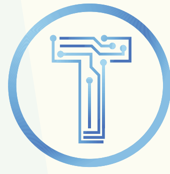

TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 20, 2021

A new decade for social changes

ISSN 2668-7798

www.techniumscience.com

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

The protection of indigenous people's rights in the equitable management of water resources

Meylan Maasye Maramis[1], Abdul Rachmad Budiono[2], Prija Djatmika[3], Rachmad Safa'at[4]

[1 2 3 4]Faculty of Law, Universitas Brawijaya, Indonesia
meylanmaramis@gmail.com[1], rachmad.budiono@ub.ac.id[2], prija.djatmika@ub.ac.id[3], rachmad.syafaat@ub.ac.id[4]

Abstract. Local wisdom plays an important role in the management of water resources and the environment. However, local wisdom in managing water resources and the environment cannot be separated from various challenges. The concept of a local environmental wisdom system is rooted in the knowledge and management system of indigenous peoples through a long process of interaction and adaptation of the environment and natural resources. Indigenous peoples are able to develop ways to sustain life by creating value systems, patterns of life, institutional systems, and laws that are in harmony with condition and availability of natural resources around the area where they live. This study aims to determine the condition of water resources, the role of indigenous peoples in preserving and conserving water resources, the values of local wisdom, and preserving the values of local wisdom in maintaining the conservation of water resources. Local wisdom in maintaining the conservation of water resources in the regulation of Law No. 17 of 2019 concerning water resources regulates indigenous peoples in water resources management. This writing is structured using a normative juridical writing method with a conceptual and analytical approach.

Keywords. Protection, Indigenous peoples, Conservation, Water Resources

1. Introduction

Water is a source of life which without it, human will never exist. Water for human life has values and social, economic, and religious functions. Water is very important and it has dominant function in the sustainability of the lives of creatures on earth. Therefore, it brings many scholars to discuss the issues of natural resources and the struggle for rights over their management [1]. The struggle concerning the rights to manage natural resources has occurred in pre-historic times and continues to this day [2]. Various conceptual resource management methods evolved and coincided with the paradigm that dominated the thinking of group at its time[3].

The environmental image of traditional societies, such as those that develop in societies in developing countries, is more cosmic-magical in character. According to the magical-cosmic world of thought, humans are placed as an inseparable part of their natural environment, humans are influenced and influence. It has a connection and dependence with their environment so that their time is comprehensive, holistic, and comprehensive. The holistic perspective builds awareness that the sustainability of human life is highly dependent on the sustainability of its function and environmental sustainability[4]. The environment must be treated and utilized

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

wisely and responsibly in accordance with its carrying capacity and its capability so as not to cause disasters for human life. This is because the relationship between humans and their environment is not an exploitative relationship, but rather an interaction that supports and maintains harmony, balance and dynamic order[5].

The environmental image as depicted is in line with the image of the environment originating from the religious-magical nature of customary law communities. The customary law community identifies itself as an integrated part of the universe in a relationship that is interrelated, dependent, and influencing one another. The most important thing is to create a harmonious, and balanced relationship so as to create a harmonious atmosphere between humans and their environment. Therefore, in simple term, it can be said that the image of the Indonesian human environment is formed and fostered from the environmental image of the customary law community.

Empirically, it can be observed that the environmental image of indigenous and tribal peoples is often irrational and mystical in nature. Because in addition to relating to life in the real world, it is also closely related to maintaining a balanced relationship in the supernatural. However, the image of the traditional environment does not mean that it has a bad impact on the environment, but instead creates attitudes and behaviour that are all religious and magical towards the environment, in the form of prudent and responsible management and utilization of natural resources. This is the essence and expression of the wisdom of the indigenous peoples regarding their environment.

The wisdom of the environment of indigenous peoples essentially stems from the religious and value systems adopted in their communities. Religious teachings and beliefs of local communities animate, give color and influence the image of their environment in the form of attitudes and behavior towards their environment. The essence contained in it is to impose demands on humans to behave in harmony with the rhythm of the universe so that a balanced relationship is created between humans and their natural environment[6].

Even though it often seems irrational and illogical, in reality, behavior towards nature with a mystical and magical pattern of action creates environmental sustainability. The behavior of the community that determines certain places in river areas, water sources, lakes, hills, mountains, forests, large trees, beaches, seas, etc. as places that are haunted, sacred is an effective strategy to protect and conserve living and non-living natural resources from negative human actions. Thus, the hydro-orological function of forests, rivers, lakes, water sources, and providers of genetic resources for human subsistence is maintained in a sustainable manner.

According to the minds of indigenous peoples who are religious-magical, this universe is inhabited by spirits who are in charge of maintaining the balance of natural structures, mechanisms and rhythms. If human behavior becomes greedy, destroys the balance of nature, or is no longer familiar and in tune with the rhythm of nature, then there will be disturbances, inconsistencies, shocks in the universe, in a form of earthquake, volcanoes erupt, disease outbreaks, hurricanes, floods, droughts, storms, landslides, fires, lightning strikes, and others as manifestations of the anger of the spirit guardians of the realm[7]. Such natural phenomena, of course, it can be understood according to modern minds because the scientific conditions of such a catastrophe naturally occur as a result of the treatment and behavior of humans who are bad, incompatible, polluting or destroying the environment, causing the shock of the universe.

Empirically, the belief of indigenous peoples as above is able and effective to control human behavior who tends to be greedy to control and exploit natural resources arbitrarily. Therefore, it would be unwise if there were some people who always criticized and discredited the mindset and actions of indigenous peoples who consciously maintained the values, religions, traditions and norms of customary law to maintain the magical balance and social order in their

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

community environment. In fact, we should have empathy and learn from the mindset and actions of indigenous peoples in treating and utilizing their natural environment so that the performance of natural resource management in development has a more human nuance [8].

When the concept of the state was born at the same time, the struggle for power over rights to water between the state and the people began. In a country that is very competitive and centralized, the power over the management rights of the water is in the hands of the state. In a democratic country the people get multiple power management rights over natural resources with various consequences. Try to seek social values and functions with the economy of the increasingly sharp management of natural resources between government and society.

The 1945 Constitution of the Republic of Indonesia (referred as the 1945 Constitution of the Republic of Indonesia) has provided a statistical basis for the use and management of natural resources including water aimed at increasing the prosperity of the people. Article 33 paragraph 3 of the 1945 Constitution states that "the earth and other natural resources are controlled by the state for the greatest prosperity of the people." In line with this mandate, the activities of managing water resources must have an impact on improving the welfare of the community. Related to water resources, the forest must be maintained because that is where a water source is there. The forest belonging to the indigenous people, which is protected for generations, is a wealth inherited by the ancestors and has traditionally been passed down from generation to generation in the form of individual and communal rights.

Article 1 Number 1 of Law Number 17 of 2019 concerning Water Resources states that water resources are water, water sources, and water resources contained therein, while water is all water that is found on, above, or under land permits, including of surface water, groundwater, rainwater and sea water on land. The existence of water is a basic need of every human being, so that the state maintains the existence of water resources for the sustainability of human life.

The issue of natural resource management, namely the reciprocal relationship between humans and their environment. Scientists who study the reciprocal relationship between living things and their environment are called ecology. The central concept in the ecology is called an ecosystem. It is an ecological system which is formed by the mutual relationship between living things and their natural environment. An ecosystem consisting of ecological components that work regularly as a unit which affects and is dependent on each other.

The ecosystem is formed by the composition of living and natural resources in a space and place, which interact and form an orderly and mutually influencing unity so that it integrally forms a system of life with this universe. The way to understand environmental issues like this is known as the ecosystem approach[9].

In its interaction, humans observe, adapt and gain experience. Then they have certain insights about the environment of their life. Human insights into this environment are referred to as environmentalism (*environmental insight*), which describes human perceptions of the structure, mechanisms and functions of the environment, as well as human interactions and adaptations including human responses and reactions. The tenure and ownership rights of indigenous peoples' forest lands are not the same as legal land arrangements based on ownership certificates. What has always been a legal issue is the right to use and manage the existing potential in community forests, including water. There are often conflicts in the application of the law with customary law in the management of customary lands and customary forests as regulated in law.

Therefore, the government needs to provide special protection regarding the management of water resources for indigenous peoples in statutory regulations, both in the constitution and in laws.

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

2. Research Questions

Based on the introduction above, the issues that can be raised in this research are as follows:

1. How is the legal protection for indigenous and tribal peoples regarding water resources management, after the enactment of Law Number 17 of 2019 concerning Water Resources?
2. What is the legal implication of Law Number 17 of 2019 concerning Water Resources on the legal protection of indigenous peoples' rights in the management and the conservation of water resources?

3. Methods

3.1. Research Type

This type of research is a non-statutory legal research which has a prescriptive evaluative activity which is classified as legal research type. This research uses primary data as secondary data support. Primary data in this research is in the form of information that can be more in-depth regarding indigenous peoples in managing water resources for research purposes which are used to network information as much as possible. Native law research includes an examination of the principles, concepts, rules and legal comparisons to answer the legal issue of this research.

3.2. Research Approach

This research uses several approaches regarding legal issues to answer issues that will be discussed between the statutory approach, the conceptual approach, the historical approach.

The statutory approach is applied by analyzing laws and regulations related to legal issues in the discussion regarding the legal protection of indigenous peoples for the right to manage natural resources based on social justice in Law No. 17 of 2019 concerning Water Resources. The result of this analysis is an argument to solve the issue faced. In non-statutory law research, the written law is examined from several aspects such as theoretical aspects, content, comparisons, structure / composition, content, general explanation and explanation in each article, formulas and language used as law language. We can conclude that a non-statutory research has a broad scope. Native law research has the same definition as digital research, namely research based on legal materials whose focus is on reading and studying primary and secondary legal materials.

a. The conceptual approach departs from the views and doctrins in legal science. By studying the views and dictatorships in legal science, researchers will find ideas that give legal insights, and legal concepts relevant to the issues that they are facing. An understanding of these views and dictatorships is the basis for researchers in building an argumentation in solving the issues.
b. Historical approach is used to examine the process of forming the Law number 11 of 1974 concerning regulation, especially article 2, to know the basis of philosophy, history, juridical and sociological in its preparation, so that it shows the basic considerations of a rule that is made. This is done by examining the background of what was learned and the developments regarding the issues he was facing. Researchers want to unveil the philosophy and thinking that give birth to something learned. The historical approach was applied in order to trace the history of legal institutions from time to time until the formation of Law no. 17 of 2019.

3.3. Types and Legal Materials

The legal materials used in this research are primary and secondary legal materials.

1. Primary legal materials:

Primary legal materials are legal materials that are defined from the statutory regulations of the official record including various decisions.

a. The 1945 Constitution of the Republic of Indonesia article 33 paragraph (3)
b. The Law State of the Republic of Indonesia No. 17 of 2019 Article 9.
c. The Article 18b of the 1945 Constitution of the Republic of Indonesia
d. The Forestry Law No. 41 of 1999. on customary forest
e. The Law No. 6 of 2014 concerning villages.
f. The Republic of Indonesia Law No. 11 of 2009 concerning social welfare. State Gazette of the Republic of Indonesia Year 2009 No. 12.
g. The Republic of Indonesia Law No. 5 Year 1990 Concerning Conservation of Natural Resources and Their Ecosystems. Gazette RI 1990 No. 49.
h. The Republic of Indonesia Law No. 18 of 2013 concerning the prevention and eradication of forest destruction. Gazette RI Year 2013 No. 130.
i. The Republic of Indonesia Law No. 41 of 1999 concerning Forestry, the State Gazette of the Republic of Indonesia of 1999 No. 167.
j. The Republic of Indonesia Law No. 32 of 2009 concerning the protection and management of the environment. State Gazette RI 2009 No. 142.

2. Secondary legal materials:

Secondary legal materials as the support in this research are legal documents, legal reports, legal records, academic regulations, and interviews to look for the relevant information to legal issues and books written by legal experts, legal journals, internet and sources which are related to this research. The management of legal materials is carried out through the literature. It will be arranged regularly, sequentially so that it is easy to understand, placing the legal materials according to a statistical framework or organizing legal materials according to variables or research objects.

3. Tertiary legal materials:

Legal materials that provide instructions or explanations such as legal dictionaries, Indonesian language dictionaries, legal and political dictionaries, legal encyclopedias and the like.

3.4. Legal Materials Management Techniques

The collection of legal materials of this research is carried out in two ways, namely primary and secondary. Primary legal materials are collected through a positive law inventory related to this research problem, while secondary legal materials are collected through literature searches related to this research problem.

3.5. Analysis of Legal Materials

After the legal materials have been collected, the next activity that is carried out is to analyze the primary and secondary legal materials that have been obtained. The analytical technique in this research is carried out from an analytical perspective, which aims to produce what should be the essence of legal research that adheres to the character of law as applied science. Analysis results use legal instruments that will generate conclusions as the answers of the formulation of the problems in research. The legal material that has been collected is then identified, classified according to the source and the hierarchy. After all the legal materials have been organized, identified, classified and systematized and analyzed using legal reasoning with deducted-proof methods and / or interpreted to be able to solve or find answers to the problem

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

of the scholars. The analysis used is normative / prescriptive, that is what should be done in relation to this research law issue; descriptive which is describing the content or meaning of the legal rule of law; and comparative that is comparing with other legal systems.

4. Results and Discussion

The international term, Indigenous people, is becoming known throughout the world and is increasingly recognized by many countries after the International Labour Organization (ILO) declared conventions concerning indigenous people used in the conversion of ILO 169 also adopted by the word Bank in project implementation development funding in a number of countries, especially in third countries, such as Latin America, Africa and Asia Pacific[10]. In fact, there is no generally agreed upon definition of indigenous people expressed by experts or non-governmental organizations (NGOs)[11].

In the 1945 Constitution of the Republic of Indonesia (UUD NRI), two terms of indigenous peoples are found, the first term indigenous peoples in article 18 B paragraph 2 of the 1945 NRI Constitution states that the state recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia, which are regulated in law. Second, the term can be found in article 28 I paragraph 3 of the Constitution which states that cultural identity and the rights of traditional communities are respected in line with the times and civilization.

In contrast to Article 28 I paragraph 3 of the 1945 Constitution, in article 3 of law number 5 of 1960 concerning the main principle of Agrarianism, the term customary law community is used which reads:

> With regard to the provisions in articles 1 and 2 the implementation of customary rights and similar rights from the community customary law communities as long as they still exist, must be in such a way that they are in accordance with the national and state interests, which are based on national unity and must not conflict with laws and other higher regulations.

If in the constitution only the terms customary law community and traditional community are found, then in the statutory regulations, the definition of customary law communities is as follows: a customary law community is a group of people who are bound by their customary legal order as citizens with a legal partnership due to similarity in place or residence, or on the basis of descent (Article 1 paragraph 3 of the regulation of the minister of agrarian and spatial planning / head of the National Défense Agency No. 10 of 2016 concerning procedures for establishing communal rights over land of indigenous peoples and communities residing in certain areas).

The Constitutional Court also helps define indigenous peoples through their decisions. The qualifications of the customary law community are based on Article 18 B of the 1945 constitution (Putusa MK Number 31 / PUU-V / 2007).

1. The existence of a community whose members have group feelings
2. The existence of customary government institutions
3. The existence of existing assets and objects
4. The existence of a set of customary law norms
5. Especially for territorial customary law communities, it must have elements of a certain territory.

This means that there are different terms that can be used to define indigenous peoples. For this reason, of all the terms found, the term customary community is intended to

accommodate the various terms of community in the constitution, both customary law communities' article 18 B paragraph 2 of the 1945 constitution and traditional communities article 28 paragraph 1.

The rights of indigenous peoples to land and natural resources constitutionally as stated above, the position of customary law communities' rights to land and natural resources has determined guarantees from the state. These rights must also be maintained for the continuity of their existence, especially regarding *ulayat* over land and natural resources owned by customary law communities. Today, the discussion about indigenous and tribal peoples and their advocacy efforts is increasingly urgent because they live in very disadvantaged conditions compared to other communities in a country.

The constitutional juridical obligations related to recognition and respect for customary law communities carried out by the central and regional governments still encounter various obstacles. State policies related to public services that have not touched the fate of indigenous and tribal peoples increasingly show that their existence as a vulnerable group is discriminated against the fulfilment of their constitutional and traditional rights which is a threat to the Republic of Indonesia. Therefore, it has not been fulfilled. They do not only live with the burden of discrimination that has a long history but also from access to their own land with all its natural resources.

The form of customary community rights to land and natural resources is divided into 2 categories, namely[12]:

1. *Ulayat* rights are a series of powers and obligations of a customary law community, relating to land located within their territory. *Ulayat* rights have two aspects. The first is the public aspect held by customary leaders in the form of land and natural resources. The second is the private aspect that is held by residents in the form of land.
2. Property rights that have a private aspect which are held by individuals or collectively in the form of land. This means that customary community ownership rights can only be in the form of land, not natural resources.

Beside the form of customary community rights to land (territory) and natural resources, indigenous peoples' rights can also take the form of: culture and identity, traditional knowledge, and the right to self-determination, both at the local and national levels [13].

In Article 1 Number 8 of Law no. 17 of 2019, it states that water resources management is an effort to plan, implement, monitor and evaluate the management of water resources conservation and control of the destructive force of water, so that the existence of water resources management is regulated by law. The existence of customary law communities and local communities who have wisdom in the conservation of water resources management, they have a separate position in the life of the nation and state, namely the power or ability to traditionally protect and conserve water resources. It is necessary to provide space in an effort to conserve water resources, so that life and sustainability can run in balance.

The existence of customary communities and *Ulayat* rights in Article 1 number 22 of Law no. 17 of 2019 is recognized for its existence. In this law, it states that indigenous peoples are customary law communities and / or traditional communities who live hereditary in certain geographic areas and are bound by cultural identities, strong relationships with land, and nature in their resource territory areas. *Ulayat* rights or customary rights are the rights of association owned by certain customary communities which constitute the living environment of their citizens, which includes the right to utilize land, forest and water and their contents in accordance with statutory provisions.

TECHNIUM SOCIAL SCIENCES JOURNAL
Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

Even though it has been regulated, in reality the indigenous people have not been able to take advantage of natural resources including water that are around community forests, and feel disadvantaged because they do not enjoy the potential that is around the forest, including water[14]. Even though there is already a judiciary as a Judicial Institution, it still does not satisfy the indigenous people because the customary law community is an anthropological entity that grows naturally and is made up of various small-size private communities whose citizens have blood relations with each other. The keywords for understanding the blood-related society are “kinship” and “togetherness”, while the empire and the national state are political identities designed to dominate the entire population of an area that has natural resources.

The rights of indigenous peoples to forests and natural resources contained therein, including natural resources obtained by natural and natural possession which have been secured and protected by international law through various instruments of international law, and the provisions of customary community - the provisions of the national laws and regulations, as well as the rules of customary law for each group of indigenous peoples. As in the 1945 Constitution of the Republic of Indonesia Article 1 which reads: Sovereignty is in the hands of the people and it is exercised according to the Constitution. The rights of indigenous peoples to forests are not solely obtained and granted based on or created by the provisions of national laws and regulations (*juristic possession*).

Decree of the Constitutional Court No. 35 / PUU- / 2012, issued 16 May 2013 which materially tested the validity of several articles in Law No. 41/1999 on Forestry, which legally establishes the existence and legal position of customary / community forests in the system, structure and national law. The Constitutional Court has the opinion that state forest and customary forest must have different treatments so that regulatory treatment is needed. As well as the decision of the Constitutional Court Number 85 / PUU-XI / 2013 related to the review of Law Number 7 of 2004 concerning Water Resources of TLN RI 4377 (referred to as Law No.7 of 2004) related to water resources management which was ultimately the decision of the Constitutional Court cancel Law no. 7 Th. 2004 so that the law is completely annulled or has no binding legal force.

For this reason, the Decision of the Constitutional Court No: 85 / PUU-XI / 2013 provides a solid foundation for the integration of the national legal system, which is not solely based on formal law which means MK decisions have a wide range of options which mean that MK decisions remain broad. against the values of law that live and develop in society (living law) in creating and forming an integrated legal system (in unity and strength) Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia which states that land and water and the natural resources contained in it is the gift of God Almighty and controlled by the State for the greatest prosperity of the people. In line with the mandate of the 1945 Constitution, management is directed towards the use of natural resources to improve the welfare of the community and other economic activities. In addition, the management of water resources is directed at empowering local communities and expanding employment opportunities.

The Constitution No. 17 of 2019 on water resources revokes and does not enforce the Constitution No. 11 of 1974 on irrigation (State Gazette 1974 No 65, additional state cabinet No 3046). Even though the Constitution No. 11 of 1974 on irrigation was reinstated after the Constitution Court annulled the Constitution No. 7 of 2004 on water resources. There are still many shortcomings and have not been able to thoroughly regulate the management of water resources in accordance with the development and legal needs of the community.

The issuance of Law No. 17 of 2019 on water resources in which there is ambiguity of norms that are contained in the duties and authorities in article 9 paragraph (2) and paragraph (3) related to the existence of indigenous peoples that is their rights in the management of water

TECHNIUM SOCIAL SCIENCES JOURNAL

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

resources held by the central or regional government which needs to be clarified the meaning of the phrase "as long as it does not conflict with national interests" in paragraphs (2) and (3) with the phrase "tenure rights of indigenous peoples or water resources as referred to in paragraph (2) remain recognized as long as the statement is still there and has been regulated by the local government ”, so that there is ambiguity of the norm.

According to the knowledge that water is one of the basic necessities of life needed by humans. One of the considerations in Law No. 17 of 2019 on water resources after the repeal of Law No. 11 of 1974 on water is the enactment of Law No. 17 of 2019 on water resources. Law No. 11 of 1974 on irrigation (state institution of 1974 No. 65, supplementary state sheet No. 3046) Law No. 11 of 1974 on irrigation was re-enacted after law No. 7 of 2004 on water resources was repealed by constitutional courts but there are still many shortcomings and have not fully regulated in the management of water resources in accordance with the development and prosperity of society, especially customary law society.

In the consideration of one of the laws No 17 of 2019 on water resources that face the imbalance of water availability that tends to decline and increasing water needs, therefore water resources need to be managed with regard to the environment, social functions, and economics in line to create integration between regions, sectors, and generations to meet society's needs over water. Because water is an important branch of production that controls the living will of the people controlled by the state to be used to the fullest for the prosperity of the people in accordance with the constitution of the Republic of Indonesia in 1945.

With the re-enactment of law No. 11 of 1974 on irrigation after the Law No. 7 of 2004 on water resources was revoked by the constitutional court, there are still many shortcomings and have not fully regulated in the management of water resources in accordance with the development and needs of the community and the protection of community law[15]. Therefore, it needs to be replaced based on letter a, letter b, letters c, and d that should form a water resources law and a general explanation of water of it.

The limited availability of water resources contrasts with an increase of water demand on the other hand, causes competition among users of water resources which affects the strength of the economic value of water. These conditions have the potential to cause conflicts of interest between the government, indigenous peoples, sectors, regions, and various parties involved in water resources. Therefore, there is a need for regulation and legal protection of the interests of society for well -being.

On the basis of state control over water resources, the central government or local government is given the task and authority to manage water resources, including the task to meet basic needs and the water itself[16]. In addition, the law gives the authority to manage water resources to the village government or otherwise called to assist the government in the management of water resources to encourage the initiative of village communities in the management of water resources.

In the Constitution of Republic of Indonesia in 1945, in Article 33 Paragraph (3) which reads, “Earth and water and natural resources contained therein are managed by the state and it is used to the fullest for the prosperity of the people”. The word "power" conveys the meaning that the state has the right to exercise control which includes the power to regulate, manage, manage, and supervise the branches of production that are important to the state and/or that control the lives of the people for the greatest benefit of the people. The World Health Organization (WHO) which publishes a book entitled *The Right to Water* places the duty of the governments of each country for the right to water.

There are three main tasks of the government of each country regarding the right to the water namely duty to respect, duty to protect, and duty to fulfil. In line with the growth of

population and economic acceleration development, economic function and social, water often disrupted due to more rapidly of water supply, while the demand continues to rise. As the understanding that water will become a rare commodity in the future, we are developing a sustainable development plan that takes into account its impact on the "sustainability of water" in the future.

Meanwhile water is an increasingly scarce resource. Resilience of natural resources is defined as production, distribution, and accessibility, including availability. In fact, the resilience of water in the regions of Indonesia at the beginning of human civilization and the emergence of economic growth centres, was started from sources of water such as rivers and the eye of the water. However, the eco-communication trend of water resources is decreasing due to decreased water productivity, inefficient utilization, poor management, and high external costs due to environmental degradation. With the existence of local aristocracy in Indonesia, the community has been able to manage natural resources, including their forests, from generation to generation. Most of the indigenous peoples have customary values or traditions in forest management.

The customary values of the community in preserving the forest are usually called local aristocracy. One of the localities in Indonesia is the local charity that exists in Mīnahasa society. One particular pride and characteristic of the community is the water barn which is a distinctive feature in the Minahasa area, especially the village of Warembungan, where the surrounding forest is a customary forest that is protected because the existing sources of water originate from the departure of the Dutch era from 1945. A sense of pride in having a source of water as inheritance from an ancestor, jointly caring for and protecting the existing forest[17].

With the shifting of local ideals, the waning of existing cultures due to technological advances and the increasing economic needs, the community no longer maintains and preserves existing forest areas. In order to return to the local dynamics that have shifted from existing values, this needs to be digested and studied because local dynamism is one of Indonesia's most valuable assets and contains a lot of personal values. The management of water resources cannot be separated from the arrangement of land ownership or land. In Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles have determined the social functions in land ownership. The verdicts of indigenous peoples, with the spirit and mandate, create justice and legal certainty in the field of land and give priority to weak economic groups or indigenous peoples who have inherited customary land rights from generation to generation. Article 18b of the 1945 Constitution states "The state recognizes and respects indigenous peoples and their traditional rights throughout life and in accordance with the development of society and the principles of the unitary republican Republic of Indonesia which are regulated in law". The state's recognition, respect and protection of indigenous peoples must be strived for to maintain the existence of indigenous peoples by establishing local regulations on the management of natural resources.

In the explanation of Article 18b of the 1945 Constitution, there are very tight conditions, namely prescriptive requirements or requirements to achieve goals, such as what is meant by the state recognizing and respecting indigenous peoples' units of customary law and traditional rights as long as life has rules, institutions have access of natural resources that are in accordance with developments and in accordance with the principles of the unitary state of the Republic of Indonesia as regulated in the Act. The conventional terms or conditions that must be fulfilled by customary law are not regulated so that their legality or recognition is not regulated. The lack of clarity of existing regulations on community rights to management of water resources is a juridical problem. Indeed, it is appropriate to recognize the management of customary forests and natural resources, because the function and use of land and the content of natural

TECHNIUM SOCIAL SCIENCES JOURNAL
Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

resources (mineral) as well as a variety of plants on it as a source of profit will be actively exploited with only those benefits. In the concept of customary law, the religious nature (*religio-magis*) of the rights of indigenous peoples to *Ulayat* land is not yet clear, because the formulation of the norms of *Ulayat* land as communal land is the legacy of the ancestors of the people or as a gift.

The problem is divided into three main problems, namely: quantity, quality and distribution. In quantitative terms, the availability of clean water that can be consumed by humans is still in number and can even be said to tend to decrease. In addition, the amount of water available has decreased and in fact, the quality of the water has been contaminated by industrial changes.

Based on Article 1 paragraph (2) of the 1945 NRI Constitution, it is stated that the highest power in the RI State is the People's Sovereignty. Therefore, the purpose of the exercise of the right to rule the State for the greatest prosperity of the people is due to the fact that those who give power to the State are the sovereign people. As for the power that is meant over all earth, water and space, this means that the power of the State over water is already possessed with a right limited by that right, that is, to the extent that the State gives power to exercise its rights under the State's jurisdiction.

The value of justice in the realization of the right to management of natural resources for indigenous peoples where the legal protection of indigenous peoples is of course in accordance with the values that already exist in the order which is in accordance with the life of the community whose the purpose is for prosperity. The debate over the reality of justice has been going on throughout the ages. What is justice? As a concrete statement of sociology in the day-to-day experience of the oppressed, justice should not be a problem of reckless philosophy, but justice should be seen as a material problem or at least a concrete problem.

In fact, the problem of water resource management in the community's customary forests is still a conflict of interest for the surrounding community because the water resources maintained from one generation to another can be depleted and endanger the livelihood of the surrounding community.

The management of water resources by the government often does not pay attention to the sustainability of water resources for future generations. Utilization is not in line with social functions and does not prosper the people. Another aspect concerns the lack of government oversight of water damage resource as a result of mining, and ongoing deforestation.

There is no specific regulation to become a reference for indigenous peoples in the equitable management and use of marine resources for welfare. With the decision of the Constitutional Court No 85 / PUU-XI / 2013, indigenous peoples are given the opportunity to exploit natural resources including the water that is around them, so that it can be used for the prosperity of life and also with the increasing number of people who will need water needs.

Lack of supervision from the government which causes the forests needs to be protected. The problems in civil cases No.234 / PDT.G / 1990 / PN. Manado, if carefully examined substantially, the problem that arise in the management of natural resources, in this case is the natural resources in the customary land in the community of Warembungan village, Pineleng district, Minahasa, North Sulawesi. One of the plaintiffs' case issues in this case is to return to the original source of the plaintiffs (indigenous / local) who became the object of the dispute at this time as in the beginning or whoever entered, controlled or conducted activities of any kind against the object of the dispute (source of water). In the defendant's case, because the object of the dispute was in the community forest, since the Dutch East Indies government (1922) and since Indonesia became independent, the land and objects of the dispute were under the supervision of the government and used for general purposes, many rights of ownership and

Technium Social Sciences Journal
Vol. 20, 357-370, June, 2021
ISSN: 2668-7798
www.techniumscience.com

control the utilization of natural resources between indigenous / local communities and the government[18].

In Article 1 Number 8 of the Law No. 17 of 2019, it states that water resources management is an effort to plan, implement, monitor, and evaluate the implementation of water resources conservation and control of the destructive force of water, so that the existence of water resources management is regulated by law. The existence of customary law communities and local communities who have wisdom in managing the conservation of water resources, have their own position in the life of the nation and state, namely the power or ability to traditionally protect and conserve water resources. It is necessary to provide space in an effort to conserve water resources, so that life and continuity can run in balance.

However, in reality, the problem of water resources management is still a blur of norms which results in conflicts of benefit for the surrounding community and the government often does not pay attention to the preservation of water resources for future generations. The utilization is not in accordance with social functions and does not prosper the people. There is still no supervision of the government against the damage to water resources as a result of the continuous destruction of forests.

This occurs because there are no specific regulations to become a reference for indigenous peoples in the management and utilization of water resources which is fair for welfare. The neglect of the existence of customary law as a source of law in Indonesia is partly due to the assumption that customary law is very traditional in nature and cannot reach the times or globalization and technology.

The basic belief that will be adhered by the passing of Law No.17 of 2019 is aimed at correcting the previous paradigm that was not in accordance with the expectations of society. In order to avoid confusion in resource management authority and with the hope that it will manifest in a more efficient and effective resource processing system, therefore the management concept is carried out jointly between local communities and the government, by means of a system cooperative management.

Therefore, it is shown in the provisions of Article 7 of the Water Resources Law which states that in principle, water cannot be owned or controlled by individuals, community groups, or business entities. This is in line with Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. However, for the recognition of customary community rights, including rights similar to that, it is understood that what is meant by indigenous peoples is a group of people who are bound by their customary legal order as members of an association, customary law based on the same place of residence or on the basis of descent.

The *Ulayat* rights of indigenous peoples that do not still exist if they fulfil three elements, namely elements of indigenous peoples, elements of territory, and elements of the relationship between these communities and their territories, namely that there is a legal order[19]. Conditional recognition in Law no. 17 of 2019 is essentially a form of recognition for all and it shows the weak of legal recognition of state law against local institutions based on customary law that has never been regulated. Meanwhile, this law is weaker than Law no. 17 of 2004 which was previously in terms of local institutional recognition.

Thus the hope of achieving justice is as will be addressed in the provisions of Article 2 of the Water Resources Law that water resources management is carried out evenly to all levels of society in the territory of the homeland so that every citizen has the right to have the same opportunity to play a role in water resources management and use water resources.

The Water Resources Law does not only provide opportunities for the presence of private entrepreneurs, providing drinking water and control of water sources, both surface groundwater and river water, commercially by business entities and individuals, but also foreign control. As

a result, clean water management which should be controlled by the state is handed over to the private sector for commercial purposes[20].

This is evident from the provisions of Article 46 of the Water Resources Law which regulates the principle of certain conditions in granting water concession licenses to private parties. It is feared that the dominance of the private sector over the state can be deceived by gifts of cooperation. Whereas in the Constitutional Court decision number 85 / PUU-XI / 2013, the Constitutional Court stated that the state guarantee as the holder of the right to control over water cannot be nullified because natural resources are part of human rights for the community. So that the right to control over water management cannot be held entirely by the private sector.

After the enactment of Law No.17 of 2019, it is a form of recognition for all and shows the weak legal recognition of state law against local institutions which is based on customary law that has never been regulated. Whereas what the people need is substantial justice and social justice, not justice from the bargaining process and the enforcement of formal law.

5. Conclusion

The concept of a local environmental wisdom system is rooted in the existing community knowledge and management system. This is due to their close relationship with the environment and water resources. Through a long process of interaction and adaptation with the environment and natural resources, indigenous peoples are able to develop ways to sustain life by creating value systems, life patterns, institutional systems, and laws that are in harmony with the conditions and availability of water resources around abandoned areas.

Customary law institutions are currently an important alternative legal institution to serve as a basis or source for the formation of national law and the field of customary law that is still relevant in overcoming current problems, including both areas of law that are neutral in water resource rights which is around the community to be able to be used by the customary law community. For this reason, the government should apply customary law in line with the national law and the government should make customary law a source of law in the formation of national law.

References

[1] M. Z. Hossain, "Water: The Most Precious Resource of Our Life," *Glob. J. Adv. Res.*, vol. 2, no. 9, pp. 1436–1445, 2015.
[2] B. Bowden, "Civilization and Its Consequences," in *Oxford Handbooks Online*, Oxford: Oxford University Press, 2018.
[3] R. E. Hoskisson, M. A. Hitt, W. P. Wan, and D. Yiu, "Theory and research in strategic management: Swings of a pendulum," *J. Manage.*, vol. 25, no. 3, pp. 417– 456, 1999.
[4] UNESCO, "Cultural for Sustainable Development," 2012. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Rio+20 ebrochure final.pdf (accessed Apr. 12, 2021).
[5] D. Webster, "Environmental Stewardship," in *Introduction to Tourism and Hospitality in BC*, M. Westcott, Ed. Victoria: BCcampus, 2015.
[6] G. A. Cajete, "Indigenous Science, Climate Change, and Indigenous Community Building: A Framework of Foundational Perspectives for Indigenous Community Resilience and Revitalization," *Sustainability*, vol. 12, no. 9569, pp. 1–11, 2020, doi: 10.3390/su12229569.
[7] UNESCO, *UNESCO World Report Investing in Cultural Diversity and Intercultural Dialogue*. France: UNESCO Publishing, 2009.
[8] T. Rahmadi, *Hukum Lingkungan di Indonesia*. Jakarta: Rajawali Pers, 2014.

[9] F. Balkau, "Industrial estates as model ecosystems," in *A Handbook of Industrial Ecology*, R. U. Ayres and L. W. Ayres, Eds. Cheltenham: Edward Elgar, 2002, pp. 488–496.

[10] International Labour Organization, *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an inclusive, sustainable and just future*. Geneva: Publications Production Unit (PRODOC) of the ILO, 2019.

[11] Secretary-General of United Nations and United Nations High Commissioner for Human Rights, "Ways and means of promoting participation at the United Nations of indigenous peoples' representatives on issues affecting them," 2012. [Online]. Available: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-24_en.pdf.

[12] F. Ridwan, *Hukum Tanah Adat, Multi Disiplin Pembudayaan Pancasila*. Jakarta: Dewaruci Press, 1982.

[13] R. Safa'at, I. Koeswahyono, E. Susilo, I. N. Nurjaya, and S. Bahar, *Relasi Negara Dan Masyarakat Adat : Perebutan Kuasa Atas Hak Pengelolaan Sumberdaya Alam*. Malang: Surya Pena Gemilang, 2015.

[14] S. de Royer, M. van Noordwijk, and J. M. Roshetko, "Does community-based forest management in Indonesia devolve social justice or social costs?," *Int. For. Rev.*, vol. 20, no. 2, pp. 167–180, 2018.

[15] N. Ardhianie, "What next after the water law annulled," *Jakarta Post*, Jakarta, Mar. 03, 2015.

[16] D. T. Muryati and D. Triasih, "Government Policy on Water Resources Management," in *Proceedings of the 3rd International Conference on Indonesian Legal Studies*, 2020, doi: 10.4108/eai.1-7-2020.2303617.

[17] T. Mananoma, L. Tanudjaja, and T. Jansen, "Desain Sistem Jaringan dan Distribusi Air Bersih Pedesaan (Studi Kasus Desa Warembungan)," *J. Sipil Statik*, vol. 4, no. 1, pp. 687–694, 2016, [Online]. Available: https://ejournal.unsrat.ac.id/index.php/jss/article/download/13859/13433.

[18] S. Pasamai, L. O. Husen, S. Rahman, and Maisa, "Factors Affecting the Protection of Indigenous Peoples' Rights under the National Agrarian Law System (Case Study in Central Sulawesi Province)," *Imp. J. Interdiscip. Res.*, vol. 3, no. 5, pp. 1958–1970., 2017.

[19] A. I. Laturette, "Ulayat Right of Customary Law Community," *Pattimura Law J.*, vol. 1, no. 2, pp. 131–144, 2017, [Online]. Available: https://fhukum.unpatti.ac.id/jurnal/palau/article/download/93/17.

[20] W. Hadipuro, "Indonesia's Water Supply Regulatory Framework: Between Commercialisation and Public Service?," *Water Altern.*, vol. 3, no. 3, pp. 475–491, 2010, [Online]. Available: https://www.water-alternatives.org/index.php/allabs/111-a3-3-1/file.