

The role of the district assemblies in the management of trans-district water basins in Ghana

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Ghana's legal regime for the management of water resources combines both the formal and informal customary law principles. Under the customary law, water as part of the customary land holding is vested in stools, communities, families, as the case may be. In the formal sector the water resources are vested in the state and any use requires a permit or license from the Water Resources Commission (WRC). In considering an application for water use in Ghana the law requires a consultation of the traditional institutions in determining the grant or otherwise. This ensures the consideration of traditional concepts and norms, such as the concept of water spirits and the holy days of water bodies. These concepts are essential for the sustainable management and conservation of water resources in Ghana.

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Introduction

Water is life and it is universally acclaimed as the most important natural resource. The end use of water is essential for every inhabitant and for a wide range of economic and informal sector activities. It is vital for agriculture, industry, health and hydropower. Water is also an integral part of the natural environment and the habitat for many forms of life, be it humans, animals, plants etc. Given current population growth and increasing demands, both in quantity and quality, the issue of water management is becoming more sensitive than any time previously in the history of Ghana.

Ghana envisages leaping to a middle income status with its concomitant increases in demand for water for economic development, and her riparian neighbours are also in the process of fashioning out similar policies for accelerated development (WARM Study, 1997). Even within Ghana, disparities in water availability may necessitate the need for the equitable management of inter-district transboundary waters, which is the focus of this paper. The aim of this paper is to consider the primary legal regime for the management of water resources, looking at the issue of ownership of water resources, the licensing process and the role of the district assemblies in the management of water resources within their district and the relationship of riparian districts.

The legal regime for water resources management

It is very difficult to identify a separate water resources management law in Ghana prior to the promulgation in 1996 of the Water Resources Commission Act. It must be stated that natural waters were managed as an appurtenance of land and therefore whoever owns a portion of land automatically may exercise certain rights over the waters contiguous to the land (Opoku-Agyemang, 2001). It is however necessary to consider the legal regime by looking at customary law principles, the common law riparian system and the current statutory intervention.

Akan Customary Water Law

Under Akan customary water law, surface water such as rivers, lakes and streams, are considered community property which can never be individually owned. Water, as part of the customary landholding is vested in stools, communities, families, as the case may be (Ollennu, 1962). Where water is in abundance, a member of a community or family or a subject of a stool, may be able to utilise a rivulet, stream or a pond which is naturally on his land, without interference from the public or the community.

As pertains to traditional landholding, a person has only usufructuary rights to water but is not considered the owner. Therefore, in times of scarcity, the whole community must share the use of the streams, rivulets, etc., irrespective of whose land is closer to the water body. In short one can say that under customary law water is a free common good; everyone is entitled in principle to its use as a community good (Ofori-Boateng, 1997). The same principle applies to groundwater. However, if an individual digs a well, priority of use may be accorded such an individual but this does not give ownership rights to the water itself. Thus, in times of scarcity, the community may also utilise the dug-well.

Riparian communities under customary law recognise the right of use of each other. Where two or more communities are contiguous to a water body, they usually agree, either expressly or through practice, on different spots from where each community may go and fetch its water. The communities manifest the communal ownership in the way they render community services in clearing paths leading to the river body as well as clearing the banks of weeds.

The basic customary water use principle among riparian communities is that each user may take as much of the water as he can carry personally and for any purpose whatsoever, provided sufficient water is left for other users as well. As rivers and other natural water bodies are considered as gods, it is considered a taboo for the “desecrating” of water bodies. It is therefore the duty of the whole community through the chiefs and religious officers to protect water bodies in their communities.

Common law riparian doctrines

Under the common law rules on riparian rights, an owner of land abutting on water, known as the riparian owner, is entitled to the access and regress from the water, whether it is tidal or non-tidal river, lake etc. provided his land is in actual daily contact with the water, either laterally or vertically.

The right of a riparian owner to access water on which his land abuts is a private and not a public right. Any interference in the enjoyment of a riparian of access to the water is actionable without proof of any special damage. Riparian right to access to water does not depend on ownership of the bed of the river or other water bodies.

In addition to his right to access and regress from the water, a riparian owner is entitled to land or to pass over the shore or bed at all states of the water for that purpose, even if the shore or bed is not vested in him. Apart from the right of access and regress, a riparian has an incident to his property in the riparian land a natural and proprietary right, not dependent on prescription, grant or acquiescence of the riparian owner upstream, but arising *jure naturae*. He is entitled to have the water in any channel which his land abuts or which passes through or under his land, flow to him in its natural state both as regards quantity and quality, whether he has made use of it or not. A riparian owner also has the right to have the water go from his land without obstruction and he is entitled to make certain uses of the water which comes to him whilst it is on his property.

Where there are multiple land owners abutting a river or lake, the right of each riparian owner is to have; (a) unimpeded access to and from the river; and (b) to have the natural flow of the stream come to his land and to make reasonable and just use of it as it flows through his land, subject however to the similar rights of each riparian owner upstream and subject further to the obligation to lower owners to allow the water to pass away from his land unaffected except by such consequences as follow from reasonable and just use.

It therefore means that in so far as an upstream riparian owner can justify that the use of the water passing through his property is reasonable, he can deplete all the water for his use to the detriment of the downstream owner. Thus, for example, if the New Juaben Municipal Assembly constructs a dam to store all the waters feeding the Densu River and such storage is considered as reasonable, taking into account the water needs of that district, the riparian owners downstream either in the Akuapem South or Ga Districts cannot complain.

The downstream riparians can only complain if the use by the upstream riparian is considered unreasonable. However, what constitutes an unreasonable water use has not been clearly defined and may depend on each case.

The riparian system as shown above are considered as part of the English common law rules which were applicable in Ghana until the promulgation of the Water Resources Commission Act, Act 522 which has replaced the riparian system with the system of prior appropriation doctrine. It must also be emphasised that the riparian water system works in areas where there is abundance of fresh water resources. Thus, in the United States, for example, while the Eastern states generally apply the riparian system, the Western states, with the proverbial water scarcity generally use the prior appropriation doctrine.

The water resources commission act and introduction of prior appropriation system

Prior to the promulgation of Act 522, there was no central agency responsible for the management of water resources. Acquisition of water rights and water use were under the general common law riparian rules as part of the land law. Apart from the riparian system, it must also be stated that there existed certain state institutions which were given powers to deal with specific water management issues.

Thus, for instance, under the Minerals and Mining Law, PNDCL 153, section 21, the Minister for Mines and Energy has the power to grant a licence to a mining company for the diversion, obstruction or altering of the course of a river within a mining area. Under SMCD 85 which sets up the Irrigation Development Authority (IDA), the Authority also has the power to develop the water resources of the country for irrigated farming, livestock improvement and fish culture. Even though these rights granted to the state institutions amounted to statutory grant of water rights, nothing was said about the ownership of water resources in the country until the coming into force of Act 522.

Ownership of water resources in Ghana

Under Article 268 of the 1992 Constitution any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person to any other person for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament. Article 269 also mandates Parliament to establish such other Commissions to be responsible for the regulation and management of the utilisation of the natural resources concerned and the co-ordination of the policies in relation to them (Opoku-Agyemang, 2001).

Unlike water resources, natural resources such as raw minerals and timber, prior to the coming into force of the constitution have been vested in the state. Therefore, until the promulgation of the Water Resources Commission Act, water was the only major natural resources not subject to state ownership. One can therefore say that Act 522 made water resources management consistent with the overall natural resources policy in Ghana.

Despite the vesting of water resources in the state, the Act recognises existing water rights, however such claims are to be submitted within twelve months after the coming into force of the Act. Failure to submit such claims means the extinguishment of those rights. Since the Act came into force on December 31st 1999, one can say that all existing rights not submitted to the Commission on or before December 30th 2000 are extinguished.

Acquisition of water rights and the role of district assemblies

Part 3 of Act 522 provides for the acquisition and use of water resources. Water resources is defined in section 37 of Act 522 as “all water flowing from any river, spring, stream or natural lake or part of a swamp or in or beneath a watercourse and all underground water but excluding any stagnant pan or swamp wholly contained within the boundaries of any private land. For purposes of the permitting process, water uses may be divided into two, namely uses requiring permit; and registrable water uses.

The Water Use Regulations 2001, LI 1692 provides generally ten main water uses in Ghana. These include, domestic, commercial, municipal, industrial, agricultural water uses, power generation, water transportation water use. The rest are aquaculture, environmental and recreational water use.

Section 13 of the Act prohibits the use of water resources without authority from the Water Resources Commission. It provides that no person shall divert, dam, store or use water resources, or construct or maintain any works for the use of water resources except in accordance with Act 522. The Act provides under section 16 for any person to apply to the Commission in writing for the grant of water right. Upon receipt of applications, the Commission is mandated to publish in the Gazette notice of an application and the area in respect of which the application is made. After the publication of the Gazette, a person who claims that his interest will be affected by the grant of water right may notify the Commission within three months of the notice in the Gazette of his objection to the grant of the water right and the person shall specify the grounds of the objection.

The Commission is mandatorily required to consider objections made prior to deciding whether or not a water right may be granted. Apart from the notification of applications in the Gazette, the Commission is under obligation, upon receipt of an application to make such investigations as it considers necessary including consultations with the inhabitants of the area of the water resources concerned.

To enhance public participation in the grant of water rights, Section 5 (2)(b) of LI 1692 provides that in conducting investigations prior to a grant of water rights, the Commission shall ensure public participation especially the people in the area likely to be affected by the proposed use. The Commission is also mandated under Section 6(1) to hold public hearing especially in respect of a water use which may cause dislocation, relocation, resettlement, or in any manner cause the destruction of the natural water resources of the community.

For the purposes of conducting a public hearing, the Commission is to collaborate with traditional authorities of the community, the relevant government institutions, notably the District Assemblies. In the traditional set up of the Akyem Abuakwa Stool, for instance, there is the office of Densu Okyeame (Densu Linguist) responsible for all matters relating to the Densu River. Currently, the membership of the Densu Basin Water Board of the Water Resources Commission (WRC), which is responsible for the management and allocation of resources in the basin, include a representative of the traditional authorities from the Akyem Abuakwa, the source of the Densu River.

The importance of the provision for the consultation with the traditional authorities is to ensure that the customary concepts of management of natural resources are considered prior to the grant or refusal of a water right. It is at this consultative stage that the role of the traditional water priests and priestesses are considered, especially in the demarcation of buffer zones and sacred groves. In the Densu Basin for example, there is an office of a river linguist

With the foregoing, it is clear that even though the Water Resources Commission has the power to grant water rights, it exercises that power in consultation with traditional authorities and district assemblies. No permit can be granted without prior consultation with the community concerned. Thus, it can be argued that even though the ownership in water resources is vested in the State, the traditional role of communities, as custodians of the resources has been maintained.

As indicated above, there are categories of water uses which are exempted from the permitting process but which must be registered prior to use. These uses are water abstracted by mechanical means and use for any purpose where the abstraction level does not exceed five litres per second or subsistence agricultural water use for land areas not exceeding one hectare.

The administration of these registrable water uses is vested in relevant District Assemblies under section 11 of the LI. Under the Regulation, an application for the registration of a registrable water use shall be submitted to the District Assembly indicating the name and address of the applicant, category and level of the water use, water body or system affected and the location of the water use. Where the Assembly is satisfied with the

application, it shall register the use and issue the applicant with a registration number. The District Assembly shall then furnish the Water Resources Commission every quarter a list of all registered water uses in the locality.

The vesting of the administration of registrable water uses in the district assemblies indicates the important role of the assemblies in the management of water resources in Ghana. The reason is that the bulk of water use in the country comes under the registrable uses. This makes it imperative for the district assemblies to understand the concepts of integrated water management and the management of trans-district waters.

Even though a District Assembly may have the power to register water uses within its jurisdiction, it should be noted that most water bodies and basins may straddle more than one or two districts. What should therefore be the relationship of trans-district riparians in the registration of water uses in the recognition of the fact that unsustainable uses of the resources in one district may affect a riparian district.

The management of trans-district waters

As stated above, the various district assemblies and local communities have a major role to play in water resources administration in Ghana. Even though the Water Resources Commission is the central agency for the grant of water permits in the country, it does so in consultation with the assemblies and local communities. On registrable water uses, the assemblies are the leading institutions in the registration of these uses within their areas. However, as indicated earlier, most water basins in the country are trans-district in nature as it passes through more than one district assembly. In some cases, basins may also be inter-regional. The question is what should be the relationship of trans-district riparian communities.

It must be noted that there has been no attempt to consider the management of trans-district water management. In the conduct of its public hearings, the Water Resources Commission always ensures the participation of all riparian districts for their comments. The question then is, whether the assemblies in exercising their mandate in registering water uses must also consult riparian districts.

The management of transboundary waters is very sensitive in international water law. It is my view that the principles underlying the utilisation and management of international watercourses may be relevant for trans-district water management. Trans-district water is unquestionably very important in the management of water resources in Ghana. This is because, almost, if not all of the fresh surface waters run through two or more districts. The aquifers of the Keta groundwaters are also trans-district in nature. For instance, the White Volta River, apart from being an international water, runs through regions and many districts in the country. This requires that mechanisms be devised to assure that these waters are co-operatively managed if water is not to become a problem for each nation's security.

The UN Convention on the Law of the Non-Navigational Uses of International Watercourses in Article 2 defines an international watercourse (transboundary watercourse) as a watercourse, part of which are situated in different states. In the same vein, trans-district water courses may be defined as watercourses part of which are situated in different districts.

Despite their geographical spread, watercourses are considered to comprise a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus. Therefore, the first principle of trans-district water management should be the acknowledgement of the interconnectedness of watercourses within a basin but which may be geographically separated. Water management therefore should be on the basis of a basin rather than apportionment of the waters within an area by a district assembly.

Apportionment is a principle whereby a district declares its sovereign rites over its portion of waters without regard for co-riparians. Even though Ghana is not a signatory to the UN Convention, the drafters of the Draft National Water Policy have provided under the "Guiding Principles for Ghana Water Policy" in paragraph 3.2

(vi) that the principle of adopting the watershed as a planning unit is central to the management of Ghana's water resources.

Another principle of international water law which should be applicable to the management of trans-district water resources is the principle of equitable utilisation of transboundary watercourses under Article 5 of the UN Convention. The effect of the provisions is that trans-district riparian communities shall in their respective localities utilise transboundary watercourses in an equitable and reasonable manner. Such watercourses shall be used and developed with a view to attaining optimal and sustainable utilisation of and benefit from the waters taking into account the interests of the other riparian communities concerned, consistent with adequate protection of the watercourse.

To ensure equitable and reasonable utilisation of transboundary waters, the communities shall co-operate and participate in the use, development and protection of transboundary watercourses. Such co-operation and participation should include both the right to utilise the watercourses and the duty to protect same.

In considering whether a riparian district is utilising the water resources in a reasonable and equitable manner, the following relevant factors should be considered. These include the geographical, hydrological, climatic, ecological and other factors of natural character. Other factors which should be considered are the social and economic needs of a riparian district concerned, the population dependent on the watercourse, the effects of the use or uses of the watercourses in one area on the other, as well as the availability of alternatives of comparable value to a particular planned use. It therefore means that whether or not a use may be considered reasonable and equitable is based on an objective assessment rather than what is subjectively perceived by a particular district.

Another major principle in the management of transboundary watercourse is the obligation of riparian communities not to cause significant harm to one another. In utilising transboundary waters, trans-district riparians shall take all appropriate measures to prevent the causing of significant harm to others. The principle of no harm can be summarised as follows; that a trans-district riparian has an obligation not to pollute and contaminate transboundary watercourses or to deplete the waters. It is also incumbent upon trans-district riparians to notify the other riparians of the adverse effect of projects on transboundary watercourses.

They also have the obligation not to over-exploit to the detriment of co-riparians. To ensure co-operation among trans-district riparians, Article 9 of the UN Convention provides that transboundary states shall on a regular basis exchange readily available data and information on the condition of the watercourses. It is therefore submitted that for the sustainable utilisation and development of trans-district waters, riparian districts should develop a reliable data to support decisions on the sharing of watercourses within trans-district water basins.

It is also submitted that to ensure the sustainability of such water bodies, trans-district assemblies should consider the establishment of joint mechanisms or institutions, as deemed necessary by them, to facilitate co-operation on relevant measures and procedures in the light of experience and capacity of the districts assemblies. It is in the light of these that the Water Resources Commission adopted a basin wide mechanism for the management of trans-district water resources. Currently, two Basin Boards, namely, the Densu and the White Volta Basin Boards, have been set up to manage the resources in the basins. The membership of the Boards, include representatives of all the District Assemblies within the basins and other recognisable bodies, such as women organisations and water user associations.

Conclusion

This paper has attempted to look at the mechanism for the sustainable utilisation and management of trans-district watercourses in Ghana. Even though the Water Resources Commission is the central agency responsible for the management of the water resources in Ghana, the administration of non-registrable waters, for example, places much emphasis on the involvement of the district assemblies. The paper also highlighted the pivotal role of the traditional authorities, especially when it comes to the consideration of application for water rights in their localities.

A critical look at the watercourses of Ghana shows that almost all of them are trans-district in nature. Since there are no provisions in the Water Resources Commission Act or the Regulations made there under on how the various districts are to co-operate in the management of trans-district waters, the paper has considered some of the cardinal principles in international water law on the management of transboundary waters which may be relevant for trans-district waters.

It is submitted that the principles, such as the equitable and reasonable utilisation of watercourses and the obligation not to cause harm to riparian communities, should guide district assemblies in either advising the Water Resources Commission in the grant of water permits or while agreeing to register water uses in their areas.

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