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WHAT ROLE FOR WATER LAW IN THE EMERGING “GOOD GOVERNANCE” DEBATE?

By Andrew Allan and Dr Patricia Wouters

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Introduction:

“Water law = Water for all”

The relative importance of *governance*, in the context of water resources management and development policy, has attracted increasing attention during the past decade. In 1992, the Rio Declaration made no explicit mention of governance as a necessary precondition to the achievement of sustainable development. This is in marked contrast to the Plan of Implementation produced at the World Summit on Sustainable Development in Johannesburg last year, where “good governance” was deemed “*essential for sustainable development*”.¹ The increased significance attached to governance derives in part from the universal realisation that “[t]he solution to current and future [water] crises will not ...be found in new and extraordinary technological advances or supply oriented approaches”, but in better water resources management.² In the view of the Global Water Partnership (GWP), effective water governance is absolutely central to resolving the world water crisis³ as it secures universal access to water, ecosystem protection and economic development.

The reasons for the intense focus on governance may be found in the many recent international efforts aimed at addressing the global water crisis. Aside from its crucial role in achieving sustainable development, it has been cited as a necessary element both in ensuring better enforcement of international environmental treaties,⁴ and more recently, in ensuring financing for water projects.⁵ As we shall see, the adequacy of the legal environment is fundamental to such improved management.

What is governance?

As is so often the case, however, while the need for effective governance is universally accepted, opinions differ as to what is meant by it and the working

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¹ Report of the World Summit on Sustainable Development U.N Doc. A/Conf.199/20, 2002, Plan of Implementation, 8. Available at <http://www.johannesburgsummit.org/>.

² UNDP Water Governance at <http://www.undp.org/water/>, Water Resources Management.

³ Global Water Partnership, “Dialogue on Effective Water Governance: Learning from the Dialogues”, 2003, ch.1, available at <http://www.gwpforum.org>.

⁴ OECD, “Environmental Strategy for the First Decade of the 21st Century”, 2001, 19-20 (<http://www.oecd.org/pdf/M00001000/M00001182.pdf>).

⁵ Report of the World Panel on Financing Water Infrastructure – Financing Water for All, 9.

definition of the concept has expanded somewhat since its first promulgation. Good water governance was identified, at the 2nd World Water Forum at The Hague in 2000, as one of the main challenges facing governments in attaining water security.⁶ The Ministers viewed good governance as being water resource management involving public interest and stakeholder participation. However, since then the definition has been expanded, reflecting a shift in international development policy, which recognises that international objectives can only be met by action at the national level. Governance is now seen more broadly as the key that locks national policy-making and policy implementation together.

The Bonn Conference on International Freshwater identified three areas where priority action was required, one of these being governance.⁷ The approach taken to governance at Bonn was a macro one, however, and demanded action to ensure that water resources management was both equitable and sustainable, putting the onus on national governments. The elements that were initially associated with governance, those of public participation, transparency and information availability, remained intact, but these were joined by institutional reform, integrated water resources management (“IWRM”), equitable access to water and effective legal and regulatory frameworks. This was consolidated at Johannesburg, where governance was understood to encompass “*sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment*”. At Bonn, the mobilisation of financial resources was tackled separately from governance, but the implicit acknowledgement that the financing of water projects depends upon “good governance” was made explicit at Johannesburg. Most recently, at the third World Water Forum, convened in March this year at Kyoto (which expressly recognised the important role of water law), the much awaited Camdessus Panel Report asserted that “*serious defects in the “governance” of the global water sector hamper its ability to generate and attract finance*”.⁸ The definition adopted by the UN Development Programme is now all-embracing:

“Water governance refers to the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society.”⁹

Improved water governance must therefore represent an environment that facilitates the most effective implementation of both international and national water policy by national governments. It is here, then, that the four areas of governance identified by the Asian Development Bank (ADB) are of prime importance. These elements include: accountability; participation;

⁶ Ministerial Declaration of The Hague on Water Security in the 21st Century, March 2000, available at <http://www.worldwaterforum.net/>.

⁷ Bonn Recommendations for Action, and the Bonn Keys, available at <http://www.water-2001.de/>.

⁸ Report of the World Panel on Financing Water Infrastructure: Financing Water For All, 2003, 9.

⁹ UNDP Water Governance, at <http://www.undp.org/water/index.html>, Introduction.

predictability; and transparency.¹⁰ Without adequate mechanisms to guarantee compliance and enforcement, however, the ADB areas of action by themselves are of little use.

The Role of Water Law:

Throughout the many discussions of the nature of governance, one of the underlying themes is that of the necessity for an adequate legal framework to be in place. The Action Plan produced at the G8 Summit in Evian in June 2003 acknowledged that the development of “*appropriate legal, regulatory, institutional and technical frameworks*” is essential for the promotion of water governance.¹¹ The particular role of law in improving governance is, however, fluid, and changes according to the context. The GWP has intimated that it believes that governance is “*mainly an issue to be addressed at the country and local level*”, although international action will serve to increase awareness of the issues.¹² At Bonn, the “*primary responsibility for ensuring equitable and sustainable water resources management*” was laid firmly at the door of national governments.¹³

While the implementation and achievement of international goals and targets is the preserve of national governments, it must be remembered that governance covers a wide range of issues, which may transcend individual nations and extend beyond national borders. For example, the implementation of IWRM requires a basin-wide approach to transboundary waters – and more than 250 of the world’s major rivers are shared by two or more countries. The optimal sustainable management of transboundary waters is dependent upon users of those waters having access to an equitable and reasonable share, and the allocation of such shares can only be made under the auspices of international law in the form of treaties between states, supported by relevant institutional mechanisms. Additionally, the importance of water supply and sanitation services provision by private actors, highlighted in both the Johannesburg Implementation Plan and the Camdessus Report, demand that attention be paid to transnational legal issues peculiar to business transactions involving foreign investors. Consequently, the role of the law in water governance must be assessed in three different contexts:

- International (sovereign State-State level);
- National (domestic legislation); and
- Transnational (public-private relations at the multinational level).

The same issues may be relevant to more than one of the above, but will take on different characteristics under each.

International Water Law:

¹⁰ Asian Development Bank “*Policy Paper: Governance: Sound Development Management*”, 1995. Available at <http://www.adb.org/Documents/Policies/Governance/default.asp>.

¹¹ “Water – A G8 Action Plan”, available at <http://www.g8.fr/evian/english/>.

¹² See GWP Dialogues, *supra*, note 5, ch.1.

¹³ See Bonn Recommendations, *supra*, note 7.

If effective governance of transboundary water resources is to be achieved, management must facilitate optimal and sustainable use of the resource. This will only be practical where the respective rights of use (whether consumptive or non-consumptive), along with the relevant obligations of each riparian state are agreed between all of the states sharing the resource. The best place to set out such rights and responsibilities is a basin-wide agreement, involving all the riparian states. International law allows each riparian state an equitable and reasonable share of the uses of transboundary waters, with an obligation not to cause significant harm to fellow riparians, and this should be encapsulated in the agreement. Ecosystem protection should be integral, along with preservation of in-stream environmental uses.

Such an agreement is imperative if a state is to be able to allocate resources within its own borders, as the limits of use for each state will be agreed. Agreements should set out a framework including institutional mechanisms and detailed procedures, which provide for “the rules of the game” in the event that a transboundary watercourse state wishes to change or increase its use, or, in the extreme case, breaches its obligations. This should also include comprehensive provisions for dispute resolution, preferably by a joint body independent of the states involved.

Finally, to secure *effective* governance, mechanisms must be put in place to verify (encourage and facilitate) compliance by participating states in accordance with the requirements of the agreement. This might take the form of an annual national report to an observer body, which should be transparent and available for inspection.

National Water Law:

In the United Kingdom, the Department for International Development (DFID) has stated that in order to improve water resource management, governments must “*establish national water policies and laws*”.¹⁴ Para.26 of the Johannesburg Plan of Implementation sets out a comprehensive list of actions to be taken in the legal sphere for the attainment of IWRM, which will lay the foundations for improved governance.¹⁵

As with the international context above, the first step for national governments is to establish an evolutive legal framework, which allocates enforceable rights of use amongst competing users, while protecting related ecosystems. The legal framework should also set out procedural rules for the administration of water entitlements, including permit allocation, registration of rights, and the rights and responsibilities of users. Dispute resolution processes, for disagreements between users and regarding contentious use applications, should be detailed, and rights of access to justice embedded in the law. In instances where a state shares a transboundary water, the terms and conditions of relevant watercourse agreements should be fully incorporated and protected under the national allocation and water rights regime,

¹⁴ Department for International Development, *Addressing the Water Crisis*, March 2001, 34.

¹⁵ See Johannesburg Plan of Implementation, *supra*, note 1, 21.

underlining the fact that international obligations can only be implemented by action at the national level.

By adopting an administrative regime based on river basins rather than political boundaries, states have the opportunity to enhance stakeholder participation and fully implement IWRM. Management groups consisting of elected local representatives allow management of water resources at the lowest appropriate level.¹⁶

Legal frameworks will also provide the foundation for an effective institutional framework, delineating powers and duties from the outset to allow clear accountability and easier enforcement. Legislation at this stage should also require that the agencies responsible for administering the water management system work in an integrated way to permit pooling of resources and the avoidance of overlapping or uncertain responsibilities. Enforceable standards with respect to institutional and water quality standards can be entrenched in the regulatory framework, along with monitoring requirements. Environmental information availability standards, conforming at the least with those laid down in the Aarhus Convention,¹⁷ must be established, with transparent compliance procedures for all agencies and users.

All of the above may be unrealistic in developing countries, but the establishment and allocation of rights and duties must be seen as the first step in improving governance at the national level, as has been the case with aspirational worldwide human rights.

Transnational Water Law:

The Transnational legal context is inexorably linked to the National, although the requirements are more specific. With the role of multinational private water companies likely to increase in order for the Millennium Development Goals to be met, unique and rather specialised issues arise. One of the particular problems associated by the Camdessus Panel with poor governance was “*an inadequate general legal framework*”.¹⁸ While the national legislative frameworks summarised above must be in place, the investment environment for private capital must also be adequate. The powers and responsibilities of corporate and public entities must be clear, and the contractual rights certain and enforceable. The banking regime needs to be transparent and anti-corruption measures, with respect to both public and private employees, should be in place and be rigorously enforceable by independent regulators to further ensure transparency and accountability – “[r]egulation is a necessary part of placing water agencies at arms’ length from governments and making their behaviour accountable to the public”.¹⁹ Service providers must be responsible to their subscribers, and pricing mechanisms must be transparent from the outset. The clearly identified need for the increased and effective

¹⁶ See Bonn Recommendations for Action, *supra*, note 7, no.11.

¹⁷ Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters, signed at Aarhus 25 June 1998, UN-ECE-CEP-43 (1998) (entered into force 30 October 2001).

¹⁸ See Financing Water For All, *supra*, note 8, 9.

¹⁹ *Id.*, 10.

involvement of the private sector, in new partnerships with the public sector (who should remain the “owners” and trustees of the water resource), requires innovative legal frameworks that facilitate the successful operation of these special arrangements. These are the backbone of “good governance” in the water sector worldwide.

Conclusion:

“Water law = water for all”

If it is accepted that *“there is enough water for everybody in the world, but only if we change the way we manage it”*,²⁰ the role of law is pivotal. Without suitably robust and responsive legal frameworks in place, effective governance will remain only an ideal and not a reality. Legal reform allows the rights, powers and duties of organisations and individuals to be clearly set out, along with standards, procedural mechanisms and penalties to ensure implementation on the ground. Accountability, participation and transparency are only effective if enshrined in properly drafted laws, multinational contracts or international treaties, and, if allied with appropriate powers of monitoring, compliance, access to justice and responsive and effective enforcement. Approaching water governance from the perspective of international, national and transnational water law lends clarity to the process and ensures that targeted legal reform best achieves the goal of effective policy implementation. An understanding of the legal issues underpinning governance is essential if effective water resource management is to be accomplished and the Millennium Development Goals realized. Water law must be part of the solution – a failure to recognise this will certainly undermine the best of all intentions. Invite a water lawyer to be part of your team.

Dundee will host an international conference on “Good Water Governance for People & Nature: What Roles for Law, Institutions & Finance?” 29 August – 1 Sept 2004 – for more information contact:

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²⁰ See Bonn Recommendations, *supra*, note 7, 2.