1.1 Towards voluntary guidelines for people-centred land-water tenure – The untapped synergies between rights-based land and water governance

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Abstract

Water is absent in the 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of Food Security' (FAO, 2012). This paper explored whether and how the people-centred approaches and the human rights values that underpin this document can be better applied in the water sector and how more recognition of the land-water interface can support this. This is elaborated for participatory approaches in which people, especially the rural and peri-urban poor, better oversee the many interdependencies of natural resources and their multiple uses than the compartmentalised public sector. Further, human rights values are discussed for the development of land-bound water infrastructure, tracing the upcoming debates about a core minimum water service level that includes small-scale productive uses. Lastly, entitlements to land and to naturally available water resources are compared. While the water sector should replicate the current strong recognition of customary land rights to customary and informal water entitlements, an important difference is discussed as well: states are water regulators in a public interest. In this capacity, they should also to protect water entitlements by the vulnerable in negotiations about large-scale land-based investments through procedural and water prioritization arrangements.

Key words: Water tenure, human rights, voluntary guidelines,

Introduction

In the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), adopted in 2012, water is absent. Yet, water availability is a major determinant of land uses and vice versa (Madiodio and Cherlet, 2014). Secure access to sufficient water and protection against too much water are vital for agricultural land productivity, forestry, and fisheries. This land-water interface is particularly strong for an important target group of the VGGT and focus of this paper: poor rural and peri-urban women and men who depend in many ways on land and water resources for their agriculture-based diversified livelihoods. Depending without choice on risky settlement and livelihoods opportunities on tiny portions of land, they have hardly access to water infrastructure to store and convey water and to protect against inundation.

One reason why water could not be included in the VGGT is that the water sector has hardly addressed two key elements of the VGGT as yet (HLPE 2015). These elements are, first, the VGGT's inclusive people-centeredness and second and related to that its orientation towards human rights values, as also endorsed by the Sustainable Development Goals. Joint action of the professional land and water communities is particularly relevant to address these elements. In the next section, we explore why people, and their differences along class, gender and other social lines, have remained so invisible in the water sector and how people-centred approaches can become a vital bottom-up 'pull' for coordination of an otherwise compartmentalized public administrative sector. In sections three and four, we explore human rights values in the land-water interface for two aspects of resource tenure; with 'tenure' defined as people's relationships with each other with regard to the resource. Section three discusses the development of land-bound infrastructure (which 'increases the pie' of water resources available for human use), while section four focuses on water resource allocation (which 'divides an available pie').

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People-centred water tenure

Decentralization, participation, accountability and community-led development approaches have become prominent across the world. They are also central to the VGGT. These approaches operationalize procedural rights as a right on its own. However, they also catalyze coordination between administrative sectors. Coordination needs to be promoted from the top, but is also critically driven by issues on the ground and people's priorities. The latter *are* integrated, reflecting the real-life intersections between land, water and other natural resources and the socio-economic, political, cultural, historical opportunities and constraints for their sustainable multiple uses, productivity and multiple, interrelated dimensions of health and wealth created. This indivisibility of dimensions of wellbeing is well recognized in human rights frameworks. People-centered approaches pull the relevant public technical, institutional and financial support together to address real-life priority problems.

However, among water professionals, 'sectors' keep dominating any discourse, so people remain largely invisible. Discourses and decision-making keep being framed top-down in terms of monolithic sectors of one single water uses, either domestic uses, or irrigation, or fisheries, or around one single resource-related issue, either onservation, or productivity, or ecosystems, or water quality or water quantities. A 'nexus', which refers to two or more sectors may be slightly more 'issue-based' but still confirms the validity of 'sectors'. People remain single-dimensional users. Significantly, the terminology of 'water and people' *only* refers to people's domestic water needs. Similarly, the adoption of a human right to water (UN 2010) was an important step forward. This human right refers to service levels of infrastructure at, or close to homesteads that the state as duty bearer should support directly as public service provider or by promoting self-supply, or both. However, this human right to water is currently equally narrowly defined to domestic uses and sanitation only. However, the General Comment 15 of the Committee on Economic Social and Cultural Rights (UN 2003) does refer to productive water uses. It endorses a legitimate priority for domestic uses but *also* other priorities in particular for small-scale productive uses that contribute to the realization of food security. Yet, rights-based approaches in the many other domains than domestic water supply and sanitation are still piecemeal (WaterLex 2014).

Intra-sectoral differences between, for example large- and small-scale irrigators, which are at the heart of poverty, are ignored. Similarly, gender issues remain being framed according to stereotypes that women are natural care takers of households' unpaid domestic water chores. Most gender indicators are about women's labor in the Water, Sanitation and Hygiene sub-sector. In contrast, women's productive water uses continuously need to be justified, while men's productive water needs are taken for granted. Obviously, both women and men have domestic and productive water needs. And especially the poor need water for many uses through infrastructure development (next section). Also, allocation of and contests over water are not a struggle between abstract 'sectors' but between people, each with multiple water needs but different powers (see section four). Thus, a people-centred approach is not only a matter of inclusive and accountable participatory processes, but it also changes the core concepts in the discourse.

Human rights in land-water synergies in water infrastructure development

Water infrastructure brings water of the right quantity and quality to the right place at the right time. Investments in water infrastructure create hydraulic property rights to the water conveyed. The link between land-bound infrastructure and land tenure of both the infrastructure and the land-bound water uses has been addressed since long (FAO 2004). For example, secure land tenure is needed to reap the fruits of these longer-term infrastructure investments. Vice versa, such investments tend to strengthen land rights. Servitudes arrange rights for infrastructure to pass, or for people to pass land to access water sources.

Poverty and gender debates in public irrigation infrastructure investments without a localized land reform have focused on the purposive selection of poor people's and women's land for

irrigation improvement in cases. When irrigation development was accompanied by the expropriation of land and allocation of the newly developed irrigation plots, a pro-poor distributive land reform was sometimes pursued. Also, membership criteria for Water User Associations can prioritize the plot users, in particular the often more marginalized tenants or women, instead of those with the stronger entitlements to the land. However, in many cases, irrigation development exacerbated inequalities, disproportionately favouring those with more land or especially expropriating and marginalizing women as supposed 'housewives' and minors to the male head of household.

Moreover, public irrigation schemes only reach a minority of the poor, certainly in Sub-Saharan Africa. In contrast, a more holistic view on land uses shows that homestead land is most widely used for gardening, livestock and other productive uses, also by women, the landless, disabled and sick. Based on this fact, a rights-based approach to water infrastructure development expands the narrow interpretation of the human right to water as for domestic uses only. Currently, the determination of core minimum service levels is based on the assumption that water at homesteads is only used for domestic uses, leading to service levels of 25 or 50 litres per capita per day. Adding productive uses that contribute to the right to food raises such core minimum to service levels of 50 to 100 litres per capita per day. Out of this, only 5 litres per capita per day needs to be safe for drinking and cooking. Importantly, this prioritization of *both* domestic and productive uses also aligns with people's own priorities. Even at consumption levels of 20 litres per capita per day, three quarters of the households have been found to use water for productive uses (Hall et al 2013). Land reforms focusing on secure tenure of homesteads would also become more effective if they ensured such multiple-use water services as well.

Moving up from this people-centred and rights-based approach of infrastructure services at household-scale, a people-centred approach at village-scale or irrigated area- or watershed-scale would take people's multiple water needs at that scale as the starting point of planning and designing water services, aligning with spatial land uses and tenure arrangements. This participatory approach allows tapping local wisdom since time immemorial of managing the complexities of *integrated* land, water and other natural resources and socio-economic conditions. For example, villagers combine the multiple water sources, in relation to land uses, to enhance resilience. Also, when investing in infrastructure they seek to meet multiple water needs through multi-purpose infrastructure as the rule, and single-use infrastructure as the exception. This is considerably more cost-effective, but ignored in the single-use sub-sectors. Since the early 2000s, the Multiple-use water services (MUS) approach has been developed to build on these advantages and to mainstream this participatory approach across the compartmentalized sub-sectors (www.musgroup.net).

Human rights in land-water synergies in water resource allocation

As a result of growing population and increasing wealth and water demands, competition for water resources and the risks of pollution are growing. While water quality and pollution issues have received some attention as rights-based approaches, we focus here on the quantitative allocation of water volumes. During the dry season and dry spells, available water resources are increasingly insufficient to meet all water needs. In more and more basins and aquifers, especially in Asia and Latin America, there are no cost-effective options anymore to store and convey more water. Expansion of water use is only possible if water uses by others are reduced. Hence, entitlements to the resource (from which water is stored and conveyed) become increasingly contested. The poor who access water sources directly or have access to infrastructure that takes water from these sources are hit hardest and inequalities even widen. This is the case, for example, in South Africa. Here, the distribution of water use in rural areas is extremely skewed: 1.2 percent of the population uses 95 percent of the water withdrawals. This equals a Gini coefficient of the distribution of water uses of 0.99 (Cullis and Van Koppen, 2008). Although water policies in South Africa formally envisage a distributive water reform (DWS, 2013a), the inequalities in allocation of newly developed water resources are just

continuing (DWS, 2013b). Obviously, a distributive water reform is even more contested than timely equal water development would have been.

In other basins, especially in Sub-Saharan Africa, more land can still be taken into production and water resources are still abundantly available for storage development and expanded use. The problem here is 'economic water scarcity' in the sense of lack of technical, financial and institutional resources to develop water infrastructure. This relative availability of land and water resources attracts medium- and large-scale investors in the so-called 'land grabs', an issue that receives much attention in the VGGT. The implications for the 'water grabbing' and rapidly growing inequalities have received limited attention as yet. These growing threats warrant more coordination in land and water governance in general and in the negotiations around these resource 'grabs' in particular.

One aspect of these negotiations regards the legal regimes that govern the allocation of water resources, which are fugitive and less land-bound than infrastructure. These regimes are plural and may even implicitly include foreign investment treaties (Cotula, 2015). The dominant statutory water law is that of permit systems, especially in Latin America and Africa. This centralized titling system has the same colonial origins as the received land laws, primarily justifying dispossession of prior rights. Permit systems are rooted in Roman water law, one of the oldest water laws, and served to declare water resources in conquered areas as ownership of the rulers, from the Roman emperor, to European civil-law colonizers in Latin America and Africa, to the independent states. Permits primarily imposed control by rulers and their favoured allies (Van Koppen et al., 2014).

The VGGT's strong call to recognize informal or customary land tenure entails important lessons for the water sector. For land tenure, half a century of trial and error learnt that the rapid formalization of customary land rights into statutory centralized titling is impossible. Customary rights have now widely been recognized as the basis for the development of any new tenure arrangements, for example for more gender equality and more participatory governance arrangements conforming to constitutional rights. However, the water sector risks reinventing precisely that wheel. Statutory permit systems with centralized titling are still widely promoted as the only existing and the most appropriate 'modern' water law that gives strongest water tenure security. If customary and other water allocation regimes are recognized at all, those other legal systems have immediately to be converted into permit systems.

In contemporary permit systems, the state is the owner or custodian of all nation's water resources. Any water user either needs to apply for a permit or needs to be exempted from such obligation. Micro- and small-scale water users, typically including poor people, are treated unfairly in permit systems. Micro water uses are exempted from the obligation to apply for a permit. However, the legal status of an exempted water user is second-class compared to permit holders. For small-scale users who have to apply for a permit, the transaction costs are disproportionately high in comparison to the benefits derived from water. Women are particularly marginalized as permits tend to be written in men's names. In some permit systems, for example in Kenya, a formal land title is required as a condition for a permit, formally excluding the large majority of water users on customary land from the opportunity to obtain first-class water entitlements. These weaknesses are exacerbated by under-sourced states' lack the resources for the lengthy processing of permit applications by hundreds of thousands, if not millions of small users. Nevertheless, without a permit, their water uses are declared as unlawful. Moreover, the link between taxation and water entitlements is especially detrimental for small-scale water users. Water resource managers become very dependent on the taxes paid by the users, especially when pricing is volume-based. Such taxation instils a perverse notion that only those who can pay are entitled to water, and reinforces rent-seeking tendencies by an under-sources state. Hence, a similar recognition, respect and protection of customary rights as for land tenure is warranted.

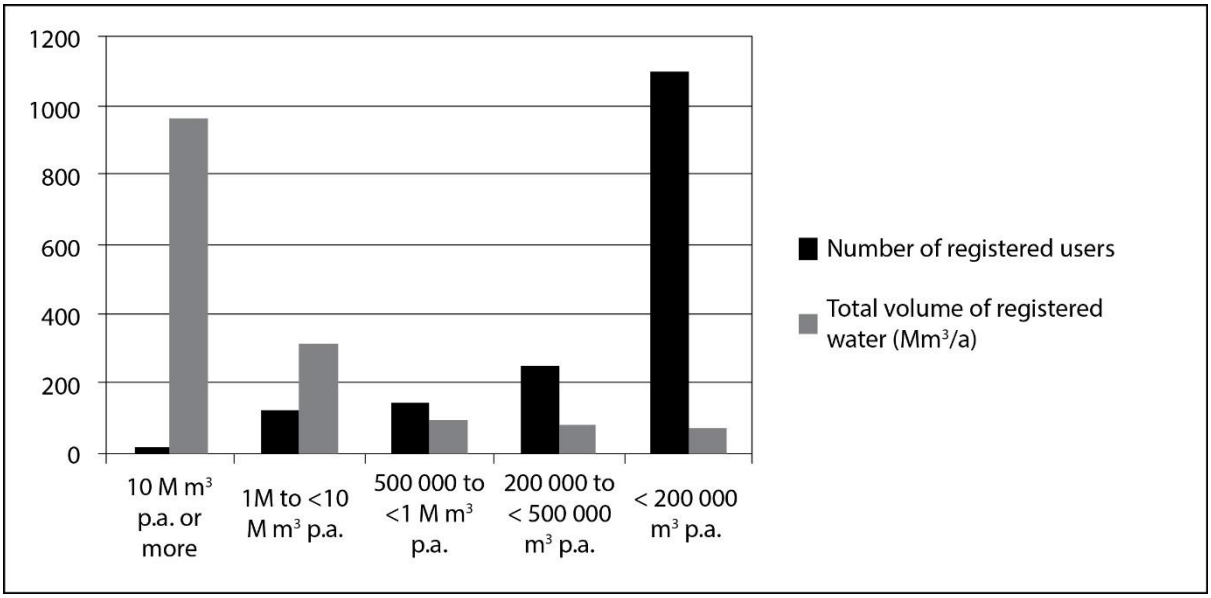
The question is which legal modalities can be designed to ensure such rights-based respect and protection of poor people's often informal (future) water uses. Here, a basic difference with land

tenure is that permit systems are *also* meant to enable the state to regulate water uses. Conditions tied to permits are the vehicle for the state to allocate water and regulate a user, for example by rejecting an application for a permit altogether or by setting caps on volumes of water uses permitted; prescribing waste discharge conditions and environmental requirements; and most recently: paying taxes to the state (or basin office) to enable public water resource management. Such regulation of the non-poor is even indispensable to respect and protect water uses by the poor. State ownership of water resources *in order to* implement such regulatory and protective role in a public interest is widely accepted. Thus, the question for rights-based regulation, also in the case of large-scale land-based investments, becomes *how* the state implements its regulatory role. This boils down to the question about the two sides of the coin: is a permit primarily designed as a long-term entitlement without major (enforceable) conditions with an aim to give security to the permit holder whatever other people's water needs? Or is a permit a short-term authorization of water use, under strict (enforceable) conditions in a public interest that can be redefined whenever public interests change?

To answer this question from a tenure security perspective, administrative permits as the only way to obtain lawful water entitlements tend to treat the poor unfairly, as mentioned. While favouring the resource rights of settlers and allies during colonization, permits for tenure security now tend to favour the national and foreign administration-proficient. Filling a form gives first-class entitlements (clauses in any water law stipulate that a permit is no state guarantee that water is available, though). As water is a shared resource, this negatively affects those without permits, typically the marginalized and women.

Therefore, in order to respect and protect poor (and others') people's water entitlements, permits need to be designed to regulate, instead of privilege those whose water uses need to be regulated quantitatively and qualitatively. Equitable distribution implies that over-use by some needs to be regulated in order to allow others to access clean water. In the case of large-scale land-based investments, therefore, permits are the vehicle to negotiate shared benefits, for example by ensuring investors' construction of sufficient new storage and sharing water stored and conveyed with communities losing their land rights.

It is needed and revealing, but still very rare, to assess the quantitative aspects of this discussion. Figure 1 illustrates how disproportionate the administrative efforts of just even registration are, let alone the legal procedures to move from an administrative registration to a legally binding permit. Based on the data of the Department of Water and Sanitation about registered water uses in the South African part of the Inkomati basin, the figure tracks the number of registrations (so transaction costs) for the volume of water registered from large-scale to small-scale users (the smallest use of 200,000 m3 per year equals some 25 ha irrigated land). This shows the futility from a water resource management perspective to aim at registering and permitting even small-scale water users. Moreover, these administrative efforts divert from effective reinforcement of conditions set.



• Figure 1 Volumes of water registered by number of registered users in Inkomati Water Management Area. *Source:* WARMS data; Schreiner *et al.*, 2010.

Another major difference with land tenure legislation is that prioritization in sharing arrangements plays a strong role in water resource allocation. In statutory permit systems sector-thinking persists; prioritization is a matter of rudimentarily ranking sectors. Domestic water uses are usually the priority, and agriculture, municipal uses, industry, or the environment follow in a certain order. Ecuador is probably the only country in the world that distinguishes intra-sectoral differences between smallholder irrigation for basic livelihoods and large-scale export-oriented irrigated agriculture, prioritizing the first.

This prioritization may, or may not be followed in issuing new permits, while it is often unclear how priorities hold among existing permit holders and those exempted under seasonal fluctuations.

People and rights-based prioritization of water uses can be a valid legal tool to vest entitlements in a bottom-up manner to respect and protect water uses that contribute to basic domestic and productive water uses that contribute to the right to water and food and adequate standard of living. While regulating the high-impact users in a public interest through conditions tied to well-targeted permits, poor water users are empowered to defend their entitlements vis-à-vis the non-poor. One criterion to set the threshold for such priority uses is administrative justice and fair treatment in the sense that the state prioritizes all those water users those whose water uses are too small to be meaningfully obliged to apply for a permit. Instead of declaring their uses as unlawful or relegating them to the second-class status of being exempted, their water uses become a priority use with a stroke of the pen. Such prioritization contributes to more equitable distribution of water, even in the case when this is a re-distribution.

An example of the above is the priority General Authorization for black women and men, as debated (but not adopted) in South Africa. The National Water Resource Strategy – second edition (DWS, 2013) in South Africa is remarkable in allocating a higher priority to 'water for poverty eradication and redressing inequities from the past' than to 'strategic uses' (mainly coal-fired electricity generation) and to regular permit holders. Only the Reserve and international obligations have a higher priority. (The Reserve includes a Basic Human Needs Reserve so water resources that are used to meet the basic human need reserve (set at 25 litres per capita per day, which is about one percent of the Mean Annual Runoff) and the Ecological Reserve (set at about one fifth of the total Mean Annual Runoff)). Further, in addition to micro-scale uses exempted from the obligation to apply for a permit, the National Water Act (1998) also has the option to issue a General Authorization for small-scale uses with a certain

threshold for specific water sources or groups of users. By vesting this high priority in General Authorizations for black small-scale water uses, the problem of the second-class status of exempted uses is legally overcome (Van Koppen and Schreiner, 2014).

Clearly, much more debate and identification and implementation of promising solutions are needed with regard to normative systems of water allocation, both from above and from below. For the latter, women's and men's own priorities emerge in participatory processes that build on a thorough understanding of existing water tenure and that ensure transparent negotiations with public and private outsiders for prior voluntary and informed consent with regard to water infrastructure development and allocation as integrated part of all natural resources.

Conclusion

The values of people-centred human rights of the VGGT can equally hold for responsible governance of water tenure. Future inclusion of water in the VGGT will ensure that this vital natural resource for other resources' productivity or degradation is considered. We showed how the land-water interface renders participatory processes more meaningful as people oversee their multiple needs of multiple inter-related natural resources and prioritize next steps within this complexity. However, a people-centred approach and inclusion of water in the VGGT also warrant conceptual changes in the water sector especially to better respect, support and fulfil small-scale productive water uses. Monolithic sectoral discourses have to change, recognizing that people, especially marginalized groups depending on agriculture have multiple water needs. We discussed how people should especially be central in two aspects of this specific resource.

First, in water infrastructure development to all sites of domestic and productive water uses, land and water are clearly connected. Especially a right to water service delivery to homesteads for multiple uses would contribute to realizing the right to food and respect the priorities of marginalized and vulnerable women and men, well beyond the minority who benefits from irrigation schemes. This core minimum right to water would be double or triple core minimums set for domestic water uses alone.

Second, in the allocation of water volumes, sites and land titles play a role, but the water resources from which infrastructure holders take water are a fugitive, variable, unpredictable and shared resource. Here, the land-water interface is relevant as it allows comparing the increasingly dominant statutory water law of permit systems with centralized land titling of customary land tenure. The latter has proven to fail and customary land tenure is increasingly respected. Customary or informal water law needs to be equally respected and protected as, also in the VGGT. At the same time, there are important differences. As owner of water resources, the state keeps a much stronger role in regulation of water quality and quantity in a public interest than the state has for land tenure. In this regulatory role the state should not only leverage respect and protection of core minimum water resource entitlements of the vulnerable in participatory and transparent negotiations with large-scale investors in land and water. In addition to this procedural support 'from below', legal tools 'from above' should strengthen the case, for example priority General Authorizations or other priority exemptions and rigorous permit conditions for large-scale investors and enforcement of the conditions.

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