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Property, legal pluralism, and water rights: the critical analysis of water governance and the politics of recognizing “local” rights

Dik Roth*, Rutgerd Boelensb,c,d,e,f and Margreet Zwarteveeng,h

aSociology of Development and Change Group, Wageningen University, Wageningen, The Netherlands; bDepartment of Geography, Planning and International Development and CEDLA, University of Amsterdam, Amsterdam, The Netherlands; cDepartment of Environmental Sciences, Wageningen University, Wageningen, The Netherlands; dDepartment of Social Sciences, Catholic University of Peru, Lima, Peru; eDepartment of Agricultural Sciences, Central University Ecuador, Quito, Ecuador; fAlianza Justicia Hídrica/Water Justice Alliance; gIntegrated Water Systems and Governance Department, UNESCO-IHE Institute for Water Education, Delft, The Netherlands; hGovernance and Inclusive Development Group, Department of Human Geography, Planning and International Development, Faculty of Social and Behavioural Sciences, University of Amsterdam, Amsterdam, The Netherlands

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In this paper we assess the impact of Franz von Benda-Beckmann’s work in the field of water rights. We argue that his contributions to understanding water, a field dominated by engineers and economists, cannot be overestimated. Over the years, Franz’s nuanced and empathic anthropological attitude, his suspicion of universals, and his critical stance towards mainstream development thinking have developed into a rich conceptual repertoire for understanding how norms, rules, and laws co-shape water flows to produce highly uneven waterscapes. His ideas have been particularly influential in re-thinking water as property, opening up for investigation the relation between “the legal” and human behaviour through a layered conceptualization of property. There is now increasing recognition of the idea that water use situations are often governed by a plurality of rules, norms, and laws that come from different sources. The impact of such insights on engineering-dominated water studies is growing. Indeed, law and notions of legal pluralism are increasingly mobilized for the purpose of better regulation of water. The instrumental use of legal pluralism may, however, result in a watering down of descriptive-analytical concepts. These concepts may thus lose their analytical power and become linked to the very forms of identity-based politics, neoliberal ideologies, and modernist-legalist interventions that critical legal pluralism studies intend to challenge.

Keywords: irrigation; law; legal pluralism; property; water control; water rights; water governance

Introduction

Although an explicit interest in water rights came relatively late in Franz von Benda-Beckmann’s career, his contributions to the field have been crucial both in terms of theoretical advancement as well as policy advice and inspiration for social activism. He was not the first to focus on existing systems of water rights and to propose conceptualizing water, land, and infrastructure as property. Nor was he unique in his focus on the often problematic interactions between existing rights and norms on the one hand and newly imposed rules imported through state interventions and development programmes on the
other. We nevertheless argue in this article that his specific analytical lens yielded a
refined imagery for grasping complex water-society dynamics.

Given his overall critical engagement with the role of law in policies and processes of
development, it was almost inevitable that Franz would also develop an interest in water.
Water has always been prominent on development cooperation agendas, with a large per-
centage of aid budgets being allocated to investments in water infrastructure. At the same
time, large-scale water projects were particularly controversial because of how they impacted
societies and ecologies. These controversies became manifest partly through struggles about
water rights and authority: in re-defining or generating new ways of regulating and control-
ling land and water, water development interventions typically entailed the disruption of
existing land and water rights systems, sometimes causing the failure of projects. Yet, and
perhaps more than in any other professional field, “water resources development” was (and,
to some extent, still is) dominated by economic and technical forms of scientific expertise
that have little regard and respect for existing ways of managing and allocating land and
water. Instead, dominant forms of professional thinking about water almost per definition
qualify these as “backward” and in need of improvement. Water was thus a particularly rele-
vant area of attention for someone like Franz von Benda-Beckmann, as it brought together
the questions of power, poverty, and development that he was interested in.

In this article we discuss what we consider the most important merits of his work on
water rights: his analysis of water, land and infrastructure as “property”; the way he
opened up for investigation the relation between “the legal” and human behaviour
through his layered conceptualization of property; and his efforts to increase recognition
and acceptance for the idea that actual water use situations are often governed by a plural-
ity of rules, norms, and laws. Though still relatively limited, the impact of these ideas on
the mainly engineering-driven field of water studies has been steadily growing. Yet, this
comes with its own challenges. First, the mobilization of notions of legal pluralism for
instrumental purposes of (globalizing) water governance policies may cause dangerous
simplifications. Rather than protecting existing rule systems, such instrumental incorpo-
ration of customary and local law into national and transnational legal orders often
implies subjecting them to existing normative hierarchies. Second, the recognition of
existing rights’ systems into higher legal orders is full of ambivalences, raising difficult
questions of power, legitimacy, and self-determination on the one hand, and of (re-)distri-
bution on the other. The bottom line is that translating academic understandings of legally
plural water situations into new water policies, institutions, or interventions can become a
process of “rendering technical” (Li 2007; see Joy et al. 2014), through and in which
deeply political choices become or are made invisible.

This article is structured as follows: in the next section we trace the emergence of
attention to water rights. We show how Franz von Benda-Beckmann’s contributions to
this field are clearly coloured by the academic environment of Wageningen University,
where he was based during a significant period of his career. Next, we discuss his contribu-
tions to the analysis of water rights. These contributions are characterized by his desire
for precision and nuance, as by his deep-rooted suspicion of simple universal “truths”.
We first outline the legal-anthropological approach to property regimes and relations in
legally plural contexts as applied to water rights; second, we discuss his perspective on
water rights in relation to globalizing debates about the human right to water; third, we
summarize his views on the challenges of translating academic understandings of legally
plural situations into policies and laws: the “politics of recognition.” Finally, we discuss
two future challenges for critical legal anthropological studies of water rights: the increas-
ingly instrumental use of the concept of legal pluralism; and the incorporation of local
rights systems into higher legal orders.
Emerging attention to water rights

The “discovery” of water rights in farmer-managed irrigation systems

Franz von Benda-Beckmann’s growing scientific interest in water rights in irrigation was a timely one. Both in scientific and policy circles, professional dealings with irrigation had long been (until the 1980s) the preserve of economists, planners, and engineers. Water development projects and interventions, often rooted in colonial engineering efforts, were an intrinsic part of development strategies for increasing agricultural production. These found expression in the “modernization” of existing “traditional” irrigation systems and in the expansion of state-built and state-operated systems. “Traditional” irrigation systems and managerial practices were regarded as backward and requiring external intervention by engineers to make them more productive. In these strategies for irrigation development, existing water rights were not seen as important. Water, formally claimed and controlled by the state, was just one input for agricultural production among many others. Its capture, transport, allocation, and delivery to farmers were regarded as technical matters to be dealt with by engineers (see e.g. Zwarteveen 2006).

In the 1980s, the modernization mode of water development started to run up against limits in two ways. First, serious management and performance problems in large state-operated systems fed a growing interest in more participatory forms of irrigation management and in lessons to be learned from “farmer-managed irrigation systems” (FMIS) (Coward and Levine 1987; Chambers 1988). Second, these FMIS themselves had come under increasing pressure because of the donor-funded modernization drive, resulting in conflicts between existing forms of organization and externally introduced changes in water rights, irrigation infrastructure, and management at various system levels (see e.g. Diemer and Huibers 1996). Both the renewed attention to FMIS as a source of irrigation knowledge and the conflicts caused by intervention in such systems stimulated more in-depth research on existing forms of irrigation organization, technology, and water rights. Organizations like FAO, IWMI, IFPRI, and the Ford Foundation became interested in and subsequently funded FMIS research in several countries (see e.g. Bruns and Meinzen-Dick 2000). Though this sometimes happened in a way that simplified and idealized “local knowledge”, “community”, and “tradition” (Zwarteveen 2006), it also stimulated more serious scientific attention to water rights. One of these initiatives, a Ford Foundation-funded research and training project on water rights in India and Nepal, provided Franz and his colleagues in the Netherlands and abroad with an opportunity to develop their approaches to understanding water rights, after having been involved earlier in work on Indonesian FMIS.2

The Wageningen environment: actor-oriented sociology and socio-technical approach

The academic environment of Wageningen University, where Franz held the chair on “non-western” Agrarian Law in the 1980s and 1990s, was very conducive for the critical analysis of development processes from a socio-legal perspective. The actor-oriented sociology that marked Wageningen social sciences of the time provided a powerful approach for the analysis of development policies and interventions. It criticized teleological notions of evolutionary progress, and questioned linear assumptions about the relation between policies and outcomes. Rather than conceptualizing and explaining development primarily from the perspective of project planners and implementers, the approach proposed treating people involved in processes of development as knowledgeable and capable actors, thus allowing for a serious consideration of their actions, skills,
concerns, and indeed power and agency (Long and van der Ploeg 1989; Long 1992). The concept of the “interface” focused research attention to the negotiations and bargaining that happen when outside development interventions “hit the ground”. An “interface” is “a critical point of intersection or linkage between different social systems, fields or levels of social order where structural discontinuities, based upon differences of normative value and social interest, are most likely to be found” (Long 1989, 1–2).

Franz von Benda-Beckman fruitfully engaged with and enriched these Wageningen perspectives on development by linking them to his own insights from the anthropology of law. He thus engaged with topics like rural development, interventions in land tenure systems, and social security, always constructively critical of policy processes and their normative agendas.3 Perhaps one of his most lucid and well-argued publications in this regard is “Scapegoat and Magic Charm” (von Benda-Beckmann 1989). Largely based on his work in Indonesia, he applied his view of law as “desired situation projected into the future” (1989, 129) to state-village interactions in development interventions. Rather than blaming law as “scapegoat” or hailing it as “magic charm”, he stressed the need to better understand the everyday use of law by villagers, researchers, and bureaucrats in specific interaction settings. For him, such understanding was a precondition for any intervention. His criticism was more specifically directed at socio-legal engineering efforts to change property regimes on the basis of normative futures that treat local property systems as a hindrance to development. Through detailed empirical studies and sound theoretical argumentation, he demonstrated that such approaches disregard the complexity of existing property regimes and relations, fail to recognize legal plurality, and simplify the role of human agency in re-interpreting and translating development interventions, laws, and management plans. This was to become the main point of entry for his scientific engagement with water rights.

In his work on water, Franz von Benda-Beckmann collaborated closely with the Wageningen water sciences, and more specifically with the Irrigation and Water Engineering Group. From the 1980s onwards, this group developed a socio-technical approach to irrigation development.4 This interdisciplinary approach to water control combined actor-oriented interface analyses with insights from Science and Technology Studies to critically interrogate engineers and irrigation artefacts (Diemer and Slabbers 1992; van der Zaag 1992; Diemer and Huibers 1996; Kloezen and Mollinga 1992; Mollinga and Bolding 1996; see Mollinga 2003). Its focus on contestations around design and technology opened the door to exploring the role of contrasting definitions of water rights among key social actors like farmers, engineers, development projects, and bureaucrats. This in turn facilitated questioning the relation between specific water rights regimes and social or gender equity (e.g. Boelens and Dávila 1998; Zwarteveen 1997; Boelens and Hoogen-dam 2002), providing a valuable point of entry for legal anthropological work on irrigation and water rights (e.g. Spiertz 2000; Roth 2005, 2009).

A property focus on water: hydraulic property and common property

**Embedded water rights in irrigation: hydraulic property**

Though rather marginal in an engineering-dominated world, there was some attention to property rights in irrigation also before the 1990s. Coward’s seminal work on “hydraulic property” deserves particular mention here (Coward 1986; Coward and Levine 1987). While studying FMIS, Coward noted how the management and organization of irrigation systems happened through interconnected sets of rules about responsibilities and rights
that are often part of larger institutions (e.g. Coward 1980). In his analysis he developed a particular sensitivity to how these rules are partly established, arranged, and enacted through irrigation infrastructure (weirs, canals, division works). He coined the concept of “hydraulic property” to denote how people establish and maintain rights to use the irrigation system (and the water that it conveys) through their investments of labour, materials, and capital in construction and maintenance (Coward 1986). The concept made it possible to understand irrigation development as a property-creating process, as “investments to create irrigation facilities always create, or rearrange, property relationships with regard to those new facilities” (1986, 498). In other words, Coward helped see and identify material property creation as a process that also creates social property relationships (Gerbrandy and Hoogendam 1996; Mollinga 2013).

Next to linking system management to the rights and obligations of system users, he drew attention to the importance of culturally existing and embedded norms and principles as determinants of water control. His work also helped create awareness of how normative dimensions are interwoven with the organizational and technical-infrastructural dimensions of irrigation systems, and illustrated how well-functioning irrigation systems co-evolve with and are part of specific socio-cultural and natural environments (Boelens and Vos 2014).

**Neo-institutional approaches and common property**

Although Coward’s work was ground-breaking and original, scientific thinking around common property and common pool resources (e.g. Ostrom 1990, 1992) was much more influential in the academic and policy debates. The work of Ostrom in particular raised and helped increase scientific and policy interest in the working of institutions for the effective and sustainable management of natural resources. Perhaps the most important contribution of the work of Ostrom lies in her refutation of Hardin’s (1968) “Tragedy of the Commons”; through her attention to common property she convincingly showed that people can and do collaborate for the sake of a collective long-term goal, even when this seems to run counter to their short-term “rational” interests. In doing so, she also provided an important inspiration for thinking beyond market or state solutions to problems of natural resources management.5 The work of Ostrom and her followers yielded a diversified and empirically rich picture of property regimes (Feeny et al. 1990). Through the “bundles of rights” metaphor, it also raised awareness of how rights to and control over resources come in shades and degrees. This metaphor helps distinguish between rights of access, withdrawal, management, exclusion, and alienation (Ostrom and Schlager 1996), showing how such rights are different, yet often related. Ostrom’s consistent theorization of property as a social relationship has yielded important refinements to the conceptual approach for examining natural resource management institutions (Bromley 1992; see Roth, Boelens, and Zwarteveen 2005).

Notwithstanding these contributions, the work by Ostrom and other commons scholars has also been criticized. Some scholars, for instance, raised concern about how, in borrowing from neo-institutional economics and game theoretical approaches to “collective action” (Agrawal 2003; Hann 2014). Ostrom’s ideas rely on and help promote particular social-evolutionary theories of adaptive change. Also, Ostrom’s strong pre-occupation with “getting the rules right”, mainly inspired by the drive to create conditions and cost–benefit incentives for sustainable commons management, has given birth to a rather instrumental and implicitly normative focus on “crafting institutions” following “design principles” (Ostrom 1992, 1993). This focus has alienated Ostrom from those social
anthropologists and political ecologists interested in acknowledging the diversity and plurality of locally embedded management and governance arrangements that emerge under specific socio-natural conditions. For Hann (2014, 67) an understanding of natural resource management institutions starts not with “anonymous individuals with a job to do (the implementation of sanctions) in a culture-free world of the kind imagined by Hardin and Hobbes” but with social persons situated in a specific socio-cultural context.

The reasons for the popularity of Ostrom’s work in policy circles and its relative lack of popularity among critical social anthropologists and political ecologists are probably the same: Ostrom’s analyses are attractive for making society seem amenable to forms of social engineering, moulding it into desired institutional formats. This instrumental applicability, however, has a strong depoliticizing effect, disavowing important questions about equity, exclusion, resource politics, and power relations (e.g. Poteete, Janssen, and Ostrom 2010). According to Hann (2014, 67) “Ostrom claims to open up the black box but, as with other neo-institutionalists, her elaborate framework can equally be seen as another somewhat opaque Western-produced wrapping paper which leaves the box itself unopened”.

A nuanced understanding of water rights
Franz von Benda-Beckmann’s contributions to thinking about water (von Benda-Beckmann 2007; von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996, 1997, 1998) display a high degree of continuity with themes developed from his dissertation onwards: property rights, legal pluralism, relations between legal systems (especially between state law and customary law), and the complex forms of hybridization that are the product of interactions between legal systems. His work on water mainly consists of the systematic application of legal anthropological theory to the analysis of water rights, policies, and interventions.

In line with the work of his Wageningen sociology colleagues interested in understanding what happens in development project contexts when actors (re-)interpret and (re-)negotiate things and ideas that come “from outside” (Long 2001), Franz von Benda-Beckmann focused in particular on the analysis of those instances in which different models, norms, and standards come together, often creating frictions and clashes, but also sometimes leading to productive interferences. While drawing on the already mentioned Wageningen socio-technical approach, he moved beyond its “social shaping of technology” emphasis and implicit identification with engineers to create more understanding on how the dynamics of irrigation interventions are also shaped by the arrangements of local water users, governments, and third parties for distributing, operating, and maintaining water.

Here, there is a clear parallel between Franz von Benda-Beckmann’s work and Ostrom’s common property studies. Yet, the former developed a greater theoretical sensitivity to the contestations, struggles, and exclusions that form an intrinsic part of the changes in property relations entailed in irrigation development. While motivated by the wish to contribute to progressive social change, his analyses were also much less optimistic about the possibilities of designing institutions for sustainable use and management. Franz clearly hoped that more and better recognition of existing rights systems would yield new entry-points for empowering those communities whose existence and livelihoods are endangered by infrastructural projects or market development. Yet, he acknowledged the contingently dynamic nature of development processes and was deeply conscious of the limitations of law and the legal in transforming prevailing social inequity...
and relations of power. He nonetheless searched for theoretical opportunities to understand the role of law, property rights, and legal pluralism in co-shaping the options of different groups of people to stake claims to water. It is here that Franz von Benda Beckmann’s work has contributed to the study of irrigation management and water rights (see e.g. von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996).

A legal anthropological approach to property applied to water rights

Franz von Benda Beckmann’s work on water rights, though coming relatively late as a topic in his work, forms part of an analytically consistent scientific agenda on law, property, and legal pluralism.7 A major ambition of this agenda was to develop the instruments for a truly comparative analysis of property regimes and relations across time, culture, and place. As he has argued in much of his work (e.g. von Benda-Beckmann 1995, 1997; von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996; von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006), for such an analysis, property thinking needs to be stripped of its ideological and economic biases and influences, while retaining a sharp focus on water rights’ embeddedness in historical and cultural contexts (see e.g. von Benda-Beckmann and von Benda-Beckmann 2006, 1999).

Franz’ analytical approach contained three crucial ingredients: a broad conceptualization of law as including both cognitive and normative conceptions of the world; a recognition of the values and valuations that give meaning to property beyond the economic; and the theoretical possibility of legal pluralism (e.g. von Benda-Beckmann 1997, 2002; see this special issue). Defining property, in a general sense, as being about “the organization and legitimation of rights and obligations with respect to goods that are regarded as valuable” (von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006, 2), allowed for the decomposition of property relations as three basic elements: the holders of rights and obligations (social units); the construction of valuables (e.g. natural resources like water) as property objects; and the “bundles” of rights and obligations that these units can hold with respect to property objects (von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006; see also Ostrom and Schlager 1996).

Following the broad conceptualization of property, and as part of a desire to question and unravel rather than assume the linkages between laws and human behaviour, Franz von Benda-Beckmann and his colleagues introduced the idea of property relations as “layers of social organization” (see von Benda-Beckmann and von Benda-Beckmann 1999; von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006). This allowed him to distinguish between cultural-ideological notions of property, legal-institutional frameworks for regulating and controlling it, and the everyday social practices and negotiations through which property obtains significance. Property relationships manifest themselves differently at and through all these layers. The interrelationships between the layers cannot be assumed, but need to be the topic of further investigation (see earlier; see von Benda-Beckmann and von Benda-Beckmann 1999). A basic distinction in this respect is that between “categorical” and “concretized” property relations. Whereas in the former “general [legal-institutional] categories of property relations are constructed” (von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006, 16), the latter concerns the ways in which these categorical relations “find expression at the layer of actual social relationships between actual property-holders with respect to concrete valuables” (19).

This theoretical approach to property, with its broad conceptualization of law and property and explicit attention to legal pluralism, has importantly stimulated the analysis of water rights, water conflicts, and the complex interactions between different water
ontologies, rights frameworks, uses, and forms of management (see e.g. Bruns and Meinzen-Dick 2000; Boelens and Hoogendam 2002; Roth, Boelens and Zwarteveen 2005; Boelens, Getches, and Guevara-Gil 2010). Boelens and Zwarteveen (2002) have developed the idea of property rights to water in terms of layers of social organization into a distinction between “reference rights”, “activated rights”, and “materialized rights”, more or less corresponding to the distinction between categorical rights and concretized rights. While reference rights resemble categorical rights, activated rights refer to “the process of transforming reference rights into operational rules and procedures for water distribution” (2002, 80), such as water distribution schedules. Finally, materialized rights refer to “the actual water use and distribution practices, and to the actual decision-making processes about these practices” (2002, 80). The analysis of bundles of rights and obligations pertaining to water, land, and infrastructure has also proven very useful for the analysis of legal complexity in irrigation management settings (see e.g. Roth 2005, 2009).

The human right to water

Franz von Benda-Beckmann’s thinking about water rights was characterized by a determination to seek the particularities and nuances of a situation on the basis of empirical research and in-depth analysis. This yielded a rich understanding of what laws and legal rules can or cannot “do” in everyday practice, an understanding that he often invoked to critically rethink supposedly universal concepts and proposals. A good example hereof is the discussion about water as a human right. In a publication about this topic, F. von Benda-Beckmann and K. von Benda-Beckmann (2003) discuss the drawbacks, difficulties, and dangers of reconceptualizing water rights as an abstracted, globally defined human right. They explain that having a categorical acceptance of a human right to water is not enough to guarantee equitable or fair access. The implications and impacts of redefining water as a human right depend on the multiple sources, functions, meanings, and uses of water, as well as on the legally complex and often competing governance arrangements to regulate and control it.

While acknowledging the potential strengths of the human right to water argument, and sharing the hopes of NGOs and activist groups that framing water as a human right will help solve water-related inequalities and exclusions, the authors warn against an excessive faith in law’s capacity to create societal order and solve societal problems of access, distribution, and power (see von Benda-Beckmann, von Benda-Beckmann, and Eckert 2009). In addition they argue, first, that introducing a universally defined human right to water changes the character of water rights; and, second, that the establishment of such a “universal” right may create new (globalized) forms of legal complexity that do not necessarily support less powerful user groups. As to the first argument, universal rights tend to be defined as the allocation of quantities (and quality) of the resource to individuals or households, with prioritized uses like drinking water and sanitation. This makes them very different from existing water rights, which often consist of complexes of historically developed and socially embedded entitlements and obligations that encompass much more than just the right to a quantity of water.

As to the second argument, from a legal pluralism perspective, the introduction of a human right to water can be understood as the addition of yet another layer of legal complexity. As argued in earlier work (e.g. von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996), legal systems do not simply replace each other in time, but form complexly interacting layers. The human right to water is no exception. According to the
authors, the addition of yet another definition of water rights may cause conflict or unexpected interferences with existing property regimes. States fulfilling their obligations related to the human right to water may, for instance, start intervening in existing water property regimes, changing and possibly marginalizing existing water institutions and use practices in the process. The water literature tends to overlook such points, because it confuses normative stances about water rights with the diverse ways in which water *is* and *can* actually be governed. Thus, Barlow (2007, 164) states that “water is not a commercial good … but rather a human right and a public trust.” This statement confuses normative notions of ideal categorical rights with the actual social relationships and practices through which legitimate access to water is (to be) realized, often under conditions of legal plurality (von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996; see Bruns and Meinzen-Dick 2000; Roth, Boelens, and Zwarteveen 2005).

With the likelihood that the human right to water becomes legally binding, a wave of scholarly thinking is being devoted to the topic (see Sultana and Loftus 2012a). Much of this literature is more sensitive to the complexities of water rights, even though the possible impacts of considering water a human right remains a big question mark. According to Sultana and Loftus (2012b, 2), the right to water “risks becoming an empty signifier used by both political progressives and conservatives who are brought together within a shallow post-political consensus that actually does little to effect real change in water governance.” Bakker (2007, 2010) is particularly critical of the individual bias of “rights talk” like in the human right to water. She argues that, contrary to the hopes of many activists, such an individual focus actually makes a human right to water perfectly compatible with the (neo-)liberal ideological points of departure of private sector-based water provision.

Although raising useful queries, few scholars appear to grasp the distinction between using the concepts of property and water rights as an analytical lens on the one hand, and a regulatory tool on the other. Sultana and Loftus (2012b, 14, note 3), to give just one example, seem to associate a “water rights” discourse mainly with “an economistic/legalistic focus on contractual obligations, concessions, property rights and water markets.” In the same vein, Staddon, Appleby, and Grant (2012, 67) contrast the “‘water as property’ paradigm” with a “‘water as commons’ paradigm”, a contrast that erroneously suggests that “the commons” is not a form of property. Even in the critical literature the absence of a more explicit recognition of and attention to legal pluralism in relation to water rights is striking.

**Whose rights? What to recognize?**

A second example of the value of Franz von Benda-Beckmann’s nuanced understanding of (water) rights stems from how his approach to the question of recognition: how to recognize existing legal systems and associated definitions of water rights? As discussed above, Franz von Benda-Beckmann was critical of interventionist approaches to development that overlook existing forms of resource management and normative-legal systems. However, in his view, idealization of customary law or communities is not the right response. Rather than reproducing the dichotomies that often guide and legitimize development interventions, such as modern-traditional or local-global, his analyses of everyday practices of using and sharing water revealed that these dichotomies, rather than reflecting experiences and practices of water users, reflect the conceptual maps and ideologies of researchers. As a critical and socially engaged anthropologist he sympathized with those whose rights to natural resources like land and water risk becoming marginalized.
However, he did not believe that such marginalization itself qualified legal systems as better or more true. He was in favour of a more agnostic approach, anchoring an understanding of customary property systems in the everyday practices and negotiations through which they obtain meaning. This implied undoing property of its many ideological biases and justifications, including the idealization of tradition, community, or customary legal systems (von Benda-Beckmann 1995; von Benda-Beckmann, von Benda-Beckmann, and Wiber 2006).

The analysis proposed by Franz von Benda-Beckmann entailed a symmetric treatment of different sources of law and rules. His position on law and legal pluralism implied accepting “non-state” (e.g. customary) legal systems as a fact of life: irrespective of whether policy-makers like them or not, and regardless of whether states recognize them or not, analysis requires acknowledging that systems and sources of norms and laws need not be formalized or institutionalized by the state to matter. Indeed, rather than a priori positing state-created hierarchies of legal systems as superior, he anchored the investigation of the legal in tracing its meanings and material effects in people’s everyday dealings with and struggles over water.

This focus also explains why Franz von Benda-Beckmann disputed the existence of “pure” customary systems. He argued that the plurality of legal systems creates legal “hybrids”, new forms of “local law” that do not fit the neat dichotomous categories of “state” versus “customary” systems. He also warned against romanticizing “customary law”, as existing normative systems may themselves be hierarchical, discriminatory or otherwise inequitable or unjust. Wary of ideological and idealistic assumptions about tradition, local knowledge, or community values, he made a strong plea for analyses to be guided by empathic objectivity in which the very use of such dichotomies needs to be critically investigated (von Benda-Beckmann 1997; von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996, 1998). In addition, to gauge what customary systems are and do, Franz von Benda-Beckmann argued that attention should not be confined to the everyday practices through which rules and norms become manifest. Instead, they need to be linked to the ideological and categorical layers of property (see above). Local water rights and identities are shaped not in blissful isolation; they are not folkloric practices, but come about and have evolved through conscious confrontations and meaningful communications among plural legal systems (von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996, 84–85). Aiming for a nuanced understanding, Franz has stressed the importance of applying a layered analysis of property relations not only to state legal systems but to all legal systems involved.

Franz von Benda-Beckmann’s contribution to the question whether and how to recognize customary rights, discussed extensively in von Benda-Beckmann, von Benda-Beckmann, and Spiertz (1998, 2006), starts with questioning the often-held assumption that state recognition of local rights systems is desirable. Accepting the need for state recognition implies accepting a state-determined hierarchical ranking of legal systems. In such rankings “other normative orders have a lower conceptual status per definition; they are ‘only’ social rules, or informal rules. They can only be ‘upgraded’ into law if recognized by and under the conditions of state law or international law” (von Benda-Beckmann 2001, 48). Franz von Benda-Beckmann thus drew attention to the fact that legal recognition implies the distinction between a “recognizing party” and a “party being recognized”; there is, indeed, a politics to recognition. He proposed for researchers to deal with the politics of recognition by including questions of how plurality is socially and politically ordered. Rather than implicitly adopting the ranking of state law, or proposing an own way to categorize and order rights systems, Franz suggested that it is the task of
research to unravel how existing, official legal structures produce and are part of social and normative orders. The question of recognition, then, becomes a question of whether and how plurality is to be or can be embedded in political and legal hierarchies, based on power structures that establish faculties and properties of “recognizers” and “recognized”.

Doing this allows acknowledging that recognition is a strategic concept that may either support or frustrate local rights struggles, and either challenge or reinforce domination and normalization practices. It draws analytical attention to the intrinsic tensions and dilemmas between state-defined rights (oriented towards generality) and local water rights systems (oriented towards particularity). Institutionalizing and formalizing dynamic local water rights repertoires may render them unsuitable to address particular water rights contexts. As Franz von Benda-Beckmann made clear throughout his work, local socio-legal repertoires make sense only in their own, dynamic, particular contexts, while national laws demand stability and continuity. How to avoid “fossilizing” local and indigenous rights systems when they become recognized in static, universalistic national legislation? How to avoid assimilation and marginalization of local rights frameworks when these are legally recognized? How to avoid a situation in which only those “customary” or “indigenous” principles that fit into state legislation are recognized, while others are silenced? Recognition of local water rights often means that such rights are curtailed by state- or donor-imposed restrictions (von Benda-Beckmann, von Benda-Beckmann, and Spiertz1998; Boelens 2014; Roth, Boelens, and Zwarteveen 2005).

Analytical attention to the politics of recognition brings to the fore the question of how to give room and flexibility to diverse local water rights and management systems, without weakening marginalized water user collectives’ vis-à-vis powerful outsiders. It also draws attention to internal inequalities or abuses of power: the gender, class, ethnic, and other injustices that may form part of customary and indigenous socio-legal frameworks and practices (Perreault 2014). This is important, as criticism of universalistic approaches should not lead to an equally simplistic reification of local rights systems; a critical analysis of power relations should apply both to customary as to official rights systems (von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1998; Zwarteveen, Ahmed, and Gautam 2012). As state laws are challenged by representatives of local communities by referring to “their own” traditional socio-legal systems (Guevara-Gil 2010; Roth 2014), it becomes clear that the question which rules and principles are to be considered (most) legitimate is itself an intrinsic part of struggles over water. It is this question that is central to the kind of analysis that Franz von Benda-Beckmann proposed (von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996; see Perreault 2008; Vos and Boelens 2014).

Glocalizing water governance

A third and recent example of the strength of Franz von Benda-Beckmann’s work comes from “Rules of Law and Laws of Ruling” by von Benda-Beckmann, von Benda-Beckmann, and Eckert (2009). In this volume, Franz von Benda-Beckmann and his colleagues elaborate on the paradoxical juncture of deregulation and juridification occurring in the current era of globalization. While in the 1980s the state was largely dismantled, it made an ironic come-back as a prominent centre of rule-making on the waves of the global trend of “good governance”. A growing number of non-state governance actors (international donors, banks, transnational companies, NGO networks) and the steady proliferation of international laws, global conventions, and transnational trade and market regulations that accompany the globalizing political economy, all ask for a renewed,
functionalist state in which to “anchor” their “good governance” objectives. The paradox of a proclaimed devolution of state powers and responsibilities to non-state actors on the one hand, and a juridification and re-regulation through central state administrations on the other, is also witnessed in the water world (Bauer 2004; Hendriks 2010; Terhorst, Olivera, and Dwinell 2013). Franz von Benda-Beckmann’s careful legal anthropological analytical repertoire is well suited for dissecting the processes at stake.

Rather than “governance beyond government”, contemporary water policies and interventions increasingly happen through processes of (transnational) governance in which (national) governments become increasingly responsible for governing (local) water flows and water users (see e.g. GWP 2000; Holden and Thobani 1999; World Bank, 2012). Rather than simply eroding former state sovereignty and its rule-making monopoly in water, transnational policy agents and international legal systems, by aligning national water bureaucracies to transnational norms, interests, and institutions, gain new and often additional powers and legitimacy (Swyngedouw 2009). As Franz von Benda-Beckmann, von Benda-Beckmann, and Eckert (2009, 7) posit:

“The emphasis on de-juridification and the presumed weakening of state power masks processes whereby state bureaucracies capture governance powers that previously have not been within their ambit. So while state sovereignty is increasingly challenged by the international legal system, at the same time state governments assume controlling and surveillance powers, imposing restrictions on the rights of citizens or peoples that are unprecedented in recent legal history.”

In many regions of the world, decentralization of water governance entails a process of re-distributing and strengthening the state’s controlling powers at lower governmental echelons, on the pretext of “freeing” water for the extractive interests of transnational mining, agribusiness, or hydropower companies and national elites (Baviskar 2007; Bebbington, Humphreys Bebbington, and Bury 2010; Venot and Clement 2013).

This “glocalization” of water affairs (Swyngedouw 2004, 2009), based on new national-transnational configurations and global–local interactions, involves the introduction of new legal norms and procedures for “designing” water rights and institutions for “efficient” and “rational” use. For the sake of making international marketing of communal or public water resources or management services possible, these new norms and procedures aim to discipline local water users into “proper” water use behaviour. This is justified by referring to the global water crisis and new water security and securitization paradigms (Allan 2006; Joshi 2015). Hence, state agents, in collaboration with private companies, frame new rules, rights, obligations, and sanctions to re-organize watersheds or keep local water user groups in the straight, using a vocabulary of global threats like terrorism or climate change. Local water users protesting against this encroachment of their water rights are often illegalized and criminalized (Boelens, Guevara-Gil, and Panfichi 2009; Meehan 2013).

Challenges: instrumentalization and incorporation

The instrumentalization of legal pluralism

The transnationalization of water governance is accompanied by the redesign of political, economic, and social institutions as well as transnational legal engineering. This entails what could be called a “fetishization of law”: “a process whereby the law is objectified,
ascribed a life-force of its own, and attributed the capacity to configure a world of relations in its own image” (Comaroff and Comaroff 2009, 33). Faith in the powers of law is not restricted to government agents and non-state actors (such as NGOs, banks, transnational companies) that have an interest in ordering societies and flows of water. Oppositional movements (such as indigenous groups, farmers’ federations, citizen platforms) also increasingly turn to law to legitimize their claims. This is demonstrated, for instance, in the battle cries for “achieving access to justice”.

This faith in formal justice brings with it a narrow academic focus on “the legal”, with scholars examining, judging, and engineering water rights rather than seriously considering the pros and cons of the multiplicity of local water rights repertoires (see von Benda-Beckmann 2001, 2006, 2007). Water law and rights are viewed as instruments to “engineer” water society and to provide the standards against which existing water situations are to be judged (Roth, Boelens, and Zwartveen 2005). In the process, the conceptual repertoire of legal pluralism is used not to describe and unravel everyday processes of normative ordering and rulemaking, but to intervene in the governance of water. This instrumental use of the legal pluralism concept runs the risk of eroding its analytical strength while compromising its potential support to marginalized water user groups. The objective of producing policy recipes for harmonizing local with state laws tends to reproduce simplifications and dichotomies that hamper critical analysis of legal pluralism, and forestalls serious attention to the problems, solutions, and context-rootedness of local water rights repertoires (von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1998; Molle 2004; Roth 2014).

As Franz von Benda-Beckmann has argued, there is a growing “pressure on state governments and big donor agencies to take non-state rights more seriously” (2001, 48). Yet, the recognition of existing rights’ systems sometimes implies simplification and the freezing and codification of living rules. Franz presented a thoughtful reflection on the dangers of governmental collaboration and recognition endeavours:

Extending governments hands to local people to form partnerships or engage in co-management suggests a benign enlightened government that offers more than what most democratic principles of political and administrative organisation would call for. If [however] one’s point of departure is that the resources in question are legally held by non-state property holders (whether as communal, group, village or individual rights) on the basis of customary or folk laws, the situation looks quite different. An external imposition of “participation” is no longer self-evident at all, insofar as projects and policies relate to other people’s property. (2001, 51)

This makes perfectly clear why a critical attitude to issues of participation and recognition are so important, the more so in a world of globalizing water policies and recipes for global water governance, as we discuss later.

**The incorporation of local rights systems in globalizing orders**

Discussions on recognition have a renewed urgency because of the glocalization of water governance, which ironically provides an important motivation to map and recognize local, customary, and indigenous rights, including water rights. Where Franz von Benda-Beckmann’s analytical exploration was guided by a desire to find ways of doing justice to and protecting plural normative orders, current thinking about water policy and governance seems to be guided by an opposite ambition: the wish to commensurate plurality to design a universal global normative and legal order (Swyngedouw 2005). The latter is
deemed essential for the emergence of “golden triangles”: assumedly effective and smooth partnerships between “the government”, ‘the market’, and “expert-knowledge centres”, in a conceptualization of water actors that conveniently ignores grassroots and civil society groups. The desire for a universal order occurs alongside the framing of water problems and solutions in global expert terms, with possible solutions expected to have global applicability (e.g. GWP 2000; Plusquellec, Burt, and Wolter 1994; UNDP-CLEP 2008; World Bank 2012). Global policy models and tool-box approaches have thus become very popular (Boelens and Vos 2012).

The proclamation of globally commensurable water meanings and values facilitates and promotes the treatment of water as an economic good. It also produces demand for new forms of expertise, creating new needs to measure and monitor water flows and travels, in support of market-based forms of allocation and management (e.g. Allan 2006; Bauer 2004). Rather than allowing for diversity, the analytical concern of those supporting these global water governance ideas is how to incorporate diverse rights systems into a single legal and market system. The continued existence of local rights, all possessing autonomy and dynamics, is seen as an obstacle to the implementation and smooth functioning of state and market institutions. The existence of diverse authorities and rule systems (that may defend local rights) makes comparison and exchange difficult, and thus also hampers outside control (Zwarteveen and Boelens 2014).

Hence, the global water policy consensus tends to consider the existence of many different context-based water rights orders as an unwanted situation (Boelens 2014). It preaches the incorporation of customary and local laws into national legal frameworks and constitutions, following globalized principles and aligned with global governance structures and international agreements. The hope is that such incorporation will help create a uniform and level playing field (e.g. De Soto 2000; UNDP-CLEP 2008), facilitating comparison, exchange and control. For this to take place, however, local systems of rights do need to be mapped and thereby recognized. The recognition of legally plural conditions thus becomes part of a processes of governmentalization and normalization according to outside expert standards and legal models that curtail heterogeneity and diversity (Boelens and Zwarteveen 2005; Meehan 2013). The conceptual repertoire of legal pluralism thus risks becoming an equalizing technical tool in support of the global neo-liberal project.

Franz von Benda Beckmann reminds us that “… ‘technicization’ of political rules and principles frequently goes hand in hand with a demonstrative celebration of the importance of law and good governance. Spectacles of international law and constitutional law mask both the privatization of law-making and the erosion of legal responsibility in many fields of governance” (von Benda-Beckmann, von Benda-Beckmann, and Eckert 2009, 15). Rather than protecting those whose rights now become recognized, better understanding the myriad ways in which people normatively organize water, and creating respect for how water is deeply intertwined with cultures, meanings and identities (e.g. von Benda-Beckmann 2007; Donahue and Johnston 1998), current policies instead subject those weaker parties to processes of equalization and discipline. This may even lead to forms of uniformization that eventually allow what used to be local rights to be transferred and sold. Hence, the dynamics and effects of recognition require critical scrutiny that takes into account power differences among legal agents, the complexity of legal interactions, and the politics of which they are part (Baviskar 2007; Boelens 2014; Meehan 2013; Roth, Boelens and Zwarteveen 2005).
Concluding remarks

In this article we have assessed Franz von Benda-Beckmann’s scientific contribution to the study of water rights and water policies. We have argued that from an initial interest in the anthropology of law, legal pluralism and the analysis of property, it was the Wageningen academic environment that brought the water field to his attention. Franz von Benda-Beckmann’s socio-legal approaches turned out to be very relevant for better understanding these themes, which included the critical analysis of the role of law in irrigation development interventions. Franz’ background and earlier work in the anthropology of law provided for an original and distinctive approach that sat well with actor-oriented sociology and socio-technical approaches, but was critical of the socio-legal engineering hopes and ambitions of common property scholars.

We have identified a number of contributions that stand out in Franz von Benda-Beckmann’s work on water rights and water policy, all characterized by a personal and scientific drive to seek the nuances in complex issues and debates rather than subscribing to simplifying normative agendas with socio-legal engineering approaches. After a more general overview of the strengths of Franz von Benda-Beckmann’s work – the analytical framework for property regimes and relations that he developed as part of his ambition to compare across geographical, cultural, and historical contexts – we highlighted three particularly salient contributions of his work. The first concerns Franz’s discussion of the human right to water. Rather than going with the flow of those who believe in the capacity of such global legal rule-making to solve problems of inequality, exclusion, and power differences, Franz drew attention to how such a universally defined right potentially creates new problems of legal complexity. The second is Franz von Benda-Beckmann’s contribution to the topic of recognizing local or customary rights. Rather than simplifying property relations and idealizing the normative framework that legitimizes local legal systems, he stressed the need for in-depth analysis of the multiple property regimes involved and their potentially layered structure of property relationships. Franz von Benda-Beckmann thus argued for anchoring a detailed anthropological description of property in a broader analysis of politics and power relations. The third contribution is his attention for the role of law in the current era of “glocalization”, in which he pointed out how global governance regimes become linked to local or customary law systems, threatening to irrevocably destroy the latter under the pretext of recognition.

We subsequently discussed how, when used instrumentally in policy agendas, contemporary uses of legal anthropological insights, rather than protecting resources or existing resource users, can also support neo-liberal agendas. Globalizing forms of water exploitation require governance frameworks that create a uniform playing field. In such contexts, the use of law and legal pluralism serves the purpose of facilitating the exploitation of water as a marketable commodity under conditions of state control. Current policies of recognition thus often entail the incorporation and formalization of local rights frameworks, subsuming them under state and supra-state legal orders. In the process, these rights get normalized and disciplined, making them transferable and marketable.

In line with the valuable heritage of Franz von Benda-Beckmann’s work on water rights and policies, we argue for a water rights approach that not only examines how water rights are embedded in socio-economic, agro-ecological, and cultural-political contexts but also considers how water (rights) knowledge and the carriers of that knowledge, whether engineering experts or those who claim to represent local water knowledge or water users, are themselves part of economic, political and cultural traditions, structures, and regimes of representation. Particular attention needs to be given to visualizing the
workings of power in and through discourse, and to exposing the positionality of dominant knowledge holders and their knowledge claims. Such analysis may reveal how particular ways of phrasing, formulating, and enacting water rights actually serve to mystify, naturalize, or render technical contentious distributional and representational questions.

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Notes
1. Franz von Benda-Beckmann’s work has become particularly influential in Indonesia, India, and Nepal in Asia, and is also used by many scholars who investigate water rights and governance in the Andean countries.
2. Much of Franz von Benda-Beckmann’s work on water rights, including projects in Nepal and India funded by the Ford Foundation, was done in cooperation with Joep Spiertz, who had done extensive field research on balinese irrigation and water rights, and with Keebet von Benda-Beckmann.
3. For a more extensive discussion of these, see other contributions to this special issue.
4. While actor-oriented sociology became the trademark of the Wageningen Rural Development Sociology group, socio-technical approaches to irrigation and water control came to characterize the work of the Irrigation and Water Engineering Group.
5. Examples are Ostrom’s work on Nepal and the work by Robert Wade on India.
6. A research programme for India and Nepal that emerged from cooperation along these lines, pioneered by Franz in cooperation with the Irrigation and Water Engineering Group, was “Matching technology and institutions in land- and water management”; see Roth and Vincent 2013.
7. For a more in-depth discussion see, among others, Wiber in this special issue.

References


