

The Role of Water Law in the Development of an Integrated Water Resources Management Strategy

(Workshop 2: “Driving Forces and Incentives for Change towards Sustainable Water Development”)

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What is the role of water law in developing an integrated water resources management strategy aimed at securing sustainable development? What are the rules of water law that contribute to, or detract from this policy goal? From a water lawyer’s perspective, the key concerns in this context relate to the identification and enforcement of the rights and obligations that promote equitable and reasonable use of freshwater resources. This would include considering such matters as legal entitlement, allocation among users and uses, institutional mechanisms, and compliance measures in response to practical needs on the ground.

Water Law: The Context

What is the role of (water) law in responding to the world’s growing water problems? An estimated 300 million people in 26 countries currently suffer from water scarcity. By 2050, approximately two-thirds of the world population, in some 66 countries, will face moderate to severe water shortage (World Water Council). More than 1 billion people live without a daily supply of freshwater and more than twice that number has inadequate sanitation. Elements of the impending “global water crisis” are already with us, and complex problems loom ahead. Managing scarce water resources for increasing demands in an equitable and sustainable manner will be one of the main challenges of the 21st century.

Providing safe and clean water, especially in situations of scarcity, heightened demand, or uneven distribution of the resource, requires the combined and coordinated efforts of all water resource experts. While traditionally, engineers and hydrologists have played central roles in this task, it is now clear that economists, lawyers, political and social scientists, should also have a say in determining how competing interests over water might best be reconciled and beneficially managed. Interdisciplinary input and support is required for the primarily political decisions that determine allocation of the uses of this finite resource. This process has become increasingly complex, especially in light of current knowledge that suggests there exists a broader range of users and uses than previously accounted for, including, in particular, the ecological functions of water, in-stream uses, the global environment, and so forth, and that there may be technological limits to meeting the ever-increasing demands of a growing human population .

Thus, new paradigms must be created to address this serious problem. In this context, unique initiatives, such as HELP (Hydrology for the Environment, Life and Policy, a joint UNESCO / WHO endeavour), seek to develop a fresh approach to integrated catchment management through a demand-responsive policy and management-focused orientation. The innovation here is in forming, from the outset, a team of scientists, managers, lawyers and policy-makers to address stakeholders’ needs in real catchments.

Such an approach has been emerging globally, as evidenced in the application of evolving best practices from across disciplines aimed at meeting multifaceted problems related to water management (DFID 2000 Strategy Report). In March 2000, a record number of States endorsed the “Hague Declaration on Water Security”, committing their governments to “provide water security in the 21st century”, and asserting that “business as usual is not an option” (Hague Declaration). The World Commission on Dams Report (London, November 2000) determined that the most effective means to “resolve the complex issues surrounding water, dams and development” involved “recognising rights and assessing risks” and instituting “decision-making processes based on the pursuit of negotiated outcomes, conducted in an open and transparent manner and inclusive of all legitimate actors involved in the issue” (WCD Report).

Despite this progressive shift in perspective, operationalising interdisciplinary responses to the world's water problems remains rather ad hoc. For example, while the Hague Ministerial Declaration introduces the new concept of "water security", it omits any mention of law, and fails to refer to the 1997 UN Watercourses Convention, the only global legal instrument that provides a comprehensive legal framework for the peaceful management of transboundary watercourses. Many of the water developments on the ground make no provision for including water lawyers in the conceptual stages of those projects.

Water Law: The Issues

In the context of equitable and sustainable management of water resources, the reference to "water law" raises two very different types of issues. The first relates to the role of water law in responding to the issue, generally. The second concerns the substantive content of the law that applies to the problem, in particular. What are the legal issues tied to achieving effective water resources management? In essence, there are four key points that must be addressed in any setting, national or international: (i) legal entitlement (what is the scope of the resource and who is entitled to use it?); (ii) framework for allocation (where all needs cannot be met, who is entitled to what quantity or quality of the resource?); (iii) institutional mechanisms, including governance issues (who is responsible for implementing or overseeing the implementation of the laws), and (iv) compliance verification, dispute avoidance and resolution (how are rights and obligations enforced?). When lawyers are drafting legislation (at the national level) or treaties (at the international level) related to water use, each of these elements must be clearly proscribed in an instrument (or series of instruments) that addresses this range of issues. This task is impossible without the input from other water resource experts, including, but not limited to, hydrologists, scientists, managers and policy-makers.

For example, on the matter of legal entitlement, two key issues must be considered and resolved. First, what is the scope of the resource, i.e. the physical, quantitative and qualitative, definition of the water resource to be utilised? Second, what is the scope of the demand for water use, i.e. who are the stakeholders and what are their resource-related needs? The conceptual approach to each of these problems requires two separate considerations: not only entitlements, but also obligations must be identified. In fact, a "rights-based" approach to water, from the legal perspective, contains both of these elements, recognising that the right to utilise freshwater is tied to similar rights of other legitimate users.

Following the definitions needed to determine legal entitlement, some prognostic work may be required in order to identify the range of options for the optimal and beneficial use of the resource -- especially where the demand for the resources exceeds the supply. Can a priority of uses be established? Where competing needs must be reconciled, what are the criteria for achieving that task? Are some uses more important than others? Science (in the broad sense of the term) and civil society must play important roles in this arriving at an agreed framework for allocation, the cornerstone of any water resource decision-support system.

The next step in the process usually requires the creation of institutional mechanisms that ensure the established "rules of the game" are applied. How these organs are constituted, their mandate, and their scope of responsibility must be established. The range of options needs careful consideration, and should be tailored meet the needs of the particular regime, without compromising the objectives of the water management scheme. Often, one duty of the institutional organs is to ensure compliance with the legal regime established. What substantive and procedural measures are best suited to monitor compliance with the rights and duties set forth? In most cases measurable indicators are needed to assess the level of implementation of legal regimes. The design and operationalisation of such a system calls for a coherent contribution from all water resources specialists -- lawyers, scientists, managers and policy-makers. In fact, compliance systems for water resources management is an area that could use further development, especially at the international level.

Water Law: National Dimension

The role of law in water resources management reflects its place in society in general. Water law is distinct from water policy. The overall objective of a water policy is to achieve the maximization of benefits deriving from available water resources and their rational management. The main function of

water law is, in principle, to promote and facilitate attaining policy objectives through a system of regulatory and institutional measures and mechanisms. In some instances, however, inadequate water legislation can be a serious obstacle to achieving effective water resources management at the national, basin or local levels.

Water law is not limited to water legislation (national water acts, by-laws and other regulations), although it usually constitutes its normative core. Relevant rules and provisions can be found in a variety of sources, including, constitutional law, environmental law, land law, mining law and also in administrative, civil and criminal legislation. In some countries, customary law can be as important as “written” law in regulating water resource-related activities, especially at the level of rural community. The fact that it is unwritten does not detract from its legitimacy.

Traditionally, the notions of “water laws” and “water rights” were considered in the same vein and referred mainly to those legal rules governing the relationship among water uses, primarily reflected in the riparian rights doctrine and the prior appropriation doctrine. Modern water law, having retained some of the traditional elements, has now evolved into a more sophisticated and complex legal system that reflects the changing value of water resources in a modern society.

At the national level, the notions of legal entitlement and framework for allocation are closely connected and broadly referred to as “water rights”, a common, but often-misused term. “Water rights” must be considered in a co-relative sense: including entitlements and obligations, rights and duties. At the national level, water is generally the property of the State held in trust for its citizens, with overall responsibility for resource-related activities vested in the State. Enforcement of the relevant laws is also the ultimate responsibility of the State and generally carried out through administrative or judicial bodies. Most national water legislation incorporates policy goals in such terms as “optimum use”, “effective and beneficial use” “common benefit”, “rational use”, “and sustainable development”, and seeks to protect and effectively manage water supply (TAC Background Paper No. 3).

Water Law: International Dimension

A basic understanding of the fundamental concepts and principles of public international law is necessary in order to appreciate fully the issues that arise in the context of the law that governs international freshwater. For example, it is important to know that the rules of international law apply to sovereign States, and it is primarily for States themselves to ensure compliance with international commitments. There is no “supra” authority to enforce such rules, except in very specific circumstances, such as a threat to international peace and security, where the United Nations can take action. Enforcement of international law is a central issue of concern. However, the first step to that exercise must be identification of the applicable rules.

These rules are found in treaties, international custom, general principles of law and the writings of “learned publicists” (Statute of the International Court of Justice). Treaties usually provide the most readily accessible source of law, but the other sources cannot be ignored. In the law governing the non-navigational uses of international watercourses, rules of customary law are particularly important and are often invoked by States in the absence of “written”, or “codified”, law. It is worth noting that not all treaties apply to all States – firstly, it must be ascertained whether the State concerned is a party to the treaty in question, and secondly, whether the latter has come into force and thus has become legally binding on the State. Finally, the normative content (requirements) of the treaty rules must be established in order to determine whether, or not, a State’s actions are in accordance with its treaty obligations.

The cornerstone principle of international water law – “equitable and reasonable utilisation” – is a universally recognised rule of customary law, reflected in many international agreements, that governs States’ behaviour with respect to international watercourses. An important element of this principle is the requirement that watercourse States take all reasonable measures not to cause significant harm to other watercourse States. These substantive rules are supported by a set of procedural rules requiring, *inter alia*, prior notification, exchange of information and consultations, concerning planned measures likely to adversely affect other watercourse States.

The fundamental principles and procedural rules of water law are codified in the 1997 UN Watercourses Convention, a framework instrument that sets forth basic rights and obligations of

watercourse States. Adopted by UN General Assembly Resolution on 21 May 1997, the Convention was supported by 104 States, with only three States voting against (Burundi, China and Turkey) (Wouters, GYIL). The 1997 Convention requires 35 ratifications and has yet to come into force. At present, Finland, Syria, Hungary, Jordan, Lebanon, Norway, South Africa and Sweden are parties to the Convention; Luxembourg, Paraguay, Portugal, Venezuela, Côte d'Ivoire, Germany, Namibia, Netherlands, Norway, Tunisia, and Yemen are signatories, who have yet to ratify it. The Convention has been recognised by the International Court of Justice (ICJ Danube case) and by a significant number of States as an authoritative statement of the fundamental principles of international water law. Regardless of when, and whether, the Convention comes into force, it will continue to play an important role in the management of international watercourses.

Much has been written about “sustainable development” in the legal context, as distinct from the “political concept for human, social, economic and environmental progress” (Brundtland). However, the precise normative content of this term – the respective rights and obligations of States flowing from that “rule” -- is unclear. It has been suggested that a distinction should be made between “sustainable development as a *concept*, on the one hand, and legal *principles* and legal *rules* aiming at normative clarification and advancement with regard to certain aspects of the concept, on the other”. One commentator claims that “the search for a meaningful legal content leads to the conclusion that ‘empty’ concepts are likely to satisfy needs of political convenience but do not satisfy the requirements of international law-making”. The concept of sustainable development must be more closely considered in the legal context, in order to define the legal parameters of sustainable development. What are the normative prescriptions of the concept? Is it a “rule” of international law? Watercourse States are prepared to endorse some of the constituent elements of sustainable development, but appear unwilling to embrace it *per se* as a legally binding obligation.

The Way Forward – Building of Bridges through Dialogue

Despite the abundance of literature on the topic of “integrated water resources management” (IWRM), achieving this goal is very difficult in practice (TAC No. 4). It is clear, however, that water law must be considered an integral part of the process. At the national level, “legislation provides the basis for government intervention and action and establishes the context and framework for action by non-governmental entities; hence it is an important element within the enabling environment [for IWRM]” (TAC No. 4). Often, the problem is not the lack of adequate legislation, but rather inadequate implementation and enforcement, usually resulting from a lack of political will, insufficient financial resources or professional expertise. Similar problems occur at the international level, where the situation is even more complicated, given the nature of the system within which the rules of international law operate.

Making water law more accessible to non-lawyers and turning it into an integral part of any water resource-related policy or project is certainly one way forward. At the national and international levels, this would mean including water lawyers from the outset, including the conceptual and practical stages of water policy formulation and implementation. Equally, to make the rules of water law, national and international, work properly, the input of the entire range of water specialists is required – the definition and effective implementation of legal regimes depends on scientific knowledge and expertise. Facilitating an interdisciplinary dialogue throughout the process could enhance the chances of achieving a coherent water resources strategy that ensures their equitable and sustainable use.

International law, as any normative system, provides the parameters for legitimate State activity. Critics that deride the principle of “equitable and reasonable utilisation” as imprecise and incapable of application fail to understand that the real strength of this rule is its flexibility. By its very nature, this principle facilitates the reconciliation of competing interests within a framework adaptable to changing circumstances – economic, environmental, social and other. One way forward would be to develop a methodology to operationalise this principle, possibly in the form of guidelines or a checklist that States could use to compile and assess the information necessary to identify their entitlements, obligations, needs and other relevant factors related to their shared transboundary waters. This task will require the concerted actions of an interdisciplinary team of experts.

Rules of international law, properly drafted and implemented, provide a solid foundation for the peaceful management of transboundary water resources. Critics of the 1997 UN Watercourses Convention ignore one important thing. The opportunity for unilateral development and power politics

is always present where the substantive rules and procedural requirements, such as equitable use, prior notification of planned measures, exchange of information, and dispute avoidance mechanisms, are missing. The former serve to level the playing field, while the latter provide predictable rules of the game. The absence of a coherent and balanced legal framework for the management of international water resources increases the likelihood of inequities and adverse consequences, leading, in the worst-case scenario, to serious international conflicts over water.

The legal issues, national and international, arising from the policy objective of achieving equitable and sustainable use of freshwater, should be considered as an integral part of the entire water management process. Effective water resources policy, that meets the changing and increasing demands of the world's growing population, requires a methodology capable of reconciling, in an ongoing manner, competing interests. A legal framework, supported by interdisciplinary expertise, is a fundamental element of this endeavour.