



Summary

The integration of the legal and regulatory frameworks related to water promotes the coordinated management of water resources. It minimises intra- and extra-sectoral conflicts and promotes collaboration across administrative entities at various levels. This Tool discusses the need and implications of integrating water-related laws, suggests mapping methodologies for assessing existing legal frameworks for water, and highlights various country examples that are integrating customary water law into their statutory legal frameworks.

The Challenge of Integrating Legal Frameworks for Water

Integrating the legal regimes that are related to water management is a foundational step towards implementing IWRM. The scope of the legal integration touches any legal, policy, and institutional framework that directly or indirectly affects water resources management (e.g., forestry, energy, industrial development, municipal water supply, agriculture, environment, etc.). This process of identifying potential conflicts and bringing coherence to the wide array of water related legislative pieces minimises fragmentation and friction between sectors and administrative entities.

While the call for an integrative legal framework seems obvious, integration remains a considerable challenge. Water management decisions are often divided between multiple ministerial portfolios (e.g., between the ministries of forestry, power, industry, agriculture, and environment), especially in countries that do not have national apex bodies (Tool B3.02). Additionally, the legislative regime to manage water resources and natural resources more generally fragmented across administrative scales (e.g., between national, provincial/state, river basin and municipal authorities). Taking into account customary practices and rules used by indigenous populations is one additional challenge in the process of integrating legal framework for water (see section below: “Integrating Customary

Water Law into Statutory Legal Frameworks").

Indeed, integrating legal frameworks for water resource management is a balancing act between harmonisation, centralisation, and subsidiarity. Harmonisation could be understood as the process of reaching regulatory efficiency, effectiveness, and clarity which is often accomplished through centralisation (Bakker et al, 2008). In the context of water management, water ministries or national apex bodies for water typically act as this centralising force towards harmonisation (Tool B3.02). The subsidiarity principle, on the other hand, holds that a central authority should only take on tasks that would not be possible to undertake at lower levels (Stoa, 2014). In the process of integrating legal frameworks, a careful attention should thus be given to making sure that the subsidiarity principle will be upheld.

As such, in order to be successful, the legal integration process has to be driven by strong policy and legislation at a national level that clearly outlines the roles and responsibilities of each tier of decision-making. The legal framework also must determine procedures for working with other sectors outside the "water box" (UNESCO, 2009). Furthermore, mechanisms for conflict resolution and stakeholder participation at all levels of decision-making can aid this integration process. While developing an integrated legal framework for the sustainable management of water resources is a highly complex and often costly process, yet it is an important steppingstone towards water security.

Legal Frameworks Mapping Methodologies

Due to water being a multidisciplinary subject, water-related provisions are found in a number of national laws and regulations, which requires a review of existing rules and regulations to find current strengths and weaknesses to be addressed (Salman & Bradlow, 2006). To identify the legislative challenges across environmental policies, countries would often undertake a baseline assessment and mapping of applicable legal frameworks and governance structures. Using tools for policy analysis, users could easily compare existing legal gaps and identify bottlenecks. Some of the mapping methodologies that could be applied for such mapping of the legal environment include:

- **OECD Water Governance Principles and Indicator Framework:** this framework presents a self-assessment tool to identify the current state of water governance policy frameworks, institutions, and instruments and how they should be improved over time. It supports the implementation of OECD Water Governance Principles, providing for efficient, effective, and inclusive water governance. The framework consists of a 'traffic light system' of 36 governance indicators, a checklist and an action plan for future improvements (OECD, 2018). The scope of application covers all governance scales, whether local, basin or national, and follows a multi-

stakeholder approach.

Image



Figure 1. OECD Water Governance Principles. Source: OECD (2015)

Image

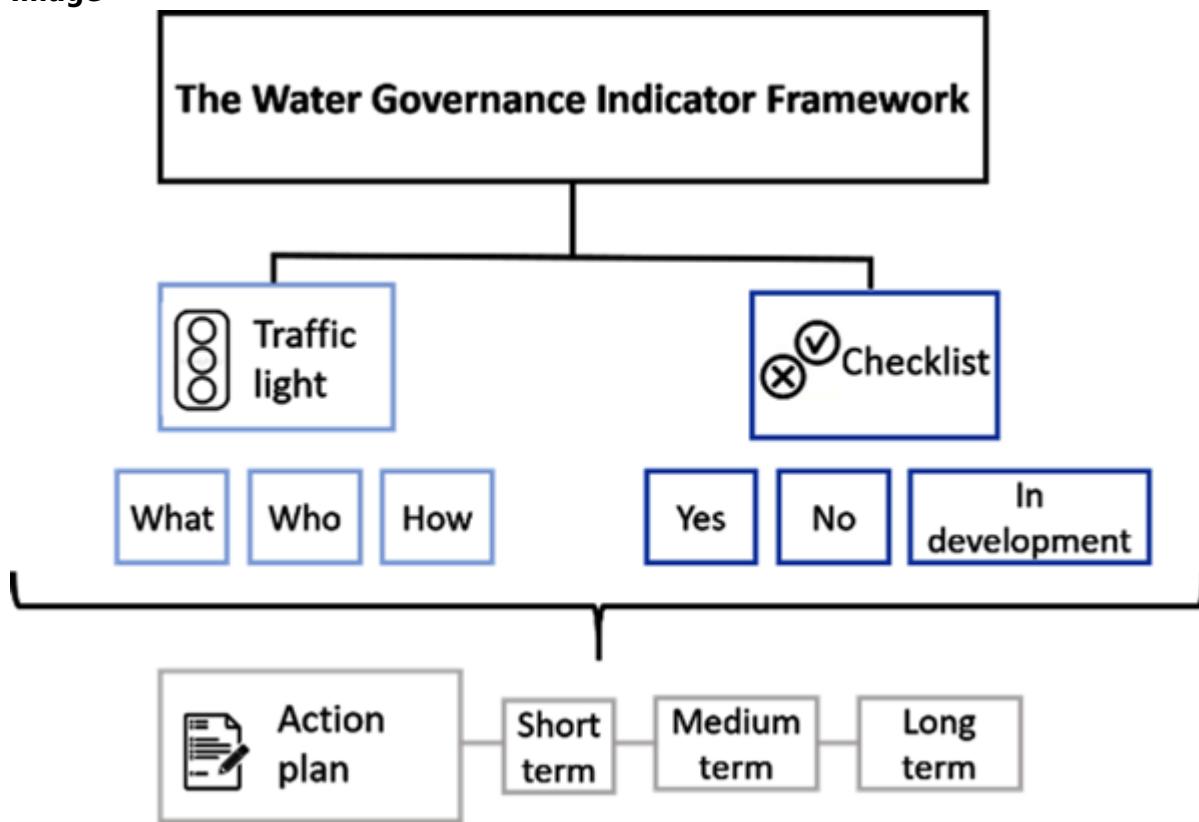


Figure 2. OECD Water Governance Indicator Framework. Source: OECD (2018)

- **Asia Water Governance Index (AWGI):** launched by the National University of Singapore in 2010, the Index was compiled using twenty components reflecting legal, policy and administrative frameworks in the water sector (Araral & Yu, 2010). AWGI follows the ultimate objective of assisting policymakers in comparing legal frameworks for water management in other countries within the region.

- **Water Integrity Network (WIN) User Guide to Assessing Water Governance:** is a conceptual framework which helps to monitor the water governance system at different levels or in different regions, especially useful to identify gaps in existing policies prior to implementing legal reforms (WIN, 2013).
- **The Water, Sanitation and Hygiene Bottleneck Analysis Tool (WASH BAT)** – a collaborative tool designed by UNICEF in 2016 to formulate Action Plans for eliminating the bottlenecks in WASH sector for sustainable delivery of WASH services. Using a participatory approach, WASH BAT offers an opportunity for stakeholder discussions on policy gaps and practical barriers for the country or region in water and sanitation management (UNICEF, 2020). The WASH BAT assessment outcomes appear as a list of actionable activities and serve as background for improvements in legal and institutional frameworks.

Integrating Customary Water Law into Statutory Legal Frameworks

In several countries, legal customary rules play a great role in regulating water rights, especially in

areas where indigenous populations live. Hence, customary law should be carefully considered when establishing legislation on the use and allocation of water resources (Burchi, 2005), particularly in creating licensing or permitting schemes (Tool A2.01). Indigenous rights have often been regarded as secondary with respect to property rights to resources (Craig & Gachenga, 2010), hence, legislative reforms should follow a participatory approach to incorporate the understanding of traditional water systems and allow for a bottom-up water governance structures, involving water users and civil society (Majzoub, 2010). Here are two examples of how countries have approached the process of integrating customary rules into their official legal frameworks:

- **Customary water arrangements in Arab states:** several Arab states have focused on the use of statutory arrangements, although some of them have relied upon diverse customary arrangements for getting access to and utilising water resources. For instance, the Aflaj, traditional water system in Oman (known as Qanat in Iran, Kariz in Afghanistan, Fogara in Algeria) still plays main role in the agricultural irrigation and securing drinking water (Al-Ghafri, 2008). Most of Aflaj wells are owned by farmers, some are fully or partially owned by government. The well system is administered by locally elected manager, dealing with water distribution and disputes, as well water shares allocation, prioritising domestic use, followed by irrigation purposes (Majzoub, 2008). The government strongly supports and aims to preserve this system, as the regulation of Aflaj system is included in the law on conservation of water resources and regulates issuing the Aflaj permits. It presents a great example of synergy between statutory and customary laws to manage water resources.
- **Inclusion of customary law in Australia:** following the approach developed by the Australian Law Reform Commission (ALRC), dealing with the law reform in 1980s, it was advised to follow a “functional recognition” approach where indigenous rights are recognised on a case-by-case basis, depending on the context (ALRC, 1986). Such approach allows to preserve original interpretation of customary rules and allowing the indigenous rights to develop outside of universalistic legal framework. In addition, the hierarchy of priorities was developed for natural resource uses, where conservation interests were put first and followed by traditional hunting and fishing activities (McIntyre, 2005). The Commission also recommended that implementation of statutory law in indigenous communities should take place in a manner appropriate from the community’s standpoint (Asche, 2003).



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