

LEGAL FRAME WORK

Introduction

The Water Act of 1948 is the building block of Zambia's water legislation. It has been criticised for being outdated and for focusing on surface water resources while ignoring the ground water resources¹. The act is also not enforced effectively in the areas that it does cover and does not apply to shared watercourses. Part of Zambia's water resources lie in international basins and are thus shared water courses. The Water and Sanitation Act of 1997 was an attempt to fill some of the gaps in the Water Act of 1948 especially with regard to domestic water supply and sanitation. The value added by this Act is yet to come to full fruition. The Water and Sanitation Act was preceded by the Environmental Protection and Pollution Control Act of 1990. The Environmental Protection and Pollution Control Act mainly addressed issues concerning the quality of water in industrial centres and other regions of the state. Another landmark in water sector reviews was the Water Policy of 1994. This was headed by the Ministry of Energy and Water Development and was aimed at revamping the water resource management and operation in the country.

The latest addition to these reforms and reviews is the Water Resources Action Programme (WRAP). Under WRAP there are plans to amend the Water Act so as to ensure sustainable water resources management and development and a participatory approach to water resource management. One of the proposed actions of the programme is the creation of a Water Resources Management Bureau which will be responsible for water allocation and licensing but this will replace a current body with similar responsibility. Only time will tell what the difference in the effective operation of the two bodies will be. Other water related legislation includes The Natural Resources Conservation Act, Local Government Act, Lands Act and the Public Health Act.

Water Act 1948

The Water Act focuses on the provision for ownership, control and use of water. In this case mainly surface water. The Act also makes a clear distinction between private and public water and primary, secondary and tertiary uses of water. Primary use of water is defined as the use of water for domestic purposes and the support of animal life². Secondary use of water means the use of water for the irrigation of land and pisciculture. Tertiary use means the use of water for mechanical and industrial purposes for the generation of power. Private water falls within the boundaries of land owned by any particular land owner. The land owner in this case includes the President and a mortgage owner or lessee. Public water means all water flowing or found in or above the bed of a public stream, whether visible or not, including lakes, swamps or marshes. A public stream means either a watercourse or a drainage depression or dambo of natural origin, forming part of a natural drainage system, wherein water flows in ordinary seasons where such water is not private water. Any person shall have the right to the primary use of public water which is found in its natural channel or bed at such places to which access may be lawfully had.

It can be deduced from the above definitions and distinctions that primary uses of water

¹ Phiri, Z. 1999. Water Law, Water Rights and Water Supply Study Country Report – Zambia. .: . Pp 7 and WRAP documents, Legislative Component.

² Republic of Zambia. 1949. *The Water Act*. Lusaka: Government Printers.

should have priority where conflict in water use and allocation may arise. The ownership of all water in Zambia is vested in the President. The use, diversion and apportionment of all waters are made according to the terms of the Water Act. The Act does not apply to The Zambezi River, Luapula River or the portion of the Luangwa River which constitutes the boundary between Zambia and Mozambique. The exclusion of the international watercourses is traced back to the colonial days. In the colonial days the authorities made agreements with neighbouring countries on management of international or shared water resources. This resulted in the Water Act being restricted to national watercourses.

Environmental Protection and Pollution Control Act 1990

This is the main legislation that focuses on managing pollution and the environmental aspects of water management. The Act outlines the procedures for licensing of effluent discharge, abstraction of water for dilution of effluent and the abstraction of water for the treatment of effluent. The enforcement of this Act is under the Environmental Council of Zambia (ECZ). ECZ operates a polluter pays principle even though it is currently reported to be unable to carry out its duties effectively due to lack of manpower, infrastructure and technical means³.

Water Policy

The policy is aimed at promoting sustainable water resources development with a view to facilitate an equitable provision of adequate quantity and quality of water for all competing groups of users at acceptable costs and ensuring security of water supply under varying conditions⁴. Under the Water Policy, the Water and Sanitation sector in Zambia is divided into a rural and urban sector with the peri-urban sector falling under the urban sector. The Water Policy clearly outlines a long term strategy for meeting the water and sanitation needs of the urban and rural sector and also the body responsible for the strategy implementation. The Water Policy has been partially implemented with some of its fruit being the commercialisation of the water sector in Zambia and other water sector reforms.

Water and Sanitation Act 1997

This Act focuses on the domestic supply of water and sanitation under the establishment of the National Water and Sanitation Council (NWASCO). NWASCO's functions are defined as: providing for the establishment, by local authorities, of water supply and sanitation utilities; providing for the efficient and sustainable supply of water and sanitation services under the general regulation of the body; and providing for matters connected or incidental to the foregoing⁵.

NWASCO has been established and has begun operation with the formation of at least five Commercial Utilities in three different provinces. The Copperbelt province has the largest concentration of Commercial Utilities. While other provinces only have one Commercial Utility with head offices in the provincial headquarter, the Copperbelt has three. The number of Commercial Utilities formed in each province is not determined by NWASCO. A Local Authority may resolve to establish a water supply and sanitation

³ Technical Component 6 Water and Environment of WRAP

⁴ Government of Zambia. 1994. *National Water Policy*. Lusaka: Ministry of Energy and Water Development.

⁵ Government of Zambia. 1997. *The Water Supply and Sanitation Act*. Lusaka: Government Printers.

utility as a company under the Companies Act provided the majority of the shares are held by the local authority. The decision to create a Utility among different Local Authorities is left to the Local Authorities concerned. At the time of carrying out the field work for this research project, the other provinces with Commercial Utilities were Lusaka and the Eastern province. The Southern province Commercial Utility, Northern Province Commercial Utility and The North Western province Utility were in advanced stages of formation. In other provinces, the process of creating Commercial Utilities was at different stages such as consultation. Countrywide coverage strategies and strategies to cater for the poor were still being worked out.

Water Resources Action Programme (WRAP)

This programme was started in 1999 and has a main goal of ensuring, “Zambia’s water resources being managed and utilised for maximum economic benefit in an equitable and sustainable manner with strong stakeholder participation”. The participation aspects of the programme are probably drawn from the key funding bodies of the programme which include NORAD, Irish Aid, GTZ (German Technical Cooperation) and the World Bank. Participation in World Bank terms is still limited to the execution stage with little participation at the planning and implementation stage of different projects. The WRAP also has a focus of integrated water management and the incorporation of groundwater resource legislation in the amended Water Act. An assessment of the impact of the project can only be made after it has been completed.

Customary and Common Law

Both customary law and common law are applied under the current judicial system in Zambia. Customary law dates back before colonisation while Common law was introduced by the British during colonisation. During the period of colonial rule, two different systems of judicial administration developed. The official courts administered English law and were found in the places where Europeans lived. Customary law was administered in tribal courts. The conflicts and contact between the two judicial systems remained at a minimum as long as the African litigants were willing to accept the decisions of tribal courts.

Customary Law

The Zambian customary law is unwritten and administered by the local courts. It is assumed to be in the breasts of the local court justices. Section 12(1) of the local courts act provides that African customary law shall apply to any matter before the local courts, in so far as such laws is not repugnant to natural justice or morality or incompatible with provisions of any written law⁶. Customary law is not uniform as each tribe in Zambia has its own values and beliefs as such it can be said there are as many customary laws as there are tribes in Zambia. Many of the laws exhibit forms of similarity in their principles and concepts.

Common Law

The common law is typified by its reference to the collective judicial wisdom of the past as a primary source of rules applicable to the present. The critical process in the use of precedence is establishing exactly what makes one case analogous to another and the degree of factual similarity required before one case can be considered influential in the

⁶ Ibid. Pp143

resolution of the other. Precedence is only considered pervasive and not actually binding⁷.

The legal framework in Zambia regarding water resources makes use of common law and not customary law. The government agencies and institutions that deal with water in Zambia, Table 1, respect customary law and the beliefs of the communities where they operate. If a conflict occurs between use of common law and customary law, common law is considered superior and is seen as serving all Zambian citizens equally.

Table 1. Water Related Institutions in Zambia

Body	Governing Act	Role
Water Development Board (WDB)	Water Act of 1948	To control the use of all surface water resources in the country by allocating water rights to different users
Department of Water Affairs (DWA)	Water Act of 1948	Provide technical support to the Water Development Board Monitoring development of water structures in the country Monitoring of water levels in national rivers Conducting Geophysical surveys Hydrological and meteorological data collection and analysis for public use
Environmental Council of Zambia (ECZ)	Environment Protection and Pollution Control Act of 1990	Control of pollution in national water ways Issuing licences for effluent discharges Identifying areas that require Environmental impact assessments Setting standards for effluent Enforcing effluent discharge standards Policy formulation
National Water and Sanitation Council (NWASCO))	Water Supply and Sanitation Act of 1997	Regulate Water Supply and Sanitation Supervise the operations of newly formed commercial utilities Enforcement of water quality standards Regulating the levels of capital expenditure associated with meeting water quality standards Evaluating efficiency levels Giving incentives for improved performance Penalizing defaulters for negligence.
Zambia Bureau of Standards (ZBS)	Zambia Bureau of Standards Act of 1982	Set standards for drinking water
Ministry of Health (MoH)	Public Health Act of 1978	Enforcement of water quality standards
Ministry of Local Government and Housing (MLGH)	Local Government Act of 1980	Physical implementation of the National Water Policy Service Provider in areas where Commercial Utilities have not been created

⁷ M.Ndulo in Ndulo, M. (Ed). 1984. *Law in Zambia*. : East African publishing House. Pp 1-2