Paper 5

Legal Aspects and Issues

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INTRODUCTION

LAWS AND THE institutions which administer them may constrain or facilitate the process of social adaptation to changed circumstances. In a somewhat oversimplified sequence, as the pressure for economic and social change translates into the review of policy and a reordering of society's priorities, implementation of society's revised agenda requires laws and administering institutions—at the governmental and nongovernmental level—attuned to the new needs of such agenda. If they are not so attuned, laws and institutions will act as a hindrance to change and will stifle economic and social development.

Laws and institutions for water resources development and management in general, and for irrigation development and management in particular, are no exception to this rule. As pressure on essentially finite amounts of available water resources mounts in response to economic growth and changing patterns of social behavior, and as dwindling public treasury finances become increasingly incapable of meeting all of the water sector's and the irrigation subsector's demands, the pressure for social adaptation to scarcity of natural and financial resources leads to a revision of water and irrigation policies and of implementing laws and institutions. This pattern is evidenced by a number of countries which have gone recently or are going through a process of policy and companion legal and institutional review in the water sector—and with special attention to the irrigation subsector—most notably, Spain, the Australian State of Victoria, Indonesia, Mexico and Chile. The collective experience of these countries points to a number of policy and related legal and institutional issues which other countries may encounter as they embark on the process of reviewing policy in the water and irrigation subsector and adjusting relevant laws and institutions to a new or revised set of policies. As the Southeast Asian Region shows all the symptoms which have resulted elsewhere in the world in a reorientation of policy, legal and institutional frameworks for the water resources sector in general and the irrigation subsector in particular, experiences elsewhere in the world may provide useful conceptual ammunition across cultural and geographical diversities.

Policy and related legal and institutional issues relevant to the irrigation subsector have been grouped and analyzed around a few main clusters. These have been further grouped in water sector-wide and irrigation-specific clusters, respectively.

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POLICY AND RELEVANT LEGAL AND INSTITUTIONAL ISSUES AT THE "MACRO" (WATER SECTOR-WIDE) LEVEL

The development and management of irrigation cannot be viewed in isolation from the development and management of the natural resources which are at its core (i.e., water and land). Issues which are not specific to the irrigation subsector will nonetheless reverberate on it and have to be accounted for and anticipated—all the more so if one considers, in particular, that irrigation water accounts for a good two-thirds of water consumption worldwide, and that, as a result, this particular use is highly vulnerable to shifts in policies and priorities for the entire water sector. The main policy and related legal and institutional issues of particular significance to the irrigation subsector appear to be *security of water rights tenure, customary law and judicial mechanisms of conflict resolution, regulatory mechanisms, effectiveness of the government water rights administration, security of land tenure, and other land-related issues.*

Security of Water Rights Tenure

The issue of security of water rights tenure has a dual connotation. Traditionally, the first concern of water users in general, and of irrigation water users in particular, has been to be able to rely on a steady flow of water. As water resources have tended to become polluted, concern for dependable flows has been coupled with a concern for the quality of water arriving at the user's headgate, a steady flow of polluted unusable water being tantamount to no water being available at all. Under the former of these two different but complementary configurations, the issue—being a mixed one of policy and law—is, how secure, in a legal sense, an irrigation "water user", be it an individual farmer or a corporate farming enterprise or an irrigation project as a whole, is in his or its water entitlement, particularly when the water he or it is dependent upon is being dammed or simply siphoned off or just sought by somebody else, be it individual or corporate user or the government, upstream on the same river or drawn elsewhere on the same underground aquifer; or when his or its title is challenged. Under its water quality configuration, the issue is, how secure in a legal sense an irrigation water user is in his water entitlement when the water he has been using is being polluted above his headgate to a level which makes it unfit for irrigation use. Under all these circumstances, the issue of security of water rights tenure is borne out of conflict situations, and is best analyzed from the standpoint of the legal mechanisms provided by a legal system for conflict resolution.

Security of water rights tenure, however, is relevant also in a situation involving a commercial transaction between water users, such as a transfer of water rights from one user to another through a market mechanism, or between a water user and, say, a lending institution such as the taking of a loan from a bank, with the water right serving as collateral. In these nonconflicting situations, the irrigation water user wants to be secure that "his" water right is indeed his, and that evidence of this fact is readily available to support the transaction. This apparent preoccupation with the instrument of a water right belies a very basic concern for the certainty, clarity and availability of title. As uncertain, unclear or simply unavailable titles breed conflict, legal systems of water resources management have sought to address this particular configuration of the security issue in context with the provision of legal mechanisms for conflict resolution.

Customary Law and Judicial Mechanisms of Conflict Resolution

Overt conflict over water has been—and is at present in many countries, particularly in a rural context—handled by a variety of customary means of conflict resolution (i.e., by "customary"

law). While a review of these is beyond the scope of this paper, suffice it to say here that customary law plays a significant role in many parts of the world. In the Moslem world, a very sophisticated body of customary rules in relation to water use has evolved from the Koran and its interpretations and applications by the different schools of thought. The Water Court of the city of Valencia, in Spain, has met once a week for the past one thousand years to adjudicate water disputes brought before it by irrigation water users for swift and inexpensive adjudication. In the absence of customary mechanisms of conflict resolution, formal litigation before a court of law has been—and is at present to a varying extent in virtually all legal systems—the most readily available mechanism for conflict resolution. Settlement of water disputes in a court tends however to be regarded as expensive, time-consuming and unpredictable in its results. Furthermore, its relevance in the cultural context of certain countries, particularly in the Southeast Asian region, may be debatable.

Regulatory Mechanisms

The more modern trend is towards the prevention or minimization of conflict via the government regulating the allocation of available water resources to different uses through the instrument of a permit, license or concession. Security of water rights tenure is achieved in the substantive sense that the permit shields its holder from attack by competitors by virtue of its operation, and in the formal sense that the permit guarantees certainty and dependability of title. This formal function of permits is enhanced by the recording of permits in registers available for public consultation. Through a permit mechanism, opportunities for conflict among water users are minimized through the governmental action of arbitrating among competing demands. Conflicts among competitors for the same water are dealt with and settled in the administrative process of granting a permit or the like, and they never reach the courts. Conflicts between the government and a user or prospective user who is dissatisfied with a given administrative decision affecting his water right or his expectation to obtain a water right are dealt with through the administrative appeal process, or before the courts of law in certain legal systems.

While ensuring formal security of title, and the maximum degree of substantive security consistent with the collective good pursued by the national community through its government, permit systems enable the government to allocate water resources and to manage allocation patterns with the desirable flexibility. Perhaps another mixed policy and legal configuration of the security issue in this particular connection is, how to reconcile security of tenure with the desirable flexibility of administrative action. In this particular respect, permits afford substantive security of tenure also from attack by the very government which granted it in the first place. This occurs when water which has been "frozen" under a permit is needed for a high-valued use, and is wanted back by the government. In these instances, security of title gives way to flexibility of governmental action, in return for compensation of the displaced permit holder.

Effectiveness of the Government Water Rights Administration

Effectiveness of the government water rights administration is complementary to security of water rights tenure insofar as security is enhanced by an effective government administration. It is of relevance to irrigation users, whatever their configuration, insofar as an effective government water rights administration will ensure that the water entitlements of irrigators, among other users, are met and protected from undue interference.

While the actual configuration of the government water rights administration will vary with the circumstances—constitutional, geophysical, development and others—of each country, there are certain parameters of general validity which can be of use in country-specific situations. A government water rights administration is akin to a central bank and functions along similar lines.

Like a central bank, it must be in a position to control withdrawals made from the total mass of available water resources by issuing and revoking water withdrawal permits. Like a central bank, it must also know at all times how much resources are "in circulation" through outstanding permits, and how much are left for withdrawal. Like a central bank, there must be a central unit within the structure of the government with authority to grant, revoke and alter permits, and to keep relevant records. Just as a central bank cannot tolerate competitors, so the function and authority abovementioned cannot be exercised by two or more units competing for the same authority within the structure of the government. Authority can be surely delegated to subnational levels of the government, but ultimately it must rest with one unit placed at the central or national level of the governmental system. Just as a central bank's scope of authority must cover the entire money supply mass, so does the scope of authority of the government water administration need to extend to all of the water resources available in a given country—from surface to underground and, depending on the circumstances, from aboveground to wastewater.

The issue which is fused with policy and institutional relevance, and which emerges in this regard appears to consist, in a majority of cases, in how to reconcile the inherent unity of the natural resource and of the manyfold management functions relevant to it with the reality of governmental bureaucracies patterned along use-specific lines (i.e., with separate administrations responsible for irrigation, water supply, energy, transportation), or along functional lines (with separate administrations responsible for water resources allocation and water pollution control, respectively), or even along different kinds of water resources (as with separate administrations being in charge of surface water management and underground water management, respectively).

Security of Land Tenure

This particular issue is of significance in the broader context of land reform and land redistribution programs inspired by social justice goals, and it does not necessarily emerge in connection with irrigation development. In this broader framework, security of land tenure entails, generally replacing precarious forms of tenure such as tenancy and sharecropping of agricultural land, including, in particular, land under irrigation, with full ownership rights. In addition, security of land tenure has emerged forcefully in connection with irrigation development of land hitherto cultivated by traditional means, where traditional cultivators have been displaced by newcomers claiming fresh title to the developed land. Legislation supporting irrigation development, particularly for the benefit of the commercial agriculture sector as opposed to subsistence agriculture, tends to introduce modern, commercially oriented instruments of land tenure, notably, written title, which ignore established customary practices. Whence the potential for conflict between customary occupants and statutory claimants of title, or between statutory occupants and claimants of customary titles.

The issue which is a blending of policy and law, in this respect appears to be how to reconcile modern land titling systems and processes with customary rights of occupancy. A key to addressing this issue in connection with the transition from traditional to modern agriculture in general, and in connection with irrigation development in particular, is to devise legal mechanisms aimed at evolving customary rights of tenure towards modern tradeable titles, thus bringing about, in a phased manner, a generalized system of land tenure based on written title.

Other Land-Related Issues

Other issues related to the tenure of agricultural land in general, and of irrigated cropland in particular, concern limitations placed by the law on the maximum size of holdings, and restrictions on the disposal of communally held land. Legal restrictions to the size, particularly of irrigated landholdings, and to the disposal of communal land tend to complement land reform programs,