

URUGUAY: DIRECT DEMOCRACY IN DEFENCE OF THE RIGHT TO WATER

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Through a process of direct democracy, social organisations under the umbrella group Comisión Nacional en Defensa del Agua y de la Vida (National Commission in Defence of Water and Life - CNDAV) secured a clause in Uruguay's Constitution which defines the right to water as a fundamental human right. This created a foundation for the public management of water resources based on principles of social participation and sustainability. In addition to having considerably influenced the situation in Uruguay, this achievement sets an important international precedent as one of the first instances where an environmental right has been incorporated into a country's constitution through direct democracy.

On national election day, 31 October, 2004, the people of Uruguay endorsed an initiative by CNDAV which amended the constitution. The reform earned the support of 64.7% of the votes cast.

This amendment established that: "Water is an essential natural resource for life. Access to drinking water and the sewerage system, constitute a fundamental human right." The Constitutional Reform of Article 47 of the Constitution (in the section "Rights, obligations, and guarantees") also establishes that the criteria for the management of water resources (which must be public) must be based on citizen participation and sustainability.

The direct democracy mechanism was fostered by CNDAV. This organisation was established in 2002 as a response to a letter of intent signed by the Uruguayan government and the International Monetary Fund (IMF) in which the government committed to further privatising drinking water and sewerage services throughout the country.

Privatisation of these services began in the region of Maldonado, first with the presence of the French multi-national Suez, and continued by the Spanish Aguas de Bilbao. As in the majority of water privatisation cases registered in the past few years around the world, privatisation had negative consequences in Uruguay.

From a social point of view, large sectors of the population were excluded from access to drinking water because they could not pay the connection costs. From an economic point of view, the deal was not a good one for the Uruguayan State. Not only did the companies not do the work that was scheduled in contracts, but they also did not pay the fees originally agreed to. Instead, they resorted to a number of revisions of the original contract by which the State effectively took over the losses of each of these companies. From an environmental point of view, the company Aguas de la Costa (a

subsidiary of Suez) was responsible for the drying up of Laguna Blanca, a lake used as a source for drinking water. As a result, community members in Maldonado recently sued the company for allegedly damaging the environment.

The Uruguayan electoral system stipulates that any constitutional reform initiated by citizens must be supported by at least 10% of the electorate before there can be a referendum on the reform by the general public. This referendum would then take place at the same time as national elections (legislative and presidential).

In October 2003, one year after its formation, the CNDAV presented to Parliament the 283,000 signatures required for a referendum (plebiscite). This started the voting process enacted a year later with national elections.

The CNDAV coalition was founded by organisations like the Commission in Defence of Water and the Sewage System of Costa de Oro and Pando; FFOSE the trade union of workers of the public water and utility company OSE); REDES-AT (Network for Social Ecology, Friends of the Earth Uruguay) and the Sustainable Uruguay Programme. After the organisation was formed, it expanded to include the Left-wing political party coalition, the Frente Amplio that won the October elections at the same time as the plebiscite, and the majority of the Partido Nacional (another major political party).

Despite the broad political support, the referendum was only a minor issue on the political agenda and in the media due to the political influence of the private water companies. Other commercial water interests (the bottled-water companies, for example) and conservative business sectors (large land owners, forestry plantations, rice industry and cultivators) developed a strong political lobby against the proposed reform.

A DECREE FOR SUEZ

On May 20, 2005, the Executive Branch, headed by Uruguay's President Tabaré Vázquez, issued a decree in which the text of the approved constitutional reform was interpreted.

According to analysts, the May 20th decree is "judicially zero" because the legal system establishes that the majority hierarchy norm is the Constitution, below which are the laws, decrees and regulations.

Basically the norms of the Executive establish that private companies extending drinking water services can continue operating until the end of their contracts. This situation occurred in the Maldonado region with two multinational companies: URAGUA (a subsidiary of Aguas de Bilbao) and Aguas de la Costa.

Despite this situation, popular mobilisation did eventually make the Uruguayan government cancel the contract with Aguas de Bilbao. Following what had been proposed by CNDAV during the constitutional reform campaign, the URAGUA concession in Maldonado was cancelled without having to use the argument of the new constitutional text. The cancellation of the contract was because of serious non-compliance by the subsidiary of Aguas de Bilbao because of work delays and non-payment of agreed fees to the State. The government reviewed the terms of the contract, revised the concession and cancelled (as CNDAV had proposed) the URAGUA contract. The authorities said the cancellation, "was not realised because of application of the new

constitution, but because of contractual non-compliance". This was to avoid a lawsuit by the company against the Uruguayan government that the contract was cancelled automatically and unilaterally as a result of the constitutional reform.

It is a political fact that without the CNDAV campaign and without the constitutional reform, there is no certainty as to what would have happened with this contract. The Concession Control Committee of the OSE found irregularities within URAGUA in 2003. These were publicly denounced by FFOSE (the Federation of OSE Functionaries), but without any measures having been taken.

In this regard, CNDAV reacted firmly on the Executive Branch decree, with the "Maldonado Declaration", which states "to reject and appeal against the presidential decree of Friday, May 20, 2005 and all government resolutions that counter the popular mandate".

ATTEMPTS TO PROTECT INVESTMENTS VERSUS THE CONSTITUTION AND POPULAR SOVEREIGNTY

The company URAGUA, through its Spanish shareholders, initiated international legal action against the Uruguayan government for cancelling the contract, based on the Bilateral Treaty for the Protection of Investments with Spain signed in 1992. In accordance with the treaty, if an accord cannot be reached between two parties, the dispute should be settled by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

There was no need to involve ICSID, since an agreement was reached between the parties in which the Uruguayan government would regain the guarantee fund and the company could retain the fees which should have been paid to the state while the conflict continued. Although the case never involved the ICSID, the example illustrates the pressure the mechanism exerts.

The solution reached by the government approved a decree which completely excluded a popular sovereign mandate, allowing the company Aguas de la Costa to continue delivering drinking water and sewerage system services.

Faced with a possible lawsuit in Commercial Arbitration Courts and intimidation by Aguas de la Costa, the government reacted to the threats of a multinational company while ignoring the popular will.

It was said on many occasions that the Uruguayan state did not have the resources to confront the companies. But a lack of resources cannot justify non-compliance with the law, especially when it concerns norms practised in the highest levels of the system, within the constitution itself.

On the contrary, this situation has to be exposed so that the people know the situation before other contracts and treaties are made with multinational companies. The Uruguayan State should act as a sovereign and independent State and question the legitimacy of the International Commercial Arbitration Courts, as was recently done by the Argentinean State.

THE FALL OF URAGUA AND THE RETREAT OF SUEZ

After negotiations between URAGUA and Uruguay's government, an accord was reached to cancel the contract and renationalise services in a "friendly" manner, in the words of the Uruguayan authorities. The "friendly" amount was approximately US\$15 million, equal to the deposit provided by the company at the start of the bidding.

The amount also coincides with "investments that have not been redeemed"; the constitutional reform established that this is the only amount that can be reimbursed to private companies.

The resolution of the OSE directorate facilitating the re-nationalisation of services indicates that the accord that was reached by the public and private company by "avoiding eventual legal actions". This meant that both parties renounced "all administrative and judicial actions" and that "URUGUA S.A. absolves the State of Uruguay of all responsibility".

The re-nationalisation of drinking water and sewerage system services that were concessioned to URUGUA brought problems. One of these was that the means used to reassume work was with the creation of a "decentralised executing unit" through the integration of OSE and the administration of Maldonado.

Services that were concessioned to URAGUA were reclaimed on October 8, 2005, in a highly emotional and symbolic act. Members of the CNDAV covered the exterior of the building with national flags and syndicate banners of the CNDAV or of the state company at the time when the cartels identified with the private company, were dismantled.

For its part, Suez announced its exit from Uruguay. After months of negotiations, the Uruguayan government decided to purchase all of the shares in Aguas de la Costa that were held by Aguas de Barcelona (a Suez subsidiary). It was agreed the government would pay US\$3,4 million to the multinational for the company's shares in Aguas de la Costa (60% of the total shares).

According to the directors of OSE, the sum paid to purchase the shares from Suez is less than the sum that should have been paid following Article 47 of the Constitution (text of the constitutional reform), which determines that only "investments that have not been redeemed" would be paid to companies forced to retreat from the country. The CNDAV has expressed its disagreement with this resolution, which created a mixed company (60% public and 40% national private capitals) facing the negative response of Suez's Uruguayan shareholders to sell their shares. This measure represented the withdrawal of the last water multinational company from the country, but it contradicted the text of the Constitution established through a plebiscite in 2004.

PROJECTIONS

One of the main expectations the constitutional reform - in addition to realising public management and recuperating privatised areas - was for the introduction of

sustainability into the management of water resources along with participation and control.

The dispute relating to the situation of multinationals in Maldonado and their effects on the people and environment did not allow the public debate to be centred on the other great need generated from the constitutional reform: public management, participatory and sustainable water mechanisms.

The government has started to resolve this situation. In February 2006, a “National Directorate for Water and the Sewage System (DI.N.A.SA.)” was created within the Ministry for Housing, Territorial Legislation and the Environment. This is to “formulate and propose policies to the executive branch with respect to the administration and protection of water resources” like the “management of drinking water and sewage system services, contemplating their extension and goals for universalising them, priority criteria, the level of services and required investment and their financing system, and the efficiency and quality envisioned” and finally to, “propose a normative mark in order to avoid the involvement of and competitive role by multiple state actors, realising the participation of users and of civil society in all levels of planning, management and control”.

At the same time that a participative atmosphere was created among social organisations, a “Technical Advisory Commission for Water and the Sewage System (COTASAS)” was created to “include delegates of public and private organisations, representatives of civil society and users, among whom would be understood ministers competent in the subject, the Office of Planning and Budgets, the National Congress of Administrators, the Administration of Sanitary Works of the State, the Regulatory Unit for Energy and Water Services and the University of the Republic.”

The problem is that, beyond these definitions, concrete proposals on how to get neighbours and communities involved in the management of resources in their area are lacking. This participation of those directly involved, the ones who can make the greatest contribution to management and control of resources, is one of the political goals of the CNDAV.

The range of possibilities of the new constitution is extensive. The first and most difficult steps have recently been taken. The road ahead will be learned while it is travelled.

TEXT OF THE CONSTITUTIONAL REFORM APPROVED OCTOBER 31, 2004

“Rights, obligations and guarantees” (Environment)
ARTICLE 47-

Adds:

Water is a natural resource essential to life.

Access to drinking water and sewage system services, constitute a fundamental human right.

1) National Water and Sewage System policies will be based on:

a) territorial legislation, conservation, protection of the environment and the restoration of nature;

b) the sustainable, joint management of water resources with future generations and the preservation of the water cycle subjects of collective interest. Users and civil society, will participate in every instance of planning, management and control of water resources; establishing water basins as basic unities;

c) the establishment of priorities for the use of water by regions, basins or parts of these, will be the first priority in supplying drinking water to the population;

d) the principle by which drinking water and sewage system services are lent, must prioritise social and economic reasons. Every authorisation, concession or permission that in any way violates these principles will be abandoned without result.

2) Superficial water, like subterranean water, with the exception of rain water, integrated in the water cycle, constitute a collective resource, subordinated to the collective interest, which forms part of the public state domain, as the public water domain.

3) The public service of the sewage system and the supply of water for human consumption will be provided exclusively and directly by legal state representatives.

4) The law, by a three-fifths vote of the total in each chamber, can authorise the supply of water to another country, when it is not in supply or out of solidarity.

ARTICLE 188-

Adds:

The dispositions of this article (referring to mixed economic associations) will not be applicable to the essential services of drinking water and the sewage system.

Transitory and Special Dispositions

Adding the following:

Z”) The reparation that will correspond with the coming into force of this reform, will not generate indemnification for redundant gain, pocketing only investments that have not been redeemed.

