

Challenges in Recognizing Indigenous Peoples' Rights in Mining Licensing in Indigenous Areas

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ABSTRACT

The mining sector is the backbone of the Indonesian economy, contributing significantly to national GDP. However, the expansion of the mining industry also has a direct impact on indigenous communities who have lived and managed their territories for generations but have not yet received formal legal recognition from the state. In practice, mining permits are often issued on customary lands without the participatory involvement of indigenous communities. This is despite the fact that indigenous communities have been recognized in the 1945 Constitution and Constitutional Court Decision No. 35/PUU-X/2012, and they have the normative right to be involved through the principle of Free, Prior, and Informed Consent (FPIC). This study aims to analyze the legal challenges and policy weaknesses in recognizing indigenous peoples' rights in mining permits in Indonesia. The method used is a normative legal approach with an analysis of legislation, case studies of conflicts in several customary territories, as well as a review of academic literature and reports from independent institutions. The results show that the absence of recognition of indigenous territories in national spatial planning, weak FPIC regulations, and overlapping policies between the mining and forestry sectors exacerbate the vulnerability of indigenous communities. This study recommends the legalization of FPIC, the establishment of a national customary recognition institution, and the harmonization of sectoral policies as steps towards ecological justice and sustainable constitutional protection.

Keywords: Indigenous Peoples, Territorial Recognition, Mining Permits

INTRODUCTION

The mining sector in Indonesia has a significant contribution to national economic development. According to data from the Statistik (2024), this sector contributed more than 7% to Indonesia's Gross Domestic Product (GDP) in 2023, making commodities such as coal, nickel, and gold the mainstay of national exports. However, behind its economic contribution, the mining industry is often a source of agrarian conflicts and human rights violations, especially against indigenous communities whose territories overlap with mining concessions. The National Commission on Human Rights (HAM, 2023) noted that throughout 2020–2022 there were more than 360 agrarian conflicts between indigenous communities and mining companies, the majority related to land legality and the lack of proper consultation. Indigenous communities in Indonesia are constitutionally recognized through Article 18B paragraph (2) of the 1945 Constitution, which states that the state recognizes and respects the unity of indigenous communities and their traditional rights as long as they are still alive and in accordance with the developments of the times and the principles of the Unitary State of the Republic of Indonesia. This recognition is also reinforced in various sectoral regulations, such as Law No. 41 of 1999 concerning Forestry and Law No. 6 of 2014 concerning Villages. However, in practice, this recognition remains declarative. Only a small number of indigenous communities receive



formal recognition through Regional Regulations (Perda) or Regional Head Decrees. Nusantara (2024) noted that of the more than 2,300 indigenous communities that have been socially verified, only 140 have legally recognized territories.

The absence of formal and legal maps of customary territories often results in customary lands being categorized as state forest areas or free-to-use state land. This results in the issuance of mining permits without involving indigenous communities as the historical and cultural owners of the land (Taman, 2020). In fact, customary territories are not only physical living spaces but also contain spiritual, economic, and collective identity values that have been preserved for generations. Ignoring these rights not only results in the loss of land access but also damages the social, cultural, and ecological fabric of indigenous communities. One important principle that must be met in extractive projects in customary territories is the principle of Free, Prior, and Informed Consent (FPIC), as stipulated in the United Nations Declaration on the Rights of Indigenous Peoples (Nations, 2007). This principle emphasizes that any activity impacting indigenous communities must be preceded by the free, prior, and fully informed consent of affected communities. However, in practice, the implementation of FPIC in Indonesia remains sporadic and is not a legally binding obligation. Prabowo & Widodo (2023) research shows that the implementation of FPIC is more often understood as an administrative formality, rather than a substantive participatory mechanism.

Several studies have highlighted how indigenous communities are victimized by discriminatory mining licensing systems. Supriyanto (2021) found that the state's failure to guarantee the collective rights of indigenous communities exacerbates unequal access to natural resources. These conflicts are often met with the criminalization of indigenous leaders who advocate for their rights, a practice that, according to WALHI (2023), has increased significantly in the past five years. Isnaeni et al., (2022) added that administrative weaknesses, such as the lack of verification standards for indigenous territory maps, are the main reasons for the slow recognition and legal protection of indigenous lands. Furthermore, weaknesses in the legal structure and overlapping regulations further exacerbate the situation. Law No. 3 of 2020 concerning Mineral and Coal Mining (Minerba Law) does not provide explicit space for the recognition of indigenous territories and instead reinforces the centralization of licensing authority in the hands of the central government. This contradicts Constitutional Court Decision No. 35/PUU-X/2012, which states that customary forests are not part of state forests. However, because there has been no harmonization of sectoral regulations, the implementation of this decision has had little impact on the ongoing licensing practices that do not consider the rights of indigenous peoples (Nurhidayat & Astuti, 2023; Safitri, 2020).

Regional governments actually have the opportunity to strengthen the protection of indigenous communities through Regional Regulations on the Recognition of Indigenous Communities. However, in reality, many regional regulations are normative in nature and are not followed by operational measures such as participatory mapping, the development of customary institutions, or integration into regional spatial planning (Nusantara, 2024). Weak local bureaucratic capacity, minimal technical support, and a lack of synchronization with central government policies are structural barriers that still need to be addressed. Several previous studies tend to emphasize the importance of social and cultural recognition of indigenous communities, but do not delve deeply into the institutional, legal, and policy aspects of mining permits. While research by Prabowo & Widodo (2023) does discuss the fragmentation of mining sector policies, it has not specifically addressed the context of FPIC and the international legal framework. This gap

lies in the lack of a comprehensive study integrating national legal analysis, FPIC principles, and an evaluation of the role of regional institutions in recognizing indigenous peoples' rights in the context of mining exploitation.

Recognizing the importance of a rights-based approach, this study presents a novel analytical framework that combines constitutional law, sectoral laws (mining and forestry), human rights principles, and local case studies to highlight how mining permits often create structural inequalities for indigenous communities. This approach differs from previous studies because it not only examines legality but also proposes alternative institutional designs that are more responsive to the diversity of customary law in Indonesia. In response to this urgency and complexity, this study aims to critically analyze the legal challenges and policy weaknesses in recognizing indigenous peoples' rights in mining permits in Indonesia, focusing on the link between the lack of implementation of the FPIC principle, overlapping regulations, and systemic socio-ecological conflicts in customary territories.

METHODS

This research uses normative legal methods with a juridical-analytical and comparative legal approach, aiming to critically examine legal regulations, mining licensing policies, and the principles of indigenous peoples' rights in both national and international contexts. This approach was chosen because the issues studied are normative-conceptual in nature, related to legal disharmony and violations of the principle of participation (FPIC) in natural resource licensing practices in indigenous territories.

The main data sources in this study are:

- Primary legal materials, namely laws and regulations such as the 1945 Constitution, Law No. 3 of 2020 (Minerba), Law No. 41 of 1999 (Forestry), Law No. 6 of 2014 (Village), and Constitutional Court Decision No. 35/PUU-X/2012.
- Secondary legal materials include academic documents, reports from institutions such as Komnas HAM, WALHI, AMAN, as well as legal and human rights journal articles discussing indigenous peoples' rights and mining licensing conflicts.
- Tertiary legal materials, such as legal dictionaries and customary law encyclopedias, are used to enrich understanding of normative terms and principles.

To add an empirical dimension and contextual validation, this research also uses a case study approach in several areas experiencing mining and customary rights conflicts, including:

1. The case of the Anak Dalam Tribe in Jambi who lost access to the forest due to coal mining concessions,
2. The case of the Dayak community in Central Kalimantan whose territory is claimed as a production forest area,
3. The case of indigenous Papuan communities affected by the expansion of gold and nickel mining.

The analysis was conducted using a legal hermeneutics method, interpreting legal norms within a sociological and ecological context. Furthermore, a comparative legal approach was used to reflect the practices of implementing FPIC in other countries, such as the Philippines and Canada, which have more comprehensive legal instruments for the protection of indigenous peoples. All data were analyzed qualitatively, prioritizing deductive-critical reasoning to assess whether current laws and regulations are capable of providing effective legal protection for indigenous peoples. This analytical technique

was also used to identify regulatory disharmony and opportunities for more just, participatory, and ecological policy reforms.

RESULTS AND DISCUSSION

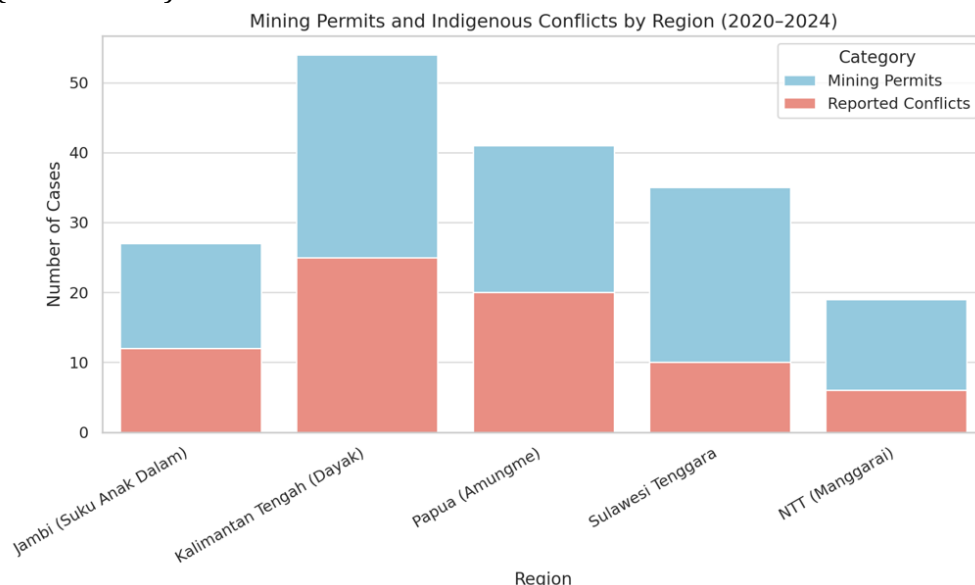
1. Uncertainty over the Status of Customary Areas as the Root of Licensing Problems

Literature studies and regulatory analysis revealed that the root cause of mining permit conflicts lies in the lack of formal legal recognition of customary areas. Research by Isnaeni et al. (2022) confirms that legally unregistered customary area maps create opportunities for the state and companies to unilaterally claim customary land. This situation is reflected in the case of the Anak Dalam Tribe in Jambi, where approximately 18,000 hectares of customary land was passed through by mining permits without FPIC (HAM, 2023). Studies by Taman (2020) and Prabowo & Widodo (2023) confirm that the weak implementation of Constitutional Court Decision No. 35/PUU-X/2012 has resulted in customary areas remaining categorized as state forests, allowing companies to access them through the Mining Business Permit (IUP) scheme. On the other hand, although several regions have passed regional regulations recognizing indigenous communities, their implementation is still minimal due to a lack of administrative and political support (Nusantara, 2024; Safitri, 2020) .

2. The Absence of FPIC as a Violation of Collective Rights

An analysis of five case studies shows that the principle of Free, Prior, and Informed Consent (FPIC) has never been fully implemented. This is evident in the comparison between the number of mining permits and the number of conflicts in indigenous territories below:

Figure 1. Comparison of Mining Permits vs. Indigenous Community Conflicts (2020–2024)



The graph above shows a consistent pattern: the more permits issued without the involvement of indigenous communities, the higher the incidence of conflict. This finding aligns with research by Supriyanto (2021), who noted that 84% of mining conflicts in Indonesia are related to the absence of FPIC. In comparative studies, countries like the Philippines have formally adopted FPIC

under the Indigenous Peoples' Rights Act (IPRA) since 1997. A study by Gopalan (2021) showed that legally enforcing FPIC reduces the potential for conflict by 65% in mining projects in indigenous areas.

3. Criminalization and Intimidation of Traditional Leaders as a Structural Impact

The impact of the absence of FPIC is not only an administrative violation but also targets social and political aspects. According to a WALHI report (2023), there were 62 cases of criminalization of traditional leaders between 2020 and 2023. Research by Latifah & Dewi, (2022) Latifah & Dewi (2022) in the Papua region found that traditional leaders who opposed gold mining expansion were charged with incitement and destruction of public facilities. This reflects structural inequalities in access to law and justice, as explained by Schlosberg, (2007) theory of ecological justice, which states that local communities are generally not only ecologically impoverished but also legally and politically marginalized.

4. Regulatory Fragmentation: Mining Law vs. Forestry Law vs. Customary Law

Normative analysis shows that the overlap between the Mineral and Coal Mining Law and the Forestry Law is a serious obstacle to the protection of customary territories. Mining Law No. 3/2020 does not mention a single clause on the rights of indigenous peoples, while Forestry Law No. 41/1999 only implicitly recognizes customary forests. Nurhidayat & Astuti, (2023) criticized that sectoral regulations in Indonesia still prioritize the principle of state extractivism and do not base themselves on participatory rights. This inconsistency has the potential to invalidate the spirit of constitutional recognition of indigenous peoples as enshrined in the 1945 Constitution. Research by Ginting & Herlambang, (2021) in the Asian Journal of Law and Society even assessed that Indonesian sectoral regulations still retain a colonial legacy in terms of state land control, which contradicts the spirit of decentralization and autonomy of indigenous communities.

5. Weaknesses of the Role of Regional Government in Implementing Recognition

The strategic role of local governments in protecting the rights of indigenous communities through the enactment of regional regulations remains suboptimal. Only 21 of Indonesia's 514 regencies/cities have regulations on the Recognition of Indigenous Communities (Nusantara, 2024). Even those regulations that have been enacted often fail to serve as a reference for granting mining permits. Research by Wibisono et al., (2022) noted that low political will, weak bureaucratic human resources, and fiscal dependence on the central government are the main obstacles to implementing these regulations. However, in several regions, such as West Kalimantan and Central Sulawesi, these regulations have been shown to reduce conflict when used as a reference in spatial planning.

6. Recommendation: Integration of National, Regional, and International Law

Based on the above findings, mining policy reforms based on FPIC and customary protection need to be carried out immediately through the following steps:

- a. Legalization of the FPIC principle into the Minerba Law or in the form of derivative regulations.
- b. Cross-sector legal synchronization between the Forestry Law, Village Law, and Constitutional Court Decision 35/PUU-X/2012.
- c. Strengthening the capacity of regional institutions in verifying customary areas in a participatory manner.
- d. Harmonization with international legal frameworks, such as UNDRIP and the FPIC principles of the International Labour Organization Convention No. 169.

This reformist approach is reinforced by the study of Fitriana & Hutabarat, (2024), which shows that countries that adopt customary law protection systems in extractive licensing systems tend to be more socially and politically stable in managing their natural resources.

One of the main indicators of the state's failure to fulfill the rights of indigenous peoples is the absence of a legal verification mechanism for the existence of indigenous communities as collective legal subjects. In the context of mining permits, the absence of official identification of indigenous communities and territories results in indigenous communities being treated as ordinary communities or even being denied recognition in Environmental Impact Analysis (AMDAL) documents. Yet, indigenous communities possess unique social, cultural, and legal characteristics that should form the basis for differential legal treatment in the context of natural resource extraction (Isnaeni et al., 2022; Ginting & Herlambang, 2021).

Institutional aspects are also a key focus. To date, there is no independent national institution authorized to systematically map and verify customary territories. This role is largely carried out by civil society organizations such as AMAN or WALHI, which, while active, lack formal legal authority. This creates an imbalance between state power and indigenous communities, and opens up room for political intervention in customary recognition. Wibisono et al. (2022) note that the process of recognizing customary territories at the regional level is often slow because it relies on the commitment of regional heads and the technical capabilities of local bureaucracies.

At the legal level, the absence of a legal hierarchy requiring FPIC in the mining permit process is at the root of violations of the collective rights of indigenous communities. FPIC has so far been merely a moral principle or technical guideline in environmental documents, but is not regulated by binding legislation. Consequently, companies conduct only symbolic consultations or formalities through project outreach, without meaningful engagement. Yet, as Supriyanto (2021) points out, ignoring FPIC constitutes a denial of the right to community autonomy and a violation of the principle of indigenous peoples' self-determination.

Furthermore, the conflicts arising from this structural injustice not only have local impacts but also cause a legitimacy crisis for the national legal system itself. Indigenous communities displaced from their lands, denied recognition, and criminalized for resisting mining will become increasingly alienated from the state. From an ecological justice perspective, as theorized by Schlosberg (2007), this constitutes a multidimensional form of exclusion encompassing exclusion in distribution, recognition, and participation.

Therefore, to realize comprehensive protection of indigenous peoples' rights, the following steps are required:

- a. Amend the Minerba Law and the Forestry Law to explicitly recognize the existence of indigenous peoples, including the mandatory implementation of FPIC.
- b. Establish a special national institution for mapping, verification, and recognition of indigenous peoples that is independent of sectoral ministries.
- c. Integrating Customary Regional Regulations into the spatial planning system and national licensing information system (OSS-RBA).
- d. Establish administrative and criminal sanctions mechanisms for companies or officials who violate the FPIC principle or falsify public consultations.

Taking into account the overall findings of this study, it can be affirmed that mining permits in customary areas have been operating within a legal system biased toward extractivism and have not provided space for the full recognition of the collective rights of indigenous communities. The state has failed to balance economic interests with the constitutional obligation to protect indigenous communities. The disregard for the principle of Free, Prior, and Informed Consent (FPIC), overlapping regulations, the weak role of regions, and the absence of a dedicated institution for customary recognition indicate an institutional and normative vacuum that must be immediately addressed through legal reform. Failure to do so will result in recurring resource conflicts, creating structural wounds that not only damage the environment but also dispossess indigenous communities of their living space, history, and future. Therefore, ecological and constitutional justice can only be achieved if indigenous peoples' rights are made the primary foundation of future mining governance reform in Indonesia.

CONCLUSIONS

This study concludes that the main challenges in recognizing indigenous peoples' rights in mining permits lie in the absence of a comprehensive legal mechanism, weak implementation of the principle of Free, Prior, and Informed Consent (FPIC), and fragmented policies between the central and regional governments, resulting in indigenous peoples losing access, participation, and recognition of their own territories. Although indigenous peoples have been constitutionally recognized, the absence of a formal-legal map of indigenous territories and binding FPIC regulations means that mining permits are often issued without involving affected communities, triggering conflict and criminalization. Sectoral regulations such as the Mineral and Coal Mining Law and the Forestry Law also do not provide explicit space for indigenous rights, while regional regulations on customary recognition that have been issued in various regions have not been able to provide a legal basis for licensing. Considering these conditions, policy reforms are needed, including the legalization of FPIC into the licensing system, harmonization of national regulations, the establishment of an independent indigenous territory verification agency, and the integration of indigenous recognition into the spatial planning system and OSS-RBA. Protecting the rights of indigenous peoples in mining governance is not only a constitutional mandate, but also an absolute requirement for creating sustainable ecological and social justice in Indonesia

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