



Book Review:

Ben Boar, Philip Hirsch, Fleur Johns, Ben Saul and Natalia Scurrah.

Mekong: A Socio-Legal Approach to River Basin Development.

Oxford: Earthscan-Routledge, 2016. 252 pages
(ISBN 9781138788459 pbk9781138788442hbk)

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This book is a valuable addition to scholarship on law in Mekong societies, and a significant contribution to understanding the politics of hydropower development in the Mekong River basin. Scholars of hydropower development in other transboundary rivers will also find the approaches and insights of this book to be of value.

The law, like science, is often seen as somehow above politics and apart from society. After reading this book you realize in fact that they are forever intertwined.

The empirical focus of the book is on hydropower dams in the Mekong River basin. The cases are introduced early in Chapter 1 and returned to throughout the book. The cases include built and planned dams in: the cascade in the upstream reaches of the Mekong in China; the cascade in the lower mainstream of the Mekong in Cambodia and Lao PDR; Nam Theun 2 and other tributary dams in Lao PDR; the so-called 3S-region (Sekong, Srepak and Sesan rivers) in Vietnam and Cambodia; and, the Pak Mun Dam in Thailand. One of the strengths of the presentation is that, theoretical arguments and claims are well illustrated through these case studies. Another strength is the generous use of paraphrases and direct quotations from a set of 53 interviews the authors made in the basin during 2011-2.

Conceptually, the socio-legal approach adopted draws on the ideas of legal pluralism, as well as traditions in the study of law and society. ‘Law’ in this book has a very broad meaning. Included in the scope are hard and soft laws, subnational to national and international law, norms, policies, and all types of regulations. In all countries there are legal frameworks which inform decision-making around hydropower projects, which as the authors highlight, are highly centralized. Energy ministries have key coordination roles, and so do finance ministries. The articulation of the socio-legal approach in Chapter 2 also contains a significant commentary on the relationships between law and development ‘template,’ questioning “*their reliability and self-evidence*” (p60). These “*financial models, scientific models, models of public participation*”, the book argues, “*should be recognized for their political significance and their negotiability, and navigated tactically on that basis, rather than be dispensed with, on the one hand, or extended unthinkingly, on the other*” (p60).

At the heart of the book is a series of five chapters that critically dissect the role of law in development, governance, assessment, transparency, and resistance. The approach in Chapter 3 on development is historical. The influence of colonial powers and communist models are described, and then overlain by more recent history of neoliberal reforms, depicting a dense and complex web of institutions and laws. The focus of Chapter 4 on governance, is on the procedures for prior notification of other states regarding the construction of mainstream hydropower dams through the Mekong River Commission (MRC). Chapter 5 looks at environmental assessment procedures, exploring who participates in them, the roles of experts and their influence. Chapter 6 takes up the theme of transparency, underlining the multiple meanings of this term in practice, but also its continuing relevance to challenging hydropower development. Chapter 7 explores how civil society has engaged the law, both within and outside the courts, when contesting hydropower development.

The final chapter of this book ties together the strands of the critique to challenge a set of widely made claims about the roles of, and

need for, laws in the Mekong River basin. These touch on the inviolability of sovereignty, the dominance of informal relations, the use of law by powerful elites, and the belief in the potential of international law to cure “*much that is failing the region, especially with regard to decision-making surrounding, and adverse impacts of, hydropower development*” (p192). The most important argument the book makes however, in my view, is that the Mekong is already filled to the brim with existing laws, norms, and principles upon which to draw from; many are already in use, with a history of mixed affects. For this reason, calls for more and better laws are unlikely to be a solution to the conflicts over hydropower development. What is needed is more careful attention from scholars and practitioners on how the law is practiced, and used in particular instances, by different actors.

The book covers many dimensions of this interplay as “*practices of legal work and argument are among the ways that the natural and societal phenomena of the Mekong River basin are produced, articulated and experienced*” (p194). In the rest of this review, I will zoom in upon the authors’ insights on the use of science or expertise in environmental assessments, and the use of the law in dealing with disputes by both governments and citizens.

Turning an issue into a technical or legal problem is often done to depoliticize an issue and make it more governable by bureaucrats (Ferguson, 1994). Thus, much of the work done by the Mekong River Commission have been scientific and procedural – diverting attention from regional deliberations on the tougher decisions about whether or not a dam project should go ahead (Käkönen & Hirsch, 2009). Similar anti-politics are apparent around contested hydropower development in Northeast India (Huber & Joshi, 2015). Furthermore, large-scale hydropower development in the Mekong River basin will have significant additional impacts on aquatic ecosystems and livelihoods (Molle et al., 2009). Hydropower has a need for ‘technologies of humility’ (Jasanoff, 2003) that encourage deliberation and ethical analysis of what *should* be done, to complement and balance the engineering and scientific emphasis on what *can* be done.

In Chapter 5, the conduct of environmental assessment (EA) procedures in several projects is explored. Although the Lao provisions for environmental impact assessment (EIA) mandates public participation, little was forthcoming in the EIA for the Xayaburi Dam project. The activities of NGOs within Laos are very circumscribed; despite this, international NGO International Rivers was able to critique the EIA, pointing out technical gaps with regards to fisheries and other factors, as well as the failure to consider downstream impacts more than 10 km away from the dam. The environmental impact statement for the Xayaburi project, prepared by a Bangkok-based consulting firm, was basically a “*project justification document*” (p131). The Xayaburi EIA concluded that mainstream dams should proceed, whereas the 2010 Strategic Environmental Assessment called for the suspension of all mainstream dam development. Assessment procedures are portrayed as technical exercises, but the choices made on scope, scale, what to measure, how to measure, and who to involve, influence the outcomes of an assessment in significant ways, and are therefore political acts.

EA has become a legislated and standardized part of development decision-making, but as the authors show, there are many limitations in current practices. The preparation of EA reports is done by international consultants for a review process looked after by environment ministries with little power: “*From the point of view of the government department or the developer involved in the hydropower project, however, EA is often seen as a narrow means to a predetermined end – namely, that the hydropower project be approved*” (p124).

Exactly which impacts are to be assessed is left vague by legislation, with downstream and transboundary impacts neglected. Often the public is not even aware that the EA process is underway, and even when they are and contribute, public inputs do not mean influence; the authors quote a Lao official explaining: “*we take legitimate concerns, not rubbish ones*” (p125).

Environmental assessments as standardized legal procedures, are not the only way in which science, law and development entangle each other. Citizens and grassroots organizations have also carried out

research to fill assessment gaps and challenge decisions, if not the legal framework itself, since “*a common sentiment among civil society is that the key problem is that national laws are good on paper but not in practice*” (p180).

The law is used by all actors, not just the state. As is neatly shown in Chapter 7, civil society organizations use law to organize resistance and challenge governments, banks, and developers. In countries apart from Thailand, this has had to be done largely outside the courts, a Cambodian legal NGO explained: “*many people do not trust the courts or because the courts are inaccessible or risky to use*” (p168). The language of law, its norms and principles, are used in the hopes that they will add weight to arguments with authorities. To this end, domestic and international NGOs in Thailand and Cambodia frequently provide training on legal matters to affected communities. NGOs have also tried to persuade private actors like banks to adopt voluntary standards, such as the Equator Principles.

But as the analysis shows, faith in the law is often misplaced. Authorities and corporations lean on the law to legitimize decisions and projects. They use it to justify control and to intimidate opponents. The Electricity Generating Authority of Thailand (EGAT), for instance, filed charges against protesters at the Pak Mun Dam in 1993. It took 20 years before the courts dismissed the case. The courts are costly and unpredictable; civil society has had to adopt other strategies, including protest and civil disobedience. Even so, the protests against the Pak Mun Dam – organized by the Assembly of the Poor – often drew on legal norms and concepts in documents and speeches, for example, related to rights, participation and justice. Thus, “*while the law often facilitates development, it’s plurality of norms and processes also enable civil society to resist development, influence its shape, or temper decision-making. Law is not only a tool of domination*” (p167).

In most countries in the Mekong Region, overt criticism of authorities is risky. The implications for Mekong societies concerned with hydropower development, the authors suggest, is that they need to be much more creative in their approach to the law. There are no legal

panaceas. The authors correctly point out that activists need to be more critical towards international law and legal norms; there may be situations in which not participating is a good strategy – for example, when it risks legitimizing a seriously flawed process. Activists may also consider paying more attention to private law, as in contracts; as these already form a thick regulatory web over the Mekong River basin. Companies should consider more closely their social and environmental responsibilities, as doing so could greatly reduce transaction costs. Donors need to be more cautious in transplanting lessons and models of development. And governments should recognize that *“they cannot simply impose their sovereign will through law; that national law is permeated by and susceptible to myriad, multiscale forms of influence; that legal argument sometimes yields unexpected or unintended outcomes”* (p196).

In conclusion, the main strength of this book is the cautionary tales around simplifications. For the law, like science, is filled with uncertainties and constraints when they must answer to the diverse, and sometimes powerful, political needs of the society in which they are part of.

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