

Water Law, Water Rights and Water Supply in Zambia – Issues and Perspectives

Zebediah PHIRI

Interim National Chairman, Water and Sanitation Association of Zambia (WASAZA)
C/O Dept. of Civil and environmental Engineering
University of Zambia, P.o. Box 32379, Lusaka. Zambia
E-Mail: zphiri@eng.unza.zm

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ABSTRACT

Over the past two decades, a number of international declarations have sought to ensure access to safe water and sanitation for the majority (or all) of the world's people. Despite these declarations, however, the reality is that clean water and safe waste disposal remains a life and death problem in much of the world – that in the 21st century. Zambia's population stands at over 9 million with a high urbanisation rate resulting in over 50% of the population living in urban and peri-urban areas. Zambia's population with access to safe drinking water is estimated at 43% and the corresponding figure for sanitation is 23%. This is so despite commendable investment programmes being implemented with the support of donor agencies during and after the International Drinking Water Supply and Sanitation Decade (IDWSSD). One of the major lessons has been that solutions to community water supply and sanitation should be sought less in technology and products and more in social, institutional and financial domains. In other words, more in the "software" domain. Unfortunately, even in this new awakening, water laws and water rights issues have so far been considered peripheral. For example, extremely rarely is an individual's basic right to an adequate water supply enshrined in national law. The paper attempts to identify (and promote awareness and understanding of), the constraints and enabling conditions provided by existing water laws (statutory and customary) with regard to the poor having access to, or being entitled to, a safe and reliable supply of water and sanitation. The paper examines Zambia's water policy, laws and rights regimes as they relate to water supply and sanitation provision for the poor while at the same time putting into perspective the current debate surrounding economic, social and cultural rights vis-a-vis political and civil rights. It is concluded that there are more constraints than enabling conditions provided to domestic water supply and sanitation (provision and access) for rural/urban poor by written and unwritten local/national laws and water rights (and related) issues in Zambia.

INTRODUCTION

The past two decades have seen the passing of an unprecedented number of declarations seeking to ensure access to safe water and sanitation for the majority (or all) of the world's people. Yet to date millions of people do not have access to even the most basic levels of service. It is beginning to dawn upon many involved in water supply and sanitation provision that one of the key constraints to providing water to the majority of the world's people may – after all – not be lack of financial resources but the political decision by states to implement the rights of citizens. Indeed there are controversial calls for a rights-based approach to financing water supply. The African Consultative Forum on Water Supply and Sanitation in its "Africa Statement" of November 1998 lists access to safe drinking water as a basic right.....and therefore a responsibility for all governments. There have been several other declarations including the UN Water Conference(1977), the Global Consultation on Safe Water Water and Sanitation for the 1990s(1990), Plan of Action – World Summit for Children(1990), Dublin Statement(1992), Agenda 21(1992), Convention on the Rights of the Child – Article 24(1989), World Water Forum Commitments(2000), etc.

Despite the above declarations, the reality is that clean water and safe waste disposal remains a life-and-death problem in much of the world – that in the 21st century. In Africa today, more than half of the population is without access to safe drinking water and two thirds lacks sanitary means of excreta disposal. This is both morally and practically unacceptable, for such widespread deprivation in the global village affects us all. And what is more, many countries in Africa are affected by slow or even negative economic growth and the stresses of structural adjustment. At the same time, overseas development assistance which had hitherto been steady, has declined. It is clear that “business-as-usual” – continuation of the same policies, strategies, funding levels, implementation methods, etc – will not even result in keeping pace with population growth.

With the increased realisation that there is no shortage of rhetoric in developing countries (and no shortage of international consensus) about the importance of providing clean drinking water to all, it is depressing to note that extremely rarely is an individual’s basic right to an adequate water supply enshrined in law. Water rights and legal issues are often ignored by governments, funders and implementers of community water supply projects.

In the short to medium term, what we need is increased awareness and a clearer understanding of the constraints or enabling conditions provided to community water supply and sanitation project implementation by local and national laws and prevailing water rights issues. But there is little information on water rights and water laws in relation to water supply and sanitation. The objective of the study therefore, was to identify and promote awareness and understanding of the constraints and enabling conditions provided to domestic water supply and sanitation provision for the rural/urban poor by written and unwritten local/national water laws and water rights issues – in order to enable the adoption of improved, effective, accessible and enforceable legislation in line with improved water supply and sanitation implementation policy and strategy.

POLICY AND STATUTORY LEGAL FRAMEWORK FOR WATER (AND SANITATION)

In November 1994, the Government of Zambia adopted the National Water Policy. The main aim of the policy is to provide a holistic management approach to the water sector. For the water supply and sanitation sector, the policies and strategies are aimed at improving the quality of life and productivity of all people by ensuring an equitable provision of an adequate quantity and quality of water to all competing user and sanitation services to all, at an acceptable cost, on a sustainable basis. The overall objective of the water policy is:

“To promote sustainable water resources development with a view of facilitating an equitable provision of an adequate quantity and quality of water for all competing users at acceptable cost and ensuring security of supply under varying conditions”.

The major legal enactments relating to water in Zambia are as follows:

- (a) The Water Act
- (b) The Water Supply and Sanitation Act

The Water Act is the supreme law on water resource issues in Zambia. The Act stipulates the ownership of water and the procedures of authorisation and invalidation of water use.

The current Act has some deficiencies and it is being revised. One major addition is likely to address the provision on abstraction of groundwater with respect to conditions, registration of borehole construction, etc. The Water Supply and Sanitation Act is an “Act to establish the National Water Supply and Sanitation Council and define its functions and powers; to provide for the establishment by local authorities, of water supply and sanitation utilities; to provide for the efficient and sustainable supply of water and sanitation services under the general regulation of the

National Water Supply and Sanitation Council; and provide for matters connected with or incidental to the foregoing.

Under “obligation to provide water supply and sanitation services”, the Act contains the following sections:

“Notwithstanding any other law to the contrary and subject to the other provisions of the Act, a local authority shall provide water supply and sanitation services falling under its jurisdiction, except in any area where a person provides such services solely for that person’s own benefit or a utility or a service provider is providing such services”.

Utilities or service providers can only operate in accordance with the Act and under a licence issued under this Act. The Act does not squarely address the issue of universal coverage with any deliberate urgency. There is in fact some confusion over what is meant by “obligation to provide water supply and sanitation service”. It is very much a “business-as-usual” Act – but perhaps a useful step.

There are other associated pieces of legislation including the Environmental Protection and Pollution Control Act, the Local Government Act, the Public Health Act, etc. The Constitution of Zambia contains Part III – Protection of Fundamental Rights and Freedoms of the Individual. The part basically contains political and civil rights. The Constitution of Zambia does not contain a Bill of Rights. Social, economic and cultural rights are not explicitly enshrined in the Constitution.

Generally speaking then, the current policy and statutory legal framework is unfavourable in as far as attempting to address the urgent task facing Zambia – providing universal access to safe water and appropriate sanitation is concerned. The process of translating declarations of intent and policy into law is on-going but with the passing of the National Water and Sanitation Act and the creation of NWASCO, it would appear that an opportunity to address the challenge has almost slipped our hands. The “slip” may partly have been facilitated by the fact that the supreme law (the Constitution) is silent on social, economic and cultural rights.

In moving away from single-mission Acts, it is important that steps are taken to progressively harmonise all existing water-and-environment related legislation in order to ensure efficiency and effectiveness. National objectives should be seen to weave through the supreme national law – the Constitution.

THE NATURE AND STATUS OF CUSTOMARY (TRADITIONAL) WATER RIGHTS

In traditional Zambian society, a man knows himself in the first place as a member of his community (whether big or small) with duties, responsibilities and certain privileges in connection with his communal body and in the second place, he is an individual anxious to protect his individual sphere of interest and to pursue his individual aims.

In the western society and perhaps in modern Zambian society, a man knows himself both as a private individual and a member of the community in which he lives and strives, regards himself in the first place as an individual self, holding and exercising his individual rights and protecting his individual interests, and in the second place he also acknowledges his position as a member of a wider and widening community; accepting (sometimes reluctantly) his obligations, responsibilities and privileges as such.

Undoubtedly traditional Zambian law recognises individual rights and interests. The strongest of these rights is ownership of land under actual cultivation or a man’s cattle. Are these rights individual? They are not. Zambian (African?) ownership relating to land

(and water) is apparently controlled by the village Headman, but actually held by the community he represents. In traditional Zambian society, one usually talks of Communal Rights or (more satisfactorily rendered) – Rights of Avail.

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Modern practices on water resource policy, administration and legislation require the people's participation in the management of water resources, which is generally achieved where a more community-oriented approach prevails in respect of ownership, distribution and use of water as well as within the organisation of water user's associations or cooperatives. Such an approach is easily applied in the African environment where the existence of traditional forms of community organisations, associations, resource ownership and right of use, may greatly facilitate its institutionalisation. Customary laws are therefore useful at this time when communities are increasingly being called upon to participate in water resources management.

NATURE AND STATUS OF WATER SUPPLY(AND SANITATION) PROVISION

There are many government ministries and agencies which have interests in or are involved in water resources development, management or administration. The Water Development Board and the Department of Water Affairs(DWA) in the Ministry of Energy and Water Development(MEWD) are the major organisations in water resources development while the resource conservation function is discharged by the Ministry of Environment and Natural Resources and the Environmental Council of Zambia (ECZ).

The Ministry of Local government and Housing is responsible for providing water supply and sanitation. The National Water Supply and Sanitation council is the regulator of the water supply and sanitation sector.

Overall, water resources management should embrace the following tasks:

- (a) Water allocation
- (b) Surface water assessment and development
- (c) Groundwater assessment and development
- (d) Domestic water supply schemes
- (e) Irrigation schemes
- (f) Fish and aquaculture schemes
- (g) Hydropower generation
- (h) Industrial water supply schemes
- (i) Inland navigation
- (j) Wastewater treatment
- (k) Pollution control
- (l) Watershed improvement, soil erosion and sedimentation control
- (m) Ecosystem conservation
- (n) Drought relief
- (o) Flood plain management
- (p) Urban stormwater drainage
- (q) Multi-purpose water facilities

Government involvement in water resources development and management can be conducted through:

- (a) Data collection and dissemination
- (b) Planning
- (c) Design
- (d) Construction and supervision
- (e) Operation, maintenance and registration
- (f) Regulation

In the current set up-up, some responsibilities are conspicuously absent due to a number of factors including lack of capacity, enabling conditions (legal and other) and resources generally. Until this year, there were many other organs involved in domestic water supply and sanitation without a defined order of involvement. None of the entities worked completely and each suffered from a lack of technical and administrative personnel and insufficient funds. There were (and there still are to some extent) duplications and conflicts in the allocation of regulatory functions(inertia?). The on-going re-organisation of the water sector seeks to address some of these shortcomings.

Water Supply for Domestic Purposes

Coverage

According to the “Social Sector Rehabilitation and Development Programme, 1993 – 1996”, only 43% of the urban population of Zambia has access to safe water and adequate sanitation structures. In rural areas, only about 30% of the population has access to safe water. According to the 1990 census, 2.75 million people or 37% of the total population then (7.38 million) were served by piped water systems in the country. Of the served population, 0.97 million people or 35% were served by internal connections. 1.37 million or 50% were served by communal taps but their service points were located more than 100m away from their homes.

Management and Financial Status/Viability

Until quite recently most urban water supplies were run by local authorities and most rural supplies were managed by the Department of Water Affairs. During the past year or so, the situation has changed somewhat. A number of urban water supplies are now run by utility companies and rural supplies are managed by the Department of Infrastructure and Support Services(DISS). The water undertakings have generally been loss making concerns.

Accessibility

Accessibility to adequate and safe drinking water supply among the Zambian people is very low. Accessibility to water and sanitation is illustrated below:

	Accessibility
Drinking Water	Urban: 70% Rural: 30% Total : 49%
Sanitation	Urban: 43% Rural: 30% Total: 35%

Source: Study of the Water Supply and Sanitation Sector, 1991 (these figures have been adopted in the on-going sector reforms)

The estimates for national sanitation coverage range from 23 to 30%. Detailed information is scarce. There is however in place a National environmental Sanitation Strategy for Rural and Peri-urban Areas dated 1997. The strategy is an attempt to raise the profile of sanitation in sector programming. The long term sector objective is to improve national access appropriate, acceptable and affordable excreta and domestic waste disposal facilities through sustainable approaches that are demand-driven and promote hygiene behaviour changes that bring about health and well-being of the people.

IMPACT OF WATER LAW AND WATER RIGHTS ON WATER SUPPLY AND SANITATION PROVISION/ACCESS FOR THE POOR

General

If we accept that people have a right of access to a limited resource(water), on an equitable basis, in a sustainable manner, now and in the future, then it is not very difficult to define the enabling legal conditions that would lead to a quickened pace towards universal coverage. Fairness, equity and sustainability would have to be key concepts. Most of the international consensus on the right of all citizens to water and sanitation has focused on the need for the extension of services to the unserved poor as a matter of urgency not as an act of philanthropy, but in recognition of humanity's common duty and the fact that the lack of services to the poor is in itself a serious environmental problem. At this point, it is perhaps appropriate to refer to the much talked about South African law reform process. South Africa's post-apartheid efforts to address water law and policy in a structured and principled way have attracted much interest of late. The starting point is the Constitution of South Africa. The Bill of Rights, Constitution of South Africa, section 27(1)(b), reads in part, "everyone has the right to have access to sufficient water". That spirit, enshrined in the Constitution, permeates the South African Water Policy, Water Act and the Water Services Act. Under "Rights of Access", the Water Services Act states, among other things:

"Everyone has a right to access to basic water supply and sanitation". "Every water services authority must

- (a) take reasonable measures to realise the right; and
- (b) provide for those measures in the development plan

What the South African case demonstrates is the fact that it is possible to ingenuously and perhaps effectively enshrine water rights in national laws contrary to popular opinion. The enshrining of the rights to water and sanitation provides focus and sustained commitment which, it can be argued, is likely to provide a basis for progressive(and quickened) realisation of basic rights. However, it is important to state that the South African case is still in its infancy but certainly there will be a lot to learn from it.

Enabling conditions and Constraints in Zambia

In Roman law, rivers were seen as resources which belonged to the nation as a whole and were available for common use by all citizens, but which were controlled by the state in the public interest. These principles fit very well with African(Zambian) customary law which sees water as a common good used in the interests of the community.

Whereas access at source seems to be well enshrined(save for unregulated groundwater extraction), the other critical elements namely technical and management skills; and adequate funds are not availed.

It is also clear that the Constitution of Zambia does not provide for the right to water for the people of Zambia. Consequently, whereas policy statements come close to "conferring" that right, enshrining that right in subordinate laws(Water Act, Water and Sanitation Act, Local Government Act, etc) is a technical impossibility. We see that in the South African case, for example, the

process of conferring the right to water is very straightforward. Since the right is already provided for in the Constitution, the right simply permeates the Water policy and the associated water laws as a matter of course. The enabling or framework legislation to provide for the legal entitlement to receive or access water in the case of Zambia is inadequate and incoherent. Consequently, the focus on the goal of universal access is not secured in law. The only hope is that probably, the auxiliary regulations within the framework of the Water and Sanitation Act will provide not only regulation but the enabling environment for serving the urban poor and achieving the goal of universal access. This is yet to be seen.

During discussions and interviews with stakeholders the perceptions (and facts?) that emerged included the following:

- a general recognition that indeed access to water and the right to receive water should be considered basic human rights and treated as such
- There was a general misunderstanding or lack of understanding) of the meaning of “duty” and “obligation” to provide water to residents in the current Local Government; and Water and Sanitation Acts respectively. Most saw it as a function and not an obligation. Yet others felt that much as the legal entitlement to receive water is desirable, the practicalities weighed against enshrining the entitlement in law. They cited institutional, legal, planning and financial difficulties. Some further felt that, in general, legislation tends to protect the rich at the expense of the rich
- There was amazing ignorance about customary water law save for the fact that under customary water law, water is regarded as a free gift from God. Most people felt that with respect to water supply provision, that concept had impacted negatively since most people did not want to pay for water. Some traditions also consider certain potential water sources as sacred and therefore not to be tapped.
- There was a feeling that the allocation of funds to the sector was insufficient and did not reflect the “basic human right” profile of water. It was noted however that the WASHE concept had gone some way in tackling the needs of the rural poor.
- Stakeholders (including professionals) tended to confuse policy with national law
- Most stakeholders felt that the legal entitlement to access water was fairly well enshrined in the current water act although the implementation appeared to have some serious problems.
- There was an isolated but strong feeling that the legal entitlement to receive water could have negative consequences in that consumers may get into a “passive and demand” culture – waiting for government to provide.
- There was general ignorance about water law and water rights issues among officials, professionals and communities. Sensitisation should not only be limited to the general public
- Some lawyers felt that the entitlement in the statutes was for regulatory purposes and not for creation of rights
- On a positive note, it was noted that some strategies were being developed for peri-urban and rural water supply. These strategies would probably feed into the Water Supply and Sanitation Act (as regulations) possibly providing some hope for the poor.

CONCLUSIONS

The paper has identified enabling conditions and constraints provided to domestic water supply and sanitation (provision and access) for the rural/urban poor by written and unwritten local/national water laws and water rights (and related issues in Zambia).

The enabling conditions include the generally held perception that access to safe water and appropriate sanitation are basic human rights, the fairly acceptable legislation in access to water at source (supported by an accommodating traditional (customary) law regimen. The high profile rights-based approach by some NGOs (and other organisations) is also an enabling condition.

The constraints include the following:

- Ambivalence among stakeholders on the efficacy of achieving universal access soon – recognised as desirable – by legislative means
- The perception that water is a free gift from God and therefore should be provided free of charge
- Inadequate political will (to confer rights) beyond the fashionable rhetoric
- The absence of “subsistence” rights or simply the right to water in the Constitution of Zambia
- Incoherent “business-as-usual” Water Policy
- Traditional “regulatory” as opposed to “enabling” water service legislation
- Weak delivery mechanisms or institutions – rendering even the good laws ineffective
- Poor funding
- Inadequate research and development – legal, socio-economic, technical, etc
- Disjointed, overlapping, potentially conflicting legislation – lacking focus on global goals, equity, sustainability and basic rights
- The now ingrained perception that the extension of water services is necessarily a costly and complex intervention that Zambia can not afford to achieve goals for universal access. This weakens the rights-based approach
- Inadequate facilitative, enabling legislation in which the state would focus more on goal setting, implementation and monitoring; promotion, coordination and mobilising critical and catalytic support to the sector
- Inadequate and ineffective advocacy on (water) rights issues
- Unfavourable national and international(donor?) priorities/dogmas(e.g. privatisation)
- Inadequate feedback into policy and legislation of past lessons(lack of research and monitoring?)
- Inadequate, sustained and honest focus on the goal of universal coverage by politicians and decision makers
- Inadequate, sustained legislative or regulatory focus on cost recovery and financing
- mechanisms for equity and sustainability
- Fresh memories of the failure to achieve the declared goal of universal access during the IDWSSD(1981-1990).

While the commercialisation that Zambia’s Water and Sanitation Act seeks to support(and private sector participation) may bring many benefits in terms of incentives for service delivery, it is not necessarily a comprehensive solution and risks further marginalising the poor. Low incomes and limited “voice” (rights) mean that the poor can bring little pressure to bear. Second, privatisation particularly in monopoly services, has brought to the fore the need for regulation of price and service quality, with special consideration to the prices and service levels of the poor. Good governance is a pre-requisite for effective regulation, and Zambia is still in its infancy in this area.

It is also important to note that despite the law reform, institutional models remain autocratic, bureaucratic, authoritarian and top down. The ethos of government institutions needs to be revisited in order to embed the hallmarks of empowerment and capacity building – transparency, partnership, flexibility, respect and empathy.

It is important to record here that Zambia’s declaration of intent presented during the launching of the IDWSSD(1981-1990) on 10 November, 1990 at the 35th session of the UN general Assembly in New York accepted the objective of providing safe water supply and adequate sanitation for all citizens by 1990. The Plan of action dated December 1983, had the general aim of ensuring 100% coverage by 1990 or 2000 at the latest. Well, that is now history.

The fact is that only 43% of the urban population of Zambia has access to both safe water and appropriate sanitation. In rural areas, only 30% of the population has access to safe water. The actual figures could be lower. Pundits agree that a “business-as-usual” approach will not even help keep pace with population growth.

But then there is good news from elsewhere in the global village. Several low-income Countries including Bangladesh, Burkina Faso, Cuba, India and Mauritania, exercising political will (rights-based approach?) are adopting appropriate priorities (equity and rights?) and strategies achieved a high rate of coverage and are on their way to achieving universal access. So it is possible after all!

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