

# Regulating Public and Private Partnerships for the Poor



## LEGAL TOOLS

This note aims to address regulatory issues relating to all components of the legal framework. Within this framework the specific issues of universal service provision, customer involvement, and alternative (small scale) service providers will be addressed.

The key legal issue is to ensure that the economic regulator is given a primary duty and obligation to ensure financeability of service provision and that service levels, within the understanding of what has to be financeable, include meeting a Universal Service Obligation within a reasonable time frame—a universal service ‘beyond standposts’ for the poorest in the slums, probably some form of differentiated service which remains affordable through cost reflective tariffs.

*The regulator ‘shall have regard to the  
interests of individuals...with low-incomes...  
or who are disabled or chronically sick..*

*Water Act 2003 , England and Wales*

## REGULATORY TOOLS: LEGAL & POLICY FRAMEWORK

How can the legal framework  
for economic regulation  
enable and promote the  
Universal Service Obligation?

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## Research Summary

Incentive based, economic regulation of monopoly water and sanitation providers is a powerful tool for improving services. Regulators determine the maximum water price ('price cap') to finance a desired level of outputs. Prices in high-income countries have tended to increase faster than inflation as society demands higher standards. The total revenue requirement (from which the price cap is derived) is determined by adding anticipated operating expenditure to planned capital expenditure (for capital maintenance as well as for improvements in quality, security of supply, service standards and service extensions), plus an acceptable cost of capital. Both opex and capex plans include efficiency targets derived from comparisons between a number of providers. Water companies are allowed to retain any further efficiency savings achieved within the price cap for a period (five years for example), an incentive to achieve even higher efficiency, before the benefits are shared with customers in reduced prices for the future.

This model has been adapted around the world with varying degrees of success, usually in the context of a Public Private Partnership, but until recently it has tended to be reactive rather than proactive regarding early service to the poor. There is now a recognised need for adequate economic regulation of public providers, as well as private companies, in lower-income countries, to deliver similar mechanisms for financeability and efficiency and as a prerequisite for developing effective pro-poor urban services.

The purpose of this DFID research project is to give water regulators the necessary technical, social, financial, economic and legal tools to require the direct providers to work under a *Universal Service Obligation*, to ensure service to the poorest, even in informal, unplanned and illegal areas, acknowledging the techniques of service and pricing differentiation to meet demand.

Looking to achieve early universal service, the research also considers how the role of small scale, *alternative providers* can be recognised in the regulatory process. *Customer involvement*, at an appropriate level, is seen as the third key aspect. The research investigates mechanisms for poor customers, and most importantly potential poor customers, to achieve a valid input to regulatory decision-making to achieve better watsan services within the context of social empowerment and sustainable

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*Photo credits: Franceys, Gerlach, Walton, NWASCO*

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### Research Summaries

- |                            |                                 |
|----------------------------|---------------------------------|
| 1. Regulating for the Poor | 11. Zambia                      |
| 2. Economic Regulation     | 12. Indonesia                   |
| 3. Literature Review       | 13. India                       |
| 4. England & Wales         | 14. Uganda                      |
| 5. Chile                   | 15. eConference                 |
| 6. Argentina               | 16. Alternative Providers       |
| 7. Ghana                   | 17. Customer Involvement        |
| 8. Philippines             | 18. Technical & Financial Tools |
| 9. Bolivia                 | 19. Legal Tools                 |
| 10. Jordan                 | 20. Pro-Poor Guidelines         |



# The Legal Framework for Regulation

The legal framework includes not only the core component of the legislation itself, but also the institutional, administrative, political, social and economic conditions or arrangements, which make the legislation available, accessible, enforceable and therefore effective.

A national legal framework is composed of:

- the international obligations
- the legislation
- the legislature
- the judicial system
- the regulators
- the regulated
- the beneficiaries (public)
- the social support mechanisms
- the political commitment to implement the law
- the resources to apply and enforce the law

A legal framework is 'good' only if it helps to achieve a particular objective; it will fail for a whole number of different reasons, e.g. (a) where sound legislation exists on paper but the regulator is weak and ineffective and/or poorly resourced; (b) where the judicial system is not strong and independent; (c) where legislation exists but few if any of the key stakeholders are aware of its existence or understand what it means.

The legal framework must also embrace inter-related sectors - i.e. not only the regulation of water supply and sanitation providers but also pollution control, resource management, public & environmental health, land-use planning and development control, social services, education, etc. This involves a wider range of people and institutions. However for this project the primary focus has been on the Service Providers and the Service Recipients.

## SERVICE PROVIDERS

Regardless of whether providers are public sector, private sector or a public-private partnership provider the key questions to be addressed are:

- Who are they?
- Are they a legal entity? (What status do small scale service providers have?)
- What are their legal obligations?
- Is universal service delivery defined as an objective and if so, how is it defined?
- What can they do? (i.e. what, if any, powers do they have with respect to charging and disconnecting customers, for example?)
- What do they do in practice?
- Who regulates them?
- What mechanisms exist if they fail to meet their obligations?

- What relationship do they have with those they serve?

With respect to the legislation, there may be a number of different and not necessarily co-ordinated pieces of legislation which contribute to the legal framework in which Service Providers operate; i.e. legislation which:

- governs how they operate – sets out their duties, obligations and rights;
- provides them with authorisation to operate (e.g. with respect to water supply infrastructure, water abstraction, wastewater disposal);
- governs the authority(ies) which has the power to grant, attach conditions to, refuse, revoke or modify any such authorisations.

## SERVICE RECIPIENTS

Again there are a number of key questions to be addressed:

- Who are they? (all citizens? all of the registered population?)
- Are they defined, and if so, how and by whom?
- What are they entitled to?
- What if any obligations do they have (e.g. with respect to payment, use and conservation)?
- Who protects those entitlements?
- What, if any, redress mechanisms exist if rights are breached / entitlements not received?
- What is their relationship with service providers (e.g. is there any requirement or mechanism for stakeholder/consumer involvement in the process of service delivery)?

With respect to the legislation, there may be a number of different and not necessarily co-ordinated pieces of legislation which contribute to the legal framework in which service recipients exist. Legislation which defines:

- who is a legitimate service recipient
- what are their rights and obligations
- how they may gain redress if a right is breached
- the rights of those who do not have entitlement to services

## The legal framework – common issues

Various case studies have been undertaken to assess the status of water supply and sanitation provision as part of the *Regulating Public and Private Partnerships for the Poor* research. Generally speaking these studies reveal that there are many people who are not receiving an adequate or any provision. The poor typically form a high proportion of this number. In order to rectify this unacceptable situation it is necessary to understand the elements and processes involved so that appropriate

# Legal Issues

interventions can be made. In this context it is useful perhaps to regard the legal framework as the glue required to hold together these elements and processes to form an effective system. Thus we can look at any existing element or process and ask questions such as: what legislation has introduced this element? what legislation controls this process?; does the legislation and/or its implementation enable or constrain provision?

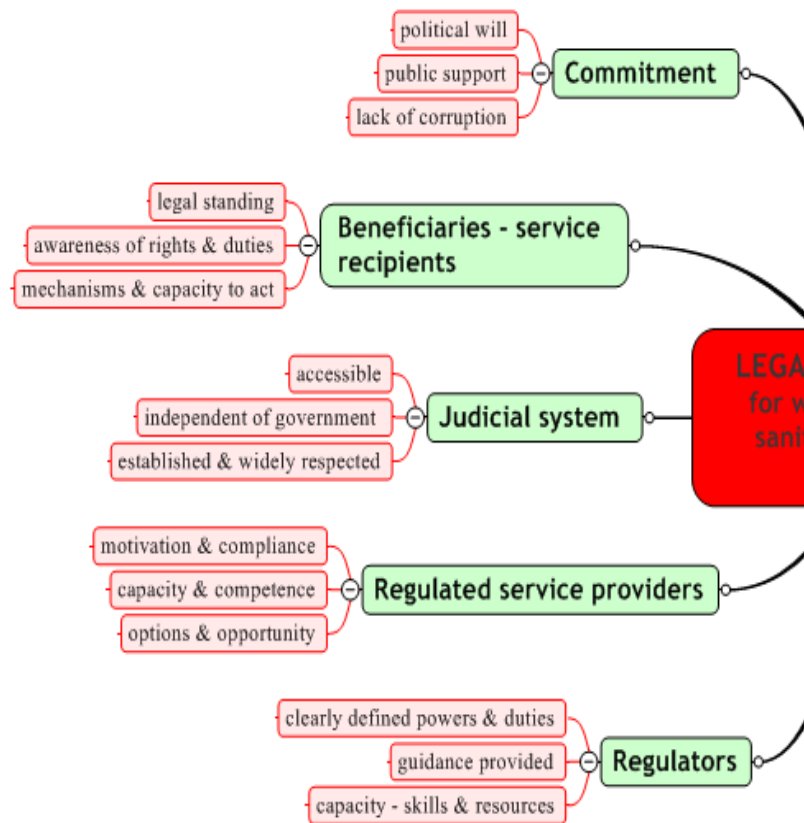
There is much debate over the pros and cons of whether public bodies, private companies, or public-private partnerships should be the providers of water supply and sanitation facilities. From a legal point of view, in many ways, it does not matter who is the provider – the basic elements of the legal framework will be very similar. Government will, or should, always have control (though this control should not be exercised by interfering in day-to-day management decisions).

The starting point therefore, and it seems to be a critical element, is the national constitution. Where water supply and sanitation are explicitly declared as the right of every citizen then this enables incorporation of the objective in the primary and secondary legislation; e.g. in South Africa. In India where the right to life is enshrined in the constitution, this has been taken in the Courts as incorporating essential needs of life, such as a water supply and sanitation. This process of Public Interest Litigation has been used to reinforce the obligations of local authorities (commonly the primary service provider) to provide an adequate and safe water supply.

The latter model, i.e. where central Government has a decentralising policy and delegates via legislation, responsibility for water supply and sanitation provision to local authorities, is quite common. The same or other legislation may then permit the authority to delegate the actual provision to other, often commercial/private, entities. While in these latter cases the legislation provides for often quite robust overseeing and regulation of the service provider, it does not provide for the equivalent overseeing of public authority provision. Or where it does it is often ineffective.

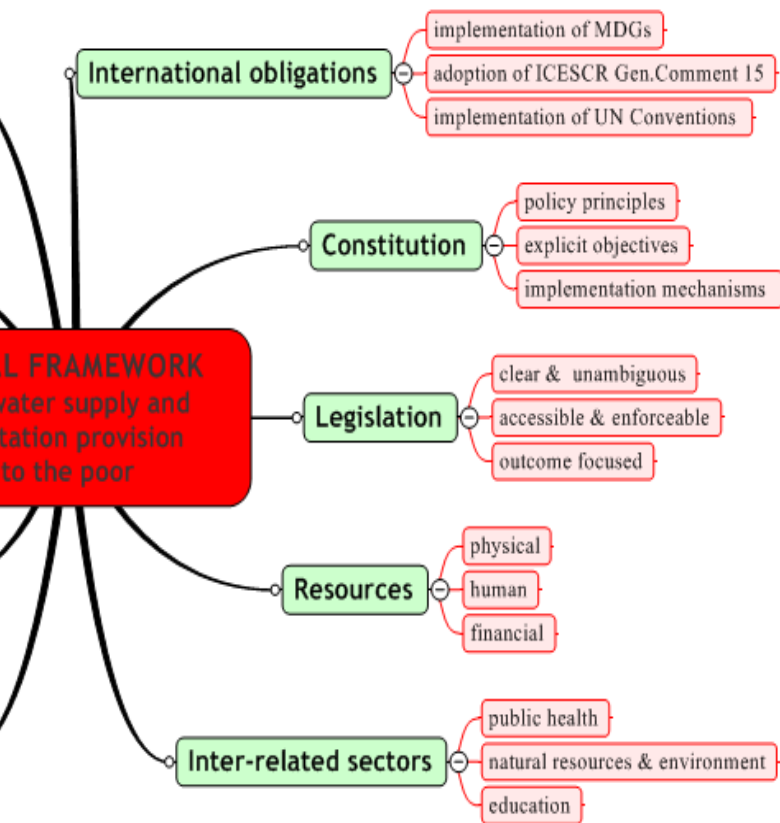
Some other observations on legal frameworks, based on both general and case study materials, are listed below.

- There does exist some substance to the legal frameworks for water supply and sanitation provision; much of this has emerged in the last decade.
- It can be difficult to (a) identify and obtain all the relevant legislation; and (b) identify which piece(s) of legislation provide the answers to the questions being asked.
- There can be discrepancies between non-binding



policy statements which advocate or imply universal service and specific duties as defined in the operating legislation and/or service contracts. Governments seem to be reluctant to enshrine universal service obligations (e.g. those advocated in UNCESCR's General Comment No.15, 2002) in legislation.

- While Governments have generally been reluctant to impose specific public service obligations on themselves they seem less reluctant to impose statutory requirements, when water supply and sanitation services are provided via the private sector. As such the legislation, and the regulatory framework established under it, would appear generally to be more robust with respect to private sector service provision than it is for public sector service provision. Although in reality Governments and public authorities still retain legal obligations (responsibilities & duties).
- Service to the poor is being addressed in some cases, but it seems to be dependent on good will and socially aware practice, rather than on explicit legal obligations.
- Generally the legislation does not appear to provide for, or facilitate, provision by community groups or the small scale independent service providers who currently operate informally.
- The role, independence and effectiveness, of the



Courts, as the vehicle of last resort, to enforce protection of entitlements and/or meeting of obligations, are often difficult to ascertain.

### Country case studies

The case study countries are listed by the order in which economic regulation of water providers became operational: England and Wales (Ofwat, 1989), Chile (SISS, 1990), Argentina (ETOSS, 1993), Bolivia (SISAB, 1999), Philippines (MWSS-RO, 1997), Ghana (PURC, 1997), Jordan (PMU, 1997/99), Zambia (NWASCO, 2000), Indonesia (JWSRB, 2001), India and Uganda (both having no dedicated water sector regulator at present). A reason for the chronological approach is to investigate whether there has been any cross-country learning with regard to service to the poor. Please note that different levels of analysis of case study countries have been undertaken, depending on the information provided and materials available.

### England & Wales

The current regime in England & Wales (E&W) stems from the privatisation of the water supply sector which occurred under the Water Act 1989, superseded by the Water Industry Act 1991 and as amended by the Water Industry Act 1999 and the Water Act 2003.

The 1989/91 legislation established the primary regulator of the privatised water industry as the Director of Water Services in the Office of Water

Services (OFWAT), with a remit to operate to a large extent independent of Government. The legislation does however provide the Government (via the Secretary of State) with powers to intervene and give directions to the regulator on matters of social and political importance and which require a democratic mandate. In practice the independence of the regulator relies on minimal corruptibility in the political and administrative systems, and full access to the courts by all parties.

Under the Water Act 2003, the authority of the Director General, OFWAT will in 2006 be replaced with a "Water Services Regulation Authority". The principles of accountability and transparency are very much enshrined in the new Water Act 2003, which requires both the new Authority and the Council to prepare and make available, for review by stakeholders, all their plans and proposals.

OFWAT oversees most aspects of the provision of water supply and sewerage services. Drinking water quality is monitored and enforced by a Drinking Water Inspectorate and water abstraction licences and waste water discharge consents are administered by the Environment Agency.

OFWAT has the primary duty to ensure that the statutory water (and sewerage) companies, licensed to operate under "Instruments of Appointment", properly carry out the assigned and authorised functions in their respective service areas and are able finance these activities.

The licensed companies have a statutory duty to develop and maintain efficient and economical water supply systems and make the necessary investments to improve and extend the water network to meet their obligations to provide water fit for human consumption and sufficient for domestic purposes. They are required, subject to payment of connection fees and charges, to provide a connection upon request from or any owner or occupier. It is the duty of the Secretary of State to ensure that service coverage is available for all areas in England and Wales at all times. Apart from a relatively small number of private water supplies, regulated under different legislation by Local Authorities, the water



Peri-urban housing, England

# Legal Issues

companies do essentially provide a universal service. While there is no explicit universal service obligation in any part of the legal framework, this combination of duties could be construed as a universal service obligation.

The statutory water companies have the right of appeal to the Competition Commission and access to the courts to contest enforcement orders and other decisions of the regulator.

The regulator has secondary duties to consider the interests of vulnerable customers; i.e. the “disabled or [those] of pensionable age, and those of low-income” and to some extent those of ill-health and those living in rural areas. The early legislation further provided for the general protection of the interests of service recipients, through the establishment of regionally based customer service committees, known as “WaterVoice, which reported to the regulator. This provision largely precluded the right of redress by an individual customer. The Water Act 2003 will establish a new “Consumer Council for Water”, independent of the regulator, to replace WaterVoice. The new Council will, like the regulator, have to give due regard to the same groups of vulnerable service recipients.



Old and new: Santiago, Chile

With the aim of protecting vulnerable people the 1999 Act introduced a ban on disconnection of service to consumers’ principal places of residence following non-payment of charges. The difficult issue for companies now is how to differentiate the ‘can’t pay’ from the ‘won’t pay.’

*Chile* - in preparation

*Bolivia* - in preparation

*Argentina* - in preparation

## *Philippines*

WITH RESPECT TO SERVICE PROVIDERS

In the Philippines, the Public Works Department is



Peri-urban housing, La Paz, Bolivia

Government body with national level responsibility for water supply and sanitation. However the Government has a strong decentralisation policy and in practice local government authorities (units - LGUs) have the lead responsibility for the provision of water supply and sanitation services (Local Government Code - Republic Act 7160, 1991). The code allows LGUs to delegate service provision to third parties, including both communities and private entities.

In Manila the primary service providers are the Manila Water & the Maynilad corporations. These private sector corporations operate under Concession Agreements (1997) regulated by the Metropolitan Waterworks and Sewerage System Regulatory Office (MWSS-RO). MWSS is a government body established under a Charter (Republic Act No.6234, as amended), with powers provided for under the National Water Crisis Act, 1995 (Republic Act No. 8041). Its Regulatory Office was created by virtue of the Concession Agreements.

The Concession Agreements do not impose a universal obligation on the concessionaires. They are required to “offer” water supply services to all existing customers in the Service Area and to make at least sufficient connections (net of any disconnections) to meet the coverage targets. They are also required to meet reliability (continuity & pressure), and drinking water quality, standards. The latter are specified by the Department of Health Administrative Order No. 26-A, 1994; i.e. the Philippine National Standards for Drinking Water 1993, under 2.9 of Presidential Decree 856.

A failure by the Concessionaire to meet any Service Obligation which continues for more than 60 days (or 15 days in cases where the failure could adversely affect public health or welfare) could lead to financial penalties (Art.10.4).

In the case of dispute, Art.12 obliges both sides to abide by arbitration proceedings (using an Appeals Panel) in accordance with the arbitration rules under international law (UN Commission on International Trade Law). (NB Art 12 has been invoked with respect to Maynilad’s concession). The provisions of Art.12 are meant to preclude recourse to the courts. However s.3(d) of the Charter does provide for MWSS to sue and be sued.

Under Art.6.8 concessionaires must comply with all

## Country Case Studies

Philippine laws, statutes, rules regulations, orders and directives of any governmental authority. For instance because all waters belong to the state, a permit is required to abstract water for supply from any natural water source (Water Code – Presidential Decree No.1067, 1976).

The two concessionaires do not serve all the people in Manila and a range of small scale independent service providers (SSISPs) exist. While water service providers should operate under licence from the National Water Resources Board (NWRB) many do not, but they are tolerated because they provide a useful service. They have no formal legal status, whether they obtain their water for supply legally or illegally, and are largely unregulated, which means that they have no legal obligations but neither do they have any legal rights. In the latter case they are ultimately vulnerable to the exclusive operating rights of the large concessionaires in whose service areas they operate.

The Concession Agreement (Art.5.3) did allow for any service provider operating legally (i.e. under licence from the NWRB) at the time the Concession was granted, to continue operating with the consent of MWSS. The Agreement (Art.5.3) also allows for new “third party” service providers to gain licences to operate from NWRB, but only if approval by both MWSS and the Concessionaire is given. However these apply only to new developments, for a limited period (<10 years) and are subject to revocation (upon 60 days’ notice) whenever the Concessionaire is ready and wishes to take over provision of services in those areas.

### WITH RESPECT TO SERVICE RECIPIENTS

The rights of service recipients are not explicit but may be implied from the responsibilities for water



Children playing in a slum recently served by piped water in Manila, Philippines.

supply and sanitation assigned to the various Government departments, public authorities or private entities. Such responsibilities as expressed in law do not explicitly establish a universal service obligation. With MWSS for example the legislation sets out its “attributes, powers and functions” but no duties as such. The Philippines Bill of Rights (constitution) makes no explicit reference to rights to water supply and sanitation, but it does provide for access to information (s.7); access to the courts (s.11) together with speedy processing of cases (s.16).

The spread of responsibility for water related issues (from the Presidents office, various Government Departments and authorities or agencies, NGOs, private companies, to individual citizens) presents a confusing picture to the average domestic water user. Lack of confidence arises when bodies such as the NWRB, with many powers and responsibilities, operate without the resources to exercise them.

Manila Water is required to meet customer services standards but nevertheless seems to have made significant efforts to improve communications and relations with its customers (with special consideration of the poor), and offers a customer hotline when problems with service provision arise.

Those receiving water from one of the Concessionaires must pay the required charges and are liable to disconnection if unpaid for longer than 60 days (Art.6.6).

### Ghana

#### WITH RESPECT TO SERVICE PROVIDERS

The main service provider is Ghana Water Company Ltd (GWCL). Previously a public utility (Ghana Water & Sewerage Corporation), GWCL has, since 1999, operated as a limited liability company (under the Statutory Corporations (Conversion to Companies) Act No.461, 1993). However its key objectives did not change. The Ghana Water and Sewerage Corporation Act No.310, 1965 requires GWCL to supply water to all inhabitants in its supply areas.

The Ministry of Works and Housing (MWH), responsible for water policy formulation, is also the part of Government with primary responsibility for water and sanitation. However more day to day control is exercised through PURC (Public Utilities Regulatory Commission – established by the Public Utilities Regulatory Commission Act No.538, 1997) which provides the economic and quality of service regulation; and SEC (the State Enterprise Commission) which is responsible for regulating state owned enterprises, such as GWCL, which operate under a performance contract. There is provision in both cases for financial penalties if targets are not met.

PURC for administrative purposes falls under the

# Legal Issues

Office of the President, but is essentially an independent body which has the responsibility of approving tariffs (previously set by GWSC), promoting fair competition, and monitoring quality of service standards. Ultimately, under The Public Utilities Regulations (Termination of Service), Legislative Instrument 1651, 1999, PURC has the power to determine termination of service.

GWCL has various powers, including the right to enter any land for water supply and sanitation provision purposes (under Legislative Instrument No.1233, 1979) and the right to disconnect (14 days notice is required before disconnecting a customer)

Other service providers do exist but these largely operate informally (i.e. they are not legal entities), serving the un-served and under-served. They include domestic vendors (i.e. neighbour on-sellers); street vendors (i.e. supplying using carts) and tanker operators. The latter have formed associations in Accra and operate more formally under a Memorandum of Understanding with GWCL. Typically all of these providers obtain their water for supply from GWCL. Those who do not (i.e. independent service providers) are required, as is GWCL, to have a permit (from the Water Resources Commission, WRC; under Act 522: Water Resources Commission Act, 1996) to abstract



Offices of Ghana Water Company Ltd.

water from a source for supply. Regulations also exist to prevent pollution of water sources, including controls on waste water and effluent discharges. In this case the regulator is the Environmental Protection Agency (EPA), under the Ministry of Science and Environment (MSE).

GWCL has until now operated without any binding duties with respect to its customers. However a Customer Charter is being now produced which will spell out the rights and obligations of both GWCL and its customers. For the alternative service providers there is no formal relationship.

## WITH RESPECT TO SERVICE RECIPIENTS

Service recipients do not appear to be clearly defined

nor are their rights, although some duties, such as the obligation to pay for services received, are defined.

There appears to be no explicit reference to a universal service obligation. However under the No.538 Act, 1997, GWCL is required to make reasonable effort to provide a safe, adequate, efficient and non-discriminatory service. Furthermore the Public Utilities Regulations (Termination of Service), Legislative Instrument 1651, does include some measures for the protection of residential consumers. The Public Utilities Regulations (Complaints Procedure), Legislative Instrument 1665 does provide a mechanism for recipients to complain and gain redress and the new Customer Charter should help make GWCL customers aware of their rights. Note that those served by alternative service providers do not, and will not, benefit from such provisions.

## Jordan

### WITH RESPECT TO SERVICE PROVIDERS

In Jordan the Ministry of Water and Irrigation (MWI), created in 1992, holds the overall responsibility for the formulation of water strategies and policy, water resource planning, research and development, and coordination with donors.

A single body is responsible for providing municipal water supply and wastewater services in Jordan and that is the Water Authority of Jordan (WAJ). It is an autonomous corporate body and carries out its functions in accordance with the Water Authority Law (No. 18 of 1988, as amended). The law provides for the establishment of water departments within each of the Kingdom's twelve Governorates.

It is reported that the establishing legislation has resulted in overlaps between the roles of WAJ and MWI and that clarification is needed. Despite this it is considered that existing laws "are strong enough", but the application of the law has been unsatisfactory.

Primary responsibility of drinking water quality & monitoring rests with the Ministry of Health (MoH) which is authorised to prevent the distribution of water declared "unsafe".

A Universal Service Obligation is not explicit. The policy in Jordan is to achieve reasonable domestic use (100 litres per capita per day is recommended). The policy is that this is achieved by expanding the role of private sector service providers. With respect to wastewater services the policy is to prioritise expansion of wastewater services in urban areas already served and where users are willing to pay for services.

In the Amman Governorate municipal water supply to Greater Amman was delegated to a joint venture of L'Yonnaise des Eaux (now Odeo, France), Montgomery Watson (US) and Arabtech Jardaneh (Jordan) (LEMA) in 1999. LEMA operates under a management contract lasting up to 2006. The contract, which has no coverage

## Country Case Studies

targets, is overseen for WAJ by PMU, a Programme Management Unit set up in 1997, under a Charter of Operations which set out its mandate, objectives, powers and duties and specific functions.

Small scale private service providers operate where LEMA fail to provide a service. Tanker operators usually source water from privately owned wells which are required to be licensed to sell potable water. They must register their trucks and obtain a licence in order to operate as a service provider. WAJ, under Law No.18 are supposed set the price of water they sell, but in practice this only used as a guideline and there are no penalties for exceeding price limits. However, as for other service providers public health aspects are well regulated and enforced by the Ministry of Health.

### WITH RESPECT TO SERVICE RECIPIENTS

The rights of service recipients are not clear. People in informal settlements are supposed to be entitled to “normal municipal services”, but often squatter status means that individuals are unable to provide the documentation required to obtain a connection. The Constitution while asserting that all Jordanians are to



Low-income area in Amman, Jordan

be treated equally before the law makes no explicit reference to water rights or the ‘right to life’.

Law No.18 (Art.23(2)) provides for Water Councils within the water department in each Governorate. The purpose is “to allow citizens and local authorities to participate in deciding priorities regarding water and wastewater projects and plan for their implementation”. In theory there is a mechanism for citizens to report problems to WAJ but it is reported that in practice this does not operate in Greater Amman. It is reported that LEMA has however made progress with the use of focus groups.

The duty of recipients to pay for services is much clearer. LEMA has the responsibility and powers to deal with illegal use from the system they operate.

Persistent offenders and those who don’t pay the required charges face legal action in the courts.

### Zambia

#### WITH RESPECT TO SERVICE PROVIDERS

Under the Water Supply & Sanitation Act (WSSA) No.28, 1997 a “Service Provider” means any person who provides water supply or sanitation services;

Responsibility for water supply and sanitation provision rests, through the Ministry of Local Government and Housing, with Local Authorities.

s.10, Part III of the Act:

10(1) Notwithstanding any other law to the contrary and subject to the other provisions of this Act, a local authority shall provide water supply and sanitation services to the area falling under its jurisdiction, except in any area where a person provides such services solely for that person’s own benefit or a utility or a service provider is providing such services.

(2) Notwithstanding sub-section (1) and any other law to the contrary, and subject to the other provisions of this Act, where a local authority is unable, for whatever reason, to supply water and sanitation services to a locality within its jurisdiction, and no such services are being provided by any service provider, the local authority may contract any person or other service provider to do so.

(3) A utility or service provider contracted to provide services under subsection (2), shall have power to enforce by-laws relating to the provision of water supply and sanitation services as may be issued by the local authority.

s.9 Part III of the Act provides for the establishment of a utility:

9(1) A local authority may resolve to establish a water supply and sanitation utility as a company under the Companies Act (1994) as follows:-

- (a) as a public or private company;
- (b) as a joint venture with an individual or with any private or public company;
- (c) as a joint venture with another local authority or several other local authorities.

Note: The requirements of the Companies Act 1994 and Water Supply & Sanitation Act 1997 are apparently such as to preclude many small scale service providers from gaining licences to operate. They currently therefore operate informally which means they have no legal status and are not regulated – i.e. no formal statutory duties or any protected rights.

Water supply and sanitation provision and therefore all service providers, including commercial utilities, are regulated by the National Water and Sanitation Council (NWASCO), established under s.3 of the 1997 Act.

The legal obligations of a utility are set out in:

- a Service Level Agreement (between the utility and the regulator), to which the mandatory Guidelines on

# Legal Issues

Required Minimum Service Level 2000 apply.

- a Service Contract (between the utility and a customer).

There is no explicit Universal Service Obligation in the legislation, or in the operating guidelines, agreements or contracts, but it is considered that with some modification the Required Minimum Service levels could in effect constitute a USO. This is supported by the National Water Policy (1994) which in s.2.6 states: *"However tariffs must be based on principles of fairness and equity which entail: (amongst other things) c) providing a minimum level of service to persons who are unable to afford the full costs"*

In the event of non-compliance with legal obligations: the regulator can serve an enforcement notice; impose financial penalties; suspend the operating licence and ultimately cancel a licence.

The 1997 Act not only imposes duties on, but also provides powers (Part VII) to, a utility or service provider; i.e. in relation to access to, or acquisition of, land for water supply or sanitation provision purposes; reduced service levels in the event of drought or other disasters; disconnection; etc. In the case of disconnections this is only allowed where someone has not paid the bill for the services provided or where



Treatment works, Zambia (NWASCO photo)

someone has damaged / interfered with the installations belonging to the service provider.

## WITH RESPECT TO SERVICE RECIPIENTS

Although the Zambia Constitution (Art.112, 1996) requires that the State shall endeavour to provide clean and safe water, neither service recipients nor their entitlements and rights are clearly defined in the legislation (Act 27 1997). In the absence of a formal USO this is important. The National Water Policy 1994 issued by the Ministry of Energy and Water Development, does in s.2.4 state that *"The overall national goal shall be: universal access to safe, adequate and reliable Water Supply and Sanitation Services"*;

but this applies only to the rural population. With regard to the urban population, s.2.5, while referring to the problem of the *"proliferation illegal settlements"* it only goes on to state: *"However, peri-urban areas considered to be legal settlements by Government shall be treated in the same manner as urban areas with regard to the provision of water supply and sanitation facilities."*

The Act 28/1997 requires providers to ensure efficient affordable and sustainable water supply and sanitation services within service areas. These requirements are clarified to some degree by the Regulator in their Guidelines on Required Minimum Service Levels. The service provider is tied, under its licence to operate, to achieve minimum standards. However achievement is a phased process with the Guidelines specifying working towards 75-90% coverage in the licensed service area.

In practice individual customers sign a contract with the service provider and this defines the rights and obligations of both parties. This service contract (between utility and a service recipient) sets out the duties, powers and entitlements of the two parties. The primary duty of the consumer is to pay the appropriate fees for the services provided.

Penalties can be imposed by the utility and/or by the Courts as provided by ss.37-38, Part VII of the 1997 Act:

37(1) *Subject to the approval of the Council, a utility or service provider may impose monetary penalties for late payment or non-payment of any tariffs, charges or fees.*

(2) *Where one or more users of a common water service connection are in default, the utility shall separate the common connections, and add the cost of separating such connections to the defaulting party or where two or more defaulting parties are involved, in proportion to the amounts due to the utility or service provider.*

38. *Any person who contravenes any provision for which a penalty has not been provided for under this Act, shall be liable, upon conviction, to a fine not exceeding six thousand penalty units or to imprisonment for a period of three years, or to both.*

The rights of an individual are protected via the regulator by checking that a utility meets its licence obligations and by a Water Watch Group, where they have been set up. A water watch group is comprised *"of volunteers from the community whose main objective is to represent consumer interests in the sector and provide information to consumers on service delivery. They have delegated powers from NWASCO to follow up outstanding consumer complaints by bringing them to the attention of the service providers and ensuring they are resolved. Should the Water Watch Group's intervention fail, NWASCO is then called upon to take it up with the utility. At this stage, the utility risks being penalised and the matter publicised by the regulator."* (Source: NWASCO web-site)

## Indonesia

## Country Case Studies

### WITH RESPECT TO SERVICE PROVIDERS

The Indonesian Constitution provides for state control of water resources and usage with the objective of providing for the well-being of the people. This provision is incorporated in the new Water Act No.7, 2004. While this could imply universal service delivery is a goal – it is not translated into an explicit legal obligation on either the primary authority or the secondary service providers (Palyja – an Ondeo partnership and TPJ – a Thames water partnership, in Jakarta). The latter however are required to meet service standards in their defined service area.

The legal framework for water supply and sanitation provision is being reformed to permit both private sector and community service providers.

At present there is no single national regulatory body, independent of Government. The model up till now, as exemplified by the establishment of the Jakarta Water Supply Regulatory Body (JWSRB), is one of regulation-by-contract (Cooperation Agreements). It is understood that the new Water Act No.7, 2004 will address this issue via the introduction of new bye-laws.

In addition aspects of water service provision are regulated under different pieces of legislation by four different institutions: i.e.

- the Ministry of Health regulates drinking water quality (Decision Letter No.907, 2002);
- the Ministry of Environment regulates water quality of drinking water sources (Regulation No.82, 2001);
- the Ministry of Public Works, regulates raw water availability and water and sanitation development (Water Act No.7, 2004);
- the Ministry of Home Affairs regulates the relationships between the local authority (public) which has the primary responsibility for water supply provision, and any private service provider (Instruction Letter No.21, 996).

### WITH RESPECT TO SERVICE RECIPIENTS

Article 33 (3) of the Constitution of the Republic of Indonesia, while giving the state the power to control over water resources, also gives it the responsibility to ensure that such control of water usage provides for the well-being of the people. This could be interpreted as providing a legitimate expectation by each citizen to be provided with, or have access to, water to satisfy their needs.

Under Local Act No.11, 1993 the people of Jakarta could again have a legitimate expectation to receive drinking water because the Governor has the responsibility exercised through Pam Jaya (now delegated to Palyja and TPJ) to distribute drinking water for the people of Jakarta.

But the same Act by describing service recipients as



Stark contrasts between poor and wealthier parts of Jakarta.

individuals or institutions that fulfil conditions as water customers in accordance with prevailing rules and regulations, means that some people are excluded.

Service recipients are obliged to pay for the service they receive and the service provider has the right to disconnect in the case of prolonged non-payment. On the other hand they have the right to receive a continuous water service that complies with water quality standards in sufficient quantity and a sanitation service to ensure community and environmental health (new Water Act No.7, 2004).

It is reported that in practice in such an event some customers have taken informal (and technically illegal) action and not paid their bills, and that this action did not result in disconnection.

In Jakarta the service providers Palyja and TPJ have no explicit universal service obligation. Service recipients do have some recourse under the responsibilities accorded to the JWSRB which is required to monitor implementation of the cooperation agreements, particularly in regard of water service delivery to water customers, and to develop, determine, and decide concerning dispute resolutions with water customers. The service provider has set up a complaints hotline and a water customer advisory committee has been set up but this in effect is an NGO with no statutory basis/authority. Law No.8, 1999 was intended to provide a legal framework for consumer protection, but a National Body for Consumer Protection has yet to be established.

The Government has provided some water terminals/public hydrants to service poor communities in slum areas but without proper controls on use so that in practice some of them are operated by "water mafias". Another significant means of gaining a supply of water is from illegal connections, which the police are meant to control.

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# Country Case Studies

## Uganda

### WITH RESPECT TO SERVICE PROVIDERS

The Ministry of Water, Lands and Environment (MWLE) is the main ministry with responsibilities for water supply and sanitation provision in Uganda. Within the ministry these responsibilities lie with the Directorate for Water Development (DWD). To support these responsibilities the Water Statute 1995 (and the National Water & Sanitation Corporation (NW&SC) Statute 1995) provides MWLE & DWD with wide discretionary regulatory powers (economic and technical respectively). This situation supports the call for an independent regulator.

Set up under the Public Enterprise Reform & Divestiture Statute 1993 and the NW&SC Statute 1995, the National Water and Sewerage Corporation (NWSC) is responsible for water supply and sanitation provision in the large towns (15 in number). The regulatory process operates via performance contracts, both between NWSC and the Government (known as IDAMCs – Internally Delegated Area Management Contracts) and between NWSC and the actual utility or service provider, whether private or public. In smaller towns (51) a number of private operators, overseen by Town Council based, Local Water Authorities, provide the services – as established under the Local Government Act 1977 and the Water Statute 1995.

The activities of service providers are also governed by secondary legislation arising from the Water Statute 1995 and relating to standards, permits and procedures; e.g. The Water (waste discharge) Regulations, 1998; The Water Supply Regulations, 1999; The Sewerage Regulations, 1999; The National Environment (standards for discharge of effluent into water or on land) Regulations, 1999;

A perception of this situation is that an adequate regulatory framework is in place but its application is poor and the organisational set up contains some duplication and contradictions; furthermore the political will to enforce compliance is not good. To some extent these problems have been recognised by the Ugandan Government in the revised Performance Contract between themselves and NWSC. They accept that amendment of the 1995 Water and NWSC Statutes, involving separation of the asset management, operations and regulation functions, may be necessary.

### WITH RESPECT TO SERVICE RECIPIENTS

Service recipients are not clearly defined in the legislation. *“The urban water sector in Uganda is broadly defined to cover all towns with populations exceeding 5,000*

*people, together with all gazetted town councils.”*

There is no explicit Universal Service Obligation in Uganda although there are various references to 100% coverage:

- (a) the *“ government acknowledges its obligation to provide social services including water to the entire population”*
- (b) the government has stated that *“it intends to ensure universal access to safe water supplies (100% coverage) in urban areas by the year 2010”*.
- (c) the government has stated that their overarching objective under the National Water Policy is *“to extend the use of safe water supplies and appropriate sanitation services to 100% of the urban population.”* but that this objective is not expected to be achieved until 2015.
- (d) the MWLE’s 2003 Urban Water and Sanitation Strategy Report gives as one of its goals – *“ sustainable, adequate and safe water supply and sanitation facilities within easy reach of 80% of the urban population by 2005 and 100% by 2015”*
- (e) the Water Statute 1995, s.4(b) provides that one of the objectives of the legislation is *“ to promote the provision of a clean, safe and sufficient supply of water for domestic purposes to all persons”*
- (d) the 1995 Constitution states - *“14 The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular , ensure that..... all Ugandans enjoy.....access..... to clean and safe water...”*

There are in the Constitution a number of other provisions which are relevant

- “21.(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.”*
  - “39. Every Ugandan has a right to a clean and healthy environment.”*
  - “45. The rights, duties, declarations and guarantees relating to the fundamental and Human other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.”*
  - “50.(1) Any person who claims that a fundamental or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a rights and competent court for redress which may include compensation.*  
*(2) Any person or organisation may bring an action against the violation of another person’s or group’s human rights.*  
*(3) Any person aggrieved by any decision of the court may appeal to the appropriate court.*  
*(4) Parliament shall make laws for the enforcement of the*
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## Recommendations

*rights and freedoms under this Chapter”.*

As in most countries many of those not provided with adequate water supply and sanitation are the poor living in informal settlements. These are regarded by authorities as illegal and are typically unplanned and unserviced.

### **Practical recommendations for a pro-poor regulatory framework**

The legal framework should be regarded as providing the underpinnings of the regulatory framework, which defines, explicitly or implicitly, the formal and informal rules for water service provision and the allocation of regulatory functions amongst the various actors and stakeholders. Whilst the term ‘legal framework’ suggests an emphasis on formal constraints (applicable legislation, contracts and specific regulations), these have important informal counterparts (such as norms and conventions, commitments, incentives and expectations), all of which influence ‘regulation’ as a process. We make this distinction in recognition of the fact that all water service providers are more or less formally regulated, irrespective of ownership and the institutional model of regulation in place.

A good legal framework for will be one which has essential components and which is developed to suit local circumstances (political, social, cultural, physical, environmental and economic). In other words, an effective regulatory framework will consider the ‘institutional endowment’ of any country, and respect the constitutional context as well as existing administrative capacities. It does not need to be complex and comprehensive and will be more effective if simple, workable and accessible. Of course even if a properly structured system of essential components is

created, it will not be effective without the necessary political will and without common social values.

It should also be recognised that a legal framework cannot be got right in one go – all examples reviewed exhibit varying degrees of evolution, responding to lessons learned and changing circumstances. The legislation has to create the right balance between creating a sense of certainty and allowing a degree of flexibility. The latter is often provided via discretionary powers, which is acceptable providing there is transparency and accountability over any decision taken and corruption is constrained. The legal framework should make room for feedback mechanisms that allow governments as the ‘guardian’ of the regulatory framework to identify and respond to conflicts and inconsistencies.

The core of the legal framework is that governing the status, rights and responsibilities (duties/obligations/liabilities) of the service providers and the service recipients. However, the relationship between these two parties does not exist in a vacuum. It is governed by relationships between each party and a range of other key parties: i.e. the Regulator, Government, and the Courts. These relationships and the rights and responsibilities need to be clearly defined in law, as do the powers and procedures required.

It should always be the case that the establishment, operation, and maintenance of water supply and sanitation systems must be supervised and controlled by the state. However some roles and responsibilities need to be devolved to autonomous or semi-autonomous authorities. Economic regulators should therefore be regarded as part of the institutional machinery which is set up to implement the law and help the government achieve its policy objectives with regard to water and sanitation services provision.

As this research has demonstrated, access, equity and distributional aspects, as well as the public health and environmental externalities of water services introduce a significant social dimension to economic regulation, such that economic regulators are no longer simply technocratic agencies, faced with the challenge of having to balance politically sensitive and frequently conflicting efficiency and welfare objectives. Ideally, social and water policies should be well-integrated, and the law provide a clear rationale for regulatory interventions. For instance, it is widely argued that it is the responsibility of democratically elected governments to develop effective mechanisms to protect vulnerable groups in society. If this responsibility is partly



A city built on many hills, Kampala, Uganda

# Legal Issues

delegated to an (economic) regulator, it would then remain a government responsibility to clearly define the regulatory mandate (providing the regulator with authority to legitimately make decisions that extend beyond its original technical remit) and to formulate laws such that the constellation of regulatory duties is such that different tasks and objectives do not contradict each other, and that regulators are awarded sufficient powers to achieve both social and economic objectives. In some instances it was found that governments failed to recognise or act upon the problems arising from commercial operation of services (based on the full cost recovery principle), increasing access to services (through capital-intensive service extensions) and a desire to protect affordability (through low tariffs for an overwhelmingly large customer base

on low incomes).

Principle	Application (to pro-poor context)
Proportionality	- regulation appropriate to size/scale of provider; i.e. from large public sector departments or private sector international corporations to very small scale local service providers
Accountability	- clear standards and lines of accountability between parties (Government – Regulator – Regulated – Citizens), including accessible, fair and effective complaints procedures
Consistency	- the regulations should provide a stable & predictable environment in which all service providers can operate; and which supports the legitimate expectations of customers
Transparency	- open & effective communication and consultation with all parties
Targeting	- clear un-ambiguous targets, with approaches adapted to the needs of different groups and enforcement focussed on provision to the most vulnerable groups.

## *Reviewing the existing status of the water sector and a creating a vision/strategy:*

Who are the providers? What regulations/legal provisions/contractual rules apply to them at the moment? What gaps in the existing legislation are evident?

What is the existing customer base of the various types of providers? Which ones are currently operating on the fringes or outside of the law?

What are the gaps in current networked service provision? Who does not have access to networked services? Who cannot get access and why? What specific challenges and/or constraints is the industry facing?

What is the national policy with respect to water services?

Which principles shall apply to basic services for citizens? Will consumer rights/protection be enshrined in national law or utility licences?

What is the nature of citizens' recourse against service providers? (Political? Legal? ...?)

## *Functions of the regulator:*

What is the rationale for introducing regulation?

What is to be the purpose/role of the regulator?

What objectives is the regulatory agency expected to achieve?

What will be the primary and secondary duties of the regulator?

What is the remit of the regulator with respect to (a) geographical/administrative boundaries, and (b) the types of service providers it will regulate?

What powers will the regulator need to fulfil these duties?

## *Setting up a regulator:*

Who will act as the competent regulatory authority?

Where will it be placed within the existing institutional structure? What administrative conflicts can be anticipated and how can these be avoided or minimised? Which agencies will regulators need to liaise with?

What will be the internal structure of the regulatory authority? What types of personnel/ expertise will be required?

How will consistency and continuity in the regulatory process be ensured?

What are the funding requirements for the regulatory authority and how shall they be met?

From where will the regulatory agency derive its legitimacy?

What level of operational flexibility and discretion in decision-making shall be granted to the regulator?

Who will the regulator be accountable to? Who has ultimate decision-making responsibility?

What regulatory procedure shall be followed?

What will be the main regulatory instruments?

To what extent/in what areas are providers capable of self-regulation?

Who will have the power to intervene in regulatory decisions and on what basis?

Who shall disputes be referable to?

## Considerations for serving the Poor

In simple terms, what is recommended is that those involved in developing a new framework, or improving an existing one, should, work through a series of questions, as this study has tried to do. The five principles of good regulation (table, bottom right) adopted by the UK Government (Better Regulation Task Force, 2005) provide some useful guidance as to what the legal framework needs to establish or facilitate. A set of basic considerations for governments wishing to create or adapt regulatory frameworks is set out below.

### LEGAL CONSIDERATIONS FOR SERVING THE POOR

A regulatory framework will not become 'pro-poor' unless it succeeds in delivering improved access to water and sanitation services for the underserved poor, many of whom may be found in urban slums or informal settlements or on the peri-urban fringe. Having clarified the institutional setup of regulation and its combination of social and economic functions, it then becomes necessary to clearly define the regulator's responsibilities vis-à-vis poor consumers, who may or may not be served by the formal, main provider. The following recommendations assume that the resources and mechanisms to enable duties to be carried out, liabilities to be met, and rights to be protected, are in place. It must be stressed that it is not appropriate for the legislation to impose duties and responsibilities that cannot be met under the prevailing circumstances. It is however recognised that new legislation can induce beneficial social change in difficult circumstances.

#### *Universal service*

The legislation should contain an explicit **universal service obligation** or a number of requirements which together result in universal service provision. Where necessary delivery of universal service can be delegated and imposed, in appropriate forms, as a primary duty on both the regulator and the regulated (service provider). The legislation should clarify who is entitled to the service – it should not be at the discretion of the service provider. This USO must consider all people, regardless of legal status (e.g. citizenship, residency, land or property rights), i.e. it should include visitors, migrants, refugees, people living in illegal settlements, for example. However, it should be realistic, taking into account existing service gaps and the time and finance required to close them. Likewise, it should not impose unnecessary burdens onto the regulator and service provider (and ultimately, the customers). There is a risk of failure to acknowledge the persistent inability to pay

of some groups of society, which require a level of support that necessitate interventions beyond what the regulatory model can realistically be expected to deliver. The USO should be consistent and explicit throughout the legal framework, e.g. from the constitution, through primary and secondary implementing legislation, to specific service contracts/agreements.

The definition of 'universal service' and any accompanying service obligations must be worded such that its interpretation can evolve in a positive sense, i.e. a USO should not be seen as a static target, but on that can become increasingly ambitious in line with social expectations and technical/financial feasibility. However, the legislation should give sufficient guidance for regulators to arrive at this socially efficient interpretation without giving the impression of consistently 'moving the goal posts', which could be seen as discriminating against an increasingly efficient provider.

Any USO must give regard to the financial implications of making such a target a legal obligation. Where affordability is a primary concern, this should not be prioritised at the expense of the financial health of the main provider. In the first instance, the regulator must be enabled to secure funding by setting cost-reflective tariffs. Where the investment requirements exceed the potential funding that can be generated without undue negative impact on all or poor/vulnerable consumers (and this is likely to be the case in many of the case study countries), the law must consider placing financial obligations on government and the social security system.



Door-to-door water vendor in Jakarta

#### *Utilities and small-scale providers*

The legislation should acknowledge the various models of service provision in a particular setting, and enable the regulation of any type and scale of provider. It should specifically include provisions for a level of formalisation of **small-scale alternative providers**,

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## Legal Issues

which frequently operate in the informal sector and/or in a more or less unregulated (and, where regulations do exist, unenforced) market. Rules should clearly set out the powers, duties and rights of any service provider, whether it be public, private or some form of partnership, irrespective of its size – with respect to its service recipients and potential competitors.

As far as relationships between the various providers (especially between the main utility provider and comparatively small private or community-managed providers) are concerned, **exclusivity rights** emerge as a major bottleneck to universal service provision. Especially in the case of large-scale concession contracts, utilities are protected from competition by exclusivity clauses in their contracts, ignoring the reality that they are unable or unwilling to offer services in some parts of their service area or to adapt their service portfolio to meet the needs of a certain type of consumer. Legislation should carefully balance the needs of *all* providers to protect their investments against the need of all residents to be served and define the conditions for market access and share.

Confining alternative providers' activities to the fringes of the law or declaring them illegal in primary legislation or contracts is an overly simplistic approach that fails to account for the reality that alternative providers – independently or in co-operation with the main provider – will remain a part of the service solution at least in the medium term. The legislation should be inclusive, but not apply uniform rules to all types of provider. A measure of **flexibility** is required to balance the necessary control of smaller scale activities against the operators' capacities, otherwise

Slum housing, Buenos Aires, Argentina (Walton photo)



workable (though by no means 'perfect') solutions may be excluded by default. In the case of utility providers, inflexible contract clauses, and high service standards and performance targets could have a similar effect. Minimum service levels should be defined such as to allow acceptable trade-offs in price and service standards, enabling affordable solutions for the 'difficult-to-serve' which may differ from conventional technological choices. The legislation should also consider the various possible models for delegation of responsibilities, providing this is done in a transparent and accountable manner; e.g. sub-contracting to alternative/local service providers; use of local NGOs to engage on behalf of vulnerable people/communities who are not in a position to help themselves.

Conversely, there is a risk of not **protecting a utility** against willing and highly adaptable competition, especially where customers in low-cost parts of a service area have an incentive to switch to cheaper alternatives. In such a case the legislation must consider the immediate implications of allowing competition, including self-supply. Pricing policy objectives, such as the cross-subsidisation of domestic and/or lower-income users, may be undermined if the customers providing the subsidy are allowed to opt out of the utility services. Other considerations, in many locations, are the environmental and public health risks associated with cheaper and/or unregulated alternatives, such as the possible over-exploitation of fragile groundwater resources and a potential lack of water quality monitoring.

The legislation must also consider the legal impediments that need to be lifted in order to enable providers to realise the service objectives. Some of these relate to routine functions, such as access rights for the provision (installation & maintenance) of services. Similarly, the legislation must also provide a mechanism for dealing with (i.e. authorising) access to, use of, purchase of, land for the purpose of carrying out statutory duties (e.g. required infrastructure installation/maintenance). Another set of considerations, such as land tenure issues in slums and peri-urban areas or presently informal resale activities, may require **amendments to existing legal provisions** which are not directly related to water law, such as planning, property and business law.

As far as regulation is concerned, the legislation must provide **effective penalties** for, and **enforcement**

# Checklist



Standpost queuing, Lusaka, Zambia (Kayaga photo)

of, any failures to meet obligations or carry out duties, which are the fault of the service provider. At the same time it should clearly set out the **rights and responsibilities of service recipients**; e.g. the right to receive services and the responsibility to pay for them. NB the ability to pay issue will need to be dealt with outside this regime alongside other social/economic measures to deal with poverty and low income recipients, unless any specific measures can be absorbed within the regulatory system).

## *Institutional roles*

The legislation should clearly set out the powers and duties of any regulator and its relationship with Government and where necessary with other regulators and agencies, where their responsibilities relate to water and sanitation services provision. In view of the frequently observed fragmentation of responsibilities between a variety of national, regional and local level organisations, the **clear allocation** and, where appropriate, separation of **institutional roles and delineation of functions** is essential. Especially where economic regulators are expected to take on social responsibilities, the legitimacy of regulatory decision-making must be anchored in the law and translated into the regulatory mandate. The law should also shield the regulator(s) from undue political influence, and any subsequently introduced legislation that affects the financial balance (as some social protection measures, such as a ban on disconnections for reason of non-payment, do) should be accompanied by provisions to restore that balance, without placing an unreasonable burden on any party (e.g. paying customers effectively having to subsidise non-payers).

The legislation should require the actions of the Government, the regulator and the service provider, to be **transparent and accountable**. This will include establishing the necessary procedures, standards and administration. It should establish a transparent and accountable body which serves (by clearly defined powers and duties) to protect the interests of all service recipients. Various models exist – ombudsman, citizen advisory bureau. Particular provisions may be necessary to facilitate accessibility for vulnerable (poor, inarticulate, disabled, etc) people. Similar **appeals mechanisms** should be accessible for all other parties, mainly the service providers.

The legislation should provide for **access to the courts for all parties**, as a mechanism of last resort, where any part of the system fails to deliver. The judicial system can only apply the law as is. There are arguments for and against involving the courts in regulation and dispute resolution. In the UK experience, negotiation between the regulator combining adjudicative and investigative functions and the regulated companies, subject to scrutiny by the Competition Commission (formerly Monopolies and Mergers Commission) has limited the use of the courts, saving public expense and time in reaching final decisions (McEldowney, 1995). Likewise, the House of Lords ruled that the regulator is best placed to deal with disputes between individual customers and water companies, especially where expert consideration of technical/financial issues is required to strike a fair balance between the rights of an individual and the community as a whole (Marcic-v-Thames Water, 2003). Minimal use of the courts will prevail where the legislation provides clarity over powers, duties and rights. The law must therefore be qualified to suit

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# Legal Framework for Serving the Poor

## CHECKLIST: LEGAL PROVISIONS FOR SERVING THE POOR

prevailing conditions/circumstances – i.e. they must generate reasonable expectations on behalf of service recipients and reasonable performance on behalf of service providers.

In order to achieve the required flexibility, and in consideration of the likely need to make some adjustments to rules and regulations once more experience has been gained with the implementation of new water laws and new policy objectives, it would be recommended to ensure that the legislation is clear on these objectives and the broad regulatory framework that is intended to achieve them, but at the same time untested rules should not be fixed in primary legislation, which is difficult to change. The legal framework should therefore consist of an appropriate mixture of laws, secondary legislation or statutory guidance, which is implementation-oriented and more flexible and detailed contracts, which can be amended in response to new insights with the consent of the parties to the contract. *To achieve universal service the regulatory framework must include:*

- Sufficient independence and length of tenure of Regulator and/or Regulatory Board to promote cost reflective tariffs for higher-income consumers, particularly for sewerage
- Transparent and fair appointment/selection process of Regulators
- Sufficient resources: personnel with the capacity to deal with poverty-related consumer issues, independent budget
- Primary Duty for the Regulator to achieve Universal Service as well as the equally critical Financeability
- Inclusive definition of regulatory remit (in terms of regulated entities, area of jurisdiction, social/economic aspects of decision-making)
- Legitimacy for the Regulator to make decisions that are not strictly of an economic nature
- Regulatory powers to
  - access and request information (from providers and other organisations)
  - license suppliers and develop appropriate tools for the regulation of alternative providers
  - monitor and audit (require monitoring and auditing)
  - define and adapt performance indicators to current circumstances (e.g. minimum service levels, coverage targets)
- set tariffs
- make regulations (e.g. setting flexible technical/service standards, accountability of service providers, anti-corruption measures, allowing on-selling, if only temporarily)
- abolish exclusivity clauses of service provision by monopoly direct provider—the ‘legal concept is non-exclusivity of service provision’
- enforce decisions, incl. powers to fine utility providers for failing to provide distribution mains to high density urban slums
- involve consumers/stakeholders in the regulatory process, possibly empowering existing consumers organisations to participate
- Regulatory duties to
  - give regard to the needs and special circumstances of the poor and vulnerable
  - ensure providers have sufficient finance to meet their obligations
  - review implications of subsidies built into the current tariff structure
  - recognise an ‘acceptable process’ towards USO without penalising direct provider inappropriately as long as ‘reasonable steps’ are taken towards meeting obligations, recognising that ‘targets are not absolutes’ and legal restrictions may be in place to prevent their achievement (e.g. land tenure issues)
  - recognise the competition implications for main utility and alternative (independent) providers
  - make decisions in a transparent manner
  - consult with consumers and stakeholders



Solid waste tip squatters, Nairobi, Kenya

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