MOSLEM LAW AND INTERSTATE WATER RESOURCES MANAGEMENT IN CENTRAL ASIA

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ABSTRACT

Moslem Law (ML) started establishing on territory of Central Asia (CA) in the end of VII c. Proliferation of Islam in arid climate zones determined specific character of ML. The majority of ML norms are imperative and conditioned by its public nature as well as orientation at satisfying common interests. Analysis shows that many ML norms can be implemented in the water legislation, in particular:

- "If water distribution was made through sluices (gateways), but someone wants to distribute water by days, the previous order of distribution must remain in force";
- "If the owner of the river's top part can use water only through the sluice's closing, he can close a sluice only in time of his turn and at the consent of others…";
- If someone has the right for use of a certain amount of water in different time, then he cannot use all water at one time, as at consent of other co-owners"; etc.

But main, there is the norm, which should be "restored in its rights". This ML norm says: "If some of the owners cannot make use of the river other than putting a barrage across it and co-owners reach the agreement between themselves, then the turn to withdraw water for irrigation must start from downstream and proceed upstream…"

This provision may be accepted as the key principle of water management in CA and it would facilitate observance of water discipline by upstream water users.

1. CENTRAL ASIAN COUNTRIES' WATER LEGISLATION AND REGIONAL WATER POLITICS

1.1. NATIONAL WATER LEGISLATION

In the Soviet period water relations in republics of Central Asia (CA) and between them were regulated by "Bases of the Water legislation of the Union SSR…" [2] and national

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water legislation, which were issued according to the named “Bases…”. Independence’s declaration by the CA States (Republic of Kazakhstan, Kyrgyz Republic, Republic of Tajikistan, Turkmenistan and Republic of Uzbekistan) has caused necessity of processing of the water legislation at national and interstate levels.

During 1993-1994 the Water Code of Kazakhstan (31.03.1993), Law of Uzbekistan "About water and water use" (06.05.1993), Water Code of Tajikistan (27.12.1993), Law of Kyrgyzstan "About water" (14.01.1994) were accepted. Water Code of Turkmenistan (from 01.06.1973) remained working up to 2004. The named “sovereign” Water Laws of SA States were prepared on an old pattern, the attempts of entering of essentially new rules were reduced as a whole to reconfiguration, dissociation and overlapping of sections, chapters, clauses, parts, items of the old Water Laws.

The new wave in development of the water relations’ legislative base begins since 2000.

Now the working acts in sphere of the water relations are:

- The Water Code of Kazakhstan, is accepted 09.07.2003,
- The Water Code of Kyrgyzstan, 12.01.2005,
- The Water Code of Tajikistan, 29.11.2000,
- The Code of Turkmenistan "About water", 01.11.2004,
- The Law of Uzbekistan "About water and water use", 06.05.1993.

Now Water legislation of Kazakhstan and Kyrgyzstan is considered as most progressive in Central Asian region (CAR). At the same time, the Water legislation of all CA States allows to introduce the basic principles of the Integrated Water Resources Management (IWRM) to the national Water politics.

1.2. REGIONAL WATER POLITICS

The basic directions of regional water politics are determined by the decisions of the CA States’ Heads. The basic political-legal documents, in which the key principles of the regional water relations are determined, are following:

1. Interstate Agreement (ISA) between Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan "About cooperation in sphere of a joint management of use and protection of water resources of interstate sources" (1992).
2. Decisions of the CA States’ Heads (1993), according to which the International Fund for Saving the Aral Sea (IFAS) is created. For years of independence IFAS has accepted a number of important political decisions in sphere of the regional water resources use.
3. ISA between Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan "About joint actions on decision of the Aral sea’s problems…" (1993).
4. Concept of the CA States (1993) on problems of the Aral Sea Basin (ASB), which has incorporated rules, which are entered in the IWRM theory in modern understanding.

5. Decision of the CA States' Heads and Russia Government (1994), by which the First ASB-Program (ASBP-1) is confirmed.
6. Declaration and Statement of the CA States' Heads (Nukus, 1995; Issykkul, 1995; Almaty, 1997; Tashkent, 1998, 2001; Ashgabat, 1999; Dushanbe, 2002; etc.), according which the politics of sustainable water management is determined.
7. ISA between Turkmenistan and Uzbekistan "About cooperation on water-economy questions" (1996).
8. ISA between Kazakhstan, Kyrgyzstan and Uzbekistan "About Syrdarya river basins' water-power resources use" (1998); Tajikistan has joined the Agreement in 1999.
9. ASBP-2, prepared on behalf of the CA States' Heads and approved by them, is accepted in Dushanbe (2002). ASBP-2 is the key political document, which reflects the basic problems of the ASB in water and nature protection spheres.

From the listed above documents the Agreements 1992, 1993, 1996 and 1998 are the legal acts, according to which the transboundary WRM (TWRM) is carried out.

Among the named Agreements the Agreement 1993 is the more political document, which establishes the general approaches to the TWRM in CA.

Last years the certain efforts on development new water legislation are undertaken, however this work goes rather slowly. In particular, ASBP-2 has 14 Priorities, from which first is called "Development of the coordinated mechanisms of the complex water resources management in the Aral Sea Basin". More than 10 ISA-drafts should be prepared according to the Priority #1. Weak account of local traditions and experience in this sphere is one of omissions by preparation of the legal acts' drafts. At the same time, the water relations' history has deep roots and traditions in CA.

2. WATER RELATIONS' DEVELOPMENT IN CENTRAL ASIA

2.1. ROOTS OF THE WATER/LAND RELATIONS' LEGAL REGULATION

The cradle of state regulation of the ownership relations dates back to ancient times. These relations are connected with the first states' creation and have from 2 up to 5.5 millenniums history. Creation of first states in valleys of large rivers (the Tigris, Nile, Euphrates, Indus, Gang etc.) and getting surplus product at the account of irrigation entailed necessity of legal regulation of the land/water ownership relations. Land/water relations ranked as the special element of legal systems in states, development of which was based on the "Oriental way", at which: (a) Irrigated agriculture was a basis of economics; (b) Irrigation structures belonged to the state; (c) Agricultural community was up a primary cell of the society" [9, p.26]. "Oriental way" of the state's formation the experts characterize as "state–authority", and "European way" – as "state-property".

Presence of the "irrigation theory" among other theories (alongside with violence, class, theological etc.) specifies the water factor's importance at the first states' forming.

Questions of genesis of the various legal systems and place in them water and land relations on the CA territory have not only perceptual or theoretical interest, but have practical interest. They are important in a context of application study bearing in mind adaptability of their provisions and principles for elaborating national and international water legislation in water-ecological sphere.

2.2. PRE-ISLAMIC PERIOD

Legal relations at the earliest stage of states emergence had been forming within the framework of religious-philosophical doctrines, of which Zoroastrianism, Judaism, Christianity, Buddhism, Manichaeism became the most famous in CA (Maverannakhr). Early Zoroastrianism (VIII-V cc. B.C.) made clear difference between good divinities (headed by Ahur Mazda), and sinister demons occurring as inevitable "by-product of creation" (headed by the spirit of evil Ahriman). From the point of view of the Ecological law the Zoroastrianism postulate is of interest, according to which evil forces transform "the fertile lands into desert", make "water saline and unfit for drinking", etc., and as to the outcome of the struggle between forces of good and evil it depends on "personal choice" made by living creatures, first of all - by human[1].

In later periods (V-IV c. B.C.) of development, excluding period of Greek-Macedonian conquests, Zoroastrianism underwent a series of transformations, but remained prevailing religious-legal ideology in Maverannakhr.

During Hellenes domination (end of IV – beginning of the second half of II c B.C.) a dualistic variant of Zoroastrian Law appeared. Presumably in this very hard period the legal norms of Zoroastrianism were formulated in 5 writings, of which Videvdat[2] ("Law against evil forces") remained safe. For the objectives of the present work a part of Videvdat is of interest, which describes crimes against Nature forces – land, water, fire and vegetation. In Videvdat "special attention was given to water, counter pollution activities were carried out... For non-observance of this requirement a penalty was imposed in the form of "400 lashes…" [7, p.68].

In particular, following dialogue between Zoroaster and Ahur Mazda deserves attention.

- "Who is the fourth one giving most pleasure to the Land"?
- "Who plants more cereals, rich fodder and eatable fruit! There where he irrigates soil because it is dry or carries out land drainage because it is too wet".

This Ahur Mazda's answer reflects the gist of irrigated land reclamation.

In Zoroastrianism the contract's respect and principles of its performance were considered very important. From 6 types of contracts the supreme force was given that, which was bound on "fertile land". This contract could cancel obligations of other types of contracts (bound by the word, handshake, in pawn of a sheep, ox, and man).

1- In Zoroastrianism all alive essences admitted by the Law's subjects.

2- Videvdat is a part of the literary monument of Zoroastrian – "Avesta", which is translated by specialists as "law", "legislation" and consists of Large Avesta and Small Avesta. Large Avesta includes as one of three major parts the Videvdat, which is considered as the juridical compendium of Zoroastrianism. Videvdat consists 22 chapters represented in form of dialogs between Zoroaster and Ahur Mazda.

The Law's performance and necessity of the correct choice are key requirements of Zoroastrianism. Contract's respect was also one of conditions for supreme authority; a good ruler was considered the one who laws' performance and kept to the contract's terms ("he is firm in belief, and faithful in the contract"). Many experts recognize that Zoroastrian Law "not less than in Roman Law the principles of "individual rights" had been formed and implemented, and that Zoroastrian Laws underline "peoples' free will" [9, p.177]. Thus, in Maverannakhr the framework of legal system had been formed at the leading role of Zoroastrianism and substantial influence on it other religious-legal and philosophical doctrines. Social-legal norms, worked out during the pre-Islamic period, had influenced on norms of Moslem Law.

2.3. ISLAMIC PERIOD

Moslem (Koranic) Law started establishing itself in Maverannakhr, which became a part of the Arab Caliphate, in the end of VII – beginning of VIII cc. Until X c. Moslem Law (ML) had been developing on the basis of interpretations of the Koran and Sunnas made by Islamic theologians. In opinion of the experts, in X c. (after titanic work had been done as to codification of Moslem Law by leading lawyers of that time) development of the traditional ML is stopped, and precise meaning of rules and principles of ML are formulated in VII-X cc.

Considerable contribution into the ML development was made in IX-XII cc. by the Maverannakhr philosophers: Faraby, Gazaly, Al Bukhary, At Termezy, Marginany and others. And in the posterior period the influence of Maverannakhr intelligentsia on ML took place. With the beginning of Russian domination in Turkestan (as a whole, the Maverannakhr territory, second half of XIX c.) the ML-development stopped.

2.4. SOVIET PERIOD

With an establishment of the Soviet authority (1920-ties), in exact opinion of the experts, "europeaization of law, truncated in the soviet form" took place.

Some ML-norms retained valid in first years of the Soviet authority in Turkestan.

Basically it concerned present Khorezm and Bukhara provinces, where the Soviet authority was established much later and with the large efforts. For instance, the Constitution of the Khorezm National Soviet Republic (from 1920) recognized a private property on ground and water. Up to Independence the Legal system of each Soviet republic was developed within the framework of the Soviet legal system, which was formed on the West-European models (basically on English-Roman-German samples).

3. MOSLEM LAW AND REGIONAL WATER RELATIONS

3.1. GENERAL PROVISIONS

Undoubtedly, Moslem Law (ML) is an independent legal system, playing the central role in legal systems of many states. It was tolerant to other non-Islamic legal norms (personal rights of non-Moslems, norms of European Law etc.). Specialists

acknowledge that ML was more then millennium ahead of European legislators in interpreting criminal responsibility and civil law.

Islam's proliferation in the arid climate zones determined the specificity of ML. As the artificial irrigation could be effectively managed only by efforts of community, institutes of private and communal ownership of land and water emerged. The Fikh[1] acknowledges three major categories of land ownership - state, vakoof and private [8]. The Fikh included in the concept "property" also various other rights (for example, on water's part of the river). The important meaning has the provision of ML - "pastures, sources of water, fire and salt belong to everybody" (The Koran). In ML the important place is borrowed by rules about the contracts and obligations, and an accent is done on prime performance of the obligations in comparison with the rights of Moslems. The obligations follow from the contract, which is valid at presence of three conditions ("arkans" –"pillars"): a) contracting parties, b) their voluntary consent, and c) suitable subject of the contract. ML recognizes as the illegal contracts, which contain immoral conditions. In ML the contracts pursuing economic benefit, should proceed from the concept legal ("halal"). The contracts are illegal, if they are connected with "riba" or providing an opportunity of "riba" (extraction, to gamble, unreliability, risk etc).

In ML the actions of the social-legal relations' subjects on 5 categories (obligatory, recommended, permitted, blamed and forbidden) were divided that it is useful to know by development of the normative acts. Major part of the ML-norms are imperative and conditioned by its public nature as well as orientation at satisfying common interests, this leading to prioritizing obligations as compared to rights of Moslem [10, p.82].

In addition to such generally accepted legal norms as "Jus cogens", "Pacta sunt servanda", ML perceived other well-known legal institutes (servitudes etc.), as well as the rather flexible principle "Rebus distantibus" ("as the circumstances dictate").

So, the latter principle is fixed in ML as "a norm in the process of its existence and disappearance is guided by the destiny of its foundation", and others [11, p.35].

Comparison a principles of the religious-legal systems in CA from times immemorial until today and major principles of International Law shows that a similarity is presented between them (equality of the parties, peaceful dispute settlement, reparation of damages etc.). It is natural, because International Law has been developing guided by "positive legal capital" accumulated by various legal systems. At the same time, such provisions of Zoroastrianism as necessity of "the correct choice", severe norms about water pollution, of ML - about "the legal economic benefit", interdiction contracts, which contains immoral conditions and connected with risk, of tolerance to the lawmaking activity by the other party, etc. require the positive judgment.

3.2. REGIONAL WATER RELATIONS: A PLACE OF THE MOSLEM LAW

Generally principles of International Water Law (IWL) are based on special principles of International Environmental Law (IEL) and fundamental principles of International Law (IL), and they may be summarized in the synthesized form as follows [5, 6, 12-14]:

1- Fikh – the legal doctrine (Science about Law) of Islam. Fikh is more "practical" Science of Law as compared to Shariah, which includes a wide spectrum of religious, legal and social norms.

(a) Equity of rights of riparian States for equitable and reasonable use of TWR;

(b) Not causing of damage to transboudary watercourse and environment;

(c) Compensation for inflicted damage;

(d) Cooperation in TWR-use while observing common interests of all and specific interests ones of each of riparian States.

As qualitatively new should be acknowledged the principle that has been recently put forward concerning necessity of recognizing "the right of Nature to water", which answers requirements of ecosystem approach to the environmental management[1].

What should be rejected and what should be reviewed creatively while considering of the Moslem Water Law (MWL)? Apparently, those provisions of MWL, which do not contradict to generally acknowledged principles of IL, IEL and IWL might be worthy of consideration. At the same time, such terms as "a large river", "a common river", "a private river", "water of large rivers", "private use" and some others should be assumed by creative approach (e.g. abstracting). Last hundred years the picture of international water relations has sharply changed. It is enough to say that such MWL-rule as "the rivers, which belong to nobody and waters' use from which is not subject to distribution (for example, Euphrates)" is hopelessly obsolete.

It seems, the following MWL-norms, are comfortable to the water situation in CA [4]:

- "In case of disagreement concerning water's volume, which can use by co-owners of the river, water's volume is determined proportionally to size of their irrigated lands";
- "If water distribution was made through sluices (gateways), but someone wants to distribute water by days, the previous order of distribution must remain in force";
- "If the owner of the river's top part can use water only through the sluice's closing, he has the right to close a sluice only in time of his turn and at the consent of others…";
- "If water distribution is carried out through gateways, then it is forbidden to do both to enlarge and to move them the upstream";
- "If each of the co-owners of the river has the right to use the certain number of sluices, nobody of them may add a single sluice";
- If someone has the right for use of a certain amount of water in different time, then he cannot use all water at one time, as at consent of other co-owners"; etc.

But such MWL-norm, as "If the water's owner wants to prevent someone from water use, and the latter is in need of water and afraid for himself or for his cattle, then he has the right to fight against the water's owner with weapon…" [4], deserves consigning to oblivion and should be sent to historical archives, the same might be said about directly ("literal") understanding and incorrect interpretation some provisions of the Koran.

As an example of such interpretation of the divine message it is possible to result the following. In late 1860-ties in the course of the first water release through the new

1- So, CA-States' Heads agreed that the Aral Sea is a separate "Water User" equal to every republic.

Ulugnar canal (Ferghana valley, Turkestan) water has broken one of the canal boards. "Obscurants from among local clergy, witnessing the disaster, carried out a religious ritual "fetva" (prediction of the God) and suggested khan officials to block water break by bodies of farmers known by names "Tokhta" and "Tokhtasyn"[1]. …About one hundred men bearing these names became victims of the unlawful action. Tied into bundles the people were thrown down the water rush alongside with brushwood in the capacity of live fascines forming the fascine dam, stones and reeds were thrown at them until the rush was at last liquidated" [3, p.38].

But there is the norm, which should be "restored in its rights":

"If some of owners cannot use by river other than putting a barrage across it, and co-owners reach the agreement between themselves, then a turn to withdraw water for irrigation must start from downstream and proceed upstream; when the turn will reach upstream of the river, the permission is given to block the river" [4].

It seems that this norm contains deep philosophical meaning, which (bearing in mind the Aral Sea and countries of its basin) may be referred to as "the unity of national and universal human values", and this concept might promote implementing into practice of WRM in CAR and answers to the paradigm "everyone live in river's downstream". This would to a great extent facilitate observance of water discipline by upstream water users. The above-named norm has not emerged from nowhere; overuse of water by upstream water users is actually beyond enforced control, as opposed to downstream practices (to turn off water is quite enough for controlling the set limits).

INSTEAD OF THE CONCLUSION

Sustainable development of the CA States is impossible without solving the problems of regional TWRM, which boil down, if expressed in one phrase, to "mismatch of interests between upper and lower reaches of the rivers", and the TWRM-principles, reflected in agreements of the CA States' Heads, may be formulated as "long-term mutually beneficial strategy of equitable and reasonable use of TWR".

Water controversies occurring from time to time between countries of the region should be composed, in particular, as it is recommended by the Koran: "And if two troops of believers would fight with each other, reconcile them. If one is unjust to another, then fight against the one who is unjust, until the latter apply to God's will. And if he applies, then reconcile them for justice and be unprejudiced: after all God loves those who are unprejudiced" [1, p.296], implying by fighting discussions on water law issues, and by "God's will" – major principles of civilized relations between states based on IL.

Nobody will give ready recipes for the decision of CA water problems because... these recipes do not exist. It seems that the development of the legal bases of TWRM in Central Asia taking into account the experience of our ancestors in this sphere is one of ways of prevention of the interstate water conflicts in the future.

1- "Tokhta", "Tokhtasyn" = "Stop", "Let him stop".

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