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# Water Law, Water Rights and Water Supply (Africa)



**Study Summary Report** August 1999

Individual Study country reports are also available for:  
Ghana, Mozambique, Tanzania, Uganda, Zambia

## **DFID KaR Project R7327**

This document is an output from a project funded by the UK Department for International Development (DFID) for the benefit of developing countries. The views expressed are not necessarily those of DFID.

August 1999

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# **STUDY REPORT**

<b>STUDY SUMMARY REPORT</b>
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## **STUDY COUNTRY REPORTS**

**Ghana**

**Mozambique**

**Tanzania**

**Uganda**

**Zambia**

# Study Summary Report

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## STUDY SUMMARY REPORT

### 1. INTRODUCTION

This study was funded by the UK Department for International Development - **DFID**. Its purpose was to identify (and promote awareness and understanding of), the constraints and enabling conditions provided by existing water laws (statutory and customary) with regard to the poor having access to, or being entitled to receive, a safe and reliable supply of water and sanitation facilities. The study focused on the poor (primarily those in rural communities but not excluding those in peri-urban settlements); on water for domestic (and other rural livelihood) needs; and included sanitation (where it was part of integrated water supply and sanitation programmes).

It was undertaken during the period January - July 1999 and was based in Ghana, Mozambique, Tanzania, Uganda, Zambia and UK, but information from other sources especially in Africa, has been included.

The study was carried out in Africa by the following Study Country Facilitators (SCFs):

- Kwadwo Mensah (lecturer and barrister), University of Cape Coast, GHANA
- Latifa Ibraimo (lawyer and consultant), Sustum Consultores, MOZAMBIQUE
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The **programme of activities** was as follows

- (a) Preliminary planning and formulation of study scope and approach
- (b) Contact and liaison with in-country Government ministries and agencies (e.g. water, legislative); local and international NGOs; Universities and other relevant institutions; individual experts; and private water sector companies.  
Contact and liaison with external foreign/international agencies involved with, or concerned about, the issues being addressed by the study.
- (c) Study in each project location to collect, collate and summarise, information (fact and opinion) so as to prepare reports on the following:
  - (i) content and status of current statutory water law(s)
  - (ii) nature and status of customary water law(s) and prevailing water rights

- (iii) nature and status of water supply/sanitation provision  
Followed by:
  - (iv) an analysis of the above to identify the constraints and enabling conditions provided by existing water laws and prevailing water rights, with regard to the poor receiving, or having access to, safe and reliable water and sanitation facilities.
- (d) On-going dissemination (primarily by email) of study findings between study participants, as well as exchange of knowledge and ideas about systems and practices between other sources.
- (e) Hold a workshop in Africa (1-2 June 1999) - to present and discuss study findings
- (f) Prepare and disseminate final project report.

The **outputs** from the study are:

- (a) A report from each of the study countries (Ghana, Mozambique, Tanzania, Uganda, Zambia) covering : content and status of current statutory water law(s); nature and status of customary water law(s) and prevailing water rights; nature and status of water supply/sanitation provision; analysis of the above to identify the constraints and enabling conditions provided by existing water laws with regard to the poor receiving, or having access to, safe and reliable water and sanitation facilities. (NB due regard is given to other laws that relate to water, e.g. land, environment, and public health law, as well as to international water law)
- (b) A report (*i.e. this report*) summarising the study's findings: from the 5 study countries; contributions from other African countries; workshop discussions; together with recommendations for subsequent action and further studies
- (c) Useful links / communication established between individuals / institutions from different professions (e.g. water engineers and lawyers) and from different countries in Africa.

This summary report is based on the findings from the five study countries and on wider knowledge from other sources. It's purpose is to present the key common issues that have been identified by this scoping study. More information and country specific detail can be found in the accompanying country reports.

## **2. NATURE AND STATUS OF THE STATUTORY LEGAL FRAMEWORK FOR WATER AND SANITATION**

### **2.1 WATER LEGISLATION**

In all five study countries revisions to water legislation has occurred within the last 8 years, and in most cases in the last 4 years. Whilst the law as is written can be described and assessed, an assessment of its effectiveness (implementation and enforcement) is limited by the relatively short time.

Typically water legislation serves two purposes: (1) to support water resource management and (2) water supply, policy and associated implementation strategies. Both purposes can be covered under a single Water Act (Bill or Statute), supported by more specific secondary Regulations, but often water resources and water supply are covered by separate Acts.

From the point of view of people having access to water or being provided with a water supply the law supports two mechanisms. Under water resource legislation the law provides a mechanism for issuing people with a licence or permit to abstract water from a source. Such a licence once granted entitles that person to take a specified amount of water, often for a specified purpose, from a specified source. This control on abstraction has, as its prime purpose, the management (allocation and conservation) of national water resources, which in most countries have been declared as the property of the state to be managed by the state for the public good. In many cases however small quantities of water for domestic purposes are exempt from the licensing regime.

Water supply legislation on the other-hand both empowers, and imposes an obligation on, designated water supply providers (they may be public or private sector) to provide water to the 'public'. Indirectly this obligation to provide, can be interpreted as giving an individual member of the 'public' the legal entitlement to receive, a water supply. However in most cases an individual member of the 'public' has little or no means to enforce the obligation or to protect his/her entitlement.

Whether the law on paper is considered to be good (and from a purely legal perspective it often is) or bad law is less significant than the general perception that its implementation and subsequent enforcement have been inadequate.

### 2.2 OTHER RELEVANT LEGISLATION

#### 2.2.1 Public Health (Sanitation) Law

Many important matters relating to sanitation provision are dealt by public health , local Government, public works, health and education legislation. Such fragmentation and the associated institutional conflicts, are constraints on any beneficial impact that the different, separate and often uncoordinated, legislation was intended to bring about.

#### 2.2.2 Land Law

Access to, or entitlement to use, a water source has historically been strongly tied to land ownership. This link persists today to different degrees, typically because it is deemed, at a political level, that it would be socially unacceptable to do otherwise than to protect long established historical rights. Land legislation can therefore have a major influence on individual or community rights to water. The law itself ,but often more the way it is implemented or enforced, is strongly influenced by politics, power and wealth. The reform of land law and the re-allocation of land is being cautiously tackled in several African countries.

#### 2.2.3 Environmental Law

Environmental protection legislation is relatively new in Africa. Particularly where demands exceed resources, then it is acknowledged that the needs of the natural environment should be part of the of the allocation equation, which previously had solely related to the different competing anthropogenic uses (agricultural, industrial, domestic). However pragmatically it can be assumed that environmental legislation will have little

real impact while priority is given to development and economic growth with negative consequences for the water environment. That said there is optimism that eventually properly integrated water, land and environmental legislation can have a beneficial impact on the poor, on their quality of life, and on their environment.

### 2.2.4 International law

International law relating to the shared management (utilisation and protection) of trans-boundary water resources by two or more states, does have, and certainly will have more so in the future, significant influence on the effectiveness of any national water legislation. Zambia for instance has seven major rivers, that are shared with 11 other neighbouring countries.

But international treaties between two or more states are developed by high level people who are a long way from, and probably have little awareness of, the poor in rural and urban communities. Equally for the people in these communities who are without adequate water and sanitation, there is little or no awareness of international water treaties and even if there was, there would be no concept that such legal provisions had any relevance to their plight.

In the current decade there has been noticeable movement , particularly by the World Bank, in working with Africa in addressing its important water resource issues. Conferences have been convened and the need for more water lawyers in Africa has been recognised.

The basic principles applicable and the issues to be addressed are the same at both the international level and the local community level. There are lessons that can be learned from both levels, even though for many of those involved the two levels rarely interact.

The difficulties involved in making sure the rights of all stakeholders with demands on a particular water resource are protected and associated obligations are enforced, is amply demonstrated by the fact that the international community has taken so many years to reach a stage where it has reached agreement on the wording of international water law. This law (the UN Convention on the Non-navigational Uses of International Watercourses - 1997) has yet to be brought in to force and no doubt implementation will go through further difficulties for many years to come. That said, this achievement is important and a major step forward.

International law also covers the subject of Human Rights. Whilst on initial reflection one would assume that rights to basic water and sanitation would be an obvious specified priority in the 1948 UN Universal Declaration of Human Rights, this is not the case. Only in the later 1989 UN Convention on the Rights of the Child, is water and sanitation given specific mention (Art.24).

### **3. NATURE AND STATUS OF CUSTOMARY (TRADITIONAL) WATER RIGHTS**

Customary law is not a set of written/coded rules of law, as is statutory law, but rather a set of traditional rules governing local communities. Traditional rules and rights relating to water are heavily linked with land ownership. Typically however every person belonging to a community would have unrestricted access to water for basic domestic needs. Different rules apply to surface water and ground water, with more scope for private ownership in the case of the later.

While the current status of customary water rules and rights in Africa is highly variable, especially when one considers the vast number of different social communities or tribes that exist. However certain general points can be made:

- (i) There is very little documented information on customary water rights in Africa and even less on their current status.
- (ii) At local community level, especially in rural areas, traditional customary rules still have some influence, especially where the state has been unable to provide water and sanitation facilities. However traditional values where the community was held to be more important than the individual are being reversed in modern society.
- (iii) Traditional local rules are to a large degree being replaced or subsumed by national statutory legislation and are ignored by international law. Some attempts have been made for statutory provisions to give due consideration to local customs but in these cases the legal relationship can be unclear.
- (iv) Political and social changes have provided opportunities to change traditional structures and behaviour including ways of dealing with land and water rights. (e.g. in South Africa following the removal of apartheid and the establishment of a new constitution; in Tanzania following independence and in Mozambique following both independence and also the recent civil war.)
- (v) The policy of encouraging community participation in water supply and sanitation provision and in general water resource management could provide opportunities for better integration of customary and statutory law.

### **4. NATURE AND STATUS OF WATER SUPPLY AND SANITATION PROVISION**

The figures (and their accuracy) for those with or without adequate water and sanitation vary widely; but provision for urban communities is generally more than 50% whilst that for the rural population is typically less than 50%. Whatever the figures the number involved is unacceptably high. Although there is no proper information it can be assumed that these percentages are even worse for the poorest members of both groups.

Although in theory closer to water supply and sanitation facilities the poor in urban slums can be considered to be in a worse situation than the poor in rural communities (who might benefit from: traditional customary rights to land and water for subsistence, access to a greater choice of water sources, lower population density and therefore lower local demand, traditional social (community) values / support, etc.).

In all cases it is widely acknowledged that access to, or provision of, adequate sanitation has received a lower priority than that given to water supply and that still more effort needs to be made to achieve properly integrated water supply and sanitation developments.

Despite this disappointing scenario today, there is a degree of optimism that positive steps to improve the situation are being, or can be, made.

## **5. IMPACT OF WATER LAW AND WATER RIGHTS ON WATER SUPPLY AND SANITATION PROVISION/ACCESS FOR THE POOR**

The study aimed to assess the impact of statutory and customary water law on access to or provision of adequate water supply and sanitation facilities on the part of the poor. In essence at the heart of this project is the analysis of the difference between water policy and law in theory and in practice.

The questions that the study attempted to address included:

- Who is entitled to what water?
- What “rules” govern allocation and entitlement, and who applies and enforces them?
- Who can enforce what rights, through what mechanisms and with what success?
- What redress is there for breach of legal obligations?
- What mechanisms and/or flexibility is there in the system to provide for adjustments or modifications for inequities, gaps or inadequate laws?

Within the limitation of such a scoping study, it has not been possible to gain clear and detailed answers to these questions and further study will be necessary.

However the national policies and laws (including customary rules) that govern the supply of water and provision of sanitation facilities to the poor have been identified. A perception of their effectiveness in affording the poor basic water and sanitation, has been gained.

The specific objectives were to identify specific constraints and enabling conditions. The constraints and enabling conditions identified by the study team at the Lusaka workshop are fully listed in Appendix A.

As can be seen from these lists the identified factors reflect the wide range, complexity and inter-relationships of the issues involved. Many relate more to political, practical, technical, economic, social, institutional issues, than strictly speaking to purely legal considerations.

In simple terms, the key constraint especially under statutory legal systems, is the lack of an accessible and effective legal means of redress for the poor, who do not have the adequate water and sanitation, that most people would say they are entitled to. The

inadequacy may lie in the legislation itself but more often than not it lies in the implementation and application.

The other issues highlight the context in which that constraint has to be tackled; Any solutions to remove or reduce constraints and to facilitate or enhance enabling conditions, will need to take these issues in to account. On the positive side the study has identified clear signs that enabling conditions are emerging and are being sought and supported.

## **6. CONCLUSIONS & RECOMMENDATIONS**

### **6.1 CONCLUSIONS**

- (a) History demonstrates that long held policies expressing an individual's right to have access to, or be provided with, adequate water supply and sanitation facilities, has not been matched by implementation, especially with respect to the poor. In many African countries it is the situation that over half the population do not have access to adequate water supply and sanitation facilities. With the recent phase of revisions to water legislation in many African countries the time is ripe to try and address this failing.

Effective (socially & politically acceptable) legally based mechanisms are needed. Two approaches are possible and both together would have a greater impact; i.e. on the one hand to provide an individual with accessible means of legal redress if his/her entitlement to water and sanitation is not met; and on the other hand to provide a means to enforce the obligations of water and sanitation providers.

- b) While national statutory legislation provides the principle legal framework for tackling the issues examined by this study, both customary law and international law have an important part to play.

Customary laws or traditional rules relating to land and water rights still, in some places, have a significant influence on day-to-day practice, especially in rural communities. Traditional customary rules (relating to land and water rights) are not widely documented and therefore there is considerable lack of awareness and understanding. Better knowledge and understanding are required in order to evaluate the part customary rules might play in future legal systems, especially in the current climate of encouraging local community participation in water supply and water resource management.

Many countries in Africa have boundaries, which lie within the same river basin and therefore have to share water resources with their neighbours. The absence or effectiveness of trans-boundary water treaties can have a significant impact on the feasibility of any national water resource allocation and management strategy and supporting legislation.

Thus both local (customary) and international legal systems need to be fully coordinated and integrated with national legislation. The degree to which this occurs

at present should be reviewed in order that improved approaches can be adopted where necessary.

## 6.2 RECOMMENDATIONS

Further more intensive studies are needed in order to provide the information necessary to improve awareness and understanding of the constraints and enabling conditions, so that the most appropriate solutions can be identified.

The following studies are proposed:

- (a) A survey to identify models of legal systems where mechanisms for legal redress for the poor and for obligation enforcement, have proved or are proving to be effective. This study would need to address specific questions such as:
  - What are the rules that identify the legal entitlement of the poor to safe water and sanitation?
  - Are they adequate and are they being effectively applied?
  - What are the legal obligations incumbent on what actors to ensure the poor receive their legal entitlements?.
  - What system/legal infrastructure can ensure equitable, accessible and enforceable rights to water for the poor?
- (b) A scoping study (similar to the 5 country Africa study) in:

Asia	(Bangladesh, India, Nepal, Pakistan, Sri Lanka)
S. & C. America	(Argentina, Chile, El Salvador, Guatemala, Nicaragua)
SE Asia	(Burma, Cambodia, Indonesia, Philippines, Vietnam)
- (c) A more detailed study in several African countries of the actual and perceived status of customary rules in relation to land and water rights.
- (d) A more detailed study in several African/Asian countries of the particular problems faced by the urban poor.
- (e) A more detailed study in several countries of the current level of co-ordination and integration between local, national and international water law.

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Mozambique  
Tanzania  
Uganda  
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## APPENDICES

### Notes from Lusaka Workshop [June 1999]

#### A : Identified Constraints

1. NB all points refer to both water supply and sanitation
2. Competing and increasing demands
3. Complexity of environment
4. Conflict between statutory and customary regimes
5. Externally imposed standardised privatisation
6. Inadequacies of customary regime
7. Inadequate (lack of ?) framework for deciding on water allocation
8. Inadequate (lack of ?) funding
9. Inadequate (lack of ?) integration (legal, organisational)
10. Inadequate (lack of ?) legislation on land rights
11. Inadequate (lack of ?) political will
12. Inadequate (lack of ?) public awareness
13. Inadequate (lack of ?) study of issues
14. Inadequate (lack of ?) information and understanding
15. Inadequate (meaningless) water policy
16. Inadequate / incomplete / non-integrated water legislation
17. Inadequate capacities (soft and hard)
18. Incoherence between policy and law
19. Information - not readily available / accessible
20. Uncertain international legal framework
21. 'Water is free' mentality
22. Water pricing
23. Weak / ineffective institutions and institutional co-ordination

## **B : Identified - Enabling Conditions**

NB all points refer to both water supply and sanitation

1. Community participation
2. Concentrated demand and emerging water markets
3. Demand driven provision (rural) - wanting & ability / willingness to pay (cost sharing)
4. Emergence of strategies to implement policy
5. Enabling private sector (NGO) participation (as opposed to privatisation)
6. Full cost recovery policy and some practice (urban)
7. Genuine moves to harmonised / integrated policy and strategy
8. Growing capacities (enhanced by training)
9. Growing consensus on importance of problem and commitment to do something
10. Improving sector co-ordination
11. Increased recognition of role of women
12. Inter- and multi-disciplinary approaches
13. International water agreements (evidence of real co-operation between states)
14. Legal (some customary & statutory) entitlement to have access to /be provided with a safe and adequate supply water
15. Moves to democratisation
16. Moves to genuinely consider water supply and sanitation together
17. Recognition of inter-relationship between national and international law

## **C : Identified - Solutions/Actions/Interventions**

NB all points refer to both water supply and sanitation

1. Capacity building - at all levels
2. Encourage / advocate country-led solutions
3. Encourage community participation + local resource mobilisation
4. Encourage international water agreements and co-operation
5. Gradual and informed decentralisation
6. More / better information management
7. More assessment at end-user level
8. More interaction between stakeholders (need to create awareness and opportunity for fora at, and between, all levels)
9. More monitoring of implementation to allow flexible/responsive strategies
10. more sharing of knowledge / experiences (incl. comparative state of the art studies)
11. More study of customary law
12. More study of relationships between local-national-international laws
13. More study of the particular problem of the urban poor
14. Raise awareness - at all levels (advocacy --> change attitudes / behaviour)
15. Sanitation - raise profile and integrate with water supply