

CUSTOMARY LAW

**SWM SUSTAINABLE
WILDLIFE
MANAGEMENT
PROGRAMME**

Customary norms and practices to strengthen the sustainable use of wildlife resources in Binga District by Tonga communities



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INTRODUCTION

Zimbabwe is participating in the Sustainable Wildlife Management (SWM) Programme initiative of the Organisation of African, Caribbean and Pacific States (OACPS) Secretariat. It is implemented through a partnership involving the Food and Agriculture Organization of the United Nations (FAO), the French Agricultural Research Centre for International Development (CIRAD), the Center for International Forestry Research (CIFOR) and the Wildlife Conservation Society (WCS). The objective of the SWM Programme is to improve the conservation and sustainable use of wildlife, for the benefit of local communities that depend on the meat of wild animals for food, nutrition and income. Wildlife is currently under severe threat from ecological degradation leading to declining populations and food insecurity. When the use of wildlife is well regulated, wildlife production can be sustained for the benefit of those who use the resource. However, wildlife sustainability is complex and can be an elusive goal because there are many challenges in local communities' access to wildlife as well as co-existence with it and the capacity to manage it.

The SWM Programme pilot site in Zimbabwe is referred to as "Mucheni Community Conservancy" in Binga District, Matabeleland North Province. It is an area of communal land covering three wards un-

der the formal authority of the Binga Rural District Council (RDC). One of the hoped-for outcomes of the SWM Programme is to ensure that policies and regulations enable the sustainable use of species that are resilient to hunting and fishing, and to ensure the conservation of protected and threatened species. To this end, the Programme identified gaps and opportunities for the sustainable use of wildlife through the analysis of statutory and customary laws. The focus of this document is to report on customary norms and practices in relation to land use and planning, hunting and fishing activities in Binga District. Gaps and contradictions between customary and statutory systems are highlighted, along with opportunities and challenges related to the formal recognition of customary rules.

Information was obtained from secondary sources including a review of the existing literature as well as semi-structured interviews with key stakeholders in the area which included local leaders (chiefs and headmen) and community representative groups (men, women, youth), Government officials (Forestry Commission, Parks and Wildlife Management Authority, Environment Management Agency, Veterinary officers, etc.), Rural District Council Officials, local NGOs and local politicians. Interviews were useful in validating information collected from secondary sources including colonial archives.



1

HISTORICAL BACKGROUND

In the precolonial period, until 1888, the Tonga people were stateless, with no evidence of a large Tonga state or empire ever having existed (Colson, 1960). Tonga, originally located across the Zambezi Valley (Zimbabwe-Zambia border) were known for having no paramount chief and were regarded as people who ruled themselves. Historically, they were a matrilineal society (Colson, 1960; Scudder, 1962).

The British colonialists did not establish administration centres in the Zambezi Valley, yet they embedded colonial administration by introducing chiefs and headmen and thereby disrupted Tonga's age-old egalitarianism (Colson, 1960). At the same time, the colonial intrusion led to the solidification of fixed boundaries across and between villages as well as the introduction of new ways of dealing with criminal cases that were centred around the chief's court (Helliker and Matanzima 2023). Moreover, the colonial government established in 1890 over Southern Rhodesia introduced hut tax and carried out large-scale appropriation of land and other assets such as livestock (Kwashirai, 2020b).

The construction of the Kariba Dam along the Zambezi River significantly impacted the lives and livelihoods of the Tonga who were directly and heavily reliant upon the Zambezi River landscape (Colson, 1971; Cliggett, 2005; Matanzima, 2022a; Tischler, 2014). The forced relocation caused hunger, famine and poverty among the resettled Tonga, whose communities were separated, relocated to land of small size and poor quality and whose livelihoods ceased to be river-focused (added to references below). Indeed, the colonial government established fishing camps far away from resettlement areas, and only men were allowed at these fishing camps (Helliker and Matanzima, 2023).

New policies and laws were also adopted with the aim of protecting birds and wildlife, citing these as "Royal game", thereby centralizing the management of wildlife. They abrogated traditional and cultural management systems at a huge cost to local communities. Hunting could only be carried out under a permit, so the new colonial system effectively criminalized traditional hunting systems (Mackenzie, 1988; Beinart and Hughes, 2007). Indeed, during the colonial era, game preservation was subordinated to agricultural and ranching interests (Gibson, 1999). Farmers could easily obtain a landholders' permit to kill as many animals as they deemed necessary to protect their livelihoods, although once Rhodesia became a party to the Convention relation to the Preservation of Faune and Flora in their Natural State', London 1933, they could no longer sell the animals' meat or skins (Child, 1996).

In the 1960s, the expansion of commercial agriculture by white farmers led to the widespread decimation of wildlife as farmers sought to protect their crops and livestock. In response, the Rhodesian colonial government introduced new provisional legislation that allowed landholders to benefit from wildlife on their property (Machena and Mutepfa, 2003; Child, 1996; and Gibson, 1999). This was farsighted and led to the development of the wildlife industry that benefited from a lucrative global market for wildlife products in Zimbabwe, notably through trophy hunting (Child, 1989; Murphree, 1993; see also Jones, 2006). The 1960s legislative provisions were later incorporated in the Parks and Wildlife Act (PWA) of 1975.

As a general tendency, the postcolonial govern-



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ment, just like its colonial predecessor, has largely ignored the plight of the Tonga who continued being marginalized (Mashingaidze, 2013; McGregor, 2009 Cliggett, L. & Bond, 2013). Since the time of political independence in 1980, Shona-speaking, Ndebele-speaking and anglophone white communities have controlled to varying degrees the fishing, tourism and wildlife industries surrounding Lake Kariba (Helliker and Matanzima, 2023). The Tonga villagers have generally accessed menial work because of a lack of suitable qualifications, without benefiting from the wild animal resources in the safaris and national game parks abutting their new villages (Mashingaidze, 2013). The Zimbabwe Government sought to extend the rights to manage and benefit from wildlife to the local communities and this led to the Amendment of the PWA in 1982. The amendment extended the right to use wildlife in communal areas to Rural District Councils (RDCs). The idea behind the amendment was that RDCs would exercise the appropriate authority status on behalf of the communities (Mo-

hamed-Katerere, 2001). However, this has resulted in subsequent tensions between communities and RDCs on revenue-sharing arrangements from wildlife.

Indeed, the amendment to the PWA also served as the basis for the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) initiated in 1989, into which some Tonga communities were also incorporated. This was an early attempt to involve villagers in the management and preservation of wildlife so as to ensure that they acquired financial and infrastructural benefits through income generated by safari hunting and tourism on their lands (Dzingirai, 2003; Murphree, 2000). While CAMPFIRE was, initially, regarded as a success, recent evidence suggests that local communities have no direct economic incentive to conserve wildlife, with most communities separated from wildlife management efforts (Child, 1996; Fabritius *et al.*, 2014; Machena, Mwakiwa and Gandiwa, 2017).

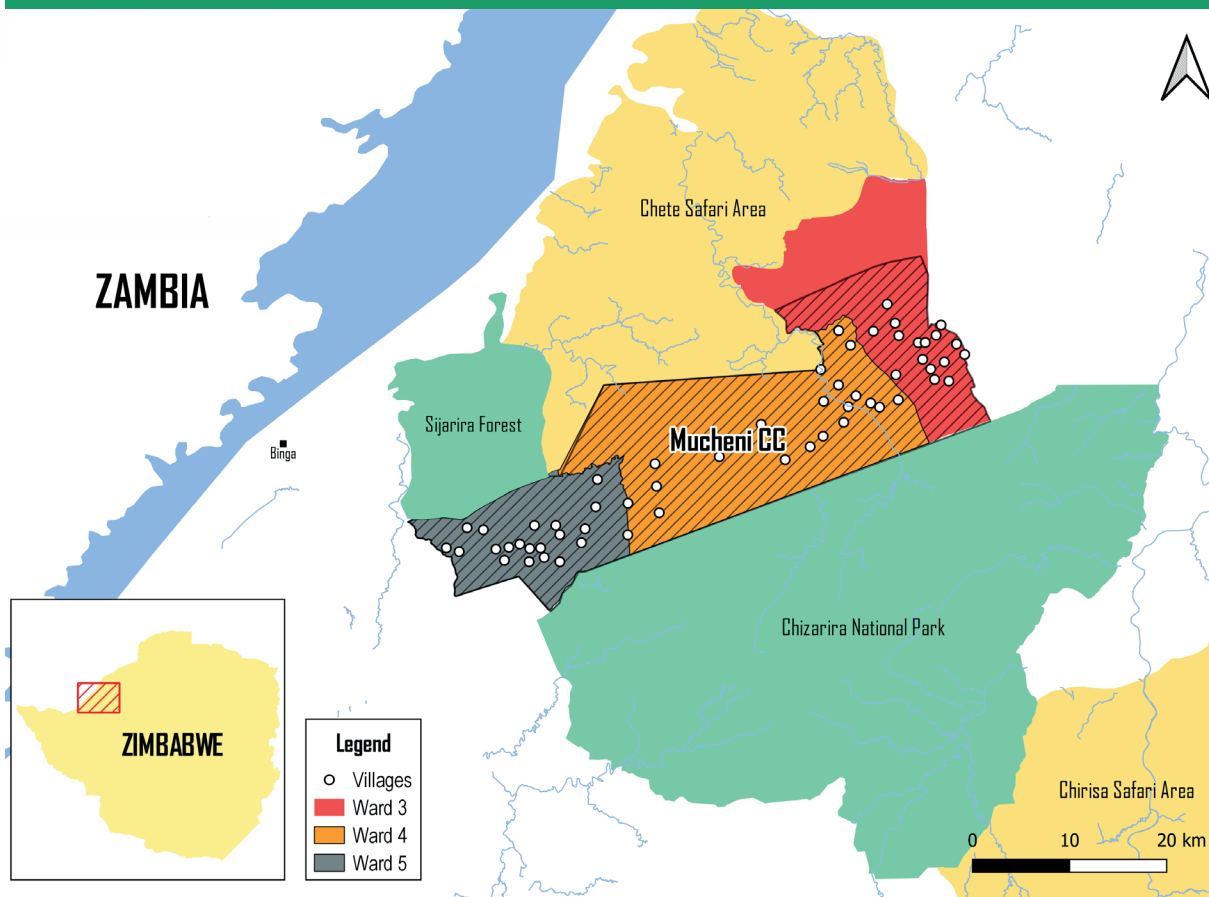
2 GEOGRAPHIC AREA AND ETHNOLINGUISTIC CHARACTERISTICS OF THE MUCHENI COMMUNITY CONSERVANCY

Activities under the SWM Programme in Zimbabwe are undertaken in Binga District, situated in the Zambezi Valley, bounded by the Zambezi River in the west, which defines the international boundary with Zambia. The area is very hot, with summer temperatures sometimes reaching 48 °C. Rainfall is generally poor with some low-lying areas receiving as little as 500 mm per annum. The proposed Mucheni Community Conservancy is found in Ward 3 (Sinampande), Ward 4 (Sinansengwe), and Ward 5 (Sinakoma) of Binga Rural District as illustrated in Figure 1 below and it is adjacent to the Chizarira National Park, Chete Safari Area and Sijarira Forest, which are core wildlife dispersal areas. The proposed community conservancy is also part of the Kavango-Zambezi Transfrontier Conservation Area (KAZA), a biodiversity-rich functional ecosystem under the management of the Angolan, Botswanan, Namibian, Zambian and Zimbabwean governments and local communities (Kaza Secretariat, 2022).

Binga District is mainly inhabited by the Tonga and Ndebele. The Tonga are the majority inhabitants of

Wards 3, 4 and 5. They are known to have been the first Bantu people to occupy the Zambezi Valley around 1100 AD before spreading to the various countries they occupy today. For this reason, the Tonga regard the Ndebele, who represent less than 10% of the population in Binga District, as newcomers to the area. The Tonga people identify strongly with the Zambezi River, calling themselves Bazilwizi, “the River People”, this being the centre of their economic, social, religious, cultural and environmental livelihoods (Colson, 2006; Manyena, 2013). They have rain shrines all along the river where they carry out ceremonies to ensure sufficient rain and good harvests. The Tonga believe in a river god called Nyaminyami who lives in the Zambezi River. They also practise hunting and fishing, with fish being part of their everyday diet. Agriculture equally plays an important role in the Tonga livelihoods and they use river bank gardens to grow two harvests per year, one in the rainy season and another in winter (Scudder, 1962). The Tonga occupation of the Zambezi Valley was brought to an abrupt end in the 1950s to pave way for the construction of the Kariba Dam.

Figure 1. Geographic site of the proposed Mucheni Community Conservancy (SWM Programme, 2021).



Source: CIRAD, in compliance with United Nations map 4170 R19, Oct. 2020

3

RECOGNITION OF CUSTOMARY NORMS AND PRACTICES BY STATUTORY LAW

Since the country was first occupied by the British South Africa Company in 1890, Zimbabwe has had a plural legal system which consists of Roman-Dutch law, with some grafting from English common law, and customary law. Indeed, customary law was also recognized by the postcolonial legal system and the Lancaster House Constitution.¹ The 2013 Constitution expressly recognizes customary law and customary institutions in various provisions: Section 332 defines law to include any unwritten law in force in Zimbabwe, including customary law which it defines as the customary law of any section or community of Zimbabwe's people. Chapter 15, particularly Section 282(1), recognizes the role of traditional leaders in resolving disputes among people in their communities

in accordance with customary law. Moreover, the 2013 Constitution buttressed the dual legal system through the constitutional establishment of a dual court structure. Sections 162 and 174 recognize customary law courts whose jurisdiction consists primarily in the application of customary law; while Section 176 bestows inherent powers on Constitutional, Supreme and High courts to "develop common law or customary law, taking into account the interests of justice and the provisions of this Constitution". All law, including customary and general law, is subject to compliance with the Constitution of Zimbabwe, which is the Supreme Law of the country. According to Section 46(2) of the Constitution, every court, tribunal, forum or body interpreting an enactment, and developing

¹ The Lancaster House Agreement, signed on 21 December 1979, declared a ceasefire, ending the Rhodesian Bush War; and directly led to Rhodesia achieving internationally recognized independence as Zimbabwe. It required the full resumption of direct British rule, nullifying the Unilateral Declaration of Independence of 1965.

both the common law and customary law, must promote and be guided by the spirit and objectives of this very chapter. Any law inconsistent with it is invalid to the extent of the inconsistency.

There are also several statutes which recognize customary law. These include the Customary Law and Local Courts Act, the Traditional Leaders Act, the Communal Land Act, and the Environmental Management (Access to Genetic Resources and Indigenous Genetic Resource-based Knowledge) Regulations, 2009. According to the Customary Law and Local Courts Act (CLLCA), customary law means the customary law of the people of Zimbabwe (or any section or community of such people) before 10 June 1891, as modified and developed since that date. The CLLCA also defines general law as the common law of Zimbabwe (Roman-Dutch Law) and any enactment (Statutory Law). According to the CLLCA, customary law is still applied in civil matters where the parties have agreed (CLLCA, Section 3). Local courts have jurisdiction on any civil case in which customary law is applicable and shall be presided over by a chief (CLLCA, Section 11). However, their jurisdiction is excluded, among others, where the claim is not determinable by customary law; or where the claim or the value of any article claimed exceeds a certain amount; or also to determine rights in respect of land or other immovable property (CLLCA, Section 16).

The Traditional Leaders Act governs the structure of traditional leadership. Section 5 lists the duties of traditional leaders, which include the resolution

of disputes and management of natural resources. Furthermore, traditional leaders have a role under the Communal Land Act in land allocations in their communities. The Environmental Management (Access to Genetic Resources and Indigenous Genetic Resource-based Knowledge) Regulations, 2009 provide for community rights over genetic resources, including animal genetic material, in order to encourage the conservation and sustainable use of these resources but also “improve their diversity as a means of sustaining the life-support and health-care systems of the people of Zimbabwe”. This includes intercommunal rights such as the right for the residents of local authorities or members of Indigenous communities to exchange among themselves genetic resources and the products derived therefrom, for their own purposes in accordance with their customary practices. According to this instrument, these rights are inalienable and shall be deemed to have always been held by residents of the local authority or members of an Indigenous community concerned, notwithstanding the past absence of any written law recognizing such right. It also includes extracomunal rights such as the right for a local authority or an Indigenous community to harvest, gather, collect specimens of or take samples from or otherwise prospect for, genetic materials that are indigenous to the local authority or the Indigenous community concerned (Section 8). However, the PWA does not expressly mention either this form of harvesting nor any form of customary hunting (that traditionally occurred for both subsistence and cultural purposes). It does not provide for



individual or collective permits for hunting or exchange of animals in relation to genetic resources.

While the legislative framework recognizes customary law, customary law's application is still superceded by statutory law, particularly in private law, criminal law and environmental law (Mohamed-Katerere, 2001). For instance, the Parks

and Wildlife Act does not recognize the role of customary law in the management of wildlife. While the Traditional Leaders Act empowers traditional leaders to manage natural resources within their areas, sectoral legislation has no provisions on the mechanisms for the active participation of traditional leaders, communities and their customary laws in the sustainable management of wildlife.

4 CUSTOMARY NORMS AND PRACTICES FOR LAND AND WATER USE AND PLANNING

While many ethnic groups in southern Africa traditionally have centralized forms of government, historically the Tonga did not recognize chiefs. However, there were certain people within Tonga society who had authority, with some of them retaining such authority to the present day, like the *Sikatongo*. The *Sikatongo* is a priest who makes sure that the spirits will take care of the people and make the crops grow. In every neighborhood (a grouping of several villages), there was also a man called the *Upanyika*, vested with the responsibility to administer the land in the interest of the community. The *Upanyika* was usually the first settler in the neighborhood. He had some influence in his neighborhood, and hunters gave him part of every animal killed in the area.

Historically, under the administration of the *Upanyika* land holdings were allocated for free to individual families as a right to use. Each household had a right to manage its own land. Security of tenure was therefore guaranteed as long as the family used the land. While the Tonga were a matrilineal society, they are gradually becoming a patrilineal society (Colson, 1960; Scudder, 1962; McGregor,

2009; Reynolds, 1993). Some families no longer give the property of a deceased man to his sister's son as per matrilineal arrangements of the past; rather, sons and daughters of a deceased man now inherit their father's property (Helliker and Matanzima, 2023). Access to land by newcomers was possible as long as they approached the chief and the chief welcomed them. This may be because of the belief of universal entitlement and the principle that all people have a right to life and to a meaningful existence (Mohamed-Katerere, 2001).

At present in Zimbabwe, since communal land belongs to the state, it is up to the RDC, the local government authority, to grant authorization for occupation and use of communal land for agricultural or residential purposes. However, as indicated in Part III of the Communal Land Act, in doing so the RDC shall have regard to customary law as well as consult and co-operate with the chief appointed to preside over the community concerned in terms of the Traditional Leaders Act. However, the Communal Land Act does not set out the procedure for such consultation. The RDC has however the ultimate authority in granting access and occupation



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of communal land. The chief ensures that the requirements of any enactment in force for the use and occupation of communal or resettlement land are observed (Section 5[g], Traditional Leaders Act).

Since independence, the powers of the chiefs have been progressively curtailed particularly in terms of their roles in rule making, adjudication, mediation and the attribution of resources (Mohamed-Katerere and Chenje, 2002). The Traditional Leaders Act effectively relegates the chief to being an implementer of statutory law. Chiefs are responsible, among other things, to ensure that the land and natural resources are used within the framework defined by the law, in particular controlling (i) over-cultivation; (ii) over-grazing; (iii) the indiscriminate destruction of flora and fauna; (iv) illegal settlements; and generally preventing the degradation, abuse or misuse of land and natural resources in their areas (Section 5[l], Traditional Leaders Act).

Likewise, the headmen's statutory duties are, among others, to mediate in local disputes and the performance of customary rites, but only to the extent that such matters are not subject to the general law of Zimbabwe (Section 9, Traditional Leaders Act). Finally, village heads are mandated to consider, in

accordance with the customs and traditions of their respective communities, requests for settlement by new settlers in the village and, after consulting with the village assembly, make recommendations on the matter to the ward assembly. They can also settle disputes involving customary law and traditions, including matters relating to residential, grazing and agricultural land boundaries to the extent that these matters are not subject to the general law of Zimbabwe (Section 12, Traditional Leaders Act). Consequently, the traditional chiefs have become accountable only upwardly and the very essence of the representativeness of their office has been undermined (Mohamed-Katerere and Chenje, 2002).

However, according to Mohamed-Katerere (2001) and Kanene (2016), social and cultural values and traditional knowledge systems still persist and continue to play important roles in many communities such as the proposed Mucheni Community Conservancy. Generally, where traditional beliefs are held, sanctions and complementary customary monitoring and enforcement regimes exist. Responsibility for ensuring compliance with local rules in general still remains with the chief, although this authority is subject to checks and balances.

5 CUSTOMARY NORMS AND PRACTICES FOR THE USE OF WILDLIFE

Historically, hunting and fishing formed the basis of Tonga's male livelihoods, and these skills were passed down through countless generations. As a source of meat, hunting for the Tonga was as prominent as cattle keeping was for the Shona-speaking communities. The Tonga killed big game for meat to support the subsistence of communities par-

ticularly during famines, but the colonial government jeopardized this livelihood pursuit by criminalizing hunting (Helliker and Matanzima, 2023). Nowadays, according to the law (Parks and Wildlife Act) Tonga people have no customary hunting rights for subsistence purposes, in contrast to their customary norms and practices. Although the En-



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vironmental Management (Access to Genetic Resources and Indigenous Genetic Resource-based Knowledge) Regulations, 2009 recognizes access to and benefit from genetic resources, which include animal genetic material, the PWA does not expressly mention any form of customary hunting (that traditionally occurred for both subsistence and cultural purposes). However, in some parts of the district, Tonga men often carry out illegal hunting and sell the dried meat for cash or barter trade for grain (Helliker and Matanzima, 2023). They target small antelopes such as duiker, impala, waterbuck, guinea fowls and even young buffaloes that can be caught in wire traps. The meat from poached animals is for the household although some is sold for income. In recent consultations, in the review of the Zimbabwe wildlife policy, communities in the project area alluded to the fact that they are involved in poaching as a source of bushmeat. Similarly, Tonga people living near the river try to make a living from small-scale fishing as they cannot afford the recommended fishing rigs and nets as well as government fishing licences that are beyond their financial reach.

Traditional methods of hunting and fishing

Historically, the Tonga used the following types of hunting methods: simple noose (wire/fibre) for small game and birds, trapping (spring pole snares for big game), big game pits for leopards and other predators, traditional guns (muzzle loading guns) for a variety of game, dogs for smaller antelopes, spear hunting (the main form of hunting), elephant spearing, hippopotamus harpooning, and fire drives for the big game (Scudder, 1962; Colson, 2006). The Tonga also used poison on the spear, particularly for big game. For fishing, the Tonga used spears, *mazubo* (traditional hand-woven reed baskets) and poison. Some forms of traditional fishing methods, like the use of rod and line, are also currently recognized as a fishing methods by the PWA Regulations.

Taboos associated with hunting and the consumption of wildlife and fish

The Tonga have used taboos as an effective measure in the management of their natural resources and surroundings for millennia (Scudder, 1962; Colson, 2006; Siamonga, 2013; Kanene, 2016). Taboos may be specific to areas, to wildlife species or to consumers' categories. Among the first, areas such as shrine forests, hot-springs and sacred

pools could not be used for any purpose other than those specified by traditional chiefs and village spirit mediums. Shrines and other sacred places in the landscape, where a spirit dwells, can only be approached with caution. Trees, grass and animals in such places could not be exploited or harvested. It is taboo even to cut down trees for firewood.

Killing and eating certain species which are someone's totem is considered a taboo. Some of the common wildlife species associated with totems include the warthog, eland, anteater, pangolin, baboon, crocodile, monkey, lion, hyena and the fish *Clarias gariepinus* (*muramba*). Hunting, trapping, killing or eating of a clan totem is not allowed as such animals are perceived as sacred. The belief is that the vitality and survival of the clan are dependent on the abundance of clan animals. Beside clans' specific totems, birds such as *tumba* (owls) are regarded as "birds of bad omen" and should not be killed, and the same applies to the killing of scavenger birds as they are considered to clean the environment. Killing fish eagles is also taboo as they direct people to where tiger-fish can be found. Moreover, some birds are deemed to be kingly; among such birds is one locally called *nduba*, a colourful and rare bird preserved for chiefs who sparingly use its feathers to decorate their regalia.

It is believed that failure to observe and comply with the taboos among the Tonga will anger the spirits of the ancestors who may decide to punish the culprit with bad luck to the culprit and/or his/her family, but also by the drying up of pools, or by the forests' failure to bear wild fruits for both animals and human beings, or even by the loss of teeth or death for those who eat clans' totems (Siamonga, 2013; Kanene, 2016).

The Tonga belief in the supernatural role of ancestral spirits continues to be very strong even today and plays a central role in the self-regulation of families and individual members of the community. It is this belief system which forms the basis of the Tonga religion, philosophy and moral code. Beyond colonial laws and institutions, market intrusion, education and new religious beliefs have all weakened community management systems and their supporting cultures (Mohamed-Katerere and Chenje, 2002). The community management systems are generally characterized by cultural rules which are difficult to violate because they are enforced by custom, transmitted across generations and ingrained in the community ethos which aims to safeguard the common interest.

6

CUSTOMARY NORMS AND PRACTICES ASSOCIATED WITH THE CONSUMPTION AND DISTRIBUTION OF WILDLIFE AND FISH

In the past, the Tonga killed mostly for subsistence (Colson, 2006). This limited the animals any hunter could kill. Also due to poor technology the hunter was limited by the animals he could carry. Hence this limited the amount of meat/fish that could be caught and transformed. The meat from ritual hunting was shared among the villages and families in the clan (Scudder, 1962; Siamonga, 2013). The bushmeat was eaten fresh and the excess was transformed for preservation by slicing it into thin strips and sun drying. Sun drying was the main form of transformation. In the wet season when there was not enough sun, the meat was transformed through smoking. There were no taboos associated with the transformation of meat. Men were responsible for butchering the animal (Colson, 2006). Colson (2006) says: “After the hunt, if the kill is close enough to the homestead, and the animal is small enough to be carried, he offers again at the shrine before butchering. Otherwise, he butchers at the kill and brings home the meat which he first places at the shrine before distributing it.”

The Tonga hunters were expected to give certain parts of captured animals as a customary honour to the chief (Scudder, 1962; Colson, 2006). These parts included the following: the side of a medi-

um-sized animal (e.g. kudu, buffalo) that hit the ground after the animal was killed, pangolin, elephant trunk and elephant tusks, a living scaly anteater (*inkakha*), lion and leopard skin and claws. The pangolin and the elephant trunk were considered special meat for the chief. No one else was allowed to eat the pangolin. The chief shared his tribute with the community, particularly those who came from families that did not have hunters, the elderly and the sick. The bushmeat was not sold and there were no barter arrangements. Individual hunters divided their catch among specific relatives and those who helped them in hunting (Scudder, 1962). However, besides clans’ totems, specific taboos on consumers’ categories also apply. Pregnant women cannot eat eggs or the meat of eland, elephant, warthog and zebra. It is believed that if they eat eggs the child to be born will delay growing hair. Eating elephant meat would cause the child to grow slowly. Zebra meat would cause the child to be marked like a zebra. Eland meat would cause the child to be vulnerable. Children are not allowed to eat eggs, rats, guinea fowl or *muramba* (*Clarias gariepinus*). *Muramba* can cause marriages to fail and water springs to dry up. The rat affects fertility.



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Key sources of conflict in the proposed Mucheni Community Conservancy area include human–wildlife conflicts (HWC). This is because of wild animals' attacks on humans (including injuries and loss of life), the destruction of property, and crop raids particularly by elephants,² buffaloes, baboons and hippopotamuses. In local Tonga villages, humans and livestock may also fall prey to lions, leopards and hyenas, while in the fishing camps, people are attacked by crocodiles and hippos (Marowa, I. and Matanzima, J., 2021) (Muringai *et al.*, 2020). In addition, human co-existence with wildlife has also determined an increased risk of livestock diseases mostly associated with foot-and-mouth disease and bovine tuberculosis.

The communities' customary approaches to mitigating the impact of conflicts with wildlife include kraaling livestock at night, human vigilance (scarecrow and guarding) around crops during the day, fencing gardens with timber, and digging big game trap pits around the gardens for animals such as

hippopotamuses, buffaloes and kudus. Additionally, from February to May, the villagers reckon with the elephants, baboons and wild pigs by screaming and beating noisy gongs from their *busanza* shelters built on stilts, setting fires on the edges of fields, and waving burning sorghum stalks (Tremmel, 1994; Helliker and Matanzima, 2023).

Indeed while people claimed that they did not have major problems with elephants feeding on their crops before displacement because “most elephants stayed near the mountains and when they did come into our villages they would be killed by our hunters” (Tremmel, 1994), after resettlement, all hunting became illegal and anyone who killed the elephants that destroyed crops was arrested for poaching by the Department of Parks and Wildlife Management (DPWM). The resettlement combined with fishing and hunting restriction had a considerably negative impact on Tonga livelihood, and has also determined an increase in poaching activities.



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² In Zimbabwe the elephant population stands at between 76 000 and 96 000, exceeding the ecological carrying capacity by over 50% (Parks and Wildlife Management Authority, 2021).

Applicability of customary law

The new 2013 Constitution of Zimbabwe provides significant recognition of customary law. This offers an opportunity for the amendment of statutory provisions on customary law to realign them with the Constitution. Customary law has a long history of being relegated to an inferior system of law in Zimbabwe. The colonial government established a hierarchical system of law with customary law being subordinate to statutory law and common law that was maintained by the postcolonial government. As a result of this systemic relegation, customary law has remained largely undeveloped by the courts which have found it difficult to apply customary law in the adjudication of disputes. The lack of application and enforcement of customary law hinders its wider recognition within the legal system. A key challenge to the application of customary law comes from the fact that it is unwrit-

ten. Furthermore, there is no customary law which is generally applicable to the people of Zimbabwe, but rather to the fixed customs and practices of the tribes of Zimbabwe. Indeed, the Constitution recognizes fifteen official languages which correspond to the different tribes. Thus, there is no single system of customary law. As a result, the application of customary law in the courts poses major evidentiary challenges as the magistrates and judges are not experts in the customary law of the different tribes. While Section 3 of the CLLCA identifies the specific criteria for the application of customary law in civil cases and Section 8 lays down the procedure required to ascertain the rules of customary law relevant to any proceedings in local courts, the courts generally adopt the application of the general law which applies across the tribes.

These criteria, procedures and identification methods could be extended to regulate the application



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of customary law to other sectors beyond civil disputes, such as the rights of use of natural resources, and not be restricted only to civil cases. Local courts have jurisdiction to hear, try and determine any civil case in which customary law is applicable, but within the limits of jurisdiction (i.e. not when the claim or the value of any article claimed exceeds a certain amount, or to determine rights in respect of land or other immovable property, etc.). These exclusions could be revised in order to provide a more substantive role to traditional leaders and local courts, not only in land attribution but on other matters that could be regulated thanks to customary norms if not contrary to general law principles.

Customary law and communal land tenure rights

Section 332 of the Constitution defines communal land as land set aside under an Act of Parliament and held in accordance with customary law by members of a community under the leadership of a chief. There is a need to align the provisions of the Communal Land Act with this constitutional definition. Indeed, under the Communal Land Act, communal land is vested in the president with Rural District Councils having authority over the administration of the land. The allocation of communal land is done by the local authorities as its occupation and use are subject to the consent of the district council, though this consent should, "where appropriate, have regard to customary law", and follow consultation and cooperation with chiefs. The constitutional alignment of the Communal Land Act offers an opportunity to recognize customary law concerning land tenure in communal areas.

Section 282 of the Constitution expressly provides that one of the functions of traditional leaders is to administer communal land. However, Section 26 of the Traditional Leaders Act prohibits traditional leaders from administering communal land and vests the administration with the local authorities. Furthermore, while the Constitution expressly recognizes communal land as land held in accordance with customary law, the Traditional Leaders Act

does not provide a framework for customary management of communal land. The constitutional alignment of the Traditional Leaders Act offers an opportunity for the recognition of customary law in conformity with the Constitution. Moreover, a clearer delineation of the roles and responsibilities of chiefs and the RDC with respect to land allocation would allow a more effective implementation of customary norms. Application of customary norms linking the right of use to the effective use of land and the possibility to allocate land to newcomers based on community consent, through the chief, could facilitate the recognition of the right of use on communal land.

Customary law and natural resource management

Section 73 of the Constitution entrenches the right of every person to ecologically sustainable development and use of natural resources, including wildlife. These natural resources must promote economic and social development. Furthermore, the state has a constitutional obligation to ensure that local communities not only benefit from the resources in their areas, but also that traditional leaders protect the environment and resolve disputes using customary law (Constitution, Section 282), while managing natural resources within their area of jurisdiction (Traditional Leaders Act).

In this regard, several aspects of the Parks and Wildlife Act could be revised to recognize the value of customary norms and practices over wildlife. Community-based wildlife management systems (i.e. as community conservancies) should therefore be legally recognized so that communities can allow their members to exercise subsistence hunting and fishing rights according to customary norms and practices. The recognition of community conservancies as a form of community customary management will also reflect the constitutional principles on customary law and traditional leadership, thus enabling various forms of community benefits from wildlife, including both income and food.

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