

PRO-POOR WATER RESOURCES REGULATION IN DEVELOPING COUNTRIES: LESSONS FROM SOUTH AFRICA AND ZAMBIA

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ABSTRACT

Water resources regulation is an increasingly critical aspect of effective water resources management and protection in developing countries. However, experiences in water resources regulation in developed countries are not necessarily appropriate for developing countries, where the challenges and available resources are different. In this paper, the authors address an approach to pro-poor regulation, appropriate for a democratic, developmental state in a developing country, drawing on lessons from South Africa and Zambia.

The paper is based on action-research to shape the use of the General Authorisation tool in South Africa into a pro-poor and transformative legal tool for historical justice, which also reduces the administrative burden on the state, as well as on a technical assistance project to the Zambian government to develop an appropriate and implementable water allocation system for river basins in Zambia. In both, the approach taken focused on enabling small users and the poorest to access water for livelihood development with minimal administrative burdens placed on the state in terms of regulatory requirements, while targeting regulation at the minority of large-impact users.

The results of the two pieces of work show there are considerable opportunities to design pro-poor water resources regulatory tools, while also reducing the administrative burden on the state. The paper draws out the lessons from this experience that can be used in other developing countries.

The paper concludes that there is a considerable, but largely untapped scope for the developmental African state to shape and implement pro-poor regulatory regimes and that, if the objectives of regulation are very clear and there is a focus on meeting the water needs of the poor and small scale water users while improving the efficacy of state regulation of large-scale users, a win-win situation is possible that achieves maximum developmental impact with limited administrative resources.

INTRODUCTION

For some time, the international water management discourse has promoted the use of water allocation and formal water use authorisation through individual permits or licenses as a critical tool for effective water resources management. Over the past 15 years, extensive water law reform has taken place in developing countries, strongly supported by the international donor community, with formal water allocation and authorisation approaches further entrenched in the legal framework. The South African National Water Act was seen, internationally, as one of the most progressive pieces of water legislation, embracing the

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concept of IWRM and designed to enable effective and sustainable water resources management.

The reality of implementation, however, has shown that there are significant challenges to implementing the proposed legislation, and that the challenges derive from a number of sources, whether they be limitations in the legislative approach itself, poor translation of the legislation into regulations and procedures, or limitations in human and institutional capacity.

There are particular challenges in developing water management regimes appropriate to developing countries, and in particular in developing approaches to water allocation and water use authorisation that support, rather than discriminate against, water use by the poor. While the concept of equity is widely embraced in the policies and legislation of developing countries, the reality is that inappropriate design of implementation tools actively, if unintentionally, discriminates against the poor.

With the appropriate focus, however, an explicitly pro-poor focus in regulatory design can serve to protect the interests of the poor and to enable the socially just and equitable use of water as well as enable the most appropriate application of limited state resources. This paper describes two cases in which such an approach is being considered: the development of a water allocation system for Zambia, and the development of a General Authorisation for water use under the National Water Act in South Africa.

METHODOLOGY

The methodology adopted considers the design and promulgation of policies and regulatory tools in general, and water law in particular, as a path dependent process of contest and negotiation among key stakeholders with diverging interests. For the historical perspective, we relied on literature reviews. For the study of the design process and substance of the legal tools in both countries, we examined general literature and relevant policy and legal documents. Further, we conducted interviews with international and national legal experts, donors, national policy makers, government implementers with technical and legal backgrounds, NGOs, and financing institutions, with the two-fold aim, first, to probe the underpinning concepts and reasons for the substance of the tools and, second, to obtain a qualitative insight in the path dependency of the proposed changes. The authors themselves took active part in conceiving and debating possible solutions. This deepened insights in perceived obstacles and opportunities for more pro-poor regulatory tools.

SIGNIFICANT RESULTS, DISCUSSION, CONCLUSIONS

The legacy of past water regulation in developing countries compounds the current challenges of water management. In Zambia, settlers dispossessed indigenous people by vesting ownership of water resources in the colonial rulers (Van Koppen 2007). During South Africa's apartheid past, black communities were deprived of their land and as a result, their access to water, since access to water for productive purposes was linked to ownership of land (Schreiner et al 2010). Currently in South Africa, huge inequities in access to water still exist, with around 99% of rural water used by just 1% of the households - mainly white commercial farmers (Cullis and Van Koppen 1998). While ownership shifted to the independent governments in the post colonial states, the Zambian and other African governments focused on putting in place the necessary infrastructure development to support the expanding uses of water for economic growth.

In more recent years, international discourse has focused more strongly on issues of regulation than infrastructure development, with issues of water allocation and authorisation taking a front seat. How this has been implemented, however, has revealed significant challenges, and the case of Zambia and South Africa raise these challenges starkly.

Zambia

Several significant changes to the approach to water administration in Zambia were introduced by the Water Resources Management Act of 2011 (GoZ, 2011). In this Act, “water” is defined as surface and ground water, and all water rights vest with the President. The Act also stipulates a priority reserve to satisfy basic human needs and protect aquatic ecosystems.

The Act also requires that **all commercial users of water** must apply for a permit to use water. Only non-commercial or domestic users will not require a permit where “domestic or non-commercial purposes” means the household use or the water use for subsistence purposes (GoZ, 2011).

This requirement imposes undue transaction costs on small-scale farmers such as emerging market-garden farmers who will need to apply for a permit to use water – even if they are using water in a catchment where there is plenty of water. Currently there is a challenge in Zambia in managing the water permits and payments of large water users – and yet the new Act potentially criminalises small scale farmers who use water without a permit and who may not be aware of their legal obligations. Many lack the resources and administrative expertise to engage with formal permit application processes

The Act poses an increased institutional burden the Zambian state in having to permit and monitor all commercial water users despite the fact that the Water Resources Management Authority already faces financial and staff capacity constraints and limited ability to carry out monitoring of water use and enforcement of water permits. For example, it is necessary for a Water Official to physically visit a remote site in order to determine whether a water user is abstracting more than his permitted allocation.

Ultimately, under Zambia’s administratively intense system, inequitable access to water arises where small water users in unstressed catchments face the same permit application requirements as large impact water users in stressed catchments. In order to address this, the Zambian government developed a water allocation framework to support the implementation of the permit system, which distinguishes between three categories of catchment – unstressed, stressed, and over-allocated (over-allocation is largely a seasonal issue in Zambia, where water demands exceed availability in the dry season). The framework, designed to make the blanket approach taken in the legislation implementable, enables both a differentiated approach to permitting small and big impact users, and allows for less intense allocation and authorisation processes to be used in unstressed catchments, which reduces the administrative burden and supports easier access to water by small (and large) users in these catchments.

South Africa

The South African National Water Act, on the other hand, was explicitly designed with an ability to introduce regulation where necessary, and in a differentiated approach, rather than

in a blanket form across the whole country (RSA 1998). One of the critical tools in this regard is the ability to authorise water use in particular areas or for particular uses and under particular conditions through a general authorisation which enables a water user to use water without having to apply for a licence.

This is a powerful tool when used appropriately. The challenge in South Africa, however, is whether this tool is being used appropriately for the win-win situation of enabling productive use of water by the poor and reducing the administrative burden on the state.

A general authorisation allows the Department of Water Affairs to enable small water users to use water without the administrative burden of applying for a licence, and hence to address issues of poverty and redress in access to water. To do so, however, the GA must be drafted appropriately, with a specific focus on enabling water use by small scale water users. To do so, unnecessary and burdensome conditions for the water use must be avoided, such as excessive requirements to measure and report on water use – particularly in a context in which many large scale water users do not have to comply with such requirements. A second condition is that a general authorisation carries sufficient legal status to an equal or higher priority than that of a water use licence or existing lawful use, and to provide sufficient confidence for banks to make loans available against the general authorisation, rather than a licence (Hodgson 2004).

If the conditions attached to water use under a GA are too onerous, the likelihood is that the many poor and under-resourced water users will not be able to comply with the conditions, rather than big water users, resulting in criminalisation of water use by the poor. Looking at the Draft General Authorisation for the Taking and Storage of Water gazetted by the Department of Water Affairs in April 2012, one is forced to say that the proposed conditions under the GA are even more onerous than those in the General Authorization of 2004 (RSA 2012).

The broader underlying alternative approach for pro-poor regulation is premised upon effectively **regulating** the relatively few large-scale uses who use most of the water, while **protecting and supporting** the expansion of water use by the large number of small-scale users who, in the South African context, use a fraction of the water. Thus, a more equitable administrative solution for effective regulation is to start with licensing the relatively few large impact users and ensuring their compliance with licence conditions. This is further informed by the fact that, without the capacity to enforce license conditions, issuing licences with strict conditions is neither meaningful nor useful.

At the other end of the scale, the focus of the state should be on supporting water use by poor and small-scale users, through a combination of infrastructure development, technical support, and the provision of access to water through an appropriately designed general authorisation. In addition, extra efforts are needed to inform and build the capacity of large numbers of remote, sometimes illiterate small-scale users, including women, speaking local languages, without mobility and internet. This is needed to avoid indirect discrimination and to level the playing fields with the usually highly administration-proficient large-scale users.

Conclusions

While regulation is rightly considered an important element of effective water resources management, it is clear from the research conducted that inappropriate regulation

discriminates unfairly against the poor and against small-scale water users. In the context of a developmental state, it is particularly important that regulation is carefully targeted to support poverty eradication and improved livelihoods for the poor, while ensuring legal compliance with authorisation conditions by large impact water users. Inappropriate or unnecessary regulation hits the poor hardest and limits the potential for development through water use. Our research suggests that a targeted and differentiated regulatory approach is a critical element of developmental water management. However, the potentials are not realized as yet. Governments need to further develop and promulgate such regulatory approach that discriminates positively in favour of the poor, while also reducing the administrative burden on the state, so that it is both pro-poor and administratively feasible.

General authorisations, as allowed under the South African National Water Act, are a powerful tool that should be investigated for use in other developing countries.

Equally important is the recognition that regulation is only one element of pro-poor or developmental water management and that the development, operation and maintenance of appropriate water infrastructure remains a crucial part of the development agenda.

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