Rights and Rites for Water Justice: A Case Study of the Proposed Hatgyi Dam on the Salween River

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Abstract

The Salween River flows through China, Myanmar and Thailand, and is an invaluable resource to the millions of ethnic people who live along it. The Hatgyi Dam is one of five controversial hydropower dams planned to be built in Myanmar territory that would affect the livelihoods and cultural values of local communities. To date, there have also been questions of community involvement in decision-making regarding the Salween dam projects, and therefore there is an issue of justice in the water governance of the Salween River. Focusing on the Hatgyi Dam as a case study, this paper uses the concepts of “Rights” and “Rites” as analytical tools to examine community expectations and the decision-making process over the Salween dams to date. According to this framework, a “Rights-based approach” is a formalized and legalistic approach to water governance normally recognized by the state. Meanwhile, a “Rites-based approach” is a locally-defined natural resource management approach that centers around cultural norms and local knowledge.

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2Karen Environmental and Social Action Network (KESAN) is a community-based, non-governmental, non-profit organization that works to improve livelihood security and to gain respect for indigenous people's knowledge and rights in Karen State of Burma, where the violence and inequities of more than 60 years of civil war have created one of the most impoverished regions in the world.
The purpose of this paper is to evaluate how both approaches - “Rights and Rites” - could work together to help ensure inclusive decision-making and to ensure a full consideration of justice with regards to the Salween River. The paper claims that the issue of justice is not yet fully considered in the current development policy agenda in water governance in Myanmar. Furthermore, the paper claims that decision-making over the Salween dams has been highly centralized and without community participation. The paper suggests that there is an opportunity to recognize both the “Rights” and “Rites” approaches to water governance in Myanmar, and this could result in a positive step towards inclusive decision-making and ensuring justice in water governance on the Salween River.

Introduction

The Salween River flows through China, Myanmar and Thailand and is an invaluable natural resource for the livelihoods and culture of millions of ethnic people living along it (Molle, et al. 2009, Ch.5 Magee and Kelley). The Hatgyi Dam is one of five dams that is planned to be built on the mainstream of the river in Karen State in Myanmar. The proposed dam is very complicated due to the decades of on-and-off violent conflict in Karen State, which has resulted in human rights violations and mass displacement of civilians, as the Hatgyi project site is situated within an armed conflict area (KRW, 2016). Community research undertaken by the NGO KESAN (KESAN, 2008), together with academic research (Simpson, 2007; Magee and Kelley, 2009), have assessed the social-economic, livelihood and cultural value of the Salween River to local people, as well as the decisions regarding development project is taken to date by powerful actors that is argued to have resulted in unequal outcomes for the local community.

3 After over 60 years of conflict with government military, ethnic people (including Karen) has been demanding for the rights to self-determination and to govern its own natural resources (Simpson 2013; Bauer et al. 2016). While ceasefire and peace negotiations with Ethnic Armed Organizations have been dragging on for years, Myanmar government has tried to advance its dam plans on the Salween (International River 2013)
Researchers of water issues in Southeast Asia have begun to address the concept of justice in water governance, arguing that there is a need to identify the winners and losers in decision-making towards water (Lazarus et al. 2011; Middleton, 2015). How decision-making could be better informed and inclusive is a critical question to address the issue of justice in water governance, including on the Salween River. To answer this question, it is important to research the social-political implications of official decision-making processes, as well as to understand the ethnic communities' expectations towards the Salween River's water governance. Hence, this study will apply a “Rights” (legalistic) and “Rites” (cultural) approach (see conceptual framework below) to analyze community expectations and decision-making processes on the Salween River, taking the proposed Hatgyi Dam as a case study.

The purpose of this paper is to evaluate whether the approaches of both “Rights” and “Rites” could work together to support inclusive decision-making and towards justice in water governance for the Salween River. In the next section, the paper details the research methodology and defines the conceptual framework of “Rights and Rites”. Then, focusing on the case study of the Hatgyi Dam, the paper details the chronology of events on the project, and also the local way of life and resource management system near the Hatgyi Dam area in Karen State. The paper then analyses the government's policies and the legal implications, together with the local resource management system, using “Rights” and “Rites” as analytical tools. After that, the paper synthesizes its analysis to draw out potential implications for justice. This paper therefore concludes that limited attention has been paid to the issue of justice by the government in its ongoing water governance policy in Myanmar to date. It also finds that decision-making over the proposed Salween dams has been highly centralized. The paper argues that recognizing both the perspective of “Rights” and “Rites” in water governance and associated policy development would be a positive step towards inclusive decision-making in order to address the issue of justice on the Salween River.
Methodology

This study’s methodology is based on a qualitative approach. Drawing from a literature review, I frame my research using “Rights” and “Rites” as analytical concepts to understand how decision-making processes take place and can be strengthened. The data collection was undertaken at two levels: at the national/state level; and at the village/community level. Methods include: in-depth interviews; informal dialogues; and meeting observations. These methods were applied with a range of actors (Table 1) to gather information about the official decision-making processes, policy development and institutions related to water governance and hydropower dams.

Data collection was conducted between November 2015 and July 2016. At the national/state level, I conducted six in-depth interviews (Appendix 1) and four informal dialogues. I also participated in meetings with six civil society networks or organizations and six international non-government organizations (NGOs) (Table 1).

Table 1: Summary of interviews conducted

<table>
<thead>
<tr>
<th>Actor</th>
<th>In-depth Interviews</th>
<th>Informal Dialogues</th>
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<tr>
<td>State</td>
<td>1. Karen State Member of Parliament</td>
<td>1. Ministry of Electric Planning</td>
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<td></td>
<td>2. Karen State Chief Minister</td>
<td>2. Ministry of Natural Resources and</td>
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<td></td>
<td>3. Parliament Committee for Natural Resource and Environment</td>
<td>Environmental Conservation</td>
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<td></td>
<td>4. National Water Resources Committee (NWRC)</td>
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<tr>
<td>Non-State Actor</td>
<td>1. Karen National Union (KNU)</td>
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At the community level, I conducted three focus group discussions in Mikayin Village in Hpa-an Township, Karen State during a small community meeting on 26 February 2016 with women, elders, and youth groups (see Appendix 2). I also conducted interviews with 16 people: four community leaders, six farmers, and six mainly-fishing families in Kaw Ku and Mikayin Village tract representing seven villages (see Figure 1 and Appendix 3). I also observed five community and network meetings held in Myanmar and in Thailand (see Appendix 4).

Villages in these areas are situated about 70 kilometers downstream from the proposed Hatgyi Dam site, and about 15 kilometers North of Hpa-an, the capital of Karen State. It is a unique and accessible area in the Salween River as this area
reveals how local livelihoods and culture are connected to the Salween River, including through the management of Dawla Lake linked to it, and from agriculture on Kaw Ku Island.

I originally intended to conduct interviews with villagers close to the Hatgyi Dam site to ensure their perspectives were also included in the study. However, community leaders suggested not to visit this area for security reasons. Instead, I incorporated information about Karen people living in areas upstream from the Hatgyi Dam site, including the traditional Karen customary “Kaw” land management systems which govern land vulnerable to large development projects like the Hatgyi Dam.

The paper also details incidents that have occurred in the past related to peace, conflict, and investment around the Hatgyi Dam (see Figure3). This includes a review of past statements or policy documents of peace and river civil society networks, the legal frameworks of the government, written policy documents of the government and ethnic armed organizations, and recommendations of civil society organizations.

Figure 1: Map of villages where the study was conducted

(Source: Google Earth)

4The area is not easily accessible as it is controlled by the BGF (Border Guard Force under command of Tatmadaw) after fighting broke out between DKBA and BGF/Burma Army (Tatmadaw) in 2014. A villager was killed around mid-2015 for participating in dam movement activity.
Figure 2: Peanut Farming on Kaw Ku Island located downstream of the proposed Hatgyi Dam Site on the Salween River

(Source: Saw John Bright: January 25, 2016)

Figure 3: Map of proposed Salween Dam sites on the Salween River

(Source: International River 2016)
Conceptual Framework

Rights-based approach to natural resource management

In this paper, the “Rights-based approach” is a formalized and legalistic approach to water governance that is normally recognized by the state (Badenoch and Leepreecha, 2011). The concept draws upon a range of substantive and procedural rights, including the Right to Water, when talking about water governance (Hurwitz, 2014). Substantive rights are such as the Right to self-determination and Indigenous peoples’ land Rights and permanent sovereignty over natural resources. Procedural rights are such as the right to access to justice and free, prior and informed consent. The Right to Water is defined as access to water of an individual and it obliges action by governments to ensure the right to be protected. Linton, et al. (2012) interprets the Human Right to Water as the identity of humanity and therefore, implicit to the Right to Water is social equity in water governance (Linton et al, 2012).

Many academic researchers in mainland Southeast Asia nowadays draw attention to the human rights-based approach to large hydropower dams (e.g. see: McCully, 2001; Middleton and Pritchard, 2016). They argue that large dam construction often cause conflicts over access to and control over river resources between local river-side communities versus project developers (and implicitly the consumers of electricity in other areas away from the river). Middleton and Pritchard (2016) show that a human rights-based approach to large hydropower dams also relates to decision-making over who can access and control over water resources, and is thus an issue of justice in water governance. Their findings suggest that even though there are now international legal mechanisms, such as the international water course law, how these legal regimes address the Right to Water remains poorly developed.

This paper will use the "Rights-based approach" as one tool to analyze whether there are contradictions between government policy and existing water governance practice on the ground in Myanmar.

**Rites-based approach to natural resource management**

The “Rites-based approach” is understood in this paper as locally-defined natural resource management approaches which center upon cultural norms and local knowledge (Badenoch and Leepreecha, 2011). This concept derives from traditional ecological knowledge and seeks to understand integrated local-approaches to natural resource management.

Badenoch and Leepreecha (2011), in a case of a Hmong ethnic community seeking to secure access to and control of their resources in Northern Thailand, explain how local water resource management is claimed as either “Rights” or “Rites”. They further explain that the “Rights-based” frame links the community’s common property resources to their claims for the need for the right legal institutions for regulations. Yet, the community also makes claims around "Rites-based" values for their watershed as a place where local people struggle for their own cultural identity and knowledge systems. In the case of the Salween River, local ethnic communities living along the river point out that there are many traditional ways of managing resources, livelihood sustainability and local culture values. These local management systems will be threatened by the proposed hydropower dams for the Salween River.

The “Rites-based approach” is used as a tool in this paper to discuss about community expectations for water governance on the Salween River, and to explore how local people near the Hatgyi Dam site traditionally manage their natural resources through local committees, local rules, traditions and ceremonies that seek to balance natural ecosystems with local livelihoods and cultural values.
Chronology of events on Hatgyi Dam

The Hatgyi Dam and the Electricity Generating Authority of Thailand (EGAT)

The plan for dams on the Salween River emerged since 1979 with the announcement of the Electricity Generating Authority of Thailand (EGAT) to conduct 14 feasibility studies for hydropower dams and water diversions from tributaries of the Mekong and Salween Rivers. Following this, a Memorandum of Understanding (MoU) was signed in July 1996 between the governments of Thailand and Myanmar for Thailand to purchase 1,500 megawatt (MW) of hydropower from Myanmar by the year 2010 (TERRA, 2006).

The initial project plan for the Hatgyi Dam, published in 1999, recommended the construction of a 300 megawatt run-of-river dam. A new feasibility study, published in November 2005, proposed that the project’s capacity could be increased to 1,200 megawatt with a 33-meter high dam. In December 2005, EGAT signed a Memorandum of Agreement with Myanmar’s Department of Hydroelectric Power for the development of the Hatgyi Dam, which was signed in a non-public manner (TERRA, 2006). In 2009, there was a large military attack by the Tatmadaw (the Myanmar military) on the Karen National Union (KNU) 17 kilometers away from the proposed Hatgyi Dam site by the Myanmar Army and the Democratic Karen Buddhist Army to control the area (KHRG, 2009). The attack resulted in approximately 3,500 villagers being forced to flee across the Thai border.

Thailand’s Office of the Prime Minister set up a sub-committee to study and monitor the human rights impacts of the Hatgyi Dam project in 2009. The sub-committee submitted a set of recommendations to Thailand’s government, which included a proposed study of the trans-boundary impacts of the project covering villages located in Thailand. Following a recommendation from Thailand’s Prime Minister Office in 2010, EGAT commissioned Chula Unisearch of

6https://ejatlas.org/print/hatgyi-dam-myanmar
Chulalongkorn University to conduct an additional Environmental Impact Assessment (EIA) of the Hatgyi Dam project (International Rivers, 2016).

In 2011, public hearings were organized in Sob Moei District, Mae Hong Son Province along the Salween River that were attended by a large number of affected people. They raised concerns on the impacts of the dam on river ecology, people and their livelihood. In December 2015, a meeting was organized to present the findings of the EIA study produced by Chula Unisearch in Mae Sariang District, Mae Hong Son, although to date, the full version has not been disclosed to the public. Meanwhile, in July 2016, Thailand's National Human Rights Commission organized a hearing with EGAT International about a number of dams, including the Hatgyi dam.⁷


In 2008, a new Constitution for Myanmar was created by the military junta, official known as the State Peace and Development Council, this outlined a process for Myanmar to move towards a Civilian Democracy, and whilst contradictorily maintaining a major formal role for the military in Myanmar's politics in the constitution (see Figure 4). Subsequently, in 2010, the Union Solidarity and Development Party (USDP) led by President U Thein Sein, a former high-ranking military general, came into power from 2010 to 2015 under the terms of the 2008 Constitution as a nominally civilian government.

The USDP government tried to engage with ethnic armed organizations for a ceasefire negotiation and peace dialogues. To this end, the USDP created the Myanmar Peace Center (MPC)⁸ to facilitate the peace process, although many participants in the peace process raised concerns that the MPC was influenced and controlled by the agenda of the U Thein Sein government so it could not be

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⁷ KESAN representative attended the meeting but limited discussion on Salween Dam Projects was made.

⁸ The Myanmar Peace Center (MPC) is an organization to provide technical support to the peacemaking process in Myanmar (Burma), including implementing and managing ceasefire agreements and facilitating dialogue on political issues.
fully trusted by ethnic groups (Burma Partnership, 2016). Despite this, mediated by the MPC, the U Thein Sein government started to negotiate with the KNU.9

For over 60 years, the KNU as well as many other ethnic groups have been in conflict with the Myanmar military demanding for the right to self-determination and to govern their own natural resources (Simpson, 2013; Bauer et al. 2016). On 13 January 2012, the KNU and Myanmar military signed an initial ceasefire agreement, enabling the KNU to move forward with political dialogues that address peace and a federal settlement. However, despite after the initial ceasefire agreement was signed, there was an increased number of Myanmar military troops deployed into Karen areas and military attacks (Wade, 2012). According to the NGO network Karen Rivers Watch (KRW)10 in its report in 2014, it was stated that from 26 September 2014 to 17 October 2014, at least six different incidents of fighting occurred between the Tatmadaw (together with the Border Guard Force or BGF) and the Democratic Karen Benevolent Army (DKBA)11 in Hpa-an District and Hpapun District. The report concluded that these clashes were linked to the Hatgyi Dam as the Tatmadaw has been seeking to control access to the dam site (KRW, 2014).

Both during the period of conflict, and during the ceasefire, the central Myanmar government has tried to advance plans for dams on the Salween River (International River, 2013). According to a Karen Peace Support Network (KPSN)12 statement in July 2015, the attempts to push ahead with large-scale

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9 The Karen National Union (KNU) is a democratic organization representing the Karen people of Burma. The goal is peace and prosperity in a democratic federal Burma. http://karennationalunion.net/index.php
10 Karen Rivers Watch (KRW) was established in 2003 in response to the needs for a stronger network of civil society organizations working on environment, women, youth, human rights and development issues to emerge in order to monitor several large dams on the lower stretch of Salween River in early 2000s.
11 The DKBA Democratic Karen Benevolent Army (also known as the Democratic Karen Buddhist Army, Splitter group from KNU) those who control most Hatgyi Dam areas, used to aligned with the Tatmadaw. But after November 7, 2010 election, DKBA oppose it and then fighting back each other again given the fact that the election is unfair.
12 Karen Peace Support Network - KPSN is the largest network of Karen civil society organizations in Burma. Its member organizations have been providing support for vulnerable people and communities in this conflict-torn region for decades, striving to empower local communities, build transparent and accountable institutions, and help create a sustainable peace in Burma.
development projects, including large hydropower dams, is obstructing the peace negotiations between the KNU and the Myanmar military (KPSN, 2015).

Figure 4: Myanmar Government Structure based on 2008 constitution

During the USDP government period, a National Water Resources Committee (NWRC) was created in 2013 to tackle water-related issues. The committee was chaired by the second vice president, and co-chaired by the Union Minister of the Ministry of Transport, with representatives from different government ministries. The NWRC has an important role in shaping water sector in Myanmar. The committee developed a Myanmar National Water Policy that was published in March 2014, and hold the intention to develop a Water Framework Directive and Water Law. More recently, in March 2016, just before the new National League for Democracy (NLD) government of Myanmar took office, the Myanmar Times newspaper reported that the Minister of Energy from the Thai Military government visited Myanmar to talk about energy production cooperation and the development of dam projects in Salween River.

During this period, civil society also produced analysis and undertook activities. For example, during the past ten years, the Karen River Watch (KRW) has
produced and disseminated different materials (documentaries, reports, policy briefs, campaign posters and information sheets) to advocate for information disclosure of dam projects, respect of human rights of ethnic communities, and to try to stop dams on the Salween River. KRW organizes workshops, meetings and trainings for the communities at the village-level and with local organizations. Every year, for example, KRW and other river watch networks, such as the Save the Salween Network, Burma Rivers Network, and Salween Watch, organize the International Day of Action against Large Dams and for Rivers on March 14. Moreover, over the past decade, KRW and its networks have organized three signature campaigns against dam building projects on mainstream Salween River (BurmaNet News, 2005). In the 2014 signature campaign, 80,000 local people from Shan, Karenni, Karen and Mon States and more than 130 civil society organizations and political parties in Myanmar signed the petition urging an immediate halt to the six dams planned by the Burmese government on the Salween River, including the Kun Long/UpperThanlwin, Nong Pa, Man Taung and Tasang dams in Shan State, Ywathit dam in Karenni State and Hatgyi dam in Karen State.

**New Civilian Government in Myanmar since April 2016**

In April 2016, a new civilian government, the National League for Democracy (NLD) led by Daw Aung San Suu Kyi came into power. The NLD is claiming to prioritize their work to focus on a democratic federal union and national reconciliation in Myanmar as mentioned in their election manifesto (NLD, 2015). They reformed the Myanmar Peace Center into the National Reconciliation and Peace Center, which is chaired by State Counsellor Daw Aung San Suu Kyi to lead the peace process (President's Office, 2016). The 21st Century Panlong Peace Conference\(^\text{13}\) was also initiated by the NLD government to bring together different political actors -- the Myanmar military, Ethnic Armed Organizations

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\(^{13}\) The 2016 Panglong Conference, officially known as the Union Peace Conference 21st Century Panglong, is a peace conference which began on 31 Aug 2016 in Myanmar Convention Centre 2 of Naypyidaw, Myanmar. It is planned to be held every six months until an agreement is reached and negotiations and political dialogue will then continue. Ethnic armed groups called for federal system that guarantees justice, equality, self-administration and protection of racial, religious and political rights of ethnic minorities.
and Political Parties -- to discuss political issues in Myanmar (President's Office, 2016). There have been many discussions and proposals submitted to the conference related to peace, federalism, democracy and resource governance.

However, many questions remain as to how the 21st Century Panlong Peace Conference will address peace and federalism (Mizzima, 2016) including because not all ethnic groups can participate in this political process without any strong reason from the Tatmadaw, and there is still fighting between the Myanmar military and ethnic armed groups in Kachin State, Shan State and now sporadically in Karen State as well. Eighteen ethnic armed organizations attended the conference, whilst three ethnic armed organizations (The Arakan Army, the Myanmar National Democratic Alliance Army, and the Ta'ang National Liberation Army) did not. “The United Wa State Army left the conference stating that they were allowed only as an observer. In the upcoming peace conference, it will be allowed only to the ethnic armed organizations who have signed the Nationwide Ceasefire Agreement.” (Mizzima, 2016).

Figure 5: Map of Hatgyi Dam Fighting in September 2016

(Source: Karen Rivers Network, 2016)
In September 2016, heavy fighting happened again in Karen State (See Figure5). The clashes seem to be driven by the Tatmadaw and the Border Guard Force (BGF) aiming to gain control over the Hatgyi Dam area. The Karen River Watch (2016) stated that: “While the Burmese government and Karen leaders are holding historic peace talks in Naypyidaw, the Burma military and its BGF wages war in Karen State to expand its control over Karen territories, in order to push for an environmentally and socially destructive hydropower project on the Salween River, the Hatgyi dam” (Pg.1).

According to Myanmar’s 2008 Constitution Article 445, it is stated that any new government will have to implement all of the projects agreed by the previous government. Therefore, the new civilian NLD government has to deal with these complicated legal bindings in any decision making over the Salween River dams. Further complicating the decision-making process, all the agreements for the Salween dams were committed to by the previous governments without any information disclosures to the public.

Even in the current NLD Government, it is unclear who is in charge of the official decision-making over the Salween dam projects. During the administration of U Thein Sein (2010 to 2015), the Ministry of National Planning and Economic Development and the Ministry of Electric Power were the key policymaking body in the hydropower industry in Myanmar (Doran, et al., 2014).

Within the NLD government, the Ministry of Electric Power and Energy will likely to have a big role in hydropower policymaking (Interview with U SoeThura Htun, 29 July, 2016).

The Ministry of Natural Resources and Environmental Conservation (MONREC) will also have a role, according to interview with experts close to government agencies. MONREC is collaborating with international financial institutions on hydropower such as the World Bank Group, particularly the International Finance Corporation, one of the members of the group. These organizations are introducing the idea of Strategic Environmental Assessment (SEA) and “Sustainable Hydropower” (Shin and Hammond, 2015). In another example, in early 2016, a report titled Improving Hydropower Outcomes through
System-Scale Planning was launched promoting technical approaches to optimizing hydropower cascades (DFID, 2016). Yet, this approach fails to adequately consider conflict and the social-political aspects of hydropower.

Further, MONREC is also working on the development of an Environmental Impact Assessment (EIA) framework, although there remain many debates about the effectiveness of these legal mechanisms in practice in regulating the impacts of the investment (Thant, 2016).

The National Water Resources Committee (NWRC) formed by President U Thein Sein’s government was abolished and reformed under the NLD government in June 2016 (Phyu, 2016). The structure is similar to the previous one, but at the time of writing it appeared likely that there would be some changes in its membership and some of its policies. The Water Law is also expected to be published very soon. However, the details of the process on the Water Law is not publicly available (interview with U Cho Cho, NWRC advisory group member, 25 July, 2016).

In this chronology of the Hatgyi Dam case, I find that the “Rights-based approach” has been in use in Thailand given the role of the Thai National Human Rights Commission, which has investigated the project and considered the role and responsibilities of the Electricity Generating Authority of Thailand. On the Myanmar side, given that the dam is linked to conflict between the Tatmadaw and ethnic armed organizations, potentially the “Rights-based approach” is relevant given the political dialogue and peace process that is now ongoing, albeit in a fragile state.

Yet, the language of “Rights” also comes with limitations in the context of existing government institutions, laws and their legal implications in Myanmar. In particular, there are limitations within the 2008 Constitution that could limit how Rule of Law in Myanmar can achieve justice in Salween Water Governance, which is discussed further in the “Rights-based” analysis section.
Livelihoods and Resource Management in Kaw Ku and Mikayin Villages

The field research was conducted in Kaw Ku and Mikayin villages, located downstream of the proposed Hatgyi dam site. The connected ecosystems of the Salween River and Mikayin’s lake and Kaw Ku Island are considered critical to the people’s livelihoods. Here, people have long adapted to the seasonal fluctuations of the river. When the river rises and floods, Mikayin’s Dawla lake expands, whilst Kaw Ku Island is submerged beneath the water, thus making this period good for fishing. As the floodwaters go down, the lake diminishes in size and the island appears again. This period is good for cash crops farming on the island (interview with Ko Thout Kyar, 11 November, 2015).

Kaw Ku Island is a seasonally flooded island in the mainstream Salween River, shared by three villages located on both banks of the Salween River. It is located about 12 kilometers North of Hpa-an. As shown in Figure 6, a map was produced by villagers demonstrating how they divide and use the island between three villages, namely:

- The blue part are farm fields managed by Mizan village;
- The long yellow part are farm fields managed by Mokadi village;
- The light yellow part are farm fields managed by Kaw Ku Village;
- The small brown areas are sandy parts of the island where there are no plantations; and

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Figure 6: Community Map of Kaw Ku Island on Salween showing how they share the use of island traditionally.

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14 The research findings in Kaw Ku and Mikayin villages are gathered in cooperation with the KESAN local team in Hpa-an.

15 The map was produced by villagers on 24 February 2016 during field work together with KESAN team in Kaw Ku Village.
- The small dotted lines showing original part of the island but lost by strong annual water flow.

About 70 to 80 families do farming on the island once the Salween River’s floodwaters recede in the beginning of October. It is a valuable source of land as the soil is good for seasonal plantations. The annual income for a household using this island is approximately 3,000USD (Interview with U Myint Sein, 25 January 2016). This income is generated over three to four months when the island is used for growing seasonal crops (see Figure 7). Moreover, villagers also get other income from fishing on the Salween River and lake in Mikayin community during fishing seasons.

Figure 7: Peanut cash crop production on Kaw Ku Island

Figure 8: grazing land near Mikayin Village
The head of the villages take a lead in sharing the use of the island, as well as the use of lake for fishing (Interview with KoNyan Win, 12 November 2015). Traditionally, they also share responsibilities for livelihood activities such as fishing and farming among men and women. However, men are more influential in taking the lead on any initiatives related to resource management in community.

They practice traditional ways of managing their agriculture and crops according to the season. “On-Land” (Farm Rice) is sown starting from the Burmese month of Nayon (June). After the sowing of the on-land rice is finished in the month of Waso (July), the reaping starts in Thadingyut (October) and ends in Nadaw (December). The showing of “In-Water” (Patat Rice) starts in Tawthalin (September). The reaping of in-water rice starts in Tanzaungmon (November) and ends in Nadaw (December). The “Original-Mixed Land and Water” (MuyinRice) is sown in the month of Pyatho (January) and reaped in the month of Tagu (April). In places where the reaping has been done the earliest, various beans are planted in those places. The sowing of the government bean starts in the month of Thadingyut (October) and is reaped in the month of Tabaung (March). Green gram bean is planted from the month of Tanzaungmon (November) to the month of Tagu (April). The farmers also normally plant vegetables together with the beans. After reaping the agricultural crops, the land is used as a grazing land for buffalos and cows (Interview with Elders Group, 26 February 2016).

Dawla Lake (see Figure9) in Mikayin Village nearby Kaw Ku Island is also valuable for the livelihoods of the surrounding six villages. It is connected to the Salween River, such that when the river flow goes down the lake, it also shrinks. At this time, land is exposed to graze animals such as goats and cows. During the rainy season, water level from the river goes up and floods the whole area flowing into the lake, and fish from the river migrate to breed and grow in the lake (Interview with KoKyawHla, 12 November 2015). This is a very good time

16Produced by villagers on 2 February 2016)
for the villagers to go fishing. This is the area of living by flood and wetland ecosystem, and is the source of their livelihood. The farmers depend on these floods to receive soil nutrients from the Salween River (Interview with DawMyaNyunt, 4 February 2016). As shown in Figure 8, villagers have their traditional lake use and management regulations. There are four main colors presented in the map: green parts represent the forest area; yellow are paddy fields; blue is the lake; and, brown parts are small rock mountains.

The six villages that surround the lake have no territorial disputes (Interview with Ko Nyan Win, 12 November 2015). Even though they don’t have official maps of resource use boundaries such as the island and lake, they have informally agreed boundaries using signs and landmarks, such as big trees, mountains and small streams as seen in Figure 8.

It floods in Mikayin village during the months of Waso (July), Wagaung (August), and Tawthalin (September). The largest fish catch is from the month of Tabau (March) to the month of Tagu (April). Meanwhile, the month of Nadaw (December) is a religious period, when there are meditation retreats and no one can go fishing as it is not permitted to kill during this period according to Buddhist teaching (Interview with Elders Group, 26 February 2016).

The six communities have an informal agreement between them to avoid overfishing and threats on fish species, including restrictions on the types of equipment used for fishing where tight fishing nets and electronic devises are not allowed. If someone is found using them, the first time they are given a warning, and if there is repeated use, the equipment is confiscated (but only if the equipment has a low value) (Interview with Youth Groups, 26 February 2016). There are other regulations, too, such as that catching fish during the hatching period is not allowed because it can harm the breeding of the fish species (see Figure 10).
It has been the practice for all the villagers to group together and make decisions based on a general consensus on setting rules and regulations and disseminating them. The main persons who take the lead are the monks, village elders, and young male leaders. The women also take part in the village meetings [enthusiastically]. However, women don’t normally participate in the administrative duties of the village, such as village administration related to livelihood and security issues. However, there are four women “ten-household” leaders in Mikayin Village and they take responsibility for keeping village records of meetings related to the management of the lake. Women also take part in fishing activities. Some go fishing themselves whilst some make fish.

Analysis

Analysis from a rights-based perspective

Looking at the existing decision-making processes around water sector from the perspective of a rights-based approach, the issue of water justice is a key issue in Salween River policy discussions. From the case of Thailand’s Office of the Prime Minister that set up a subcommittee to study and monitor the human rights impacts of Hatgyi Dam project in 2009, and the Thai National Human
Rights Commission's related studies of the human rights issue at the Hatgyi Dam, it is clearly seen that in Thailand, a rights-based approach is being used to respond to the issues raised by the villagers around Hatgyi Dam. However, there is no clear deepening of this approach given the situation in Thai politics at the time of writing, which is currently a military government.

In Myanmar, the establishments of the Myanmar Peace Center during the U Thein Sein Government, despite its limitations discussed in Section __, reveal efforts between the government and ethnic armed organizations that directly and indirectly address the issue of resource governance through political dialogues on peace and federalism such as decentralization of natural resource governance. However, the problem remains given the fighting in ethnic areas and the fragile peace process, including around the Hatgyi dam area (Burma Partnership, 2012).

Furthermore, as discussed in Section 4.2 regarding water governance, the U Thein Sein government also tried to establish policy and institutions such as the National Water Resources Committee and the National Water Policy (2014). However, there remain many gaps between government policy, institutions and practices, especially in the case of Salween River. For example, Myanmar has never had a clear policy or legal mechanisms on trans-boundary water, nor on conflict sensitive water disputes such as on the Salween River. Myanmar’s National Water Policy (2014), authored by an expert group of the National Water Resources Committee (NWRC), does not clearly mention about how the policy will address these issues. There is no comprehensive Water Law in Myanmar yet, although there are many investments related to water resources such as hydropower projects. The most relevant law is the Conservation of Water Resources and Rivers Law (2006), which addresses only three main themes: navigation on rivers; water infrastructure (excluding hydropower and irrigation infrastructure); and water pollution. This is partly explained by the fact that it is the Ministry of Transportation that is the responsible body mandated by this law. Similar to the National Water Policy, the law fails to address key water governance disputes happening especially in conflict and trans-boundary areas such as the Salween River.
Since the assumption of National League for Democracy in government from April 2016, there was a reform of the NWRC in June 2016, yet the direction of any updated National Water Policy (2014) is not clear. There are also limitations in the reformed peace process, where the “21stCentury Panlong Peace Conference” appears not yet to be on the same page with what many ethnic people would like to see in terms of the right to self-determination and the creation of a federal political system. Moreover, the government is also trying to establish “Rights-based” efforts with other international actors such as the International Finance Corporation, member of the World Bank Group member, the idea on sustainable hydropower pathway and Strategic Environmental Assessment and the development on Environmental Impact Assessment. Despite these ideas being explored, there are many public debates about how can these tools address the issue of peace and conflict in the ethnic area.

It has not just been the governments who have used different aspects of the rights-based language as mentioned above. Civil society organizations have also been very strong in articulating a “Rights-based approach” in responding to the Hatgyi Dam case. The movement of the Karen Rivers Watch (KRW) network since 2003 has called for the right to access to information, respect for the rights of ethnic community, and the move to halt dam projects on the Salween River. KRW also works together with other ethnic river networks (such as the Save the Salween Network, Burma Rivers Network and Salween Watch) to amplify the voice of communities living along the Salween River, together with other individuals and concerned organizations across the country. With this, there are indeed strong “Rights-based” claims towards the state regarding the Hatgyi Dam and other Salween Dam projects.

Analysis from a rites-based perspective

The case studies of Kaw Ku Island and Dawla Lake have shown that there is also a strong “rites-based” perspective within the community that links the Salween River to community livelihoods. Villages in this area of the lower Salween River Basin in Karen State have traditional systems (i.e. non-written regulations) for governing and using the valuable, seasonally-changing natural resource base. For
example, they have a traditional form of community natural resource use map as shown in Figure 6 and Figure 9), from which they know exactly where the mountain, forest, paddy field, river and lake are situated. KoNyan Win, village head of Mikayin, said:

“We know exactly where our natural resources are and how to manage it sustainably and equally among our villager. We have been managing traditionally to live in harmony with our resources since our ancestors.” (Interview on 12 November 2015)

Hereferred, for example, to Dawla Lake which is to the South of Mikayin Village and that is divided between six villages. The lake provides food and drinking water for villagers as it is connected to seasonal river flow of Salween River. However, he said that the government poorly understands these values. In 2013, for example, the state government fisheries department sought to give Dawla Lake as a concession to a private company for commercial fishing (during the U TheinSein Government period). The communities that are dependent on this resource resisted the idea and submitted a letter to the KarenState chief minister, claiming that the lake had been owned by the local community since their ancestors and has been a key source of livelihood for fishing.

Villagers who farm on Kaw Ku Island are seriously concerned about the government’s plans to build the Hatgyi Dam upstream. KoThout Kyar, the village head of Kaw Ku village, said that:

“If the dam is built, the natural balance will be completely destroyed. The river’s flows will be blocked by dam, and there will be no seasonal lake or island, and no chance for fishing and farming.” (Interview on 11 November 2015)

He said that he and others are very much worried about the Hatgyi Dam project, as they have no official information from the government, but had just heard about the project from the news and from other civil society organizations. He also commented that he is not sure on who will take the responsibility for their lives if the dam is built (Interview with KoThout Kyar, 11 November 2015).
Discussion

It is important to consider both the “Rights and Rites” approaches to address the Salween issue. We have seen that the government existing policy making and institutional arrangements (could be seen as "Rights" and "Rites" issue) have neglected the role of the local community in managing natural resources. The Save the Salween Network\(^{17}\) has been claiming that the Salween River is the lifeblood of local people, providing livelihood opportunities and culture identity. The Save the Salween Network, in its statement on 22 February 2016 states that the Salween issue is mainly about environmental injustice\(^{18}\) for ethnic community (SSN, 2016), which can be understood from a “Rights and Rites” perspective.

There are many successful case studies of community-based approaches for managing natural resources sustainably (“Rites” approach). In the report Accessible Alternatives (2009) which details some of these case studies\(^{19}\), the Burma Environmental Working Group pointed out that ethnic communities have their own systems of natural resource management that both support their lives and the sustainability of resources in itself (BEWG, 2009). A report titled Our Customary Lands launched in July 2016 by the Ethnic Community Development Forum, drawing on seven customary land management systems in six ethnic communities, claims that ethnic customary land management systems needed to be protected and recognized by a new federal constitution and decentralized legal framework, which is an issue of both “Rights and Rites” (ECDF, 2016).

There are public debates among community activists, experts and academic researchers that Myanmar’s development has been driven by the economic interests of a smaller group of people, rather than the public interest of the

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\(^{17}\) Save the Salween Network is a campaign network of both local communities from Salween River Basin and community based organizations who work on environmental justice issues across the country.https://web.facebook.com/Save-the-Salween-Network-1685498275073019/

\(^{18}\) Environmental Injustice can be understood as distributional justice ; procedural justice ; and recognition justice as discussed in a presentation (Aug 12, 2016) by Dr.Carl Middleton on Environmental Justice and the Nexus.

\(^{19}\) The case studies report about external threats on local knowledge on resource management, livelihood systems from Arakan, Kachin, Karen and Lahu Communities indicate how militarizing and development projects in that area have destroyed local natural resource management systems.
country (The issue of "Rights"). For example, at the Myanmar Energy Forum on 9 March 2016 in Nay Pyi Taw, experts pointed out that Myanmar is struggling with different policies and different master plans, such as the Myanmar National Electrification Plan (September 2015) supported by the World Bank versus the Myanmar Energy Master Plan (December 2015) supported by the Asian Development Bank (ADB) (Myanmar Energy Forum Report, 9 March 2016).

Meanwhile, laws and policies on development and investment are not developed in support of each other (for example: National Land Use Policy- January 2016, Nay Pyi Taw). Framework and mechanisms, such as the Strategic Environmental Assessment EIA, have been introduced by the World Bank to deal with development issues, but it is not clear how they will address key issues such as peace and conflict impact (IFC, 2016). The EIA Procedure – approved by the cabinet in November 2015 – was drafted with support from the ADB, and although it was said to be based on guidelines from the International Finance Corporation it fails to cover complaint mechanisms and only poorly recognizes community rights as it does not, for instance, mention about “Free, Prior and Inform Consent” which are important community rights for ethnic groups.

As all of the current laws and policies are under the 2008 Constitution (The issue of "Rights"), government legal mechanisms will have limited consideration on the peace process, decentralization, and revenue sharing of natural resources that ethnic nationalities are negotiating for (PRIO, 2012). A member of Parliament from the NLD, elected to the Lower House and who is Chairperson of the Lower House Committee for Natural Resources Affairs, stated in his interview that State government should have decision-making power for development projects in their areas as mentioned in the Constitution (interview with U Soe Thura Htun, 29 July 2016). Related to this perspective, the Myanmar Times newspaper recently stated that the Shan State government is planning to stop all hydropower projects in Shan State (Htwe, 2016). Meanwhile, in an interview, the Karen State Chief Minister mentioned that:
“We are aware of the negative impacts of the Hatgyi Dam on the environment and people, but we are not sure exactly how to deal with the Hatgyi Dam as the decision was made by the Union Government of the previous Government.” (Interview with Daw Nan Khin Htway Myint, 19 June 2016)

The decision-making role of the State Government is unclear on development projects like dams on the Salween River, even if the project is situated geographically within the relevant State administration control areas. This is an ambiguous part of the Constitution that can be understood from the perspective of “Rights”. Given this ambiguity, the current government should pay more attention to these fundamental political problems as it promised in the NLD Election Manifesto (2015). The rush towards foreign investment and development projects especially in conflict affected areas without considering justice in resource governance, could lead to a political deadlock in the peace negotiations. International actors and investors should pay serious attention to these challenges, including over justice in water governance.

The environmental, social, political and economic costs of hydropower projects should also be counted in the decision-making process. Prof. Maung Maung Aye, retired Rector of Yangon University of Distance Education and Chief Advisor/Head of Myanmar Environment Institute, said that:

“All life is connected; we need to have environmental ethics, meaning we need to pay reverence to all life, pay respect for sustainable life, apply frugality in environmental conservation and resource management.” (Interview with Prof. Maung Maung Aye, 2 July 2016).

U Own Myint, Chairperson of the advisory group of the NWRC, said that

“…we need neither have an optimistic nor pessimistic view, but we need to have a realistic view…” of understanding the issues and shaping policy towards water governance on the Salween River (Interview with U Own Myint July 24, 2016).

Karen National Union (KNU) Vice Chairperson Padoh Naw Seporah Sein mentioned in a documentary interview that the KNU has a clearly stated policy
that a moratorium for the Hatgyi Dam project and other Salween dams should be made and no discussion on this before peace has settled down in the ethnic areas and resource governance and federal issues are sorted out (Fawthorp, 2016).

In summary, given the current political context in Myanmar under the 2008 Constitution which incorporates significant military control, the “Rights” approach can probably deal with the issue of transparency, accountability and regulations of best practices on technical aspect of hydropower development. However, it cannot address the issue of justice if the “Rites” approach is not accounted into the decision-making processes that will lead to an equitable outcome for all parties involved.

Conclusion

This paper has examined the “Rights” and “Rites” approaches as a conceptual framework to analyze how decision-making processes for the Hatgyi Dam on the Salween River have taken place. It has described “Rights” as a state and legality approach and “Rites” as a locally-defined approach to cultural norms from the community. Taking the case study of the Hatgyi Dam, the paper has looked at a chronology of events and local ways of livelihood and resource management systems near Hatgyi area in Karen State. The paper has also analyzed government policies, legal implications and local resource management systems. In its analysis, the paper has drawn out discussions on potential responses to Water Justice in Salween.

Millions of ethnic people are living along the Salween River who mainly depend on water-related resources for their livelihoods. The Salween River is also a symbol of cultural identity since their way of life is interdependent with the river basin ecosystem. Large-scale development projects such as the Hatgyi Dam, threaten existing ways of life for Karen people living along the Salween. The Hatgyi Dam case study clearly shows how an ethnic Karen community has traditionally managed to live with the river resources on the Salween River sustainably until now. However, this way of life is threatened by plans for
hydropower dam projects on the Salween River, which take place in the context of violent conflict, militarization and human rights violations. Decision-making over the Salween Dams has been highly centralized to date. Furthermore, there has been significant discussion nationally and internationally that approaches towards justice in water governance should be in place to address water-related issues in Myanmar, including for hydropower dams on the Salween River.

From the perspective of water justice, as discussed in this paper on conceptual framework and policy discussion, “Rights” and “Rites” are interconnected. Government policies and legal mechanisms in Myanmar do not yet fully reflect Human Rights-based approaches. Policy institutions, such as the National Water Resources Committee, and other actors in current official decision-making processes such as financial institutions and international experts, should also consider “Rites” based-approaches in shaping water governance policy in Myanmar. In conclusion, I argue that there is an opportunity in Myanmar to work with both the perspectives of “Rights” and “Rites” approaches in water governance policy development, which could reflect a positive response towards inclusive decision-making in order to address the issue of justice on the Salween River.
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