

Transparent differentiation between types of freshwater (technologies) in island regulation

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Abstract

Regulation is only one of the tools to which we turn in hope to mitigate the freshwater challenges islanders currently face due to climate change. Legal theory must not defend abstract ideas about regulation because regulation can only be a useful tool if it 'fits' (1) the context of the islands, as lived by the islanders, and (2) the insights and tools from other fields focusing on islands e.g. decentralized water technologies. 'Legal transplants', importing regulation from mainland legal systems to islands, risk to ignore both. In that sense cherry-picking best-practices from foreign regulation is not desirable, neither from a democratic nor from a technocratic point of view. We want to present one particular feature of 'mainland property theory' that ignores the insights and tools from other fields, and might thus result in maladapted regulation.

Mainland property theory debates the most 'sustainable' form of freshwater management in terms of private vs. public vs. common water management. While these abstract denominations amount to different practices across legal systems, more and more authors conclude that freshwater management is inevitably a shared responsibility between public and private actors. We agree with this nuanced conclusion, but regret the tendency of property theory to talk about *all* freshwater in abstract terms. We instead argue for regulatory differentiation between 'types of freshwater'. This might seem strange, given that freshwater policy should be coherent (cf. third OECD Water Governance Principle). However, coherency can require differentiation.

It might be tempting to simply declare all freshwater equally 'not appropriable' in view of protecting it. Especially as it is nowadays accepted that ground- and surface water are interconnected, as regulation generally strives to be mindful about future generations and environmental protection, as scholarship is increasingly aware of the role that e.g. land property, class, gender and religion play in the effective access to water rights. Although all freshwater is indeed valuable to all islanders, tackling water scarcity will demand well-reasoned choices between rain water, surface water, phreatic groundwater, deep groundwater, purified waste water, desalinated water etc., depending on the use, the season, the location etc. It is not only important that regulation guides islanders in making sustainable choices between types of water (technologies), but also that islanders understand why they could prefer one over the other (e.g. long-term and short-term effects, more autonomy, safer, less scarce, less wasteful). A regulatory 'management tool', similar to Lansink's waste hierarchy, could potentially help to empower islanders in making conscious water choices, especially if such hierarchy is created from a dialogue between scientists and islanders.

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