Movik

Institute of Development Studies, University of Sussex, Brighton BN1 9RE, UK.
Fax: + 44 (0)1273 621202. E-mail: s.movik@ids.ac.uk

Abstract

The paper focuses on the evolution of water management regimes, water scarcity, and the transition to a new water legislation in South Africa that occurred with the passing of the 1998 National Water Act. It takes issue with the analysis offered by Turton & Meissner in their 2002 article ‘The hydrosocial contract and its manifestation in society: A South African case study’ (in Hydropolitics and The Developing World (2002), African Water Research Unit, Pretoria, pp. 37–60) who argue that the relations between resource users and the State may be conceived of as a ‘hydrosocial contract’, and that the nature of this relationship has changed from constituting a Hobbesian form of social contract where the State is all-powerful (the Leviathan), to a more Lockean form, where the emphasis is on individuals’ willingness to cede some of their autonomy in order to be governed. The main argument against Turton & Meissner’s analysis is that it ignores policy and legislative aspects, which, if included, would substantially alter their conclusion.

Keywords: Hydrosocial contract; IWRM; South Africa; State authority; Water rights reform; Water scarcity

1. Introduction

Increasing pressures on water in many regions of the world have brought the question of how to tackle the perceived problem of water scarcity to the fore. The last couple of decades have seen a huge level of activity with respect to managing water resources. Apart from being an essential precondition for life, water is intimately associated with the evolution and growth of societies, and the way in which societies deal with water resources will contribute to determining their future prospects. Water management is not only the realm of engineering and hydrology but is often intensely political, especially as competition over the resource becomes more pronounced. The nature, origin and relative abundance of water in a region contributes to shaping the way societies function; there is a mutual dependency, an intimate interlinking of water access and the structure of civilizations. Karl Wittfogel’s theories of ‘hydraulic despotism’ (Wittfogel, 1957) is a case in point. Though his theory has been critiqued for being too

doi: 10.2166/wp.2010.132

© IWA Publishing 2010
simplistic in terms of explaining causal links (see e.g. Davies (2009) for an overview), it nevertheless underscores the role that water can play in forming power structures. Water has had a profound impact on the status and authority of many of the world’s great civilizations; consider the Nile of ancient Egypt, the Indus valley civilisations of Mesopotamia and, later, the Romans and their aqueducts. The industrial revolutions in England and North America were made possible due to the abundance of flowing water (Rose, 1994; Getzler, 2004), the flowing energy which was harnessed by the water wheels and water mills that powered the budding factories.

Water’s significance in the modern era has not diminished. On the contrary, perceptions that the resource itself is dwindling has led to an unprecedented level of attention in terms of how to manage it. Ismail Serageldin’s¹ prophecy in 1995 (Frontline, 1999) that the next wars in the Middle East would be fought over water rather than oil, forcefully brought home water’s life-giving and pivotal role. Though the notion that water shortages will lead to the clashing of countries over access to rivers is a disputed one—many argue that it is a cause for co-operation, such as is the case in the Nile Basin Initiative—the fact remains that localised water shortages, and the mounting pressures on water that comes from increasing population densities in urban areas, industrial growth, etc., need to be dealt with. The way in which societies cope with perceptions of water scarcity both shapes and reflects the nature of the problem. A major shift that has occurred over the last decades is that from supply-side management, dominated by engineering and hydrological issues, to demand-side solutions, where questions of getting an adequate institutional framework into place, to provide incentives for more prudent use of water, becomes of prime importance.

2. Recent water reforms: IWRM and the rise of administrative rights

The last couple of decades have seen the increasing dominance of a powerful paradigm, the Integrated Water Resources Management (IWRM) framework (Global Water Partnership, 2000; Garduño & Hinsch, 2005; Gyawali et al., 2006; Shah & Van Koppen, 2006; Jonker, 2007). The notion of integrated management is not new: it has a rich history, spanning the multi-purpose use of rivers in the ancient world to the emergence of river basin organisations in Europe and elsewhere in the 19th Century that focussed on facilitating integrated management (Delli Priscoli, 1998). Even so, water management in many areas tended to occur in a sectoral and piecemeal way, with little cross-sectoral collaboration occurring. Currently, however, IWRM has become the discursive framework of the 21st Century (Conca, 2006), its intuitive reasonableness and rationality has gained broad purchase and given rise to new approaches at integration at the local and household levels, such as the multiple-use approach (Van Koppen et al., 2006). However, though IWRM is appealing in its logic, the concept is vague enough to allow for a variety of interpretations, and it has proved difficult to implement in practice (Biswas, 2004; Chereni, 2007; Jonker, 2007; McCulloch & Ioris, 2007). The framework is based on the idea that water resources should be treated holistically, in an integrated manner.

Intimately associated with the paradigm of IWRM is the notion of tradable formal or administrative rights, known variously as permits, licences, concessions or grants (Rosegrant & Binswanger, 1994; Dinar et al., 1997; Van Koppen, 2007). The logic underpinning the imposition of such use rights is that it

¹ At the time, Serageldin was Vice-President for Environmentally and Socially Sustainable Development at the World Bank, and he later retracted the statement. He is now Director at the Bibliotheca Alexandria.
will facilitate an overview and the efficient allocation of use rights to water. Over the last couple of decades, a number of countries have embarked on reforming their water legislations, bringing water resources under the ambit of the State and adopting tradable administrative use rights (see e.g. Burchi, 2004). According to van Koppen (2007: 47) ‘permits are now being promoted as the single most effective legal device to address the water management problems of the 21st Century’, and is becoming a standard ingredient of IWRM approaches. There is thus a shift from systems where water rights are derived from legal doctrines (such as the riparian principle) to ones where the authority to issue use rights in the first instance is vested with the State (see e.g. Burger, 2006). South Africa is in a unique position, as its main focus is on the potential of licences to enable the State to engage in reallocation of resources in order to rectify an extremely skewed distribution resulting from a historical legacy of colonialism, apartheid and discrimination. Licences are thus a tool offering the State the potential to ensure a more equitable distribution (Stein, 2000; Tisdell, 2003; Woodhouse & Chhotray, 2005).

3. The evolution of the hydrosocial contract in South Africa

South Africa is considered to be in the vanguard of reform efforts, due to its emphasis on justice and the introduction of novel concepts such as the Reserve. In 1998 a progressive Water Act was promulgated that had as its overt objective the redress of past injustices, and which instituted water use licences as a means to facilitate redistribution to achieve such redress. This marked a major transition from the previous 1956 Act, which rested mainly on the principle of riparianism, where owners of land adjacent to the river (riparian land) enjoyed reasonable use rights to water. The new legislation severed the link between land and water, and made all new water use contingent on the authorisation of the Department of Water Affairs and Forestry (DWAF).

Turton & Meissner (2002) provided an interesting analysis of the process of water legislation and management in the South African context, arguing that the transition in 1998 may be viewed as a progression from a Hobbesian form of governance, which emphasises the necessity of an all-powerful State (the Leviathan) that serves to constrain the behaviour of its subjects, to a Lockean form of governance characterised by the consensual agreement of subjects to have some of their individual authority curbed in order to enable a degree of governance to be exercised. Below, I describe the key points of Turton & Meissner’s analysis, and offer my own interpretations of them. I will argue that, rather than a transition to a Lockean-style State, the new legislative framework is, if anything, more akin to the notions of Hobbes, though my main contention is that neither offers an accurate portrayal of the processes unfolding in the South African context. Rather than resorting to 16th Century theories of governance, I contend that it would be more fruitful to engage with current intellectual efforts to analyse governance issues, such as e.g. the concept of deliberative democracy (see e.g. Wagenaar & Cook, 2003) to understand policy and practice. First, I will briefly sketch the background and main characteristics of the South African water reform before turning to Turton & Meissner’s account of the process in which they develop the concept of a hydrosocial contract to form the basis for their analysis.

---

2 The Reserve is the idea that a certain quantity of water should be retained in the hydrological system to meet basic human needs (the basic human needs reserve) and to maintain ecosystem functionings (the ecological reserve).
South Africa’s history of colonisation, violent oppression and apartheid came to an end with the first non-racial democratic elections in 1994, which swept the former ANC leader Nelson Mandela to power. The transition from apartheid to a ‘rainbow nation’ was a remarkably bloodless one, and constituted nothing short of a miracle (Sparks, 2003). The shift from white minority control to majority democratic rule ended 40 years of segregationist apartheid policy, and the new ANC government was keen to set about rectifying the injustices of the past. The water law was one of the first legislations to be reformed, as millions of people lacked access to clean water, and in 1997 the Water Services Act came into force (Government of South Africa, 1997), followed by the Water Act a year later (Government of South Africa, 1998). Over the next couple of years, the Government made an immense effort to provide safe drinking water and sanitation services to the poor and hitherto unserviced. In 1998, the National Water Act (NWA), which dealt with water as a resource rather than as a service, was promulgated. It did away with the principle of riparian rights introduced by the British settlers in the early 19th Century, which essentially held that those owning land adjacent to the river were entitled to a reasonable proportion of the flow of the river: hence water use rights were closely tied up with the land rights (Stein, 2000; Tisdell, 2003; Burger, 2006; Thompson, 2006). Instead, new water allocation mechanisms were introduced; schedule one uses, general authorisations, licenses and existing lawful uses. Schedule one use, drawing on the de minimis principle (see Hodgson, 2004), includes uses of water for reasonable domestic needs, whereas general authorisations can be made in certain geographic locations or for particular groups of people where water withdrawals are deemed to have little impact. Licenses, issued on application, are authorised by the State according to a specific set of criteria including social equity and environmental sustainability; licenses are of a temporary nature, with a maximum duration of 40 years, and subject to review every five years. Finally, there is what is termed ‘existing lawful uses’, a controversial notion in which water uses that were valid under the previous legislation and actively practised during a period of two years prior to the NWA being promulgated (the qualifying period), were carried over into the new legislation.

Though the NWA emphasised the potential of licenses to facilitate redistribution, it did not spell out in detail exactly how water allocation reform should be brought about. Hence, work started in 2003 to craft a more practical-oriented policy that could offer concrete guidelines, and the final document, The Strategy for Water Allocation Reform, was completed in November 2006. A core idea was the concept of compulsory licensing which would be carried out in catchments that were considered stressed, i.e. where water was over-allocated. The idea of compulsory licensing was to cancel all existing use rights in a catchment considered to be under stress, and then publish a new call for licenses, which would be authorised according to criteria of equity and sustainability. However, little real progress has been made to date, though frameworks for allocation have been completed recently in several catchments.

In their analysis of the period leading up to the transition and beyond, Turton & Meissner (2002) introduce the concept of a hydrosocial contract. This notion essentially refers to the ‘unwritten contract that exists between the public and government’ with respect to water resource management (Turton & Meissner, 2002: 8). The hydrosocial contract comes into existence ‘when individuals are no longer capable of mobilising sufficient water for their own personal survival, and acts as a mandate by which government ultimately takes on and executes this responsibility…[it] thus acts as the basis for institutional development’ (Turton & Meissner, 2002: 38). The concept of a hydrosocial contract derives

from social contract theory, which takes as its point of departure the notion that individuals live in a society of no mutual obligations or relations of authority, and that people’s moral and political obligations depend on a mutual agreement or contract to form society. Turton & Meissner use the idea of a hydrosocial contract as the basis from which to analyse institutional development in the South African water sector, contending that the nature of the contract changes over time, and hence that the institutional set-up must necessarily change as well. They conceive of this change as shaped by three major hydrological stages: water abundance, water scarcity and water deficit. They venture to develop a theoretical model where the transition from the first to the second stage, i.e. from a situation of abundance to one of relative scarcity, is characterised by the development of a Hobbesian hydrosocial contract in which there exists a bipolar relationship between the Government and the water-consuming public. The transition to a new legislation and the concomitant emergence of a strong consciousness on the part of water consumers and civil society replaced this bipolar relationship with a triangular relationship of authority between the State, water consumers and civil society. The emergence of civil society as the third pillar on which water management rested aligns well, in Turton & Meissner’s view, with the ideas of John Locke’s political philosophy (Locke, 1690 [2005]). This analysis is explained and interpreted in more detail below.

4. The first transition: from abundance to scarcity

In the latter part of the 19th Century, the area known as the Witwatersrand was characterised by a relative abundance of water. At the time, people would look after their own water needs, transporting water from nearby wells and flowing sources to where it was needed. Then gold was discovered in 1886. The news brought a huge influx of people into the region, causing the demand for water to rise steeply. The gold lay deep in the ground, hence mineshafts needed to be sunk in order to follow the deep seam; the shafts had to be dewatered, causing the groundwater table to be lowered. The challenges of finding enough water to satisfy the needs of a swelling populace in the area prompted the government to move in and construct dams and reservoirs to ensure a stable supply.

These two factors combined led to the transition from a situation of relative abundance to one of relative scarcity, as Johannesburg experienced shortages of drinking water of adequate quality. Turton & Meissner outline the purported consequences of this shift. First, they observe, there was a loss of the ‘intimacy’ that existed between individuals and their sources of water for drinking and domestic use. The government had taken on the responsibility of supplying water and sanitation services to the people, rather than individuals themselves controlling their own water. The first initiative to set up a centralised service agency was the establishment of the Rand Water Board in 1903 (Bath, 1999, cited in Turton & Meissner, 2002). With this new set of responsibilities carved out, implying the construction of storage and infrastructure to facilitate a sufficient supply of the life-giving liquid, the State ‘rose to the occasion with some relish’ (Bath, 1999 cited on p.41 of Turton & Meissner, 2002). Turton & Meissner invoke Swyngedouw’s concept of a ‘hydraulic mission’ to describe the State’s new role, a term that is of central

---

4 Water deficit refers to the prevailing condition that exists when the use of freshwater within a given social entity exceeds the level of sustainable supply (Turton & Ohlsson, 1999), and the ecological and financial costs of additional supply-side augmentation schemes become questioned by civil society.

5 Witwatersrand means ‘the ridge of white waters’ in Afrikaans, and traverses what is now the Gauteng province.
importance to their entire analysis. The spirit of the hydraulic mission—how to get more water from increasingly distant sources—was imbued with the idea of ‘the production of nature’ (Swyngedouw, 1999: 444–45) and a preoccupation with exercising control.

Turton & Meissner argue that this state-led hydraulic mission and the relationship of state control over water consumers closely resemble the notions of the British political philosopher Thomas Hobbes (1588–1679). Hobbes’ *Leviathan* (1651 (2002)) maintained that the State might be regarded as a great artificial man (*Leviathan*), with a stature and strength greater than natural man. This artificial man—the body politic—was composed of men performing different functions of governance: the magistrates and other officers of the judiciary composed the nerves of the body; the wealth and riches of all individual members made up its strength; councillors who suggested the laws comprised its memory; and its soul was the notion of sovereignty of the body politic over all individuals. Hobbes viewed as a necessity an all-controlling, all-powerful artificial man—or State—that could, if needed, use force to curb the potential chaos wreaked by the uncoordinated actions of self-interested individuals. The English Civil War (1642–1649) made a profound impression on Hobbes’ thinking and strengthened his perception of the chaos that would ensue from individuals living in a state of nature, augmenting his belief that a strong central State was needed to control human passions. This was epitomised in the notion of a ‘war of all against all’ (*bellum omnium contra omnes*), resulting in lives that were ‘solitary, poor, nasty, brutish, and short’ (Hobbes 1651 (2002) : 57). Hobbes drew on the ancient idea of a social contract to impose governance, but he ‘carefully excluded the implication of a contract binding on the ruler, describing it instead as “a covenant between individuals by which all resign self-help and subject themselves to a sovereign”’ (Sabine, 1961: 468, quoted in Turton & Meissner, 2002: 48). The gist of Turton & Meissner’s argument is that the State’s focus on building large-scale engineering works represented an urge to control, and removed the possibility of individuals to engage in self-help and accommodate their needs themselves; they became increasingly dependent on the State and its engineering feats to meet their needs. Hobbes’s exclusion of ‘the implication of a contract binding on the ruler’ (Turton & Meissner, 2002: 48) was reflected in the water sector by the lack of any alternative authority to impose checks on the exercise of State power. Hence, the technocratic elite had free rein to engage in large-scale engineering projects aimed towards ever-increasing control over the water supply, which reinforced their importance as an element of the State apparatus. Turton & Meissner contend that ‘[i]n effect, the State would cease to function and anarchy would prevail if the technocratic elite did not perform ‘hydraulic miracles’ (Turton & Meissner, 2002: 48). The stability of the State thus, to a large extent, hinged on the continued practices of the engineers as instruments of the State, as they increasingly took on the role of gatekeepers in terms of the control they exercised over water access.

5. The second transition: from scarcity to deficit

As a consequence of the rapid urbanisation and growing demands on its water resources, Johannesburg depends on some of the largest interbasin transfers (IBTs) in the world. Supplying water to the greater Johannesburg area is becoming increasingly complex and costly. According to Turton & Meissner, a situation of water scarcity evolved into a situation where existing supply-side solutions could not meet mounting water demand, resulting in a condition of water deficit. This second transition roughly coincided with the period of political upheaval and transformation from apartheid to a
multiracial democracy. The ANC-led government saw the reform of old repressive legislations as a
major task of utmost importance, and water legislation was some of the first to be targeted for reform.

This second transition, according to Turton & Meissner, marks the end of the supply-side era and
the State’s role as Leviathan. A new consciousness is emerging in terms of environmental and justice
matters, and there is a burgeoning civil society which starts to act as a ‘strong counterforce to government
hegemony’ (Turton & Meissner, 2002: 44); there develops a ‘triangular configuration’ between
government, the water-consuming public and non-governmental organisations (Turton & Meissner,
2002: 38), which replaces the old bipolar relations of government controlling supply to water consumers.
They argue that such a scenario aligns well with the views of another English philosopher, John Locke
(1632–1704). Locke’s Two Treatises of Government (1690 [2005]) was written to counter the absolutist
political philosophy of Hobbes. Locke held a much more positive view of human nature and its capability
for reason and tolerance than did Hobbes. Some of his ideas were considered rather revolutionary at the
time and inspired the American Declaration of Independence as well as the French Revolution. His
philosophy laid the foundations for the growth of classical republicanism and liberalism. The first
Treatise generally refutes the idea prevailing at the time that no government may be justified through an
appeal to the divine rights of kings. The second Treatise outlines a theory of civil society. Locke begins by
describing the state of nature, and portrays it as a much more stable situation than Hobbes’ assumption of
‘war of all against all’. Locke argues that all men are equal in the state of nature and possess natural rights
to defend life, health, liberty, or possessions, and from this point of departure he goes on to explain the
hypothetical rise of property and social relations comprising societies and the evolution of institutions of
governance. He contends that the only legitimate governments are those which have the consent of its
subjects, and any government that rules without such consent may be overthrown. His core ideas, then,
were that all men were created equal and independent, that all possessed natural rights, and that
governance could only function through the voluntary consensus of those to be governed.

If man in the State of nature be so free, as has been said; if he be absolute lord of his own person and
possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will
he give up this empire, and subject himself to the dominion and control of any other power? To which
it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is
very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he,
every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of
the property he has in this state is very unsafe, very insecure. This makes him willing to quit a
condition, which, however free, is full of fears and continual dangers: and it is not without reason,
that he seeks out, and is willing to join in society with others, who are already united, or have a mind
to unite, for the mutual preservation of their lives, liberties and states, which I call by the general
name, property. (Locke, 1764, Second Treatise, §123: 148)

People enter into agreements in order to avoid conflict and war. Locke believed that the relationship
between the State and its citizens took the form of a contract whereby the governed agreed to surrender
certain freedoms they enjoyed under the state of nature in exchange for the order and protection provided
by a State, exercised according to the rule of law. However, if the State oversteps its limits and begins
to exercise arbitrary power, it forfeits its side of the contract and thus the contract becomes null and void
(Locke, 1690 [2005]).
An essential part of Turton & Meissner’s argument is that the move from the first to the second transition can be viewed as a move from a Hobbesian to a Lockean society, which seems to centre on the idea of the bipolar relationship in the former, where relations are primarily between weak water consumers and an all-powerful State engaged in its hydraulic mission, to a triangular configuration in the latter that includes the government, water consumers and non-governmental organisations. The idea is that the inclusion of civil society represents a force to check the power of the State, and thus weakens the Leviathan.

6. Bringing the law back in

Whilst Turton & Meissner’s analysis is certainly interesting, I believe it ignores a crucial element—namely, the institutionalisation of legal principles to govern water. I contend that bringing in the nature of the legislation contributes to a more nuanced understanding of the stages of development, and throws up some key questions with respect to Turton & Meissner’s arguments. In the following paragraphs I provide a brief overview of the evolution of water law in South Africa, focusing mainly on water use rights. Drawing on this overview, I will challenge parts of Turton & Meissner’s analysis before going on to offer some concluding remarks.

When the Dutch came to South Africa in the early 17th Century, they brought with them the hybrid legal traditions that had evolved in their water-rich homeland which drew heavily on Roman legal principles, such as the idea of a distinction between public and private water. Roman–Dutch law emerged in a situation where too much, rather than too little, water was the main problem, and dealt with flood control rather than water scarcity. The Roman–Dutch doctrines guided water use practices for irrigation and other purposes in South Africa until the early 19th Century, when the Dutch mercantile power was on the wane and the British arrived on the scene. The British brought with them their common-law traditions and the principle of riparianism. The concept of the Crown owning or having authority over flowing water was alien to this doctrine, which rested on the notion that landowners holding land adjacent to a water source—riparian land—should be entitled to enjoy a reasonable use of that water, in proportion to land holdings. This principle was manifested in the 1912 Irrigation Act, and also provided the mainstay of the 1956 Water Act, though the latter made some allowance for non-riparian use, such as for industry, mining and urban uses, reflecting the mounting pressures on water. Particularly stressed areas were designated Government Water Control Areas (GWCAs), where the government placed a cap on water use by riparian users, and also had the authority to issue permits for non-riparian uses. Almost all of the riparian landowners were white Afrikaners; the large majority of the black population had little or no access to water for productive uses as a result of the extremely skewed distribution of land, itself resulting from the discriminatory and repressive colonial and apartheid laws. Though the 1956 Act accounted for increasing pressures, it still rested in the main on the principle of riparianism. This meant that landowners along a river essentially represented a closed commons, inasmuch as they had a right to use the water deriving from the ownership of their land, but this right had to be exercised in conjunction with other uses along the stretches of a stream. So, although the delivery of drinking water was increasingly centralised (a pivotal point of Turton & Meissner’s analysis), the management of water for productive uses such as irrigated agriculture (which then, as now, accounted for the majority of water use) was not. The separate trajectories of water management as resource and water as service delivery are not reflected in their analysis.
It is curious that, whilst drawing on political theorists such as Hobbes and Locke to account for the development of institutions, Turton & Meissner fail to pay more attention to the concept of property. This is especially intriguing since Locke in particular concerned himself with the question of the evolution of property rights and the origin of possession (cf. Chapter 5 of the Second Treatise of Government). Turton & Meissner’s conception of three major hydrological stages is pertinent, but their emphasis on infrastructure means that the legal changes that occurred more or less in tandem with these shifts are not adequately dealt with. Getzler (2004: 329) observes from his studies of the English common law tradition:

‘Even in the pragmatic and a-theoretic culture of the common law, philosophical ideas about property did play a role in the history of riparian law. The law of water rights was influenced at crucial points by political theories of the sanctity of ancient practices and custom: by Hobbesian social contract theory implying mutual obligation to create order and resolve conflict; by Lockean or Kantian concepts of appropriation or usage expressing possessive intention; and by Benthamite requirements of certainty of rights promoting allocative efficiency’.

In terms of the evolution of water law in South Africa, a prominent trend is the increasing tendency towards augmenting State control. Under the 1912 Irrigation Act, the emphasis was on individuals’ use rights arising from their possession of land, and farmers were largely self-governing, with local Water Courts acting as arbiters on an ad hoc basis in cases of conflict (Thompson, 2006). With the transition to the 1956 Act, the notion of Government Water Control Areas was introduced, and the regulation of water abstraction became more stringent. Irrigators within GWCAs were subject to permits and the imposition of caps on their abstraction rates. The 1998 Act essentially extended the notion of a GWCA across the whole country, and requires all users over and above schedule one to have authorisation from the State (Government of South Africa, 1998; Burger, 2006).

There is thus a countervailing trend here. Turton & Meissner focus on the engineering elite who controlled the large infrastructure projects and how they increasingly became out of touch with prevailing social norms. The basis of this argument is the control of supply exercised by the State in terms of infrastructure, and how this control, shaped through a bipolar power structure between the State and water consumers, over time gave way to a triangular arrangement where civil society came to play an increasingly important role as a check on State power. But, looked at from a legal perspective, the precise opposite shift in authority appears to be taking place. Where, initially, individual water users, largely farmers and irrigators (who derived water use rights as a consequence of their possession of land) were left to their own devices in terms of organising themselves, with limited intervention from the government, the subsequent changes heralded an increasingly bigger emphasis on State control, first with the imposition of GWCAs in the 1956 Act, and thereafter with the institution of administratively authorised licenses in the 1998 Act. This represents a gradual augmentation of State control, rather than a decrease, and there is little alternative authority with respect to determining who and on what basis should possess a right to use water. If anything, the trend in tenurial terms seems to move in the reverse direction, towards more centralised control rather than less, even though the purpose of this control is an overtly benevolent one: to engage in the redress of past injustices, and as such is to be welcomed in principle, if not in practice; see e.g. Movik (2008).

My contention is that there are different forms of control, and where Turton & Meissner focus on the physical and material ones, they do not sufficiently include the notion of control from an administrative and legal perspective. To support this contention, I draw on the writings of Pufendorf (1632–1694),
a German jurist, political philosopher, economist and historian, and a follower as well as a critic\(^6\) of Hobbes (Palladini, 2008). Writing in the late 17th Century, Pufendorf (quoted in Becker & Kelsey, 2001: 2) noted that when property emanated from sovereigns ‘the right by which citizens hold the property depends on the discretion of the Sovereign’ (Becker & Kelsey, 2001: 2; emphasis added). In contrast, when citizens obtain property rights through their own industry (as through the Lockean labour-derived claim to property), that property is conditional to three rights held by the State: that the State may make laws to which the use of the property must conform; that the State has the right to tax property; and that it has the right of eminent domain. Although somewhat archaic, this division nevertheless highlights the main point I want to make: that there has been a shift from property gained through individual initiative—individual acquisition—to property gained through the authorisation of the Sovereign, or the State. This shift has vested the State with considerable discretionary power in terms of defining rights. I believe that adding these perspectives radically alters the analysis.

Moreover, likening the State’s function (in terms of exercising its capacity and willingness to supply sufficient water to its privileged citizenry) to Hobbes’ notion of the State as a monolithic monstrosity is, I submit, somewhat exaggerated. The State’s engaging in a hydraulic mission is first and foremost an enterprise to gain control over nature rather than people. It was not necessarily based on the notion that individuals’ behaviour needed to be curbed, but rather emanated from what Turton & Meissner term the sanctioned discourse of the engineering elite engaged in a conquest of nature. Hobbes’s contention was that the institution of a Leviathan was needed to prevent the uncertainty and risks of a state of nature in which a condition of all-out war, of everyone against everyone, would prevail. His pessimistic take on human nature suggested to him that a central authoritarian force was needed to check the brutishness and misery that would otherwise spring up. But there is little in the account of the South African hydrosocial contract to suggest that taming passions was the primary aim of the government at the time. Certainly, the government was fiercely discriminatory and repressive towards the majority of the country’s people, but this did not emanate from a failure to believe in the principle of men’s capacity to control themselves, but from an intrinsic and intense racial bias. Some men, such as white farmers, were largely left to their own devices in deciding on how to go about the business of applying water to their crops, and they entered into mutual agreements with other farmers in order to do so, rather than subject themselves to an authoritarian sovereign. The doctrine of riparianism meant that all the landowners adjacent to a river had a right to use water reasonably, and were, in effect, ‘closed commons’ (Rose, 1994; Getzler, 2004). A central tenet of Hobbes’ Leviathan was his genuine doubt of the self-regulating capacity of individuals, as he believed that in a state of nature there would be a violent struggle between self-interested and calculating individuals. Arguing that the necessity of State involvement in large projects constituted a Leviathan risks ignoring the fact that there was indeed the potential for the self-regulating capacity of individuals, reflected in the existence of water user associations and irrigation boards. The riparian rights doctrine represented a form of ‘closed commons’, where only those who had land adjacent to the river were able to join in collective action to govern a particular stretch of river. This self-regulation, although highly elitist and discriminatory, would not have been possible under a true Hobbesian State. This arrangement resonates to a much greater extent with Locke’s conceptions of property deriving from men’s use of labour to posit claims of possession (to land, which in turn granted

\(^6\) Pufendorf did not agree with Hobbes e.g. on the state of nature as a ‘war of all against all’, but rather believed in it as a representation of peace.
possessors rights to water), and their capacity for mutual beneficial interaction, than it does with Hobbes’s steadfast belief in the necessity of a central authority. It thus had less to do with controlling the state of nature, and more to do with enabling the growth of self-sufficient segments of society.

With the transition to State authority in 1998, however, the picture became radically different. The shift was heavily influenced by the IWRM paradigm and, according to Turton & Meissner, one of the most important principles to be formulated in the new legislation was the idea that water should be regarded as a common resource irrespective of where it occurred in the hydrological cycle, to be subjected to national control. Precisely; it is this notion of national control that is reflected in the current efforts to register all water users, to validate and then verify water use, and to subject all users to authorisations. These efforts are more aligned with a Hobbesian conception of the State than with Locke’s ideas—but the shift in focus is towards controlling people’s access rights, rather than being in control of the infrastructure of supply.

Moreover, while Turton & Meissner’s argument about the transition being towards a Lockean sort of State in terms of the emergence of a triangular relationship between the State, water users and civil society, this begs the question: is there really such a robust civil society in South Africa? Apart from a few high-profile NGOs, such as e.g. the Mvula trust⁷, and a couple of NGOs doing commendable work in rural areas (such as AWARD⁸), it doesn’t seem to me that South Africa has a burgeoning civil society in the context of water resources management, compared to e.g. India. Moreover, to what extent civil society actually represents the interests of the most marginalised is a matter of debate; see e.g. Cheru (2001). However, that said, there are limits to the usefulness of applying social contract theoretical models. 17th Century social contract theories that aimed to explain the mutual relations and obligations of men towards one another, though interesting, sit a little uneasily with a narrow focus on the State’s role in building infrastructure for water supply.

7. Conclusion

South Africa, with its troubled and turbulent history, offers a unique lens with which to explore the evolution of water management regimes. Turton & Meissner’s analysis, based on the concept of a hydrosocial contract, offers an intriguing framework to understand how change has occurred over time. Their main argument rests on the notion that the history of water management can be conceived of in terms of the occurrence of two permutations of the hydrosocial contract—the Hobbesian and the Lockean forms—and the essence of their analysis is that there has been a shift from a Hobbesian form of governance, in which the State exercised a large degree of power, to a more Lockean form in which civil society plays a greater role in water management. I have argued that such a rendition fails to take into account an aspect of crucial importance to the exercise of government authority, namely policy-making and legislation. Rather than moving towards a more decentralised form of governance as envisioned in the Lockean form of social contract theory, the hydrosocial contract, is, if anything, reversing to a more authoritarian form of governance.

⁸ www.award.org.za.
Looked at from a tenurial angle, then, and staying with the idea of applying social contract theories to describe the relations between different actors in a society, it seems to me that there is a move towards, rather than away from, a Hobbesian state of affairs. This is because the government is intent on controlling and monitoring all aspects of water use through maintaining a database of all users and their abstraction rights, and through their abstraction rights, and through issuing permits that sets out in very specific terms the nature of a particular individual’s water use. Whether the State currently has the capacity to exert such control is doubtful, however; after 10 years of reform efforts, there seems little reason to believe that it has. There is, therefore, great potential to explore alternative ways of shaping relations of authority with respect to water resources, especially with respect to redressing the injustices of the past.

References


Van Koppen, B., Moriarty, P. & Boeele, E. (2006). Multiple-use water services to advance the millennium development goals. IWMI Research Report 98. IWMI.

Received 12 December 2008; accepted in revised form 25 April 2009. Available online 5 January 2010