LEGISLATION FOR SUSTAINABLE WATER USER ASSOCIATIONS

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FAO
LEGAL PAPERS
ONLINE #69
November 2007

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ACKNOWLEDGEMENTS

This paper was presented at the 4th Asian Regional Conference & 10th International Seminar on Participatory Irrigation Management, held in Tehran, Iran 2–5 May 2007, which was jointly organised by the Iranian National Committee on Irrigation and Drainage (HIRNCIDH), the International Commission on Irrigation and Drainage (HICIDH) and the International Network for Participatory Irrigation Management (HINPIMH).

Thanks are due to IRNCID, ICID and INPIM as well as to the Government of the Islamic Republic of Iran and to the World Bank for permission to publish the paper online.

INTRODUCTION

This paper considers the legislation necessary for sustainable water user associations (WUAs). Its primary focus is the legislation (in the form of laws, acts of parliament etc) relating to the establishment and operation of WUAs. This is sometimes described as 'enabling legislation'. Of almost equal importance, though, is the legislation that regulates the irrigation and drainage sector as well as basic water legislation in the form of a water code or a water resources law.

In contrast to the large body of literature on other aspects of participatory irrigation management (PIM) and WUA development relatively little has been published on the topic of WUA legislation. This, it is suggested, is a significant omission. After all, legislation ultimately underpins all aspects of WUA formation and activity, including institutional matters. It follows that the absence of appropriate legislation (because there simply is no legislation or because the legislation that exists is ill-adapted to PIM) will negatively impact WUA sustainability, even if it permits WUAs to be formally established.

Based on the experiences of a number of transition countries in Eastern Europe and Central Asia[1] (the 'transition countries'), but also on practice in Western Europe and North America, the findings of this paper are considered to be of general application.

The paper is set out in five parts including this introduction. Part Two considers the legislation relating to WUAs and Part Three considers irrigation sector legislation. The important contribution to WUA sustainability of basic water legislation is briefly considered in Part Four while conclusions are drawn in Part Five.

[1] Including Albania, Armenia, Azerbaijan, Bulgaria, the FYR Macedonia, Georgia, the Kyrgyz Republic and Romania.

LEGISLATION ON WUAS

The background to the establishment of WUAs in the transition countries was the dissolution of the large collective farms (known variously as state farms, collective farms, agro-kombinats and cooperatives) that were such a feature of socialist agriculture.

Although the precise arrangements varied from state to state, during the socialist period each farm was basically responsible for the operation and maintenance of its own 'on-farm' irrigation system. Apart from those cases where a collective farm had access to its own water source, irrigation water was supplied to each collective farm by a state irrigation ministry or agency (the 'irrigation agency').

Land and agrarian reforms, which began in the 1990s, saw the break up of the collective farms and either: (a) the distribution of the land they had used among their former workforce; or (b) the restitution of that land to former owners or their descendants. [2]

These reforms had significant impacts on the irrigation sector. First of all the dissolution of the collective farms meant that there was no longer anyone responsible for the operation and maintenance of the 'on-farm' irrigation systems. At the same time land reforms meant that the process of distributing irrigation water had become a great deal more complex. Within each (former) on-farm irrigation system, the large fields of the collective farms were typically split into scores, hundreds even, of small land plots each planted with different crops and thus with different water requirements.

[2] Generally speaking distribution was undertaken in the states of the former Soviet Union while restitution took place in those states where collectivisation took place after the Second World War (including the Baltic States).

In the absence of any other obviously viable solution[3] and with the support of a range of donors, including the World Bank, the transition countries moved to establish WUAs to take responsibility for the operation and maintenance of the on-farm irrigation systems.

From the outset it was clear that in order to be able to function effectively WUAs would need to have independent legal personality. In other words they would need to have the legal capacity enter into contracts, including contracts of employment, to hold property, to open bank accounts and to take and defend legal proceedings in their own name, independently of their participants. Without independent legal personality WUAs would not be able to: have a legal relationship with their members or with third parties; hold use or ownership rights over irrigation infrastructure and other assets or; hold water rights.

Although in a number of countries brief references were made to the concept of WUAs in new water or irrigation legislation[4] these typically did not elaborate in any detail what a WUA was or how it was to operate. Thus WUAs themselves were established on the basis of existing legislation using existing organisational forms such as companies (in Azerbaijan and Bulgaria), co-operatives (in Armenia, Bulgaria, Georgia) and various types of civil association or non-government organisation (in Albania, FYR Macedonia, the Kyrgyz Republic and Romania).

WUAs could be said to have been "successfully established" in the sense that following the relevant registration procedure they acquired independent legal personality, a governing document[5] , a membership, a bank account and so forth. [6] However sooner or later, in a pattern repeated in country after country, one or more of a number of legal problems arose, problems that threatened the sustainability of the new WUAs.

Legal problems arising from the use of existing organizational forms

In no particular order the legal problems typically encountered included the following:

First of all, as a result of the use of existing organizational forms the precise nature and purpose of WUAs was not always clear either to farmers or government officials. It is not surprising that before agreeing to work together farmers wanted to have a clear picture as to the purpose and scope of activities of WUAs. This is normal human behaviour – who would join a club before being aware of the implications of membership? Such caution was particularly strong in the transition countries where, following the experience of collectivization, farmers were often somewhat skeptical about the merits of collective activity. This had an impact on trust in the concept of WUA establishment and on the support farmers were willing to provide. For people who had been on PIM seminars and overseas field trips the concept was perhaps clear. The problem is that at a conceptual level none of these organisational forms is really suitable for WUAs.

Companies and cooperatives, for example, are business legal forms, used to make profits for their participants. How could this be reconciled with the idea that WUAs are supposed to operate on a non-profit basis? On the other hand, associations are used to establish private clubs such as football clubs. Were WUAs just private clubs? Furthermore while associations may typically undertake commercial activities ancillary to their main task, the buying and selling of irrigation water, which is a type of commercial activity, is actually the main task of a WUA.

[3] The irrigation agencies had insufficient resources to take over this task, local governments were rather weak and, given the depressed state of post-socialist agriculture, privatisation was not seen as a realistic or desirable option.

[4] For example, article 24 (3) of the Azerbaijani Law on Amelioration of 1996 simply provided: 'To organise operation and protection of amelioration and irrigation systems being in joint or individual ownership, to manage them, to collect water fees, to settle disputes arising during the use of water and to solve other issues, an association of water users could be established. These associations' activities shall be regulated by the legislation of Azerbaijan Republic.'

[5] Described variously as a 'statute', a 'charter' or a 'constitution'.

[6] Although sometimes restrictions on possible membership restricted the success of WUA establishment. This is a point that is returned to below.

Another common problem with the use of existing organisational forms concerned the issue or participation. In some countries the legislation precluded the participation of legal persons[7] ; elsewhere it appeared to prevent the participation of natural persons . As farms had typically been established as both natural and legal persons[8] such restrictions were hardly conducive to broad participation. In some countries the legislation required a capital contribution from potential 'WUA' members that precluded all but the richest from membership or participation in the establishment procedure. [9] In any event, such legislation could not, by its very nature, confer legal rights to membership of WUAs nor specify the rights and obligations of members with any degree of specificity certainly as far as rights to water were concerned.

Furthermore the legislation typically permitted the establishment by only a handful of people of a WUA that might potentially have hundreds of members. WUAs could, and indeed often were established largely on paper. In cases where this happened, those who had not participated in the establishment process (and who had sometimes not even been consulted) understandably felt little sense of ownership over 'their' WUA, in some cases (rightly) distrusting the motives of the WUA founders. In a number of cases WUAs were set up as companies or cooperatives by the entrepreneurial and well connected who saw an opportunity to set up a monopoly business.

Another problem was that governance structures designed for small private businesses and private associations were not always sufficiently robust or flexible for WUAs. For at the heart of each WUA lies a contradiction. They are premised on the basis that farmers will cooperate, while those same farmers are frequently in competition for scarce water resources. Clear mechanisms to promote accountability are thus particularly important. At the same time, such mechanisms must take account of variations in the sizes of the farms of those who participate in WUAs. The typical "one member, one vote" model is frequently unsuitable where, as was often the case in a number of the transition countries, there were large variations in the size of landholdings. On the other hand it is extremely difficult to ensure transparency if more complex approaches to vote allocation are used with legislative backing.

In some countries, such as the Kyrgyz Republic, as a result of the lack of suitable primary legislation extensive use was made of subordinate legislation in the form of regulations, decrees and so forth. This approach was not popular. Farmers, with some justification, argued that if governments were seeking to promote WUAs as a matter of policy then this should be backed up in legislation. Subordinate legislation, by its very nature, can be easily changed. Why should farmers invest time and effort in such flimsy structures?

Another frequent problem with the use of existing organisational forms was that changes made to the relevant legislation for other un-related reasons frequently negatively impacted WUAs. This happened in Romania where new non-government organisation legislation, intended to simplify legislation governing non-government organisations, significantly modified the internal structures of existing WUAs by removing various safeguards that had been carefully included to promote WUA transparency.

Flowing from the first point the lack of clarity as to the nature and purpose of WUAs frequently led to problems regarding their appropriate tax treatment. First of all, WUAs established as companies or cooperatives, which are legal forms that are intended to make profits, were frequently liable to profit taxes notwithstanding their proclaimed non-profit objectives. At the same time, as already noted, the use of the association form also created problems due to the fact that the commercial activity of water purchase and sale was in fact the principal task undertaken by WUAs. In any event even though WUAs do not seek to make and distribute a 'profit' they need to operate on commercial lines and to have a surplus of income over expenditure each year. In Romania, for example, the Tax Inspectorate argued that as WUAs were non-profit organizations, they could not hold over any surpluses from accounting year to year.

[7] Eg FYR Macedonia.
[8] Eg the Kyrgyz Republic.
[9] Eg Georgia.

Furthermore as they had been established under private law there was frequently no formal means whereby the ministry or agency responsible for irrigation, could supervise the performance of WUAs or audit their accounts. Nor was there any legal means for such bodies to supervise their establishment procedure. The WUAs were private entities and thus free to get on with their business subject, typically, to relatively minimal formal supervision by the relevant ministry such as the Ministry of Justice in the case of WUOs established as 'associations'.

Finally there was the problem of compulsory measures. As noted above WUAs are premised on the basis that farmers will cooperate in their common self-interest. Training and capacity building can help this process as can the benefits of successful water distribution. But what if farmers don't cooperate or pay fees and charges owed to the WUA? In countries where irrigation is essential for agriculture it may be possible to cut off the supply of water but this option is not relevant as far as payments for the costs of field drainage are concerned and is not likely to be effective where irrigation is supplemental. Similarly what of the case where farmers refuse access to their land for the purpose of operation and maintenance or where they refuse to allow water to flow across their land? Expecting WUAs to launch court proceedings as private legal persons was clearly not a realistic solution.

These legal problems were evidently not the only problems faced by the new WUAs in the transition countries. Other problems included the challenges of agriculture in the transition economies including loss of markets, shortage of inputs and lack of farming experience, as well as degraded irrigation infrastructure. Nevertheless the legal problems were real, a threat to WUA sustainability and in need of a solution.

Experience of countries with longstanding WUA legislation

As already mentioned the rich body of literature on PIM and WUAs, which has tended to focus on the experiences of so-called developing countries, has generally paid little attention to legislation and the legal aspects of WUA establishment. Instead it was necessary to turn to the experience, and the legislation, of the countries of Western Europe and North America which have their own long established WUA tradition. WUAs in Spain, the Netherlands and Germany, which undertake a range of water management tasks including irrigation and drainage, can trace their roots back over many hundreds of years.

Although the detail varies from country to country an examination of the relevant legislation revealed a number of important common features. First of all the legislation provides for WUAs to be established as a specific type of organisational form. In other words WUAs are established as WUAs and not as cooperatives, companies or associations.

Secondly, WUAs are invariably established on the basis of specific WUA legislation. Furthermore, although examples do exist of WUAs that are established on the basis of very old legislation, [10] much of the legislation is surprisingly recent. WUAs in Spain, Germany and France are regulated by legislation dating from 1985, 1991 and 2004 respectively.

Thirdly, the legislation is relatively detailed addressing most aspects of the establishment and operation of a WUA. This is legally necessary (because of the fact that a WUA is a particular organisational form) but it also allows the specific requirements of WUAs to be addressed.

Finally, in contrast with the WUAs that had been established in the transition countries on the basis of private law organisational forms (companies, cooperatives and associations), WUAs in West Europe and North America are invariably established on the basis of public law as 'bodies of public law' or 'public (statutory) corporations'. Public law is the body of legal rules that regulates the conduct of state bodies (including central and local government) as well as bodies that undertake public functions (such as state agencies and universities) on the basis of specific laws. Nevertheless WUAs in Western Europe and North America are still controlled by their members and managed in a participatory manner.

Public law status enables the public interest functions of WUAs to be taken into account. A moment's reflection shows why this is

[10] In Northern France and Belgium for example.

conceptually the correct legal basis for WUA establishment. Most of the problems faced by the early WUAs in the transition countries arose as a result of the inability of the existing private law legislation to reflect their public interest nature. For while WUAs are controlled by their participants, they provide a service that is in the public interest. They operate state-owned assets and use a state-owned resource (water) which is characterised as a 'public good' in this context. The correct operation of WUAs is a matter of public interest. They are not simply private clubs or companies. A farmer whose land lies within the service area of non-functioning or poorly functioning WUA cannot simply move to join another one, or for that matter, realistically establish a new WUA using the same infrastructure.

The legal effect of having public law status is that WUAs lie halfway between the state and the private sector. Thus they are self-managed, setting their own tariffs and making their own decisions as well as their operating rules. While they may be entitled to claim subsidies or state assistance, they are largely self-financing, the bulk of their income being provided by their participants. They operate on a 'non-profit' basis or, more accurately, such profits (surpluses) as they accumulate are retained rather than distributed.

At the same time the performance of such WUAs is supervised by the state which may challenge their decisions in the courts. It is, however, important to note that a decision taken by a WUA can usually only be challenged on the grounds of illegality. In other words the supervisory agency can only challenge a decision made by a WUA if that decision is legally incorrect: it cannot challenge a decision that it does not like in order to substitute its own decision. Despite their public law status WUAs retain their independence from state bodies involved in the irrigation sector.

Finally by reason of the legislation and their public law status, WUAs focus only on clearly defined water management tasks. They cannot branch out into potentially risky commercial activities. A person who joins a WUA knows full well that it will only undertake water related activities. Furthermore because a WUA has a single task it is easier to determine whether or not that task is being achieved.

The benefits of this approach, in other words establishing WUAs as WUAs on the basis of specific legislation as bodies of public law, are numerous. Furthermore this approach provides solutions to the kinds of legal problem outlined above.

First of all the fact that WUAs are established on the basis of specific legislation means that their purpose can be clearly specified from the outset as can the manner in which they are to be established and operated. A potential WUA member can understand exactly, for example, what WUA membership entails, how the WUA operates and what it can do. Similarly other actors can easily understand how WUAs fit into the overall scheme of water management, what their rights and duties are. It also means that the legislation can take account of the specific nature of WUAs through, for example, the provision of suitable and appropriate governance structures that are designed to promote transparency and effective rule making.

Establishing WUAs under public law makes it possible to confer favourable tax treatment upon them. They can, as non-profit bodies, be exempted from the duty to pay profit tax. In many countries they are also exempted from the requirement to levy value-added tax (VAT) or alternatively their services are 'zero rated' for VAT purposes. [11]

Public law status makes it easier to transfer user or even ownership rights over state owned infrastructure to WUAs. There is not question of privatization as WUAs are not private law entities. It also permits the legislation to confer powers on WUAs to take and impose compulsory measures. These can include: the right to impose compulsory membership/participation on those who benefit from the WUA's activity; the right to levy compulsory charges regarding, for example, the costs of maintaining an irrigation system; the right to make binding operational rules concerning, for example, the use and allocation of irrigation water; compulsory access rights over land for the purpose of operation and maintenance and if necessary the rights to compulsorily acquire land; and the right to recover outstanding fees and charges on the basis of direct execution (for example by imposing a lien over the land of a debtor) without needing first to obtain a judgment in

[11] In other words VAT is payable at the rate of 0 percent.

the civil courts. While such powers sound quite draconian in practice they are seldom used. It is sufficient that WUAs have such powers and that WUA members are aware of this.

Finally, the use of specific legislation means that provision can be made for WUAs to be effectively supervised by the state so as to ensure that they operate fairly and lawfully in the interests of their participants as well as in the wider public interest.

A full discussion of the contents of such WUA legislation, and new the WUA laws adopted in the transition countries is beyond the scope of this paper. [12] Evidently each country's legislation is different and adapted to its own cultural, legal and social norms. Simply copying the legislation from, say, a West European country would not be a realistic solution for any country.

Nevertheless clear similarities can be found including similarities of approach. A common but mistaken perception of legislation is to conceive of it only in terms of 'command and control' type laws, regulatory rules that set out what can and cannot be done and which establish penalties for non-compliance.

In contrast WUA laws should be seen as 'organisational' rather than prescriptive. Elinor Ostrom many years ago correctly warned against the use of 'blueprints' for the design of WUAs. [13] Just as each irrigation system is different so it is likely that each individual WUA will be different. The role of an effective WUA law is to set out the basic parameters within which the design of each individual WUA can be 'crafted'. At the same time such a law must set out minimum criteria necessary to ensure transparency and robust governance structures while at the same time conferring substantive legal rights and duties on WUA members.

Finally there is one important issue that for reasons of legislative form and practice usually cannot be fully addressed in a WUA law and that is the issue of tax liability. At best a WUA law can create the appropriate legal conditions for WUAs to be exempted from tax liability but usually such an exemption can only be created through tax legislation.

IRRIGATION AND DRAINAGE LEGISLATION

Effective WUA legislation is not however sufficient to guarantee WUA sustainability. Experience in the transition countries shows that it is equally important to ensure that irrigation and drainage sector legislation, including land tenure legislation, is appropriate and supportive.

Improved security of water delivery can be a key incentive for farmers to establish WUAs. Evidently in order to be able to provide such increased water security WUAs need this kind of security themselves either on the basis of long term legal rights to abstract water from a natural source or, more commonly, on the basis of a long term contractual right with a bulk water supplier (usually a state agency). Annual contracts with no legislative backing offer little in the way of water security. What if there is a dispute? How can a WUA be sure that the supplier will enter into a new contract the following year? Ideally such contractual arrangements should be backed up with legislation that should also specify that within their service area WUAs are to have an exclusive right to supply irrigation water.

Next, WUAs will very often need to have express legal rights to use publicly owned irrigation infrastructure. If WUAs do not have such rights or if they are weak or vague then very quickly problems regarding responsibility for maintenance can arise with no-one willing to undertake this.

Another argument in favour of PIM is that WUAs can usually provide a cheaper as well as a better service to farmers. Here the legislation relating to tariff structures may have a negative impact on WUA sustainability if, for example, there is a fixed national tariff for retail water delivery or if tariffs are subject to regulatory approval by a state anti-monopoly body.

Finally it is important to ensure that legal and institutional framework contains appropriate incentives for the bulk water supplier to provide an efficient and

[12] See Food and Agriculture Organization of the United Nations (FAO), 2003. *Legislation on water user organizations*., by S. Hodgson, Legislative Study No.79, Rome, for a discussion of this topic. www.fao.org/Legal/legstud/list-e.htm

[13] Ostrom, E. *Crafting institutions for self-managing irrigation systems* 1992, ICS, San Franscisco at page 11.

responsive service to WUAs. This issue raises a much broader set of questions of course that may go beyond a PIM programme but nevertheless may have a significant impact on WUA sustainability. In particular it is important to 'sell' the idea that strong WUAs can be valuable customers for such organisations but at the same time it is important that such organisations have an internal structure that is conducive to this end.

WATER RESOURCES LEGISLATION

Finally, the sustainable operation of WUAs relies on the effective management of water resources in general and the secure allocation of water to the irrigation sector in particular. To this end it is important to enact and implement basic water legislation, in the form of a modern water code or water resources law. The key issue here is water rights. A full discussion of the importance of water rights is beyond the scope of this paper[14] but, to give a concrete example, unless a bulk irrigation water supplier holds secure long term water rights it is difficult, impossible even, for that supplier to enter into a long term water supply contract with WUAs. Without such water security, as outlined above, the sustainability of WUAs can be threatened.

CONCLUSION

Legislation is clearly not a panacea. It cannot, by itself, guarantee the sustainability of WUAs. On the other hand, as outlined in this paper if appropriate legislation is not in place then even though WUAs can usually be established using existing laws they are not likely to be sustainable.

Particularly in the concept of individual investment projects there is an understandable tendency to 'make do' with the legislation that is currently available. Changing existing legislation, or adopting new legislation, can be a lengthy and challenging process, one that of necessity involves stakeholders outside the irrigation sector including other ministries, the government and ultimately parliament. But if such investments are to be fully realised, or if PIM is adopted as part of a national policy, then just as one would pay careful attention to the economic, financial, social and engineering aspects equally it is necessary to have regard to legislative issues and the experience and practices of other countries. The body of detailed legislation relating to WUAs found in Western Europe, North America and now in the transition countries is there for a good reason. After all no country adopts legislation for fun!

[14] See Food and Agriculture Organization of the United Nations (FAO), 2006. *Modern water rights*., by S. Hodgson, Legislative Study No.92, Rome. www.fao.org/Legal/legstud/list-e.htm