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Shona customary practices in the context of water sector reforms in Zimbabwe

Claudious Chikozho and Jim Latham

Zimbabwe has implemented a water sector reform programme aimed at decentralizing water resources management to the user level. The Water Act of 1998 led to the establishment of new management institutions. Although the act does not make any reference to customary law, traditional informal practices still prevail among rural communities. Case studies illustrate that the new water legislation lacks relevance for rural communities, who rely on their indigenous institutions for the management of natural resources. These customary practices are well understood by the people, they have congruence with their worldviews and are functional. There is a conspicuous absence of true devolution of authority in the new statutory arrangements. This means that at grass roots level, the only consistent and observable form of management is that found in local customary institutions. The paper argues that despite the influence of colonial and post-colonial regimes, traditional institutions remain relevant to local communities.

Keywords: Zimbabwe, devolution, water resources management, customary law

Introduction

The Government of Zimbabwe embarked on a reform of the water sector in 1995. Informing this decision was a belief that the Water Act of 1976 (in turn a revision of the original Water Act of 1927) was inadequate in a number of areas. The Government of Zimbabwe indicated the principles that it hoped would be enshrined in a new Water Act (finally passed in 1998 and promulgated in 1999) in order for it to be an effective instrument for the reform of the management of the country's water resources. These were:

- all surface and underground water will belong to the State
- all Zimbabweans must have access to water for primary use
- all water must be beneficially used
- water should be treated as an economic good
- water tariffs will need to take cognizance of those unable to pay the full price
- water rights in perpetuity need to be replaced by water permits issued for a specific time period.
- water management should involve all stakeholders at the lowest possible level and
- the environment is to be considered as a consumer in its own right (see Latham, 2002).

The act established catchment councils comprising of members from sub-catchment councils (selected on a stakeholder basis) which in turn are underpinned by informal, non-statutory water user boards. There is no provision for customary law and practice in the act, apart (possibly) from recognition of primary rights[1] to water. However, water use and management is still strongly influenced by customary law, and informal practices. The dilemma created by the new legislation is how to reconcile the newly created institutions with existing formal and informal institutions. They have to reconcile statutory district local government (Rural district councils - RDCs) and traditional (indigenous) institutions of governance on the one hand, with the catchment councils (CCs) on the other. There are immense problems in achieving any sort of fit between the spatial dimensions of the resource and the institutions of resource governance and rural development (Latham 2002). Little attention has been paid to the role of customary law and other locally developed legal or normative systems (Katerere and Zaag, 2003). The application of both indigenous and formal institutions of governance as instruments for the management of resources, and how a useful symbiosis can be achieved is an exciting challenge to academics and water professionals. The Zimbabwean case is made more complex by the current "fast-track land reform programme".

This programme has had a serious impact on both the customary laws and the new water management regime in the sense that it has generally ignored the rule of law – both formal and customary. Its "fast track" nature seriously disturbed the smooth implementation of the water reform programme. Most noticeable has been the uncontrolled use of water particularly in the resettlement areas, difficulties in collecting water levies/tariffs and considerable environmental damage to rivers by gold panning and deforestation.

Methodology

The paper is based on an exploration of literature on customary law in Zimbabwe specifically and Africa in general. Case studies are used to demonstrate the inherent conflict between formal legislation and Shona water use and management practices on the ground. The case studies heavily tape into the authors' understanding of the basic structure and function of the Shona judicial system, which is in turn a product of the Shona people's worldviews. The paper magnifies those views in order to bring out the influence that they have on water resources management. The case studies are drawn from the Mazowe and Manyame catchments (see figure 1), where the Centre for Applied Social Sciences (CASS) water research team closely followed developments in the water sector reform programme for more than six years, beginning from 1996 up to 2002. The case studies demonstrate the resilience and relevance of indigenous institutions and worldviews for the management of resources in the face of an extensive water sector reform programme. The paper also makes use of insights gained during those six years of research carried out at CASS to provide discourse, conclusions, and recommendations.

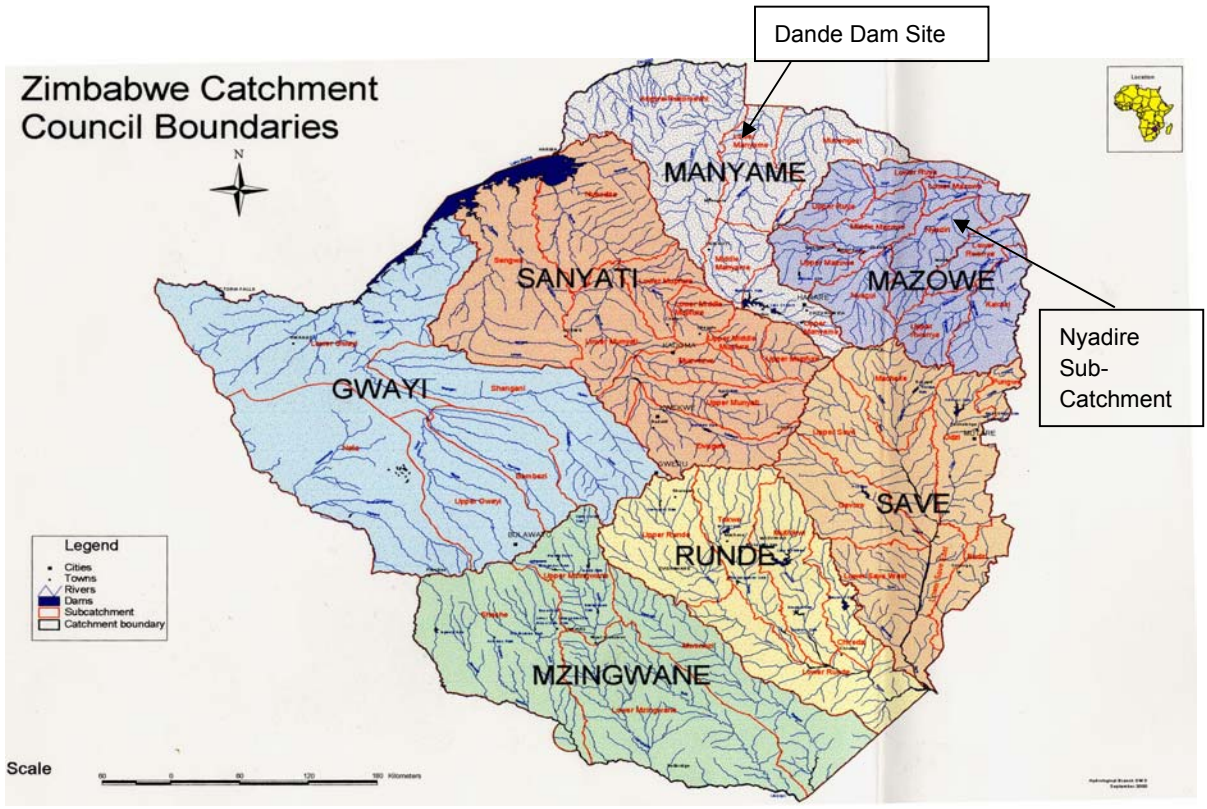

Figure 1. Catchment council boundaries and location of case studies

Source: Hydrology Department, Zimbabwe (2000)

Legal pluralism

Most developing countries instituting water sector reform programmes have to contend with plural legal and institutional frameworks that govern resource use. May (1987, 21) describes legal pluralism as a situation where the transfer or introduction of one system is superimposed on an existing political structure or culture. Attempts to unify legal systems in both colonial and post-colonial Africa have generally met with very little success. According to Hooker (1975, viii) despite political and economic pressures, legal pluralism has shown an amazing vitality as a working system. Zimbabwe has not been an exception to the existence of legal pluralism. Nemarundwe (2003, 28) points out that in practical terms, communities in the communal areas of Zimbabwe are governed by resource systems that have multiple rules (State, RDC and local) with multiple legitimation bases (e.g. legal and customary) and different enforcement structures and processes.

Customary law and practice

"Both law and custom comprise that code of rules approved by tribal tradition; the hereditary body of established conduct; that which has been observed, recognized, and enjoined from time immemorial, and handed down by the fore-fathers" (Posselt (1935, 44). This definition posits two fundamental elements of customary law. Firstly, it is approved by tribal tradition (communally agreed upon), and secondly it is handed down from generation to generation. However, law (customary or otherwise) is not static. It changes as society adapts to changing social, economic and political circumstances. To what extent can that body of law and practice remain customary when it is subjected to so many pressures? Goldin and Gelfand (1975, 28). Two important points emerge. Firstly, the colonial era had a profound impact on the nature of laws and resource use patterns such that it diluted or altered what was hitherto customary (Goldin and Gelfand, 1975, 28; Bryde (1976, 108). Secondly, colonial practitioners embarked on recording customary law so that it would be in a form they were familiar with and to make it more readily accessible to others involved in administering justice.

We define customary law as any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in a community and accepted by such community in general as having the force of law. This also includes customary laws as modified by external forces and pressures and the influence of statutory law. Customary behavior is perhaps best defined as what people consider seemly - what is fitting and acceptable in given situations. Because of its generally unwritten, flexible and adaptive nature, it may exhibit considerable complexity. This adaptive quality provides the elasticity that underpins its resilience. Customary law seeks to enforce society's perception of what is normal, what is just and what is consistent with its worldview. Such adaptations are iterative and they lie within the shifting landscape of the peoples' notions of what is culturally acceptable. They conform to society's current values. Customary law in this sense is not something that was, but something that is (Katerere and Zaag, 2003). "A particular society is a going concern – it functions and perpetuates itself – because its members, quite unconsciously, agree on the basic rules for living together" (Foster 1962, 11). Culture and customary behavior are reflections of society's perceptions and worldviews. They are learned while practicing them. They are the embodiment of society's legal institutions.

There however, exist basic differences between Roman-Dutch law (the Common Law of Zimbabwe established through statutes) and Shona customary law that are as fundamental as the differing worldviews that produced them. These are:

- African law is unwritten. In the western world, all legal systems are recorded and characterized by a high level of certainty and precision (Bennett 1985, 17).
- African laws are not always clearly defined. They can vary from district to district and even within the same district (Goldin and Gelfand 1975, 10).
- Customary laws are directly validated by community acceptance - Western law is validated by legislative enactments, case law and judicial precedents.
- Because of its written and codified nature, western law is the preserve of professionals who engage in the esoteric work of interpretation, application and creation of rules (Bennett 1985, 17). Africans understand their laws by virtue of being and living as Africans. African Customary courts are open to all and there are no restrictions regarding evidence.

- Shona law makes little distinction between criminal and civil law. All litigation was and is still aimed at reconciliation (see Bourdillon 1976; Holleman 1955; Goldin and Gelfand 1975, 78; and Dande case study in this paper). Compensation for the injured parties is the prime objective rather than punitive punishment of the transgressors. "The objective of traditional courts or tribunals in Africa was to reconcile the disputants and maintain peace, rather than to punish the wrongdoer.

Structure and function of traditional Shona society

Ideally, a Shona polity (chieftainship) consists of nested levels of governance, starting at the village. A number of villages, typically between twenty and fifty, comprise a ward. Several wards comprise a chieftainship. Legal proceedings invariably commence at the village level. At village level it is important to heal ruptured relationships and restore peace and harmony as quickly and effectively as possible. Compensation or restitution of rights for aggrieved families is the best way to restore harmony. If it is not possible to reconcile disputants, then the matter is referred to the court of the ward headman. The chief's court is the court of final appeal before entering the State system of district courts presided over by professional judicial officers. Judgments in the lower tribunals (especially at village level) were and are hard to enforce if parties cannot be reconciled by arbitration. Only chiefs or semi-autonomous headmen could/can enforce judgments – and even chiefs (since the Colonial era) have sometimes had to resort to the state system to enforce judgments in the light of refusal by litigants to abide by their judgments.

Traditional courts were weakened by the "peoples' courts" introduced after independence. Nevertheless, they continued to operate as forums for arbitration. With the resumption of authority implied by the Traditional Leaders Act (1997), the courts of chiefs and headmen (through their "assemblies") are likely to assume a more positive role in the legal and social framework of the lives of rural people. There are problems with governance and the management of resources at the lowest (village) level. First of these is that of maintaining congruence with ecological or resource scale. In the case of water, a village community may have a limited vision of how to manage a river system. Empirical data suggests that the unit of management best suited to compromise between the need for local level management and the demands of scale and practical governance, is that of the traditional ward. It is generally at this level, that an accumulation of authority provides the ingredients for ecological resilience without detracting from the need for a clear perception of the necessary links between authority and responsibility. For management of resources to endure, it is desirable that there is an alignment of authority, responsibility and incentive (Murphree 2000, 4). At the ward level such an alignment is possible because the unit is still small enough for most people to know each other on a face-to-face basis, while large enough to encompass the ecologies of scale. It is perhaps for this reason that Shona society recognizes the court of the chief as the first level of formal indigenous governance. It is at this level that customary law is made operational. The ward best fits the definition of "community" which we use as a working hypothesis.[2]

Shona worldviews

Traditional Shona religion (which is still strong today) centres on the belief in a Supreme Being (God). God is generally approached through a hierarchy of spirits, representing departed members of society. In traditional Shona religious belief, the founding ancestors of the most powerful royal lineages converge and merge with the spirit of the Supreme Being. Another important perception is represented by the dictums*: "*The land is the people" and "the chief is the people, the people are the chief." By the authority of their acceptance of his station, the people determine the power and position of the chief. These maxims encapsulate an institutional reality that has profound implications. They suggest that the head of a socio-political unit (be it village, ward, chiefdom or state) governs by general consensus. And as the people are also the land ('the land is the people') and its resources, this worldview embraces a notion of Man and his environment in ecological union. These views are magnified in two case studies presented in this paper. These world views influence the resource use behavior of the Shona people in a way that creates a gap between the demands of statutory law and actual (customary) water use practices on the ground.

Manyame catchment: Dande dam and irrigation scheme

The Dande River rises on the Great Dyke and flows through Guruve Communal Land to the Gota Hills where it plunges over the escarpment to the lowlands that have taken its name. It then flows on to merge with the Manyame

before debauching into the Zambezi. In many parts of the area the two rivers traverse, the *mhondoros* (founding ancestral spirits*)* are revered and held in high regard by the inhabitants. Territorial boundaries delineate the areas of influence for different *mhondoro*, mirrored to a greater or lesser degree by current chiefdoms. The *Mhondoro* territories are also arranged in nested levels. These have been labelled spirit districts and provinces and culminate in "commonwealths" (Latham, 1987). These domains of the spirit world are profoundly territorial, indeed ecological. They are concerned with the care and management of the earth. It is underwritten by what has been called a "philosophy of the Earth" (Schofeleers, J. 1999:2).

"There exists a type of cult which functions for the whole community …and which is at the same time profoundly ecological" and "what sets territorial cults apart from other religious institutions is the combination of communal and ecological concerns" (Ibid; 2). Characteristic activities of these so-called territorial religious institutions are rituals to counter-act drought, floods and other environmental events. More positively they function as arbiters of a community's well being: its crops, livestock, fishing, hunting and social cohesion. This conclusion is very much the essence of what may be called "Indigenous Holism". It echoes Hunt and Berkes (2000) 's notion of "people in environment" or what we have interpreted as "environmental dwelling". The *mhondoro* are served by spirit mediums*,* who reside at sacred sites, sometimes described as cult centres.

In a narrow gorge in the Gota Hills of the Zambezi Escarpment, the colonial administration built a concrete bridge across the Dande River that was breached many years ago. It was never re-built. Recently, a much more ambitious project has been undertaken by the Zimbabwean Government, first with German donor support, and more recently with aid from the Chinese, through the African Development Bank. However, local support for the dam has been less than enthusiastic. Many people will be displaced once the dam fills. They are not likely to receive much benefit from the construction as the water is to be channelled down to the Zambezi Valley. The Germans pulled out of the scheme due to local resistance.

In 2001 a team of Chinese engineers moved onto the dam site. There was minimal consultation with the locals. However, there was an understanding that Chingowo's grave would not be submerged (Chingowo is remembered as the founding ancestor of the Guruve people). When the villagers discovered that this undertaking had been broken and that the dam would drown this sacred place, a revolt against the dam was mounted led by seven spirit mediums, including the mediums for Chingowo, his sons Swembere and Dandajena; the spirit medium for the pre-Chigowo autochthonous leader Nyamapfeka; Mutota (founder of the Mutapa dynasty) and his senior kinsmen. This combined *mhondoro* congregation represented not just the people whose homes would be flooded along with the sacred gravesite of Chingowo, but the peoples of the Valley floor, the area commonly called the Dande, where the planned irrigation scheme is to be introduced. It thus represented a general resistance to the proposed dam and the intended irrigation on the valley floor. Concurrent with the formal and ritualised protest from the *mhondoro*, villagers obstructed the construction work and vowed to burn the bulldozers. Dande villagers also expressed grave misgivings about the benefits of the proposed irrigation scheme (Sithole 2002).

We attended a meeting of angry local villagers which took place in June 2001. They requested us to report to the District Administrator (DA) that they would set fire to the bulldozers unless the spirit of Chingowo was appeased. The seven spirit mediums were demanding a large amount of compensation for the anticipated desecration. This amounted to 25 head of cattle and a sum of money in the region of Zimbabwean $10 000. Until and unless this was paid, work on the project was to cease. Subsequently, the DA held a number of meetings (one memorable meeting saw him actually chased away by angry locals) before an agreed compensation was arrived at. The *Mhondoro* articulate and validate public opinion (Latham 1987; Bourdillon, 1976; Spierenberg 2003). In extreme situations *mhondoro* also mobilize community action. People are prepared to risk central state authority if it is clear that they are acting out a compelling instruction from their *mhondoro*. This shields them from direct responsibility and excuses their apparent defiance of superior political authority. The Chingowo grave-site issue was a clear signal that the population was unhappy at the lack of consultation that had taken place. They demanded to be heard, and what better way than through the mhondoro with their strong religious and ritual significance as the "owners of the Earth. It is interesting to note that their strategy was to seek compensation rather than bar the project completely. It is clear from this that the people were more opposed to their exclusion from the planning and implementation of a

scheme that directly affected their lives and their rights in land and water than they were to the notion of development per se.

Below the escarpment on the valley floor, the Dande Irrigation Scheme (DIS) envisages the water from the Dande Dam being transported via a tunnel, to the Dande area (Zambezi Valley), where it will provide water for the irrigation of some 5000 hectares of land in Chief Chitsungo's area. This area has already been subjected to considerable resettlement of local people, and the influx of many "outsiders" consequent on what was termed the Mid Zambezi Project. This was a top-down intervention introduced by Central Government shortly after Independence in the 1980's designed to rationalize settlement patterns and to accommodate the many people who were moving to the Valley seeking land for agriculture. Its most controversial component was the moving of people away from the river banks where they had lived for centuries and prohibiting the use of riverine alluvial soils for cultivation. It met with sharp resistance and was the cause of a protracted struggle (with the *mhondoro* playing a prominent role) between the original Valley people and the central planners, in which Central Authority ultimately prevailed though individual victories went to the *mhondoro* and the people native to the Valley (see Derman 1990, 1993; Spierenberg, 2003). The Dande irrigation Scheme would mean that people already resettled would be "resettled again – this time onto small irrigation holdings about 2 hectares in size.

Opposition to the scheme was inevitable, except from those who had settled more recently in the area. "The indigenous Korekore people, it seems, are generally skeptical and worried about the Dande Irrigation Project (DIP)… particularly on social and cultural structures. They felt that the DIP would further entrench the ever widening gap between the original indigenous valley people and the 'settlers' who seem to have control of the political and economic aspects of life in the valley" (Sithole, 2002).

Plans for irrigation using water from the Dande and Manyame were being investigated by the parastatal, Agricultural Development Authority (ARDA), as far back as 1992. A supplementary scheme was also being investigated by The Department of Agricultural Extension (AGRITEX). Central to the plans of these schemes was the use of a natural pool in the Dande River as a storage and abstraction point. Mushongaende Pool is sacred. "In this pool there are lots of things which belong to different *mhondoro*….There are *njuzu* and *tsunguni* (water spirits). There are drums.. which are herd playing and people can be heard singing…People from Chitsungo family are not allowed to go to the pool" (Spierenberg 2003, 140). In 1994 a team from Agritex started work near the pool. At the same time a team from ARDA arrived to initiate their plans for the Dande Scheme (Both projects were being planned without any knowledge of the other). No one in the area had been advised. When they questioned the officials, they learned for the first time, of the proposed irrigation schemes involving redistribution of land. "The plans were received with great suspicion" (Ibid; 140). Shortly after starting their work the engineers experienced two car accidents and there were mysterious occurrences involving bateleur eagles following them (these birds are regarded as sacred messengers of the *mhondoro*). A man who allegedly saw a goblin disappeared into the bush for four days returning in a state of bewilderment. This caused the team to express concern. Even though they were technocrats from outside the Dande they were nevertheless, sensitive to the apparently supernatural interventions taking place and directed against them. They were eventually directed to Chief Chitsungo. He in turn demanded that the scheme be explained to his people. He also referred them to the *mhondoro*. A long drawn out struggle ensued. In the process, those in favour of the scheme seem to have recruited a *mhondoro* who argued in its favour. Despite this the scheme has not materialised, due to "cultural problems". Opposition to the notion of large-scale irrigation using water from the Dande dam and supplemented by Manyame water, is still an issue.

In the winter dry season of 2003, the Lower Manyame Sub-catchment council (LMSCC) responded to a Government appeal to grow an irrigated winter maize crop in the Dande. They approached ARDA with a plan to grow maize on land occupied by Chitsungo villagers, adjacent to the existing Mushumbi Pools ARDA farm. A local councillor for the area reported to the Council that local villagers were in favor of the idea provided they receive some benefit from the crops. ARDA were mobilized to clear and plough about 100 hectares, which would be irrigated from water derived from ARDA water (Manyame River water for which they have an abstraction right). In the end nothing happened. We observed that there was no real intention by ARDA to pursue the plan for fear of engendering the hostility of villagers and that the councilor's assertion that they were supportive of the plan

was motivated by his ambitions rather than any genuine desire on the part of the people to give up their land for an ad hoc cultivation plan.

Field data throughout the communal lands of the LMSCC (and in the Mazowe catchment) area suggests that large-scale irrigation schemes are not generally favored by the Shona people. There is a rather strong preference for small and micro-irrigation projects. These are perceived as manageable by the people themselves and (a very important aspect to them) do not involve movement or re-settlement of people. Moreover, micro-irrigation (defined as irrigation by householders or a small group of neighbours) is consistent with their notions of landscape. A major complaint voiced by the people in all areas we have carried out research is the lack of genuine consultation by State and local government officials. As one respondent expressed it, "this is our land and our water. How can these outsiders come and plan without consulting the 'owners of the Earth?" In addition, small-scale and micro-irrigation is at a level not penetrated by the state or second tier government structures. Here local customary rules and institutions) prevail.

At no other level or scale is there congruence between the institutions of management and the resource being managed. Catchment Council (CC), Sub-catchment council (SCC) boundaries, and RDC ward boundaries ignore the realities of traditional resource management spatial units. They sometimes coincide with traditional boundaries though they do not recognise them. For example, the newly formed Manyame Catchment Council, is divided into sub-catchment councils. The boundary between the Middle and Lower Manyame sub-catchments is the watershed dividing streams and rivers flowing into the Mukwadzi and Mutorashanga Rivers. This is roughly coincidental with the original boundary drawn between Chingowo and Zvimba areas in the sixteenth century. When the boundary was explained to councillors of the Lower Manyame SCC, Chief Chisunga expressed great satisfaction as this coincided with "our true boundary that was demarcated by our *mhondoro* long, long ago" (Meeting of the LMSCC, June 2000). His pleasure was short-lived when he discovered that half of his area as chief fell into another subcatchment area for purposes of water management.

As this paper is being written, the Dande Dam is once more under construction. However, prior to the return of the Chinese construction team, a delegation from the Lower Manyame SCC visited the senior *mhondoro* and made presentations to them of snuff and black cloth. Chigwedere (1980) explains that the cloth is used by the mediums for their ritual attire. It is often faced with white and is known as *hungwe* cloth. *Hungwe* is the fish eagle and also the totem of the very earliest proto-Shona migrants to settle in Zimbabwe in about the second century AD. These early Shona peoples are identified by their totems, all being associated with water, the very essence of life. Dzivaguru, the Great Pool, is a synonym for God. A visit to the dam site in December 2002 by the Lower Manyame SCC culminated in a tour of the proposed dam wall. Here overlooking the remains of the old wall and the birth of the new, councillors requested one of their colleagues (the chairman of ZANU (P.F.) Guruve district development committee) to pray to the *mhondoro* for the dam project to be successful. Significantly, this supplication included a suggestion to the spirits that they should be more accommodating since the dam was now being built by children of the soil. By September 2004, work was still progressing on the construction of the dam wall and spillway but only after foreigners and local bureaucrats have been reminded of the "weapons of the weak".

Mazowe Catchment: insights from a water allocation workshop

We attended a series of consultative workshops (a total of five) organized by the Mazowe Catchment Council in different sub-catchments Mazowe catchment to introduce to the communities and other stakeholders the proposed proportional water allocation system as part of the water sector reform program. Insights presented below are from the workshop held in the Nyadire Sub-catchment. Views and feelings presented at that workshop generally reflect those displayed at the other workshops. At the Nyadire workshop the participants were composed of three chiefs, 15 headmen, 2 RDC councilors, 13 members of the various water user boards that constitute the Nyadire SCC and 18 ordinary people from various villages in the Sub-catchment. Generally, people had been elected to the WUBs and SCC though it must be acknowledged that the traditional authorities had been sidelined since the elections. The chiefs present indicated that they were not sure why they were invited to the meeting on this day especially given

that they had not been formally part of the water reform process right from the beginning. They stated that most people did not know what water permits are all about, this meeting was the first time that they were being introduced to such issues as well as being asked to participate actively. They further said, "as far as water is concerned, most people follow the ways of their forefathers and are not aware that this or that particular type of water use is illegal."

The chiefs and headmen in the workshop could not conceptualize and understand the idea that water could be shared (allocated), and they even found it amusing that anybody could talk about paying for water from the Nyadire river. This was expressed in statements like: "*We cannot share what is flowing, how do we plan or manage what is not there?"* With respect to the proportional water allocation system, most of the participants did not see the relevance of discussing the sharing of water that they either did not have or did not see. They felt that they could only talk about the small section of the river that they lived riparian to and not discuss water allocation in the whole catchment of the Mazowe. They also felt that they could not discuss 'water allocation' when they did not have dams in their respective areas to capture and therefore, 'allocate' the water. One participant said: *"We are wasting time discussing what should happen tomorrow when we have nothing and are unlikely to see these plans materializing. This is like buying a maternity dress for a woman who is not yet pregnant, you should build dams in rural areas first before you can talk about water allocation."* It became apparent that to most of the participants, the discussion was at best too abstract, meaningless, and irrelevant. That there were serious disagreements over the issue of paying for water, was very evident during this and the other workshops. However, most of the stakeholders involved accepted that there are circumstances under which payment might be justified, for example where a level of personal control is evident. They observed that the *"person who impounds the water is the one who makes the river dry."* Thus, it is acceptable that water stored in dams can be paid for but not that sourced from small weirs, boreholes, and pools. At the same time, water stored in private dams should become public property, at least for livestock and other domestic needs, when there is a severe drought.

The polarity between modern water management concepts and traditional worldviews regarding water became very apparent. The participants did not see the possibility of water conflicts emerging in their area since they have conciliatory dispute resolution mechanisms that they have been using since time immemorial. They also did not agree to the idea that water should be paid for except in certain very specific circumstances. One chief stated and the rest of the participants strongly agreed: *"This water that you want permits for, this water you want us to pay for, who is making it, who is its owner? This water in the Nyadire River has been flowing along the Nyadire River for many centuries, can we really start fighting for it among ourselves now, why would I want a permit for water that is flowing through?* The participants agreed that water comes from God and that no one has the right to control its use through an allocation system that requires that users pay for the water. One of the chiefs stated vehemently, *"The Queen of England could not do it, Ian Smith could not do it, the Mugabe government cannot do it, we have to rely on ourselves to find the means to realize our development objectives. We must be strong and we must do it ourselves. This is our country, our water, we want to share it equitably!"* His statement illustrates the resilience of customary laws and practices in surviving through different political regimes in the country. And yet another participant observed *"You have presented your thoughts to us about the proportional allocation system, whose water is this you are going to allocate? Is this not our water? You must not come here and confuse us, and then say we are being difficult!"*

What is apparent from the sentiments expressed by the people during the meeting is that the Shona people have an alternative governance system (customary) that they have relied on for many years. They still have confidence in the ability of that system to solve their water use and management problems. The new water use and management demands from the water reform programme are received with, at best, some bit of curiosity and, at worst, either absent-minded indifference or active resistance. In most cases, where the laws prohibit certain local practices, these practices are continued, although in discussions inhabitants will feign compliance or ignorance.

Water sector reform and customary law in Zimbabwe: the discourses

Customary laws have existed in parallel with statutory water legislation for many years in Zimbabwe. These traditional systems are particularly applicable in the area of conflict resolution, management of water and other natural resources. Despite the imposition by the state of a water regime in the first water act of 1927 that empowered a government department and a specialist water court, statutory regulations and procedures, and technical criteria for water management, areas of customary practice remained (Bolding et al. 1996, 193). An important aspect of economic development in Zimbabwe during the colonial era was the racially skewed model that denied the indigenous people access to resources and thus placed limits on economic and development opportunities. This trend was to continue even in the post-independence period. For example, within the irrigation sector in Zimbabwe by 1994, commercial farmers (predominantly white) still used about 84 percent of the available irrigation water while small-scale and subsistence farmers (predominantly black) used only 7 percent (Derman and Hellum 2001, 3). Consequently, water policy and law represent the complex interplay between multiple interests, priorities, and approaches that, as Derman et al. (2000) argue, are not always compatible. "The reform process is a site of tensions and conflicts between values and principles embedded in liberal economic thinking and more welfarist concerns embedded in both human rights and African customary laws" (Derman and Hellum 2001, 11).

Both case studies show that some of the principles advocated in the reforms indicate that rights to resources under customary law are conceptualized in a fundamentally different way from the requirements of statutory law. This has implications for the resource use and management model to be implemented. Several issues immediately arise, including the legitimacy of treating water as an economic good. In customary law and practice, water is treated as a god-given resource that all are entitled to use. Both case studies identify this as a real concern amongst rural communities in Zimbabwe (also see Bolding et al. 1996; Sithole 2002, Mohamed-Katerere 1996; Hellum and Derman 2003). Among the Shona, the founding ancestors are linked genealogically to even more senior sacred ancestors. The spirits of these "divine heroes" are merged into and become a part of the presence of god (Latham, 1987). By stating that water "belongs to God', people are saying it belongs to the land. And by saying it belongs to the land, they are saying it belongs to them. By implication, they say, the control and management of water should therefore be in their hands. The rural dwellers of today need water to satisfy their domestic requirements, to irrigate small vegetable gardens, to make bricks for constructing their houses, and to water livestock. For them, water must be accessible all the time regardless of whether this is enshrined in statute or not. They see it as a basic human right because it is a source of basic survival, water is life (Latham 2002).

Legislation enacted under the water sector reform program, stipulates that water users must secure water permits if they want to use water for purposes other than domestic. In continuation of past policy, Zimbabwe's waters continue to be divided into the categories of commercial and primary. This division reflects the plural legal system of imported Roman Dutch Law and Customary Law (Hellum and Derman (2003). However, the legislation is hazy on what constitutes water for commercial irrigation. Debate has been vigorous in the Mazowe and Manyame catchments regarding this sensitive issue - sensitive because many micro-irrigation schemes currently regarded as domestic could be reclassified as commercial, thereby rendering them liable to water permits and levies. Primary rights do not cover water used for irrigation. The definition of irrigation could be construed as including micro-and small-scale irrigation. "Irrigation means the artificial application of water to land for agricultural purposes" (Water Act 1998). As one chief in the Nyadiri sub-catchment stated, *"our concern is for our tiny gardens."* Is a 'tiny garden' adjacent to a perennial pool or dam an irrigation scheme or not? This haziness in defining what is commercial and what is domestic has the potential to worsen the clash between customary and statutory legislation. It also has the potential to raise feelings of betrayal among rural communities who are used to receiving water for free.

Among the Shona and other ethnic groups in the country, water use at the community level is ordinarily regulated by local water point committees or by chiefs, headmen or village assemblies. Community sanctions generally ensure compliance. Customary norms and practices appear better suited to handle enforcement of water use and management practices than the new institutions imposed by the reform programme. Unfortunately, statutory instruments give the responsibility for enforcement to other agencies outside the confines of customary law (i.e. the

new SCCs and CCs). These are agencies whose legitimacy is still in question because they do not fall into any of the existing frameworks of resource management (be it customary or otherwise) with which people are familiar. Seventy five percent of rural Zimbabweans interviewed believe that customary authorities should regulate water use (Derman et.al. 2000). Yet the customary authorities do not have any formal representation on the new stakeholder bodies. In the light of the water and land reform, we ask what kinds and forms of law will emerge from these apparently contradictory processes as the new black farmers move into areas that were previously occupied by white farmers? (Hellum and Derman 2003).

There are certain fundamental ingredients necessary for successful natural resources management. Amongst the most important of these are resilience, congruence, adaptability and the devolution of authority to the lowest appropriate level. Most of these requirements, as they apply to local communities, are congruent with the traditional institutional arrangements of resource governance. Over time, local level adaptive management employs considerable energy to molding, rejecting or modifying "outsider" interventions so as to fit their local institutional conventions. In the process the strengths or advantages of either system are often diminished and their operational effectiveness reduced. Nevertheless, at the local level, it is local knowledge that is generally best equipped to deal with complexity, uncertainty and environmental shocks.

Despite the introduction of the water reforms, water use and management in the communal areas in the catchments of our study have remained largely governed by customary laws and practices. Therefore, as scientists and practitioners, we would be sensible to recognize the strength, resilience and elasticity of local institutions as suitable instruments to manage and develop their own resources in a manner most likely to be sustainable. This can be done through devolution of power to appropriate levels. By the nature of their institutionalized devolution of power, through nested levels of spatial and jurisdictional authority, the Shona customary system of governance provides for systematic devolution and creates an environment for top-down, bottom-up and lateral accountability because of the dictum 'the chief is the people and the people are the chief'. Evidence abound (including the case studies) to illustrate that a major reason for failure of common property resources management lies in the reluctance or inability of central government structures to devolve power to appropriate levels of management. The alternative is to ensure that the existing resource management structures are taken on board when new initiatives are implemented. "The problem is that this requires also a shift of real decision-making powers from the national to the district and local levels. National power groups normally, however, strongly resist giving up power once they have acquired it" (Stohr and Taylor 1981, 471). The real threat to local level management of natural resources is therefore, not their lack of ability to manage. It is the lack of the external authorities' will to release their political hold on power that is the main factor inhibiting their ability to function effectively.

The Water Act of 1998 while purporting to decentralize jurisdictions has failed in this regard for it has made no provision for decentralisation below the level of SCCs, bodies that are tasked with managing spatial jurisdictions so large as to be dysfunctional and that do not recognise existing traditional institutions. Science has laid the empirical basis for substantive policy and political change. It has also suggested, however, that we have now reached the stage where experience must actively be applied in the political arena; with tenurial empowerment being the goal and the communities themselves being the actors (Murphree 2000). Murphree was addressing general issues of community-based management of natural resources but his comment has absolute resonance with integrated water resource management. It is the postulate of this paper, that the pivotal role of indigenous (traditional) institutions, based on accepted and understood worldviews, and enshrined in customary law and practice, may provide the practical and acceptable path for political acceptance of devolved community based management of resources. It may also prove an acceptable and exciting arena for academics and development professionals to find sustainable solutions to the problems of resource management.

Conclusions and implications for policy reform

Zimbabwe and other African independent states have in place plural legal systems composed of customary law (in its various forms) and the received or imposed systems of the colonizers. Customary law has, by and large, been shaped by the historical reality that it was adopted, applied, de-constructed, and adapted by the colonial experience

in ways that have distorted its development (Bentzon et al. 1998). Customary practice is almost always overshadowed by the reality of the supremacy of imposed State law. In the case of conflict between local people and the state, it is this imposed legal regime that is ultimately authoritative at higher scales of governance. Nevertheless, local institutions can and do have an influence on how exogenous interventions are applied. At the local level, the State lacks the capacity for sustained interventions in resource management, leaving space for customary practices to prevail (Katerere and Zaag 2003). Customary law is not static. It adapts to change thus providing an element of resilience. It is not easily obliterated by hegemonic state-crafted, statutory institutions and instruments that fail to recognise the nexus between law and practice. Legislation alone cannot bring about change. An understanding of customary law and the modalities of local resource management are essential for the creation of legitimate and viable resource management regimes.

Current models of water management based on western paradigms that ignore African institutional arrangements and worldviews are overly simplistic and inhibit efforts to deliver sustainable IWRM systems. "Perhaps indigenous laws somewhat modified, are more suitable as expressing unique cultural values"(May 1987). They need to be incorporated into the design of institutional frameworks thus providing legitimacy and congruence in the eyes of local user communities. Customary rights and usage of water should be recognized and incorporated into the formal legal framework of catchment management. There is no recognition of customary law or indigenous institutional arrangements in Zimbabwe's Water Act. Primary rights only partly meet the customary perceptions of "water is free to all users". Water for irrigation restricts customary access rights to water. The Mazowe case study illustrates this point. To legitimize and make operational the customary institutions of governance requires real devolution of authority and tenure over resources currently absent in Zimbabwean land and water legislation. It must be recognized that any serious intervention to formally incorporate customary law and practice into the water legislation will require in-depth research and advocacy. In this way process could lead to changes in policy and practice more suited to the realities of sustainable management of water and other resources.

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Contact addresses

Claudious Chikozho, Centre for Applied Social Sciences, University of Zimbabwe, PO Box MP167, Mount Pleasant, Harare, Zimbabwe (chikozho@arts.uz.ac.zw)

Jim Latham, Centre for Applied Social Sciences, University of Zimbabwe, PO Box MP167, Mount Pleasant, Harare, Zimbabwe (ecoed@mango.zw)

Notes

[1] A primary right entitles the user to domestic water, water for livestock, dipping tanks and brick making.
[2] "For the purposes of our topic community is defined functionally as a principle manifest in social groupings with the actual or potential cohesion, incentive, demarcation, legitimacy and resilience to organize themselves for effective common pool natural resource management at levels below and beyond the reach of state bureaucratic management." Barrow and Murphree 2001, 27)