SOSIOLOGICAL JURISPRUDENCE JOURNAL

Volume 7; Issue 2; 2024, Page: 132-140
ISSN 2615 - 8809
E ISSN 2615 - 8795
https://ejournal.warmadewa.ac.id/index.php/sjj

Submited: 16 Oktober 2024 Revised: 26 Oktober 2024 Published: 28 Oktober 2024

Recognition of Indigenous Peoples' Jurisdiction over Water: Comparison of Law in Indonesia and New Zealand

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How to cite:

Rumalutur, F. I. (2022). Recognition of Indigenous Peoples' Jurisdiction over Water: Comparison of Law in Indonesia and New Zealand. *Sociological Jurisprudence Journal*. Volume 7, Issue 2; Page 132-140. https://doi.org/10.22225/scj.7.2.2024.132-140

Abstract—This article argues that various water management issues in Indonesia today are caused by water governance that is still uniform between one region and another. In addition, water management law in Indonesia is still state-centric. On the other hand, the existence of customary law communities in Indonesia is still legally recognized by the state. By using the comparative law method, where I compare the laws in Indonesia and New Zealand, the findings of this research show that the granting of jurisdiction to indigenous peoples in the management of water resources in New Zealand shows the seriousness of the state to reform water management and truly strive for sustainable water management. The New Zealand government recognizes that water management using customary law can be a solution to water governance.

Keywords: Indigenous peoples jurisdiction; water resources management; comparative law; Indonesia; New Zealand.

Introduction

Water is a basic need of all living things, including humans. The history of human dependence or need for water is as old as human life. Gupta and Dellapenna more specifically said that the history of water management law parallels human civilization (Gupta & Dellapenna, 2008). This means that water is an inseparable part of the historical process of human life in nature. Humans can live without money, gold, cell phones, motor vehicles, and all the material accouterments of modern life. However, humans cannot live without water. Dependence on water is no different between simple humans and modern humans, no different between societies with simple or complex cultures; all the same, all need water to live. Various civilizations, small and large in human life, are always related to water. For example, the Euphrates and Tigris rivers formed civilizations in Mesopotamia and Sumeria, the Ganges River formed civilization in India, the Nile River formed civilization in Egypt, the Musi River formed Srivijaya civilization in Sumatra, and many more. Says Nikhil Anand (2017), human history can be characterized by the search for and control of water.

Human dependence on water makes the relationship between humans and humans and between humans and water very complex. This reality gives rise to the prevalence of knowledge and the creation of water management by humans in everyday life. It is common for every community or culture to know about managing water resources. Knowledge emerges through experience in carrying out management activities

continuously throughout life. The existence of governance shows the law in a community in managing these resources. This simple illustration encourages anthropological scientists to include law as one part or element of culture.

I do not want to discuss whether the law is a *sui generis* entity or part of the culture. However, the important thing that I want to convey in this paper is that every community has its knowledge and laws for managing water for their lives, which has existed since the social community was formed. Interestingly, in simple communities, which in Indonesian legal discourse are called "customary law communities," water management is about the relationship between humans and humans and includes the relationship between humans and water in the space where they build their lives together. Water is seen as an entity, sometimes as a subject and an active object. This means that each customary law community has laws for managing the water resources in the space where they live historically.

The problem in modern societies is the emergence of state entities with sovereign territories covering various cultures or social communities. A single law is made to manage water resources within these diverse communities and cultures. The issue of legal unification is a controversial and discourse issue for legal activists in Indonesia. The reason is that a law that does not grow within the community in the same space will become foreign to the customary law community, whose water resources are regulated by the new law. This is because this law does not grow and live together with human life and water in the space where they live. Social relations and relations between humans and water certainly have the potential to become disconnected and sometimes have a severe impact on the degradation of water resources. In addition, the single-state law can break the life history of humans with their environment and potentially break humans with their ancestors in that place.

Gupta and Dellapenna (2008) argue that over the past five millennia, different water law systems have grown and developed around the world. They want to convey that water laws shaped by societies globally are diverse. Thus, legal pluralism is essential in water management to realize water justice in diverse communities.

A literature search conducted by the author shows that until now, there has been no research or legal writing in Indonesia that specifically discusses the rights of indigenous peoples in water management using their customary law. Indonesia is one of the countries where, until now, many customary law communities still live and still hold their old life knowledge connected with nature, such as water. This lack of literature or research encouraged me to write "Regulating the Jurisdiction of indigenous peoples over Water: A Comparison of Laws in Indonesia and New Zealand."

This issue is important because the law is essential in formulating and streamlining water resources policy. (Goldfarb, 1988). In Indonesia, the legal instruments regarding water have yet to show any improvement in managing water resources. In many areas of Indonesia, there are still many citizens whose rights to water have not been fulfilled. Some of this unfulfillment is caused by the geographical conditions in which they live, and some is caused by the exploitation of water by the private sector. This exploitation by the private sector comes in two forms: first, the utilization of groundwater as a commodity for bottled drinking water, and second, the utilization of water for the benefit of the hotel business. In my opinion, the main cause of this exploitation of water by the private sector lies in the legal paradigm used in water management.

Method

The phenomenon described above has given rise to the discourse of indigenous peoples' rights to water or water resources, which has been widely discussed in the last few decades, especially in Australia and New Zealand. This article aims to look at how the regulation of indigenous peoples' rights to water resources in state law in New Zealand and Indonesia. Inspired by Macpherson (2019), this article focuses on the issue of "*indigenous water jurisdiction."*

This research was conducted using a comparative research method. A comparative law approach is used in legal studies to understand the quality of the legal systems being compared. According to Macpherson (2019), comparative law is the study of foreign law to understand whether or not the legal system is better than other legal systems. This comparison can be made between countries or within countries. This article uses a comparison between countries, precisely the matter of comparing state legal arrangements for the jurisdiction of indigenous peoples in the management of water resources between Indonesian law and New Zealand law.

I want to compare Indonesia with New Zealand because the characteristics of customary law communities in New Zealand (Maori people) are culturally very close to customary law communities in Indonesia, especially in Eastern Indonesia. For example, the conception of human attachment to water (river, one part of the river, seawater, moor water). In addition, the methods used in this research are *legal review* and literature study. Legal review focuses on laws and regulations in Indonesia and New Zealand that regulate the jurisdiction of indigenous peoples in the management of water resources. Meanwhile, the literature study focuses on literature both books and articles that discuss the topic.

Result and Discussion

Indigenous Peoples and Water

In this article, I will shorten the term "indigenous people" to "MHA" for technical writing purposes. The term "indigenous people" used in this paper refers to the technical legal terms in Indonesian legislation. However, the meaning used is not strict to the definition made by Indonesian legal regulations. *Indigenous people* in this paper refer to the term "*indigenous people.*" The author does this so as not to be trapped and limited by the indicators set out in various regulations in Indonesia regarding the definition of indigenous peoples.

Water, as stated above, is a basic human need. However, modern communities and indigenous communities see water differently. Suppose modern communities see water as an item humans need, which can be commodified or used as a commodity. This view is not surprising when we read or hear that modern society sees water as a source of the human economy. This view is undoubtedly different for MHA. Water is the "lifeblood" of indigenous peoples' lives. (O'Bryan, 2019). This means that water is not just necessary for life but has become part of the indigenous community. Water is related to indigenous peoples' culture, economy, environment, politics, and beliefs. This aligns with what O'Bryan said as he shared his experience as a lawyer for indigenous peoples in Australia. In various meetings between him and indigenous peoples, he saw how water was presented in multiple ways; sometimes, they explained it culturally, sometimes spiritually, and sometimes physically, socially, and economically. The complexity of the relationship between humans and water and the importance of water to humans has led to discussions on whether water is a public good or a commodity. Kornfeld discusses this issue in his article. According to him, in discussing this issue, water must be seen as a public good, which has a change of form in ownership claims or management rights. (Kornfeld, 2012). The latter has led us to discuss water as a commodity.

The phenomenon of indigenous Australians described by O'Bryan above is not much different from the historical life experiences of the Maori people in New Zealand. Most Maori tribes derive their identity from lakes and water. (Ruru, 2018). Ruru explained that when Maori people meet, and they want to know the identity of the other person, the question is not "Where are you from? or Which person are you?" the question they often ask is "*Who is my water?*" so, water is a marker of identity from a tribe or sub-tribe.

In Maluku, some communities on the island of Ambon (Ajawaila, 2000), Seram, and Lease Islands associate their communities with 3 (three) rivers in western Seram island (Bartels, 2017). These three rivers form a social alliance of communities in Maluku called the "fellowship of three water stems." The three rivers are the Tala, Eti, and Sapalewa rivers. Some Maluku people identify as coming from one of these three rivers. Myths and beliefs are instrumental in justifying the community's relationship with the river. The

phenomenon of the alliance of three water streams or three rivers in West Seram, Maluku, is like the Maori community in New Zealand described by Ruru.

Bali has a Balinese concept of water management called "*subak.*" In normative law (stipulated in the regional regulation of Bali province in 1972), subak is defined as the traditional law of the Balinese people whose agriculture has a socio-religious character and has historically existed since time immemorial and has developed as a landowner organization in the field of water management in certain areas (Norken et al., 2010). (Norken et al., 2010).. Subak is usually defined as the Balinese customary institution for managing irrigation. However, this irrigation is different from government-driven irrigation projects. Irrigation in Bali is a social fact as a consequence of Balinese society as an agricultural society. The management of irrigation water by the Balinese through subak shows the concept of harmony between humans and their environment, which is managed using sustainable principles (Roth, 2015). (Roth, 2015). Apart from the conception of Balinese knowledge that is very harmonious and balanced in the management of water through subak, subak itself cannot be separated from the state's various political and economic interests. For example, in the era of the green revolution, subak became the main instrument of the state in the success of this program. Similarly, when the tourist industry in Bali increased, subak was also used to support this business. However, my essential point is that indigenous Indonesians in every region have conceptions of knowledge and beliefs that show their attachment to water.

Regimes of Water Regulation in Indonesia

Currently, water in Indonesia is regulated by Law No. 17/2019 on Water Resources (hereinafter referred to as "Law 17/2019"). Law 17/2019 was born after the Constitutional Court issued several rulings that stated that several clauses in the old Water Resources Law (Law 7/2004) were contrary to the 1945 Constitution. This led the government to issue a new law, Law 17/2019. Since the Dutch East Indies era in Indonesia, there have been four regulatory regimes regarding water or irrigation or water resources (Astriani, 2021). The establishment, changes, and replacements of these water regulations show the long politics of water management in Indonesia. (Pasandaran, 2015). Of course, the formation, changes, and replacement of one regulation to another cannot be separated from the social and political-economic interests of the state. These state interests must also be understood independently or in the context of the state or its relations with actors other than the state (companies or non-state organizations). Pasandaran (2015) identifies the political element in water management from the term used, namely the term "*good water governance.*" This article explores the state's interests and how the regulation regulates the jurisdiction of indigenous peoples in the management of water or water resources.

The first regulation in Indonesia governing water was issued by the Dutch East Indies government in 1936. This regulation was named the Algemene Water Reglement (AWR) of 1936. According to Pasandaran (2015), the 1936 AWR was born as a response to and simultaneously overcame the problem of famine on the island of Java in the mid-19th century. What does the AWR have to do with the solution to the famine? The 1936 AWR was intended to regulate irrigation. Budiono et al. argue that the 1936 AWR is a water resource management regulation specifically about irrigation in the independence era. (Budiono et al., 2020). Both Budiono et al. and Pasandaran say that this is also related to the development of water management technology in the Dutch East Indies or Indonesia today. A different view comes from Nadia Atriani; according to her, the 1936 AWR was related to the colonial government's forced cultivation policy and irrigation development intended to support the large plantations built in the colonial era. (Astriani, 2021).

The author has traced various literatures, but the 1936 AWR does not mention indigenous peoples or their authority in water resources management. This means that the first water regulation in Indonesia ruled out the existence and rights of indigenous peoples in water affairs. This can be understood because this regulation was issued by the colonizers.

Only after 29 years of independence did Indonesia establish legislation on water resources management. This policy was passed on December 26, 1974, in the New Order era through Law Number

11/1974 on Irrigation. Law 11/1974 defines irrigation as a field of development of water sources, including the non-animal natural resources contained therein, both natural and those that have been cultivated by humans. Meanwhile, water resources management is called "water management" in this law. What is water management? Article 1 point 6 of Law 11/1974 defines it as:

"all efforts to regulate development such as ownership, control, management, use, exploitation, and supervision of water and its sources, including the non-animal natural resources contained therein, to achieve the maximum benefit in fulfilling the livelihood and life of the people."

Why was Law 11/1974 enacted? In the preamble of this law, it is stated that the AWR 1936 has a narrow arrangement in terms of both its applicability and the objects it regulates. The 1936 AWR only applies to Java and Madura, and this colonial-era regulation only regulates one part of water resource management: irrigation. Therefore, adequate regulation of irrigation is needed, both in terms of its applicability and the objects regulated. In addition, Law 11/1974 has a clear constitutional basis, which refers to the provisions of Article 33, paragraph 3 of the 1945 Constitution. Meanwhile, the AWR, formed before Indonesia's independence, certainly does not have a substantial constitutional foundation because the regulation was born before the birth of the 1945 Constitution.

Law 11/1974 consists of 17 articles and 12 chapters. Of the 17 articles, one clause in Article 3 mentions indigenous peoples. This provision is precisely contained in Article 3, paragraph (3) of Law 11/1974, which reads:

"The implementation of the provisions of paragraph (2) of this article shall continue to respect the rights owned by local indigenous peoples, as long as it does not conflict with the national interest".

The phrase "respect" in the above provision cannot be interpreted as a "form of state recognition" of the existence and jurisdiction of indigenous peoples in managing water resources that are culturally part of the indigenous community. In addition, the phrase "as long as it does not conflict with the national interest" is also a clause that can be interpreted anywhere. This clause is often used to legitimize the removal of indigenous peoples from their historic places of life. Dam construction projects in the New Order era, such as the Kedungombo reservoir dam in 1985 in the name of the national interest, displaced communities in 37 villages in Grobogan, Sragen, and Boyolali regencies.

The regulation of water resources management in Law 11/1974 looks very *state-centric*, where the state is given broad authority in developing and managing water resources. (Astriani, 2021). Astriani continued that the state acts as a regulator and provider in managing water resources. The right to control the state, regulated in Article 33, paragraph 3 of the 1945 Constitution, is the primary legal basis for claiming the authority to manage water in Indonesia. The politics of state management in this law is suspected to be related to the government's interests at that time in realizing increased food production in the Indonesian government's green revolution policy. (Pasandaran, 2015).

In 2004, after reformasi and Indonesia entered the era of democratization and information disclosure, the government issued Law No. 7/2004 on Water Resources, replacing Law 11/1974. Law 7/2004 was passed on March 18, 2004, during the era of President Mgewati Soekarno Putri. This law was issued to replace Law 11/1974 because the government thought the old law was no longer relevant. Ironically, although this law was born after the state constitutionally recognized and respected the existence of customary law communities, out of 100 articles, only two clauses mention customary law communities. These clauses are found in Article 6, paragraph (2) and paragraph (3) of Law 7/2004. This provision reads:

"(2) The control of water resources, as referred to in paragraph (1), is carried out by the Government *and regional governments while recognizing the ulayat rights of local customary law communities and similar rights, as long as it does not conflict with the national interest and laws and regulations.*

(3) The layout rights of customary law communities over water resources as referred to in paragraph (2) shall continue to be recognized as long as they still exist and have been confirmed by local regulations."

Substantially, the regulation of indigenous peoples in Law 7/2004 has not changed significantly compared to the previous law. In this law, the state uses the term recognition instead of respect, but the recognition is also given strict limitations as in the provisions of the old law. Indigenous peoples' rights are recognized as long as the interests of indigenous peoples do not conflict with national interests. In addition, this law adds a new clause that state recognition can occur if the state has confirmed the customary law community through legislation. So, the existence of a recognized customary law community is not factual but is the most critical juridical technical requirement. This means that even though a community of indigenous peoples exists, as long as the state has not confirmed its existence through regulations, the indigenous peoples are legally considered non-existent.

Law 7/2004 was submitted for judicial review to the Constitutional Court by several community groups, and the Constitutional Court found several articles in the law to be contrary to the 1945 Constitution. This led to the law being annulled by the Constitutional Court. Because Law 7/2004 was repealed, the government re-enacted Law 11/1974 through Law 17/2019. This is explicitly mentioned in letter d of the preamble of Law 17/2019. The re-enactment of Law 11/1974 does not mean that there are no changes in the substance of the regulation. Law 17/2019 contains many additional articles when compared to Law 11/1974. Law 17/2019 consists of 79 articles and 16 chapters, which is much different from Law 11/1974, which only consists of 17 articles and 12 chapters.

Provisions for indigenous peoples in water resources management matters are regulated in Article 9, paragraph (2), and paragraph (3) of this Law. In principle, the regulation of MHA and their rights in water management affairs in Law 17/2019 is no different from the provisions in Law 7/2004. The point is that the state recognizes the existence of customary rights of MHA as long as they do not conflict with the national interest, and the community must also be regulated in legislation. This means that the recognition of the existence of MHA has not yet reached the level of recognizing MHA as a legal subject with authority over water resources that have been integrated with the existence of the indigenous community. In addition, the existence of MHA is not only factual but must also be normative. This juridical existence is evident from the phrase "... has been regulated in the Regional Regulation." If MHA is a legal subject in water resources law in Indonesia, its status still requires legal recognition; what about its management authority? This article refers to "water resources management jurisdiction."

New Zealand water legislation

Maori people, especially the Te Awa Tupua tribe in New Zealand, got a breath of fresh air in 2017 because, in March 2017, the New Zealand government passed the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (2017 No 7)* or Act Number 7 of 2017 concerning Te Awa Putua or Whanganui River. In this Act, the New Zealand government recognizes the existence and attachment of the Te Awa Putua tribe to the Whanganui River. It acknowledges the Whanganui River as the jurisdiction of the Te Awa Putua tribe. This assertion of jurisdiction relates to the management of the Te Awa Putua, indigenous people to manage the river with knowledge and governance systems based on Te Awa Putua customary law.

Historically, indigenous peoples in New Zealand have been marginalized in water management matters since the signing of the Treaty of Waitangi in 1840. (Macpherson, 2019). This treaty marked the era of the forced takeover of indigenous peoples' authority in the management of their nature, including in water affairs by the British. The Treaty of Waitangi marked not only a change in nature management but also a matter of conception or knowledge in nature management in New Zealand. The British managed nature using a modern European perspective where nature was seen as an object to be exploited. This view is certainly different from the Maori people's view of nature, especially water (O'Bryan, 2019).

For the Maori, water is considered an entity that can relate to humans and an inseparable part of Maori society. As stated by Machperson, water is part of the Maori people's identity. Maori people do not ask their interlocutors, "Where are you from?" but ask, "What water are you from?" water can represent a clan or sub-tribe in Maori. According to The Land and Water Forum, Maori people's relationship with water

involves 3 (three) principles, namely: *Whakapapa*, *taonga*, and *kaitiakitanga*. (O'Bryan, 2019). O'Bryan further explains these three principles in his book as follows:

"*The relationship between iwi Maori and freshwater is founded in* ***whakapapa****, the foundation for an inalienable relationship between iwi and freshwater that is recorded, celebrated, and perpetuated across generations.*

Freshwater is recognized by iwi as a ***taonga*** *of paramount importance*

Kaitiakitanga *is the obligation of iwi to be responsible for the well-being of the landscape. This obligation is inter-generational. Kaitiakitanga has been affected over the generations in many ways and differs amongst iwi and across different circumstances.*"

If you look at the explanation of the three principles of Maori people in water management above, it seems pretty holistic to the Maori people's view of water. First, water is seen as a separate entity but has a strong relationship with the Maori people. Second, Maori people see water as an essential treasure for their lives. The Maori people have an obligation to maintain the existence and sustainability of water, and interestingly, this obligation is passed on to future generations.

The management of nature, with a European-biased view in New Zealand, has pressured nature in Aotearoa. Seeing water resources as an object that the consequence of exploitation is a drastic decline makes water resources experience a drastic decline, and this situation has a more severe crisis impact when there is extreme global climate change.

This situation made the Te Awa Tupua tribe, which customarily has attachment and customary rights to the Whanganui River, urge the New Zealand government to recognize the existence and legal authority of the Te Awa Tupua tribe to manage the Whanganui River. According to Macpherson, the Maori people are mobilizing with two main demands. *First is the Whanganui River negotiation and claim* from the Te Awa Putua tribe. This demand was embodied in Act No. 7 of 2017 on Te Awa Putua. Through this Act, the Whanganui River is recognized as an inseparable and living kutuhan with all a legal entity's rights, titles, and obligations under the guardianship and management of Te Awa Putua tribal representatives. (Macpherson, 2019). This is what Machperson calls "indigenous jurisdiction over water." *Second*, the Maori claim to ownership of water. The movement to realize the claims in this second claim was pursued through litigation at the Waitangi Tribunal.

Jacinta Ruru's article implicitly said that environmental law policy in New Zealand changed drastically, starting when the Resource Management Act 1991 (RMA) was passed (Ruru, 2018). The RMA's enactment affected more than 50 laws and repealed key sections of those laws, including water laws (O'Bryan, 2019). Thus, the Te Awa Putua Act of 2017 is a derivative regulation of the 1991 RMA.

Why did the New Zealand government finally recognize the existence and authority of indigenous peoples in water management? Ruru explained that recognizing the jurisdiction of Maori people (indigenous peoples) in resource management (land, water, and forests) is an effort to build the state's understanding of sustainable resource management and allows the state to take action to use and care for nature. (Ruru, 2018). Following Ruru's explanation, it is clear that Ruru, a legal academic in New Zealand, believes that customary law is an alternative solution to realizing sustainable nature management. However, this law cannot be managed by institutions other than customary institutions owned by indigenous communities. The reason is that customary law is not a separate entity but is bound to the people and space where it grows and lives.

Conclusion

Global climate change and extreme natural disasters in recent decades have threatened the sustainability of water resources worldwide, including in Indonesia and New Zealand. This situation should be the primary reference for public administrators to evaluate various water resources regulations and discuss alternative models as a solution to the impasse of modern society in managing nature. Various global

commitments of countries to suppress the climate change rate since the Kyoto Protocol have not yet seen results. The lesson to be learned is that the solutions offered have not yet touched the root of the problem.

I think the idea of "indigenous jurisdiction over water" is an alternative idea that should be considered. What has been done by the New Zealand Government since the passing of the Resource Management Act (RMA) in 1991 until the latest development they passed, the Te Awa Tupua Act in 2017, shows the government's political will to evaluate the way nature management has been used seriously. As described above, these two regulations try to re-adopt customary law and provide legal space for indigenous peoples in managing water to realize the desire to maintain and ensure the sustainability of water resources for future generations in New Zealand.

What the New Zealand government has done in water matters has yet to appear in the Indonesian government's political policy on water governance. The four water regulation regimes in Indonesia described above do not have a single clause showing the seriousness of wanting to involve indigenous peoples and their knowledge of managing water. Indonesia, as an archipelagic country located between the meeting of three large plates and flanked by two oceans connected to the north pole, makes Indonesia a country that is very vulnerable to global climate change. In addition, the management of water resources that has been taking place using a modern European paradigm has never really considered nature's carrying capacity and sustainability. The diction "sustainability" is just a sweetening of words on paper.

On the other hand, Indonesia is one of the countries rich in indigenous peoples. Indigenous peoples in Indonesia are very diverse and have their own cosmology, knowledge, and laws. Although diverse, the conception of indigenous peoples in managing nature (in this context, water) is similar; nature is seen not as an object but as a subject.

As a subject, water, for example, is seen as having a shared history with the people who live around it, as suggested in the culture of indigenous people in Maluku. The three main rivers on the western island of Seram become community markers and are always present in songs and folk stories. Of course, this conception gives birth to the concept of sustainable water management because there are various artifacts of the history of the people living in the water or the area around the water.

Comparing the latest New Zealand regulations on water with the latest rules in Indonesia, it looks very far from the development of our legal system compared to New Zealand. At the same time, indigenous peoples in New Zealand are a minority community. Most of the population comes from Europe. In Indonesia, most are indigenous Indonesians who have a customary attachment to the place where they live. However, as stipulated in Law 17/2019, Indonesia's latest regulation on water only provides passive recognition to indigenous peoples. I call this passive recognition because the law limits it with the phrase "as long as it does not conflict with the national interest." In the name of national interest, large dams are built, highways are constructed, private companies manage water, and hydropower plants are built; the marginalization of indigenous subjects always follows all of this. If the subject has been marginalized, what about the law of the subject? Of course, it is also negated. According to Chalid and Yaqin, the complexity of water issues in Indonesia, which impacts the neglect of citizens' rights to water, is caused by the massive global agenda in liberalizing and privatizing water in Indonesia. (Chalid & Yaqin, 2018). For this reason, the findings of this article show that Indonesia must learn from New Zealand, especially in regulating the jurisdiction of indigenous peoples in water management, if we want Indonesia's water resources to be enjoyed by the next generation.

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