

# *The Evolution of Water Law: European Union, International, and Comparative Law*

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## A Conversation about Water



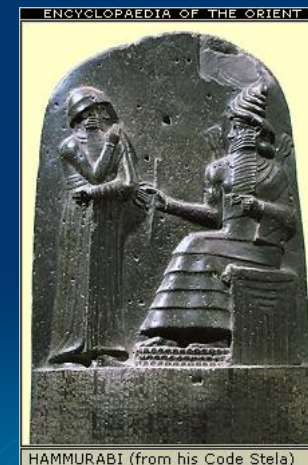
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## Thinking about Law

- By “law,” I mean social norms that guide or control our behavior, the violation of which is considered to merit collective response
  - The scope of “law” is always fuzzy around the edges
  - Today, we mostly focus on formally enacted rules that are enforced by specialized public institutions
  - Whether “law” is an effective institution of social control turns on cultural variables
    - Is there a tradition of reliance on “law”?
    - Are public institutions respected and obeyed?
    - Is there an independent bench and bar (a legal profession) that functions effectively?
    - In sum, is a particular society a “rule of law” society?
- Water law is the subset of laws that relate to management or use of water

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## The Heading of the Stele of the Code of Hammurabi (ca. 1750 BCE)



HAMMURABI (from his Code Stela)

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## The Cultural Origins of Water Law

- Some of the earliest legal texts concerned water
  - The Code of Hammurabi (ca. 1750 BCE)
  - The Law of Moses (ca. 1000 BCE)
  - The Laws of Manu (ca. 200 BCE)
  - Customary antecedents
  - The laws were often presented as divinely ordained
- Few and simple rules:
  - Requiring a sharing of water, or
  - Protecting existing uses
  - Often a mix of the two principles
  - Emphasis tends to cluster depending on the aridity of the climate
- While most early laws addressed the right to use water, even early rules also addressed pollution

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## How Legal Systems Spread

- The spread of civilizations (cultures)
- The spread of religions
- Conquest and colonization (including the first wave of globalization)
- Legal codification
- The rise of engineering and epistemic communities
- The rise of international law
- The rise of environmentalism
- Second wave globalization

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## A Page of Justinian's Digest (14<sup>th</sup> Century) with glosses



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## National Water Laws Today

- Overlays and contradictions
    - Indigenous law
    - Imposed law
    - Water law reforms or reformulations
  - Increasing regulation and increasing emphasis on “markets”
    - Just more overlays?
    - True markets function only at the margin
      - What is called a “market” often is government management masquerading as a market
      - Champions of markets compare markets-in-theory with public management-in-practice
- Chilean markets are overhyped—see Carl Bauer, *Siren Song*, etc.

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## Marketed Water



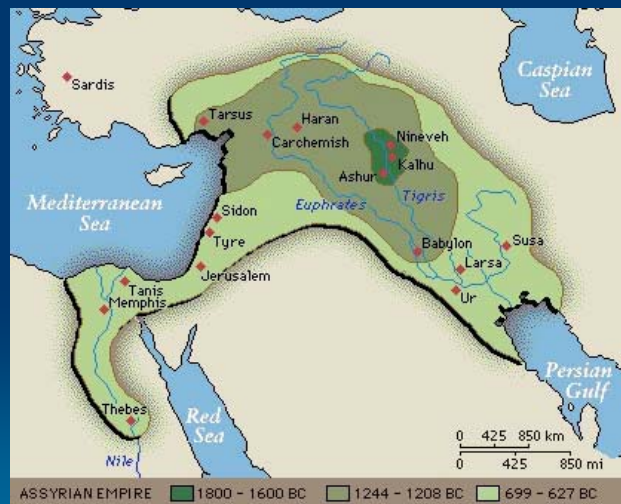
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## Paradigms within National Water Law

- Rights defined by:
  - Relationships to water
    - Focusing on places of uses
    - Focusing on nature of uses
    - Focusing on timing of uses
    - Focusing on sources of water
  - Property in water
    - Common property systems
    - Private property systems
    - Public property systems
- Regulations serve to:
  - Prevent or control pollution
  - Manage uses
  - Promote or preclude markets

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## An Early Hydraulic Empire



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## Paradigms of International Law

- Hydraulic empires
  - The Middle East
  - China
  - India
  - Latin America
- The rise of treaties
  - Bilateral
  - Multilateral
- Codifications of international law
  - The Helsinki Rules on the Uses of International Rivers (International Law Association 1966)
  - The UN Convention on Non-Navigational Uses of International Watercourses (1997)
  - The Berlin Rules on Water Resources (International Law Association 2004)

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# An International Basin



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# The Contemporary Paradigm of International Water Law (from the Berlin Rules)

- The New Paradigm (all waters)
  - Participatory management
  - Conjunctive management
  - Integrated management
  - Sustainability
  - Minimization of environmental harm
- The New Paradigm (internationally shared waters)
  - Cooperation
  - Equitable utilization
  - Avoidance of transboundary harm
  - Equitable participation

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# Modern Challenges to Water Law

- Geographic fragmentation
  - Upward to regional authorities
  - Downward to catchment or community authorities
  - Leading to multilevel governance
- Functional fragmentation
  - Shifting authority to specialized institutions
  - With recent emphasis on markets and individual choice
- Resource fragmentation
  - Failure to integrate water resources in a conjunctive system
  - Dispersal to different stakeholders
- Interest fragmentation
  - A de-emphasis on “the public interest”
  - Increasing focus on competing private interests
- Normative fragmentation
  - Limiting national sovereignty
  - Pressure of integrated management collides with markets and individualization

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# For Further Reading



edited by Joseph Dellapenna and Joyeeta Gupta  
 Springer Science + Business Media BV  
 2009

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