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## Water Laws in Moslem Countries, by Dante A. Caponera

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## BOOK REVIEWS

### *Water Laws in Moslem Countries*

By DANTE A. CAPONERA

Rome: Food and Agriculture Organization of the United Nations  
1973, 223 pp.

The Moslem world incorporates about 12 per cent of the total population of the earth. Because such a large part of it extends over arid or semi-arid regions, all matters pertaining to water were and are of great concern to it. Building on foundations laid down by the great fluvial civilizations of antiquity, the Moslem world has contributed much to the art of water use and management. The influence of its institutions, through the intermediate of Spain, contributed to the cross-fertilization of European water law systems, even though these were based mainly on Roman law. Later, in reverse flow, European water law was superimposed on Moslem customary law in a number of countries, either through conquest, as in former French North Africa, or through borrowing or adoption, as in the lands of the former Ottoman Empire, which incorporated elements of European law into the Mejlle Code.

Considering the influence and widespread distribution of Moslem water law, it is surprising how little has been written on the subject, especially in the English language. Out of 118 entries in the very comprehensive bibliography to the work under review, only twenty-five are specifically on water and water law, and of these only four—very specialized—are in English. Dr. Caponera's book is thus unique in its coverage and fills a great need. His previous study of Moslem water law, published in 1954,<sup>1</sup> was an excellent introduction to the subject. The present work, however, is not just a revised and expanded second edition: it is much larger in scope and in depth. Assisted by Mr. Bernard J. Wohlwend, Dr. Caponera has brought to bear both the great theoretical knowledge of comparative law which he displayed in earlier studies of traditional Chinese and Hindu water management,<sup>2</sup> and the practical acquaintance with modern water law systems which he acquired in his work with FAO<sup>3</sup> and during many years as consultant to governments of developing countries.

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1. D. Caponera, *Water Laws in Moslem Countries* (1954) (FAO Agricultural Development Paper No. 43). This has been out of print for several years.

2. Caponera, *Water Law Principles in the Chinese Legal System*, 1 *Indian J. Int'l L.* 239 (1960); Caponera, *Evolution and Concepts of Water Legislation in Water Legislation in Asia and the Far East* 209 (Economic Comm'n for Asia & the Far East, 1968) (Water Resources Series No. 35) (ST/ECAFE/SER.F/35) (1968).

3. Dr. Caponera is Chief of the Legislation Branch of the Food and Agriculture Organization of the United Nations.

This study of Moslem water law comes very appropriately, at a time when many different water law regimes are beginning to coalesce into what may eventually become a single world system—a tendency that is exemplified by numerous common trends in water legislation.<sup>4</sup> The timeliness of Dr. Caponera's book is underscored also by the current growing need to conserve water, a problem that confronts not only arid countries where it has always been acute, but even humid areas where the increased use of water in general and of irrigation in particular tends to offset climatic advantages. We see in this work how well developed conservation measures were in Moslem customary law. It wisely required that upper lands be irrigated first, before water could be allowed to pass to lower lands—a provision that would enable a small or erratic supply of water to be used before it dissipated. As far as the technology of the period permitted, it prescribed the amount of water that could be retained on land in time of scarcity.<sup>5</sup> This centuries-old technique, combined with the volumetric method of measuring the amount of water allocated, was probably more exact than the early custom in the western United States of gauging the amount of water by the capacity of the ditch.

One is struck by some of the similarities between Moslem customary law and provisions of other water law systems. For example, the Sunnite precept which says that "if a watercourse traverses a property, water may be employed for irrigation and for other agricultural or industrial purposes, provided the water is returned after use to its normal course,"<sup>6</sup> reads like part of the Code Napoléon. The doctrine that "lower-lying plots are to receive the water which flows naturally from upstream plots"<sup>7</sup> recalls the servitudes of upper and lower lands in Roman law, and, indeed, might have been influenced by it. It is also very probable that the right of thirst, so highly developed in Moslem law from the teachings of the Prophet, may have contributed to the priority of domestic use in other systems, including modern codes. Interestingly, in order to satisfy this right, it is permissible to cross the property of another.<sup>8</sup> In a much more limited context, of course, this is a forerunner of the solution toward which we are striving today in dealing with the problem of access to public waters for recreational purposes.

Dr. Caponera's study devotes more than forty pages to a descrip-

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4. See Teclaff, *The Influence of Recent Trends in Water Legislation on the Structure and Functions of Water Administration*, 9 Land & Water L. Rev. 1 (1974).

5. D. Caponera, *Water Laws in Moslem Countries* 16 (1973) (Sunnite doctrine § 3.2.1 (ii)(a)—up to the ankle).

6. *Id.* at 21, § 3.5.1(i)(b)

7. *Id.* § 3.5.1(ii).

8. *Id.* at 14, § 3.1.1(i).

tion of customary law and gives the doctrines of all the major branches of the Moslem religion as they pertain to water. Thorough and well documented though this section is, in recognition of religion's central position and continuing importance as the basis of all legislation in Moslem lands, one would have wished that it could be even further expanded and illustrated with actual cases. Following this is a very useful and concise roundup of the changes brought about by codification, especially by the Ottoman Mejjellé Code. The main body of the book (some 170 pages) is devoted to a detailed description and analysis of the existing law in twelve Moslem states—Afghanistan, Bahrain, Brunei, Iran, Jordan, Kuwait, Morocco, Qatar, Somalia, Tunisia, the Yemeni People's Democratic Republic, and the Yemen Arab Republic.

Following a method devised by Dr. Caponera earlier in his contribution to the ECAFE water legislation series,<sup>9</sup> the outlines used in all these contry studies is basically the same. This makes for easy reading and comparison, even though for some countries certain sections are necessarily rather exiguous, absent, or amalgamated with others. The outline covers the following topics: water legislation in force; ownership of and right to use water; order of priorities; legislation on beneficial uses of water, on harmful effects, on water quality and pollution, on underground waters, on control and protection of water works and structures, and on protected zones and areas; government water administration and institutions; legislation on financial and economic aspects of water resources; special and autonomous water development agencies; and the implementation of water law and administration.

Perhaps in the future the main features of the laws of these states could be presented also in tabular form, which would enable the reader to see the similarities and differences at a glance. The very thorough bibliography adds much to the value of the book and one could wish that an index had also been provided. This omission, however, only minimally detracts from the overall excellence of the study, which is a "must" for everybody interested in water law.

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9. Economic Commission for Asia & the Far East, *Water Legislation in Asia and the Far East, Part I* (Water Resources Series No. 31) (ST/ECAFE/SER.F/31) (1967), & *Part II* (Water Resources Series No. 35) (ST/ECAFE/SER.F/35) (1968).

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