



Programme FAO
“Approvisionnement et distribution alimentaires des villes”

Série «Aliments dans les Villes»

LEGAL ASPECTS
OF URBAN FOOD SUPPLY AND DISTRIBUTION

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DT/14-97 - juin 1997
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Legal Aspects of Urban Food Supply and Distribution ¹

1. Introduction

Law provides the foundations for the existence of food marketing systems and is essential for their continued development. Furthermore, legislation is probably the most important tool available to states for regulating a marketing system and changing how it functions in order to achieve socially desirable goals

This paper argues that:


- 📖 legal issues are fundamental to reforming systems for supplying and distributing food to urban areas and should be specifically addressed;
- 📖 a careful analysis of how laws and regulatory systems actually function is essential for rational policy development;
- 📖 the liberalization of food marketing systems challenges legal reformers to move away from laws designed to maximise state control and to actively seek ways of creating a legal environment which will facilitate the effective participation of the private sector; and
- 📖 states should involve the private sector in the process of legal reform.

2. The role of law in food marketing systems

The role of law in relation to food marketing systems is multi-faceted, but for the purposes of this discussion, law can be regarded as having the following three main functions.

- (a) **Enabling functions** which provide the essential legal framework for the marketing system. Enabling functions are performed by laws which establish:
- 📖 property rights and rules to protect it (such as the prohibition on theft), and therefore define what can be sold and who is entitled to sell it;
 - 📖 mechanisms for constituting a group of individuals as a legal entity (such as a company or cooperative) which is entitled to assume rights and obligations in its own name;
 - 📖 laws of contract which clarify the consequences of certain transactions and allow commitments agreed between the parties to be enforced in court and so permits the evolution of more complex commercial transactions which go beyond direct barter exchanges;
 - 📖 laws of exchange, (e.g. recognising warehouse receipt as negotiable documents of title so that ownership of stored grain can be transferred by transferring the document); and




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 security laws (e.g. rules allowing movable goods such as grain to be pledged as security for a loan).

(b) **Economic regulatory functions** which seek to promote, guide and discipline the operation of markets. This function would be performed by a wide range of laws, including laws dealing with competition, uniform weights and measures, food quality standards and tax. (Other mechanisms such as unwritten market rules and standard contracts adopted by market authorities or trading associations, may also serve to regulate the economic functioning of markets.)

© **Constraining functions** designed to restrict the operation of the market in some way in order to avoid socially undesirable consequences. Typical examples of this are found in laws dealing with environmental and consumer protection (e.g. laws establishing maximum residue limits for pesticides in foods).

Legal rules operate in different ways. A distinction may be made on the basis of the object of the legislation between regulations which:

-  establish a **structure** for market interactions but rely on the market to determine preferences (e.g. allowing ownership of stored grain to be transferred by transferring warehouse receipts enables a new type of transaction to occur but the price is still determined by the market);
-  regulate **conduct** and so do not rely solely on the market to determine preferences; and those which
-  directly specify the **result** or outcome (e.g. setting official prices for grain).

This classification gives a general indication of the extent to which a legal mechanism substitutes political decision making for the decisions of the market and will often also be an indicator of the likely enforcement costs. Generally, legal rules which serve an enabling function would relate to structure and would have low enforcement and compliance costs. Rules with an economic regulatory function would mainly prescribe conduct but may also seek to prescribe results.

3. Law as a tool for developing more effective food marketing systems

Using law as a development tool is not straight forward, and the effects produced are heavily influenced by the context in which rules are used, particularly by factors such as the institutional framework and legal culture. This means that one should be cautious about making general recommendations about the best way to improve legal frameworks. Nevertheless, based on the experiences of a range of countries, it is possible to identify general criteria for evaluating the regulatory environment for food marketing which can be usefully applied in most circumstances (see section 5 below).

The process of reforming legal structures in order to give effect to market liberalisation programmes present particular challenges to policy makers and those drafting laws. Policy makers should beware of over-simplistic models based on the mistaken belief that fewer rules mean more efficient markets. Legal drafters should be aware of the new challenges created by the reduction of the role

of the state in controlling agricultural marketing. Liberalising food marketing systems challenges those drafting law to move away from highly prescriptive legislation designed to maximise state control, towards legislation designed to enable efficient private sector involvement. However, the creation of greater economic freedom for the private sector may also increase the potential for market manipulation (e.g. by cartels) and create a need for new and more sophisticated regulatory mechanisms.

4. Identifying areas requiring legal reform

A huge number of laws can have an effect on the functioning of a system for supplying and distributing food in urban areas. Therefore it is useful to narrow the focus : firstly by concentrating on those areas in which specific legal obstacles are preventing the development of the food marketing system (e.g. insufficiently developed laws may prevent the establishment of inventory credit systems); and secondly, by examining those areas of law which would typically have a significant effect on marketing systems.

It may be productive to consider the following categories of laws affecting the functioning of food marketing systems to determine whether or not they should be improved.

1. Laws governing who can participate in food markets and under what terms (e.g. licensing systems for various participants including wholesalers, retailers, and warehouse operators).
2. Laws applicable to the commodities traded (e.g. rules governing quality standards, the protection of public health, and packaging and labelling).
3. Laws affecting the movement of food (e.g. prohibitions on transporting certain foodstuffs; controls over how much, or how, food may be transported; and trader's licences which are only valid for one area).
4. Laws affecting marketplaces, including the premises where food is sold (e.g. rules which: prohibit the trading of key commodities except in certain market places; prevent markets and processing facilities such as grain mills being appropriately sited in towns, restrict the dates, times and frequency with which markets are held, and establish hygiene standards).

Annex 1 sets out various questions and potential sources of legal rules which may be useful in identifying relevant rules.





5. Analysing the Legal Environment for Urban Food Markets

A legal framework should facilitate the attainment of the objectives of urban food marketing policy. The effectiveness of the legal framework must be evaluated against these policy objectives and not only against the criterion of economic efficiency. Since different countries have different policy objectives, it is not possible to define a universal set of criteria for evaluating such legal frameworks. However, it is informative to discuss national regulatory frameworks on the basis of the three criteria of : flexibility and responsiveness to

the needs of participants in the food marketing system; certainty regarding the law and transparency regarding its implementation; and the enforceability of laws and contracts. Indicators in respect of each of the criteria are also set out below to facilitate evaluating the performance of a regulatory framework against the criteria. Applying these criteria should give a very general indication of the extent to which the legal framework is conducive to encouraging efficient private sector involvement in urban food marketing.

1. *Flexibility and responsiveness to the needs of participants in the food marketing system.*



Indicators:

-  The extent to which participants were involved in the preparation of new legislation (how wide was the consultation, what opportunities were created for private sector input in the drafting process etc.).
-  The degree of support among participants for new rules before and after implementation.
-  The degree to which participants have flexibility to find the most economically efficient means to achieve an objective (i.e. if the law prescribes what practices are acceptable rather than merely prohibiting unacceptable practices, it may reduce flexibility and restrict the freedom of participants to seek more economically efficient alternatives).
-  Low compliance costs (i.e. participants do not have to spend unreasonably large amounts of effort, time and money in order to comply with the law). The level of compliance costs will usually be higher where : there is poor communication of the law to those affected by it, multiple authorisations are required, and the conditions for obtaining authorisations are unnecessarily complex.

2. *Certainty and transparency concerning the law and its implementation.*

If the meaning of all relevant laws is clearly understood by participants, the law is implemented and enforced in a consistent manner, and there is an effective mechanism for enforcing compliance with contracts, there will be greater legal certainty, the risks to participants will be significantly reduced and the system will operate more efficiently. “Transparency” refers to the degree to which the workings of a regulatory system are clear and “visible” to those affected by it. Making a regulatory system more transparent can help reduce the possibility of corruption and increase the predictability of administrative decision-making, by making officials more accountable to the public. This creates greater certainty about how a law will be implemented and reduces the risk of those affected by it.

Indicators:

-  Legislation which is clear and easy to understand.
-  A practice of communicating changes in the law to all affected parties well in advance of implementation of the laws.

- ☞ Licencing procedures which : require a licence to be granted if certain clear criteria, published in advance, are met, require reasons to be given for any refusal of a licence, and provide for a right of appeal.
- ☞ Consistency of interpretation and application of law by different officials and authorities in different areas.

3. *Enforceability of laws and contracts*

Indicators:

- ☞ The use of economic and other incentive to encourage compliance with the law.
- ☞ Few cases where there are strong economic or other incentives not to obey a particular rule (the introduction of such rules is usually only appropriate where very important social issues are at stake).
- ☞ Statistics on monitoring legal compliance and successful prosecutions (for example if a new licencing law is being well enforced one would expect to some level of non-compliance initially followed by a sharp increase in successful prosecutions which then declines as compliance increases).
- ☞ Adequate institutional capacity to enforce laws (generally it is wise to avoid bringing rules into force until the capacity exists to enforce them).
- ☞ Low regulatory costs (i.e. costs to the state of implementing and enforcing relevant laws).
- ☞ A degree of private sector “self-regulation” which is adequately monitored by the state (e.g. rule-making and enforcement or market by-laws, produce quality standards and minor dispute resolution by market committees, traders associations etc.).
- ☞ Availability of inexpensive, quick and effective conflict resolution mechanisms, particularly for smaller claims.







6. **A methodology for analysing and reforming regulatory systems**

Law is one of the primary determinants of market performance and can be a powerful tool for implementing policy. If there is no rational evaluation of how a rule functions and what its impacts are, rational policy development is not possible. However, conducting a comprehensive analysis of the legal environment for food marketing in a particular country could be a huge task. In theory it would be necessary to examine: each relevant legal rule, how the rule is implemented and enforced, how it interacts with other parts of the regulatory system (e.g. existing market customs and practices and economic and political forces), how it is perceived by the people subject to it, and the effects it produces on human behaviour and hence the performance of the various aspects of the food marketing system. Therefore, in practice it will usually be necessary to restrict the analysis to the most significant aspects of the regulatory system (see section 4 above).

Annex 2 sets out a methodology for analysing relevant laws in a particular socio-economic context which is based on the recognition that the legal, institutional and economic aspects of a regulatory system for food marketing are inseparable. It is intended to give policy makers and

lawyers a framework for identifying the key legal features of the regulatory system to enable them to make informed decisions about how to improve its functioning in order to meet specific policy objectives. It also seeks to identify the most important economic implications of a rule in terms of cost to the participants (compliance costs) and costs to the state or other authorities, in implementing and enforcing the law.

7. Questions for Discussion

-  Is the current regulatory framework for urban food supply and distribution generally conducive to the continued development of the system and the attainment of the government's key policy objectives?
-  Does the current regulatory framework generally tend to facilitate private sector participation or restrict it? (It is particularly important to ascertain the views of the private sector in answering this question).
-  Is it possible to identify any specific areas which require legal reform?
-  Is the government in a position to enforce existing laws given current constraints?
-  Has the regulatory framework been reviewed in any detail in the recent past?
-  Would a review of the regulatory framework for food supply and marketing (or of the agricultural marketing system as a whole) be of value in future efforts to improve and strengthen the system?

IDENTIFYING RELEVANT LEGAL RULES

N.B. The following list of questions is intended to help identify some of the issues which may be relevant to the functioning of food marketing systems in urban areas. However it is not a complete check-list and nor should it be used as such since answering all the questions would be very time consuming. Instead existing knowledge about the functioning of the marketing system and the policy objectives of any market reform initiative should be used to narrow the focus to specific areas where problems exist and/or improvements are desired.

Potential Issues and Questions to Ask

Where to Look

Restrictions on access to, and participation in, markets.

Are any parties excluded from participation in the market?
 What licences (if any) are required to participate in the market in various capacities?
 What are the requirements to qualify for a licence? (e.g. requirements to have a certain bank balance, to have approved storage facilities, and to maintain certain records).
 What conditions are imposed in licences?
 What is the procedure for obtaining licences and how much does it cost?
 Is there a restriction on the number of licences and how are they allocated?

Agricultural Marketing legislation, market by-laws

Legislation and standard licence forms, administrative guidelines.

Commodities traded

What legal provisions are there relating to:

- the quality of produce and food;
- public health;
- standards of agricultural products;
- packaging and labelling?

Is there a distinction between standards for domestic and export markets?

Food Laws
 Public Health, Pesticides legislation
 Agricultural marketing legislation.
 Marketing & Environmental legislation.
 Marketing, and Trade & Export legislation

Restrictions on the Supply and Price of Agricultural Produce

Are there controls on the movement of certain foods, above certain quantities or between locations?
 Are there controls on sales of food, eg on the basis of type of commodity, quantity, quality or location of sale?
 Are there controls on the storage of food?
 Are there any direct controls on the prices of food?

Marketing legislation, conditions in licences
 Marketing legislation.

Anti-hoarding legislation.
 Marketing or Price Control legislation & laws establishing state marketing institutions.

The market place

Are there any restrictions on market days and hours?
 Are there any restrictions on the location of markets in urban areas?
 Are there any restrictions preventing the establishment of market places in optimum locations?
 Are there adequate rules governing hygiene standards in the market?
 Are there legal measures to maintain public order in and around the market, and to control competition from unlicensed operators outside?

Town planning laws and municipal bye-laws, market laws.
 Food, public health and hygiene laws, by-laws and market rules.
 Laws empowering officials in charge of markets. Trading laws.

Dispute Resolution

What legal mechanisms exist to enforce contracts?
 What evidence would usually be required to prove the existence and

Case law/jurisprudence. Laws establishing courts, marketing authorities or other bodies with

Potential Issues and Questions to Ask

terms of a contract ?

Finance and credit

Can stored produce such as grain be pledged to secure a loan?

Can effective security be created even when the produce in question is mixed with other similar produce and can no longer be specifically identified?

What protection does the lender have against third parties who buy the produce or acquire some interest in it without knowledge of the lender's security interest in it? (E.g. some countries have a system of registering security interests designed to protect the interest of the lender by giving notice to the world at large of lender's interest in the goods).

What protection does the lender have if the borrower or operator of the warehouse containing the goods, dies or becomes bankrupt?

Are warehouse receipts are recognised as negotiable documents of title?

Does the legal personality of the borrower have any effect on the security?

Do public sector organisation in the marketing system have preferential access to credit?

Are there any restrictions on access to foreign exchange?

Transactions in the Market

Are there any rules establishing standard weights and measures?

Are there any standard contracts in use which standardise and clarify issues such as: the date when the transaction is binding; the terms of sale; the margin of tolerance for quality, responsibility for loss or damage, consequences of delay, etc?

Public Sector Institutions

How is the responsibility for administering various aspects of the marketing system allocated among government departments, agencies and parastatals?

Are there jurisdictional overlaps and conflicts?

Are there legal mechanisms for ensuring that delegated rule making (e.g. by market committees) does not conflict with superior laws?

Private sector organisations

Are there any laws preventing the formation of private organisations of producers, wholesalers, retailer etc. or to run markets?

Would such bodies be able to acquire legal personality?

Could limited powers to make and enforce rules or business practices, and decide disputes be legally delegated to-such bodies and have these powers been used?

Are there any rules aimed at preventing special interest groups dominating such organisations?

Market manipulation

Are there any rules applicable to agricultural markets which prohibit cartels, price fixing, "unfair competition" or other anti- competitive behaviour?

Are there any rules prohibiting specific forms of fraud or corruption relevant to agricultural marketing? (E.g. submitting false applications, misgrading produce, bribing officials etc).

Where to Look

adjudicatory powers.

Case law and jurisprudence
Commercial Code, legislation on security and collateral, banking law.

Case law and jurisprudence
Bankruptcy/ insolvency law.
Legislation (and case law/ jurisprudence)on warehouses, legal tender and negotiable instruments.
Commercial Code and Banking legislation.
Exchange Control laws.

Legislation on weights and measures.

Laws constituting public sector organisations.

Marketing laws.
Company laws and Commercial codes
Legislation on Markets

Competition or "anti-trust" laws, legislation on business practices, case law or jurisprudence on "unfair competition".
Criminal law, legislation on trade practices; anti-corruption and economic crime legislation

A METHODOLOGY FOR ANALYSING REGULATORY FRAMEWORKS

The suggested approach would be to assemble a team to perform the initial analysis which would be performed in two phases. The first phase be primarily a “desk-top” exercise involving the identification, analysis and classification of relevant legal rules and the identification of the agencies responsible for implementing and enforcing the rules. The second phase would involve field research, primarily by interviewing various participants in the agricultural marketing system including farmers, wholesalers, retailers, market agents, state officials, market officials, and consumers. This part of the study would be aimed at identifying how the law actually functions, including the costs to the authorities of implementing it, the costs to market participants in complying with it, the responses of participants to it, and the effects on the performance of the market. The results of the study could be summarised in a matrix in the form of Figure 1 which uses three hypothetical legal rules as an example.

Phase 1

The first step is to identify the actual law applicable to the various stages of agricultural marketing. (Annex 1 lists some of the areas of law to be considered and questions to be asked in this regard). The relevant laws and the precise rules would be filled in the first column of the matrix.

The purpose of the legal rule should then be identified where possible (column 2). In many cases this is likely to be difficult, particularly where the rule is an old one, and frequently a range of rationales will be mentioned for the same rule (all of which may be correct). The point here is not so much to arrive at a single, historically correct, purpose for the enactment of the rule, but rather to focus attention on trying to identify the social purpose(s) which the rule was intended to achieve in relation to agricultural marketing. This allows the effectiveness of the rule as a tool for achieving policy objectives to be evaluated by comparing the original purpose with the actual responses of actors in the market (column 8) and the performance of the market (column 9) - insofar as these can be evaluated. Furthermore, if it is difficult to identify a relevant purpose for a rule it suggests that the rule is likely to be either irrelevant or redundant.

The third column in the matrix requires the legal mechanism being used to be identified more precisely if this is not already apparent from the first column. It also allows the rule or legal mechanism to be classified according to its main object - structure (s), conduct (c); or result (r).

Identification of the agencies responsible for implementing and enforcing particular rules is important as the institutional structure has a very strong influence on the functioning of a regulatory system. The information summarised in the fourth column should also highlight any inappropriate fragmentation of regulatory powers and jurisdictional overlaps between state agencies.

Phase 2

The second phase of the exercise will be to examine how the legal rule actually functions in context. Since the responses of participant to a rule will be determined by their own interpretation of it in relation to their own interests, most of the data will be subjective in nature and a degree of inconsistency must be expected. The data may be collected in any convenient form and only a few salient points would be reflected on the matrix.

Analysis of the incentives to comply with a legal rule (mainly economic but also social) and the sanctions for non-compliance is important in predicting the extent to which the rule is likely to be effective. The incentives will often be different for different participants and where there are significant variations these should be indicated to facilitate understanding of the responses of market participants. (One way of beginning an analysis of incentives is to ask who would benefit and who would lose from compliance with the rule).

Where there are strong economic incentives for compliance one would expect a high degree of compliance and low enforcement costs. On the other hand, where there are significant economic benefits to be obtained by non-compliance (i.e. strong negative economic incentives to compliance) one would expect high enforcement costs if the law is to be effective. In such cases, even if there are high sanctions for non-compliance these may not have a significant deterrent effect unless there is a significant enforcement effort which increases the probability of offenders being caught.

One of the most important factors to assess is the compliance costs of various participants. What is important here is to identify how participants see the cost of complying with a rule. This may involve direct financial costs such as licence fees or finance charges incurred as a result of delayed payment, as well as factors such as inconvenience and delays. If high compliance costs co-exist with low or negative compliance incentives, the law is likely to be ineffective without heavy expenditure on enforcement. Unnecessarily high compliance costs can also function as a type of “friction” in the regulatory machinery which reduces efficiency and increases the cost of transactions in the market.

It is important to attempt to identify the responses of various participants to a rule (in fact the response is usually to a version of the rule as communicated by intermediaries such as officials and conditioned by other factors such as past experience). If the response from a key “target group” of market participants is negligible, unanticipated, or undesirable, it would suggest that a re-evaluation is required and that corrective action should be taken, for example, by adjusting incentives or sanctions and improving communication of the rule to the target group.

The aggregate of the responses by different classes of participants will be an important determinant of the performance of the market in response to the legal measure (which is recorded in the last column). From a policy maker’s point of view, the last column of the matrix reflects what really counts since it should enable the effectiveness of the legal rule as an instrument for implementing policy to be evaluated. In many cases it will be difficult to make unequivocal statements about the effects of a rule on market performance but the information recorded in the previous columns should help in identifying areas to focus on in assessing the effect on performance. For example, by starting with the original purpose behind the legislation (column 2) and armed with the knowledge of what aspect of the market the mechanism will act on (structure, conduct or result), who will implement

and enforce it (column 4), whether the economic forces will push each class of participant - including state agencies - towards or away from compliance and enforcement; and how participants are responding (column 8), it should at least be possible to develop a well-informed hypothesis of the likely effect on performance (column 9). In addition, reference can be made to the discussions in section 4 of various laws which predominantly affect certain aspects of the marketing system, such as the movement of goods, availability of credit and access to markets.

In using the above methodology it is important to appreciate that regulatory systems change over time and current events are influenced by history. It is important not to lose sight of the fact that such a study (or at least that part of it based on the results obtained from phase 2) is only a snapshot of the system at a particular moment. Therefore, where the regulatory system is being reformed to strengthen the legal environment for agricultural marketing it would be advisable to conduct a baseline study of the status quo and then undertake further studies at a later date to evaluate the effects of the changes.

Figure 1 : Matrix of Assessment Criteria for Legal Instruments with hypothetical examples

(1) Legal Instrument/ Rule	(2) Policy Objective	(3) Mechanism & Object (s) = structure © = conduct (r) = result	(4) Implementation (I) & Enforcement (E) Agencies	(5) Compliance Incentives & Sanctions	(6) Costs of Implementation (I) & Enforcement (E)	(7) Costs of Compliance	(8) Response	(9) Performance
Commercial Code Warehouse receipts are negotiable documents of title	To increase trade by facilitating transfer of ownership of stored goods	Creation of principle of exchange and security interest. (s)	(I) Market participants (voluntary) (E) Parties then Courts	Strong (+) economic incentives Civil sanctions	(I) Negligible (E) Low	Negligible	Inventory credit offered by banks Increased borrowing by wholesalers. Increased supply of food?	Increase in liquidity. Increase in grain storage
Marketing Act Prohibition of use of non-standard weights & measures	Facilitate trade & protect consumers.	National Standardization ©	(I) National Trading Standards Authority (E) Inspectors from Authority, local market authorities	No incentives for traders. Sanctions: suspension of licences, fines	(I) Moderate additional inspectors required. (E) high - inspections & prosecutions time consuming.	Traders : moderate to high in short term (cost of new scales etc).	Compliance by larger traders, evasion by unlicensed traders. Consumer approval.	Variable : some increase in consumer protection, also evasion & abuse (eg. officials taking bribes).
Maize Control Act All maize to be sold to Board at fixed price	To stabilise prices, protect farmers from fluctuations, & increase production.	Seasonal price fixing by Ministerial regulation (r)	(I) Maize Board (E) Board Inspectors then Courts	Strong (-) economic incentives Sanctions : fines, confiscation, imprisonment.	(I) High - cost of single marketing channel infrastructure & of intervention to stabilise prices. (E) High - many trained inspectors required nation wide.	Farmers: Variable, High cost if shortage, benefit if oversupply. Traders : High risks/costs to participate in	Farmers: Sale of part of crop on parallel market Traders: widespread evasion of law. Officials; Incentives to	No increase in production. Mounting costs to state Flourishing parallel markets undermining state revenue collection.

