A review of customary and statutory water management institutions in Botswana and Zimbabwe

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Abstract

The role of institutions (indigenous or modern) in the management of water resources cannot be overemphasised. This paper is a review of literature on customary and statutory water resource management institutions in Botswana and Zimbabwe. It specifically assesses the existing traditional water management practices and institutions amongst different ethnic groups in the two countries. It examines water governance structures in customary and statutory water management practices and assesses the impact of colonialism on customary water management practices and governance. A critical review of literature on water management statutes and policies (that is, the Water Acts, Water Policies as well as Master Plans) and journal articles on customary and statutory water management institutions was carried out. The prevailing themes in the literature reviewed indicate that although governments are silent on the role of indigenous knowledge systems in water management, customary water management institutions are strongly rooted in rural areas, and there is a clear distinction in terms of water access and ownership between rural and urban areas. While traditional leaders are seen as proxies for the ancestors, with the latter conferring on the former custodianship of water resources in rural areas, people in urban communities view water as a natural resource with a commercial value, and this consequently engenders access and control rivalry amongst different stakeholders. Given the divergent approaches associated with water governance in rural and urban settlements, the paper recommends a hybridisation of water resources management institutions in Botswana and Zimbabwe.

Key words: Botswana, customs, customary, indigenous knowledge system, institution, norms, statutory, taboos, Water Act, Zimbabwe

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Introduction and background

This paper assesses traditional water management practices amongst indigenous ethnic groups in Botswana and Zimbabwe in order to understand their implication on water management institutions in the two countries. It argues that the key to water management in Africa in general, and Botswana and Zimbabwe in particular, is to integrate statutory and customary water management practices to form hybrid institutions. This is because most people in these countries reside in rural areas where they are self-reliant in terms of water provision. Hybridisation of water institutions would counter the impact of globalisation and colonialism on cultural values in the two countries as they relate to water resource management. This is because the colonial period has had an enduring impact on the nature, use and pattern of customary institutions in Africa, particularly on the management of natural resources such as water. Colonialism has considerably altered customary practices; for example, it has supplanted customary water institutions and replaced them with statutory water institutions. Secondly, colonial administrators in some cases embarked on the recording of customary water practices so that they could be in the format the colonisers were familiar with, and to make them more readily accessible to others involved in water administration (Rusinga and Maposa, 2010; Sarpong, 2005). Unfortunately, this process distorted the customary (legal) water management system in the colonised communities. As customary rules and practices are generally unwritten, flexible and adaptive, they were regarded as too complex for colonial administrators to record and then come up with a true record of customary regulations which reflect the aspirations of the rural people. It is this adaptive quality which provides the elasticity that characterises the resilience of customary practices and hence the call for a legal pluralism which would ensure their integration into today's water management institutions.

Legal pluralism is the existence of more than one law governing the society (Gachenga, 2012). Institutions are rules that constrain and shape human interactions (North, 1990). They consist of both informal (customary) and formal (statutory) institutions. While customary institutions are reflected in such elements as taboos, customs, and traditions that govern and sustain a social system, statutory institutions are found in Western-oriented constitutions, laws and policies that govern the conduct of a society. Based on their contents, these institutions may sometimes be in conflict with each other. Research in water management has shown that to ignore customary water institutions in water sector institutional reforms is to attract water reform problems in Africa (Kuruk, 2004; Sarpong, 2005). Most developing countries instituting water sector reforms have to be amenable to legal pluralism. Latham and Chikozho (2004) define legal pluralism as a situation where one legal system is superimposed on another, pre-existing legal system or culture, as has happened in the case of with colonial legal systems being super-imposed on indigenous African cultures. However, attempts to unify legal systems in both colonial and post-colonial Africa have had little success (Muyambo and Maposa 2013; Taringa 2006; Rusinga and Maposa 2010). Yet, according to Latham and Chikozho (2004) and Twikirize (2005), legal pluralism has shown amazing vitality as a system. Communities in southern African countries are governed by water resource management systems that have multiple rules which include state,

rural district, town and city councils as well as cultural norms, taboos and superstitions. There are multiple legal systems which can be classified as statutory and customary legal systems with multiple legal and customary apparatuses and different enforcement structures and processes. While customary institutions are characterised by codes or rules approved by ethnic traditions, statutory institutions comprise policies, acts and by-laws enacted by governments to manage resources in a formal manner.

Customary water institutions are hereditary bodies which have been observed, recognised and enjoined from time immemorial and handed down from generation to generation (Chikozho and Latham 2005; Muyambo and Maposa 2014). This definition of customary institutions has two key elements. First, customary institutions should be approved by tradition, that is, they should be based on consensus. Second, they should be transferred from generation to generation. However, Chikozho and Latham (2005) and Latham and Chikozho (2004) admit that the law is dynamic; it changes as society adapts to changing social, economic and political circumstances. The authors question the extent to which a body of institutions and practices can remain customary when it is subjected to so many pressures. However, Chikozho and Latham (2005) are silent on the integration of customary and statutory institutions.

The problem

Research and oral traditions show that before colonisation, customs such as taboos, totems and other cultural practices played a major role in the management of natural resources, especially in the conservation of water in both Botswana and Zimbabwe (Segadika, 2006; Muyambo and Maposa, 2013). Indigenous water management approaches served as a means of ensuring sustainable access to and use of water (Gachenga, 2012). Colonialism and globalisation have eroded customary water management practices in Africa, particularly in Botswana and Zimbabwe. The imposition of new water management systems is implicated in the marginalisation of customary techniques of water management. When Botswana and Zimbabwe gained independence in 1966 and 1980 respectively, the expectation among traditional leaders was that the traditional water management practices (taboos, customs, superstitions and totems) would be incorporated into the new statutory water management institutions (e.g. Water Acts, Water Policy and Water Management Master Plans) (Sharma 2013; Maposa and Muyambo 2013). The United States of America, for instance, has hybrid water management institutions which have aspects of the English Common Law and the Roman-Dutch law (Solanes and Gonzalez-Villarreal, 1999). Botswana and Zimbabwe's statutory water management institutions have a Roman-Dutch law component only. Customary water management institutions have been sidelined even after independent governments took over from the colonial administrators. This is despite the fact that studies conducted by African scholars (Mogende and Kolawole 2016; Kgathi *et al* n. d.; Muyambo and Maposa 2014) show that local knowledge is invaluable in natural resources management. This paper therefore assesses the existing traditional institutional water management structures among different indigenous ethnic groups and their implications on statutory water

management institutions in Botswana and Zimbabwe. It also examines the roles of different stakeholders in customary and statutory water management structures and assesses the impact of colonialism on customary water management institutions and practices, as well as their implications on policy formulation in Botswana and Zimbabwe.

Methodology

The paper employed a critical review of literature to highlight issues relevant to customary and statutory water management practices in Botswana and Zimbabwe. Statutory water management institution documents (such as Water Acts and Policies) and several publications that provided of how water is managed in both countries were reviewed. By using an inductive process, we accessed papers on Google scholar using the key words: 'customary water institutions', 'statutory water institutions', 'culture and water management', 'water governance' and 'water management institutions'. The papers chosen were those that comprised analyses of cultural water management practices. From these research papers, common themes that related to customary and statutory water management in Botswana and Zimbabwe were derived. The analysis of the papers focused on (1) the assessment of the existing traditional water management practices among different indigenous ethnic groups in Botswana and Zimbabwe, (2) the examination of the roles of different stakeholders in customary and statutory water management practices and (3) the impacts of colonialism on customary institutions related to water management practices and their implications for policy formulation in Botswana and Zimbabwe.

Structure of customary and statutory water management institutions in Botswana and Zimbabwe

Currently, water management institutions in Africa are mostly based on the Roman-Dutch Law which has influenced many legal systems of African countries, especially the former colonies. Today the law is used in the Republics of South Africa, Namibia, Swaziland, Botswana, Zimbabwe and the Kingdom of Lesotho, (Twikirize, 2005; Rusinga and Maposa, 2010; Muyambo and Maposa, 2014). This paper focuses on Botswana and Zimbabwe water management institutional structures. It highlights the customary and statutory water management institutional structures in the two countries. First we compare customary institutions with statutory institutions as a way of highlighting the difficulties of integrating the two water management systems. African water management practices are usually unwritten while all statutory institutions and legal practices are recorded (Latham and Chikozho, 2004). Furthermore, customary practices vary from district to district and even within the same district (Chikozho and Latham, 2005). It is these variations which make it difficult to make a compilation of the practices that apply uniformly within these countries. Customary water management practices are directly validated by community acceptance while statutory codes are validated by legislative enactments, case law and judicial precedents (Goldin & Gelfand, 1975). The written and codified nature of statutory water institutions

(Muyambo and Maposa 2014) makes it the preserve of professionals who engage in the esoteric work of interpretation, application of legal prescriptions and creation of rules based on these legal requirements (Latham and Chikozho, 2004). On the other hand, African customary water institutions are easily identified with by Africans because they are passed from one generation to the other through oral traditions (Augustine, 2016). African customary courts, including the *Kgotla* system in Botswana and *Dare* in Zimbabwe are open to all and there are no stringent rules for court attendance. The advantages of customary institutions lie in the cost of administration. The customary water tribunals are cheap and lawyers are not permitted to practise in these tribunals (Kane *et al.*, n.d.), thus eliminating a major impediment to participation. In customary institutions, litigants do not have to travel great distances to access courts because traditional courts are situated within local communities. Most of the structures of statutory institutions tend to be in major urban areas and are not commonly found in remote areas where most people live (Hook and Raumati, 2011).

Also, the language used in customary institutions is accessible to the people involved (Kane *et al*., n.d.). This contrasts with statutory institutions where the language of proceedings is not only foreign (English), but is also very technical, which renders it incomprehensible to most of the people living in the villages, and sometimes even those in urban areas. While procedures used in customary tribunals tend to be simple and clear, statutory institutions' procedures tend to be very complex and often archaic. According to Hook and Raumati (2011), the practices of the customary tribunals can be more 'modern' and relevant than the statutory practices. This is because the statutory institutions and legal frameworks become obsolete and out of tune with modern socio-economic developments, and sometimes governments have limited resources to undertake the vast work involved in legal reform (Hook and Raumati, 2011; Kane *et al*., n.d.). In Botswana, for instance, the Water Act, which dates as far back as 1966, is still being used to regulate the country's water sector. This is despite the fact that the former colonising power, Britain, from which the piece of legislation was adopted, has either updated some elements of their own Water Act or struck them off altogether from the British Water Act. Since customary institutions are organised at the grassroots and informal level, they are much less vulnerable to national disasters (e.g. National institutional failure). As they are closer to the people, confidence in customary institutional structures may persist even in times of crisis or a breakdown of confidence in the statutory structures (Mtisi and Nicol, 2003).

More importantly, customary tribunals encourage decisions that are restorative (Mtisi and Nicol, 2003). For instance, fines or compensation go to the aggrieved party, even in criminal cases. This type of restorative justice is appropriate considering the needs of the poor, and tends to rebuild community relations, unlike statutory justice, which is adversarial or punitive and is without restitution to the aggrieved party (Kane *et al*., n.d.; see also). In contrast, fines imposed by statutory courts go to the state (Hook and Raumati, 2011). In Botswana and Zimbabwe, customary water institutions make little distinction between criminal and civil law (Segadika, 2006; Rusinga and Maposa, 2010). All litigations were and are still aimed at reconciliation and restitution. In African customary institutions, compensation for the injured parties is the prime objective rather than the punishment of the

transgressors as is the case in statutory institutions (Chikozho and Latham 2005; Goldin and Gelfand 1975). As many local people are poor (Kolawole, 2015; Morapedi, 2010), it is rational for them to identify with and use local systems (in this case, Customary institutions) which are more suited to local conditions (Kolawole, 2015) than the statutory institutions. Figure 2 below shows the customary water management institutional structure in Botswana (A) and Zimbabwe (B).

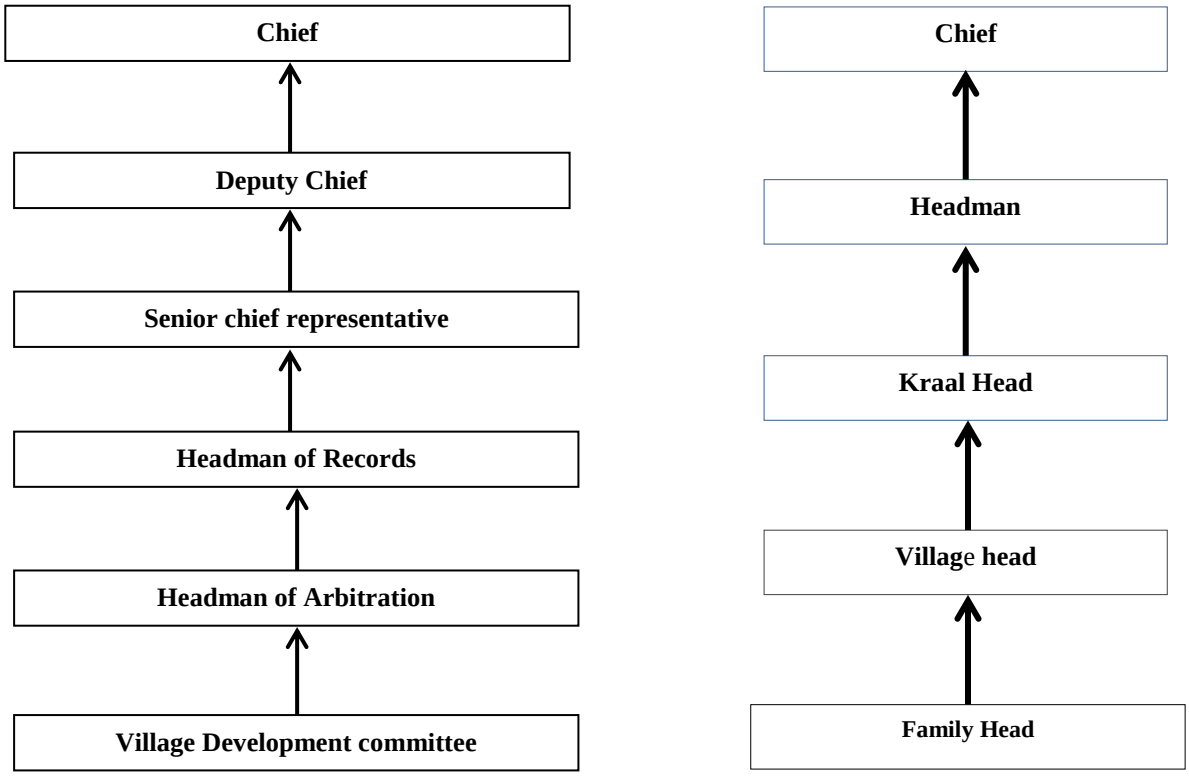

Figure 2 Customary water management institutions in Botswana and Zimbabwe

Figure 2 shows the organograms of customary institutions that play important roles in natural resources management in Botswana (A) and Zimbabwe (B). At the top of the Botswana customary organogram is the Chief (Kgosi). Based on the Chieftainship Act of 1987, a chief is someone who has been designated as such in accordance with customary institutions by his tribe which had assembled in the *kgotla* and has been recognised as a Chief by the Minister of Local Government, who is responsible for traditional leadership (Republic of Botswana, 1987). The Deputy Chief assists the Chief in administrative matters. Next on the organogram is the Senior Chief Representative followed by the Senior Chief and then the headmen; there are headmen of records and the others are headmen of arbitration. The Chief is the head of the district and is based in the District Capital (Kgathi *et al*., n.d.). At the bottom of the hierarchy is the Village development committee.

As shown in the traditional leadership structure in Zimbabwe (B), the chief is the supreme leader. While the headman directly reports to him, the kraal head in turn reports to the headman. While the village head reports to the kraal head, the family head reports to the village head in that order. Within this structure, there exist other sub-structures which are

subordinate to the ones shown in Figure 2 (B). For instance, there is a chief's messenger (locally known as *nhume yamambo*). In Zimbabwe, the roles of traditional leaders are wide ranging and all-involving, particularly the chief's roles. First, a traditional chief is the head of the community. Through the traditional leadership structure, the chiefs oversee the collection of village water levies, rates and charges payable in terms of the Rural District Council Act (1988). As earlier mentioned, the chiefs oversee all activities on the use and conservation of natural resources including those of land and water.

However, literature has shown that customary water management institutions, like their statutory counterparts, have their own share of challenges. For example, in Shona customary institutions, judgements in the lower tribunals, particularly the village level were and are still very hard to enforce. For instance, Muyambo and Maposa (2014) and Chikozho and Latham (2005) in their studies cite several failed cases of customary institutions in which water cases had to be referred to the headman and the chief's courts after the village level courts failed to enforce the law. If parties cannot be reconciled by arbitration, only chiefs and headmen can enforce the law and make judgments. However, recently, probably because of the erosion of traditional authority due to colonialism or westernisation, even chiefs sometimes resort to the state to enforce judgments because of the refusal of litigants to abide by their judgements (Muyambo and Maposa, 2014). For instance, Muyambo and Maposa (2014) cite a case in which recently one chief had to refer the case of one villager in Chipinge to the state courts after the villager had refused to abide by the chief's judgement.

In the context of this study it is important to state that environmental degradation is caused by a variety of factors, including the misuse of Africa's indigenous knowledge, technologies and practices (Kolawole, 2015; Mogende and Kolawole, 2016; Muyambo & Maposa, 2013) because it demonstrates that for any water management interventions to be effective, there is need to find a place for indigenous culture in water management systems. The utilisation of indigenous knowledge would assist the locals to accept and embrace the statutory institutions more readily. This is the main reason why Maposa and Mhaka (2013:15) point out that:

> *"*.... the inclusion of aspects of Shona culture in the management of water..... will help the perception of the local Shona that any programme which engages norms, taboos and culture would be more acceptable and people may cooperate so rapidly. This helps in avoiding the usually hated "top-down" or paternalistic approach to policy making and implementation in rural development.

The revival and strengthening of customary water management practices would enhance the implementation of water management policies in local communities, especially in rural areas. Scholars like Schoffeleers (1979) wrote at length about Shona ethnology and detailed the role of *vadzimu* (ancestors) in the protection of the physical environment. Scholars such as Mbiti (1969), Gelfand (1962), Schoffeleers (1979) and Ejizu (2013) claimed that *vadzimu* are considered the guardians of water and other natural resources in Shona ethnology. Many authors point to the fact that Africans are very religious (Juma & Maganga, 2005; Mbiti,

1969) as religion permeates all aspects of their daily lives. The Ndau and the Korekore, both of which are ethnic groups found in Zimbabwe, are no exception. It is this religiosity that has influenced how the Korekore view their environment. The Korekore believe that God does not pay attention to individual activities, a belief also popular among the Ndau, Karanga, and Zezuru ethnic groups (Gelfand, 1962; Rusinga and Maposa, 2010). They believe that God is the Creator, but is far removed from the daily mundane activities of the people (Gelfand,1962; Augustine, 2016). God is regarded by all Shona people as omnipotent, and as having made all things, yet He is far removed from people's lived experiences. As a result, Shona people do not pray to Him directly (Mbiti, 1969; Gelfand, 1962; Muyambo and Maposa, 2013). However, Mbiti (1970) indicates that this does not mean that this High God has no concern for the people; His concern is for the whole tribe rather than the individual. According to Muyambo and Maposa (2014), individual concerns are for junior spirits, and it is these that people pray to. Of concern to the Korekore ethnic group are the ancestors (*vadzimu*). These are the living dead (Mbiti, 1969). It is a common belief amongst the Shona ethnic groups, including the Korekore, that the ancestors are the custodians of the natural resources, and in this case, water. Amongst the Korekore, a wrong done to the ancestors is met with multiple punishments which include drought and pests (Gelfand, 1962). For most indigenous ethnic groups in Zimbabwe, water is not just an economic asset; it has value which is intricately linked with the tribe, its chief and the spirits of the ancestors (e.g. *Tengeza* in Zimbabwe). For instance, there is a belief in Zimbabwe that the real owners of water are the spirits of the deceased tribal rulers. Territorial spirits are the owners of the land (Schoffeleers, 1979). Closely related to these are nature spirits which are associated with springs, pools and rivers (Gelfand 1962; Mbiti 1969). This article, therefore, argues that any natural resources management strategy would benefit from the utilisation of indigenous perceptions about nature and its resources, especially the ownership of the latter.

The Botswana statutory water management structure is a five-tier hierarchy while that of Zimbabwe has only four levels. Form the top, Botswana has the Water Utilities Corporation. This is followed by Water Apportionment, Land Boards, Department of Water Affairs and lastly the Ministry of Land Management, Water and Sanitation Services. In Zimbabwe, on the other hand, the hierarchy starts with the sub-catchments council. From this level the next is the catchment council, Zimbabwe Water Authority and finally the Ministry of Environment, Water and Climate Change. Figure 3 shows the water management institutional structures of the two countries.

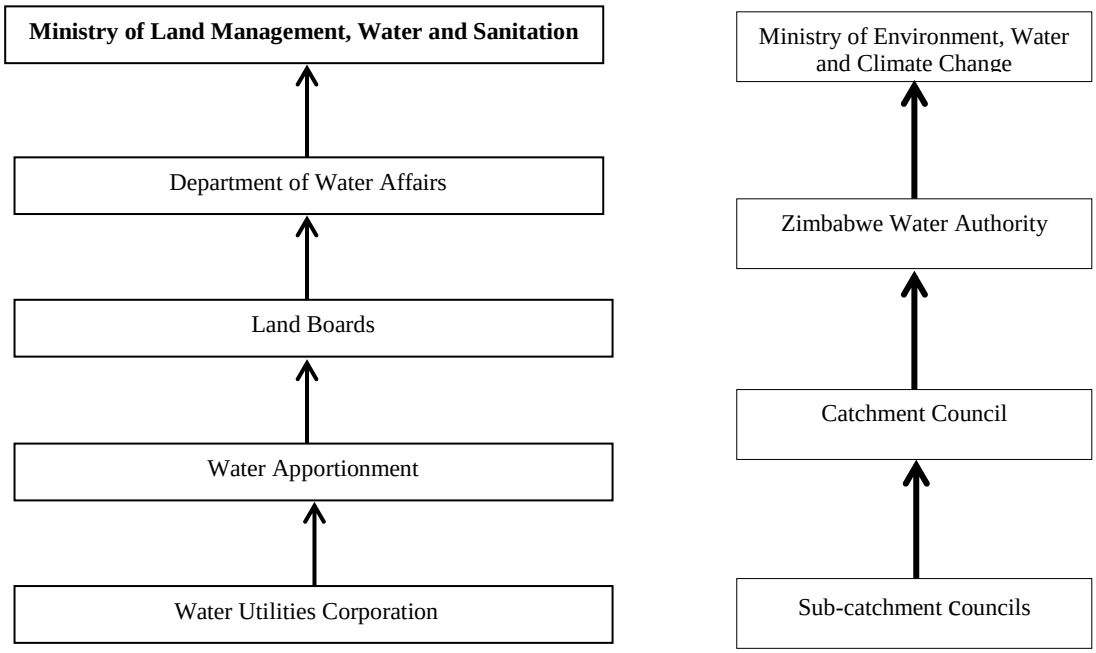

Figure 3: Statutory Water Management Institutions in Botswana and Zimbabwe

The Water Act of 1968 governs the use of water in Botswana. According to the Act any person within Botswana can abstract water from any public stream for domestic use. It also allows individuals who own pieces of land to sink a borehole on that land, but the water should be used for domestic purposes only (Government of Botswana, n.d.). However, the Water Act (1968) has several weaknesses. As it was enacted in 1968, it does not provide for Integrated Water Resources Management, and current issues like climate change are not addressed. Also, it does not address water pollution. The population of Botswana was low in 1968 (650 835 people), and to ignore pollution issues now when the population has increased to 2.2 million people would be disastrous. Furthermore, there is no provision for management of shared water courses, and the Act is not in line with the Southern Africa Development Community (SADC) protocols. The monitoring and enforcement of water use are inadequate. The penalties for non-compliance were high when they were set in 1968, but they have not been adjusted and are now very low due to inflation and its impact on the value of the local currency. For instance, a person who is guilty of an offence under section 9 (2) and 36 (1) is liable to a fine not exceeding P1 000 or imprisonment for a term not exceeding one year or both (Government of Botswana, n.d.). Most importantly, the 1968 Water Act does not incorporate the needs and values of the people in rural areas. It is silent on the role of indigenous knowledge in the management of water, especially in rural areas. This is despite the 2007 Declaration on the Rights of Indigenous People, which affirms the right of indigenes to self-governance through the use of their traditional practices (Killander, 2010) and resources. Ethnic minorities in rural areas possess indigenous knowledge which, if incorporated into statutory institutions, would make water management in the rural areas more efficient (Kolawole, 2015; Mogende and Kolawole, 2016). Furthermore, the inclusion of

customary water management practices in statutory institutions and the application of indigenous knowledge in water management can assist in setting the scientific baseline for environmental and cultural flows through the establishment of standards and targets, as well as having a role in regulatory enforcement (Maganga, 2003; Sage and Woolcock, 2006). The integration of the two institutions is important as national decisions on water would be more equitable and sustainable because decisions would have been made with the input of those who are familiar with the land and water resources in their areas.

The institutional water management in Zimbabwe began with the 1976 Water Act, which was later replaced by the current 1998 Act. The Water Act of 1976, according to Makurira and Mugumo (2005), was a good piece of legislation then. In their view, it brought all forms of water use under one control and ensured a systematic allocation of water resources. Like in other African countries' legislations on water, the 1976 Zimbabwe Water Act ensured that all people had access to water provided the water was for basic human needs. However, anyone who wanted to use water for commercial purposes was expected to obtain a water right. The water right was issued in Harare where the water court was based (Makurira and Mugumo, 2005). However, the 1976 Water Act had some weaknesses. According to Makurira and Mugumo (2005:168) the following were the weaknesses of the 1976 Water Act (a) All issues pertaining to water rights were centralised at the Water Court in Harare. (b) The water right was issued in perpetuity on a first-come-first served basis and a water right was attached to land rights, which meant that when water was allocated to users, no further water rights would be issued regardless of the need, and those without land could not obtain water rights. (c) In the event of a water shortage, reallocation of water was very complicated and took a long time. (d) The water right could not be revised, even if the right holder was not using the water. (e) The revision of water rights could only be done if the right holder so wished. (f) The process of acquiring a water right under this 1976 Water Act in Zimbabwe at that time was very long. (g) Once someone had access to water, no further payment for the water service was required. These problems led to the abolishment of the 1976 Act which was eventually replaced by the 1998 Act. The Water Act (1998) partitions the country into seven Catchment Councils (CC) representing water users in a river system.

The sacredness of water in the context of rural communities in Botswana and Zimbabwe

In the Tsodilo Hills, located in the western part of Botswana, are two local communities, namely the HaMbukushu and BaSarwa who live in Tsodilo and Chukumuchu respectively. These people have strong traditional beliefs and spiritual connection to and respect for the Tsodilo Hills as a place of the worship of ancestral spirits. There are many legends told by the local communities to explain the supernatural origin of many features of the hills. Based on Segadika and Taruvinga's (2009) accounts, one prominent feature which is a manifestation of their beliefs is the water hole on the Female Hill where two large pythons are believed to reside. Local people and some church groups believe that the water found there can cleanse bad spirits or solve witchcraft problems (Campbell and Robins; Segadika and Taruvinga, 2009). Similarly, Kadangwe, a natural wetland in Zimbabwe has numerous traditional stories

told about it. One such story talks about a very big snake occasionally found in this wetland and its environment. It is believed that the snake did not harm anyone since it was sacred and was believed to protect the wetland from drying up. These beliefs are at the very heart of the conservation of the environment and water resources in these areas and the fact that the communities in Zimbabwe and Botswana have very similar beliefs attests to the importance of the recognition of indigenous beliefs and knowledge in the management and conservation of natural resources, including water resources, for their sustainable use.

Concluding remarks

The review of literature on customary and statutory water management practices in Botswana and Zimbabwe has shown several interesting observations in water management. However, the general consensus amongst the scholars whose work has been reviewed here is that customary water management practices and institutions are considered as irrelevant by the governments of both countries. We have shown that in both countries customary regulations are not written, but are based on convention and traditional belief systems. The rules and regulations governing water conservation and use, and their associated practices, are transferred from generation to generations by word of mouth. In both countries, statutory institutions dominate in water management; this reflects the legacy and impact of colonialism on indigenous knowledge systems. It is a general belief that the management of water under customary institutions is premised on the belief that all resources are owned by the ancestral spirits and should benefit all. In sum, there is a consensus amongst scholars that people who live in rural areas are not served well by the current statutory water management institutions (Maposa and Muyambo, 2013). This is because in most cases they are not provided with water like their counterparts in urban areas. The elite prioritise their values and needs at the expense of the poor and uneducated majority (Sidanius & Prato, 2001). The principles of integrated water resources management as adopted in southern Africa buttress the need for all stakeholders' participation in water resources management.

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