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LEGAL APPROACH



**How to meet the regulatory
framework?**

AVOCATS



PECC INTERNATIONAL PROJECT 2007-2009

**Issues related to water management , in Island
territories, coastal regions and isolated communities**



Access to water :

- Is one of the essential services : *water is not a consumer good to sale but an heritage to protect (european directive 2000/60/CE October 23 of 2000 setting a framework for a european water policy)*
- Is perceived as a natural monopoly
- Must be guaranteed for everybody
- Calls for a geographic logic of management

MAIN PROBLEMS



- Lack of infrastructures or essentials services are isolating some territories from globalisation
- Public interventionism in structures of prices is sometimes producing perverted effects
- A need of public sharing out policy



« *One of the critical factors determining how the international system adjusts to increasing scarcity has to do with the types of international institutions it develops and manages* »

(Francis Fukuyama, Professor of International Political Economy of Johns Hopkins University).



« *Demain, nos successeurs ne s'étonneront pas quand on leur parlera de droits de propriété sur l'eau, de droits à polluer, ni de devoir payer pour accéder à l'usage de biens environnementaux élémentaires... C'est l'une de principales leçons de l'histoire de la civilisation.* »

(Henri Lepage, Institut Euro 92 – Les fondements économiques d'une approche libérale de l'écologie)

WHAT LEGAL TOOLS FOR WATER MANAGEMENT?



- 1. An institutional framework,**
- 2. A legal *corpus* of texts,**
- 3. An economic and contractual pattern,**
- 4. Rules and procedures to solve conflicts.**



1. AN INSTITUTIONAL FRAMEWORK

WHAT ABOUT IMITATION?



A very strong sociological and cultural component :

- Who takes care of the water ? Man or woman?
- What traditional value is recognised to water? Pure water or recycled or desalted water?
- To whom belongs water? Universal property or property to the one who catches it?
- Legitimacy equal proximity?

AN INSTITUTIONAL FRAMEWORK*



- **Governance question** is a key in water problems
- Over 200 hydrographical basins in the world ignore political frontiers
- Water difficulties are always linked to local, regional and sometimes international components,
- Very few entities of regulation and very often no national water policy (ONU 1997), (but some progress since, as «Nil basin organisation» that concerns ten countries),
- ONU thinks about creating a Water Agency or Committee.

* dph, Gouvernance de l'eau : l'urgence de changer de regard et de pratique, 2007/2008

<http://www.d-p-h.info/spip.php?article> 111



To find the good institutional level of decision : state level or local public entity or groups of local public entities?

Water Agency or others kind of committee :
intermediate organisms

- To measure quantity of water consumption and quality of water,
- To share water, along its natural life-cycle,
- To regulate on basis of solidarity included financial one,
- With no extra cost for the user !
- Trust determining by public strength or by independence both from public power and private economic operators.



- **The good level of policy is the regional one or the basin one**
- **A real need of autonomy of decision:** “intercommunalité” provides a good scale for managing a water network
- **The example of the European institutional model**
 - corpus of rules through Directives upon water,
 - no trans frontiers conflicts,
 - efficient water and purification water public services,
 - successful action against pollution,
 - no more water diseases,
- **Two actual problems**
 - adverse effects of intensive agriculture,
 - level of water infrastructures in new European members



- The specific problematic :
 - Water resources exist but badly shared or with no infrastructures, nor access to water, lot of diseases due to insalubrious water,
 - a Trans-frontiers resource: 80 rivers and 38 water tables through several countries
 - lack of financial resources,
 - governance problem resulting from a lack of institutions in charge of water management,
 - realisation of infrastructures works is impossible without creation of an adapted institutional framework by countries and local entities.

* Le Cercle des économistes Aix-en-Provence. Juillet 2006. ressources rares et rôle des Etats. L'expérience de la Banque africaine de développement et le rôle des Etats africains dans la problématique de l'eau. Thierry de Longuemar. Banque africaine de développement.

Africa case (2/2)



- **A selective approach** concentrated on supplying water in rural areas, rather than wasting efforts on too numerous problems (14,2 milliards \$ during 10 years, 30% BAD, World Bank and others contributors as France and African states),
- **The creation of a Fund in 2002** (la Facilité africaine de l'eau) managed by BAD to enable states to:
 - Reinforce their financial and human capacities,
 - Reform the general legal and institutional framework,
 - Valorise and diffuse information,
 - Define and settle the regulations frameworks
 - Develop exploitation and maintenance means.
- To give full efficiency to this financial help, **a coordination** by the BAD, between all the countries and the local economic entities was preferred, rather than an individual approach, even in the infrastructures field,
- **Progressive transfer of water management** toward the regional or local public entities, trough « water management unities », is organised to assure proper maintenance of the networks and an adequate control of prices and quality,
- **A control from the African Ministerial Conference**



2. A LEGAL *CORPUS* OF TEXTS



At the global level

- A necessity : an efficient, coherent and sustainable **water policy**
- Common **principles**
- A **global program of actions** well adapted to local contexts
- A « **directive** » for preservation, protection, improvement of environment and rational use of natural resources
- Elaboration of environmental **quality standards**.

At the local level

- Rules and procedures for solving trans-frontiers problems within the boundaries of a common hydrographical basin
- Obligations of surveillance by each entity of the concerned community, with implementation of measures.



- Technical and scientific data
- Environment conditions in the areas concerned
- Cultural, economic and social development
- Diversity of specifics conditions and needs
- Benefits and costs to act ... or not.



« *La réglementation environnementale est le plus souvent la généralisation à l'ensemble d'un secteur de la BAT (Best Available Techniques) déjà utilisée par les grandes entreprises [...] Elle agit comme un cliquet, en permettant d'éviter les retours en arrière toujours possibles. »*

« **Sustainable rules result frequently from the generalisation to a whole economic field of the BAT (Best Available Techniques), already used by the big firms [...] They produce a catching effect and avoid a return back »**

(Michèle Papalardo –ADEME – 2006 july – economics meetings of Le cercle des économistes)



3. An economic and contractual pattern

TO ORGANISE FIGHT AGAINST SCARCITY



States and communities have to conciliate the satisfaction of collective needs with the respect of financial constraints :

- either by privatising water production,
- or by delegating water management to a private operator while keeping supervision and control over goals and ends.



Systematically use of private management

- To benefit from private funds, technical know how and innovation ability to answer important national needs and investments,
- To create competition in favour of best economic efficiency

Or exclusive public management of a public service

- Because of a lack of trust in foreign investors,
- Because of ideological obstacles opposing to foreign private investors

A GOOD CONTRACTUAL COMPROMISE



For the state, at the central or local level, to look for :

- a « **public – private** » **equilibrium**,
- a « **public –private** » **partnership**.

Through :

- Concession of work and services (Casablanca)
- Build, Operate & Transfer (Sydney)
- Exploitation, maintenance et services (Dunkerque)...

Today PPP is the solution that presents the biggest potential for contractual invention and adaptation to diverse social and cultural contexts



- A competition for the market between private economic actors as a guarantee for the best performances and the lowest prices for consumers
- With a condition: a stabilized political public environment to create trust for private investors
- Until now a limit with, too often, a renegotiation of the contract during the first years reducing the benefits for public entities and users.

TOPIC POINTS OF « *future water PPP* »



- Clear share of responsibilities and benefits for a **win-win-win ! relationship**
- Contractual means to regulate (by the contract or a third person) and fulfill the political engagement for an **equal access to water** for all people
- **Regulation of prices** by public authorities
- Incentive measures :
 - either a mix of public financing and private management only remunerated by **fees based on volume** (percentage of new users) , **to protect poor populations from discrimination,**
 - or a mix of private financing and public subsidies (output based aids) **for realising new infrastructures to bring water to isolated places,**
- **Good balance between financial and social aims,** by taking into account populations' capacity of payment



4. Rules and procedure to resolve conflicts

« WATER WAR »



- Several states in West of United states are fighting in front of the Supreme Court causes because of conflicts due to scarcity of water (International Herald Tribune 2007 April 5) upon property of water.

WATER WAR - NEW WAYS OF CONFLICTS RESOLUTION



Three fundamental questions :

1. How to share water resources?
2. How to regulate water's waste?
3. How to resolve conflicts between different types of uses and users :
domestic, industrial and agricultural ?

Three means to answer needs and resolve disputes:

- Define a (local or regional) **area of solidarity**
- At this level of solidarity, recognise or create **a supra-local entity to regulate the conflicts** about water property and water waste,
- Search for solutions through **regional dialogue** between public entities, users, associations and ONG.



Which kind of conflicts?

- Between operators and users
- Between public entity and private operator
- Between geographical, economic or social category of users

As no specific modes of resolution of water conflicts prevail, the best way to solve conflicts is to prevent them :

- By the contract,
- By the rules: incitation and dissuasion,
- By competences and quality of technologies,
- By a strong regulation,
- By a permanent education and consultations,
- By alternative modes of resolution of disputes (?)

AN ALTERNATIVE EXAMPLE OF DISPUTE RESOLUTION



Domain name dispute resolution service

- **WIPO* Arbitration and Mediation Centre**
- Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre was established in 1994 to offer [Alternative Dispute Resolution \(ADR\) options](#), in particular [arbitration](#) and [mediation](#), for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Centre are widely recognized as [particularly appropriate](#) for technology, entertainment and other disputes involving intellectual property.

*World Intellectual Property Organization



As an intermediate conclusion


PERSPECTIVES AND PROPOSALS TO EXAMINE



1. To establish institutional **perimeters of solidarity** : geographical or social, or functional, or economic,
2. To define the **adequate levels of governance**, and eventually create local water agencies or committees,
3. To **inform, educate and consult** populations within adapted consultative structures
4. To promote **public private partnership PPP**, as a tool of equilibrium and flexibility,
 - Reinforcing the strength of the contract when regulation is weak,
 - Favouring firms' innovations and their diffusion,
 - Settling new rules with incitation and financial penalties,
5. To create a **new entity and alternative procedure of conflicts resolution**, between users
6. To examine the usefulness to conceive and sign a **framework agreement for water management in Island territories, coastal regions and isolated communities, at a pertinent level**
(for ex : Convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation)



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