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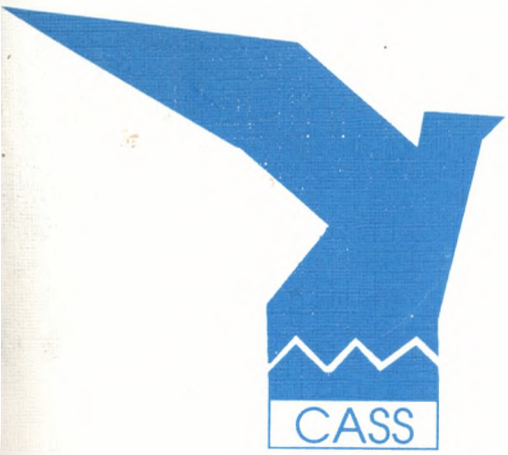

TOWARDS REFORMING THE INSTITUTIONAL AND LEGAL BASIS OF THE WATER SECTOR IN ZIMBABWE :

Current Weaknesses, Recent Initiatives and Their Operational Problems

Edited By

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with Bill Derman [2]

August 1997

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TABLE OF CONTENTS

CONFLICT MANAGEMENT DILEMMAS IN THE UMVUMVUMVU CATCHMENT, EASTERN ZIMBABWE

Emmanuel Manzungu [12]

Introduction

This paper briefly explores conflict management dilemmas in water allocation posed by the absence of effective conflict resolution mechanisms in the Umvumvumvu catchment in eastern part of Zimbabwe. Table 1 shows the main actors in the catchment with their legal water entitlements. It is argued that poor legislation governing water allocation, the Water Act (1976) No. 41, which does not reflect the new political and social realities, has largely been responsible. Reduced water flows in the river worsened the problems.

Most of the users in the catchment do not incorporate the provisions of the Act into their behaviour. The priority system which espouses the principle of first-come-first-served in granting water rights and first-come-last-out during periods of water scarcity was a major problem. Also, the fact that water rights were expressed in absolute terms did not help either. A centralized conflict resolution structure located far away (about 400 km) in Harare, the capital city , which moreover, was costly, complex and promulgated alien concepts of conflict resolution compounded the problem. Further compounding this situation were a group of users who, although sharing a common water source, found little reason to co-operate. The rigid legal water allocation regime that was not matched by flexible water sharing arrangements which recognise natural flow variations represented yet another problem.

Of particular concern to this paper are the practicalities regarding the decentralization proposals in the water sector. It is government intention to devolve management responsibilities to catchment authorities (incorporating sub-catchments). This is meant to involve all stakeholders in local management of water resources. Under this proposed arrangement the Administrative Court, which had sole responsibility of administration of water rights, will cede its administrative duties to catchment authorities and will remain a court of appeal. It is argued in this paper that while decentralization of water resource management is desirable, there is a need to pay particular attention to the realities on the ground. One issue that is 'on the ground' is conflict management as conflicts in water sharing are inevitable. To examine this issue the legal position in the current Water Act is outlined. This is followed by a brief documentation of what actually happens on the ground in the Umvumvumvu catchment. Lastly some policy implications are outlined.

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Table 1: **Umvumvumvu Water Users and Their Entitlements**

User	Water Right
Mutambara Mission	- water right no. 66, priority 16 March 1916 to abstract 56 lps for agricultural purposes - water right no. 2469, priority date 7 October 1949, to abstract 3 lps for agricultural purposes
Mutambara Irrigation Scheme	first granted in 1941 with the final grant in 1953. A flow of 89 lps may be abstracted when the flow in the river was in excess of 344 lps, but when the flow was less, abstraction was supposed to be 42 lps.
Mandima Co-operative, a model B co-operative	15 lps when flow is greater than 56 lps
Shinja Extension, model A	no water right
Maraisi Co-op	no water right

Source: DWR, Mutare files

Conflict Resolution in the Law

There are two main schools of water allocation in the world, the riparian and appropriation doctrines. Zimbabwe's water law is based on the appropriation doctrine which is markedly different from the riparian doctrine. The riparian doctrine originated in well-watered regions while the appropriation doctrine emerged in arid and semi-arid areas (Howe et al, 1986). Under the riparian doctrine landowners bordering on a water body (riparian owners) are entitled to make *reasonable use* of water provided the water is retained to the river undiminished in quantity and quality. Because of the difficulty of defining what constitutes *reasonable use* and the increasing scarcity of water, the riparian doctrine has been changed in favour of the appropriation doctrine in many places (Howe et al., 1986). It is important to note that the doctrine was based on the assumption that water will not be scarce such that it would limit agricultural production. On the other hand, the appropriation doctrine is supposed to be based on efficient use of water. There is reference to water being allocated on the basis of *beneficial use*. To ensure beneficial use of water, a water right application is required to be accompanied by a demonstration that the water will be used efficiently (see Matinenga, 1995) in the form of a document from Agritex alongside the hydrological report. Once *beneficial use* is demonstrated, water rights are issued in perpetuity on the first-come-first-served and first-in-last-out basis. This means that the first applicant gets the water and in the face of water

scarcity, the same first applicant gets the water ahead of anyone else. To further ensure efficient use of water the applicant is also required to install water measuring devices so that water use can be monitored. The Act is not concerned with ensuring water availability to vulnerable groups such as communal and resettlement farmers. This situation has resulted in social tensions, contempt for the law, large scale theft and illegal use of water from public streams.

Under the current legislation, the state owns all the water. Users get use rights. All issues relating to water allocation are under the jurisdiction of the Administrative Court. The Court is empowered to hear and determine (a) applications for the use of public water made in terms of the Water Act and (b) disputes concerning the abstraction, appropriation, control, diversion or use of public water (GOZ, 1976). The centralized nature of conflict resolution is illustrated in the statement that 'no court, other than the Administrative Court, shall have jurisdiction in the first instance to hear and determine an application or dispute [involving water]'. There are a number of situations where other forms of conflict resolution apart from litigation, are mentioned in the Act. Parties involved in a dispute can opt for a less rigorous route by writing to the judge and asking him to make a decision on the issue. Any award made under this route is however just as valid as the normal court process.

Conflict Resolution in Practice

This section looks at problems with regards to water sharing in the catchment between the 1993/94 and 1995/6 seasons. The magnitude of problems was directly related to the amount of water flowing in the river. Serious problems were encountered when the most downstream water user, in this case the Scheme, experienced water scarcity. In such cases people from Mutambara travelled upstream in search of more water. Events documented by the researcher in September 1995 when he went up the river with the Scheme water bailiff revealed a lot of problems.

Mutambara Irrigation Scheme versus Mutambara Mission

The Scheme faced a critical water shortage in the 1994/95 season because of decreasing river water inflows. This was a consequence of reduced rainfall (in the 1990s the flow in the river was below average). During the 1994/5 season the shortage culminated in the irrigators in the scheme sleeping with axes at their side to safeguard water (this was largely a failure) (Manzungu, 1995).

The forcefulness of the demands for water by the Scheme varied according to the flow in the river. When water was low in the river during the 1994/95 season, the Scheme people were active in their bid to secure water. The Mission disagreed with this view since this would jeopardize their own farming operations. Besides, the Mission argued that it had senior water rights (see below). Faced with this 'intransigence', the Scheme water bailiff attempted to get water down-river by removing the stones at the Mission intake. Mission workers in such cases simply put the stones back. In the end the Scheme water bailiff resorted to removing the stones at night. The following morning workers from the

Mission would put back the stones. In more than one instance the Mission, exasperated by this hide and seek game, deployed its workers to patrol the intake during the night to make sure that their intake was not tampered with.

During these encounters the Mission relied on the legal argument of senior water rights. On its part the Scheme did not have a copy of the water rights. The knowledge that they had about water rights was enough for them to engage in serious wrangles with the Mission. The Mission approached the district administrator and the local police on more than one occasion but this strategy did not work. In all cases the District Administrator tried to arbitrate with no success, hence the endless problems. The Mission put the blame on the Scheme people "who are illiterate and who do not understand water rights".

Mandima Co-op versus Mutambara Mission

Ever since the Co-op farmers settled, the Mission tried to dissuade them from abstracting 'too much water'. The DA was again called to arbitrate. In an interview he commented that the Mission tended to be dogmatic about the law which did not help matters. The DWR was called in to arbitrate. It ruled in favour of the Mission on technicalities of the colonial law. This, however, did not solve the problem.

To secure their position, the Co-op farmers enlisted the help of Agritex to obtain water rights, a copy of which they received in 1988. Just like the Mission, Mandima Co-op farmers did not mind the fine print on the water right which stipulated that they were entitled to abstract 15 lps when the flow in the river is greater than 56 lps and also that the Mission had the priority over water because of its older water right. They seemed unable to understand why a population of 300 people, with a primary school of all grades, and dependent entirely on agriculture, should have less priority over a Mission station that gets external funds and also receives school fees from its student population. This case has not been resolved.

Mutambara Irrigation Scheme vs. Mutambara Mission, Mandima Co-op, Shinja Extension and Maraisi Co-op

In 1995 the Scheme was up in arms against all the upstream users who were "denying" it water. From time to time the water bailiff went up and talked to the users with no success. He opened up the stone barriers but that did not help. The upstream users would put back the barriers as soon as he turned his back.

Shinja Extension and Maraisi used the legitimacy argument. Why would they not irrigate when they were occupying lands which used to be irrigated? The other reason was one of livelihood; they needed to survive. In fact Shinja took more water equal if not more than every other user despite the fact that they only irrigated 35 hectares.

Mandima versus Shinja Extension

The basic problem between these two was one of ideology. Mandima Co-op farmers asserted that they did not want to live like those in Shinja Extension who

were bothered by all the tradition that goes on with living in the "murusevha." [13] On the other hand, the Shinja farmers blamed the Mandima farmers of disrespect for tradition by refusing to contribute towards rainmaking ceremonies. This was a cause of poor rains, they asserted. On their part, although refusing to acknowledge the authority of the nearby Chief Mutambara, Mandima Co-op farmers contributed towards the rainmaking ceremonies under the auspices of the Chief. There was ill-feeling between the two to the extent that there was a fist fight on one occasion.

Conclusion: Some Policy Issues

It can be observed that dilemmas in conflict management are a result of natural, social and legal factors. Below is a summary of the main points contained in the paper.

Principle of Water Allocation

Due to the inadequacies in the existing legislation there was a new water allocation 'principle' at play in the Umvumvumvu catchment: the bulk of the water was actually used by 'illegal' users. The inadequacies of legislation related to the priority right system which could not be enforced because it clashed with what was considered fair, just and equitable by the users. The satisfaction of basic needs seemed paramount to the users as evidenced by the fact that Mutambara Mission was given a lower priority since it was deemed to have other sources of obtaining food for the school children. Moreover, the legal requirement that demanded latecomers to give priority to early comers was impractical. At any rate, that cut off point was difficult to determine and was not locally enforced by the DWR. Clearly the legalities around definition of property rights reflected in the concept of water rights, formulated in another political era, failed to be applicable to a new socio-political reality. For example, how could it be possible to deny Shinja farmers the right to abstract water for their needs just because the original owner did not secure water rights? It seems obvious that a new allocation principle is necessary.

The Issue of Basic Needs

Cross-cutting all the disputes in the Umvumvumvu catchment was the issue of irrigators' concern to secure their livelihoods. The practical implication is that unless the water legislation is seen to address the basic needs of the people concerned it is likely to run into problems. It appeared that the concept of *beneficial use* of water ran contrary to the aspirations of many smallholder farmers.

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[13] "Reserves", a term that refers to areas which were reserved for black people during colonial times, now referred to as communal areas. The term has persisted with the connotation of impoverishment.

The Importance of the Hydrologic Reality

The importance of the hydrologic reality and the existence of conflict need to be appreciated as attested by the fact that when the water was plenty there were no conflicts. An obvious conclusion is that conflict management arrangements conceived in water abundant years may succeed, not on their own merits but on 'hydrologic luck'. In drought years the arrangements crumble as in the 1994/95 season when there was a test posed on the conflict management arrangements. Water scarcity is thus the right circumstance to evaluate any conflict management arrangements.

Effective Institutions for Effective Conflict Management

The present structures for conflict management are too centralized. Moreover the Act espouses culturally unacceptable solutions such as the first-come-first-served and the first-in-last-out concepts. Many people respected the riparian principle. The definition of property represented by absolute volumes read by sophisticated gadgets meant that this was hardly angled towards local resource management. Decentralization of water allocation and conflict management (this is actually not mentioned in any detail in the proposed reforms) may be a better alternative. However, as was shown here, decentralization discour needs to engage with the specifics of conflict management. Oft decentralization is presented as a panacea. This case has highlighted some the pitfalls that decentralization has to avoid. For example, how would o choose representatives to this sub-catchment? If this is based on t representatives per sub-catchment as suggested by Taylor et al. (1996), it obvious that other interested parties would be excluded. In other words, the cannot be an a priori decision on the composition of the catchments. This shou be a subject of research. On the same point its also worthwhile to think of h democratic these decentralised bodies can be. If they are constituted on t basis of alien/unfamiliar (to small-holder farmers) concepts of water allocati using technical or non-vernacular languages then small-holder farmers c easily be side-lined.

The Need for Simple Ways of Conflict Management

Another relevant point that needs to be mentioned is the issue of procedures conflict management. Matinenga (1995) reported that the current legislation w costly for the small-holders to use in seeking redress. This point is relevant t the proposed reforms. If costs are prohibitive then justice would have be denied. That is the reason why there is a need to look at alternative forms conflict management which are simple, less cumbersome and inexpensive (s Syme and Fenton, 1993).