Ownership and Allocation of Water Rights

Summary

Water allocation regimes refer to the set of legal and policy instruments that determine which users are able to use water, how much, and for what purpose. A properly implemented water allocation regime prevents uncontrolled abstraction, which in turn, reduces the risk of running into water resource conflicts, over abstraction, and environmental depletion. This Tool defines the key terms related to water allocation regimes, discusses the two main approaches to determine water rights, and introduces customary water law.

Introducing Water Allocation Regimes

A water right is essentially a "a legal right to abstract and use a quantity of water from a natural source such as a river, stream or aquifer" (Hodgson, 2006). This entitlement provides the user with the right to water withdrawal, divided into two categories. First, it deals with a basic water right, acquired by people through primary legislation (incorporated in an act of legislature, i.e. the highest law making body or authority of the country, which states policies, principles, approaches and mechanisms, (Burchi, 2005)). Second, it deals with water rights acquired through an administrative process involving water allocation, such as permitting or licensing authorising particular uses of water.

Countries and societies around the world have developed their own practices for sharing and distribution available water resources. Since a water right entails a legal entitlement to divert, store, and regulate for any use extracting benefits for the user, water allocation regimes are often more advanced in regions where demand equals or exceeds proposition. Thus, these systems have developed historically and continue to change under climate or anthropogenic pressures.

Consequently, a water allocation regime entails for the entire regulatory framework around the distribution of present water resources, whether surface or underground, to valid requesters, conferring upon them an authorisation for certain water uses. This creates “water use rights”, usually administered by a public authority against a set of water allocation priorities (WWF, 2007) (Tool B1.01). The relationship between basic water rights and water use rights is reflected in Figure 1.

Image

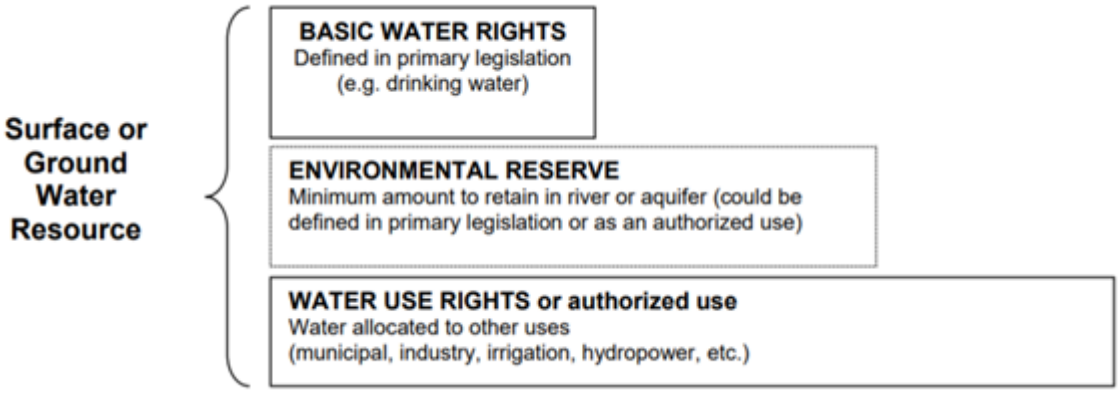

Figure 1. Water Rights and Water Use Rights (ADB, 2009).

Benefits of Water Allocation Regimes

Water allocation regimes confer direct benefits to prevent shortages and unauthorised abstractions (OECD, 2015). These regimes often aim to allocate resources considering traditional rights and minimum requirements stemming from human right to water (Tool A2.05). The outcomes of water allocation regimes depend on the initial allocation of water resources, i.e. distribution set by water rights, hence the initial allocation needs to follow such principles as beneficial use, equitable distribution and no significant harm to achieve maximum benefits in final allocation setup (ADB, 2009). Since access to water resource is subject to water use rights, an allocation regime also needs to have two key characteristics: a robust design to account for both regular and extreme conditions and a capacity to adjust in the future depending on changing conditions (OECD, 2015).

In order to address water scarcity, alternative water allocation models have been developed to model the potential negative impacts (Berbel et al, 2018), such as hydro-economic models based on the previously available modelling studies (IMPACT model, Rosegrant et al, 2002) and macroeconomic models referring to previous economic frameworks (Wittwer, 2012).

Approaches to Determining Water Rights

In water law, there has been two main approaches to determine water rights:

- **Water rights based on ownership of land:** in common law countries the legal doctrine privileged the owners of land bordering with water bodies and provided that a ‘riparian’ land owner was entitled to ordinary use of the water flow and any other reasonable uses unless it interfered with the rights of other riparians. These natural riparian rights could be supplemented by any water rights acquired from land tenure. The use of public waters, for water located next to public land could be utilised freely, unless there was some limitation such as to right of passage or land tenure defined by the government. This leads to the common law distinction between riparian and littoral rights, where former concern the rights of a landowner if their land is adjacent to navigable streams and owners, and the latter deal with legal use and enjoyment of the shoreline for land that borders non-flowing body of water like a pond, lake, or sea (Black’s Law Dictionary, 2021). Overlap of riparian and littoral rights could results in clashes between right to use of water for private landowners, hence reasonable use rule plays crucial role to

resolve potential interference with neighbouring landowner's rights (Bogart, 2009).

- **Water rights based on previous use:** one of responses to increasing competition among water users took place in the United States, where western states have adopted a 'prior appropriation' or 'first in use, first in right' doctrine, to accord an earlier user a superior right to water use (Hockaday and Ormerod, 2020). Such doctrine led to development of detailed administrative procedures for water allocation and permitting system, to ensure that earlier users enjoy their allocations without prejudice to the later user needs. The principles of prior appropriation doctrine include the following (Gopalakrishnan, 1973): 1) exclusive right is given to the original appropriator, and all following privileges are conditional upon precedent rights; 2) all privileges are conditional upon beneficial use; 3) water may be used on riparian lands or non-riparian lands (i.e. water may be used on the land next to the water source, or on land removed from the water source); 4) diversion is permitted, regardless of the shrinkage of the river or stream; 5) the privilege may be lost through non-use.

In modern jurisdictions water rights tend to be detached from the surrounding land, being subject to a number of requirements such as minimum flow, environmental impact assessment and importance of public interest prior to allocation. This enables decision-makers to take a rational decision about entitling users with substantial and secure rights, at the same time making sure their needs will be met in the future (Hodgson, 2006).

Customary Water Law

"Customary water law" refers to broad collection of water allocation rules and traditional practices used by indigenous communities (FAO, 2008). It comprises traditional law of indigenous people, based on established performative practice, generally oral than in written codes (Australian Law Dictionary, 1ed, 2010). Indigenous rights arising from traditional law include the right "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources" (Art.25, UN Declaration on the Rights of Indigenous People, 2007) and "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use" (Art.26.2, UN Declaration on the Rights of Indigenous People, 2007).

Several countries have started to acknowledge indigenous concepts of land ownership and common property within their official legal and policy frameworks related to water management. Here are practical experiences from countries that aim to recognise customary rights as part of their regulatory setup for water (FAO, 2008):

- **Argentina:** The Argentinian indigenous people have traditionally maintained a communal way of living and regarded resources located on their traditional ancestral land and water in general as sacred. When the traditional land has been taken in some parts, ancestral practices of water use were abandoned as a big part of lost cultural identity. Current constitutional regime upholds indigenous land rights by recognising legal personality of indigenous communities (Art.17, Sec.75, Constitution of the Argentine Nation 1994). These communities are entitled to all property on their land and have a right to participate in management of their natural resources. There is no specific recognition for customary water rights in the national or provincial laws but governmental bodies are required to account for third party interests when issuing water use permits, which could protect earlier right holders. One of important cases on contradictions between customary and statutory rights took place during the construction of Yacyreta hydroelectric dam in 1997 (Kornfeld, 2015), where the panel found that the government failed to engage indigenous communities in decision-making process on their ancestral lands. Another

landmark case took place in 2020, when the Inter-American Court of Human Rights found Argentina in violation of indigenous communities rights to communal land and consultation, condemning Argentina for disregarding its treaty commitments (Lhaka Honhat Association Argentina case, Judgment, IACHR, 2020).

- **Canada:** Most of applicable legislation focuses on land rather than water rights, combining the concepts of ownership and utilisation in court judgments and local regulations. The materials from Royal Commission on Aboriginal People (RCAP) suggest that the customary water rights included "unquestioned right of access" to communal resources for each community member, excluding a possibility of viewing water as a commodity (RCAP, 1996). Some of preserved dispute settling mechanisms reflected also the priority of non-consumptive use of resources. Current legislative framework recognised aboriginal rights which cover "an activity which must be an element of a practica or custom integral to the … aboriginal group claiming the right" (*v*. Van der Peet, 1996, 509). Indigenous groups were signatories to historic land treaties with the UK, which had specific provisions on water. Thus, aboriginal title indisputably includes water use rights within the land boundary. These rights have evolved from customary laws to constitutional recognition mainly through numerous legal precedents (f.e., James Bay project (Marsh, 2015), Saanichon Marina (Saanichton Marina Ltd. v. Claxton case, 1989) and Piikani (Phare, 2009) cases).
- **Ecuador:** customary rules considered water as a sacred communal resource, while most indigenous communities believed that water resources should be shared in a participatory manner. This included the right to participate in associations, which had membership fees for water users. Members also participate in "mingas", a communal labour event for infrastructure maintenance and a way to acquire and review the water rights, ensuring compliance with social commitments on member's side. The legal system nowadays recognises water as a national good for public use (Constitution of Ecuador, 2008; Wingfield et al. 2021), where individuals need a special authorisation for its use and even land rights do not confer ownership of surface or groundwater. Indigenous rights are compiled into statutes to clarify the rights and obligations of a particular group, however, conflicts over water uses appear quite often due to lack of common register for water licenses. The contradictions may be settled only if they arise among indigenous rights of the groups, but not if the indigenous rights conflict with statutory provisions. For example, Chevron-Texaco case (Donzinger, 2010) appears to be one of great examples of struggles to protect indigenous rights within a national legal system against global corporations.

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