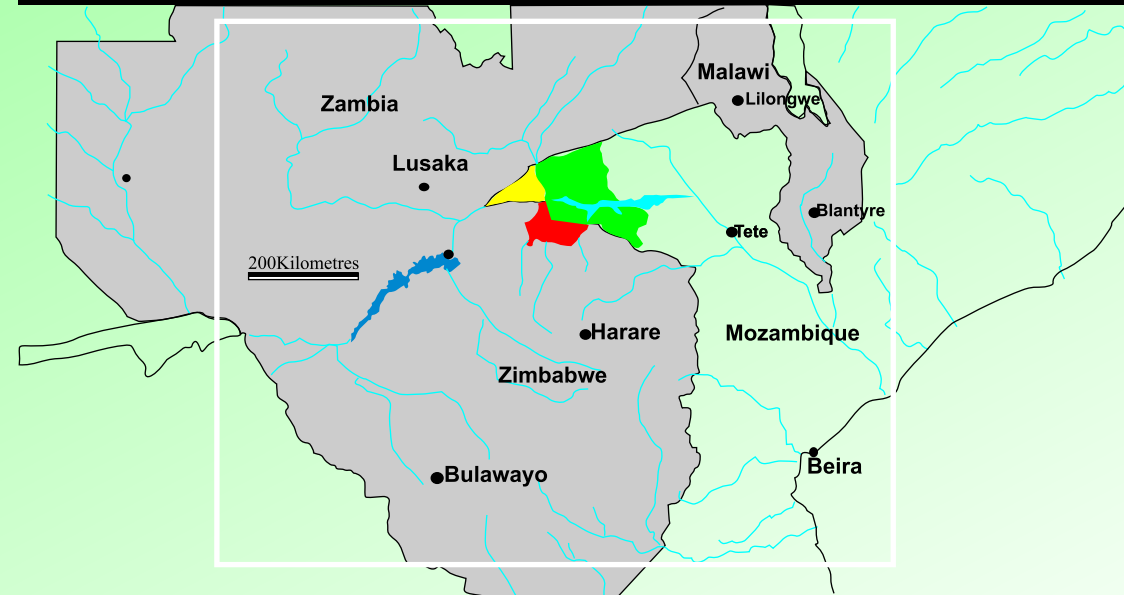


THE LEGAL AND POLICY FRAMEWORK FOR COMMUNITY PARTICIPATION IN TRANSBOUNDARY NATURAL RESOURCES MANAGEMENT (TBNRM) INITIATIVES

A case for the Participation of Zimbabwean Communities in the Zimbabwe, Mozambique and Zambia (ZIMOZA) TBNRM Initiative



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Law Association



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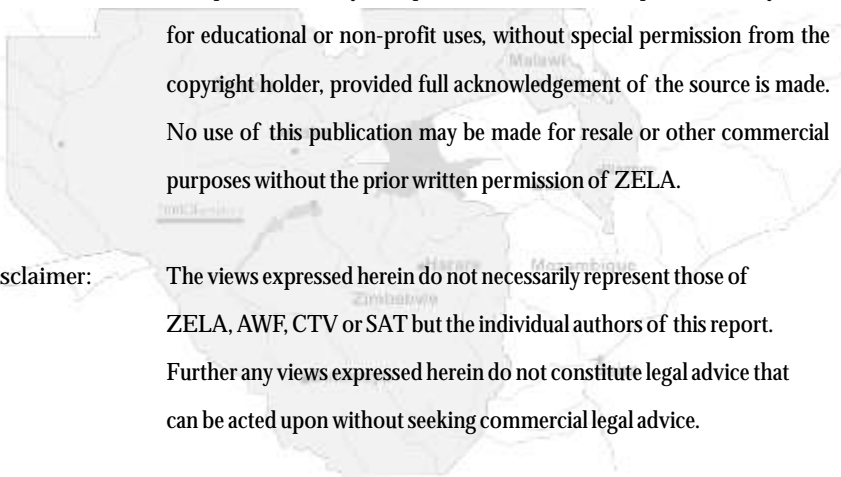
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INTRODUCTION

Setting the Pace: The Struggle for Promoting Community Participation in Environmental and Natural Resources Governance

By Shamiso Mtisi

This book comprises a collection of papers written by different authors driven by their passion to advance community participation in environmental and natural resources governance. Their objective is to assess the extent to which existing laws and policies at the national level in Zimbabwe, and at the regional level in the Southern Africa Development Community (SADC) accords with the universally accepted need to promote public participation in environmental management. The issue is that access rights, which essentially include the right to participate in decision making processes, access to information and justice are defined or denied through poor legislative frameworks or through undemocratic practices in other societies. The importance of public participation in decision-making processes for sustainable development, social equity, and for engendering local ownership cannot be overemphasized. Therefore, given the predominance of nature-based household economies in Africa, natural resource management is the issue that democracy must deliver on - it is the true test of democracy.

My task is to reconcile and present the information gathered through mainly literature reviews in a manner that makes it easy for readers to understand the issues being discussed by the authors. However, it is useful to give the contextual framework within which the views of the authors are being expressed, and that is what I intend to do in this introduction. I also recognize that much may have been left out in this book, however, I hope that this short analysis will stimulate debate and make people think more creatively about how best local communities especially those living in transboundary natural resources management areas or border communities who share common cultures, languages and natural resources may have their voices uplifted in environmental and natural resources governance. This publication is also intended to assist practitioners and decision-makers to appreciate the essence of national laws and policies, as well as the regional SADC protocols on natural resources management and community participation. It is expected to inform and influence policy and legislative changes.

¹Principle 10 of the Rio Declaration on Environment and Development for example states that environmental issues are best handled with the participation of all concerned citizens and each individual shall have appropriate access to information concerning the environment, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings adopted at the United Nations Conference of Environment and Development held in 1992.

²Veit, (2005) (Unpublished paper) Legislative Representation of Rural Natural Resource Interests in Africa, World Resources Institute

This book specifically explores the implications of the various SADC Protocols related to the management of natural resources in the region and the national legislation on environmental and natural resources management in Zimbabwe. Zimbabwe is a state party to a number of regional multilateral and bilateral agreements dealing with natural resources management. The question has always been whether these regional protocols and treaties provide scope for communities to participate in decision-making processes taking into account the conventional rule that treaties and protocols are binding on states only as opposed to individuals. In that regard, if the treaty or protocol is to have national effect it has to be incorporated into national legislation, depending on a country's constitutional systems. This is why this assessment seeks to review the regional treaties and the national legislation to determine whether they advance community participation.

In particular the book seeks to assess the implications of these legal frameworks on communities living on the Zimbabwean side of the Zimbabwe, Mozambique and Zambia (ZIMOZA) Transboundary Natural Resources Management (TBNRM) area. The ZIMOZA TBNRM was initiated through the support of the IUCN Regional Office for Southern Africa in 1999. The four districts and communities of Guruve (now Mbire District) in Zimbabwe, Luangwa in Zambia, Zumbu and Magoe in Mozambique which form the ZIMOZA TBNRM area share common borders. In addition to sharing common borders the four districts share a lot of natural resources including water from the Zambezi, Luangwa and other rivers; fish, wildlife, forests, and other resources. The majority of the communities in the four districts also share common histories, cultures and languages. These attributes make the border area ideal for transborder co-operation and co-ordination in the management of natural resources. The IUCN led process resulted in the formulation of a draft ZIMOZA Agreement in 2001 which, however, has not yet been adopted by the three countries.

What this book also brings out is the conceptual and practical significance of community participation as a model of promoting democracy and good governance in natural resources management. In most cases decisions on natural resources exploitation are made in hotels or offices far away from the rural areas without any meaningful input from the communities in relation to access, cost, and benefit sharing. Community participation therefore should be understood as the ability of, or opportunity given through the law or practice to a people living in a geographical area, or who share the same religion, culture or language to at least have a say in decisions relating to the use, sharing of costs and benefits resulting from natural resources. It also includes prior informed consent, and mutual agreement on biodiversity conservation and utilization. This means that communities have the right to be consulted about any environmental changes or initiatives that are likely to take place in their proximity or which may affect their livelihoods and enjoyment of the local environment. The problem is that throughout the region there is a long history of exclusion and expropriation, which has resulted in the alienation of people from their rights to, and responsibilities for natural resources.⁴ Nevertheless, recent legal developments around the region have increased the opportunity for public participation

³ *Legal and Policy Issues for the ZIMOZA TBNRM Initiative*, IUCN-The World Conservation Union, 2003, Harare, Zimbabwe

⁴ Barrow, et al (2002), *Analysis of Stakeholder Power and Responsibilities in Community Involvement in Forestry Management in Eastern and Southern Africa*, IUCN, KENYA.

especially in natural resources planning and management⁵ This is established in most cases through the law and that is why it was crucial to publish this book so that we assess the degree to which the law guarantees the rights of communities to participate in the proposed ZIMOZA TBNRM initiative.

Structure of the book

Makanatsa Makonese's opening chapter gives a brief analysis and statement of the implications of the different SADC Protocols on community participation in transboundary natural resources management. In particular she assesses the implications of the SADC Protocol on Forestry of 2002, the SADC Protocol on Fisheries, the SADC Protocol on Shared Watercourses, the SADC Protocol on Wildlife Conservation and Law Enforcement and the SADC Protocol on Tourism. Her point of departure is that most of the SADC Protocols provide scope for community participation. She points out that the SADC Protocol on Forestry for example recognises the value of forests to humanity and the need to protect indigenous knowledge of communities in forest management as an important factor in coming up with forest management plans or strategies. Makonese also touches on the gender values found in the Protocol on Forestry since it positively recognizes the need for women to actively and effectively participate in decision-making processes regarding the sustainable management and use of forests.

The SADC Protocol on Wildlife Conservation and Law Enforcement of 1999 is more specific on promoting community participation as it enjoins state parties to establish measures for community based wildlife management and to integrate principles and techniques derived from indigenous knowledge systems into national wildlife management and law enforcement policies and procedures. In the same breath, the SADC Protocol on Tourism recognises community participation as it seeks to ensure the involvement of small scale and micro enterprises, local communities, women and youth in the development of tourism throughout the region, (Article 2 (4)). Makonese concludes by stating that most of the SADC Protocols encourage the transboundary management of natural resources within the region with an emphasis on harmonization of legislation to ensure uniformity in the manner in which the resources are managed, and how policies and laws are enforced. These provisions are therefore important in the implementation of projects and related activities in the ZIMOZA area if communities are to benefit.

The second chapter written by Mutuso Dhliwayo, reviews the draft ZIMOZA Agreement of 2001 and assesses the potential of the agreement to facilitate or hinder community participation in natural resources governance in the ZIMOZA Area. The paper identifies terminology as one of the factors that have hindered community participation in natural resources governance as some words and processes are sometimes poorly defined and this often clouds understanding. In this regard, he opines that the draft ZIMOZA Agreement aptly defines

⁵ *Legal and Policy Issues for the ZIMOZA TBNRM Initiative, IUCN-The World Conservation Union, 2003, Harare, Zimbabwe.*

critical terms in natural resources management such as “*community based natural resources management*”, “*community based organisations*”, “*local community*” and “*stakeholders*”. By alluding to terminology Dhliwayo captures the word-play that has characterised development work. He reaches the conclusion that by defining such words and phrases the agreement clearly shows that local communities will be an integral part of the ZIMOZA initiative and that this is indicative of the seriousness of the negotiating states to involve communities in natural resources management.

Expressing optimism, Dhliwayo further argues that the draft ZIMOZA Agreement has wide scope for community participation by citing Article 4 (1) (c) which provides for the promotion of community based management of natural resources and Article 4(1) (b) which calls for the realisation of economic benefits for the parties and local communities. The chapter also celebrates the recognition by the draft Agreement that the state parties should respect, recognise and promote the rights and responsibilities of local communities (Article 5) noting that this is a welcome departure from other agreements that just outline state and private sector obligations and rights, leaving out those of the communities. At least from an institutional perspective, communities in the ZIMOZA area can also participate in natural resources management through the Transboundary Local Committee Area which is one of the key institutions that will be critical for the implementation of the ZIMOZA initiative.

Nevertheless, Dhliwayo bemoans insecure community tenurial rights over natural resources as a potential hindrance to community participation in natural resources management. The ZIMOZA Agreement does not provide a framework for communities to have security of tenure over natural resources such as fisheries, land, forestry and water. Another weakness is that the draft agreement treats the private sector and the communities as equals, yet they have different interests, skills and resources. In fact the power play is tilted in favour of the private sector.

Thereafter the national legal framework is given by George Gapu who assesses the relevance of environmental legislation in Zimbabwe to community participation in natural resources management. He states that the laws and policies that have been promulgated over the years have been progressively pro-community but the current *status quo* does not promote community interests at an optimum level. The main law is the Environmental Management Act (Chapter 20:27). In addition, there are various sectoral laws and policies dealing with forestry resources, fisheries, wildlife, water, land, and minerals. His chapter further juxtaposes the draft ZIMOZA Agreement and the Environmental Management Act to reveal the similarities and differences found in these legal frameworks on community participation. The result is a comparison which indicates in some respects that the national legislation promotes more community participation than the draft agreement, while in other respects the draft agreement advances community rights than national legislation. The paper also identifies the legal provisions in national legislation and in the ZIMOZA Agreement that provide for the carrying out of Environmental Impact Assessments as a mechanism through which communities in the ZIMOZA area can participate in decision-making processes. Gapu also analyses a number of

legislative frameworks on water, wildlife and mining and concludes that in practice there is an urgent need to give legal effect to these provisions and make sure that communities benefit from natural resources management.

The chapters of this book therefore present part of the struggle to promote community participation in natural resources management. As stated above, the book is intended to influence policy and practice in natural resources management, and in particular the implementation of regional agreements.

Synopsis of Selected SADC Protocols with Implications on Community Participation in Transboundary Natural Resources Management

By Makanatsa Makonese

INTRODUCTION

This paper seeks to identify the relevant natural resources and natural resource related activities in the Zimbabwe-Mozambique-Zambia (ZIMOZA) Transfrontier Conservation Area (TFCA) and analyse the extent to which the Southern African Development Community (SADC) protocols have captured such issues and how they can be used to enhance community participation in natural resources management and related activities in the area. The ZiMOZA area consists of the Districts of Guruve in Zimbabwe, Zumbu and Mague in Mozambique and Luangwa in Zambia. The resources that are found in this TFCA include forests, fisheries, watercourses and wildlife. Tourism activities take place in relation to the various resources that are located in the ZiMoZa area. This analysis firstly looks at the relevant SADC protocols namely Protocol on Forestry, Protocol on Fisheries, Protocol on Shared Watercourses, Protocol on Wildlife Conservation and Law Enforcement and the Protocol on Tourism and how these can be employed to ensure greater public and community participation in the management of the various resources and related activities in the ZiMoZa area. Secondly, the paper also looks at whether the protocols address the issue of community participation at all, and if not what can be done to enhance community participation in natural resources management and conservation in the TFCA.

The SADC Protocol on Forestry

The Protocol recognises the value of forests to humanity and the whole world in relation to the role that forests play in regulating global climate. It also recognises the trans-boundary nature of some of the forests in the SADC region and therefore the need to manage them as integrated ecosystems through the implementation of trans-boundary management strategies and the ecosystem approach. In addition the indigenous/traditional knowledge of communities in forest management is regarded as an important factor which should be put into consideration in coming up with forest management plans or strategies. All these factors are important in light of the trans-boundary nature of the ZIMOZA Transfrontier Conservation Area which is occupied by rural indigenous communities. Women as the majority population in rural areas and as people who play a critical role in activities that most directly affect forest management are recognised in the protocol and required to be involved in forest management planning and implementation (Article 13). The ZIMOZA area is mainly a rural setting meaning that women form the majority of the residents in that area and play a major role in activities that affect forests management and therefore should be included in forestry management programming and implementation.

The protocol in Articles 18-22 recognises the regional role that forests play including the following:

- development of regional trade in forest products derived from sustainably managed forests;
- protection of water catchments including shared watercourses;
- improved regional cooperation through coordinated forest management; and
- harmonization of approaches to sustainable forest management including forest policy, legislation, enforcement and issues of international concern.

In line with community-centred approaches in Transboundary Natural Resources Management (TBNRM) initiatives, State Parties are required to facilitate public participation in decision-making regarding the sustainable management of forests and the use of forest resources and that forest communities are entitled to effective involvement in the sustainable management of forest resources on which they depend and to share equitably in the benefits arising from their use (Article 4 (9) and (10)). Article 12 of the Protocol deals specifically with community based forest management and urges state parties to:

- Adopt national policies and mechanisms to enable local people and communities to benefit from the use of forest resources and to ensure their effective participation in forest management activities, including affirmative steps to seek and encourage such participation.
- Develop regional guidelines and share expertise related to community based forest management.

In terms of Article 14, state parties are encouraged where appropriate to establish programmes and enter into agreements to promote the cooperative and integrated management of trans-boundary forests and protected areas. Further, Article 16 requires state parties to recognise, respect and protect the rights of individuals and communities over their traditional forest-related knowledge and their right to benefit from the utilization of this knowledge.

The SADC Protocol on Fisheries

This protocol covers the issues of fisheries for subsistence, small scale commercial, large scale commercial, and regional trade purposes.

In relation to TBNRM, it deals with the issue of shared resources in Article 7 where State Parties are among other things required to amicably resolve disputes, to share information as well as coordinate and cooperate in the management of fishery resources. Article 8 encourages State Parties to harmonise legislation related to fisheries especially in relation to management of shared fishery resources, including dealing with illegal access to fishery resources.

The concerns of communities are addressed in Article 12 which calls on State Parties to seek a balance between social and economic objectives by protecting the rights to fishery resources of artisanal, subsistence, and small scale commercial fishing activities of fishing communities. In particular, they are encouraged to:

- work towards education, empowerment and upliftment of artisanal and subsistence fishery communities;
- encourage small scale and artisanal fishers to participate in the control and management of their fishing and related activities; and
- take cognisance of indigenous knowledge in the fishing area when coming up with legislation and in the process of harmonising legislation.

The SADC Revised Protocol on Shared Watercourses

Article 4 (2) (ii) encourages state parties to harmonise their legislation especially in relation to environmental protection and in particular the protection and preservation of ecosystems. The Protocol is however silent on the issue of community based management of shared watercourses.

The SADC Protocol on Wildlife Conservation and Law Enforcement of 1999

The Protocol recognises that the survival of wildlife depends on the perceptions and development needs of people living with the wildlife in its preamble. This is reinforced by Article 6 (2) (e) which encourages State Parties to harmonise legislation governing the conservation and sustainable use of wildlife by putting in place measures facilitating CBNRM practices in wildlife management and wildlife law enforcement. Article 7 (4) specifically requires State Parties to;

establish or introduce mechanisms for community based wildlife management and as appropriate to integrate principles and techniques derived from indigenous knowledge systems into national wildlife management and law enforcement policies and procedures.

In the process, the State Parties are required to promote the cooperative management of shared wildlife resources and wildlife habitats across international borders. Special recognition is to be given to important role played by rural communities, hence the need to include them in CBNRM initiatives (Article 7 (8))

The SADC Protocol on Tourism

The protocol recognises the pivotal role that host communities play in any successful tourism development endeavour in the region (Preamble). One of the objectives of the Protocol is “to ensure the involvement of small scale and micro enterprises, local communities, women and youth in the development of tourism throughout the region” (Article 2 (4)). This ensures participation by a wide spectrum of stakeholders especially those who may otherwise be disadvantaged by their socio-economic positions. Local communities and various groups of people within the local communities are encouraged to participate in the tourism ventures and State Parties are required to play an active role in ensuring that the rights of these groups are protected and recognised. This is to be achieved through the formulation and pursuance of policies and strategies that promote the involvement of local communities and local authorities in the planning and development of tourism (Article 3 (4)). In the process, there are important requirements for the recognition of human rights, gender sensitivity and the involvement of people with disability. Again, this is an indication of the desire by the member states to ensure that all people from different sectors and from all walks of life are, where possible involved in the tourism activities.

Under the theme of investment incentives and development, Member States are encouraged to pursue incentives that encourage the private sector to involve communities in the tourism development process and to ensure that local communities as providers of goods and services to the private sector are involved in and benefit from the development of tourism. The Member States are also encouraged through the SADC framework to put in place financial mechanisms so as to facilitate the meaningful participation of local communities. This participation is therefore not supposed to be a window dressing activity but is required to be meaningful and ensure empowerment for the local communities.

The Protocol like the others also encourages harmonization of legislation and policies, collective efforts and cooperation by Member States in the tourism sector. Article 2 (3) encourages the optimization of resource usage and increase in competitive advantage in the region vis-à-vis other destinations through collective efforts and cooperation in an environmentally sustainable manner. Other areas where harmonization is required include in training, education, visa requirements, tourist registration documents and in marketing.

Conclusion

Except for the SADC Protocol on Shared Watercourses, the other relevant Protocols as explained above, give sufficient details about community participation in the management of the relevant natural resources as well as in tourism activities which derive from the same environmental resources. All the Protocols also encourage the trans-boundary management of natural resources within the region with an emphasis on harmonization of legislation to ensure uniformity in the manner in which the resources are managed and policies and laws enforced. These provisions are therefore important in the implementation of projects and related activities in the ZiMoZa area if communities are to benefit and natural resources are to be managed holistically within the region.

Implications of the Zimbabwe–Mozambique and Zambia (ZIMOZA) Transboundary Natural Resources Management Agreement on Community Participation in Natural Resources Management

By *Mutuso Dhliwayo*

INTRODUCTION

Zimbabwe, Mozambique and Zambia are involved in a Transboundary Natural Resources Management (TBNRM) initiative known by the acronym ZIMOZA. This initiative encompasses the Districts of Guruve, Zumbu and Mague and Luangwa in Zimbabwe, Mozambique and Zambia respectively. TBNRM and Transfrontier Conservation Areas (TFCAs) initiatives are expected to scale up benefits deriving from new and greater opportunities and much has been said about how they will improve the welfare of local communities living in the areas where they are being initiated, developed and implemented. ⁶Once signed, the draft ZIMOZA Agreement will be the legal document for the establishment of the ZIMOZA initiative. Its provisions will determine whether or not communities can effectively participate in transfrontier conservation initiatives or not.

This paper analyses the provisions of the ZIMOZA draft Agreement⁷ to determine if they facilitate or hinder community participation in natural resources governance in the ZIMOZA Area. The first issue is to assess whether or not the definition of terms that provides scope for recognition of community rights to participate in transboundary natural resources management at least from a theoretical perspective. The second issue that this paper deals with is whether there are provisions for access to information by communities. The third aspect is on community participation in decision-making institutions and partnerships in conservation between communities, private sector and government. The draft ZIMOZA Agreement focuses on all natural resources that are found within the area namely fisheries, forestry, wildlife, and water.

Scope for Community Participation in the ZIMOZA Agreement

One of the factors that have hindered community participation in natural resources governance is terminology which is poorly defined and understood by both the implementing agencies and communities. Ambiguous terminology and provisions in treaties lead implementing agencies to interpret them in ways that do not require them to actively and effectively promote community participation. However, under its interpretation section,⁸ the ZIMOZA draft Agreement clearly defines and interprets the terms that are used in the agreement. Some of the terms that are clearly defined and interpreted are “community based natural resources management”,

⁶Hanks, J 2003. *Transfrontier Conservation Areas in Southern Africa. Their Role in Conserving Biodiversity, Socio-economic Development and Promoting a Culture of Peace*. in Goodale, U.M, Stern, C, Maguluis, Lanfer, G.A. and M. Fladeland. (eds). *Transboundary Protected Areas: The Viability of Regional Conservation Strategies*. New York: Food Products Press

⁷The ZIMOZA Draft Agreement used in this analysis was drafted on 4 June 2003. This draft incorporated comments from the Minister's Meeting held in Maputo, Mozambique on 8 February 2002, and comments from the countries' respective legal advisors.

⁸Article 1 of the ZIMOZA Agreement

“community based organisations”, “local community” and “stakeholders.” Community Based Natural Resources Management (CBNRM) is defined as “the management of the environment and natural resources by local communities and community based organisations which have the right and responsibility to manage the environment and natural resources and to receive benefits from the management” while community based organisation is defined as an organisation composed of people from the area engaged in environmental, natural resources and development activities in the area. “Stakeholders” is defined as the parties, local communities, community based organisations and the private sector.

These definitions clearly show that the local communities are an integral part of the ZIMOZA initiative. In some transfrontier conservation agreements, these terms are conspicuous by their absence.⁹ The fact that the term “local community” is clearly defined and interpreted shows the seriousness with which the draft ZIMOZA Agreement regards community participation in conservation. Participation being a right rather than a privilege at the discretion of the state or implementing agencies, gives communities and community based organisations a basis for challenging decisions that marginalise them from participating in natural resources governance in the ZIMOZA Area.

Article 3 focuses on the management principles. The principles provide the rationale for and expectations of the parties and stakeholders involved. Member states that are Zimbabwe, Mozambique and Zambia are encouraged to cooperate in good faith in conserving, managing and maintaining the biological and cultural diversity of the area. However, in their cooperation, they shall “ensure that the utilisation of natural resources is sustainable and that benefits are shared equitably, taking into account the rights, interests and respective capacities of the Parties, local communities, and community based organisations and the private sector.”¹⁰ This provision is an explicit recognition of local communities as important and key stakeholders in the ZIMOZA area. Such a provision ensures that there is no ambiguity on the role of local communities in conservation and also ensures that their participation is a right rather than a privilege.

Article 3(5) also recognises local communities as important stakeholders in the ZIMOZA Area. It states that “the parties shall harmonise policies and legislation on environmental impact assessment in the area and shall ensure that the assessments are conducted with the involvement of local communities, community based organisations and the private sector in the area.”

Article 3(7) also makes implicit provisions for community participation in the ZIMOZA area. There is no way good governance that promotes transparency, accountability and participatory mechanisms for effective conservation of the environment and the sustainable management of the natural resources in the Area can be adopted and implemented without community participation. As a result of democratisation, there is now a move towards participatory rather than representative democracy. This paradigm shift is not restricted to politics only, but also to natural resources governance.

⁹See for example the Great Limpopo Transfrontier Park Treaty

¹⁰Article 3(2)

community participation.¹¹ Article 4(1) (b) states, “to encourage the full realisation of the economic potential of the area which will bring economic benefits to the Parties and especially to the local communities in the Area.” There is a special emphasis on local communities and this is a welcome development as they are the most important stakeholders who, until recently, have borne an unfair proportion of conservation costs without getting any real benefits. Furthermore, there is recognition of the need to “promote and encourage community based management of the environment and natural resources of the Area.”¹² According to the interpretation section, CBNRM means “the management of the environment and natural resources by local communities and community based organisations which have the right and responsibility to manage the environment and natural resources and to receive benefits from management.”¹³ This provision will ensure that communities are not marginalised from natural resources governance and ensure that they get a fair and equitable share of benefits.

Equity is an important component of both conservation and sustainable natural resource use because it eases communities' burden of bearing the conservation costs with limited benefits. Equity entails the sharing of both the costs and benefits associated with conservation. It thus provides incentives for communities to engage in sustainable natural resource use. This focus on equity therefore infuses the agreement with key concepts that underpin the idea of sustainable development.

Community participation is further strengthened by Article 5 which addresses the obligations of the three partners that is the state, communities, and the private sector. The parties are required to respect, recognise, and promote the rights and responsibilities of local communities in the Area. This explicit provision is a welcome departure from other agreements that usually outline the rights and responsibilities of the other partners in the conservation partnerships that is the state and the private sector without outlining those of the communities. An explicit provision like this ensures that at least on paper, the communities enter into these partnerships as equals and not as inferior partners. This provision also gives recourse to communities to seek redress through the Arbitration Tribunal in those circumstances where they think that their rights have been violated.¹⁴ Some of the obligations that the state parties have towards local communities are:

- ensure full and effective participation of local communities, community based organisations in the design, implementation, monitoring and evaluation of projects
- consult, involve and take into consideration the views and concerns of local communities and community based organisations in making decisions relating to the management and utilisation of natural resources management in the area. Here the states are not only required to consult communities but to be guided by these consultations in their decision making. This is a departure from the norm where state parties can consult but ignore any input from the communities in the decision making process. Through this provision, communities are empowered to demand transparency, accountability and good governance in the decision making process.

¹¹ Article 4 of the Draft Agreement

¹² Article 4(1)(c)

¹³ Article 1

¹⁴ Article 15

- promote equal and equitable access to and control of natural resources among local communities. This provision is very important in that it requires that the needs, roles and responsibilities that the various stakeholders of the community like men, women and youth have to be taken into account. Men, women and youth are affected differently by environmental problems and there is therefore need to take into account the needs of each and every group.
- promote the use of customary norms and community management practices. This encourages the use of Indigenous Knowledge Systems which have now been recognised even in international conventions like the Convention on Biological Diversity¹⁵ of 1992 as critical in natural resources management
- promotion of legal, policy and institutional frameworks that facilitate community participation in natural resources governance.¹⁶

Even in their co-operation to implement the Agreement fully and effectively, the parties are required to involve local communities and community based organisations in the area.¹⁷

Institutional Framework and Community Participation

Institutions are key to achieving sustainable management of natural resources and the same is true of community participation. The ZIMOZA Draft Agreement provides for three institutions namely the Transboundary Ministerial Committee, the Transboundary Technical Committee and the Transboundary Local Area Committee. The Transboundary Ministerial Committee consists of a Minister from each state party and its key functions are policy guidance, supervision and ensuring that each state party's sovereignty is not infringed. The Transboundary Technical Committee consists of senior representatives from each state party designated in accordance with Article 9(1), a representative of each one of the local authorities in the ZIMOZA Area three representatives from the Transboundary Local Committee Area other than the representatives of local authorities. The functions of the Transboundary Technical Committee are policy formulation, project approvals, financial management and technical supervision. The Transboundary Local Area Committee consists of the following membership: one representative from each local authority in the Area, one representative of the community from each of the districts in the area, one representative from natural resources committees from each of the districts in the Area, one representative from the private sector from each of the districts in the area and one representative from women, youth or religious organisations in each district. The main functions of the Transboundary Local Area Committee are to act as the focal point for community participation, local project formulation and facilitation of cross border partnerships.

More often than not, communities are marginalised from natural resources management institutions on the basis that their interests are reflected and represented through other stakeholders like Ministries, implementing agencies and Rural District Councils. The draft

¹⁵ Article 8 (j)

¹⁶ Article 5

¹⁷ Article 7(2)(g)

Agreement creates institutions for community participation in the form of the Transboundary Local Committee Area.¹⁸ Membership of the Transboundary Local Area Committee consists of one representative of the community from each of the districts involved. Community representation in decision making institutions gives them an opportunity to participate in the decision making process on issues that affect their livelihoods instead of other stakeholders. According to Article 11(2) the transboundary local area committee “shall be the focal point of local community participation in the conservation and management of the environment and natural resources in the area.”

Limited Tenurial Rights over Natural Resources

Progressive as the draft ZIMOZA Agreement maybe, it has some weakness. One of the weaknesses of the ZIMOZA Agreement is that it does not provide a framework for communities in the ZIMOZA Area to have security of tenure over natural resources. As indicated earlier on, a number of resources are found within the ZIMOZA Area namely fisheries, land, forestry and water. Tenure is defined as the “control over resources or the way in which people hold, or do not hold, individually or collectively, exclusive rights to land and all or part of the natural resources upon it.”¹⁹ Accordingly, tenure to a large extent, determines the way in which natural resources are managed and used and the manner in which the benefits are distributed. Security of tenure is a key component to building the confidence of communities to participate effectively in natural resources governance. While the resource rights of the state and the private sector are clearly provided for and defined, those of the communities are generally not. Because security of tenure has not been a precondition for partnerships between communities, the state and the private sector, establishing security of tenure can be an effective incentive for community participation in transfrontier conservation. The point here is that insecure tenure may affect communities' ability to bargain and negotiate effectively for benefits in these partnerships. If the other partners, the state and the private sector have secure rights over the resources that they are bringing into the partnership, then communities should also have secure rights over the resources that they are either bringing into or gaining from the partnership.

While it may be argued that Mozambique and Zambia have laws that give communities greater security of tenure over resources at the national level and by implication in the ZIMOZA area, the same is not true of Zimbabwe.²⁰ In Zimbabwe, all communal land is vested in the president. The Rural District Councils (RDC) have the legal authority in terms of the Rural District Councils Act to manage communal land on behalf of the president.²¹ The RDC can allocate user rights over communal land and its associated resources. The ZIMOZA Agreement could have been used to strengthen community rights by recognising their rights to use natural resources not only for subsistence purpose but also on commercial basis. This would have placed an obligation on countries like Zimbabwe to realign their national laws and policies to conform to their commitments at the regional level.

¹⁸ Article 11.

¹⁹ Tenure in Transition

²⁰ For example Mozambique's Land Law of 1997 recognise community title to land based on occupation and Zambia's Land Act of 1995 recognise customary tenure. Similarly, the Forestry and Fisheries Laws of Mozambique and Zambia promotes sustainable utilisation of natural resources by communities in the respective countries while on the other hand, Zimbabwe's laws mainly focuses on conservation.

²¹ See Chapter 3 by George Gapu

The draft Agreement recognises both state sovereignty and community rights which includes the right to participate, right to demand transparency and accountability in the implementation of the ZIMOZA initiative and right to benefit equitably. However, the concern is that these two have not been adequately reconciled and it is not clear how they will work in practice. This may be a source of conflict in the future as the state asserts their sovereignty right while communities assert their community rights.

Community, State and Private Sector Relationship

While the relationship between the three states and communities are addressed in terms of Article 5, the same is not true of the relationship between the private sector and communities. In terms of rights, the private sector is treated at par with local communities. However, the reality is that in terms of skills, resources both human and financially, there is a wide gap between these two stakeholders. As Mohamed- Katerere aptly notes;

the ZIMOZA Agreement identifies the established business /private sector as key and gives them rights virtually equivalent to those of communities. They are for example included into managerial regimes. Given unequal access to resources, the general alienating nature of institutional processes, issues of power etc, it is possible that this approach can threaten community interests.²²

Partnerships between the states, the private sector and communities are regarded as key in the implementation of the ZIMOZA draft Agreement so as to facilitate and develop the tourism potential of the ZIMOZA area for the benefit of the people of the four districts. However, as a result of power and resource inequalities between communities and the private sector, there is a real possibility that one of the partners may use the weakness of the other as leverage during the bargaining process within the partnership. This can lead to what has been hypothesised as “choiceless partnerships” between the private sector, communities and the states in which communities entering into those partnerships may do so on the basis that something is better than nothing criterion. Such inequitable conditions do not lead to effective participation in conservation and communities remain disadvantaged.

Access to Information

Access to information by communities is critical if communities are to play an active role in the implementation of the ZIMOZA initiative. Without information, communities will not be able to make informed decisions. There are no clear or explicit provisions made by the ZIMOZA Draft Agreement for communities to have access to information. The closest that the Agreement comes to making provisions for access to information is under Article 4 (f) where one of the management objectives provides for the sharing and pooling of expertise, experiences and information among the Parties, local communities, community based organisations and the private sector in order to promote the conservation of the environment

²² Mohamed- Katerere, J 2003. *Legal and policy Issues for the ZIMOZA TBNRM Initiative*. Harare, Zimbabwe. IUCN-The World Conservation Union

and sustainable utilisation of natural resources in the Area. Community access to information should not be regarded as a privilege but as a right and as such it would have been better to have access to information provided for under Article 5 of the Agreement which deals obligations of parties towards local communities, community based organisations and the private sector in the area.

Conclusion

Despite its limitations, the ZIMOZA Agreement is one clear example of TFCA initiatives where serious attempts have been made to address the shortcomings of community participation in natural resources governance. Clear provisions for community participation are made and if these are applied in practice, they may lead to improved livelihoods for the people in the ZIMOZA Area. A possible explanation to this progressive approach to community participation in natural resources governance can be attributed to the fact that, the ZIMOZA initiative unlike the Great Limpopo Transfrontier Park initiative is a community initiative which is being driven by NGOs that are community focused in their conservation approach. The ZIMOZA initiative was first facilitated by IUCN-The World Conservation Union and now by African World life Foundation.

The Impact of Environmental Laws and Policies on Community Engagement in Transboundary Natural Resources Management in the ZIMOZA TFCA: The Zimbabwean Case.

By George Gapu

INTRODUCTION

Zimbabwe has several environmental laws and policies that impinge on community participation in natural resources management. The laws and policies that have been promulgated over the years have been progressively pro-community but the current situation does not promote community interests at an optimum level. The main law in this area is the Environmental Management Act (Chapter 20: 27) and the regulations made under it. The Act is the supreme law in all matters pertaining to the environment and natural resources (save for the national constitution) and it takes precedence over all other laws which are inconsistent with it. In addition, there are various sectoral laws dealing with forestry resources, fisheries, wildlife, water, land, and minerals. The relevant policies include the draft National Environmental Policy, the Wildlife Based Land Reform Policy, Fisheries Policy and so on. This paper assesses the extent to which each of these laws and policies affect community participation in natural resources use and management as envisaged in the Zimbabwe, Mozambique and Zambia [ZIMOZA] agreement.

Environmental Management (Environmental Impact Assessment and Ecosystems Protection) Regulations S.I. 7 of 2007

The regulations provide that any developer who wishes to carry out any of the projects listed in the first schedule has to comply with the procedures stipulated in the regulations when compiling its Environmental Impact Assessment report. The developer is obliged, when preparing the report, to carry out "wide consultations with stakeholders". Local communities are key stakeholders who have to be consulted when projects are being considered for implementation in their areas and thus they are part of the decision making process whether a particular project should be implemented and if so, what mitigatory measures should be put in place. The Director-General of the Agency can cancel or decline to give a developer an EIA licence on the basis that the local community was not consulted when the EIA report was compiled. This provision can be used to reinforce the more explicit provisions of the ZIMOZA agreement providing for community participation in the conduct of EIAs.

In terms of these regulations, any land owner or occupier is obliged to put in place fire suppression measures on his land and put out all fires on his property. Any person in the vicinity of any fire is also obliged to take reasonable measures to put out such fires. Local communities in the ZIMOZA area can use this provision to advocate for the suppression of veld fires by compelling project proponents in the area put in place fire suppression measures. The interdependence of local community members and commonality of interests can also be used by community members to ensure that they all comply with the regulations.

Table 1: Summary of Provisions and Implications

Section	Provision	Relative Provision in ZIMOZA Agreement	Comment
4 (b)	Right of access to environmental information	Articles 5 & 6 provide generally that communities should participate effectively in the design and implementation of projects, the making of decisions relating to environmental management.	The provisions in the agreement do not specifically provide for the right of access to environmental information though it is implied
4 (c)	Right to protect the environment and ensure intergenerational equity	Articles 3 (2), 6 (a) provide specifically that communities should participate in sustainable environmental management in the area.	Both documents provide for sustainable development and intergenerational equity
4 (c)	Right to participate in the implementation and promulgation of legislative, policy and other measures that prevent pollution and degradation, and secure sustainable exploitation and management of natural resources while promoting economic development	Article 4 (1) (c), (i), 5 (1) (a), (c), 7 (2) (g) specifically provide that communities should participate in the design, implementation, monitoring and evaluation of projects and programs in the area.	The right of communities to participate in the formulation of the agreement and subsequent measures for management of the local environment not specifically safeguarded in the agreement but it is implied. The Act is more specific.
4 (2) (c)	Participation of all interested and affected persons in environmental governance must be safeguarded. All people must be given an opportunity to develop the understanding, skills and capacity necessary for effective participation	Article 5 (1) (a), (c), (g); 6 (1) (a); 7 (2) (g), (3) (i) (vi); 11 (1) (b). These provide generally for full and effective participation by communities in environmental governance but there is no specific provision for capacity building for the communities	The agreement does not have adequate and specific provisions for capacity building for communities though their participation in environmental management is safeguarded.
4 (2) (d)	Environmental education and awareness for communities must be promoted	Article 4 (1) (f) provides that sustainable use of natural resources and environmental conservation shall be achieved by allowing local communities to share and pool expertise, experiences and information	The agreement is weak on environmental education and awareness for communities and the provisions of the Act must be used to enforce the obligation of the State
4 (2) (g)	Polluter pays principle and obligation to pay reparation damages to affected persons	none	Communities can rely on the Act to claim compensation from anyone causing environmental damage e.g. through water pollution
57	Any person who pollutes the aquatic environment in contravention of water pollution control standards obliged to pay the cost of rehabilitating the environment and pay reparation or compensation to any third party affected.	none	The law provides a convenient route for communities to compel polluters to restore the environment and pay compensation to the community if damage is suffered.
73	Any person who discharges hazardous substances, chemicals or oils in to the environment obliged to pay cost of restoring the environment and compensation to affected persons	none	See above
95	Every local authority is obliged, when preparing environmental action plan, to place it on public exhibition and give the public a chance to make representations on it.	Article 5 (1) (c), (g); 6 (1) (a). Local communities should participate in the design, implementation, monitoring and evaluation of projects in the area.	Public participation in the design of local environmental action plans ensures that the plans have the buy-in of local communities from the beginning. Mechanisms are needed to ensure that communities actually get the opportunity to make input into the plans.
99	Developers to undertake Environmental Impact Assessments for projects and the report should indicate whether the project may affect the environment of any other country and if so, the measures to be taken to mitigate against that.	Article 3 (4), (5) provides that local communities should be involved in the conduct of EIAs	The agreement specifically provides for community participation in EIAs and this is reinforced by the general provisions of the Act.

Parks and Wildlife Act (Chapter 20:14)

This Act regulates national parks, wild animals, fisheries and other resources and confers the overall responsibility for management of the resources on the Parks and Wildlife Management Authority. The Act does not specifically provide local communities with any rights over the resources but section 83 (1) provides that the minister may “declare any person to be the appropriate authority for any waters and may in like manner amend or revoke any such notice” and furthermore, the minister may appoint a rural district council to be the “appropriate authority” for such area of communal land which would otherwise be under the control of the Parks and Wildlife Management Authority. Appropriate authority status confers power to access, regulate, control, and use the natural resource in question.

This provision has however been used to advance the CAMPFIRE program in which communities have participated in natural resources management in conjunction with rural district councils. The Wildlife Based Land Reform Policy, which is dealt with below, may provide the impetus for amendment of the provision to enable communities to be granted appropriate authority status over land as the policy seeks to inter-alia, confer power over land to local communities. Apart from the Environmental Management Act, this is the most important piece of legislation that can be used to enhance the level of involvement of communities in natural resources management. This Act is very pertinent to the ZIMOZA communities as it may be the vehicle through which the communities can hold legally recognized interest and stake in the local natural resources.

Communal Land Forest Produce Act (Chapter 19:04)

This Act regulates the exploitation of forest produce in communal lands. It provides in sections 3 and 4 that the Minister of Environment and Tourism and the local inhabitants have the right to exploit the forest produce in the area. The right of local communities to exploit the resource is however limited to subsistence use and not commercial use. The exploitation of major forest produce within a protected forest requires a permit which is issued by the Minister. In terms of section 20, the proceeds from the sale of forest produce from a communal land or licences to exploit the produce shall be used by the Minister to pay the local authority or in the absence of a local authority, the money is paid to the District Development Fund. It should be noted that local communities are not listed as potential beneficiaries from such funds.

Although the Act recognizes and protects the right of local communities to utilize forest produce for their own requirements, it should be noted that the right does not extend to the commercial exploitation of the resources, as envisaged in the ZIMOZA agreement. The effect of the Act is that when it comes to commercial exploitation, local communities are in no stronger position than outsiders. This is an anomaly since local communities should be given priority in the commercial exploitation of the local resources as provided for in the aforesaid agreement.

Communal Land Act (Chapter 20; 04)

All communal land vests in the president and it is managed on his behalf by rural district councils. The rural district council can allocate user rights over such land and in doing so it is enjoined to have regard to the traditional and customary use and allocation of such land and to allocate it to the community which has traditionally and customarily used the land. Any rural district council may make regulations relating to the use and exploitation of communal land within its jurisdiction provided that such regulations shall not be inconsistent with the provisions of the Act.

Where a local community has traditionally and customarily been using a particular area of communal land, it is clear that members of such community have a greater right to occupy such land when compared to outsiders. The right to occupy the land entails the rights to use it for residential and agricultural purposes among other things.

Water Act (chapter 20; 24)

All water in Zimbabwe vests in the president and no water shall be capable of being privately owned and use rights are conferred through a permit. The use of water for primary purposes, that is domestic use, supporting animal life and making bricks for private use, does not require a permit. The responsible minister may appoint a catchment council for water in any river system and such catchment council shall be made up of users of the river system.

Whenever a matter is heard before a Catchment Council which affects the supply of water to a communal land, the responsible minister may appoint a fit and proper person to represent the interests of the communal land occupiers before such catchment council. Where an order is made by a catchment council which affects the supply of water to a communal land, such an order shall not take effect until it has been approved by the Minister responsible for the administration of the Communal Land Act. This provision may be used to ensure that the interests of local communities are taken into account whenever decisions affecting the communities are made by Catchment Councils. It is submitted that it would have been more desirable if the local communities, and not the Minister, had been given the right to appoint the person who would represent the community before the Catchment Council. This is because there could be instances in which the interests of the minister may be opposed to those of the local community and in such an instance, the minister may appoint a person who would not promote the interests of the community.

The ZIMOZA agreement has a wider scope for community participation in water management than the Act as it specifically provides that local communities should be directly involved in the management of all natural resources in their communities.

Mines and Minerals Act (Chapter 21; 05)

The Act provides that all minerals and the right to search for them, vests in the President and one may only extract or prospect for the minerals with the authority of a permit. Such permit

may be issued with respect to communal, State or private land. The owner or occupier of land on which a mining location is situated shall retain the rights to graze his animals and cultivate the land as long as such activities do not interfere with the mining activities. Section 255 of the Act requires miners to pay certain prescribed sums of money at prescribed intervals to the local authority in whose area the mining location is situated. No payments are specifically provided for with respect to local communities.

The *proposed Mines and Minerals Amendment Act* which was gazetted as a bill in 2007 seeks to make substantial alterations to the Act. Clause 42 will put an obligation on all miners to make funds available for the rehabilitation of the environment after their operations but this will not exempt the miners from their obligation to rehabilitate the environment after their operations.

Part XXX of the Act will provide for indigenization of the mining sector and proposes that at least 51% of the shares in the mining companies be owned by the State or by indigenous Zimbabweans. Indigenous Zimbabweans are those Zimbabweans who were discriminated against on the basis of race as at the 18th April 1980, or the descendants of such persons.

It should be noted that the Bill makes no specific reference to local communities who live adjacent to mining locations. They would have to compete on an equal basis with other indigenous Zimbabweans for the shares in the mining companies.

Indigenisation and Economic Empowerment Act No. 14 of 2007 (Chapter 14: 33)

This Act was passed in 2008 and its broad objective is to ensure that at least 51% of the majority of businesses in Zimbabwe is owned by indigenous Zimbabweans. Although the Act provides for a mechanism by which companies will fund the acquisition of their own shares by indigenous Zimbabweans, there is no provision providing for the right of local communities *per se*. Assuming that the Act is justifiable, it would have been desirable if it had made specific provision for members of local communities to have preference over the acquisition of shares in companies operating in their local environments. This is because it is these communities who suffer the environmental and socio-economic costs of the operations of these companies. Furthermore, most members of local communities, by virtue of being rural dwellers, do not have the economic or political influence to compete for the shares on an equal footing with other qualifying Zimbabweans from outside the area.

Draft National Environmental Policy (NEP) (published September 2003)

This has been in draft form since 2003 but it is likely to retain its basic provisions when it is finally adopted as it has been subjected to wide public debate. The draft policy was prepared in conjunction with the Environmental Management Act although the Act became law in March 2003.

It mandates the Government of Zimbabwe under guiding principle 22, to promote equitable access to land by decongesting overpopulated communal areas and promoting appropriate land use options and intensive use of land. Under guiding principles 24 and 25, the Government shall

“strengthen the rights of the poor to access and use natural resources on a sustainable basis, including for purposes of income generation” and “strengthen decentralisation for more effective environmental management by local communities”. The poor and marginalized communities will be empowered through greater consultation and involvement in the formulation of policies, and through their active participation in environmental impact assessments. With regards to indigenous technical knowledge, it provides that: *“Communities and individuals have the sovereign right to retain or share as they see fit their indigenous technical knowledge and practices concerning the properties and use of plants, animals and other life forms. Where they choose to impart this knowledge to others, any benefits from the use of that knowledge should be fairly and equitably shared with the original owners of such information”*

The draft policy also promotes the principle of inter-generational equity by providing that a sustainable growth and development strategy should put the welfare of its citizens first while ensuring that the country's natural resources and environment conserved for use by present and future generations (Guiding principle 37). Guiding principle 38 recognises the right of every Zimbabwean to gainful occupation that accords them dignity and social standing within their community but the employment creating initiatives should be environmentally sustainable.

This draft policy advances a host of the progressive principles in the ZIMOZA agreement and it is hoped that it will be approved without major subtractions from the main principles. Most importantly, it promotes the right of local communities to derive economic benefits from local natural resources and it is regrettable that this has not been translated into specific provisions in the Environmental Management Act.

Draft Wildlife Based Land Reform Policy (WLBRLP)

This draft policy, last revised in February 2004 is awaiting approval before it becomes policy. Its aim is to ensure profitable, equitable and sustainable use of wildlife resources, particularly in areas where agricultural potential is limited. One of the specific objectives of the policy is *“to facilitate the indigenization of the wildlife sector and to ensure more equitable access by the majority of Zimbabweans to land and wildlife resources and to the business opportunities that stem from these resources”.* The policy seeks to achieve an equitable ownership of wildlife resources by benefiting *“rural and landless people willing to engage in wildlife production and those who reside adjacent to wildlife”* and *“those who have the means (skills and resources) and wish to enter or remain in the sector”*

The other objective of the draft policy is to promote secure and equitable tenure to be provided in diverse forms including leasehold (20-99 year leases), freehold (ownership through shares in companies) and communal tenure (to be done through an amendment to the Parks Act so that communities can be appointed as appropriate authorities in the same way as RDCs). This draft policy provides a springboard for the implementation of the ZIMOZA agreement on the Zimbabwean side in as far as it specifically provides that local communities living adjacent to wildlife will be given an opportunity to engage in sustainable wildlife production and that the communities will be provided with secure tenure. The significance of this is highlighted by the fact that when CAMPFIRE was originally implemented, one of the reasons cited for the unequal position of communities was that they

were not legally recognized as legal entities and control of the resource legally vested in the RDCs anyway and the latter had a say in the manner in which communities used their share of benefits derived from the enterprises. This policy seeks to put the control of the wildlife resource in the hands of communities and to have them recognized as legal entities in one form or another.

It is unfortunate that apart from the Indigenisation and Economic Empowerment Act, which is not of universal application to all enterprises as it only applies to corporate businesses, Zimbabwe has not crafted laws which will specifically give teeth to the policy statements in the NEP and WLBLRP. The most important amendments would start with the amendment of the Parks and Wildlife Act and Environmental Management Act to recognize local communities as entities to which natural resources management power can be devolved and to recognize their entitlement to an equitable economic stake in the local natural resources.

Even under the land reform program, the country has not done enough to provide legally secure tenure over the redistributed land. One gets the impression that the land is always occupied at the mercy of the authorities because the offer letters for land specifically state that the land can be repossessed at any time even through no fault of the occupier. Even though the Government launched the exercise of giving beneficiaries 99 year leases in 2007, this did not go far as very few people were given the long leases. The tenurial insecurity has resulted in some beneficiaries maximizing their exploitation of land given to them without regard to sustainable use, and no long term investment on the land. It is evident that in this regard, the objective of the exercise is being negated by poor planning and policy implementation on the part of the authorities. It is hoped that when the draft WLBLRP is operationalised, the authorities will have learnt their lessons from the experiences had with agricultural land redistribution.

Conclusion

Zimbabwe has got a comprehensive set of laws and draft policies which impact on the participation of communities in the ZIMOZA initiative. While the draft policies and the Indigenisation and Economic Empowerment Act (in general terms) are progressive in advancing the status and rights of local communities, not enough has been done on the legal front to ensure that the policies are given the force of law. Local communities still have no legal rights over local natural resources nor economic benefits flowing from the exploitation of the resources. At best their legal entitlement is limited to the user rights enjoyed under the Communal Land Act and the mainly procedural rights provided under the Environmental Management Act. The ZIMOZA agreement contains specific clauses recognizing the rights of local communities but even these clauses will not give the communities legally enforceable rights since the local communities are not party to the agreement (in that they did not sign the agreement) and it is only binding on and enforceable by the State parties who signed it.

