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ORGANISING AROUND WATER: HARNESSING THE LEGAL SYSTEM FOR RURAL DEVELOPMENT

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Abstract

Water in rural areas can act as a catalyst for development. This paper presents a brief theoretical overview of trends of rural domestic water usage in southern Africa. It highlights missing links in contemporary research, project design and implementation, and gives specific emphasis to organisational aspects. The failure to give adequate attention to human infrastructure, specifically organisational issues, often results in unsustainable water projects. Grassroots legal issues have received scant attention. The evolutionary process of organising can be assisted by utilising and adapting conventional legal principles and frameworks. These frameworks can increase the community's capacity to access, and control, the resources it requires for development. This paper outlines a variety of organisational options and examines their legal implications. These are illustrated by a specific case study.

Uittreksel

Water as kern: Aanwending van die regsisteem vir landelike ontwikkeling

Water kan binne die landelike omgewing dien as katalisator vir ontwikkeling. Hierdie referaat verskaf 'n kort teoretiese oorsig van tendense binne landelike huishoudelike water verbruik in Suider Afrika. Dit beklemtoon leemtes in kontemporêre navorsing, projek ontwerp en implementering, en lê spesifiek klem op organisatoriese aspekte. Die onvoldoende aandag aan die menslike infrastruktuur, spesifiek organisatoriese aangeleenthede, lei dikwels tot nie-standhoudende water projekte. Regsaspekte op lokale vlak het tot dusver beperkte aandag ontvang. Die evolusionêre proses van organisering kan ondersteun word deur gebruik en aanpassing van konvensionele regsbeginsele en raamwerke. Hierdie raamwerke kan die vermoë van gemeenskappe verhoog om toegang tot, en beheer van, hulpbronne benodig vir ontwikkeling te, bekom. Hierdie referaat dui 'n verskeidenheid van organisatoriese opsies aan en ondersoek die gepaardgaande regsaspekte. Laasgenoemde word vervolgens geïllustreer deur 'n spesifieke gevallestudie.

1. Introduction

Water is a vital resource and it can play an important role in maximising welfare (Stone, 1984). A United Nations study estimates that the control of water borne disease, through improvements to domestic supplies, would add an average of 10 years to life expectancy in less developed areas (Baum, *et al* 1985). The need for access to water in reasonable quantities and of appropriate quality was reinforced by the United Nations Water and Sanitation decade 1981-1990. Its goal was to give every person access to 50 litres of water per day (Friedman, 1984). Although this is an admirable goal for which to strive, research in South Africa suggests that rural domestic consumption in rural areas tends to fall well below this yardstick.

This paper presents a short theoretical overview of rural domestic water consumption in South Africa during the last decade. It focuses particularly on one missing link in research, project design and implementation. This is the grassroots organisational issue, which is a vital component of the human infrastructure needed for sustainable rural community water projects. The paper is divided into eight parts. The first three sections focus on research findings on rural domestic water usage in South Africa. An attempt is made to identify possible trends and to highlight planning and policy issues requiring further attention and study. The latter part of the paper focuses specifically on the importance of organisational issues. Section four describes why organisational arrangements for water provision are important. The following section gives reasons for registering an organisation, thus creating a legal entity, and indicates how this may be achieved within the current

parameters of South African Law. Section six focuses on Section 21 Companies and Trusts, which may be appropriate legal options for "formalising" a rural community water organisation. The practical application of using such options is explored by means of a case study in section seven. The final section of the paper is devoted to a few concluding remarks.

2. A brief review of recent domestic rural water trends in South Africa

Stone (1984), Krone (1986) and Davidson *et al* (1990) in needs assessments of rural people in Ciskei, Transkei and Venda respectively, noted that access to domestic water was considered the most important priority. Water is not simply a basic need for survival, but as Stone (1984:2) notes:

"... there is a relationship between sanitation level, health ... and the socio-economic status ... of a community. (The last) is not a function of its per capita consumption of water, but without the availability of the resource, or infrastructure for its distribution, a community is unable to progress towards the advancement of socio-economic conditions".

This view is substantiated by other research findings. Increased access to water results in a lower incidence of water washed diarrhoeal disease (Carruthers and Brown, 1977; Krone and Dunne, 1986; Wiseman and Eberhard, 1988). A study in Venda shows that ten of the thirty babies born to the 86 households in 1981 had died in comparison with no infant mortality in the adjacent village, which had uncontaminated piped water (Schutte, 1984).

Table 1 : Synopsis of select variables describing rural domestic water consumption

Place surveyed	De facto household size	Average household consumption per day in litres	Average per capita consumption per day in litres	Average time spent collecting water in minutes	Average distance traveled by households per day to collect water	Average daily number of trips per household to collect water (l)	Average size of the container used to collect water	Average number of people per household who collect water
Eastern Cape 1982 (Kopke)	8,0		9,0		1km	2,0		2,0
KwaZulu, 1982 (Kopke)	9,0		9,0		1km	2,0		2,0
Natal, 1984 (Friedman)		(Stand 99,5 pipes)	10,9		Median 101-500m Range 1m-2km		3,9	
Peddie, 1987 (Kopke)	8,0		8,2		1,5km	2,5		3,0
Platkop: Transkei 1986 (Krone)		40,0/51,0?	8,5	90,0				
Queenstown 1987 (Kopke)	9,0		13,2		0,5km	2,0		2,0
Transkei, 1986 (Krone & Dunne)	6,4	47,4	7,4				2,8	16,0
							Range from 1-8	Range from 5-25
Venda, 1989 (Davidson & Bele)								
Zwigodini	6,1	112,4	18,5	57,1	5,4 km	3,7	Range 5-25	2,2
Matatani	4,7	74,8	16,0	39,7	4,3 km	3,1		1,8
Mbodi	6,0	95,2	15,8	72,0	5,9 km	3,8		1,9
Dumasi	5,7	173,9	30,7	37,3	3,6 km	4,4		2,3
Tshipako	6,0	114,7	19,5	67,9	5,4 km	5,0		2,7
Manavhela	5,6	117,5(stand pipes)	21,4	17,4	1,6 km	4,3		2,4
Mandiwana	5,5	85,7(stand pipes)	16,0	7,1	0,8 km	4,0		2,0
Mphaila	5,7	96,9(stand pipes)	17,3	14,3	1,4 km	4,4		2,1
Vulindlela, 1985 (Alcock <i>et al</i>)	6,9	91,5 (including washing)	15,6 (2,3/day for drinking)					

Source: Compiled from Friedman, 1984; Alcock *et al*, 1985; Krone, 1986; Krone and Dunne, 1986; Kopke 1988; Davidson and Bele, 1989.

Friedman (1984) found a statistically significant relationship in the causative linkage between the incidents of infantile diarrhoea and the volume of water used by households in Natal. Households consuming less than nine litres per capita/day had a 19,6 per cent incidence of infantile diarrhoea in comparison with 7,8 per cent for infants in households with a per capita daily consumption of 10 plus litres (Friedman, 1984). Krone, (1986) notes that individual, isolated water projects in rural areas are unlikely to bring about substantial economic benefits per se. It is the supporting package of inputs and the spin-offs from providing safe water that give rise to opportunities. "Apart from direct health benefits ... there may also be increases in productivity through the use of the water for the growing of food and also rendering available more human energy and time to be put to other productive uses" (Krone and Dunne, 1986:12). In addition, the collective action and organisational skills needed to establish a village water supply are virtually synonymous with those required for individual or community socio-economic projects. Thus, the provision of water can be a nexus around which community development can be stimulated. However, before analysing the organisational requirements needed to optimise these benefits it is important to understand the context in which rural water projects operate.

Hence this section will briefly describe and comment on consumption patterns, time taken to collect water, distances travelled from the home to the source, and energy expended.

Table 1 summarises the results of nine different studies undertaken in various parts of South Africa in the last decade. The total domestic water consumption levels are probably an underestimate, because washing of clothes and personal hygiene often occur at the water source. This usage is not included in the statistics depicted in Table 1. Krone and Dunne (1986) suggest that the presence of babies in a household usually results in a greater demand for water and this may also skew the data. Certainly the results from the Venda study denoting the mean time spent per day collecting water are conservative (Davidson *et al*, 1989). It was only possible to establish the amount of time taken walking from the homestead to the water point. The Venda survey failed to elicit accurate information about the time spent waiting in a queue (Davidson *et al*, 1989). In many instances people assisted their friends to pump water, which increased the time expended on this activity. Similarly, in the afternoons the children who collected water often played at the pump before returning home. Finally, at certain peak periods during the day the water pressure dropped which in-

creased the time required to fill a container. The only way to rectify inaccuracies in the data would have been to use participant observation as the sole methodology, but time constraints precluded the use of this alternative (Simpson-Herbert, 1982; Salmen, 1987).

Table 1 highlights various problems associated with rural domestic water consumption. These could be grouped into three categories, namely: quantity, distance and reliability. The mean daily capita consumption ranged from 7,4 litres in Transkei to 30,7 litres in Dumasi, Venda. No study achieved an average daily consumption level compatible with the 50 litre United Nations goal. Perhaps this suggests that in lieu of a minimum level of living standard it would be more appropriate to advocate a survival level. "The low volume of water used means that an insufficient amount is available for washing ... , cooking and sewage disposal" (Wiseman and Eberhard, 1988:236). This has severe consequences for contaminating the surface or groundwater source of supply, and can have a negative impact on health levels.

The burden of collecting water falls on women and children, who use 20 or 25 litre containers to transport water to their homes. The average distance covered by households collecting water ranged from 101 metres, in a closer rural settlement supplied with water from community taps in Natal, to virtually six kilometres at Mbodi, in Venda (Table 1). Respondents with easy access to standpipes seem to collect water more often. The mean number of trips and the total consumption per household tend to increase with household size. However, this is not on a proportional basis and the data suggests that per capita consumption actually declines (Krone and Dunne, 1986).

Naturally, the topography of the study area will also influence the energy and time expended collecting water. For example, "in the 19 villages of Chalumna in Ciskei research showed that the energy expended in the average walk to the homestead carrying a container of water (weighing 21kgs) was the equivalent to that used by miners wielding a pick" (Stone, 1984:6). Table 1 indicates that the time spent collecting water ranges from as little as seven minutes a day in Mandiwana, which is serviced by standpipes, to 90 minutes per day in the Platkop community, who rely solely on a natural spring.

Finally, cognisance has to be taken of the reliability of the supply source. This is particularly pertinent when analysing the proportion of time women have to spend each day collecting water. Cairncross *et al* (1980) note that throughout Africa it is estimated that less than 20 per cent of villages have any form of improved water supply. In addition, about a third of these supplies are defective or malfunctioning.

3. Contemporary research, planning and policy issues requiring attention

The *per capita* consumption of water varies enormously within countries and can be simplistically explained in terms of availability and cost (Stone, 1984). Within South Africa the fundamental problem is not the lack of water *per se*, but rather a question of its quality and distribution (Wilson and Ramphela, 1989). The political space economy in this country has been distorted. High levels of welfare and service provision are associated with the major centres of economic growth, especially the PWV area. The lowest areas (ie. one standard deviation below the mean) largely coincide with the rural peripheries of Ciskei, Transkei and Zululand (Board *et al* in Smith, 1977). One repercussion of Apartheid policies has been the cost of water to the poor in terms of time, effort and money (Wilson and Ramphela, 1989). The challenge is therefore to plan, design and implement appropriate solutions within the means of the rural poor (Hollingworth, 1990).

Research has focused on the provision of affordable domestic water to rural dwellers (Harries, 1984; Stone, 1984; Kopke, 1988). Whilst policy makers wrestle with the issue of capital cost recovery, maintenance and operating costs, the practitioners sing the praises of appropriate technology and financing through collective action (Alcock *et al*, 1985; Churchill, 1987; Keyter *et al*, 1989). However, "many of the problems hindering the success of (rural water) schemes are related to the choice of water supply technology and the low level of community involvement ..." (Wiseman and Eberhard, 1988:234). The latter point is worth extended comment.

Wiseman and Eberhard (1988) note that village water supplies often take the form of spring protection schemes, handpumps and to a lesser extent windpumps. Attempts are made to encourage community participation through the selection of design, sweat equity in the construction phases, and the election and training of water committees to ensure the ongoing maintenance and sustainability of projects. However planners seem to fail to address the community context fully. Failure of water projects is often attributed to problems stemming from institutional and local organisational capacity (Cairncross *et al*, 1980; Churchill, 1987; Singer, 1989). In particular three issues need attention.

Firstly, democratic local organisations, which are either autonomous from the Tribal Authority or which co-opt and complement this level of local government, need to be mobilised and fostered. Of essence is the empowerment of rural people. The causes of poverty in South Africa are not merely a repercussion of underdevelopment, but relate to the structure of the political economy. As Wilson and Ramphela (1989:258) note,

"power lies at the heart of the problem of poverty in South Africa. Without it those who are poor remain vulnerable to an on-going process of impoverishment ...".

If poverty is to be addressed, it is vital that the poor have political power, and are able to participate in the decisions that affect their lives. Such transformation depends on mobilisation and organisation especially amongst the rural poor (Daphne, 1982).

Effective structures through which the poor can voice their opinions and demands are often missing in rural areas (Daphne, 1983). "The tribal authority system is still seen as the primary administrative structure through which rural development (projects are) channeled, despite evidence that the vast majority of chiefs and headmen lack any training or skills in administration of development programmes" (Haines and Tapscott, 1987:25). The need for alternative, accountable organisational structures, such as residents or farmers associations and water committees, around which community development can occur, and which enable people to take control over, and have ownership of, the limited resources at their disposal, is self evident (Daphne, 1982; Cooper, 1985; Zulu, 1985). Thus mobilisation, training and organisation building are vital building blocks in rural water supply project design.

Secondly, as water collection is largely a female preserve this will call for a change in the cultural and stereotypical accepted roles of women. In the past, men, as decision makers, have tended to decide on the siting of projects, the technology used and the levying of user charges (Friedman, 1984; Churchill, 1987). The United Nations Decade for Women in 1980 noted that in many Third World countries the position of women was worsening. The causes were complex. "Where women are discriminated against and dominated by men, barriers are set up against their participation in (the decision making of) political life, control of resources, control over child-bearing and fertility, access to education and new technologies and participa-

tion in religious life" (Pratt and Boyden, 1985:42). Projects therefore need to pay special attention to inequalities arising from gender differences within a family and society.

Pratt and Boyden (1985) also note that women are responsible for 50 per cent of the world's food production, and in the Third World their average working day begins at about four in the morning and ends at about nine o'clock at night. Responsibilities include food preparation, the collection of fuel and water, animal husbandry, agricultural production and child care. This burden is exacerbated as households become increasingly matrilineal and day-to-day decision making is placed on female shoulders. The need for formally recognised rural networks to provide moral support for women, and efforts to ease their work burden, become increasingly obvious and important. Within this context the following observation is pertinent.

"Fetching water, while a burdensome and time-consuming task, can often provide one of the few occasions when women can meet and talk together. Informal networks of this sort exist in many societies and help to counteract the isolation of women. Programmes attempting to ease the burden of water-carrying or affecting women's work in other ways should take this factor into account" (Pratt and Boyden, 1985:43).

Efforts should therefore be made to encourage the development of organisations that provide support for rural women, represent their interests, and in which they have a definitive interest.

Land tenure arrangements are often vested in the male household head, who in many instances is a migrant worker. Land may be a source of security for credit and tenure can be a criterion for access to extension services, irrigation, mechanisation and co-operative membership (Pratt and Boyden, 1985). A need therefore exists for the development of organisations with a defined legal status. These organisations should be open to both men and women: no differentiation should be made regarding rights and obligations on the basis of gender. This would assist members, including women, to gain access to credit from the formal banking sector for a variety of social and economic activities.

Thirdly, a prerequisite for the efficient running of any rural organisation, such as a water association, representing users and/or suppliers, implies that both are aware of their rights and obligations and able to seek recourse should the need arise. Project design needs to focus greater attention on the definition and practicalities of this issue.

4. The importance of organisational arrangements for water provision

Research has illustrated that low cost, low technical water systems operated and maintained at local level by representatives of the user group, are the most successful and cost effective means of delivering water to the rural poor (Baum *et al.*, 1985; Hollingworth, 1990). However, studies have also indicated that water supply provision is severely hampered by institutional weaknesses at all levels (Cairncross *et al.*, 1980; Churchill, 1987). Should a low cost, low technical decentralised approach toward water provision be adopted, institutional capacity to manage local schemes at this level is essential (Uphoff, 1986; Wilson and Ramphel, 1989; Hollingworth, 1990).

Local level institutional arrangements for water provision must firstly pay attention to the suitability of the organisational structure given the nature of the particular activity being undertaken, and to the characteristics of the people involved in the activity. Issues such as the ownership, as distinct from the management, the cost paid, and the benefits received from the schemes require attention. The relationship between the

owners, managers and users of the service also needs to be addressed. The responsibilities and liabilities of the deliverers, as opposed to the users of the service, requires precise definition.

Water is a "public good". The water supply service provided by physical infrastructure is classified as a social service, and in certain circumstances, it is considered a "public good". The two main characteristics of "public goods" are "excludability and jointness of use or consumption" (Uphoff, 1986:59). To the extent that goods are indivisible, or users cannot be kept from using them, they are public. These factors are often matters of degree. Jointness and excludability are not simple characteristics. However, they have implications for local organisational development. Depending on design, water services can exclude some users and do not necessarily require joint usage.

For whatever combination of physical, financial, moral or social reasons, it may be considered undesirable for basic water services to be provided only to certain people at market prices. In such cases, although the direct and indirect benefits to water supply users are substantial, the direct benefits or financial return to the supplier may be limited. When this occurs the institutional options are narrowed because service provision by profit orientated private organisations is not viable. Private organisations might lack the authoritative basis to ensure that water users pay for the services received. Public organisations such as local government and administration, with their authoritative, and possibly more assured financial bases may be better able to provide a continuous service than private organisations. For these reasons, water provision frequently is considered a public sector function.

If a private organisation engages in water provision, the relationship between the owners, managers and users of the scheme, together with their respective rights and obligations, requires careful assessment. In addition the relationship between a private water service organisation, whether it be a users association or a profit orientated private business organisation, and the relevant public institution, requires careful definition.

Ironically, in South Africa many local government structures lack the credibility and authority to charge for services. Often an assured financial base, and sound organisational capacity to ensure the operation and maintenance of services is missing. This increases the importance of the private sector's role. In South Africa, given the past record of public sector delivery of services to blacks, it is generally accepted that the private sector has a vital role to play in social service provision, including water, particularly at local level (Wilson and Ramphel, 1989).

Rural development is a process that requires the evolution of innovative institutions capable of meeting the new and changing needs, or demands, of both participants and the environment. Likewise, the process of organisational development is evolutionary. Characteristically, local initiatives at grassroots level start small. They tend to focus around a particular issue such as a production activity like brickmaking, or a consumption service, such as water or sewage. At this point in the development process, groups tend to be loosely and informally structured. As the capacity of a group increases and the extent, and/or scope, of its activities diversify, the organisational requirements become more complex. It may become necessary, and/or helpful, for the group to structure itself more formally.

For example, a Garden Group diversifies its activities to include poultry and egg production. A commercial hotel is prepared to purchase produce regularly from the Group providing a formal agreement is negotiated. In addition, the local branch of the commercial bank is prepared to make a revolving credit facility available to the Group to help it ensure continuity of production. Both the hotel and the bank can, but are reluctant to enter into the respective supply and credit

agreements with an informal group. They request the Garden Group to acquire a formal legal identity and possibly register as a co-operative or a close corporation.

A further example is that of a Civic Association which forms, organises and presents an alternative to the Local Authority. The latter lack popular credibility in a dense settlement characterised by an urban morphology, but which is designated a rural area. The community votes that the Civic Association will take responsibility for water and sewage provision. Various organisations, such as consulting engineers and financing institutions, are willing to deal with the Association to provide these services. However, they are reluctant to do so without the Civic Association formalising itself, and becoming a recognised legal entity. Possibly, registration as a section 21 company (association incorporated not for gain) would be appropriate. Incorporation as a legal entity will assist to define and regulate the relationship between the Civic Association, the user group, the established local authority and external parties, such as consulting engineers and financing institutions.

In terms of South African law, there are a variety of legally constituted entities, or structures, which local groups could adopt and utilise for their benefit. These include co-operatives, close corporations, both private companies having share capital and section 21 associations incorporated not for gain, and trusts.

In this paper, section 21 companies and trusts will be examined because they are the legal structures considered more generally relevant to local membership organisations involved in public service provision. The basic characteristics of these legal entities, together with their implications and suitability for a rural community involved in water provision will be examined.

In terms of the South African political system and its legislative framework, different sets of legislation are in operation in the Republic itself and all ten homelands. On achieving "self-government", a homeland automatically adopts the South African law as it exists at that point in time. Simultaneously, it acquires authority to legislate on certain items set out in Schedule 1 to the National States Constitution Act No. 21/1971 depending on the degree of self-government achieved. On achieving "independence", a homeland acquires full legislative capacity. Any laws in existence at the time of independence shall continue to be of force and effect until repealed or amended. Thus, currently in South Africa there may be eleven differing versions of a Co-operatives Act. The hideous complexity of this system is hard to appreciate. In this paper, the South African version of the legislation is referred to in the hopeful anticipation that shortly, South Africa will revert to one common legal system.

5. The reasons for "registration" of an organisation and creation of a legal entity

(a) Organising is an evolutionary process. It may or may not be appropriate, or necessary to "register" depending on the circumstances. For example, it is possible to establish group identity and group liability without any form of registration in one of the following three ways:

- (i) Every group member signs an Agreement such as an Acknowledgment of Debt. Liability under the Agreement can be, "joint" or "joint and several". The former implies a creditor can proceed against each debtor for his pro rata share of the debt only. The latter stipulates that the creditor can proceed against any group member for repayment of the whole, or

portion, of the debt. The group member has a right of recourse against the other members for their pro rata share.

This is the basis on which most commercial agreements are concluded where one party is a partnership or an unincorporated association. Liability of the parties is not limited as in the case of a company or co-operative. The personal estates of the signatories can be attached to satisfy payment of the debt.

However, such an Agreement has two main disadvantages. Firstly, every group member must sign and all group members require an understanding of the legal consequences of their act. A further disadvantage is that in terms of Section 31(i) of the Companies Act No. 61/1973, no association or partnership consisting of more than 20 people for the purpose of carrying on any business for profit, is permitted, unless it is registered as a company. As many community groups are large, this could be a problem.

The advantage of an Agreement signed by all is that joint and several liability is a strong safeguard against default, particularly in the light of peer group pressure.

- (ii) All group members sign a Power of Attorney empowering an elected representative to sign all documentation on their behalf. The advantage of this is that only one person needs to sign the documentation although liability remains "Joint", or "Joint and Several".

- (iii) An elected Chairperson/Group Office Bearer signs on behalf of the group.

The disadvantage of this method is that formal group liability is lacking. Legally the individual who signed is liable for debt repayment, which places an undue responsibility on one person. Heavy reliance is placed on informal group pressure ties.

- (b) Generally speaking, organisations tend to acquire formal legal status and to register themselves in terms of several varying sets of legislation for the following six reasons.

- (i) An organisation formalises to acquire legal personality. It acquires a personality and becomes a legal entity as distinct from the human beings who comprise it (Coaker et al, 1975). It can acquire rights, property and liabilities in its own name and can sue or be sued in its own name.

- (ii) Formalisation enables an organisation to acquire perpetual succession. By virtue of its separate identity, the organisation does not die because a member dies.

- (iii) A formalised structure enables the organisation to subscribe to an established code of rules, which prescribe procedures

for operating and dissolution. This provides a framework in terms of which organisations may do business with one another.

- (iv) By acquiring a defined legal status, an organisation can "make public" its name, objects, business, assets, and operational procedures. Through registration, this type of information becomes available to interested members of the public.
- (v) If people or an organisation undertake certain actions they are "obliged" to comply with certain legal formalities. For example, a fund raising number must be obtained if donations are solicited from the general public (Section 2 of Fund-raising Act No. 107/1987). A further example is that a company must be registered if an association of more than 20 people undertakes a profit making business venture (Section 30(i) of Companies Act No. 61/1973).
- (vi) A major factor in determining an appropriate legal structure depends on whether or not an organisation operates for the personal benefit of its members.

6. Characteristics of Section 21 companies and trusts and their implications for organisations involved in water provision

Tables 2 and 3 present a brief review of the legal characteristics of Section 21 Companies or "Associations incorporated not for gain" and Trusts. The implications of these characteristics for local organisations involved in water provision are also tabulated.

7. Qadi/Nyuswa water project - A case study

7.1 Historical background

The Valley Trust is a non-profit socio-medical project situated in the Valley of a Thousand Hills in Natal. It is a Non-Government Organisation which serves 80000 people in five tribal areas comprising some 250 square kilometres, (Valley Trust, 1989a; 1989b).

In 1982, the Valley Trust was approached jointly by the Qadi and Nyuswa people through their tribal authorities. These two Tribal Authority areas are situated on the periphery of the Greater Durban area, close to Inanda. Assistance was sought for a water supply similar to that implemented in an adjacent area. As a result of discussions between the Valley Trust and the Qadi and Nyuswa people, it was proposed that an institutional structure at tribal level be implemented to manage not only a water supply project, but a wider development programme. The focus of this case study is the former which aimed to provide clean and accessible water to the Qadi and Nyuswa inhabitants. An integral part of the project was the development, monitoring and evaluation of an institutional structure to organise, implement and manage the water supply.

The project, therefore consisted of two components.

- a) Firstly it entailed the physical construction and implementation of a waterpipe line and standpipe reticulation, consisting of 19 kilometres of mainline and seven kilometres of branchline piping, which were installed using labour intensive methods. This part of the project was to be implemented in two phases. The first phase involved the construction of

12 kilometres of mainline piping with approximately 30 standpipes. It would supply water to over 10000 people. The second phase entailed the installation of the remaining seven kilometres of mainline and seven kilometres of branchline pipes.

- b) The second component of the project comprised support for the experimental institutional structure (Pers Com, 1990).

The organisational structure was devised through participatory discussion with the project recipients and is set out in Figure 1.

In December 1985, the Qadi and Nyuswa people elected office bearers to the Qadi/Nyuswa Development and Services Committee by secret ballot. This is the policy making forum for the project and it acts as the management agent of the pipeline project. Operational issues are administered by the Qadi/Nyuswa Water Board which employs the members of the Corporation. The Valley Trust and Thuthukani Advisory Committee advise and assist the Board in its work. They also provide all the training for officials. Thus the Valley Trust is, in effect, the project facilitator and supporter. The organisational structure depicted in Figure 1 and the constitution of the Committee were approved by the Tribal Authorities, who also agreed to certain powers being delegated to the Service Board. This decision was also approved by the Regional Magistrate.

The bulk water supply is obtained from the Pinetown Municipality and the Committee is responsible for the payment of the monthly account. The water is sold on a cost recovery basis to any member of the Qadi and Nyuswa communities at R2,00 per litre (as at 1986). Comparatively this is expensive water. Dues are collected through a coupon system administered by standpipe attendants and the income generated is used for water supply costs (Mann, 1985).

The capital cost of project establishment was financed from a variety of sources. World Vision, a non government organisation involved in rural development, was a major contributor. In addition the Umgeni Water Board, KwaZulu Department of Works, the Valley Trust, Hewlett Packard and the two communities themselves, all contributed to the capital costs. Although the KwaZulu Government agreed to stand guarantee for any loans granted to the Board as yet no loans have been taken up. The KwaZulu Government has also supported the creation and operation of the project's institutional structure, which although sanctioned by the tribal authority constituted an alternative structure to it (Mann, 1985).

Phase One of the project was implemented during 1985 and 1986. Consumption at most of the standpipes was in line with expectations, but a few were making a loss. In these cases, the water sold was not covering the cost of the standpipe attendant's wage. Overall the scheme was making a very small profit. The Board was not prepared to close down non-viable standpipes because the community had all paid the same amount towards the scheme on the understanding that everyone would have access to water on an equal basis.

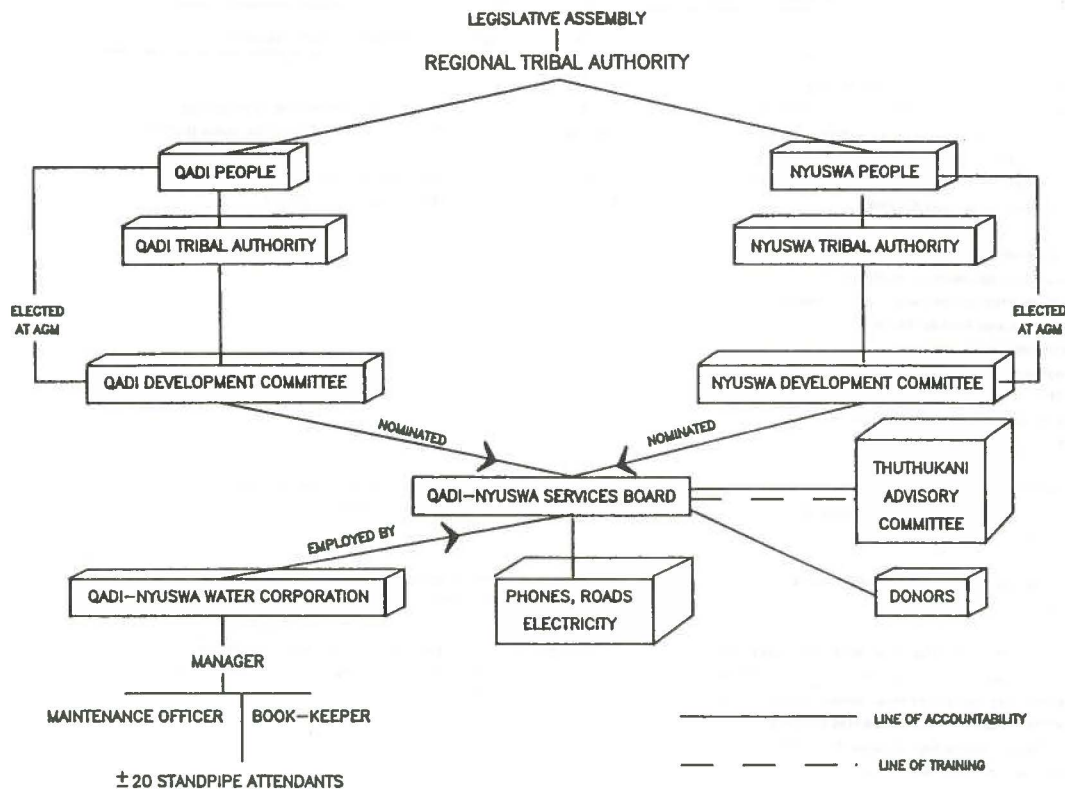
In the 1988 elections for Board members in the Nyuswa tribal region, all the Nyuswa Board members were voted out of office. This was attributed primarily to the issue of the siting of standpipes. The ex-Board members stated that they had sited the standpipes near their homes to facilitate supervision of water sales. The community perceived this as the Board members benefiting themselves unfairly. Consequently, half the Board members were new and untrained, and the training exercise had to be repeated. This shift meant the pool of skilled people within the community increased. However, the Board's functioning suffered, temporarily.

Table 2: Basic legal characteristics of a Section 21 company and their implications for water organisations

Legal characteristics of a Section 21 (S21) company or "Association incorporated not for gain"	Implications for organisations involved in water provision
<p>Essential provisions</p> <p>Governed by the Companies Act No.61/1973.</p> <p>The essential difference between this association & a private company is that it does not have a share capital & its profits are not distributed to its members. Its members liability is still limited (Coaker et al, 1975).</p> <p>To qualify as a S21 Company, the organisation</p> <ul style="list-style-type: none"> i) must be formed for a lawful purpose; ii) it must have as its main object the promotion of religion, arts, sciences, education, charity, social activity or communal or group interest; iii) it must intend to apply its profits (if any) or other income towards the promotion of the main object chosen by it; iv) it must prohibit the payment of any dividend to its members; and v) it must comply with the specific requirements laid down in the Act regulating its formation, registration & memorandum of association. <p>If such an association is wound up, deregistered, or dissolved, & if its assets at that stage exceed its liabilities, such assets must be given or transferred to some other association or institution (or associations or institutions) having objects similar to the main object of the defunct company (Act 61/1973 S21).</p> <p>Company has a legal personality, and perpetual succession (Coaker et al, 1975).</p>	<p>These features together with the basic characteristics of a company (such as legal personality & perpetual succession) render it an appropriate organisational structure for the provision of a public service. A public good such as "water" and publicly owned infrastructure could be transferred to & owned by the S21. The assets/ service could be operated & maintained profitably for the wider community. Profits would be applied toward furthering the objectives of the company.</p> <p>Although profits are not distributed to members, like other companies, salaries can be paid to employees.</p> <p>On dissolution assets would be transferred to another organisation with similar objectives.</p> <p>Company is a legal entity as distinct from its members.</p>
<p>Size</p> <p>Minimum of seven members. Legal persons can be members. (Coaker et al, 1975).</p>	<p>The public nature of the company protects all parties involved, especially creditors.</p>
<p>Formation</p> <p>Registration of Memorandum and Articles of Association and registration of members, inter alia, with Registrar of Companies, Pretoria. The documents are public.</p> <ul style="list-style-type: none"> - Memorandum sets out business and objectives - Articles regulate company's internal affairs, eg. meeting procedures. 	<p>The formation and regular reporting requirements are extensive and expensive.</p>
<p>Accounting/ Reporting requirements</p> <p>Audited annual returns and duty payment to be made to Registrar. Annual General Meeting required. Powers and duties of company and its officers regulated by Companies Act.</p>	<p>Possibly the directors could be appointed by the parties with an interest in the activity, such as service users.</p>
<p>Relationship between owners administrators beneficiaries</p> <p>Company has - members</p> <ul style="list-style-type: none"> - directors who are the officers (administrators) of the company who may employ employees. 	<p>Protection for creditors & third parties with whom the company deals, achieved this way.</p>
<p>Rights/ obligations of company, owners/ beneficiaries & administrators</p> <p>Company can acquire rights & obligations in its own name, eg. sue & be sued, own property. Company is liable for the acts of its agents. Members & directors of company have limited liability for debts of the company (Coaker et al, 1975).</p>	<p>Payment of dividend to members prohibited (Act 61/1973 S21 (1)(d))</p>
<p>Payments to members</p>	<p>On dissolution, assets must be transferred to some other organisation having similar objectives (Act 61/1973 S21 (2)(b)).</p>
<p>Winding up, dissolution</p>	<p>In terms of the spectrum of institutions required for water provision this would be an appropriate legal structure:-</p> <ul style="list-style-type: none"> i) for a water users association to adopt; ii) to which a public authority could delegate responsibility for water provision, or with which it could share responsibility with the users.
<p>Relevance to water provision</p>	

Table 3: Basic legal characteristics of a trust and their implications for water organisations

Legal characteristics of a trust	Implications for organisations involved in water provision
<p>Essential provisions Governed by the Trust Property Control Act No.57/1988. Exists when an owner or founder hands over, or is bound to hand the control of an asset which, or the proceeds of which, is to be administered by a trustee (administrator) in his capacity as such for the benefit of some person (beneficiary) other than the trustee or for some object (Honore, 1985; Act 57/1988).</p> <p>Therefore, for the existence of a valid trust there must be (i) a segregation of the trust assets by the founder; (ii) the existence of an obligation on the part of the trustees to administer them otherwise than for himself; (iii) actual control by the trustee over assets; (iv) a degree of independence on the part of the trustee as the holder of an office; and (v) the control of the court over its administration (Honore, 1985).</p>	<p>Trusts in the wider sense are used when property is to be held or administered by one person or on behalf of another, for some purpose other than own benefit (Honore, 1985). Trusts are set up to administer property for the benefit of minors, the public, or a particular class or category of person.</p>
<p>Juristic personality A trust is not a legal person, but in certain circumstances it is considered a separate entity, eg. insolvency of trustees, tax purposes (Honore, 1985).</p>	<p>This provides protection for third parties & for the founder, trustee & beneficiaries whose interests are separated out.</p>
<p>Size Any number of trustees may be appointed & there may be any number of beneficiaries.</p>	<p>The flexibility of trusts is one of their essential & most useful characteristics. The flexibility arises from the founders capacity to determine the contents of the trust and modes of appointment & replacement of trustees. It allows beneficiaries to benefit from trust property without owning or administering it. This has favourable tax implications for beneficiaries.</p>
<p>Formation The trust is regulated by the terms of the trust deed. The trust deed must be lodged with the Master of the Supreme Court. It is a public document. Unless exempted the trustee must furnish security to the Master. Trust property should be transferred to the trust (eg. registered in name of trust), and be kept separate & identifiable by the trustee (Honore, 1985; Act 57/1988, S4 - 12).</p>	<p>This illustrates the 'public' nature of trust affairs as like the deed itself, these accounts are available to the public for inspection. This provides protection for all parties.</p>
<p>Accounting/ reporting requirements The trustee is accountable to the Master of the Supreme Court for the proper administration of the trust. There is a provision, <i>inter alia</i>, for the rendering of an annual account (Act 57/1988, S16).</p>	<p>This is why trusts are so widely used. It allows for a division & specialisation of labour. The founder can benefit people who may lack the capacity to administer or not be involved in the administration of trust assets. It also allows for continuity beneficiaries of administration. The trustee is obliged to administer trust assets for the benefit of others. The trustee could be a person/s or an organisation which would provide for continuity of administration. For example, an individual may create a trust because he wishes to promote a political, social, religious cause. The State has used a trust (South African Development Trust) to provide for the purchase & administration of land for blacks & for the purchase of land & management of national parks.</p>
<p>Relationship between There is a separation of the concepts and roles of ownership, administration & beneficial enjoyment (Honore, 1985).</p>	<p>This provides protection for all parties concerned.</p>
<p>Rights/ obligations of company owners/ administrators/ beneficiaries The founder must actually hand over control of trust property to the trustee. Trusteeship is a public office and a trustee is accountable to the court for the proper administration of the trust for the benefit of trust beneficiaries. A beneficiary sues a trustee, in his capacity as such, for maladministration of the trust. The trust sues/or is sued in the names of the Trustees, in their capacity as such (Honore, 1985).</p>	<p>A public good such as "water" & the infrastructure necessary for its distribution could vest in and be registered in the name of the trust. The trust could construct and/or administer the operation & maintenance of the water service for the benefit of the wider community (beneficiaries). The trustee's duties could be prescribed by the founders of the trust. The trust deed could be varied if circumstances necessitated it.</p>
<p>Winding up dissolution The founder can retain the right to revoke/vary the trust deed. The discharge of a trust will be influenced by the trust deed itself (Honore, 1985).</p>	<p>The flexibility of a trust, its relatively simple & inexpensive registration & administration requirements, & its clear distinction between the concept of founder, administrator & beneficiary would make it a useful legal entity:- (i) for a water users association to adopt; (ii) to which a public authority could delegate responsibility for water provision, or with which it could share responsibility with the users.</p>
<p>Relevance to water provision</p>	<p>The flexibility of a trust, its relatively simple & inexpensive registration & administration requirements, & its clear distinction between the concept of founder, administrator & beneficiary would make it a useful legal entity:- (i) for a water users association to adopt; (ii) to which a public authority could delegate responsibility for water provision, or with which it could share responsibility with the users.</p>



(SOURCE: Mann, 1986)

Figure 1: Qadi-Nyuswa pipeline: Organisational structure

The new Board members were adamant that the community did not want the scheme expanded further unless it was viable (Pers Com, 1990). Finally, in 1988 the drought ended and spring water became available from natural sources. The community has stated its preference for spring water which is tastier, free, and therefore less expensive than piped water. The questionable profitability of some standpipes and the tendency to opt for spring water has resulted in a decision by the current Board members not to proceed with phase two of the project (Pers Com, 1990).

7.2 Analysis of the organisational structure of Qadi/Nyuswa water project

(a) The current structure

The Committee provides an example of the development of a democratically constituted Non Government Service Organisation with the necessary capacity to carry out one of the responsibilities normally attributed to a local public institution, either, local government or administration (Uphoff, 1986).

The rights and duties of the various organisations and participants, and the relationships between them, have been carefully defined in this organisational system. The Committee constitutes an elected community service organisation with a constitution. Currently the Committee, *per se*, has no legal status. It has no independent legal personality and therefore it cannot sue, or be sued, in its own name.

Should the Committee fail to pay an account from the Umgeni Water Board, the Water Board would sue the individual committee members for payment, and their personal estates could be utilised for repayment of the debt. (The situation set out in

5a(i) above would therefore apply.) Conversely, should water users fail to pay for coupons, the individual committee members, and not the committee *per se*, would be obliged to sue the users for payment.

Should the Committee decide to expand the water service infrastructure, or take up a loan, both the Committee members and the third parties with whom it is dealing, may consider it desirable to define the legal status of the Committee more clearly. Possibly the Committee may decide to acquire a legal personality as distinct from its members for the reasons set out in 5b above.

The purpose of the Committee is to facilitate and support development in its area, and particularly, to manage the water supply for the wider community who pay for this service. It may be the intention of the scheme to operate profitably, and for the profits to be used to maintain or upgrade the scheme, or further the committee's development objectives. However, it is not intended that the Committee members as individuals should profit from the operation. Hence, it would be appropriate for the Committee to register as a section 21 company or possibly a trust.

(b) Registration of the committee as a Section 21 company

Should the Committee register as a section 21 company, the Committee itself, would have legal personality, perpetual succession and it could own property. As the Committee members change, this could be useful. Third parties, such as the Tribal Authority and Umgeni Water Board, would deal with the Sec-

tion 21 Company as a legal person. They would enter into agreements with, and sue or be sued by the Section 21 Company.

The objectives and business of the Committee, as set out in its constitution, would form part of the Section 21 Company's Memorandum of Association. The Committee's operating procedure would be set out in the Articles of Association. It could decide on its own procedures within an established legal framework. The Section 21 Company would be required, inter alia, to submit audited financial statements. These documents are filed in a public office and are available for inspection by interested parties (such as aid donors). This safeguards all parties and defines their accountability. The Articles of Association of the Section 21 Company would set out procedures for the election of directors. The directors (committee members) could employ staff to carry out the Company's stated objectives.

The physical infrastructure required for the water supply service, which essentially constitutes a public or community asset, could be registered in the name of the Section 21 Company.

On dissolution for whatever reason, the Section 21 Company's assets could be transferred to an organisation with similar objectives, and not distributed to committee members. This safeguards these assets for the community and defines and regulates more clearly the rather fuzzy concept of "community ownership".

(c) Registration of the committee as a trust

A Trust could be set up by the community, certain committee members, the Tribal Authority and/or the Valley Trust or possibly the current members of the Thuthukani Advisory Committee. The Trust would be a recognised legal entity for certain purposes, if not a legal persona, and could have perpetual succession if desired.

Trust affairs would be regulated by the trust deed which would set out the trust objectives, operating and dissolution procedures. The trustees would be required to report to the Master of the Supreme Court by, inter alia, filing trust accounts. The public nature of the trust deed and accounts would constitute a protection for all parties concerned.

Trusts distinguish between the concepts of founders, administrators and beneficiaries. Accordingly, the trust deed would provide for the appointment of trustees (administrators), regulate their activities and define their accountability to the beneficiaries.

The trustees could be responsible for arranging for the election of committee members if desired by the community (beneficiaries). The rights and obligations of the committee and the community could be set out in the trust deed. This allows for maximum flexibility to regulate affairs in accordance with the interests of founders and beneficiaries.

The physical infrastructure required for the water supply service, which essentially constitutes a public or community asset, could be registered in the name of the trust. Provisions regulating the disposal of trust assets on dissolution of the trust would be set out and regulated by the trust deed.

Essentially, a Trust allows for maximum flexibility of arrangements. This may be necessary to accommodate the diverse requirements of all parties involved. The contents and provisions of the trust deed could be negotiated between the interested parties, and altered if circumstances necessitated it.

9. Conclusion

Water in rural areas can act as a catalyst for development. This paper briefly reviewed current trends of rural domestic water usage in South Africa, and it calls for greater attention to be given to organisational issues at community level. The failure to give sufficient attention to mobilising and encouraging democratic local organisations to administer public goods, such as water, in rural areas is highlighted. Reference is made to the need for organisations to be accountable to their members and donors. In addition, the practicalities of overcoming the nebulous and subjective perspective of community ownership are debated in detail. Planners and implementing agencies should take cognisance of any inequalities arising from gender differences, which particularly affect rural women. Finally, the need for local organisations to have understandable, clear cut rights and obligations is discussed.

Previously, the legal issues relating to local organisations involved in economic and social activity, of which water represents but one example, have received scant attention. The evolutionary process of organising around water provision can be assisted by using and adopting conventional legal principles and frameworks, such as a section 21 company or a trust. These frameworks can increase the community's capacity to access, and control, the resources it requires for development.

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