Environmental Policy Brief

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Access to justice in the Water Act and Environmental Management Bill

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INTRODUCTION

Justice entails the right to be heard by decision-making institutions or individuals. It means that these decision-makers are accessible and open to representations, protests and lobbying by various individuals and sectors of the society. Accessibility to the decision-makers becomes even more crucial when one considers the broad spectrum of interests and claims over natural resources in any country.

Zimbabwe recently introduced a new Water Act. At the same time an Environmental Management Bill was drafted and circulated. It is yet to be presented to Parliament. The Water Act governs the use of a crucial natural resource: water. The Environmental Management Bill seeks to coordinate the management of the country's natural resources, including water. If passed it will have a massive influence on the management of our natural environment and exploitation of its resources. It is important to analyse the provisions of these two documents and see what institutions and procedures they provide for a just environmental governance, in which competing claims and rights over the use of natural resources receive careful and impartial treatment.

STAKEHOLDERS

The involvement of citizens in the formulation and implementation of decisions which affect the environment is necessary in the pursuit of environmental justice. The Bill specifically provides for the involvement of all Zimbabweans in the decision-making process. In section 4 (f) of the Bill, authorities are obliged to take measures necessary for:

"Encouraging the participation of all Zimbabweans in the making of decisions that affect the environment, including in the development of policies, programmes, plans and processes for the management of the environment."

Further to that, the Environmental and Natural Resources Board is obliged by Section 26 of the Bill, when any matter arises for the determination of the Board, to notify all people interested in the issue, and to give them facilities to make representations.

The Water Act provides for stakeholder participation. It has provisions that oblige authorities to notify all interested people about the issues for determination.

PROVISIONS FOR PUBLIC CONSULTATION

Both the Bill and the Act set out specific areas where the public and stakeholders have to be consulted before decisions are made. These provisions are crucial as they enable the various sectors of society to articulate views, objections and plans in relation to the exploitation of the country's natural resources. These include environmental impact assessments, environmental audits, pollution permits, and environmental action plans.

Environmental Impact Assessment (EIA)

In Section 34, any project or policy specified in the first schedule of the Bill shall not be implemented unless the Minister has been presented with, and approved subject to such conditions as he deems necessary, an environmental impact assessment report.

Examples of projects that require EIAs are, dams and human-made lakes, drainage of wetlands, irrigation schemes, chemicals plants, iron and steel smelters and plants, tanneries, breweries, quarrying, highways, etc.

The list of activities requiring EIAs, is not closed as per the schedule, instead it may be amended from time to time, but of significance, such amendment shall not take place unless the Minister has consulted, among others, various stakeholders.

A developer is obliged to display an EIA report for the public benefit. The public is entitled to inspect the report to enable them to use the information for proceedings brought under the Bill and any other law relating to the protection of the environment.

This provision is important as it guarantees the public access to information which enables people to pursue their rights, claims and objections to the use of natural resources. Public participation is further provided for by Section 36 (1) (a) which gives the minis-

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ter a discretion to conduct public hearings to gauge public opinion over an EIA report.

Environmental Audits – Section 40 of Bill

The Minister has discretionary powers to require a proponent of any activity to carry out an environmental audit. However, the same section provides any other persons with an opportunity to petition the minister to force a developer to carry out an environmental audit.

Pollution Permits – Section 49 of Bill

In granting pollution permits, the minister may notify and actively seek the views of persons who may be affected by the granting of a pollution permit. He or she may also consider representations made by anyone in connection with pollution permits. Although it is clear that public consultation under this section is not obligatory, it is at least a positive move that the lawmakers recognise that the public has an interest over the granting of pollution permits.

Environmental Action Plans (EPAs) – Section 59 of Bill

Environmental Action Plans (EAPs) are designed to promote and facilitate the integration of local and national strategies and measures for the protection and management of the environment into plans and programmes for social and economic development. In making EAPs, the Bill provides for mandatory public consultation at the national and local levels. At the local level, local authorities are required to ensure the participation of their residents in the preparations of EAPs.

Environmental Protection Areas – Section 61 of Bill

The minister may declare an area to be an environmental protection area but he/she is obliged to consider representations by any person interested in the area, and to the interests of the local communities in or around the area.

THE WATER ACT

The provisions of the Bill as discussed above also appear to a similar extent in the Water Act. The public or stakeholders have access to the decision-making process in different ways.

Water Resources Planning and Development

According to Section 12(1) of the Act, the National Water Authority and the catchment council are required to prepare and outline a water development plan for every river system. The minister is obliged to give notice in *The Government Gazette* and in newspapers circulated in the area the places at which the outline plan will be publicly exhibited and the period within which objections or representations in connection with the outline plan may be made. It is clear that the public has an influence in the shape and contents of the outline plan for river systems.

Reservation for Areas – Section 56 of Act

An area can be reserved from, for example, the construction of permanent improvements if the minister believes that the area is a potential dam basin or a potential dam site. Such a reservation can have a negative effect on persons living within the area concerned, for example, settlers may have to be moved. Section 56(6) and 57(4) provide an opportunity for affected parties to claim compensation and to object to the reservation respectively. The claims and objections should be directed to the administrative authorities under the Act.

Water Restriction Areas – Section 58 of Act

If the minister believes that the use of water in any catchment area is approaching the limit of the potential area he/she may declare it a water development restriction area. Again, the minister is obliged to publish his intention to declare or to amend the boundaries of the water development area. The public can influence the minister's decision as the section allows for any person to make representations to the declaration.

ACCESSIBILITY OF PUBLIC OFFICIALS

Some of the sections in the Act and the Bill provide for interested parties to make representations directly to the decision-making public officials. Direct access to public officials concerned facilitates a cheaper negotiation process and cuts unnecessary bureaucracy. However, the Bill seems to be more facilitative of negotiations than the Act. Under the Act, appeals against administrative decisions should be directed to the Administrative Court. The Bill, however, allows appeals to be addressed to the minister (Section 67(1) on environmental protection orders) and then to the Administrative Court, Section 67 (4). The Bill's procedure allows the public to negotiate further with public officials instead of resorting, at first instance, to costly court applications.

CONFLICT RESOLUTION

Court actions are costly and not always simple to pursue. A system that allows for other means of resolving disputes is always welcome. It is clear that there can be many competing rights and claims over the use of our natural resources. Therefore, any dispute resolution system must be sensitive to this. The language of the courts is not always easy to understand. Often there is no room for compromises, a winner take all situation is normal in the courts. Most of our citizens have no basic appreciation of court procedures and most find courts intimidating.

An important aspect of the Bill is that it recognises the need for alternative dispute resolution by providing the minister with the power to make regulations to govern conflict resolution, (Section 39 (e). More encouragement should be given to the resolution of disputes, especially environmental disputes by resorting to arbitration or other alternative dispute resolution mechanisms. Even our judges agree that arbitration is, for example, a better way of dealing with complex commercial disputes. Decisions made by arbitrators are respected even in the courts and are only set aside if, for example, it is proved that the arbitrator committed an act of misconduct during the arbitration. Courts only interfere with the arbitrators' decision only on very narrow grounds.

In the development of conflict resolution rules or regulations, the minister should build upon the successes made by the commercial sector's resort to arbitration proceedings, and also take advantage of the progress made by institutions that deal with arbitration. An alternative dispute resolution system will benefit the generality of the people. The advantages of using another system apart from courts are many, for example, an alternative conflict resolution system:-

- is cheaper;
- allows evidence, views or representations to be led without restrictive rules of procedure; and
- does not use the specialised and complex language of the courts.

These attributes contribute greatly to the improvement of access to justice and should be taken advantage of if the Bill is enacted. The Water Act does not have a provision for conflict resolution.

ACCESS TO INFORMATION

It is much easier for an informed person to pursue his/her rights. The right to information held by private and public institutions is not well developed in Zimbabwe. It is only at a few public institutions that upon request, one can provide access to certain information. For example, one can walk up to a clerk of court at the criminal division of the magistrate court and request details of a particular trial. It is difficult to identity any other institution where information is provided on request.

To this end, Section 35 (3) of the Bill, which grants the public the right to access and inspect EIA reports, is a very progressive provision. The provision assists the public in their pursuit of justice in that any objections or claims they may have over any EIA report are made from an informed perspective.

However, the provision can be further enhanced if the Minister uses his/her powers to prescribe certain language requirements. For example, it is very important to make sure that every EIA report is published in all main languages of Zimbabwe, and where the welfare of specific small language groups is concerned, the EIA report should also be published in the relevant language.

ACCESS TO COURTS

Environmental justice can be achieved if mechanisms are in place to allow greater access to all institutions with powers to make decisions. Courts live at the upper end of these institutions as they can pronounce on the finality of disputes. Unfortunately litigation is a complex and costly process to many. Technical rules of procedure can frustrate many a claim. The rules and the specialisation of the legal profession usually make one resort to the services of lawyers. This can fail the claims of many of our citizens affected by orders linked to the environment. More often than not such people are usually from the low income end of the society and it is not realistic to expect free legal services. However, it is possible to read certain parts of the Bill and the Act and interpret them as having made some progress towards access to justice as far as courts are concerned.

Example of environmental justice

Let us take the example of a small group of small-scale farmers. They grow an irrigated crop, say sugar beans. They rely on it for survival because they sell it upon harvest. The crop is growing well when one day they wake up to find it ruined.

A few enquiries lead them to conclude that something is wrong with the water from the river. The offending chemical in the water is traced to a factory further along the river. Ordinarily the farmers will have a tough time suing the factory owners. They have to pay for legal services, they have to pay for the scientific services which will have to provide proof that the chemical ruined the crop and that it came from the factory in question. There is room to submit that justice for these farmers can be achieved if the State prosecutes the factory owners. The Water Act has increased the fines for water pollution from a paltry $500 to maximum of $100,000. In addition an offender has to pay for any damage caused, see Section 68 (4) of Act and Section 86 (e) of the Bill provide for this.

What it means for the small-scale farmers above is that in the prosecution of the factory owners for pollution, the state will have to lead evidence of the extent of the damage caused by the pollution. The State has the machinery to do this. It has scientists who are able to assess and provide the evidence. It has agricultural extension officers, who can assess the damage on the crop and provide the state with the amount of damages. And because this is a prosecution case, the farmers will not pay for this if the factory owners are convicted. If evidence of damage caused is properly led, there is no reason why the factory owners cannot be made to pay compensation to the farmers.

Section 68(4) is a new concept in the Water Act, it is repeated at Section 86 (e) of the Bill. By far, this provision contributes tremendously to the quest for environmental justice.

Problem Area: The Water Act

Section 114 (1) of the Act provides that:

'Any person who is aggrieved by any decision, direction, order or action of any authority in terms of this Act, may appeal against the decision, direction, order or action to the Administrative Court in terms of this Part."

At the same time Section 114(6) provides that; "Where an appeal has been noted in terms of this Act, the decision, direction, order or action appealed against ,shall, notwithstanding the noting of the appeal, remain valid pending the determination of the matter by the Administrative Court."

The later provision is problematic and it presents difficulties for environmental justice. Take a scenario where a local authority issues a pollution permit with inadequate conditions to an incompetent company with a history of pollution, and because of the inadequate conditions in the permit, the company is spoiling a river passing through a particular town. A residents' association may seek to apply to the courts to stop the company from spoiling the river until the permit is worked out again and strict conditions are introduced. The association would want a quick remedy to stop the pollution pending administrative rectification of the permit, this is usually referred to in law-as a temporary interdict.

However, it is a requirement at law that where one applies for an interdict one has to have a prima facie right deserving of protection.

While it is clear that the residents' association wishes to have a clean river passing through its town, and to have an unspoilt environment, this does not translate to a clear right deserving of protection. The law does not recognise anything akin to "environmental" or "green" rights. Essentially, the residents' association will have problems trying to establish such rights. The only channel they will have is an appeal against the granting of the permit.

But Section 114 (6) is clear, while the appeal is being lodged the company granted the permit can continue to carry out its activities. The appeal process is not a speedy procedure, there is no time limit in which an appeal that has been noted, must be heard by the Administrative Court. It could take weeks, months, even years – in the meantime the river in question will still be a dumping ground.

SUGGESTIONS FOR LAW REFORM

To provide effective environmental policies and laws, it is important that citizens be granted environmental rights in the Constitution. Once the constitution grants one a right to, for example, a clean environment, procedural difficulties as the one noted above will fall away. Strides made in the Bill need to be supported by the Constitution being the country's Supreme Law. The draft new Constitution, rejected in February 2000 in a national referendum, recognises "green rights".

Secondly, the lawmakers should consider amending Section 114(6) of the Act. It should not provide for a blanket cover for all actions appealed against. At least, it should allow an appellant to give reasons why the action appealed against should be stopped pending the hearing of the appeal.

CONCLUSION

The provisions of the Bill and the Act provide a wide scope for the administrative authorities to consult the general public over environmental issues. Some of the provisions make it mandatory that interested persons be consulted and their views considered for the effective implementation of environmental policies. These provisions go some way towards establishing access to environmental justice in Zimbabwe.

However, the strength of any law lies in its enforcement. Rights to make objections or representations on environmental issues are useless if they are not used. There is need to educate the general public about the existence of these provisions. If the Bill is eventually approved by Parliament it has to be widely distributed in a language that is accessible throughout the country. The law envisaged by the Bill will be of no use if it is not appreciated by the general public.

One also has to accept that there is a tradition of apathy in this country. Unless this is tackled, all the high sounding intentions of the Bill will be useless verbiage. Even the suggested amendment to S114 (6) of the Act will be of no use if it is not utilised.

Glossary of Terms

Environmental Audit means the systematic documentation and periodic and objective evaluation of the protection and management of the environment and the conservation and sustainable utilisation of natural resources.

Environmental Impact Assessment means a systematic evaluation of a project to determine its impact on the environment and the conservation of natural resources.

Pollution means any direct any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment caused by the discharge, emission or deposit of waste or a pollutant into the environment.

Sources for Further Information

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ZIMEAs Programme

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