

Governance and Legal Pluralism: Challenges in Irrigation Management Transfer

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ABSTRACT

In many countries in the developing world, the responsibility for managing irrigation systems which were previously controlled and managed by the state through its irrigation and agricultural support bureaucracies is slowly being transferred from central government authority to local communities. Such a process has been variously characterized as privatization, turnover, local institutional strengthening, democratization, decentralization, and so on.

This paper presents the rationale and issues that confront irrigation management transfer (IMT). It first deals with the broad topic of implications and challenges of privatization, the context for Nepal and irrigated agriculture and then focusses on two aspects those of gender issues and institutional arrangements. The gender aspect is often ignored in the IMT process. Though a great deal of emphasis can be seen on institutional arrangements, it focusses on institution building around rules and the need to take a social science view of legal pluralism. Such an approach and understanding would enhance the knowledge of crucial elements in institution building for IMT and also provide policy intervention windows to bring about justice and nature resource management.

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RATIONALE AND CHALLENGES OF PRIVATIZATION

Throughout the world, the 60s and 70s can be noted as an epoch of state expansion and nation building, however the last and the current decade can be associated with de-nationalization and market-oriented reforms. Privatization world wide has encompassed major utilities and other diverse areas such as education, prison management, health, etc. (Cowan, 1990).

Irrigation schemes have not been isolated from the global bandwagoning of public sector reform programs (Samad, Dingle, and Shafique, 1994). Governments and lenders have at times together and at times separately been trying to change the relationship between the government agencies or the state apparatus and the farming community or irrigators and peasants. The locus of governance has been shifting from state to joint to local and vice versa depending on the dominant economic and political forces. The intensity and magnitude of this change varies from country to country, from outright transfer of ownership of irrigation schemes and facilities to water users as in the case of New Zealand, Bangladesh and Indonesia (Farley, 1994; Johnson *et al*, 1993; Vermillion, 1991), transferring responsibilities of operation and maintenance in secondary and tertiary canals to farmer groups as in the case of Sri Lanka or the Philippines (Vermillion, 1992; Wijayratna and Vermillion, 1994) or the state disassociating itself from the provision of support services for irrigated agriculture as in the case of Sudan.

The impetus for turnover or privatization of irrigation systems and institutions stem from the dominant perception that they lack the incentives and responsiveness to optimize management performance. On the other hand, it has been noted that farmers have a direct interest in sustaining cost efficiency, profitability, and physical conditions of irrigation systems (Vermillion, 1992).

Other reasons for privatization include the cost saving for the public sector, increased allocative efficiency through water markets, improved management of irrigation systems as the collection of user fees would induce management agencies to improve their services to their clients (Small and Carruthers, 1991).

The reasons cited above for turnover to the farmers groups or a turn towards privatization have mainly been economic. The fiscal and budgetary crises encountered by governments as results of decades of interventionist policy have been instrumental in propounding privatization measures. Focus only on economic gains from privatization may downplay the motivating power of non-economic factors and their consequences (Samad, Dhingle, and Shafique, 1994) especially since the irrigation management transfer is being implemented within the overall context of macro-economic and political adjustments.

To a great extent, privatization is being proposed not by the social groups but by politicians, state officials, and lenders/donors. The motivations of the government could be a deliberate attempt to relax its control over the economy and reorder its political goals, or it could involve state maintaining a controlling interest in the economic and political outcomes whilst the mechanisms for implementing these goals are being reformed or renegotiated (Ikenbury, 1993). Governments that were previously very interventionists have gradually become more comfortable with privatization because they more fully appreciate that by divestment they do not lose control of development. Cowan (1990) points out that the power to regulate is only now being more fully understood : judicious use of it without impeding private initiative will provide the government with enough control to give directions to development without itself becoming immediately

involved. It can therefore create an enabling environment for institutional changes without itself being dragged down by transaction costs.

POLITICAL PERSPECTIVE ON PRIVATIZATION

Samad *et al* (1994) point out that shifting responsibilities from the state to NGOs or the private sector alters the institutional framework through which stakeholders articulate, arbitrate, and advance their individual and collective interests. private sector management sees ends and means differently. Private sectors main aim is maximization of returns to investments. Such a pursuit may result in management taking actions that could be a disadvantage to the farming community. Similarly, if boundaries are not set and parameters of social interactions not negotiated in advance, where users take over the management, the interests of the more powerful groups on the basis of caste, class, locus of residence or landholdings in the system, and even political affiliations could dominate production relations to the disadvantage of the less powerful members of the community.

Such an asymmetrical relationships, especially when not negotiated and accepted by the different parties concerned could be conducive to major conflicts that could stifle the irrigation management transfer programs. Ignoring the political perspective misses a larger set of dynamics which could undermine the sustainability of the transfer effort itself. The internal social stratification and the negotiated asymmetry to a great extent condition the evolving dynamics and external relations of the local institution.

THE CONTEXT FOR NEPAL

The rethinking on the part of the lenders and some government officials for a process of management transfer in an agrarian society and economy of Nepal has occurred due to fiscal and

legitimacy crises faced by the state in managing and controlling the natural resource, and to some extent, the confidence that the planners and policy makers have had in the institutional capacity of the farmers and local irrigators in managing their own systems through their own customary practices and laws.

Research on irrigation management in Nepal carried out in the early and late eighties has been instrumental in acquiring a recognized status for farmer controlled and managed irrigation systems. Such research on collective action portrayed by self-governing farmer irrigation organizations was able to put farmer managed irrigation systems (FMIS) on the map of Nepal.

It was only in 1981 in Nepal that the government acknowledged their importance and began to consider ways to enhance and expand FMISs. The Irrigation Sector policy for the fulfillment of Basic Needs spelled out the direction that FMISs will be managed by the farmers themselves and that appropriate assistance will be provided by the government. Further research on large farmer managed irrigation systems (over 5000 ha in the plains) and findings on the intricate resource mobilization pattern, organizational and institutional arrangements for the operation and maintenance of the irrigation systems have been conducive to the recognition of the capabilities of farmers in constructing and managing large irrigation systems (Pradhan, Giri, and Tiwari, 1988; IIMI, 1993).

In the First Five Year Plan, the total area irrigated in Nepal was considered to be around 14,000 ha for some 8.5 million population. Official irrigation statistics often ignored the area coverage and role of FMIS. What was not within the purview of the government agencies did not count as irrigation. Furthermore, what did not look like the irrigation structures taught in academic

institutions (these institutions dealt more with technologies for large plain irrigation systems) were always thought to be rudimentary and needed structural improvements. Throughout Nepal there are examples where "modern" and scientific but institutionally inappropriate physical structures have been superimposed on existing local irrigation structures. Then these irrigation systems were controlled by the state. In effect, existing FMISs got taken over by the state through "physical improvements" and such takeovers in due time gave the reason for the very need for the continuity of the irrigation bureaucracy. On the other hand, many systems that were built by the government some time ago, have in fact been "turned over" to the irrigators by default due to lack of resources channeled to these systems by the government.

In less than three decades since the first Five Year Plan, we see a noticeable change in the attitudes of some planners and irrigation officials whereby there is current thinking in making even agency managed irrigation systems FMISs.

RESEARCH FINDINGS AND PARTICIPATORY IRRIGATION MANAGEMENT IN NEPAL

Research on and findings on the performance of farmer managed irrigation systems (FMIS) have encouraged agencies to tap indigenous knowledge and skills of the local irrigators for government and agency assistance to FMIS. Such farmer expertise and knowledge have also been utilized for bringing about participatory management in the form of joint management in several agency managed irrigation systems of Nepal in the plains called the terai (IIMI, 1992; Rana et al, 1994).

However this effort has been limited to only a few systems and has been to a great extent been encouraged by external financing. Similar efforts had been exercised on several irrigation

systems and participatory management was not carried out in these systems due to the discontinuation of external funds for these systems. The government has not been able to carry out joint or participatory management activities as an integral part of its mandate despite such institutional arrangements being specified to be followed in the current irrigation policy and the Eighth Five year Plan . Participatory management gets carried out as an appendage of the more construction or contract oriented bureaucracy.

CHALLENGE TO IMT: GENDER BIASES

A concern about relative success of IMT process is the gender aspects especially in terms of efficiency and equity. An emphasis on gender aspects of irrigation forces us to clarify who is included in the group of users of irrigation services. As Zwarteveen (1994) points out, in most IMT literature, water users are implicitly assumed to be male individuals, whilst in reality water users are organized in a household collectivity with members of both genders who have parallel, complementary and sometimes conflicting roles, needs, and interests with respect to water.

Men and women will be differentially affected by changes in the costs and benefits of irrigation as brought about by IMT and these changes are to occur primarily through improved markets and improved institutions. Both markets and institutions are known to be gender biased, in the sense that they do not fully recognize that all economic activity works through gendered relationships. In many of the irrigation organization's executive committee female participation has been reported to be low or not welcome.

The fact that organizations function even without female participation cannot be taken as proof of their efficiency. Zwarteveen (1994) indicates that organizations and institutions do not

persist only because they are allocatively most efficient. Institutional economists have begun to recognize that institutional arrangements may actually be dysfunctional on strict efficiency criteria but persist because of social ideology that seeks to preserve the status quo (Evans 1993).

The benefits and costs of IMT cannot be fully understood or realized when no attention is paid to prevailing gender relations which structure markets as well as institutions. If the anticipated financial accountability between irrigation agencies and users is to become a reality, it should be realized that gender norms and relations may distort the incentive structure by disassociating payments from benefits.

The fact that IMT processes entail a relegation of functions and responsibilities to markets and local communities makes it seem justifiable for policymakers, planners, and irrigation agency personnel to also shift the concern for women's rights and powers to markets and local community-based organizations. However, there is no reason to believe that markets or community-based institutions and organizations will be better instruments to address gender inequalities and gender based inefficiencies than government agencies.

ANOTHER CHALLENGE: INSTITUTIONAL ARRANGEMENTS AND CULTURAL BIASES

In the pursuit of laying down rules and institutional arrangements there may be an implicit cultural bias of those involved in this effort and therefore the need for the appreciation of a social science view of legal pluralism that takes into account plurality of possible and probable rules, behaviors, and institutional arrangements. Two decades of research on locally managed irrigation systems (Yoder, 1994; IIMI/WECS, 1987) have shown a variety of rules, institutions, and

mechanisms that address effective irrigation management. To an extent, elements in the IMT process have again been dominated by mainstream cultural notions of equity and efficiency.

The cultural biases in organizational formation, accountability, rules, principles of water rights and allocations, basis for local resource mobilizations have to an extent hindered ready adoption of many institutional development programs propelled from the external. IMT could be an evolving process whereby governance structures are created that will facilitate justice, accountability, financial and institutional sustainability, and poverty alleviation. Such renegotiations may bring about access to resources by future members and also the development of water resources.

The understanding of legal pluralism and the dynamics of local governance may foster innovative IMT practices than otherwise. It is often reported that assistance should be channelled through existing institutions and that water users associations (WUAs) should be built upon existing institutions. In my opinion this should be done with joint evaluations of the existing rules and regulations and the capacity of the existing institutions. The internal power relations and rules of deprivation that exists (formed by dominant groups within the larger group) may impede justice, human dignity, future access to and benefits from resources.

The organizations for managing irrigation systems, the rules and tools used, and the jural aspects of rights, dispute mediation, resolution, and repertoire of justifications for either the rights or claims, the basis for the reproduction of rights, vary from system to system. How best to pursue IMT such that it is not considered paternalistic, shift of responsibilities and transaction costs, a process in the unavoidable package of structural adjustments imposed on developing nations by

lenders, and principal stakeholders (the irrigators themselves) empower themselves to be active partners in policy and legislation making remains a challenge. The IMT movement to date is not the irrigators' movement and is being carried out because the government agencies have no choice in front of the "political will" of carrying these out backed by external finance and the lack of resources for daily operations and maintenance of the numerous systems.

In defining a process for IMT, often preconceived notions of users group formation and the conditionalities of institutional arrangements are laid down. The challenge will be to what extent local institutional arrangements and practices can be relied upon to govern the natural resource providing access to the needy and at the same time conserving and managing the resource. As pointed out, the current common pool of irrigators with private lands are but a corporate group acting as a private individual with private property denying access to the resource for others. The nature of assistance in the IMT process should create such avenues of future access and flexibility in the operationalizations of duties and rights. Several organizations have dealt with future memberships with varying degrees of fairness. Compensation for initial investments, acceptance to a hierarchy of rights and duties, seniority or lack thereof in terms of ensuring security of water during water scarce times, etc. have been worked out while accepting newer members.

NATURE OF PAST FIELD RESEARCH AND POSSIBLE FUTURE DIRECTIONS

Studies of locally managed irrigation systems have clearly indicated the tenacity of the reproduction of property rights and relations in water rights and the concomitant management of the resource and its reproductions or sustainability. In many of IMT processes, the ownership of assets or irrigation facilities and water rights (from the source to the system as well as the internal

distribution of water rights) do not seem to be considered. Often it is the operation and maintenance functions rather than rights over the irrigation facilities and water source. The transfer of authority over the irrigation system and the transfer of ownership and rights of the assets and water source should be considered. In systems where heavy investments have been made and the technology is deemed to be sophisticated, institutional arrangements must be sought that will guarantee equal partnership in decision making regarding the management of the system and enforce transparency and accountability in the managing of the irrigation system.

Sociology, anthropology, agro-economic, political sciences, and other disciplines studying irrigation management have ignored or long nurtured a blind spot for the legal or para-legal dimensions of their objects of study (Spiertz, 1995). Matters involving law, legislation, or rights, were either seen as irrelevant or minor or were seen as exclusively belonging to the domain of legal science. To some extent social science conceptualizations of social institutions, social rules, and human behavior of common goods and private rights, of conflict and conflict management have long been dominated by normative legal definitions. Such understanding have led to unintended consequences and failures in development programs aimed at socio-legal engineering.

TOWARDS A SOCIAL SCIENCE VIEW OF LEGAL COMPLEXITY²

In most domains of social life more than just one of the legal, or law-like systems will be relevant. This can loosely be termed as legal pluralism. It means that in many life situations farmers, water-users, village-headmen, bureaucrats and officials can make use of more than only one normative repertoire to rationalize and legitimize their decisions or their behavior. However,

which specific repertoire, in which specific case, people will orient themselves at, will mostly be a matter of expediency, of local knowledge, perceived context of interactions and power relations.

This paradigm of legal complexity has important implications for conceptualization of the relationship between norms and behavior. Discrepancies between rules/norms and people's behavior no longer need to be seen in terms of deviance or non-compliance but need to be explained in terms of people's options and choices. Similarly for the rule conformed behavior.

The perspective of legal pluralism means that people's actions and people's rationalizations in terms of cognitive and normative repertoires should carefully be distinguished. A crucial element of legal pluralistic approach is "locality." This would mean starting out from the assumption that the relationship between rules and behavior can only be meaningfully studied by looking into real-life situations^(Spradley, 1995). Instead of top-down analysis of law and behavior in terms of effectivity, compliance, implementation, what is preferred is a grass-roots approach by trying to look at the surrounding legal complexity from the actor perspective, and to do so in different time and locales.

Vanderlinden (1989:151) argues that pluralism is ubiquitous in our lives:

one might say that man [sic], as a member of many social networks, is constantly subjected to a dialectical process in which competing regulatory orders assert their power over him [sic] and strive to achieve autonomy from the others. law is one of these regulatory orders and competes with them in order to assert its supremacy at the same time over the individual and over other regulatory orders.

He goes on to add an important point:

When confronted with the reality of competing social networks and hence with rival legal orders, the State system, in order to conceal the inevitable failure of its totalitarian ideal, pretends to incorporate the other legal orders into an order which it calls "legal pluralism." This enables the State system to affirm in principle a monopoly of regulatory order, since it

claims that the competing legal orders only exist by virtue of its "tolerance" or "recognition".

Thus from a research point of view, according to Vanderlinden, the way out for social scientist to avoid falling prey to such legal centrist approach is to focus on individuals, since it is the individual actors who are involved in networks, experience the contradictory pull of various regulatory orders and decide which shall influence their behavior. However, the relationship between individual choices and the emergent structure needs to be examined as has been done by Wiber in her study of the Ibaloi village in the Philippines (Wiber, 1991). Wiber's research has led her to challenge the dependency theory of legal pluralism, whereby peripheral zones are forced into economic dependency by having to exist within two legal structures, their own and another imposed by a central power zone, in favour of the social science view of legal pluralism that emphasize that all heterogeneous societies experience legal pluralism, but in different and individual ways, as people have a tendency to manipulate the law to their own advantage.

WATER RIGHTS AS A PROBLEMATIC

In the approach to the study or understanding of water rights one would start out by, in the first instance at least, ignoring the legal lexicons and legal definitions of types of rights --such as private rights versus public rights. the first things to look at would rather be how water, and the value of water has been conceptualized in the society or community studied. Which types of interests in water (which would normally be associated with land) would be involved and which types of social relationships would be connected with these interests. Which social institutions and normative frameworks would be involved? This would bring us to legal pluralism, if only because

any legal repertoire (even customary law) tends to become transformed, tends to develop contradictory versions in specific interaction situations in time and space.

The first point of departure would be the assumption that people in their natural and social resources are interconnected through complex sets of cultural and normative schemes of meaning (Espino) Through these people construe concepts and different categories of natural resources, and institutionalized relationships and social practices through which they try to control, exploit, and preserve, them. Since natural resources such as land, water, crops, are of existential importance for human life and organization, the conceptualizations of resources and of rights to control them, form key elements in any legal system.

A second point of departure would be the assumption that law not only consists of rules, concepts, principles and procedures which are external to social practices and institutions but is also embodied in social practices and resources, (Spaatz, 1995) Carrying within itself the assertion of legitimate authority and use of social power, law provides normative structures and constraints to people's activities, and can be a source of motivation and orientation. Law cannot however be seen as a determinant of social practices since in any society there actually is more than one body of normative concepts, rules, principles and procedures that relate to social organization.

Exploring the relationships between complex legal orders, various conceptualizations of water and land as natural resources, types of interests and social relationships and practices involved, is an essential precondition for any effort to understand, and certainly to improve natural resource management.

The legal systems or sub-systems are by no means well integrated wholes. Policies and legal regulations for property regimes intersect with other concerns such as sustaining law and order or with politicians' or bureaucrats' private and class interests. Local forms of customary and folk legal regulations are also far from being unambiguous. In the local processes of social ordering, the various sets of normative systems tend to become intertwined and these are reflections of the social, economic, and political conditions in most rural areas. These are the daily experience of farmers, bureaucrats, and development agents. A legal pluralistic perspective guides researchers in the field of natural resource management and property regimes not to start out from the normative oratory of the legal profession nor from the recitals of local traditional law but from the people's daily experiences regarding their normative environment with all its ambiguity, variations, and contradiction.

CONCLUSIONS

Irrigation management transfer presents us with an opportunity to bring about changes in the way access to resources are denied and to the way justice can be brought about. However preconceived notions of what rules should be enforced, how conflicts should be managed, and what institutional arrangements should be superimposed would only repeat the failures of previous institution building efforts. What would be important would be to set the negotiating process between the different stakeholders going with a mutual vision for change, adaptability, and resiliency. What can be done is to negotiate for the parameters for the process of local governance with elements of justice and fairness to the wider community than just the corporate body of monopolistic users of a resource. The existing power relations mediates these and the best that can

be hoped for is group action and sanctions that can bring about the enforcement of rules and mutual accountability.

The restructuring process that IMT entails increases the scope for critically examining many of the interactions and tensions between social institutions, gender relations, and economic performance and at a more practical level --for exploring ways and mechanisms to make markets and institutions more responsive to specific women's needs. Through a focussed effort of policy makers and planners, IMT processes could in fact be used to redress the perception that irrigation is an all male affair, by explicitly gearing training and awareness programs to all stakeholders, irrespective of their gender, and by identifying and removing constraints to female participation in organizations (Zwarteveen, 1994) and the disadvantaged ones of the community. IMT in fact becomes a policy experimentation and the process becomes the product that brings about guaranteed rights to the users through accepted negotiations and compensations and also a transfer of authority and working relationships and roles between the state agency and water users.

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