

Accommodating customary water management arrangements to consolidate poverty-focused water reform: A policy brief

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. The domain of these institutions typically covers thousands of square kilometres, tens of thousands of farmers or other small-scale water users, and hundreds of thousands of domestic water consumers. 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?

Objective of the briefing note

The 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.



Customary water management arrangements

The terms *customary*, *custom*, *community-based*, *informal*, and *local*, which may have different meanings in different situations, are often used interchangeably to distinguish from *formal*, *statutory* or *legal* frameworks. Here we refer to 'customary water management arrangements (CWMA)', to convey the sense of locally inspired, probably informal (i.e. outside existing statutory arrangements), and active arrangements. Key terms are explained in the box.

Some key terms explained

Customary – based upon custom, but does not need to be traditional.

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

Statutory law – written down in the statute books; of the state.

Customary water management arrangements - locally inspired, probably informal, and in operation.

Formal / informal – often used to convey the sense of national/local, statutory/customary, written/unwritten etc.

Institutions – mechanisms, rules or customs by which people and organisations interact with each other.

Integrated Water Resources Management – aims to make the most equitable, efficient, and sustainable use of water through decision-making that considers water users at different scales.

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 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. 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.



Informal arrangements often represent the only social safety net and insurance for marginalized groupings. Also, communities may have strong norms of sharing of project benefits in general and sharing of water resources in particular, rather than allowing few individuals to appropriate or over-use a scarce community resource. Projects that are not aware of these norms may well introduce measures that favour the male elite

more than communities would have allowed had they been directing project design.

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, have 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 concretize 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 puts forward 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

- 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.
- 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 and constitutional imperatives – as equal to, or alongside, statutory rights and foster synergy between the systems:
 - ‘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

| |
|--|
| <ul style="list-style-type: none"> principles; <ul style="list-style-type: none"> ➤ 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 stifle 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. • Avoid discrimination. Some forms of direct and indirect discrimination can be solved by recognizing communities' (or groups of communities') indigenous water rights as lawful: <ul style="list-style-type: none"> ➤ Avoid formal registration processes that discriminate against women and other poor users who may feel and be intimidated by levels of bureaucracy (e.g. literacy requirements); ➤ Avoid water laws that favour larger water users over micro-scale water users. The former are frequently able to register and obtain first-class, often individual, water authorizations such as licenses or permits that are tradable (and compensated in cases of expropriation); the latter typically get collective second-class water rights (because of administration difficulties/costs). |
| 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. • 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. • 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 communities. Policies and laws should allocate collective water rights to users of CPRs such as watering ponds: ➤ Allocate collective water rights to small-scale irrigating groups. • Restrict water levies to large-scale and collective water users (Ref. Van Koppen et al); for example in Tanzania: (a) TANESCO who receive a lot of revenue from hydro-power generation; and (b) large-scale parastatal irrigation projects (now being privatised). • 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. |
| In mitigating upstream-downstream or groundwater competition, e.g. in the dry season |
| <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. |
| In establishing statutory water resources management institutions |
| <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 materials and information

You can find further information in the following documents:

- *Building upon customary practices in implementing IWRM in Africa: Good practice guidelines for water managers*
www.nri.org/waterlaw/reports
- Case studies (33 papers) presented at the *African Water Laws Workshop*, 26-28 January 2005, Johannesburg
www.nri.org/waterlaw/workshop
- Plenary statement of the participants at the *African Water Laws Workshop*, 26-28 January 2005, Johannesburg
www.nri.org/waterlaw/workshop

Acknowledgements

This guideline is an output of a research project supported by the UK Department for International Development (Project R8323 - 'Implications of customary laws for implementing Integrated Water Resources

Management') and the Water Research Fund for Southern Africa.

