

THE LEGAL FRAMEWORK OF WATER RESOURCE MANAGEMENT

Lessons Learned from the IDLO seminar on legal framework of water resource management conducted on September 11-22, 2006 in Rome

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Existing legal regimes for water resource management often fail to meet present day challenges, as they were conceived at a time when water was considered an inexhaustible natural resource. To achieve the Millennium Development Goal N°7, which aims to halve by 2015 the proportion of people without sustainable access to safe water and improved sanitation services, transition economy and developing countries need to revise existing policies, develop appropriate regulatory frameworks, and improve governance for Integrated Water Resource Development and Management (IWRDM).

Within this context, this DLU is based on lessons learned from the two-week seminar, "Legal Framework of Water Resource Management," conducted at IDLO's Rome-based headquarters. The lessons distilled are the result of a lively exchange among legal professionals and high-level policy advisors, representatives from regulatory authorities, in-house lawyers and law firm practitioners, NGO lawyers and user/consumer association representatives from 20 countries of Africa, Asia, Eastern Europe and Latin America.

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The DLU endeavors to provide information concerning current, important lessons learned pertaining to the development field, largely based on IDLO videoconference sessions, Rome-based legal training programs and in-country legal training and technical assistance programs.

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The **International Development Law Organization (IDLO)** is an international inter-governmental organization dedicated to promoting the rule of law and good governance in developing countries, countries in economic transition and in those emerging from armed conflict.

By doing this, IDLO creates the basis for economic and social development and favors conditions that are conducive to improved social justice, increased trade and investment and more efficient distribution of all forms of aid. IDLO fulfils its mandate through training, technical assistance, distance learning, research and publication. Since its establishment in 1983, IDLO has worked with over 15,000 legal professionals from more than 175 countries and IDLO Alumni Associations now operate in 41 countries.

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IDLO/ Italian-financed Project: Ansari Square towards Kulala Pushta, first street on the left, 2nd house, Shari-Now, Kabul, Afghanistan

IDLO/ Canadian-financed Project: Nearby Muslim square 2nd street, Shari-Now, Kabul, Afghanistan

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The Human Right to Water

Developing countries vary in their treatment to water; some countries refer to the right to water in their constitutions, such as Congo, Ethiopia, Ecuador and South Africa, while others refer to water as a basic need rather than right. In other countries, the right to water for drinking purposes is treated separately from the right to water for production purposes. The right to water is a concept that has gained attention and acceptance over the past five years. The basis for such a right finds its origin in several sources, nationally and internationally.

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The Universal Declaration of Human Rights of 1948 guarantees all people a right to a standard of living adequate for their health and well-being; while the International Covenant on Economic, Social and Cultural Rights (ICECSR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

International Covenant on Economic, Social and Cultural Rights (ICECSR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In 2000 the United Nations Committee on Economic, Social and Cultural Rights, the ICESCSR supervisory body adopted a General Comment on the right to health. The General Comment interpreted the right to health as an inclusive right that extends not only to timely and appropriate health care but also to those factors that determine good health: access to safe drinking water. The same Committee went on to recognize water itself as an independent right in 2002, by stating “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”

Taken as the human right, the right to water entitles the holder to water that is sufficient, safe, of acceptable taste, physically accessible, as well as affordable. These characteristics are normally divided into three dimensions: availability, quality and accessibility. This right to water implies obligations on behalf of the state, which have been defined in terms of “respect,” meaning, no interference; “protect,” from third parties; and “fulfill,” which includes an obligation to facilitate, promote and provide. Nevertheless, it is noteworthy that the right to water does not mean water is free, but rather that it be affordable and accessible to all.

Water Regulatory Issues and Contemporary Problems

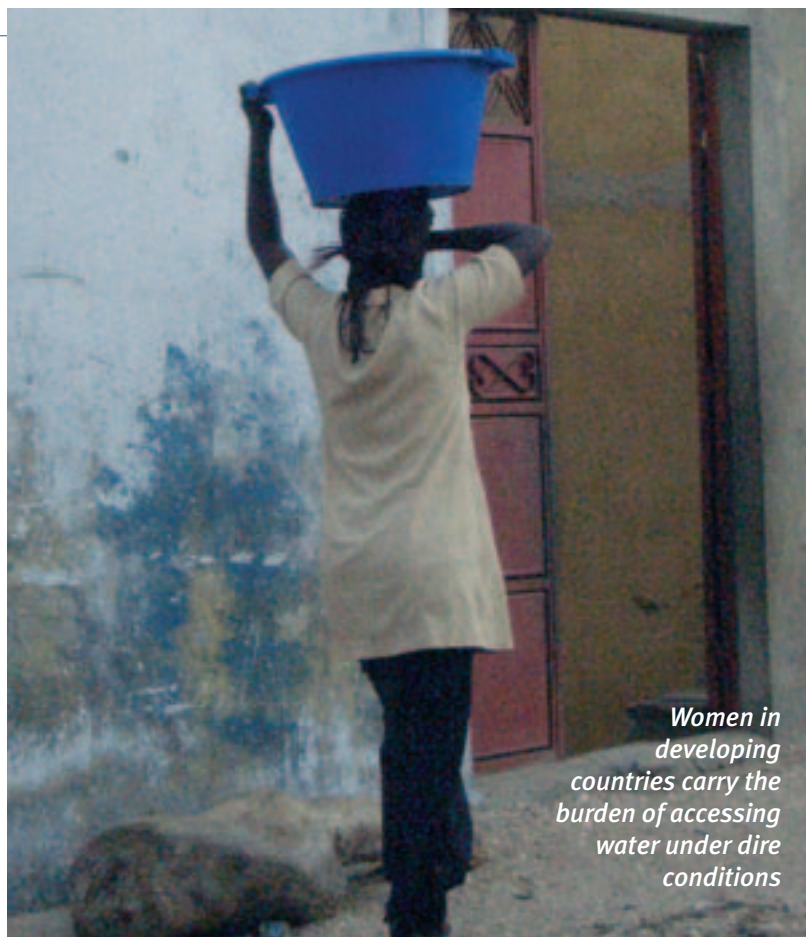
Fresh water is important for maintaining agriculture, livestock, development, etc. The mandate of the Food and Agricultural Organization (FAO) is to assist its member countries in developing legislation for the management, development, and conservation of renewable natural resources, including fresh water. Based on this experience assisting and advising member countries in conceptualizing and framing legislation for fresh water resources, FAO experts provided the following insight on the water regulatory issues and contemporary problems encountered when drafting water legislation.

Drafting water legislation requires a thorough analysis of existing water codes, in order to understand the valid and efficient legal frameworks for managing water resources under current water legislation. Moreover, the process of law reform is a chance to complement, improve and reinforce existing legislation by incorporating vital concepts such as “sustainability,” when dealing with natural resources. Although there are hundreds of issues to address when drafting water resource legislation, in the past, the main focus has been on water supply at the expense of water resources. This has oftentimes led to a lack of coordination between different agencies managing water resources.

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Crucial Issues Identified for the Efficient Management of Water Resources:

- The economic mechanisms of water use (including charging for water use and disposal)
- The issue of pollution prevention (addressing issues of sustainability)
- The protection of water zones in terms of quantity and quality
- Dam safety as another important aspect of physical resource management
- Irrigation and other water economy activities



Women in developing countries carry the burden of accessing water under dire conditions

For example, the Mexican Water Act of 1994, a very systematic piece of legislation had little impact on public and local legislation due to the lack of an effective process of implementation (in contrast to South Africa, where more attention was devoted to implementation). General and specific implementing regulations are essential, especially to determine how to create the capacity to actualize the legislation. This calls for building institutional capacity to implement of legislation.

- State water inspectorate as an oversight inspection body that oversees compliance with legislation
- Interstate cooperation between states for water management (indispensable for implementation)
- Implementation of water legislation (requiring governmental capacity to internalize and make water legislation operational)
- The issue of consensus on policy making is crucial: it is easier to find consensus on general water principles, but leaving the detailed implementation to subsequent legislation ends up relegating important and significant policy issues to potential future regulation
- Transboundary issues and distribution of power between federal and state government: relevant to places with a strong federal structure—such as the United States, Nigeria, and Argentina—where different levels of water laws and acts emanate from federal or state governments and operate at different levels as a result.



IDLO participants during a training session

■ The Process of Law Reform

The first critical step is to identify the policy problems and objectives of the reform, considering that water law reform is not an exercise in a vacuum. The issue is not whether the water law is old or new, but rather, whether it addresses the issues it needs to address. A key question to pose is whether there are water issues that cannot be addressed in a country unless the law is changed. In Kenya, there was a pressing need to reform the water law that existed at the time which placed water administration and water resources in one administration, whereas the ideal is to separate water resource management, water resource services, and water supply under the same umbrella of the Water Decision Body (such as a National Water Advisory Commission).

The three aspects of law reform process are: 1) articulation of policy; 2) reform of legislation; and 3) implementation and enforcement. Legal reform must be recognized as a process whereby vested interests are determined and a balance struck between a more appropriate administrative arrangement and vested interests. The belief that legal reform is beneficial for everyone is mistaken, since varied groups of people want to continue to receive the benefits they received in the past; therefore, any reform is a compromise.

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Recent water law reform in developing countries:

- South Africa's Water Law dated back from 1956 and was reformed in 1998. The reform introduced : 1) equity and redress; 2) civil participation on decision-making; 3) the principle of sustainability; 4) institutional reform introducing a Water Tribunal and a National Water Infrastructure Agency; and 5) Environmental Reserve-Resources and National Classification System.
- Croatia's Water Law from 1995 was reformed in 2005 to meet requirements of the EU. A Water Price Policy Water Finance Act was introduced, which put a standard price on water, new water charges were imposed, and four river basins were created.
- Uruguay's Water Law of 1978 was amended in 2004 to introduce new principles of sustainable management and control of water resources. During the reform process, Uruguay introduced a water information system and new concepts like water size unity, which brought fresh conceptual approaches. River basin authorities and mechanisms of social participation were created, which may have contributed to preventing the rebellions against privatization that many Latin American countries faced.
- Cameroon water law of 1996 and environmental legislation underwent a reform in 1998, providing a higher level of security in the country's drinking water.

The government responded to private sector water pollution by imposing penalties and sanctions, yet this did little to improve the quality of water, as fines went to the national treasury, rather than a specific commission; hence the urgent need to decentralize water management. Another problem was the high cost of water that led to increasing conflict. In response, the reform privatized the water distribution corporation, with private corporations having to apply to the government for water supply. The new reform also criminalizes water pollution, and holds the manager responsible for the company. Lastly, corporations are obliged to release information to the public about the state of the water.

Divergence and convergence of water and environmental law

Water reform must address the various policy objectives to be achieved. Since the aim of environmental legislation is to ensure sustainability, it often conflicts with water interests such as irrigation, supply, etc. Balancing water needs and environmental principles of sustainability is a difficult endeavor for countries, as illustrated in the box below. Effective water regulations must reflect environmental protection principles such as precautionary, prevention and polluter-pays principles. Although conflicting interests are inevitable, water laws should adopt a flexible framework with a set of guiding principles that allow for change, improvement and amendment, without leading to abuse of discretion or implementation problems.

Environmental issues are often neglected in water laws in many developing countries, with the focus primarily placed on the water available to use through a system of supply, disregarding environmental protection and a sustainable

Focusing on water supply instead of the environmental sustainability of water

In Kenya, as is commonplace in many developing countries, the same agency regulated water, the environment, and the water supply to customers. This often leads to the focus of the public, parliament and politicians narrowly on supply. In fact, three-fourths of the budget of the Kenyan Ministry of Water was spent on supply and one-fourth on water in the environment, which led to difficulties in managing water resources sustainably. Water scarcity is a major concern in Kenya, leading to the emphasis on supply, yet demand is difficult to meet without proper environmental management. As a result, the legal reform process was driven by the need to separate water resource management from water service management, in order to protect natural resources, irrespective of the service needs.

way of supply. The priority is the provision of water, regardless of the consequences to the environment.

Obstacles to Implementation and Enforcement

Drafting and passing good laws is the first step to legal reform, but its effectiveness depends on the more crucial step of restructuring institutions to implement the new law. This is more problematic, as those involved in the restructuring process are sometimes the ones most resistant to change, due to the negative effects change may have on them. Moreover, implementation requires the technical, financial and administrative



Water resource management expert outlining the relevant issues



Pia Ximena Rodriguez, Program Legal Counsel, and Judge Amady Ba, Head of the IDLO Francophone Legal Department during the commencement ceremony

capacity to administer the law; hence the need for capacity building to fulfill policy objectives. Accordingly, comprehensive studies should include an examination of capacity, and given that the majority of countries are likely to have insufficient capacity to achieve the desired objectives, it is essential for communities to be an instrumental part of implementation. Providing a platform for water users to self-police and self-implement through

Sustainable water development depends on governance.

water user associations is crucial, as implementation and enforcement cannot be achieved solely by water administrations. Another alternative is to implement a sanctions-based approach, which would require the willingness to sanction people for using water. Generally, effective sanctions need to be coupled with incentives for compliance and public awareness campaigns to inform users on why compliance is in their best interest.

The Role of the Private Sector in Water Rights

An economic approach is essential to assess public private partnerships and the role of the private sector in water rights. Lawyers often mistakenly perceive

law as the most central factor in determining development when, in reality, various factors determine the effectiveness of a law for development. Generally, the most determinant element for the performance of a law is the economic context, followed by the social context. Often, the causes for the misuse of water are not the laws, but the underlying economic incentives and aspects of water that relate to the market.

The role of the public-private sector is contingent on general economic policy, as well as on the suitability of these economic policies. To illustrate the impact of economic policies on water service provision, one can compare and contrast Chile and Argentina in the 80s and 90s. During the eighties Chile put in place a very conservative economic system (embodied by guarded public expenditure, an open economy subject to international competition, etc.), including a floating exchange rate to foster production. In contrast, Argentina decided to fix the Argentinean peso to the U.S. dollar, creating an artificial exchange rate. This was unsustainable due to low levels of industry and led to a great deal of public indebtedness, high interest rates, and decreased investment, diminished tax base, and in turn, increased unemployment and diminished resources to effectively manage Argentina's water sector.

Recently, Argentina has had to cope with the loss of irrigation to approximately 30% of its land, and consequent reductions in production and export at levels, while Chile has remained successful, primarily as a result of sound economic policies. By and large, one can assume that a country's economic context will determine whether the water system will work; therefore, a country with an unsatisfactory economic context will most likely have an inadequate water system.

Conclusions:

Broad factors of a well functioning water system:

Water resources and water utilities are two distinct things; one focuses on water supply and the other on water users. If clumped together, there is a tendency to focus on one or the other, rather than both. Second, the success of formal institutions and legislation depends on macroeconomic policies and economic incentives. For instance, water charges can be appropriate incentives for proper economic behavior for water management, but a water charge in Costa Rica is not the same as a water charge in a poor country that faces water scarcity and whose economy is largely agricultural. Lastly, government subsidies to municipalities can help ensure greater public access to water, as in Chile, but this was predicated on a solid economic context, sound tax revenue system, and centralized control over municipalities that curbed

corruption. Argentina did not provide subsidies for the poor, which contributed to the failure of the privatization of water services. Colombia provides a payment for water use system that is pro-rated according to income; hence, those falling in higher income brackets pay higher rates than those in lower brackets.

Sustainable water development depends on governance. IDLO has gathered the following key lessons for effective governance:

- Social capacity to coherently mobilize resources
- Separate water management into use and supply with the aim of sustainable water development and use
- Social consensus as a prerequisite for success
- Capacity for effective implementation
- Appropriate policies, programs, projects and legislation

Challenges to governance in developing countries include:

- The fight against corruption both at the governmental level and at the donor level for NGOs operating within the country can weaken governance
- In theory, private utilities are more efficient than public utilities, yet this efficiency may translate into profit for stockholders and high costs to society.
- The aim of successful regulation is to transfer efficiency gains to society, but this requires extensive institutional development. The need for greater institutional development is a chief issue in water resource management.

Endnotes

1 For further information on Anglophone and Francophone thematic course held annually at IDLO Rome headquarters, please visit <http://www.idlo.int>.

2 See Article 25 of the Universal Declaration of Human Rights; see also Articles 11, 12 of the ICESCR, from which taken together the right to water can be implicitly inferred.

It has been argued that water was not stated explicitly listed because at the time of the conventions, access to clean water was not an issue.

2 Presented by experts from the Economic Commission for Latin America and the Caribbean.

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