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Part 3. Insight Pieces and Book Reviews

Water Permits: Do they enhance or hinder water governance?

H.J. Bosch & J. Gupta

Global water use grows exponentially with economic development and its associated production and consumption patterns, and population growth. At the same time, while water demand is increasing, water availability is fluctuating, not least because of the impacts of climate change. Already river basins are closing, meaning there is no water left to be allocated. Moreover, it is becoming increasingly difficult to satisfy existing, new, and emerging demands. Hence, the need to carefully govern increases in water allocations which requires flexibility in water allocations. Water use permits are a key instrument to sustainably govern water, because permits are used to allocate water between different uses and users within a country. Against this background, we investigate the question: What trends do we see in Asia and Africa and why do these trends possibly challenge our ability to govern water?

Based on an analysis of water laws and policies in 60 countries in Asia and Africa, we see the following trends in how water governance is organized around permits. Following independence, most countries have put water in the public domain. With this, states have tried to expropriate existing water rights and ownership systems including customary rights and the rights of former colonists owning land. States then allocate their fresh water resources in five ways: they allow people to use water for domestic purposes, or to withdraw water up to a certain threshold above domestic use without requiring a permit; they allow for the continuation of existing water use and rights that originated in the pre-independence period by bringing it in conformity with a water permit system; they allocate water through contracts, leases, concessions. And lastly, they allocate water through a modern permit system which is considered the main instrument available to states.

Generally speaking, by granting a water use permit, states allocate several rights,¹ including: the right to use the water for a specific purpose during a fixed period of time; the possibility to renew the permit when the period expires; the possibility to change permit conditions during the period; the possibility to transfer the permit to others; and the possibility of appeal to and/or compensation by the state if the permit is withdrawn or the conditions changed prematurely, leading to financial loss to the permit holder.

There are some key challenges in the governance process of allocating permits. First, in many developing countries there is inadequate information about how much water is available for allocation for human uses, after deducting for the maintenance of ecosystems. Second, this implies that permits are being allocated to uses and users without a good understanding of what the state can actually allocate. Third, there are existing systems of water ownership that were dismantled following independence, but many of these systems continue to exist – because of customary practices or because water owners have gone to court to protest against such expropriation and demand compensation for lost income. Fourth, in order to promote stable and predictable water supply to farmers and industrialists, many of these permits are for a long period – ranging from 5 to 75 years. This tends to reduce the flexibility of the authority to redistribute the water when needed. Fifth, however, states do have the authority to revoke, modify, limit and/or suspend permits if certain conditions arise although, these tools are more reactive than proactive. Moreover, the conditions are generally quite limited – including that the permit holder has violated the law and/or permit conditions, because there is imminent likelihood of water shortage/drought, or if this is in the public interest. But a key question is – who determines what is in the public interest? Sixth, such withdrawal and revocation are not without consequences. In many countries, permit holders can appeal against this decision and possibly claim compensation. Seventh, water authorities in most parts of the developing world are not rich bodies and the fear of having to pay compensation to large users may influence how they decide whose permits to cancel. Permits enable countries to allocate water, but also constrain their flexibility in reallocating water.

¹ J.W. Dellapenna and J. Gupta. 'Fundamental Concepts of Property in Water and the Role of Markets in Water Governance.' In J.J. Bogardi and others (eds.), *Handbook of Water Resources Management: Discourses, Concepts and Examples*. (Forthcoming).

A case study of water permits in South Africa (SA) reveals that by promulgating its first post-independence water law in 1998, it put fresh water resources in the public domain.² Under this law, all water use must be licenced unless such use is considered as domestic use (Schedule 1), an Existing Lawful Use (ELU), or is exempted under a General Authorisation.³

The new water law abolished the existing riparian right system, while trying to recognize the existing rights. In other words, it tried to state that landowners would lose their right to water based on the former colonial laws, but could continue to use this water during a transition phase under the ELU provision, which would then lead to a conversion to licensed water use through the process of compulsory licensing. However, the process of converting ELUs into licenses is failing for a number of reasons. It appears that the state may be afraid to proactively push this as this may affect food production and food security; and the accompanying land reform programme is generally considered to be unsuccessful. A big challenge is that most ELU holders will go to court to protest against this expropriation of what they see as their water rights, and if approved by the court, they are demanding compensation for existing and potential economic damage. Such litigation, especially by rich farmers, puts a heavy burden on an authority with limited resources. Although the law states that if water is needed for the Reserve, to correct an over-allocation, or to rectify an unfair or disproportionate water use, no compensation can be paid. These provisions may be inadequate to enable South Africa cope with the problem of addressing existing legal uses, twenty years after the new law was adopted.

Beyond the problem of ELUs, the permit system also raises some governance challenges. Permits come with clearly defined conditions, subject to a periodic review which must be at intervals of no more than five years. Licences can only be amended through this review process, which requires considerable resources and capacity. Since the authority has limited resources, no permits were reviewed 17 years after the promulgation of the Act. Another challenge is that licence holders enjoy a certain degree of legal protection and financial security, which while enabling them to produce goods and services and contribute to national development, also implies that they are reluctant to give up their entitlement. Permit holders can appeal against an amendment of permit conditions, and can

² H.J. Bosch and J. Gupta, 'Access to and Ownership of Water in Anglophone Africa and a Case Study in South Africa' (2020) 13 *Water Alternatives* 205.

³ National Water Act 1998 (South Africa), Art 4.

claim compensation when experiencing economic damage. This further puts a strain on the ability of authorities to govern the water in the public interest.

These trends lead to the following governance challenges. First, it is difficult for states to set up a fair and flexible water governance system. On the one hand, the state wants to allocate water and provide enough security to encourage long-term investment. On the other hand, states struggle to do this in a way that allows them to keep control of the water, and the possibility to reallocate water when needed. Second, the current tools in place to govern permits do not allow for the reallocation of water to provide for growing demand for water use, to facilitate social and economic development, to promote equitable access to water, or to respond to changing environmental conditions. Third, as seen in SA, which is ostensibly trying to take control of its water resources, it can be difficult for a postcolonial state to set up a fair and equitable system for effective and sustainable water governance. Fourth, it seems that states do not fully understand the implications of their policies. Understanding the implication of granting permits, and the governance of these permits is of critical importance in the development of legitimate, equitable, and effective governance systems.⁴ Fifth, while most papers discuss adaptive and integrated water governance, they overlook the key challenge that states face in gaining and retaining control of a country's water. This is the case with permit systems and is even more relevant in regions where a full-scale process of commercialisation is underway.

We conclude that developing countries and emerging economies in Asia and Africa face critical challenges in governing their water. On the one hand, expropriating water resources whether from poor farmers who had customary rights to water or from former colonial landowners with some form of riparian rights comes with challenges – as both groups protest. The former often protest through social movements, the latter by going to court. Moreover, while the new water laws have been designed in a way to avoid any mention of private property in connection to water, they often end up de facto privatizing the water through granting clearly defined property like rights through permits, many of which are valid for decades.⁵ Permit holders then make their investments based on the expectation of an assured supply of water of a certain quality for a considerable period of time, and

⁴ J. Gupta, C. Pahl-Wostl and R. Zondervan, "Glocal" water governance: A multi-level challenge in the Anthropocene.' (2013) 5(6) *Current Opinion in Environmental Sustainability* 573.

⁵ HJ Bosch, J. Gupta, & H. Verrest, 'A water property right inventory of 60 countries.' (2021) Review of European, Comparative and International Environmental Law. (Forthcoming)

will resist any effort by the state authorities to redistribute the water based on new considerations whether as a consequence of climate change or because of reasons to protect ecosystems, or even to ensure a more equitable distribution of water in a country. Finding a way out of this conundrum is a challenge for these water institutions.