

Challenges of legislating for water utilisation in rural Tanzania: drafting new laws

Palamagamba John Kabudi

Mainland Tanzania is in a process of preparing new pieces of legislation that will govern and regulate the water sector. The drafting of the new laws is in line with the implementation of the National Water Policy (NAWAPO) which among other things calls for review of the existing institutional and legal framework and proposes legislative instruments according to the policy directives. The on-going exercise has posed several challenges in relation to the process of drafting new laws as well as the scope and content of the proposed laws. For the first time in the history of legislating for water supply in Tanzania, the issue of rural water supply has received a special attention both in the policy and in the legislation proposals. However, despite that encouraging development, there are still issues that need to be clarified on the governance and utilisation of water by rural population. How eventually the issues of rural will be adequately addressed, will depend very much on the active participation of the rural population and other concerned stakeholders in the on-going process.

Keywords: rural water legislation, governance, customary water law, water utilisation associations

Introduction

Mainland Tanzania is now in the process of preparing new pieces of legislation that will govern the management of water resources as well as water supply and sanitation. The process of preparing new pieces of legislation was preceded by the adoption of a new National Water Policy (NAWAPO). The Cabinet in July 2002 adopted the policy recommendations contained in NAWAPO which has a whole part dealing with rural water supply and sanitation. Mainland Tanzania has since 1974 been governed by the Water Utilization (Control and Regulation) Act, 1974. Since then new concepts and approaches to governance and utilization of water resources have emerged that need to be taken on board. NAWAPO replaces the Water Sector Policy of 1991 which addressed sources, use of water in the urban areas, planning and quantity of water supply, financing and maintenance of water operations, authorities responsible for water, and enforcement and coordination policies of the water sector.

Water has been explained as a natural resource that plays an important role in economic activities and it impacts on the health and sanitation of human communities (Wangwe, S.M., et. al (eds) 1998). Tanzania is reputed to have abundant water resources, which serve many uses including water supply to urban and rural areas. The country water resources have, in recent years, started to diminish in terms of quantity and quality and the water supply systems in urban and rural areas have also been plagued by series of operational and structural problems and hence failed to cope with the increased water supply and sanitation demands. One of the critical underlying factors for these failures has been identified as lack of clearly defined and comprehensive legal and institutional framework. As noted in the National Water Policy, 2002 (NAWAPO), “This legislation (i.e. the Water Utilization (Control and Regulation) Act, 1974) and associated regulations do not adequately meet present and emerging water resources management challenges. Thus the legislation needs to be reviewed in order to address the growing water management challenges” (NAWAPO: 48-49).

As noted earlier, the review of existing water legislation and drafting of the missing provisions in that legislation was deemed to be imperative and urgent. The Government through the River Basin Management and Smallholder Irrigation Improvement Project - River Basin Management Component financed the process of drafting the new pieces of legislation through a Consultancy Services on “Reviewing Water Resources, Urban Water Supply and Sewerage and Rural Water Supply Legislation”.

The consultants who were chosen to undertake the assignment by the Ministry of Water and Livestock Development were required to prepare draft Bills for three pieces of legislation. These were the Water Resources Bill, the Urban Water Supply and Sewerage Bill and the Rural Water Supply and Sanitation Bill. The three draft Bills were prepared and submitted to the Ministry of Water and Livestock Development in June 2004. The draft Bills have been subjected to technical Government consultations and a national workshop. In response of recommendations of various stakeholders it has been decided by the Ministry of Water and Livestock Development that there should be two instead of having three new water legislation. As a result of the decision the Urban Water Supply and Sewerage Bill and the Rural Water Supply and Sanitation Bill are being merged into Water Supply and Sanitation Bill. Initially it had been argued that rural water supply needed its independent piece of legislation so as to give focus and importance like that which has been given to urban water supply. However after more consultation it has been decided that both urban and rural water supply be placed in the same piece of legislation so as to accord them equal status and attention the difference being on how they are managed.

The Colonial legacy and post-colonial marginalisation of customary law in Tanzania

The colonial legacy in relation to natural resource utilisation in Tanzania has continued to influence the post-colonial approach to the application of customary law. It does not need to be emphasised that one of the motivations of colonialism was not only to access the abundant natural resources in Africa but also to control them. Thus the advent of colonialism witnessed initially the appropriation of natural resources from the people and they were placed under the colonial state. This was followed by alienation of the people from the natural resources that they once owned. They were now required to have permits and licences to access and use the natural resources. The alienation process was coupled with the criminalisation of most of the traditional uses of such resources that were to a large extent governed by customary law. It was a criminal offence for natives to be seen in a natural resource protected area without a permit. Thus the application of customary law during the colonial period was tolerated only where it did not conflict with the interests of the colonial state. Customary law was always subordinate to statutory laws enacted by the colonial state. Actually the application of customary law was more accepted in private matters such as marriage, inheritance and the like but not in the control and ownership of natural resources. It is statutory laws which prevailed and they clearly stipulated that all natural resources including water were vested in the Governor on behalf of the colonial state.

The colonial situation was not changed by the post-colonial state. The provisions vesting all natural resources in the state have been retained in statute books. What has changed is that they are now vested in the President as a trustee of all the citizens of Tanzania. Still access and use is regulated by statutory law and not by customary law. Indeed there have been changes in some areas especially of management of natural resources. Community based natural resources management is now accepted as the means to ensuring sustainable utilisation of natural resources. However things are easily said than practiced. It will take time to change the mindset of bureaucrats who were schooled that people are an anathema to management of natural resources and therefore should be kept out and be converts of community based natural resources management.

The initial euphoria by the new African governments after independence in the 60's to codify and apply customary law has fizzled and to a large extent died out. The codification exercise in Tanzania ended up with only the patrilineal tribes and it has ignored the matrilineal tribes who constitute 20% of the population of Tanzania. Even the codified customary law has never been reviewed and updated ever since the exercise was completed in 1963. More statutes have been enacted that have eroded the application of customary law in Tanzania. It needs to be pointed out that in 1963 the rule of the chiefs was abolished and thus removing traditional institutions which were applying customary law in regulating the resources that remained under their stewardship. This went hand in hand with the marginalisation customary dispute settlement institutions and their replacement by court system with powers to apply customary law and Islamic law. Discussion of application of customary law is today not a topic of interest as compared to the emerging trends in law that are being pushed by deregulation of the economy and securing the legal base for the participation of private sector.

It is a reality that despite researches that have been conducted on customary law on water the discussion of the application of customary law has not been given prominence that one would have expected in the drafting of new water laws. It is interesting that one of the studies that the consultants were requested to undertake as part of the drafting process was on customary water law in Tanzania. That included making an analysis of relevant customary water laws so as to be able to identify the local informal water management systems operating today in Tanzania in the Basins and their interrelationship with the formal systems. The assignment included the identification of how customary laws and by laws provide for water allocation, tenure rights, conflict resolution and protection of water resources and catchments as well as on how customary law can be used to effectuate the implementation of statutory law and how these could be used in specific cases.

Policy framework for reforms on water resources and supply in Tanzania

The government in adopting NAWAPO shows to be keen to improve the regulation of water supply and sanitation in both urban and rural areas. However that good intention will have to be measured by the extent that the interests of the rural areas are crafted and accepted in the new laws being formulated. It is not the first time that Tanzania has formulated a national water policy. What has changed is that the other policies which were promulgated when Tanzania was pursuing the policy of *Ujamaa na Kujitegemea* (Socialism and Self-Reliance). The current water policy has been adopted when Tanzania is pursuing a free market economy and where the private sector is urged to be the driving engine of the economy. The language now is on how to attract private investment by providing them with incentives that will ensure return of their investment. The danger is the marginalisation of the fact that water is one of the basic needs and rights that needs to be secured also for the indigent urban population and the rural population.

The legal framework governing water supply is being reviewed as part of implementation of NAWAPO. The legal framework is required to: define roles and responsibilities of various stakeholders; to secure investments made; augmenting private sector participation and legally recognizing water users' entities. The main thrust of the review of the water legislation therefore, takes cue from NAWAPO and the latter had adopted a two-pronged approach of separating water resources legislation from those of service provision.

For the proposed water resources legislation, NAWAPO recommends: that existing Water Act and regulations be reviewed and conflicting water related laws and regulations be identified and harmonized, and strengthening the mandates of Basin Water Offices to:

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

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

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

NAWAPO promotes an integrated approach to water resources assessment, planning and development and development that takes into consideration the social, economic and environmental factors based on the above cited principles.

For rural water supply, NAWAPO objective is to improve health and alleviate poverty of the rural population through improved access to adequate and safe water. The policy aims at defining ownership and management structures of Rural Water Supply Schemes (RWSS). To do that the policy calls for:

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

The Rural Water Policy objectives have been formulated from four main principles derived from experience gained in the implementation of the 1991 National Water Policy and of other developing countries (NAWAPO 2002:51). These are social principles, economic principles, environmental principles and sustainability. Under social principles NAWAPO promulgates that water is a basic need right and therefore accords first priority provision of water supply and sanitation services to basic human needs enjoying such use by rights. The policy further gives priority of investment in water supply and sanitation to areas which experience water scarcity and experience acute water shortage with an objective of satisfying human beings and livestock needs.

NAWAPO objective is to achieve sustainable development and delivery of rural water supply services. That calls for clear definition of the roles and responsibilities of various actors and stakeholders. Conditions precedent for a sustainable rural water supply are:

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

The Policy objectives were set out following the existing situation. In 1971 the Government's twenty years Rural Water Supply Programme was launched with the objective of supplying every Tanzanian with safe and portable water within 400 meters. Notwithstanding reinforcement of UN Water Decade which was adopted by Tanzania, the target of supplying water to all by 1991 could not be achieved. However in that year it was found that it was only less than 48% of the rural population which had clean and safe water. The said target was largely achieved through donor support which included among others DANIDA, SIDA, NORAD, TCRS, GTZ, KFW, FINNIDA and UNICEF.

In the 1995 Ministry's Water Sanitation Review it was recommended that:

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

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

Brief review of legislation on rural water supply in mainland Tanzania

Unlike the urban water supply sector the development of rural water supply sector legislation has been gradual in contrast to what has happened to the Urban Water Supply Sub sector. The Urban Water Supply Sub sector had the advantage of getting two pieces of legislation to regulate the water supply. The legislation are:

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

Although the Urban Water Supply Act, 198 established the National Urban Water Authority with the main aim of managing urban water supply in all urban areas in the country the Authority operates only in Dar es Salaam, Kibaha and Bagamoyo. It also manages a two Kilometres corridor on either side of the transmission mains from both lower and upper Ruvu water plants. However, in certain circumstances the application of the said legislation in the rural areas could not be avoided.

The Waterworks Ordinance, Cap. 281 was enacted to provide for and regulate supply of water to the public. The Waterworks Ordinance has passed through two important stages of development. The first stage was prior to the amendments which were made pursuant to the provisions of Water Utilization (Miscellaneous Amendments) Act, 1997. The second stage comprises of reforms that have been implemented after the amendments. Initially the Minister was given the mandate by order, to declare any area defined in any such order to be a water supply area for the purposes of the Ordinance (section 5). The Ordinance further provided that the Minister may appoint a Water Authority for any water supply area and until such appointment is made for any such area the Engineer in Chief was supposed to be the Water Authority for that area (section 4). Further powers were given to the Minister if any special circumstances exist in a water supply area to provide by order in the Gazette that such of the powers, duties and functions of the Water Authority for such area as are specified in the order shall be exercised and performed by any person or persons other than the Water Authority.

Pursuant to the provision of Water Utilization (Miscellaneous Amendments) Act, 1981 Section 3 of the Waterworks Ordinance was repealed and replaced as follows:

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

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

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

The effect of the amendments was that the powers of the Minister are confined to the City Council, a Town council, any urban area other than a village, village settlement or a minor settlement and an area within 400 metres of the existing distribution. This means that the application of the provisions of the Ordinance to the rural areas stopped. Prior to the amendments the Minister had powers to declare the rural areas to be Water Supply Areas.

In the exercise of the powers discussed in above up to the end of October 2003 the Minister declared a total of 38 district headquarters to be Water Supply and Sewerage Authorities out of which 27 have already formed water boards.

Few attempts were made in developing rural water supply legislation pursuant to the provision the Water Utilization (Control and Regulation) Act, 1974. Under the Act the Minister has been given the mandate to make regulations prescribing anything which may be prescribed under the Act for better carrying into effect of the provisions of the Act. The Minister in exercise of these powers made Water Utilization (General) Regulations to provide for among other things, for the formation function and conduct of the Water Users Associations. As a result 44 Water Users Associations have been formed and registered as legal entities and 22 are in different stages of registration (Maji Review, 2003:18). Under the said regulations the functions of the water user associations are to govern conservation, maintenance of works in the river in question and shall decide the assessment to be levied thereof and for the expenses of the association.

Similarly under the provisions of Section 38(2) of the Act the Ministers powers are limited to making rules and regulations for the formation functions and conduct of local associations of water users. It needs to be observed that though the registration of water users association has improved giving comfort to the Ministry and the beneficiaries in rural water supply and sanitation sector, the Act was not meant to be a legislation for rural water supply. It is therefore imperative to have a piece of legislation in place which will regulate the establishment, governance and operations of Water Users Associations.

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

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

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

Issues in legislating for rural water supply

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

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

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

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

Challenges and salient features in the proposed rural water supply legislation

The Rural Water Supply and Sanitation Bill addresses a number of issues as outlined in the Policy and contributions from stakeholders. As it has been explained the Ministry of Water and Livestock Development has decided that the Bill should be merged with the Urban Water Supply and Sewerage Bill into a Water

Supply and Sanitation Bill. The consolidated Bill will have a parts dealing with urban water supply and another addressing rural water supply. That means some of the provisions that are in the Rural Water Supply and Sanitation Bill will be retained in the consolidated Bill. The discussion below reviews some of the challenges and salient features of the Bill on rural water supply.

Ownership of water resources

As it is with other natural resources legislation, as well as the Water Utilization (Control and Regulation) Act, 1974 the proposed new water legislation vests the radical title on water to the United Republic. The Water Resources Bill proposes that all the waters in Tanzania are vested in the United Republic. This means that all water uses, with few exceptions provided under the law must be used with holders of water permits granted, as it is the case under the current Act where they are granted water rights. Therefore, the Bill does not envisage private ownership of water since state ownership of water resources is clearly stipulated under the Act and reiterated under NAWAPO. The Policy stipulates under Paragraph 4.1.1 that:

“...all water in the country is vested in the United Republic of Tanzania and every citizen has an equal right to access and use the nation’s natural water resources for his and the nations (sic) benefit”

Ownership and management of infrastructure

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

Citing of rural water supply system

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

Administrative and engineering requirements for rural water supply

The Rural Water Supply Bill provides for the integration of water and sanitation services. It has provisions on design and development criteria which aim to ensure the following:

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

Other factors to be taken into account in the Draft Bill are:

- environmental protection against possible degradation from the use of such water;
- provision of Environmental Impact Assessment
- implementation of demand responsive approaches;
- creation of water funds
- implementation of demand responsive approaches

Licensing of practitioners in rural areas

The draft Bill provides for minimum professional qualifications and procedures for licensing or registration of small-scale practitioners such as plumbers pump mechanics and masons. More specifically, the draft Bill provides for:

- selection criteria for applicants and their qualifications to be used by designated agency;

- registration, certification and categories of such practitioners.

Water service charging

As provided under NAWAPO, provision of rural water supply and sanitation services must ensure cost-recovery. Therefore the Bill has provisions that will provide a legal framework for the:

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

Private sector participation in rural water supply

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

The mechanism for the private sector participation in the existing infrastructure and new infrastructure rural water supply to be developed or managed by the private sector can be through service contracts, management contracts, leases, concessions, and outright privatisation.

Governance of rural water supply

Issues of governance of rural water supply in Mainland Tanzania have been dodged with a number of problems. The tendency for many years was more based on centralisation of management of rural water supplies through the Central Government or donor agencies. Even after the institution of the policy of decentralisation by devolution in Tanzania still the tendency was to decentralise down only the district level ignoring the lowest levels. This has made the institutional framework for rural water supply to be an issue of intense debate. The balancing act between the role of the central government and the district councils on one hand and the community based water user associations is not yet concluded and it is being worked out in a strategy that is being prepared by the Ministry of Water and Livestock Development.

The decentralisation of the government functions to the regions and districts started in 1972. The decentralisation was aimed to transfer the decision making as well as implementation close to the communities. Most ministries had to decentralise their functions to the regions and districts. The government decided to abolish the local governments but in 1982 they were reinstated. The objective of creating local government authorities is stipulated under the Constitution of the United Republic of Tanzania which provides under Articles 145 and 146 among other things that:-

- there shall be established local government authorities in each region district, urban area and village in the United Republic.
- the Parliament shall enact law providing for the establishment of local government authorities their structure and composition sources of revenue and procedure for the conduct.

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

The biggest challenge in the governance of rural water supply is to ensure that the village level and communities fully participate. There are still discussions on what will be the role of district councils in the management of rural water supply.

There is a general agreement that water user association should be main vehicle in the management of rural water supplies. An association is a legal entity registered under the provisions of the Societies Ordinance [Cap. 337]. An association has similarities with Cooperative Societies. However, unlike cooperative societies which are subject to the control and interference by the Government through the Registrar of Cooperatives, they are autonomous. Water User Associations that are registrable under the provisions of the Societies Ordinance are to be registered with the Registrar of Associations who is under the Ministry of Home Affairs. However, under Section 38(2) (f) of Water Utilization (Control and Regulation) Act, 1974 the Minister has also been given the mandate to make regulations to provide for the formation, functions and conduct of local associations of water users. The associations are to be registered with the Ministry of Water. In both cases the societies registered are conferred with corporate status. They are capable of suing and being sued and owning property.

Customary water law and norms

Customary law refers to set of rules and norms practiced by a community over a long period of time and most often are not codified. These laws provide for a set of rights and duties to be observed by certain community and against outsiders.

In the case of water resources, various communities in Tanzania have a long history of practicing certain customary laws for management of such resources. Even in the advent of colonial invasion, customary water law continue to exist in parallel with statutory law. These traditional ethos and practices are deep rooted and have been found to be useful in resolving water use conflicts, defining water allocation for different local uses and provide for catchment protection.

The FAO Legislative Study No. 58- Readings on African Customary Water Law provides for an in-depth study of the dynamics of customary law in different African ethnic groups and some of them are from Tanzania. In some areas in Tanzania there are traditional/customary water rights practiced by rural communities that ensured sustainability of water resources. In some areas communities have customary laws/practices that bestowed them with ownership rights that exclude outsiders. Because these practices are established over the years, they are critical considerations that need to be reflected in the law for the better management and voluntary enforcement of the laws. Customary laws or practices, if consistent with statutory laws may also form the basis for community support for enforcement of statutory laws.

Currently the water resources laws do not make provisions for recognition of customary laws and practices. This is one of the gaps in the legislation that needs to be addressed. As noted elsewhere, “the non-recognition of traditional or customary water users is at the root of many water use conflicts.” (FAO: 1997) Even in cases where customary practices conflict with the objectives of the water resources laws, awareness and enforcement efforts may help to change the existing practice. There are proposals for provisions on the relevancy of customary law for water resources management and rural water supply service delivery. Customary water laws may provide relevant provisions on conflict resolution, community participation in the management of water resources and water allocation.

In trying to include the application of customary law the following tentative provisions were proposed for consideration for inclusion in one of the water laws being drafted. The decision of whether they will be adopted or not is not in the hands of the consultants but the Government and eventually the Parliament. The proposals are as follows:

Definition of customary rights

Customary rights mean the rights and practices in relation to water resources as have been practised by communities or individuals since time immemorial in the belief that they create binding rights and obligations.

Incidents of customary law water rights

- (i.) Customary rights held by any natural person or community in a water resource shall be recognised and is in every respect of equal status and effect to a granted right and shall, subject to the provisions of this Act, be:-
- (a) capable of being granted by a Basin officer to a citizen, a family of citizens, a group of two or more citizens whether associated together under any law.
 - (b) capable of being of indefinite duration.
 - (c) governed by customary law in respect of any dealings, between persons using the water body within the authority or body having jurisdiction over the water resource or facility.
- may be granted subject to a premium and an annual payment, which may be varied from time to time

Grant and management of customary water right:

- (1) A person, a family unit, a group of persons recognised as such under customary Law or who have formed themselves together as an association, cooperative society or as any other body recognised by any law which permits that body to be formed may apply to the Basin officer for grant of a water right.
- (2) An application for a grant of a customary water right shall be:-
 - (a) made on a prescribed form,
 - (b) signed-
 - (i) by the applicant or
 - (ii) were the application is made by a family unit, by not less than two persons from the family unit or
 - (iii) where the application is by a group of persons recognised as such under customary law, by not less than two persons who are recognised by that law as leaders or elders of
 - (iv) where the application is by a group of persons formed into an association cooperative society or a body under a law which recognises that body, by not less than two duly authorised officers.
 - (v) A duly authorised agent of any of the applicants referred to in paragraph (i) to (iv)
 - (c) Accompanied by any document and information from the village council or any other information which may be prescribed.
 - (d) Accompanied by any fee which may be prescribed.

Determination for application of customary water right

- (1) The Basin officer shall within ninety days of the submission of an application or within ninety days of submission of further information or a satisfactory explanation of it's non availability, determine the application.
- (2) In determining whether to grant the right the Basin officer shall:-
 - (a) comply with the decisions that have been reached by any committee or other body on the adjudication of the water rights in the area which the subject of the application for a customary right.
 - (b) have special regard in respect of the equality of all persons, such as:-
 - (i) treat an application from a woman, or a group of women no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women; and
 - (ii) adopt or apply no adverse discriminatory practices or attitudes towards any woman who has applied for grant of a right.
 - (c) where the application is from person or a group of person:-
 - (i) the purpose for which the applicant is intending to use the right and whether that purpose accords with any village development or land use plan.
 - (ii) any other matters that may be prescribed
- (3) The Basin officer shall after considering an application in accordance with subsection (2).
 - (a) grant the right applied for subject to any conditions which may be prescribed or
 - (b) refuse to grant the right to the applicant.
- (4) where an application is refused, the Basin officer shall, at the request of the applicant, furnish that applicant with a statement of reasons for the refusal.

Grant of customary water right

- (1) Where a contract for a grant of a right has been concluded the Basin officer shall within ninety days of that conclusion grant a right to the applicant who accepted the offer by issuing a certificate to the applicant
- (2) A certificate shall be:-
 - (a) in a prescribed form
 - (b) signed and sealed by the Basin officer.

Enactment of By-laws

- (1) The village Councils shall enact by laws in their areas of jurisdiction that shall manage and resolve conflicts in respect of persons with customary rights in accordance to the traditional customs of the particular area.

Establishment of water user associations:

- (1) Any group of households using a specific water point may apply as a body corporate for registration as a water user association on a prescribed form to the Basin Officer.
- (2) Membership in water user association shall be open to individuals or households who regularly use a specific water point for their water supply needs; provided that an individual or household may be a member of more than one water association if the individual or association regularly uses more than one water point.
- (3) Every water user association shall consist of not less than five and not more than ten members one of whom shall be the secretary.
- (4) The members of the water users association shall be elected by the persons in community who use the water point.
- (5) Each member of the water user association shall hold office for a term of two years and shall be eligible for re election on the expiration of his term of office.
- (6) The water user association shall manage and maintain the water point in its area of jurisdiction.
- (7) The water user association shall initiate water schemes including water wells where it deems fit to do so.

Concluding remarks

The finalisation of the provisions of water legislation is very crucial in ensuring that the concerns and interests of rural dwellers are genuinely addressed. Fortunately the legislative process in Tanzania has made public hearings mandatory at the level of standing parliamentary committees and they are open to every body that wants to participate. The experience in the process of enacting the Land Act, 1999 and the Village Land Act, 1999 in Tanzania has shown that where people are organised and consistent in pushing their arguments leads the Parliament enact a law that takes into account interests of the people. In the case of the land laws it was the women civil society organisations which took the lead in pushing for reforms. Equally in the case of water laws if the women civil society will appreciate that water is as critical as land to women interest in Tanzania and champion the cause it will help in shaping the laws to the interest not only of women but the entire rural population and the indigent urban population.

References

- FAO, 1997. Preliminary Report on National Water Resources Laws and Institutions in Tanzania, (Water Law and Advisory Programme- GCP/INT/620/NET)
- Ministry of Water, 1994. Rapid Water Resources Assessment Report
- Ministry of Water, 2001. Partnership Framework for the Support to the Rural Water Supply and Sanitation Sector in Tanzania.
- Ministry of Water, 2002. National Water Policy.
- Sayi, C and Mutalemwa, 1997. The water sector in Tanzania: Current Status and Possible Divesture Alternatives. Paper presented at the Competition Policy/ Utility and Regulation Workshop 20-22 January 1997
- RBMP, Ministry of Water, 2003. Report on the preparation for the Review of Water Resources Legislation: Issues for Consideration.

- United Republic of Tanzania, 2003. Speech of the Minister of Water and Livestock Development Hon. Edward Lowassa during the Parliamentary Budget Session for 2003/2004
- Betlem, I, (1997), Preliminary Report on National Water Resources Laws and institutions in Tanzania-FAO Water Law & Advisory Programme GCP/INT/620/NET (unpublished Report).
- Boesen, J, Maganga, F& Odgaard, R (1996), "Norms, organisations and actual practices in relation to land and water management in Ruaha River Basin, Tanzania" paper prepared for the IUAES/IGU congress on livelihoods from Resources Flows Linokping. 19-22 August 1996.
- Burchi, S (1993), "Institution and legal issues in Rural Water Management" in FAO, Proceedings of the Technical consultation on integrated Rural Water Management, 15-19 March 1993 Rome.
- Dungumaro, E & Ndalaha F. Madulu (2002), "Public participation in integrated water Resource Management. The case of Tanzania" paper presented at the 3rd Waternet/Warfsa Symposium Water Demand management for sustainable Development, Dar es Salaam 30-31 October 2002.
- James, R.W & Fimbo G.M, Customary Land Law of Tanzania. A Source Book.
- Maganga, F, (2002), "Incorporating Customary laws in implementation of IWRM. Some insights from Rufiji River Basin" paper presented at the 3rd waternet/warfsa symposium Water demand management for sustainable development, Dar es Salaam, 30-31 October 2002.
- Moore, S.F (1986), "Social facts and Fabrications Customary Law on Kilimanjaro. 1880-1980" Cambridge University Press.
- Moore, S.F (1989), "History and redefinition of custom on Kilimanjaro".
- Mutayoba, W. (2002), "Management of water resources in Tanzania through Basin Management "paper presented at the 3rd Waternet/warfsa symposium, water demand for sustainable Development, Dar es Salaam 30-31 October 2002.
- Shauri, V. (1997), "Legal Report on Water Resources Law, policies and institutions in Tanzania" prepared in connection with FAO Project GCP/INT/620/NET.
- United Republic of Tanzania (2003), Draft Report on the Preparation for the Review at water resources Legislation:-Issues for consideration-River Basin Management Project.
- URT (2004), Report on the Review of Water Resources Legislation: Issues and Recommendations for Legislative Reform.
- URT (2004) Report on the Review of Customary Water Laws: Issues and Recommendation for Legislative Reform.
- URT (2004) Report on the Proceedings of the National Workshop for Water Sector's Stakeholders to Discuss the Draft Water Laws.

Contact addresses

Palamagamba John Kabudi, Faculty of Law, University of Dar es Salaam, PO Box 35093, Dar es Salaam, Tanzania (pjkabudi@udsm.ac.tz)