

Preparing national regulations for water resources management Principles and practice

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for the

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FOREWORD

Essentially finite stocks of freshwater resources have been coming under increasing pressure to satisfy the ever-growing economic, social and environmental demands of today's complex, interdependent societies. In response to this pressure, governments virtually everywhere are substituting themselves for individual landowners as the masters or simply the guardians of water resources. As a result, government-administered legislation regulating the development, use and protection of water resources has supplanted litigation of basic tort and property doctrines almost everywhere as the primary framework of rights and obligations for all those who, in the public and in the private sector, develop and use water resources. Enactment of such legislation involves settling issues of policy and principle on the one hand, and matters of implementing detail on the other hand. Yet policies and principles often fail to be implemented for lack of the detailed procedures necessary to give them effect. As a result, the primary legislation may remain without practical effect and fall quickly into disuse.

This publication illustrates the types of legal machinery used for the management of freshwater resources through subordinate water resources management legislation. It is intended to bridge the gap between policy and implementation in the field of water legislation. It is an updating of an older Manual by the same title, published by FAO in the Legislative Studies series (No. 52, 1994)¹, written by Mr Stefano Burchi, Senior Legal Officer of the Development Law Service. The present version follows the structure of the original, but the legislative material supporting the analysis has been updated throughout, with the able assistance of Ms Ariella D'Andrea. In addition, fresh attention has been given to the trading of water rights, while the sections of the original Manual dealing with drinking water supply and sanitation, matters that could easily fill a separate book, have been deleted.

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¹ A French version of the older Manual, based on original research on legislative material from French-speaking countries, has been published by FAO as "Elaboration des réglementations nationales de gestion des ressources en eau – Principes et pratiques", Legislative Study No. 69 (1999).

INTRODUCTION

This Manual has been written having in mind a composite target audience consisting of lawyers and non-lawyers who, in one capacity or another, are engaged in the preparation of subordinate water resources management legislation. Thus a conscious effort has been made in the descriptive part of the Manual to avoid cryptic legal language, in order to make the material more accessible to a broader audience.

The variety of legislative approaches reflected in the implementing regulations presented in this Manual should be of interest to a wide range of users from a variety of countries. This is because the rationale that may prompt the adoption of one or another legal mechanism for implementation, and the very nature of the mechanism itself, are very much the same across national and language barriers and even across legal systems. What varies is generally the formal configuration of a particular mechanism, but seldom its substance. As a result, it is hoped that users will find the legislative material and the narrative which complements it of value from a comparative law perspective.

Practice varies considerably with regard to the style of drafting and the contents of subsidiary water management legislation. For the sake of consistency, research for this Manual focused on legislation available in the English language – from countries where English is the official language, as well as official translations into English from other languages . Exceptionally, unofficial translations of legislation of particular interest have also been presented.

When this Manual refers to subsidiary legislation, it is drawing a distinction between legislation which issues from the highest lawmaking body or authority of the land (i.e. the Parliament, Congress or National Assembly) and legislation made by government in the exercise of subordinate lawmaking authority. Principal or primary legislation made by the legislature generally lays down policies and principles, whereas subsidiary legislation made by government generally sets out the details of implementation, i.e. it gives practical effect to the provisions of the primary legislation. This type of legislation is variously styled "subordinate" or "subsidiary" or "ancillary" or "secondary", and tends to be collectively referred to by the term

"regulations". Depending on the level of specificity, regulations may span the entire spectrum from matters of mostly administrative procedure to matters of substance and, occasionally where principal legislation is silent, even of policy.

It is primarily with these kinds of legislation that this Manual is concerned, examining such subordinate or subsidiary instruments as regulations, rules, orders, decrees and by-laws. However, in certain cases where matters of implementing detail are contained in parliamentary-level acts, these too have been included.

Rather than a strict division based on the type of legislation, the Manual has included provisions based on the kinds of subject matters they address. The subject matters or functions in water resources management and development addressed include: managing available water resources, i.e., allocating resources to users; preventing and mitigating water pollution from a variety of "point" and "non-point" sources; and controlling development of surface water resources and of groundwater (Chapters I–IV). In addition, the Manual examines provisions regulating the use of water for irrigation (Chapter V). Management of water resources involves also preventing or minimizing the damage to life and property due to poor drainage of lands (Chapter VI). And finally, charging for water resources at the source – as opposed to at the tap – has been singled out for separate treatment in view of its growing importance as a prime instrument of demand management, with significant policy and political overtones (Chapter VII).

A list of the legislation discussed in this publication is given in Appendix VIII. An effort has been made to identify contemporary legislative examples, although recourse has also been had to less recent legislation which could usefully illustrate a particular mechanism or approach. It is the view of the author that the comparative usefulness of legislation is not measured only by how contemporary it is or even by whether it is still in force. It is hoped that this publication will provide food for thought and practical examples for the reference and use of the various disciplines involved in the preparation of subordinate water legislation.