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ANALYSIS OF ASPECTS OF OWNERSHIP RIGHTS TO DRINKING WATER SUPPLY AND SANITATION SYSTEMS AND POSSIBILITIES OF ORGANIZING THEIR EFFECTIVE MANAGEMENT

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TajWSS
Tajikistan Water Supply & Sanitation

CONTENT

ABBREVIATIONS

RT	Republic of Tajikistan
CC of the RT	Civil Code of the Republic of Tajikistan
WC of the RT	Water Code of the Republic of Tajikistan
SUE	State Unitary Enterprise
SUE RIP	State Unitary Enterprise “Registration of Immovable Property”

RESUME

Legal regulation of ownership issues in Tajikistan is conducted by a large number of complex, cross-sector, sector specific and specialized legal and regulatory acts of international, national and local purpose. Those legal and regulatory acts establish general rules for ownership relations, as well as a series of specific rules on ownership rights in the sector of drinking water supply. Main normative and legal acts that regulate ownership rights in the sector of drinking water supply are Civil Code of the RT, Water Code of the RT and Law of RT "On drinking water and water supply".

Normative and legal acts in the sphere of ownership rights to drinking water supply regulate mainly aspects of state ownership to drinking water supply, without separately defining legal regime for private systems of water supply.

Since existing legal models of drinking water supply are also clearly oriented towards a system of drinking water supply under state ownership, then possibilities for management of such systems also concentrated on application of state organized legal forms – mainly State Unitary Enterprises. Legislation does not explicitly prohibit transfer of drinking water supply systems to private sector usage, but at the same time does not include clear and detailed mechanisms for implementation of such rights. As the Law of the RT "On drinking water and water supply" has entered into force, prohibition on privatization of drinking water supply systems was removed, however due to absence of mechanisms for transfer of state ownership to non-state actors, practical changes in forms of ownership for drinking water supply systems did not actually occur.

Legislation of the Republic of Tajikistan includes certain mechanism for attracting private operators to manage state owned systems of drinking water supply on a universal basis through rent, loan and asset management agreements, however in such examples are practically non-existent due to absence of clear mechanisms that determine under what terms such change of ownership is possible.

To improve effectiveness of management for systems of drinking water supply the following scenarios are possible for prospective development:

- **Increasing effectiveness of current management practice in the sector**

Effective performance of state enterprises in developed countries are achieved through higher standards of their accountability to clients, government, and public at large, which is ensured through strict legal frameworks, traditions, citizen's active participation and the rule of law.

- **Demonopolization approaches to management of drinking water supply systems**

Establishment of state enterprises to manage drinking water supply systems is not always economically, technically and/or practically possible and necessary at the local level, and such is the case especially for small rural systems of drinking water supply. For those purposes, it is reasonable to attract local private and community initiatives through development of introduction of by-laws within the legal framework on transfer of state ownership and operational management rights on the basis of rent, loan and asset management agreements, or any other agreements.

For these purposes, it is reasonable to involve local private and community initiatives through development of by-laws to legal framework for transfer of state ownership to use on terms of rent, loans, trust management, or on other contract arrangements.

❒ Denationalization[1] and effective sector regulation

Privatization of drinking water supply systems, in accordance with new regulations in the Law of RT "On drinking water and water supply" is allowed under terms of preserving main purpose of the system. The given regulation also may provide good solutions for small-scale autonomous systems of drinking water supply, which provide additional burden for state responsibility, thus do not necessarily require state ownership. However, cases of any privatization of state property, particularly of such a vital sector, must go along adequate sector regulation, which allows monitoring and control over activities of private drinking water supply organizations. Such regulation in developed countries is carried out by independent commissions for communal services, and their main instruments of regulation are tariff policy, licensing and consumer rights protection.

1. OWNERSHIP RIGHTS IN TAJIKISTAN: LEGAL AND PRACTICAL REVIEW

The foundation of any political and economic setting comprises endorsed system of ownership rights. As a material good, ownership often is considered as a source of new material goods. Therefore, the spectrum of ownership relations is quite wide and multilateral: including those on establishment and protection of ownership of material goods to concrete entities of persons, conditions under which such rights are established or discontinued. In that regard, effective and comprehensive legal regulation of ownership rights regardless of chosen form are key factors of economic development of any country. Legal regulation of ownership rights is ensured by large, complex, multi-sectoral, sectoral and special legal and normative acts of international, national and local level.

1.1. Legal basis of ownership rights

Ownership rights are regarded in objective and subjective terms. In objective terms, this is an aggregate of legal acts, regulating entire spectrum of relationships, connected with material goods belonging to concrete subjects. In that connection, ownership rights relate to a wide range of branch laws (constitutional law, civil law, land law, entrepreneurial law, housing law and many others), and so the institute of ownership rights relates to multisector and complex institute of law. Ownership rights in subjective terms – is envisaged and guaranteed by legislation a right of concrete subject-owner (person or legal entity, their combined association) to possess, use, manage or other possible power (authority) with regards to belonging property in one's discretion and with any purpose, if other is not considered by law.

Normative legal acts regulating ownership rights, in spite of their diversity and multiplicity, traditionally consider rights and obligations of the owner, his/her responsibility, guarding and protection of ownership.

1.1.1. Owner's triangle of authorities

Emerging from tradition of Roman private law the triangle of authorities of the owner includes three characteristics of ownership rights: right of possession, use and disposition over property. Traditional definitions on authorities of owner include:

Right of possession: Legally ensured opportunity to carry out factual possession over property.

Right of use: Legally ensured opportunity to incur from a property its useful and natural characteristics, as well as acquire from it benefits. Benefits may be seen as income, incremental increase, yields (offspring, offshoot, etc) and in other forms.

[1] Transfer of state ownership to private, stock or other ownership; privatization.

Right of disposal: Legally ensured opportunity to define legal fate of the property.

Better interpretation of the given authorities are given through their names:

Right of possession – right to "possess", i.e. right to express belonging of a concrete property to concrete subject, right to have property on its balance/household/site and etc. Right of possession is provided legally, i.e. confirmed by a certificate, agreement of sale and purchase, gift, will, and/or other legal provisions. Legally non-provided ownership right is already illegal possession, for instance, theft, unauthorized acquisition and so on. Right of possession is a precondition to implement other rights – rights of use and disposition. Right of possession may also be transferred, for instance leasing, i.e. leaseholder may "temporarily possess" the property.

Right of use – literally as the right to use the property with a purpose of extracting "benefit". The owner, on one hand, may itself use and benefit from owning, on the other hand, may also transfer such right to someone else on various legal grounds: rent, transfer for the use and management, hire/lease and other. However, there are properties – belongings that may lose their properties in the process of use, or may be fully consumed. Any non-consumable belongings may only lose their initial natural form after repeated use, whereas consumables may fully be exhausted in the process of use. For example, buildings, engineering tools, equipment, machineries may get depreciated (amortization) during the process of use; while such properties like raw materials, fossil fuels and etc may completely be consumed after usage. Consequently, the rights of use may have respective natural limitations with regards to application of various types of properties.

Right of disposal – right of "command on the future" of property, i.e. the right to sell, give, rent out and other actions, which often lead to change of ownership. Such a right may also be partially given by owners to a non-owning party (entity, person). For example, property given for rent, may be transferred fully, or partially for sub-rent. Another example, a leaseholder during the process of use or owning may apply significant changes

Another example, leaseholder in the process of use and ownership through its actions may apply significant changes to the rented property, enlarge or improve it, which is also to some degree considered as "disposal". Nevertheless, right of disposal, despite the opportunity for its partial transfer to third parties, remains the only authority, which may not be transferred in full. In exact, the rights of sale, gift (donation), inheritance, and other forms of expropriation may not be transferred to third parties. This is not merely a legal norm, but rather the logic of the given action – one may not sell something that is now actually owned.

All authorization of the owner must be legally supported, i.e. the owner must have respective documents (certificate, agreement of purchase/sale, lease agreement, donation/gift certificate, hire contract, inheritance and many others), which confirm stated authorities altogether, or separately.

The mentioned authorities of the owner are considered comprehensive characteristics of ownership rights conceptually, except concrete details, also listed above. Attempts to add other authority such as the "right of management", could not have become a separate authority, since in one way or another such right would repeat one of the three authorities entirely or partially.

1.1.2. Responsibility of the owner

While reviewing the right of ownership along with authorities of the owner Due attention must be paid to the *responsibilities* of the owner, which is strongly linked with the right to own, use and dispose. The responsibility of the owner in relation to his/her property, or bur-

den of maintaining assumes that the owner bears the costs of upkeep of the property in good, safe and suitable for operation and maintenance in accordance with its designed purpose. Burden of upkeep assumes mandatory nature for the owner[2]. Such a norm is logical, since safekeeping of the property is in owner's own interest, however this norm has been legally affixed as the responsibility of the owner. The necessity of such requirement is explained by many reasons varying form the attempt to warn against gradual depreciation of the owned property and consequent deterioration of material well-being of individuals and legal entities to protection of properties of others located nearby, or protection of any other public interests. For example, deteriorating private housing, or administrative building may cause harm to properties of third parties located nearby, or harm health and lives of passerby.

The owner may be free from responsibilities for upkeep of his property, if under agreement or law such responsibility is transferred to third parties, for example to leaseholders, employers, and etc.

1.1.3. Safekeeping of property

Safekeeping of property, or its protection, is a complex of measures which are contained in different sectoral legislation for protection of both the owned property from unauthorized impact and consequent harm, and for protection and guaranteeing of rights of the owner. Different sector legislations apply different methods and means for such protection.

The civil rights in general are concentrated on various property related methods for recovery of ownership rights, or for compensation of harm. Criminal law considers a serious of criminal penalties for infringement upon the property, i.e. from penalties for robbery or theft to economic crimes, from fraud to misleading. Such penalties may result in imprisonment, prohibition on being employed in certain positions for a certain period of time. Administrative law considers different fines for damage and infringement on property. Labor laws protect ownership of employer from infringement by employees. And further in similar character all other sectoral norms and regulations have different methods of protection for respective types of ownership: environmental laws – on natural resources, water code – on water resources and water infrastructure, land legislation – on land and respective infrastructure and facilities, housing legislation – on housing infrastructure and sites, and etc.

1.2. Hierarchy of normative legal acts regulating ownership issues in Tajikistan

As earlier indicated, normative legal acts regulating ownership issues touch upon different sectors and represent a complex institution of law. Diversity and multiplicity of normative legal acts in relation to ownership rights may conditionally be classified hierarchically based on their legal force.

1.2.1. International regulation of ownership issues

Constitution of the Republic of Tajikistan as the main normative legal act possesses a highest legal force. In accordance with the norms of Article 10 of the Constitution of the RT "International legal acts, recognized by Tajikistan, are constituent element of legal system of the republic". Accordingly, if the laws of Tajikistan fully or partially contradict, or do not correspond to the norms of international legal acts (recognized by Tajikistan in established order), then international legal acts are applied. Since the international laws also touch upon different sectors, then accordingly the ownership issues may be considered in the framework of different

[2] Гражданский Кодекс Республики Таджикистан, Часть I, ст. 233

institutions and branches of international laws, for example, international maritime, space, air, criminal, economic, humanitarian, ecological laws and others.

International laws regulate two main areas: international public relations (relations between states and within the international organizations), and international private relations (relations, complicated by foreign elements (foreign state, foreign physical and legal persons). Third branch of international law is supranational law. That refers to laws of supranational establishments, for example, system of supranational laws of European Union, or some agreements of Commonwealth of Independent States which bear supranational character. Such unions or associations like WTO and Eurasian Economic Union, Customs Union are also characterized as supranational, and the regulations are carried out fully or partially in a particular sector (for example, customs rules and regulations) in accordance with the norms and regulations endorsed by such unions, as opposed to national norms and regulations.

However, despite a diversity of norms of international laws, the main ones are key ownership principles in democratic countries, which are affixed in the basis acts of international laws. For example, the International Bill on human rights, which is the main compound document and consists of a Universal Declaration of Human Rights (endorsed by the Third Session of UN General Assembly through a Resolution #217A (III), as of 10 December 1948), International Pact on economic, social and cultural rights, International Pact on civil and political rights (Endorsed by the Resolution 2200 A(XXI) General Assembly of 16 December 1966) and its two facultative protocols. The norms of Universal Declaration of Human Rights bear recommending character, and norms of Pacts on the other hand represent an international agreement of UN member states and their norms bear mandatory character for participating countries.

Bills in general touch upon most different boundaries of relationships in society, also defining overarching principles for ownership relations. For instance, Article 17 of Universal Declaration declares:

“1. Every person has the right to own a property personally and/or jointly with others.

2. No one must be withdrawn of such a right to own arbitrarily”.

By legal force, Declaration, as indicated above, is simply a recommendation which need be reflected within the national legislation of participating member states of the United Nations Organization. More accurate formulations and norms, mandatory for implementation are part of international agreements, from most general to sector specific, international to multilateral, regional to bi-lateral.

The example of more accurate international norms could be some agreements between countries of CIS, related to ownership issues. For instance, “Agreement between CIS countries on mutual recognition of rights and regulation of ownership issues”, as of 9 October 1992”. The given regional agreement also re-states international norms guaranteeing rights of owners, and essentially considers ownership issues between member states of CIS. Another example of such agreements can be Minks Convention on legal aid and legal provisions on civil, family and criminal matters (1993); Ashgabad cooperation agreement in the field of investment activity, in force since 21 November 1994, and Minks Convention on protection of investor’s rights, in force since 21 January 1999. The given agreements consider their own direct spectrum of relationships, but also partially regulate some features of implementation of ownership rights, in relation to, for example, investors, or citizens whose civil, criminal or family rights touch upon some aspects of ownership issues.

On the whole, international normative legal acts define basic principles of development of ownership relations, based on concepts of citizens’ rights and liberties and separate special terms, endorsed for unification of certain norms in international bilateral and multilateral relations.

1.2.2. Constitution of the Republic of Tajikistan

The basic principles of ownership rights in the national legislation of Tajikistan are laid down in the main law of the country – Constitution of the Republic of Tajikistan. Specifically the Article 12 of the Constitution of the country proclaims the principle of recognition of multiformity of ownership and guarantees freedom of economic and entrepreneurial activity, equality and legal protection of all forms of ownership. The given principle means that the state recognizes juridical equality of all forms of ownership. The legislation cannot endorse privileges for one or another form of ownership, similarly cannot include norms that endorse special privileged regime, or regime of restrictions for entities carrying out their activities with the use of certain form of ownership.

Another group of norms related to the subject of the present review, norms of Article 13, regulating rights of exclusive state ownership on natural resources, in particular, water resources. The state in accordance with the norm of the article guarantees effective use of the given resources in the interest of its citizens.

Separate norms of the Constitution, re-stating widely recognized present-day norms of international law, establish guarantees of ownership rights for the citizens. In particular, in accordance with the Article 32 "Each has the right to own and right to inherit. Nobody is allowed to deprive or restrict citizens of the right to own a property. Deprivation of personal properties for public needs is allowed by the state only on the basis of the law and agreement by the owner through complete compensation of its cost".

The norms described above are key, constitutional principles that regulate ownership issues in Tajikistan, which also proclaim multiformity and equality of ownership, exclusive state ownership over natural resources and basic guarantees for citizens right to own.

1.2.3. Civil Code of the Republic of Tajikistan

One of central codified acts of legislation without a doubt is the Civil Code, regulating all spectrums of civil legal relations. The Civil Code of the Republic of Tajikistan consists of 3 parts, endorsed on 30 June 1999, 11 December 1999 and 01 March 2005 respectively. The Civil Code does not have the highest juridical force as opposed to Constitution, but nevertheless new laws harmonize with the norms of the Civil Code, since in accordance with the Article 2 of the Code "Norms of civil legislation, included in other laws and other legal acts, must correspond to the given Code".

The acting edition of the Civil Code replaced the previous edition of 1963 and annulled a series of transitional laws, specifically the Law "On ownership" as of 14 December 1996 was annulled. This is linked with the period of transition from Soviet command economy to market economy approaches since independence of the country, where features of legal ownership relations as transitional ensured regulation of new forms ownership, i.e. increasing and prevailing private ownership.

In the Civil Code of the Republic of Tajikistan are laid down fundamental norms, regulating ownership rights, objective and subjective, different aspects of ownership rights are considered practically in each Chapter of the Code. The following articles of the Civil Code provide concrete provisions with regards to legal regulation of institutional of ownership rights:

- **Main norms and points of articles 140 and 177, Section I, Chapter 6, Part I of the Civil Code**. The given articles provide legal characteristics on objects of civil rights, in particular property goods and rights (over property). In accordance with Article 140, such are as follows: "belongings, money, including forex, securities, products of labor, services, information, products of creative intellectual activity, brand names, trademarks and other means of individualization of goods, property rights and other property";

- **Articles 232 and 327, in Chapters 11 and 19, Section II, Part I of Civil Code.** Norms of the given articles define and regulate practically all key aspects of ownership rights: main definitions and terms; relations arising from purchase and termination of right of ownership; ownership issues of different subjects of law: citizens, legal entities, state and administrative and territorial units, or ownership of two or more subjects (common ownership); restricted ownership (right to possess, use and dispose the property on behalf of the owner of the property; and right of operational management); property rights protection and other ownership rights.

1.2.4. Other legal acts

Considering the multisector nature of ownership rights, norms that regulate specific areas of relations, connected with issues of ownership in different sector could be found in a series of other normative legal acts. Principles and norms laid down in those acts certainly must correspond to norms of Constitution and Civil Code (in the part of norms of civil legislation).

The following main normative and legal acts may be brought as examples:

Codes[3]:

- Land Code of the Republic of Tajikistan, as of 13 December 1996 (with changes and additions: Akhbori Madjlisi Oli Respubliki Tadzhikistan 1997, #23-24, pp. 333; 1999, #5, p. 59; 2001, #4, p. 176; 2004, #2, p. #55; 2006, #7, p. 347; 2008, #1, part 2, p. 22, 2008, #6, p. 463; Law of RT as of 25.03.11 #704; as of 16.04.2012, #819; Law of RT as of 01.08.2012, #891). Land is under exclusive ownership of the state in Tajikistan, but could be transferred for use to physical and legal persons on different terms, and the Code is designed to regulate relations on land ownership.
- Water Code of the Republic of Tajikistan, as of 29 November 2000 (Akhbori Madjlisi Oli of the Republic of Tajikistan, 2000, #11, p. 510; 2006, #3, p. 164; 2008, #3, p. 200; 2009, #12, p. 824; Law of RT as of 28.06.11, #744; as of 16.04.2012, #821) regulates ownership rights on water objects (rivers, lakes, streams, glaciers, and etc), water facilities (canals, drainages, water reservoirs, dams, water supply systems and etc) and centralized/non-centralized water supply systems.
- Forestry Code of the Republic of Tajikistan as of 24 June 1993 (Vedomosti Verkhovnogo Soveta RT, 1993, #13, 243; Akbori Madlisi Oli RT, 1997, #9, p. 117; 2008, #1, Part 2, p. 17, 2008, #6, p. 464), regulates ownership rights[4] on forests and forest use.
- Housing Code of the Republic of Tajikistan, as of 12 December 1997, regulates all issues with regards to ownership in housing sector.

Laws

There are a series of laws that regulate special terms for acquiring to own (or use) certain properties:

- Law of the Republic of Tajikistan "On privatization of state ownership", as of 16 May 1997 (Akhbori Madjlisi Oli Respubliki Tadzhikistan, 1997, #10, p. 160; 2002, #4, Part 1, p. 167; 2003, #12, p. 699, #3, p. 90) regulates relations between state represented by assigned focal body and legal and physical persons in the process of privatization of state property.

[3] «Code – integrated and systematized law, through certain sphere of public relations is regulated in full volume, directly or systematically", Article 17, Law of RT "On normative legal acts" as of 26.03.2009

[4] Forests in Tajikistan are placed under state ownership in accordance with the Article 2 of the Forstry Code of the RT – *comment by the author*

- Law of the Republic of Tajikistan "On privatization of housing fund of the Republic of Tajikistan", as of 4 November 1995 (Akhbori Madjlisi Oli Respubliki Tadzhikistan, 1995, #21, p. 253) establishes main principles for carrying out privatization of state housing fund in the territories of the Republic of Tajikistan, defines legal, social and economic foundations for transformation of relations for housing ownership.
- Law of the Republic of Tajikistan "On state registration of immovable property and property rights" as of 20 March 2008 (Akhbori Madjlisi Oli Respubliki Tadzhikistan, 2008, #3, p. 194, ZRT ot 22.07.2013, #997) establishes legal basis and order for state registration of immovable property, property rights and restrictions (encumbrance) within the territories of the Republic of Tajikistan.
- Law of the Republic of Tajikistan "On (subsoil) minerals" as of 20 July 1994, (Vedomosti Verkhovnovo Soveta Respubliki Tadzhikistan, 1994, #15-16, p. 235; Akhbori Madzhlisi Oli Respubliki Tadzhikistan, 1995, #22, p. 259; 2008, #1, part 2, p. 1005; 2010, #12, part 1, p. 822; ZRT ot 28.12.13, #1048) establishes the legal basis for analysis, protection and use of subsoil minerals;
- Law of the Republic of Tajikistan "On drinking water and water supply" as of 29 December 2010, additionally regulates ownership relations in the drinking water supply sector.

Enlisted laws and codes are not the full list of normative legal acts that regulate ownership relations in Tajikistan. Separate norms may be in other by laws of sectoral or special character. For example, certain restrictions are proclaimed in ecological legislation and others.

Besides laws, certain norms may also be included in by-laws. But in accordance with rules laid out in the Law of the Republic of Tajikistan "On normative legal acts", by-laws are normative legal acts, endorsed on the basis and for implementation of laws and therefore must not contradict with the acting laws at any extent. In Tajikistan's legislation, norms that regulate ownership rights on objects of sewerage (sanitation) are practically absent, except certain by-laws. For example, "Rules for the use of communal water supply and sewerage systems in the Republic of Tajikistan" endorsed by the Government of the Republic of Tajikistan, as of 30 April 2011. For sewerage objects, usually, by analogy, drinking water supply and sanitary norms and standards are applied.

2. SPECIFICS OF OWNERSHIP RIGHTS IN THE SPHERE OF DRINKING WATER SUPPLY AND SEWERAGE IN CIVIL LEGISLATION

Norms that regulate ownership relations in the sphere of drinking water supply are divided to legal acts of common and special character. Common ones provide general framework for regulation of ownership relations, and special ones are those that are sector specific. The normative legal acts of common character relate to norms of Constitution, Civil Code, Law on privatization of state property; whereas special acts – water legislation – norms of Water Code and Law "On drinking water and water supply".

This chapter further provides review of related norms of legislation, which have direct relation to the sector of drinking water supply and sanitation.

2.1. Ownership rights in the civil legislation

2.1.1. Property as an object of civil rights

Articles 140-177, Part I of Civil Code of the RT are dedicated to describing and regulating objects of civil rights. Property goods and rights are one of two key objects of civil rights, along

with personal non-property rights[5]. In accordance with the norms of Article 140, Civil Code of the RT "Property goods and rights refer to: belongings, money, including foreign currency, securities, labor products, services, information, actions and products of creative intellectual activity, brand names, trademarks and other means of individualization of goods, property rights and other property".

Property, like other objects of civil law, may be freely expropriated or transferred from one person to another in the order of full succession, or through other means if they are not withdrawn from turnover or not restricted in turnover, in accordance with the norms of Article 141, Civil Code of the RT. Restrictions in turnover by legislation of Tajikistan are for example the following – land and water resources that are under exclusive ownership of the state and therefore cannot be privatized, i.e. be freely expropriated like other properties. Another example, partial restrictions in turnover – state centralized and non-centralized systems of water supply cannot be privatized in accordance with the norms of Water Code (Article 57), and more recent Law "On drinking water and water supply" (Article 8) allows transfer of ownership rights and change in forms of ownership under conditions that allow uninterrupted functioning of given systems. Withdrawal from turnover, as an example, may be as such in case when a volume of out-of-date product is withdrawn from turnover (realization).

In accordance with the norms of Article 142, Civil Code of the RT, centralized and non-centralized systems of drinking water supply are considered immovable object or property. Ownership rights on immovable property are subject to mandatory state registration. Mechanism for state registration is defined in compliance with the norms of Article 143, Civil Code of the RT, and special Law of RT "On state registration of immovable property and property rights", as of 20 March 2008. Since January 2015, registration of immovable properties in Tajikistan is carried out by the State Unitary Enterprise "Registration of immovable property"[6]. State registration in compliance with the given normative legal acts are mandatory not only for the right to own, but also "right of disposal, right of operational management, right for lifelong inheritance of property, right for permanent use, mortgage, servitude, as well as other rights in cases considered by the give Code and other laws".

Enterprise may also be considered as an object of ownership in compliance with the norms of Article 144, Civil Code of the RT – "property complex, employed to carry out entrepreneurial activity". Enterprise, completely or partially, may become the object of purchase and sale, collateral, rent and other transactions with regards to establishment, alteration and termination of ownership rights. The property complex of an enterprise may include all kinds of properties, designed to serve the mission and purpose, including land use rights, buildings, facilities, inventory, raw materials, production, receivables, debts, as well as right for labelling, that individualizes the enterprise, its products, works and services (trade name, trademark, service labelling), and other exclusive rights, if otherwise not considered by law or agreement.

Centralized and non-centralized systems of drinking water supply, as sophisticated property complex, are legally described and defined by the norms of Articles 145-148, Civil Code of the RT. The norms of the given articles define such basic concepts of ownership rights such as "divisible", "non-divisible", "complex (heterogeneous) articles", and "principal article". Articles of ownership can be divisible and non-divisible.

Divisible article is a property, part of which in the result of division does not lose its designated function, whereas non-divisible articles on the contrary lose such designated property. For

[5] "Personal non-property goods and rights are considered the following: life, health, personal dignity, honor, personal reputation, business reputation, immunity of private life, personal and family secrets, right for name, right for authorship, right for immunity of writing, and other non-material goods and rights", Civil Code of the Republic of Tajikistan Part I, p. 140, point 3.
[6] Established in compliance with the Law on state registration, 2008, officially established by the Resolution of the Government as of 02 March 2013, and factually established on 02 January 2015. Comment by the author.

example, fuel, grain, crushed stone – divisible; whereas vehicle, TV set, refrigerator are non-divisible.

Complex articles are heterogeneous properties, which form a single whole and considered as one article. For example – pump station. Complex properties may be expropriated both entirely and also in parts.

There are also types of properties, where one part is designed to serve the other principal part, and consequently there is no sense to apply the parts separately. Example: mounted lock and its key.

Drinking water supply systems and respective service provider enterprise is a property complex, consisting of all enlisted categories of articles.

The principal designation of drinking water supply system is to provide access to drinking water for consumers, respectively the water supply service is the actual "product" of the system or the operating enterprise. In accordance with the norms of Article 149, Civil Code of the RT "income obtained in the result of property use (fruits, products, incomes), belong to the person/entity, that uses the given property on the basis of legislation, if otherwise not recognized by the law, other legal acts or agreements for the use of property".

2.1.2. Legal regulation of ownership rights

Chapter II, Part I of Civil Code provides detailed set of regulation for property rights and other ownership rights for citizens.

GENERAL PROVISIONS

Article 232 of the Civil Code of the RT establishes the authority of owner described in the first chapter of the given analysis: right of possession, use and disposal. The owner in accordance with the norms of the given article has the right with no restrictions to carry out all actions with regards to possessed property, including expropriation, pledge, transfer of ownership rights to other persons, carry out any other actions in the framework of acting legislation. But owner's practice of rights must not violate rights and legal interest of other persons. Ownership right is termless and no one could forcefully be deprived of ownership rights, except in cases defined by the legislation.

Article 233 of the Civil Code of the RT defines the responsibilities of the owner over management of the property – burden for maintenance of ownership. For inadequate conduct of such responsibilities practically no penalties are directly applied. This is a principle, which lies in specific laws, binding the owner to bear the costs related to maintenance/upkeep of own property. For instance, the Law of RT "About maintenance of apartment buildings and Association of home owners" obliges owners to participate in (share) mandatory costs for maintenance of common property (rooftop, basement, entrance, and etc.).

Article 235, determines the list of entities/persons of ownership rights in the Republic of Tajikistan, such are as follows: "the state, citizens of the Republic of Tajikistan, public associations and religious organizations, other associations of citizens and groups, administrative and territorial units, foreign states, international organizations, other foreign legal entities and persons".

Articles 236-238 of the Civil Code of the RT, define two possible forms of ownership in the Republic of Tajikistan, which are private and state ownership. Private ownership includes properties owned by citizens or non-state legal persons and their associations. Properties of public associations and religious organizations related to separate type of private ownership. In its turn, state (public) ownership may also be of two types – republican and communal

ownership. Republican property is a property attached behind republican legal entities, for instance – properties of the ministries and agencies of republican status. Customary word "communal" in the given context does not have any relation to 'communal' services. Communal property is a property attached after communal legal entities, for instance – local bodies of state power. In other ways, those types of state ownership could be defined as centralized and local. In practice, it is sometimes difficult to separate such types of ownership, they usually are differentiated by balance ownership.

Regardless of forms of ownership and their attachment to legal entities/persons, in accordance with the Constitution of the RT, norms of Civil Code, state must provide equal conditions, required for development of diverse forms of ownership, and ensure their protection.

Article 241 introduces a term "non-owners' proprietary interest", according to which owner has the right to transfer owned proprietary interest for use by other persons/entities, or in other words, transfer of other "proprietary interests" on the property.

Other proprietary interests may be provided to their owners with regards to else's property, or right of use (eg. Servitude), or right of possession and use (eg. Right of permanent use of land holdings), or right of possession, use and limited disposal (economic management, operational management). Norms of the article provide list of proprietary interest by non-owner entities/persons:

- Land use rights;
- Disposal rights;
- Operational management rights;
- Other property rights (example: servitude).

ACQUIRED OWNERSHIP RIGHTS

One of important groups of norms with regards to ownership are norms that regulate acquisition of ownership rights, to which is dedicated Chapter 12, Section II of the Civil Code of the RT "Acquisition of ownership rights".

The grounds for acquisition (origin) of ownership rights are considered juridical facts, in the result of which ownership rights originate. Such grounds are classified in ones that are initial and derivative. To initial grounds relate acquisition of ownership rights on properties that did not have (for various reasons) owners before (newly acquired owners, ownerless, treasure, find and etc); and to derivatives relate all types of succession (in the result of purchase and sale agreements, gifts, inheritance, privatization, and etc). Article 242 defines the following grounds for acquisition of ownership rights:

- To new property, developed or created by a person/entity for oneself.
- On yields, products, income, acquired in the result of property use.
- On the basis of purchase and sale agreement, exchange, gift or other arrangements on expropriation of the given property.
- In cases of inheritance in accordance with testament or law.
- In case of reorganization of legal person/entity, rights of ownership over owned property is transferred to legal person/entity – legal successor of reorganized legal person/entity.
- In case when the property does not have the owner, or owner is not known, or the property denied by the owner, or when the owner has lost ownership over the property on various grounds defined by the law.

- In case of payment of fixed contribution (share) in full by a member of housing, housing-communal, summer cottage, garage or other non-commercial cooperative or other persons having rights for share accumulation.

Furthermore, the given chapter regulates the order of acquiring rights of ownership on each of the abovementioned grounds.

Ownerless properties

Acquisition of ownership rights on ownerless properties is of common and actual interest for the drinking water supply and for the purposes of the given research. From the time of reorganization of state and collective farms (*kolkhozes* and *sovkhozes*) in the midst of 90'ies of the past century, there have remained systems of drinking water supply which may be considered as ownerless on various legal grounds. By the regulations of the Civil Code of the RT the following properties could be considered ownerless:

- Property without an owner;
- Property without a known owner (or owner unidentifiable);
- Property over which the owner refused/denied its right of ownership.

Ownerless properties could be movable and immovable. Properties cannot be considered ownerless, which was developed (built), but not yet registered in the established order. Self-willed construction is not considered ownerless property, and actions with regards to such properties are regulated by the article 246 of the Civil Code of the RT. Also cannot be considered ownerless the immovable property, if such property belongs to deceased or person that is declared as deceased, who does not have inheritor (heir), or whose heirs had been denied inheritance by the testament (last will). Such a property by the right of inheritance is transferred to the state[7]. And at last, ownerless property cannot be mixed with property that is ineffectively maintained. Ownerless property for various reasons does not have the owner, however 'beskhozaystvenniy' is considered ineffectively maintained property with does have actually an owner.

In the context of the given research, practically not a single drinking water supply system that belonged earlier to collective farms can be considered ownerless. In accordance with the Decree of the President of the RT as of 25 June 1996, #522 "About reorganization of agricultural enterprises and organizations", on-farm water supply and sanitation facilities on various grounds were to be transferred to balance of respective ministries and agencies[8]. For these purposes, local bodies of state power ought to establish a commission which after conducting a technical inventory must have carried out formal transfer of water supply systems: (1) those constructed through the means of the state budget to be handed over to ministries and agencies – SUE KMK, or Ministry of Energy and Water Resources, (2) those constructed through the means of state and collective farms, at the discretion of successor organization.

Such processes were found to be complicated because local commissions must have differentiated properties that constructed and acquired in collective farms by the means of state budget, and properties build by the means of collective and state farms. The fate of systems, constructed only by means of collective and state farms, must have been determined by their successors. In the result such a process was formally followed only in few districts and Jamoats. Despite the complications in determining owner for drinking water supply systems, today, with exception of few drinking water supply systems which have lost their technical documentation, all others have actually their owners represented by successors, or their fate

[7]Article 1149. Transfer of inheritance to the state. Civil Code of the RT, Part III, 01.03.2005

[8] Source «Study on water sector's vulnerability and risks to corruption", UNDP, Dushanbe-2012.

had been determined by the commissions. As indicated above, such systems may simply be considered as being ineffectively maintained (which actually have their owners).

But in practice, ownerless systems could in fact be found, which remained in such condition because of the mess during reorganization of state and collective farms. The formal order of declaring properties as ownerless differs for moveable and immovable properties. Such order is defined in the article 249 of the Civil Code of the RT "Ineffectively managed properties". In accordance with the given article:

- "Ownerless immovable properties are placed under record by the agency carrying out state policy for registration of immovable property, by the request of respective state agency. Following a two-year period from the day the given property was placed in record, the agency responsible for management of state properties, may address to court (take legal action) with a request to declare the given property as a state property".

In accordance with the given norm, ownerless immovable property is placed in record by the request of respective state body. Such a body could be local executive body of state power, or its related affiliate (sub-organization). Such a formal request must include documentation that confirms the fact of ownerlessness of the property. With such request, the given property is placed under record by the agency responsible for registration of immovable property – State Unitary Enterprise "Registration of immovable property" and during the period of two years remain there as ownerless. Following completion of a two-year period, responsible agency for state property management[9] may address to court (take legal action) with a request to declare the given immovable property as a state property.

- If the court does not declare such property as ownerless on any grounds, then the following consequences may come into force, which are described in Point 3 of Article 249: "Ownerless immovable property, not declared as state property by the court, may again be possessed, used and disposed by the owner that denied the property, or acquired to own on the basis of acquisitive limitation (prescription) (Article 258)". If justifications presented to the court by the requestor will seem groundless, then former owner (in case if found), may re-acquire ownership rights with regards to the given property. Another option, the given property may be acquired to own on the basis of acquisitive limitation (prescription), in accordance with the order described in article 258. The given order considers situation under which "Person – citizen or legal person, - who is not property's owner, but honestly, openly and interruptedly owned the property as its own immovable property during the past fifteen year or any other property during the past five years, acquires the right to own such property (acquisitive limitation). Ownership rights on immovable and other property which is subject to state registration, originates for a person, who acquired the given property on the basis of acquisitive limitation (prescription), from the moment of such registration.

TERMINATION OF OWNERSHIP RIGHTS

Another important group of norms with regards to ownership are norms that regulate termination of ownership rights, to which are dedicated the Chapter 13, Section II of the Civil Code of the RT "Termination of ownership rights". Grounds for termination of ownership rights could be divided into two groups: 'by the free will of owner' and 'by force'. Special grounds for termination of ownership rights – privatization, i.e. expropriation of ownership rights on state property.

[9] Responsible agency for state property management is the State Committee for Investment and State Property Management of the Republic of Tajikistan (established 28 December, 2006, Decision of the Government of the RT, #590), comment of the author.

Termination of ownership rights by the free will of the owner includes all kinds of expropriation (through agreements of purchase and sale, gifts, exchange, inheritance and etc.), as well as voluntary refusal of ownership rights.

Refusal of ownership rights does not involve termination of ownership rights and responsibilities with regards to the property in question until the moment of acquisition of ownership rights over the property by other person/entity. For example, successors of collective farms may refuse ownership rights over drinking water supply systems, but before another owner does not legally acquire ownership rights, former owner, who refused the rights, is obliged to maintain the property in good condition. Systems, over which owner must in that example refuse ownership rights, are considered ineffectively maintained and their further fate is determined in accordance with the norms of Article 249, Civil Code of the RT, commented further above. There are no special order of refusal over ownership rights, it may be practiced simply through public announcement by the owner, or any other related actions. With regards to immovable property, as indicated above, request must be filed by the responsible agency with attachment of related documentation that testifies such a fact.

By general rule, forced termination of ownership rights is not allowed. Exceptions from such general rule are described in Article 259, Point 2:

a. Charging order on property by the liabilities of the owner;
b. Forced expropriation of properties, which by the legal norms cannot belong to the given person;
c. Requisitions;
d. Confiscations;
e. Expropriation of immovable property in connection with expropriation of a land holding;
f. Ransom of ineffectively maintained cultural or historical values;
g. In other cases, defined by the given Code.

The order of implementation of forced termination of ownership rights on grounds listed above are described in detail in articles 261-269, Civil Code of the RT. The given list of grounds for forced termination of ownership rights is open, as the legislators refer to other possible cases, defined by the Civil Code of the RT.

COMMON OWNERSHIP AND ITS TYPES

Chapter 17 of the Civil Code of the RT regulates common ownership rights. In accordance with the norms of Article 292 “Property, which is under ownership of two or more persons/entities, belongs to them on the right of common ownership”. There are two main types of such ownership: shared and joint ownership. With regards to shared ownership, each participant of common ownership rights has a definite, usually abstract share in property. Most often, such a share may be calculated in monetary means in percentages from overall value of property. Whereas joint ownership does not include such shares, and in cases of disputes property may naturally be divided; and in cases of disputes during division, court may define shares of owned property to participants of such ownership.

For the purposes of the given analysis, main complication in application of the given type of ownership is expressed for shared character of ownership rights of each party, participating in common ownership rights. Since any participant of common shared ownership rights may request for free disposal of its share of property: sell, give, inherit, and etc, in accordance with established order in the given Chapter.

Applying the given type of ownership for the sector of drinking water supply, one may underline a few potential cases, when common shared ownership may original for drinking water supply and sanitation systems. In the first case it is a property, which is under ownership of cooperatives[10]. For example, if a cooperative became the owner of drinking water supply system, then each member of cooperative has the share of ownership rights over the property of the cooperative, including as well the drinking water supply system. This means that member of cooperative first of all bears shared responsibility on costs of maintaining given property, and secondly member has the right to dispose its share. Share of a member of cooperative is usually determined proportionately to size of fixed contribution. In order to avoid violation of other owners' rights over the given property the Civil Code of the RT defines restrictions on disposition of shares within commonly shared property. The given rule is established in Article 298 of the Civil Code of the RT, in accordance with the norms of the given article – "For the sale of share of a common property right to an outsider, other participants of shared ownership have an advantage in purchasing the shared right in sale for the price which is sold and on other equal terms". The article establishes the rules for sale of share of owned property, but the norms of article do not related to arrangements with regards to gifts, consequently by the agreement of gift member of cooperative may freely transfer his share in commonly shared ownership to a third party.

The articles of the Law of RT "On cooperatives" as of 22 July 2013, also define certain strict limitations for transfer of shared rights, and in accordance with the article – "**Member, former member or inheritor of deceased member of cooperative may transfer his/her share to only active or future member of cooperative, under condition that such transfer will be for the benefit of a cooperative. The order of transfer of share is defined by the charter of cooperative**". Thus, exiting member of cooperative may transfer his share, i.e. his share of property, only to active or future member of cooperative.

2.2. Restricted ownership right

For the purpose of the present analysis is undoubtedly the importance of applying restricted ownership right on property, which is regulated by Chapter 18 of the Civil Code of the RT. Limited ownership right embodies certain limited rights of possession, use and disposal by persons/entities that are not owners of the property, i.e. represent the right on other's property, that has in fact its owner. The owner has the right to transfer rights of possession, use and disposal to other persons/entities, by law, or by contract.

Most systems of drinking water supply are under state ownership, and (in rural areas) in some cases under the ownership of successors of state and collective farms. The main problem in effective and market oriented organization of drinking water supply is in diversification of operators of drinking water supply systems through transfer of limited ownership rights on state owned systems of drinking water supply. The two main types of limited ownership rights in the Civil Code of the RT – rights of **operation** and **economic management** – are limited by law, and implemented in practice only with regards to state enterprises. The law does not have direct prohibition in application of those two types of limited ownership rights for other types of organizational and legal forms, but at the same time does not provide any mechanisms for application of such types of limited ownership rights with regards to non-state organizational and legal models of operating organizations.

[10] Law of RT «On cooperatives» as of 22 July 2013.

2.2.1. Право хозяйственного ведения и право оперативного управления

Right of economic management is regulated by the norms of second paragraph of Chapter 18, Civil Code of the RT. In accordance with the norms of that paragraph – "Object of right of economic management may become any property, if other is not defined by the law". For implementation of the right of economic management republican or communal unitary enterprises may be established. The term 'unitary' in that context means indivisible, i.e. the state property that is handed over with limited ownership right is not to be divided in shares and contributions, as well as between workers of the enterprise. In that way, the state property is transferred for operation and revolving incomes.

Property rights of sate unitary enterprises are limited by law. Specifically, in accordance with the norms of article 312 the following restrictions are imposed for certain types of entrepreneurial activity:

a. Sell and hand-over to other persons, exchange, transfer for long-term leasing (more than three years), provide for temporary unpaid use of owned buildings, facilities, equipment and other capital funds of enterprise. The Government of the Republic of Tajikistan may determine the list of buildings, facilities, equipment and other capital funds of state enterprises, the rent of which is carried out in agreement with responsible state agency regardless of the period of rent;
b. Create branches and affiliated enterprises, establish jointly with private entrepreneurs enterprises and joint ventures, and contribute their productive and financial capital;
c. Provide to private entrepreneurs loanable funds with payment of interests on them below interest rates determined by the National Bank of the Republic of Tajikistan.

State unitary enterprises are free in disposal of their movable properties, if other is not defined by the law.

Right of operational management is regulated by the norms of third paragraph of Chapter 18, Civil Code of the RT. In application of operational management rights republican or communal state enterprises are established. In comparison with state unitary enterprises, state government enterprises are strongly restricted with regards to ownership rights. In accordance with the article 314 – "State government enterprises have the right to expropriate or dispose in other ways their properties only by the agreement of owners of the given property".

Activities of state enterprises, besides articles 124-127, Civil Code of the RT, are additionally regulated by special Law of the RT "About state enterprises" as of 24 February 2004. The given law defines in more detailed differences of mentioned types of state enterprises. In particular, state unitary enterprises may independently determine the price for their production, based on demand and supply, are more independent in productive activities and operational expenditures, as well as are independent in re-distribution of profits in accordance with their Charter. State government enterprises through the right of operational management are strictly bound in their actions to owners of the properties and must agree with them practically on every step. In practice state government enterprises are established for military defense industries, or for criminal and disciplinary system, as well as in other spheres, where more independent operation of means and economic management are limited due to various factors. One more difference is that only state unitary enterprises may establish their affiliates and branches.

There are no special restrictions for application of any of the forms for organization of drinking water supply in the legislation. But traditionally, form of unitary enterprises are commonly applied, since this form is more flexible in economic terms; and besides, drinking water

supply activity is specifically underlined in open list of activities for state unitary enterprises[11]. Almost all state organizations of drinking water supply are established in that form.

2.2.2. Other ownership rights

Other ownership rights regulated by third paragraph of Chapter 18, consisting of only Article 320. In accordance with the norms of the given article – "**Restricted ownership rights for possession, use and disposal of property originates also in the result of contractual obligations, such as: contracts for bailment for hire, rent, loan and in other cases considered by the law**". The given norm allows transfer of restricted ownership rights on any property on contract basis for contracts of bailment for hire, rent, loan, and in other cases considered by law. In essence, this is the main opportunity to transfer state (as well as non-state) owned systems of drinking water supply on terms of restricted possession, use and disposal terms to any organization of any time of organizational and legal form.

Contract of bailment for hire is regulated by the norms of Chapter 33 "Bailment for hire (rent)", part II, Civil Code of the RT, articles 624-646. In accordance with the norms of Article 624 – "By the contract of bailment for hire (rent), lessor is obliged to provide to lessee a property for payment on terms of temporary possession and use, or only use". Contract of bailment for hire of immovable property is subject to state registration. Lessee is obliged to use the property in accordance with the terms of the contract, and if such conditions in the contract are not defined, then - in accordance with designated purpose of the property. Contract of bailment for hire is a contract that foresees payment for leasing by a lessee.

Contract of unpaid use (loan) is regulated by the norms of Chapter 35, part II, Civil Code of the RT, articles 699-713. By the contract of unpaid use (loan agreement), one party (lender) is obliged to provide or provides a property for unpaid, temporary use by the other side (borrower), and the latter is obliged to return the property in such a condition that was at the time of lending, with consideration of normal depreciation, or in a condition defined by the contract.

However, compared with the rights of economic and operational management the mentioned two forms of contracts at various extents are taxable operations for the owner.

Contract of asset management is another form of possible transfer of restricted property right on immovable property. Such arrangement is regulated by the norms of Chapter 48, part II, Civil Code of the RT, article 923-957. By the contract of asset management one side (trustor) transfer to other side (trustee) on a determined period of time a property for asset management, and the other side is obliged to carry out management of the property in the interest of trustor or a delegated authority (beneficiary). Compared with the contract for rent or loan, contract of asset management does not consider benefits from the use of the property by the trustor (physical or legal person).

Features of implementing all three of abovementioned contract arrangement for transfer of restricted ownership rights are regulated by indicated norms of Civil Code of the RT, as well as the contract.

In practice, the given types of contracts for drinking water supply systems are practically non-existent, since traditionally drinking water supply is carried out by state enterprises. In separate cases there are different contracts for hand-over of insignificant systems of drinking water supply for the ownership of Jamoats, and use by specially created organizations. Organizational and legal forms of such organizations were public associations: public organizations, or local self-governing organizations. The present report provides examples of such contracts.

[11] Article 20, Law of the Republic of Tajikistan «On state enterprises», as of 28 February 2014.

3. SECTORAL FEATURES OF IMPLEMENTING OWNERSHIP RIGHTS FOR DRINKING WATER SUPPLY: OPPORTUNITIES AND OBSTACLES

Legislation in the sector of drinking water supply established special requirements for legal regulation of ownership rights over drinking water supply systems. As indicated above in the present report, the special legislation in the area of drinking water supply consists of Water Code of the Republic of Tajikistan and the Law of the RT "On drinking water and water supply". For implementation of the given laws there are by-laws and normative legal acts endorsed, and the norms of which provide additional regulation for issues of ownership rights in the sphere of drinking water supply and sanitation.

3.1. Review of Water Code of the RT

Water Code of the Republic of Tajikistan is active since 29 November 2000, and came into force to replace previous edition of the Code of 27 December 1993., (Vedomosti Verkhovnogo Soveta Respubliki Tadjikistan, 1994, #2, st. 38). In the active edition of the Water Code a series of changes and additions were made in 2006, 2008, 2009, 2011 and in 2012. The given changes and additions practically did not touch upon issues of drinking water supply and sanitation. Water Code practically does not include a single direct norm related to issues of sanitation and sewerage. Norms related to drinking water supply, except general ones in the Code, are mainly consolidated in Chapter 9 "Use of water objects for drinking, household and other purposes of population".

GENEARL NORMS

Water Code regulates the entire spectrum of relationships with regards to water use in a wide range of purposes. For regulating relationships, general in nature, in different subsectors, the Water Code considers a series of general norms, among which some part may directly or indirectly refer to regulation of ownership rights for drinking water supply sector:

- Water Code defines important concepts, common for the entire water sector, in particular in article 2 – "General concepts" provides definitions to terms, important for the present analysis:
  - Considering inseparable connection of systems of drinking water supply with water resources: two important terms applied in the texts of the Water Code of the RT are as follows: "***water resources*** – reserves of surface and underground waters, located in water objects, which are used or maybe used", "***water objects*** – concentrated waters on surface of the earth in forms of its relief, or in subsoils, having boundaries, volume and characteristics of water regimes".
  - One of common terms also for drinking water supply: "**use of water objects** – benefitting in various ways from the use of water objects to satisfy material and other needs of citizens and legal persons; **water related activity** – activities of citizens and legal persons, related to use, rehabilitation and protection of water resources";
  - Activities related to drinking water supply also involve authorization (permits) for special water use, by the text of the Water Code of the RT: "**permits for special water use** – permits for use of water objects, given by the responsible state agency for regulation of use and protection of water resources";
  - Three terms that characterize drinking water supply and some of their aspects: "**drinking water supply** – activity aimed to meet the needs for drinking water for physical and legal persons", "**special water use** – water use through the use of facili-

ties and technical equipment", "primary water uses – physical and legal persons, to whom water objects are provided for separate use"

- Systems of drinking water supply are considered as **water facilities** by the text of the Water Code of the RT: "**water facilities** – water reservoirs, dams, canals, collectors and drains, water supply pipelines, boreholes, ditches, hydro=technical facilities, protective dams, aqueducts, piped water supply with distribution networks and other elements of infrastructure";

- Article 6 of the Water Code of the RT establishes that "***defining the order of changing form of ownership over water facilities***" is under competence of the Government of the Republic of Tajikistan in the sphere of regulating water related affairs. Water facilities, in accordance with the norms of article 2, include also drinking water supply systems. Also such competence of the Government include "***management of restructuring and ownership of water complex***", however, by the text of the Code there are no definitions for "water complex", as well as no clarity on restructuring of what kind of property in question.
- Article 7 of the Water Code of the RT describes competencies of local executive bodies of state power – "**drinking water supply, protection and development of centralized, decentralized systems and systems of distributing drinking water to consumers within boundaries of its competencies**".
- In accordance with the norms of article 8 of the Water Code of the RT, the state may provide support to enterprises of drinking water supply through: "**endorsement and implementation of republican and local programs for providing to owners of centralized systems, organizations, operating those systems, as well as organizations that produce equipment, engineering tools, materials and reagents to meet the needs for drinking water, subsidies, subventions, concessional credits, budget and tax concessions".**
- Article 10 of the Water Code of the RT defines opportunities for transfer of restricted ownership rights on water facilities that are under state ownership – "**Government of the Republic of Tajikistan through a tender bidding process with maintaining the designated purpose may transfer the rights of management of water facilities owned by the state, within determined territory, to specialized local and foreign legal persons on a contract basis**".
- Water facilities designed for the purpose must be adequately put in place that allow providing drinking water supply services, and which is defined in article 25 of the Water Code of the RT. In accordance with that article – "Physical and legal persons, which are provided with water facilities for designated use – as primary water users, in cases regulated by the laws of the Republic of Tajikistan, have the right to allow other physical and legal persons a secondary use by agreement with responsible state agency for regulation of use and protection of water resources".
- Article 30 of the Water Code of the RT establishes priorities in providing water facilities that meet the needs of the population for drinking and household purposes.

SPECIAL NORMS

Chapter 9 of the Water Code of the RT is dedicated to issues of use of water facilities to meet population's needs for drinking and household purpose, and in particular the given Chapter includes a series of direct norms that regulate aspects of ownership rights over drinking water supply systems. Specifically:

- Article 54 of the Water Code of the RT, provides definition to the term "centralized water supply to population". In accordance with that definition – "**Legal persons with right of**

operational use or right of ownership over the household drinking water supply systems, whilst the use of water facilities for drinking, household and other needs, in the order of centralized water supply, have the right to access water from a source in accordance with the permits for special water use and supply it to consumers". However, by the text of the Water Code of the RT, there is no separate definition for "water supply system", besides already provided indirect definition in the given article.

- In article 55, there is more accurate concept of non-centralized water supply, in a situation brought as follows – "**enterprises, organizations, institutions and citizens have the right to offtake water directly from surface or underground sources in the order general or special water use**". On the whole, by definition provided in article 54 and 55, **centralized** water supply is defined as water supply to consumers through drinking water supply pipelines to households, and **non-centralized** water supply is an independent offtake of water from sources by consumers.
- Article 57 establishes the order of regulation of ownership rights over drinking water supply systems. In accordance with the norms of the given article:
  - "**Centralized and non-centralized systems of water supply may be of republican, communal ownership, or ownership of legal persons**". By the given norm, systems of drinking water supply maybe under ownership of those mentioned entities.
  - "**System of communal distribution of drinking water, separate drinking water supply systems, drinking water supply systems on transport vehicles are under ownership of owners' housing fund and transport vehicles**". In this norm, the subject is about internal and local systems of drinking water supply (for example in-house multi-flat buildings), or transport vehicle based drinking water supply system, which are owned by related owners of housing fund, or transport vehicle.
  - "**Centralized and non-centralized systems can be privatized**". The given norm of article 57 establishes prohibition on privatization of centralized and non-centralized water supply systems. The given norms is also re-confirmed by other designated law on privatization – Law of RT "On privatization of state property", as of 16 May 1997, in accordance with the article 6, which follows – "**In accordance with the article 13 of the Constitution of the Republic of Tajikistan, objects that are under exclusive state ownership, as well as objects of historical legacy and national patrimony, buildings and facilities of state agencies and local bodies of state power, *systems of drinking water supply*... are not to be privatized**"
  - "**Physical and legal persons may have under their ownership systems of water supply, constructed independently in accordance with the requirements of active norms, standards and laws of the Republic of Tajikistan**".
  - In accordance with the norms in point 4, article 57 of the Water Code of the RT, physical and legal persons may act as owners of drinking water supply systems, provided if those systems are constructed independently in compliance with established norms, standards, order and laws.
- Another indirect mention of possible transfer of restricted ownership right over drinking water supply systems to non-state organizations are found in article 60 of the Water Code of the RT – "Guarantees for drinking water supply in cases of malfunction of centralized and non-centralized drinking water supply systems". In accordance with the norms of the given article – "**Physical and legal persons on a voluntary basis may establish non-state organizations for joint water supply**". The main purpose of their establishment is to raise sustainability of water supply and construction of new network, or rehabilitation of existing water supply networks, **upkeep in good working condition, financing and**

maintenance of networks of common use. Similarly, in accordance with the norms of this article, the state must provide support to non-state organizations of common water supply and support their development, but the lawgiver does not clarify how such support can be provided.

- As indicated above, the Water Code of the RT practically does not regulate issues of sewerage and canalization, besides norms dedicated to protection of water resources in articles 98-100, where it establishes the order of discharge of communal and household sewage waters.
- In accordance with article 136, all hydro-economic facilities, including drinking water supply systems, must be accordingly documented (passports issued) and entered in the State register of water facilities, which must be maintained by responsible state agency for regulation of use and protection of water resources.

3.2. Review of norms of Law of the RT "On drinking water and water supply"

Law of RT "On drinking water and water supply" came into force on 29 December 2010. The given law in accordance with the regulations of the Law of RT "On normative legal acts" is entitled higher legal weight than the Water Code with regards to drinking water supply. Since, by the norms of article 70 of the Law of RT "On normative legal acts", the Law of RT "On drinking water and water supply" is, firstly, more recent by date of coming into force, and secondly, is more specialized to regulated sphere in question. Therefore, norms of the Law of RT "On drinking water and water supply" has a definitive purpose, including for issues of regulating ownership rights over drinking water supply systems.

The following norms of the Law of RT "On drinking water and water supply" have direct and indirect relation to aspects of ownership rights in the sphere of drinking water supply:

- **Article 1. Main definitions**. The given article defines a series of terms, which characterize different aspects of the subject of analysis:
  - **"drinking water supply – activity, designed to meet the needs of physical and legal persons for drinking water",** repeats the norm provided in the Water Code of the RT.
  - "**source of drinking water supply – water object (water body, water stream, waterbearing formation) or its part, from which water is used or may be used for drinking water supply purposes after adequate treatment or without any treatment**", the given definition introduces a new concept, such as "water object" used for drinking water supply.
  - "**centralized system of drinking water supply (water supply of common use) – complex of facilities for offtake, treatment, storage and supply of drinking water to places of consumption, with open access for common use by physical and (or) legal persons**" – the given term more accurately characterizes the given term, defining the main feature of centralized system – "with supply of water to places of consumption".
  - "**non-centralized system of drinking water supply – facilities for offtake and treatment (or without treatment) of drinking water without its supply to places of consumption, with open access to common use by physical and (or) legal persons**" – here the difference is the lack of water supply to places of its consumption. The given and previous definitions do not provide clear answer to the question – to which water supply systems one may consider a water supply system with street standpipes designated for few households, as it is not clear exactly what is meant by "**places of consumption**".

- "**autonomous systems of drinking water supply – facilities for offtake and obtaining of drinking water with supply (without supply) to places of consumption, placed under individual use (separate house, farm, summer cottage or other object)**" – new definition, by general sense is a drinking water supply system placed under individual use;
- "**drinking water supply system – term, used for the purposes of defining all systems responsive to norms of centralized, non-centralized, autonomous and transport vehicle-based drinking water supply system**" – general definition for all kinds of systems, which is used further in the text of the Law;
- "**organizations of drinking water supply – legal persons, maintaining and operating centralized and non-centralized drinking water supply systems**" – the given term characterizes persons, operating systems of drinking water supply, which may or may not be owners;

- **Article 8. Forms of ownership over drinking water supply systems.** The given article includes key norms on forms of ownership over systems of drinking water supply and possibilities of transfer of ownership rights on them. Repeating the norms of the Water Code of the RT by parties, which may have water supply systems, the Law adds also physical persons in the list of such parties. The article also determines another different than in the Water Code of the RT order of transfer of ownership rights for drinking water supply systems, in accordance with the second paragraph: "**transfer of ownership rights or change of forms of ownership of centralized or non-centralized systems of drinking water supply, is allowed provided if such transfer or change do not result in malfunctioning of such systems".** By essence, such a norm by itself "cancels" privatization, established by the Water Code of the RT and Law of RT "On privatization of state property". The main condition for change of forms of ownership and transfer of ownership rights is – "non-violation of functioning of systems", i.e. drinking water supply system must function according to its designated purpose after such changes.
- **Article 9. Centralized drinking water supply systems.** Norms of the article define the importance of centralized drinking water supply, by including centralized drinking water supply systems among objects of vital importance for life support. Regulatory role over drinking water supply systems by Law is ascribed under competencies of specialized responsible state agency, determined by the Government of the Republic of Tajikistan[12]. The article also provides opportunities for transfer of restricted property rights over drinking water supply systems on a contract basis by **legal persons**, however by restricting such opportunities to only right of economic use or operational management rights.
- **Article 10. Non-centralized, autonomous drinking water supply systems.** Non-centralized water supply by text of the given article is an alternative to centralized, and is created when centralized drinking water supply systems are not available. Management of such systems also can be carried out by owners of such systems independently, or the right of management may be transferred to other physical and legal persons. In the context of article 10 and 11, centralized systems of water supply may not be transferred for management by physical persons, and management of non-centralized systems is possible to be transferred to such persons.
- **Article 12. Provision of state regulation of development of drinking water supply.** The given article also underlines importance of drinking water supply, defining its mandatory inclusion within administrative and territorial socio-economic development plans.

[12] Decree of the Government of the Republic of Tajikistan, as of 31 December 2011, #679, such a body in the sphere of drinking water supply is assigned – State Unitary Enterprise "Khojagii Manziliyu Kommunali" (SUE KMK) – *comment from the author*.

- **Article 14. State support for drinking water supply.** The norms of this article includes possible support of organizations of drinking water supply regardless of forms of ownership through concessional taxation, loans and other concessions for organizations in the sphere of drinking water supply regardless of forms of ownership, as well as concessions for producers of equipment, materials, reagents and investors.
- **Article 15. State guarantees for supplying the population with drinking water.** Among state guarantees in this article include measures, directed for priority development of centralized or non-centralized drinking water supply systems, as well as state support for water supply.
- **Article 21. Rights and responsibilities of owners of drinking water supply systems and organizations of water supply.** Besides a number of rights of owners of drinking water supply systems, with regards to consumers and physical persons that caused harm to systems and sources of water supply, the present article also considers a number of responsibilities for such owners (or organizations of water supply):
  - Comply with technological terms, responsive to normative requirement for drinking water;
  - Maintain norms of un-interrupted supply of drinking water in immediate way to meet the needs of the population, as well as enterprises of food industry and medical entities;
  - Use equipment, materials and chemical reagents, allowed for application in supply of drinking water with available certificates of compliance to established requirements;
  - Maintain record of used/consumed drinking water;
  - Not to allow use of drinking water for industrial needs of entities, technological processes which do not require use of drinking water, if such conduct directly harms the way drinking water is supplied to the population;
  - Organize quality control of drinking water in accordance and on the basis of laboratory tests or standardized methods and inform consumers on poor quality of drinking water in a timely manner;
  - On a timely manner, inform local executive bodies of state power, specialized responsible executive bodies of state power in the sphere of natural resources and environment protection, bodies of state sanitary surveillance during catastrophes and other emergency situations, impacting on the state of sources and systems of drinking water supply, as well as in cases of incompliance of drinking water quality with requirements of sanitary norms and standards;
  - Provide free access to representatives of bodies of state sanitary and epidemiological surveillance, bodies that regulate use and protection of water resources for purposes of carrying out surveys/ analysis/ quality control of water bodies and water supply facilities;
  - Comply with norms of economic management and other activities, defined for zones of sanitary protection of sources and systems of drinking water supply;
  - Not to allow violation of rights of other water users and causing of harms to environment;
  - Provide means for regular and capital repairs of water supply systems;
  - Ensure protection of water sources from contamination, drying and exhaustion, and water supply systems from damages.

- Also the article establishes responsibility of owners with regards to drinking water supply systems which were handed over under management by other persons – organizations of water supply. For example, local executive body of state power, that transferred rights of economic management to SUE (State Unitary Enterprise) that it established, continues to carry out responsibilities over drinking water supply system on points mentioned above.

CONCLUSIONS AND RECOMMENDATIONS

Sector of drinking water supply is quite conservative and traditional in terms of organizational models of management. The world experience shows that most large systems of drinking water supply are under state ownership, and most small-scale water supply systems are on the contrary under private ownership. For example, in USA, more than 85 percent of drinking water supply systems that serve more than 10,000 individuals are under state ownership, and more than 72 percent of small water supply systems serving up to 500 individuals are under private ownership and therefore managed by private companies, or associations of local residents[13]. In addition, tendencies are such that the larger are the systems of drinking water supply, the greater number of them are under state ownership and vice-versa.

Privatization of drinking water supply systems carried out in the course of the past century showed different progress in different countries. For example, in France, more than 60 percent of water supply systems were privatized, and Holland introduced in 2004 full prohibition on privatization of drinking water supply systems. In other countries more effective models were found under state ownership managed by private companies through management contracts.

On the whole, as practice shows, the key factor of efficiency is not actually the form of ownership for drinking water supply system, but rather adequate sector regulation and legislation that is responsive to development level of sector and society.

Conclusions

- Legal regulation of ownership affairs in Tajikistan is conducted through a large number of complex, multi-sectoral, sectoral and specialized normative legal acts of international, national and local levels. Given normative legal acts establish general rules for ownership matters, as well as a number of specific regulations for ownership rights in the sector of drinking water supply.
- Normative legal acts in the sphere of ownership rights for drinking water supply regulate mainly aspects of rights of state ownership over systems of drinking water supply, without separating legal regimes for private water supply systems;
- Legislation of the Republic of Tajikistan does not regulate ownership rights for sewerage, except some separate norms.
- Since existing legal models of drinking water supply are also clearly oriented on drinking water supply systems under state ownership, opportunities for management of such systems also concentrated on application of state organizational legal forms – mainly state unitary enterprises. Legislation does not directly prohibit transfer of drinking water supply systems for use to private sector, but does not also provide direct clear mechanisms for implementation of such rights.
- With coming into force the Law of RT "On drinking water and water supply", there came into force abolition of prohibition for privatization of water supply systems, however be-

[13] Источник «National Characteristics of Drinking Water Systems Serving 10,000 or Fewer People» отчет Агентства США по охране окружающей среды (http://water.epa.gov/)

cause of lack of mechanisms for denationalization of such systems changes in forms of ownership over systems did not take place in practice.

- Along privatization lines, independent construction of drinking water supply systems by non-state legal persons becomes the main ground for acquiring ownership rights over such drinking water supply systems.
- Despite existing norms in the Civil Code of the RT, Water Code of the RT and the Law of RT "On drinking water and water supply" concerning responsibilities over ineffective maintenance of drinking water supply systems, there lacks mechanisms for termination of rights for economic management of state unitary enterprises, which are not able to fulfill the purposes of drinking water supply to consumers.
- The mechanisms for acknowledgement of abandoned drinking water supply systems as ownerless also is oriented on consequent transfer to state ownership of such water supply systems, which restricts opportunities for private and community initiatives in providing drinking water supply services.
- In the legislation of the Republic of Tajikistan there is certain mechanism for attracting private operators for management of state owned drinking water supply systems on common terms through contracts for rent, loans and trusted management, however in practice such cases are almost non-existent due to lack of clear mechanisms as to when and in what cases such transfer is possible.
- Activities related to drinking water supply always involve obtaining of permission for special water use. Legal regime for acquiring such permission is the same for all regardless of forms of ownership and organizational legal models of related entities.

Recommendations

To raise effectiveness of management of drinking water supply systems the following scenarios of perspective development could be summarized:

❒ **Raising effectiveness of current management practice in the sector**

Effective functioning of state enterprises in developed countries is achieved by their high level of accountability to their clients, state, and public, which is enforced through strong legislative frameworks, traditions, participation of citizens and rule of law. Primary measures for ensuring effectiveness state enterprises' functioning in drinking water supply must be as follows:

- Ensuring good governance in management of state unitary enterprises through promoting higher level of their accountability;
- Development of legal measures to raise level of transparency of financial and economic activities of state unitary enterprises;
- Development and promotion of operational mechanisms of feedback mechanisms between consumers and suppliers.

❒ **Demonopolization of approaches to management of drinking water supply systems**

Opportunities for management of drinking water supply systems through establishment of state enterprises are not always there economically, technically and practically, especially at the local level, which is the case for a large number of small-scale rural water supply systems today. For these purposes, it is reasonable to attract local private and community initiatives through development of bylaws for transfer of state property for use on the basis of contracts for rent, loans, trusts, or other contract-based arrangements.

❒ Denationalization and effective sector regulation

Privatization of drinking water supply systems, in accordance with the new norms in the Law of RT "On drinking water and water supply" is allowed with a condition that the new owner will maintain the designated purpose of the system. The given rule also may become a good decision for small-scale autonomous systems of drinking water supply, which do not necessarily need to be under state ownership and provide additional burden for the state. However, any privatization of state property, especially in such a sector of vital importance, must go along with consequent proper regulation in the sector, that allows carrying out monitoring and control over activities of private organizations of drinking water supply. Such a regulation in developing countries is carried out by independent commissions for communal services. The main instruments of regulation for such commissions are tariff policy, licensing and consumer rights protection.