NAST Legislative Forum on Water Transfers
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Water, the State and Fundamentals

Water is a good which is vital to human life. It is an economic good because its production and distribution carry a cost; a common good for which non-state, local collective arrangements are necessary to govern its use and maintenance (Biswas and Seetharam 2008, 164); and a public good in that its provisioning require some form of state subsidy to ensure access by all. Water is not a free good and its continued availability is subject to environmental constraints such as seasonality, scarcity and overall condition of the watershed. With respect to policy and institutional arrangements on water, the following are generally accepted as normative goals: ensuring access to the poor; reliable; quality water to the largest number of users; resource maintenance to ensure its future availability; and provision at the minimum cost (Nayar 2013).

In the Philippines, the governance of water is premised on a legal framework which gives the state exclusive property rights to the resource. The state owns all water, surface and ground, within the Philippine territory but grants usufruct rights to utilize, develop and appropriate the resource to individuals and groups/collectives. For domestic use, usufruct rights are given through water permits which are issued by the National Water Resources Board (NWRB), government concessions or by legislation (e.g. for water works and water districts). Unlike the agriculture sector (water for irrigation) which is dominated by a singular state agency (National Irrigation Administration), a diverse set of domestic water providers— water districts, local government-run water works systems, water cooperatives, private water concessionaires and enterprises— comprise the sector, each varying in size of operations and coverage area. Permits specify among other things the volume of water that can be abstracted at a given price which is set by the NWRB. Water permits can be leased, transferred, modified, reduced, suspended, revoked or cancelled. Concessions likewise lay out the terms for coverage and pricing for its holders, and are also subject to similar actions as water permits. Under the principle of subsidiarity, the management, supervision and monitoring of water resources is devolved from the national agencies to the lowest level agencies or local governments. Catchment or basin-based formations (e.g. Laguna Lake Development Authority or the Tigum-Aganan Watershed Management Board) are also given the remit to collectively solve problems.

The state has an array of laws and institutions which establishes the "rules of the game" including sectoral prioritisation (i.e. priorities for use between sectors (agriculture, domestic, energy generation, etc.) and concomitant reallocation during times of water scarcity; direct participation as investor in water development projects (dams) and provisioning at subsided price through GOCCs and LGU internal revenue allotment financed schemes; and regulation of private sector participation in the domestic water market (Dukhovny, Mirzaev & Sokoloveds 2008, 23). In line with decentralisation push in the 1990s, local governments have taken stronger interest in their subsidiary role with respect to water, coming up with their own codes/laws that articulate management imperatives towards watershed protection, anti-water pollution and conservation within their administrative boundary. Since the 1990s, the government has also allowed the privatisation of water districts and in a recent Supreme Court decision (Adala case), private water competitors to water districts within the same coverage area. However, the government's presumed role in the lease and transfer of water permits is as yet unclear, as is in water pricing beyond cost recovery. The price of water at the tap is premised on volumetric pricing indicated in the water permit and distribution cost, but do not impute the cost of resource maintenance, scarcity nor the opportunity cost arising from prioritisation for domestic use and food security (Challen 2002, 8). Neither the NWRMB, subsidiary local

government units or user-administering authorities have a mandate for science-based expertise on the water supply or the biophysical characteristics of surface water flow and ground water deposition.

Why water transfer is controversial

Water transfer refers to the physical transfer of water resources, both surface and ground, for domestic use from one locality to another.[1] The transfer is effected through a contract between parties in the form of bulk water sale: private water permit holders and water districts; LGU and private water enterprises; water districts and LGUs. It allows water-scarce communities to meet demands for domestic water by tapping excess resource from water-rich communities. It also allows supply augmentation to water districts or private water concessionaires faced with rising demand brought about by rapid urban expansion in their coverage area.

In practice, water transfers generate conflicts. Water permits are granted by the NWRB but do not require public disclosure nor prior consultation with riparian communities or with communities where the ground water is abstracted. The transfer or lease of water permits similarly are not subject to the same requirements of transparency and accountability. Water districts do not possess a priori claim over supply that lie within the administrative jurisdiction of a local government authority. LGUs who see themselves as subsidiary state agents can create legislative or administrative hurdles to prevent water districts from extracting water for distribution in areas outside its jurisdiction. LGU-run water works (NAWASA) and water districts, meanwhile, are presumed able to transact freely with neighbouring towns to sell excess water. Deep wells for domestic water use are also supposedly permit-based but the subsidiary local government tasked to monitor the number of wells neither keep tabs of how many permits have been issued or the combined drawdown on the aquifer. Permits granted by the NWRB impute surface water flows which are not based on science-based information on the biophysical characteristics of the watershed.

Two cases illustrate the tensions arising from lack of policy clarity on water transfers. In Majayjay, Laguna, a spring water-rich community, concerned citizens field a graft case against the local government officials in 2011 for irregularities in the 50-year bulk water contract (with 50 year automatic renewal) granted to a private water enterprise. The mayor, vice mayor and town councillor were found guilty by the Office of the Ombudsman for extending unwarranted benefits, preference and advantage to Israel Builders Development Corporation despite the company's lack of experience in water systems development. The lack of public consultation on the terms of the contract, including granting the private firm grossly favourable revenue share (90%) and right of first refusal to alternative water developers were the main concerns.

In July 2014, the Court of Appeals issued a Temporary Environmental Protection Order against PTKO H2O corporation's plan to extract 50,000 cubic meters per day on four rivers in Cavite to supply the growing needs of Tagaytay City. The NWRB issued said a water permit to PTKO H2O but the court ruled in favour of the petitioners' (a citizen/s advocacy group from the affected Cavite towns) argument that such extraction will compromise the health of the watershed and result in much lowered surface water flow for use by the other riparian Cavite towns.

These two cases point to an urgent concern that as cities expand and attract more development, these growth comes with rising domestic water demand and pressure for water actors to seek

[1] In the academic literature, surface water transfers are examined at the transboundary level— that is, across riparian states. Concerns such as conflict in uses; over utilisation/ misuse; high demand due to increased population; and gaps in policy, plans and practices between countries can be also be seen at the scale of subnational entities. Law and institutions as found in treaties and agreements are argued to shape the behaviour of resource users and user administering authorities in each country. The prescriptions for expertise mobilization and a domestic governmental infrastructure that promotes cooperation and collaboration are likewise applicable. (Kliot, Shmueli and Shamir 2001, 239)

supply augmentation from geographically proximate sources through bulk water contracts or by purchase/transfer/lease of NWRB water permits for surface water extraction. The need for orderly contracting for bulk water and for market trade of permits based on formal rules; an institutional infrastructure for science-based information on all watersheds behind water permit issuance; and a dedicated platform for settling water conflicts are legislative gaps which must be addressed. In addition, vetting of water permits and contracts through public consultation in affected communities must be built into the process to ensure transparency and accountability. Towards this end, we propose the following: (1) the creation of an academe-based Water Resource Center to provide technical assistance to the NWRB on surface water flow and aquifer status metrics in all Philippine watersheds; (2) a dedicated and more robust platform for water conflict resolution that tackles cases between private parties and government agencies as well as water districts; (3) more investment towards educating water actors particularly at the local level on formal rules regarding contracting for bulk water sale and market trade of water permits; (4) requirement for public consultation of affected communities prior to the issuance of water permits or the conclusion of a bulk water contract.

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