

Formal law and local water control in the Andean region: a field of fierce contestation

Rutgerd Boelens and Rocio Bustamante

Water access and control rights of peasant and indigenous communities in the Andean countries are under continuous attack. Apart from historical processes of rights encroachment by elites and landlords, currently powerful water actors intervene within communities and territories while often neglecting agreements on local water rights and management rules. Vertical state law and intervention practices, as well as new privatization policies, tend to intensify the problem and generally ignore, discriminate or undermine local normative frameworks. Recognition of and security for the diverse and dynamic local rights and management frameworks is crucial not just for improving rural livelihoods but also for national food security in the Andean countries. The paper outlines the efforts of the action-research, exchange and advocacy program WALIR (Water Law and Indigenous Rights) to address these issues. The water policy and legal context in the Andean region, and some of the key conceptual challenges related to the official recognition of local socio-legal repertoires are briefly discussed. It ends with a reflection on conditions for improving rights recognition of marginalized groups and peasant and indigenous communities, through policy and interactive intervention strategies.

Keywords: Andes, Latin America, irrigation, water law, water rights, positive law, local law

Introduction

For centuries, local and indigenous water rights and rules in the Andean region (including highland parts of Colombia, Venezuela, Ecuador, Peru, Bolivia and Chile) have been largely neglected or discriminated against. Since agriculture for the larger part depends on irrigation within peasant and indigenous water management systems, food security is also compromised. The process of undermining local communities’ water access and control rights continues up to today and is not only headed by powerful local, national and international water use actors encroaching local rights; it is also a direct consequence of vertical State law and intervention practices, and the latest privatization policies. However, recognition of and security for the diverse and dynamic local rights and management frameworks is crucial for improving rural livelihoods and even national food security in the Andean countries.

In this paper¹, the challenges of a water rights action-research, exchange and advocacy program are outlined. The program ‘Water Law and Indigenous Rights: Towards recognition of local and indigenous rights and management rules in national legislation’ (WALIR)² aims to contribute to countering the above-mentioned discrimination and injustice. Within a broader international perspective, a central focus of the program is on the Andean region. Therefore, after this introductory section, we address some basic features of the Andean context regarding local water rights, and the water policy and legal arena. In the third section, the action-research program is presented. In the fourth section, we elaborate some of the key conceptual challenges related to the issue of official recognition of local socio-legal repertoires, and question the effectiveness of law-oriented strategies for solving water conflicts and rights issues. In the last section we reflect on some critical issues related to policies for participatory water intervention strategies to sustain local rights systems. The paper’s intention is not to give definite answers but rather to clarify and illustrate some important questions and dilemmas emerging in the context of the Andean region, and which may have a wider relevance in other regions and continents.

Background on water control in the Andean region

Diversity and legal pluralism in water rights and management

Increasingly academic and policy efforts are trying to understand and reflect upon the socio-legal complexities of local water use and management realities, and the relationship between official water

resources management and the plurality of legal conditions in society (see for example: Benda-Beckmann et al. 1998; Bruns and Meinzen-Dick, 2000; McCay and Jentoft, 1998; Peña, 2004; Roth, 2003; Zwartveen 1997). Water rights and policy analysis in the Andean region has received similar attention, and a vast body of literature now concentrates on local rights and water management practices (for example: Boelens & Hoogendam, 2002; Bustamante & Vega (forthcoming); Gelles, 2000; Gerbrandy & Hoogendam, 1998; Guillet, 1992; Palacios, 2003; Vera 2004) on the critique of bureaucratic water management, the State legal system and its top-down policies (e.g. Bustamante, 2002; Gelles, 1998; Guevara et al., 2002, 2004; Guillet, 1992; Lynch, 1988; Palacios 2002) and on the problematic impacts of the recent neo-liberal privatization proposals and policies (Bauer 1997, Dourojeanni & Jouravlev 1999; Gentes 2002, 2003; Hendriks 1998, 2004). But notwithstanding the fact that the issue of local water rights ‘recognition’ may now receive more attention, its conceptual and practical problems are far from resolved and the situation ‘in the field’ is getting worse every day.

Commonly, legitimate authority in Andean water management is not restricted to only State agencies, nor do legitimate rights and rules refer to only those emanated by State law. Water rights usually exist in conditions of legal pluralism where rules and principles of different origin and legitimization co-exist in the same locality, mutually interacting (Cf. Benda-Beckmann et al. 1998). In order to penetrate deeper into the importance and functioning of water rights, and to better understand the complexity of water management arrangements found in real life situations, it is necessary to analyze water rights as a multi-layered concept (See Benda-Beckmann et al. 1998, Boelens & Doornbos 2001, Roth 2003). Water rights do not refer to water access and use only. The multi-layered character of water rights can be conceptually represented by the ‘bundle of rights’ concept, involving water use and operational rights as well as management decision-making rights, and showing enormous diversity and divergence from one place to the other (Beccar et al. 2002, Schlager and Ostrom 1992). Different right-holders, therefore, have different rights and powers.

Obviously, local normative systems do not and have never come into being within a social vacuum, nor are they limited to independent development: alongside physical and ecological conditions, their development is interwoven with the past and present history of the cultural, political, economic, technological and institutional foundations of Andean society. They comprise normative frameworks that are locality-specific, displaying enormous variety from one community to the next and from one region to another. In general, these water rights and management norms are the backbone of community systems in the Andes. Local frameworks of rights, obligations and working rules define water distribution, system operation and maintenance, including the basic agreements that define the organizational structure and application of sanctions for infringements (see Box 1).

Box 1. “Uses and Customs” in the Northern Altiplano of Bolivia

Ancoraimes is an *Aymara* municipality in the *Altiplano* region of Bolivia, where the *Turrini Jawira* watershed is situated (4640 m.a.s.l. – 3810 m.a.s.l.). The river flows through the communities (*Turrini Alta, media y baja*) and *Ancoraimes* town until reaching the *Titicaca* lake. Land management in these communities is still collective but based upon individual (family) holdings and water management constitutes one of the responsibilities of the peasant’s union. The rights over the river are linked to the communal territory and the local organization is charged to control that the obligations linked to the usage (initial investment in the infrastructure, work on the maintenance, contribute with money, attend to the meetings, etc.) are fulfilled. However, small water sources as springs and wells are usually considered to be “private” as part of the land being held by families. The water that flows in the river is used mainly for irrigation, watering cattle and small animals, washing, domestic consumption, etc.; but the water of the springs and wells is mostly for domestic use and watering animals. Only the community that is next to the shores of the *Titicaca* lake has rights for fishing, because they are part of its territorial rights. In the year 2000 this community were part of the mobilizations and blockades organized against the approval of a new Water Law in the country, because according to their perception, it was going to have an affect on their “uses and customs”.

Struggles over water rights and benefits therefore involve conflicts about the access to and withdrawal of this extremely powerful resource, as well as about control over its management, and recognition of the respective authorities’ legitimacy. This is a crucial issue in the Andean region (as well as in many other parts of the world), since it is precisely the *authority* of indigenous and peasant organizations that is increasingly being denied, their *water usage rights* that are being cut off, and their *control over decision-making processes* that is being undermined (Boelens 2003).

The erosion of local water rights

Informal local rights systems seem to be on the losing side in an ever more legalistic world (Hoekema 2004) with severe consequences. In most Andean countries, farmer-managed water management and production systems sustain local livelihoods and are the backbone of national food security. Consequently, water access security and the means and authority to manage their water systems are of central importance to peasant and indigenous communities. However, on top of the historically extremely unequal distribution of access to water, indigenous and customary water rights in the Andean countries are increasingly under pressure. Millions of indigenous water users consequently find themselves structurally among the poorest groups of society. They are usually not represented in national and international decision-making water organs.

When indigenous rights and water management practices are *not* simply obstructed by national legislation and intervention policies, positive attention to the subject is negligible. Governments have paid it mere lip service. Most policies and legislation do not take into account the day-to-day realities and specific contexts of indigenous groups. Since the existence and importance of local and indigenous rights regimes is either ignored or poorly recognized by State law, local regulations and solutions in water management tend to be overlooked by official policies and intervention strategies. Moreover, in the Andean countries, the decision-making power of state irrigation institutions is often based on undemocratic principles and unequal representation of local communities.

Strong demographic pressure can lead to the degeneration of natural resources and livelihood systems, and processes of migration, transnationalisation and urbanisation, among others, are leading to profound changes in the agrarian structure. Not infrequently, local water use systems collapse and local forms and cultures of natural resource management are challenged. Newcomers enter the territories of local peasant and indigenous communities, generally claiming a substantive share of existing water resources and often neglecting local rules and agreements. New water policies tend to completely deny the role of local water users, in particular the central role of women in water provision and management. Consequently, women tend to be the ones who suffer the hardest consequences. All this contributes to a situation of increasing inequality, poverty, conflict and ecological destruction.

Box 2. Indigenous groups lose out in the market for water rights in Chile

In 1981, a new water law was enacted in Chile (*Código de aguas*) which established a system of market trading in water rights. The law limited collective water rights while emphasising individual ownership, and indigenous communities have subsequently tended to lose access to water. The law benefited the rich, corporate and well-informed (amongst others mining, forestry and energy companies) who have been able to accumulate new water rights. Indigenous groups are located in two main areas of the country. In the northern Andes, powerful mining companies have been able to buy water rights from *Aymara* and *Atacameños* communities who, having effectively sold their future, have in many cases broken down. In the southern Andes, the water rights of indigenous *Mapuche* groups have been affected by expanding plantation forestry and the construction of new large dams. Trying to register their water rights, some communities were told that no further rights could be granted since all the available resources had been allocated. Efforts to restore collective rights are now being made by the State, but at considerable expense to repurchase rights on behalf of indigenous groups.

Adapted from Gentes (2003)

New policies for water management and regulation

As in other parts of the world, new policies for the regulation, intervention and adaptation of water management are being developed in the Andean countries as an answer to 'water crises'. In principle, such policies, which are supposed to encourage decentralization, could be a major step toward strengthening users' organizations by granting them greater decision-making power and security in their water rights, and respecting sufficient autonomy for water management according to their needs and their own potential and solutions in particular contexts. However, in these times of neoliberalisation and State downsizing in the Andean countries, the slogan of participation is often also a facade for the underlying intention to abandon essential public tasks and cut back on public spending in water management (Boelens et al. 2002a). Looking beneath participatory words and promising statements, one must ask whether transfer policies are also a strategy to, with minimal expense and effort, maintain or even strengthen State control over water at the local level.

The negative impacts and lack of functionality in water management policy at the national level with regard to local situations and marginalized groups means that new water policies are heavily contested in the Andean

countries. It is common to see that powerful stakeholders manage to disproportionately influence new regulations and policies, or monopolize water access and control rights. Generally, female water users and indigenous or peasant representatives have been excluded from the negotiation platforms, consciously or not. Also, the effectiveness of top-down 'decentralization' policies is questioned, especially since this usually involves transfer of tasks but not decision-making powers to lower management levels. Simultaneously, there is the fear that governmental actions to privatize water services and to establish water markets will not be complemented by adequate frameworks or regulatory bodies to protect the collective interests and water rights of local communities (see Box 2). And where new regulations and institutions *have* been implemented recently, they have often been only paperwork, without sufficient backing in terms of realistic strategies, means or capacities for implementation. As a result, virtual or artificial water management bodies have been created. Moreover, these entities can easily supplant local initiatives that aim to co-ordinate efforts among grassroots user organizations and enforce their own water management rules.

As a consequence, apart from the growing claims from indigenous and peasant water management organizations, as well as female water users, for external agencies to invest in and give serious support to their systems, indigenous and peasant groups also demand to take part in the policy-making process. These demands aim to offset their historical exclusion from these political arenas, which has resulted in water policies that are not grounded in an in-depth analysis of real problems and the potentials of the different players in water management. In the last decade, thereby, we see a certain shift from a class-based to class-, gender- and ethnicity-based claims for water access and control rights, especially in countries such as Ecuador and Bolivia (see Box 3). In many regions the traditional struggle for more equal land distribution has been accompanied or replaced by collective claims for more equal water distribution, and for the legitimisation of local authorities and normative frameworks for water management.

Box 3. The power of organisation and numbers

In Ecuador and Bolivia, the countries in South America with the largest indigenous populations, well-organised social movements have been able to be instrumental in national level debates in water reform. In 1996, CONAIE in Ecuador made its own proposal for a new water law based upon a consensus of all membership indigenous and peasant organisations, which included demands on 1) resisting privatisation of water resources and a loss of state control in water allocation, 2) recognition of cultural and social rights, and 3) representation of users, indigenous and peasant organisations within the institutional framework for water management. In 1998, some of these proposals were recognised in constitutional reforms. In Bolivia, indigenous and peasant confederations proposed in 1998 an alternative agenda for water reform to what the then government was offering. This proposal emphasised the social rather than just economic in use of water and community water rights. Following the Cochabamba Water War in April 2000 a new process of water reforms moved towards recognising these concerns and new irrigation bye-laws and drinking water laws in 2004 have started to recognise some of the concerns of indigenous groups.

Adapted from Palacios (2003), Bustamante (2002) and Bustamante and Vega (forthcoming)

Certainly, there have been many attempts to support local water management, both at the level of policy-making and at the level of project intervention. However, due to a lack of understanding of peasants' norms and ways of thinking, the absence of appropriate forms of collaboration and interactive support strategies, and the prevailing power structures, among others, even well-intentioned irrigation, drinking water and watershed management projects have often broken down local normative and technological systems and the peasant and indigenous communities' own ways of organizing around water. In other cases, outside agents, policy-makers and local elites refused to understand these peasant norms, organizational forms and technology, since these local rules and techniques would underscore and legitimize peasants' own authority and local autonomy in establishing the rules of the game. This often runs counter to outside interests.

As a result of the above, the Andean countries are full of examples of the negative organizational and infrastructural impacts of many top-down water programs, and are guided by ineffective or counter-productive water policies and vertical legislative frameworks. Despite the failures of vertical approaches, and notwithstanding the many discussions and the appearance of a tremendous volume of literature on participatory methodologies and approaches, there are very few examples of water management projects in which the objectives and decisions about technical, normative and organizational design and implementation have been based substantially on the involvement, capacities and knowledge of the direct stakeholders – and particularly neglected are the less powerful groups such women, peasants and indigenous water users. Training programs

tend to involve users in the projects of institutions and professionals, rather than involving the latter in the users' projects and reality.

In the Andean countries, the denial of contemporary forms of indigenous water management is also often combined with a glorification of the past. We find a folkloristic attitude towards contemporary indigenous communities. Very common is the use of either romanticized, paternalistic or racist approaches. Policies are oriented towards a non-existing image of 'Indianness', a stereotype; or towards the assimilation and destruction of indigenous water rights systems (Albó 2002, Baud 1997, Boelens et al., 2004). As a result of the above, many water programs fail to understand the dynamic and plural nature of indigenous rights and management rules (Gerbrandt and Hoogendam 1998, Boelens and Dávila 1998, Guillet 1992, Mitchell and Guillet 1994).

WALIR: an inter-institutional platform for water rights action research and policy debate

Notwithstanding the long tradition of top-down water control policies and official legislation, there appear to be opportunities for customary and indigenous cultures and water rights systems. It can be observed that most Andean countries have accepted international agreements and work towards constitutional recognition of ethnic plurality and multiculturalism (in some cases Ecuador for instance, even '*interculturalidad*'). At a general level 'indigenous rights' are associated with or are considered to be 'human rights'. However, when it comes to materializing such general agreements in practice or in concrete legislative fields, such as water laws and policies, particular local and indigenous forms of water management (especially water *control* rights) tend to be denied, forbidden or undermined (see Box 4 and Bustamante 2002; CONAIE 1996; Gelles and Boelens 2003; Gentes 2002, 2003; Getches 2002; Guevara et al. 2002, 2004; Pacari 1998; Palacios 2002, 2003; Urteaga 1998; Urteaga et al. 2003; WALIR 2002, 2003).

Box 4. Constraints facing indigenous communities in the Andes

- In Peru, the current water law enacted in 1969 does not recognise any specific water rights of peasant and indigenous communities. Attempts to make everybody equal under the term 'users' have eroded the protection of such communities.
- In Chile, neo-liberal inspired privatisation of water resources has led to the decline of collective water management in the northern and southern parts of the country where indigenous groups live and are struggling to retain water rights in competition with powerful corporate interests
- In Bolivia, local groups supported by effective social movements have generally been able to retain water rights. However, a vacuum in laws and institutions at the national level and growing demands for water, place local organizations in continual contestation to maintain water rights. Examples include the recently aborted proposal to export water from southern Bolivia to Chile.
- In Ecuador, since the approval of the 1972 water law, there have been many conflicts to defend indigenous water rights. By demanding detailed and legalistic registration, the law has constrained the dynamics of these water rights.

To help contribute to the resolution of the above mentioned problems of water rights encroachment and lack of recognition of local water control efforts, the WALIR program was formulated. WALIR is an international, inter-institutional endeavour based on action-research, exchange, capacity-building, empowerment and advocacy. This comparative research program builds upon the work of academic researchers and action-researchers in local networks – both indigenous and non-indigenous. It attempts to be a kind of think-tank to critically inform debates on indigenous and customary rights in water legislation and water policy, both to facilitate local action platforms and to influence circles of law- and policy-making. Equitable rights distribution and democratic decision-making and therefore, support for empowerment of discriminated and oppressed sectors, are the major concerns.

In co-ordination and collaboration with existing networks and counterpart-initiatives, WALIR sets out to analyze water rights and customary management modes of indigenous and peasant communities, comparing them with the contents of current national legislation and policy. Thereby, it sheds light on how the first are legally and materially discriminated against and destroyed. The aim is to contribute to a process of change that

structurally recognizes indigenous and customary water management rules and rights in national legislation. It also aims to make a concrete contribution to the implementation of better water management policies. As part of its strategy, WALIR plans to contribute to and present concepts, methodologies and contextual proposals and to sensitize decision-makers regarding the changes needed for appropriate legislation and water policies.

The program, therefore, is not just academic but also action-based. While especially the indigenous populations are being confronted with increasing water scarcity and a traditionally strong neglect of their water management rules and rights, the current political climate seems to be changing for the better. However, actual legal changes are still empty of contents, and there is a lack of clear research results and proposals in this area. The program aims to help bridge these gaps, facing the challenge to take into account the dynamics of customary and indigenous rules, without falling into the trap of decontextualizing and ‘freezing’ such local normative systems. Fundamentally, the WALIR program is directed towards activities and conclusions that facilitate local, national and international platforms and networks of grassroots organizations and policymakers. But the practical and conceptual pitfalls of rights analysis and recognition initiatives are manifold.

Local and positive law: a difficult relationship

Some conceptual challenges of recognition efforts

In order to confront processes of discrimination, subordination and exclusion, local groups often aim for political action with clear, collective, and unified objectives and answers. However, the struggle for formal and legal recognition poses enormous conceptual problems and challenges with important social and strategic consequences. The notion of ‘recognition’ in contexts of legal pluralism is, by definition, many-faceted and generally ambiguous.

- First of all, recognition of legal pluralism in the analytical sense refers to the theoretical possibility for there to be more than one single normative framework or legal repertoire in one and the same socio-political setting – multiple normative frameworks that interact with each other. It does not establish any moral or juridical hierarchy among the different existing repertoires (“What there might be according to analytical reasoning”).
- On a second level, it refers to the empirical existence of normative plurality in a given, particular society, with its concrete social relationships: the analytical recognition or confirmation on an empirical basis – ‘what there is’ (“What is observed and recognized scientifically in a particular case”).
- On a third level, it refers to political, administrative and juridical recognition, generally by the state and its legal framework, that there are multiple legal systems within one single concrete society (“What is legally recognized by the state”).
- On a fourth level, the notion of ‘recognition of legal pluralism’ may be and often is defined as ‘what should be’. Here, the issue in question is recognition of the existing normative plurality in a given society according to the political ideology of the observer. For example, it is common to hear in the Andes (with legal plurality in the sense of levels 1 and 2) that “the state does not recognize indigenous normative frameworks or legal plurality”, whereas that same state may have institutionalized legal hierarchies and linkages among the country’s different socio-legal repertoires (level 3). The political observer and strategist-activist will sometimes reject such ‘subordinating’ recognition, since it does not fit in with his or her own outlook.

More generally, we can distinguish, then, between the analytical use of the concept (levels 1 and 2) and the juridical-administrative and political-strategic uses (levels 3 and 4). “In an analytical sense, legal pluralistic thinking does not establish a hierarchy (based on the supposedly higher moral values or degrees of legitimacy, effectiveness or appropriateness of a legal framework) among the multiple existing legal frameworks or repertoires. In political terms, however, it is important to recognize that in most countries the existing, official legal structure is fundamentally hierarchical and consequently, in many fields state law may constitute a source of great social power – a fact that does not deny the political power that local socio-legal repertoires may have. Recognizing the existence of this political hierarchy and the emerging properties of state law in particular contexts offers the possibility to devise tools and strategies for social struggle and progressive change. In the discussion about ‘recognition’ as a way of giving legal pluralism a place in policy-related issues, both the political-strategic and analytical-academic aspects of recognition combine”

(Boelens, Roth and Zwarteveen 2002). See also Benda-Beckmann 1996; Stavenhagen, Rodolfo & Diego Iturralde, eds. 1990; Stavenhagen, Rodolfo 1994.

Collective and unified claims indeed are interesting for grassroots and indigenous movements, but many questions arise in the debates and struggles for ‘water rules and rights recognition’, for example (Boelens, 2003):

- Do indigenous peoples and their advocates claim recognition of just ‘indigenous rights’ (with all the conceptual and political-strategic dilemmas of the ‘indigenous’ concept), or do they also struggle for recognition of the broader repertoires of ‘customary’ and ‘peasant’ rights prevailing in the Andes? And what precisely is the difference in concrete empirical cases?
- There are no clear-cut, indigenous socio-legal frameworks, but many dynamic, interacting and overlapping socio-legal repertoires: should indigenous peoples or local water management organizations try to present and legalize *delimited frameworks* of own water rights, rules and regulations? Or should they rather claim the recognition of their water control rights and thereby the *autonomy to develop* those rules, without the need to detail and specify these rules, rights and principles within the official legal framework?
- Or would it be a more appropriate and effective strategy to claim and defend legalization of their water *access rights* – since these are increasingly being taken away from them - and assume that water management and control rights will follow once the material resource basis has been secured?
- Do recognition efforts only focus on the legal recognition of explicit and/or locally formalized indigenous property structures and water rights (‘reference rights’, often, but not always, written down), or do and should they also consider the complex, dynamic functioning of local laws and rights in day-to-day practice? These ‘rights in action’ and ‘materialized rights’ emerge in actual social relationships and inform actual human behaviour, but are less ‘tangible’.
- How to define and delimit the domain of validity of so-called indigenous rights systems, considering the multi-ethnic compositions of most Andean regions and the dynamic properties of local normative frameworks? In terms of exclusive geographical areas, traditional territories, or flexible culture and livelihood domains?
- How to avoid assimilation and subsequent marginalization of local rights frameworks when these are legally recognized? And how to avoid a situation in which only those ‘customary’ or ‘indigenous’ principles that fit into State legislation are recognized by the law, and the complex variety of ‘disobedient rules’ are silenced after legal recognition?
- Indigenous socio-legal repertoires only make sense in their own, dynamic and particular context, while national laws demand stability and continuity: how to avoid ‘freezing’ of customary and indigenous rights systems in static and universalistic national legislation in which local principles lose their identity and capacity for renewal, making them useless?
- ‘Enabling’ and ‘flexible’ legislation might solve the above problem. However, enabling legislation and flexible rights and rules often lack the power to actually defend local and indigenous rights in conflicts with third parties. How to give room and flexibility to diverse local water rights and management systems, while not weakening their position in conflicts with powerful exogenous interest groups?
- And what does such legal flexibility mean for ‘internal’ inequalities or abuses of power? If, according to the above dilemmas, autonomy of local rule development and enforcement is claimed for (instead of strategies that aim to legalize concrete, delimited sets of indigenous rights and regulations), how to face the existing gender, class and ethnic injustices which also form part of customary and indigenous socio-legal frameworks and practices?

There are no easy and uniform answers to these questions, and analysis and responses must necessarily be contextual and contextualized. A fundamental dilemma of ‘recognition’ relates to the fact that positive state law by definition is oriented towards generality, where local law addresses particular cases and issues. Often, the two are at odds.

A closely related dilemma involves the effectiveness of legal recognition strategies. Considering peasant and indigenous communities’ lack of access to State law and administration, this question comes prominently to the fore: is *legal* recognition indeed the most effective strategy, or would it be better and more effective for

peasant and indigenous communities to defend their own water laws and rights ‘in the field’? (see Box 5 for examples)

Box 5. Defending water rights ‘in the field’

- In the Ecuadorian Andes, when the Guargualla irrigation system (Chimborazo province) was being built, the Ceceles zone was arbitrarily excluded from the project area. In 1990, the people of Ceceles began their struggle in order to be included in the project and at times they threatened the government to dynamite the system if their needs were not addressed. In 1994, the efforts of the Ceceles people were successful, their zone was finally included in the allocation and distribution of the system after years of intense struggle.
- In Peru, the community of Cabanaconde successfully managed to gain water rights as part of a new irrigation project that passed through their community without providing enough water for them, through a combination of direct action to open a new intake and press releases to differentiate their activities from ‘terrorists’. The community collectively faced down police and authorities, arguing their legitimate needs for water.
- The “Water War” in Bolivia (2000), forced the government to suspend the concession contract granted to an international consortium in the city of Cochabamba and to modify much of the recently approved Drinking and Sanitation Service Law. The conflict opened up, and made more participatory, the legal reform process in the water sector.

Adapted from Boelens and Doornbos (2001) and Gelles (2000)

It is not a dichotomous choice, however. Access to state law indeed is limited, but state law cannot be neglected since it certainly has important influence on (the lack of) local opportunities for local water management forms. It is because of this that indigenous and grassroots organizations in the Andean region have fiercely engaged in the legal battle. In this regard it is important to consider here that efforts to gain legal recognition do not *replace* but rather *complement* local struggles ‘in-the-field’. On both levels there is political-strategic action to defend water access rights, define water control rights, legitimize local authority and confront powerful discourses.

New directions in the recognition of diversity

As we have mentioned above, during the last decade, there has been a major change in the laws of most Andean countries. In Colombia, Peru, Bolivia, and Ecuador, the constitutions now formally recognize cultural diversity and legal pluralism. These constitutions grant legal validity, to different degrees and in varying breadth, to the indigenous peoples’ own jurisdiction, to peasant and indigenous communities’ own norms and authorities, and to self-governance within their own territory (cf. Guevara et al. 2002, Palacios 2002). But it is too early to analyze the true direction and depth of penetration of the latest processes of legislative changes. In civil society and among indigenous and peasant groups, such changes have often failed to materialize (Yrigoyen 1998). Communities of irrigators have often been unable to take advantage of the opportunities for self-governance offered by the new constitution’s concept of a pluri-cultural, multi-ethnic state. Another key aspect is that constitutional changes have not yet produced changes in developing the laws and regulations that will enable implementation (Assies et al. 1998).

As for our thematic interest in water management, commonly, changes regarding recognition of diversity are not reflected either in the ‘powerful’ water laws or agrarian laws (Boelens et al 2004). Despite the great importance of the many ways of managing water for local economies and societies, they are still denied. In Bolivia, version 32 of the proposal for a new water law is being discussed (Box 6 and Bustamante 2002).

In Peru, in a similar way, enacting a water law that would respect peasant and indigenous rights and the country’s diversity is far from reality. In Chile, the hegemonic sectors with monopolistic water rights have managed to prevent any legal change that would increase social justice, environmental balance and political democracy. In Ecuador, the indigenous movements’ federation Confederation of Indigenous Nationalities of Ecuador (CONAIE), the main representative of the country’s millions of indigenous families led a process to formulate a proposal for a new water law, recognizing Ecuador’s diversity in peoples, regions and water management institutions (CONAIE 1996). However, resistance by powerful sectors against legal amendments recognizing diversity and actual implementation of more participatory policies is fierce.

Box 6. The legal reform process in Bolivia

Since the 1970's there were many attempts, mainly promoted by international agencies, to change the outdated Water Law (1906) in Bolivia. By 2000 the Parliament started to discuss proposal number 32, but after the conflicts generated in September and October of that year by privatisation of the water company in Cochabamba, the government signed an agreement to stop the process of legal reform in the water sector. However, because of the need to secure investments in drinking water systems, irrigation and hydroelectricity, a participatory process to elaborate new norms was started. This was initiated with the debates about the drinking water bylaws (2001 and 2004) and continued with the irrigation bylaw (approved in May 2004). Likewise, the Inter Institutional Water Council (CONIAG) was created in 2002, and has as its members representatives from the government, social organizations (indigenous, peasants, irrigators, etc.), public universities, and private companies. Its mandate is to promote a process to design a water policy and legislation for the country in a more participatory way.

This last point seems to be key: to what degree do legal changes for 'recognition' and implementation thereof in society have the necessary political and social support? How can these new provisions be reproduced beyond the constitution, in 'strong' legislation (e.g. water law), and in public administration and procedures, and daily water management practice? And to what degree are new legal changes actually responsive to demands for greater local autonomy and self-governance in water management?

Reflections

Critical and balanced support to local water rights systems still faces many obstacles, and remains a challenge. Below we summarise some crucial issues to be tackled relating to the field of water policies for interactive, jointly-devised intervention and support efforts. Legal change is empty without matching change in the way water development and support to local normative frameworks is given shape in the field, in diverse particular contexts. Comparing water management policies and actual intervention projects, we have observed the wide divergence between the discourse on people's participation and actual practice. Reasons have to do with: the adverse socio-political context; unavailability of time and the need for short-term, tangible results; rigid institutional and budgetary planning by donors; and in some cases, users' groups' lack of basic experience with water management. A further key factor is the lack of adequate methods and methodologies and the single-discipline, vertical training of both technical experts and social organizers and action-researchers. Consequently, although an increasing number of exceptions exist, most institutions have not usually been able to adequately address the strong demand of water user communities for interactive support to their use and management systems. Fundamentally, interactive water system or platform support is about the sharing of power – power based on knowledge, economic standing, or social and psychological status. Sharing that power to make and implement decisions goes against the grain of many vested interests.

The same goes for legislative and policy frameworks. While existing policies in the Andean countries are often obsolete, the mono-disciplinary training of young water professionals and future policy-makers makes it even more difficult to work on creative, multi-sector and interdisciplinary solutions and proposals. Issues like legal pluralism in Andean water user communities, and the interaction between socio-legal, technical and organizational domains of water management, make an interdisciplinary focus essential when working on new policy proposals. Although specialization is important, no artificial separation can be made among the disciplines (hydraulics, agronomy, sociology, law, economics) or among the fundamental issues and elements of water management. They are directly inter-related and interact: changes in one water use and management domain directly influence the other domains and the overall system. This conclusion goes beyond so-called multi-disciplinarity. For example, 'dynamic rights reflected in hydraulic works' and 'technologies to materialize water rights' must become subjects for the work of legal and sociological professionals as well as irrigation engineers and technicians. But current practice is far from generally realizing that such a perspective and this remains an important bottleneck and an urgent challenge.

A next crucial point is the fact that development of water use systems and the emergence of management platforms is not a linear process of planning and implementation with pre-calculable, predictable outcomes. Interventions in irrigation, for example, whether 'social' or 'technical', always influence water rights, modify power relationships and gender relationships, and change resource distribution. These relations cannot be planned with organizational prescriptions or by technical and economic formulas. This does not, however,

lend itself to paternalistic aid or an abandonment of planning; it calls for building dynamic strategies, jointly devised with users, including those with the least negotiation power.

In the same way, as a next example, pluralism in systems of rights and authorities simultaneously present in Andean basins cannot be denied by official decrees, the imposition of a single positive normative system, or regulation by the market. This may seem quite appealing to legislators, politicians, intervening projects and outside authorities, but it will never resolve the underlying conflicts. The search for dynamic platforms from which to negotiate, and taking these divergences as starting-points, would seem to offer better opportunities.

Obviously, understanding and facilitating such processes is a complex issue. It requires knowing about local norms, power relations and water use interests. It also requires tact and skill in discussions among the different groups, from users to policy-makers, as well as creativity and professional expertise to prepare and present constructive proposals.

At the local level, organization-building and generation of greater sustainability and social justice in water management, through equitable rules and concrete practices known to all, go hand-in-hand with self-respect, identity, capacity, power and collective action. Not just in general terms, but with specific challenges, consequences and strategies for the field of water management. One of the greatest challenges is to generate creative, pro-active capacity for water management through and within local water organizations: capacity for analysis and (counter) proposals. These activities should materialize at the local level (within and among households, and communities), but also spread to broader arenas. Farther-reaching alliances and networks are indispensable in order to join complementary capacities and forces, to resist imposed norms and to influence both rule-making and rule-implementation, as well as their water access results. Users' alliances do not necessarily consist of peasants or indigenous irrigators only. They can be based on organizational forms integrating multiple interest groups and larger territories, such as entire watersheds, in order to defend local interests, build consensus on rights and co-ordinate activities involving the many different sectors and uses of water.

Conclusion

At the policy level, capacity for critical and interdisciplinary analysis and constructive proposals for change are crucial. Water management development is a socio-political process in which different interest groups meet, face off and negotiate, to include their ideas and interests in organizational, technical and normative designs. These interests are about increasing control over water resources themselves, over decision-making power in system management, over the redistribution of productive resources and/or over the behaviour of the users' group in general. Thus, the *sine qua non* prerequisite, and at the same time the great challenge, is for such negotiation platforms, at the local, regional and national level, to give groups with less social, economic and political power the right to speak up and to vote, to become real co-managers of the water resources, and to avoid the hegemonic rule of dominant groups and institutions. To find the starting-points for strengthening water organizations and platforms, it is fundamental to understand the dynamics of local water management and of peasant and indigenous normative systems, the fundamental motives and mindsets of collective action, the way they are embedded in power and gender relationships, and the creation and reproduction of very specific organizational forms and local identities. A prerequisite for such understanding is to analyze the interaction of local water management with other social, political, technological and normative frameworks and with the different institutions that make up the institutional context in every case.

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Acknowledgements

WALIR is a collaborative program coordinated by Wageningen University and the United Nations Economic Commission for Latin America and the Caribbean (UN/ECLAC) and implemented in co-operation with counterpart institutions in Bolivia, Chile, Ecuador, Peru, Mexico, France, The Netherlands and the USA (<http://www.eclac.cl/drmi/proyectos/walir/>). The counterparts work with a much broader group of participants: institutions at international, national and local level. The Water Unit of the Netherlands Ministry of Foreign Affairs funds the program.

Contact addresses

Rutgerd Boelens, WALIR and Wageningen University and Research Centre, Wageningen, The Netherlands (Rutgerd.Boelens@wur.nl)

Rocio Bustamante, WALIR and Centro AGUA, San Simon University, Cochabamba, Bolivia (vhrocio@entelnet.bo)

Notes

¹ The paper is largely based on the documents "Local Rights and Legal Recognition" by Boelens (2003), and "Water Rights and Watersheds" by Boelens et al. (2002), and Bustamante (2002).

² In its initial phase, WALIR has set up an inter-institutional network of institutions, scholars and practitioners of various disciplines and backgrounds, involved in and committed to the above objectives. Preparatory studies conducted so far have focused on current legislation and legal attention to, or neglect and discrimination of, indigenous and customary water rights. The project aims to have an effect beyond this Andean focus, by providing an example and tool for similar action research to be pursued in other regions. Second phase studies of WALIR focus on indigenous water rights in international law and treaties, indigenous identity and water rights, current indigenous water management systems, field case studies, and thematic, complementary research projects (on the relation between "WALIR" and gender, food security, land rights, water policy dialogue methods, among others). Short comparative studies in other countries further complement and strengthen the project and its thematic networks, and lay the foundation for a broader international framework. Next, a number of exchange, dissemination, capacity-building and advocacy activities are implemented, in close collaboration with local, national and international platforms and networks.