

# Water for Agriculture in Zimbabwe

Policy and Management Options for the  
Smallholder Sector



*Edited by*  
Emmanuel Manzungu, Aidan Senzanje and Pieter van der Za

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**September 1998**

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**CHAPTER 14****A New Water Act for Zimbabwe?**

E. T. MATINENGA

**INTRODUCTION**

In the 1970s, oil became a powerful political weapon. International friendships were created and cemented because of oil. Enemies were made and nations went to war because of oil. Is water, in the next decade or so, going to assume the same proportions as oil? Warnings about global climatic changes make the prospect of wide-scale international conflict not only possible but probable. Conflicts over water, however, do not only loom large at the international scale. Within the boundaries of nation states, conflict over water, due to the presence of many users, existing and potential (e.g. small and large scale farmers, primary water users, industrialists, miners) cannot be ignored. Another important dimension is history. Due to historical reasons, like colonialism, some individuals and groups have better access to water than others in many parts of the world.

In such cases redressing past injustices becomes an important item on the agenda. Zimbabwe falls under this category. Because of colonialism, most of the country's water resources for agricultural purposes are accessible to a White minority population. At independence Zimbabwe adopted the concept of reconciliation, which has done the nation proud. Does this reconciliation hold when emotive issues like land and water allocation and re-allocation are concerned? As regards water law, does the Zimbabwean Water Act (1976), cater for the aspirations and fears of new and established consumers alike? Should we smugly sit back in the belief that we have one of the best pieces of water law or should we at the other extreme throw the existing legislation out of the window as something unsuitable? Government has expressed interest in reforming the water law, a process which involves a number of important issues. The question is how might such a redress be structured? The purpose of this chapter is to try and contribute to the ongoing debate about water reform. Before presenting some suggestions I shall briefly examine the principles of the current water legislation.

**BASIC PRINCIPLES OF THE WATER LAW (WATER ACT, 1976)**

In the Western world there are two main systems of law — the English and the Roman Dutch systems. Though Zimbabwe was colonized by the English, its

legal system falls under the Roman Dutch system because of the South African influence.

According to the Roman Dutch law, water is a public resource. The water legislation (the Water Act, 1976) in Zimbabwe broadly affirms this common law position. Under this system private water is vested in the owner of the land on which it is found and its sole and exclusive use belongs to such an owner. All water, that is not private water, is vested in the President and shall not be abstracted, apportioned, controlled, diverted or used than in accordance with the provisions of this Act.<sup>1</sup> The basic principle that water is a public resource is a sound one and needs no change. However, not all water is treated as a public resource. The law recognises private and underground water as distinct entities from public water. This shall be expanded later on.

The English law is based on what is known as the riparian principle. An owner of land riparian to a stream has the right to use water passing through his land. The right to use of water in Zimbabwe depends on the type of water one is talking about. Private water is solely and exclusively owned by the owner for the land on which it is found. As regards underground water, an overlying land owner 'may for any purpose abstract and use underground water from any point on the piece of land'.<sup>2</sup> The above position restates the English common law doctrine of absolute ownership of underground water by an overlying owner.<sup>3</sup>

In Zimbabwe such use is based on prior appropriation doctrine. An appropriative right is the opposite of riparian right. It does not depend on ownership of riparian land but on the application of appropriated public water to a beneficial use. The grant of a right to use of the public water is an exclusive function of the Administrative Court. The right is dependent upon the date on which an appropriation is made. This appropriation is effected by filling an application form with the Registrar of the Administrative Court either to store public water or to abstract public water from a public river or stream for a stated purpose. The date of the filling of the application determines the applicant's priority to the use of the water applied for. A right to the use of public water, when granted, is a real right which is registered against the title of the property to which it relates. The right is in perpetuity.

The broad effect is that the person who makes the first application has got the first call on the water of the relevant public stream or river. Any subsequent applicants must respect right holders with earlier, and therefore, senior priority dates. Since water is finite, there comes a time when a particular public stream or river becomes fully committed. Any person who aspires to enter the system when all the public water has been committed discovers to his utter dismay that he cannot get any water even if his land is riparian to a public stream or river. The effect of granting rights in perpetuity with the attendant possibility



of shutting out new entrants has irked the indigenous (Black) population. Is the present Act so fundamentally flawed that a new Act is needed?

## POSSIBILITIES FOR REFORM

### Water allocation mechanisms

Previous colonial governments, as a matter of policy, administered the Act for the benefit of the White minority settlers. Unfortunately, and with the due respect to the present government, there has been no bold shift in policy resulting in the administration of the Act for the benefit for all the Zimbabwean populace.

The premise in this chapter is that the administration of the Act must be for the benefit of all Zimbabweans. Any exercise in water re-allocation must be in the best economic interests of Zimbabwe. The social factor must obviously come into play. However, it is naive for anybody to think that everybody is going to have equal access to water. The simple reason for this is that there is just not enough water for everybody. It is also naive for anybody to think that the status quo *vis-a-vis* water access should remain. Past imbalances must be addressed but wholesale expropriation of water from the White minority to the Black majority is unnecessary extremism. Any water re-allocation exercise must weigh, and put in balance all legitimate competing interests. The task is not easy.

The allocation of water in practice is according to set guidelines. In its allocating role, the Administrative Court broadly asks two basic questions before granting a right. These are:

- a) is public water available; and
- b) is the public water going to be put to beneficial use?

Both questions have to be in the affirmative before a water right is granted. There are however, other conditions that have to be fulfilled. In response to an application lodged in terms of subsection (1) or (2), the Administrative Court, subject to the provisions of this Act

- a) may accede to such an application and grant a right to the use of public water subject to such conditions as it thinks fit to impose, or may refuse such an application and
- b) if it accedes to such an application

shall, if the public water to which such application relates is being beneficially used by any other person by virtue of a right granted in terms of this Act or any other enactment, grant the use of such public water to the applicant on condition that the applicant pays to the person beneficially using such public water such compensation as may be agreed by the applicant and such person or, failing agreement, as may be fixed by the Administrative Court.<sup>1</sup>

The above provision provides for water re-allocation and shows that committed water is not sacred. A new entrant can apply to use already committed water which is being used. In my experiences as President of the

Administrative Court, I did not have any occasion to deal with an application contemplated by the above provision. The possibility of the indigenous population using this provision to get water is unlikely because:

- a) Very few indigenous persons have the requisite finance to pay compensation to a right holder who is already beneficially using that water;
- b) the right holder beneficially using the contested public water will not relinquish his right to the use of such water without a fight. Litigation can be expensive. Not many people can afford the finance to embark on litigation which can be protracted and costly; and
- c) The Act is a complicated and unwieldy piece of legislation. Moreover, the majority of people are not aware that such a provision exists for their benefit.

It is suggested that the provision remains as part of the Act. Those persons able to utilise the provision should be free to do so. Minor amendments can be made, as will be more fully canvassed later, to give the water allocating role to agencies other than the Administrative Court. It is submitted that the Act must be amended to enable the Minister, in the public interest, to recommend that public water be re-allocated, be it to a riparian or non-riparian owner. In terms of present legislation, the Minister can only exercise the public interest doctrine, it would appear, to a non-riparian owner.

The rationale in the present legislation is that it is the riparian owners who must be given first priority to the water in rivers contiguous to their land. The situation on the ground in Zimbabwe is that the indigenous population though riparian, does not have access to public water because of over-commitment. The public interest doctrine must therefore be invoked in their favour to re-allocate public water. This, however, should be on sound and acceptable grounds.

#### **Who should allocate water?**

The Administrative Court has the exclusive right to allocate rights to the use of public water in Zimbabwe. It is submitted that the Administrative Court should not allocate water in the first instance. This task must be delegated to catchment authorities. The Administrative Court then becomes a court in which the decisions of catchment authorities are challenged. It makes sense that catchment authorities, in addition to their other duties, take the responsibility to allocate water. The catchment authority, having compiled a water resource plan for its area, is aware of its local needs. The people within the jurisdiction of the catchment authority will identify more with a decision made by their peers as compared to a decision made far away in the capital city, for example.

#### **Which water should be allocated?**

Water law in Zimbabwe recognises three types of water viz. public water, private water and underground water. The recognition of three types of water is

anachronistic and artificial. All water is part of the same hydrological cycle. There should be no scope for private water. Any reference to private water is unhelpful. For practical reasons only surface and underground water should be recognized. The recognition of surface and underground water should purely be for identification purposes. Both surface and underground water should fall under public ownership. The rules relating to the allocation of both surface and underground water should therefore be the same.

### **Duration of a water right**

As earlier said, a water right under the present legislation is granted in perpetuity. A better option is a permit system whereby a water right holder is granted the use of water for a certain period of time after which it expires. Periodically, the allocating authority would re-assess the competing needs of the people within its area of jurisdiction before re-allocating water. It is not necessarily true that the permit system interferes with land tenure. If conducted in a transparent manner the permit system can result in improved efficiency and could be, at the same time, a strong re-allocating tool.

### **Who forms the catchment authority?**

The proposed catchment authorities will be successors to the present river boards. River boards have, in the main, operated most diligently but have unfortunately been sectional. Their composition, as an example, was such that most river boards were patronized by White farmers. Instead of this sectional representation, the catchment and sub-catchment authorities must incorporate every stakeholder. Furthermore representation should not be limited to water right holders. This is illustrated by the fact that while a consumer is not a right holder, the same consumer is affected by whatever decisions are taken concerning water resource allocation, planning and management.

### **Efficiency in water use as an allocative process**

The government has been criticised for not having a dam construction policy. While this criticism may be valid, dam construction should not be seen as an end in itself. Without efficient use of water, investments made in water resource development comes to nought. There must be greater efficiency in pollution control, water conservation (through the use of appropriate technologies), water use and investments in ensuring water quality. There must be suitable legislation to enforce the above.

One measure that can be used to enhance efficiency of water use is to treat water as a commodity which can be traded on the market. If water is treated as an economic commodity, efficiency results. If costing water is linked to the re-allocating exercise, efficiency can be realised. However, blanket and uniform

charges for all water users are not helpful. The economic and social implications must be studied and appreciated before such decisions in connection with the prices are made. Some possible alternatives are:

- a) Large water users are charged an abstraction fee per megalitre of water. The charge should be quantifiable through farm budget studies that should show what typical farms could pay and still remain profitable. The charge would raise additional revenue and motivate efficient water use;
- b) Allow large water users, subject to endorsement by catchment authorities, to trade water amongst themselves. This will further motivate efficiency and allow flexibility to move water around in response to economic and demographic changes. The water seller will be obliged to contribute a portion of the sale price to the catchment authority thereby boosting the finances of such an authority;
- c) Allocate water to smallholders using the Mexican scheme. i.e. a fixed abstraction rate which incorporates a fixed allowance based on efficient water use. After the free allowance has been used, the smallholder pays an abstraction fee high enough to motivate efficient use of the free water.<sup>5</sup>

### CONCLUDING REMARKS

In this chapter I have argued that the water legislation in Zimbabwe needs to be amended in a number of directions. Basically the Water Act is a good piece of legislation. Like any other piece of legislation, it needs to be visited at intervals and fine tuned so that it is responsive to the needs of various groups of people. Any amendments must, as far as is possible, seek to achieve an equitable distribution of water and sound management against the background of sound economic growth which benefits the whole country. One of the important tasks is to make the legislation simple because at present it is a complicated and an unwieldy piece of legislation. There also must be in place appropriate management structures with appropriate sanctions for offenders. The penalties provided for infringing the present Act are derisory. In fact it pays to contravene the law.

### NOTES

1. Section 43 of the Water Act, 41/76, the Act.
2. Section 43 of the Act.
3. Langbrook Properties Ltd vs Surrey Country Council [1969] 3 ALL ER 1424.
4. Section 47 (4) of the Act.
5. Courtsey of discussion between the writer and Professor Charles W. Howe, Professor of Economics, Director of the Institute of Behavioral Science, University of Colorado at Boulder.



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