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## **A LOST OPPORTUNITY: THE CASE OF THE WATER REFORM DEBATE IN THE FOURTH PARLIAMENT OF ZIMBABWE<sup>1</sup>**

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### **Abstract**

*This article analyses the debate on water reform that took place in the fourth Parliament of Zimbabwe leading up to the enactment of the Water Act [Chapter 20: 24] and the Zimbabwe National Water Authority (ZINWA) Act [Chapter 20: 25]. It assesses how Members of Parliament tried to ensure the utilisation and management of the country's water resources for the benefit of their constituencies, most of them disadvantaged smallholder farmers, and the nation in general. Using Moore (1989)'s critique of the neo-liberal doctrine in water management, that emphasizes "the market" and technical efficiency, as water use-regulating mechanisms, it is argued that the debate failed to push for a more people-oriented water reform. This is illustrated in the article with regards to the goal of the reform torn between economic-technical and social objectives, lack of strong local institutions to further the democratic ideals and poor financing of water resource development. Overall the debate failed to place on the national agenda sustainable water development. Perhaps at a later date the lost opportunity can be regained by way of amending the concerned Acts of parliament.*

### **INTRODUCTION**

Close to 20 years after achieving national independence in 1980, the Government of Zimbabwe passed two laws meant to guide water reform in the country. These were the Water Act [Chapter 20: 24] and the Zimbabwe National Water Authority (ZINWA) Act [Chapter 20: 25], both promulgated during the fourth Parliament of Zimbabwe. The aim of the Water Act was to provide for the development and utilisation of Zimbabwe's water resources (Zimbabwe, 1998a). The ZINWA Act was meant to establish a national water authority by the same name and to provide for its functions (Zimbabwe, 1998b). This article analyses the debate leading up to the enactment of the two laws. It seeks to assess how Members of Parliament (MPs), as "representatives of the people",

1 I would like to thank Dr P. van der Zaag of the Department of Civil Engineering and Dr F. Maphosa of the Department of Sociology at the University of Zimbabwe and two other anonymous reviewers for making useful comments on the article.

tried to ensure the utilisation and management of the country's water resources for the benefit of their constituencies, most of them disadvantaged smallholder farmers, and the nation in general. The fourth parliament of Zimbabwe was made up of 120 elected constituency Members of Parliament, 10 traditional leaders and 20 non-constituency MPs appointed by the state president in accordance with the country's constitution. All but three of them were members of the ruling party, the Zimbabwe African National Union, Patriotic Front (ZANU PF).

The article explores the extent to which the debate ensured that the legal impediments, originating from the colonial era, militating against access to water and participation in its management by rural communities who constitute 70% of the country's population, were removed. As expounded in the next section, this was the driving force behind the reform. The article uses Moore (1989)'s critique of the neo-liberal doctrine<sup>2</sup> in water management to highlight some pertinent issues. In the main the doctrine emphasizes the supremacy of "the market" as a mechanism of regulating water use. The market logic says that water should be treated as an economic good (WRMS, 1998, cf; Cosgrove and Rijsberman, 2000), and must therefore be allocated according to its scarcity value (Muir, 1999). Technical efficiency is another cornerstone of the doctrine. It advocates for the application of utilitarian standards in the usage of water. The preoccupation is to move towards higher water use efficiencies, captured by the maxim 'crop per drop' calling for maximum crop harvest to be obtained from every drop of water (IWMI, 2000).

As observed by Moore (1989), the neo-liberal doctrine contains some positive aspects, which he called the fruits of neo-liberalism. However, the practical application of the "fruits" in the water sector tends to be limited due to water's physical characteristics. Moore suggests that failure to appreciate the hydraulic properties of water *vis-à-vis* their relevance to market principles, has resulted in fallacies of neo-liberalism being bandied around. For example, a culture of using water efficiently is said to be best inculcated by implementing water prices that are either unsubsidized or partially subsidized. Moore, however, suggests that water prices should be seen as decision-making signaling devices rather than as economic resource allocation mechanisms. In this context, water prices are a

2 According to Moore (1989) the neo-liberal doctrine dates back to 19th century neo-classical economics. This emphasizes (a) the superiority of competition over monopoly, (b) private over public economy, (c) market-determined over administered prices, (c) choice and freedom over regulation, (d) decentralised decision making over hierarchy, (e) integration into markets over autarky, and (f) individual personal responsibility over paternalism. Moore also observes that in the last decade or so, rent seeking analysis has also emerged. This postulates that public involvement in the economy is motivated by the search for illegitimate rents on the part of individual actors – citizens, politicians, public officials, enterprises and corporations.

component within the nexus of political and institutional controls in water management. He concludes that most of the "fruits" of the neo-liberal doctrine can only be achieved by using political mechanisms as implicit market surrogates, as incentives for promoting a different way of using water. This of course is an interesting paradox in that the practical viability of market principles are seen as dependent on local, non-market patterns of social interdependence and hierarchy, normally regarded as the antithesis of the market.

Despite Moore's caution, neo-liberalism in the water sector seems to be gathering momentum worldwide. The World Water Vision, for example, stresses privatisation of water and curiously shies from pronouncing water a basic human right (Cosgrove and Rijsberman, 2000, 1). As this article will show, Zimbabwe seems to have bought into the doctrine, perhaps because international donors bankrolled the reform process.<sup>3</sup> However, the flirtation with the doctrine was half-hearted out of the realisation that a puritan application of the doctrine could jeopardize the social objectives of the reform. This is illustrated by the fact that, despite claims of water being an economic good, there is retention in the legislation of a strong regulatory role by the state, leaving little room for market principles to be applied. There was also no commitment to putting in place strong local political and institutional arrangements to complement the positive aspects of the neo-liberal approach, as signaling devices in resource use and allocation. To illustrate the argument being made, the article examines how the debate ensured a) access to water by the disadvantaged communities, b) financing national water resource development and c) participatory democracy in water management.

## RATIONALE, OBJECTIVES AND PRINCIPLES OF THE WATER REFORM

The rationale, objectives and principles of Zimbabwe's water reform need to be placed within the context of what triggered the reform. This, of necessity, means looking into the country's history, a task that is undertaken below.

### Rationale and background

The emergence of the 'water question' in Zimbabwe some 20 years after independence, in the form of the two laws cited above, can be characterised as a case of 'water blindness' on the part of the post-colonial state. Cleaver (1995) argues that the dominance of land as the

3 Practically all aspects towards the enactment of the new water laws, such as fact finding, including the financing of two pilot case studies, to drafting of the laws were donor-financed.

defining issue in Zimbabwean agrarian politics to the neglect of water is misguided. Zimbabwe has a semi-arid climate. As such, the agrarian debate is incomplete without taking water into account since its availability is an important factor in land utilisation. The importance of water, was however, not lost to the colonial administration.

A National Archives of Zimbabwe (NAZ) document entitled *Southern Rhodesia* says that "irrigation laws were passed by the Legislative Council in 1913 and modified in 1920, 1922 and 1927".<sup>4</sup> The underlying idea was that settlers could allocate themselves as much water as they wanted: "being a new country, Southern Rhodesia [now Zimbabwe] was unhampered by the pernicious common law relating to riparian ownership."<sup>5</sup>

The Water Act of 1927 constituted the basis of the country's water law for some 70 years until its repeal in 1998/9. Water rights were based on land ownership, the principle of the priority date system, and water rights being issued in perpetuity. The linkage between water rights and land ownership meant that only holders of title deeds could apply for water rights. Indigenous Black people in the rural areas, who had lost their land rights because of colonial dispossession, could only apply for water through government officials. Even then the District Administrator or Minister of Water Development held the water right on their behalf, more as a charity case than anything else (Manzungu and Senzanje, 1996). The priority date system implied that applications with earlier claims to water had priority over latecomers. That is to say water rights were issued on a 'first come, first served' basis which disadvantaged Black indigenous people who had not applied for water rights as they did not operate according to this colonial logic (Bolding, Manzungu and van der Zaag, 1996). The granting of water rights in perpetuity meant that once issued water rights were not revoked unless in special circumstances. This could be during the declaration of a drought or if someone applied to have access to the same water in which case they were required to pay compensation.

While the legal foundation of racial water allocation was laid in 1927, massive transfers of water into White hands only occurred in the 1940s, thanks to the introduction of subsidized finance for irrigation development (including dam construction and in field works). Magadzire (1995) says that:

4 National Archives of Zimbabwe (NAZ) file SP160, Southern Rhodesia.

5 *Ibid.*

The establishment of irrigation in the [White] commercial sector arose from a conscious decision on the part of government to allocate funds for dam construction and irrigation development. Funds were allocated to the Department of Water Development for dam construction while affordable money was made available to farmers for in-field irrigation development (Magadzire, 1995 cf; Bolding, Manzungu and van der Zaag, 1999, 238).

As a consequence, White agriculture flourished at the expense of Black agriculture. Today most of the irrigation on White-owned farms depends largely on water stored in 12 000 dams nation-wide, 60% of which were developed through private funding.<sup>6</sup> The same situation continued even after independence. A low interest fund meant to support irrigation, the National Farm Irrigation Fund, was practically used up by White farmers who accounted for 98% of the loaned-out funds (Manzungu and Senzanje, 1996). This contributed to the development of syndicate dams, built out of pooled financial resources, where water is shared according to the amount of money contributed.

The rationale for the water reform can thus be found in the country's colonial history. Currently 85% of all agricultural water, which accounts for two-thirds of the total developed surface water resources in the country, is used by 4 500 White large-scale commercial farmers.<sup>7</sup> The smallholder farming sector, a rather infamous enclave of Black indigenous people comprised of over 1 million communal area households, 56 000 units in resettlement areas and 8 500 small scale commercial units, uses the balance (Manzungu, 1999). This sector has had no say in the way the country's water resources were used and managed, as participation was restricted to water right holders.

The sector, as already said, sustains 70% of Zimbabwe's estimated 12 million people who depend on agriculture as the main source of livelihood. However, many smallholder farmers cultivate low quality land, most of it infertile and dry. This explains why, with the exception of maize and cotton, most of the agricultural output in Zimbabwe is from the large-scale commercial sector (Herbst, 1990). The Black-owned<sup>8</sup> smallholder sector accounts for a third. This situation obtains because large-scale farmers own not only the best agricultural land, but also a disproportionately larger portion. According to a Government of Zimbabwe document (GOZ, n.d.), out of 33 million hectares designated as

6 Strictly speaking this is not true as the dams were built using subsidized public funds.

7 This figure may well change in the near future if government's fast track resettlement programme designed to take 5 million hectares of land from the White commercial sector in as short a time as possible succeeds.

8 Technically speaking this is not entirely correct as farmers have user's rights in communal and resettlement areas.

agricultural land in the country, 11 million are in the large-scale sector of which 35% is in the prime natural regions I and II. About 1 000 000 communal households farm some 16 million hectares of which 74% are in the agriculturally poor and ecologically fragile regions of IV and V. The small-scale commercial sector, with 10 000 families, occupies 1 million hectares in natural region III. Some three million hectares of resettlement land in regions III, IV and V are farmed by close to 56 000 families. Land size also limits agricultural productivity, particularly in the congested communal areas where arable lands of less than three hectares are common (Moyo, 1995). This situation has been blamed for the grinding poverty in Zimbabwe's rural population where 75% of the households are classified as poor (GOZ, 1995, xix-xx).

Irrigation, which could go a long way in alleviating the aridity problem, does not hold much promise. Large-scale commercial farms account for 84% of the total irrigated area, parastatal schemes for 9%, and the smallholder farms for 7% (Manzungu and van der Zaag, 1996, 1-2). Expansion of the sub-sector, which entirely depends on government financial support, looks bleak. Smallholder irrigation grows by 400 hectares per year compared to a growth of 4 000 hectares in the large-scale commercial sector (IFAD, 1997). This cocktail of factors has given rise to widespread malnutrition particularly in the drier areas (Rukuni and Jayne, 1995). These statistics make the case for water reform self-evident.

### **Redressing the evils of the past**

The beginning of the water reform process can be characterised as a knee jerk reaction to the 1991/92 drought, the worst in the country's history (Makarau, 1999). The first step towards reviewing the 1976 Water Act was the setting up of an inter-ministerial review committee headed by the Ministry of Lands, Agriculture and Water Development in mid-1993. The committee also included representatives from the Department of Agricultural, Technical and Extension Services popularly known as Agritex, Regional Water Authority, Department of Water Development, Ministry of Local Government, Rural and Urban Development, Zimbabwe Farmers Union, Commercial Farmers Union, Administrative/Water Court Judge and a co-opted member (a retired judge of the Water Court).

Advertisements were placed in the print media inviting written submissions from interested parties (Mlambo, 1994). The committee visited all the eight provinces to gather oral evidence from river boards and other interested water users (Mlambo, 1994). A workshop was held on 30 September 1993 in Harare, the capital city, to further discuss the issues. The committee submitted its recommendations to the Minister during that same year. One of the recommendations was that a new Water Act be put in place and should be simple, short, precise, easily

manageable and understood by ordinary people. In the short term, smallholder farmers were allocated 10% of all water in government dams (Mlambo, 1994).

### **Objectives and principles of the reform**

One result of the review outlined above was the establishment of the donor-financed Water Resources Management Strategy (WRMS), housed in the ministry responsible for water development, to spearhead the reform. Organizationally the WRMS was composed of a steering committee, to give direction to the reform, and a technical secretariat to develop the strategy. According to WRMS, the Government of Zimbabwe, through the water reform programme, intended to:

- a. ensure fair access to water by all Zimbabweans,
- b. improve the management of water resources,
- c. increase protection of the environment, and
- d. improve the administration of the Water Act (WRMS, 1998).

A number of principles to guide the reforms were identified, namely:

1. The state would own all surface and underground water. Except for primary purposes (mainly for domestic uses such as drinking, cooking and washing) any use of water would need approval by the state.
2. All people with an interest in the use of water would be involved in making decisions about its use and management.
3. Water would be managed by catchment areas<sup>9</sup> as rivers do not match political or administrative boundaries.
4. Use and development of water resources would be carried out in a way that protects and sustains the environment.
5. Water would be made available to all Zimbabweans regardless of race.
6. People who use water would pay as well as those polluting the water.
7. Water, in all its different uses, as an important part of Zimbabwe's economy, would be recognized as an economic good. This was the best way of achieving efficient and fair use, and of encouraging conservation and protection of water resources. The national water authority, ZINWA, would operate as a commercial enterprise. However, Government would ensure that the poor and disadvantaged would continue to have fair access to water.

To achieve these objectives a number of changes to the 1976 Water Act were envisaged.

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<sup>9</sup> A catchment (area) refers to the area which naturally drains into a dam, lake, reservoir, river or watercourse and from which the dam, lake or reservoir or watercourse receives surface or underground flow which originates from rainfall (Zimbabwe, 1996).

**Major changes to the 1976 Water Act***Water rights would no longer be issued in perpetuity*

Instead of a water right, a water permit would be issued to indicate that a person has a legal licence to use but does not own the water. Permits would be issued for a limited time sufficient to earn back money invested to develop facilities. Water rights that people hold under the old Act would be changed to water permits within five years from the appointed date.

*The priority system abolished*

The priority date system would be abolished as it was unfair.

*No private ownership of water*

Since water belongs to the hydrological cycle and belonged to the whole nation, the theory of private water would be abolished.

*Water shortages better managed*

The procedure to declaring a water shortage during droughts would be reduced in order to enable speedy reallocation of water.

*More efficient management by catchment area*

Water would be managed by catchment areas. Catchment and sub-catchment councils would be set up for all river systems and aquifers, and would be based on sub-hydrological zones. They would include representatives from communal, small-scale commercial and large farms and mines, as well as urban representatives from industry, manufacturing and municipalities. These would replace the River Boards (which used to supervise day-to-day management) and the Advisory Councils (which used to assist in water planning) and would have the responsibility of granting water permits, a function previously carried out by the Administrative Court.

*More representative assessors at the Administrative Court*

All people with an interest in water would be involved in making decisions related to its management as part of the panel of assessors at the Administrative Court. Assessors would include communal, small-scale and large-scale commercial farmers, members of Agritex and water engineers.

*More effective prohibition orders*

Under the old Water Act, a person committing an offence and ordered to stop could appeal and continue to offend until the appeal was heard in the Administrative Court. Under the new Water Act, when a user is

ordered to stop an offence he or she must stop immediately, even if the matter is to be heard in court.

*Increased penalties for offences*

Penalties would become stiffer and more prohibitive. Fines would be appropriate to the value of the prejudice caused.

*The polluter pays*

Under the old Act, people who caused pollution could apply for exemptions at no cost. Under the new Water Act, people who cause pollution of water will pay for expenses for removing the pollution.

*The environment as a water user*

The environment would be considered as a legitimate 'user' of water competing with other users such as industrial, agricultural, mining and domestic users.

The next two sections of the article go into detail about the conduct of the debate in the fourth parliament of Zimbabwe. According to parliamentary procedures, a Bill is read three times before it is passed. The first reading introduces the Bill to the House. At the second reading it is debated. The third and final reading serves to inform the House of what the new Bill, with corrections and amendments, looks like. After the first reading and before the second, the Parliamentary Legal Committee, charged with the responsibility of making sure that the Bills presented to Parliament are not in breach of the constitution of the country, examines it. According to the rules, if a Bill does not comply with the constitution, an adverse report to signal that corrective measures should be taken is issued.

## THE WATER BILL DEBATE

The first reading of the Bill was on 30 July 1998 by the Deputy Minister of Rural Resources and Water.<sup>10</sup> On 26 November 1998 the Minister requested to make introductory comments (paraphrased below) on the Bill to the House despite the adverse report that had been issued by the Parliamentary Legal Committee.<sup>11</sup> In her introduction the Minister touched on the salient points of the Bill.<sup>12</sup>

<sup>10</sup> *Zimbabwe Parliamentary Debates*, Vol. 25, No. 4 (Harare, Thursday 30 July 1998), 68.

<sup>11</sup> *Zimbabwe Parliamentary Debates*, Vol. 25, No. 37 (Harare, Thursday 26 November 1998), 2561.

<sup>12</sup> *Ibid.*, 2561-2576.

**Minister's introductory remarks**

The Minister noted that Zimbabwe had very limited water resources, which had been extensively utilized in some parts of the country. Water resources needed to be used judiciously for the socio-economic good of the country to cater for the welfare of the Zimbabwean population in general, improvement of agriculture, expansion of urban areas, exploitation of mineral wealth and the future development of the economy. These would continue to put increasing demands upon this finite resource.

Eighty percent of the water was used for agricultural purposes, 20% for primary purposes, urban, industrial and mining development. Access to water was currently skewed according to racial lines, a fact not unrelated to land and economic ownership.<sup>13</sup> The bulk of the (White-owned) large-scale commercial farms constituted land with the best "marriage" between land and water and used 85 per cent of agricultural water. On the other hand are vast tracts of communal (and resettlement) lands, which could be highly productive if water was provided. The emphasis had been placed on providing clean water for drinking and other domestic uses. This situation needed to be redressed as 70 per cent of the country's population lived in areas where only 5 per cent of the water resources were developed. It was "important to ensure that the legal framework governing access to and management of the use of water resources was supportive not only of the imperatives of equity and restitution, but also development needs of the nation".<sup>14</sup>

The first consolidated piece of legislation governing water was passed in 1927 and was improved upon and amended in 1964. It was repealed and replaced by the 1976 Water Act which stipulated that use of public water required specific authority except for riparian users *vis-à-vis* domestic and stock watering purposes. The 1976 Water Act, which the Water Bill sought to repeal, espoused the "appropriation" doctrine where water rights were allocated on "a first come, first served" basis and in perpetuity, which in conjunction with other factors, had unfairly disadvantaged the majority of the Zimbabwean population. For example, numerous cases had been cited in communal areas where people lived within sight of a dam and yet had no access to that water as it had already been spoken for.

To redress this situation the government had set up an inter-ministerial committee, comprising people from the private sector (farmers and industrialists) to review the Act, consult with the public and make

13 This was in reference to the fact that the Water Act of 1976 stipulated that water rights were attached to land.

14 *Zimbabwe Parliamentary Debates*, Vol. 25, No. 37 (Harare, Thursday 26 November 1998), 2564.

recommendations on the necessary changes. The recommendations were presented to the Ministry of Lands, Agriculture and Water Development in 1994. These were subsequently translated into principles that were presented to the Cabinet Committee on Legislation and were approved on 4 January 1996. The principles called for a break with the past that could no longer be justified from an economical, technical, social and moral point of view.

The Bill was governed by seven principles. These are not given here as they were virtually the same as those pertaining to the overall reform as outlined by WRMS (see above).

### **A constitutional minefield**

The Parliamentary Legal Committee produced an adverse report on the Water Bill H.B5, 1998 in terms of section 40B (10) of the Constitution of Zimbabwe. The Committee was unanimous that clauses 3, 4, 118 and 124 were in contravention of the Bill of Rights. Box 1 gives the contents of the adverse report. On 3 November 1998 the House debated the adverse report.

#### **Box 1: Objections to the Water Bill by the Parliamentary Legal Committee**

- 1.1 Clauses 3 and 4 as read with clause 124 (1) of the Bill will have the effect of abolishing ownership of water and vesting it in the President.
- 1.2 Section 32 of the Water Act [Chapter 20: 22] and the common law of Zimbabwe recognize the concept of private ownership of water and indeed some citizens of Zimbabwe own water found on their pieces of land. Section 36 of the Water Act (supra) proceeds to provide that compensation ought to be paid for use of water either privately owned or whose use is enjoyed under a water right, by any other person.
- 1.3 Clauses 3,4 and 124 amounted to compulsory acquisition of water without compensation and were in contravention of section 16 (10) of the Constitution of Zimbabwe.
2. Clause 118 of the Bill placed the onus of proving his innocence upon any person accused of contravening any of the provisions of the Bill. The clause was in contravention of Section 183 (a) of the Constitution, which provides that every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty.

*Source:* Report of the Parliamentary Legal Committee

The Attorney General, on behalf of the government, argued that water was a public good, vested in the president of the republic and "the

president as is his right is now seeking to redistribute that water".<sup>15</sup> He summed his argument by saying that "it is an extinction not an acquisition of the right of the public water."<sup>16</sup> With regard to the second point he argued that the Parliamentary Committee had erred with interpretation of Section 118 because the onus was upon the state to prove that abstraction of water had taken place. This was different from placing onus on the accused to prove that he did so under a lawful excuse.

The Attorney General did not seem to have convinced anyone, at least those who made a contribution, namely the MPs for Makoni North, Mutare Central (ruling party Chief Whip) and Pumula-Magwegwe. The MPs suggested that the Legal Committee and the Attorney General meet and discuss the issue further. This is eventually what happened.

In the end the Attorney General capitulated on both points. The point around expropriation of water rights was solved thus:

(a) Any right to use water in terms of the repealed Act or any other previous Act and subsisting immediately before the fixed date shall, or after the fixed date, continue in existence until amended or revised in terms of this Act shall be deemed to have been granted in terms of a permit issued under this Act.<sup>17</sup>

The concept of private water was retained this way:

Notwithstanding any other provision of this Act, this Act shall not affect any right to private water, as defined in section 2 of the repealed Act, which existed immediately before the fixed date.<sup>18</sup>

### **Beyond the constitutional cobwebs**

Once the constitutional hurdles had been cleared, the debate went into more specific issues. A non-constituency member, Mrs Makarau, was concerned that the Bill:

- a. did not address the issue of siltation.
- b. had removed issuing of water rights (now permits) from a competent Court, the Administrative Court, to Catchment Councils who were subject to political manipulation, the result of which would be large allocations of water permits to Ministers.
- c. had no stipulations concerning the composition of Catchment Councils which was worrying since these would be contained in secondary legislation not debated in the house.

15 Zimbabwe Parliamentary Debates, Vol. 25, No. 26 (Harare, Thursday 3 November 1998), 1566.

16 *Ibid.*, 1569.

17 Zimbabwe Parliamentary Debates, Vol. 25, No. 43 (Harare, Wednesday 16 December 1998), 3251.

18 *Ibid.*

d. had no provision to finance water development in communal areas.

The Attorney General pointed out that siltation was covered under a different legislation administered by the Ministry of Environment, which stipulated the minimum distance from the stream where cultivation could be undertaken. The problem was that of poor enforcement. On the second question he said that the setting up of catchment councils would in fact ensure that there was equal access to water. Local people, who did not have access to the Water Court that was located in Harare, would now be involved in water allocation. On the composition of catchment councils he said that the questioner had answered herself.

Concerning water development for communal people the Attorney General argued that the Bill was not about providing water to the people; it was meant to set up a framework of governing water use. Making water available to people was something separate which Government had an obligation to do.<sup>19</sup> This would be done through the Ministry of Rural Resources and Water Development, for example by way of dam construction. He referred to the Tokwe Mukosi dam whose construction had just started and the Zambezi Water Project that had been adopted by the government.<sup>20</sup> He could also have referred to the existence of a Water Fund in part V of the ZINWA Act, section 39 which reads:

There is hereby established a fund, to be known as the Water Fund, the management and control of which shall, subject to this Act, be vested in the Minister as trustee of the Fund . . . the object of the Fund shall be the development generally of the water resources of Zimbabwe.

The third reading of the Bill was on 17 December 1998.

### THE ZINWA BILL DEBATE

The first reading of the ZINWA Bill was on 30 July 1998 by the Deputy Minister of Rural Resources and Water Development. The debate on the occasion of the second reading was on 29 September 1998. The Bill went into the committee stage on the same day.

The MP for Pumula-Magwegwe complained of the lack of focus of the Bill on water development relating to the building of dams, for example — it was unreasonable to assign a function of "administering water which is not there".<sup>21</sup> His other concern was whether the Authority would

19 *Zimbabwe Parliamentary Debates*, Vol. 25, No. 41. (Harare, Tuesday 8 December 1998), 3011.

20 Significantly both failed to take off in any meaningful way. The construction of the Tokwe Mukosi Dam was stopped in 1998 because of a shortage of money. The Zambezi Water project, the centrepiece of which was to construct a 450 km pipeline from Zambezi to Bulawayo, has not featured in any national budget.

21 *Zimbabwe Parliamentary Debates*, Vol. 25, No. 14 (Harare, Tuesday 29 September 1998), 594.

control illegal abstraction of water like that which occurred around Bulawayo during the 1991/2 drought.

The MP for Zvimba South was interested in knowing whether there had been sufficient preparation of the communal people so that they would be in a position to pay for the water. On a related point the MP for Bulilimangwe North expressed concern that smallholder farmers were likely to be disadvantaged. They would be dealing with people who had been in the game for a long time and would end up paying "through the nose". He was also interested in understanding how water pricing would be done:

I also want to find out whether it will be local council or local authority to decide how much to charge or it will be blanket charge throughout the country, paying the same services where there is scarcity of water and where there is abundance of water? My fear is that if the price is too exorbitant, it is going to deny many people to have access to water.<sup>22</sup>

The issue of water pricing proved to be an exciting one. The MP for Hwange East also wanted to know whether people who could not afford to pay for the water would be disadvantaged.

In relation to payment for water-related charges by communal people, the Minister emphasized that people would be expected to pay for operation and maintenance of the infrastructure. She urged the House to tell our people "if we want to develop in the water sector we have to contribute". This message needed to be stressed because "it is very disappointing that our people are not becoming responsible but irresponsible". She said it was a disappointment to visit rural areas and find that windmills that draw water for watering animals have chains stolen with the chains being used to harness the donkeys on a cart! In conclusion she said that as far as paying for water was concerned, "... for irrigation, yes, and for industrial purposes – they will have to pay". This proved appropriate for the MP for Hwange East had understood that "people in the communal areas will not be paying anything, which should be included in the Bill so that people know exactly that they will not be paying anything."<sup>23</sup>

The Ministry was said to be working on a water pricing policy paper into which many stakeholders had been asked to make an input. The Minister hinted that the system of a blanket charge across the nation, known as the national blend price, would be retained.

<sup>22</sup> *Ibid.*, 604-605.

<sup>23</sup> *Zimbabwe Parliamentary Debates*, Vol. 25, No. 14 (Harare, Tuesday 29 September 1998), 612-613.

We have discovered a lot of problems with the pricing of water to different people of different areas and different levels. As a result, we would want to find the easiest and the most workable mechanism that would see almost every one of us having chances of using this scarce resource that we treasure so much in the country.<sup>24</sup>

By that answer the Minister illustrated that market principles in water management had been subordinated to a system that was easy to administer.

The MP for Nyanga posed a question relating to the composition of the ZINWA board:

It would appear that there is so much authority centred on one person, that is the Minister appointing 50 percent of the members. From experience, we have had lots of problems in concentrating power in an individual for interest of the nation. Is there no other way which is more democratic rather than the Minister appointing half of the people. If we have a reasonable number, why not ask our Catchment Councils to provide representatives who form a committee? In other words, each council sends a representative instead of concentrating on the powers to one person.<sup>25</sup>

The same question was raised by Chief Makoni.

The Minister replied that:

I am sure this is the most democratic way of doing things when the Minister asks the community to appoint 50 percent of their representatives onto the committee . . . Yes the Minister, has to have an eye to look around and make sure that almost everyone who is an interested party is represented . . . We do not just come up with a number and say that the Minister shall do that as she sits by herself and chooses her friends. No, that is not it.<sup>26</sup>

The Minister said that no permits would be required for primary water. She dwelt at length on the issue of catchment councils. The country would be divided into seven catchment councils and this would be based on the geographical setting of the country. These would deal with the day to day water issues in accordance with 'the plans, the projections, the activities, the developmental programmes that we want our sub-catchment council to plan and hand it over to the main catchment council'.<sup>27</sup>

She added that ZINWA, together with catchment and sub-catchment councils, would prepare catchment plans as a way of involving all

<sup>24</sup> *Ibid.*, 608-609.

<sup>25</sup> *Ibid.*, 603.

<sup>26</sup> *Ibid.*, 605.

<sup>27</sup> *Ibid.*, 609.

stakeholders.<sup>28</sup> These Catchment Councils would, for instance, solve problems like that faced by Bulawayo City since catchment management involves upstream and downstream people. Vital lessons had been learnt from Mazowe and Mupfure pilot catchments although some mistakes had been made.

Traditional leaders seemed to be worried that their influence would be diminished and invoked supernatural powers to reverse the situation. According to Chief Makoni,

Water is very much related to the soil, and the land, the hills and the chiefs in that vicinity . . . how is it [ZINWA] to work with the traditional leaders . . . If we traditional leaders are not involved in this committee, you find that in other places you will have no rain and no water . . .<sup>29</sup>

The Minister seemed to understand the question differently. She understood that Chief Makoni was "worried about the involvement of ordinary persons in the communal areas" whereupon she assured that the institution of catchment and sub-catchment councils, where water will be managed at the lowest appropriate levels by people interested in water, would help address the issue.

The Bill underwent its third reading on 29 September 1998.

### EXTENDING THE DEBATE: WHAT MPS COULD HAVE ASKED

This section discusses what issues MPs could have raised to ensure that the country's water resources were utilized and managed for the benefit of the formerly disadvantaged people in particular, and for the nation in general. The three issues discussed here were selected on the basis that they were important and were raised but not exhaustively debated. This is an important caveat since the purpose here is not to engage in detailed content analysis of the Water and ZINWA Acts.

#### **Rural communities' access to water**

The degree to which new laws ensure and encourage access to water by the formerly disadvantaged communities can be taken as a barometer indicating the (lack of) success of the reform. It must be said that the new bills contained some positive aspects in this direction. Unfair clauses such as the priority date system and the granting of water rights in

<sup>28</sup> Unfortunately there is nothing in the Act to ensure that this will be done. For example, failure to produce a catchment plan should have been made a criminal offence. This is important given that the provision of production of outline plans were in the old Water Act but no plans were ever produced.

<sup>29</sup> *Zimbabwe Parliamentary Debates*, Vol. 25, No. 14 (Harare, Tuesday 29 September 1998), 597.

perpetuity were removed. Furthermore, allocation of water permits was decentralized to Catchment Councils from the Administrative Court, thereby theoretically giving a chance to local communities to participate in the allocation of the precious resource. I shall return to this point later in this article.

There, however, remained areas of concern. For a start water permits are still attached to land (not necessarily ownership though), which many people do not have. This limits access to water. One way out of this problem could have been to let communities acquire water permits that are unattached to land which they could use to bargain for irrigation facilities (Bolding *et. al*, 1999). This, however, could be in breach of the concept of beneficial use of water, a crucial aspect of the neo-liberal doctrine. The concept stipulates that water should be allocated to those individuals who demonstrate that they have suitable land for irrigation as well as the financial means to install irrigation facilities. Ideally the facilities should ensure efficient use of water. These conditions are captured by the regulations governing application of water rights as contained in section 23(1) of the Water Act:

... in considering applications for permits for the use of water, a Catchment Council shall -

- (a) in the case of more than one application for the use of the same water, have regard to -
  - (i) the need to achieve, as far as possible, an equitable distribution of the available water resources;
  - (ii) the needs of each applicant; and
  - (iii) the likely economic and social benefits of the proposed use;
- (b) in granting a permit for the use of water for agricultural purposes, have regard to -
  - (i) the extent and nature of all land, whenever situated, irrigable by the water concerned; and
  - (ii) the suitability for irrigation of the land concerned; and
  - (iii) the efficiency of the proposed method or possible methods of using the water concerned.

Section 23(b) is particularly interesting for our discussion. We saw that 85% of the water was used by the large-scale commercial farming sector. We also saw that this was on the back of a generous financial package unrepeatabe in the present circumstances where government can only afford an expansion of 400 hectares per year in the smallholder irrigation sub-sector. It is therefore interesting to note that the Bill in section 23b puts the equity issue in the background and is overly concerned with efficiencies. Given that smallholder farmers cannot afford the sophisticated equipment that ensures high water use efficiencies, it can be said that this contradicts the main objective of the water reform,

which is equity. This is worsened by the fact that all the existing water right holders automatically have their water rights changed to water permits for long periods, up to 20 years, a point conceded begrudgingly by the government through the Attorney General, as discussed in the constitutional debate. In an over-righted catchment this translates into no immediate release of water to the smallholder sector. The only course of action available to smallholder farmers in such a situation is expensive and cumbersome. Section 34(6) of the Water Act says that,

Before granting an application for a permit relating to water which is being beneficially used by another person, a Catchment Council shall require the applicant to pay to the person beneficially using the water concerned such compensation as may be agreed by the applicant and such person or failing such agreement, as may be fixed by the catchment council.

While it is commendable that the Bill permits personal negotiations concerning compensation, with the Catchment Councils coming in as arbiters, this only works if it is negotiation of equals. It is unlikely that smallholder farmers can enter into any meaningful dialogue with commercial farmers and be able, at the end of it all, to meet the demanded compensation. While the government can appoint whosoever it feels may represent the interests of the communal farmers according to section 48 of the Water Act, this still raises the question of effectiveness of such surrogate representatives. A better approach would have been for the government, through the Water Fund, to provide money for compensation, in which case the fund would become genuinely a water development fund as was suggested by Zimconsult (1996). As an aside, it is curious that the needs of resettlement areas as far as water for primary purposes is concerned are not catered for, as the rights of the communal people, which are contained in section 49 of the Water Act.

Meanwhile an avenue that would allow disadvantaged communities to have access to cheap water was opened and closed simultaneously. Section 30(5) of the Water Act says that,

... different charges may be fixed in terms of subsection (1) for the sale of water to different classes of persons or for different uses: Provided that, in fixing different charges in respect of different classes of persons, there shall be discrimination between persons on grounds of race, tribe, place of origin, political opinion, colour, creed or gender.

It is difficult to see any other grounds for instituting differential water pricing other than those listed above.

### **Financing water resource development**

One of the concerns raised by MPs was the alleged lack of focus on water resource development. As already said the Attorney General could have

alluded to the fact that a Water Fund was created for the purpose. The crux of the matter, however, centres around the management of the fund. The existence of the fund does not guarantee that there will be enough investment in the water sector. For example, there is no stipulated guarantee of what proportion of the money should go to water development. This is not an unimportant concern since there is a likelihood that most of that money could go to expenditures not related to water development. This is a critical issue since financial prudence is not the strongest point of parastatals in Zimbabwe. Financial mismanagement in parastatals has reached endemic proportions due to incompetence, exorbitant reward system to employees, and outright corruption. The cost to society has been very high. The guaranteed external debt of Zimbabwe parastatal organizations, at the end of 1999 was Z\$45 billion (US\$650 million). The foreign currency amount owed was indicated to have grown to US\$661 million in 1999 from US\$448 million in 1991, representing a 47% growth.<sup>30</sup> Given this scenario, the Bill should have set a cut-off point, as a proportion of the money that would go directly to water development, similar to that of the Urban Councils Act where not more than 28% of the revenue should go to salaries (Duri, personal communication).

Private sector participation in water development is poorly dealt with. In a country where finance is limited, it is not difficult to imagine that the government does not have the money to finance all water resources development projects for example, dam construction. The suspension of work at Tokwe-Mukosi, that would have been the largest dam in the country, is a case in point where the private sector was sidelined. This obsession with control on the part of the state was also demonstrated by the fact that, in the law, no trading of water is allowed and that investment in the water sector is tied to a direct utilization of the water. According to section 44 of the Water Act, only the Minister, ZINWA and the local authority have authority to sell water. Any other person has to get special authority. This is not an example of treating water as an economic good. In such circumstances private funding in the water sector is not easily attracted. This provides little possibility of a privately funded dam being constructed under the "build operate and transfer model" as was done for the Bulawayo-Beitbridge railway link. Still on the point of water sales, it should be mentioned that both government and semi-government departments have been engaged in bulk water sales where customers paid for a block of water whether they used the water or not. In some cases payment was in advance. This runs counter to the notion

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30 "Company Digest Supplement", *Zimbabwe Independent*, 20 April 2000.

of using efficiency as a resource allocation mechanism. Clearly it is the political arrangements, in the form of local institutions, that are likely to ensure efficient water utilization.

There is yet another disturbing point. The Bill provides for shares to be owned in ZINWA by individuals and organizations other than the state. However, there was no enthusiasm for this as revealed by the fact that ZINWA was set up as a 100% owned government entity. One must wonder whether it will escape the fate of other parastatals in Zimbabwe, which initially are solely run by the government and when they are run down, are then privatised. The state could have allowed water users and other investors to take up equity in the parastatal, which could have enhanced a feeling of ownership of such an important public resource.

### Democracy

In relation to democracy three issues are pertinent namely,

- establishment and functioning of Catchment Councils,
- composition of the ZINWA board, and
- the role of local level organizations other than identified in the Act.

In pursuance of the objective of ensuring that "people with interests in the use of water are involved in making decisions about the use and management of water resources" (WRMS, 1998), the establishment, functions and procedures of Catchment Councils was provided for in Part III of the Water Act in sections 20–31. While the intention of involving local people in water management is noble, there are areas of concern that MPs could have raised.

First, it is a cause for concern that the Minister has, as contained in section 20 of the Water Act, absolute power in many aspects such as drawing the boundary, stipulating the number of members and assigning the Catchment Council a name. This is in addition to the fact that the Minister may, under section 20 (3) of the same Act abolish, alter its jurisdiction or its membership. There are no specified circumstances under which this happens which raises the spectre of arbitrary dismissals. But perhaps more worrying is the fact that the catchment manager, who to all intents and purposes is a government appointee, can act as a Catchment Council under sections 28 and 29. Section 21(2) of the Water Act says that,

The Minister may, by written notice to a Catchment Council, confer all or any of the powers of officers upon a catchment manager or on all or any of the members of a Catchment Council, and may at any time amend or revoke any such notice.

The catchment manager also has power in terms of section 29(1)(v) of the Water Act, subject to section 11 of the Communal Land Act [Chapter

20:04], to award servitudes (permission for water related development to take place), apparently without consulting the rural district councils and the local communities. Catchment Councils were given a rather short leash to exercise their rights. They cannot even have a meeting without the state indulging itself in some legal eavesdropping of the deliberations. Under section 30 of the Water Act it is ZINWA that provides the secretarial services to catchment and sub-catchment councils.

The situation is no better when it comes to appointments to the ZINWA board, a powerful body that directs water resource development in the country. As noted by the MP for Nyanga, the Minister appoints directly or indirectly 50% of the board, approves the balance of the members, directly appoints the chairman and influences the appointment of the chief executive. While it is appreciated that the government needs to retain control of the board, it is argued here that this could have been done without unduly disenfranchising three Catchment Councils (since only four Catchment Council representatives are elected to the board at any one time). The best arrangement could have been to have all Catchment Councils represented on the board as was suggested by one MP.

One other problem is more of an omission than a commission. The Act recognizes the sub-catchment councils as the lowest user organization, some of which cover 2 000 kms and are far too big for any practical programme. More fundamentally, however, is the fact that existing institutions are neither recognized nor their existence provided for in law. Irrigation Management Committees, for long identified as requiring legal clout (see Makadho, 1994; Manzungu and van der Zaag, 1996), are not catered for at all. By locking local institutions in the informal sector an important opportunity for genuine local water management was lost. It is ironical that the Act goes to elaborate lengths to set up strong local institutions in the form of combined water schemes stipulated in part VIII, sections 86-95 of the Water Act which apply to the already advantaged large scale commercial sector. They are not applicable to the rural areas. Other institutions such as traditional leaders were unnecessarily sidelined in contravention of the provisions of the Traditional Leaders Act (Zimbabwe, 1998c). One golden rule that the Bills missed is that it is better to strengthen existing institutions rather than create new ones.

## SUMMARY AND CONCLUSION

This article has tried to characterize the parliamentary debate in the fourth parliament of Zimbabwe on water reform *vis-à-vis* how access to water by the disadvantaged communities, financing the development of water resources and democracy in water management, was provided for

in the two Acts. The article showed that Zimbabwe's water reform as contained in the two laws had two contradictory currents of thought. The rationale for water-use reform was rightly construed as a political process so as to correct the injustices foisted by colonialism, which meant crafting new legislation to suit the new social order obtaining in the country. However, a half-hearted embrace of neo-liberalism, emphasizing "the market" and technical efficiency, as water use-regulating mechanisms (Moore, 1989), out of a realization that a puritan application of the doctrine could jeopardize the social objectives of the reform, produced a double vision regarding the goal of the reform.

For all the three points chosen for discussion in the article it was observed that the debate failed to push for a more people-oriented water reform principally because the legislation framing the water reform was torn between a neo-liberal and social agenda. In relation to access to water we saw that the claim of wanting to achieve equity (section 23a of the Water Act) was contradicted by neo-liberal clauses insisting on water being allocated on the basis of technical efficiencies and market forces (section 23b of the same Act). In relation to popular participation in water management, the state allocated itself disproportionately huge powers somewhat in contradistinction to the democratic claims. There was also a lack of appetite for strong local institutions with sufficient political clout to complement the positive aspects of the water reform. No good strategy to develop the country's water resources, for example through public-private sector partnership, was instituted.

The main conclusion of the article is that the debate was a lost opportunity to spearhead the cause of those formerly disadvantaged communities, and the nation in general, in relation to water access, sustainable development and popular participation in water management. Perhaps at a later date the lost opportunity can be regained by way of amending the concerned parliamentary Acts.

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