

7 April 2017

**OHCHR Mandate of the Special Rapporteur on the human right to safe
drinking water and sanitation**

AquaFed contribution to Enquiry on

Service Regulation and Human Rights to Safe Drinking Water and Sanitation

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1. Introduction

AquaFed, the International Federation of Private Water Operators, is honoured to be invited to contribute to the proposed report on Service Regulation and human rights to safe drinking water and sanitation, by commenting on the questions posed in the consultation document.

Our Federation, which was established to meet requests from multi-lateral institutions in order to facilitate contacts and information exchange between them and private water service operators, has an established record of contribution to the works of the OHCHR and the Special Rapporteurs on water and sanitation¹². Our contribution to this enquiry is submitted as a continuation of that effort.

The prime business purpose of our Members is to provide high quality water and sanitation services to the whole of each community under the direction and control of its public authorities. Delivering water, sanitation and wastewater services, in a fully sustainable and human rights compliant way, is the core of our Members' business. Good service regulation is a key success factor in the organisation and delivery of water and sanitation services and therefore of significant interest to our Members.

2. Scope and purpose of submission

The scope of our submission is determined by the experience of AquaFed's Members and therefore has a focus on the needs for good regulation from the perspective of professional private sector water operators. However, as most of the issues faced in water services operations are the same irrespective of the nature of the operator, be it public, private, mixed or community, most of the information in this submission is applicable to all operators.

Due to the large number of countries where AquaFed Members operate, and the necessity to respect the relationships between each operator and his contractual partner, it is not practical to illustrate all the points we make in this submission with specific examples. We would like to refer the OHCHR to the AquaFed brochure entitled "*Private operators delivering performance for water users and public authorities*".³ This document has a section specifically on implementing the human right to safe drinking water (section 2.5.1) and a number of case studies that include this dimension are listed on page 13 and detailed in the body of the publication. Some of these case studies are cross-referenced in our submission.

This submission, made on behalf of all the Members of AquaFed, does not preclude individual Member companies making their own submission in parallel.

¹ <http://www.aquafed.org/WaterIssues/Entry/item/global-issues--4.sls>

² http://www.aquafed.org/WaterIssues/Entry/item/global-issues--4.sls#hrws_chrono

³

http://www.aquafed.org/Public/Files/publication/aquafed_private_operators_delivering_performance_2nd_edition_2016_en_057e93d1f1.pdf document available in English, French and Spanish

3. Overarching key messages

By AquaFed's best estimates, there may be between 3.5 and 4 billion people who do not fully enjoy their human rights to safe drinking water and sanitation. This may be because they have no service at all, or, because the service they do have does not meet all the human rights criteria of availability, quality, acceptability, accessibility, and affordability and is not delivered with equity and non-discrimination. We refer to this deficiency as the human rights to safe drinking water and sanitation gap. The full recognition of the human rights to safe drinking water and sanitation by the United Nations and the ambitious 2030 Agenda for Sustainable Development make the closing of this gap an urgent imperative.

Sovereign States are the duty bearers responsible for the realisation of the human rights to safe drinking water and sanitation. To close the gap, it is crucial that States recognize the human rights to safe drinking water and sanitation in their national laws and regulations. They need to do this in a way that expedites practical implementation and supports all the public authorities and operators of all kinds who they have charged to contribute to closing the gap and ensuring the full realisation of Sustainable Development Goal 6 and the human rights to safe drinking water and sanitation.

Operators, public and private are tools that public authorities must use to implement the human rights to safe drinking water and sanitation. It is crucial that the regulations and regulatory framework for water and sanitation should be devised and implemented in the same way for all forms of service delivery operator. Public, private, mixed and community operators should be expected to perform to, and be regulated by, the same standards.

Lack of regulation is a lack of water governance and contrary to popular public perception, private operators do not thrive where regulation is weak or non-existent, rather they thrive where the regulatory environment is stable and predictable, thus facilitating the honouring long-term contracts and operating licences.

The regulation of water and sanitation services is complex and embraces a wide range of different disciplines ranging from technical through economic, environmental to social and human rights. This usually means that several different sets of regulations and regulators need to be in place. In this situation, good performance accounting, transparency and access to information, reporting and benchmarking are important components of good water governance.

4. General comments on regulation and the human rights to safe drinking and sanitation

4.1. Defining Regulation

For purpose of our response, it is necessary to define what we understand by regulation. The OHCHR questionnaire points to a very wide interpretation of regulation by referring to “legislative, institutional, policy, standards, principles, measures, frameworks, mechanisms, bodies, actors, monitoring, enforcement, etc. These are all key expressions that are very significant in the context of this enquiry. However, a more precise interpretation is needed in this context of this submission.

A useful starting point is the [IWA Lisbon Charter](#)⁴, which uses the following:

Regulations “*the rules that emanate from governments and public administration and are enforceable by regulatory authorities or regulators*”

Regulation “*the act of applying and enforcing standards, criteria, rules or requirements, which have been legally or contractually adopted –i.e. ‘to regulate’*”.

Regulator “*a public authority responsible for applying and enforcing standards, criteria, rules or requirements – which have been politically, legally or contractually adopted – exercising autonomous authority over the Services, in a supervisory capacity.*”

These definitions imply that there are **policy** dimensions and **procedural** dimensions to be considered.

The IWA Charter states that “as human rights duty bearers, governments should foster good public policy and effective regulation to meet their international commitments as well as the commitments to their own people.”

A challenge arises from the very broad and diffuse role played by water in any society. This means that water policy, and the processes necessary to implement or enforce it, are usually very wide ranging and difficult to coordinate. The significance of water governance at all levels from global to local is widely recognised and is closely linked to the subject of this enquiry. The principles set out in the [OECD Water Governance Initiative](#)⁵ show how specific water and sanitation regulations need to be built within an holistic context. We strongly recommend the work of this multistakeholder platform to the Special Rapporteur in the context of his work.

4.2. Specific regulation requirements for water supply and sanitation services

In relation to service regulation and human rights to safe drinking water and sanitation, we believe that several dimensions of regulation should be considered, having in mind that the regulatory authorities may differ from one subject to another:

⁴ <http://www.iwa-network.org/publications/the-lisbon-charter/>

⁵ <https://www.oecd.org/gov/regional-policy/OECD-Principles-on-Water-Governance-brochure.pdf>

- **Policy objectives** (including setting priorities, responsibilities, procedures, incentives, penalties, etc.)
- **Resource allocation** (including water abstraction and wastewater discharge, financial resources and budget prioritisation, planning and rationing, etc.)
- **Service Performance** Regulation (including water quality, public health, technical standards, system reliability, asset condition, terms and conditions of service, etc....)
- **Economic** Regulation (Including setting cost recovery approaches and levels, budgets, investment, financing, subsidies, etc....)
- **Societal** Regulation (including user responsiveness, **human rights**, social solidarity, pro-poor, etc....)
- **Environmental** Regulation (including resource protection, maintenance of ecological diversity, ecosystems, etc....)

All of these issues are covered by the IWA Lisbon Charter. Whilst many of these dimensions of water regulation can be separated in this way, in reality most of them interact with each other. Few can be viewed independently of the others and in practice cannot be isolated from wider policies, laws, standards, norms and regulations in any given country.

Many of these issues, the interactions between them and the human rights to safe drinking water and sanitation are covered from a practical point of view in the [IWA publication “Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners”⁶](#). We commend this publication to the OHCHR, because it also addresses many of the questions raised in the enquiry.

4.3. Need for sector wide regulation

As a general rule, we and our Members advocate for water service regulations to be established at a national level and to be applied consistently across the sector to all actors and stakeholders. This encourages consistency, predictability and harmonised reporting, even when local conditions in individual operations may be significantly different from one another.

We have identified an exception to the above. This is in a situation where there is a single private operator working under a single contract for an entire country. In this case, the contract is with the central government and there is a state-owned asset owning company and a private operating company. This means that there are checks and balances in place, the contract is directly with the central government and for those reasons, in this exceptional case, regulation independent of the contract management seems to be of less relevance. This situation only works effectively because there is a coherent national water law and policy and regular and effective communication and coordination with the Minister responsible and between the asset and operating companies.

Conversely, we have observed a number of situations where there is a single state-owned company responsible for covering the entire country and where the absence of an independent sector regulator leads to difficulties, including political interference and lack of transparency. This is because one public authority finds it very difficult to regulate another.

⁶ <http://www.iwa-network.org/wp-content/uploads/2016/08/Manual-Human-Right-Water-Sanitation.pdf>

We are aware of a country where there are three completely different regulatory bodies for different parts of the sector, one covering large scale private operation in metropolitan areas, one for smaller private operators in local municipalities and a third that regulates public municipal operators. The standards of regulation applied by these different regulators are very different and inconsistent, with the least well-regulated being the public operators. This kind of confusion is to be avoided. A growing number of Water Districts entering into some form of Public Private Partnership (PPP) in this country has triggered a review of existing laws and regulations. However, currently the reviews are conducted in siloes (owing to the fragmented nature of the government agencies governing water) and there is no overarching framework that aligns these efforts. It is anticipated that without such alignment, the resulting reforms will be at best incomplete. As a consequence the delivery of good and reliable wastewater services is at risk, which effects the fulfilment of the human rights to safe drinking water and sanitation.

All of these observations support the general recommendation for consistent nationwide regulations and regulation that are applied to all parties involved in the same way.

4.4. Two operational 'modes' for Water Service Operators

For the purpose of this enquiry, it is important to recognise that Private Water Service Operators operate under two different and distinct operational modes. They are either asset owners and operators as in the U.K., Chile, and a substantial part of the USA. Here they are controlled by the Responsible Public Authorities and regulated through a **licence**. Elsewhere, they are contractors that operate all or part of a water supply or sanitation system and their relationship is controlled by the Public Authority through a **contract**. From the regulatory point of view, these are similar to state owned or corporatised public operators on one hand and direct municipal operation on the other. The former operate very much like asset owning private operators and should be regulated as such. The latter should be in position similar to a contract operator and regulated accordingly.

There are some practical differences in the way regulation is applied. It depends on whether the operator (public or private) is controlled through a licence or by a contract. Under the model that uses contracts, it is particularly important that the regulators' responsibilities and actions are not allowed to undermine or displace the contract management responsibilities of the public party to the contract. It is important that the implementation of the contract is carried out by the contracting parties and that the sector regulator monitors their joint compliance with the national standards and regulations.

4.5. Responsibilities of different actors in the water services value chain

A particular challenge in the delivery of water services is the number of different institutional elements that make up the "value chain". This potentially creates a large number of interfaces and difficulties in achieving optimal trade-offs between differing responsibilities and objectives. The value chain usually comprises: The Sovereign State (the duty bearer); one or more Responsible Public Authorities; a range of water service regulators; a regional or municipal public authority; a public, private or mixed water service operator; and the water service user. Each of these links has, or should have, specific duties and responsibilities that need to be met to achieve good quality human rights compliant water services.

4.6. Human rights impact assessments and human rights due diligence

Whilst we have not found any examples where formal human rights impact assessments have been conducted publicly by any operators (public, private, mixed or NGO), we are aware that on many projects some form of human rights due diligence is conducted by the operator. This is often done in conjunction with the local public authority. It may not be specifically referred to as human rights to diligence, but it's effectively the same thing within either the pre-contact due diligence or the periodic contract review.

4.7. Pro-poor and social solidarity approaches

Ensuring sustainable and affordable access to water and sanitation services for the whole population in its service area is one of the water service operator's missions, whether it is from the public or the private sector. To do so, operators have to develop appropriately adapted tools and methods that aim to reduce the impact of economic inequalities in terms of access to services and to avoid the phenomena of exclusions or stigmatisation.

In order to achieve full access to water and sanitation services for all people, special provisions and actions are needed to help poor, disadvantaged and marginalised people. In order to support all its customers that may be suffering from difficulties in accessing water services, private water operators can propose a large range of solutions to the Public Authorities. These solutions are designed to fit the specific situation of their customers.

These solutions are often the result of extensive development and practical experience in the field, which gives the opportunity for operators to share approaches that have worked in practice with the public authorities, communities concerned and other local stakeholders. In broad terms, these initiatives comprise either social tariffs or social support systems, and often a combination of both. Private operators often have special units in their operations to ensure that there is a focus of expertise on the challenges at the local level. However, it is important to stress that while all options, information and experience should be examined to adapt the best option to each case, the final decisions regarding the tariff structure, charging levels and support systems are in hands of the public authority. These must also be in compliance with national policy and regulations.

Some countries have developed versions of these proposals in their regulations. For example, in Brazil, all contracts with private sector involvement include a social tariff. The beneficiaries of these social tariffs, are generally the same people who are covered by programs of low income support promoted by the federal government.

4.8. Non-payments & cut-offs

In the context of providing sustainable water services to all, the problem of non-payment for services delivered is one of the most difficult challenges for both public authorities and their operators. Non-payment arises into different ways, for different reasons and that require different approaches. Non-payment also has a damaging effect on the ability to operate and extend the services to all users and therefore requires close attention by both the public authority and the public or private operator.

Non-payment that arises from financial difficulties faced by the end-user in question requires the understanding and support implied in 4.7 above. In these circumstances, disconnection from the services is of no useful purpose and would be against the principles of the human right to water.

On the other hand, people who can afford to pay but refused to do so, pose a direct burden on the service and have a negative impact on all of the other service users that impinges on their enjoyment of their rights. It should also be noted that voluntary non-payment by those who can afford to pay is not limited to households. It is also quite common that public institutions do not pay and the value of their bill can be very considerable with very serious implications for the sustainability of the service. In such cases, the sanction of disconnection from the services can be an effective incentive. For this reason, a total ban on all cut-offs can be counter-productive. The very significant sums of payments outstanding in some countries that have imposed blanket bans on all forms of cut-offs confirms this point.

The procedures for identifying and examining non-payment situations and for deciding if a support or a sanction procedure is appropriate need to be, and usually are, well defined and regulated by the public authority. Such procedures in themselves are costly. They also require careful coordination between the operator and the public authority or administration because each of these parties have a role to play, but their legitimacy is different.

5. Detailed Answers to OHCHR Questions

5.1. Question 1. Please describe the role and responsibilities of your organization in the water and sanitation sector.

AquaFed is an international association that represents non-states actors that are service operators. They deliver the part of the water wastewater and sanitation services that is entrusted to them by public authorities. In this role, AquaFed itself does not operate any services.

In the context of the Special Rapporteur's questionnaire, and the human rights to safe drinking and sanitation, we see our responsibilities as being:

- i) To assist our Members in their understanding and development of appropriate processes that help them to deliver human rights compliant public services on behalf of the communities and public authorities that engage them.
- ii) To provide information to the Special Rapporteur and OHCHR based on consultation with our wide range of Members working under different conditions in different parts of the world.
- iii) To provide information about water supply and sanitation services and the human rights to safe drinking water and sanitation to a wide range of stakeholders to help further the realisation of these rights and the long-term sustainability of human settlements.

5.2. Question 2. "How can a regulatory framework (e.g., legislative, institutional, policy) and bodies contribute to the realisation of the human rights to water and sanitation? Please provide examples."

A sound regulatory framework covering all the dimensions outlined in 4.2 above is an essential part of good water and sanitation governance. Such a framework is necessary to ensure the sustainable delivery of services in an equitable, economic and human rights compliant way to all people at all times.

An effective regulatory structure, equipped with well-trained people and operating good and transparent regulatory processes, assists all the parties involved to meet their objectives. It provides checks and balances that help to harmonise all interests and optimise the inevitable trade-offs that need to be made. It ensures that all parties comply with the laws, rules and regulations that are in place. It encourages monitoring and reporting that ensure the policies and service implementation are reviewed and adjusted as may be required.

Specifically, in relation to human rights to safe drinking water and sanitation, a regulatory structure that incorporates these rights can help to focus attention of policymakers, public administrations and service operators on ensuring that services are designed and implemented in order to achieve progressively full human rights compliance. It can also help to identify and overcome difficulties, particularly for disadvantaged people, by making their needs more visible and helping to prioritise appropriate solutions.

In practice, it is unlikely that all of the functions listed in 4.2 can be carried out by a single body. Different subjects require different kinds of expertise and need to be conducted at different geographical scales within each country. For example, setting drinking water quality standards in order to protect public health is likely to be done by the Ministry of Health (probably following international World Health Organisation guidelines). Analysis of water samples for compliance with those standards is likely to be done by an accredited national or regional laboratory (public or private) as well as by the water service provider itself (also public or private). Effluent discharge standards are likely to be set by a combination of Ministry of Environment and Ministry of Public Health. The analysis of the effluent and water samples are likely to be carried out in similar ways to those for drinking water.

AquaFed Members have commented that a regulatory framework can contribute to the realisation of human rights if it leads all parties in the value chain:

- to recognise the need for a cost recovery approach that allows the full recovery of all costs and includes appropriate targeted subsidy mechanisms as necessary
- to facilitate universal service standards (including, continuity of supply, water quality, pressure, etc.).
- to organise progressive expansion of public networks to all those who need access to them.

Another issue is to have full fiscal recognition of the investment programmes carried out by private operators.

Beside coordinating the actions and clarifying the roles and responsibilities between the public bodies in charge of ensuring a good water and sanitation services management, national laws and regulation can also foster implementation of the human rights to safe drinking and sanitation by facilitating and encouraging innovative measures. An example is the Brottes Law of 2013 in France, which authorised the implementation and testing of new social tariffs in water sector. The pilot phase, which ends in 2018, covers 50 municipalities, which are currently experimenting different types of pro-poor policies based on social criteria.

An interesting innovation in Brazil is the National Information System on Sanitation (SNIS), which, while still needing refinement, shows the deficits of each municipality in the country. This set of information enables the government to focus on reducing these deficits in order to work towards guaranteeing the human rights to safe drinking water.

5.3. Question 3. Are the contents and principles of the human rights to water and sanitation generally reflected in regulatory frameworks? How do you assess your country's regulatory framework in this regard? Please provide examples of other countries if available.

AquaFed's experience shows a variable picture. In some countries, the Rights to safe drinking water and sanitation have been explicitly transferred into national law and regulatory processes have been, or are being, set up to ensure the implementation of

these. Examples are South Africa or Bolivia, where the right to water is written directly in the constitution, thus providing a sound basis for national and general pro-poor policies.

In other countries, the Rights are implicit in laws and regulations. This is the case in Vietnam or Australia, where the human rights to safe drinking water and sanitation are not formally recognised as a constitutional right, but are partially recognised in laws. Most of the time only a part of the criteria of the human rights to safe drinking and sanitation are targeted (availability, affordability, non-discrimination etc.). In a few countries, the Rights are not recognised.

In a number of countries there is confusion between “water rights” and the human rights to safe drinking water and sanitation. The work of OHCHR and the special rapporteur are helping to clarify this and changes are being made in many countries to overcome this confusion and make the human rights obligations specific.

5.4. Question 4. Please provide examples of situations where the lack of regulation, or inadequate regulation, in the water and sanitation sector could potentially lead to, or has actually led to, violations of the human rights to water and sanitation.

AquaFed’s knowledge of specific violations of the human rights to safe drinking water and sanitation are very limited. Notwithstanding this, we have the following observations on this question.

5.4.1. Private water service operators’ positive contribution to human rights compliance

A private water services operator has the vocation to provide high quality compliant services to all service users in its service area. This means that irrespective of the specific or implicit recognition of the human rights, AquaFed Members aim to satisfy all the human rights performance criteria.

In the majority of countries there have been extensive regulations and standards in place for many years. However, many of these have been based on technical or public health criteria and have not necessarily recognised all dimensions of specific human rights criteria.

The work done by OHCHR on clarifying the normative content of the human rights to safe drinking water and sanitation, starting with General Comment 15 and continuing to the work of the current Special Rapporteur, has been very useful. This work helps and reinforces the central objective of universal good quality service delivery. It becomes even more positive when it is integrated into national law and supported by regulators using well-structured regulatory processes.

In practice a private operator is often contracted by a public authority to enter a non-performing utility with the specific objective of improving performance and overcoming service deficiencies and access backlogs. Depending on the stage of the project, the means allocated by the public authority and the rate of growth of the settlement in question, there

may be a proportion of the population that has its human rights to safe drinking and sanitation un-met, or only partially met, at a particular point in time. The principle of progressive implementation recognises this situation. The operator, together with the contractual client and other public authorities, usually work together to prioritise and plan work programmes necessary to achieve universal, compliant coverage in a structured way.

When the cooperation is good, the results can be achieved remarkably quickly. The example of Algiers where access to continuous 24/7 water supply was expanded from 8% of the population to 100% in 3 ½ years (see page 62 of the AquaFed performance brochure) and 150,000 households have been connected to the water network within five years.

Another example is from Brazil, where starting from the precarious state of many operations before being contracted to a private operator, positive results and improvements have appeared quickly thereafter. In the municipalities of Blumenau (SC), sewage treatment has been increased from less than 5% to 40% between 2010 and 2017. In the Lagos region of Rio de Janeiro, formed by the municipalities of Armação de Búzios, Arraial do Cabo, Cabo Frio, Iguaba Grande and São Pedro da Aldeia (RJ) and operated by Prolagos, treatment has progressed from virtually zero to 77% within 20 years.

In prioritising the delivery of access to water and sanitation to un-served or under-served areas, public authorities and regulators need to recognise the interdependence of parts of infrastructure and services on others. This means even though ‘affirmative action’ in favour of the most disadvantaged needs to be prioritised, it may be necessary to concentrate initially on improving the technical performance of the service in zones that are already served. As the example of Algiers shows, if water resources are inadequate to meet the needs of an unserved zone, the best prioritisation might be to concentrate on repairing and improving the existing infrastructure. In this way, improved network efficiency can yield water savings in an already served zone, so that the water saved is available to supply the new area. Similar action may be necessary to ensure that all the deficiencies that arise from intermittent supply are overcome and a 24/7 service is available.

5.4.2. Private operators’ role in overcoming public authorities conflict of objectives

In some cases, difficulties have arisen because the Public Authorities do not want certain districts, informal settlements or categories of population to be served and have instructed the operator not to do so. This presents a difficult, or even untenable, situation for any operator, and particularly for our Members, because it goes against the principles of progressive implementation, non-discrimination and affirmative action. On the other hand, for a private operator to attempt to serve people against the instructions given by the Public Authority, under the contract or license in which the operator is working, leads to a breach of the contract or terms of the operating licence.

In a number of such cases, Members have been able to negotiate with the public authority to find ways to work to provide services in spite of instructions of this kind. In some large projects, by aiming to extend the services to low-income areas that were not identified or even excluded in the contract, a private operator has achieved good results. For example,

in Buenos Aires, Aguas Argentinas provided 520.000 inhabitants of low-income areas not identified in the contract with water connections. This performance could have been higher still if there had been clear instructions coming from the public authority and a shared vision to support the action.

Whilst such approaches enable the operator to continue with the progressive implementation of water and sanitation service access, it makes it more difficult and may limit the quality of services that can be provided.

The risk of this kind of situation arising can be greatly reduced or even eliminated if the country in question has a clear policy on the human rights to safe drinking water and sanitation and a nationwide regulator that is enabled to enforce them.

The case of Morocco is an example where Member company operators were able to work with the government to transform a situation. At the beginning of the contract, illegal settlements were not recognised by the public authorities and were excluded from the service area. The joint effort and collaboration between the operator and the public authority led to a situation where the rights to safe drinking and sanitation are recognised and progressive implementation to these illegal settlements is now underway. (See the example of Tangiers on page 44 of the AquaFed performance brochure). In Casablanca, a project of Lydec, developed under the policy of the National Human Development Initiatives INMAE, has already provided 36.000 households in such settlements with water, sanitation, and energy services.

Another example is [Maynilad's Samahang Tubig Maynilad \(STM\)](#)⁷. This is a project to provide water to poor urban communities that solved the problems of affordability, accessibility, and safety of water through a model using water cooperatives. It started out as a CSR project but some STMs have become profitable and self-sustaining social enterprises for their member-households, which are mostly represented in the cooperatives by women. Note that this system has been in place even before the formal declaration of water as a human right. Without such a program, large populations of urban poor communities would not have access to piped water at an affordable (socialized) price and would have continued to buy untreated water from peddlers at a much higher price as they did before the contracts started.

5.4.3. Private operators stimulate the creation of effective regulation

Some countries have no specific water law or such laws are incomplete and only partially enforced. The advent of opening a country's water and wastewater service provision to private operators is often a stimulus to creating or strengthening water regulation.

Public operators may resist external regulation and public regulators find it difficult to enforce regulations on other public agencies ([link](#)).⁸ It is much easier for a public agency to

⁷ <http://www.mayniladwater.com.ph/company-csr.php>

⁸ Konisky, David and Teodoro, Manuel P., When Governments Regulate Governments (July 1, 2015). American Journal of Political Science, 2015, DOI: 10.1111/ajps.12221. Available at SSRN: <https://ssrn.com/abstract=2707741>

enforce regulation on, and to supervise private companies. This is expected and accepted by many stakeholders, but this kind of asymmetry has no reason to exist.

Our Members have observed the establishment of water sector regulations and the development of regulatory skills in countries where they have operations or where the introduction of the private sector is envisaged.

In practice, the experience gained through the interaction between private operators and regulators strengthens the regulators and improves the regulation that is applied to other types of operators as well. Staff of regulatory agencies gain practical experience from regulating private operators and also benefit from formalised training schemes put in place by public authorities to meet the regulators' needs. The advent of international networks of specialist regulators such as the [IWA International Regulators Forum](#)⁹ is a further demonstration of this effect.

5.4.4. Regulation, human rights and practical implications of external changes

Work programmes, service standards and therefore the regulations that apply to them, have to be adapted to changing circumstances imposed from beyond the water service itself. An interesting case to illustrate this is the impact of climate change in Chile.

The country has enjoyed 24/7 service coverage standards for more than a decade. However, in recent years, due to the "mega drought", there have been difficulties in ensuring continuous water supply in the rural sector. In Copiapó during the peak drought period there were interruptions of supply.

The central area of the Chile, which has the highest concentrations of population, is the one that all climate change models indicate is strongly impacted by decreases in precipitation and temperature increases. This introduces additional pressure on the sector to maintain the coverage (practically universal in the urban areas) and the levels of service achieved. This requires joint and coordinated action between all the public and private organisations involved in the service value chain.

5.5. Question 5. What are the main challenges or obstacles encountered when trying to incorporate contents and principles of the human rights to water and sanitation into regulatory frameworks?

AquaFed and its Members have seen little or no practical obstacles to incorporating the content and principles of the human rights to safe drinking water and sanitation in regulatory frameworks. We encourage states to set up nationwide independent regulation that applies right across the water sector and is implemented even-handedly to all parties involved in it.

⁹ <http://www.iwa-network.org/projects/water-policy-and-regulation/>

In our experience, the challenges arise when converting regulatory frameworks into regulatory action. This can be hampered by the lack of resources made available to the regulator.

Frequently, when trying to develop or apply a new rule, the funding conditions raise an issue. A good illustration was given recently in France, when the proposals for the Lesage law, which aimed to introduce an obligation for municipalities to improve the conditions of access of citizens to public sanitary facilities, was rejected by the Senate. The Senate argued that neither municipalities nor bottled water companies should have to pay for these installations.

5.6. Question 6. Please provide specific examples of good practices where a human rights-compliant regulatory framework has led to the progressive realisation of the human rights to water and sanitation.

The examples of South Africa, Bolivia and France already cited in this submission indicate the benefits of a good legal framework and positive impacts on the progressive realisation of the human rights to safe drinking and sanitation.

Another example of where recognition of human rights and continued concern for these rights can be seen in the Philippines. The SALINTUBIG project created under the Aquino administration was born out of a growing awareness and concern for basic human rights to safe drinking water and sanitation ([link](#)).¹⁰ It led to access to water for many people in previously un-serviced areas. Some of these water systems were eventually turned over to private operators as it was recognized they were the best suited to continue their operations.

Overall, the Philippines has made serious strides in the past two decades to recognize and provide for the basic human rights to safe drinking and sanitation. From the clean water act of 2004 to programs such as SALINTUBIG, more importance is being given to these rights, with special concern for women and children, disabled people, indigenous people, the poor, and other marginalized parts of society.

5.7. Question 7. Non-State actors have the responsibility to respect the human rights to water and sanitation and to exercise human rights due diligence in their operations. How should a regulatory framework reflect this responsibility? Please provide examples.

We do not believe that there should be any differentiation between operators when it comes to their responsibilities to respect human rights. Public operators and Non-State actors should be expected to perform to the same high standards. They should be directed controlled and regulated in exactly the same way by properly empowered and resourced public authorities to ensure that high quality, human rights compliant, services are provided to everybody.

¹⁰ <http://www.doh.gov.ph/provision-of-potable-water-program>

A regulatory framework can help by clearly establishing minimum service levels that must be satisfied in a "universal" way by every provider, regardless of ownership. It should also provide for the existence of channels of communication and information with service consumers and define expeditious and timely processes, with pre-defined response deadlines that are applicable to all operators.

For both practical and ethical reasons, operators, whether public or Non-State actors, should not be directly involved in all steps of the water supply and sanitation service delivery value chain (see section 4.5 above). There are clearly areas such as policy formation, policy objectives and targets, priority setting, administrative and regulatory supervision that must be conducted by a public authority. Non-State actors are not legitimate in these kinds of functions.

In the context of the human rights to safe drinking water and sanitation, a particularly sensitive topic is the identification or denomination of individuals who might be categorised as poor, disadvantaged or having special needs that require public solidarity, support or affirmative action. Non-State actors should be in a position to draw the attention of public authorities to people who may be in need of such support, but it is not legitimate for them to make a determination of any individual's status. However, once this has been done by the appropriate public authority, Non-State actors are able to implement the agreed support measures. We are aware of a number of instances where AquaFed Members have been able to work proactively with public authorities to develop appropriate procedures that respect these principles.

In many situations where public authorities operate services themselves "in-house", there are inherent conflicts of interest between the public governance responsibilities and the operational ones. This leads to lack of clarity and tensions that can easily spill over into actions that impair the exercise of human rights.

When political and administrative activities are clearly separated from the service delivery, Non-State actors should have exactly the same responsibilities and obligations as public operators. We believe that current human rights obligations and good practice already provide very good guidance as to what should be incorporated into a national regulatory framework.

To ensure non-state actors promote and respect the human rights to safe drinking and sanitation, the regulatory framework has to find a good balance between incentive and restrictive approaches. The Brottes law in France provided a very good illustration of this necessity. Firstly, it allows municipalities to develop social-tariff policies (by doing so softening the principle of non-discrimination of public services), which are a powerful tool to reduce economic inequalities and improve service affordability. But at the same time, the Brottes law prohibits all forms of water cut-offs, even for customers who have the capacity but not the willingness to pay their bill. Disconnection remains one of the most important tools to ensure payment-collection and therefore service quality. Primarily designed to ensure the human rights to safe drinking and sanitation for all, this measure turns out to be too restrictive and thus presents a real threat to the sustainability the whole service.

5.8. Question 8. Which model of regulatory mechanism would facilitate stronger compliance with human rights standards by service providers? Why? What are advantages and disadvantage of an independent and autonomous regulatory body?

As already indicated in this submission, AquaFed and its Members believe that as much independence and autonomy as possible should be given to any regulatory body. In particular, regulators need to be protected from short-term political pressures and political interference. Total independence and autonomy of the regulators from the state is an unrealistic illusion, but every step possible should be taken to ensure that the various regulatory bodies have the independence and autonomy to stand and work at a realistic arm's length from national and local politics and any other pressures or influences that can interfere with the due exercise of their responsibilities.

It is doubtful if a specific regulator on the human rights to safe drinking water and sanitation would be of significant benefit. It is probably more appropriate for the dimensions of all human rights, including water and sanitation, to be specifically included in the remit of the regulator that oversees societal and customer relation issues. This would keep the number of regulatory interfaces to a manageable number and therefore limit the risk of conflicting positions. As in many cases, the societal dimensions of regulation fall within the remit of an "economic" regulator, this also has the advantage of grouping one of the most difficult trade-offs that has to be faced, that of the tensions between the sustainable economics of service provision and the challenges of "affordable" charging systems, into the same remit. What seems to be important is that the country's institutional framework clearly allocates the duty of implementing each dimension of the human rights to safe drinking water and sanitation to a well-identified public authority or regulator. This is something that is still unclear in many countries.

5.9. Question 9. What mechanisms should be in place to ensure that the voice of persons and communities in vulnerable situations is heard and their needs are taken into consideration in the regulation of water and sanitation services? Please provide positive and negative examples.

In today's world, giving "voice" to all end-users is extremely important and not necessarily very easy to achieve. The process requires real and open two-way communication. However, many people are unwilling, unable, or uninterested in talking to, or listening to, their political leaders, political authorities, or water operators. Conversely these organisations are also often ill-equipped to overcome these communication challenges, particularly when they extend beyond their normal voter/customer relations activities. This difficulty is certainly extended to issues concerning human rights, which may be an area of engagement that is unfamiliar to many of those concerned.

The challenge becomes even greater when the communication and involvement must reach disadvantaged and marginalised people. Such people often do not have access to "classical" communication channels, do not have access to any form of media, do not receive a water bill and might be illiterate or speak a language that is not used or

recognised in the community in question. This means that while all the standard approaches to communication and engagement are essential, (identification, segmentation, targeting, etc.) additional measures may be needed.

AquaFed Members have tried a number of innovative approaches, often with the support of the local public authorities, community leaders and NGOs to achieve this. Experience shows that the solutions that work are very case specific and highly localised. This means that they are not easily replicable in other locations and difficult to specify in regulatory terms. In some locations, they have been very effective in ensuring that the voice and needs of vulnerable people are taken into account. In others, the results may not have been good enough to justify the very considerable efforts and resources required.

In some countries or contracts there is a regulatory mechanism whereby operators are fined in proportion to the number of customer complaints that have been handled unsatisfactorily or left unresolved. This creates a clear economic incentive for operators to seek out proper resolution of customer complaints, particularly when these concern the most vulnerable and marginalised (e.g. poor, minorities, etc.).

An example of where regulations have stimulated communications is in Brazil, where the regulatory framework set up by Brazil's Law 11445/2007 established a mechanism for the participation of the population through the municipal health and environment councils, in order to ensure social control.

5.10. Question 10. What measures could be envisaged in a regulatory framework to promote transparency and tackle corruption in the water and sanitation sector?

A regulatory framework should be designed and operated with the specific objectives of providing transparency and certainty within a rules-based system. There should be two levels/types of regulation which complement each other: one general anti-corruption framework, which makes all forms of corruption illegal, and another sector specific regulation which more directly steers behaviour in the sector.

Corruption can take various forms (bribes offered or received, extortion, influence, bias, abuse of powers, nepotism, etc.) all of which have potential negative impacts on the quality of services offered to all beneficiaries and to rights holders. For example, a common occurrence is for government operators to waive payments from politically-favoured customers, to the detriment of the other members of the community. Likewise, government and other public agencies often refuse to pay their bills to public and private water operators. This leads to inefficient collection (and financial management in general), which impairs the operator's capability to provide reliable water service to the entire the community.

Regulation has been described as a necessary approach to situations where rules or behaviour based on self-discipline of any of the parties involved in the system have been insufficient. In many ways, the most effective approach to overcoming corruption is installing a high level of integrity into all levels of the community and organisations within

it. Building integrity to fight corruption is the objective of the [Water Integrity Network \(WIN\)](#)¹¹.

Corruption is generally frowned upon in most societies, but moral deterrence must be supported by an unambiguous depiction of how corruption is counter-productive to achieving the goals of the human rights to safe drinking water and sanitation. Governments and sector organisations should explicitly state and describe how corruption in the water services sector adversely affects the quality, affordability, reliability and sustainability of service delivery.

A good regulatory framework and good, empowered regulators (both in the sense of having sufficient powers and having sufficient human capacity), provide transparency and are in themselves an important way to provide checks and balances that reduce substantially the risks of corruption. Public budgets and spending at all levels, rules for setting tariffs, procurement as well as staff appointment procedures, performance of utilities, handling of complaints all should be transparent. To be able to hold actors accountable, responsibilities of organisations and persons need to be clearly defined. A zero-tolerance regulatory mechanism should be in place that clearly sanctions any party or person who transgresses.

However, regulation on its own can lead to opportunities for abuse and regulators themselves can be corrupt.

To reduce this kind of risk, a regulatory framework should include provision for periodic audits of regulators activities and reports. It may also be beneficial for the framework to include provision for a multi-stakeholder watchdog organisation and a carefully structured whistle-blower procedure, including protection of whistle-blowers against potential retaliation.

¹¹ <http://www.waterintegritynetwork.net/>

6. Conclusions

Duty bearers, public authorities, operators of all kinds, rights holders and other stakeholders all share an interest in the effective outcome of the good regulation of water services and the human rights to safe drinking water and sanitation. Each have different roles to play and responsibilities to carry. Difficult trade-offs between their many interests may need to be made and these require careful political decisions and leadership.

An integrated regulatory framework, comprising adequate regulations and good regulation has a positive impact on the implementation of the human rights to safe drinking water and sanitation.

Regulations must cover a wide range of topics, which implies a careful integration of human rights issues with other disciplines covering social, technical, economic and environmental dimensions in a long term sustainable way.

There is a wide diversity of regulatory models. All of them can contribute positively to the human rights to safe drinking water and sanitation. In each case, the model adopted needs to be appropriate to country specific conditions and the range of service delivery models available.

Regulators need to have sufficient skills and resources to conduct their work impartially, effectively and transparently.

To be effective in promoting the human rights to safe drinking water and sanitation, a national regulatory model must regulate all types of operators (public, private, NGOs, etc.) without discrimination.