18. How to study human rights in plural legal contexts: an exploration of plural water laws in Zimbabwe

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INTRODUCTION

Human rights, in all parts of the world, operate in a terrain were a plurality of normative orders coexist, interact and sometimes conflict. State-law does not, in spite of the nation-state’s formal status as the main duty-bearer under international law, provide the sole means of regulating social behaviour. This socio-legal phenomenon, termed legal pluralism, is a characteristic feature of modern nation-states in all parts of the world. To come to grips with the complex legal situations that legal pluralities give rise to in an increasingly transnational world, many human rights scholars have started to cross disciplines like anthropology, law and political science.

There is today a growing body of interdisciplinary human rights research, exploring the interaction between international, national and local norms at different levels of law and in different social contexts.

Research from this burgeoning field of study indicates that formal state justice, in most parts of the world, is not readily accessible for vulnerable

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groups and individuals within these groups, most importantly women and children. This has prompted a series of international policy initiatives suggesting that the plurality of alternative norms and institutions people turn to for justice be considered as a tool to promote human rights. International political and economic agencies like The Commission on Legal Empowerment of the Poor (CLEP) and the World Bank have recommended justice sector initiatives that include non-state legal services and informal justice systems. Seeing poverty and disadvantage as a result of legal exclusion, CLEP concludes that most human rights and development initiatives fail because they ‘tend to focus on the official economy, the formal legal system and the national rather than the local level’.

Human rights scholars and practitioners have seen such initiatives as a two-edged sword. As a pathway to the realization of human rights, legal pluralist approaches may, on the one hand, expand the spaces for the exercise of local autonomy by different social, ethnic and religious groups. Such approaches may, on the other hand, reinforce unequal power relations based on gender, age and class within different groups. Legal pluralities, as emphasized by UN Women, often constitute an obstacle for women’s rights since local customary and religious forums often rely on traditional norms that are discriminatory. The former UN Special Rapporteur in the field of cultural rights, Fareda Shaheed, has in her report to the UN emphasized the need to strengthen women’s agency within such groups because: ‘the critical issue, from the human rights perspective, is not whether and how religion, culture and tradition prevail over women’s human rights, but how to arrive at a point at which women own their culture (and religion and tradition) and their human rights’.

A key question is, in the light of these developments and discussions,

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5 Commission on Legal Empowerment of the Poor (n 4) 2.
whether and under what conditions legal pluralities as a socio-legal phenomenon constitute a factor that prevents or promotes human rights for different groups and for differently positioned individuals within them. This broad research question gives rise to a series of closely interrelated phenomenological, evaluative and normative sub-questions that require an approach that cuts across law and social science.9

Firstly, it poses research problems that call for analytical tools which facilitate analysis of human rights as part of a process of overlapping, intersecting and sometimes conflicting norms that are invoked by differently positioned actors in terms of gender, ethnicity or social status. A phenomenological approach, which sees human rights as socially constructed, is needed to transcend the longstanding normative debate between human rights universalists and cultural relativists within law and anthropology on whether it is possible to define common values and principles across different societies and cultures.10 The theory of law as a semi-autonomous social field, proposed by Sally Falk Moore, constitutes a useful analytical starting point to describe and understand the process of interaction between international, national and local norms in different social, political and legal contexts.11

Secondly, the options and limits of an anthropology of law’s purely descriptive approach to the plurality of norms that have a bearing on the realization of the human rights of different groups and individuals need to be considered. From a human rights perspective methods that can assess the outcome of the interaction between international, national and local norms with a view to whether and how they promote or prevent the realization of human rights standards are needed. This evaluative research task requires a vertical comparative approach addressing both similarities and differences between existing human rights, national law and the living local law. To assess how different groups and vulnerable individuals within them in terms of gender, age or social status are able to invoke international, national and local norms towards their own ends and goals a horizontal comparison is needed.

A third and closely related challenge that the question whether and under what circumstances legal pluralities promote or constrain human rights is

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9 On these three dimensions on interdisciplinary human rights research see Malcolm Langford, Chapter 8.
11 Moore (n 1).
how to handle the gap between the dominant human rights discourses and the norms and values that are evolving through human interaction in different social fields. While local norms in certain respects may be more responsive to local needs than existing human rights, they may in other respects fall short of human rights standards. A difficult question from a social science perspective is whether abolition or formalization of the living law would be the most promising way to promote human rights. From a jurisprudential perspective the question of how human rights should be interpreted in order to respond to local demands represents a challenge.

To address these closely related phenomenological, evaluative and normative dimensions of this broad research question this chapter presents an interdisciplinary research design that constitutes a cross-fertilization of law and anthropology. The aim is to demonstrate how human rights analysis that is contextually specific and sensitive to different layers of legal norms, the interaction between them and possible conflicts may be carried out. While legal pluralism is a characteristic feature of all modern nation-states there are considerable regional, national and local differences as to how existing relations of domination, inequality and control are affected by emerging constellations of governance shaped by history, power structures and legal pluralism. To offer insight into some of the context-specific methodological challenges and considerations associated with empirical, evaluative and normative explorations of the relationship between human rights and legal pluralism, this chapter uses empirical research from a former Western colony in Southern Africa, Zimbabwe.

The aim of the Zimbabwean case is to show how a study of the interplay between the human right to water, national water laws and local community-based water norms in rural and urban areas may be designed. The ratification of the human right to water in the context of a political, legal and economic crisis that led to breakdown of rule of law and rural and urban public water supply makes Zimbabwe an interesting case.


study. The legal system in Zimbabwe constitutes ‘weak’ legal pluralism. It is made up of a mixture of inherited Western law, formal customary laws developed by the colonial and post-colonial courts and post-independence legislation. In practice access to water for domestic, livelihood and productive purposes is regulated by a mixture of statutory law, municipal by-laws and the living local norms expressed in the Shona proverb ‘water is life’.14 This proverb, which is based on the idea that to deny water is to deny life, forms part of a broad right to water for livelihood: for humans, animals and nature.15 This phenomenon constitutes ‘strong’ legal pluralism.16

This chapter unfolds in five sections. Following this introduction an analytical framework is set out for the study of human rights and legal pluralism with focus on Sally Falk Moore’s theory of law as a semi-autonomous social field. The next two sections show what this analytical framework may yield through a brief presentation of my own academic journey accompanied by a longitudinal study of the interplay between international human rights, national law and community-based water norms in Zimbabwe. By way of conclusion the final section discusses the broader normative and evaluative implications that the interpretation and implementation of the human right to water give rise to in the context of complex power relations and social inequalities that today shape the existing multiplicity of coexisting, overlapping and conflicting water governance systems in Zimbabwe.

LEGAL PLURALISM AS A DESCRIPTIVE, ANALYTICAL TOOL: LAW’S SEMI-AUTONOMY

Analysis of the relationship between human rights and different normative orders raises questions about social science methodology and how law is framed. In post-colonial anthropological theory legal pluralism has been

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14 The Shona is the largest ethnic group in Zimbabwe.
16 The concepts ‘weak’ and ‘strong’ legal pluralism are elaborated in the next section.
It distinguishes between ‘weak’ and ‘strong’ legal pluralism. ‘Weak legal pluralism’ refers to situations where the state legal order recognizes a plurality of normative orders. An example of ‘weak legal pluralism’ is the legal systems in former British colonies where imported Western law applied to the settlers while the customary and religious laws of the different ethnic and religious groups applied to the native population. ‘Strong legal pluralism’ refers to situations where regulatory and normative orders other than the formal state law (statutory, customary or religious) affect and control people’s lives.

Post-colonial anthropological theory constitutes a descriptive socio-legal theory which focuses on ‘strong legal pluralism’. Addressing the co-existence of several normative orders in different social fields, legal pluralism is not seen as a product of the colonial legal systems in former Western colonies. It is a socio-legal phenomenon to be found in all states, whether situated in the North or South, in the ‘developed’ or ‘underdeveloped’ world. This body of theory offers different conceptual frameworks that can be used to describe and analyse various aspects of the interaction between international human rights, state-law and local norms that are inherent in human interaction in different social fora. The anthropologist Sally Engle Merry has focused on ways in which women’s human rights, particularly the right to a life free from domestic violence, travel between the international and the local. She uses the concept of ‘vernacularization’ and ‘indigenization’ to analyse the process whereby human rights are adopted, translated or resisted in different local contexts. Describing how, in the era of globalization, law is constituted in an intersection of different legal orders, the sociologist Boaventura de Sousa Santos uses the term ‘interlegality’ to characterize the mixed and porous character of law at this point in time. The aim of this theory is to explore how organized grass-roots resistance to neo-liberal globalization that invokes human rights can translate into emerging counter-hegemonic socio-legal discourses.

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17 Griffiths (n 1).
18 Ibid.
19 S.E. Merry, Human Rights and Gender Violence (University of Chicago Press 2006).
20 Moore (n 1); B. Sousa Santos, ‘Law a Map of Misreading: Towards a Post-modern Conception of Law’ (1987) 14(3) Journal of Law and Society 279–299; Merry (n 19); Von Benda-Beckmann (n 12).
Drawing attention to the fact that the same social space and the same activities often are subject to other regulatory regimes than state-law, the legal anthropologist Sally Falk Moore has suggested that we approach law as a semi-autonomous social field. Law, as suggested by Sally Falk Moore, should be studied as a process, observable to the researchers, in small social fields ‘in terms of its semi-autonomy – the fact that it can generate rules and customs and symbols internally, but that it is vulnerable to rules and decisions and other forces emanating from the larger world it is surrounded by’. Semi-autonomy offers a framework that enable the researcher to identify those arenas where actions and decisions informed by different international, national and local norms invoked by different actors are taken. The boundary of the semi-autonomous social field is defined by a processual characteristic – namely a social arena made up by actors that have the capacity to generate rules and the power to induce compliance with them. Compliance is not limited to norms that are sanctioned through the state-legal system but includes various forms of social sanctions such as shaming and blaming and social stigmatization and exclusion.

The concept of the semi-autonomous social field, in other words, is a tool that can be used to draw initial boundaries around the social fields where the researcher assumes that encounters between international, national and local norms take place. The different actors that participate in the process of norm generation define the social field of investigation. Semi-autonomous social fields, in a global world, often involve women and men embedded in relationships that extend beyond geographic and national boundaries. Examples of norm-generating entities are families or clans, workplaces, companies, religious communities, epistemic communities, national or international donor agencies, national or international humanitarian agencies and non-governmental organizations.

The norm-generating processes that take place within such social fields can be observed through fieldwork where participant observation is supplemented with qualitative interviews to get insight in different actors’ sense of obligations and duties and those on which different actors base their claims and decisions. The case study method is well suited to explore claims-making processes where differently situated actors invoke different norms with different outcomes. ‘Trouble cases’ and ‘trouble-less cases’ constitute two main roads into norm-generating and norm-upholding processes.
activities. ‘Trouble cases’ are cases that are handled by formal and informal dispute resolution agencies. They offer an opportunity to study how different norms invoked by different actors are dealt with by different courts. ‘Trouble-less cases’ offer insight in the norms which are evolving through arrangements or agreements in everyday life, and different actors’ participation in these processes. The inclusion of ‘trouble-less cases’ has proved particularly valuable from a gender perspective because it indicates how women and men on a day-to-day basis negotiate access, use and control of resources in the family and in the local community.

Questions of power are pertinent in plural legal constellations where different state and non-state actors are ‘engaged in contestations over who has the power to generate law and construct its meaning’. Most importantly, these processes include questions of power where norm-generation can be dominated by a relatively powerful group who define and use rights for their own narrow purposes. Local communities have often been seen as undifferentiated, having similar interests, and therefore little account has been taken of their complexities and divided interests. To come to grips with the complex struggles of power and resources that shape the way in which the relationship between international, national and local norms is negotiated, the notion of common community interests requires unpacking. As regards the study of access to resources, such as the human right to water, a framework that addresses women as members of a group and as differently situated individuals within the group is needed.

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26 Bentzon et al. (n 2) 60–61.
FROM THEOR Y TO EMPIRICAL RESEARCH: 
EXPLORING THE HUMAN RIGHT TO WATER IN 
ZIMBABWE

The formulation of research problems raises questions about the choice of 
theory which in turn calls for considerations about what kind of activities, 
what actors and what geographic, social and institutional areas should be 
studied. To illustrate the various steps in the research process and to dem-
onstrate what kind of knowledge the above described approach may yield 
I will use my own research on the relationship between the human right to 
water and plural water norms in Zimbabwe, which was carried out between 
1999 and 2014.

My Own Research Journey: From Lived Realities to Legal Pluralities

As a background to the study of plural water laws in Zimbabwe, which 
will be presented below, I will briefly share my own research history. I 
was trained as a lawyer at the Faculty of Law at the University of Oslo. 
Research in women’s law, a legal discipline that sets out to describe, under-
stand and improve the position of women in law and society, led me to 
further studies in anthropology and anthropology of law. Anthropology, 
particularly Marianne Gullestad’s conception of the family as a kitchen-
table society and the legal anthropologist Sally Falk Moore’s concept of 
law as a semi-autonomous social field, attracted my interest because it 
facilitated studies of women as actors in the process of law.

A turning point in my understanding of human rights as process was 
my encounter with post-colonial African law through a joint teaching 
and research program between the Faculty of Law at the University of 
Oslo and the University of Zimbabwe. In the 1990s, Zimbabwe, like a 
number of other Southern and Eastern African states that was part of this 
cooperation, ratified the Convention on the Elimination of All Forms of 
Discrimination against Women (CEDAW). As a researcher with a back-
ground in the Scandinavian women’s law tradition, which took women’s 
lived realities as a starting point, I was puzzled by the disjuncture between

Eastern African Women’ in Water is Life: Women’s Human Rights in Local Water 
Governance in Southern and Eastern Africa (Weaver Press 2015) 1–32.
32 M. Gullestad, Kitchen Table Society (Norwegian University Press 2002).
33 A. Hellum, ‘Legal Pluralist Perspectives in Scandinavian and African 
Women’s Law’ in K. Papendorf, S. Machura and A. Hellum (eds), Ehrlich’s 
the customary laws that were applied by the post-colonial courts and the living customary norms that evolved through social life. I was curious how the CEDAW’s demand for gender-equal marriage laws was reconciled with women’s experiences of the legal pluralities that had a bearing on their marriage and family relationships in everyday life.34

To bring the concept of gender equality down from the plane of abstract international principles I embarked on a study of how different groups of Zimbabwean women and their families dealt with problems associated with childlessness. To explore these questions I carried out fieldwork in urban middle-class areas in Harare, a lower-class high-density area in Harare and in a peri-urban area. To describe and understand the circumstances under which the promotion of women’s human rights, particularly the right to equality in marriage and family life, was promoted or hindered I turned the concept of law as a semi-autonomous social field. This framework facilitated analysis of decision-making in the family, consultations with traditional healers, church leaders, traditional leaders and local courts, and as such the complex process in which human rights were adopted or resisted by various actors invoking different norms. The study showed how different communities responded to the new family and marriage laws at different rates and in different ways, and with different effects for different groups of women. I was puzzled by insight in the process whereby the living law, under certain circumstances, was more receptive to the ongoing process of social and economic change than statutory law and state-court customary law. Regarding the disjunction between international human rights and the uneven normative development taking place on the ground, I concluded that it was an important task for legal sciences to provide a nuanced picture of custom and local law as a site of diverse and contested practices.

An opportunity to further explore these questions arose when in 1999, I was invited to join an interdisciplinary research project hosted by the Center for Applied Social Studies at the University of Zimbabwe.35 The overall aim of the research project was to study the Zimbabwean water reform. The reform was partly informed by the World Bank’s quest for a more efficient water management system and partly by the quest for greater racial justice regarding the distribution of water for productive

35 The project, which was funded by USAID, was a cooperation between Michigan State University (MSU) and the University of Zimbabwe (UoZ). It was led by Francis Gonese from UoZ and Bill Derman from MSU.
purposes. Empirical research that I carried out in Mhondoro communal land with my colleague Bill Derman uncovered community-based norms which imposed a duty to share clean drinking water and land with accessible water to grow food. To our great surprise, these local norms had much in common with the bundle of human rights that forms the right to an adequate living standard. They were embedded in the Shona proverb ‘water is life’, which saw the right to water as deriving from the right to life, livelihood and dignity. These norms, which we termed ‘living customary law’, were not described in legal textbooks that addressed the customary laws applied by the formal courts. As the main regulation of the way in which local communities managed and shared water, these norms were important for new and innovative forms of commercial cropping in the communal areas. They were particularly important for the role women, through home gardens, played with regard to food security, health and education. However, the Zimbabwean water reform of 2000, we observed, failed to recognize the community-based norms and institutions that guided the use of water for domestic and productive uses in the communal areas. We thus concluded that the right to water for personal, domestic, livelihood and productive purposes was by far better protected by ‘the living customary norms’ than by state-law and international human rights law. The human right to water was, at that point in time, not fully recognized by the UN.

The Human Right to Water in Zimbabwe: Problems, Concepts, Field Sites and Actors

In 2010 I embarked on a study of the incorporation and implementation of the human right to water in Zimbabwe. In this year the Zimbabwean Government of National Unity (GNU) signed the UN General Assembly Resolution 64/292 on the Human Right to Water and Sanitation in the aftermath of the political and economic crisis that culminated after the Fast Track Land Reform Program (FTLRP). In an attempt to cope with the water crisis the GNU included the right to clean drinking water in Section 77 of the new Zimbabwean Constitution and in the new water policy. We were interested in a broader comparative study of the plurality

36 Derman and Hellum (n 15).
37 Members of the research team were Dr Ellen Sithole, PhD scholar Elizabeth Rutsate, Professor Bill Derman and myself. The research, which was part of a study of four Southern and Eastern African countries, is compiled in the book A. Hellum, P. Kameri-Mbote and B. van Koppen (eds), Water is Life: Women’s Human Rights in Local Water Governance in Southern and Eastern Africa (Weaver Press 2015).
of norms and institutions that people in different rural and urban contexts were turning to in order to access water for production, livelihood and domestic uses. Taking account of the multiplicity of state and non-state actors, norms and institutions that were involved in the governance of water in Zimbabwe, we decided to approach water governance as the system of actors, resources, and processes which mediate society’s access to water.38 We thus moved beyond a statist conception of law and governance, which is limited to the exercise of state authority through institutions, laws, policies and procedures.

Through this pluralist definition of law and governance we set out to explore how national and local government agencies, development agencies, humanitarian organizations, traditional leaders, local communities, families and individual women and men navigated a terrain where international and national law coexist and interact with local norms and practices. Underlying this research strategy was the assumption that different rural and urban communities would be affected by both national water laws and the human right to water, but that they also had the capacity to uphold and generate norms internally. We were interested in how the norms that guided the management and distribution of water were negotiated in different rural, peri-urban and urban communities. We were also interested in how the existing pluralities of norms and institutions were shaped by political and economic power relations on a larger scale. We were particularly interested in the effects of the politicization of water governance, for example how the ZANU PF party used water as a source of political control in the struggle against the competing Movement for Democratic Change (MDC) party. What norms were invoked by different actors and with what outcome? Who in the different urban and rural communities had the power to interpret and enforce the norms that guided people’s access to different water sources? In the light of earlier research in communal land areas we were curious what norms would be applied by the new farmers in the Fast Track Resettlement Areas. We were also curious as to what the norms that guided urban citizens’ use of groundwater and open sources were. Whether and to what extent did the human right to water make a mark on the way in which water was negotiated in different rural and urban contexts?

The overall methodological challenge, as regards the choice of field sites, was to lay an empirical foundation for a comparative study that could demonstrate how legal pluralities under certain conditions may promote

the realization of the human right to water for some groups while preventing the human rights of other groups. We were also interested in the situation of vulnerable individuals within the group, such as women in poor households and widows looking after children and grandchildren. Towards this end a research strategy that encompassed a communal lands area, an urban high-density area and a Fast Track Resettlement Area (A1) was designed. The sites selected were three villages in Domboshawa Communal Land Area, three A1 resettlement farms in Mazowe Catchment and three high-density areas in Harare.39

Domboshawa Communal Area is a water-rich area with good soils 20 km outside Harare.40 The growing and marketing of vegetables and fruits in combination with non-farm employment in Harare has led to economic growth among many families. Owing to informal sale of communal land there is an increasing competition of access to land and water in the area. Small-scale farmers in Domboshawa, as in other communal areas, have through the digging of canals, small dams and wells made significant investments in water infrastructure, operation and maintenance. These irrigation systems establish relations between water users and form the basis of norms that govern the ways in which water is shared. In these three villages we charted the different water sources that women and men made use of for productive and domestic purposes. We were particularly interested in how the interests of poor users, particularly widows in charge of children and grandchildren, were affected by the breakdown of public water services and the increasing competition over water for agricultural production in the area. In-depth interviews were carried out with women in three villages, including wealthy, middle-income and poor households.41 To gain insight into the formal and informal water governance structures in place in the selected areas we interviewed staff from women’s non-governmental organizations operating in the area, chiefs, sub-chiefs, headmen and elected councillors from the Rural District Council.

In Zimbabwe, the FTLRP, which involved the invasion and redistribution of white-owned large-scale commercial farms, resulted in a dramatic

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39 A1 resettlement farm is a small land allocation under the Fast Track Land Resettlement Program.
40 See Chapter 12 in Water is Life (n 37).
41 The structures of the buildings at the homestead were the main indicator of a household’s economic status. For instance, the wealthy had a modern brick house with at least three rooms while the middle had the same structure with at least two rooms. The poor had one or two round huts in their homestead. Additional factors used to determine status included the type of building material used, the roofing, availability and type of toilet, and possessions such as vehicles.
change of circumstances for farm workers. As a result of violent evictions, more than 200,000 workers with families lost their jobs and homes, including access to sanitation and water for domestic and livelihood use. The farm workers’ right to water and sanitation had, before the occupations, been part of the work contract with the commercial farmer. To explore how the new farmers and the displaced farm workers negotiated access to the different water sources on the former commercial farms, three A1 resettlement farms in Mazowe Catchment were studied.\(^{42}\) The politicization of land and water made it difficult to do research in the area. For security reasons the white team members visited the area only once because it potentially could have jeopardized the research. The Zimbabwean researcher explored how the new farmer’s and displaced farm worker’s urgent need for clean water and water to grow food was responded to by international and national actors in the aftermath of the cholera outbreaks in 2008. Both new farmers and displaced farm workers were interviewed with a focus on women’s access to water for personal, domestic and livelihood uses. Key informant interviews were carried out with UNICEF officials, employees and members of rural district council, municipal health workers, chiefs, village heads and leaders of local irrigation committees.

To explore the relationship between formal and informal water governance systems in an urban context we choose three high-density areas in Harare: Mabvuku, Tafara and Glen Norah.\(^{43}\) We were interested in how women from middle- and low-income households coped with the breakdown of public water delivery.\(^{44}\) The aim was to establish what water sources people in these areas were using to supplement municipal water and what the norms and institutions governing access, use and control of these sources were. Towards this end, we focused on public provision of water by the City of Harare, provision of water through humanitarian assistance by UNICEF and self-provision at the household level. We interviewed employed, high- and low-income women, married women with employed

\(^{42}\) These farms were studied by Elizabeth Rutsate who was a PhD fellow participating in the Zimbabwean country study. See Chapter 13 in Water is Life (n 37).

\(^{43}\) The low-density suburbs have found private solutions. These include private boreholes, bottled drinking water and/or the purchase of water from private water vendors who bring a weekly or monthly quantity of water to a place in large elevated water containers. There are currently large numbers of water delivery trucks carrying water to those who can afford to pay; L. Mangwanya, ‘A Study of Individual and Collective Responses to Domestic Water Scarcity in the City of Harare’, MA thesis, University of Zimbabwe (2011) and personal observations.

\(^{44}\) See Chapter 11 in Water is Life (n 37).
and unemployed husbands, female-headed households and female renters, as well as elderly and disabled women. Key informant interviews were conducted with officials in international humanitarian organizations, city councillors from the area, administrative staff from the area and the city of Harare, borehole committee members and representatives of Mabvuku, Tafara and Glen Norah resident associations. Our discussions with people at boreholes in the areas were several times interrupted by ZANU PF supporters who accused us of being foreign infiltrators and the people talking to us of being traitors.

STUDYING NORMATIVE INTERPLAY: THE HUMAN RIGHT TO WATER, NATIONAL WATER LAW AND LOCAL NORMS

In Zimbabwe community-based water governance systems anchored in unwritten customary norms and values are widespread, in spite of efforts by both colonial and independent African governments to redefine citizens’ relationship to water through state laws and policies. We were, as already mentioned, curious as to how different actors in different rural and urban contexts negotiated access to water in the face of the breakdown of the public water governance system and the adaptation of the human right to water. An overall aim was to gain insight in whether and to what extent different actors in different communities had the capacity to invoke or generate norms that overruled the formal laws employed by the official water governance institutions.

Domboshawa Communal Land: How Villagers Generate, Uphold and Enforce Norms

In Domboshawa communal land the formal legal responsibility for provision of primary water, which according to the Zimbabwean Water Act includes both drinking water and water for cattle, brick-making and family food, lies with the Rural District Council.45 The maintenance of water infrastructure is with the District Development Fund. On paper national legislation – particularly the right to primary water in rural areas – is in consonance with Zimbabwe’s human rights obligations.

Field work observations combined with interviews with villagers and councillors showed that public water service provision, as a result of

45 See Chapter 12 in Water is Life (n 37).
the political and economic crisis, had broken down. Those who did not have groundwater on their land, those who could not afford to invest in a private well and those whose wells dried up in the ‘winter season’ were hard hit by the lack of functioning boreholes. Our study showed that women, who were responsible for fetching water for domestic needs, accessed water from their neighbour’s wells dug by family members. This practice was described by the first female sub-chief in the area, who had just returned from the UK where she had lived for many years, in the following way:

When I returned from the UK, I dug this well here in our compound for my mum. I was surprised when women from the surrounding area, when their wells dried up at the end of the dry season, started flocking here to fetch water. I said to myself, ‘Look, no one assisted me in buying cement and bricks to build the well as well as pay for labour for its digging.’ I used to become furious about the whole issue and sometimes I would not even greet some of the people who came here to fetch water. Some would come as early as 4 a.m. My mother then sat me down and said to me, ‘Look here, you can’t deny people access to water in your well because if you do that people are bound to get angry with you such that they may dump a dead dog into the well or even put poison into the well’.

The obligation to share, according to the women we interviewed and local leaders, arose from good neighbourliness and the fact that water is a basic need that can be denied no one. In Domboshawa communal land, like other communal areas we had studied, the Shona proverb ‘water is life’ formed part of a broad right to water for livelihood entailing corresponding rights and duties. Local authorities tried to ensure that urban dwellers who had bought land in the area followed these rules:

Those with privately dug wells share with neighbours who don’t have with the exception of this new guy called Tsatsa. He locks up his well so that neighbours cannot access it. He is a civil servant working in Harare but his wife lives here all the time. He is a newcomer who settled here recently. I will have to go and talk to him about it because it’s not acceptable in our community for an African to deny others access to drinking water which belongs to God.

Yet the community-based institutions often lacked the power to enforce these norms when they were not adhered to by wealthy and well-connected actors in the community. In one of the villages, about seven households who all belonged to the same family regularly blocked the water on the river from flowing downstream to the rest of the villagers. These farmers,

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46 Interview with the first female Sub-Chief in Domboshawa, July 2012.
47 Sithole (n 15), Matondi (n 15), Derman and Hellum (n 36).
who were engaged in large-scale vegetable production, were blocking water in order to produce enough to meet the demands of their markets. According to one of the family members:

We will be thinking about them [downstream users] but in Shona there is a saying that you can’t stop eating just because someone you know has a problem. So I understand their situation but I have a family to feed and that comes first.\textsuperscript{48}

This and many other conflicts between large- and small-scale farmers remained unresolved. The offenders did not adhere to the agreed resolutions because they came from more powerful families and were strategically located in terms of water resources. In some instances the local leaders, who came from the wealthiest families in the area, were also protecting their own interests as large-scale water users. The national water governance institutions that formally are charged with regulating and allocating water were not present in the area. Poor women, producing food and other items for livelihood, were the ones who suffered most in a situation where the national water governance institutions were absent and the local institutions tended to side with larger and more powerful water users.

This demonstrates the need to analyse the outcome of the interaction between international, national and local norms with a view to whether and how they promote or prevent the realization of human rights standards. A methodological challenge is to uncover how these processes include questions of power where norm-generation can be dominated by a relatively powerful group who define and use rights for their own narrow purposes. To come to grips with the consequences of legal pluralities from the perspective of differently positioned groups and individuals, the combination of an actor perspective and a comparative research strategy involving gender, ethnicity and social status is helpful.

\textbf{New Farmers and Displaced Farm Workers on A1 Resettlement Farms: The Limit of Local Customary Norms}

Both national water governance institutions and international humanitarian organizations were conspicuous by their absence in the Fast Track Land Reform Areas. On the three A1 farms we studied in the Mazowe there was, with the exception of intervention by one local health official, no state

\textsuperscript{48} Makonde villager, September 2012; however, it isn’t just about feeding a family but continuing to provide more income for a range of purposes.
intervention to ensure clean drinking water for the new farmers and the displaced farm workers. International humanitarian organizations, coordinated by UNICEF, would not step in on resettlement farms because the farms were taken illegally and without compensation of the former owners.

Owing to the breakdown of water infrastructure on the former commercial farms, the lack of clean drinking water and sanitation was a problem for everyone living in these areas. It was not just farm workers who suffered from insufficient access to clean drinking water but also most of the A1 settlers. The displaced farm workers’ access to basic resources, such as housing, land, water and sanitation, relied on their ability to negotiate with the few remaining commercial farmers and the new A1 farmers. Generally the displaced farm workers felt insecure about voicing their complaints over unclean drinking water to the white commercial farmers who were still farming. They were afraid any complaints could endanger their job security. They were also reluctant to approach the new farmers on the A1 irrigation committees. They feared they would be regarded as rebellious elements of the worker community, which could lead to their eviction from the farms as traitors who were against land reform.

Common pool water sources like river water or water from shallow wells in the wetlands were generally shared between the new A1 farmers and the farm workers. However, the Shona customary norm providing a duty to share clean drinking water and land with water to grow food proved to be highly problematic in the context of resettled farms. In the resettlement areas access to resources was, to our surprise, to a large extent decided on the basis of group membership. Viewing the farm workers as foreigners without citizenship, most of the new settlers who had taken over the formerly white-owned farms did not see themselves as obliged to share available sources of clean drinking water with them. Most village heads did not allow farm worker access to land to grow food along the rivers, referring to the statutory requirement that no cultivation should be done within a 30 metre distance from a river bank. Despite denying women farm workers the opportunity to have riparian gardens, these village heads allowed women A1 farmers to have such gardens. There were, however, instances where women from the farm worker communities, owing to a longstanding amicable relationship with the people who had taken over the farms, were allowed access to clean drinking water and land to grow food close to the rivers.

This study, by comparing the way in which different social and ethnic groups accessed water, showed the multiple forms of exclusion and marginalization experienced by displaced farm workers in relation to the customary, national and international obligations of the different actors.
involved in the governance of water on the A1 farms. Because farms had been taken through a process that fell short of rule of law standards, international donors did not see themselves as obliged to address the basic needs of the displaced farm workers and their children, still living in the FTLRP areas. The Shona customary norm entailing a duty to share clean drinking water with those in need was in most instances not extended to the displaced farm workers, mainly owing to the perception that farm workers were of foreign origin, and as such outsiders to the group.

Harare’s High-density Areas – Customary Norms Overrule State-law

The city council of Harare, where the MDC at the time of the study was in majority, is in accordance with existing legislation tasked with provision of treated potable water services. Since there is no clear legislative obligation to ensure affordable water to consumers in under-privileged communities, the existing legal framework falls short of human rights standards. The City of Harare, which is economically dependent on fees from water users, has, in order to increase its water revenue, stepped up the number of water disconnections. Water and property revenues are, overwhelmingly, the largest income of Harare City Council.

Owing to the irregular supply of water from the municipality caused by mismanagement, the disconnection of people who could not afford to pay and the breakdown of the public boreholes provided by humanitarians, the inhabitants in these areas had dug wells next to their houses or in surrounding wetlands. We were surprised to find a widespread application of the customary principle, ‘water is life’, implying a duty to share clean drinking water. As these customary norms have so far been associated with rural Zimbabwe, we did not expect to find that many owners of private wells in these high-density areas freely shared water with their poorer neighbours or people who did not have groundwater on their property. The duty to share in Harare’s high-density areas was, like in the communal lands, based on the belief that water is an essential, God-given resource which cannot be denied anyone. As a woman stated: ‘water is something

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that you cannot deny another person. In one neighbourhood almost all the women we interviewed reported that when the taps ran dry they would fetch water in a well in a garden in the wetlands about one kilometre away. There was also a belief that those who did not share their water with those who need it would be punished:

There is one man who did not want to share water from his well with others but he has since had his well filled up with earth. Some people say the well’s walls were not reinforced with bricks and so the walls collapsed. But well, God is not a fool! God punishes you if you do things out of the expected. How can a person charge a fee for water which he did not create?

The existing plurality of norms were not recognized by municipal authorities and national government who sought a centralized legal framework. The widespread practice of sinking wells in backyards for water supply or drilling private boreholes has put residents in conflict with City of Harare by-laws on issues of environmental and health concerns. The municipality, with reference to the by-laws, ordered that the wells be closed and that a penalty be charged against those who have a well. The citizens were of the view that the city was forcing them to resort to alternative water sources since it did not fulfil its duty to provide safe, available and affordable water for domestic, sanitary and livelihood needs. In their view, water in the urban areas, as in the rural areas, ‘is life’ and the municipality should not deny their use of groundwater for such basic needs. Within this struggle the local norms have so far taken precedence. The citizens in these areas have also contested the widespread water disconnections on legal grounds. Many of them are active members of local resident’s associations that, with the support of organizations such as Zimbabwe Lawyers for Human Rights, have challenged the legality of the City of Harare’s water cuts through litigation. Litigation invoking Section 77 of the new Zimbabwean constitution, which recognizes the right to clean water, has been successful. In a decision of April 2014 the High Court outlawed the City of Harare’s by-laws, which empowers the City Council to cut off water from residents arbitrarily without a court order, with reference to the constitution.

In defiance of this court order the City of Harare has, however, cut off the water supplies of thousands of defaulters without a court order. The continued disconnections must, however, be understood in the light of the bitter conflict over water governance between ZANU-PF and the

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51 Harare North resident, December 2011.
52 Elderly widow in Mabvuku, January 2011.
MDC. Owing to the fact that the MDC has had majority representation in Harare and other cities since 2000, there has been continuous contestation for power and interference in local governance structures, including water, by the ZANU-PF-controlled Ministry of Local Government, Rural and Urban Development (the Ministry of Local Government). During the campaign for the 2013 elections the ZANU-PF Minister of Local Government passed a Directive to Write off Debts by all Local Authorities. The Directive, which addressed all provincial administrators, town clerks and chief executive officers, was used by ZANU-PF, including Robert Mugabe, as one of the key points in their election campaign. The directive undermined the MDC-dominated council’s need for revenue to fund the city’s water and sanitation system and specific measures directed at those public and private institutions and citizens who had not paid their water bills which mounted to millions of US dollars. In response to the dire economic situation, partly caused by political interventions by the ZANU PF government, the City of Harare has stepped up the number of illegal water disconnections and introduced reconnection fees and, in spite of resistance from civil rights organizations, is planning to install water meters.

All in all this study from Harare’s high-density areas demonstrates the importance of linking the understanding of law’s semi-autonomy and legal pluralism in small-scale social fields to political, economic and legal events on a larger scale. Clearly the breakdown of the physical water infrastructure along with the lack of independent and transparent governance institutions has created a situation of legal impunity where both state-law and customary norms are reconfigured and manipulated through the dominant political networks. This underscores the need to study legal pluralities as a process of constantly changing and interacting normative constellations and power relations taking place in a shifting legal, political and economic terrain.

CONCLUDING REMARKS: DESCRIPTIVE, EVALUATIVE AND NORMATIVE RESEARCH CHALLENGES

All in all the case study from Zimbabwe demonstrates how an analytical approach seeing law as a semi-autonomous social field, an actor perspective involving gender, ethnicity and class and comparisons between different social fields and levels of law may be combined to explore how legal pluralities may be an enabling or constraining factor regarding the realization of human rights. This discussion entails interrelated
phenomenological, evaluative and normative challenges that this interdis-

**Descriptive and Evaluative Dimensions**

The empirical study of how norms were generated in the three different
social fields provided a window into the way in which differently situated
actors negotiated access to water in the context of a conflict-ridden and
fragmenting national and municipal water governance system. A finding
that cut across the three field sites was that the human right to water and
the right to primary water in the Zimbabwean Water Act played a modest
role in ensuring people access to water in comparison to local customary
norms expressed in the proverb ‘water is life’. These living customary
norms were in many instances so strong that they overruled state-law that,
to protect the environment or people’s health, restricted people’s use of
common pool water sources.

A vertical comparison between the content of international, national and
local norms revealed that the living customary law was more responsive to
the needs of vulnerable groups and women within them than the dominant
legal understanding of the human right to water. An observation that cut
across the three sub-cases was that the community-based water norms
not were confined to water for personal and domestic uses, but included
water for growing, preparing and selling food and other products that were
vital for family welfare. Both rural and urban women’s access to water for
domestic, livelihood and productive purposes relied heavily on these local
norms. They formed part of a broader cluster of norms that defined their
rights and duties as members of a family and of a local community. These
small-scale studies thus point to a disjuncture between the community-
based water norms and the ambiguities that are inherent in human rights
water discourse. The CESCR General Comment No. 15 states that priority
in the allocation of water must be given to such personal and domestic
uses. Defining the human right to water through its link to the right to
life, the right to food and the right to health, it also demonstrates a wider
understanding. On this background General Comment No. 15 also recog-
nizes that priority should be given to water resources required to prevent
malnutrition, starvation and disease. UN General Assembly Resolution
64/292 on the Human Right to Water and Sanitation, however, remains
silent on water for broader livelihood needs. The UNGA resolution, which
has become the dominant paradigm in international human rights dis-
course, does not fully respond to the holistic way in which rural, peri-urban
and urban women access water, not only for personal and domestic uses,
but also for growing nutritious food.
A horizontal comparison, however, displayed differences in terms of gender, social status and ethnic background with a view to differently positioned actors’ capacity to invoke different layers of law to their own advantage. Local norms and practices, on the one hand, ensured women from the ethnic majority groups’ access to water for domestic, livelihood and productive purposes. These norms, on the other hand, imposed a series of water-related duties on lower middle class and poor women. These deep-seated gender stereotypes undermined other rights, such as the right to education, work and participation. Another limitation of the community-based water norms is that they were not seen as universal but limited to group members. Research conducted in the FTLRP resettlement areas clearly showed that the duty to share drinking water and land with water to grow food in most instances did not apply to the displaced farm workers. Owing to their lack of recognized citizenship and the claims that they had ‘foreign’ backgrounds, they were not in a position to assert their rights either under state law or under the living customary law.

The Normative Dimension – And So What?

An overall normative question is what social science and human rights theory has to offer with regard to consider measures that may be taken to improve the situation for weak and vulnerable groups.

A key question is whether formalization or abolition of the living customary law would be the most promising way to attain the human right to water for different social groups. From a social science perspective this question calls for careful consideration of the political, economic and legal power relations that shape legal pluralities. As demonstrated by the Zimbabwean case study, the legal pluralities that inform the fragmenting national water governance system were closely linked to the autocratic ZANU PF government’s efforts to control both national and local water governance institutions. In this situation, both state-law and the living norms are shaped by broader political and economic power structures. Rather than a return to the customary, this contextual understanding points to the need to strengthen the normative and institutional protection of vulnerable groups’ access to water, not only for personal and domestic uses, but also for livelihood purposes.

54 Namely under section 77 of the 2013 Zimbabwe Constitution, the right to free primary water for rural households provisions under the Water Act Chapter 20:24 and the 2012 National Water Policy.
55 Von Benda Beckmann (n 12) 69–95.
Furthermore, the small-scale studies point to the need of a human rights framework that responds to the holistic way in which rural, peri-urban and urban women access water, not only for personal and domestic uses, but also for growing, preparing and selling food and other products that are vital for family welfare and food security. From this perspective a dynamic and context sensitive mode of human rights interpretation that takes into account the normative diversity that exists in law and society should be considered. From this perspective mechanisms that can assist poor water users in holding the plurality of coexisting water governance institutions accountable should be explored.

Towards an Empirically Informed Dialogue Between International, National and Local Norms

In view of human rights methods, this chapter illustrates how the role of legal pluralities as an enabling and constraining factor to human rights realization can be studied empirically in local contexts. The use of law as a semi-autonomous social field is demonstrated in comparative case studies of the interplay between international, national and local water norms in three social and geographically distinct localities in Zimbabwe. This case study and the embedded sub-cases, underscore the need for human rights analysis that is contextually specific and sensitive to different layers of legal norms, the interaction between them and possible conflicts that may arise. From a social science perspective the need to situate the norm-generating processes that take place in small social fields into long-run historical processes, changing political power relations and paradigms of governance is emphasized. From a normative human rights perspective the need for an empirically informed dialogue between international, national and local norms with a view to better integration and harmonization is pointed out.

57 Sieder and McNeish (n 2).
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