Chapter 2: theories of Water law

2.1. Major Trends

- Long History and contextual in nature
- Integrated and coherent(developed countries) and pluralistic(developing countries)
- Cover similar subjects(Control, ownership and use of water)
- Environmental issue gets more recognition
- Private sector and stake holders participation

2.2. Theories

Two theories are developed:

- Prior appropriation theory

“go take the water and make the farms fruitful and develop the mines and the water powers and you shall always have the first right in the stream”

- Riparian theory

Both theories are derived from the same old principle “*running water is not the property of anyone and cannot be.”*

2.3. Traditional approaches towards water rights

- Water right: is a legal right to abstract water from a natural source and use it for consumptive and non consumptive purposes
- Details of water rights

A. Surface water

I. Common law tradition

- Flowing waters are public juris(public property)
- There was not distinction between public and private waters unlike the Roman tradition
- The two theories: Prior-appropriation and riparianism developed

Prior appropriation

- *Started in western united states to serve mining for federal lands which later extended to farmers*
- *The elements of valid appropriation includes*

a. *The intention to use the water for a beneficial use*
b. *Diversion of water*
c. *Application of the diverted water for the intended purpose*

ORDINARY use implies reasonable use of the water

- Reasonable also implies without a significant effect on downstream proprietors

What is SIGNIFICANT?

II. **Civil law tradition**

- The Roman law on water rights influences the civil law tradition
- Waters are classified into private and public waters

Private waters

- *Adjacent land owners will have exclusive right to us the water except statutory limitations like the right to servitude*

Public waters

- *Waters belong to the public domain*
- *Requires government permit(authorization) to use the waters*

Group Assignment

- Refer different materials on water laws and write an essay on “Traditional approaches of civil and common law systems toward ground water(a maximum of 4 pages)

Chapter 3
International experiences on Water rights(Modern approaches towards water law)

3.1. Conflicts over international waters

Do you have any international water conflicts which are active today in mind?

- International waters refers to a water body that involves two or more states
- About 261 international river basins which involves 145 nations and 45 percent of the land surface
- In the old times there were peaceful uses of water
- Conflicts increases day after day generally because of

➢Population growth

➢Existence of sovereign states

➢Emergence of new uses of water(hydroelectricity, large scale transportation and industrialization)

Derivers of water conflicts(Broadly)

1. Sovereignty

- States claim to be their property what is in their jurisdiction including water
- Increases the tension of use of water with another country

Note : what is Sovereignty ?

2. Level of development

- The power of the states Economically and in military also increases the tension
- If the lower riparian is more developed there is a high chance of conflict

Examples

- US And Mexico on Colorado river
- China and the lower riparians(Laos, Cambodia, Myanmar, Thailand) on Mekong river
- Ethiopia and Egypt

3. Water scarcity

- The more scarcity of water in two or more riparian countries the more conflict will be.
- There is a high chance of conflicting over international waters if the lower riparian(s) is arid area.
- Ethiopia and Egypt

Derivers of water conflict(Specific)

1. National state formation process

- Monarchial or democratic
- Unitary or federalism
- Geographical, Ethnic or religious

Eg. If it is federalism the units may think running waters belong to them and discard the interest of other riparian countries



2. Ruling regimes

- New regimes may choose to ignore TREATIES and change attitudes towards water

Eg. Compare Egypt’s regimes towards Blue Nile during MOH. Mursi and Al Sisi



3. Water security

- In some states water is considered as a source of food security
- In most of arid countries the issue of water is an issue of national security

Eg. For Egypt blue Nile is a matter of national security and even it is one of constitutional issues

4. Sub national political processes

- The political in the national level, if it bothers about food security, may use international waters for political games
- Eg. Muh. Mursi was using the issue of water for national political games

5. Deferred reciprocity

DR: is using an international water for another purpose other than what the riparian should use.

- Exporting water from international rivers

Eg. Egypt wanted to give 700M m3 per year for Israel to solve the issue of Jerusalem

6. Non-state actors

- International organizations, funding organizations and civil societies and the way they handle international water issues may derive for more conflics

Eg. UN security council in resolving issues

IMF and other funding institutions in funding on international water developments

The civil societies and the way the international water issues are handled

7. The resolution process

- When a conflict is about to happen how is the issue resolved matters
- Does it include all of the states or not?
- Is it a political will or just an agreement with influence

3.2. International principles on international water use

- 17th C -International principles were recognized since, first focusing on water navigation
- 20th c- the principles focuses on also on non-navigable issues like relations among riparian states, water resource protections and citizens' rights over waters
- General and procedural rules are developed

I. General Principles

1. Basin Unity

- Geo-hydrological indivisibility
- Considering the basin as a whole
- Works for Both surface and ground waters
- The riparian states are interdependent and should cooprate

2. Cooperation

- Derived from the 1st principle
- States should cooperate in water management

3. Equitable and reasonable utilization

- All states stand on the same position to satisfy their water needs
- Doesn’t refer allocating equal quantity of water

4. No significant harm

- Serious injury shouldn’t happen to the other state
- Consultation and scientific research in using the water will help to determine whether the harm is significant or not

5. Sustainable development

- A recent concept
- Basin states should agree on terms that can guarantee sustainable development

6. Public participation

- Participation of the people that could be affected by the use of international waters

I. General Principles

1. Basin unity
2. Cooperation
3. Equitable and reasonable utilization
4. No significant harm
5. Sustainable development
6. Public participation

II. Procedural rules

1. Information exchange

- Tell whatever it thinks to do to the other

2. Previous notifications

- Information exchange should be made previous to any work over the international water

3. Consultation and negotiation

- There must be consultation and negotiations in ***good faith***

4. Peaceful settlement of disputes

- If they failed to reach an agreement, they should resolve the dispute in peaceful means
- ADR(mediation and conciliation)
- Adjudication in international courts

Class Activity

- Take Gibe river and imagine Oromia and SNNPR regions are conflicting over use of this river. Consequently, an integrated rule is required to be developed from the side of the federal government. Draft a rule that govern the use of Gibe river by taking into consideration of all international water law principles(Apply also your knowledge of legislative drafting)