



Through the aqueduct and the courts: An analysis of the human right to water and indigenous water rights in Northwestern Mexico



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ABSTRACT

This article examines the relationship between the human right to water and indigenous water rights as articulated in the legal strategies of indigenous Yaqui (*Yoemem*) leadership in Mexico, and in the jurisprudence of the Inter-American Human Rights System. Accelerated urban growth and climate change in the area of study are rekindling historical water conflicts between rural indigenous communities and state authorities encouraging urban development. This configuration is not unique to Northwestern Mexico and, thus, offers an instructive case for exploring contradictions and alignments between indigenous right claims and the human right to water. This article addresses the following questions: What role does the human right to water play in the competing claims of state authorities and indigenous Yaqui leadership in Mexico? To what extent can the human right to water be reconciled with the collective rights of indigenous peoples? And in particular, what can be learned from international jurisprudence in this regard? Through content analysis of legal documents and media sources I show that even when Yaqui claims over water are advanced in the arena of international human rights, the human right to water does not have a primary role in framing their demands. In fact, I show that the human right to water was primarily mobilized to uphold rural-to-urban water transfers and undermine indigenous opposition to large-scale infrastructure development. This article produces new empirical knowledge to contribute to scholarship examining what a human right to water means in practice. This line of research is particularly timely as the human right to water becomes institutionalized in the context of growing public debate and legal discussions on collective indigenous rights.

1. Introduction

Over the last decade, the human right to water has become central to a policy agenda aimed at addressing conflict in situations of perceived water scarcity and competing claims. While references to this policy framework can be found in international treaties and declarations dating back to the 1970s, the first comprehensive definition of the human right to water was put forward in 2002 by the United Nations (UN) Committee on Economic, Social and Cultural Rights with its General Comment 15 (GC15). Explicitly titled *The Right to Water*, this document states that the human right to water is a prerequisite for the realization of other human rights. Since the United Nations' recognition of access to basic water supply as a human right, over forty-five countries have amended their national constitutions adopting it as a stand-alone right (See Harris and Roa-Garcia, 2013). At the same time, social mobilizations around the human right to water are increasingly widespread, but often have different political goals from each other and work at different scales. In practice this framework has been the basis for diverse claims from low-income African American neighborhoods in

the United States denouncing the state government for contaminating their water supply, to middle-class citizens across Uruguay seeking to prevent privatization through a constitutional reform.

As the human right to water is taken to the streets and enters into national legislation, scholars are examining the opportunities and challenges inherent in operationalizing it. On one hand, scholars point out that insofar as human rights are fundamentally state-centric, individualistic, and universalizing they are not a radical alternative to policies informed by market environmentalism (Bakker, 2007 and Bakker, 2011; von Benda-Beckmann and von Benda-Beckmann, 2003; Goldman, 2007). On the other hand, others argue that despite its roots in liberal political philosophy a human right to water framework can generate openings for marginalized communities to become involved in previously inaccessible decision-making processes of water policy (Barlow, 2007; Miroso and Harris, 2012; Perera, 2012; Sultana and Loftus, 2012). Even these more optimistic authors, however, suggest that implementation thus far says little about how and who will provide people with water to ensure the right. Furthermore, as the right to water means different things to different people, it risks becoming an

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empty, and potentially dangerous, signifier for water justice (Naidoo, 2010; Sultana and Loftus, 2015).

This article examines the relationship between the human right to water and indigenous water rights as articulated in the legal strategies of indigenous Yaqui (*Yoemem*) leadership in Mexico, and in the jurisprudence of the Inter-American Human Rights System. Access to and control over water resources have fueled indigenous mobilizations and community action the world over. Around the world cases abound where indigenous control over water resources has been challenged or displaced by dominant authorities who do not recognize their customary rights and their hydro-social relations. Indigenous water rights and institutions have been the subject of rich ethnographic and legal research on water governance in the context of colonial regimes and, more recently, neoliberal political reforms (Boelens et al., 2010; Budds, 2010; Jackson and Altman, 2009; Lansing, 1991; Perreault, 2008; Wilkinson, 2010). While contemporary state policies recognizing indigenous rights and local institutions are a move towards more inclusive and equitable water politics, research shows that these policies are often conducive to the codification and confinement of water users and their collectives into the state's water bureaucracy and market systems (Boelens, 2009; Bustamante et al., 2012; Prieto, 2015; Vos et al., 2006). At the same time indigenous peoples are known to selectively and strategically access and use the state apparatus as a resource for claiming their water rights and sovereignty. This is illustrated in diverse cases from the Indian water rights settlements in Southwestern United States to the privatization of water infrastructure in Andean countries (Boelens et al., 2015; Getches, 2005; Lewis and Hestand, 2006; Radonic and Sheridan, 2017). While the corpus of research exploring the intersection between water governance and indigenous sovereignty is robust and growing, there is as yet little analysis of how indigenous peoples have interpreted and appropriated the human right to water (See Morinville and Rodina, 2013). Addressing this lacuna in the literature is particularly timely as the human right to water becomes institutionalized in the context of growing public debate and legal discussions on collective indigenous rights.

Accelerated urban growth and the already tangible effects of climate change in Northwestern Mexico are rekindling historical water conflicts between indigenous groups with predominantly rural livelihoods and state authorities encouraging urban-industrial development. This configuration of conditions is not unique to the area of study and, thus, offers an instructive case for exploring contradictions and alignments between indigenous rights and the human right to water more broadly. In international and Mexican policy circles there is growing support for a human right to water framework and high expectations that marginalized groups would draw on this framework to fight resource disenfranchisement. Nonetheless, even when Yaqui claims over water are advanced in the arena of international human rights, the human right to water does not have a primary role in framing Yaqui legal struggles. In fact, my research shows that in this region the human right to water has primarily been mobilized to uphold rural-to-urban water transfers and undermine indigenous opposition to large-scale infrastructure development. This paradox raises the questions driving this article: What role does the human right to water play in the competing claims of state technocrats and indigenous Yaqui activists in Mexico? To what extent can the human right to water be reconciled with the collective rights of indigenous peoples? And in particular, what can be learned from international jurisprudence in this regard?

This article centers on Yaqui legal actions precipitated by construction of an aqueduct for inter-basin water transfer to supply Hermosillo, the capital city of Sonora, with water from the Yaqui River, which is a central artery of the Yaqui territory. In addressing these research questions, I draw on publically available legal documents and media sources published between 2012 and 2016. About 300 news sources were collected from seven regional news outlets and three national ones selected based on their wide circulation and online accessibility. The regional outlets include newspapers from the two regions

corresponding to the two river basins with contesting water claims due to the aqueduct (i.e. the Sonora River and Yaqui River basins). I selected all news articles that covered the Yaqui Tribe, potable water and infrastructure development in Hermosillo, and the aqueduct at the core of the water claims. Legal documentation related to Yaqui water demands between 2010 and 2016 were obtained from local and national legal archives and sources. These texts were then analyzed using classic content analysis. Qualitative analysis was guided by themes previously identified in semi-structured interviews with water managers and water activists conducted during ethnographic fieldwork in 2012–2013 and 2016. In addition, this article draws on systematic review of ten court rulings issued between 1998 and 2016 by the Inter-American Court of Human Rights in cases concerning the human right to water, as well as indigenous rights and water resources in Latin America.

The following section of this paper provides a brief introduction to water governance in Mexico with specific attention to water rights and the human right to water. In section three I then introduce the case study by positioning the construction of the aqueduct in the context of historical Yaqui struggles over territory and contemporary access to water. Section four delves into the case study. I use the legal actions filed by Yaqui leadership against the aqueduct as the analytic thread to show how the human right to water was mobilized against, rather than for, indigenous peoples. I demonstrate how in the context of inter-basin, rural-to-urban water transfers the historical association of indigenous peoples with rural areas and agriculture is enlisted against their claims within a human right to water framework. Section five then moves to the international level to examine how the human right to water is addressed in relation to indigenous water claims within case law from the Inter-American Human Rights System. Analysis of this jurisprudence helps elucidate how and why Yaqui leadership have focused on collective rights over water as prior to the human right to water, even when water developers are mobilizing this framework to further marginalize them.

2. Water governance in Mexico

In the last two decades access to potable water in Mexico has significantly increased nationwide. The numbers of people lacking potable water dropped from 24 percent to 5.4 percent. However, indigenous peoples continue to be disproportionately underserved with 21 percent of communities—equivalent to a million and a half people—lacking secure access to safe drinking water (INEGI, 2015). Furthermore, statistics on existing coverage say little about the quantity and quality of water access. With the stated purpose of closing the gap in service, the human right to water was explicitly recognized as a stand-alone right and elevated to constitutional rank in 2012 through a constitutional amendment (DOF, 2012). The new text echoed resolution 64/292 from the United Nations General Assembly, which was adopted in 2010 formally recognizing the human right to water and sanitation as essential for the realization of all other human rights.¹ Accordingly, Mexico granted every individual the right to access and use clean water for personal and domestic consumption in a way that is sufficient, healthy, acceptable, and affordable. Yet, the human right to water does not define the property regime for water or the way it is to be provisioned, and implementing legislation is still lacking.

Virtually all water in Mexico is the property of the state; this includes groundwater and surface water designated for any use from preparing coffee and cultivating beans at home, to mining copper and cooling an industrial generator. The federal government by way of the National Water Commission (CNA) is charged with granting water use

¹ Resolution 64/292 calls for states to provide everyone with sufficient, acceptably safe, physically accessible, and affordable water for personal and domestic activities. UN resolutions are not legally binding but they are authoritative interpretations clarifying the content of human rights under the International Covenant of Economic, Social, and Cultural Rights, a UN multilateral treaty ratified by 164 countries, including Mexico.

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