Participatory Natural Resource Management in the Communal Lands of Zimbabwe: What Role for Customary Law?

JENNIFER MOHAMED-KATERERE

Abstract: A widely held assumption about environmental management is that its success is dependent upon its relationship to the political process. This is expressed in the emerging but as yet inadequately defined concept of "environmental governance." A recurring issue, in practice and in the literature, is the value and role of traditional institutions and systems in natural resource management. In particular, the relationships of accountability and representation between such institutional systems and local communities are questioned. This paper examines the relationship between formal and informal norms and institutions as an aspect of governance in environmental decentralization initiatives within Zimbabwe's communal lands.

It addresses this issue from a legal perspective and in particular a human rights paradigm. It considers both well established human rights and emerging rights with in the new generation of multi-lateral environmental treaties. It is argued that the international legal regime creates a framework for participation and defines fundamental principles for the realization of environmental objectives. These rights must be recognized within national systems if they are to be consistent with emerging international regimes.

The paper explores the nature and status of customary law in Zimbabwe and its interaction with state institutions and formal rule systems. It considers whether the recognition of customary law is fundamental to good governance and, in particular, for creating viable systems for meaningful local level participation. It is demonstrated that the status of customary law, and the level of participation provided for, falls short of developments in international law and seriously undermines environmental governance that is capable of realizing sustainable development objectives.

Jennifer Mohamed-Katerere is a constitutional lawyer specializing in Environmental Law. She is particularly interested in the involvement of local communities in natural resource management. She has done considerable research and policy work in this area, which includes advising a Zimbabwean NGO on using by-laws at district level to promote natural resource use. She is also engaged in law reform and development initiatives, including the development of a Forest Protocol to the Southern African Development Community (SADC) Treaty. She has recently completed editing a book on "Environmental Law in Zimbabwe". She is a member of the IUCN Commission on Environmental Law.

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1. ENVIRONMENTAL GOVERNANCE

1.1 Background

The policy framework for natural resource management changed dramatically in the last two decades. "Governance" moved to the center of development debates in the 1980s.[1] By the mid-1990s environmental governance and sustainable development had become key concepts influencing environmental management.[2] Devolution and participation emerged as important issues in development and environmental thinking. This coincided with increasing concern by governments and non-governmental actors about the success of natural resource management, and resulted in a global trend to participatory approaches.[3]

The concept of governance, like development, is both a political and a technical term. This conflates the normative and prescriptive with the descriptive and analytical, and consequently refers to both an end state and a process.[4] Governance may be conceptualized in many ways – including structural constructions, dynamic approaches and objective driven strategies.[5] Alternatively, and as in the approach taken here, governance may be thought of as the relationship between civil society and the state, and thus fundamentally different from the concept of government. It covers the "whole range of institutions and relationships involved in the process of governing."[6] For Hyden governance is not the relationship per se but the "body of values and norms that guide or regulate state-civil society relationships in the use, control, and management of the natural environment."[7] These norms and values are expressed as a "complex chain of rules, policies and institutions that constitute an organizational mechanism through which both broad objectives and specific planning targets may be achieved."[8] Although the approach adopted here differs somewhat from Hyden's - the focus on the values and norms and their various manifestations is insightful and is used as the basis for understanding the relationship between citizen and state. The paper however focuses on this aspect of governance.

1.2 Participation Approaches

Defining the relationship between the state and civil society and their respective roles has become a core issue in development theory- participation, accountability, local institutions, local practices, indigenous knowledge, policy, gender equity, tenure and fair and equitable decision making processes became key focuses. [9] This shift from centralist development strategies to locally driven development has been complemented by a corresponding shift in the rights and obligations of various parties.

Participation may take many forms. It occurs along a continuum from active consultation to complete transfer of authority and responsibility to stakeholders.[10] Devolution, decentralization or deconcentration may promote participation because they focus on creating lower levels of decision-making. Decentralization can be defined as "any act in which a central government formally concedes power to actors and institutions at lower levels in a political and territorial hierarchy. It involves the creation of a realm of autonomy in which a variety of lower-level actors can exercise some autonomy. It is fundamentally different from deconcentration. Deconcentration occurs when powers are devolved to appointees of central government."[11] The

increasing downward linkages of governments towards sub-national government may be a strategy to reassert control and is not necessarily driven by a concern for rights.[12]

Participatory approaches may redress inequalities by helping to retain and distribute the benefits of local activities within the community and hence provide new opportunities for development.[13] Further, participation may increase economic and managerial efficiency in three ways. Firstly, by allowing local populations who bear the cost of natural resource management to make decisions, rather than leave them in the hands of outsiders or unaccountable locals.[14] Secondly, by reducing administrative and management transaction costs via the proximity of local participants.[15] And, thirdly, by using local knowledge, values and aspirations in project design, implementation, management and evaluation.[16] Participatory approaches may also be seen as a strategy for conflict management.[17] One common approach is to use participatory systems to create a trade off with communities – the community receives some benefit for implementing conservation practices.

These motivations are echoed in the various local level natural resource management initiatives in Zimbabwe. These include state-driven local community natural resource management, the devolution of some authority to local government planning and development agencies.[18] There is also the development of new decisions making bodies at the district or local level.[19] Along with the devolution of some authority to chiefs.[20]

2. DEVELOPING A RIGHTS FRAMEWORK

2.1 Customary Law and Governance

Good governance practices not only require balancing economic, social and environmental objectives, but also recognizing fundamental human rights. Early discourse on governance and participation failed to locate it within a legal framework and, in particular, a rights perspective. Consequently, many governments introduced tenure reforms or decentralization, but did not change related local institutional and legal systems and hence did not fundamental change the relationship between the state and community or state and individual.[21] Additionally, macro-legal frameworks such as property rights, including traditional resource rights, administrative fairness and procedural equity, so critical to the success of decentralization initiatives were not changed. Consequently the balance of power remained the same.

Law embodies the values, objectives and norms of a given society. The application of law is affected by social, political and economic context, thus, only at the level of practice, and relationships, can the lived reality of law be ascertained.[22] Law is a product of struggle, negotiation, compromise and power dynamics, and may represent the dominant views or social compromise. It not only has a regulating or legitimizing function, but also defines rights and obligations. Consequently, it may serve as a tool for the recognition of human rights, which are also products of struggle. The concepts of responsibility, authority and accountability, are at the core of legal rights and obligations and are now widely accepted as the "bottom line" for development.[23] Recent developments in international law reflect trends within conservation and development thinking and practice.[24]

The essence of human rights is the recognition that certain norms are fundamental to human existence. Consequently, human rights seek to "protect individuals from people made problems, and hence avoid suffering inflicted … through deprivation, exploitation, oppression, persecution, and such other forms of maltreatment, by organized and powerful groups of other human beings or government."[25] In Zimbabwe the achievement of independence in 1980 resulted in a constitutional commitment to build a country free from racial injustice and to protect certain fundamental freedoms. These included the right to life, the right to protection from inhuman treatment, and freedom of conscience and expression.[26] A recent constitutional amendment commits Zimbabwe to redressing historical wrongs.[27] However, the Constitution failed to provide a historical bridge to a new order of key rights. These include the rights to transparent and accountable administration, access to information, environmental rights and traditional resource rights were also not included nor where procedures developed for addressing these issues.

The emerging human rights regime acknowledges the findings of historical and environmental studies that human societies bear no meaning without the natural surroundings that define their culture and, further, that the recognition of one's culture is fundamental to identity.[28] Human rights in the environmental sector need to be addressed from this perspective, and not simply on the basis that it may create better management.

In a society, such as Zimbabwe, that remains highly divided along racial, gender, ethnic and economic lines, law is contested terrain, reflecting a struggle over values and consequently a divide between policy objectives and actual practice. This contestation over legal rights may, as in the commercial areas of Zimbabwe today, be characterized by other social conflicts, violence and extra-legal means. There continues to be incongruence between the stated objectives of environmental management and the legal instruments that provide for it. Environmental law today represents the conflict between environmental management that focused on control and command strategies, and management on behalf of the people, where the new environmental policy which leans towards management by the people.[29] Control over natural resources constituted an important aspect of the colonial state's strategy of political and economic subjugation of the indigenous people. It created a racially inequitable natural resource and land endowment system, which with few modifications has remained in place. The law trivialized indigenous technical knowledge, formally disempowered traditional leadership structures.[30] In addition, it places severe limitations on the way in which the resources may be used.[31] However this appropriation of authority by the state has been incomplete because of the state's own limited capacity to replace existing institutions.

Despite the advent of independence, only general law applies to natural resource management.[32] Customary colonial law governs family law (and related matters). However, general law remains the dominant legal normative order when dealing with political, economic, commercial, property and criminal matters.[33] Rights to natural resources derive from property law. Given that rights to these resources were, and continue to be, vested in the state customary law does not apply to its management and use. Although the authority of local government structures has been partially extended to natural resources indigenous local law systems are still not applied. Customary law is dismissed as either backward because its approach is fundamentally different from the received law, or as a colonial construct. Customary law, as

applied by the state, was a product of its interaction with the values of colonial administration and consequently was codified and distorted.[34] Through the doctrine of legal precedence the courts continue to enforce this modified law. It is important to distinguish between customary law as a state construct and customary law as practice, which is constantly evolving outside the framework of the state structures. This paper uses the term customary law to refer to the law and practice of local people. Given that customary law is a flexible and continually developing system, responding to new circumstances and values it could offer some valuable approaches for devolved environmental management, particularly concerning rights and decision-making systems. [35]

Environmental law, at both the national and international level, has two basic rule types: those designed to "ensure" compliance or conservation, these are prescriptive, and those designed to "facilitate" better practice, these are process oriented.[36] Various aspects of governance are now addressed in law, using both rule types, in multi-lateral environmental agreements, including public participation, access to information and due process. Not all of these create rights that are actionable against the state. Nevertheless, they impose a duty on the state to develop national legal systems that recognize such rights. In some instances it encourages the development of private law rights such as traditional resource rights. These developments have occurred within the context of a growing body of human rights law dealing with development, justice, fairness and equity.

2.1 Participation as a Key Right

By the mid-1980s, environment legal agreements had become increasingly human-focused. Issues such as population, livelihood systems, access to resources and opportunities, socio-economic status, culture and knowledge systems and governance became central.[37] There was a shift towards the integration of environment and development in decision-making. Consequently, in law, the citizen is no longer treated simply as a beneficiary, but as a key actor. The new international law regime addresses good governance practices, including the rights of prior informed consent and access to information, measures to ensure accountability and transparency, and the right to appeal against or contest a decision.[38] It represents a global consensus that public participation is essential in order to ensure environmental sustainability and the realization of development objectives.

The right of public participation, as developed in these agreements, is significantly different from the established legal concept of public participation, which was based primarily on a right to object to decisions, but offered no role in decision-making. This approach was reactive and was based on indirect representation. The emerging right of participation is proactive in that it creates opportunities for individuals and groups to participate in the formulation of management strategies and the implementation thereof.[39]

Participation, as a legal concept, has evolved in the context of an environmental management framework that recognizes the importance of effective representation, the inclusion of the full diversity of stakeholders and the recognition of their value and knowledge systems, the linkage between authority and responsibility, capacity building, accountability and transparent administrative procedures including access to information and due process.

Recognized stakeholders include women, indigenous people, workers and trade unions, farmers, youth and children as well as business and the scientific community.[40] There is also recognition of the rights of local communities and indigenous people.[41]

The success of participatory systems is dependent on many other non-legal factors as well.[42] Successful participation requires empowering people to mobilize as social actors, resource managers, and decision-makers, allowing for the control of activities that affect their lives.[43] According to Hadenius, decentralization only works if local state agencies govern democratically with the skills and capacity to make important decisions, and are adequately funded.[44] Additionally, if participation is about choice and the defining of paths, then it needs to be capable of balancing competing interests and values at the local, national and global levels. One key problem with participation is that it is often based on simplistic notions of community that ignore the lack of homogeneity within such communities.

2.3 Indigenous Peoples' Rights

A number of indigenous or local people's rights can be extrapolated from international agreements.[45] These include rights to control traditional resources, development, self-determination, environmental integrity, intellectual property, cultural property and folklore, protection of cultural heritage, recognition of customary law and practice, community empowerment and respect for and recognition of their knowledge and environmental ethic. An increasing number of conventions recognize the value of customary systems and the importance of recognizing them if effective participation is to be achieved.[46]

One critical aspect of participation is the right of indigenous people to prior informed consent (PIC). This requires the full acceptance of an activity by a community. It implies not only the right to stop an activity before implementation, but also after it has started and, consequently, limits the right of administrative bodies to act contrary to local interests.[47] The recognition of local value systems is central to these rights and to the notion of participation as developed in law. PIC requires the acknowledgement of the right to make such determination in accordance with one's own value system.

3. RIGHTS IN ENVIRONMENTAL MANAGEMENT IN ZIMBABWE

Environmental rights in Zimbabwe are barely recognized. This section examines the extent to which law, and in particular customary law, traditional institutions and rights of participation and indigenous people, is taken into account in natural resource management.

Although the conservation success of a rights approach must be tested empirically, the principal argument made here is that rights must be recognized in themselves because of their centrality to human dignity and integrity. Further, it is argued that the perseverance of customary law indicates its continued legitimacy amongst many local communities.

3.1 Customary Law in Natural Resource Management

Colonial states in Africa used a system of legal duality; one law for the European settlers and another for native peoples to formally exclude African people from civil and economic

society.[48] Where customary law continued to be used, its application and content was distorted to fulfill these colonial objectives.

In Zimbabwe, the application of customary law to the environment was restricted, under statute, to civil law and land allocation.[49] It excluded the management of natural resources. Natural resources disputes at the formal legal level may only be determined according to customary law where the dispute is civil and both parties are African, provided also that it is consistent with general law. This is quite divergent from actual practice and constitutes the first level of distortion. By excluding the application of custom the state has effectively denied a role for local values and priorities to inform resource utilization and management and it has further trivialized the role given to traditional leadership. Additionally, local practices were criminalized.[50] Consequently, the opportunity for collaborative and participatory management based on dialogue and partnership is lost.[51]

The second level of distortion is that customary law through its application by the courts and other arms of the state was brought into the formal law arena and consequently ossified.[52] Local systems of management are complex and vary from locality to locality, making it impossible to generalize about its content and identify a set of uniformly applicable customary law rules.[53] Yet, this is precisely what the formal legal system sought to do. Effectively "hijacking the development of custom by robbing it of its flexibility and dynamism through a process of assigning certainty and create rules where none existed."[54] However principles and procedures may be extracted from actual practice.[55] It is important to distinguish between customary law as a state construct and customary law as a reflection of the actual values and practices of a community.

Thirdly, customary law has in many instances been harnessed and modified by the state to control local people.[56] According to Moyo, for example, the use of traditional leaders intended to replicate customary norms of land administration.[57] However, the presence of the chiefs, in the judicial and administrative structure did not result in the accurate recognition and implementation of local customs and practice. Instead "customs and tradition became a means by which the local rulers and family heads bargained with the colonial State for power in their communities."[58] Thus, in areas where the chiefs continued to have jurisdiction, new or distorted "customs" emerged.[59] This contributed to the development of two forms of customary law – customary law of the courts and the formal State structures and that of the communities.[60] This schism is less evident in the area of resource management than in personal law, as the state did not recognize custom as a source of natural resource law.

These distortions have led many to conclude that the traditional institutions cannot be representative and that there is little role for customary law.[61] The government itself came to this conclusion and focused on the creation of elected local government bodies.[62] Although the reasons for this shift are complex and include the role of chiefs during the colonial era and, in particular, their collusion with the colonial regime, it nevertheless demonstrates the lack of understanding about the continued use of customary law in local natural resource management. Customary law has continued to play an important role simply because it reflects actual values and priorities. Consequently it is constantly evolving. The failure to include local knowledge and values has contributed to the failure of many development projects.[63] Indeed, the

recognition of local rules and value systems may constitute the basis for successful local natural resource management.

Customary law as legal discourse is an ensemble of ideas, concepts, and categorizations that are produced, reproduced and transformed into a set of practices.[64] Customary natural resource management law includes substantive and procedural rights.[65] As well as general principles, decision-making processes and institutional arrangements.[66] Several features can be distinguished. Firstly, conservation strategies are inter-wound with cultural beliefs.[67] For example, the increasing intrusion and destruction of forestland in Nyaminyami District by settlers is believed to have angered the ancestors, resulting in greater conflict between people and animals.[68] Land is held subject to the guardianship of ancestors or spirits.[69] Secondly, given the relationship between environmental integrity and human well being, customary resource management takes a holistic approach and does not give precedence to any particular value associated with the environment. These values include cultural, social, economic, subsistence, medical, aesthetic, ecological and religious values.[70] Thirdly, access regimes are directly linked to use. Although some land was held communally for grazing, cultural and other purposes, individual land holdings were allocated to families provided they used it.[71] The right to land was a universal right and nobody was denied such right where land was available.[72] This applied to other resources as well. Nevertheless, rights in communities were not undifferentiated – social and cultural status affected the quantity of the resource made available. Access to certain resources was restricted because of scarcity or its particular value to a group, however outsiders were not arbitrarily denied rights.[73] In many communal areas there is evidence that chiefs have allocated land to new settlers.[74] This may be because of the belief of universal entitlement and the principle that all people have a right to life and meaningful existence. There are, however, other motivations for giving outsiders access to land. In some areas, this has been done to create a human buffer between the original community and wild animals.[75] Or, to accumulate or gain access to wealth including wives and cattle.[76] In addition, gain access to certain skills.[77] Some important management principles can be extracted from practice; for example, the obligation to undertake restoration where damage to the environment occurs.[78]

Current planning processes do not take cognizance of local social, cultural and economic systems and the values inherent in them, although the rhetoric around the adoption of the Traditional Leaders Act suggests that this deficiency is being addressed. In many communities social and cultural values and knowledge systems persist and still play important roles.[79] Where traditional beliefs are held, sanctions and complementary customary monitoring and enforcement regimes exist.[80] Responsibility for ensuring compliance with local rules generally lay with the chief, although this authority is subject to checks and balances.[81] Nevertheless, new kinds of institutions are emerging at the local level. Increasingly communities are actively engaged in resource management and rule formulation.[82] There is, however, increasing skepticism about them, as people realize that the sanctions have no physical basis and also because they are of no legal force.[83]

Meaningful participation is not only the right to be involved in decision making, but also the right to have one's values and priorities reflected in the management system. The incorporation of customary law may partly address this. This is not simple as it involves two

very different systems of law; customary law rules are facilitation focused and flexible, where as national law is based on rules and legal precedent. Incorporation of custom into statutes may rob them of their flexibility. Secondly, local values, practices or priorities may in some instances run counter to national ones. Customary law rules may, given these difficulties be more effectively recognized through incorporation in subsidiary legislation and regulations, although even this could lead to ossification.[84] Alternatively, principles and key values could be recognized within formal law, effectively setting the framework for the development of local rules.[85] This would be consistent with emerging rights at international law. Communities should be able to determine, subject to broad directive management principles and standards, rights to local stewardship, local rules of equity, management rights and rules, procedures for resolving disputes and monitoring and enforcement procedures. Whether the community chooses to rely on customary frameworks should be a question of local democratic choice.[86]

3.2 Traditional Institutions, Local Government and Representation

In Zimbabwe, four sets of institutions have roles in natural resource management at the local level: specialist agencies, elected local government bodies, traditional institutions and state initiated community management structures.

Legally, the role of Chiefs has been perverted – or in Mamdani's words the chief has been transformed into a "decentralized despot." [87] The colonial government used traditional leadership institutions to control and administer local people. At independence, the government sought to reduce their power and role at all levels.[88] A Prime Minister's Directive in 1984 on local government established a system of localized development committees; Village and Ward Development Committees (VIDCOs and WADCOs). The purported objective of this Directive was to define the administrative structures at provincial and district level and the relationships and channels of communication between all participants in the development at provincial and district level in order to achieve the coordinated development of provinces and districts."[89] With the adoption of the Traditional Leaders Act in 1998, government has done a near complete turn around and reinstated the power the chiefs held during colonialism. Village assemblies now exist alongside the VIDCOs and WADCOs.[90] In the natural resource area decentralization was further provided through the development of the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE).

This section considers whether decentralization through these institutions was effective in that it created real autonomy and authority and, secondly, whether the right of participation and other related legal norms including representation, accountability, transparency, respect for local value systems, access to information and rights of consent were incorporated.

Traditional Institutions

The role of chiefs during the colonial era has been a checkered one with them being alternatively empowered and disempowered. [91] The chiefs, however, became a key part of the colonial system of indirect rule.[92] This affected local systems of accountability. The incorporation of chiefs into the colonial administration distanced them from their communities,

local values and priorities. Given this, and the failure to create new, credible and effective institutions local customs and practices were undermined, but not completely displaced.

Today the chiefs continue to have few legally recognized powers other than as ceremonial heads or as functionaries of the state. Governmental pronouncements in the wake of the adoption of the Traditional Leaders Act of 1998 Chapter 29: 17 proclaimed that the authority of the chief was being restored. The crucial issue is whether this is more apparent than real. In addressing this, it is crucial to focus on the actual powers created. The starting point of the Act is that chiefs are appointed to preside over their communities and to perform the functions of their office as traditional heads of the community. The Act does not define what these functions are and so at first glance although it seems that their roles in rule making, adjudication, mediation and distribution of resources have been restored this is in fact not the case.[93] In respect of natural resources this responsibility has been located elsewhere. The Acts that provide for natural resource management vest these roles in state technical and managerial agencies, local government authorities, parliament and centralized ministries and provided that the use and management of these resources is in terms of general law.[94] The Traditional Leaders Act effectively relegates the chief to being an enforcer of statutory law. Chiefs are responsible for ensuring that the land and natural resources are used in terms of the general law.[95] In particular, they must prevent over-cultivation, over-grazing, the indiscriminate destruction of flora and fauna, illegal settlements and generally the degradation, abuse or misuse of land and natural resources. They are responsible for ensuring that communal land is allocated in accordance with the Communal Land Act, 1982 Chapter 20; p4. The Communal Land Act, gives the local government authority, that is the Rural District Councils, general responsibility for the communal areas. It placed the right to allocate land in the Councils although it recognized that this should take into account customary practice.[96] In practice chiefs continued to assert their right to allocate land, this resulted in years of conflict between themselves and Councils.[97] In an attempt to resolve this the government amended the Communal Lands Act through the adoption of the Traditional Leaders Act and provided that land allocation must be exercised in consultation with the relevant chief. Additionally, chiefs in terms of the Traditional Leaders Act oversee the collection of levies, taxes, rates and charges by village heads, protect public property, provide information to the Rural District Council about epidemics, natural and other disasters, and about persons who intend to permanently leave their area. Chiefs have no authority to make legally enforceable management rules. Nevertheless, in many areas in Zimbabwe chiefs still enjoy a large degree of legitimacy. Many chiefs continue to be active in their communities, some are also involved in rule formulation.[98]

There is evidence of an increasing struggle between traditional leadership and RDCs around issues of authority and power. The Rural District Council Act Chapter 29; 13 established a local government structure that excluded traditional leaders. Thus, it is somewhat ironic that many of these structures were inaugurated with the blessing of traditional leaders.[99] The empowerment of traditional leaders has been opposed by these Councils on the grounds that, given the changing composition of rural society through migration, chiefs are no longer able to represent rural communities as they would discriminate against people who belong to groups other than their own.[100] The RDCs alleged that the "office of the chief lacks accountability, ability to adapt to training, dynamism and administrative capacity" and thus should not be

given an independent role.[101] Councils are intent on retaining control as natural resources are important sources of revenue and they assert that they are best placed to manage the profits.[102] In this context, it remains to be seen how the new village assemblies and role of the chief will evolve in practice.

By excluding the application of customary law, and trivializing local belief systems, the role of the chief is severely constrained as he/she is forced to operate in accordance with the values and principles of the general law system, which may run counter to local values. Consequently, the chiefs have become only upwardly accountable and the very essence of representativeness of their office has been undermined.

Rural District Councils

The colonial state located responsibility for natural resources in state agencies in order to wrestle control from local peoples and to retain the benefits for itself. This trend continues in much the same vein today. The responsible institutions include specialist managerial agencies such as the Department of National Parks or the Forestry Commission and local government bodies such as the RDCs. The RDCs have general authority for natural resource management in the communal lands.[103] In non-communal areas landholders are legally recognized as managers of natural resources on their land. This differentiation falls into the trap of so many post independence reform initiatives in Africa that perpetuate legal dualism.[104] By failing to critically examine the institutions of legal dualism of the colonial era, African states in their deracializing efforts, simply reproduced this legacy as an urban rural divide.[105] Or, as Ribot suggests, by uncritically privileging local government and customary authority, decentralization maintains and even deepens this on-going legislative apartheid.[106]

The Rural District Council Act formalized the planning process envisaged under the Prime Minister's Directive and established a system of administration, management and development for districts. The RDCs are responsible for policy formulation provided that it is not in conflict with national policy, district planning, regulation and control of activities subject to national legislation. Although the RDC, VIDCOs and WADCOs are elected bodies, the legal framework does not recognize key rights, and thus fails to ensure downward accountability. The VIDCOs have little credibility at the local level. This may be attributed to the fact they are generally accountable upwards and not to their constituencies. [107] The failure to create a representative system may be attributed to the lack of a political culture that encourages participation.[108] In addition to the exclusion of traditional leadership structures which, despite their history of involvement in the colonial administration, continued to have significant support at the local level.[109] There is also a lack of investment in these structures in terms of financial resources, training and skills development.[110] There is also no remuneration for committee members means that at the local level they are often seen simply as the "master's voice."[111]

Both the RDCs and the recognition of chiefs failed to achieve effective representation. Nevertheless, there is no evidence to support the view that elected representatives are more likely to ensure rural "enfranchisement," than an "indirect system of empowerment" based on representation through non-governmental organizations and chiefs.[112] Enfranchisement or empowerment is more than political representation. Mere election does not ensure

accountability. Similarly, representation through indirect means is not necessarily anti-democratic or ineffective. Issues of representation are infinitely more complex. Effective representation is a function of governance systems, rule systems, decision-making processes, social obligations and kinship ties. Current practice indicates that the inclusion of chiefs into state structures has not meant empowerment and has not automatically resolved issues of equity, representation and accountability: nor does it constitute community participation.[113] Chiefs do not appear to participate fully in the decision making process. This stems not only from a lack of capacity, but also from a development culture that negates the role of traditional institutions. Additionally the system established does not promote accountability to their communities, but makes them functionaries of the central state. Incorporation and empowerment of traditional leaders is more complex than merely including chiefs in the formal structures. The different roles and status of different groups of traditional leaders needs to be acknowledged and customary processes of decision-making should be addressed. [114]

Participation and adoption of sustainable resource management practices has not been consistently achieved. In spite of changes in the administrative structures, at both the legal and policy levels, which were designed to increase and facilitate local participation. Localization has not resulted in better representation. Although local government structures broaden the base of representation and thus increase the likelihood of widespread participation, alienation and dislocation remains the predominant feature of local management systems.[115]

The empowering Acts fail to create systems for accountable decision-making. The law does not provide opportunities for people at the local level to influence decisions. Participation requires not only accountability and transparency, but also that all stakeholders feel valued. It implies a relationship of equality between different stakeholders rather than authority. There is, however, no attempt by councils to ensure communities understand the decision-making and management processes. In a context where cultural values (including customary law) are not recognized, such equality is not possible.

Establishing legal systems for participation requires the recognition of the right of those affected by any act or decision to challenge that act or decision or the decision-making processes through the recognition of PIC. Additionally, government agencies must be obliged to give written reasons for decisions and full disclosure of information. It should also be recognized that conflict is inevitable and thus appropriate mediation and resolution systems and enforcement mechanisms should be provided for. Ensuring that the outcome of participation is adhered to by the state and that rights are not violated requires the existence of meaningful rules and procedures for enforcement. Currently a variety of legal mechanisms may be used to contest decisions made by administrative bodies that impact upon the environment.[116] These remedies are extremely limited, since a person bringing such actions has to establish a direct legal interest. The usefulness of these remedies is directly affected by the economic status of affected persons. The local government system fails on all these counts.

The solution to these problems may not lie, Ribot suggests that "by bringing the state back in as a legitimate representative of the community," albeit a reformed state, "a downwardly orientated state accountable to and legitimized from below," but establishes locally accountable participatory systems.[117] The real issue is whether without public participation and well defined community rights the state can become downwardly accountable.

State Initiated Community Management

It was intended that decentralization for natural resource management, be through the development of CAMPFIRE. This section argues that CAMPFIRE failed to provide for meaningful rights of participation – one aspect of which is the recognition of the diversity of stakeholders, their interests and value systems.

CAMPFIRE is a state driven local natural resource management initiative adopted in response to a legitimacy crisis of the Department of National Parks, that had come to be seen as little more than a police unit given their control and command strategies.[118] This devolution was driven by the need to establish management systems that promoted natural resource sustainability rather than from a concern for governance systems, human sustainability or the inherent rights of indigenous people to utilize a resource.

Despite these origins, CAMPFIRE's objectives focus on the development of a participatory approach that is flexible and creates long-term solutions. [119] It sought to introduce a system of group ownership, develop institutions under which resources can be managed by communities for their own benefit and provide technical and financial assistance to communities to enable them to realize these objectives.[120] The Programme was a remarkable conservation success. Through practice, it restored the belief, destroyed in the colonial era, that good wildlife management could create new livelihood opportunities. In many areas illegal use of wildlife, as defined under general law, was reduced as communities derived monetary and other benefits from wildlife management. Nevertheless, it did not fundamentally change the nature of governance in the wildlife arena.

Firstly, it failed to effectively link authority and responsibility. Communities are not involved in all levels of decision-making.[121] Their role is generally restricted to determining which safari operator will manage the area and determining the allocation of profits. Effectively communities are little more than "gate keepers." In return for their conservation efforts communities are paid a dividend. Although community structures provide some opportunity for local decision-making control is ultimate retained by the RDCs.[122] The conflict around rights to wildlife demonstrates not only a need for differentiation of rights, but also the failure of CAMPFIRE to recognize local values and priorities. In many areas community members express anger over hunting rights granted to outsiders even where such hunting takes place under CAMPFIRE.[123] Although residents appreciate the value of hunting as a revenue source, they feel that in difficult times their daily survival needs to be given preference.[124] Decision-making that neglects these values is not only anti-democratic, but also fails to recognize the right of prior informed consent.

Secondly, CAMPFIRE did not give real rights of ownership to communities and as a consequence communities did not emerge as managerial and planning partners. Authority continues to lie with the RDC rather than with the actual user communities. This is in conflict with the trend in international law to place responsibility at the community level. Communities have often not been party to basic decisions and consequently many questions around rights of entitlement and authority have been raised.[125] Rule systems in CAMPFIRE often have no link to local values and priorities. Failure to consult at an adequate level and with sufficient transparency has lead to resentment that there may be other more powerful stakeholders whose

interests over-ride those of weaker ones.[126] This may also be attributed to inadequate access to information.

Thirdly, those responsible for the management of CAMPFIRE at the local government level generally underestimate the capabilities of communities and consequently exclude them from management, thus effectively failing to provide technical assistance or to build local capacity as required in the CBD and other legal instruments.[127] Decentralization has to seek lasting solutions to these issues of local capacity by promoting the emergence of local leadership able to mobilize and develop local resources. Local communities need to be supported to network and forge linkages with other institutions and interest groups. Additionally, actual practice of communities needs to form the basis of capacity building.

4. CONCLUSION

The paper has argued that the processes of devolution in Zimbabwe have not been taken to their logical conclusion, so that local grassroots interests are able to fully exert themselves. The key problem seems to be that these initiatives were not about devolution but were instead a means for achieving other objectives including conservation, legitimacy and more effective government. However given the rhetoric about devolution and empowerment that have accompanied these initiatives they have sent mixed messages to communities about their rights vis-à-vis traditional interests and state interests and as a result created a level of expectation and discontentment. It is clear from the experience of all these initiatives that their future (and their success) lies in addressing these expectations and thus redefining governance relations. This paper suggests that through focusing on "rights" a new level of governance based on partnership can be achieved.

The recognition of customary law seems to be important because at the level of local communities, it is evident that traditional leaders and practices do assert themselves and that many of these reflect sound resource utilization controls and practices. Yet these are not incorporated into land use considerations or management plans, except at ad hoc informal levels.[128] The creation of village assemblies and the new roles of the chiefs seem to offer some opportunity for local approaches to resource management to be formally included in planning. However, this potential is constrained because the value basis, that is customary law, on which this approach is developed, is not legally recognized. Village assembly initiatives will need to fall firmly within the boundaries of national law, which defines rights of access, management and use. For these institutions to play a meaningful, and empowered role in natural resource management, the ambit for decision making needs to be broadened. One approach suggests that national law facilitate rather than prescribe. This would allow institutions to define rules for management that are locally appropriate.

Also important is the recognition of the now widely accepted constitutional principle of administrative justice, which requires that state decisions be made in a fair and just manner. Its recognition would help redefine the relationship between state and citizen and move away from the current approach that treats the public as subject. For example it requires that the public be given opportunities to contest state decisions. Such rights are poorly provided for in Zimbabwe. For example, the RDCs, like other branches of the state, are not obliged to give

reasons for their decisions. Where villagers have made recommendations, and these are rejected, there is no obligation to disclose relevant information or give reasons for the rejection.[129] The Rural District Councils Act, the Traditional Leaders Act and CAMPFIRE provide for consultations that are essentially a one way flow of information from officials to the community and local views and knowledge can so easily be ignored.[130] Ex post facto consultations are used as a way to ratify the decisions of the local authorities or government departments that have already been taken.[131]

The devolution attempts have not brought communities into resource management as partners, let alone owners. The decentralization initiatives, including CAMPFIRE, did not resolve the issue of entitlement. Many local communities and individuals continue to make claims to title, use and management of resources on the basis of historical rights, their investment in the resource, proximity and need.[132] Although, the courts have rejected the legality of historical claims, there is clearly a strong social and cultural affinity to land that cannot simply be wiped away by the law.[133] Since independence the authority of government agencies to determine rules of use and management continues to be contested. [134] Attention to customary values about title and use may be valuable in refining the managerial and decision-making frameworks of CAMPFIRE and other community management initiatives.

Mechanisms and system of participation need to be creatively thought about if the initiatives discussed here are to be improved and to acknowledge local rights. The emerging international regime identifies some key issues. The starting point of many multilateral environmental agreements is that the full diversity of interests related to resource management must be acknowledged – systems for acknowledging these, and mediating and negotiating between different perspectives need to be created. The paper suggests that the recognition of customary law and values might offer opportunities for more effective participation.

In conclusion the process of developing appropriate structures for local conservation must be seen as just that a process. The challenge facing conservation initiatives is to move beyond a focus on benefits to finding its place within the broader "culture" of humanity. Humanity is at the end of the day not just about having food in one's stomach but recognizing the totality of what makes us human – it is about development, governance, health, integrity and human dignity. Conservation efforts need to begin to bring all these aspects in.

Notes

1. Oakley 1991
2. Redclift and Benton 1994
3. Adams and Hulme 1998; Agrawal and Gibson 1999; Tyler 2000
4. Peters 1986, 1
5. Pierre and Guy Peters 2000
6. Ibid.
7. Hyden and Mugabe 1999
8. Tumushabe and Okoth-Ogendo 1999, 15
9. Mamdani 1996; Murombedzi 1992.
10. Borrini-Feyerabend 1996, 17; IIED 1994

11. Agrawal, A and J Ribot 2000, 2
12. Pierre and Guy Peters 2000,16; see also Makumbe 1998
13. Ribot 1999, 29
14. Murphree 1999
15. Katerere and Mohamed-Katerere 1996
16. Matwonyika 1997; Mohamed-Katerere 1996
17. Tyler 2000
18. Communal Areas Management Programme for Indigenous Resources.
19. The new Water Act provides for the establishment of the first locally based management institutions that are recognized in legislation, the catchment councils.
20. Rural District Councils, village development committees and ward development committees
21. Tyler 2000, 4
22. Schuler 1986
23. Redclift 1992 cited in Dalal-Clayton 1994, 4
24. These include the Stockholm Declaration, the World Charter for Nature, the Rio Declaration, Agenda 21, the Framework Convention on Climate Change, the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, the CBD, and the Convention to Combat Desertification. Also of direct relevance is the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.
25. Madala 1995, 3
26. Constitution of Zimbabwe, Chapter III: The Declaration of Rights.
27. Constitutional Amendment No 16
28. Ranger 1999, 4
29. These phases of environmental policy are based on Murphree 1998
30. Chiefs moved from being governors of their societies to being little more than functionaries of the colonial state.
31. Mohamed-Katerere 1996
32. That is the received law and acts of parliament
33. For a full discussion see Bentzon, et al. 1998, 32-39
34. Chanock 1985; Cheater 1989
35. It is not, as so often assumed, a stagnant anarchical system. Bentzon, et al. 1998; Dengu-Zvogbo, et al. 1994; Mohamed-Katerere, 1996; Zero, et al. 1996
36. Ojwang 1996
37. Mohamed-Katerere 1996
38. At this stage no comprehensive international legal definition exists although some of its constituent parts may be identified.
39. Principle 10 of the Rio Declaration
40. CBD; Principle 20 of the Rio Declaration;
41. Article 8 of the CBD creates an obligation, subject to "national legislation, to respect, preserve and maintain knowledge of indigenous and local communities embodying

traditional lifestyles relevant for the conservation and sustainable use of biological diversity." See also Chapter 26, Agenda 21

42. The CBD for example recognizes that effective participation may require special capacity building initiatives, support, training or education.
43. Cernea 1985
44. Hadenius 1995
45. IUCN 1997
46. Article 10c of the CBD provides that the parties shall in so far as appropriate and possible, "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."
47. IUCN 1997, 90
48. Mamdani 1996
49. Customary Law and Local Courts Act defines customary law as the law of the people of Zimbabwe or of any section or community of such people, before the 10 June 1891, as modified or developed since that date.
50. For example the prohibition of stream bank cultivation. See also Mohamed-Katerere 1996
51. Chief Manwa cited in Hove and Trojanow 1996, 87 states "One of our problems is the new wisdom…It does not accommodate the old wisdom of our people. There is a conflict of wisdoms. The new wisdom fought to gain its space. The old wisdom does not fight for its space. It withdrew and looked forward to the day when it will be sought once more;" see also Zero, et al. 1996
52. Dengu-Zvogbo et al., 1994; Channock 1985; Mamdani 1996; Bentzon, et al. 1998
53. Mohamed-Katerere 1996; Bentzon et al. 1998; Dengu-Zvogbo et al. 1994
54. Dengu-Zvogbo et al. 1994, 65
55. Dengu-Zvogbo et al. 1994; Zero, et al. 1996
56. Mamdani 1996; Dengu-Zvogbo, et al. 1994; Bentzon 1998 and Channock 1985
57. 1995
58. Rwezura cited in Dengu-Zvogbo et al. 1994
59. Dengu-Zvogbo, et al.
60. Ibid.
61. Mamdani 1996
62. 1984 Prime Minister's Directive on Local Government, Rural District Councils Act
63. Langill 1999
64. Hajer 1995, 44
65. These may vary from one locality to another
66. Mohamed-Katerere 1996
67. Elders in Nkayi attributed both ecological demise and social conflict to the settlement and agricultural production, in contravention of custom, by younger people along Gwampa River (Field research, 1998)
68. Field research 1998
69. Gumbo 1993; Makuku 1993; Zero, et al. 1996; Matwonyika 1997

70. Mohamed-Katerere 1996
71. Field research Nyaminyami 1998
72. Matwonyika 1997
73. Some resources and areas are reserved for the use of traditional leaders, traditional healers and children.
74. Field research in Chundu and Nyaminyami 1998; Hammar 1999
75. Hammar 1999 and field research, Hurungwe 1998
76. Field research Nyaminyami, 1998
77. Hammar 1999
78. Ibid.
79. Zero, et al. 1996; Matwonyika 1997
80. These include getting lost for venturing into a scared place; seeing a snake, the mere sight of which led to death; seeing a lion below a tree if one climbed a protected tree and divorce (Clarke, 1994) Other sanctions that have been documented include blindness Chenje et al. 1996
81. Zero, et al. 1996. Note for example that the Chief was always guided in the administration of justice by his advisors or dare and that he also consulted with his wives prior to the meeting out of justice.
82. Chenje, et al. 1996
83. Lue Mbizvo and Mohamed 1993
84. Zero, et al. 1996
85. Ibid.
86. Ibid.
87. Mamdani 1996
88. For example the Customary Law and Primary Courts Act, 1981 removed the jurisdictional capacity of the Chiefs.
89. Government of Zimbabwe 1984b in Thomas 1992
90. The Traditional Leaders Act establishes village and ward assemblies. The village assembly is composed of all villagers over 18 years. The ward assembly includes headmen, village heads and the councilor for the ward. Section 15 describes the function of the village assembly. Subsection 1 paragraph c thereof provides that these new village assemblies have the function to: "consider and resolve all issues relating to land, water and other natural resources … and to make appropriate recommendations in accordance with any approved layout or development plan." However it is uncertain how this Act will work in practice, as systems have not yet been established for its implementation.
91. Ncube 1990; Cutshall 1991
92. Mamdani 1996
93. No attempt is made here to define what those roles would be as this would vary from one group of people to another.
94. The Forest Act; Communal Land and Forest Act; National Parks and Wildlife Act; and Natural Resources Act
95. Section 5(l)
96. Section 8

97. Mohamed-Katerere and Ncube 2000
98. Maphala in Clarke 1994
99. A chief in Nyaminyami district told us of how "Mugabe's boys," the RDC officials, had sought authority from the traditional leadership before establishing the RDC. In recounting the traditional ceremony that had taken place inaugurating it he mused "how can these "boys" now tell us what to do?" Field research, Nyaminyami, 1998
100. Parliament of Zimbabwe 1995.
101. Ibid.
102. Personal communication Chikate, Chief Executive Officer, Association of Rural District Councils 1996
103. Councils have important wildlife management functions where they are designated as the appropriate authority for wildlife. Under the Communal Lands Forest Produce Act Councils have the right to exploit forest produce in any natural forest on public land, to issue licenses and to enter into agreements to non-communal land inhabitants to utilize forest resources in communal areas. Licenses and agreements are subject to the approval of the Forestry Commission.
104. Mamdani 1996
105. Ibid.
106. Ribot 1999
107. Lue Mbizvo and Mohamed 1993; Katerere and Mohamed-Katerere, 1996
108. Murombedzi 1990
109. Mohamed-Katerere 1996
110. Katerere and Mohamed-Katerere 1996
111. Lue Mbizvo and Mohamed 1994
112. Ribot 1999, 49
113. Chiefs are represented in RDCs, as part of the quota nominated by the Ministry,
114. Zero, et al. 1996l
115. Ibid.
116. These include interdicts to curtail existing practices or prevent an imminent harm, declaratory orders to establish the status quo, the employment of criminal law remedies and actions for nuisance.
117. 1999
118. Personal communication, Maveneke, Director, CAMPFIRE Association, 1996.
119. Martin 1986 in Murphree 1990
120. Ibid.
121. In Nyaminyami, villagers viewed CAMPFIRE as a district council programme. Community members were involved in so far as they were employed by the council but were not involved in actual planning (Field Research, 1998); In Mbanje Dam residents told us ""Council and NGOs come and ask us what we think and then do something different. So it is now their project not ours. It is not right." Field research, Mbanje Dam, Nkayi, 1998
122. Katerere and Mohamed-Katerere 1996
123. Field research Nyaminyami and Chundu, 1998; Zero, et al. 1996

124. Zero, et al. 1996
125. Ibid.; see note 119
126. Ibid.
127. At the Hurungwe Rural District Council, for example, a CAMPFIRE official explained that communities were incapable of running hunting safaris and that it was imperative to bring in a hunter from outside. However there had been no attempt by the Council to provide community members with the necessary training. Not surprisingly in the villages we visited community members had no sense of ownership of the project. Field Research 1998
128. Ibid.
129. Ibid.
130. Field Research Chundu and Nyaminyami 1998; Zero, et al.
131. Field research Nyaminyami and Chundu 1998
132. Katerere and Mohamed-Katerere 1996
133. Makanyanga & Others v Forestry Commission (SC 1/91)
134. Katerere and Mohamed-Katerere 1996

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