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To cite this article: Kenneth Kang (2019) On the problem of the justification of river rights, *Water International*, 44:6-7, 667-683, DOI: [10.1080/02508060.2019.1643523](https://doi.org/10.1080/02508060.2019.1643523)

To link to this article: <https://doi.org/10.1080/02508060.2019.1643523>



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Published online: 06 Aug 2019.



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## On the problem of the justification of river rights

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### ABSTRACT

This article aims to work out the social conditions that determine whether the communication of river rights finds success in society. Employing the context of hydropower development in the Mekong region, the article finds that an essentialist strategy which claims that river rights have unlimited ‘moral’ validity regardless of any of the decision consequences is unlikely to succeed. Instead, it is proposed that moral conflicts over river rights may ultimately only be resolvable ‘unmorally’, that is, by procedural legitimacy – and this is best captured by employing a methodological framework composed of thematic, social and temporal dimensions.

### ARTICLE HISTORY

Received 28 September 2018  
Accepted 2 July 2019

### KEYWORDS

River rights activism; hydropower infrastructure development; social validity; post-ideological jurisprudence; Mekong region

## Introduction

In recent years river rights have gained traction in political discourse not only as a reaction to unsustainable practices, but also because river rights themselves produce new violations, and hence new modes of litigation actors can be subject to (Chaturvedi, 2019). The problem is that since river rights are, so to speak, works in progress; nobody knows exactly what they are. For example, what is their scope: the river, the freshwater ecosystem, the environment as a whole? And who is to say which jurisdictional mandate counts? These are just some of the unanswered questions.

At a first glance, one could employ the six fundamental values of the Grant Wilson Universal Declaration of River Rights (UDRR, 2017a, 2017b):

- The right to flow
- The right to perform essential functions within its ecosystem
- The right to be free from pollution
- The right to feed and be fed by sustainable aquifers
- The right to native biodiversity
- The right to restoration.

Indeed, such normative aspirations provide a useful ‘starting point and baseline standard’ (UDRR, 2017a, p. 3) for constitutionalizing the rights of nature, as exemplified in Ecuador; triggering new modes of legal action to grant rivers the status of legal personhood to sue or be sued, as exemplified in New Zealand (O’Donnell & Talbot-Jones, 2018; Youatt, 2017); or

empowering river activists to oppose the dominance of hydropower 'productionist-oriented' regimes (Blake & Barney, 2018), as exemplified in the Mekong River, which flows from China to Vietnam crossing six national boundaries (WWF, 2016). That said, although these six fundamental rights may direct attention to the problem of which values should be imputed to rivers, this does not mean that concrete blueprints for action will automatically proceed from them. In fact, due to their abstractness, only picturesque details in judicial reasoning can be offered to guide the mediation of experience. Why?

Consider an activist lawyer who employs river rights as a normative reflex of human rights (Kersten, 2017), draws support from the Universal Declaration of River Rights, and argues that a river's right to flow is so morally imperative that 'all dams that lack a compelling social and ecological purpose' (UDRR, 2017a, p. 3) should be decommissioned, regardless of consequences. What one finds is that the success of the claim derives not so much from ordaining abstract river right principles but from the state in which the claim happens to be made at a given time. This means it is not a sender-receiver (telegraph) model which dictates the claim's success (for this simply directs attention to the skilfulness of the lawyer that announces the claim); rather, the claim must endure a negotiation process akin to a 'conductor-less jazz orchestra' (of improvisers following each other's lead), which includes the problem of information and understanding (Winkin, 2001, cited in Guy, 2018).

In the Mekong region, which this article will employ to illustrate the nuances of river rights, the problem of promoting interests can be described as follows. On the one hand, hydropower dam planners today may pay more attention to the articulation of announced laws, such as the right to equitably utilize water resources, but in 50 years' time, the repertoire of relevant scientific information may change the contextualization of these announcements, and hence the understanding of hydropower dam planners. On the other hand, a river activist today may pay more attention to the articulation of announced scientific evidence, such as the ecological degradation of river basins caused by dams, but in 50 years' time, the repertoire of relevant policy-driven information may change the contextualization of these announcements, and hence the understanding of the river activist. The point here is that the significance and meaning of river right claims derive neither from the truth value of information, nor the expressive behaviour of an actor's announcements, nor from a presupposed combination of background information and articulated announcements which informs us that it is reasonable to seek understanding and consensus. Rather, the significance and meaning of river right claims derive from the 'circular linkage' of *information, announcement and understanding* – an often hard-won achievement, considering that announcements and understandings are separated in time by the buzzing, booming, confusing world of information. How then to come to terms with this complexity?

This article proposes that Niklas Luhmann's (2004) strictly scientific endeavour to begin with certainty in the analysis offers an innovative way forward. But in order to acquire this objective diagnosis, a paradigm shift from normative to post-ideological jurisprudence is required. This is a shift from normative jurisprudence, which presupposes normative standards against which to improve practice (Devlin & Devlin, 1965), to post-ideological jurisprudence, which radically distances itself from ideological positions and normative standards so as to improve *the account of* practice (Philippopoulos-Mihalopoulos, 2009). Here *improve* refers to, in the tradition of science, a guarantee 'at least' that the account of

practice is ‘correctly false’ (i.e. investigating what is not true in order to define problems more specifically). Of course, this aim to begin with certainty in the analysis does not mean that post-ideological jurisprudence is better than normative jurisprudence: it simply assists normative jurisprudence by describing practice in a different way from how practice observes itself. But then what relevance does this have for practice? If relevance is defined broadly as making a difference, then post-ideological jurisprudence may have no relevance (because practice might already know what is described). But if relevance is defined as the reconnectability of practice to a methodological framework composed of the thematic, social and temporal dimensions, the endpoints of reflection,<sup>1</sup> then it could catch the interest of practitioners, as it gives new contours to the problem of the justification of river rights. And this is useful because only by defining problems more specifically can one more adequately describe the social conditions that determine whether the communication of river rights finds success in society – the research aim of this article, which is to be analyzed in three parts:

- The thematic dimension articulates the conceptual relevance practice has to social information systems which enable variation in the assessment of river rights.
- The social dimension articulates the instrumental relevance practice has to the forecast of communication, namely the expressive behaviour of announced legal arguments seeking to stabilize the expectations of river rights.
- The temporal dimension articulates the legitimitive relevance practice has to the understandings of valid river right claims, which is distinguished by whether one pays more attention to the thematic dimension at points in time, or the social dimension.

In what follows, I first provide a summary of the proposed paradigm shift from normative to post-ideological jurisprudence. Drawing on the analytical lens of the latter, I then address the research question by employing a methodological framework comprising thematic, social and temporal dimensions, with conclusions presented in the last section.

## **From normative to post-ideological jurisprudence**

How does society induce itself to reflect on the question of the validity of river rights? At a first glance, the aspiration of normative jurisprudence to improve the practice of river rights by pursuing some sort of secularized search for redemption through guiding principles, universal values or categorical imperatives might seem the logical way forward. However, if one unmasks this ‘cloak of professionalism’ (Mattei & Russi, 2012, p. 267), one finds that the ideals of rationalism are upheld not by identifying the ultimate justification for river rights but by employing rhetorical ‘shock and awe’ strategies. For example, first moral outrage is created about the unilateral development of hydropower dams along the Mekong River and their potential destructive impact on the region’s ecosystem, fishing grounds and the livelihoods of local indigenous communities (Fawthrop, 2018b; Santasombat, 2011; Van Ha, 2012). Then, beautiful counter-visions are suggested, such as treating rivers as living entities (Yogendran, 2017), holistic guardianship of river basins (Studley & Bleisch, 2018), and hydrosolidarity as a potential emancipatory alternative to water conflicts (Falkenmark & Rockström, 2004).

In short, the assumption here is that by embracing the ‘collaborative turn’ in water governance and its core values of ‘inclusivity, holism and representation’ (Harrington,

2017, p. 257), humankind can, in accordance with the traditional optimistic ways of thought, rationally plan or at least decide on its own future (Allmendinger, 2002). But what happens when one finds that such utopian counter-visions are hard to come by? Moreover, what happens when one finds that the prevalent reality of our globalized '3.0' world (Friedman, 2006) creates the conditions whereby human actions are increasingly 'mediated by technological loops, financial opacity, political interests, legal complexity, and so on' (Philippopoulos-Mihalopoulos & Webb, 2015, p. 447)? Under these circumstances, perhaps what we need most is not a more trenchant critique of the crisis at hand, nor another blueprint for action to patch up problems, but a thoroughly constructed framework or set of guidelines by which the social landscape of river rights can be observed and described adequately.

This is where the analytical value of post-ideological jurisprudence can be found: not because it intervenes in decision making by proving the necessity of river rights claims, but because it deconstructs, from a normatively neutral stance, how such claims are justified in the first place. Admittedly, this 'reflexive form of critique' (Esposito, 2017, p. 24) does not lead directly to better principles, guidelines or blueprints for action. But what it can do is assist normative jurisprudence by improving the account of practice – and doing so in a manner which leaves legal practice free to do what it deems right, as opposed to having always to reassure jurisprudence of the foundations of river rights, as claimed by philosophers such as Nussbaum (2005) and Stone (1972).

Due to this non-interventionist stance, post-ideological (or post-philosophical) jurisprudence does not follow the impulse to react to the issues of river rights with 'shock and awe'. This is not to say that it is blind to the suffering that 'exists on a massive scale and in such forms that are beyond description' in today's world (Luhmann, 2005, p. 269). But what it can do is warn society of the traps of either overenthusiastic hopes or numbing fears: that when these themes about river rights appear in society, they are not constructed by groups of people who then lay down their own particular agendas; rather, they are the result of an 'information society' which communicates these hopes and fears via worldwide networks, yet in a manner which has been neither thought out (in terms of coping with the loss of central agency) nor understood or accepted in society as one had wished or planned.

To offer an illustration, the 'mountain cults' of the Tibetan lay people may trust and hope that the *ghzhi bdag* spiritscapes – animistic beliefs which paint the watershed as spiritual resources, as opposed to an exploitable commodity (Studley & Jikmed, 2016) – grant them the legitimacy to protect their livelihood practices within governance discourses. However, this legitimacy does not immediately become part of society until it has been given meaning and significance by one or more social (communication) systems. For example, the *ghzhi bdag* spiritscapes have to be recognized by a Buddhist religious system which constructs communications such as animistic 'mountain cult' rituals – and which constantly reproduces these experiences through a network of communications – on the basis of its observational frame, its ritual code (revelation/non-revelation); a legal system which constructs communications such as the principle of 'community participation', on the basis of its legal code (lawful/unlawful); a science system which constructs communications such as best practices of 'environmental governance', on the basis of its science code (truth/non truth); an economic system which constructs communications such as the 'national account system', on the basis of its economic code (pay/non-pay); and/or a mass media

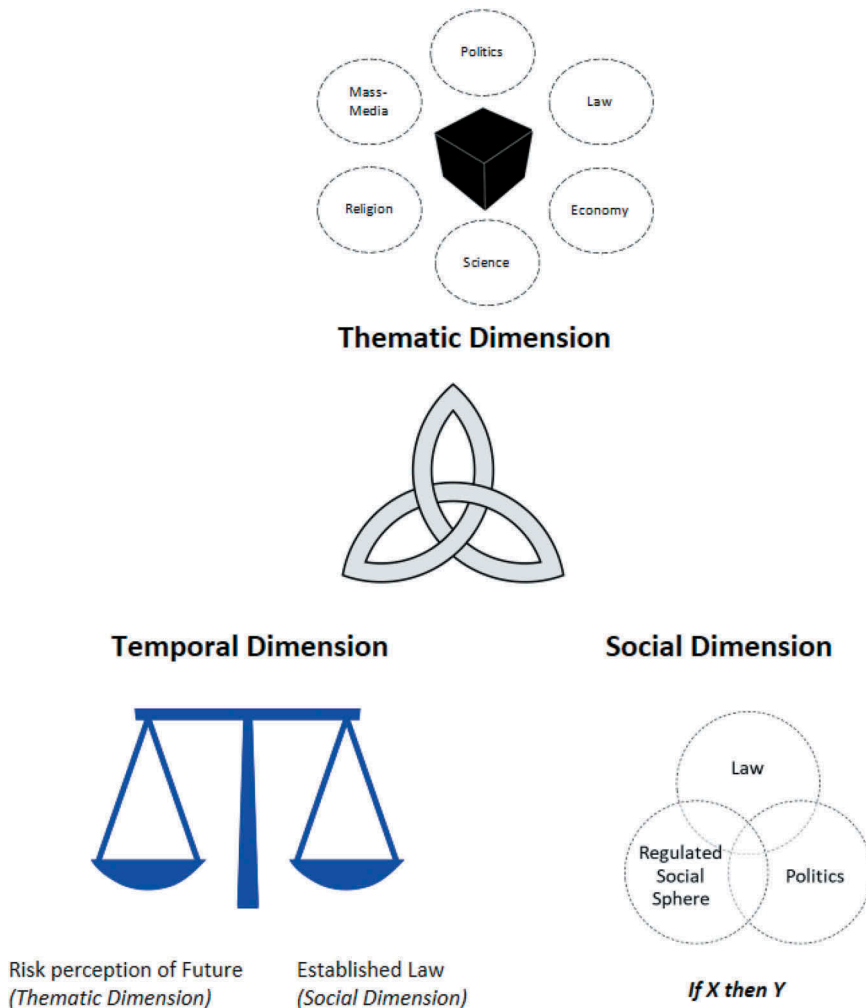
system which constructs communications such as news broadcasts, on the basis of its media code (informative/non-informative).<sup>2</sup>

If one accepts this description, then the ‘sociological insult’ (Moeller, 2012, pp. 19–31) here is that the ideals of enlightenment, rationality and progress are no longer determined by individual groups of people, actors or nation-states; rather, it is social systems themselves that are the genuine ‘medium of Enlightenment’ (Luhmann, 1967, cited in King & Thornhill, 2003, p. 133). Indeed, this observation dramatically undermines river right approaches which advocate a more inclusive world according to universal principles, rational necessity and/or moral obligations. For the issue here is that in a hypercomplex society where different social systems reconstruct different versions of enlightenment (indigenous justice, economic justice, juridical justice) and where we humans are constrained by the outcome of these unreliable systems, this disturbingly means that nothing can be described as necessary or problematic any longer in any objective sense (Kang, 2018a). Instead, every individual perspective co-emerges and co-evolves with the particular requirements of social systems, as exemplified in the systemic rule of rationality, which determines that all legal observations of river rights takes place first on legal terms, and only second is recontextualized from an economic, political or indigenous point of view. This is not necessarily a bad thing, of course, but what it does suggest is that it is social systems, not people, which actually stimulate and perpetuate the processes of societal rationalization. Which raises the question: If it is true that each social system uses a different criterion for success and relevance, but an equally legitimate problem construction and remedial imperative of river rights, how then to adequately reflect on the social validity of river rights? The answer, I propose, can be found by employing a methodological framework oriented to problems, as opposed to normative interests.

### Improving the account of practice via methodology

To keep track of the difference between normative and post-ideological jurisprudence, I propose a methodological framework comprising thematic, social and temporal dimensions. Here the difference is maintained since the framework does not start out with normatively charged concepts such as water security, sustainability, or hydrosolidarity – concepts, that is, which typically seek to promote interests.<sup>3</sup> Instead, it starts from a normatively neutral stance, and this is acquired by constructing the framework from the ground up independent of any scholastic conventions. Indeed, it is through this independence that the framework is able to complete its ‘spherical’ way of thinking, which is that its thematic, social and temporal dimensions cannot be isolated empirically. They must be combined as a unity, just like the Holy Trinity,<sup>4</sup> even though they are to be distinguished analytically to provide three different phases of decision making (Figure 1).

- The thematic dimension articulates the conceptual relevance practice has to social information systems which enable variation in the assessment of river rights. It is concerned with bringing conceptual awareness to the form of the ‘black box’<sup>5</sup> problem of different social systems, generating different questions about what constitutes the validity of river rights.
- The social dimension articulates the instrumental relevance practice has to the forecast of communication. It is concerned with bringing instrumental awareness to the willingness of legal argumentation – which is more rigid than policies and plans – to guard



**Figure 1.** Decision-making framework on the social validity of river rights.

itself against changes that see river rights potentially go against law’s conditional programme, if X then Y.

- The temporal dimension articulates the legitimitive relevance practice has to the understandings of valid river right claims. It is concerned with bringing legitimitive awareness to how understandings of validity evolve depending on the emphasis of ordering (experiencing) the thematic/social dimensions at different points in time.

The contribution of this decision-making framework is that it helps us understand what interests lie behind the problem/solution constructions of river right claims (thematic dimension). This in turn helps explain why the promotion of interests becomes a problem, especially since in detailed planning the number of opposing interests that suffer increases (social dimension). And the root of this social problem derives from the temporal dimension, in the various forms of realizing future uncertainty, that is, the problem of the justification of river rights, as will be explored next.



### **Thematic dimension**

The thematic dimension articulates the conceptual relevance practice has to social information systems which offer a repertoire of possible solutions to the problem of what constitutes river rights. More specifically, this is a ‘black box’ problem derived not from the content of river rights themselves but from the problem of how social systems react to river rights. For the empirical observation here is that river rights do not directly affect river basins themselves; rather, their effects or normative qualities are always purely socially constructed by social systems. Indeed, if river rights do show up on the radar of highly distinct social systems such as law, politics, or the economy, they are often introduced, so to speak, from the sidelines. This is because the underlying ecological problems which river rights aspire to resolve have no genuine roots in any of these social systems. Their questions, therefore, can be effectively treated only in accordance with purely local or system-specific criteria (Borch, 2011). This explains why each system may have quite a different perspective on river rights, and thus why systems such as the law find it so difficult to determine their jurisdictional scope.

But these differences in perspective do not necessarily lead to less dynamic discourses. In fact there is more room for dynamism the more that the systemic rule of rationality kicks in and systems ask the questions that matter to them. The political system asks how river rights can legitimize (or undermine) the government’s actions. The law asks how river rights can continue (or discontinue) the law’s requirements for consistency in decision making. The economy asks how river rights can facilitate (or inhibit) the cost-saving transactions of freshwater management. The science system asks how river rights can generate (or block) more research proposals which address the conditions and effects of river protection. The system of religion asks how river rights can reinforce (or undermine) the supremacy of religious values. And the mass media system asks how river rights can satisfy the media’s rigorous selection filters to improve the prospects that people will watch tomorrow’s news.

That said, although system-specific criteria is the precondition for meaningful river right discourses, they also create (conceptual) boundaries which prevent systems from operating outside their own problem trajectories. Science may propose that an ecologically healthy river is one where the ecosystem has the ability to maintain its structures and function over time in spite of external stresses (Costanza & Mageau, 1999), but this cannot be read as such by the legal system, and must instead be transposed into concepts such as legality. A legal conclusion that a ‘healthy’ river equates to the environmental standard of ‘not too degraded’ (Kauffman & Sheehan, 2019) may not map onto topocosmic beliefs that consider rivers spiritual entities. Topocosmic beliefs cannot be translated directly into terms that are meaningful to the economic system, except in concepts such as ‘tourism destination reputation’, to allow the economy to calculate the profitability of monetary investments. The economic rationality of investment risks posed by the environmental impacts of tourism is not identical to scientific understandings of risk minimization, or more specifically, ‘ecosystem-based management’ (Scrimgeour & Wicklum, 1996). In short, what this description unveils is that social systems do not have direct inputs and outputs to one another; they cannot directly steer one another, and they do not share the same perceptions of what ought to constitute the specific technicalities of river rights.



Social systems can, nevertheless, complement each other. Although they may seem independent, and thus increasingly able to follow their own logic, this does not mean that their dependence on other systems is decreasing. To the contrary, it is increasing. For example, the politically acceptable threshold level of a hydropower dams water release for irrigation purposes in the Lower Mekong region will reappear as a factor that reduces or increases profits in the economic world of energy supply distribution, while the language of profit derived from this energy supply will reappear in the world of politicians as a limitation on how far promises can be made to guarantee a river's right to 'natural' flow. Significantly, what this process of systems feeding into each other and adjusting to each other describes is how each social system proceeds to reconstruct the unity ('realness') of river rights in its own functionally distinct ways.

Admittedly, this system of checks and balances may also spark conflicts. For river rights cannot be colonized and isolated according to the functional priorities of any one dominant system. Instead, systems have to struggle over what exactly constitutes river-rights-specific technicalities. After all, what is deemed valid in one world might be invalid according to the logic of another. Take for example the practice of river rights essentialism and the 'politics of obstruction' – 'no dam building on the river', 'no blowing up of the river basins rapids', and so on. Nothing prevents Thai politicians, for example, from demanding or promising a river's right to native biodiversity (Nijhuis, 2014). But this is only because they are not obliged to think about or act on how such actions may affect the economies of upstream states, and do not have to face the consequences (such as the loss of energy supply and jobs). What matters above all to the system of Thai politicians is whether these calls to action can maximize or limit the power of the opposition party. Where is one led by this mode of essentialism? From the perspective of social contribution, it leads to a situation whereby an involved/uninvolved spectator is created, one who demands to take part in changes while being protected from their consequences – a demand, that is, which hardly begins to solve the problems of the natural environment.

Indeed, if it is true that person-centred moral judgements are increasingly swept aside by the overwhelming (amoral) priorities of social systems,<sup>6</sup> then the underlying problem is not how to define some sort of ultimate (moral) ground from which all matters about river rights can be derived; the more analytically useful question is, what kind of expectational burdens can river rights endure? In other words, how much monetarization, scientification, politicalization and religionization are river rights able to generate and cope with, and how much of these specialisms at the same time (rather than, say, monetarization alone)? The answer is that the implementation of river rights can only work if the 'magic triangle' of political, legal and the relevant social spheres in regulation can also continue. Only if the political game is given space to continue, 'to negotiate land use and value extraction' (Van Assche, Beunen, Smit, & Verschraegen, 2015, p. 51), and the regulated social systems are given space to calculate their own criteria for success and relevance, such as the monetary calculation of social entrepreneurship in economics (Aikaterini & Hummels, 2019), can decision makers adequately implement river rights – something which legal processes help manage, as will be explored next.

## **Social dimension**

The social dimension articulates the instrumental relevance practice has to the willingness of legal argumentation to assume responsibility for the risks involved in operationalizing river rights. This is best captured in the law's conditional programme, the 'if-then' formula, which takes on the primary role of 'formalizing' normative expectations: only if fact X is given can it be decided whether Y is legal or illegal. Or more specifically: only if a rivers' right to be free from pollution is violated, such as with the illegal dumping of untreated waste, can the decision of illegality be made. Here the advantage of employing the conditional programme is that it enables the law to function as a risk-reducing institution, because it aligns an actor's expectations and behaviours long before any serious disagreement arises. In doing so, the programme therefore provides the possibility that violators face serious sanctions if they do not live up to the law's expectations – a possibility which should normally not become relevant if the legal system fulfils its function properly.

That said, the problem with the conditional programme is that it is input-oriented, as only the correct identification of what is formalized, or concretized, will lead to a certain planned legal measure being carried out. In practice, this means that the willingness of legal argumentation to assume responsibility for operationalizing river rights depends to a large extent on the principle of voluntariness, which in effect permits states to induce a race to the bottom and decide only the softest obligations. This is exemplified in the Mekong region (Hirsch et al., 2006; Johns, Saul, Hirsch, Stephens, & Boer, 2010). Here this race to the bottom takes a form whereby river rights cannot go against the established law, as shown in the conditional programme: only if contract law and international customary norms are not violated will the law enforce the obligation 'to protect . . . the ecological balance of the Mekong River Basin' (MRC, 1995, Article 3).<sup>7</sup> In other words, the extent to which river rights are legally binding, with enforcement effect, depends on the degree to which other regulations remain in effect, such as the law on investment property and commercial navigation – the essential building blocks for development initiatives put forth by organizations such as the Lancang Mekong Cooperation (Biba, 2018). Thus, it is only realistic to assume that the established legal framework (which includes environmental law and quality standards) accommodates the interests of the dominant, since the law could not conduct itself otherwise, or else lose binding recognition and support from nation states such as China (as occurred when China refused to join the Mekong River Commission).<sup>8</sup> Nonetheless, what is also crucial here is the extent to which the law can be purged of structural biases, and this is best exemplified when the law attempts to correct its optical biases by employing purposive programmes.

Purposive programmes are output-oriented: they define fixed goals to be attained, as exemplified in the formula: to decide Y for the purpose of achieving X. Or in the context of international customary law: to impose the notification of planned measures, even in the absence of treaty agreement, to achieve the standard set by the requirement not to cause significant harm (UNWC, 1997). Of course, from the perspective of legal validity this does not mean that the no-significant-harm programme is receptive to claims that evolve around the 'big questions', such as actual factual harm caused to rivers (Kang, 2018a). This is because the no-significant-harm purposive programme, a variant of the conditional programme, prescribes that in the event of violation, it is the conduct of state practice, not the

expectation of factual harm, which is wrong.<sup>9</sup> Hence, dam development without prior consultation is forbidden, as claimed for instance in the Pak Beng Dam lawsuit, which questioned the legality of the power purchase agreement between Laos and Thailand (Roykaew, 2017). Paradoxically, this also means that what is not forbidden, such as actual factual harm, is permitted (within reason) – and this is why lawyers and policy makers are able to speak of ‘fully legally compliant’ hydropower dam projects (Reuters, 2018), and the subsequent ‘good’ international practices of ‘benefit sharing’ (Suhardiman, Wichelns, Lebel, & Sellamuttu, 2014).

Admittedly, this does not necessarily mean that the law is just. In fact, the more law tries to exclude non-legal communications, such as actual factual harm caused to rivers, the more does the consciousness of this arbitrariness establish itself. This is amplified when one considers that in a hyper-complex modern society, the established procedures, rules and ‘normal’ rational criteria offer little help, because one is inclined to expect the improbable (Esposito, 2017). Chinese officials may draw on law and science to assure Southeast Asia that the Yunnan dams will have a positive environmental impact in terms of enhanced flood/drought management – but a catastrophe could always happen tomorrow, because 100% security against these extreme events does not exist. And here a problem arises because anxiety ‘cannot be regulated legally nor contradicted scientifically’ (Luhmann, 1989, p. 127). In fact, once the theme of anxiety gains enough traction that it can no longer be seen in a negative light, such as after the flash floods of the Xe Pian-Xe Nam Noy dam collapse in Laos (Fawthrop, 2018a; Sim, 2018), it has the effect of cutting loose the law from its ‘social moorings’ (Luhmann, 2004, p. 162). In other words, anxiety acquires the advantage of replacing the difference of norm and deviation by forcing the law to yield to the authority of the temporal dimension, as will be explored next.

### **Temporal dimension**

The temporal dimension articulates the legitimative relevance of practice to the tensions between the future and past which arise in operationalizing river rights. That is, between the perceived act of significant harm, and the established legal procedure for restitution, or in other words, between the eruption of events in the thematic dimension and the social dimension. But this mode of legitimation awareness is not attuned to the time-binding arrangements of ‘rational’ solutions (especially where rational means capable of or requiring consensus). It refers here to the possibility of recognizing errors in the risk perception of the future, which, under the conditions of ecological modernization, overtakes the past as the meaningful construction of the present.

At a first glance, the essentialist strategy of river rights activism might seem a viable candidate, as exemplified when Thailand-based activists protest the blasting of rocks in the Mekong Rivers’ rapids; the media decry the violations; and the government commissions feasibility studies (Nation, 2017; Perlez, 2005). But where such essentialism provides a useful ‘alarm’ function to safeguard society from being aligned with (unquestioned) policy objectives, it also generates a social environment whereby either too little or too much ecological noise is produced. On the one hand, too little noise is produced because river rights activism tends to get drowned out by information overload. Consider the possibility that humans and fish that swim in the Mekong River might

die because it is so polluted. As long as this observation does not become the subject of communication, it will have no social effect: as the saying goes, *pas d'intérêt, pas d'action* (no interest, no action). But if the ecological noise does gain traction, then the evolution of river rights activism takes on a paradoxical form: the capacity for river rights to become known and affirmed depends not on the extent of ecological degradation but on the extent to which river rights are validated by their very violation and subsequent outcry – and due to the busy and exhausting tasks of daily life, it is never very long before all this fades into the white noise of the mass media.

On the other hand, river rights activism may produce too much ecological noise, due to 'over-engaged' announcements. The mass media, for example, may turn to science and announce that it is 'the weather' that caused fish to die in Vietnam (VNS, 2017). This will typically give the general public more knowledge and more ignorance at the same time: more knowledge because more normative statements are provided, and more ignorance because such knowledge comes set against a 'virtual reality' which is typically announced metaphorically: 'is this information manipulated?' and 'does this violate a river's rights?' lead to the question, 'who's colluding with who?' And when this occurs, the individual case becomes uniquely common, so much so that the problem for the government is no longer the underlying environmental risk: how to minimize harm to the fish and to the river's integrity. It becomes a conflict between decision makers and those affected, whereby the government, due to the fear of political revolt, is forced to focus on its own legitimacy – a distraction which may result in episodes of state-linked violence, as observed in the discourses surrounding the Pak Mun Dam (Foran & Manorom, 2009).

Viewed in this way, one can see that river rights essentialism generated from protest and dissidence is not particularly helpful in legally prohibiting the environmental degradation of river basins. It may actually obstruct the acceptance of laws, because it pretends to go beyond the established juridical world, and thus be more than law. For what drives its implementation is not the functioning of law's code, legal or illegal – what counts is humanity. And the error here is that river rights essentialism which tries to impose itself on the law, or even ignore the law (e.g. by assuming that everybody wants a naturally free-flowing river, not a dammed-up river, which violates the principle of consultation), is not actually a solution but a disappointment-ridden mode of conflict resolution. Why? It is because this lethargic attitude to the law pressures politics into politicizing risks of all kinds which, in this era of unsustainable co-evolution (Kang, 2018b), politics can no longer resolve. This is not to say that river rights should be given up; their practical implications, after all, serve the important function of protecting rivers from ecological degradation. But how then to give legitimacy to the communications of those whose actions count on the belief that river rights are socially valid?

This is the point where the return to legal technique, the management of differences between the perceived act of harm and established legal procedure, shows its potential. Here a viable candidate is the granting of legal personality to rivers. Granting rivers (as legal persons) organizational representatives and giving them rights and duties offers an advantage because these representatives are socially addressable. In principle, this form does not cause any general problems, because the unlawful (representatives) can always be legalized if they are imported into the law and regulated. Of course, the structural biases of law's social dimension will resist the personification of rivers, because granting

them rights and duties via representatives could go against the established law. But the law cannot go on as if nothing has happened. This is because the personification of rivers perturbs general expectations in the thematic, social and temporal dimensions.

From the perspective of the thematic dimension, legal personhood for rivers, such as the Whanganui River in New Zealand (more specifically, the 2017 *Te Awa Tupua Act*, clause 38, prioritizing regulatory conformity with Maori practices), sets a precedent for other jurisdictions. The effect here is that the more that such rules are implemented, and the more this becomes the norm rather than the exception, the greater are the reputational risks for jurisdictions that resist personification.

From the perspective of the social dimension of law, the validity of granting a river legal personality depends on existing rules. But the personification of a river challenges this structural bias not because it pushes the establishment to the point that it bursts, but because it works against it from the inside: it absorbs the undecidability of political conflicts that evolve around rights, resistance and dissent into, at least in the world of law, decidable technical inquiries about representation, participation and the judiciary of 'citizens' tribunals' (GARN, 2009).

Finally, from the perspective of the temporal dimension, giving legal personality to rivers keeps the future open to all possible preferences, such as shifts in balancing river rights with the 'right to water', or the ideological fault lines over whether animistic worldviews should be protected only if they contribute to conservation outcomes (Jonas et al., 2017). This is crucial not only because it enables the law to 'catch up' with its social environment, but also because it maintains the law's presentation that its operations are not in fact based on structural biases. Indeed, only by maintaining this presentation that the law is legitimate, just and fair can it paradoxically maintain legal security, stabilize expectations and pacify conflicts.

## Conclusion

This article aims to work out the social conditions that determine whether the communication of river rights finds success in society. Employing the context of hydro-power developments in the Mekong region, we find that an essentialist strategy which claims that river rights have unlimited 'moral' validity regardless of consequences is unlikely to succeed in society. This is because from the perspective of social contribution an essentialist strategy is not revolutionary but conservative, since it neglects the all-important problem trajectory structures of social systems.

To come to terms with this complexity, I propose a paradigm shift from normative to post-ideological jurisprudence. Where normative jurisprudence pursues the search for the ultimate (moral) foundation of river rights (often with spectacular disappointments), post-ideological jurisprudence recognizes that moral conflicts over river rights may ultimately only be resolvable 'unmorally', that is, by procedural legitimacy, as captured in the proposed decision-making framework (Figure 1).

- The thematic dimension articulates the conceptual relevance practice has to the various (amoral) social information systems, such as politics, economics and science. It is concerned with bringing conceptual awareness to the form of the 'black box' problem,<sup>10</sup> of different social systems generating different questions about what constitutes the validity of river rights.

- The social dimension articulates the instrumental relevance practice has to the expressive behaviour of announced legal arguments. It is concerned with bringing instrumental awareness to the willingness of legal argumentation to guard itself against changes that see river rights potentially go against law's conditional programme, if X then Y.
- The temporal dimension articulates the legitimitative relevance practice has to the understandings of valid river right claims. It is concerned with illuminating why validity lies not in essentialism (where one presupposes an ordering of the thematic/social dimension to justify ultimate (moral) grounds) but in the principal impossibility in modern society of predicting who can say which normative interests count.<sup>11</sup>

And it is precisely this operation of law, to keep the future open against all final judgements, which granting rivers legal personality facilitates: not because this legal technique repairs social problems directly, but because it absorbs uncertainty; because it enables society to deal with problems, to inquire about what questions one should ask the other,<sup>12</sup> without risking the freezing side-effects of confronting and solving problems directly. Indeed, giving rivers rights as juristic/legal persons or living entities may have vital functions, even if it is only on the symbolic level.

In sum, when one combines the thematic, social and temporal dimensions into a singular decision-making framework, the insights offered are not impractical orientations which one cannot seriously recommend, let alone put into practice. After all, what is contributed is a creative lateral way of thinking, which advises that when things fall short, perhaps it is more rewarding not to look for better solutions to problems – problems that are constructed by the mass media – but to ask instead, 'What is the problem in the first place?' This does not mean simply reiterating the ways in which multiple sovereign borders and jurisdictions structurally disconnect communications, nor does it mean ordaining a narrow criticism of the asymmetry between river rights and prevailing hydropower development agendas in regions such as the Mekong River. Rather, the 'critical attitude' (Esposito, 2017) here is that by defining the problem of the justification of river rights more specifically, one can more adequately describe the social conditions that determine whether the communication of river rights finds success in society or not, as can be summarized as follows: only if the social environment of systems calls for positive ecological reputation (thematic dimension) will law and politics show leadership in implementing river rights (social dimension); but when negotiating the specifics, it is the perceived risk of the future where authority is found (temporal dimension). And whose guesses about the future validity of river rights are correct – well, that is a question of who is in power.

## Notes

1. In the sense that these dimensions are the definitive lines beyond which one starts to lose analytical power. Accordingly, I draw support from my interpretation of Luhmann's offhand comparison with the doctrine of the Holy Trinity. The Father is the world of information (*thematic dimension*); the Son, the reality of announcements (*social dimension*); and the Holy Spirit, how the meaning of the Father and Son is acquired through the evolution of understanding (*temporal dimension*). For further details see Rasch (2013).
2. For more details on this non-exhaustive list of social systems, see Roth and Schütz (2015).
3. In the sense that these concepts typically seek to show why the particular interests are the common interest, or at least cover many other interests as well.



4. See note 1.
5. Here 'black box' articulates the problem of working out what lies inside a system which cannot be recognized because it is too complex.
6. In the sense that each social system employs an amoral code of rationality, such as legality in law, efficiency in economy, or risk minimization in science.
7. See for example Article 36 of the 1995 Mekong Agreement (MRC, 1995).
8. For more details, see Ho (2014).
9. As McCaffrey (2001, p. 347) points out, the rule regarding no significant harm 'is not factual harm per se but injury to a legally protected interest that the law prohibits'.
10. See note 5.
11. As Přibáň (1997, p. 345) supports, that 'law is legitimate to the extent to which it is open to outside critique; by different vocabularies and language games'.
12. Procedural right questions such as the right of information, the right to participate and the right of access to justice, or substantive right questions such as a rivers' right to be protected from pollution to maintain its good ecological status. For more details, see Wuijts et al. (2019).

## Acknowledgments

I would like to thank Marleen van Rijswijk, Cathy Suykens, Herman Kasper Gilissen, Jappe Beekman and David Devlaeminck for their invaluable feedback made on earlier versions of this manuscript. I also thank the editors and anonymous reviewers for their detailed and insightful comments.

## Disclosure statement

No potential conflict of interest was reported by the author.

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