Can there be confluence? A comparative consideration of Western and Islamic fresh water law

Thomas Naffa,*, Joseph Dellapenna*b

a Department of Asian and Middle Eastern Studies, University of Pennsylvania, 847 Williams Hall, Philadelphia, PA 19104-6305, USA
b School of Law, Villanova University, Villanova, PA 19085, USA

Received 18 June 2002; received in revised form 28 July 2002; accepted 20 September 2002

Abstract

The authors examine and analyze comparatively the bases, nature, and workings of international Western and Islamic fresh water law and attempt to answer such questions as whether the two legal systems, one secular the other religious, can be sufficiently harmonized or integrated to enable effective, basin-wide management of such waterways as the Indus and the Nile Rivers where the two systems of law co-exist? Does Islamic law (sharia) have a direct, practical role to play in the management of international water basins in today’s world? If precedence is given to the hydro-political dimensions of transnational river basin issues, is there an effective role for law in the processes of international river management? What are the implications of the fact that Muslim nations where Islamic law prevails are members of the UN and have signed UN conventions and treaties? The authors attempt to provide answers to these and other questions and to offer at least one way in which the two systems of law could possibly be made to work compatibly over fresh water issues.

© 2002 Elsevier Science Ltd. All rights reserved.

Keywords: Sharia; Customary law, international law

1. Introduction

The hegemony of Western law on the international scene raises a series of important questions for any Islamic nation that might wish to employ Islamic law (sharia) in international water management and sharing. If one accepts, at least hypothetically, that there is a distinct set of what has been labeled “Islamic Water Management Principles” (Farouqui, Biswas, & Murad, 2001),
then, in international river basins, can those principles, translated into sharia, form an effective basis for resolving water management disputes even when Muslim governments are involved e.g., the Tigris and Euphrates Rivers? Or, for that matter, can those rules of water management putatively embedded in sharia be applied effectively to basins where Muslim nations share the water source with non-Muslim states (or between sunni and shi'i nations)? Can it be said that Islamic water law as a discrete set of rules even exists, or carried a little further, is there an international Islamic water law? These issues converge in the basic question of whether Islamic law has a direct, practical role to play in the management of international water basins in today’s world.

The management of transnational fresh water resources in accordance with any system of international law is beset by many difficulties. Perhaps the most formidable problem is that water is always foremost an international hydro-political issue because most rivers and ground water systems are not usually coterminous with national borders and cannot naturally be confined within the bounds of a single nation. The resulting problems of international hydro-politics raise serious issues for both Western and Islamic systems of law. Principle among them is the question of whether the two legal systems, one secular, the other religious, can be sufficiently harmonized or integrated to enable effective, basin-wide management of such waterways as the Indus and the Nile Rivers where the two systems of law co-exist? If the transcendent internationality of water gives precedence to the hydro-political dimensions of the issues in these (and other) river basins, then is there an effective role for law in the processes of international river management? Answers to these queries require a comparative grasp of the nature of Islamic law and Western (or general) international law and of what their jurisprudence has to say about the regulation and use of water together with some notion of the complexities of water management and sharing.

2. Complexities of international water management

Among the earth’s vital natural resources, only flowing fresh water is used sequentially and in diverse ways by different communities, with long distances sometimes separating the first and last users. Often, such waterways involve peoples with distinct values, beliefs, languages, cultures, institutions, laws, and attitudes toward water who must share the same watercourse. Moreover, each river basin and groundwater source is unique in its hydro-geological characteristics. Consequently, all these variables are shaped in large part by the physical, quantitative, and qualitative nature of the water resource itself and its environmental setting—factors that do not lend themselves to easy, large, or quick changes from the established norms of usage.

Since the advent of kingdoms and nation states, these characteristics have caused water to become a complex international resource. Most of the world’s watercourses are now international or transboundary; that is, they flow across the borders of two or more sovereign nations, or constitute an international boundary between or among two or more states. Some rivers such as the Tigris and the Jordan are both. Historically, whenever communities have had to share water, there have been disputes over how the water is to be divided, managed, and used. The potential for conflict has tended to rise in accordance with the nature and intensity of the quarrel and the power ratios involved.
If there are to be long-term solutions to problems of ownership, equity, usage, distribution, and management of water among nations that share an international water source—including those within the Islamic world—and if conflict is to be avoided or managed, there must exist a strong framework of international law within which hydro-political problems can be resolved. In the absence of a matrix of law and its institutions, water issues tend to be settled by power relationships (that are prone to change over time) and to create persistent conditions for conflict. Without law, the management of transboundary waters remains unsettled and subject to revision whenever power relationships change.

3. The nature of customary international law of transnational rivers

Generally speaking, law in the simplest sense is based on customs and traditions rather than written codes. Because received customs represent the collective norms of the group and contain rules of behavior considered essential to the well being of the community, societies tend to feel bound to observe them, (Lloyd, 1966, pp. 201–202). Some 75 years ago, an English law professor suggested an analogy that makes the development of customary international law clear (Cobbet, 1922, at 1:5). He posited a field between two villages with no connecting road across it. Initially, he argued, the villagers who wanted to get from one village to the other would take random routes, but eventually, for a variety of reasons, they would settle on a particular path, which, with use, would become a road. In time, all would agree, without having a sense of when the agreement was reached that the road was the only acceptable way to travel between the villages. Anyone who attempted to traverse the field by another route would be treated as a trespasser at which moment there would exist a legal, not merely a factual claim.

In the modern era, customary Western international law has arisen from the practices of states when those practices are undertaken out of a sense of legal obligation (the opinio juris) (Brierly, 1963, p. 60; Brownlie, 1990, p. 4; D’Amato, 1971; Tunkin, 1974, pp. 89–203; Villiger, 1997). References to law connect a customary practice to a sense of legitimacy, and thus constitute the practice as law. This is particularly true if the states involved reach a consensus, often found through the exchange of diplomatic notes, about what each state has a legal right to do in the circumstances at hand. A formal construction of where customary law stands in relation to general international law is found in Article 38 of the Statute of the International Court of Justice (1945) (the World Court) that identifies four principal sources of international law, including customary international law. The sources are international agreements, customary rules of international law, general legal principles, and (secondarily) generally accepted opinions of jurists and scholars.

Customary international law has a bearing on almost all aspects of the management and use of international watercourses, including certain basic legal principles that have evolved from the sharing of rivers. Customary international law empowers international actors by legitimating their claims while also limiting the claims they are permitted to make (McDougal & Schlei, 1955). Relevant state practices can be found in a consistent set of treaties or other international agreements, in decisions reflected in votes of international assemblies, decisions by international courts or international arbitrators, or in the unilateral acts of states. Even unratiﬁed agreements might help demonstrate the emergence of a binding custom. Proving that these practices arise
from a sense of legal obligation rather than from mere expedience is often more difficult. Formal statements made in connection with carrying out the practice are often inconclusive. As a result, international decision-makers frequently turn to the writings of well-respected scholars of international law to find evidence of such intent (such scholars are termed “the most highly qualified publicists” in the Statute of the International Court of Justice, art. 38(1)(d)). Strictly speaking, such opinions are not a source of law, but rather function as evidence of what the law is—whether found in conventions, customs, or general principles.

4. Basic principles of western customary international water law

Principles of customary international law arise from settled patterns of state behavior that give rise to strongly held expectations that eventually crystallize as rules of customary international law. By and large, violations of the rules have been the exception, though the exceptions have sometimes been highly significant. There are sanctions that may be taken against nations that violate international law, but the means for applying them are often ineffectual—even with approval by the UN Security Council—particularly as regards powerful nations with nuclear arsenals.

Because of the general absence of a neutral enforcement mechanism, international law has nothing better to offer for sanctioning violations than the law of the vendetta (e.g. Bilder, 1982). As a result, customary international law has proven unable by itself to solve the problem of managing transnational water resources (Dellapenna, 1994b, pp. 72–90). Still, the pattern of state claim and counterclaim, and of state behavior intended to make effective such claims, remains consistent. The ultimate outcome, even in cases of strong power imbalances among the states sharing an international watercourse is, in general terms, entirely predictable (Berber, 1959; Bruhàcs, 1993; Elmusa, 1997; Godana, 1985; Teclaff, 1985; Schwebel, 1982).

All states agree that only riparian nations—states along or across or through which a watercourse flows—have any legal right, apart from a stipulated agreement, to use the water of a river. (International Law Commission Draft Articles 1994, art. 4) Beyond that point, however, the patterns of international claim and counterclaim of the basic legal principles diverge sharply according to the riparian status and power of the disputants.

States have generally expressed one or more claims based upon asserted principles that they claim govern as customary international water law:

1. “absolute territorial sovereignty”—a claim of the right to do whatever a state chooses with the water within its borders regardless of the effect on other riparian users who share the watercourse;
2. “absolute integrity of the water source”—a claim that upper riparian states can do nothing that adversely affects the quantity or quality of water flowing in the watercourse;
3. “equitable utilization” (or “restricted sovereignty”)—a claim under which each state recognizes the right of all riparian governments to use some of the water from a common source and the obligation to manage their uses in ways that do not interfere unreasonably with similar uses by their riparian neighbors;
Typically, the uppermost riparian state bases its claims on the principle of absolute territorial sovereignty (Berber, 1959, pp. 14–19, 77–78, 108; Bruhâcs, 1993, pp. 41–47; Godana, 1985, pp. 32–35; McCaffrey, 1996). A downstream state, on the other hand, generally invokes the principle of the absolute integrity of the river (Berber, 1959, pp. 19–22; Bruhâcs, 1993, pp. 43–47; Godana, 1985, pp. 38–40) The utter incompatibility of such claims guarantees that, juridically, neither principle will prevail in the end, although the process of trying to arrive at a solution might require decades. This has been the case among Turkey, Syria, and Iraq in the Tigris–Euphrates basins and among the riparian states along the Jordan River who have been making unresolved countervailing claims.

The common solution tends to be found in the concept of equitable utilization (Berber, 1959, pp. 11–14, 78–79; Bruhâcs, 1993, pp. 45–48; Godana, 1985, p. 40). States wedged along a river so as to be both upper and lower riparian relative to other states on the same river are often the first to embrace a theory of restricted sovereign rights (equitable utilization)—Syria, for example, is an upper riparian on the Orontes River (in Arabic Nahr al-Assi) in relation to Turkey and a lower riparian in relation to Lebanon. Under this principle, each state would recognize the right of all riparian states to use some water from a common source under the obligation to manage their uses so as not to interfere unreasonably with like uses in other riparian states.

States often allocate water under this concept according to some selected historic pattern of use, although occasionally some other more or less objective measure of need is advanced (population, area, arable land, etc.). In final analysis, the theory of equitable utilization/restricted sovereignty might constitute little more than the vague notion that each state is entitled to a “reasonable share” of the water.

5. Equitable utilization and no significant harm

The two most notable legal principles of international customary fresh water law—equitable utilization and no significant harm—emerged from efforts over the last four decades by the UN and other international professional legal organizations, such as the International Law Association (ILA), to synthesize a set of universal rules for the use, sharing, and management of international watercourses. As stated, equitable utilization, based on the concept that an international drainage basin is a coherent juridical, economic, and managerial unit, has now become the standard customary rule of international water law. This status has been confirmed by many treaties based on the concept, by international judicial and arbitrated awards, and by the near unanimous opinions of the most highly qualified legal publicists. The rule of no significant harm derives from the emerging body of international environmental law, but potentially has a broader reach.

Because these tandem concepts are now the fundamental rules applied in fresh water adjudication, and are also the legal principles most raised in comparative or analogous discourses dealing with Islamic and general international law, it is necessary to grasp not only their essence but the way in which they were drafted and the intent of the International Law Commission (ILC)
and its parent body, the UN. The ILC is an organ of the UN whose mission is to promote the “progressive codification of customary international law”.

The decisive act that made equitable utilization the premier working concept began with the efforts of the ILC when the ILC embraced the principle of equitable apportionment in article 5 of its Draft Articles on Non-Navigational Use of International Watercourses. The Draft Articles proposed that watercourse states were under certain obligations arising from the equitable utilization principle:

1. the water must be used in an equitable and reasonable manner;
2. use and development of international watercourses must be for the attainment of optimal utilization consistent with adequate protection of the watercourse;
3. equitable and reasonable participation in the use, development, and protection of a watercourse;
4. acceptance that such participation includes both the right to utilize the watercourse and the duty to protect and develop it cooperatively.

At the same time the ILC also embraced the “no harm rule” in article 7 of the Draft which stipulated: “Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States”. This proposition generated considerable controversy because it appeared to contradict the rule of equitable utilization and did not offer any empirical standards or measurements for what would constitute significant harm. (Bourne, 1992; Bruhàcs, 1993, pp. 142–143, 194–204, 217–220; Dellapenna, 1994a, pp. 38–42; Handl, 1992; McCaffrey, 1991; Okidi, 1992).

Subsequently, in 1994 the ILC completely revised Article 7. The new version specified that watercourse states would exercise “due diligence” in their use of the water to ensure that no significant harm to other watercourse states would ensue; but in instances where, despite the exercise of due diligence, significant harm was caused, then, in the absence of agreements to such use, there would be consultation with the state suffering harm. The consultation would cover the extent to which the use in dispute proved to be equitable and reasonable, taking into account the factors listed in Article 6, and the question of ad hoc adjustments in the watercourse use designed to mitigate the harm and, where appropriate, the issue of compensation.

The meaning of this substituted Article 7 was not altogether clear (Dellapenna, 1994b, pp. 84–85) However, there was no need to resolve these uncertainties as the UN General Assembly undertook to convert the Draft Articles into a United Nations Convention on the Non-Navigational Uses of International Watercourses. That process was completed when the Assembly approved the UN Convention on May 21, 1997, by a vote of 104-3 (United Nations, 1997). In the UN Convention, the Assembly, while making no material change to article 5, approved yet another new article 7 that made clear the subordination of the “no harm” rule to the rule of equitable utilization:

Article 7 (under the UN Convention Obligation Not to Cause Significant Harm)

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultation with the affected State, to eliminate or mitigate such harm, having due regard for the provisions of articles 5 and 6, and, where appropriate, to discuss the question of compensation.

The duty to take “all appropriate measures” seems to incorporate the standard of “due diligence”, but even if it does not, that duty is expressly limited in Section 2 by “due regard for the provisions of articles 5 and 6”. Articles 5 and 6 delineate equitable utilization. Section 2, then, as the United Nations’ final word on the question, subordinates the obligation to prevent harm to the rule of equitable utilization and thereby reinforces that principle as the primary rule of law in international fresh water litigation.

Should the UN Convention come into force (ratification by 35 nations are needed), it will unquestionably be the law governing internationally shared fresh waters at least among those states ratifying it. Furthermore, it would appear to be an accurate statement of international customary law as well.

The International Court of Justice confirmed this reading in its ruling on the Danube River Case later in 1997. The Court’s opinion referred twice to the rule of equitable utilization and did not mention the “no-harm” rule (International Court of Justice 1997, pp. 78, 85). The court’s failure even to mention the “no harm” rule, despite Hungary’s heavy reliance on it while pleading its case, only confirms that the rule of equitable utilization is primary. The avoidance of harm must be considered only in the context of analyzing whether a particular use or pattern of use is equitable and reasonable.

6. Equitability and proportionality

It would be useful at this juncture to elaborate briefly an important attribute of the equitable utilization concept: that of proportionality. This is a quality that is innate to the meaning of “equitable” (that which is fair and just) and may be one of the reasons why this principle has become the main legal standard for settling transboundary and international water disputes. When water is shared and allocated in an agreement based on the principle of equity, proportionality guides the specific arrangements. That is, each party (presumptively) receives water proportionate to real need based on such factors as demographics, economic development, the amount of arable land, and ability to utilize the water appropriately. While proportionality may not always be perfectly applied—power and other advantages frequently produce disproportion—proportionality strengthens equitable utilization in at least two fundamental ways: it makes for a greater degree of both perceived and real fairness, and it provides the flexibility essential for future change that stems from inevitable alterations in the factors that determine real need. The built-in flexibility of proportionality can make such changes a less quarrelsome and dangerous process and, simultaneously, promote cooperation.
7. The customary international law of groundwater

Groundwater makes up about 97 percent of the world’s fresh water apart from the polar ice caps and glaciers. Yet in contrast to the considerable state practice regarding the sharing of surface water resources, there has been remarkably little state practice regarding shared underground sources of water. This is hardly surprising because, before the spread of vertical turbine pumps after World War II, groundwater was a strictly local resource that could not be pumped in large enough volumes to affect users at any considerable distance. With the newer technologies, and with the exponential growth in demand for water during the last several decades, groundwater has emerged as a critical transnational resource. Moreover, in many parts of the world, most of the known groundwater resources have not yet been entirely or accurately mapped. Although groundwater has increasingly become the focus of disputes between nations, a consistent body of state practice has yet to emerge.

Perhaps for this reason, the UN Convention, like the Draft Articles, limits its coverage on groundwater to that groundwater which is tributary to, or shares a common terminus with, surface waters covered by the Articles. (UN Convention, art. 2(a); Draft Articles, art. 2(b)). As the hydrologic, economic, and engineering variables involved are essentially the same for surface and subsurface water sources, it would appear that the same principles would be applied to shared aquifers as are applied to shared rivers (Barberis, 1991; ILC Report, 1994, p. 326; Rodgers & Utton, 1987; Seoul Rules, 1986; Teclaff & Utton, 1981). A gathering of experts on the law of international fresh water recently confirmed this conclusion in a meeting at Bellagio, Italy, where they drafted a model treaty to assure the equitable utilization and management of internationally shared groundwater basins (Hayton & Utton, 1989). This issue is particularly important in the Jordan Valley and elsewhere in the Middle East (Benvenisti & Gvirtzman, 1993; Feitelson, 1996; Isaac & Shuval, 1994).

8. Case study: riparian position and law in the Nile basin

8.1. Background

The case of the Nile basin illustrates the major legal principles that underlie Western customary international water law. We may for our purposes disregard the six states that share the upper basin of the White Nile; activities there have little effect on the lower basin states mainly because of the Sudd, an enormous swamp choked with islands of vegetation. The three lower riparian states on the Nile—Ethiopia (on the Blue Nile), Sudan (on both), and Egypt (on the united Nile)—all suffer severe poverty and are in various stages of economic development in which water plays a vital role. Egypt, whose per capita GDP is US $630 per year is wealthier and more technically and militarily advanced than both Sudan and Ethiopia whose per capita GDP are, respectively, US $540 and US$ 120 per year. Each also has population growth rates of three percent or more per annum—growth rates that are unsustainable in relation to water and other resources.

The two major tributaries of the lower Nile—the Blue Nile and the Atbara—rise in Ethiopia and provide the impetus for the legendary floods of the Nile as it passes through Sudan to Egypt.
Egypt and Sudan bound themselves to specific allocations of Nile water in a 1959 treaty that gives Egypt 55,000 mcm/yr (million cubic meters per year) and Sudan 18,500 mcm/yr—a 3 to 1 ratio in favor of Egypt. Ethiopia is not a signatory to that treaty and is now attempting to undertake a significant economic and social development program that requires significantly more water consumption and that includes plans for increased agricultural production and the building of multi-purpose dams. Both Sudan and Egypt rely on the discharges from these two rivers, but Egypt views any upstream activity that diminishes the flow of the Nile with utmost alarm. Cairo has stated that if necessary, Egypt would resort to military action to ensure a flow that is adequate to its needs.

Without a common border, Egypt cannot easily pose a military threat to Ethiopia. Ethiopia, on the other hand, is simply too poor and too poorly organized to construct the dams and related infrastructure necessary to exploit the Blue Nile and the Atbara without outside financial and technical assistance (Kliot, 1994, pp. 67–69). Egypt has succeeded in exploiting its greater political influence to block or delay international financing of Ethiopian dams and related works. The three Nile states have been discussing their concerns over the past 10 years, and all 10 Nile basin states have been engaged in intense, but thus far inconclusive, discussions on the legal and related issues for the entire basin for about 5 years.

8.2. The legal issues

As part of this diplomatic program, the Egyptians have freely deployed legal arguments, particularly the so-called “no harm” rule in its stronger, more absolute, rendition as expressed in the 1991 version of the International Law Commission’s Draft Articles. Ultimately, the Egyptians claim an absolute right to the integrity of the river because of the priority of their use. (Ahmed, 1990; Dellapenna, 1996, pp. 243–244; Dellapenna, 1997, pp. 126–128; Fahmi, 1967; Godana, 1985, pp. 143–144; Hosni, 1961). Priority of use, while undoubtedly relevant to an equitable allocation of water among national communities, has never been treated as controlling in international law (Bruhács, 1993, pp. 132–40; Maluwa, 1992, pp. 30–33; Shuval, 1992, pp. 136–38, 141–142) Any other approach would negate the concept of equitable utilization that is now accepted as the controlling customary international law.

For priority in time (“historic use”) to override all other values, or even to dominate other values, would hardly be conducive to achieving the developmental equity proclaimed under various banners at the United Nations. To accord such priority to existing uses in the Nile Basin would condemn Ethiopia to remain impoverished and dependent on international food aid to stave off mass starvation, for the benefit of the relatively richer Egyptians and Sudanese. Similarly, in the Jordan Valley, this same approach would condemn the Palestinians to remain a colonial society utterly dependent on Israeli water largesse, and would leave the Jordanians only marginally better off.

The tension between protecting “historic rights” and providing for developmental equity can be made tractable only if the water is cooperatively managed basin-wide by the several national communities in such ways as to assure equitable participation in the benefits derived from the water by all communities sharing the basin. Customary international law, in its somewhat primitive state of development, cannot by itself resolve the water management problems of the Middle East region. While in some circumstances the uncertainty of legal right can induce
cooperation among those sharing a resource, it can also promote severe conflict (Axelrod, 1984; Bendor, 1993; Ellickson, 1991; Radinsky, 1994; Young, 1989).

In the Nile basin, as in the other major Middle Eastern river systems, the partitioning of the waters does not offer a solution. The complications of hydro-geology, hydro-politics, and scarcity militate against any one-dimensional approach to a solution. To create the sort of regime necessary to allay conflict and optimize the use and preservation of the resource will require a new treaty, one that includes all 10 of the river’s basin states, that creates appropriate representative basin-wide institutions, and that has the clout to enforce its mandates. Unfortunately, the international political and legal scene provides few exemplary models for the equitable management of cross-boundary watercourses. If the political will that is essential to devising and implementing a cooperative regulatory regime existed, however, putting one in place might be easier than generally supposed owing largely to the region’s common cultural and legal traditions, particularly as they relate to water and to the compelling force of widespread water scarcity.

9. Islam and international water law


Islamic jurisprudence (usul al-fiqh) has had to address the same, no less complex issues of the ownership, custom, usage, and regulation of shared water resources as its Western counterpart. While this fact has produced many similarities of approach and principle, the likenesses are, in actuality, offset by very different legal cultures. The semblance may, at least in part, be explained axiomatically: social institutions and systems, legal or otherwise, in every culture will always have certain commonalities rooted in the constancy of human behavior and distinguished by beliefs and values sculpted by historical experience.

A Muslim society may be defined as one that adheres to sharia. Water in sharia has been, historically, a central issue in all Muslim societies. The significance of water in Islamic legal thought is disclosed in the double meaning that the word sharia carries. In its most common sense, sharia signifies the moral path that Muslims must pursue to attain salvation. At the same time, in an older and more pointed sense, it denotes access to the source of pure drinking water that must be preserved for humans—it is “the place from which one descends to water and is the law of water”. (Ibn Manzur, 1959, v. 3, 175) Even today, (on the authority of our colleague Professor Farhat Ziadeh), older Palestinians use the word in this sense in their common parlance: Nizil 'alil sharia, which means, when used this way “He went down to the [Jordan] River”.

Specific hard-and-fast rules of Islamic law are relatively few. Sharia is constituted chiefly of general moral guidelines with the consequence that where water issues are concerned, 'urf (custom), reasoning (ijtihad), and consensus (ijma') are applied more than strict doctrine. Although customary laws differ from one Muslim society to the next, and though there are differences between Muslim and Western customary laws, they do share certain common traits. The congruities that pertain to water in both systems of jurisprudence reflect not only the common ways in which all of humankind uses water, but the pre-Islamic amalgam of knowledge and rules that Muslims synthesized, Islamicized, and made a part of their own legal culture. (Wilkinson, 1909, pp. 64–67; Bosworth et al., EI² Ma’, pp. 860–861, 878).
Islamic customary law (’urf) carries the same meaning as customary law in Western jurisprudence; it derives from the same kinds of sources—customs and traditions—and displays comparable strengths and weaknesses (Ziadeh, 1959). Customary water law is of fundamental importance to sharia and Western legal systems alike. Another commonality is that both systems are positive law, based in evidentiary proof and sworn testimony. In both legal traditions, rules governing water originate chiefly from those appertaining to land ownership and use. Both systems share, to a degree, the concepts of mubah/res communis, i.e., free, unencumbered or ownerless property which belongs to the community. Great importance is attached to honoring treaties and other agreements among nations in both general international law and sharia.

In both cultures, it is generally assumed that customary norms underlie customary laws, but this assumption confronts each with the same set of legal problems: Since such norms are not codified (and are always dynamic and imprecise), it is difficult to prove their existence jurisprudentially, especially in international customary law. This is particularly true as regards watercourse systems, each of which is unique in some way. This means customary law can be and often is inconsistent or applied idiosyncratically. Hence, in general international law, resort must be made to secondary sources such as state and communal practices, social behavior, and the empirical studies of recognized experts, while in Islamic law, first recourse is, hypothetically, to the Quran, the primary source of all law, and only then to such secondary sources as the hadith (sayings and traditions of the Prophet), the sunna (sayings and actions of the Prophet), to precedents, and to reasoning and consensus (ijtihad and ijma’). In practice, however, after about the 15th century Islamic jurisprudence was increasingly built up from the legal rulings (fatwas) of practicing Muslim legists and in the modern era, Islamic law is found almost exclusively in the writings of Muslim jurists and only in an ancillary way, depending on the specific area of the law to be applied, derived from references to the Quran, sunna, and hadith.  

This situation has often led to instances of creative misinterpretation. For example, under sharia, since water belongs to God and is His gift to humankind, it cannot be bought and sold as a commodity. In the present era, there have been some privileged entrepreneurs in Muslim nations who have nevertheless sold water for profit, claiming they were not selling water but energy (this matter is developed further below).

Beyond the general characteristics of ’urf, it is worth noting certain other qualities of Islamic law that have a bearing on water issues in the international arena: Sharia is not a national (or in some legal parlance, municipal) law in the sense that American or European codes are. Historically, Islamic law has been applied regionally and in modern times has in various ways been incorporated into secular national codes of law. Because there are four major sunni schools of sharia (madhahib, pl.; madhhab, sing.)that are employed diversely in different parts of the Islamic world, there have always been wide variations in the interpretation and application of Islamic law reflecting the different schools and even within the same school as practiced in different Muslim nations. While shia Islam does not technically adhere to the sunni schools of law, Islamic law under shia’ism is very similar to its sunni counterpart. In Iran, for example, a form of sharia called Ja’fri is practiced. Those sunni Muslim nations that practice sharia do so

---

1 On this latter point and on several others concerning the nature and historical development of sharia, we are indebted to our colleagues Dr. Joseph Lowry and Professor George Makdisi for their guidance and assistance.
according to one or a combination of the schools (madhahib); a single madhhab is typical, but when there is a mix of schools, one tends to be dominant.

In Islam, because law is divine in origin, it cannot be improved upon and therefore, hypothetically, it does not need to be changed. But in human society, with all its human imperfections, including an inability to know perfectly (in the absence of a true prophet) what God’s rulings and revelations mean, there must be an instrumentality for novelty and modernity if stagnation is to be avoided. *Usul al-fiqh*—jurisprudence, the process of law with a vision of what the rule of law requires in a given instance—is the chief mechanism by which Islamic law adjusts to the times, just as in Western law. It is a generally accepted principle of *usul al-fiqh* that one can neither object to nor deny a change in law necessitated by changing times. (The political counterpart of *usul al-fiqh* is the concept *maslaha*, actions by the ruling authority that appear to have dubious Islamic credentials but may be permitted if they are for the good of the Muslim community, e.g. the modernizing reforms of the Ottoman sultans in the 19th century.)

### 9.2. Islamic water law

Islamic water law is, in the main, ‘urf. Conversely, ‘urf constitutes the main source of Islamic water law.

All the major schools of Islamic law accept the notion that scarcity creates special individual and communal conditions and relationships with respect to water. Water appears in the Quran without a clear legal character or sanctions. Rather, the emphasis is on water as the source of life and on reminding the Muslim adherent that water is a gift from God, not a mundane thing, and that humans are stewards (khulafa) of that life-giving resource: *Have not the unbelievers then beheld that the heavens and the earth were a mass all sewn up, and then We unstitched them and of water fashioned every living thing… And you see the earth barren and lifeless but when we send down water upon it, it thrills and swells and puts forth every joyous kind of growth… We send down pure water from the sky, that We may thereby give life to dead land and provide drink for what We have created…* The Traditions (*hadith*) of the Prophet Muhammad offer no more precise legal language than the Quran, as for example: *He who withholds water in order to deny the use of pasture, God withholds from him His mercy on the Day of Resurrection,* [and] *Excess in the use of water is forbidden, even if you have the resources of a whole river,* [and] *The surplus of a well must not be withheld* (Sura xxi:30, Sura 22:50, and Sura 25:48–49 in Arberry, 1980, Vol. II; Al-Mawardi, 1983, 158; Adam, 1967; WAJ, Jordan, RSS, n.d).

Muslim jurists have consistently treated water, land, and crops as indivisible, and water rights have generally been restricted to amounts considered to be adequate for a given crop area. This practice is based on one of the few stipulations the Prophet is said to have articulated in a *hadith* concerning water: The sum of water to be drawn was not to exceed that which is needed to cover a cultivated plot to two ankle’s depth (literally *qa‘bayn* or “two heels”). In the Mahzuz Valley dispute, the Prophet decreed that “water over the depth of two ankles cannot be withheld by the owner of the higher [ground] from the owner of the lower lands”. The Prophet also ruled in the case of the Mahzuz torrent that palm tree owners had a right to water to the depth of two heels, and that sowers have a right to water as high as two straps of the sandal, after which the water is sent to those lower down (Mawardi, 1983, p. 156; Ibn Qudama, 1969, v. 5, pp. 42–433; Ziadeh, 1993, pp. 3–12; Adam, 1967, pp. 71–76; Al-Farra, 1938, pp. 198–205).
These provisions hypothetically fixed the basic legal principle for allocating water in Islamic law. By and large, the relatively few hadith concerning water appertain to rights of ownership of wells and springs, to rights of access to water, the obligation to share water, and prohibitions on selling water. Although for purposes of use, allocation, and adjudication, water is segregated according to source (river, well, and spring water, and further into rain, snow, and hail). It is further divided by use: pure (taher) for both religious and mundane purposes, clean (tahur) for drinking, cooking, irrigation, etc., and polluted (mutanajjis) which is unfit for either religious or mundane activities. In practice, however, sharia recognizes only two broad categories of water within which all others are comprehended: owned and not owned (Ibn Qudama, 1969).

Most Muslim jurists consider water generally to be beyond private ownership—mubah or res nullius—that is, a substance which cannot be owned unless it is taken in full possession, such as water contained in a jar or a privately dug well—but only the water in the well, not its source. This position is based on the belief that water originates with God and, in principle, belongs to His community; thus, ownership of water in any form will always be qualified. If water is claimed by the state, the ruler is considered to hold it in trust for the community or nation because in a hadith the Prophet is said to have declared that “…Muslims [humankind] are co-owners in three things: water, fire, and pasture.” (Ibn Qudama, 1969, Vol. 4, p. 61; al-Rahbi, 1973, pp. 636–638, 646–648; al-Nabban, 1970, p. 247; Al-Farra, 1938, pp. 198–205). No person or ruler may appropriate a river or sell, rent, or lease its water, nor may he tax such a resource; only a product that results from its use may be subject to a levy by the state. This latter statement must be taken hypothetically as few, if any, nations, including Muslim states, allow the use of water without some kind of tariff, whatever it is labeled.

One school of Muslim law, the Maliki, is exceptional in that it extends to individuals broad, firm rights of ownership and with them, the right to refuse “the use of such waters to any or every one; or he may consent to their sale to anyone he pleases at his discretion, just as if the water was in his actual possession, as in a pot, a jar, a water bag, or bowl”. These rights end if the denial of water for any reason might result in the death of a person: “In such circumstances, water must be abundantly provided without payment, and all ulterior claims are forbidden.” (Ibn Qudama, 1969, vol. 4, p. 61; Ruxton, 1916, pp. 255–256; al-Rahbi, 1973, p. 651; Adam, 1967, pp. 75–77). The Maliki position could be roughly analogous to the Western international legal concept of absolute sovereignty regarding state ownership of a water source. The other schools of Islamic law have rejected or sharply limited any right of sale of water.

According to tradition, “a man of the desert” (i.e. a Bedouin) asked Muhammad, “Oh Prophet! What is a thing that is not legal to withhold?” and the Prophet answered, “It is not permitted to withhold water and salt”. By the same principle, water for irrigation must be accorded to a neighbor who for any reason has lost his water supply and whose crops are in danger of being fatally parched. In fact, there are hadith that permit the use of arms if water is denied unjustly or if refusal to its access causes a threat to life: “If I were not to find a passage for the water but on your belly I would use it!”—thus ʿUmar b. al-Khattab, Companion of the Prophet and second Caliph. On another occasion when ʿUmar was told of a tribe that refused access to water to people who needed it, he is said by tradition to have asked them, “Why did you not use arms against them?” (al-Rahbi, 1973, p. 651; Yahya Ben Adam, 1967, pp. 75–77).
9.3. Water and the enemies of Islam

It is interesting that the rules governing who is to be given water in circumstances of need appear to be relatively few and not, in all cases, precise or specific regarding an enemy, most particularly a non-Muslim enemy. Perhaps the clearest statements on this matter are made in those parts of sharia dealing with *siyar* (military campaigns).

Salah ad-din used water as a weapon more than once while fighting the Crusaders. For example, when taking back Jerusalem from the Crusaders he seized the aqueducts that supplied the city and severed the water supply; and at the battle of the Horns of Hattin he took control of the only fresh water springs in the area of hostilities and waited for several days before engaging the “thirst-maddened infidels”. However, in both instances, when the Crusaders surrendered they were granted *aman* (safe conduct or security) by Salah ad-din and were given water lest they perish. The strategic use of water in this way was at least tacitly permitted by sharia and more explicitly by the *hadith* (al-Shaybani (1958–1960b), particularly the commentary of Muhammad al-Sarakshi, Munajjid edition; and Ziadeh, personal communication).

During their three centuries of hegemony over southeastern Europe, the Ottomans adhered to the rules of *aman* in warfare with relative consistency. Accordingly, an enemy that surrendered on terms was given *aman* and therefore had to be allowed access to water; to inflict any further punishment without just cause would have been a serious breach of sharia. If a town and its surrounding neighborhood, for example, were under siege and surrendered on conditions, then not only was drinking water made available, but so too was water for animals, domestic purposes, and irrigation.

Some schools of law (particularly Shafīʿi) consider the Abode of Islam—territories where sharia prevails—an abode of *haram* (refuge or asylum). Thus, should an “enemy”, a non-Muslim in this case, enter the abode of Islam without an intent of doing harm but having failed to obtain a grant of *aman* (which is equivalent to granting refuge or asylum) he falls under the protection of *haram*. Therefore, hypothetically, he cannot be harmed. On the other hand, if he refuses to convert to Islam, he is to be shunned and denied food as an incentive for him to leave. However, he cannot be deprived of water or pasture because, it will be recalled, the Prophet said that Allah made True Believers co-trustees of pasture, water, and fire. The point is underscored by the further juridical reasoning that if one were given the right to deny an enemy water even though he were under *aman*, that would be tantamount granting a license to kill him—which would contradict the principle of *haram* (al-Shaybani (1958–1960a), pp. 366–368; supplemented by Ziadeh in a personal communication; it was Professor Ziadeh who found the key passages in al-Shaybani that were critical to solving this problem).

Finally, in this matter, given the general thrust of the Prophet’s commandments and moral guidelines as revealed in accepted, validated sources and their exegeses, particularly the dictum that no one may be denied water if survival is at stake, it would be safe to assume by implication that enemies are included under that judgement. The Quran and *hadith* are clear that gratuitous cruelty toward anyone is forbidden. It follows that denial of water to one in dire need falls under that dictum and would constitute an act of moral self-degradation.

Nevertheless, human nature being what it is, despite the religious, legal, and ethical requirements concerning the humane treatment of those in need of water, these rules have been in practice violated many times, chiefly, when in warfare *aman* was offered to an enemy and was
refused, in instances of local disputes over water, territorial tribal feuds over wells and oases, and on many other occasions.

10. Principles and priorities: the workings of water-related sharia

When the foregoing qualities of water-related sharia, *hadith*, and customs are combined with other characteristics, a profile of Islamic water law emerges that is interesting not least for parallels with certain basic concepts of Western water law (in addition to those already discussed). Islamic water law is largely customary, highly pragmatic, and supple in its application of moral principles as guidelines: Persons may not be denied water that is necessary for their survival or livelihood, and while animals have clear legal rights to water, humans take precedence in use. Drinking water for man and beast and water for domestic uses take priority over agricultural needs.

Once all drinking and domestic requirements of the community are satisfied, sharia recognized a right to irrigate land—*shib* (Maktari, 1971, pp. 23–30; Mallat, 1995, p. 129; Norvelle, 1974, pp. 30–35). At least some Muslim regions practiced a rather simplistic view of precedence in irrigation, giving upstream irrigators antecedence over downstream irrigators only because the water reached those upstream first, not because their use had begun any earlier (Maktari, 1971, pp. 27–28, 37–38, 41–43; Norvelle, 1980, pp. 30, 33–35, 46; Varisco, 1983, pp. 369–370, 376; Wilkinson, 1990, p. 61). This attitude might simply express the reality of a hot, dry climate where evaporation and losses can be enormous. In such a setting use closer to the source is considerably more productive than use farther removed. But when new societies are settled upstream, after the establishment of downstream communities, the usage rights of the new community are subject to adjudication and their withdrawals must not adversely affect historic (prior) rights (Varisco, 1983, p. 369). Ultimately, sharia generally deals with problems of later users interfering with earlier users in terms that Western common law would describe as private nuisance (Maktari, 1971, pp. 14–15; Norvelle, 1980, pp. 45–46, 55–58, 80–81, 85–88; H. Mallat, 1995, p. 151). Although sharia literature devotes attention to the duties of irrigators regarding the maintenance of irrigation ditches and admonishes against wasting water for the benefit of downstream users, it is not so clear about an obligation to maintain the quality of water for those same consumers.

The hoarding of surplus water, even if all of the needs of the community are met, is forbidden. Water is considered to be an overriding community interest, and Islamic law deems as immoral its treatment as a product for commerce or speculation. Surplus water was shared according to customary standards or by agreement or even by casting lots (Adam, 1967, pp. 71–76; Maktari, 1971, pp. 14–16, 27–28, 36–37; Norvelle, 1980, pp. 33, 37–43, 77–80; Varisco, 1983, pp. 370–373). Generally, in the appropriation of water, the principle of proportionality is stressed (as it often is in the West) (Norvelle, 1974, Chapter II; Ibn Qudama, 1969, vol. 4, pp. 61–63).

Some explain the apparent preference under sharia for upstream users as based upon the principle of prior appropriation coupled with a presumption that the sequence in which a watercourse basin is settled is from upstream to downstream. The occupation of a basin, however, usually moves in the opposite direction. Historically, settlement in most river basins, particularly those that involve heavy off-stream use of water, normally proceeds from the lower end of the
basin because it tends to be more level, which affords easier agricultural development and urbanization than more elevated upstream regions. Thus, priority in utilization as a principle of law has usually favored a basin’s downstream inhabitants on the basis of historical usage rather than the upstream users. Of course, the upstream consumers are likely to be in a position to control the source of the water, which gives them a special advantage. By and large, Islamic law, as adumbrated in the hadith, reflects the Prophet’s efforts to protect the smaller, less powerful users of land and water.

As an addendum to this profile, it must be pointed out that sharia rules governing the appropriation of water originate in those rules that regulate the appropriation of land, to wit, appropriation and use must derive from an input of labor, e.g., building an irrigation canal. Only the fruit of labor matters. It is the irrigation channel and the irrigated field and its crop that may be owned in inalienable right (mulk) by virtue of the labor that created them, not the water that flows through the one into the other. Water is the product of Allah’s creation and belongs to Him, not to humankind, and therefore can be used only transitorily in accordance with sharia and ‘urf. (Norvelle, 1974; Ibn Qudama, 1969; Ziadeh, 1979).

11. Sharia and the ascendancy of western international law in the modern age

The precepts of sharia regulated water issues in most of the Islamic world for about 1300 years. In the Middle East, the traditional conventions of Muslim water law were carried over into the modern era and systemized in the Ottoman Civil Code (Mecele or Majalla) and the Land Laws of 1858 following the Reform Edict of 1856, whereby water and land rights were classified and registered in official cadasters. The Mecele and the Land Laws became residual law for several independent Middle Eastern nations that emerged as a consequence of the partition of the Ottoman Empire following World War I, namely, Jordan, Palestine, Syria, Lebanon, and Iraq.

Under the impact of European colonialism and the mandate regimes, the sharia system of water law in most Muslim nations slowly—but not entirely—yielded to European models. Certain fundamental sharia concepts pertaining to water—concepts that had important implications for the management of what were to become international water resources—remained intact, particularly that water is free community property (mubah), and that communal rights (musha’i) are protected. (Mallat, 1995, pp. 4–6) As indicated, although sharia has been widely superceded by westernized codes of law in the last century and a half, it is still applied in many Islamic nations. In some instances, the spirit of traditional Islamic water law has been incorporated into more recently adopted secular legal codes.

Nevertheless, the membership of all Muslim nations in the United Nations attests to the supremacy of Western law in the international arena. Muslim nations, even those where sharia is the exclusive law, have embraced the secular principles of the UN Charter, have signed and ratified UN declarations, conventions, and treaties, including those that created the World Court, and have conducted their foreign relations in accordance with the jurisprudence of general international law.
12. The two faces of law in the Islamic world

Like Janus, the mythical guardian deity of Rome, law in the Islamic world has always had two faces, one religious (sharia) the other secular (kanun). Both, visages and their historical relation to one another, must be noted for an understanding of how the actual conduct of government—and therefore management of affairs, including water—functions under an Islamic system.

An examination of the first facet begins with a brief glance at two doctrinal aspects of Islamic law that concern individual and collective obligations, doctrines that theoretically override all of those aforementioned similarities between ‘urf and general international customary law and that also irrevocably segregate the two legal systems. In a strictly Muslim context, these doctrinal factors would presumably have a bearing on current transnational water management issues.

The fundamental mission of Islam is to ensure the spiritual salvation of each individual Muslim because only the individual is held to be capable of salvation. Therefore, it has always been, hypothetically, the individual who is placed under special moral obligations (fard ‘ayn) which, when fulfilled, were intended to secure the soul against damnation on the day of judgement. Consequently, collective state, governmental and societal obligations (fard kifaya)—such as defending the abode of Islam against heresy and physical dangers and conducting foreign relations—have been thought to serve the purpose of creating and maintaining conditions that would make possible and ensure that the Muslim citizen performed his individual obligations to God (‘ibada), the fulfillment of which is considered essential to salvation. This, in Islamic political theory, is the primary function of government.

From the inception of Islam, however, sharia in its various forms has never been the exclusive system of law applied in Muslim societies. There has always been a parallel body of secular law, kanun (sometimes referred to as sultanic law), with its own mazalim or administrative courts (as opposed to qadi or sharia courts) by which Muslim governments largely conducted their day-to-day business. Indeed, in the Islamic legal culture centered as it is on the spiritual salvation of the individual, and giving secondary standing to institutions and even the state itself, it is highly doubtful that the greatest Muslim empires could have been created and maintained without a system of kanun.

It may be argued that kanun (along with the principle of maslaha) made possible the transition from sharia to the adoption of Western style codes of law in the Islamic world and thus to the secularization and modernization of traditional Muslim societies. Although secular law, in time, predominated in the administration of the affairs of state, sharia never lost its moral hold on the Islamic community. In sharia states, acts of kanun could not violate the prescriptions of sharia and authorities had always (and must in the present) to take care not to outrage the Muslim sentiments of the community as embodied in sharia.

It must be noted that in the course of the 19 century in some of the leading Muslim nations, sharia and mazalim courts, under the impact of the rapid modernization and secularization of society and institutions, underwent certain evolutionary changes. In Egypt, particularly, it appears that sharia (or qadi) courts came increasingly to be used as civil courts hearing private claims and the mazalim or administrative courts tended to exercise criminal jurisdiction in the name of public order because the rules of evidence in sharia courts made conviction too difficult. (Peters, 1997, vol. 4(1), pp. 70–90; Fahmy, 1999, vol. 6(1), pp. 224–271; supplemented by personal communication from Joseph Lowery).
The point of this discussion is that even though before the middle of the 19 century religious
laws and sensibilities were integral to the conduct of Islam’s international relations, the doctrinal
nature of sharia seriously limits its applicability and force as an instrument of foreign relations
and in political, economic, or managerial affairs in today’s intricate, interdependent, secular
global society. Historically, sharia was able to serve successfully as the framework for relations
between the Islamic and non-Islamic worlds only when an Islamic state such as the Ottoman
Empire had the power to impose its will. Since international water law is not a theological issue of
individual believers but distinctly one of collective inter-state relations, it would seem that sharia
is ill suited to deal with the complexities of contemporary transnational water and environmental
issues.

Some Muslim legal authorities have put forward an exception to this assumption—albeit a
hypothetical one. The exception is based on the concept of the priority of domestic law. If
the laws of a nation, in this case a sharia state, decree that domestic law has higher standing
than international treaty obligations, then sharia could conceivably have relevance and
could be applied in water-related international disputes. For that to happen, the case under
adjudication would necessarily involve only sharia states that mutually subscribe to the
priority of domestic law principle, and agree that a particular school (or combination
of schools) of Islamic law would be applied, not to mention the panel of judges (qadis) and the
venue of the proceedings. Were all of those requirements satisfied and still the case were not
settled, and if it were to be resolved by means of law rather than conflict, then recourse to
arbitration or mediation by other Muslim parties would probably be the only expedient consistent
with sharia.

But that act in itself would reveal the basic flaw in the legal principal and the severe limitations
of sharia in today’s international legal system. The legal culture of sharia has never produced an
international legal institution recognized by all sharia states, let alone all Muslim nations,
comparable to the International Court of Justice in general international law. Nor should one
expect a Muslim version of such an institution, given the primary concern of sharia with the moral
behavior and spiritual health of the individual Muslim. The obvious defects of the domestic
priority approach make it unworkable.

While the great majority of Muslim nations have enacted or decreed Western-model codes of
law, and although the doctrinal nature of sharia restricts its efficacy as a kind of general
international law, sharia cannot be entirely ignored. Though in today’s world sharia is not in any
direct, practical sense the governing word in the management and disposal of international water
systems—even among Muslim nations—it does lie at the heart of the Islamic world’s legal culture.
Consequently, it carries some relevance to these issues. Sharia provides the basis for
understanding, say, the attitudes of Muslim farmers (and legislators representing Islamic-oriented
parties) toward rights and access to water, whether water should be treated as an economic good
or be taxed, or who has prior rights or ownership, how much may be given to downstream users,
what are the limitations of use, etc. These are all matters that bear on international water law,
particularly in cases involving a shared transnational river basin. Furthermore, sharia should be
paid attention in these matters, at the very least as context for understanding how the system may,
in subtle but important ways, influence both the domestic management of water and international
hydro-political agreements in the Islamic world. It is conceivable that, in Muslim nations,
consistent, culturally sensitive water education and legislation at the local level could have a
positive cumulative effect on larger international hydro-political practices at regional levels—if the local and general rules were consonant (on local Islamic water management see Amery, 2001; and Abderrahman, 2000).

13. Can there be confluence?

Because the concept of a law of nations is embodied in sharia, Western and Islamic understanding of that notion have been in harmony since the 19th century. Nevertheless, it cannot be said that sharia is or can be formally or institutionally codified as “international” in the way that there is a separate body of international law in the West that is designated and recognized as such and to which the international community of nations adheres (Naff, 1963, 1984; Naff & Matson, 1984). The basic reasons for this circumstance are clear. In order to transform Islamic law into an effective, discrete, systematized body of general international law, sharia would first have to undergo basic changes in its core mission regarding the moral salvation of the individual believer, that is, at the very least shift the emphasis away from that focus to the collective salvation of the community of believers (umma).

As sharia is considered to be divinely given, it follows that a credible divine intervention would be necessary to alter its nature, purpose, and institutions if such fundamental change were to be accepted by the Islamic world as legitimate. Reinterpretation by clerics, however renowned, would not suffice. Furthermore, despite the universality of Islam’s theological message, there is the undeniable fact that sharia lacks jurisdictional standing where other religious systems or secularism obtain, that is, among cultures of “unbelievers”.

When sharia is taken on its own sanctified terms, which is the only appropriate approach, the reasons adduced against the notion that Islamic law constitutes a separate body of international law do not make sharia intrinsically inferior to Western law—only different, despite similarities. Perhaps, as one authority observes, “…general international law and Islamic international law often speak to different questions rather than provide different answers to the same questions”. (Westbrook, 1983).

In the end, the prospect that sharia will be or can be widely applied as an international regulatory instrument in the adjudication of transnational water issues is virtually nil. This proposition is reinforced by the fact that no Muslim nations practice sharia water law internationally. Islamic law, like its Western counterpart, has yet to demonstrate that it can effectively cut through all the varied issues surrounding all the planet’s fresh surface and ground water systems and fashion a workable universal water code for all cultures and conditions irrespective of religious beliefs or value systems.

Other perplexing questions arise as much from the nature and complexities of contemporary international water problems as from the nature of Islamic law. For example, jurists in any system must face the problem that the prevailing hydrological and other watercourse conditions, together with individual state needs, are so distinctive from basin to basin and among nations. Thus, even though the rules of law may be uniform in their intent, the uses made of them will often diverge widely from state to state.
14. Does it matter?

If Islamic and Western international water law are so much more different in essential ways than they are similar, or if general international law continues to be overriding, what are the implications for issues of transnational water management in the Islamic world? In most respects, they are not very consequential.

There has long been a general acceptance among Muslim nations that the established world order is secular and they do not have the power to change that reality even if they would have it otherwise, an acceptance buttressed by their experience in using the secular institutions of the international system. Furthermore, riparian governments that make contentious claims over shared waters infrequently (relative to the number of hydro-political quarrels) take their dispute to the International Court of Justice. More often than not, power—usually together with some kind of negotiation, mediation, or arbitration—is the determining factor. In this respect, the Middle East is prototypical. Such is the case in every major Middle Eastern river system, as will be seen shortly.

International law as an instrument of regulation in international fresh water issues is at present inconclusive and weak, or as one expert put the matter: “…The longstanding disjunction between the existing sophisticated body of doctrine and inadequate institutional means for its application continues to characterize international law”. (Dellapenna, 1984, p. 158). This discontinuity has allowed riparian water issues to be manipulated as part of the power relationships not only in the realm of Islam, but in other world regions as well.

At bottom, the controlling element in this matter is that today all Muslim nations have joined the UN and conduct their relations with the non-Muslim world in accordance with the accepted norms of general international law and invoke that law in their disputes with one another and with non-Islamic states. This generalization does not contradict the fact that each nation approaches questions of international law from the perspective of the beliefs, values, customs, and attitudes that obtain in its society.

Thus, when the United States ratified the International Covenant on Civil and Political Rights, it did so with reservations regarding “hate speech” and abortion, refusing to accept explicit language in the Covenant that prohibits propaganda in favor of war, racism, or religious bigotry because of the free speech article of the Constitution, or the implications of the right to life provisions of the Covenant. Similarly, when Saudi Arabia ratified the Convention against Torture, it added reservations designed to protect certain aspects of Sharia. Specifically, Saudi Arabia rejected the oversight of the UN Committee on Torture, and declined to accept the Convention’s limitations on corporal punishment (amputations or flogging). While the precise legal effect of such reservations remain open to debate, neither nation presented its reservations as a rejection of general international law but rather as the implementation of the privilege accorded by general international law to tailor the ratification of multilateral conventions to the particular situation of the ratifying state.

As regards water issues, in all of the disputes involving the major international river systems in the Middle East, the Tigris, Euphrates, Jordan, and Nile Rivers, none of the Muslim nations involved has as yet invoked Islamic law—either in public utterances or print—in putting forth legal claims, not even, for example, the government of Sudan which has proclaimed sharia as the nation’s sole body of law.
That is understandable. If, even in the present revivified, often militantly religious climate in the Islamic world, a Muslim nation sought to apply sharia for an international purpose, there exists no generally recognized international legal instrumentality for doing so. The typical pattern of behavior among Middle Eastern riparian nations is that although governments involved in disputes over water do not resort to legal processes, they nevertheless adopt that particular Western legal theory that best suits their position on the contested waterway in order to justify their demands, often using it more as a bargaining ploy in negotiations than as a serious legal argument. Power and riparian position have consistently been the determining factors.

15. The role that law can play

There is nothing inherently lacking in legal theory or in law itself—Western or Muslim—that can account for the general weaknesses of international water law. It is, rather, that the peculiar complexities of water issues necessitate a merging of the political and juridical dimensions of the problems in order to realize the full potential of international riparian law. The fusion of hydro-politics and water law occurs when formal political agreements—treaties and conventions—stipulate law to regulate their implementation, thereby creating the essential role that law can play, and at the same time creating new international law.

While international law cannot resolve water disputes on its own, law remains the critical ingredient to creating and maintaining an orderly and peaceful solution to such disputes. When there are in place political accords that govern how specific watercourses will be shared and used—especially in those instances when international or inter-riparian oversight is considered necessary to assure compliance—law then becomes the most effective instrument for regulating the terms of the compact equitably, efficiently, and consistently. Further, the involvement of law lends the political agreements the moral weight of legitimacy. Reciprocally, the more treaties require that their terms be governed by law, the stronger and more effective the institutions of international law will become.

Worldwide, at least 286 international fresh water treaties have been concluded. Of those, about two-thirds concern North American and European river systems; the rest are scattered around the globe. In the Middle East region, with one notable exception—the 1959 Egyptian-Sudanese apportionment agreement on the Nile—international treaties regulating the sharing, use, and quality control of water are virtually non-existent; it follows that there are no legal institutional arrangements either. This situation has nothing to do with Islamic law per se except insofar as sharia does not provide international institutional structures for the purpose.

Political and ideological rancor or outright hostilities have defeated sporadic efforts to fashion multilateral (or even bilateral) cooperative schemes for the shared use of all the major Middle Eastern transboundary and international river basins, namely, the Jordan, the Yarmouk, the Orontes, the Euphrates, the Tigris, and the Nile. Several multi- and bilateral commissions have been proposed and a few have actually been born into short, unproductive lives. Well-intentioned mediation efforts by regional and outside parties have withered away as well. These endeavors have produced many workable integrated basin-wide and region-wide plans for the allocation and distribution of Middle East waters across jurisdictional boundaries that could be effectively
sustained by legal instruments and institutions—if the political obstacles to cooperation by treaty could be overcome.

16. Are regional codes the key?

General or regional treaties that constitute framework agreements are the essential first steps toward transforming legal theory into the institutional application of law. The time has come to recognize that until all nations agree to invest international law with sufficient transcending authority over state sovereignty—as when the US and other nations agreed that ratified treaties would supersede prior domestic laws—endeavors to put into place a uniform, universally applicable international fresh water code of law will probably falter. In the absence of such a code, the hydrological and environmental diversity of the world’s individual surface and groundwater systems, together with the regional cultural and historical traditions that attach to them, will always overwhelm such efforts, however laudable. Nevertheless, an ongoing effort to do so is critical, and the *UN Convention* represents a very good start.

There is one possible approach to these matters wherein sharia and Western international water law might be successfully combined in the management of some international river basins that involve Islamic riparian states: discrete regional framework accords or codes.

Law could be harnessed to the needs of good water management of international river basins in the Islamic world through the drafting of regional codes within the flexible framework of the *UN Convention*. Use of the Convention in this way could be highly effective in encouraging the drafting of regional codes by regional actors that reflect local conditions and interests, and at the same time, incorporate any general principles such as equitable utilization, no significant harm, and proportionality that are widely supported and UN sanctioned.

In many contemporary Muslim nations where sharia is either practiced or is influential in policy matters, particularly among those governments that are open to modern interpretations of sharia, professional water experts have been able to construct religiously sanctioned principles of integrated water management and utilization that incorporate equitable utilization, no significant harm, proportionality and more: the notions that water is a social good, that water conservation is a core Islamic obligation, that privatization, albeit limited, may play a useful management role, and that the interests of the end-users must be upheld. Muslim water and legal specialists have enunciated these principles clearly (Farouqui et al., 2001).

However, there is no hard evidence that these notions have been formally and publicly imbued with a specific Islamic cachet and adopted across the Muslim polity. But as they are virtually exact facsimiles of their Western counterparts, their application in international water sharing, utilization, management and negotiations can be given an Islamic imprimatur on ad hoc bases, case by case. This circumstance could strengthen the attractiveness and efficacy of regional codes that reflect a given hydro-political profile.

Theoretically, because of their regional nature, such codes could be produced by Islamic states that share the same body of water and be rooted in those qualities of basic water law that sharia shares with general international law. The UN International Law Commission has already recognized the need for flexibility and a certain degree of diversity in creating effective international water law. The ILC has done so by incorporating into its own draft articles for a
universal water code a pliant “framework agreement” approach. The initiators and ratifiers of such regional agreements (which must of necessity be at once legal and political) should be exhorted to create region-wide water institutions or agencies and invest them with sufficient supranational authority and resources to implement and administer the new laws cooperatively and effectively. It is here that sharia could make a major contribution. To the extent that most or all of the interested states have cultures centered on sharia, they should be able to build on these shared cultural norms in creating the necessary basin-wide institutions.

References


