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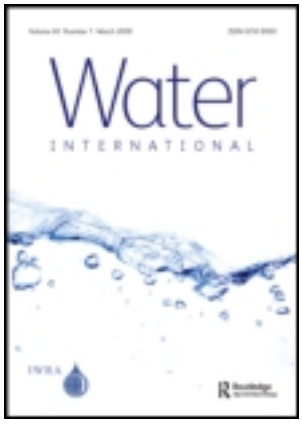

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A book conversation with the editors and a reviewer. Law and water governance: past, present, and future

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The evolution of the law and politics of water, edited by Joseph W. Dellapenna and Joyeeta Gupta, Springer Science + Business Media B.V., 2009

Book editors' opening statement: What role can law play in contemporary water governance?

Water cooperation has tended to foster the peaceful resolution of disputes; there are more events of cooperation over water than of conflict over water in the world. Yet, after 5000 years of water governance history, there is still no mature system of water governance. Among the many challenges faced today, global water problems such as access, sanitation, pollution, ecosystem destruction and changing flow regimes as a result of the cumulative effects of dams continue to bedevil the global community. Until recently, people for the most part focused on resource discovery, exploitation, technological mastery and wealth generation. In the 21st century, we face the challenge of achieving sustainable resource governance. All manner of resources are dwindling or disappearing. We now must learn to manage separate resources sustainably while taking into account the ways they interrelate, concerns that are no less true for water than for other resources. Achieving sustainable governance for water resources requires, among other things, an end of the exclusive monopoly of the state and those it privileges to control water resources. And today, participation by multiple stakeholders is becoming a reality. Whether these stakeholders are able to make legitimate, accountable and transparent policy in conformity with the rule of law remains to be seen.

We begin with a few definitions. Governance is "the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken" (Commission on Global Governance 1995, p. 2). Government and governance both refer to goal-oriented activities and to systems of rule. Government involves activities backed by formal authority, while governance refers to activities pursuing shared goals that may or may not involve formally prescribed responsibilities and do not necessarily involve coercive public enforcement. Law and policy are a subset of governance, referring to the traditional actors engaged in formal policy-making. National water law is a subset of national law, referring to numerous different domestic laws that impact on water governance – primarily irrigation law, energy law, health law and water resource law. International water law is a subset of international law focusing on the governance internationally of freshwater. Water policy means systems of water management that are expressed in legal doctrines or governance institutions.

Water has long been seen as primarily a local issue. Today it is increasingly a subject of global governance for four reasons: the global nature of the hydrological system and its connections with other global resource systems; the interrelationship between global environmental change and socio-economic processes; the accumulation of local phenomena to

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form serious global trends requiring a global approach; and global repercussions of direct and indirect impacts of changes in water management. Global water governance is diffuse and the related international law, while binding, suffers from the shortcomings of international law generally. Furthermore, global water goals are defined but scarcely adequate or achievable, and United Nations water policy is a work in progress. Global water meetings and discussions provide only an elusive arena of global governance and global water "ideology" is marketed through a variety of instruments worldwide. As a result, water law and policy remain a patchwork of local customs and rules, national legislation, regional agreements and global treaties creating a global legal governance framework.

How has water law and policy evolved through the centuries? What were the motivating factors that led to changes in legal and social practices? Why, after 5000 years of water resource governance do we appear little closer to understanding and addressing water governance than at the beginning? What are the current challenges facing governance today? And what is the role of water law in the evolving structure of water governance in the 21st century? Some 24 authors, contributing 23 chapters, in *The Evolution of the Law and Politics of Water* address these questions. The book focuses primarily on water law while recognizing that the legal framework is only a subset of the governance framework for water. It begins with a reflection on past historical approaches (Part 1, four chapters), then moves onto case studies of evolving national law and politics (Part 2, nine chapters), before assessing some aspects of evolving regional and supranational law and politics (Part 3, five chapters), discussing some current trends in water governance (Part 4, four chapters), and closing by addressing some of the research questions it raises (Part 5, one chapter).

Water laws can be found in the earliest human civilizations, the Chinese, the Indus, the Egyptian and the Mesopotamian, developing first in the drier regions of the world. These and later water law systems reflect the *cultural origins* of law. Water law has developed in a highly contextual manner reflecting the historical, geographical and political contexts of the countries concerned. As a result, today there are 193 different national water law systems, each with country-specific characteristics. At the same time there are a number of unifying forces that have spread common principles of water law to different parts of the world. These include: the *spread of civilizations*; the *spread of religions*; the impact of *conquest and colonization*; the *legal codification* movement; the rise of *epistemic communities*; the influence of *environmentalism*; and the second wave of *globalization*. These various influences overlapped and often continue to co-exist within a single society, resulting in plural systems of water law competing for application within a single national system, despite recent efforts to integrate different approaches into one comprehensive body of water law. International water law, essentially a product of the last 200 years, remains seriously deficient. The 1992 United Nations Economic Commission for Europe (UNECE) Watercourses Convention, the 1997 UN Watercourses Convention, the 2000 Water Framework Directive and the 2004 *Berlin Rules* together probably provide a comprehensive idea of how water law is developing (International Law Association (ILA) 2004). These developments are discussed in detail in the case studies of national, regional and international legal regimes, as well as in the overarching chapters.

The book explores a number of different shifts in governance discourses that impact on water governance. First, a *geographical fragmentation* of authority involves the shift of authority upward from states to supranational (e.g., European Union) and international authorities (e.g., World Trade Organization) and downwards to catchments and communities. Hence, water is increasingly subject to *multilevel governance* where authorities from the local level, through provincial, national, regional, supranational and global levels are involved in water governance. Second, *functional fragmentation* arises from the shift

in authority to specific bodies that are relevant in terms of its functions (e.g., development banks). One result is a shift to market actors and individualism away from supposed guardians of public interests. Third, *resource fragmentation* is occurring through the movement of resource control from the sovereign to dispersed social actors. Fourth, *interest fragmentation* is shifting the focus from a public interest that seeks to reconcile different interests to a vision of pluralist interests that cannot be aggregated in a common vision. On the one hand, the notions of civil society, direct democracy and public participation to some extent counter this tendency. Fifth, *norm fragmentation* has shifted from centring on national sovereignty and command and control towards limited sovereignty, self-government and the marketization of social relations. Sixth, *policy fragmentation* has broken down existing sectoral policy making in favour of still emerging integrated policy-making that recognizes the larger role of water in society, a shift towards integrated water resources management and integrated environmental management, where water is one resource in a complex nexus of resources needed for human use and ecosystem maintenance. And seventh, *decision-making and implementation fragmentation* moves from hierarchical and centralized decision-making to diffuse decision-making. While policy implementation was authoritative and could be enforced by coercive means, today the focus is mostly on self-regulation (e.g., codes of conduct), voluntary participation (e.g., eco-labelling), and decentralization. Shifts downward increase the compliance pull of decisions; shifts upwards increase the political effectiveness of transboundary decisions; shifts to non-state actors counteract the declining authority of states.

One result of these trends is a merger of public and private national and international spheres. This leads to merger and competition between public international law and private/commercial international law. Increasingly this means competition between international and global water law (diffuse and unclear as it often is) and trade (highly centralized and relatively clear) and investment law (highly pluralistic but nevertheless legally binding). The increasing private sector participation in the water sector and the concurrent internationalization of the sector has led to water litigation or arbitration following water contract failure in processes that tend to protect investors. In addition, non-United Nations meetings that have contributed to the emergence of a global water policy, beginning with the Dublin Conference of 1992 with its four water principles (the finite and necessary nature of water, the need for a participatory approach at all levels of management, the central role of women in water management, and the need to recognize water as an economic good). This was followed by the establishment of numerous multi-stakeholder forums such as the World Water Forum, the World Water Council and the Global Water Partnership. These meetings discuss water issues and come up with a number of proposals, but these are not embedded in international agreements and therefore provide only a background community for global water governance rather than a formal legal structure. Neo-liberal ideas have also had a strong influence on the water sector in competition with the human rights concept of water management. The notion of water as an economic good, where the private sector should have a key role, is increasingly marketed by various meetings, the economic literature, aid agencies and development banks. The contemporary dominance of highly varied water actors in global governance with an emphasis on national sovereignty and neo-liberal ideas creates a situation where many people involved in water management simply are not aware of the long history of water law in water governance – a potentially fatal flaw in developing these approaches.

Governance systems themselves are in a state of flux. While there is a shift in the locations of governance, there is no corresponding shift in the rules of engagement to guarantee legality, legitimacy, accountability, transparency and the rule of law. Will these multiple

talking shops on governance lead to greater enlightenment or confusion in the process of water governance? Against this background, water law is slowly moving forward with regional agreements, administrative law frameworks and joint water bodies at all levels of governance from community through to global levels. These legal systems, however slow they may be, have the authority of history behind them and may ultimately provide the vehicle for problem-solving and conflict resolution in the 21st century. In the mean time, global governance will have to grapple with a number of issues – whether private participation of water will promote solutions to access issues; whether public participation can account for the common good; and whether non-state actors can more successfully govern political goods like water than state actors. Water law will remain the mediating mechanism for resolving such questions. This book presents a first attempt at a comprehensive consideration of these issues. As with any such first attempt, it has its omissions, and no doubt errors, but it is a beginning.

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Reviewer's response: the beginning of an important dialogue

This ambitious book seeks to answer a series of critical questions. Why is it that after 5000 years of governing water resources there is still no mature system of global water governance? How has water law and policy evolved through the centuries? What are the current challenges facing water governance today? What is the role of water law in the evolving structure of water governance in the 21st century?

In Part I (Introduction), the editors set the context with a broad overview of the current global water governance regime. This regime, if it can be called that given its incoherence, has evolved under the influence of a number of discrete but sometimes conflicting "shifts" in governance discourses, which are well covered by the editors in their statement above and will not be repeated here.

Lawyers, policy-makers, students and practitioners alike will undoubtedly find an extremely valuable resource in the abundance of information and rich analyses in the

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