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Water Right in Islamic Law and Indonesia Legal System

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ABSTRACT

Islamic law regards the presence of water is important. In fact, one of the basic technical terms in it correlated with the water, the word *shari'ah*. In etymological sense, *shariah* is the path to the springs. As the legal system, which emerged in water scarce region, the Islamic law system should be made by the experts who prioritize the presence of water as something that is used generally by the public for their lives and interest and being considered as objects. There are number of fundamental problems in the Act No.7 of 2004, especially in matters of water rights and control of water resources. The Act No. 7 of 2004 divides water rights into two types, namely the right-to-use and right-to-cultivate, as stated in article 7, paragraph 1. Meanwhile, regarding the acquisition, the Act No.7 of 2004 states that the state should relinquish control to another party. These two issues become very important when associated with Islamic water law theory, especially in terms of water rights and state authority in controlling water resources.

Key words: Islamic water law, right of use, right to cultivate.

Introduction

On the World Water Day, on March 22 2007, the Food and Agriculture Organization (FAO) as a coordinating body within UN system sets the theme "Coping with Water Scarcity". The FAO's director on that time, Jacques Diouf, warned that the current use of water in the world are increasing more than twice fold compared to the century ago, while its availability is decreasing. Consequently, water scarcity should be beared by more than 40% of earth population. This condition will be worse before 2025. More than 1,8 billion people will experienced absolute water shortage. Currently, the Middle East and North Africa become the main issue of development. Those regions are two of the highest population growth in the world (around 2,8%/year), with low water resource and tend to be rare. The water supply in those regions is decreasing from the average of 3.300m³/person/year (m³/p/y) in 1960 to 1.250m³/p/y in 1996, and estimated will decreasing to 725m³/p/y in the forthcoming 2025.

In general, water supplies in many countries in the two regions are decreasing and estimated less than 500m³/p/y. As happen since 1990's, clean water supply each person per year in Jordan, Tunisia, and Yemen, are declining in each year, consecutively reach 540, 445, dan 327m³. It is estimated that number will decline drastically in the forthcoming 2025.

The Islamic law regards the importance of water existence. In fact, one of the basic technical terms within is correlated to water, which is "sharia". Literally, sharia means a path to a spring. As a legal system which arose in water-scarce region, the Islamic law system should be developed by the experts who give more attention to water existences as a source that use generally by community for their living and being considered as object. However in reality, the Islamic jurist in the past did not discuss much about water law as an object that can be possessed and owned.

The Islamic jurist in the past was more attracted to develop literature that related to water as an object for worship importance. However, there is some Islamic jurist who wrote about water as an object in Islamic jurisdiction system, namely Al-Mawardi, Abu Ya'la, Al-Khatib, Abu Yusuf, Al-Shadr, and Al-Mishri. Although, their writing mostly reviewed the water sources and its distribution, rather than writing about Islamic legal rules regarding the governance of these sources in material law aspect. In fact, the discussion about water is only a mere glimpse among other law discussion, except for water in worship realm.

At the global level, especially after the holding of International Conference on Water and Environment in Dublin, Ireland, in 1992, there is paradigm change on water management approach, namely the change form supply side approach to the demand side approach, which raise philosophical problem in water law field. The new approach has forcibly push perspective changes from water as social goods to water as economic goods.

Generally known in the theory of economic, that the characteristic of demand places cost as its main logic and allocate asset to a sector with higher demand value. Consequently, the demand side approach made water being managed and regulated in profit oriented and placed as economic goods. Meanwhile, in Islamic law this topic is a distinct legal problem that needs fundamental and thorough reasoning.

This paradigm changes spreads to almost every country in the world, including Indonesia. Indonesia restructured its water sector by enacting the Act No. 7 year 2004 regarding Water Resources Management in February 19th 2004 by the Parliament. This Act no. 7/2004 is a replacement to prior act No. 11 year 1974 regarding Water. The Act No. 7/2004 is the climax of water resources management reformation program, which started since 1993 and effectively applied in 1999.

There are some fundamental problems in the Act No. 7/2004, particularly concerning right on water and control over water resources. The Act No. 7/2004 divides right on water into two class, namely right to use and right to cultivate, as stated in article 7 point 1. Meanwhile, upon the control over water, the Act stated that state can give the right to control to other party. These two issues become very important when associated to the theory of Islamic water law, especially in term of right on water and state authority in water resources control. In addition to the two issues, there is one more important issue that not included in the Act No.7/2004, which is the regulation of water ownership, while the Islamic law regards it as a crucial substance. The act does not regulate water ownership that exists on someone's land property. It necessary, especially these days selling water by individual happens in community.

Materials and Methods

The concept of natural resources management among the Islamic Jurist is divided into three models, namely: (a) *istinbathi* model, a theory which generated as a result of Quran and Hadith interpretation, (b) *tarikhi* model, a theory which generated as a result of Muslim management practices in the past and later become a theory, and (c) *tathbiqi* model, a theory which generated from legal formulation that perform as reference for factual natural resources management policy. Some of theories which emerged regarding natural resources management are: (a) state objective theory, (b) states obligation theory, (c) state responsibility theory, (d) justice and welfare theory, (e) ownership theory, and (f) theory of beneficial (*maslahat*).

The applied method in this study is the descriptive analysis methods in form of content analysis. This method describes number of Islamic law discourse on water management and analysing legal substance in Act No.7/2004. This study applying juridical-normative as its approach, by using some of Islamic jurist's concepts and Act No. 7/2004 as basis for analysis. This approach is chosen because this research involves study on legislations product, so the theory that related to water management can be clearly described.

Based on Islamic law, water is public domain and contained with public right and cannot be converted as economic goods. Everyone has right to access water to fulfil their basic necessity, even if the water source exists on land which privately owned. This water source/springs, which located on privately owned land, still has public dimension, everyone has rights to fulfil its basic needs and the (land) owner is not entitled with absolute rights to use the water without any permission from the government, except for his basic needs and amount of water that has been proceed through legal work process.

Results:

The Islamic law concept on water management resulted from a study of three interconnecting fields of law, namely (a) ownership law, (b) right-to-use law, (c) water allocation law. The water ownership, whether surface or ground water, is belong to public which cannot be claimed individually by a person. This public domain can only be claimed personally upon a volume of water which have been moved, collected, and used through a legal work activity, whether by using cost or simply man power.

Regarding to water use rights, originally the Islamic law only acknowledges right to use, while the right to cultivate is a supplementary right (secondary). The water use rights is a primary right and automatically guaranteed by law, which its fulfilment shall not depend on laws or regulation and its legal position as guaranteed constitutional rights. This water use rights is applied for basic necessity and agriculture. While the water use right as supplementary rights, its fulfilment is depend on beneficial (*maslahat*) aspect and laws, and its legal position as regulated rights. To obtain the right-to-cultivate is depend on entitled permission from the government, as the public right holder.

Discussion:

There are coincident similarities of legal substance between the Act No. 7/2004 and the Islamic water law. These similarities are not due to common source or occur due to transformation of Islamic law to the Act. Besides the similarities, there are fundamental differences between the Act and the Islamic water law. The found

similarities are in term of principles and legal materials. The similar materials are in terms of water resources governance/control, water rights, and its allocation. While the similar principle is found in the water allocation principle. The differences are found in terms of regulation regarding water on personal land and the principle of water rights.

Conclusion:

The Islamic water law regards water as public domain which contain of public rights. The theories formulation regarding natural resources management among the jurist is based on the facts of the studied object, postulate facts, historical facts, and socio-political facts. There is historical periodization of water resources management in Islam. The Islamic concept of water management law resulted from the study of property law, right-to-use law, and allocation law. There are similarities of legal substances which coincidentally happen between the Act No. 7/2004 and the Islamic water law.

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