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LEGAL AND INSTITUTIONAL OPTIONS FOR COMMUNITY MANAGEMENT OF WATER SUPPLIES IN KENYA

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List of Acronyms

BADC	Belgium Administration for Development Cooperation
CMWS	Community Management of Water Supplies or Community Managed Water Supplies
DANIDA	Danish International Development Agency
DDO	District Development Officer
DSDO	District Social Development Officer
DWE	District Water Engineer
FINNIDA	Finnish Development Agency
MCSS	Ministry of Culture and Social Services
NGO	Non-Government Organization
NWCPC	National Water Conservation and Pipeline Corporation
PWE	Provincial Water Engineer
SIDA	Swedish International Development Agency

FOREWORD

A lot of efforts have been made in Kenya to strengthen the *sustainability* of rural water supplies through community management. *Community participation* has been, and still is, a key feature of water projects. However, it has been observed that the level of participation varies in nature - from involvement in contributing labor and materials to full responsibility for all aspects of the water supply development and management.

Within this continuum, there is a variation in the information and knowledge available to communities of what *institutional and legal structures* are available and suited to them. Lack of clear, well defined *options* has meant that supporting agencies use their own judgment in defining what is best for their projects.

Ownership issues are also not clear with regard to assets in general and to buildings, other structures, land and access rights in particular. Where communities are assisted by an external support agency, it is not always clear what role the different parties will play after completion of the scheme. Even where it is clear, the legal authority to play such roles is not always specified.

The process of *handing over* water supply projects to communities is meant to play an important role in clarifying the ownership issue of a project. Communities are expected to realize that the transition from the *implementation stage to the management stage*, is crucial to the ownership issue.

As far as the government *policy* is concerned, communities will be expected to play a key role in all aspects of the development and future management of rural water supplies. In light of this policy position and in view of other developments in the sector, this study looks closely at the institutional and legal framework within which communities in Kenya can manage water supplies.

It is hoped that this study will contribute constructively to further deliberations on the issue of sustainability of rural water supplies in Kenya.

The result of the study is the outcome of joint efforts by a team of consultants, the staff of RWSG-ESA in Nairobi, rural water supply projects in various parts of Kenya and a support group of interested sector partners. The study has been carried out under the general direction of Lars Karlen, RWSG-ESA.

Jean H. Doyen
Regional Manager

Executive Summary

Introduction

This study has been carried out with the purpose of exploring the various legal and institutional options for community management of water supplies. The need for the study arises out of a desire to empower communities to effectively manage their water supplies. The underlying hypothesis of the study is that in addition to mobilizing, training and motivating communities to take over water supplies, sustainability will be better achieved when the communities are organized in a manner that enables them to legally manage their own water systems.

Choice of Study Area and Classification of Water Supplies

The areas selected for study are Kakamega and Meru in high potential , Siaya and Machakos in medium potential and Baringo, Kilifi and Kajiado in the low potential zones. The choice enables the study of different management systems in the three main ecological classification zones of the country.

Management systems were expected to vary with the type of technology and the area where one is working. The water supplies in the study area have been classified both by the type of technology and by management systems. It has, however, been found that there are mainly two types of management system in application in the areas. These are: self-help and traditional "consumer understanding" water management systems. This classification, therefore, has little relevance to the effectiveness of the management systems and is left out of further analysis.

Traditional management systems are, by and large, no longer applicable in matters related to water management. Even where these are still used, the various Land Acts have rendered them impracticable and unenforceable. Except in range lands, where group ownership of land is still partly practiced, traditional management systems can only give guidance but not "regulations" with regards to ownership of and responsibilities for water supplies.

Legal and Institutional Options for Community Management of Water Supplies

Various Acts under which water management groups could be registered have been studied and their merits and limitations evaluated. No single Act seems to be ideal for community management of water supplies. The study proposes a combination of Acts as the best way to lead community groups from a present status, where they are not "legal persons", to full ownership of assets and liabilities. This will however remain a desirable goal to be achieved only when other conditions, particularly economic and attitudinal ones, are favorable.

Current concerns relate to the fact that:

- The legal status of the water supply "group" is becoming increasingly important to "external" investors.
- New schemes may require a particular legal option as condition for intervention
- The "handing over" of Government schemes might need a "recipient" that meets defined legal requirement
- Rehabilitation of existing schemes would also have to fit such a new framework for investment or divestiture

Recommendations:

The main recommendations of the study are:

1. Water Supplies that are managed by communities on the basis of a general "consumer understanding" should register as self-help groups as a first step towards legality. This will formalize their status and provide a framework for democratic decision making. This should, however, not be imposed on communities but evolve from the communities own desire to change their systems. The main strategy for facilitating this change is information, education and communication (IEC) within the communities. ***IEC should be an important component of project interventions aimed to improve community management.***

2. Systems managed under self-help groups should be encouraged to become water associations. Other self-help groups that have by-laws[1] which are already effectively enforced may not need this change of status, except for the purpose of being appointed a water undertaker. ***The main objective of moving from self-help group to water association should be to get the groups to prepare by-laws which will guide their operations and, in some cases, to qualify for external support or handing over.***

3. Registering self-help groups as water associations or gazetting them as water undertakers, will help adjust to a changing and more liberal situation, preparing for a sustainable water management system. The main issue will continue to be the ability and willingness to pay for service, reflecting the value communities attach to water. ***Economic activities based on the water supplies should be allowed as an integral component if these are viable and therefore have a positive impact on sustainability.***

Further Investigations:

On the basis of the foregoing conclusions and recommendations, given the changing situation, improving the legal and institutional capacity for community water management would be enhanced by the following activities:

- Investigate the perceptions of the communities with regard to their present legal status and management systems,.
- Identify how the possible decision to change status and mode of management could be based on the informed choice by the community and its own realization of the advantages of such changed status.
- Investigate how intensified information, education and communication campaigns can enhance knowledge on the options available to communities.
- Carry out an assessment of what water related income generating opportunities exist and how these could be realized by a better water service.
- Assess financing mechanisms available to communities and related institutional conditions required to implement innovative financing and management options.
- Clarify the corresponding role distribution between GoK and private actors.

[1] A rule adopted by an organization chiefly for the government of its members and the regulation of its affairs

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CHAPTER 1: CHOICE OF STUDY AREAS

Selection Criteria

To carry out a study of representative samples of community managed water supplies, it is necessary to establish criteria for choice of areas to be studied. The ToR required that agro-ecological potential, coverage and technological complexity be major considerations in these criteria.

Based on the above, the number of community managed water supplies in the different areas has been looked at and an attempt made to cover those areas with the biggest number of community managed water supplies. In this effort, provincial representation was also considered and all provinces except North-Eastern and Central are covered in our study sample. North Eastern was left out because the sources of information on community managed water supplies are limited while the central areas, including Kiambu, Embu, and Kirinyaga, were more useful for comparison purposes as some water projects in these areas have been studied earlier in great detail (Kabuku Water Supply in Kiambu, Ngandori Water Project in Embu)

This wide coverage of the provinces has made it possible to consider as many technological options as possible. The provincial approach has the added advantage of presenting a diversity of approaches in community management, ranging from common, unwritten understanding of the consumers, to a fully registered water companies. In this way it has been possible to look at the operational management practiced by the different categories and arrive at an opinion on what may be feasible for community managed water systems.

There are some limitations, nonetheless, inherent in this approach.

The geographical area covered in the sample becomes too big and important details risk being left out in favor of general trends. To avoid this, specific districts, covering the different agro-economic potentials, have been selected for each province. This selection, however, could lead to a situation where the district selected may only have one category of community managed water supply. This is the case with Nandi which has almost exclusively spring protection as the only form, the others being Government managed until very recently. This difficulty was overcome by consulting with Provincial and District Water Engineers who have assisted in the choice of districts to be considered in each Province.

Finally, the districts chosen have the advantage of being the locations of current community water management initiatives within the Ministry and which, therefore, renders them ideal for further tests and piloting should this be found necessary. The areas used in this study as well as the justification for their choice are outlined in the following section.

Study Districts

High Potential Areas

For high potential areas, Kakamega and Meru have been chosen because they present a variety of community managed water supplies, both in technology and in the numbers covered.

In addition, many different types of management systems have been tried initiated both by the consumer communities and proposed by local and external support agencies. The experiences gained in this way are considered useful in analyzing possible options for sustainable community management.

As the present study, basically is a desk one, the documentation available on these projects also plays an important role in the choice.

Medium Potential Areas

For medium potential areas, the projects studied are from Siaya and Machakos Districts.

In Nyanza Province, Siaya has had a longer history of self-help projects than the higher potential area of Kisii. In the case of Kisii, water is more abundantly available in fairly good quality springs. In recent times in Siaya, there have been attempts by the local communities to take over water supplies that are managed by the Government. Although not successful, these attempts indicate a desire to change the management responsibility for these supplies. The options available for a smooth transition from Government management to whatever organization may be more appropriate could benefit from the Siaya experiences.

Machakos is considered in this study due to the high priority the community puts to water as

evidenced by the number of community managed water supplies in the area. It also presents a challenge in the search for a sustainable solution to water management as it has more than ten community managed water supplies reported to be non functional due to organizational problems. Finally, in the district, apart from domestic and livestock water, there is an increase in irrigated agriculture which may present management issues that need to be considered.

Low Potential Areas

For the low potential areas, the Districts of Baringo and Kajiado in Rift Valley Province and Kilifi in Coast Province were selected.

Baringo and Kajiado, though presenting similar agro-ecological potential, differ in the nature and level of community participation in water management.

Since the early 1980s, the trend in Baringo was towards the Government taking over water supplies previously initiated and managed by communities and local authorities (County Councils).

This was because there was evidence, for whatever reason, that communities and local authorities were unable to manage these systems which were based on boreholes with diesel operated pumps. It needed a central authority with the capacity and the means to carry out the complicated repairs that were often required.

The Provincial Water Engineers Office had a "borehole rapid intervention" team which effectively carried out repairs using funds centralized in the Province. With the introduction of District Focus for Rural Development and the economic slump that seems to have occurred at this time, this unit was disbanded and the districts had to find their own solutions. This was not successful and services have deteriorated since.

For these projects, as for many others in the country, the concept of community management is now considered a solution to improved services. The concept is, in this respect, relatively new in Baringo and mainly promoted by NGOs and other external agencies.

In Kajiado, the main water projects were originally for serving group ranches. These ranches, as long as they remained communal property, had their own in-built systems of managing their water once they had been assisted to put them up. To a large extent, these ranches still exist. Where the Government has put up a water supply system, the majority of the communities are directly involved in its management already, only requiring technical assistance from the District Water Engineer.

Both for the group ranches and sub-divided ranches, the manner in which water management is carried out may point to some lessons to be taken into consideration when proposing an institutional and legal framework for community management of water supplies in low potential areas.

In Coast Province, Kilifi was chosen because it presents a technical category of water supply not common to many districts. The main community managed water supplies in this area have Sabaki pipeline Mombasa as the source. In essence, this makes these communities bulk purchasers of water from the National Water Conservation and Pipeline Corporation (NWCPC) and the connection to the consumers as the retail points, after transportation and handling.

As expected, different management systems have been and are being tried in this area and innovative solutions that will compliment the efforts of finding an appropriate legal and organizational option for different situations may come from these trials.

Having made the choice of areas that will be looked into, it is still felt that, due to the important role the hand pump well and spring protection, play in water supply in rural areas, these will be treated in a category of their own that cuts across the areas identified above. An attempt will therefore be made to summarize the experiences of the Kwale Water and Sanitation Project as well as that of the KFWWSP in so far as pertains to legal and organizations implications. The same will be done for auxiliary water supply systems such as roof catchments, where appropriate.

CHAPTER 2:
COMMUNITY MANAGED WATER SYSTEM CLASSIFICATION BY TECHNOLOGY TYPE

Introduction

The management systems applicable to Community Managed Water Supply (CMWS) are influenced by complexity of the technology which in turn depends on the extent of service coverage, both in numbers and area. The classification outlined below takes this into account and explores the implications of technology types on management requirement of the different systems. The classification also gives the numbers of water supplies in the different technological categories in the study areas as well as the current status on their management.

In terms of technological complexity and numbers of people served, two categories of water supply have been identified; point sources and piped systems. Point sources include roof catchments, springs, (protected and unprotected) and wells with or without handpumps.

Piped systems include all systems that involve transportation of water from the source to some distance from the point of abstraction. In this respect, when protected springs have a pipeline serving consumers away from the spring point, these are considered as piped systems. Piped systems also include simple gravity schemes with or without treatment, piped pumped schemes without treatment and piped pumped schemes without treatment. The main elements of the above categories of water supply are discussed in the sections that follow.

Point Sources

Roof Catchment

Roof catchment systems involve a roof surface that is capable of collecting good quality water, a collection system usually involving gutters and downpipes of different materials and a storage facility. It is a cheap method of supplying water in areas with ample rainfall and where good quality roofs exist. In the study area, these systems are used in institutions and households in the high potential areas, to some extent in institutions in the medium potential areas and rarely in the low potential areas due to inadequacy of rainfall. In medium potential areas, the main constraint to the use of this system is the scarcity of good quality roofs. In these areas, the systems are usually constructed at institutions with the involvement of NGOs.

Documentation on the numbers of such systems that exist and the population covered by them was not available. In the districts under consideration estimates of the coverage were obtained from District Water Engineers (DWEs). The DWEs, nonetheless, pointed out that these estimates were not based on an updated evaluation and may not reflect the actual usage as some of the systems have been rendered obsolete by newer developments.

Roof catchments are generally managed at household level except when they serve more than one household. This is the case for institutional systems and those facilities that serve cattle dips in many of the higher potential areas. For the institutions, management is ensured by the institutions themselves through school funds or by school children who are sometimes united into a club (Water and Sanitation for Health Club - WASH Club) as is the case in some institutions in Siaya.

Where cattle dips are involved, there usually is a committee charging a dipping fee which is also used to look after the water requirements. On the face of it, this system presents few management problems. There are, however maintenance lapses in most of the systems that undermine the quality of water collected and reduce the health benefits that would otherwise accrue from this technology.

Springs - Protected and Unprotected

Natural springs are an important source of water for communities in rural areas. Paradoxically, these sources have not had the prominence they deserve when it comes to planning for water services. Apart from some districts where low cost technology has been emphasized, there are few districts where documentation on the numbers and yields of springs have been recorded. In the study area, a spring census was carried out in Kakamega District as part of the preparation of the District Water Plan. The yields of the springs were also, at the time, measured to establish those suitable for development as public water supplies. This census documented 500 springs of which 300 have to date been developed and protected while others have dried or been found to have intermittent yields.

Nevertheless, these springs are still used by those populations that do not have easy access to alternative sources. The number of unprotected springs in the other districts of study have not been as well documented but are estimated a total of between 1,500 and 2200.

Unprotected springs are managed on the basis of the users "community undertaking" which is hinged on norms dealing with traditional conduct. These norms prescribe, without being written, when water may be collected, bathing points and times for different sexes and livestock watering locations. The applicability of these norms in the present ownership and water use practices will be considered in Chapter 4 giving an overview on traditional management systems. It is, nonetheless, noted that these norms are no longer applicable to the same effect as was originally the case because of erosion of the concept of community ownership of resources and that this causes management constraints to unprotected springs

Protected springs which were introduced in the country during the colonial times had the objective of improving water quality as a means of reducing water borne disease. The forced manner in which they were introduced, at the time, undermined the health objective and led to a general resentment which characterized most government initiatives of the period. This was caused by inadequate community understanding, consultation and dialogue. Even after independence, the negative attitude to this technology has persisted for quite some time, reinforced by the fact that little amenity value resulted from the protection. In recent times, as a consequent of the need for more economically viable water systems in the rural areas, the technology has gained more acceptance. Most of the viable spring protection locations have now been developed and protected and the issues of discussion on this technology revolve around increasing the amenity value of the water, improving design to better protect sources from pollution, ensuring permanent low flow in the springs and upgrading water delivery systems. Currently, there is an estimated 1500 protected springs in the study area serving over 175,000 people. Exact figures of the number of protected springs is not documented as a large number are now implemented by communities without external support.

Management of protected springs is generally carried out on the same principles as that for unprotected ones. There have been moves among sector actors to introduce more refined organizational structures where communities opened a fund for repairs, cleaning and replacement should this be required. Most of these attempts have not been successful as such funds have stayed idle for a long time because maintenance requirements on this technology are limited and far between. Needed repairs seem to be easily realized by a community impromptu fund raising rather than continuous payments which are tempting to the treasurers.

The real problem in the management of protected springs revolves around the effects of erosion of traditional management and ownership systems resulting from an individualistic approach to resource allocation. These traditional systems generally controlled the right of access to communal goods and prescribed penalties for those who failed to participate in works of a communal nature as well as defining compensation mechanisms for those who did.

Handpump Wells

Only wells equipped with handpumps are considered in this report. This is because other types of wells in the study area are personally owned and not community managed. Although handpump wells have been used in the country over a long time, this technology has only recently been popularized during the International Drinking Water Supply and Sanitation Decade. Major low cost technology projects , centered around the handpump, have been carried out in Kwale, Western Province, the lake basin area and in Eastern Province. In the study area, there are over 1,500 such handpump wells in operation serving an estimated 300,000 persons.

Originally, handpump wells were presumed easy to manage at community level as they were expected to be run on the same principles as the protected spring, applying traditional norms. Up to the present, this is indeed the case and they are managed by formal (self-help) and informal community organizations .There are, however, some key issues that are still under consideration and whose solutions are important for the future sustainability of this technology.

Availability of spare parts at community level has still not been achieved. Private sector participation is generally hampered by the limited volume of business caused by an inadequate number of pumps requiring these parts. Where the concentration of pumps is high, like in Kakamega District, private sector interest is beginning to pick up. Ownership of the installed facilities is also beginning to be a problem. In some cases, land easement has been used to

ensure that the facilities remain community property. This easement does not in all cases include wayleaves (rights of access to an individuals land) and could still cause problems where land ownership changes hands.

Organizationally, many of the handpump well committees are dormant, do not have a bank account and ensure maintenance through impromptu fund raising. While this is not necessarily an ineffective system, it results in long pump downtime especially during rain seasons when alternatives sources are available. These sources are not always of good quality.

More people are replicating this technology at household level which is a desirable development that will contribute to the sustainability of the systems. The price of the handpump is however prohibitive for most households. This perhaps is the major factor behind the increasing number of stolen community pumps and calls for a more formalized well committee organization, clearly defining ownership of the facilities.

Piped Systems

Piped Gravity Systems

The majority of community managed water projects are based on river, stream or spring intakes with gravity delivery systems. Gravity systems vary in size and coverage from small spring based facilities serving a small number of families to large schemes with over 100 km of pipeline serving whole divisions. Two sub-classifications have been made for the purposes of this report. These are spring and rock catchment based systems serving less than 5,000 people and livestock and river and stream based systems serving up to 50,000 persons and livestock.

In the first category, the smallest are protected spring sources with or without a collection box equipped with a pipeline serving several families. There is an estimated 20 such supplies in the study area, mainly in the high potential areas serving a population of about 85,000 people and 15,000 livestock. In these areas, because of the size of the projects the water is almost exclusively used for domestic purposes with livestock using the overflow from the springs.

As long as such sources are adequate for the community that initially used the unprotected spring, the management of these projects is simple and does not present many problems. This is also the case with sources situated at locations which were not initially used by the community. Where the above conditions do not apply, the same problems as those for protected springs are encountered - access and priority of use. In addition, even on this small scale, water use patterns change with its closer proximity. This sometimes leads to unequitable distribution of the available water to the consumers and results in increased management problems. Control of pollution in spring sources even when this has been considered at design stage also poses a management problem particularly since the consumers do not have access and control over the spring catchment.

A form of gravity system that is common in medium and low potential areas is rock catchment. This system is similar to the spring protection with storage sump and limited distribution pipeline. The main management problem, apart from those relevant to the spring source which are also applicable here, is the difficulty of controlling potentially polluting activity within the larger surface catchment.

Larger gravity supplies usually have stream or river sources, large balancing and break pressure tanks and serve population in excess of 5,000. The majority of these supplies are located in the high potential areas where the topography and rainfall favor them. There are 80 such water supplies in the study area serving an estimated total of 500,000 persons.

Where the sources are located in forested catchments, the quality of water has been generally good. Nonetheless, with increased human activity, this quality is fast deteriorating to a state where some form of treatment is now required on most of the systems with attendant management implications. The initial response was to use slow sand filters. These although offering a solution require higher discipline in maintenance which is, in most cases, lacking at community level. Conventional treatment increases O&M costs and requires qualified operational capacity usually beyond the means of existing community organizations. As improvement on water quality is going to be required in more of these supplies there will be need to continue building up the community organizations responsible for managing the water supplies.

Apart from quality considerations, problems with the management of gravity systems arise from the fact that most committees assume that the supplies are maintenance free. In most cases, funds for operations are not collected and preventive maintenance is expected to be

handled by the consumers on voluntary basis. Consumption rates are hardly ever controlled. This results in unequitable distribution of available water with upstream consumers oftentimes extravagantly using water (irrigation, washing etc.) and limiting the amounts available downstream. This perhaps explains why the major rehabilitation requirement of these types of supplies are indicated by the need for augmentation of main lines. In essence, what is required is not augmentation but improved management and control of consumption.

The difficulty with community appreciation of the need for improved management in gravity schemes stems from the fear of raising O&M costs for a category of supply supposed to be the cheapest. Considered in its totality, however, improved management will cut down the need for further capital investments, increase the life of projects and lead to improved consumer satisfaction without which willingness to pay for water is difficult to envisage. Promotion of this perception should, perhaps, be the focus of interventions to technically improve the performance of gravity water systems.

Pumped Systems Without Treatment

The sources for this category are usually rivers and boreholes but occasionally streams, springs and lakes are also used. For borehole sources, the usual system consists of the borehole, a pumping mechanism, a water tank at an elevated location and a pipeline for distribution of the water. In the case of stream, spring, river or lake sources without treatment, the same components found in the borehole source apply. The main difference is in the types of pumps and the water intake arrangements. Surface water pumps will usually require a pumphouse while intake structures vary from run-of-the-river intake boxes to complicated impounding weirs, raw water pumps and balancing tanks. In general the technical management requirements for surface water intake are more than for boreholes. The former, however, provide more water than the latter but usually of a poorer quality

There are 65 pumped water supplies in the study area with the majority in the medium and low potential areas. Of these, 43 are boreholes while 16 are river sources and six based on Lake Victoria. The majority of these supplies present complicated technical and management problems which have resulted in intermittent operation.

This perhaps explains why few of these systems are under community management. The original intention of initiating rural water supply projects being for human consumption and many of these sources not being of a quality suitable without treatment, communities have not been encouraged to develop them. The facilities serve an estimated 145,000 people in the study area.

Technically, the main operational tasks involved in pumping water systems consist of maintenance of pumps, tanks and pipelines and their replacement when the need arises. Managerial requirements involve organizing and deploying personnel to carry out the above tasks and availing the means to do so. In this sense, the managerial function ought to treat a water supply system as a factory producing water, distributing it and selling it at a cost, collecting payment for it and considering this payment as operational costs to be used for further production and improvement of the water service.

In most cases, community management of water supplies has not come to this level yet. The extent to which different groups understand the commercial nature of water operations varies. In general, those systems which originated from a commercial motive seem to operate better than those that had a social and amenity motive. Thus, the pumping systems in Kajiado where the main objective was to water livestock generally operate better than those in Western and Nyanza where the objective was to bring safe water closer to consumers with possible future health and economic benefits.

Pumped Systems With Treatment

There are so far no pumped and treated water projects under community management in the areas considered. This however may not be long in coming as the need for safe water for human consumption continuous to gain acceptance. The organization and management requirements of such systems will be more involving than that for all the other categories and needs to taken into consideration in proposals for improvement of community water management options.

CHAPTER 3:
COMMUNITY MANAGED WATER SYSTEM CLASSIFICATION BY MANAGEMENT SYSTEM

Introduction

Two main categories of management systems for rural water have been identified in the study area as Consumer Understanding and Self-Help Groups. The main features of these management systems are outlined below while the merits and limitations of these, and other available options are discussed in Chapter 5 of this report.

Consumer Understanding

The main technological category of water supply managed on the basis of "consumer understanding" is the point water source. These are springs, protected and unprotected with or without a distribution pipeline (usually less than 1 km long) as well as handpump wells. They serve a population of not more than 300 at each point but considered together, account for about 25% of the coverage in the study area.

Consumer understanding is under pinned by previously existing traditional norms that govern the sharing of communal goods. In the recent past, efforts have been made to formalize this understanding by drawing up rules and regulations to be followed and registering consumer groups with the Ministry of Culture and Social Services (MCSS). It still doubtful that this action has improved on consumer understanding although it may have clarified the roles and responsibilities among consumers.

The main limitations of this system of management are summarized as follows:

- The understanding is based on personal trust which can cease with changes in membership.
- It does not take account of the provisions of existing laws on wayleaves and easement.
- Penalties for contravention of the understanding may exist but may not be enforceable.
- It does not facilitate forward planning for major repairs.

The major advantage of the system is that it is based on what the consumer understands best and works for the present. Formalization of the understanding may result on loss of control by the consumers. In many instances, it is not in the interest of the community to jail one of its members for stealing a handpump.

Self-Help Groups

Most community water management organizations in the country are registered as self-help groups by the MCSS. The types of technologies registered under this system differ from one community to another and from one ecological zone to another. Almost all the different types of technology are represented in the study area as indicated in Chapter 2.

The merits and demerits of this type of management are exhaustively discussed in Chapter 5. It is emphasized, nonetheless that this system has been in use a long time. Changes envisaged on it should take into account the implications this would have on rural communities and the perceptions of these same communities on the changes.

CHAPTER 4:
ELEMENTS OF TRADITIONAL MANAGEMENT SYSTEMS

Introduction

The study of traditional methods of managing community goods (such as ownership, access, use/abuse and disposal rules) with specific reference to the traditional water management systems is essentially a study of the management systems in pre-colonial Kenya. It is also a study of the different customary systems of water management by 42 tribes of Kenya in pre-colonial times.

In this respect the time allocated to this study does not permit an exhaustive discussion on the customs and practices of the various tribes of Kenya. For the purposes of this study, generalized observation of the patterns of customary management of communal goods that subsisted at the time have been made. With reference to the communities living in the study area, those practices have been related to the existing situation in those areas. It is expected that this approach will be adequate to arrive at options for community management of water supplies in the present era.

Management of Community Goods in Pre-Colonial Kenya

Community Goods

Traditionally, communities in the study area considered land and the natural resources on it as communally owned. In some areas, the community itself was defined as a clan, which is a small subdivision of the tribe or of sub-tribes as is the case among the Luhya tribe. In other areas, the community was the whole tribe or even combinations of them depending on the relations that existed between the tribes themselves. Individual clans or tribes owned land on which they carried out unlimited economic activity. Ownership was defined by the activities carried out on the land, grazing, firewood gathering, hunting and eventually cultivating.

At the time, therefore, it can be said that until the coming of the white settler in Kenya, land was owned communally and individually irrespective of the community. Both pastoralist or agrarian communities and individuals thereof had equal access to the use of land and the resources on it. Even individuals who contravened established social norms were never denied this right. In the worst case, they were ostracized to other communities. In the new communities, they still had access to land and its resources. The land itself was "inalienable outside the tribe, clan or family circle" and could not, therefore, be disposed of.

One of the resources that went with land were animals both domesticated and wild. Domesticated animals grazing on the land were owned by the individuals but, even here, there was an element of communal ownership in the sense that the owner of the animals would only dispose of them in a manner and for purposes prescribed by the community and usually entailing communal benefit. Wild animals could be hunted by all according to their skills but in the sharing of the meat. Communal norms were also followed to ensure that even the weak got a share. In addition, there was always an element of conservation in the hunting with the most abundant or destructive species being favored in the hunt.

Water, the resource that most concerns this study, was like all the other resources on land, also communally owned. In pre-colonial Kenya there was adequate water for almost everybody. All the tribes had a right and access to any water within the community jurisdiction. The desire to extent the jurisdiction of some of those communities that did not have adequate water was the object of some of the tribal wars that were fought in pre-colonial Kenya. In general, however, the country at the time was criss-crossed by lakes, rivers, swamps and wetlands of unpolluted waters from which the communities enjoyed this natural resource equally.

Management of Communal Goods

During this time there existed in each community a 'clique of elders' who enforced the traditions of each community. These, often elderly men were revered by the whole community and 'their instructions' followed without question. They foresaw the proper sharing of communal assets and settled any disagreements arising from their community assets whether natural (forests, land, animals) or personal. In the absence, therefore at this time of any system of individual ownership of land, water and other natural resources, all the members of a community enjoyed these resources uninterrupted as a God-given right.

Since all resources on the land belonged to the community, access to water, which at present, is a matter requiring the attention of our lawmakers

was never an issue and was ensured through mutually recognized paths, which in any case, were not important as there was little cultivation practiced.

Box 1: Traditional Community Practices

The level of community involvement in aspects of life currently considered personal was very high among the Luhyia of Western Province. In marriage, the whole clan, through the elders, participated in the activities leading to its formalization (negotiations, dowry payment, actual marriage etc.). In return, the wife was considered a communal asset protected by all. Children although in a strict sense belonging to the father and mother, were brought up, educated and disciplined by the whole community. In this respect a child guilty of socially unacceptable behavior was punished on the spot by whichever adult happened to witness the offense. A similar arrangement exists among the Kamba of Eastern Province. For the Meru's, in the same province, this provision is still revered through the Council of Elders - Njuri Ncheke - although the latter has lost some of its clout to modern law.

The Current Status on Management of Community Goods

As indicated in the last section, land has traditionally been the main community good. Changes in the manner land is managed, therefore, have a major impact on the traditional management system applicable to this good and to all other goods derived from or depending on it.

Major changes in the manner land was to be managed and partitioned in Kenya were initiated around 1956. After several trials with different methods, Acts related to land consolidation, adjudication and registration were promulgated in the early sixties. These Acts, made mainly in the interest of settler farmers, shattered the communal ownership system of the majority of Kenyans. Through these Acts, ownership of land was effectively changed from traditional communal to individual.

The system affected not only land but also all other natural resources that go with the land including water, forests and to some extent wildlife. This meant that the land was defined, identified and registered in the name of an individual excluding all other persons. Water, nonetheless, remained a public good with its apportionment and management remaining vested, through the ***Water Act [Cap 372]***, in the Minister in charge of water affairs. Access to water was however not addressed by these Acts. This meant that one could not cross through another person's land to the water without permission of the registered owner. At the time, access to a water source which is wholly in someone's private land continued to be ensured under previously existing traditional norms which were, to a great extent, made invalid by the land Acts.

The introduction of the concept of easement both in land law, the ***Registered Land Act*** and under the ***Water Act*** - whereby a person has to be granted a 'right of way' through another person's land to arrive at a communal resource (water, market, main road etc.) reinforced the fact that communal ownership of the resource was diminishing and that individual ownership of resources was the accepted way of life. The application of these easement provisions is limited by the fact that once land has become personal property, it can freely be disposed of and subdivided with little regard for future wayleave rights. Even recourse to the fast fading traditional norms may not be practical as the new owner may not subscribe to the initial traditional laws if he does not belong to the original community.

In essence, the traditional laws applicable to the management of communal goods have been irreparably compromised. Even the ***Chief's Authority Act [Cap. 128]*** which was meant to have received its legitimacy from traditional norms, cannot fulfill the role originally played by these latter.

Today most areas of Kenya are consolidated, adjudicated and registered. Communal water points are now owned by individuals while intensified agricultural activities have resulted in the silting of swamps, rivers and lakes, more pronounced in the Central Province. Under these circumstances, there is little future for traditional systems of water management in most parts of the country.

The exception may be the pastoralist communities. These communities still practice communal ownership of land, watering points,

animals etc. However with the advent of individual ownership gathering momentum and more and more parts of the country being registered under the ***Registered Land Act***, it is doubtful how much longer these communities can sustain this lifestyle.

Box 2: Registration Options Under the *Land (Group Representatives) Act*

In the recent past the Government had encouraged pastoralist communities to register themselves under one Act, The Land (Group Representative) Act. In this system, groups of persons are registered as owners of the group ranches in the range areas. Once registered the group becomes a body Corporate with perpetual succession. The group has been defined by the Land (Group Representatives) Act as 'a tribe, clan, section, family or other group of persons whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group. Once the group is registered, it continues to share all the resources and infrastructure within the registered area, communally. In Kenya this is the only traditional system that has been preserved by-law. It operates in very limited areas (pastoralist lands) and has been more recently discouraged as it would appear to have been abused to benefit groups of people who did not qualify and who were in essence land buying companies.

CHAPTER 5:
LEGAL AND ORGANIZATIONAL OPTIONS FOR COMMUNITY MANAGED WATER SUPPLY

Introduction

Community water supplies in this country have been registered, operated and managed under various institutional and legal frameworks, depending on the preferences and the awareness of the communities concerned. These have included registration in the following categories:

- Self-help group under the Ministry of Culture and Social Services
- Water Associations under the ***Societies Act, Chapter 108*** of the Laws of Kenya
- NGOs under the ***Non-Governmental Organization and Coordination Act, 1990***
- Water development and management under the ***Cooperative Societies Act, Chapter 490***
- Water Companies under the ***Companies Act, Chapter 486***

The main focus of this chapter is to analyze the legislative provisions that govern existing management systems in the areas of decision making, contracting, regulating requisitioning and disposal of assets. Where traditional systems, that are or were legally binding, have implications for the existing legal provisions, these will be considered and their effect evaluated. Resulting from this analysis, options for improvement of existing legal and organizational status of water management systems will be proposed for trial on ongoing projects.

In order to effectively discuss the different institutional and legal patterns, this chapter is divided into seven sections dealing with the following areas:

- Water management systems registered with the Ministry of Culture and Social Services
- Implications of registration under the ***Societies Act.***
- Systems registered under ***Non-Governmental Organizations and Coordination Act.***
- Application of the ***Cooperative Societies Act*** to water management.
- Water management under the ***Companies Act.***
- An overview of the provisions relating to CMWS in the ***Water Act.***
- Conclusions and recommendations.

Water Management Systems Registered with the Ministry of Culture and Social Services (MCSS)

Most community water management organizations in the country are registered as self-help groups by MCSS. The types of technologies under this category differ from one community to another and from one ecological zone to another. Nonetheless, almost all the different types of technology are represented in the study area as indicated in Chapter 2.

Key Positive Features of this Registration
Many communities in the rural areas perceive this registration to have the following merits:

- It is a cheap way to register, the only payment is usually a small nominal fee.
- The registration office is within reach of most communities. All registration is undertaken at the District headquarters by either the District Development Office (DDO) or the District Social Development Office (DSDO).
- There is no requirement for share capital or such other payment as is required in registration of companies.
- Registration is usually community-driven with the commnity initiating the project and participating directly in terms of monthly contribution, membership fees, labour provision without any obligation to do so.

Mobilization of the community, where there is need for discussions, is easy since most members live within the same zone and

oftentimes belong to the same tribe and/or clan. Decisions can thus be quickly taken and implemented with a minimum of delay.

Disadvantages of this Type of Registration
Although most rural communities foresee their registration under this system as ideal, in fact it has many disadvantages and ambiguities. Key among these are:

- There is no legal base for this type of registration. Consequently the regulations developed by the self-help groups are purely administrative with no legal backing.

- Although all self-help groups develop by-laws or rules and regulations similar to those developed by societies, often, the committees they elect operate with few checks on their powers. The only obligation the committees seem to owe to the group is to report on how they have spent the group's finances once a year at the Annual General Meeting.

- The group has no capacity to do those other things that a legal person can undertake. They do not have the capacity to:-

  i. Enter into binding contracts including financial and employ-ment contracts.

  ii. Acquire property and dispose of such property by whatever method.

  iii. Legally own the property on which their developments stand.

  iv. Operate substantial bank accounts because of uncertainty of deposits.

  v. Effectively deal with those who misuse assets of the group.

Proposed Measures to Improve Management In Self-Help Groups
The underlying problem with the registration of water organizations as self-help groups is that this does not provide a legal and institutional framework that promotes income generation. It is, nonetheless, still the most appropriate and applicable option to small scale systems (like protected springs) which serve a limited number of families.

For larger projects that serve more than 20 families and where improvements of the water delivery systems have been carried out, self - help groups must be encouraged to be formally registered under existing legal provisions. This will reduce the shortcomings in their current legal and institutional status and enable them to undertake the following:

1. Acquire capacity to enter into legally binding contracts e.g. with banks, financiers etc.

2. Acquire property, such as land, mortgage or lease such land and generate income.

3. Safeguard the assets of the registered group against disposal without the groups authority.
4. Have the capacity to ensure that office bearers are accountable to the members.

Registration Under the Societies Act (Cap. 108)

Some self-help groups do, after registration with MCSS, apply to be registered under the ***Societies Act***. Groups of individuals may also opt to come together, with the intention of managing their water supply, and apply for registration under the Act without going through the self-help process. Any group can register as a society including any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya ... (Section 2 of the ***Societies Act***). It does not include a company, firm, association or partnership consisting of more than 20 persons, formed and maintained with the view to carrying on business for profit ... or a cooperative society registered as such under any written law (Section 2 (d,e) of the ***Societies Act***).

Every society becomes a lawful society, where, within 28 day of its formation, it has applied for registration under the this Act and it has been notified of its determination of its application (Section 4 (1) and Section 9 of the ***Societies Act***).

Registration under the *Societies Act* has the benefits which accrue to a society registered under a substantive law. These include the acquisition of a legal personality enabling it to:

1. Sue and be sued
2. Enter into binding contracts
3. Own property such as land and dispose of it
4. Opt to acquire perpetual succession.

There is a requirement for accountability by the treasurer to the members during an Annual General Meeting or on request to the Registrar of Societies. The society is also required to appoint

an auditor who should not be a member of the society and who must audit its books every end of the year. In addition, certain persons convicted of crimes are barred from holding financial offices.

Provisions for disciplining errand members exist, usually by removing them from the society without refunding their contributions.

The option to appoint trustees, who are answerable to the members, to oversee the investments of the society ensures proper accountability. On the other hand, trans-parency is ensured through provisions in the law requiring elections to be held every year at which discussions on any matter will only proceed when there is quorum.

Shortcomings of Registration as an Association

As for self-help groups under the MCSS, registration under the ***Societies Act*** has demerits:

1. The procedures for registration of a society are long and tedious often taking more than six months. The registration office is only in Nairobi. Because of the distances involved, and the fact that communication is not effective, it takes time for even the application to be received.

2. If the society is registered for the purpose of drilling a borehole and supplying water, it must not venture into other objectives other than those identified in its constitution. Such restrictions tie the societies' hands even where they would have undertaken other income generating projects to sustain the water project. For the society to undertake other activities, it must amend its constitution which is a long process.

3. Although a society, once registered under the Act, becomes a legal person with powers to acquire property and dispose of it, most water societies do not generate enough funds to meet the running costs of the project, maintain the plant, and have surplus to acquire property. Thus, while this power would be useful in a tea coffee or milk society, it is not of practical application in a water society.

4. In practice, most societies have only one meeting in a year and there is hardly any requisitioned meeting, leaving the running of the affairs of the society to the executive committee. Because of this, the societies cease being participatory which undermines transparency.

5. Inspite of the provisions in the law for accountability and transparency, even where certain members breach these, hardly any action is taken since it is seen to cause bad blood among members of the same community/clan living within the same area. In the circumstances, persons who may spoil or misuse society assets are not charged.

6. Acquisition and disposal of society's assets, is often undertaken by the executive committee, usually a powerful group of individuals, usually without the knowledge or consent of the members. Members are then requested to endorse such acquisition and/or disposals at the annual meetings

Thus, registration under the ***Societies Act,*** though superior in legal terms, to that under MCSS does not still seem adequate to ensure sustainability of community managed water projects. In its present form and practice, it will still need a radical change in communities' attitudes to their goods for this type of registration to be effective. This cannot be legislated but requires a high level of understanding by communities of their rights.

Nevertheless, it is still possible to improve the management of water projects registered under the ***Societies Act*** without necessarily taking major time consuming actions that would involve amendments to the Act.

Suggestions on Improvement of Water Societies

1. An individual society may, in its own by-laws, amend the provisions that require one minimum meeting per year to a bigger number. This would avoid the tendency by committees to wait until the end of the year to hold the one statutory meeting. It is foreseen that a water society has a minimum of four meetings per year. This gives opportunity to members to be constantly informed about the society's matters and to make contributions.

2. During registration, the society should expand the scope of its activities to include those which promote the objectives of the society beyond water alone. These would include income generation in support of water supply operations sustainability

3. Education of members on their rights, where the office bearers or committee members

are in breach of their statutory duty, especially in connection with accountability to the members, will improve the performance of water societies.

Registration under the NGOs and Coordination Act

In 1990 the Government enacted the ***Non-Governmental Organization and Coordination Act, 1990*** to make provisions for the registration and coordination of mushrooming NGOs in Kenya. NGOs have traditionally played an important role in the development of water services particularly for those communities that seem to be disenfranchised. They are among the key contributors to most community water based projects in terms of providing funds, technical support and training. External Support Agencies such as DANIDA, SIDA, FINNIDA, UNDP, BADC sometimes prefer to channel their aid in support to the rural and peri-urban community projects through established and registered NGOs rather than the Central Government.

The role NGOs play in the management of water systems mainly centers on training of community organizations to manage their own resources. In doing this, and particularly in articulating the need for communities to understand their rights, they have often met opposition from the very forces whose interest should be sustainability in the sector. As pointed out in the previous section, ignorance by the communities of their rights under the different registration options is a major reason for the non-effectiveness of the legal options in place. It should follow that there are advantages in registering community organizations under the ***NGO Act.***

Advantages of Registration Under the NGOs Act

So far, in the study area, umbrella NGOs for water management groups are proposed in Kilifi and Makueni Districts. Such an organization would have the following advantages:-

- They would have a legal base derived from operating under a substantive law [***Section 12(3) of the NGO Act, 1990***]. Once registered the organizations would become a body cooperate capable in its name of:

1. Suing and being sued.
2. Taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property.
3. Entering into contracts.
4. Doing or performing all such other things or acts necessary for the proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

- As for all registered NGOs, it would be answerable and accountable to the donor community for all funds remitted through them. In addition, the NGO Act requires that proper books of accounts be kept, that auditing be undertaken every year and that the audit rules and procedures developed by the NGO council be strictly followed by all.

- An existing system of checks and balances for NGOs through the NGO Council which has developed a Code of Conduct for all NGOs [***Part IV of the NGO Act***] would be applicable to it. The Council has powers under the Act to discipline and to recommend the de-registration of any NGO by the Board.

Disadvantages of this System of Registration

Registration of community water management organizations would be cumbersome, and perhaps even more confusing, than the first two systems dealt with in the previous sections. Its main demerits are:

- NGOs are not perpetual which can create serious problems in water supply management. Every certificate issued to an NGO shall be valid for a period of sixty months from the date of issue only.

- It is usually not open to a large number of people while communities are usually very large.

- The registration system is tedious, long and expensive, as compared to registration under MCSS. Usually the registration will take a minimum of three to six months to be completed and can only be undertaken in Nairobi. It is not a viable system for local communities as the costs of registration would require external support which would undermine the sense of ownership meant to be promoted.

- Many NGOs have tended to be support-oriented seeming to concentrate on funding, technical and education services. This has left initiation, management and operation of projects entirely to the community. This is as it should be. However, where ownership of land and other project assets become a problem, it has resulted in some debate on whether or not NGO support is sustainable.

Box 3: The Need for Continuous Software Support

There are instances where NGOs or International Organization render support to a community to the extent of setting up, as its own cost, the whole project. Once the project is completed, there is always the danger of lack of continuity in the provision of finances or other software support to enable communities meet running costs of the projects. Such unfortunate occurrences are usually blamed on the communities who should have understood the agreements they were entering into with the NGOs. Other NGOs have tended to heavily rely on expatriate personnel at the exclusion of local expertise which is sometimes more relevant in software support. At this stage, it may not be opportune to advocate for community water management groups to register under the NGOs Act.

Application of the Cooperative Societies Act to Water Management

Cooperative Societies, registered under the ***Cooperative Society Act (Cap 490),*** comprise of ten or more persons who choose to be registered as a cooperative society for the purpose of promoting their economic interests.

In Kenya today, there is a variety of cooperative societies including those for farmers, coffee, milk, fish, handicraft, horticulture and housing. There are however, so far, no water cooperative societies which would seem to imply that there are some difficulties in registering a water cooperative society. This is indeed the case because of two factors related to the nature of a cooperative society.

1. Water groups are, generally, not established for the promotion of economic interests of their members but for the improvement of their welfare and social status. Any economic gain that may accrue through a water society would be indirect in the form, for example, of increased milk yield through adequate clean water to animals.

2. All cooperative societies have, or tend to have, a closed membership. The Act that regulates these institutions provides that they have a limited liability. It follows that in a tea, milk, coffee or horticultural cooperative society, one cannot be accepted as a member unless he **has** tea, milk, coffee or horticultural products. If a water cooperative society were to be registered, it would require that all its members **have** water. As the communities being dealt with are those that **require** but do **not** necessarily **have** water, it would be difficult to control the membership since almost nobody in the community would qualify.

As a result of the unique characteristics of the cooperative societies, most of them have undertaken to be associated with many water projects within their jurisdiction, using the resource to complement their principal objective which is economic.

Box 4: Cooperatives in Water Supply and Management

A horticultural cooperative society will drill a borehole or build a water supply for the community and benefit by irrigating from the borehole. Similarly, housing cooperative societies will pipe and pump water to their residents to ensure the well being of their members and at the same time increase the value of their property.

Advantages of registration under the *Cooperative Societies Act*

There are several advantages connected to registration as a cooperative society under the ***Cooperative Societies Act.***

The cooperative society has a legal base under which it operates, complemented by a system of by-laws outlining the procedures for the implementation of the parent Act. Once registered, the society becomes a legal person capable of:

1. Suing and being sued.

2. Entering into contracts, including borrowing money.

3. Acquiring, purchasing and disposing of property.

4. Acquiring perpetual succession.

A cooperative society enjoys limited liability and its membership is restricted by-law. The members must be persons who share or participate in a common venture (tea, coffee, horticulture) for economic gain. Direct economic gain to the members is always ensured in the form of an annual dividend or bonus.

Cooperatives have a large spectrum for generating funds which includes deposits, share capital, members loans repayments and reserve and surplus funds. This contrasts unfavorably with societies or self-help groups which raise their income from membership related fees only.

Registration procedures are fast and cheap, being done in the district unlike that for general societies which have to be undertaken in Nairobi and which therefore takes a long time to be finalized.

Strict accounting procedures are monitored by the Commissioner of Cooperatives and individual officers are disciplined where necessary. The law provides that:-

- before payment of any dividend the Commissioner must consent,
- no loan or credit can be given to non members unless the Commissioner approves,
- funds can only be invested in identified projects,
- the Commissioner can, on his own initiative, or that of the Minister or member, order an inquiry into the affairs of a cooperative society and anybody found guilty is prosecuted,
- money to be paid to charities is limited to 10%.

Conclusion

The cooperative society is a classic example of community participation where the community initiates, manages and owns the society, participating in its day to day affairs. It has improved the welfare of many rural communities and could be a solution to the sustainability problems of CMWS. With the advent of liberalization in the cooperatives sector, these societies are set to play an even more important role in the economic life of rural areas. There is every reason to hope that cooperatives will play a more visible role in the management of community water supplies. For this to happen, the entry point to rural water development may need to shift from the water itself to some other more commercially oriented activity.

Water Management Under the Companies Act

In our study area, we did not identify any company registered under the Companies Act, for the purposes of management of community water supplies. There is Runda Water Association in Nairobi, the property of Mai Limited, a company that has the objective of carrying out development in the Runda area. Development and distribution of water is only one of its many activities. A rural water company limited by guarantee has also been recently registered in Vihiga District. Being very new, experiences on its management are yet to be drawn.

There are various reasons why, so far, there seems to be some hesitation in incorporating of a water company, even one limited by guarantee which would not require a share capital.

Merits of Registration as a Company

If community water management systems have to be registered under the ***Companies Act***, they can only be registered as companies limited by guarantee. Companies limited by guarantee are non-profit making and tend to be welfare or charitable in nature. The benefits accruing from this type of registration include:

- The registered company is a body corporate capable in its name of, suing and being sued, having perpetual succession, owning, purchasing and disposing of property and entering into contracts.

- Because of its charitable nature it is exempt by-law from payment of income tax.

- Accountability and transparency is a requirement for all the directors and officers of the company, just as if it was a profit making company.

Disadvantages of Registration Under the *Companies Act*

The preparation of documents and registration procedures are complicated, often requiring the services of a lawyer. This is beyond the means of most community organizations who may not, in addition, understand the full implications of the registration being sought.

Registration of community water management organizations under the ***Companies Act*** is at present not feasible and efforts to involve the private sector in urban and peri-urban water management should be started first and lessons drawn from these used to benefit CMWS in rural areas.

Overview of Provisions Relating to CMWS in the Water Act

In this section, the provisions of the ***Water Act***, that accommodates CMWS, are looked into.

The ***Water Act*** was enacted in 1952 for the purpose of making provisions for the "conservation, control, apportionment and use of the Water Resources of Kenya." The Act established the Water Resources Authority whose main task was to "investigate the water resources of Kenya and advice and make recommendations to the Minister in regard to the improvement preservation, conservation and utilization of water resources."

The ***Water Act*** is the substantive law for the management of all bodies of water; upon or under any land. The Minister responsible for water affairs is seen as the manager of all 'bodies of water' in the country except those bodies of water where *the right of use* is vested in any other person by the ***Water Act*** or by any other written law.

Box 5: Powers of the Minister Under the *Water Act*

> ***Section 3 (1) of the Water Act provides: "The Water of every body of Water under or upon any land is vested in the Government subject to any rights of use in respect thereof of which by or under this Act or any other written Law, have been granted or recognized as being vested in any other person.***

Consequently the only water under the direct management of the Minister would be those bodies of water *the right of use* of which is not vested under any written law to someone else.

Section 7 of the ***Water Act*** provides that "It shall be the duty of the Minister – to secure throughout Kenya effective exercise by the authority or person under the control of the Minister of their powers and duties in relation to water"

The underlined words clearly anticipate the existence of other bodies of water whose use and management does not fall directly under the control of the Minister. These would be those 'bodies' of water managed and controlled through an existing Act of Parliament (e.g. Societies, Companies, NGOs or State Corporations Acts)

Having thus excluded 'water bodies' managed through existing laws, only those managed by organizations which are not registered under any existing Acts of Parliament, which in essence means self-help groups, would be under the direct control of the Minster.

Options Available to Self-Help Groups Registered by MCSS

Community self-help water groups registered as **Water Undertakers** by the Ministry responsible for water would have many advantages. They would:

1. Acquire monopoly to provide the service within the limits of supply identified with any other person wishing to offer similar service having to get the written consent of the registered water undertaker (section 124(4) of the ***Water Act***).

2. Get powers to enact by-laws which are enforceable and supported by the Minister. Such by-laws would cover exclusive areas of operation of the undertaker, prohibition of pollution of the resource (*Section 145(1) (b)*), provisions for payment of tariffs (*Section 143(1)*, disciplining of errant persons (*Section 144(3)* and the fines/charges to be paid (*Section 146 (2)*).

3. Have the possibility for the Minister to:

   - acquire land for any water undertaker
   - declare any area a 'protected area' (*Section 150 (1)*)
   - construct and maintain water works for the community/water undertaker on such land (*Sections 11(3)* and *9(1)*).

4. Be exempt from any provisions of the Act which hinder the progress of the by applying to the Minister (*Section 152*).

Under the Act, checks and balances for the water undertaker and members of the groups are ensured by the Minister. Where a complaint is lodged against any water undertaker the Minister can:-

- Institute an inquiry to establish the authentically of the complaint
- Require that certain correctional matters/ actions be undertaken by the person responsible
- Transfer the functions of the water undertaker to himself or to some other person or authority
- Refer the matter to court where necessary
- Take over the liabilities and assets of the water undertaker and administer them himself or appoint somebody to administer them
- Where the water undertaker is a body corporate, society, association or body of persons, hold every person charged with the offense answerable *(Section 136 (2))*

Recommendations

The existing Water (General) Rules (section 182 of the ***Water Act***) do not include provision for CMWS while the Water (Undertakers) Rules (also in the same section) are applicable only to legal entities. Having indicated that the legal status of self-help groups is a constraint to improved CMWS it does not appear logical to amend the ***Water Act*** to make provision for community management if such communities are not a legal entity. It is, therefore, recommended that:

1. Existing water groups registered under the MCSS be encouraged to take advantage of the provisions of the ***Water Act*** and get themselves registered as Associations or body corporate either under the societies or cooperative societies acts. This would enable them to apply to the Minister in charge of water affairs to become Water Undertakers.

2. Water (Undertakers) Rules be revisited to include provisions that would deal with simplification of matters dealing with applications forms, registration requirement, Annual Returns, Audit requirements etc. in order to encourage community groups to gain legal recognition and become Water Undertakers

3. Considering that the majority of self-help water groups are not aware of the provisions of the ***Water Act*** and the benefits that accrue from being a Water Undertaker, the Ministry in charge of water affairs and all sector actors should enhance their education portfolio. This would enable them to better sensitize communities on the need for, and benefits of, being a body corporate and becoming a Water Undertaker.

CHAPTER 6:
TOWARDS IMPROVING COMMUNITY MANAGED WATER SUPPLY

Introduction

In Chapter 5 dealing with existing community water supply management systems, five legal frameworks have been identified:

i. Community projects under the ***Water Act [Cap.372 Section 41]***

ii. Water Associations under the ***Societies Act [Cap. 108 Section 2]***

iii. NGO under the ***NGO Act***

iv. Cooperative Society for water development and management under the ***Cooperative Societies Act [Cap 490]***

The existing status of self-help groups registered under the MCSS is not considered as a legal framework as no Act exists. In 1991, MCSS developed and published policy guidelines on "Community Group Promotion Development".

In the sections below, an attempt is made to define the sequence of activities foreseen in improving the legal status of the different categories of community managed water supplies. The basic objective of this is to move progressively from whatever status exists now towards one that will empower communities to effectively and efficiently take charge of the management of their water supply affairs while contributing to environmental conservation.

Proposed Approach

Water as an economic good means different things to different people. To the international community, it means there is an opportunity cost to every use to which water is put. This interpretation is not understood by most sector actors in the rural areas. In the Kenyan rural context, water can only be viewed as an economic good to the extent that it is a factor of production and that its use can increase peoples' income. This interpretation has no relationship to the social dimension of its availability or to the economic loss that would result from an unhealthy society that lacks adequate wholesome water.

On the above basis, it is concluded that sustainable rural water supply can only be attained if it contributes to the economic welfare of individuals - helps produce money and food. This means that it will be difficult to interest communities in important capital and recurrent investments in water if the water does not pay for itself and, contribute to raising incomes.

The legal and institutional framework for CMWS should take this into account. One immediate consequence of the above conclusion is that water cannot in itself be the entry point, the objective, of a sustainable rural Community Water Supply Management framework. **The entry point should be what water can do to increase income and welfare.** The legal and institutional framework that will best ensure the realization of material gain should therefore be the object of proposed interventions for improving the legal and institutional framework of CMWS. The sections below give options that could be considered in improving the present status.

Community Understanding

All community groups managing water supplies on traditional understanding should be registered as self-help groups under MCSS. This has the advantage of formalizing the relationship between consumers and enabling binding understandings to be reached on access to the source and to some extent on operational and management rules. This registration will permit the affairs of the supply to be guided by MCSS and the ***Chiefs Authority Act [Cap. 128]*** in cases where traditional understanding falls short.

Although a step towards legalizing the consumer organization, this status is not, on its own, adequate to promote investment in the water supply. Such organizations would operate within the rules governing water resources management and be the first step towards achieving more empowerment to the communities.

Self-Help Groups

Self-help groups manage a large majority of community water supplies. In Chapter 5, the legal status of these groups has been analyzed and limitations established. In the introduction to this chapter, it is pointed out that investments in water can only be justified, from the point of view of most communities, if they are expected to yield profits. Giving more legal empowerment to self-help groups should be geared towards the "profit motive" with profit defined as increase in income.

The first step towards upgrading self-help groups is consequently proposed to be one of information, education and communication on the economic opportunities that a water supply offers. The fact of having an already existing organized group will help facilitate this activity.

The activity itself should start by examining the communities own income generating activities and identifying the extent to which water would improve these. It should be followed by an evaluation of community perceptions to present and future activities. The result should be a set of opportunities and activities that could be carried out by the groups, or individuals therein, to increase their income base using available water. It would also require piloting in order to assess the actual performance on the ground.

Once income generation is established, there will arise a demand for better management of the funds resulting from this income. Whether this income is individual or group, the perception of the role played by water in realizing it will change and require an organizational framework that would ensure availability of the water. This is the stage at which the other options will be required by the community.

Water Associations

The next step from a self-help group would be registration as a water association under the ***Societies Act***. The advantages and demerits of this option have been analyzed in Chapter 5. A water association, would not be free to engage in other income generating activities The legal powers that a water association would have over those of a self-help group would not be effective in increasing incomes.

Since the objective of examining different legal options is to enhance sustainability of water systems, and having concluded that domestic water supply on its own is not sustainable in the long run, it appears that this registration should be treated cautiously. It should only be used because it improves and clarifies the roles and responsibilities of all parties involved in water supply management. Its main advantage would be to instill a sense of responsibility for communal goods and redevelop a tradition/culture of working together. This option is proposed only as an intermediate stage to a full commercial approach to water management.

The effect of the long procedures necessary for registration under this Act could be minimized by the groups themselves agreeing to work in accordance with the provisions of their by-laws before actual registration. In fact depending on how fast the group's commercial objectives evolve, this long procedure could render itself unnecessary as the group could move to the next level of registration without being an association first.

The intermediate nature of this status will, however, facilitate easier transition from a traditional system where penalties were usually not related to the offense, particularly in material terms, to one where the groups understand that sanctions and sentences will be according to the laws of the land. When a group accepts and practices this, application to become a water undertaker can be made.

The activities foreseen to move from a self-help status to a water association are similar to those for forming the self-help group but stressing the need for transparency and improved management of services. At this stage mobilization towards income gene-rating activities and the role water plays in it, should be a key element. These income ventures could be on household level or group level depending on the conditions in the supply area. The need for use of water for economic purposes will be stressed, but, more importantly, if it is going to be adequate for all, regulated by **tariffs that reflect the actual incremental cost of water.**

Box 6: Proposed Water Association By-Laws and Tariffs

Currently, most water supply by-laws proposed under different on going programmes prohibit use of water other than for domestic purposes. This would be contradictory to the income motive. Rather water charges should recognize the household portion and charge it at a break even tariff while surcharging the other portion that is used for production. In most areas, this tariff would discourage sprinkler irrigation in favor of drip irrigation which would still ensure market crop production without encouraging wasteful uses of water.

More Refined Legal Status

The other two legal options: cooperative societies or limited companies are considered the ultimate status with the NGO option viewed as a temporary measure to promote improved management under one umbrella. It is not proposed to promote this status at community level but rather to make communities aware that the options exist and have their disadvantages, but, in the right conditions, a lot of advantages can be exposed.

The reason for this approach is to ensure that their formation comes as a natural process of the development of the groups. When water is being used for production, its importance will be recognized and its sustainability ensured. The need for a cooperative society will come because of a development and commercial objective like better marketing of the resulting produce or further development of water supply to increase production. As stated in the analysis of the provision of these laws, the evolution of water groups to this levels is a development that may not have direct relations to water supply alone.

The Way Forward for Current Interventions in CMWS

The major interventions in the rural water supply sector are geared towards empowering communities manage their own water supplies as a means of ensuring sustainability of the services. The strategy employed involves encouraging communities to form their water groups or associations, training them in management, organizational and technical fields and "handing over" the water supplies for their management.

"Handing over" has been considered an obstacle to effective community management as it does not confer real ownership of the water supply unless the organized group has the legal personality to own. It has been argued that communities will only invest and look after a water supply when they legally and effectively own it.

The current section looks at the implications of the proposed line of action on current interventions and proposes elements that should be included in the activities geared towards enhanced community management of water supplies.

Projects Managed by Self-Help Groups

For these self-help projects, current interventions involve mobilizing and organizing communities, sensitizing them on the underlying reasons for the need for rehabilitation, training them for better management and carrying out rehabilitation with them. It is believed that this approach will improve future sustainability and general management of the systems. The basis for this belief stems from the principle that a trained, well organized group will collect revenue from sale of water and use it to further develop the system if they legally own them.

Even if the above hypothesis is true, there is an added element which may hinder groups from improving the performance of the systems. Such groups should have an ability and willingness to pay for water. Ability and willingness depends on the value communities attach to water and this value is best understood by what goods it avails.

Current interventions should, therefore, seek to maximize the value of water at all stages before, during and to a great extent after the rehabilitation.

Recommendations

It is recommended that:

- Rehabilitation interventions start with an exploration of what water related income generating activities exist in the community. These opportunities should then be brought to the attention of the

groups and attempts made to incorporate them in the water activities. When rehabilitation plans are being drawn up, allowance for income generating water related activities should always be considered and catered for in implementation and subsequent management strategies.

- Recognizing that some of these activities may not be within the scope of individual water projects it is proposed that communities be encouraged, as part of the projects, to exploit other existing channels for initiation of income generation opportunities.

- As part of the "handing over" process, communities should be encouraged to take a legal status that would enable it be a water undertaker.

- The information, education and communication packages should include material on economic opportunities and seek to expand areas of cooperation with other sector projects in the community as a way of leading to a natural evolution of the self-help groups into legal entities.

- On the organizational level, self-help groups should be assisted to draw up by-laws and to effectively operate as water associations even before they register as such. This status will better facilitate their transition to the higher levels of commercialization as more activities are brought on board.

Box 7: Possible Economic Options in the Districts Considered

Kajiado and Baringo
Already livestock is the prime objective of developing community water management initiatives. The issue to be addressed would be diversification into other income generating activities and education.

Machakos and Siaya ***Irrigation on small scale, focused an households and water conserving should be examined. For the last ten years, Ministry of Agriculture and University of Nairobi have demonstrated at the Nairobi International show that the water requirement for 300 cabbages on drip irrigation is only 200 litres per day. Cabbage in Nairobi costs Ksh. 30.00 a piece! Egg farming could also be an option to be studied.***

Kakamega and Meru: ***Small scale irrigation potential, improved livestock and chicken keeping are areas not adequately exploited in Kakamega. The price of vegetables in Kakamega is higher than Nairobi on the off reason (December - March). The same is applicable to Meru. In all the above cases, there are parallel projects that are attempting to improve the economic areas indicated. Opportunities for water projects linking onto these other initiatives should be exploited.***

Box 8: Possible Threats to Sustainability

The risk is that, a few people recognizing the economic importance of water before others do, will monopolize the little water available. This risk would in itself not be so bad as it should lead to a greater demand for better and enforceable rules of management in the long run. Nevertheless, these few people have been known to use all means at their disposal, including mobilizing the communities themselves, to campaign against improvements in the management systems for their private gain.

GOK Water Supply Projects

The intention is to hand-over management of water supplies managed by the Ministry of Land Reclamation, Regional and Water Development to community organizations. The proposed approach is similar to that for self-help supplies. The only difference is that since there are no existing water supply organizations in these areas, the projects do not have to go through the self-help phase first except for practical convenience. It would be more practical to move directly to the legal status that would facilitate the communities' registration as water undertakers.

Recommendations

- **Registration of a *self-help group* will only be done in order to hasten the process of organizing the group (meetings, discussions, collection of funds). At an early stage, and before the community starts performing management duties, including collection of funds, these group should operate essentially as *water associations*, using by-laws that will have been discussed and agreed upon with them. Whatever period the process of registration takes, it should not be a hindrance to operating under the relevant Act. The longer term objective should be registration as a *Water Undertaker.***

- **Information, education and communication components of such projects should contain the elements proposed for self-help groups and be carried out in the same manner.**

New Projects

New projects will need to incorporate all the elements of a holistic approach to water management including provision for income generating activities that will recognize the ***economic value of water.*** This may not be easy where large systems are considered but should still be incorporated even at household level. It is recommended that in all cases new projects should be demand driven and implemented with maximum inter-sectional collaboration to ensure the income incentive.