

Formalization of Water Rights and its Implications for Equitable Sharing of Water Resources in Tanzania

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Keywords

Water rights, water tenure, legal pluralism, conflict, integrated water resources management, Tanzania

Abstract

Tanzania is already in advanced stage of drafting a new legal framework for water resources management, aimed at attaining the objectives of the National Water Policy of 2002. These objectives include the development of a comprehensive framework for promoting the optimal, sustainable and equitable development and use of water resources for the benefit of all Tanzanians; and separation of water resources management legislation from those of service provision. Three separate pieces of legislation will result from the proposed legal framework to cover water resources management, rural water supply and urban water supply and sewerage. In light of proposed framework, this paper surveys the increasing pressure on water resources, the efforts of the government in Tanzania trying to fix property regimes and formalizing informal arrangements related to the use of this resource. The paper starts with a brief discussion of the link between property rights and water resources management. This is the theoretical framework under which the discussion is based. The paper then presents four case studies that display interactions between traditional water management systems and the modern, formal systems. The paper then concludes with a discussion 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.

Introduction

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. The new Water Policy aims to develop a comprehensive framework for sustainable development and management of the nation's water resources. This includes:

- the introduction of cost sharing and beneficiary participation in planning, construction, operation and maintenance of community-based domestic water supply schemes; and
- a composition of 3 sub-sectors, one of which is Water Resources Management which would aim to provide a comprehensive framework for promoting optimal, sustainable and equitable development and use of water resources for the benefit of all.

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 include 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.

This paper surveys the increasing pressure on water resources, the efforts of the government in Tanzania trying to fix property regimes and formalizing informal arrangements related to the use of this resource. The paper starts with a brief discussion of the link between property rights and water resources management. This is the theoretical framework under which the discussion is based. The paper then presents four case studies that display interactions between traditional water management systems and the modern, formal systems. The paper then concludes with a discussion 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.

Property rights and water resources management – a conceptual framework

The debate about the role of property rights in NRM 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)¹. 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 2002², Mwangi, 2003³ Mwangi, 2004⁴).

In the new enthusiasm for 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 CPR's 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)⁵ 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

1 de Soto (2000) *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York, Basic Books.

2 Mathieu, P. (2002) Security of Tenure Papers and Unleashing Grass-root Investment for Rural Development in Africa: Some Comments. *Forum for Development Studies*, Vol. 29 No. 2. pp. 367-372

3 Mwangi, E. (2003) *Institutional Change and Politics: The Transformation of Property Rights in Kenya's Maaasailand*. PhD Dissertation, Indiana University.

4 Mwangi, E. (2004) Pitfalls of Privatization, PERC Reports, June 2004

5 Heltberg, R. (2001) Property Rights and Natural Resource Management in the Developing Countries, *Journal of Economic Surveys* Vol. 16 (2).

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 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)⁶, 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)⁷. The inter-play between formal and informal institutions in NRM is also well captured by Meinzen-Dick and Pradhan (2001), and Derman and Hellum (2003)⁸, who have written about the implications of legal pluralism for water resource management.

Four case studies narrated below illustrate this inter-play between formal and informal institutions.

Interactions between traditional and modern water management systems: 4 case studies

Case 1: The Taiko Clan vs Other Landanai Villagers (Water Conflict, Pangani Basin)

Landanai village is situated in Naberera Ward, Simanjiro District in Manyara Region. 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 during the early part of the 20th century, when it was established. Later one Greek known as George renovated the schemes. 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 local community had repaired the scheme collectively. Members of the clan claim that payment for the development of the scheme was made by Maasai community by contributing their livestock.

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 Rufiji 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 exclusive grant of water right. Already there were claims of

6 Meinzen-Dick, R. and R. Pradhan (2001). Implications of Legal Pluralism for Natural Resource Management, *IDS Bulletin*, 32, 4: 10 – 17.

7 Boesen, J; Maganga, F. And R. Odgaard (1999). Norms, Organizations and Actual Practices in Relation to Land and Water Management in Ruaha River Basin, Tanzania, in T. Granfelt (ed) *Managing the Globalized Environment*, London, Intermediate Technology Publications.

8 Derman, B. and A. Hellum (2002). Neither Tragedy nor Enclosure: Are There Inherent Human Rights in Water Management in Zimbabwe's Communal Lands? *European Journal of Development Research* 14, 2: 31 – 50.

some villagers having 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 will not be fair, and it will exacerbate conflict within the community.

The Pangani Basin Water Office recommended that Landanai village government and village assembly (involving all villagers) should be convened between 17-18 February 2004 to decide who should apply for water right over Landanai springs. The village government met on 17th February 2004. Delegation from Pangani Basin Water Board and Central Water Board (Dar es Salaam) attended this meeting. The delegation took time to explain the procedure to be followed by those applying for water rights. The village government meeting recommended to the village assembly that the village should form a committee of users of Landanai water springs. It is this committee that should apply for water right. It was recommended that this Committee be made up of: 4 members drawn from Taiko clan; two members from other pastoralist clans, 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 on 18th February 2004. The assembly agreed with the recommendations of the village government. The Committee was mandated to work under Landanai Village government for three years.

The case study of Landanai village illustrates how Maasai customary water law contends with mainstream statutory framework. The mainstream package here includes statutory provisions and resulting institutions like Basin Water Board, village governments and district and regional administrative structures. The Lanandai case provides a clear example of how an application by a clan for water right could not sustain the wider interests of the village and other customary water users. A traditional hitherto in control over 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 management⁹. 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'- are 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 on 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.

9 Potkanski, Tomasz (1994) "Property Concepts, Herding Patterns and Management of Natural Resources Among the Ngorongoro and Salei Maasai of Tanzania", Pastoral Land Tenure Series No. 6, IIED Drylands Programme, London, International Institute for Environment and Development.

Case 2: Irrigation Project vs Customary Law (Changes on Land and Water Management, Ndung'u, Pangani Basin)

The village of Ndung'u is situated in the local government Ward of Ndung'u of Same District. The village is part of the Same District Council. The village is a traditional village of the Wapare people, although there are other tribes like the Sambaa, Maasai pastoralists. It is estimated that around 2000 villagers use irrigation water. The village enjoys year round irrigation water. Paddy is grown twice a year. Irrigation water sustaining economic activities in Ndung'u flows from a number of rivers and streams.

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 non-existent because ownership was in accordance with customary arrangements which were well established. The conflicts over land were restricted to relatives competing over inherited parcels or tenant failing to comply with applicable agreement. These conflicts were referred to traditional bodies known as *kitala*.

With intervention of statutory laws, projects and other institutions land disputes are now referred to irrigation project leadership. If the project leadership fails, dispute will be taken before the *Baraza la Ardhi la Kijiji*. Land within irrigation areas are divided into blocks under block leaders. Resolution of disputes within irrigation area will involve irrigation block leaders. A new hybrid of customary system with strong dosage 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, 1982¹⁰ to regulate irrigation agriculture in Ndungu area of Same district.¹¹ The by-laws cover the Mkomazi river valley area of Ndungu 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. The Same District Council is product of another piece of legislation regulating local governments in Tanzania. 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 project also spelt 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. Each irrigation block elects its own leaders and committees. These leaders are mostly drawn from those families, which in the past exercised control over water and land management. Each block has designed its own internal Project office is expected to provide water users' groups with full technical assistance, and maintain an accurate inventory of the project property and assets.

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

10 Act No. 7 of 1982.

11 Same District Council (Regulation of Agriculture in Ndungu Irrigation Development Project) By-laws, 1994 GN No. 324 of 1994.

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. 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 Ndungu 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.

Despite delegation of powers to the level of Water Users' Assemblies and Water Users' Groups, project beneficiaries are subject to more control from the District Council and the project office. Project office may for instance change or vary the irrigation schedules according to weather conditions. The district council may impose water charge to 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, 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.

Case No. 3: Water rights vs multiple uses of irrigation water in Mbarali, Rufiji Basin

Festo Magidanga was fishing in a canal which NAFCO_Mbarali Farm had water rights, and he was arrested and charged at the Rujewa Primary Court (*NAFCO-Mbarali vs Festo Magidanga Criminal Case No. 162/ 1998*). NAFCO-Mbarali State Farm accused Festo Magidanga of Criminal Trespass, contrary to section 299 of the Penal Code, which creates an offence of unlawful entering into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property; or having lawfully entered into or upon property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with

intent to commit any offence. It was stated in court that Magidanga had blocked the flow of water in order to fish. Luckily for him, the officials of the State Farm failed to appear in court to give evidence against him, and he was released under Section 32 (1) of the Magistrates' Courts Act, 1984. Nevertheless, he had tasted the turmoil of police arrest and harassment by the law-enforcement state apparatus.

The government established the Basin Water Boards and Offices in order to manage water utilisation by different users, i.e. to allocate water rights; legalise, grant, modify and control water abstractions; protect the existing water rights and take to court defaulters of the Water Utilisation (Control and Regulation) Act, 1974. In many cases however, the statutory systems ignore multiple water usage of water which is allocated for a specific purpose (e.g. irrigation). The above example, which was first cited in Maganga and Juma (2000), illustrate this problem which faced many villagers who find it difficult not to utilise water passing near their premises simply because they belonged to people or institutions with water rights.

Case No. 4: Searching for Justice from Statutory Organs: Simon Dangala vs Manyenga Villagers, Rufiji Basin

In 1969 Simon Dangala in collaboration with 5 other villagers started the Manyenga irrigation canal. They invited other villagers to join in, and soon the canal had a membership of 36 villagers, most of them cultivating rice. As the membership grew, tensions started emerging among them, especially regarding maintenance of the canal, and competition over scarce water. All the other villagers who started the canal have since died. In 1997 SD (who actually lives in another village, Mawindi), applied for and got a 33-year Right of Occupancy for 59 acres of land on the upstream of the canal, creating tensions with villagers who depended on the canal downstream. SD did not have the ability to cultivate all the 59 acres, cultivating only about 4-5 acres, and renting the rest for between T. shs 15,000/= and T.shs 20,000/= per acre. The Rufiji Basin Water Board encouraged the villagers to form a Water Users Association in order to benefit from a World Bank-assisted Smallholder Irrigation Project. In 1998 the villagers applied for Water Right for their Association, but SD objected, since the canal passed through his land. He demanded a "compensation" of T. shs 150,000/= for his efforts in maintaining the canal since 1969, before he could allow the canal to pass through "his land".

In 2001, SD filed a civil case before Rujewa Primary Court, alleging that Adriano and Ayubu had encroached and trespassed into his duly registered canal by building bricks (*Simon Dangala vs Adriano Tandika and Ayubu Kanyamala Civil Case 38 of 2001, Rujewa Primary Court*). The canal in question was registered in Dangala's name and given number RBWO 96. He traced his ownership to the canal to a 1997 letter from the Rufiji Basin Office. The letter urged him to pay for the Water Right before 1st June 1998, and on 14th October 1998 he was given the Water Right, stipulating terms and conditions for his use of water. The complainant claimed that after getting the water Right he built a canal in 1999 by engaging the services of paid casual labourers. On 19th October 2001 while returning from his farms he found the respondents constructing a canal to draw water from the source, through his farms SD denied that he was a member of the Irrigation Association of Manyenga "A". Adriano Tandika told the Primary Court that he farmed at Manyenga, although he was not a resident of the village. He only used the Manyenga "A" by virtue of being a member of the Irrigation Association of Manyenga "A", which he joined in 1997. He alleged that when he joined the canal membership, it was under the leadership of SD. The canal broke down in 1997, and Adriano joined in the canal repair, and he rose to the position of Assistant Secretary in the Irrigation Association. He further testified that, in 1998 misunderstandings arose when SD demanded and was given Tshs 150,000/= for his role in the founding of the canal. Adriano further contended that SD's Water Right was RBWO 96, whereas the canal they were building had 200 registered members, with a Water Right RBWO 102. The Primary Court, comprising of the Primary Court Magistrate and two Court Assessors visited the canal in dispute. The court found that SD had no claim over the registered canal RBWO 102, which the two respondents were building. In

addition, the Primary Court noted that SD's Water Right (RBWO 96), had been revoked by the Rufiji Basin Water Office. SD lost his case and was ordered to pay the cost incurred by the two respondents. SD appealed to the District Court (*Simon Dangala vs Ayubu Kanyamala and Adrian Tandika*, Civil Appeal No. 2/ 2001). The District Court dismissed SD's appeal and noted that (a) The two respondents were given ownership of water registered as RBWO 102 as formal owners of Manyenga "A" Irrigators Association (b) Though it is true SD built the canal of Manyenga "A", he was compensated for the labour and costs he incurred.

In the above case, which was also reported in Maganga et al 2003¹², Simon Dangala first uses customary arrangement to obtain water for irrigation. However, 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.

Highlights and implications of the proposed legislative changes

The National Water Policy (2002) has not yet been incorporated into legislation. Water resources management in Tanzania is governed by the Water Utilisation (Control and Regulation) Act No. 42 of 1974 as amended by Act No. 10 of 1981, Act No. 17 of 1989, Water Laws (Miscellaneous Amendments) Act No. 8 of 1997 and Water Laws (Miscellaneous Amendments) Act of 1999, which relates to the administration of granting of rights to water users. The regulations provide in detail for the granting of water rights, and determine water use fees for various water uses.

Water Utilisation law and its various amendments are currently being revised, based on the provisions of the new policy. Among many important elements in the proposed legislation is the charging for water and financing of water management, which has challenged by some recent commentators (van Koppen et al. 2004¹³). The current water fees charges are as follows:

Current Water Use Fees in Tanzania

Item	T.shs	US\$
1. Water rights applications for domestic/livestock small scale irrigation/fish farming	40,000.00	40.00
2. Water rights applications for large-scale irrigation/power generation/industrial/commercial use	150,000.00	150.00
3. All other applications	40,000.00	40.00
4. On every appeal to the Minister	70,000.00	70.00
5. Economic water use fees		
(a) Domestic/livestock/fish farming for every 100m ³		
• All abstractions less than 37 litres/second, flat rate	35,000.00	35.00
• All abstractions equal or above 37 litres/second for 100m ³	35.00	0.035
(b) Irrigation (small scale)		
• All abstractions less than 37 litres/second, flat rate	35,000.00	35.00

¹² Maganga, F.; H. Kwasila; I. Juma and J. Butterworth (2003) Implications of customary norms and laws for implementing IWRM: Finding from Pangani and Rufiji basins, Tanzania, Paper Presented at the 4th Waternet/WARFSA Symposium, Gaborone.

¹³ Van Koppen, B.; C.S. Sokile; N. Hatibu; B.A. Lankford; H. Mahoo and P.Z. Yanda (2004) Formal Water Rights in Rural Tanzania: Deepening the Dichotomy? International Water Management Institute Working paper 71

• All abstractions equal or above 37 litres/second for 100m ³	35.00	0.035
(c) Large scale Irrigation		
• All abstractions less than 18.5 litres/second, flat rate	35.000	35.00
• All abstractions equal or above 18.5 litres/second for 100m ³	70.00	0.07
(d) Business (e.g. flower export) for every 1,000m ³	1,000.00	1.00
6. TANESCO Power Royalty Fees	165,500,000	165,500
7. Industrial		
• All abstractions less than 1.11 litres/second, flat rate	35,000.00	35.00
• All abstractions equal or above 1.11 litres/second for 100m ³	35.00	0.035
8. Institutional/Regional Centres		
All abstractions less than 1.4 litres/second, flat rate	35,000.00	35.00
All abstractions equal or above 1.4 litres/second for 100m ³		
• Urban Water and Sewerage Authorities Category for every 100m ³	120.00	0.12
• Urban Water and Sewerage Authorities Category B for every 90m ³	100.00	0.10
9. Commercial		
• All abstractions less than 0.94 litres/second, flat rate	35,000.00	35.00
• All abstractions equal or above 0.94 litres/second for 100m ³	150.00	0.15
10. Mining: Fore every 100m ³	170.00	0.17

Source: Turpie et al. (2003)

Three separate pieces of legislation will result from the proposed legal framework to cover water resources management (URT 2004a)¹⁴, rural water supply (URT 2004b)¹⁵ and urban water supply and sewerage (URT 2004c)¹⁶

The draft pieces of legislation do not indicate any change in the tenuous state of customary rights to water. Section 33 of the draft for example, emphasizes registration of every water user association and water user group. There is also the requirement that constitutions of the water user association or of water user group should have regard of customary law prevailing in their area of jurisdiction especially over matters of distribution of water and in the settlement of any dispute that may arise in the course of discharging their functions. Section 37 provides that settlement of disputes and distribution of water the Committee should be guided from time to time by the customary laws prevailing in its area or areas of jurisdiction.

One important question for customary water law is whether the proposed pieces of legislation will enhance the place and position of customary law. This paper contends that new 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.

14 URT 2004a Second Draft for Water Resources Management Act. Ministry of Water and Livestock Development

15 URT 2004b. Second Draft for Rural Water Supply Act. Ministry of Water and Livestock Development.

16 Second Draft for Urban Water Supply Act. Ministry of Water and Livestock Development

The strategy vesting in the state all property over water in the country will continue to operate under the new pieces of legislation. This strategy can potentially be used to require the formalisation of traditional water abstractions. By legislating that “all property over waters in Tanzania belongs to the Republic” it means that access to various types of water can only be had through the procedures provided for under mainstream laws. Mainstream laws today exert control over customary water abstractions through the strategy of designation of certain rivers, streams, lakes and water sources to be controlled. Declaration is a water use control mechanism that can force customary systems to mainstream.

Acknowledgements

This paper is based on the findings of a study funded by WARFSA and DFID on ‘Implications of Customary Laws for Implementing Integrated Water Resources Management’ The authors would like to thank the two organisations for their generous financial support. Also, the authors would like to acknowledge the contributions of their colleagues in the project, John Butterworth, Mike Morris, Barbara van Koppen, Hilda Kiwasila, Claudious Chikozho, as well as Jim Latham.

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