

Restoration of Indigenous People's Rights in Natural Resources Management

Ari Ade Kamula¹⁾ Rachmad Safa'at²⁾, Imam Koeswahyono³⁾
^{1,2,3)}Faculty of Law Universitas Brawijaya Malang, Indonesia

*Corresponding Author
Email : Akamula20@gmail.com

Abstract

The position of Indigenous communities remains uncertain due to the biased recognition they receive. In other words, the recognition provided by the central or regional government is unsatisfactory as it is influenced by political and economic interests, as seen in the case of the Cek Bocek Reen Sury Indigenous Community, which has yet to obtain legal certainty. Therefore, the restoration of Indigenous rights, particularly in the management of natural resources that have been heavily sacrificed, requires improvements in recognition, participation, and natural resource management. This research employs a normative juridical method with a legislative and case study approach. Primary legal materials consist of various legislations, while secondary legal materials include books and scholarly journals specifically addressing the Cek Bocek Reen Sury Indigenous Community. The findings of this study indicate that the government plays a crucial role in resolving issues of bias towards Indigenous Law Communities, which can be initiated through the enactment of a Law on the Recognition of Indigenous Law Communities. Consequently, other derivative concepts such as Free, Prior, and Informed Consent (FPIC) can soon be realized, thereby reducing mining conflicts.

Keywords: *Restoration of Indigenous People's Rights, Fpic, and Natural Resource Management.*

INTRODUCTION

In relation to the management of natural resources, the constitution has provided guidance that in the management and utilization of natural resources, both marine and other natural resources, as a national economic asset, shall be carried out in accordance with Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The implementation of this constitutional provision is based on the principles of national economy as stipulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As stated in Article 33 paragraph (3), it is stated that, (Frans Magnis Suseno, 2021).

"The land, water, and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people." The interpretation of the phrase "controlled by the state" in the above article has been interpreted by the Constitutional Court in decision number 001-021-022/PUU-I/2003, which essentially states that "the phrase 'controlled by the state' must be interpreted to include the meaning of state control in a broad sense that originates from the conception of Indonesian people's sovereignty over all sources of wealth" of the land, water, and natural resources contained therein, including the concept of public ownership by the collective of the people over the intended sources of wealth. The collective people are constructed by the 1945 Constitution to give a mandate to the state to formulate policies (beleid) and management actions (bestuursdaad), regulations (regelendaad), administration (beheersdaad), and oversight (toezichthoudensdaad) for the greatest prosperity of the people. The function of administration (bestuursdaad) by the state is carried out by the government with the authority to issue and revoke licensing facilities (vergunning), licenses (licentie), and concessions (concessie).

The interpretation used by the Constitutional Court in translating the phrase "dikuasai oleh negara" includes the systematic or logical interpretation, which is an interpretation related to other laws and regulations, and there is no law that stands alone apart from the entire system of other laws and regulations. Interpreting the law as part of the entire system of laws and

regulations by linking it to other laws is called systematic interpretation or logical interpretation. (Sudikno Mertokusumo & A. Pitlo, 1993). In other words, systematic interpretation views constitutional provisions as a solid and inseparable structure.

As the above interpretation influences the consistency of the state in providing space for the management of natural resources by customary law communities, it is strengthened through two of its decisions, namely Constitutional Court Decision Number 45/PUU-IX/2011 and Number 35/PUU-X/2012, which essentially also recognize customary forests constitutionally. Soepomo's views had a significant influence as stated in the explanation of the 1945 Constitution as follows:

“In the territory of Indonesia, there are approximately 250 *zelfbesturende landchappen* and *volksgetneenschappen*, such as villages in Java and Bali, *negeri* in Minangkabau, *dusun* and *marga* in Palembang and so on. These regions have their own original structure, and therefore can be considered as areas that are special in nature.”

Two statements from Soepomo and M. Yamin in the BPUPKI session show that the existence of Indigenous communities is one of the issues that must be considered in the formation of the Republic. Even Soepomo and M. Yamin mentioned the estimated number of Indigenous communities in various terms in each region. This also serves as a starting point for identifying the orientation of legal experts at the beginning of the Republic, which is oriented towards customary law. (Yance Arizona, 2010). Meanwhile, the legal basis for the existence of indigenous communities is found in Chapter VI on Regional Governance Article 18B paragraph (2) and Chapter XA on Human Rights Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that

“The state acknowledges and respects the unity of indigenous communities along with 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 as stipulated by law..”

““Cultural identity and rights of traditional communities are respected in line with the development of time and civilization (Undang-Undang Dasar Negara Republik Indonesia, 1945a). The implementation of the provisions of Article 33 of the 1945 Constitution of the Republic of Indonesia is further regulated by law, taking into account principles such as efficiency and justice. Thus, existing resources must be allocated efficiently to support healthy national economic growth and achieve justice. Economic progress in all regions of the country must be balanced, and in the implementation of regional autonomy, national economic unity must also be maintained. These efforts culminate in the crystallization of Article 18 and Explanation II of Article 18 of the 1945 Constitution (before amendment). (Naskah Akademik Rancangan Undang-Undang Tentang Masyarakat Hukum Adat, 2020). This recognition continues with the strengthening of the constitutional position of Indigenous communities' existence through the second amendment in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The recognition of Indigenous peoples' rights in the constitution is a manifestation of the application of the principle of justice and the state's support for Indigenous peoples whose rights, both constitutional rights and traditional legal rights, must be protected.(Dominikus Rato, 2021).

The recognition of indigenous customary law communities becomes a key variable in the granting of management rights, as the legal standing of such recognition is based on various considerations. These considerations include the historical existence of indigenous customary law communities, customary law, ancestral territories, customary wealth and/or property, and institutional systems/governance. (Tolib Setiady, 2008).

The recognition of customary law communities is the main variable in granting management rights, as this recognition is given with various considerations, including the

existence of the community's history, customary territory, customary law, customary wealth or property, and institutional systems/governance. This recognition is given by local government institutions, which some argue can cause vertical conflicts because political interests dominate over other considerations. For example, the case of the Cek Bocek Reen Sury Customary Community in Sumbawa Regency, which to this day is not legally recognized as a customary law community, began during the New Order regime that marginalized the rights of customary law communities and prioritized centrally-driven economic interests. Therefore, based on the above case, further research will be conducted to what extent the rights of customary law communities in natural resource management are recognized, with the title "Restoring the Rights of Customary Law Communities in Natural Resource Management". Based on this, problem formulations will be obtained, including (1) Has the right to manage natural resources by customary law communities been accommodated in Indonesian laws and regulations, (2) What is the ideal concept of the participation rights of customary law communities in mining project agreements?

RESEARCH METHODS

The type of legal research conducted is normative juridical where law is conceptualized as what is written in legislation (law in books) or law is conceptualized as rules or norms that serve as a guide for human behavior considered appropriate.(Amiruddin & Zainal Asikin, 2012). In normative studies, the law referred to is not only in the form of laws and regulations, but also related to the framework of theories, philosophies, comparisons with other countries, structures, and the composition of explanations of each Article of the law.

Therefore, normative legal research is no longer identified solely with legislation. Instead, it covers various aspects related to the normative system as its object of study, such as ideal legal values, legal theories, legal principles, legal doctrines, court decisions, and legal policies.(Irwansyah, 2021). The researcher will focus on the study of the rights of indigenous peoples, particularly on the management of natural resources. This study begins with the position of indigenous peoples from the level of the constitution, laws, and regulations, and then specifically discusses the case that occurred in the Cek Bocek Reen Sury Indigenous Community, ending with offering the main idea about recognition given by the judiciary. The research approach used is both separate and collective, according to the issue or problem being discussed.(Nasution, 2008), The researcher uses both statutory and case approaches. The statutory approach will function to examine issues through legislation, complemented by a case approach to seek for better and fairer norm-setting for indigenous communities.

RESULT AND DISCUSSION

The Rights of Indigenous Communities in The Management of Natural Resources in Indonesia, The word "Pengelolaan" is synonymous with a specific process or activity by using energy or ideas as a way of achieving a goal. The Kamus Besar Bahasa Indonesia (Indonesian Language Dictionary) defines pengelolaan as the process, method, or act of managing, while "mengelola" means to control or organize. The term "Pengelolaan" can also be equated with management, which means regulation or administration. In relation to the meaning of pengelolaan described above, it directly refers to the rights and obligations of managers or at least those involved in management, and in this case, the management of natural resources is often linked to the State's duty.

According to Rachmad Syafaat, the constitution before or after the amendment did not give serious attention to the recognition of environmental awareness, because the addition of Article 33, paragraph (4) and paragraph (5) in the 1945 Constitution made it no longer fully embrace socialism or people's economy, but rather embraced the idea of capitalism or neoliberalism. This duality of values makes the constitutionalism level of Article 33 of the 1945 Constitution continuously open to debate and interpretation between the two values of socialism vs capitalism/neoliberalism. (Rachmad Safa'at, 2022). According to him, Article 33 paragraphs (4) and (5) provide a gateway to assess the extent of the state's role in managing natural resources, and it is not limited to being a regulator. In this case, the government is empowered to take a role in the economy or can become a direct actor if there are negative externalities, failures in market mechanisms, economic imbalances, or social disparities. However, Article 33 of the Constitution of the Republic of Indonesia does not provide an explanation on the limitations of state ownership rights, sustainability aspects, and the protection of the earth's ecosystem, water, and natural resources (Santosa, 1999).

Achmad Sodiki highlights the burden on the state to restore the rights of Indigenous communities over their living space in the Constitutional Court's Decision No. 45/2011 and 35/2012. Although it is only limited to the restoration of Indigenous peoples' rights over their living space, this leads to a new understanding of the management of natural resources for Indigenous peoples (Achmad Sodiki, 2022). Since the Constitutional Court has affirmed the legal standing of Indigenous communities over their rights to forests and the wealth within them, it is reasonable to conclude that concerning the management of natural resources, the legal standing of Indigenous communities should be treated equally, particularly regarding their rights to forests and mineral and coal mining. As a comparison, the discussion will be continued on the rights of Indigenous communities in forest areas and the management of natural resources, as follows:

Rights of Indigenous Communities in Forest Areas

As is known, the main task of the Constitutional Court is to examine laws against the 1945 Constitution that are deemed contrary (unconstitutional) to it. The provisions regarding forest areas as stipulated in Law Number 41 of 1999 concerning Forestry (hereinafter referred to as the Forestry Law) were declared unconstitutional by the Constitutional Court as stated in the verdict as follows:

Decides that the content of Article 1 number 6 of the Forestry Law shall be “Customary forest is forest located within the customary law community area”

Decides that the provision of Article 4 paragraph (3) of the Forestry Law is contrary to the 1945 Constitution and has no binding legal force if not interpreted as “State forest ownership must still pay attention to the rights of customary law communities, 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 as regulated in the law”

Decides that the provision of Article 5 paragraph (1) of the Forestry Law is not in accordance with the 1945 Constitution and has no binding legal force if not interpreted as “State forest refers to forests as intended in paragraph (1) letter a, which do not include customary forests”

Decides that the provision of Article 5 paragraph (3) of the Forestry Law states “The Government determines the status of forests as intended in paragraph (1); and customary forests are designated as long as according to reality the customary law community concerned still exists and is recognized in its existence”

The existence of the Forestry Law is considered problematic by some people, but the spirit of protection expressed by the Constitutional Court shows a progressive stance (Tobroni & Faiq, 2013). Mandasari Zavanti argues that the Constitutional Court's decision is very

important, considering that the existence of Indigenous Peoples has been recognized as a legal subject (Mandasar & Zavanti, 2016). Therefore, post-Constitutional Court decision, "Hutan Adat" has provided two important things for the development of indigenous peoples, as follows:

The position of indigenous communities after the Constitutional Court's decision has a clear legal standing as a subject of law, thus having equal rights as other subjects of law. The recognition of indigenous communities as a subject of law in forest areas should also be treated equally in various sectors concerning their customary rights.

Forests that are no longer under state control as customary forests give indigenous communities an important position in managing the forests (Sari et al., 2014).

Yance Arizona argues that the legal consequences of Constitutional Court Decision Number 35/2012 will inevitably produce local and national legal products related to provisions on how to establish an Indigenous People's Community as well as the disappearance of an Indigenous People's Community regulated through regional regulations (Arizona et al., 2014). The recognition given to each subject of law will raise questions, as the relationship between the state and indigenous communities often needs to be debated. The relationship between the two needs to be balanced without hierarchy or even with the need for hierarchy to balance and carry out management functions.

Soerjono Soekanto, in his book, provides a detailed description of the ongoing conflicts, from theoretical and doctrinal levels to implementation. The approach used is not only legal but also sociological. For example, in terms of terminology that is sometimes conflicting with state sovereignty, this theory does not or insufficiently consider the various types of rights, interests, and developments of diverse groups or factions within the country. (Arizona et al., 2014).

It seems that in the context of state sovereignty, the state symbolically represents the strong party that imposes its will on the weaker party (Arizona et al., 2014) In this context, it can be ensured that marginalized parties, such as traditional indigenous communities and minorities, are protected through procedural mechanisms and the awareness of lawmakers to create justice and legal certainty for them. Therefore, the progressiveness of the Constitutional Court's decision must be seriously and thoroughly examined, and used as a basis for other legal products that concern the rights of Indigenous Peoples, especially regarding their legal subjectivity in both private and public domains.

Rikardo Simarmata and Bernadinus Steni have seriously discussed Indigenous Peoples as legal subjects in both private and public realms (Rikardo Simartamat & Bernadinus Steni, 2017). The discourse on the recognition of indigenous peoples is not entirely new, but sometimes public interest in protecting indigenous peoples' rights is not as significant as other issues. Moreover, the friction between national interests and the communal interests of indigenous peoples is often conflicting and almost endless. The study of indigenous peoples as legal subjects in both private and public realms look to the future when all experts focus on resolving disputes.

As is known, the criteria for legal subjects have undergone transformations in response to practical needs. In civil law, for example, legal subjects or persons are divided into two categories: natural persons (*natuurlijk persoon*) and legal entities (*rechtspersoon*). Natural persons are those who exist from birth until death, while the second type of legal subject, legal entities, are entities that are physically present as persons (*persona ficta*) or have legal personality (Rikardo Simartamat & Bernadinus Steni, 2017). There is a slight difference in the case of legal subjects in the realm of Public Administration, which adds public legal entities resulting from the actions or deeds of the government.

These predicates are not only possessed in the realm of modern law, customary law has the same foundation although there has been no clear differentiation in terminology. Because the

subject of law is often identified with humans as individuals (persons) according to Western philosophical thought. According to Western thought, what is referred to as an individual is a human being, while animals and plants are not included. This is because individuals are equipped with reason and rationality, which make humans have universal moral standards because every individual has them (E. Sumaryono, 1197). This is reinforced by the liberal philosophy of individuals being classified not only as having universal rationality but also as autonomous entities, the creator because they are able to use reason to formulate moral values and create knowledge to uncover the mysteries of nature, "Man does not originate from anything else but is the source of all other things," as stated by a philosopher (Budiono Kusumodihadjojo, 1999).

So the direction of thinking puts humans as bearers of rights, but what about Indigenous Peoples, is their recognition as legal subjects only valid in the era before modern states existed? Or will their recognition be eroded and replaced by modern political entities? This discourse leads to an understanding of two variables that are interdependent, between conservatism and modernism, both of which are considered values that have long been debated regarding the rights of Indigenous Peoples. Conservatism upholds existing values, culture, and customs, while modernism does the opposite.

The realm of customary law society also has legal subjects, although its basis differs from the two bases in civil and administrative law, which are based on a person's capacity as a rights holder and the basic pattern of society's organization. Conceptually, humans are distinguished from persons. Humans are a natural or biological phenomenon, while persons are a social phenomenon of society. Humans are the developers of the predicate as persons because of their ability to organize social life. To become a person, a human being must not be an object of someone else's property, for example, becoming a slave to someone else. Meanwhile, a person is a subject in society's life, a bearer of rights and obligations, and a bearer of legal acts that give rise to rights and obligations. With such an explanation, what is referred to as legal subjects in customary law is a person. Except in societies that recognize slavery, a person's status as a legal subject (person) has been obtained since birth (Imam Sudiayat, 2000). Meanwhile, the criteria for legal subjects are only about the ability/capacity to claim rights to an object and at the same time able to fulfill obligations, although the criteria for legal subjects for legal entities require wealth, it is not the main requirement for legal subjects.

The discussion on legal subjects is limited and will focus on developing the rights of legal subjects in customary law communities in the management of natural resources based on the understanding that entities in customary law communities can be equipped with similar rights as other legal subjects, especially in the management of natural resources. This argument is relevant given the autonomy of customary law communities in managing and establishing their communities independently, even without state assistance. As part of the state, customary law communities are considered capable of performing actions that have legal consequences. The foundation of this legal subject will certainly lead to communal ownership, which has been recognized in various countries such as New Zealand, where recognition has been given to communal entities as legal subjects, as evidenced by the historic agreement between the Maori people and the British Crown called the Treaty of Waitangi, which guarantees that Maori people will continue to have their lands, forests, fisheries, and all their wealth, but they surrender sovereignty to the British and governance in the Maori way. Thus, Maori people are treated as citizens who have special subjective rights due to their communal entities under the law.

The Constitutional Court's decision will be a landmark decision for the recognition of customary law communities in Indonesia, especially since it is conceptually and theoretically possible for customary law communities to be fully granted rights in both private and public

law, including the management of natural resources. The next chapter will discuss the legal and political construction of Mineral and Coal Mining governance.

Rights of Indigenous Peoples in Natural Resource Management

Subjective recognition of customary law by the community is an inseparable part of what is understood as the legalization of communal entities that have been adhered to and maintained by customary law communities until now. Political will is needed to realize communal entities as the right of indigenous peoples. A new chapter began with the collapse of the authoritarian era, which marked a shift in the political configuration that was initially dominated by the government towards the era of democracy, where the process of forming laws can be influenced by elements of interest groups within the community, in addition to the House of Representatives as a form of representation of the people's voice (B. Hestu Cipto Handoyo, 2008). In the three decades since the reform era, the direction of national legal policy has been intended to develop the economy, and the chosen approach tends to lean towards legal centralism, which results in social inequality and tends to benefit one party. Moreover, in every procedure for drafting legislation, it does not fully reflect the will of the people but is defeated by transactional politics among factions (Zainal Arifin Mochtar, 2015).

The character of post-New Order laws, especially those related to natural resources, besides promoting the sectoralization of natural resources, is also followed by a wave of commercialization and privatization, or the privatization of the public sector which should be the direct responsibility of the state. With the demand for reform in all fields, including the mining sector, which is one of them is the paradigmatic change from centralism to broad regional autonomy based on Law Number 32 of 2004 concerning Regional Government, including such practices as characteristics. Economic liberalism is a new idea that assumes that all forms of economy are the same. All individuals have a desire to compete and maximize profits. The application of economic liberalism is clearly ahistorical and negates forms of ecological, social, and political organization. Because in reality, economic liberalism tries to separate economic activities from their relationships with religion, entities, kinship, and political organizations (Polanyi & Karl, 2001).

Post-Reformasi New Order seems to still maintain the same political configuration regarding natural resource management, as evidenced by the lack of seriousness by the government in providing subjective recognition of indigenous communities in separate laws. Therefore, the concrete form of the government should be to evaluate the rules for managing natural resources, especially regarding mining contracts. This mining contract model has been pursued by the New Order government as a basis for a collaborative working model for many years. However, the mining contract has sidelined the rights of indigenous communities that should be considered meaningfully according to the constitution. Therefore, Article 169A of Law No. 4 of 2009, as amended by Law No. 3 of 2020 regarding Mineral and Coal Mining, is declared unconstitutional because it does not involve participatory restoration with affected communities/indigenous communities. Furthermore, community participation is guaranteed as a constitutional right based on Article 27 paragraph (1) and Article 28C paragraph (2).

A long journey to stop harmful actions towards the state based on contract of work has been made through several breakthrough efforts, considering that contract of work (KK) and Coal Mining Work Agreement (PKP2B) are *lex specialist* and *nail down*. After the enactment of Law Number 4 of 2009 concerning Mineral and Coal Mining on January 12, 2009, contract of work (KK) and (P2KB) are no longer declared as *lex specialist* and *nail down*. There are many provisions that are contradictory between Contract of Work (KK) and Articles in Law Number 4 of 2009 concerning Mineral and Coal Mining, but the provisions of Contract of Work cannot be cancelled easily, considering that Contract of Work is an agreement between legal subjects, so it will end when the contract period expires.

The ideal Concept of In The Involment of Indigenous Peoples Rights in Mining Enterprise Agreement

The problem description regarding the rights of natural resource management by Indigenous Peoples has been analyzed, which directs to the necessary stages to be implemented and evaluated. The actions needed are of *Ius constituendum* nature, while the evaluation is aimed at improving regulations to make them better. Regarding the ideal concept of the involvement rights of Indigenous Peoples in Mining Business Agreement, it will be perfect if the solution starts from upstream to downstream, i.e. the legal personality (*Ius constituendum*) for Indigenous Peoples as described in the previous chapter, an evaluation of regulations that only restricts the rights of Indigenous Peoples in managing natural resources, particularly in mining business agreement which is by nature only related to manipulative participation.

The idea of FPIC (Free, Prior and Informed Consent) has been evolving since the 20th century, and other European countries have implemented it in the joint agreement process with other indigenous communities to create fair management. Experts propose several important things that directly relate to the rights of indigenous peoples in the Oil and Gas sector, including (1) revising Law Number 22 of 2001 on Oil and Gas, (2) revising Law Number 2 of 2012 on Land Procurement for Development for Public Interest, (3) standardizing FPIC in the Bill on Recognition and Protection of the Rights of Indigenous Peoples, (4) including FPIC requirements in bank loans (Nisa Istiqomah Nidasari, 2014a).

The analysis and development of the idea of implementing FPIC and the necessity of its application in Indonesia as an ideal concept encountered obstacles, as the legal protection referred to in the concept is still relatively disproportionate among the parties involved. Papillon et al., in particular, pay special attention to this issue. According to them, the agreement contained in the FPIC concept contains significant gaps and has real implications. However, they believe that this presents an opportunity for indigenous peoples to show their restrictive approach to their participation rights, but also to give FPIC a more appropriate meaning, based on their legal traditions and worldviews. (Papillon et al., 2020).

The ambiguity lies in the understanding of the meaning of consent in the FPIC concept, and the FPIC methodology needs to be adjusted methodologically so that the meaning of consent is not only interpreted hierarchically, but reading the purpose of the same section, considering the entire economy, its guiding principles, may suggest that a more substantive definition of consent is required (Papillon et al., 2020). Meanwhile, in the technical field, FPIC is still felt to have conceptual ambiguity. Because the emergence of FPIC is part of the protest of indigenous communities in Canada against the process provided by the state, examples of community-based FPIC processes in Canada are: the Ceeof Northern Quebec, which has adopted their own mining policy, and the Squamish Nation of British Columbia, which has developed a community-based impact assessment process, which is interpreted as institutional-based consent by indigenous communities.

This is in line with the opinion of Rachmad Syafaat, who argued that the community's ability to generate a "Self Regulatory system" shows its relevance in the present time. Self regulatory system will be optimally beneficial if it also interacts with the external environment that influences the system. For instance, it needs support, legitimacy, and even recognition to exist and develop positively (Rachmad Syafaat, 2016). In other words, it is possible for indigenous communities to be involved in the formulation of FPIC, starting from its planning to its successful implementation in the field.

FPIC is not just a participatory engagement concept, but a concept with significant value. Community participation in decision-making, particularly in the management of the environment and natural resources, will encourage the creation of policy products that not only

prioritize economic growth but also preserve the environment and basic human rights, through the minimization of social, economic, and environmental costs (Indro & Josi, 2006). Conversely, development that is non-participatory and damages the rights of indigenous communities is a violation of human rights. Based on the doctrine of state responsibility in human rights, the FPIC mechanism includes respect, protection, fulfillment, and enforcement of the rights of indigenous communities over their natural resources in any action taken by external parties (Nisa Istiqomah Nidasari, 2014).

The perspective of law that exists in society is a legal dimension within the context of sociology. This is the result of the conflict between the thesis and antithesis of various legal ideas, so that even though it does not form an integrated synthesis, it has been considered as a uniqueness of law itself. In the context of this research, it is also possible to understand issues of legality in a wise and prudent manner, because the problem of legality is not the only cause of conflicts, but there are other elements, such as politics, economics, and power. One of the first contributions to the advancement of legal science was pioneered by Eugene Ehrlich, who proposed the concept of legal pluralism or what is also known as living law as a reaction to the legal ideology centered on the state. According to him, "Ordering and upholding every human association" by shifting the focus of law from normative state authority to a legal foundation based on social problems and order found everywhere (E. Ehrlich, 2001).

Weak and strong legal pluralism. The former refers to a legal system where the ruler governs or validates or recognizes different legal entities for various groups in the population, thus the highest authority formally recognizes different legal entities that stem from norms that live in society (J. Griffiths, 2013). Through the analysis of this theory, there are some things that need to be emphasized as an effort to provide a solution for legal patterns in the future. Firstly, FPIC is a solution that can resolve issues that occur in society because FPIC represents two models of interest, namely the interests of indigenous communities and national interests. Secondly, FPIC is related to the concept of living law, by looking at legal norms in society as a benchmark for achieving the common good without eliminating individual rights. Thus, strong legal pluralism as mentioned in the 1945 Constitution of the Republic of Indonesia can be implemented properly in the field.

Regarding the ideal implementation of FPIC in the field, a specific formulation that considers multiple interests is needed. At least, in formulating the ideal FPIC system, the following must be emphasized: firstly, emphasizing the concept of triangular relationship since this concept is the main basis of FPIC thinking that provides a space for participation for Indigenous Peoples, the state, and businesses to reach an agreement. This concept can be implemented through an open negotiation forum that contains considerations and consequences that will be taken. Secondly, the need for validation techniques before, during, and after the implementation of FPIC, in order to realize the certainty of policy formulation to be taken. The validation technique before FPIC is implemented when identifying customary land and customary land rights holders, identifying policy-making institutions among the community, then during the FPIC process, it can be carried out through socialization and dialogue, and monitoring and evaluation is carried out after the negotiation process is completed before the policy is made. Lastly, negotiation is based not only on economic benefits but also on other strategic issues such as economic sustainability, compensation, and the sustainability of Indigenous Peoples' social and cultural life.

CONCLUSION

The relationship between the state and Indigenous communities has been established since the formulation of the constitution, but its implementation has not been fully carried out. The position of Indigenous communities in natural resource management is still limited to subjective rights of citizens regarding the knowledge and management of natural resources, while communal entities as mentioned in the Constitutional Court's decision on Forestry material review have not been fully accommodated in natural resource management legal products. As a result, the position of Indigenous communities has weaknesses as follows: First, the limited position of Indigenous communities only as participants in environmental assessments, while participation in management has no regulations yet. Second, this limited opportunity results in a tug of war of interests intentionally not granting communal entity status to Indigenous communities due to conflicting interests in natural resource management.

Regarding the issue of the ideal concept of indigenous peoples' participation, several legal breakthroughs are needed to solve the problem of indigenous peoples' interests in defending their customary rights, as follows: First, the need for conflict resolution starting from upstream to downstream, by starting to formulate the legal personality of indigenous peoples with recognition/confirmation nomenclature. Second, the need for the formulation of an FPIC concept that is suitable for social and cultural conditions in Indonesia, emphasizing the principles of triangular relationship, validation, evaluation, and monitoring.

Meanwhile, the author suggests two alternative recommendations. The first practical suggestion is to recognize indigenous communities without involvement from political institutions such as central or local governments. This is because political institutions are susceptible to political transactions that hinder the recognition process of indigenous communities, resulting in a lack of legal certainty for indigenous communities, as experienced by the Cek Bocek Reen Sury community. The second suggestion is futuristic in nature, which is to immediately enact an Indigenous Peoples' Law that recognizes all their inherent rights, especially communal entities. This could be a starting point towards achieving the ideal concept of mining business agreements based on FPIC (Free, Prior and Informed Consent).

REFERENCES

- Achmad Sodiki. (2022, December 13). *Pemulhan Hak Masyarakat Adat atas Ruang Lingkup Hidup dalam Putusan MK No 45/2011 dan 35/2012*.
- Amiruddin, & Zainal Asikin. (2012). *Pengantar Metode Penelitian Hukum*. Raja Grafindo.
- Arizona, Yance, Hermawati Siti Rakhma Mary, & Cahyadi Eramus. (2014). *Kembalikan Hutan Adat Kepada Masyarakat Hukum Adat: Anotasi Putusan Mahkamah Konstitusi Perkara Nomor 35/PUU-X/2012 Mengenai Pengujian Undang-undang Kehutanan*. Perkumpulan HUMA Indonesia.
- B. Hestu Cipto Handoyo. (2008). *Prinsip-Prinsip Legal Drafting dan Desain Naskah Akademik*. Universitas Atma Jaya.
- Bertrand Russell. (2020). *Sejarah Filsafat Barat dan Kaitannya dengan Kondisi Sosio-politik dari Zaman Kuno Hingga Sekarang*. Pustaka Pelajar.
- Budi Harsono. (2005). *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya* (10th ed.). Penerbit Djambatan.
- Budiono Kusumodihadjojo. (1999). *Ketertiban yang Adil Problematik Filsafat Hukum*. Grasindo.
- Domikus Rato. (2015). *Hukum Adat Kontemporer*. Laks Bajang Justitia.
- Dominikus Rato. (2021). Perlindungan HAM Masyarakat Hukum Adat Yang Bhineka Tunggal Ika Di Era Digital. *Majalah Hukum Nasional*, 51(2), 155–155.

- E. Ehrlich. (2001). *Fundamental Principles of The Sociology of Law*. Havard University Press.
- E. Sumaryono. (1197). *Etika Hukum; Relevansi Teori Hukum Kodrat Thomas Aquinas*. Hukum Kodrat dan Teori Hak Milik Pribadi.
- Frans Magnis Suseno. (2021). *Etika Politik prinsip Moral Dasar Kenegaraan Modern*. Gramedia.
- Imam Sudiyat. (2000). *Hukum Adat Sketsa Asa*. Liberty.
- Indro, S., & Josi, K. (2006). *Membuka Ruang, Menjembatani Kesenjangan*. Indonesian Center for Enviromental Law (ICEL).
- Irwansyah. (2021). *Penelitian Hukum Pilihan Metode dan Praktik Penulisan Artikel*. Mirra Buana Media.
- J. Griffths. (2013). What is Legal Pluralism, . *Journal of Legal Pluralism*, 1–55.
- Kalangi K. (2018). Kedudukan Amdal Tentang Eksploitasi Pertambangan Menurut Undang-undang Nomor 32 tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup. *Jurnal Lex Privatum*, 6(1), 43–43.
- Mandasar, & Zavanti. (2016). Politik Hukum Pengaturan Masyarat Hukum Adat (Studi Putusan MK Nomor 35/PUU-X/2012). *Jurnal Konstitusi*, 10(3), 461–461.
- Moh. Koesnoe. (1979). *Catatan-catatan Terhadap Hukum Adat Dewasa Ini*. Airlangga University Press.
- Naskah Akademik Rancangan Undang-undang Tentang Masyarakat Hukum Adat*, 1 (2020).
- Nasution. (2008). *Metode Penelitian Hukum*. Mandar Maju.
- Nisa Istiqomah Nidasari. (2014a). Peluang FPIC Sebagai Instrumen Hukum Progresif Untuk Melindungi Hak Masyarakat Adat Dalam Kegiatan Usaha Minyak dan Gas Bumi. *Jurnal Hukum Lingkungan*, 1(2), 82–82.
- Nisa Istiqomah Nidasari. (2014b). Peluang Penerapan FPIC Sebagai Instrumens Hukum Progresif Untuk Melindungi Hak Masyarakat Adat Dalam Kegiatan Usaha Minyak Dan Gas Bumi. *Jurnal Hukum Lingkungan*, 1(2), 72–72.
- Papillon, Leclair, & Leydet. (2020). Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency. *International Journal on Minority and Group Right*, 27(2), 223–223.
- Polanyi, & Karl. (2001). *Great Transformation, The Political Economic Origins of Our Time*. Beacon Press.
- Rachmad Safa'at, dkk. (2022). *Hak Warga Negara Dan Kewajiban Negara Dalam Pengelolaan Lingkungan Hidup Dan Sumber Daya Alam*. Inteligencia Media.
- Rachmad Syafaat. (2016). *Advokasi dan Aleratif Penyelesaian Sengketa*. Surya Pena Gemilang.
- Rakhmat Syafa'at. (2008). *Negara, Masyarakat Adat dan Kearifan Lokal*. Trans Publishing.
- Rikardo Simartamat, & Bernadinus Steni. (2017). *Masyarakat Hukum Adat Sebagai Subjek Hukum: Kecakapan Hukum Masyarakat Hukum Adat dalam Lapangan Hukum Privat dan Publik*. Samdhana Institute.
- Santosa. (1999). *Reformasi Hukum Dan Kebijaksanaan Di Bidang Pengelolaan Sumber Daya Alam, Prosiding Loka Karya Reformasi Hukum Di Bidang Pengelolaan Sumber Daya Alam*. Indonesia Center for Enviromental Law.
- Sari, Daistya Mega, & Akahyaroni Fu'adah. (2014). Peranan Pemerintah Daerah Terhadap Perlindungan Hutan Adat Pasca Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012. *Jurnal Penelitian Hukum*, 1(1), 53–53.
- Simon Thompson. (2006). *The Political Theori of Recognition: A Critical Introduction Cambridge*. Polity Press.
- Sudikno Mertokusumo, & A. Pitlo. (1993). *Penemuan Hukum*. Citra Aditya Bakti.
- Tobroni, & Faiq. (2013). Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012). *Jurnal Konstitusi*, 3(3), 470–470.
- Tolib Setiady. (2008). *Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan)*. Alfabeta.
- Undang-Undang Dasar Negara Republik Indonesia*, (1945).
- Undang-Undang Dasar Negara Republik Indonesia*, 18B (2) (1945).
- Undang-undang Nomor 4*, (2009).
- Yance Arizona. (2010). *Antara Teks Dan Konteks, Dinamika Pengakuan Hukum Terhadap Hak Masyarakat Adat atas Sumber Daya Alam Di Indonesia*. Huma.

Zainal Arifin Mochtar. (2015). Antinomi dalam Peraturan Perundang-undangan di Indonesia. *Hasanuddin Law Review*, 1(3), 335–335.