

**THE INTERFACE BETWEEN
CUSTOMARY AND STATUTORY
WATER RIGHTS –
A STATUTORY PERSPECTIVE**

**BY
STEFANO BURCHI**

**FAO LEGAL
PAPERS
ONLINE #45**

March 2005

FAO Legal Papers Online is a series of articles and reports on legal issues of contemporary interest in the areas of food policy, agriculture, rural development, biodiversity, environment and natural resource management.

Legal Papers Online are available at <http://www.fao.org/legal/prs-ol/paper-e.htm>, or by navigation to the FAO Legal Office website from the FAO homepage at <http://www.fao.org/>. For those without web access, email or paper copies of Legal Papers Online may be requested from the FAO Legal Office, FAO, 00100, Rome, Italy, dev-law@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Legal Paper Online to the same address.

The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the United Nations or the Food and Agriculture Organization of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

The positions and opinions presented do not necessarily represent the views of the Food and Agriculture Organization of the United Nations.

In the countries where customary rules play a significant role, particularly in the rural areas, customary law and customary water rights are a factor to be reckoned with when preparing "modern" legislation regulating the abstraction and use of water resources through government permits or licences. From a statutory perspective, the two water rights systems intersect and interact in the transitional phase following enactment of new water legislation, and in the course of administering the latter's abstraction licensing regulatory provisions. The law avails mechanisms to prevent collision between the two water rights systems, and to settle disputes. The analysis of these mechanisms raises a number of issues. Further research into the functioning of these mechanisms will be welcome to shed additional light on a much neglected facet of water resources law, and to enrich the policy debate on the role and accommodation of customary water rights in the new dispensation inaugurated by modern water legislation.

This paper was prepared for the international workshop on:

African Water Laws: Plural Legislative Frameworks
for Rural Water Management in Africa
26-28 January 2005, Johannesburg, South Africa

Table of Contents

Introduction

Some salient features of customary water rights

Points of intersection and interaction of customary and statutory water law and water rights and legislative approaches to reconciling the two

Statutory recognition and safeguarding of “pre-existing” customary rights

Statutory grant of original usufructuary rights to water for selected purposes

Accounting for customary rights in the administration of statutory abstraction licensing requirements

Reconciling customary and statutory water rights in the process of disposing of applications for the grant of new abstraction licences

Reconciling customary and statutory water rights in the course of operating new abstraction licences

Other avenues to reconciling customary and statutory water rights

Issues Emerging

Conclusions

References

Notes

Introduction

The last two decades of the 20th century and the beginning of the current century have witnessed a spate of new laws on freshwater management and developmentⁱ. This phenomenon reflects increasing attention to the looming "water crisis" by policymakers, legislators and public opinion in a vast number of countries from all parts of the world alike. This surge of statutory law, i.e., the body of law laid down in the Acts of legislature and in subordinate legislation, however, offers no *per se* guarantee of change on the ground. On one hand, the success of regulatory legislation in general, and of legislation regulating access to and use of natural resources, like notably, freshwater, in particular, hinges on *implementation* and *enforcement*. Both implementation and enforcement have met with problems in many a jurisdiction, for a variety of reasons, the investigation of which is beyond the scope of this paper. On the other hand, whereas regulation of water resources abstraction and use stands a chance of success in regard to the relatively few large commercial users of the "raw" resource (i.e., water drawn directly by the user from rivers and wells), the reach of such law in rural areas in general can be effectively stifled by a combination of factors, such as a myriad of users of the raw resource, low literacy rates, and difficulty of communication from the capital city. To these factors one must add the resilience of a body of water law pre-existing statutory water law, commonly known and referred to as "customary law", i.e., law and rules based on long-standing practice, not codified in written form.

In countries where customary law and customary water rights play a significant role, particularly in rural areas where they govern access and rights to water for basic human needs, for the watering of livestock and for subsistence agriculture, customary law and customary water rights are a factor to be reckoned with when preparing "modern" legislation regulating the abstraction and use of water resources through government permits or licences. Failure to recognize the existence and resilience of customary practices, and to take them into account in "modern" water resources legislation, is a recipe for social tensionⁱⁱ.

This paper will contribute to mapping out the area of interface of customary water rights and statutory water rights. Based on original surveys and analyses of water legislation and customary water rights and practices in Canada (Nowlan 2004), Ghana (Sarpong 2004), Guyana (Janki 2004), and Nigeria (Kuruk 2004)ⁱⁱⁱ, as well as a brief analysis of the contemporary legislation of Argentina, Indonesia, and Namibia, this paper will (a) review the extent to which customary water-related practices and rights have been accounted for in water legislation, (b) analyze the approaches to reconciling such rights with the rights created by statute and administered by government, and (c) based on the analysis, flag emerging issues as well as sketch an agenda for future action.

Some salient features of customary water rights

Customary law consists of the customs and practices accepted by members of indigenous groups as binding upon them^{iv}. While customary law and rights in general enjoy constitutional status in Canada and Ghana, in none of the countries surveyed can they be regarded as a uniform body of law and rules, as customs and practices vary from group to group^v.

A detailed description of the customary water rights in the four main countries surveyed is beyond the scope of this paper^{vi}. Customary *water* rights are frequently rooted in customary *land* law, i.e., the body of rules and practices which govern access to and tenure of land. This is so in Nigeria, where a customary grant of land generally confers rights on water resources, among other products of the soil^{vii}. In Canada, customary water rights have been implied by the courts in aboriginal title to land, in treaty-based land rights, in land reserve rights, and in common law land-based riparian rights^{viii}. Until enactment of the Water Resources Commission Act of 1996, customary water rights in Ghana were, by and large, regarded as part of land rights^{ix}. And, Indonesia's new Water Resources Law's provisions on the "traditional rights" of local communities are ostensibly directed at *land* rights and, only by implication, at the *water* rights which accrue from them^x. As will be shown later in this paper, these salient features of customary water rights are not devoid of legal implications when it comes to their interface with statutory water rights, and with modern water legislation which severs the land-water link and de-couples water rights in general from the land.

Points of intersection and interaction of customary and statutory water law and water rights and legislative approaches to reconciling the two

Theoretically, customary water law and rights could co-exist with and alongside statutory water law and rights, as two separate systems and bodies of law, mutually impermeable. This proposition, however, is untenable in practice as the two systems are bound to intersect and interact, in space and time. They do so particularly where a country's legislature adopts legislation providing new rules of water resources appropriation, use and protection. As such legislation invariably upsets a pre-existing body of rules, be they of customary or also of statutory origin, and the rights operating under these rules. Enactment of such new legislation inaugurates a transitional period of intense interaction of the new and the old sets of legally binding rules, during which mutual adjustment of the old rules and rights to the new rules, but also of the latter to the former, is pursued and generally achieved, as smoothly and painlessly as permitted by the rules provided to this specific end by the new legislation^{xi}.

Once this time-limited transitional process is over, opportunities for intersection and interaction will continue to arise. This interaction will take place to the extent that the pre-existing body of customary rules and practices controlling water resources appropriation and use particularly in the rural areas, and the rights operating under them, survive new legislation and the ensuing adjustment process^{xii}. Customary rights become then an important factor to be reckoned with and taken into account by government in the administration of legislation

inaugurating water abstraction licensing and, in particular, in the process of disposing of applications for the grant of a licence, and thereafter during the life of a water abstraction licence.

Statutory recognition and safeguarding of "pre-existing" customary rights

When the Water and Sewerage Act of 2002 was adopted, Guyana's lawmakers recognized and safeguarded "any right, privilege, freedom or usage possessed or exercised by law or *by custom* by any person"^{xiii} (emphasis added). The relevant statutory provision connotes the lawmakers' will to accommodate *en bloc* customary water rights alongside statutory water rights. However, to qualify as customary water uses, it must be proved that these uses are ancient, certain, reasonable and continuous. It is unclear to what extent customary uses of water would meet this standard and it is the burden of the communities concerned to prove the existence of customary use. To complicate matters, Guyana's Act provides no definition of the exact scope of this saving provision, nor is there any case law that would help^{xiv}. A similar approach is reflected in Indonesia's new Law on Water Resources, adopted in March 2004, to replace the previous Law on Water Resources of 1974. The new Law carries an implicit statutory recognition of the "local traditional communal rights" held by traditional communities, so long as these are known to exist in fact and have been "confirmed" by local regional regulations. Recognition, however, is conditional upon communal rights not contravening national interests and the legislation. The new Law also volunteers criteria to test traditional rights for being in existence^{xv}.

Ghana has taken a different approach. In an attempt to attract customary law and rights within the fold of statutory law, Ghana's lawmakers vested ownership of water resources in the State, and directed the holders of water rights to stake their claim within twelve months of the coming into force of the Water Resources Commission Act of 1996. The government would then investigate such claims and, if it found that a right indeed existed, "it would take such action as it considers

appropriate". However, no claims are known to have been filed, nor have any administrative actions been reported to have been taken, pursuant to this remarkably open-ended provision^{xvi}. As a result, whether a successful claim would result in the transformation of an original customary water right into an administrative right, subject to all the restrictions and limitations of this latter category of water rights, is a matter for intellectual speculation.

This issue has been addressed head-on by the Argentinian Province of Tucuman's Water Act of 2001. This Act states that "traditional" rights pre-existing the Act would, on application to be made within one year of the coming into force of the Act, be confirmed through the grant of an administrative concession. The administrative concession is not subject to a term of duration, however the rights accruing from it become subject to the new statutory provisions and water rights regime^{xvii}. This includes, in particular and by implication, the obligations imposed by the statute on all water rights holders, and the government's authority to cancel the right under given circumstances.

The approach taken by these countries, of seeking to bring within the fold of statutory law traditional customary rights, is common across all jurisdictions, in the developing and in the developed parts of the world alike. A vast majority of the countries where surface-water resources were historically appropriated and used on the basis of riparian rights and groundwater on the basis of the rule of "capture"^{xviii} has, in the past two decades, transitioned from what could be described as a system of customary water law and rights to an entirely new dispensation based on government water abstraction permits and licences. In the process, pre-existing customary rights have invariably been brought within the fold of the new legislation through either of two techniques or both. The two common techniques are: (a) a statutory grant of original usufructuary-type rights (see below for relevant discussion), and (b) an administrative recognition-cum-safeguarding of existing rights^{xix}.

This administrative recognition-cum-safeguarding is rarely *en bloc*, but more frequently subject to meeting given

substantive and evidentiary requirements, and to a discretionary appreciation of the same by government^{xx}. Administrative recognition-cum-safeguarding, in particular, tends to be conceived of by lawmakers as an opportunity offered to the holders of pre-existing rights, be these based on custom or other legal grounds, to "come forward" and have their rights formally acknowledged and recorded by the government. This window of opportunity is transitional, generally lasting one year after the coming into force of the new legislation. Failure to avail such opportunity generally implies forfeiting the protection afforded statutorily to all rights covered by the new water resources legislation as against third-party claims, including claims by government. This sanction "bites" when this transitional window of opportunity closes and the next conceivable opportunity for intersection and interaction between statutory and customary rights materializes, i.e., in the normal course of administering the new statutory water abstraction licensing requirements (see below).

Proving that a customary right or practice exists is central to the recognition and the ensuing recording process. The legislation sometimes helps by supplying standards or criteria of required evidence to guide the discretion of government or the courts if the rights are litigated. In Nigeria, Customary courts hear cases involving customary law and rights. The judges of these courts are presumed to know the customary law and can apply it on the basis of their personal knowledge. However, the parties may call in witnesses acquainted with the native custom, including chiefs, linguists, advisers and other experts. Books and manuscripts, and reports of Customary courts on questions referred to them are also regarded as legitimate sources of evidence^{xxi}. The courts too have developed standards of evidence. For example, in Canada, in a landmark case on aboriginal title to land, the Supreme Court accepted the use of oral evidence^{xxii}. In another Canadian case, a ten-factor test was laid down to prove the existence of an aboriginal fishing right^{xxiii}.

Statutory grant of original usufructuary rights to water for selected purposes

In Nigeria, by virtue of the Water Resources Decree of 1993, the legislators vested in the Federal Government a superior right to the use and control of all interstate water resources. At the same time, Nigeria's legislators also bestowed on "any person" an original statutory right:

- to take water without charge for the person's domestic purpose or for watering his/her livestock from any watercourse to which the public has "free access"^{xxiv}, and
- to use water for fishing to the extent that such use is not inconsistent with any other law in force.

In addition, a customary right of occupancy of land would attract an original statutory right to draw water from under the ground or from an adjacent stream, without charge, for domestic purposes, for watering livestock and for personal irrigation^{xxv}.

This approach is also common across virtually all jurisdictions which have transitioned from traditional riparian and capture rights to water to an entirely new dispensation based on government water abstraction permits and licences. The ostensible purpose and justification of this approach is to achieve administrative expediency by "weeding out" a myriad of sparse users who are reckoned to place, individually, no serious stress on the available water resources, and thus lighten the burden on government of administering the abstraction licensing legislation. Arguably, a less apparent, but no less compelling, purpose for the kind of provisions illustrated above is to defuse the potential for social disruption inherent in a radical change in the "rules of the game" by, in particular, acknowledging to a given extent the rights and practices of customary origin.

Accounting for customary rights in the administration of statutory abstraction licensing requirements

Once the transitional phase of intense interaction between customary rights and new water legislation discussed earlier is over, opportunities for intersection and interaction of the two, and of the water abstraction and utilization rights accruing through the operation of both, are bound to arise in the regular course of administration of the licensing requirements of the new legislation. Ideally, the transitional phase of interaction and adjustment between the two systems and the rights under each will have brought within the fold of statutory law all pre-existing customary rights. The transitional phase should also have afforded all pre-existing customary rights equal standing and protection as are afforded statutory water rights against the claims of new applicants for the abstraction and utilization of the same water resources. At that level and stage, customary water rights will, in practice, be no different than statutory water rights as to legal standing and protection before the law. By virtue of having been recorded with and made known to the government water administration, those rights will be routinely protected by the government water administrators as they dispose of new applications for the grant of statutory abstraction licences which conflict with those rights^{xxvi}.

This, however, is an ideal scenario. In practice, pockets of customary rights and practices, particularly in rural areas, are bound to escape the net cast by the capital city's lawmakers and water administrators. Such pockets of unaccounted-for rights vary in size and significance, and tend to be in direct proportion to (a) the number of customary users scattered in the countryside, (b) their ignorance of, or (c) indifference to, the new water legislation in general, and its transitional rules and the opportunities these afford in particular, and (d) the government water administrators' willingness and ability to inform and sensitize the user population and, eventually, to make good on the threats carried by the legislation against

the users who ignore its transitional provisions and opportunities^{xxvii}. In addition, the protection from third-party claims which is implicit in the formal recognition of customary water rights is not water-tight as the government tends to enjoy wide latitude in appraising applications for the grant of statutory abstraction licences.

Reconciling customary and statutory water rights in the process of disposing of applications for the grant of new abstraction licences

As a general rule, new statutory licences can only be granted subject to pre-existing rights and licences. If pre-existing rights need be sacrificed, in whole or in part, to accommodate a new licence, compensation is generally provided. For the existing and the proposed new water rights to be reconciled, however, the former must be or become known to the government water administrators responsible for the disposal of applications and the eventual granting of new abstraction licences. The transitional recognition-cum-safeguarding opportunities availed by the legislation are intended to provide government with just that information and knowledge. If, for one reason or another, these time-limited opportunities have not been availed, existing customary rights could, in theory, be claimed as against a proposed new licence through the public information and consultation process generally availed by the legislation in the course of disposing of new license applications, and prior to making a final administrative decision on them.

In Canada, *consultation* with aboriginal groups or individuals holding customary water rights, with a view to determining if a proposed water abstraction licence will affect such rights, is entrenched in much provincial water legislation^{xxviii}. In particular, the British Columbia department which administers the water licensing legislation has developed an elaborate procedure of consultation to determine if a proposed water abstraction licence will affect aboriginal interests, and has drawn up Protocols for water administrators to use to fulfil their consultation duties. Case law is also

available on the matter, and it is in constant evolution. In particular, the courts have held that the nature and scope of the water administrators' duty to consult vary with the circumstances, and that it may stretch as far as requiring the prior consent of the affected group.

The legislation can go as far as prescribing to what extent customary water rights are to be factored by the government water administrators in the abstraction licensing decision-making process. This, regardless of whether such rights are on record as a result of their having been surveyed and formally recognized, or they come to light at the investigation stage of new license applications. Namibia's legislature adopted recently a Water Resources Management Bill, for instance, which directs the government water administrators to (a) take into account customary water rights in determining applications for abstraction licenses, and (b) enter in the new abstraction licenses terms and conditions which will satisfy the requirements of customary water rights^{xxxix}. Recourse is routinely available to water rights holders in general, and to the holders of customary water rights in particular, to challenge an administrative decision to grant a water abstraction licence. In Canada, most provincial water licensing systems provide for affected parties to appeal from such decisions, often in the first instance to an administrative tribunal and then to a court of law^{xxx}. In particular, British Columbia's Environmental Appeal Board has heard several cases involving conflicts between customary water rights held by aboriginal groups or individuals and statutorily-granted water abstraction licences. Only a handful of cases, however, has reached the judiciary so far in that Province and elsewhere in Canada, with mixed results for the plaintiff customary water rights holders^{xxxi}.

Reconciling customary and statutory water rights in the course of operating new abstraction licences

Conflict situations may arise also if a licence has been granted in ignorance of pre-existing customary rights, and these come to light after the licence has begun

operating and generates, as a result, the resistance of the customary rights holders. The recourse mechanisms described in the previous section to challenge a water abstraction licence are also available to address this conflict situation, provided however that the relevant statute of limitations has not run its course, and recourse has not become time-barred as a result. Short of this, legal recourse can also be had on the grounds of a takings violation of constitutionally protected property rights. The remedy sought could consist of the total or partial withdrawal of a licence or, alternatively when this course of action is not feasible or desirable, compensation. A compelling case could be made particularly where customary water rights derive from customarily-held landed property rights. It has been argued that this could well be so under Guyana's constitutional provisions on the protection from deprivation of property^{xxxii}. A similar argument has been put forward, also hypothetically, as grounds for the protection of customary water rights under Ghana's constitutional guarantees of property rights^{xxxiii}.

Other avenues to reconciling customary and statutory water rights

In Canada, the Province of British Columbia (BC) has embarked on a Water Use Planning (WUP) process aimed at reviewing the operating conditions of BC Hydro's power generation facilities with the goal of finding a better balance between competing uses of water that are socially, environmentally and economically acceptable. WUP is not a statutory process, yet the Provincial government has gone to the extent of developing WUP Guidelines which imply that one of the Province's intentions in developing WUPs is to canvass the customary water rights of aboriginal groups^{xxxiv} and, in the process, defuse opportunities for confrontation and eventual dispute.

The goal of defusing opportunities for confrontation and eventual dispute underpins also other mechanisms devised by the legislation to engage customary water rights holders in statutorily-mandated and -regulated decision-making by government. These range from membership of one tribal chief in Ghana's

Water Resources Commission to the obligation placed by Guyana's Water and Sewerage Act of 2002^{xxxv} on the Minister responsible for water resources to consult with Amerindian Village Councils in developing the national water policy^{xxxvi}. The consultation requirements of Canada's government water administrators with customary water rights holders when the government contemplates water resources allocation decisions has been mentioned earlier. *Co-management* regimes have been established, also in Canada, where indigenous peoples participate directly in planning and administration decisions over natural resources, including water. Since the first co-management regime and institution were negotiated in 1975, more than fifteen Boards have been formed to manage and allocate resources in a particular area of Crown lands and waters. The Boards which have been established in Yukon, the Northwest Territories and in Nunavut have, among others, water abstraction licensing authority and responsibilities^{xxxvii}.

Issues emerging

A paramount issue of much on-going "modernization" of water resources legislation is how to deal with pre-existing rights and practices of customary origin, at least in those countries where customary law constitutes a legitimate source of law, and customary rights play a significant role, particularly in the rural areas. Stated otherwise, dealing with such rights and, in the process, striking the "right" balance between the security of title legitimately sought by commercially-minded investors and the equally legitimate requirements of traditional livelihoods and lifestyles is a paramount issue which water lawmakers must grapple with. Standard statutory responses to this issue have been illustrated, which provide the policy parameters for the government water administrators to strike the balance best suited to the circumstances of each particular case.

The statutory responses, and their day-to-day implementation on the ground, trigger in train a number of other emerging issues, notably:

- customary water rights holders may be ignorant of, or simply indifferent to, the initial opportunities for formal recognition-cum-safeguarding of customary rights afforded by water resources legislation^{xxxviii}. Lack of or inappropriate communication, lack of incentives, and a cultural bias, are the root causes of such ignorance and indifference. Both risk entrenching the insulation of customary systems of water rights from mainstream statutory-driven change, and multiplying as a result opportunities for confrontation and dispute at a mature stage of implementation of the legislation, in the course of administering its water abstraction licensing provisions;
- for the same reasons, customary water rights holders may be equally ignorant of, or simply indifferent to, the subsequent avenues for their rights to be accounted for at the stage of administering the water abstraction licensing provisions of the water legislation. This risks undermining the security of statutory abstraction licenses, as these will be exposed to legal challenges on a variety of possible grounds, so long at least as the affected customary rights holders have the required knowledge of their rights and of the avenues for protection through government and the judiciary afforded statutorily - and, of course, the means to approach both and to vindicate their rights;
- to be effective as a vehicle to defusing opportunities for confrontation and dispute between customary and statutory water rights and users, participation of customary water rights holders and groups in government-driven decision-making on matters of policy, planning and day-to-day water resources allocation, must be meaningful. Arguably, for instance, membership of a lone tribal chief in Ghana's fifteen-member Water Resources Commission hardly lives up to this standard, and pays lip service to the role and significance which customary water rights are reckoned to have in that country;

- in the process of accounting for customary water rights for the purposes of water resources legislation, the standards of evidence supplied by the latter to prove a customary water right will play a critical role. It is readily apparent that if the evidentiary requirements are set too high many customary rights will not survive, at least on the terms set statutorily;
- the holders of customary water rights will perceive themselves as losers if, as a result of successful formal recognition of their rights, these are replaced by statutory rights, and become as a result subject to all the limitations as to quantity and purpose of water withdrawal, and duration of the right, and to burdens like payment of charges, which generally accompany and qualify statutory water abstraction licences^{xxxix};
- much "modernization" of water resources legislation is underpinned by a culture of decoupling water resources from the land, which is at loggerheads with customary water rights generally deriving from customary land tenure^{xl}. By cutting off customary water rights from their source, the risk is to further erode the cultural identity and diversity of the rights holders and their groups. In particular, if decoupling is pushed to the extreme of allowing statutory water rights in general, and formally recognized customary water rights in particular, to drift away from the land and the original purpose for which water was abstracted and used thereon, to where the market dictates, there is a serious risk of further marginalizing the holders of customary water rights and their groups^{xli}.

Conclusions

This limited review and analysis of experience and legislation discloses that customary water rights intersect and interact with statutory law at the stage of formal recognition of the former by the latter. This phase follows enactment of

the legislation and is time-limited. It culminates in the formal "recognition" of customary rights and in their attraction into the statutory regime of regulated water abstraction licenses and rights inaugurated by the legislation.

Customary water rights surviving this transitional phase intersect and interact with statutory water rights typically accruing from water abstraction licenses, at subsequent phases:

- the reconnaissance phase of customary rights in the process of disposing of statutorily-regulated abstraction license applications, with a view to the former being reckoned with in this process. Intersection and interaction at this level occur also, and in particular, if customary water rights have gone un-accounted for in the recognition phase mentioned earlier;
- in default, the operating phase of statutory water abstraction licenses, i.e., when these have begun impacting on customary water rights which have gone un-accounted for in the formal recognition and in the reconnaissance stages of these rights, alluded to above. This interaction continues to occur where newly granted statutory rights may interfere with unrecognized customary rights, up until the point of the statute of limitations for making such interference claims, or longer should the judiciary have any discretion.

The two are potentially highly conflictive areas of legal intersection and interaction between the two water rights systems. Statutory law has responded by availing legal mechanisms to prevent confrontation and to settle formal disputes, and to ultimately seek to reconcile customary and statutory water rights. The statutory responses, however, raise a number of issues, some of which have been identified and briefly discussed.

In the countries where they play a significant role, accounting fairly for customary water rights in a new statutory environment favouring effectiveness and efficiency of water allocation and use is a key factor in the smooth operation of the

new dispensation inaugurated by water resources legislation, and in its ultimate success. The achievement of this goal calls for collaborative-type mechanisms engaging customary water rights holders, and inviting them to approach the legislation and avail themselves of the opportunities this provides to be "counted in" in the new statutory dispensation. The success of the legislation on this score very much depends on the statutory incentives provided, and on the government's strategy to communicate and reach out to customary water rights holders. In default, expensive, time-consuming and unpredictable confrontational means of formal dispute settlement remain the only option for customary water rights holders to be reckoned with by the government water administrators and by the holders of statutory water abstraction licences.

Further research into the areas of intersection and interaction mapped out in this paper and, in particular, into the collaborative- and the confrontational-type response mechanisms provided by the formal legal systems, is called for to corroborate the analysis and the findings of this paper, to uncover additional experience on the ground and additional relevant legislation, and to identify and discuss additional issues. More in general, such research is desirable to shed additional light on a much neglected aspect of water law, and to enrich the policy debate on the role and accommodation of customary water rights in the new dispensation inaugurated by modern water resources legislation

References

- Food and Agriculture Organization of the United Nations (FAO), 1996. Readings in African customary law-Anthologie du droit coutumier de l'eau en Afrique, by M. Ramazzotti, Legislative Study No.58, Rome
- Food and Agriculture Organization of the United Nations (FAO), 2001. Water rights administration – Experience, issues and guidelines, by H.Garduño Velasco, Legislative Study No.70, Rome.
- Food and Agriculture Organization of the United Nations (FAO), 2002. Law and sustainable development since Rio - Legal trends in agriculture and natural resource management., Legislative Study No.73, Rome.
- Food and Agriculture Organization of the United Nations (FAO), 2004. Land and water – the rights interface., by S. Hodgson, Legislative Study No.84, Rome
- Janki, M., 2004. Country Study on Customary Water Law and Practices in Guyana. This paper was commissioned by IUCN under a joint FAO/IUCN research project investigating the interface of customary and statutory water rights, in progress.
- Kuruk, P., 2004. Country Study on Customary Water Laws and Practices in Nigeria, 2004. This paper was commissioned by the International Union for the Conservation of Nature (IUCN) under a joint FAO/IUCN research project investigating the interface of customary and statutory water rights, in progress.
- Nowlan, L., 2004. Customary Water Laws and Practices in Canada. This paper was commissioned by FAO under a joint FAO/IUCN research project investigating the interface of customary and statutory water rights, in progress.
- Sarpong, G., 2004. Going Down the Drain? Customary Water Law and Legislative Onslaught in Ghana. This paper was commissioned by FAO under a joint FAO/IUCN research project investigating the interface of customary and statutory water rights, in progress.

Contact addresses

Stefano Burchi
Development Law Service
Food and Agriculture Organization of the United Nations (FAO)
Rome, Italy (stefano.burchi@fao.org)

Notes

- ⁱ Reviews of selections of these, by this author, have featured in 12 *Water Law*, 330-337 (2001), 14 *Water Law*, 7-15, and 281-290 (2003). FAO 2002 carries a review of trends and developments in contemporary water resources legislation (on p. 145-161).
- ⁱⁱ Customary water rights have been referred to as the "sleeping giant" of water law in Western and Northern Canada as many of the older land claim treaties with native people did not address water rights (Nowlan 2004, p.1)
- ⁱⁱⁱ These four country studies were jointly commissioned by the Food and Agriculture Organization of the United Nations (FAO) and the International Union for Conservation of Nature (IUCN) under a research project investigating the interface of customary and statutory water rights, in progress.
- ^{iv} A thorough discussion of what is meant by customary law in the specific context of water resources and water rights features in FAO 2004, on p.84-88.
- ^v In Nigeria, different rules may apply to members of the same language group (Kuruk 2004, p.4)
- ^{vi} FAO 1996 carries a systematic survey of the available literature on customary water rights in Africa.
- ^{vii} Kuruk 2004, p.6
- ^{viii} Nowlan 2004, p.18-19, 20, and 22, and court cases and literature cited therein.
- ^{ix} Sarpong 2004, p.8.
- ^x See the relevant discussion and legislative references at 3.1 below.
- ^{xi} The relevant clauses are generally found at the end of any new statute, under the label of "transitional provisions" - i.e., provisions of limited duration, designed to ensure a smooth transition from the old to the new system of water resources dispensation over a set period of time. Once this is over, the "transitional provisions" become void.
- ^{xii} Survival may be due to a variety of factors, ranging from the deliberate will of the lawmakers to accommodate *en bloc* customary rules and practices at one end of the spectrum, to the deliberate resistance of water users to the new rules imposed by statute, and a no-enforcement policy of government, at the other end of the spectrum.
- ^{xiii} Section 94.
- ^{xiv} This discussion is based on Janki 2004, p.9
- ^{xv} Law No.7 of 2004, Article 6 and relevant Elucidation. Interestingly enough, the Elucidation clarifies that the "traditional rights" the Law refers to are *land* rights.
- ^{xvi} Sarpong 2004, p.8.
- ^{xvii} Law No.7139, as amended by Law No.7140, sections 28 and 33
- ^{xviii} Ownership or possession of land abutting a stream, and ownership or possession of the land which overlies groundwater, have traditionally provided the legal bases for, respectively, riparian rights to surfacewater and for capture rights to groundwater, across legal systems.
- ^{xix} As in Guyana
- ^{xx} As in Ghana, Indonesia and the Argentinian Province of Tucuman.
- ^{xxi} Kuruk 2004, p.11
- ^{xxii} Nowlan 2004, p.8 and case cited there.
- ^{xxiii} *Idem*, p.16-17 and case cited there.
- ^{xxiv} This term is not defined in the Decree.
- ^{xxv} Section 2. As defined in the Decree, "domestic use" means the use of water for drinking, washing, bathing, cooking, gardening, or for any other domestic purpose in any residential premises utilized for non-profit motives.
- ^{xxvi} If the government water administrators fail in their duties, or if they discharge their duties to the dissatisfaction of existing rights holders, avenues of recourse are routinely available to the latter under the water resources legislation.
- ^{xxvii} The experience of Mexico in the implementation and administration of the transitional provisions of the 1992 Law on National Water Resources is a textbook example of water user population ignorance of, and indifference to, the "opportunities" afforded existing water users by the new statute. User ignorance and indifference occurred on such a scale that the lawmakers had to go back to the drawing board and re-think the transitional phase and process anew, and re-draw the relevant legislation (see FAO 2001, p.21-53.).
- ^{xxviii} The discussion here draws extensively from Nowlan 2004, p. 28-31
- ^{xxix} Sections 35(1)(h), and 37(b). The Bill carries in section 1(1) a statutory definition of "customary rights and practices" and of "traditional community". The Bill was passed by the Namibian legislature in November 2004, and is awaiting promulgation by the President of the Republic.
- ^{xxx} The discussion draws extensively from Nowlan 2004, p.27.
- ^{xxxi} These are illustrated at some length in Nowlan 2004, p.34-37.
- ^{xxxii} Janki 2004, p.13
- ^{xxxiii} Sarpong 2004, p.9
- ^{xxxiv} Reported in Nowlan 2004, p.24-25

^{xxxv} Sarpong 2004, p.7

^{xxxvi} Janki 2004, p.16

^{xxxvii} Nowlan 2004, p.31-33

^{xxxviii} To date, no applications have been made under Guyana Water and Sewerage Act, 2002's six-month transitional provisions for the recognition of customary water rights. It is reckoned that this is almost certainly due to ignorance of the statute and its provisions by the traditional communities holding customary water rights (Janki 2004, p.14). In similar vein, it has been argued that, in Ghana, customary rights and practices regarding water utilization go on unabated on the ground, with traditional users and communities not having the remotest idea of the impact that the Water Resources Commission Act, 1996 has had on their ancestral water rights (Sarpong 2004, p.12).

^{xxxix} This issue has been posited in relation to Guyana, where once a water abstraction licence is granted under the Water and Sewerage Act, 2002 it replaces the "lawful authority" under which water used to be previously abstracted and used and therefore customary access rights would become extinguished. As a result, hitherto customary users would become subject to payment of an annual administration fee and an annual abstraction fee. However such condition would conflict with customary rights to use water without payment. Furthermore, "converted" customary right could be suspended or cancelled by government for breach of a condition of the licence. This, however, would have serious implications for the livelihood of customary communities (Janki 2004, p.15). See also in this regard the Argentinian Province of Tucuman's Water Act provisions illustrated at 3.1.

^{xl} A thorough discussion of the complex interface between land rights and water rights of both statutory and customary origin features in FAO 2004, on p.83-94, and 104-105. The same features also a discussion of the "decoupling" issue in relation to the tradability of water rights, on p.94-98.

^{xli} This phenomenon has been documented, notably, in Chile, where water rights can be freely traded as a commodity.