

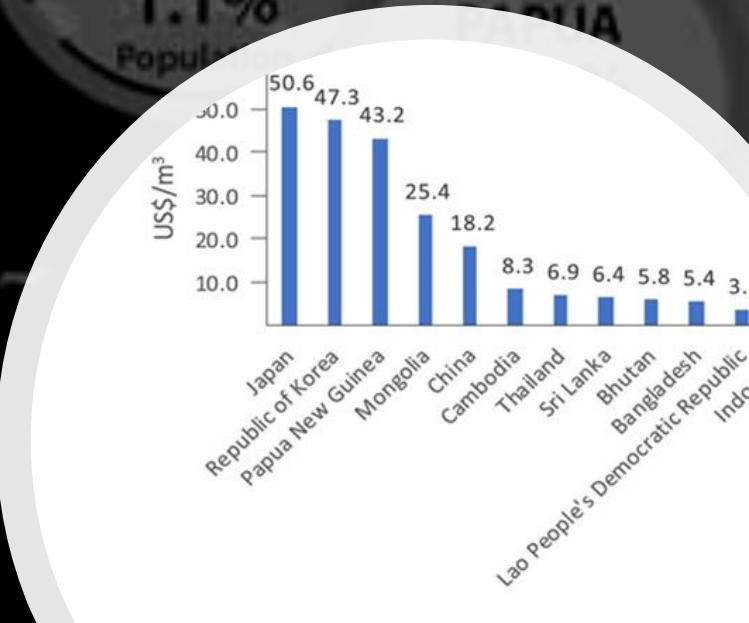
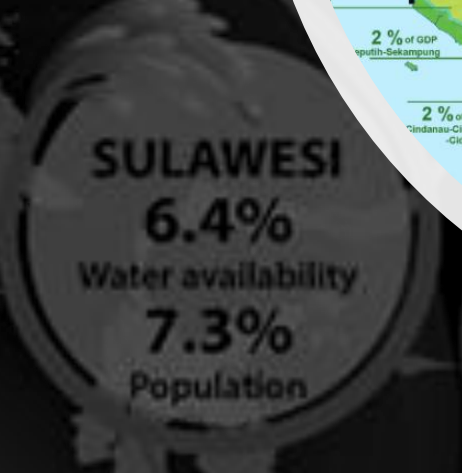
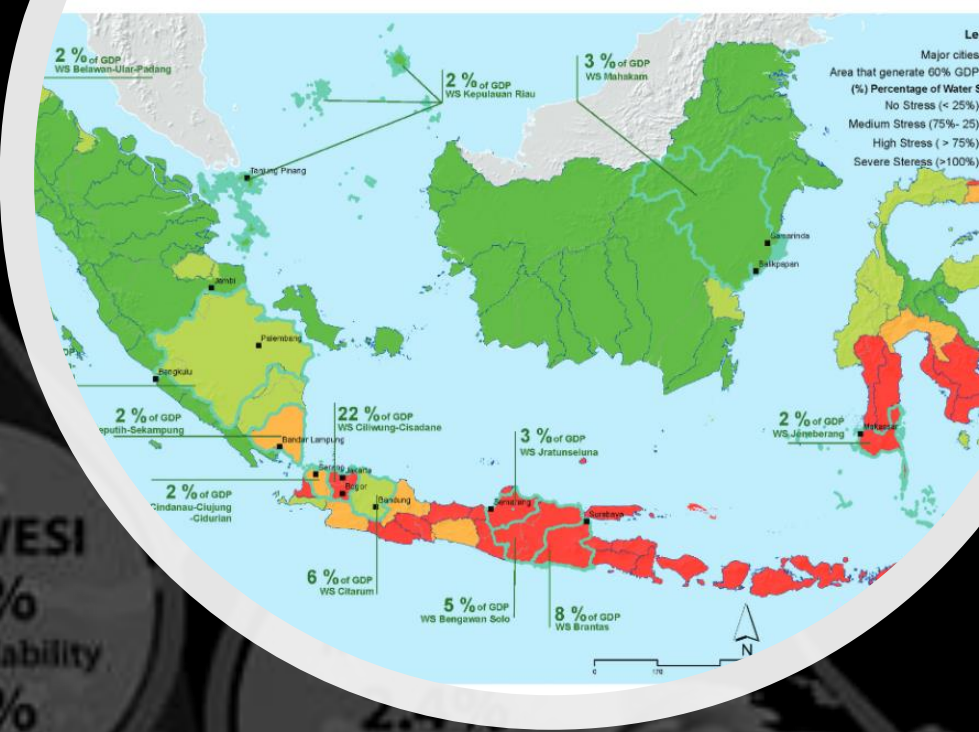
Strengths and Limitations of The Constitutional Court's "6 Basic Principles" as a Normative Guidance in Resolving Water Conflicts

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Bali, 5-7 October 2022

Dry Season Water Stress



Khalil et.al, World Bank, 2021



Examples of Water Conflicts



Click Me

Note: Some conflict may have been resolved, temporarily or permanently. A lot more conflict has **not** been recorded here. See map input at <https://bit.ly/3y56EvC>

The 6 Basic Principles

The Constitutional Court begins outlining the 6 basic principles by elaborating: [...] based on the above consideration, then, **water commercialization** must be strictly limited in an effort to preserve and sustain the availability of water for the nations' life:

1. [...] water commercialization shall not impede, override, or even abolish people's right to water because the land, the earth and water and the natural riches contained therein, in addition to that they shall be controlled by the State, should be exploited to the greatest benefit of the people;
2. [...] the state shall fulfill the people's right to water. [As mentioned earlier] the access to water is a specific human right, then article 28 I (4) Constitution 1945 stipulates that "Protecting, advancing, upholding and the **fulfilling human rights** are the responsibility of the state, especially the government."
3. [...] we must pay attention to **environmental conservation**, since as the human rights Article 28H (1) of the Constitution, 1945, states "Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain health services".
4. [...] as a vital production sector, which controls the livelihood of the people [...] must be controlled by the state (Based on Article 33 (3) of the Constitution, 1945) and water (according to Article 33 (3) of the Constitution, 1945) must be controlled by the state and shall be used to the greatest benefit of the people. Therefore, the supervision and the control by the state regarding water is absolute;
5. [...] as a continuation of state control and since water controls the livelihood of the people then the **primary priority on the commercialization of water is by State Owned Enterprises (BUMN) or Region-Owned Enterprises (BUMD)**;
6. In the event all the restrictions **above have been fulfilled and there is an availability of water**, the Government may grant permits to **private enterprises to commercialize water** based on strict requirements.

Part 1: The Strengths

Strengths of The 6 Basic Principles

No.	Content	Comments
1.	[...] water commercialization shall not impede, override, or even abolish people's right to water;	Reinforces the duty to protect and respect
2.	[..] the state shall fulfill the people's right to water.....	Reinforces the duty to fulfill
3.	[...] we must pay attention to environmental conservation ...".	Highlights the importance of environmental conservation
4.	[...] ...the supervision and the control by the state regarding water is absolute;	
5.	primary priority on the commercialization of water is by State Owned Enterprises (BUMN) or Region-Owned Enterprises (BUMD);	Manifestation of "controlled by the state" (<i>dikuasai oleh negara</i>)
6.	In the event all the restrictions above have been fulfilled and <u>there is an availability of water</u> , the Government may grant permits to private enterprises to commercialize water based on strict requirements.	

Strengths: (i) reinforces human rights to water and environmental protection, (ii) offers guidance on allocation

Implementation of the 6 Basic Principles in Water Law's Allocation Framework

Law 17			Kahayan	Citarum
Art 8	Rank	Art 49		
Minimal Daily Basic Needs Principle 1 & 2 →	1.	General Daily Basic Need (no permit)	✓	✓
	2.	Daily basic need for large group	✓	✓
	3.	Daily basic need which alters the natural condition of the water source	Pamsimas Program	Pamsimas, etc
People's Farming Principle 1 & 2 →	4.	People's Farming Within Existing System (no permit)	Farming on alluvial land and handil	Various Irrigation Areas including Leuwi Kuya and Cirasea (Upstream)
	5.	People's farming outside of existing irrigation system	✓	✓
Daily basic needs through drinking water provision system Principle 1 & 2 →	6.	Daily basic need through drinking water provision system	3 Drinking Water Utilities (PDAMs)	Jakarta Water Utilities and surrounding Regency/City Water Utilities
Principle 5 → Principle 6 →	7.	Non-commercial activities for public needs	Not Yet Identified	Not Yet Identified
	8.	Water utilization for state, region and village-owned enterprises	Food Estate	Hydropower, Tourism
	9.	Water utilization for the private sector (individual or enterprises)	Oil Palm, other plantations, industries SME, Cooperatives	Geothermal in Wayang Windu*, various industries SME, Cooperatives

What happens to Principle 3?
There is no explicit “environmental flow” regime under Water Law. Environmental needs are only “taken into account” when allocating water. See Art 8(6) of the Water Law

Principle 4
(State Control)

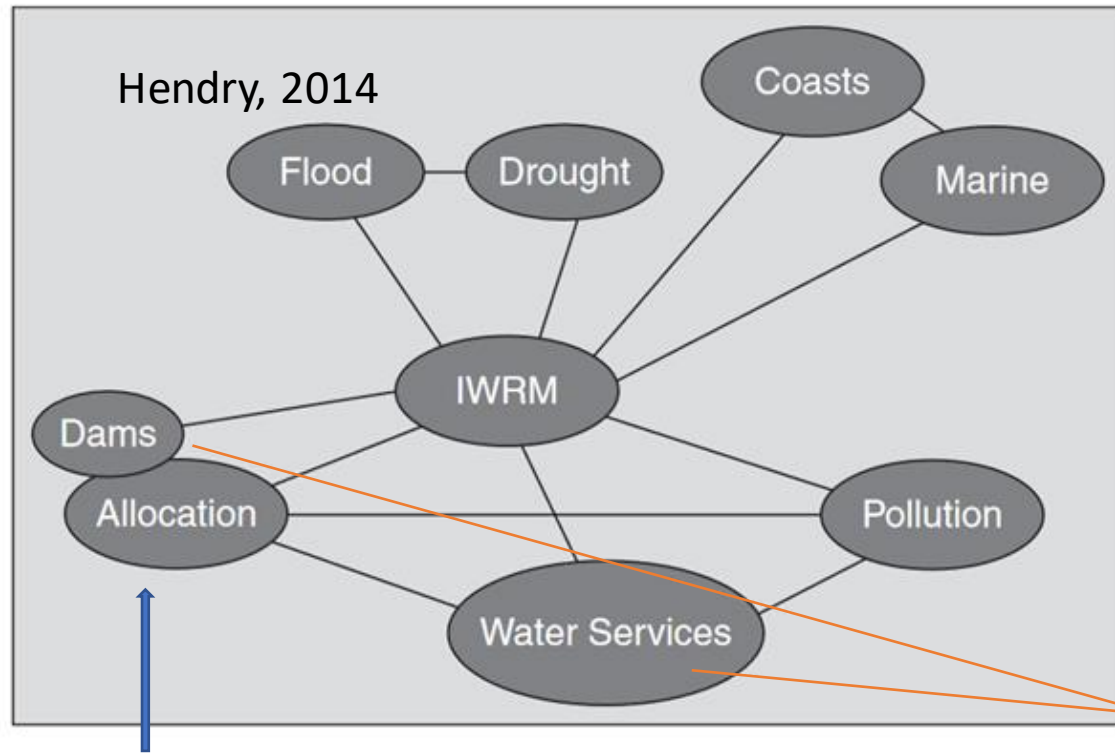
* Prohibited by the Water Law (Art 33) and violations can be criminally prosecuted (Art 69)

Source: AlAfghani MM, Susetyo B, AICEE Conference, 2022

Part II: The Limitations

Limitation 1

- Unclear Scope.
- Not Sufficiently Broad to Address the Water Sector



1. The 6 basic principles only addresses allocation, but is silent on other aspects of the water sector, such as pollution control
2. The 6 basic principle does not even address privatization and commercialization of water services (and possible conflict arising thereof)
3. The 6 basic principle appears to be limited to *commercialization* (=commercial water use?) but not to water governance as a whole

The 6 Basic Principles



Limitation 2: Neglect Towards Efficiency

Source: PJT 2 Annual Report, 2020



Definitions

Theoretical:

“...maximum economic output from the use a scarce input”

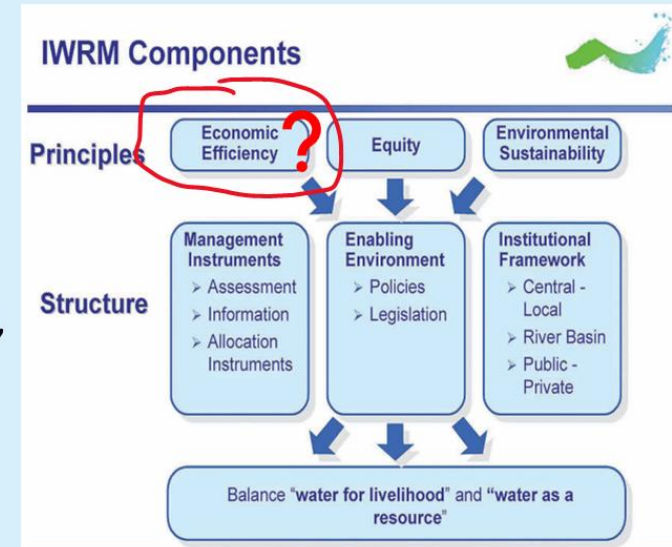
Practical:

“water should be allocated from **lower** to **higher** productive uses”

13/10/2022

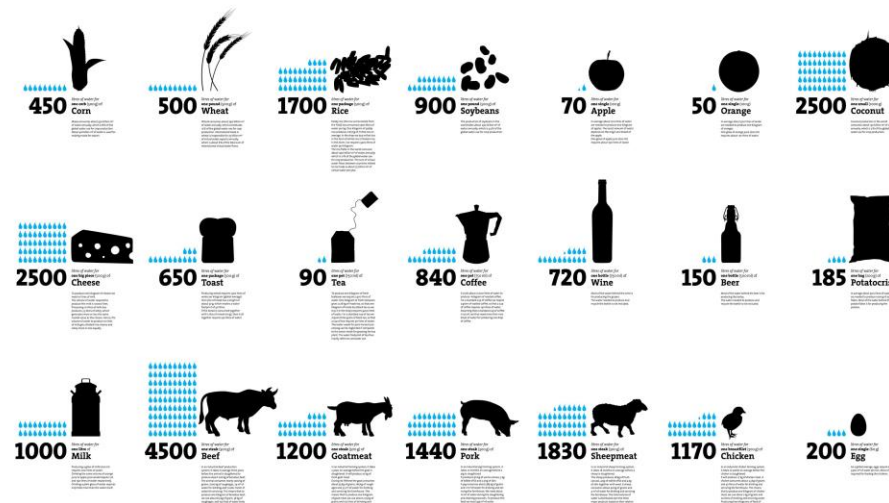
Figure 1 The three pillars of IWRM: an enabling environment, an institutional framework and management instruments

GWP,
UNEP
and
UNESCO,
2009



VIRTUAL WATER

Inside products



Picture: Ecosistema Urbano

Limitation 3: Inapplicable to certain water quantity conflicts

Parties	Applicability
Between Smallholders (Farmers vs Farmers)	Not applicable. Since the 6 basic principles apply to different categories of uses and users, it is of little relevance to conflict within the same categories of uses and users. For example, if two state-owned enterprises compete over water, the principle is of little use.
Smallholder Farmers vs Industry	Applicable. Smallholder farmers should be prioritized over industry. However, allocation priority may not matter too much if industrial water use is so small to be usefully reallocated to smallholder farmers. There are also cases where conflict arises due to inefficient irrigation infrastructure and its management.
Rice fields vs Aquaculture (tambak)	Applicable IF aquaculture is not defined as “pertanian rakyat” (smallholders). Note that elucidation of Article 8(b) of Law 17/2019 categorized “perikanan” (fishery) as smallholders. If this is the case then the principle is not applicable (see no 1 above).
Smallholder vs Drinking Water	Applicable but does not provide clear solution. It can be argued that drinking water – through drinking water utilities (PDAM) - is more protected by the constitution than the rights of smallholder farmers. But this is more complicated than it sounds, some PDAMs also supply water to hotels, malls and industries and they are commercial, in that they levy charges and make an operating profit. During scarcity, it is possible for example, to allocate a certain amount of water to PDAM and ensure that priorities be given to households and consumers utilizing water for their daily needs. As discussed above, reallocation of water from rural to urban needs to be accompanied with incentives and compensation mechanisms.

13/10/2022

Source: Flores Editorial

Irigasi Aesesa Picu Konflik Antar Petani

Admin Flores Editorial - Jumat, 19 Maret 2021 | 05:34 WIB



01-04-2019 / KOMISI IV



Komisi IV DPR RI Edhy Prabowo memimpin Kunjungan Kerja Reses Komisi IV DPR RI. Foto: Ane/mi

Komisi IV DPR RI Edhy Prabowo meminta permasalahan tarik ulur penggunaan air untuk tanaman pangan dan perikanan budi daya di Kabupaten Musi Rawas, Provinsi Sumatera Selatan segera diakhiri. Sehingga permasalahan itu tidak menimbulkan gesekan antarmasyarakat petani sebagai pemanfaat.

DPR, 2019

Bendungan Wonorejo Kurangi Jam Operasional PLTA Imbas Dampak Kekeringan

Adhar Muttalqin - detikNews
Kamis, 22 Agu 2019 16:12 WIB



Detik, 2019

Kompas, 2022

Kompas.com / News / Nasional

Jeritan Petani di Balik Proyek PLTA di Poso yang Diresmikan Jokowi

Kompas.com - 25/02/2022, 18:22 WIB

BAGIKAN: f t w s



Air Irigasi Subak Direbut PDAM

© Selasa, 23 April 2019 9:11 WIB



Desong petani menyiapkan perlengkapan orang-orangan di kawasan sawah Subak Dalam, Denpasar. FOTO ANTARA/Ngman Budiana/ngm/2019.

Denpasar (Antara Bali) - Air irigasi dalam sistem pengairan tradisional bidang pertanian di Bali (Subak) sejak beberapa tahun terakhir diperebutkan oleh perusahaan daerah air minum (PDAM) untuk kebutuhan air irigasi maupun untuk kepentingan sektor pariwisata.

Antara, 2013

Their operational hour was reduced from 24 hours to 8 hours a day. But the cost would be significantly higher if this occurs in Western Java

11

Limitation 4: Inapplicability to Water Quality Conflicts

Aquaculture vs Rice Farmers (Smallholders)

Not Applicable. The language of the 6 basic principle (at principle 6) is “apabila masih ada ketersediaan air” (if there is an availability of water). In conflict over quality, water is available in terms of quantity but its quality is low. However, it can be applicable IF the 6 basic principle is interpreted extensively so as to cover quality and that aquaculture is not categorized as pertanian rakyat. Hence, the principle would prioritize rice farmers.

Aquaculture vs Hydropower

Not Applicable. Neither aquaculture (in this case Keramba Jaring Apung) nor hydropower is specifically addressed in the 6 basic principles. Principle 1 and 2 protect “access” to water, this possibly meant water for daily basic need, which constitutes the core elements of the human right to water. In addition, even if sufficient volume of water is available, the problem is that waters are dirty and/or corrosive. However, it can be applicable IF the 6 basic principle is interpreted to cover water quality. In this case, Hydropower which is operated by state owned companies should be prioritized over aquaculture.

Aquaculture vs Tourism

Not applicable. Neither Keramba Jaring Apung nor tourism is the concern of the 6 basic principles.



Source: Liputan 6



Pikiran Rakyat, 2022

Limitation 5: Inapplicability to Spatial Conflicts with Water Implications

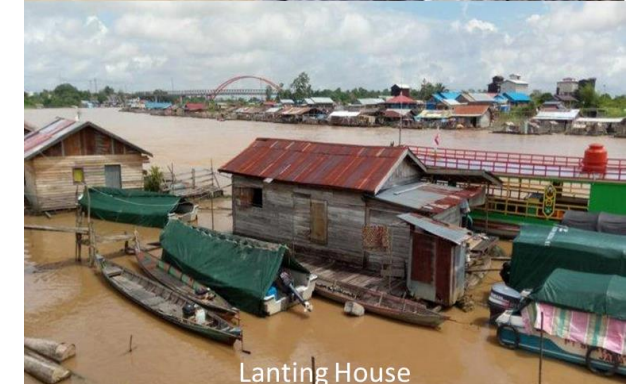
Conversion of green or blue spaces into residential or business districts	Not applicable. None of them are considered as water uses or users under the 6 basic principles
Mining vs Drinking Water	Not Applicable. The state has the duty to protect and fulfill the people's right to water, however, principle 1 is confined to the context of commercialization: "water commercialization shall not impede...". Discharging dirty water into the river does not fit into this category. Dewatering (the drainage of tunnels or pits to enable mining activity) is an allocation issue. If dewatering affects drinking water, drinking water shall be prioritized over dewatering.

(Source: Lubis, et.al; Satia et.al; Subahani; Octora, et.al)

Lexicon	Explanation
Handil	According to Lubis, it is used to denote three things, depending on its context: "a) a manmade navigable canal connecting a river to farmland; b) fields around the canal under collective management; c) the system of collective management of the fields and canals". Handil (in the context of a) is under collective ownership; are more than 2 meters width and depth and is usually named after the site or the river. Handil in terms of (b) can be sold, purchased, inherited.
Tatas	manmade channels (approximately 1×1 m), dug to give access to forest resources (Lubis, et.al). Anyone can build a new tatas, extending on existing ones. Usually named according to the name of the person who built the main tatas. Family can extract resources on fields on the sides of tatas (up to 500 m). Owners of tatas can levy forest product transported through their tatas (10% for logs)
Anjir	A channel built to connect two streams
Kanal	A channel built by the government as part of ERP. Considered free access.
beje	Manmade small pond in the swamp area. Considered a "private" property
tabat	Overflow dam, usually made of clay or wood
Batang Danum	Large river. Free access
lutu	Small lake
Baruh	Small pond in Peatland which is filled with water all year long, usually formed due to large trees which are uprooted
Saka	Third order tributaries, usually a short and narrow creek



Menuba



Lanting House



Handil



Beje

Customary Water Tenure in the Kahayan can overlap with Food Estate, Palm Oil Plantations or other uses.
Source: AIAfghani, FAO, 2022

A large, semi-circular graphic on the left side of the slide. It contains a photograph of an industrial facility, possibly a refinery or chemical plant, at sunset. The sky is a mix of orange, yellow, and blue. In the foreground, there are large, white, cylindrical storage tanks. In the background, there are industrial buildings with smokestacks emitting smoke. The entire scene is reflected in a body of water in the foreground.

Conclusion 1: Strengths

1. Reinforces the duty to protect, respect and fulfill
2. Emphasize environmental protection
3. Provide guidance for some water “allocation” conflict

Conclusion 2: Limitations

1. The principles can only be used to guide *some* allocation conflicts, but not broader water conflicts; such as conflict arising out of privatization and concession of water services;
2. The principles (by literal interpretation) covers only *commercialization* not water governance as a whole;
3. The principles (although incorporates equity and environmental sustainability) as values, neglect efficiency
4. The principle (by literal interpretation) may prohibit the reallocation of water to higher values uses (**dangerous!**)

Recommendation 1: Teleological Interpretation to Enable “Efficiency” as Value Guidance

Literal Interpretation of Principle 6: Private enterprises can only be granted a permit to abstract water if, and only if, the other allocation priorities, namely (i) human right to water – water for daily basic needs and livelihood including smallholders, (ii) water for environmental conservation and (iii) water for state owned enterprises - have been fulfilled and sufficient resource exist to supply commercial demand. This means that, according to the literal interpretation, **if there is no water left, the private sector shall not be allocated with any.**

Teleological interpretation: Principle 6 should be read in conjunction with Principle 1, which reiterates Article 33 of the Constitution in that natural resources (water included) should be exploited **to the greatest benefit of the people’s welfare** (*sebesar-besarnya kemakmuran rakyat*). In this case, water should be allocated in such a way that would optimize welfare – which could include employment in the “private” sector. At the same time, the teleological argument states **that less than economically optimal (but nonetheless “equal”) allocation of water would violate the constitution**. Thus, if industries have higher economic water productivity, which means that they can produce more rupiah per drop of water compared to agriculture or livestock, then (some) water may need to be reallocated to industry.

Recommendation 2: Expand the scope of the principle (extensive interpretation), from commercialization to governance

1. Non-commercial water uses (such as for smallholders) too have environmental impact → Land Subsidence
2. The 6 Basic Principles should be extensively interpreted to cover water governance



Recommendation 3: Set-up Reallocation Framework in Legislation

Based on recommendation 1 (teleological interpretation which enables efficiency as value guidance), the government should set-up a reallocation framework based on equity and environmental sustainability principles. Compensation could take the form of:

1. More efficient irrigation system/irrigation maintenance
2. Development of water storage for farmers
3. Monetary compensation

Thank You

Your criticism, comments and feedbacks are very important as the government is currently drafting implementing regulation of the Water Law – which will be based on the 6 basic principles

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