



Implications of Customary Laws for Implementing Integrated Water Resources Management

Final Research Report

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1 EXECUTIVE SUMMARY

This project was motivated by the fact that the current water reforms in most southern African countries focus on the use of statutory legal systems to regulate the use of water resources. However, these countries have pluralistic legal systems - land and water resources are regulated by different pieces of legislation and institutions, including statutory law, customary laws of different ethnic groups and Islamic law. Especially in poor rural areas, diverse customary laws are often more important than statutory law and are relied upon in developing access to natural resources and resolving management conflicts. It was feared that neglect of customary laws could cause IWRM implementation to fail, or would have negative consequences for individuals and groups who were better served by customary-based systems – especially the poor.

The project's goal was: 'significant improvements are made to the lives and livelihoods of poor men, women and children in Southern Africa'; and the purpose of the project was 'more sustainable and equitable water management policy and practice are established in southern African countries'. The project aimed at achieving the following outputs:

1. New knowledge derived on local water rights, and the complementarities and contradictions between statutory and customary systems in addressing equity and access issues, development and management of water resources, with particular focus on poor people's livelihoods.
2. Guidelines – 'good practice' knowledge resource – developed for taking account of customary laws in the delivery of more effective and equitable IWRM under plural legal systems in Southern Africa.
3. Awareness - capacity and practice of river basin managers and IWRM policy makers in taking account of plural legal systems for IWRM significantly improved, communities' voices heard and their customary arrangements better understood.

The project had 3 components: case studies, development of guidelines and awareness raising. The case studies from Tanzania, South Africa and Zimbabwe were developed through the following stages:

- Literature review
- Archival search
- Fieldwork
- Presentations to workshops and symposia to validate the findings.

The South African case study explored the continuing 'secondary status' of African smallholder water users in the former Lebowa and Kwa Ndebele homelands, compared to the former white-dominated areas in the Olifants Basin. It compared the implementation of the Water Act of 1956 in the former white areas, with implementation in the former homelands by customary tribal authorities. The Tanzanian case study surveyed the increasing pressure on water resources and the efforts by the government to fix property rights and formalise informal arrangements related to the use of water resources. The case study considered the new roles of established Basin Water Boards and Basin Water Offices in management of water utilisation by different users, especially traditional rights holders, and the extent to which the proposed legislative dispensation will protect the existing traditional or customary water rights. The Zimbabwean case study documented findings from Guruve district in the Manyame Catchment, where culture and lifestyle is still deeply influenced by customary laws and values, compared to other parts of Zimbabwe.

The three case studies show that, so far the weight given to customary law in the water sector reform programme has not been substantial and empirical evidence indicates that the survival of customary practice is almost always overshadowed by the reality that the legal supremacy of the imposed law is clearly established. In the case of conflict between local people and the state, it is this imposed legal regime that is authoritative. Also, the findings show that there is a general lack of understanding about customary law among water management practitioners and policy makers in the three countries.

During the course of the project, a total of seven conference papers were presented in Dar es Salaam (Tanzania), Gaborone (Botswana), Windhoek (Namibia) and Johannesburg (South Africa). A number of the conference papers have been published in books and journals; and the case studies have also been published on the project website at www.nri.org/waterlaw; and a book will result from the proceedings of the Johannesburg workshop. Two draft guidelines have been developed. One 4-page guideline is targeted at policy makers. This is based upon the outcomes and statement of the African Water Laws conference. The second 6-page guideline is targeted at catchment managers. Both guidelines were further validated and honed in November 2005 during training workshops held in South Africa and Tanzania.

2 CASE STUDIES

During the inception phase the research partners reviewed relevant literature and sought to establish a common conceptual/analytical framework. They also reviewed the original project log-frame in order to ensure that the monitoring indicators that are **specific, measurable, action-oriented, relevant and time bound (SMART)**.

2.1 Customary water law and challenges of current water reforms for rural water utilisation in Tanzania

The findings from the Tanzanian case study are summarised in a paper titled ‘Customary water law and challenges of current water reforms for rural water utilisation in Tanzania’ The paper notes that Tanzania is currently at an advanced stage of drafting a new legal framework for water resources management. The new legislation is aimed at attaining the objectives of the National Water Policy of 2002 (URT, 2002). This policy aims to develop a comprehensive framework for sustainable development and management of the nation’s water resources including the introduction of cost sharing and beneficiary participation in planning, construction, operation and maintenance of community-based domestic water supply schemes. For water resources management the policy envisages that:

- water allocation shall be prioritised for human needs (adequate quantity and acceptable quality) and for environmental protection (environmental flows);
- a sound information and knowledge base including both data on surface and groundwater, social and economic data shall be established;
- fees and government subvention will finance water resources management. The fee system includes a fee for conservation; and
- use of technical, economic, administrative and legal instruments will be enhanced. Proposed economic instruments include water pricing, charges and penalties.

The paper discusses some of the aspects related to customary law and the challenges of current water reforms for rural water utilization. It traces historically the process of formalising customary laws; then presents cases that display interactions between formal and informal institutions in water management. The paper also contains a discussion of issues that need to be clarified on the governance and utilisation of water by the rural population. It is argued that, despite the early initiatives at providing space for the growth of customary law, the legal system pertaining in Tanzania today is tilted more in favour of statutory than customary systems. While narrowing down to identification of customary/traditional water laws, the chapter looks at other areas where customary laws have come out very clearly. Customary land tenures are examples of areas where customary law has received more coverage by case law, statutory intervention and academic writings. The wider coverage in land matters provides some good insights of problems which are likely to face the articulation of customary water laws. Unlike customary land laws, customary water laws have not under the current legal framework received statutory and judicial recognition. So experience of customary laws over land is used to project the texture of the customary water laws if courts and parliament intervene. The paper identifies four major areas where formal and informal institutions interact in water management. The paper concludes with a discussion of the governance challenges for legislating for water utilisation in rural Tanzania.

Conceptualising institutional and legal aspects of water resource management

In conceptualising institutional and legal aspects of water resource management, a number of studies are referred to, dealing with the role of institutions in natural resource management (NRM), conflict management and legal pluralism (e.g. Boesen, et al 1999; Cleaver, 2001; Cousins, 1996 and 1998; and Meinzen-Dick and Pradhan, 2001).

As noted in Boesen et al (1999), one of the issues that calls for clarity and consistency when analysing institutional aspects of natural resource management is whether to make distinctions between such concepts as ‘institution’ and ‘organisation’; as well as ‘formal’ and ‘informal’. Writing about the confusion between ‘institution’ and ‘organisation’, Uphoff (1986) has noted:

The terms *institution* and *organization* are commonly used interchangeably and this contributes to ambiguity and confusion. Three categories are commonly recognized: (a) organizations that are not institutions, (b) institutions that are not organization, and (a) organizations that are institutions (or vice versa, institutions that are organizations) (Uphoff, 1986: 8).

Using the terms ‘institution’ and ‘organisation’ interchangeably and categorising them in a continuum from the public, participatory and private sectors, Uphoff (1992) lists some of the areas where institutions might play a role in natural resource management:

- mobilising resources and regulating their use;
- generating and interpreting location-specific knowledge;
- facilitating quicker and less costly monitoring of changes in the status of resources;
- conflict resolution;
- conditioning people’s behaviour (through community norms and consensus); and
- encouraging people to take a longer-term view by creating expectations and a basis for cooperation that goes beyond individual interests.

In contrast to Uphoff, North (1990) makes a clear distinction between institutions, which he views as ‘rules of the game’ and organisations, which he views as ‘a set of players, a team, working within the framework of the rules towards specific objectives’. He defines institutions as follows:

Institutions are the rules of the game in society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic... Institutions reduce uncertainty by providing a structure to everyday life. They are a guide to human interaction... Institutions include any form of constraint that human beings devise to shape human interaction (Uphoff, 1990: 3-4).

According to North, institutions can be both formal (constitutions, laws, property rights) or informal (sanctions, taboos, traditions and codes of conduct) and they may be created (e.g. a constitution) or they may simply evolve over time, as does common law. North thinks it is very important to distinguish between institutions and organisation. According to him, although organisation, like institutions provide structure to human interaction, this structure consists of human beings, while the structure provided by institutions is composed of rules, laws, etc.

A number of the studies have dwelt on the distinction between the ‘formal’ and ‘informal’ institutions in NRM, and their importance in conflict management (Boesen et al 1999; Cousins, 1996; Mehta et al 2001). Observing that institutions include knowledge systems, rules and norms, organisations and conflict resolution mechanisms, Boesen et al (1999) note that demands for a resource may grow in relation to either intensification under the same use, or diversification into new uses. This demand may be by the same user group or new user groups. In Pangani and Rufiji river basins, for instance, there is intense competition for land and water resources. Cousins (1996) has written about conflict management in the context of utilisation of natural resources for multiple purposes, or by more than one user. He argues that disputes or conflicts are common in these situations, and hence the need for appropriate institutional frameworks for resolving and/or managing these disputes and conflicts. To a certain extent, the evidence from Pangani and Rufiji basins corroborates Cousins assertions, but there is also a lot of cooperation, negotiation and accommodation, as noted by Cleaver (2001), and Maganga (2000).

Cousins (1998) has written about the relationship between formal and informal institutions in conflict management. According to him, formal institutions “are those backed by law, implying enforcement of rules by the state, while informal institutions are upheld by mutual agreement, or by relations of power and authority, and rules are thus enforced endogenously”. However, as it will be shown later in this chapter, it is problematic to adopt a very strict distinction between ‘formal’ and ‘informal’ institutions of managing resource conflicts. Hence, decisions in ‘formal’ Primary Courts are also influenced by ‘informal’ institutions such as tribal elders who sit in the courts as Court Assessors.

Instead of focusing on conflict resolution, other writers (e.g. Hendrickson, 1997; Cleaver, 2001) focus on relations of conflict and cooperation, challenging the perspective which tend to see conflict as “undesirable, a breakdown in normal relations and something to be avoided or resolved as quickly as possible”. These writers point out that there is a relationship between conflict and cooperation, which involves various reconciliatory systems. In this chapter further evidence is provided to support the assertion that conflict and cooperation are not exclusive to each other.

Another perspective which is relevant for Pangani and Rufiji basins where data for this study were collected, is legal pluralism. Meinen-Dick and Pradhan (2001) have written about the implications of legal pluralism for natural resource management, noting that many conceptions of property rights have focused only on static statutory law, ignoring the co-existence and interaction between multiple legal orders such as state, customary, and religious laws. Tanzania has a pluralistic legal system and hence land and water resources are regulated by different pieces of legislation and institutions, including statutory law, customary laws of the 120-plus ethnic groups, Islamic law, etc. Whenever there is scarcity and competition, though, the authorities pretend that the only prevailing law is state law.

According to Kabudi (2005), customary law refers to a ‘set of rules and norms practiced by a community over a long period of time and most often are not codified’. According to him, these laws provide for a set of rights and duties to be observed by certain community and against outsiders. In the case of water resources, various communities in Tanzania have a long history of practicing certain customary laws for management of such resources. Even in the advent of colonial invasion, customary water law continued to exist in parallel with statutory law. Kabudi (2005) believes that the traditional ethos and practices are deeply rooted and have been found to be useful in resolving water use conflicts, defining water allocation for different local uses and provide for catchment protection. The FAO study on African water law (FAO 1997) provides an in-depth study of the dynamics of customary law in different African ethnic groups and some of them are from Tanzania. In some areas in Tanzania there are traditional/customary water rights practiced by rural communities that ensured sustainability of water resources. In some areas communities have customary laws/practices that bestowed them with ownership rights that exclude outsiders. Because these practices were established over a period of many years, they are critical considerations that need to be reflected in the law for the better management and voluntary enforcement of the laws. Customary laws or practices, if consistent with statutory laws may also form the basis for community support for enforcement of statutory law. Currently the water resources laws do not make provisions for recognition of customary laws and practices. This is one of the gaps in the legislation that needs to be addressed. As noted elsewhere, “the non-recognition of traditional or customary water users is at the root of many water use conflicts.” (FAO: 1997) Even in cases where customary practices conflict with the objectives of the water resources laws, awareness and enforcement efforts may help to change the existing practice. There are proposals for provisions on the relevancy of customary law for water resources management and rural water supply service delivery. Customary water laws may provide relevant provisions on conflict resolution, community participation in the management of water resources and water allocation

Other studies on customary arrangements for water development, use, and management (e.g. Boesen et al 1999; Juma and Maganga 2005; Maganga et al 2004) observe that it is possible to distinguish four different ways of conceptualising customary law, as follows:

- ‘tribal’ customary laws of specific ethnic groups;
- ‘formal’ customary law which is recognised in courts of law;
- customary law as it was enforced by traditional authorities (e.g. chiefs, headmen); and (this system was severely undermined by the abolition of chieftaincy in 1962); and
- living customary law - current people’s customs and practices presently, and the principles underlying these practices. It is this ‘living customary law’ that has invariably been described as informal. It includes aspects of customary law, statutory provision and day to day practice of a community concerned.

The debate about the role of property rights in natural resources management has recently come to the fore, thanks to De Soto’s treatise on why capitalism triumphs in the West and fails everywhere else (De Soto 2000). According to him, up to 4 billion people are effectively excluded from participation in the global economy because their property rights are not recognized. They are thus deprived of legal identification, and the forms of business that are necessary to enter the global market place. However, while some people see the legalization of property rights as a vital step in the transformation of the informal economy and reduction of poverty, other scholars have raised doubting voices (e.g. Mathieu 2002; Mwangi, 2003; and Mwangi, 2004).

In the obsession with formalization and privatisation of property rights, it is often forgotten that in most rural areas of Sub-Saharan Africa, common property farmland, water, pastures and other resources often provide social security and substitute for missing insurance markets. People tend to forget that resources under common property can serve vital economic functions that individual property cannot. Not only may common property display lower transaction costs compared to private property under certain circumstances common property resources’ role as insurance substitute often depend on secure and easy access to geographically dispersed resources. This is the case for management of resources where yields fluctuate widely across time and space. Herders in the arid and semi-arid tropics thus rely on common property to a very large extent because of the large spatial variability in rainfall, water and pasture, which makes it crucial to have access to very large areas. Thus, scholars such as Heltberg (2001) have argued that, “common property systems deserve respect for their management, equity and insurance functions. Policymakers should refrain from undermining common property systems, and should consider providing them with legal recognition and other forms of support”. This paper explores both sides of the debate and recommend where formalization and privatisation may be appropriate, and where common property management may still be maintained. In discussing the process of formalisation of water rights in Tanzania, the following issues may draw immediate interest:

- the performance of private property regimes in relation to other property regimes (state, communal, open-access); and
- the implications of formalization and individualization of property rights for vulnerable groups.

While there is no doubt about the fundamental role played by formal property rights in shaping how people manage natural resources, the literature on legal pluralism has cautioned against static definitions of property rights. As it was noted by Meinzen-Dick and Pradhan (2001), policymakers are often influenced by approaches to property rights which regard these rights as unitary and fixed, rather than diverse and changing. This is the case in countries like Tanzania, where the government, prompted by increasing pressure on land and water resources, has been busy trying to establish

formal legal systems, fixing property regimes and formalising informal arrangements through institutions such as River Basin Boards. In spite of governments' over-reliance on statutory arrangements for water resource management, a number of studies have highlighted the different roles played by both 'formal' and 'informal' institutions in water management (e.g. Boesen et al 1999). The inter-play between formal and informal institutions in natural resources management is also well captured by Meinzen-Dick and Pradhan (2001), and Derman and Hellum (2003), who have written about the implications of legal pluralism for water resource management.

Interplay between community-based and formal arrangements

A number of studies (Juma and Maganga 2005; Sokile et al 2005) have documented the interplay between community-based and formal arrangements in rural water management. The case study of Landanai village in Pangani Basin (Box 1) illustrates how Maasai customary water law contended with the mainstream statutory framework.

Box 1. The Taiko clan vs other Landanai villagers

Landanai village is situated in Naberera Ward, Simanjiro District in Manyara Region, in the Pangani Basin. The Maasai clan of Taiko Muna Mamasila applied for a water right to control water from Landanai springs. Development of the springs is traced historically to the German period of rule during the early part of the 20th century. Later a Greek known as George renovated the springs and even later the Roman Catholic Church renovated the scheme on behalf of the community and the village government. Canals had already been built to collect and convey water from the springs to cattle troughs. Over the years the members of the Taiko clan repaired the scheme. Members of the clan claim that payment for the development of the scheme was made by contributing their livestock to pay for the maintenance of the scheme.

However, it was also alleged that the Landanai water scheme has also been maintained frequently by other Landanai villagers, apart from the Taiko clan. The villagers rely upon the scheme for their water needs. Officers of the Pangani Water Basin were of the strong view that it could not in the circumstances allow one clan alone to apply for a water right over the springs. The Basin was wary of possible conflicts likely to result from an exclusive grant of a water right. Already there were claims that some villagers had been beaten for using the water. Therefore, the Simanjiro District Executive Director was advised to block that granting a Water Right to one clan alone since it would exacerbate conflict within the community.

The Pangani Basin Water Office recommended that Landanai village government and village assembly (involving all villagers) should be convened in February 2004 to decide who should apply for water right over Landanai springs. A delegation from the Pangani Basin Water Board and Central Water Board (Dar es Salaam) attended the first village government meeting. The delegation took time to explain the procedure to be followed by those applying for water rights. The meeting recommended to the village assembly held the next day that the village should form a committee of users of Landanai water springs who should apply for the water right. It was recommended that this Committee be made up of: 4 members drawn from Taiko clan; two members from other pastoralist clans, and 4 members drawn from the agricultural communities resident in Landanai village. It was agreed that amongst the committee members there should be at least two women drawn from pastoralists and agricultural communities. Between 200 and 300 villagers attended the village assembly meeting. The assembly agreed with the recommendations of the village government. The Committee was mandated to work under Landanai Village government for three years.

The mainstream package of law and institutions here includes statutory provisions and resulting institutions like the Basin Water Board, village governments and district and regional administrative structures. The Landanai case provides an example of how an application by a clan for water right could not be sustained against the wider interests of the village and other customary water users. A traditional body with partial control over a water source, wanted to use the modern system of water rights to reinforce its hold over the source

Potkanski (1994) contains a succinct description of Maasai traditions related to water management. Traditionally, amongst the Maasai, access to water for domestic use is freely granted to all on request. The need for ownership of water sources only makes sense in the dry season, when there is a relative shortage throughout 'Maasailand'. All water sources in 'Maasailand' are either collectively owned, or are individual property. Neither the collective nor individual categories of ownership have a distinct name in the Maa language. Instead, they are given locality names, and their status is known to all. Water sources with a relatively small output ('standing water') include the wells and small springs with relatively short streams of a few meters which end up at cattle-troughs. These are individually owned. The large water sources ('flowing water') are the longer

streams and rivers, which are collectively owned. For the Maasai, this division is ideologically grounded and comes from their model of the world. According to them, flowing water has been created by God for all Maasai, and cannot be owned by an individual person. It is a common resource, governed by the principles of common property management. Sources of standing water are the property of those who dug them if it is a well, or first discovered them if it is a spring. Rights to this water pass to a man's heirs, following the rule of primogeniture. However, the Lanandai case shows how the Taiko clan wanted to go beyond these Maasai traditions. The response by the Pangani Basin Water Office and the government illustrate how application of mainstream laws may facilitate equitable conflict management in communities with multiplicity of customary systems. This intervention helped to avert a possible conflict between the Taiko clan and the rest of the villagers in Landanai.

Another example from the Pangani Basin of the interplay between community-based and formal arrangements for rural water management is in Box 2 where Pare customs interact with 'project law' generated by the irrigation project (Box 2).

Box 2. Ndung'u Irrigation Project vs Pare customary law

The village of Ndung'u is situated in the local government Ward of Ndung'u of Same District in Pangani Basin. The village is part of the Same District Council. It is a traditional village of the Wapare people, although there are also other tribes like the Sambaa, and Maasai pastoralists. The village enjoys year round irrigation water from a number of rivers and streams which is used by around 2000 villagers. Paddy is grown twice a year. .

Traditionally, land in Ndung'u was owned under customary arrangements, including in the areas covered by the irrigation project. There are several cases of customary owners leasing their irrigated blocks to others. Conflicts over land between owners and outsiders were almost non-existent because ownership was in accordance with customary arrangements which were well established and respected. Conflicts over land were restricted to relatives competing over inherited parcels or tenants failing to comply with applicable agreements. These conflicts were referred to traditional bodies known as kitala.

Following the penetration of statutory laws, projects and other institutions, land disputes are now referred to the irrigation project leadership. If the project leadership fails to resolve an issue, the dispute is taken before the *Baraza la Ardhi la Kijiji* (the Village Land Tribunal). A new hybrid of the customary system with a strong dose of mainstream values is in place. This hybrid came in the form of the subsidiary legislation made by the Same District Council under Local Government (District Authorities) Act, 1982 to regulate irrigation agriculture in Ndung'u area of Same district (Same District Council, 1994) The by-laws cover the Mkomazi river valley area of Ndung'u designated as a project area for purposes of agricultural development. Mkomazi river is a controlled water source under the Water Utilisation (Control and Regulation) Act, 1974.

Ndung'u Irrigation project extracts water from Mkomazi river under a water right issued by the Pangani River Basin. The project has taken over the control over a number of facilities that were constructed over land and water sources occupied and used under customary law of the Wapare people. Existing land and water tenure system were as a result of the project divided into blocks forming (i) main and secondary drains from Mkomazi river and their related structures; (ii) main and secondary irrigation canals, intake weir, water gates and other related structures; (iii) tertiary irrigation canals and drains; (iv) flood dikes, gates and other installations for prevention of flood, (v) water course and their related structures, and (vi) trunk road, main and secondary farm road, warehouse, residential quarters and any utility designated for residential or infrastructural purposes. The irrigation project also spell the end of traditional water and land management systems. The district council established a project office responsible for the running and maintenance of the irrigation project. It must be observed that the project retained to certain extent traditional system, because each irrigation block elects its own leaders and committees, and these leaders are mostly drawn from those families, which in the past exercised control over water and land management.

There is in place also an Executive Committee of the project assisting the Council. This Committee is composed of District (i) Commissioner or his representative; (ii) District Director or his representative; (iii) Chairman of the Same District Council; (iv) Chairman to the standing committee on economic affairs of the Same District Council; (v) two councillors from the project area; (vi) two prominent farmers nominated by project beneficiaries (defined to mean any person or community holding any agricultural land within the project area). Functions of the executive committee have obviously taken over those which customary organs would exercise. The committee enjoys overall oversight of the project. It discusses, reviews and approves- (i) past performance of the project office and the water user's group operating in tertiary blocks; (ii) annual programmes for the operation and maintenance of the project; (ii) expenditures and budget, on the running of the project office. Other activities of the Committee include approval of the appointment of the project Manager, and determination of the amount of water charges to be imposed on the project beneficiaries. Project beneficiaries have formed two Water Users's assemblies for the Ndung'u and Misufini areas. Each of the two assemblies elects a chairman, a secretary and an accountant. Assemblies meet at least once every year to discuss irrigation plans and methods. The assemblies also meet to supervise, direct or otherwise coordinate activities of Water Users' Groups. Assemblies designate methods of imposition and collection of water charges. Water Users' Groups, operating at the level of tertiary blocks execute orders and instructions flowing from project office. These groups are described as terminal organs of the project office. The groups are ultimately required to ensure proper operation and maintenance of the terminal project facilities. These groups decide on the water distribution plan within their respective tertiary blocks. Water Users' Groups settle disputes arising among members of the group and take care of water distribution within tertiary blocks.

There is no doubt that implementation of the irrigation project has completely changed the pre-existing customary tenures in Ndung'u. The limited space for the application of customary water and land laws is closely related to the increasing power of the District Council. The Council is vested with a lot of power over the organization and administration of the project office. The day-to-day activities of the project office are under a Project Manager who remains answerable to the Council.

Despite delegation of powers to the level of Water Users' Assemblies and Water Users' Groups, project beneficiaries are subject to control from both the District Council and the project office. The project office may for instance change or vary the irrigation schedules according to weather conditions. The district council may impose water charges upon beneficiaries in consideration for the use of project facilities and irrigation water. Project beneficiaries are not allowed to alter the form and nature of the agricultural land without written approval of the district council. Again, the project manager, members of executive committee and any person authorized by the district council may without prior notice enter any land of a project beneficiary for the purpose of surveying and inspecting operations and maintenance of the project facilities and conditions of agricultural land. Project beneficiaries are required to sell to the Primary society allocated in the project the products from their agricultural land. By-laws have also taken over the place of punishments existing under customary laws. By laws prohibit tenant farming within the project areas. All agricultural land is to be cultivated and managed by project beneficiaries only. This prohibition does not cover hiring of temporary labour on parcels of land.

Hence, it can be concluded that unless development projects specifically engage with customary law, they are likely to marginalize and replace it. We have noted how the project Executive Committee has taken over functions which were previously exercised by customary organs. The composition of the Committee, including the 'two prominent farmers nominated by project beneficiaries' may exclude poor farmers and women. The repercussions of this could be negative for marginalized villagers who are not well placed to capture the benefits of the project.

From Rufiji Basin, Sokile et al (2005), also document the interplay between formal and informal institutional frameworks for water management with a case study of the Mkoji sub catchment, where they identify four major areas of interactions:

- between the central and the local levels;
- between modern and customary water rights;
- between modern (formal) and traditional (informal) water user associations; and
- between formal and informal power relations.

Sokile et al (2005) highlight several levels where the interplay between formal and informal institutions occur. At the central level is the Ministry of Water and Livestock Development. Although the thrust of current water resource management in Tanzania is to implement water management at the basin level, the central ministerial level continues to play a significant role in water management and the coordination of all nine basins in the country. This structure is not in line with the requirements of the National Water Policy (2002). The central level is responsible for developing, disseminating, monitoring and evaluation of the National Water Policy 2002 (URT, 2002). A new structure is being proposed in the draft new Water Resources legislation (2004, draft). The basin level is also dominated by formal arrangements. The basic tasks of the basin office are:

- Allocate and regulate the existing and new water rights within the basin;
- Monitor water availability, water quality and water uses in the basin;
- Control water pollution;
- Collect the water user fees as per water law and Regulations;

- Mediate and resolve water conflicts within the basin; and
- Establish Water User Associations as per Act No. 42 of 1974.

Although the Basin Water Office does all these functions with little or no involvement of the local communities, there is a potential of associating the informal institutions in managing water by jointly undertaking the above functions. However, the capacity of the Basin Office is limited in terms of its human and financial resources, given the extensiveness of these tasks in the largest basin of Tanzania. For example, the Rufiji Basin Water Office (RBWO) depends on the collaboration between a number of existing and new institutions in the execution of these tasks on the ground, especially for the regulation and distribution of river water flows during the dry season; the collection of water user fees; the construction of new infrastructure, and most importantly, the mediation and resolution of water conflicts. Potentially, essential synergies can be tapped by aligning formal and informal institutions. For example, the Basin Water Office may solicit support from the informal institutions in the villages. Grassroots water users may be mobilized to discuss and agree on the amount of water to be allocated to various uses/ users and then be empowered to oversee and regulate the allocation. Similarly, the village leaders- formal or informal- may be involved in monitoring water availability and quality through gauge reading and through development and implementation of bylaws for pollution prevention. However, apart from some isolated initiatives along these lines, the partnerships between the RBWO and local communities are still largely to be forged.

At the catchment and sub-catchment levels, there is a fair collaboration between formal and informal institutions. The formal arm of water management in the Mkoji sub-catchment comprises two district councils, and several wards. Three to seven villages make up a ward. Wards are important tier in the governance structure. Although not specifically formed for managing water, wards influence water management considerably. The Ward Development Committees frequently pass bylaws that impact on sanctions and penalties that seek to guide water allocation and quality. Each ward has a Ward Councillor. Ward Councillors are very influential in the villages and in water resource management. Ward Councillors represent the community members who elected them into power in the district council. Owing to their electorate, councillors, seeking to please their voters tend to be more informal and highly interact with informal institutions, which influence water management. Councillors in the lower zones of the Mkoji sub-catchment have, for example, been reported to mobilize downstream water users for negotiating for water upstream, mobilized funds for domestic water supply, pushed by-laws for water management at the District Council, and mobilized communities towards the formation of Water Users' Associations (WUAs). This is not to say that the functioning of Ward Councillors is smooth or perfect. They may also battle with popular opinions and sometimes counteract customary arrangements. Although district, ward and village councils may deliberate on decisions that affect water management, a specific mandate for this lies within the Rufiji Basin Water Sub-Office at Rujewa, the main town in the Mbarali district. The sub-office coordinates water management through Water User Associations (WUAs) and village committees in case where there are no WUAs. Generally, there is no specific provision for taking on board the local and customary views into the formal councils and committees. Occasionally, however, the basin sub office has used informal community leaders in implementing some of the water management activities, especially in resolving water conflicts. The results have been very impressive.

Sokile et al (2005) observe that the lowest tier of formal institutions in Tanzania is the village level. The informal arrangements for water management are more elaborate at the grassroots level. There, formal and informal initiatives for managing water clearly co-exist. Each village has a Village Assembly of all adults, which elect 25 representatives to form the Village Council. The Village Council operates through three mandatory committees, which are vested with responsibilities for handling daily affairs of the village: the Finance, Economic and Planning Committee; the Social

Services and Self-reliance Committee and the Law and Order Committee. Water sub-committees fall under the Social Services and Self-reliance Committee. The strength and functioning of the village sub-committees differ from one village to another, and similarly, their specific intervention into water affairs also differ depending on the availability and the levels of demand on the water resource. In places where irrigation is carried out only in dry season or is not carried out at all, like in the villages in the upper catchment, the water sub-committees are relatively redundant. There, the informal arrangements through customs, taboos, and traditional rainmakers tend to be more popular and respected. Conversely, in the middle zone of Mkoji sub catchment where wet season irrigation is highly practiced, there is an active formal Water User Association, which handles both domestic and irrigation water management. Seemingly, whenever the formal village sub-committees are weak, there is a stronger informal institution that assumes the roles and fills the gap.

Sokile et al (2005) also highlight the interplay between modern water rights and customary rights in the Mkoji sub-catchment. The Water Policy (2002) requires water users to mobilise and organise themselves into associations, especially into WUAs, to apply for water rights, and to pay application and user fees. Many users at the Mkoji sub-catchment have already formed WUAs and have applied for the rights. Specifically, the law bars abstraction of water for whatever purpose without a prior paper-based license or water right. However, many small-scale irrigators in the area still use the traditional systems of diverting water from rivers for their farms.

Sokile et al (2005) also highlight the interplay between formal and informal power relations. Tanzania abolished chieftdom officially in 1962, soon after independence. In some places, however, traditional and customary leaders have been co-existing with the new formal local governments and are somewhat influential. In the upper zones of the Mkoji sub catchment, among the local ethnic group of the Wasafwa, there exist an array of traditional leaders called mwene (Pl. mamwene). Mwene is a chief to this ethnic group. Each mwene commands an area of roughly a new ward. Powers of mamwenes are more elaborate in water and natural resources management where they enforce customs and traditions against cutting riparian trees, cultivating on water banks and polluting water bodies. Both customary and formal institutions display power and influence power relations at various degrees. Formal institutions display powers by the virtue of the state and formal rule of law, while the informal ones acquire power through customary influences and beliefs. Since the formal arrangements are backed by state power and the rule of formal law, those who incline and abide with the state are at an advantage.

Maganga et al (2004) and Sokile et al (2005) have analysed interactions between formal and informal institutions in conflict resolution over water resources. In one case a villager first uses customary arrangements to obtain water for irrigation, then he switches to statutory arrangements of applying for Right of Occupancy, when he sees that he could take advantage of this system for personal benefit, even though he ends up creating conflict and tension within the community (Maganga et al 2004). Sokile et al (2005) have noted that formal and informal institutions interact appreciably in conflict resolution at the local level. Most disputes on water are resolved informally at the lower levels before they erupt into serious conflicts. They observe that local water users prefer informal routes over formal ones because they feel a greater sense of identity and hope for justice than they would experience in the courts of formal law where decisions are based on “the winner takes all” principle. Such parallel forums provide an effective conflicts resolution institution for managing water conflicts at a lower cost. The formal arm of conflict resolution involves village committee meetings, primary courts and district magistrate’s courts, in cases where the conflict has escalated higher, and the Basin Water Offices in cases where they need a formal forum but are afraid to go to the courts of law. Apparently, the costs of abiding with formal and informal institutions in water management differ. The formal route is expensive, time-consuming and less trusted among local communities.

Sokile et al (2005) observe that shaping a harmonious interface between the formal and informal institutions for water management is not be that simple. Institutional contradictions, power struggles, bypass and duplication of activities are likely to be encountered, unless a specific effort is made to foster harmony within and between the multiple institutional frameworks. Gaining effective centralized and decentralized water management institutions requires formulating interface mechanism that will ensure sufficient contacts and overlaps without unnecessary contradictions. This also concerns the vertical interactions between the ministerial level and the basin levels, the basin level and catchment levels, and the catchment levels and villages levels. There is a still a considerable gap in knowledge on the processes through which the informal arrangements feed into and sustain the formal water management systems, which requires elaborate further study. Critical focus areas are grassroots levels, especially the village level, the WUAs level and the Primary Courts level.

Challenges of current water reforms

Juma and Maganga (2005) and Kabudi (2005) have written on the challenges of drafting new laws for water utilisation in rural Tanzania. The historical context of trends towards formalisation of customary is provided by Juma and Maganga (2005) who observe that the early years of independence found a number of African countries facing the challenge of trying to define the place and position of customary law, while at the same time building modern nation states. A series of conferences were conducted to chart out the future of customary and Islamic law within the emerging legal systems of these independent African states. The idea was to allow customary law to organically grow within the legal systems of the emerging states, and then for it to be absorbed into mainstream laws (formal). These ground-breaking conferences discussed the contemporary definition and ambit of customary law in Africa; their respective place in the legal systems; the policy that should be adopted regarding uniformity of customary law in newly independent Africa countries; the problems of how to ascertain and record Islamic and customary laws and the conflicts of laws. Subsequent to the London Conference another conference was held in Dar es Salaam from 9-19 September 1963 to consider matters touching upon both Islamic law and customary law. In particular the conference considered two main questions: the future of the local courts; and the place of customary law in the modern African legal systems (Rubin and Cotran, 1971).

The Judicature and Application of Laws Ordinance (JALO) was enacted in 1961 to provide for a general framework for the growth and development of 'formal' customary law in Tanzania. This piece of legislation provides a helpful guide on the extent to which customary law is accepted as one of the sources of applicable laws. The Ordinance is very clear that customary laws and Islamic laws cannot apply over areas covered by written laws. This confirms the predominance of the formal-written over informal unwritten laws, implying that Islamic and customary law do not apply over areas where an Act of Parliament make provisions. The piece of legislation gave customary laws a very general formal recognition, setting strict parameters within which customary law could later grow and develop. According to JALO, customary law may only apply over matters of a civil nature and does not extend to cover criminal matters. Second, in order for customary law to apply it should be between members of a community in which rules of customary law relevant to the matter are established. Hence, statutory law courts could not apply any rule or practice of customary law, which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly superseded by any written law.

Under the statutory scheme provided by the JALO, customary laws were to grow under the ambit of district councils. Apart from a few District Councils which proceeded to formalize the customary laws of inheritance, custody of children and affiliation, no District Council has used this avenue to organically formalize customary water laws. The potential within the district councils to formalize local customary water laws have not been employed.

Kabudi (2005) observes that the on-going exercise of preparing new pieces of water legislation is faced with several challenges in relation to the process of drafting new laws as well as the scope and content of the proposed laws. For the first time in the history of legislating for water supply in Tanzania, the issue of rural water supply has received a special attention both in the policy and in the legislation proposals. However, despite that encouraging development, there are still issues that need to be clarified on the governance and utilisation of water by rural population. How eventually the issues of rural will be adequately addressed, will depend very much on the active participation of the rural population and other concerned stakeholders in the on-going process.

Writing about the policy framework for reforms on water resources and supply, Kabudi (2005) notes that, in adopting NAWAPO, the government shows to be keen to improve the regulation of water supply and sanitation in both urban and rural areas. The legal framework governing water supply is being reviewed so as to: define roles and responsibilities of various stakeholders; to secure investments made; augmenting private sector participation and legally recognizing water users entities. The main thrust of the review of the water legislation therefore, takes cue from NAWAPO and the latter had adopted a two-pronged approach of separating water resources legislation from those of service provision. For the proposed water resources legislation, NAWAPO recommends that the existing Water Act and regulations should be reviewed and conflicting water related laws and regulations be identified and harmonized, and strengthening the mandates of Basin Water Offices to:

- enforce legislation and operating rules on water use and pollution control;
- collect water user charges;
- facilitate the establishment of lower level water management organizations which will bring together users and stakeholders of the same source;
- act as centres for conflict resolution in water use, allocation and pollution control; and
- institutionalise relevant customary law and practice related to water management into statutes.

Overall, with regard to water resources management NAWAPO demands for the establishment of a “comprehensive framework for promoting the optimal, sustainable and equitable development and use of water resources for the benefit of all Tanzanians based on a clear set of guiding principles”. The guiding principles have been outlined as:

- subsidiarity through decentralization;
- equity amongst diverse stakeholders;
- participation of stakeholders in use and decision making; and
- sustainability of the resources.

NAWAPO promotes an integrated approach to water resources assessment, planning and development and development that takes into consideration the social, economic and environmental factors based on the above cited principles. For rural water supply, NAWAPO objective is to improve health and alleviate poverty of the rural population through improved access to adequate and safe water. The policy aims at defining ownership and management structures of Rural Water Supply Schemes (RWSS). To do that the policy calls for:

- review of existing law under which rural water user entities can be legally registered;
- strengthening private sector participation in water supply and sanitation services in rural areas; and
- dissemination of information of regulations pertaining to rural water supply and sanitation services.

The Rural Water Policy objectives have been formulated from four main principles derived from experience gained in the implementation of the 1991 National Water Policy and of other developing

countries (NAWAPO 2002:51). These are social principles, economic principles, environmental principles and sustainability principles. Under social principles NAWAPO promulgates that water is a basic need right and therefore accords first priority provision of water supply and sanitation services to basic human needs enjoying such use by rights. The policy further gives priority of investment in water supply and sanitation to areas which experience water scarcity and experience acute water shortage with an objective of satisfying human beings and livestock needs. NAWAPO objective is to achieve sustainable development and delivery of rural water supply services. That calls for clear definition of the roles and responsibilities of various actors and stakeholders. NAWAPO identifies conditions precedent for a sustainable rural water supply as including:

- supplying and managing water schemes at the lowest appropriate level;
- the establishment by beneficiaries themselves of the water schemes which they will own and manage;
- establishing a mechanism for full cost recovery maintenance and replacement;
- facilitating availability of spare parts and know how for timely repairs and maintenance of the schemes through standardization of equipment and promotion of private sector involvements;
- protection of water sources areas;
- reconciling the choice of technology and the level of service with the economic capacity of the user groups; and
- recognising the role of women as principle actors in the provision of rural water supply services.

The Policy objectives were set out in response to situation then pertaining in Tanzania. In 1971 the Government's twenty years Rural Water Supply Programme was launched with the objective of supplying every Tanzanian with safe and portable water within 400 metres. Notwithstanding reinforcement of UN Water Decade which was adopted by Tanzania, the target of supplying water to all by 1991 could not be achieved. It was found that it was only less than 48% of the rural population which had clean and safe water. And again the 48% target was largely achieved through donor support from among others DANIDA, SIDA, NORAD, TCRS, GTZ, KFW, FINNIDA and UNICEF. In their 1995 Water Sanitation Review, the Ministry responsible for water recommended that:

- the government should ensure adequate funding of rural water supply schemes;
- that cost sharing should be made obligatory;
- financial support be given to those ready to contribute financially towards the costs of construction and improvement;
- the government should encourage communities which want to manage their own water supplies and reduce over dependency on the government;
- there is need to encourage external support agencies to enhance funding of water projects.

It was further proposed that a new piece of legislation should be enacted to govern management of rural water supplies with specific attention to private sector participation in the projects and ownership by communities.

Giving a brief review of legislation on rural water supply, Kabudi (2005) notes that, unlike the urban water supply sector, the development of rural water supply sector legislation has been gradual. The Urban Water Supply Sub sector had the advantage of getting two pieces of legislation to regulate the water supply. The legislation are:

- the Urban Water Supply Act (Act No 7 of 1981);
- the Water Works Ordinance (Cap 281 of 1958)

Although the Urban Water Supply Act, 1981 established the National Urban Water Authority with the main aim of managing urban water supply in all urban areas in the country the Authority operates only in Dar es Salaam, Kibaha and Bagamoyo. It also manages a two Kilometres corridor on either side of the transmission mains from both lower and upper Ruvu water plants. However, in certain circumstances the application of the said legislation in the rural areas could not be avoided. The Waterworks Ordinance, Cap. 281 was enacted to provide for and regulate supply of water to the public. The Waterworks Ordinance has passed through two important stages of development. The first stage was prior to the amendments which were made pursuant to the provisions of Water Utilization (Miscellaneous Amendments) Act, 1997. The second stage comprises of reforms that have been implemented after the amendments. Initially the Minister was given the mandate by order, to declare any area defined in any such order to be a water supply area for the purposes of the Ordinance (section 5). Water Works Ordinance empowers the Minister to appoint a Water Authority for any water supply area. Until such appointment is made for any such area the Engineer in Chief acts as a Water Authority for that area (section 4). Further powers were given to the Minister to provide by order in the Gazette that such of the powers, duties and functions of the Water Authority for such area as are specified in the order should be exercised and performed by any person or persons other than the Water Authority.

Water Utilization (Miscellaneous Amendments) Act, 1981 repealed section 3 of the Waterworks Ordinance and replaced as follows:

- 3(1) The Minister may by order designate and declared any area define in any such order to be a Water Supply and Sewerage Board Authority for the purpose for the Ordinance;
- 3(2) The Minister may declare that the facilities and infrastructure used in rendering the above services be transferred to the declared Water Authority Board (section 4(2)).

The term Water Supply and Sewerage Area is defined by the Waterworks Ordinance to mean:

- in an urban area the area of jurisdiction of a City Council, a Municipal Council, a Town Council includes any urban areas other than a village, village settlement or a minor settlement.
- in rural areas, the areas within 400 metres of the existing distribution.

The effect of the amendments was that the powers of the Minister are confined to the City Council, a Town council, any urban area other than a village, village settlement or a minor settlement and an area within 400 metres of the existing distribution. This means that the application of the provisions of the Ordinance to the rural areas stopped. Prior to the amendments the Minister had powers to declare the rural areas to be Water Supply Areas. In the exercise of the powers discussed in above up to the end of October 2003 the Minister declared a total of 38 district headquarters to be Water Supply and Sewerage Authorities out of which 27 have already formed water boards.

A few attempts were made in developing rural water supply legislation pursuant to the provision the Water Utilization (Control and Regulation) Act, 1974. Under the Act the Minister has been given the mandate to make regulations prescribing anything which may be prescribed under the Act for better carrying into effect of the provisions of the Act. The Minister in exercise of these powers made Water Utilization (General) Regulations to provide for among other things, for the formation function and conduct of the Water Users Associations. As a result 44 Water Users Associations have been formed and registered as legal entities and 22 are in different stages of registration (Maji

Review, 2003:18). Under the said regulations the functions of the water user associations are to govern conservation, maintenance of works in the river in question and shall decide the assessment to be levied thereof and for the expenses of the association. Similarly under the provisions of Section 38(2) of the Act the Minister's powers are limited to making rules and regulations for the formation functions and conduct of local associations of water users.

The Local Government (District Authorities) Act, 1982 brought about further developments in the regulation of rural water supply. Under the Act all waterworks that were previously owned by the Government and institutions were vested with the District Councils and rural water supply operations and management became vested under the District Council Authorities (section 118(4) and First Schedule). The District Councils have been given the mandate to perform the functions specified under the First Schedule to the Act. Under Clauses 90-93 of the schedule the District Councils may among other things perform the following functions:

- provide, establish, maintain and control public water supplies and impose water rates;
- regulate or prohibit the sinking of wells and provide for closing of wells;
- regulate or prohibit the construction and use of furrows;
- prevent the pollution of water in any river, stream water course, well or other water supply in the area and
- for this purpose prohibit regulate or control the use of such water supply.

In view of the aforesaid background there is no specific legislation governing the Rural Water Supply Sub-Sector. The regulations or bye-laws made under various legislation do not adequately cover rural water supply and sanitation.

Kabudi (2005) highlights the issues that are addressed in the proposals for the rural water supply legislation are provided for in the NAWAPO. Taking into account the broad rural water supply sub-sector policy objectives which are to improve health and alleviate poverty of the majority of Tanzanians who live in the rural areas by improving access to adequate and safe water, the NAWAPO stipulated the following objectives:

- to provide adequate affordable and sustainable water supply services to the rural population;
- to define rules and responsibilities of various stakeholders;
- to attract the participation of the private sector in the delivery of goods and services;
- to involve the rural communities in contributing part of capital costs, and full cost recovery for operation and maintenance of services as opposed to the previous concept of cost sharing;
- to depart from the traditional supply driven to demand responsive approach in service provision;
- to manage water supplies at the lowest appropriate level as opposed to the centralized command control approach; and
- to improve health through integration of water supply, sanitation and hygiene education.

The specific issues addressed in the proposed rural water supply piece of legislation include:

- ownership and management of the rural- water infrastructure;
- siting of rural water supply systems;
- administrative and technical requirement;
- water supply and sanitation services;
- quality of water supplied to public through a public distribution system;
- licensing of practitioners;

- institutional aspects; and
- charging for water.

Highlighting the challenges and salient features of the proposed rural water supply legislation, Kabudi (2005) notes that the Rural Water Supply and Sanitation Bill addresses a number of issues as outlined in the Policy and contributions from stakeholders. The Ministry of Water and Livestock Development has decided that the Bill should be merged with the Urban Water Supply and Sewerage Bill into a Water Supply and Sanitation Bill. The consolidated Bill will have a parts dealing with urban water supply and another addressing rural water supply. That means some of the provisions that are in the Rural Water Supply and Sanitation Bill will be retained in the consolidated Bill. The discussion below reviews some of the challenges and salient features of the Bill on rural water supply.

Regarding ownership of water resources, it is noted that, as it is with other natural resources legislation, as well as the Water Utilization (Control and Regulation) Act, 1974 the proposed new water legislation vests the radical title on water to the Government (United Republic). The Water Resources Bill proposes that all the waters in Tanzania are vested in the United Republic. This means that all water uses, with few exceptions provided under the law, must be used with holders of water permits granted, as it is the case under the current Act where they are granted water rights. Therefore, the Bill does not envisage private ownership of water since state ownership of water resources is clearly stipulated under the Act and reiterated under NAWAPO. The Policy stipulates under Paragraph 4.1.1 that: "...all water in the country is vested in the United Republic of Tanzania and every citizen has an equal right to access and use the nation's natural water resources for his and the nations (sic) benefit".

One of the critical issues in legislating for rural water supply in Tanzania is the ownership and management of infrastructure. There are quite a number of rural water supply projects which have been financed by donor funding. In such a situation to whom does the infrastructure constructed belong and who is responsible for their management. In order to ensure sustainability of rural water supply it is necessary that communities be vested with the ownership of the infrastructure. In order to ensure that communities become legal owners of water supply schemes legal registration of water entities the proposals have provisions placing ownership of water supply schemes including water wells to the communities.

As in the case of urban water supplies, the draft Bill proposes that the regulation of rural water supplies should commence at source. Specification for the criteria for the citing of rural water schemes and protection of the system of works is important to ensure that the rural sector is not treated to sub-standard services. The law also will provide for pre-construction and post-construction screening of works and the necessary administrative and engineering requirements.

Regarding the administrative and engineering requirements for rural water supply, the Rural Water Supply Bill provides for the integration of water and sanitation services. It has provisions on design and development criteria which aim to ensure the following:

- pre and post-construction government screening of works;
- consistency in quality of materials used, and in standards of workmanship;
- construction (and maintenance) of private connections to a public mains system;
- construction, operation and maintenance of works;
- management of the quality of water supplied to consumers;

Other factors which the Draft Bill takes into account include,

- environmental protection against possible degradation from the use of such water;
- provision of Environmental Impact Assessment;

- implementation of demand responsive approaches;
- creation of water funds;
- implementation of demand responsive approaches

The draft Bill has provisions for licensing of small-scale water users, and it provides for minimum professional qualifications and procedures for licensing or registration of small-scale practitioners such as plumbers pump mechanics and masons. More specifically, the draft Bill provides for (i) selection criteria for applicants and their qualifications to be used by designated agency; and (ii) registration, certification and categories of such practitioners.

With regard to water service charging the draft Bill has provisions to ensure that rural water supply and sanitation services must ensure cost recovery. Therefore the Bill has provisions that will provide a legal framework for the:

- pricing and financing mechanisms for rural water supply schemes and water funds;
- obligations of services recipient to pay for the same;
- level, rates , criteria and parameters to be taken into account in the calculation of the charges;
- procedure for the payment and collection of the charges (including arrears of such charges);
- options for waiver of charges; and
- incidence of taxation laws on water charges, water supply equipment and treatment chemicals.

The proposed water legislation is the charging for water and financing of water management, which has challenged by some recent commentators (van Koppen et al. 2004). The current water fee charges distinguishes between the domestic, economic and institutional users, and the amounts to be paid differ according to whether the application is for:

- water for domestic/livestock/ small scale irrigation/ fish farming;
- water for large-scale irrigation;
- water for economic use for domestic/livestock/ fish farming;
- water for irrigation and an economic activity;
- power royalty fees
- water for industrial uses
- Water for institutional/ regional centre and
- Water for mining activities.

The private sector participation in rural water supply sanitation sub sector is provided for in NAWAPO. Tanzania has instituted economic reforms which has seen it moving away from centralised planned economy to free market economy. In implementation of economic reforms the private sector has been given a prominent role in the provisions of services. The Draft Bill has been trying to ensure there is flexibility and that a number of options and choices of form of private sector participation in the rural water supply. The choice will depend on their interest either in the existing water supply infrastructure or in the development of a new infrastructure. In the case of existing infrastructure invitation of the private sector in the management aims at enhancing efficiency and improvement of service delivery by injecting more capital into the existing water supply and sanitation infrastructure. The other area that the private sector is expected to play a big role is in the development of new infrastructure. The mechanism for the private sector participation in the existing infrastructure and new infrastructure rural water supply to be developed or managed by the private sector can be through service contracts, management contracts, leases, concessions, and outright privatisation.

Kabudi (2005) notes that governance of rural water supply in Mainland Tanzania have been dodged with a number of problems. The tendency for many years was more based on centralisation of management of rural water supplies through the Central Government or donor agencies. Even after the institution of the policy of decentralisation by devolution in Tanzania still the tendency was to decentralise down only the district level ignoring the lowest levels. This has made the institutional framework for rural water supply to be an issue of intense debate. The decentralisation of the government functions to the regions and districts started in 1972. The decentralisation was aimed to transfer the decision making as well as implementation close to the communities. Most ministries had to decentralise their functions to the regions and districts. The government decided to abolish the local governments but in 1982 they were reinstated. The objective of creating local government authorities is stipulated under the Constitution of the United Republic of Tanzania. Articles 145 and 146 of the Constitution among provides first for the establishment of local government authorities in each region district, urban area and village in the United Republic. The Constitution is empowered to enact law providing for the establishment of local government authorities their structure and composition sources of revenue and procedure for the conduct.

The Constitution further provides that the objectives of establishment of local government authorities are to transfer authority to the people in order to enable them to plan and implement development programmes within their respective areas. In the process decentralization at the regional level the Regional Commissioners play the same roles as Ministers while the Regional Administrative Secretaries play the role of Permanent Secretaries of Ministries.

The biggest challenge in the governance of rural water supply is to ensure that the village level and communities fully participate in the management of water resources. There are still discussions on what will be the role of district councils in the management of rural water supply. There is a general agreement that water user association should be the main vehicle in the management of rural water supplies. An association is a legal entity registered under the provisions of the Societies Ordinance [Cap.337). An association has similarities with cooperative societies. However, unlike cooperative societies which are subject to the control and interference by the Government through the Registrar of Cooperatives, the associations are autonomous. Water User Associations that can be registered under the provisions of the Societies Ordinance are to be registered with the Registrar of Associations who is under the Ministry of Home Affairs. Section 38(2) (f) of Water Utilization (Control and Regulation) Act, 1974 mandates the Minister with power to make regulations to provide for the formation, functions and conduct of local associations of water users. The associations are to be registered with the Ministry of Water. In both cases the societies registered are conferred with corporate status. They are capable of suing and being sued and owning property.

Best practices and directions for the future

A number of best practices related legal and institutional arrangements for water management can be drawn from the case studies cited in this chapter.

The first one is related to sharing of scarce water resources. Sokile et al (2005) cite irrigation water rotation as a successful case of formalised informal arrangement for water management. It is noted that water rotations (popularly known as zamu in the Usangu plains) provide an interesting and successful interplay of formal and informal institutions in water management. In the Mkoji sub-catchment, along long stretches of streams, both water users who have formal water rights and those who do not are increasingly realizing that the available water resource is not enough even for the water right holders. In the peak of dry season (September - November), all water users come together and agree on how to share water through rotational arrangements (zamu). This is done without external formal interventions. A weekly roster is set and agreed upon and each use

prefecture, commonly referred to as wana-zamu, i.e. the bearers of the rotation appoints members to make up a loose committee to oversee the water rotations. Each prefecture takes the rotation further to make up an intra-canal rotation. The table below shows such rotation schedule between intakes, taking the case of three villages along Mlowo River in the middle Mkoji sub catchment. With exception of the Ipatagwa and Motombaya improved irrigation schemes that receive water throughout the week even during this period, the remaining intakes are scheduled in a weekly rotation. It is observed that the informal rotation groups (zamu) and labour groups (njanwaa) have a great potential of contacts and mutual interaction, although this potential is yet to be realized. The groups interact in terms of membership and places where they operate. There is however, no mechanism as yet for synchronization of their undertakings, for example, for making sure that when it is the turn (zamu) of water users to access water, they also work together (njanwaa) in the fields to maximize water use without any losses. This vital interface mechanism requires further examination for maximum benefit.

The second lesson is related to the crafting of appropriate legal framework for water management. The formalisation process of water rights can draw a number of lessons from the more articulated processes relating to land. Customary tenures have received clearer recognition in land laws than in water laws of Tanzania. Customary land tenures have been recognised by the repealed Land Ordinance of 1920s and also the current Land Act and Village Land Acts of 1999.

The Land Act and Village Land Acts have both made attempts to define customary land tenures away from any ethnic/tribal group. In his recent paper on customary tenure, Fimbo (2004) illustrates some of the strategies that mainstream statutory provisions use to formalize customary tenures. This formalization strategy is described as aimed “to ensure that existing (customary) rights in and recognized long standing occupation or use are clarified and secured by law.” Fimbo points out that the Village Land Act (1999) uses the expressions “customary tenure,” “deemed right of occupancy” and “customary right of occupancy” to secure existing and longstanding use over lands. Recent developments within land law indicate the desire of policy makers (through new statutory organs) to define customary laws away from ethnic traditions and grant formal customary tenures over land. “Customary right of occupancy” is for example under the Village Land Act 1999 granted to an applicant by a village council. Whereas a “deemed right of occupancy” refers to the land title of an indigene, that is to say the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law.

Fimbo (2004) can discern from statutory provisions that generally customary tenures apply to all land whenever African communities have settled except in areas specifically excluded by legislation. Thus, though existence of customary tenure is now in terms of the Village Land Act, 1999 firmly rooted in the in game reserves, forest reserves, national parks and preserved areas, relevant formal authorities which retain power to regulate land use in those areas.

In safeguarding existing water rights of poor and marginalized villagers, the water sector could follow the same provisions as those which have guided the protection of customary land rights. However, it seems the policy makers in the water sector have been inspired by the neo-liberal principles that prevailed in the 1990s, which link everything to the individual rather than the community.

Conclusions

The Tanzanian case study has traced the historical process of formalising customary law and related arrangements related to the use and management of water resources in Tanzania; then presented four case studies that display interactions between traditional water management systems and the

modern, formal systems. The chapter also highlighted the content of the proposed policy and legal changes, focusing on the extent to which the proposed legislative dispensation will protect the existing traditional or customary water rights – showing that, despite the early initiatives at providing space for the growth of customary law, the legal system pertaining in Tanzania today is tilted more in favour of formal than informal systems. The authors conclude that:

- the new water laws will not usher in any shift of the position and place of customary water law. The mainstream policies and laws will continue to regard customary laws as a transient system expected to die out.
- because new statutory provisions will not reach out to all areas of the society, customary water laws of the various communities will continue to be resilient and policy makers will continue to contend with these laws where statutory laws have not reached.
- irrigation water rotation (popularly known as *zamu* in the Usangu plains) is a good example of sharing scarce water resources . This practice provides an interesting and successful interplay of formal and informal institutions in water management.
- the prevailing systems of customary water law involves not just utilisation of water but is closely linked to other external factors like markets for local products, injection of external capital (like irrigation), prevailing inheritance, legal system (system of local governance) and availability of mainstream courts operating outside the control of customary law institutions. Law reformers will have to contend with this diversity and conflicting interests and how it will affect the basin-wide water resources management.
- in order to protect the water rights of vulnerable and poor rural communities the formalisation process of water rights should draw a number of lessons from the more articulated customary land tenures.
- in carrying out water reforms, policy and lawmakers need also to explore alternatives to formal property rights, and in some cases, actually protect common property systems.
- unless development projects specifically engage with customary law, they are likely to marginalize and replace it. The repercussions of this could be negative for marginalized villagers who are not well placed to capture the benefits of the project.

2.2 Traditional Institutions and Customary Law as Instruments for Management in Zimbabwe

The Zimbabwean case study is documented in a paper titled ‘Traditional Institutions and Customary Law as Instruments for Management in Zimbabwe’ The paper notes that since 1996, Zimbabwe has been implementing a complex water sector reform programme aimed at decentralizing water resources management responsibility from central government to the user level. A new Water Act passed in 1998 led to the establishment of new user based institutions mandated to run the water sector. Despite the introduction of this new water management regime, customary law, and traditional informal practices still prevail among Shona rural communities. The extent to which customary law and indigenous institutions can be incorporated into the new water management regimes is a subject of debate. The dilemma faced by those implementing the reforms has been how to reconcile the new institutions with existing formal and informal institutions at the local levels. Although in real practice customary law plays a vital part in the resource governance system, very little has so far been done to systematically incorporate it into the new water management institutions. The situation in Zimbabwe has been made more complex by the “fast track” land reform programme initiated to run concurrently with that of water reform. It has seriously affected

both the customary laws and the new water management regime in the sense that it generally does away with systematic forms of natural resource governance. Two case studies drawn from the Mazowe and Manyame catchment demonstrate the importance of customary law in IWRM in Zimbabwe.

The paper argues that despite the attempt by both colonial and post-colonial regimes to try and subvert customary law to the formal judicial system, basic customary principles and practices have survived in Zimbabwe. Customary law has certain obvious qualities that make it quite different from European law. It is conciliatory rather than punitive. It is oral, not written and is therefore more adaptive in its interpretation and application. These distinctions need to be understood by any regime trying to create a unified body of laws governing resource management. Whether a government decides on the creation of a new code of law or to continue with their present system of legal pluralism, what is needed is an imaginative approach that takes cognizance of social realities. More research is required to systematically analyse the complexities inherent in customary law so as to make recommendations that contribute to more effective resource governance.

The paper notes that in 1995 Zimbabwe ~~began~~ embarked on a comprehensive reform of the water sector. This was in response to a strong donor driven international movement to introduce integrated water resource management and planning on a catchment scale, supported by local perceptions of the need for more equitable distribution of access to water. A main objective was to decentralize water resources management responsibility from central government ~~ministries and departments to the user level. This was to be accomplished through the decentralization of water management responsibility from central government to~~ to institutions made up of water users. ~~The~~ reforms sought to promote and legitimate stakeholder participation and involvement in decision-making processes through the promulgation of new legislation. The promulgation and formation of catchment councils and their ~~sub-catchment councils~~ provided the vehicle for water use representation and self regulation of water resources ~~and water user boards/associations~~. Another principle objective was the promotion of equal access to water for all Zimbabweans. This was necessary to redress past injustices ~~in accessing water so~~ so as to benefit the historically disadvantaged smallholder farmers and ~~upcoming~~ emergent indigenous commercial farmers while at the same time not prejudicing existing large-scale commercial and estate concerns (Bolding et. al., 1997, 32).

In line with the notions of the New Institutionalism was an economic rationale. ~~To~~ remove inefficiencies in water use and make the sector self-sustaining, demand management was promoted as a means to limit wasteful use of commercially used water (i.e. for irrigation). ~~Encapsulated~~ ~~putting more emphasis~~ was placed on cost recovery of investments in the water sector. Water was thus seen as ~~and treating water as~~ an economic good. Thus, the “user-pays principle” was adopted to reinforce this new focus.

A new National Water Act was passed in 1998. Under the newly formed Zimbabwe Water Authority, catchment councils were established. Catchment councils comprised selected members of their sub catchments councils, in turn selected by stakeholder groups ~~who in turn are underpinned by water user boards~~. The extent to which the original objectives of the reform have been achieved is a subject of on-going research and debate. Preliminary indications from research undertaken by the Centre for Applied Social Sciences, University of Zimbabwe from 1997 to 2002 suggest that ~~in~~ real practice, very little has changed for the targeted beneficiaries. Despite the initiatives water use and management in rural communal areas is still strongly influenced by customary law, and “informal practices.” Customary law and practice appear very resilient not only in the area of water management but in the governance of all natural resources. Customary law envisions natural resources holistically and has always embraced the notion of integrated management ~~—~~ something

that **W**estern science and law, rooted in Cartesian reductionism has been much slower to comprehend.

The dilemma faced by those engaged in water management at local levels is how to reconcile the newly created institutions with existing formal and informal institutions. They have to reconcile statutory district local government (Rural district councils) and traditional (indigenous) institutions of governance on the one hand, and the catchment councils on the other. There are immense problems in achieving any sort of fit between the spatial dimensions of the resource and the institutions of resource governance and rural development. (Latham, ~~CJK~~ 2002).

It is noted that nested levels of jurisdictions of traditional governance exist and these have relevance and applicability to local user communities yet little attention has been paid to the role of customary law and other locally developed legal or normative systems. (Katerere and Van der Zaag, 2003). The application of both indigenous and formal institutions of governance as instruments for the management of resources, and how useful symbiosis can be achieved is an exciting challenge to academics and water professionals. The Zimbabwean case is made more complex with the commencement of the current land reform programme. This programme has had a serious impact on both the customary laws and the new water management regime. In the sense that it has generally ignored –traditional forms of governance – both formal and customary. Most noticeable has been the uncontrolled use of water particularly in the resettlement areas that were former commercial farms, difficulties in collecting water levies/tariffs and considerable environmental damage to rivers by gold panning and deforestation. There has been a consequent weakening of the formal institutions of governance such as catchment councils and rural district councils.

Legal Pluralism

Most less economically developed countries (LEDCs) instituting water sector reform programmes contend with situations of plural legislative and institutional frameworks that govern resource use. May (1987, 21). Some legal scholars and practitioners argue that legal pluralism is counter-productive, divisive and violates the principle of the unity of the law. However, attempts to unify legal systems in both colonial and post-colonial Africa have generally met with very little success. Despite political and economic pressures, legal pluralism has shown an amazing vitality as a working system. (Hooker, 1975, viii). Zimbabwe has been no exception in regard to the existence of legal pluralism. In practical terms, communities in the communal areas of Zimbabwe are governed by resource systems that have multiple rules (state, RDC and local) with multiple legitimisation bases (e.g. legal and customary) and different enforcement structures and processes. (Nemarundwe (2003: 28).

Defining Customary Law

“Both law and custom comprise that code of rules approved by tribal tradition; the hereditary body of established conduct; that which has been observed, recognized, and enjoined from time immemorial, and handed down by the fore-fathers.” (Posselt 1935: 44) This definition raises fundamental elements of customary law.

- It is approved by tradition (communally agreed upon)
- It is handed down from generation to generation.

However, law (customary or otherwise) is not static. It changes as society adapts to changing social, economic and political circumstances. To what extent can that body of law and practice remain customary when it is subjected to so many pressures? Thus it can be questioned whether customary law is indeed customary at all. Is it perhaps a comparatively recent development set in motion by colonial culture contact. (Goldin and Gelfand (1975:28) In making this observation, Goldin and

Gelfand make the error of assuming that “custom” and “customary law” were in some way divorced from the institutions of governance upon which Society is structured.

It is true that the colonial period had a profound impact on the nature of laws and resource use patterns. It diluted and altered the authority of indigenous institutions and their validating customary practices. What emerged was a hybrid of African customary law and European law that ensured the compliance of the African population to their colonial masters. As important, the Colonial governments embarked on writing or codifying customary law so that it would be more readily accessible. As customary law came to be written down it inevitably altered in character. Writing down an unwritten law and “extracting immutable, non-negotiable rules from it to create a certainty which it presumably lacks, must inevitably change its substance.” (Goldin and Gelfand, 1975:28.) But it is the advantage of unwritten laws that their change is not consciously perceived as a departure from pre-existing binding rules. Thus they combine flexibility with a legitimizing ideology of immutability. When this is recognized as an important feature of customary law, it is obvious that attempts to codify it in case law or in statutes fundamentally alter its nature. The tendency is for it to lose its adaptive capacity.

The paper suggests that customary law is a body of customs, including different rules and regulations, usages and norms that are found in a particular society. In this paper, customary law is considered as any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any community and accepted by such community in general as having the force of law. It includes customary laws modified by external forces and pressures and the influence of Statutory Law. Customary Law is as much process as it is substantive. Emphasis is on both the formal and informal law as applied by the Shona peoples in the communal lands of Zimbabwe. This includes their informal water use practices not legally recognized by statutory instruments.

It is proposed to view a custom as simply society’s perception of what is normal, what is just and what is consistent with its worldview. It is generally perceived to have been practiced over a long period of time. Such adaptations as are made are iterative and within the shifting landscape of the peoples’ notions of what is culturally acceptable. They must conform to society’s current values. Customary law in this sense is not something that was, but something that is. Thus, it is not the law that governed a bygone age but a vibrant body of rules and principles that are flexible and constantly growing in response to a changing world. It is, as such, the law as it applies today (Katerere and Van der Zaag, 2003). In the conventional literature of the twentieth century, both culture and tradition are often portrayed as static and unchanging, founded in immutable customary laws (See Bullock 1913; Holleman 1952; and Bourdillon 1976). More recent literature engages the proposition that interpretations and analysis of culture are dynamic. They illustrate interpretations of what is traditional and cultural as being subject to influences of complex and conflicting stimuli, both external and internal.

Customary behaviour is perhaps best defined as what people consider seemly - what is fitting and acceptable in given situations. This is why it is never static and why defining what is “seemly” can and does change through time and is dependent on the perceptions and perspectives of individuals and groups. “A particular society is a going concern – it functions and perpetuates itself – because its members, quite unconsciously, agree on the basic rules for living together. ‘Culture’ is the shorthand term for these rules that guide the way of life of the members of the social group” (Foster 1962, 11). Culture and customary behaviour are reflections of society’s perceptions and worldviews. They are learned while practicing them. They are the embodiment of society’s legal institutions.

The use of the word customary to define indigenous African law is the cause of much that is misleading because, despite the wider and more accurate definition of custom as described above, there remains a vestigial conception of “custom and tradition as being archaic remnants of some

romantic period of the past. It might be more appropriate to use the term African law, with such descriptive local appellations as may be required. After all the unwritten Common Law of say Britain, is not labeled as “customary” though it undoubtedly is based on what is considered by British society as seemly and what is acceptable to that society at large. Thus we prefer to say that Zimbabwe has a plural legal system combining elements of Roman-Dutch, English and African Law.

African Customary Law versus Roman-Dutch Law:

Reference to the dynamism of customary law raises an important issue regarding external influences. It draws our attention to the restrictions that have been imposed on Shona law by both colonial and post-colonial governments in their attempts at reconciling and rationalizing the opposing views of what is good law: what conforms to society’s values: what is “seemly”. There exist basic differences between Roman-Dutch law (the Common Law of Zimbabwe) and Shona (customary) law that are as fundamental as the differing worldviews that produced them.

~~African law is very different from European law.~~

- African law is unwritten; and without writing it must survive ~~in~~ orally. In the Western world, all legal systems are recorded and characterized by a high level of certainty and precision (Bennett 1985, 17).
- African laws are not always so clearly defined. They may vary “from tribe to tribe, from district to district and even within the same tribe” (Goldin and Gelfand 1975, 10). Mamdani expresses a similar sentiment when he writes that “(T)he Native Authority was a tribal authority that dispensed customary law to those living within the territory of the tribe. As such there was no single customary law for all natives, but roughly as many sets of customary laws as there were said to be distinct tribes.” (Mamdani, 1996:110)
- Customary laws are directly validated by community acceptance. European law is enforced by legislative enactments and judicial precedents.
- Because of its written and codified nature, Western law is the preserve of professionals who engage in “the esoteric work of interpretation, application and creation of rules.” (Bennett 1985, 17).
- Africans understand their laws by virtue of being and living as Africans. African Customary courts are open to all and there are no restrictions regarding evidence.(Goldin B. and Gelfand 1975, 78).
- African law and Roman-Dutch law differ in the main objective of court action. African law is less ~~vindictive~~ adversarial than Roman-Dutch law. European Law is designed to punish transgressors. The aim of African law is reconciliation: “to arrive at a decision that will bring the litigants together again as friends and remove the friction.”(Goldin and Gelfand, (1975:23) Thus, African law aims primarily at ensuring compensation for the person or family wronged rather than inflicting punishment even though punishments are imposed in some cases.
- Thus Shona law makes no juridical distinction between criminal and civil law. All litigation was and is still -aimed at reconciliation (see Bourdillon 1976; Holleman 1955). Compensation for the injured parties is the prime objective rather than punitive punishment of the transgressors. (Goldin and Gelfand 1975, 78) The objective of traditional courts or tribunals in Africa was to reconcile the disputants and maintain peace, rather than to punish the wrongdoer. The ‘winner takes all’ judgements favoured by adversarial systems of law were generally avoided in favour of the ‘give-a little, take-a-little’ principle. Western systems are inherently goal-oriented and fear based, and tend to negotiate conflicts from a position of power and in order to control people and situations. In contrast, non-Western approaches tend to be process-oriented, focused on the needs and the desires of the people, rather than the results. There are, however, certain actions that are recognized and punishable as serious offences against the body politic: incest, witchcraft and murder fall within this category. In cases of this nature, not only is compensation for the injured party a requirement, but the perpetrator may be punished and the body politic also compensated. The injury is deemed both personal and

public. In European law on the other hand, the criminal must be punished for his wrong and the question of compensation for the person wronged is a lesser consideration. (Goldin and Gelfand 1975).

Structure and Function of the Shona Judicial System

Legal proceedings invariably commence at the village level. At village level it is important to heal ruptured relationships and restore peace and harmony as quickly and effectively as possible. Compensation or restitution of rights for aggrieved families is the best way to restore harmony. If it is not possible to reconcile disputants, then the matter is referred on appeal to the court of the ward headman (*Sadunhu*). The chief's court (*dare ramambo or dare ra'she*) is the court of final appeal before entering the State system of district courts presided over by professional judicial officers. Judgments in the lower tribunals (especially at village level) were and are hard to enforce if parties cannot be reconciled by arbitration. Commonly they will describe settlements as "*kuenzanisa*" - to smoothen out rather than "*kugura*" - to reach a determination. Only chiefs or semi-autonomous headmen could/can enforce judgments – and even chiefs (since the Colonial era) have sometimes had to resort to the state system to enforce judgments in the light of a total refusal by litigants to abide by their judgments. Judgments could be enforced through the district commissioner's court. This gave the chief's court the necessary support to ensure compliance. However, more commonly it is the fear of social sanctions (including those of the shades of the dead [*mhondoro* and *midzimu*]) that provides the necessary enforcement mechanism and legitimacy to the traditional judicial system to ensure compliance.

Traditional courts were undermined by the “peoples’ courts” introduced after Independence. Nevertheless, they continued to operate as forums for arbitration. “Peoples courts” have now almost completely disappeared in communal lands. Only in the new resettlement areas are such tribunals to be found and only on an informal basis. Chiefs are trying to gain access to these areas to restore their authority (and thereby capture control of natural resource management). With the resumption of authority implied by the Traditional Leaders Act (1998), the courts of chiefs and headmen (through their “assemblies”) are likely to assume a more positive role in the legal and social framework of the lives of rural people.

There are problems with governance and the management of resources at the lowest level. First of these is that of maintaining congruence with ecological or resource scale. In the case of water, a village community may have a limited vision of how to manage a river system. While recognizing some of the value of the aphorism that “small is beautiful” (Schumaker 1973), it nevertheless may devolve authority to such a low level that it can easily be usurped by larger and more powerful political entities. For this reason empirical data suggests that the unit of management best suited to compromise between the need for local level management and the demands of scale and practical governance, is that of the dunhu ([traditional ward headman's area of jurisdiction](#)). It is generally at this level, that an accumulation of authority provides the ingredients for ecological resilience without detracting from the need for a clear perception of the necessary links between authority and responsibility. For management of resources to endure, it is desirable that there is an alignment of authority, responsibility and incentive (Murphree, 2000:4). At the traditional ward (dunhu) level such an alignment is possible because the unit is still small enough for most people to know each other on a face-to-face basis, while large enough to encompass the ecologies of scale. It is perhaps for this reason that Shona society recognizes the dare of the sadunhu as the first level of formal indigenous government. It is at this level that customary law is made operational.

Shona Worldviews and Institutional Congruence

Traditional Shona religion centres on the belief in a Supreme Being-Mwari (God). While not otiose, Mwari is generally approached through a hierarchy of spirits, representing departed members of society. The founding ancestors of royal lineages are linked genealogically to even more senior sacred ancestors. The spirits of these “divine heroes” are merged with and become a part of the presence of Mwari, the Supreme Being. (Latham, 1987). In Shona religious belief, the founding ancestors of the most powerful royal lineages converge and merge with the spirit of Mwari – the Supreme Being.

Another important perception is represented by the dictums: “Nyika vanhu” and “Ishe vanhu: vanhu ndi’she: The land is the people, the chief is the people: the people are the chief.” By the authority of their acceptance of his station, the people determine the power and position of the chief. These maxims encapsulate an institutional reality that has profound implications. They suggest that the head of a socio-political unit (be it village, ward, chiefdom or state) governs by general consensus. Ishe vanhu, vanhu ndi’she allows the whole system to be flexible and adaptive in the face of both endogenous and exogenous influences. And as the people are also the land (*nyika vanhu*) and its resources, this worldview embraces a notion of Man and his environment in ecological union. In essence this is an ecological, territorial expression of religion We call it African Holism.

By stating that water “belongs to God”, people are saying it belongs to the land. And by saying it belongs to the land, they are saying it belongs to them. By implication, the control and management of water should therefore be in their hands. No one, not even the state president, has the right to claim a resource that is in the remit of Mwari and the Divine Heroes. By the same definition, the only authority that can allocate and manage water within the *nyika* is the chief. But the chief is the people (*Ishe vanhu*) and so it is the indigenous institutions of governance that have legitimacy in regard to water management and allocation. Our case studies support this perception. That it happens to coincide with currently popular notions of integrated community based management of resources is a happy convergence of academic scholarship and indigenous knowledge systems.

Colonial, Post Colonial Law & Shona Customary Law

In British controlled Africa, the colonial power assumed the mantle of custodian of general humanitarian notions of right and wrong. The standard formulation thus required that customary law be applicable in litigation involving Africans “if not repugnant to natural justice and morality”. The courts were required to “respect any native (civil) laws and custom ...except in so far as they may be compatible with the due exercise of Her Majesty’s power and jurisdiction.” The overriding constraint of this so called “repugnancy clause” therefore stemmed from the reality of defending power and the application of Customary Law became the equivalent of decentralized despotism. Bennett (1985:22;) fortifies this view when he states that the recognition of customary law is explained not in terms of an objective existence as ‘law’ but in terms of how it reinforced the structure of the colonial and the post-colonial state. (See also Koyana, D 1980).

It could be postulated that in the situation that prevailed during the colonial era many laws or customs might have weakened or died. This has, however, not been the case because traditional customary courts continued to function and were enshrined in legislation (African Law and Courts Act/Customary Law and Courts Act.) The Shona and other ethnic groups continued to bring their disputes to their village heads, ward headmen or chiefs for adjudication. Only in those cases where the litigants failed to reconcile their differences did they seek retrial in the courts of the District Commissioner. DC’s courts and the African Appeal Court were courts of record and consequently a body of case law developed. Thus traditional courts practiced African law except for the limitations placed upon them by the Colonial State and African Law merged with the Common Law of the State once litigants entered the court of the District Commissioner and the African Appeal Court. In these courts, African customary law was recognized, but proceedings were conducted according to

British notions of procedure and evidence. In so far as criminal proceedings were concerned, however, traditional courts had no jurisdiction. Thus in cases of, for example rape, the accused would be tried in the High Court before a judge and assessors (chosen for their knowledge of African Law) and if found guilty be given a punitive sentence. This did not preclude the traditional court hearing the case as a “civil cause of action” where the accused (now the defendant) and his family would be sued for compensatory damages in terms of African notions of justice.

The situation has not altered significantly since independence from Great Britain. Magistrates replace district commissioners and the High court the Court of Appeal for African Civil cases. In both the colonial and post-colonial periods legal plurality found full expression in the area of statute law. Laws passed into statute cover nearly all aspects of natural resource management and tenure. These invariably create a degree of legal pluralism with regard to governance or management of resources. The case of water is exemplary.

Water Sector Reform and Customary Law

Customary laws have existed in tandem with the statutory legislation for many years in Zimbabwe. The promulgation by the state of the first Water Act of 1927 created a government department responsible for the management and development of water, a specialist water court, statutory instruments for regulating byelaws covering bureaucratic procedures and technical criteria for water management. These were designed for and generally favoured settler and State-run irrigation systems. Indigenous African practices were perceived as wasteful and illegal. Yet, areas of customary practice remained (Bolding et al. 1996, 193). Throughout the communal lands there was very little penetration of State institutions (except where the few state run irrigation schemes came into being) and so traditional management of water remained *de facto* the only system in operation. State imposed legislation to regulate the use of water has largely been ignored at local level both in the colonial and post-independence states. First, it is little understood and has no relevance in terms of local norms and values. Secondly, the State lacks the capacity to penetrate to local level (except in episodic and spatially exceptional cases) to effect functional management.

The colonial authorities put in place a racially skewed water management model which ~~denied restricted the indigenous people~~ access to resources by indigenous people and thus placed limits on economic and development opportunities. This trend was to continue in the independence era. For example, within the irrigation sector in Zimbabwe by 1994, commercial farmers (predominantly white) still used about 84 percent of the available irrigation water while small-scale and subsistence farmers (predominantly black) used only 7 percent (Hellum 2001, 3). Consequently, water policy and law represent the complex interplay between multiple interests, priorities, and approaches that, as Derman et al. (2000) argue, are not always compatible. Many of these reforms embrace, albeit to varying degrees, principles of equity, efficiency, ecological integrity, and sustainability. These reforms are relatively recent, and therefore how they interact with customary approaches is not always clear. “The reform process is a site of tensions and conflicts between values and principles embedded in liberal economic thinking and more welfarist concerns embedded in both human rights and African customary laws.” (Hellum 2001, 11)

An analysis of some of the principles advocated in the reforms indicates that rights to resources under customary law are conceptualized in a fundamentally different way from those under the new water statute. This has implications for the resource use and management model being implemented. Several issues arise, including the legitimacy of treating water as an economic good and by extension, the user-pays principle. Other issues include the legitimacy of State authority at the local level of resource management as well as how basic needs are taken into account. The new water management regime in Zimbabwe, consistent with global trends, expressly advocates the treatment of water as an economic good and vests ownership of water in the State. In customary law

and practice water is a god-given resource to which all have free use rights. (Bolding *et al.* 1996; Sithole 2000; Mohamed-Katerere, 1996).

Under the new Act, use of all water other than for primary purposes (domestic) is regulated by permit. The permit if approved, stipulates volumes of water to which is attached an appropriate levy. During our research programme, we asked respondents their views on these provisions. The standard response was that all water came from God (Mwari) and was therefore free. No one may be denied water. This premise is based on the perception that “water is a sacred common-pool resource” (Hellum and Derman 2003, 1). A deeper exploration of Shona customary law would shed light on this aspect. For the Shona, the fact that “*Mvura yakabva kuna Mwari*” (water comes from God), is an extension of “*Nyika vanhu*”. In an earlier section, we stated that *nyika* includes all natural resources within its territory. We also state that *nyika* includes all people within the territory with access rights. People have kinship ties (both as cognates and agnates) stemming from the legitimate founding ancestor of the *nyika* (*muridzi wenyika*): the owner of the land.

A simple truth needs underlining. Development and management of resources by local communities is perceived as part of a holistic and integrated landscape. Yet governments, international practitioners and advocates of conservation and development invariably embark on single resource interventions ranging from forestry to wildlife to water. Our research data posits informed that Shona rural dwellers need water primarily to satisfy domestic requirements, to irrigate his small vegetable garden, and to water livestock. In a practical sense water must be accessible regardless of whether this is enshrined in the statutory documents or not. It is a human right because it is a source of basic survival (water is life). Yet the Water Act (1998) stipulates that water users must secure water permits if they want to use water for purposes other than domestic.

In a continuation of past policy, water is divided into two categories for use purposes: commercial and primary. This division stems from the beginning of the twentieth century and reflects the core land tenure division between commercial (formerly European) lands and communal (formerly tribal trust) lands. It also reflects the plural legal system of Roman Dutch Law superimposed upon Customary Law (Hellum and Derman (2003). Complicating this dichotomy is the vaguely worded legislation on what constitutes commercial use of water. Vigorous debate has taken place in the Mazowe, Manyame, and Sanyati catchments regarding this sensitive issue. It is sensitive in the sense that what has been customarily regarded as domestic by the rural water users (e.g. bucket-irrigated micro-irrigation projects) could be classified as commercial use of water under the new act.

The Water Act restricts primary (free, unregulated) use of water to the reasonable use of water for basic domestic human needs in or about the area of residential premises, the watering of livestock and for and charging dip tanks; and for domestic brick making. Thus they could be reclassified as irrigation schemes rather than “domestic gardens” thus rendering them liable to the requirements of the new act, including permits and levies. As one chief in Nyadiri sub-catchment stated, “Our concern is for our tiny gardens. Is a tiny garden adjacent to a perennial pool or dam an irrigation scheme or not?”

Superficially, the focus on equity in new water law reforms appears to be consistent with customary law approaches as it reinforces the notion of the primary right to water for everyone. However, the issue of equity is linked to the criterion of economic beneficial use. The communal area stakeholders are very much aware of this. They also question what these primary needs are that statute law protects since they are god-given in the first instance.

Among Shona communities, water use is ordinarily regulated by local water point committees, very often dominated by women within a nested system of accountability to local assemblies of elders

under the chiefs, headmen, and village heads, according to local customary practice. There are rules for protecting the resource and in the event of non-compliance, there are penalties that can be imposed, the most powerful being social ostracism. Customary norms and practices may be better suited to handle enforcement of water use and management practices than the new institutions imposed by the reform programme because they have local legitimacy. Enforceability of water rights in a rural context hinges on means of effective, inexpensive adjudication, which tends to be the hall mark of customary systems of water related dispute resolution as opposed to litigation before the courts of law. It is doubtful if state institutions could effectively provide such effective management down to field edge.

The Water Act gives the responsibility for enforcement to the Catchment Councils, agencies whose legitimacy is still in questioned because they do not fall into any existing frameworks of resource management (be they customary or otherwise) with which they are familiar.

During the research process, it was found out that seventy five percent of rural Zimbabweans interviewed believe that customary authorities – chiefs, headmen, kraal-heads and spirit mediums should regulate water use. Yet these do not have any formal representation on the new stakeholder bodies although chiefs sometimes participate as ordinary members. In the light of the water and land reform, we ask what kinds and forms of law will emerge from these apparently contradictory processes as the new black farmers move into areas that were previously occupied by white farmers? (Hellum and Derman 2003). How local negotiations over entitlement and access to resources take place in the shadow of both state law and international law is a central theme in the literature of legal pluralism (Griffiths 1997).

Social science acknowledges certain fundamental ingredients for successful NRM. Amongst the most important are resilience, congruence, adaptability and nested levels of jurisdiction. Most of these, as they apply to local communities, are congruent with the traditional institutional arrangements of resource governance. Indeed our research suggests that through time, local level adaptive management employs considerable energy to molding, rejecting or modifying “outsider” interventions so as to fit their local institutional conventions. In the process the strengths or advantages of either system are usually diminished and their operational effectiveness reduced. This is the all too obvious legacy of the often well intentioned, top- down interventions of the last ten decades.

What is suggested here may incline the reader to the view that we advocate turning back the clock and re-discovering the proverbial traditional “Little Society”, romanticized as a homogenous and harmonious group of equals (Beach 1980). This is not our stance: far from it. The Little Society is as diverse and divergent as the larger world of which it is a part. What we emphasize, is that, at the local level, the institutional arrangements of local traditional governance are what regulate society in practical terms. At the local level, it is local knowledge that is generally best equipped to deal with complexity, uncertainty and environmental shocks. Despite the introduction of the water reforms, water use and management in the communal areas of the catchments in our study have remained largely governed by customary laws and practices. Therefore, it would be sensible to recognize the strength, resilience and elasticity of local institutions as the best instruments to manage and develop their resources in a manner most likely to be sustainable. This can be done through devolution of power to appropriate levels. By the nature of their institutionalized devolution of power, through nested levels of spatial and jurisdictional authority, the Shona customary system of governance provides for systematic devolution and creates an environment for top-down, bottom-up and lateral accountability because “*Ishe vanhu, vanhu nd’she.*”

The paradoxical reason for failure of CPR management of resources lies in the reluctance or inability of central government structures to devolve power to appropriate levels of management.

“The problem is that this requires also a shift of real decision-making powers from the national to the district and local levels. National power groups normally, however, strongly resist giving up power once they have acquired it” (Stohr and Taylor 1981, 471). It is not local level institutions that lack ability to manage their own resources. It is external power, vested in state, regional and global politicians and bureaucrats that lacks the will to provide real devolution. The real threat to local level management of natural resources is not their lack of ability to manage using their own institutions and customary laws, it is the lack of these external authorities’ will to release their political hold on power that is the main factor inhibiting their ability to function effectively. Science “has laid the empirical basis for substantive policy and political change. It has also suggested, however, that we have now reached the stage where experience must actively be applied in the political arena; with tenurial empowerment being the goal and the communities themselves being the actors” (Murphree 1995, 7). Murphree was addressing general issues of community-based management of natural resources but they have absolute resonance with integrated water resource management. It is the postulate of this paper, that the pivotal role of indigenous (traditional) institutions, based on accepted and understood worldviews, and enshrined in customary law and practice, may provide the practical and acceptable path for political acceptance of devolved community based management of resources. It may also prove an acceptable and exciting arena for academics and development professionals to find sustainable solutions to the problems of resource management.

2.3 The Interface Between Customary and Formal Water Legislation in South Africa

The South African case study (documented in Anderson 2005; Malzbender *et al* 2005; Pegram and Bofitalos 2005; and Pollard and du Toit 2005) explores the continuing ‘secondary status’ of African smallholder water users in the former Lebowa and Kwa Ndebele homelands, compared to the former white-dominated areas in the Olifants Basin. It compares the implementation of the Water Act of 1956 in the former white areas, with implementation in the former homelands by customary tribal authorities.

Anderson (2005) notes that South Africa is currently establishing 19 basin-level governing-bodies called Catchment Management Agencies (CMA’s). The CMA’s are responsible for implementing South Africa’s new water management approach that aims to foster economic development and poverty eradication, while maintaining the ecological integrity of the system. The first CMA was established in the Inkomati catchment area in March 2004 and the minister, based on the recommendations of the advisory committee, will soon appoint a governing board. The Inkomati CMA was established after seven years of public participation and stakeholder negotiations. The complicated socio-political issues at play in the Inkomati, as well as the fact that this was the first CMA in the processes to be initiated, have created opportunities to learn improved techniques to engage disadvantaged communities in IWRM. It is pointed out that, ultimately, the success of the Inkomati CMA will depend on the calibre of the individuals nominated to represent the interests and their ability to voice the needs of rural and poor communities. In addition, these individuals will need to see beyond sectoral interests to build a common vision for catchment management; to see the importance of raising public awareness and establishing effective local representative bodies; and to use creative methods of communication based on reliable and transparent sources of information. To assist in the process, DWAF will need conflict resolution expertise drawn from local knowledge and experiences. The challenges that lie ahead for the Inkomati CMA are likely to occur in other catchment processes in South Africa and DWAF will need to apply these principles as it seeks to establish a further three CMA’s over the next year.

In the first part of their paper, Malzbender *et al* (2005) discuss the rationale for the recognition of traditional water management structures in the light of the realities of water management and supply in South Africa’s rural areas. Based on the findings of two case studies, it is argued that customary arrangements form part of the social adaptive capacity of communities and can aid integrated water

resource management. In the second part, they discuss the relationship between traditional water governance structures and South Africa's new National Water Act. The case is made that South Africa's law and policy framework supports the recognition of traditional water governance structures as part of the overall water management strategy. Based on these arguments, in its final part, the paper debates the role for traditional leadership in water management in the cross-over zone between traditional rural customs and the new democratic governance and service delivery structures in South Africa.

In their paper, Pegram and Bofilatos (2005) outline the legislative requirements for representation on CMA Governing Boards and highlight the way that this may be used to support the interests of rural and poor communities in obtaining improved access to water. The paper illustrates the advantage of the process through the experience of the Advisory Committee for the Inkomati CMA Governing Board leading to an outcome that would have been unlikely through an electoral or public nomination process. However, it is noted that, ultimately the process will be dependent upon the calibre of the individuals nominated to represent the interests and their ability to voice the needs rural and poor communities within different WMA. The South African water sector waits with baited breath for the outcome of this brave new experiment in institutional change.

In their paper, Pollard and du Toit (2005) note that, central to the National Water Policy of South Africa and echoed in the National Water Act (Act 36 of 1998) and Water Services Act (Act 108 of 1997), is the devolution of water management and regulation to regional authorities that take the form of Water Services Authorities and Catchment Management Agencies. Their argument is that local government has a very narrow focus of responsibility within WRM – that is, a focus specifically on water supply - and that this is not planned within the WRM framework of the catchment. They suggest that in a new policy environment that talks to sustainability planning this represents a major oversight. Moreover, this situation is exacerbated by the different boundaries within which WRM and water supply operate. They illustrate this argument through examining the situation in the Sand River catchment and the Bohlabela Municipal District and highlights key issues that should be considered in charting a way forward.

3 GUIDELINES FOR TAKING INTO ACCOUNT CUSTOMARY LAWS IN IWRM

One of the outputs of the project was to develop guidelines – ‘good practice’ knowledge resource – for taking account of customary laws in the delivery of more effective and equitable IWRM under plural legal systems in Southern Africa, and two draft guidelines have been developed.

3.1 Guidelines for Policy Makers

The first guideline is targeted at policy makers. This is based upon the outcomes and statement of the African Water Laws conference (See below).

Accommodating Customary Water Management Arrangements to Consolidate Poverty-focused Water Reform

Across most of Sub-Saharan Africa, decision-making on day-to-day water development and management issues is in the hands of local communities. Over centuries and with limited external assistance, individuals and communities have developed small irrigation systems, springs and wells for domestic water supply, small dams for livestock etc. Such water uses are typically governed by customary water management arrangements whose evolution in the local environment will in many places have helped them stand the test of time.

Unprecedented investments to develop water resources are now being made by national and international agencies. New institutions are also being established to manage water resources on a catchment basis. Each of these institutions typically covers large areas and many small-scale water users. But do these investments and efforts really build upon what already exists?

Not only are there opportunities to build upon the existing infrastructure, but even more importantly, to build upon existing local or indigenous institutions, many of which already encapsulate the knowledge, experience and practice needed to manage water effectively in their specific context. Could not better use be made of these opportunities by working more closely with traditional management/governance bodies/institutions?

Objective of the briefing note

This briefing note aims to share with water policy makers, administrators and managers, international financing institutions, donors and other key players, current and relevant ideas, options and means to consolidate poverty-focused water reform. Expressly it advocates (as necessary) revisions of water laws and policies, and complementary changes to water resources’ development and administration, to better accommodate customary water management arrangements alongside statutory initiatives. It is proposed that building on, blending the best and redressing inadequacies of the two approaches – customary and statutory – is the surest route to realising the principles of IWRM, and the MDGs.

Context

Current water reforms in most southern African countries focus on the use of statutory legal systems to regulate the use of water resources. These countries however have pluralistic legal systems - land and water resources are regulated by different common law institutions, as well as statutory law, customary laws of different ethnic groups, and Islamic law. Especially in poor rural areas, diverse customary laws are often more important than statutory law and are relied upon in developing access to natural resources and resolving management conflicts. Neglect of customary laws may cause implementation of IWRM to fail, or will have negative consequences for individuals and groups who were better served by customary-based systems – especially the poor.

In Africa the existence and effectiveness of local community-based arrangements for livelihood-oriented natural resource management, and the need for synergy with statutory legal frameworks, has already been recognized, for example in land tenure reform and titling. However, recent statutory water reform in most

African countries still ignores community-based water arrangements, exclusively focusing on centralized statutory water permits, water levies, and new basin institutions. Thus, statutory water reform risks missing and possibly jeopardizing vital opportunities to concretise universal human rights to water for life, human rights to livelihoods and prevention of starvation, and opportunities to achieve the Millennium Development Goals of halving, by 2015, the number of people without access to safe drinking water and sanitation, halving the number of people with incomes below one dollar a day, and empowering women

Recommendations - ideas, options and means

This section offers recommendations that might be considered by policy makers, administrators, managers and other parties with interests in promoting and implementing poverty-focused water reforms. Some of the suggestions are elaborated in terms of the steps that might be taken, while others are open ended, inviting further reflection. In either case the aim is to promote the identification of locally appropriate and enforceable procedures, tools, and modalities for building upon or consolidating CWMA in water development and regulation.

In water policy and law
<ul style="list-style-type: none"> • Ensure that all policies and laws are essentially pro-poor (PRSPs & other overarching policies should provide a steer for this but may fail to explicitly indicate adequately address how with respect to natural resources this might be done). Examples would include ensuring formal recognition of the legitimacy of small-scale productive uses for livelihoods.
<ul style="list-style-type: none"> • Formally recognize the validity and legitimacy of local community-based water arrangements – as far as they comply or are convergent with principles of human rights (sounds like the old colonial codicil “not repugnant to natural law and justice – meaning Western notions of same) and constitutional imperatives – as equal to, or alongside, statutory rights and foster synergy between the systems: <ul style="list-style-type: none"> ➤ ‘Recognition’ is pragmatic: legal pluralism is the norm; not to recognise CWMA is to limit horizons, preclude synergistic opportunities; ➤ ‘Customary rights’ should be compliant (or responsive to convergence) with accepted principles; ➤ Seek optimal blend: build on and enhance positive elements of CWMA; redress inequities (e.g. arrangements that disadvantage women); ➤ Degrees of formalisation: a recorded acknowledgement of CWMA would be more flexible than codification, which might stifling or corrupt the customary arrangement; ➤ Commission studies to develop robust mechanisms for assessing the advantages and disadvantages of codification to communities, diverse groups, and individuals.
In developing water resources
<ul style="list-style-type: none"> • Provide financial and technical support for affordable infrastructure development for small-scale rural water uses by women and men, building on CWMA and local government, better integrating domestic and productive uses, and incorporating institutional principles consistent with community-based arrangements in the technical design of infrastructure from local to basin level.
<ul style="list-style-type: none"> • Provide training opportunities for practitioners (and students) to develop their understanding of and abilities to interface with local community-based water arrangements.
In administering and authorizing water use
<ul style="list-style-type: none"> • Avoid imposing alien & unrealistic registration requirements: <ul style="list-style-type: none"> ➤ Disconnect payment of water services from entitlement to water.
<ul style="list-style-type: none"> • Give consideration to the allocation of collective rights which would provide secure legal rights for local communities over common resources on which they depend: <ul style="list-style-type: none"> ➤ Allocate collective water rights to pastoral communities. Current trends towards privatisation and enclosure deny mobility and flexibility which are key to the survival of pastoral

<p>communities. Policies and laws should allocate collective water rights to users of CPRs such as watering ponds:</p> <ul style="list-style-type: none"> ➤ Allocate collective water rights to small-scale irrigating groups.
<ul style="list-style-type: none"> • Restrict water levies to large-scale and collective water users (Ref. Van Koppen et al); for example in Tanzania: (a) TANESCO who get a lot of revenue from hydro-power generation; and (b) large-scale parastatal irrigation projects (now being privatised).
<ul style="list-style-type: none"> • Linkage between land and water rights. Ensure that land related policies and laws are not implemented at the cost of customary water management arrangements: <ul style="list-style-type: none"> ➤ Avoid uncontrolled privatisation of the commons. During this neo-liberal era there is a general tendency towards privatisation, titling and enclosure of common property resources (CPRs). These are vital for the survival of poor land and water users, who need assured rights to access grazing and water. Mobility and flexibility is key to the survival of such livestock keeping people, who continue to provide a major part of the meat and milk produced in the country. Finding ways to maintain and strengthen such mobility is crucial for the survival of pastoral communities, and calls for the pastoral herders to “modernise” and settle down would mean death to pastoral livelihood systems which have proved productive and sustainable, despite harsh and risk prone environments. ➤ Seek an understanding of the gendered dynamics of local water and land arrangements, so as to ensure that women’s entitlements (and those of other vulnerable groups) to resources for family livelihoods are respected, protected, and improved.
<ul style="list-style-type: none"> • Test the logistical requirements, implementability and enforceability of draft legislation before wholesale adoption.
<p>In mitigating upstream-downstream or groundwater competition, e.g. in the dry season</p>
<ul style="list-style-type: none"> • Maintaining a pro-poor focus. Prioritise & protect water uses that are most beneficial for the livelihoods of the poor against more powerful users: <ul style="list-style-type: none"> ➤ Facilitate dialogue according to local community-based arrangements, such as proportional allocation.
<ul style="list-style-type: none"> • Provide deliberative procedures to reduce and solve conflicts: <ul style="list-style-type: none"> ➤ Identify and promote reconciliatory conflict management systems as opposed to adversarial systems e.g. in areas where cultivators and livestock keepers co-exist, ways should be found to reduce risks of conflict between them through locally agreed rules for rights of passage for animals along agreed pathways, access to water and compensation for crop damage (ref Ben Cousins); ➤ Recognise, strengthen and facilitate water sharing dialogue according to local community-based arrangements, such as proportional allocation.
<p>In establishing statutory water resources management institutions</p>
<ul style="list-style-type: none"> • Ensure that the integration of IWRM is balanced with the devolution of WRM authority to the lowest appropriate level: <ul style="list-style-type: none"> ➤ Keep emergent water bureaucracies (e.g. all new basin institutions) small, cost effective and connected to ‘poverty’; ➤ Build on existent formal and informal water management structures, including local government; ➤ Ensure that new water bureaucracies actively take account of CWMA (Have they been recorded? Have the mechanisms for assessing the advantages & disadvantages of codification been deployed? Have staff received training on understanding CWMA and interfacing with communities?)

Further information

Implementation guidelines

Case studies (33 papers) presented at the African water laws workshop, 26-28 January 2005, Johannesburg (www.nri.org/waterlaw/workshop)

3.2 Guidelines for Catchment Managers

The second guideline is targeted at catchment managers (See below).

Across most of (southern) Africa, decision-making on day-to-day water development and management issues is in the hands of local communities. Over centuries, local individuals and communities have developed small irrigation systems, springs and wells for domestic water supply, small dams for livestock etc with limited external assistance. These water systems are mainly governed by customary water management arrangements that have also been developed locally. These systems or rules are specific to local environments and have stood the test of time in many places.

Unprecedented investments to develop water resources are now being made by national and international agencies. New institutions are also being established to manage water resources on a catchment basis. Each of these institutions typically covers large areas and many small-scale water users. But do these investments and efforts really build upon what already exists?

Not only are there opportunities to build upon the existing infrastructure, but even more importantly, to build upon existing local or indigenous institutions, many of which already encapsulate the knowledge, experience and practice needed to manage water effectively in their specific context. Could not better use be made of these opportunities by working more closely with traditional management/governance bodies/institutions?

Objective of these guidelines

These guidelines aim to provide ideas, advice and options to help water managers make the best use of customary water management systems alongside formal management systems in working towards the objectives of IWRM. You can use the guidelines if you are trying to find new ways to build effective implementation of IWRM upon locally successful water management practices. They will help you to find a balance between the implementation of centralised systems such as licensing for all water users

introduced at a catchment or national level, and local management rules.

Some key terms defined

Customary – something based upon custom, that is currently in use but changing.

Customary law – is usually local, unwritten, and considered 'informal'. It may have its origins in social, cultural, ethnic, or religious experience.

Formal and statutory laws – are written down in the statute books of the state and are thus strongly backed up by state power in implementation

Living customary laws – while customary laws may be codified and 'fixed' (e.g. as during colonial periods to establish a basis for indirect rule) they are otherwise constantly evolving

Customary water management systems/ arrangements – water management systems (a system is not just infrastructure but also the resources, institutions etc) that are based mainly upon customary laws, rules or norms

Institutions – mechanisms, rules and customs by which people and organisations interact with each other; often also interpreted in a sense as organisations (e.g. local government).

Integrated Water Resources Management – a process which promotes the coordinated development and management of water, land and related resources, in order to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems' (definition of IWRM, GWP 2000).

Guidelines: how to make the best use of customary water management arrangements

This section poses questions that you could ask yourself as a water manager, and suggests some possible courses of action to find the answers to the questions. It is intended to inspire water managers to think about customary water management arrangements, to avoid eroding or damaging such practices where they are successful, and where possible, to find ways to build upon them.

KEY ISSUES

ACTIONS YOU COULD TAKE

Existence of customary water management arrangements

Customary water management systems are usually localised and based upon unwritten laws. Therefore consider:

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| <ul style="list-style-type: none">▪ Are you aware of the different customary water management systems for development, use and management of water that may exist in the catchment where you work?▪ Do you understand the main characteristics of these systems and what makes them more or less successful?▪ Are traditional conflict avoidance or resolution management systems in place that may, when needed, address water-related problems? | <ul style="list-style-type: none">▪ Investigate where these systems are found and what types of issue and decision-making are addressed▪ Investigate the rules, who the decision-makers are, who are the beneficiaries, the scale at which they work, their history▪ Consider collaborating these systems and traditional leaders to help avoid and resolve water-related conflicts. Use traditional courts and reconciliatory-based systems rather than adversarial courts for enforcement |
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Effectiveness of customary water management arrangements

Customary water management systems may be highly effective (e.g. compared to formal systems that are perhaps not sufficiently resourced to penetrate to the local level) or failing and struggling to cope with changes

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| <ul style="list-style-type: none">▪ Are customary water management systems equitable?• Are customary water management systems efficient themselves? Do they encourage collective action for investments in infrastructure and efficient uses of water and avoid wastage?▪ Are customary water management systems sustainable?▪ At what scale are customary water management systems most effective?▪ Do you know how many water users are actively governed by customary water management arrangements compared to formal systems? | <ul style="list-style-type: none">• Think about the extent to which customary water management systems discriminate on the basis of gender, ethnicity, age and consider actions that might be taken to address these shortcomings• Consider whether customary water management systems take water management decisions and actions at a lower cost than is possible through a bureaucracy working at a larger scale.▪ Have they endured? Are they equipped to cope with change?▪ Assess |
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Recognition of customary water management arrangements

Customary water management systems are usually ignored in water policies, laws and guidelines.

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| <ul style="list-style-type: none">▪ Do the existing policies, laws and guidelines stop you from recognising or collaborating with customary water management arrangements? | <ul style="list-style-type: none">▪ Advise policy makers on whether customary water management systems should given more recognition in policies and laws (see |
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KEY ISSUES

ACTIONS YOU COULD TAKE

policy brief).

Example: Gadaa systems in Ethiopia

In Oromia, Ethiopia, inter-and intra-ethnic conflicts over the use of natural resources, including water, in the major pastoral areas are settled by local elders following the principles of the Gadaa (age-based) system. Elders in their 40s become the key decision makers. These customary institutions have largely been ignored by the government in dealing with conflict resolution between individuals and communities. This has led to a reduction in their efficiency and relevance.

(Source: Edossa, Babel, Gupta & Awulachew, 2005)

Example: A conflict over rural water supply in South Africa is solved by traditional authorities

In Tshikombani village in Venda, South Africa, villagers developed a self-regulated and self-financed water supply system that was managed by the local traditional leader. Water from a mountain stream was piped to the village for gardens and domestic use. A conflict later arose with the neighbouring village who claimed equal access to the stream and therefore also the water scheme. Traditional authorities in the two villages were unable to resolve the dispute which was referred to the local Magistrate's court. They returned the case for local leaders to resolve and eventually the traditional leaders agreed that the adjacent village could benefit from the scheme providing they contributed equally to the costs of maintenance.

(Source: Malzbender, Goldin, Turton & Earle, 2005)

Building upon customary water management arrangements

There are many practical steps you could consider to build upon customary water management arrangements.

- Do new institutions risk overlapping with or undermining existing ones that function well?
- Are the water charges levied effective in encouraging more efficient and equitable use of water?
- Do they raise enough revenue to cover the costs of collection?
- When negotiating conflicts, are local values and dispute settlement procedures built upon?
- Are there problems in setting abstraction limits because of large seasonal fluctuations in available water resources?
- Are you encouraged to promote 'participation' and 'grassroots involvement' in your activities?
- Make an inventory of existing local institutions and build upon their strengths.
- Consider whether registration, water rights and fee payment favour a particular group, at the expense of others (e.g. illiterate, women, livestock keepers)
- Ensure that most charges levied can be utilised to improve local management
- Relegate problem-solving to local institutions at the lowest appropriate level while supporting the marginalized.
- Consider using volumetric caps to manage wet season abstractions (based upon a formal centrally managed system), and proportional caps to manage dry season abstractions (managed by users based upon flexible customary arrangements) etc
- Consider understanding and supporting customary water management arrangements as a concrete way (entry point) to encourage grassroots participation

4 AWARENESS RAISING

Two workshops with catchment managers and other key professionals were held in South Africa and Tanzania in November and December 2005 to raise awareness and test the draft guidelines. Reports of outcomes from two workshops are attached to this report.

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6 ANNEXES

6.1 Summary of the proceedings of the South African workshop

Background

DFID is supporting comparative research, policy dialogue, and training in Tanzania, Zimbabwe, and South Africa on 'Implications of customary law for implementing IWRM' (project number R8323; www.nri.org/waterlaw/). This project also supported the international workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa' 26-28 January 2005, co-organized by IWMI, the Faculty of Law of the University of Dar-es-Salaam, the Natural Resource Institute UK, and the Department of Water Affairs and Forestry, South Africa. In the context of this project, the International Water Management Institute and Ninham Shand Consulting Services organized a South Africa national policy dialogue workshop on 11 November 2005 at the ARC-IWMI premises in Silverton.

The participants of the workshop 'Existing lawful use in the former homelands' (see list below) agreed on the following points.

Conclusions and Recommendations

1 - The Constitution of South Africa and the National Water Act (1998) clearly recognize black customary law. In particular, the now repealed 'Interim Protection of Informal Land Rights Act 1996' gave an indication of informal rights as including 'any tribal, customary, or indigenous law or practice of a tribe; the custom, usage or administrative practice in an area'. So existing water uses in former homelands are lawful under the National Water Act and if exercised during the qualifying period (two years preceding the promulgation of the National Water Act) and if they can be proved (satellite imagery, tribal permission, etc). There is therefore no need for a specific declaration about the lawfulness of existing water use in the former homelands. It is noted that all existing lawful water use is recognized as formal entitlements until they are replaced under Compulsory Licensing.

2 – However, a Section 33 declaration about 'existing' lawful water uses in former homelands may be needed in cases in which water entitlements were not exercised in the qualifying period, for example due to the collapse of irrigation schemes (as many smallholder irrigation schemes in Limpopo province) or lack of infrastructure development to exercise allocated rights.

3 –It is needed to better reach people on the ground and to improve our understanding on the strengths of customary water arrangements, while recognizing their weaknesses, e.g. with regard to gender equality or elected leadership. New measures building upon the strengths of customary water laws and complying with the National Water Act (1998) and Constitution need to be designed in a bottom-up consultative way.

4 - General Authorizations, in which the Department of Water Affairs and Forestry grants formal authorization to customary water users, may be an appropriate entitlement to support customary water use. More thought is needed on HOW this can be done.

5 –Water licensing to individuals in former homelands may erode the customary rights of those who have no licenses. A better understanding is needed of possible negative impacts of individual entitlements.

6 – Existing water uses in the former homelands need to be identified during the validation process.

7 – Penalties for late registration to be waived should be considered for the former homelands because people were hardly or not at all informed about the need to register.

8 - DWAF needs to implement less precautionary and more aggressively, recognising the risks of not taking action or taking action too slowly.

Participants

Anderson, Aileen	Ninham Shand Consulting Services – presenter*
Kavin, Hadley	Legal consultant free lance – main presenter*
Khethe, Arthur	DWAF
Koyana, Nomzi	DWAF
Masangu, Glenda	Program for Land and Agrarian Studies Cape Town Ph.D.
Mohapi, Ndileka	DWAF - presenter
Quibell, Gavin	DFID consultant to DWAF Water Allocation Reform – presenter*
Rakimana, Tshepo	DWAF
Skosana, Vusi	DWAF
Sullivan, Amy	International Water Management Institute
Thompson, Hubert	Engineer and Advocate
Tucher, Paul	AWIRU University of Pretoria
Van der Merwe, Francois	DWAF
Van Koppen, Barbara	International Water Management Institute – presenter*

*Presentations are available

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Barbara van Koppen: 082 8286750 b.vankoppen@cgiar.org

6.2 Summary of the proceedings the Dar es Salaam workshop

Workshop objectives

The objective of the workshop was to facilitate an exchange of ideas, advice and options for accommodating customary water management arrangements alongside statutory management systems. More specifically the workshop aimed to develop innovative ways by which policy makers and water sector professionals could respectively identify, evaluate and utilise living customary laws to enhance the delivery of efficient, equitable and sustainable IWRM.

Workshop outcomes

(i) The draft briefing notes, *poverty-focused water reform* and *good practice guidelines for water managers*, tested in the Tanzanian context against the workshop objectives - delivery of more effective, equitable and sustainable IWRM - validated and upgraded.

(ii) Imaginative options and outline plans to effect: (a) the promotion of policy reform agenda, and: (b) dissemination and up-take of the good-practice guidelines (i.e. through awareness creation, training, capacity building).

Workshop programme

1st December 2005

Time	Activity/ Presentation	Responsible	Chairperson
09.00 – 09.30	Registration	Secretariat	
09.30 – 10.00	Opening Remarks and Introductions	IRA Director	Eng. W. Mwaruvanda, RBWO
10.00 – 10.30	Brief project introduction; Workshop objectives & outcomes; Introduction to WS format.	Prof. Ibrahim Juma	
10.30 – 11.00	<i>Contextual papers for poverty-focused water reform:</i>		
	Customary Law Issues Emerging from the AWL Conference (15 mins)	Prof. Ibrahim Juma	
	Issues in integrating customary arrangements in water policy and law (15 mins)	Dr. Faustin Maganga	
11.00 – 11.15	<i>Coffee/Tea Break</i>		
11.15 – 11.30	‘Critique’ of policy reform briefing note (10 mins to catalyse subsequent group discussion)	Eng. I.I. Nkuba PBWO	
11.30 – 12.15	Group work (homogeneous groups, max of 6 per group); Clear instructions: re-read brief (individually); critically review recommendations, the 5 ‘ideas, options & means’ sections; strengths/weaknesses of each component perhaps? Come up with new ideas, options & means; (flip chart).		
12.15 – 13.00	Presentation of all groups’ observations in plenary		
13.00 – 14.00	<i>Lunch Break</i>		
14.00 – 14.30	<i>More contextual papers</i>		Dr. C. Sokile

	The Current Drive to Formalise Property Rights in Tanzania and its Implications for Water Management (15 mins)	Dr. Faustin Maganga, IRA	
	Taxes and Titles at the Interface of Customary and Formal Water Law (15 mins)	Presenter: Dr. Barbara Van Koppen	
14.30 – 14.45	<i>Clarification by way of discussion</i>		
14.45 – 15.30	Group work (homogeneous groups, max of 6 per group); Clear instructions: x imaginative but realisable ways (how, who, when, where etc) that the policy reform agenda (in the brief) might be promoted; outline plan picking up on links; document ways (flip chart)		
15.30 – 16.15	Presentation of groups' 'ways' & 'outline plans' in plenary		
16.15 – 16.30	Managing Water Conflicts Through 'Traditional' Institutions in Pangani Basin	Hilda Kiwasila, IRA, UDSM	
16.30 – 18.30	Refreshments		

2nd December 2005

Time	Activity/ Presentation	Responsible	Chairperson
09.00 – 09.30	<i>Contextual papers for 'good practice' guidelines for water managers:</i>		Dr. Bruce Lankford
	Presentation of the Riparwin Project (15 mins)	Dr. Bruce Lankford	
	Existence and Effectiveness of Customary Water Management Arrangements (15 mins)	Presenter: Dr. Charles S. Sokile, UNESCO	
09.30 – 09.45	<i>Clarification by way of discussion</i>		
09.45 – 10.00	Critique of good practice guidelines (10 mins; <i>to catalyse following group work</i>)	Willie Mwaruvanda, RBWO	
10.00 – 10.45	Group work (homogeneous groups, max of 6 per group); Re-read policy brief (individually); critically review the first 2 sets of issues and actions (existence.. & effectiveness); Come up with 'y' diverse examples of CWMA against each 'issue', test actions against examples; improve / elaborate 'actions' list in light of examples; document examples and improved actions (flip chart).		
10.45 – 11.30	Presentation of groups' CWMA 'examples' & improved 'actions' list		
11.30 – 12.00	<i>More contextual papers</i>		

	Customary and Formal Arrangements to Address Over-Abstraction in Mkoji Catchment, Upper Ruaha (15 mins)	Presenter: Abraham Mehari, IWMI	
	Addressing up-stream-downstream competition in water use in Rufiji Basin (15 mins)	Dr. Bruce Lankford	
12.00 – 12.15	<i>Clarification by way of discussion</i>		
12.15 – 13.00	Group work (homogeneous groups, max of 6 per group); Re-read guidelines (individually); critically review the last 2 sets of issues and actions (recognition.. & building upon); (set 3) Come up with diverse examples of where policy & laws impede recognition of CWMAs; identify actions to mitigate examples; (set 4) come up with additional examples of CWMAs and ways to build on them; document all examples and actions (flip chart).		
13.00 – 14.00	Lunch Break		
14.00 – 14.45	Presentation of group work: 'examples' & improved 'actions' list		
14.45 – 15.30	Reflections/discussion of both sets of group work		
15.30 – 16.00	Discussion on the way forward, (including a presentation of training and consultancy opportunities in IWRM)	Professor N.F. Madulu	
16.00 – 16.15	Round –up		

Conclusions and Recommendations

1. The extent to which informal water management arrangements should be formalised depends on circumstances. In some cases formalisation empowers the marginalized, but in other circumstances it dis-empowers them.
2. The limitations of informal water management arrangements in managing water resources in large areas water noted. The challenge is to facilitate the best mix of formal and informal arrangements.
3. The need to conceptualise customary law beyond ethnic confines was emphasised.
4. A number of exaggerations were noted in the draft briefing notes were noted and toned down.
5. The crucial role of Apex Water Users Associations (AWUAs) in bridging formal and informal systems of managing water resources was noted.

Workshop Participants

Name	Institution
1. Prof. Ibrahim H. Juma	Faculty of Law, Univ. of Dsm
2. Dr. Faustin P. Maganga	Inst. of Resource Assessment, Univ. of Dsm
3. Dr. Barabara Van Koppen	International Water Management Institute
4. Ms. Hilda Kiwasila	Inst. of Resource Assessment, Univ. of Dsm

5. Dr. Bruce Lankford	University of East Anglia
6. Dr. Hussein Sosovele	Inst. of Resource Assessment, Univ. of Dsm
7. Eng. I.I. Nkuba	Pangani Basin Water Office, Moshi
8. Eng. Willie Mwaruvanda	Rufiji Basin Water Office, Iringa
9. Dr. S. Mwakalila	Department of Geography, Univ. of Dsm
10. Dr. Charles Sokile	UNESCO, Dar es Salaam
11. Mr. Abraham Mehari	International Water Management Institute
12. Prof. N.F. Madulu	Inst. of Resource Assessment, Univ. of Dsm
13. Mr. Nick Hepworth	PhD, University of East Anglia
14. Mr. Songoro Alexander	MSc, IRA
15. Mr. Amani Gibson	MSc, IRA
16. Mr. Brown Gwambene	MSc, IRA
17. Mr. Melubo Kokel	MSc, IRA
18. Mr. Kalumanga Eliakana	MSc, IRA
19. Ms. Nyega Nyangubho	MSc, IRA
20. Mr. Mwakipesile Augustino	MSc, IRA
21. Mr. Kalonga Severin	MSc, IRA
22. Ms. Tumbo Madaka	MSc, IRA
23. Mr. Nyakisinda Mgya	MSc, IRA
24. Mr. Lazaro Mangewa	MSc, IRA
25. Mr. Hamadi Hamisi	MSc, IRA
26. Mr. Ally Kebbly	MSc, IRA

