



RESEARCH ARTICLE

**LEGAL PROTECTION OF INDIGENOUS
PEOPLE'S RIGHTS THROUGH
STRENGTHENING THE LICENSING
PRINCIPLES BASED ON SOCIAL
SENSITIVITY**

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ABSTRACT

The issue of human rights in Indonesia towards the 21st century has shifted from violations committed by the government during the new order to the issue of human rights violations by multinational companies (corporate crime), because of natural resources exploitation is directly proportional to the increase in human rights violations. Many cases of human rights violations by business actors that occur in the form of annexation and seizure of indigenous peoples land that occurs every year. One of the causes of the many

cases of human rights violations against indigenous peoples is due to the loosening of permits given by the government to companies wishing to exploit natural resources. Strengthening the Permits principle can be used as a strategic step in reducing the number of violations of poverty that occur to indigenous peoples. Permits used as a means of controlling human behavior which results in rights and obligations born of licenses.

Keywords: Permit; indigenous peoples; rights; protection

TABLE OF CONTENTS

ABSTRACT	1
TABLE OF CONTENTS	3
INTRODUCTION	4
VIOLATION OF INDIGENOUS PEOPLE'S RIGHTS AND SHIFTING THEIR RESPONSIBILITIES	9
LICENSING PRINCIPAL BASED ON SOCIAL SENSITIVITY	18
CONCLUSION	28
REFERENCES	30



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INTRODUCTION

THE PRESENCE of foreign multinational companies in Indonesia in managing natural resources is beneficial, in addition to increasing

state revenue (APBN), also increasing employment, improving people's purchasing power and creating a conducive investment climate. In fact, to achieve this, the government is willing to make policies through policy packages and make visits to neighboring countries, so investors are willing to invest their shares in Indonesia.

However, these efforts are often not based on the good will of the government and the company itself in the welfare of the surrounding community. Alexandra Xathanki mentioned that the government is only trying to attract investors without seeing and paying attention to the social conditions of the surrounding community.¹ Some of them were forced to leave their homes. Meanwhile, the company is also less sensitive to the condition of the community. Its evidenced by the lack of appreciation of local community personnel and preferring to use personnel from outside the region.

Indigenous Peoples² often live in rich areas of natural resources.³ This condition is becoming the target of resource extraction and development programs by the Government and multinational companies.⁴ In the name of modernization and development of the nation's development, the existence of indigenous peoples faced with the impact of Mining and logging, large-scale plantations and infrastructure programs. This project is usually carried out without notice, consultation, and approval to the affected communities and led to the massive migration of indigenous peoples from their hometown. As a result, various customary tenure systems

¹ Alexandra Xanthaki, *Lands Rights of Indigenous Peoples in South East Asia*, 4 MELB. J. INT'L L. 467, 467–95 (2003).

² International Labor Organization, "ILO Convention 169" (1969).

³ Reggina Renata Tanuramba, *Legalitas Kepemilikan Masyarakat Adat Atas Tanah Ulayat Menurut Hukum Agraria*, 7 LEX PRIVATUM 27, 25-33 (2020).

⁴ Ana Suheri, *Penyelesaian Tanah Sengketa Adat Melalui Proses Peradilan*, 2 JURNAL JENDELA HUKUM 33, 33–43 (2018).

over forests and various natural resource management systems managed for hundreds of years removed in order to meet the country's purposes.⁵

For example In Indonesia, more than 7.5 million hectares of land already covered by oil palm plantations.⁶ According Aditya and Al-Fatih (2017) any of these plantations have been established in forest lands traditionally used by indigenous peoples.⁷ Reports published by Forest Watch Indonesia and the World Resource of Indonesia in recent years indicate that land acquisition for oil palm plantations is in line with serious violations of Indigenous peoples rights, which are predominantly native inhabitants.⁸ Their lands are often forcibly taken without prior knowledge, without consent and compensation.⁹

Besides, Indigenous Peoples in Indonesia over the last few decades have been suffered from the impacts of mining, logging, transmigration and other forms of development projects.¹⁰ As well as Amungme indigenous peoples of West Papua affected by Freeport mining for almost 50 years. They lost their shelter, livelihood, and culture because the Ertsberg mountains as the mountains considered sacred by them have been flattened and becoming the world's largest

⁵ Forest Watch Indonesia/Global Forest Watch, *Keadaan Hutan Indonesia* (Bogor, Forest Watch Indonesia/Global Forest Watch, 2001).

⁶ Asia Indigenous Peoples' Pact, "ASEAN's Indigenous Peoples: The International Work Group for Indigenous Affairs (IWGIA) and Asian Forum for Human Rights and Development (FORUM-ASIA)" (Chiang-Mai, 2010).

⁷ Zaka Firma Aditya and Sholahuddin Al-Fatih, "The Legal Protection System of Indigenous Peoples In The Southeast Asia," International Conference "Human Rights in Southeast Asia: Are Moving Backward?" (Jember, 2017).

⁸ Watch, *Keadaan Hutan Indonesia*.

⁹ *Id.*

¹⁰ Ahmad Fadlil Sumadi, *Hukum dan Keadilan Sosial dalam Perspektif Hukum Ketatanegaraan Law and Social Justice in Constitutional Law Perspective*, 12 JURNAL KONSTITUSI 853, 853–54 (2015).

gold and copper mine. Although Freeport Company is able to mine tens of tons of gold and copper with a profit of 112M per day, the livelihoods of local indigenous peoples are still far from prosperity.

Moreover, not only in Papua, the case occurred. In Kalimantan, for example, there are cases of Dayak tribes in Suriyan District, Central Kalimantan. They demanded the rights of their customary land because the land they occupied and obtained by descending was annexed by entrepreneurs with large capital and some local government officials. Meanwhile, in Sulawesi, there are customary land disputes in East Luwu, South Sulawesi involving local communities against foreign mining companies PT. International Nikel Indonesia (INCO).

The case that most grabbed the public's attention was the Mesuji case that occurred between 2009-2011 in Lampung, which the public complained to the DPR RI in December 2011. The Mesuji residents complained about the murder of approximately 30 villagers around the palm oil plantations in Mesuji, Lampung and South Sumatra. Badan Perjuangan Rakyat Penunggu Indonesia (BPRPI)/Aliansi Masyarakat Adat Nusantara (2010) who asked the North Sumatra Provincial Government to distribute 9,085 hectares of customary land to the community as agreed upon during the reign of North Sumatra Governor on May 24, 1980.¹¹ The promised land located in Langkat district and Deli Serdang district.¹²

In fact, when referring to the legislation, the state must protect indigenous peoples. Human rights for the people of Indonesia have been guaranteed in the constitution, namely in Article 28A to Article 28J of the 1945 Constitution of the Republik Indonesia which involves life, liberty, and property. Also the ratification of the Universal

¹¹ Aliansi Masyarakat Adat Nusantara, *Memahami Dimensi-Dimensi Kemiskinan Masyarakat Adat* (Jakarta, Aliansi Masyarakat Adat Nusantara, 2010).

¹² *Id.*

Declaration of Human Rights into Law Number 39 of 1999 concerning Rights Human. In Article 18B of the UUD 1945, the state has recognized the existence of customary law communities and their traditional rights. Although, indigenous peoples who located in the vicinity of mining extraction areas still cannot enjoy their rights.

In addition, the existence of laws that are more legal in favor of the Indonesian state has not been able to stem the dominance of the legal power of multinational companies. For example, PT Freeport Indonesia in its establishment was not based on the provisions of Law Number 5 of 1960 concerning Agrarian Principles; it was precisely the cooperation agreement with the Indonesian government through the Contract of Work even though at that time Law No. 1 of 1967 on Foreign Investment (PMA law) had not been issued. Seeing this, PT Freeport Indonesia in principle has ignored the subject matter of licensing in the PMA Law in the form of the absence of IMB licenses, environmental disturbance licenses, and AMDAL documents to anticipate future impacts.

The implementation of the regional autonomy system by giving power widely to the regions has shifted the concept of licensing from the central government to the provinces, with the note that licenses relating to natural resources remain the authority of the central government. This is what makes licenses a norm that interconnected from the central level to the regions, and the regions generally serve permits in a more practical domain, such as the H.O licenses, IMB licenses, and AMDAL documents.¹³

However, due to investment reasons, the government then imposed a one-stop service system that facilitated licensing by ignoring the substance of licensing. Like for example with a one-stop

¹³ Adinda Putri Jade, Diah Nadia Putri, and Sholahuddin Al-Fatih, *Perizinan Membuka Tanah Negara Di Kota Balikpapan*, 29 SUPREMASI HUKUM: JURNAL PENELITIAN HUKUM 102, 102–30 (2020).

service pattern, then taking care of H.O (environmental disturbances) and IMB licenses can be done at the same time on the same day. It is not true, considering that the permit for H.O must be well-planned and cannot be done with just one or two days because it involves many people.

AMDAL documents as a basis for predicting the consequences that can be caused by the existence of these activities often made in a relatively short period of time. As a result, when natural disasters occur due to certain activities, the government will eventually bear the burden of recovering costs. For example, the Lumpur Lapindo case that bears the burden is the central government, even though the disaster is the result of the activities of companies that are drilling gas in the middle of community settlement without a clear analysis of AMDAL documents. Whereas, in the concept, the permits creates rights and obligations.

Therefore, it is very important to strengthen the principles of granting permits for management of resources in indigenous territories. strengthening these principles must be based on social sensitivity principles, which are sought not only for benefits but also for the welfare and sustainability of the indigenous peoples. the use of natural resources in indigenous territories must not pose a threat to their survival. because, they are legitimate owners of indigenous territories that are rich in natural resources long before the establishment of the country.

This paper uses the method of legal research considering the unique and characteristics of legal science are normative.¹⁴ Peter Mahmud Marzuki said that the legal research was carried out by identifying legal facts, collecting legal material, reviewing legal issues, drawing conclusions in the form of argumentation and finally

¹⁴ Philipus M. Hadjon & Tatiek Sri Djatmiati, *Argumentasi Hukum* (Yogyakarta, Gadjah Mada University Press, 2008).

prescribing based on the arguments that had been built so that they were in line with the prescriptive and applied nature of legal science.¹⁵ The research approach that used in this paper is the statute approach¹⁶ and the case approach.¹⁷

VIOLATION OF INDIGENOUS PEOPLE'S RIGHTS AND SHIFTING THEIR RESPONSIBILITIES

ADITYA & AL-FATIH emphasized that the idea of human rights starts from the view that humans are God Almighty beings who naturally endowed with rights called basic rights, without any difference between one another. Through these human rights, humans can develop their personal self, role, and contribution to the welfare of human life.¹⁸ The definition of classical rights as the basis for the ratification of human rights laws is expressed by Cranston (1973):

A human rights by definition is a universal moral Rights, something which all men, everywhere, at all times ought to have, something of which no one may deprived without a grave affront

¹⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta, Kencana Prenada Media Group, 2014).

¹⁶ Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Jakarta, Kencana, 2017).

¹⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta, Kencana, 2005).

¹⁸ Zaka Aditya & Sholahuddin Al-Fatih, *State Liability for Violation of Constitutional Rights Against Indigenous People in Freedom of Religion and Belief*, 4 BRAWIJAYA L. J. 30, 29–58 (2017).

*to justice, something which is owing to every human being simply because he (she) is human.*¹⁹

Ronald Dworkin (1977) said that every right is also attached to the obligation, so that in addition to human rights, there are also basic human obligations namely obligations that must be carried out for the realization of human rights.²⁰ In using human rights, we are obliged to pay attention to, respect, and respect human rights that are also owned by other people. Awareness of human rights, dignity, human dignity, and dignity begins with humans on the face of the earth.²¹ This is caused by human rights that have existed since humans were born and are natural rights inherent in humans. The history records various major events in the world as an attempt to uphold human rights.²²

Recognition of the existence of basic human rights provides moral and legal guarantees for every human being to enjoy freedom from all forms of servitude, oppression, deprivation, and persecution or other treatment that causes humans to not live as human beings worthy of glory by God. Human rights itself is one of the pillars that is very important in supporting the establishment of a state based on law.²³

¹⁹ CRANSTON, *WHAT ARE HUMAN RIGHTS?* (New York, Basics Book, 1973).

²⁰ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Cambridge, Harvard University press, 1977).

²¹ Ketut Arianta et al., *Perlindungan Hukum Bagi Kaum Etnis Rohingya dalam Perspektif Hak Asasi Manusia Internasional*, 3 *JOURNAL KOMUNITAS YUSTITIA* 167, 166–176 (2020).

²² Zaka Firma Aditya & Sholahuddin Al-Fatih, “Democracy and Human Rights As A Solution To Resolve The Humanitarian Crisis In Muslim Countries,” in *Conference On Islamic Studies (ICIS)* (Yogyakarta, 2017).

²³ MICHAEL FREEMAN, *HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH* (Cambridge University Press, 2004).

As defined by the Secretary-General of The United Nations, the rule of law requires that legal processes, institutions and substantive norms are consistent with human rights, including the core principles of *equality under and before the law*, accountability before the law and fairness in the protection and vindication of rights.²⁴ There is no rule of law within societies if human rights are not protected and vice versa; human rights cannot be protected in societies without a strong rule of law. The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.²⁵

While universally agreed human rights, norms and standards provide its normative foundation, the rule of law must be anchored in a national context, including its culture, history, and politics. States therefore do have different national experiences in the development of their systems of the rule of law. Nevertheless, as affirmed by the General Assembly in resolution 67/1, there are common features founded on international norms and standards.²⁶ Its very strength norms to protect human rights in the rule of law. Because the rule of law and human rights are two sides of the same principle, the freedom to live in dignity.

The rule of law and human rights therefore have an indivisible and intrinsic relationship. That intrinsic relationship has been fully recognized by Member States since the adoption of the Universal Declaration of Human Rights, in which it is stated that it is essential, *“if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”*

²⁴ Security Council, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* (London, United Nations, 2004).

²⁵ *Id.*

²⁶ United Nations, “Rule of Law and Human Rights,” *United Nations*, 2021, <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>.

Based on the regulation indeed, included international and national act/law, it is very clear to declare that human rights are a part of a state based on law. It means, that state must has a way to protect, to promote and to fulfill the rights of the citizenship.

Indonesia has a population of approximately 250 million. The Government of Indonesia recognizes 1,128 ethnic groups. The Ministry of Social Affairs identifies some communities as *komunitas adat terpencil* (meaning 'geographically isolated customary communities').²⁷ Recent government Acts and Decrees use the term *masyarakat adat* or *masyarakat hukum adat*, which mean 'customary law societies'. Those customary law societies are considered to be Indonesia's indigenous peoples. AMAN estimates that the population of indigenous peoples in Indonesia is between 50 and 70 million.²⁸ Those huge populations of indigenous peoples in Indonesia are spreading from Sabang until Merauke, with different culture, language, etc.

There are so many juridical norms to protect the rights of indigenous people in Indonesia. But actually, it was ignored and violated since the publication of Basic Forestry Law No. 5 of 1967, later replaced by the Forestry Law in 1999. The Forestry Law legalized land grabbing and converted customary forests into state forests. Through this Law, the Government has been granting concessions to private companies for mining, logging, and plantations in indigenous people's traditional lands in violation of their rights.²⁹ It mean, the Government more proactive with companies rather than indigenous

²⁷ AMAN & AIPP, "Joint Stakeholders' Submission on The Situation of Human Rights of Indigenous Peoples in Indonesia," *3rd Cycle of Universal Periodic Review of Indonesia, 27th Session of the Human Rights Council, 3rd Cycle of Universal Periodic Review of Indonesia, 27th Session of the Human Rights Council* (Jakarta, 2017).

²⁸ *Id.*

²⁹ *Id.*

people. This situation already happens for a long time, that make indigenous people eliminated from their customary land or customary forest.

Further, in 2013, the Parliament adopted a Law on the Prevention and Eradication of Forest Destruction that criminalized indigenous peoples living within national parks, protected forests and wildlife reservation. Between 2014 and 2015 only, a total of twelve indigenous leaders have been put in jail for living in those areas while there have also been cases of burning and displacing indigenous villages. Few representative cases of violations of indigenous people's rights in the context of mining, logging, and plantations and in the name of conservation, which were reported to AMAN after 2012 or have been unresolved since earlier are listed in Annex 1 and 2 respectively.³⁰

The violation of human rights of indigenous people in Indonesia continues to grow every year. The National Human Rights Commission (Komnas HAM) notes that 20% of the complaints submitted to the Commission are related to land disputes. In 2012, there were 1213 complaint files concerning on land disputes, 1,123 complaints in 2013 and 2,483 complaints in 2014.³¹ In other hand, AMAN has identified 2,230 indigenous communities that are asking for investigations. During 2013 alone, the group recorded 150 new cases of rights violations.³² That record showed how many cases about violations of human rights of indigenous people has been affected.

Further, the CERD has also repeatedly written to the Government of Indonesia on four representative cases of violations of

³⁰ IWGIA, "IWGIA Year Book," IWGIA, 2021, <https://www.iwgia.org/en/?view=category&id=303>.

³¹ Komnas HAM, "Komnas HAM National Inquiry Summary April 2016," Komnas HAM, 2016.

³² Loren Bell, "Indonesia to Hear Indigenous Peoples' Grievances on Land Disputes," *Mongabay*, 2014.

indigenous rights reported to the Committee between 2009 and 2015. These include violations of indigenous rights over their traditional lands, among others, in implementation of Kalimantan Border Oil Palm Mega Project,³³ formulation of the Regulation on Implementation Procedures for Reducing Emissions from Deforestation and Forest Degradation (REDD) within the frame of the United Nations Framework Convention for Climate Change (UNFCCC),³⁴ continuation of Merauke Integrated Food and Energy Estate (MIFEE) project in Papua³⁵ and granting license to PT. Menara Group Consortium for sugarcane 8 plantations in Aru peoples' ancestral territory in Moluccas.³⁶

Another data of violations against indigenous people was recorded by Komnas HAM, reported that Nearly 70 percent of Indonesia's forest - 136 million hectares (336 million acres) - belongs to the state.³⁷ Land conflicts involving indigenous people date back to the Dutch occupation of the country from 1847 to 1942.³⁸ Land was frequently claimed as the state's property without considering the customary claims of native people living in forested areas, so the indigenous people that live in forested areas must move on. This happened in Kalimantan, Sumatera, and Papua.

Until nowadays, the state is still considered as the actor in charge of fulfilling human rights and the state is considered as the holder of international human rights obligations (state responsibility). These paradigms form the basis of various rules of international human rights treaties, such as the International

³³ CERD, "CERD Early Warning 13 March 2009," CERD, 2009.

³⁴ CERD, "CERD Early Warning 28 September 2009," CERD, 2009.

³⁵ CERD, "CERD Early Warning 2 September 2011," CERD, 2011.

³⁶ CERD, "CERD Early Warning 28 August 2015," CERD, 2016.

³⁷ Fidelis E. Satriastanti, "Indonesia Probes Violations of Indigenous Rights In Contested Forests," *Trust*, 2014.

³⁸ *Id.*

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the two covenants, the state and not any actor is responsible for protecting human rights.

Thus, other companies or legal entities are not considered as a subject to human rights law, both as stakeholders (duty holder) and as rights holders. In the old paradigm, companies or other legal entities cannot be held to legal responsibility to respect human rights. This old paradigm then ignores the latest facts about the presence and strength of multinational companies that are directly or indirectly involved in human rights violations in developing countries. Seeing this, the author uses a legal analogy to describe whether the company is a legal subject in a human rights court or not.

The new paradigm has spread amid the dissatisfaction of the international community because the imposition of human rights responsibilities that only relies on the state is no longer sufficient. Along with the increasing role and economic-political strength of multinational companies, there is an urge to build a new paradigm that begins to consider non-state actors, in this case multinational companies. According to this new paradigm, multinational companies or other legal entities outside the country can be held legally accountable (legal responsibility) for human rights violations that they might commit.

The experience of the failed of a human rights lawsuit against a multinational company encourages an expansion of the concept of liability for human rights violations so that multinational companies can be held accountable under the basis of international human rights treaties. The first argument is based on the Universal Declaration of Human Rights which states that *“every individual and every organ of society society to play their part in securing the observance of human rights.”* The companies that categorized as a subject *“organ of society society”*

has responsibilities to “*promoting and securing those human rights set forth in the Universal Declaration*”.

In the law there are several legal interpretations, namely the interpretation used to embody the rules/ norms contained in each article in the law. As it is known that the Human Rights Law in Indonesia uses the word “*every person*”, people in their legal concept are called “*persoon*” and are divided into two, namely people (*naturalijke persoon*) and legal entities/ corporations (*rechts persoon*).³⁹

Furthermore, the description of the perpetrators of crime is still often associated with acts that are physically carried out by the perpetrator (*fysieke dader*) even though in modern criminal law, especially in the social environment, the economy of a crime does not always need to commit his crime physically. Actions taken by corporations (Legal Entities) are always realized through human actions, namely directors / management. Thus, the transfer of management responsibility into corporate actions can be carried out if the act in the social traffic applies as a corporate act or known as *functionale dader*.

It should be noted also by human rights observers at this time that the existence of a Contract of Work between PT Freeport Indonesia and the Indonesian government made their legal standing balanced, meaning that no one had a higher position even though PT. Freeport represents the business entity while the government represents the state legal entity. This means that, under contract law and contract law, PT Freeport is also a legal subject in the Indonesian human rights law and the international human rights law. PT Freeport can be tried at the International Human Rights Court for human rights violations committed against the Papuan people so far.

³⁹ DWORKIN, *supra* note 20.

The same cases occur in Borneo, Sumatra, Celebest and Nusa Tenggara. The majority of mining and plantation companies, co-opting land belonging to indigenous peoples in various ways. They expel the native population in exchange for money and coercion. In fact, during the acquisition phase of the land, elements of human rights violations were often found. The incident keeps repeating without being able to find a solution. Companies are reluctant to be responsible, the state is not brave enough to take action against naughty companies for various reasons.

Abroad, cases in Brazil need to be used as reference material. Brazil at that time carried out massive development in the framework of building sports facilities and football fields when the country was chosen to host the World Cup. Many customary lands are taken for reasons of state interest. In this case, many people were homeless and many human rights violations took place there. On the basis of mutual interests in order to succeed the annual event titled the World Cup, the Brazilian government relinquished responsibility for the human rights violations they had committed.⁴⁰ The same motive also occurs in Indonesia, where the government and companies do not want to be responsible for human rights violations.

For the many cases of human rights violations, the United Nations then passed the United Nations Guiding Principles on Business and Human Rights (UNGPR). UNGPR is a guideline for running a business while still paying attention to human rights values. Broadly speaking, UNGPR contains 3 main pillars, namely *protect*, *respect* and *remedy*. Through these 3 pillars, the United Nations hopes that the company can run its business with continue to pay attention to human rights values. Also in the UNGPR, the United

⁴⁰ JDIH BUMN, "FGD Bisnis Dan HAM di BUMN : Antara Hak Asasi Manusia Dan Hak Asasi Perusahaan?," JDIH BUMN, n.d., <http://jdih.bumn.go.id/berita/fgd-bisnis-dan-ham-di-bumn-antara-hak-asasi-manusia-dan-hak-asasi-perusahaan>.

Nations seeks that the responsibility for fulfilling human rights can be borne by the company and not just the state. Likewise if a human rights violation occurs, the company concerned can be punished with the applicable provisions. The company is also asked to return the rights it violates through prescribed methods (remedy).

Protect means the company must fulfill the rights of the employee. It also mean that the company must be punished with the applicable provisions while the company violates the rights of the employee or environment around it. **Respect** in UNGP mean that the company must build a system or culture to promote human rights issues. Such as, the company must give a permit for a pregnant employee or breast feeding employee. **Remedy** pillar as mentioned before, the company is also asked to return the rights it violates through prescribed methods and so on.

LICENSING PRINCIPAL BASED ON SOCIAL SENSITIVITY

IN LAW, licensing/Permits is one of the most widely used instruments in administrative law. Licensing is the binding of a permit regulation generally based on the wishes of the legislator/government to achieve a certain order or to obstruct bad conditions.⁴¹⁴² So, the principal on licensing is that an action is prohibited, except as permitted, with the aim of being inside the

⁴¹ RIDWAN HR, *HUKUM ADMINISTRASI NEGARA* (Yogyakarta, Rajawali Press, 2006).

⁴² DARDA SYAHRIZAL, *HUKUM ADMINISTRASI NEGARA & PERADILAN TATA USAHA NEGARA* (Yogyakarta, Media Pressindo, 2018),

provisions that are linked to the court can be meticulous given certain limits for each case.⁴³

The government uses licenses as a juridical means to drive the behavior of the citizens. So that licenses can also be referred to as the approval of the authorities based on laws or government regulations, to in certain circumstances deviate from the provisions of the prohibition of legislation. According Ten Berge (1993), by giving licensing, the ruler allows the person who begs him to take certain actions that are actually prohibited. This stings the imposition of an action which in the public interest requires special supervision over it.⁴⁴

Tatiek Sri Djatmiati mentioned that Juridically the character of the license is **constitutive**, namely the existence of rights and obligations that are born from the license so that certain activities can be carried out if they already have a license.⁴⁵ Licensing is an instrument used in administrative law. The government uses licenses as a juridical means to regulate the behavior of citizens.⁴⁶ However, there has been a shift from licenses as a means of regulating community behavior into licenses as a source of income. This can be proven when the government simplifies the license to become a **one-stop service**, whereas according to its character, licensing is an interconnected norm. So even though formally one-stop services shorten licensing time, however, materially, they have ignored the substance and law enforcement.

⁴³ PHILIPUS M. HADJON, *PENGANTAR HUKUM PERIZINAN* (Surabaya, Penerbit Yudika, 1993).

⁴⁴ TEN BERGE, *PENGANTAR HUKUM PERIZINAN* (Surabaya, Yuridika, 1993).

⁴⁵ Tatiek Sri Djatmiati, "Perizinan Sebagai Instrumen Yuridis dalam Pelayanan Publik," *Speech on the Inauguration of Professors in Administrative Law* (Surabaya, 2007).

⁴⁶ *Id.*

According to Ten Berge, by actions binding on a licensing system, lawmakers can pursue various objectives such as:

1. Desire to direct (control) certain activities
2. Preventing danger to the environment
3. Desire to protect certain objects
4. Have to divide a small object
5. Briefing, by selecting people and activities⁴⁷

The authors have stated earlier that the character of the license is constitutive, meaning that the rights and obligations are born of the licensing. Certain activities are only possible if you have licensing. However, there has been a shift from licenses as a means of regulating community behavior into licenses as a source of income. This can be proven when the government simplifies the license to become a **one roof service** (one stop service), even though according to the character the license is a related norm (*gelede normstelling*). So, even though formally one roof services shorten licensing time, but materially have ignored the substance and law enforcement.

In order to pursue investment and income of the country, the government often makes policies that benefit investors. For example, with the existence of a policy package that ignores existing licenses and cuts them into one-stop licenses. Economically, this kind of policy is right to be used to shorten licensing and investment times, especially mining licenses, which in the beginning could last for years. Because the character of the license itself is a related norm (*gelede normstelling*), meaning that one license requires other licenses. The legal regulations that are used as the basis for licensing are related laws and regulations that refer to the pattern of authority, procedures, substance and law enforcement.⁴⁸

⁴⁷ BERGE, *supra* note 44.

⁴⁸ Djatmiati, *supra* note 45.

In general, the licensing system consists of prohibitions, agreements which are the basis of exceptions and licenses relating to licenses [berge]. The prohibition and authority of a government organ to deviate from the prohibition by giving permission must be stipulated in a law. This means that licenses must be based on law, not laws based on licenses. This is the juridical problem of the PT. Freeport where the Contract of Work is in advance rather than its legislation, namely Law Number 1 of 1967 concerning Foreign Investment.

This proves that the government in granting licenses is not based on the principle of carefulness and prudence as contained in the general principles of good governance (*algemene beginselen van behoorlijke bestuur*). Whereas this principle is used as a basis for the government in issuing policies and decisions, without paying attention to this principle the government has committed treason against the law.

The purpose of licensing as mentioned by Ten Berge is to prevent harm to the environment. Therefore, the AMDAL document becomes the reference and guidelines, whether or not an area can be exploited should be based on the AMDAL document that is done scientifically. The big question is whether the Papuan people have been informed of an AMDAL document from PT Freeport? because the appointment of an AMDAL document to the community is an obligation, therefore the government means that it has committed arbitrariness. In licensing, there are also known *inspraak* or community participation, namely deliberations with interested parties, including the obligation to hear from the government by the public (*public hearings*).

Based on this, the authors argue that in the implementation of mining licenses must be strengthened to protect the community from the arbitrariness of the company, namely by:

- a. **Removing one-stop service patterns.** Although a one-stop service policy is used to improve the quality of public services, this policy can cause juridical problems in the future because it does not meet the principles of accuracy. One of the benefits of a one-stop service policy is that licensing services are fast and uncomplicated, even though the character of licenses is an interconnected norm. So it is necessary to observe the existing regulations starting from the law until the regional regulations and ministerial regulations are licensed or not.
- b. **Paying attention to the general principles of good governance.** In granting licenses must pay attention to these principles, because this principle used as a basis for the government in making decisions concerning the lives of many people.
- c. **Involving society near the project.** One of the most important steps to make a license is the way to get approval or grant from the society near the project. This steps actually included in the formal license method, but usually ignoring the truth. As usual, society is given some money or facilities by the corporate/company to fulfill the permit. To avoid this fact, NGO's or academician must give some socialization to the society/community, especially to the indigenous people.
- d. **AMDAL document.** One of the obligations when a foreign investor establishes a company in Indonesia is to include an AMDAL document. This document is a scientific study of the location that will used as a place of business against the possibilities that will occur from the activities carried out.
- e. **Obedient to UNGP Pillar.** In addition to complying with technical procedures in making AMDAL documents, licensing must also be looked at in the 3 pillars in UNGP, namely protect, respect and remedy. New license can be approved when the

company that applying for the licensing can show that the business they will be able to do can fulfill the 3 pillars of the UNGP in a comprehensive and integrated steps.

- f. **Preparation event/Inspraak.** The stakeholders and the community must be involved in the licensing process, and this is intended to find out and hear what the community wants after the company's activities exist. So that there will not be a crime against humanity due to the expulsion of the community by the business activity, including compensation.
- g. **Controlling.** The government as the party that issued the license must provide supervision on activities carried out by the applicant, and this is done to prevent the occurrence of irregularities committed during the activity/activity process. In addition to protecting the surrounding communities from being victims of systematic and massive crimes against humanity. Supervision can be done in collaboration with NGOs, Ombudsmen and the community.
- h. **Making cooperation must be based on the Law.** This is very important to do, namely the creation of cooperation must be based on the provisions of the law so that the cooperation made not only benefits investors but at the expense of society. Making a work contract with PT. Freeport is one of them, the Contract of Work is not known in the contract law in Indonesia, and the contents of the work contract have in fact contradicted Article 33 paragraph (1) of the UUD 1945 and Law Number 5 of 1960 concerning Agrarian Principles.

Meanwhile, in order to realize social sensitivity-based licensing, it must begin with building social capital in the community. According To Zaka Firma Aditya (2018), the core of social capital lies in how the ability of society in an entity or group to work together to

build a network to achieve a common goal of cooperation.⁴⁹ It is built on positive and strong social norms and values, which strength will be maximal if supported by a proactive spirit of making relationships on the following principles:

a. *Participation In a Network In a Society*

Social capital is not human capital, it is not only built on the tendency that grows in a group. It is a shared norm that lies in the tendency that grows in a group to socialize as an important part of inherent values. The success of social capital depends on how to build a network of social relations.

b. *Reciprocity*

In the concept of social capital, reciprocity is not only interpreted immediately as a contractually based relationship. Good exchange between members of one group against another is not always done immediately, but can also be a combination of the short and long term. The spirit to help each other and the spirit to reciprocate will be a determining factor in the improvement of the quality of social capital.

c. *Trust*

According to Francis Fukuyama (1995), trust is a trusting attitude in the community that allows the community to unite with each other to increase social capital.⁵⁰ The level of trust between one community member and another member, the group will support community participation in order to build mutual progress, otherwise the destruction of the level of trust will become a social problem that can hinder the development of shared goals. Qianhong Fu divides three trust levels, namely: individual level

⁴⁹ Zaka Firma Aditya, *Penerapan Modal Sosial Dalam Praktek Peradilan Yang Berbasis Kepekaan Sosial*, 25 LEGALITY: JURNAL ILMIAH HUKUM 202, 200–219 (2018).

⁵⁰ FRANCIS FUKUYAMA, *TRUST: SOCIAL VIRTUES AND CREATION OF PROSPERITY* (New York, Free Press, 1995).

as individual wealth, personal variables and individual characteristics, level of social relations, trust is considered as a shared attribute to achieve a common goal, as well as the level of the social system, is the value of a broad society that develops and is facilitated by existing social system.⁵¹

d. *Social Norms*

Eric Posner (2000) in his book entitled "*Law and Social Norms*" mentioned that the norms are a set of rules that are alive and are recognized as a means for a social entity in society.⁵² Social norms are usually institutionalized and contain social sanctions so as to prevent members of a society from deviating from it. This social norm will play a role in controlling people's behavior.

e. *Values*

Value is an idea that has been passed down from generation to generation considered true and essential for community members. Value is a measure that can be used to measure a person's behavior in a social system. Values always have ambivalent consequences, from optics which are considered positive, but from other optics are negative. Values always play an essential role in human life in society. Usually, certain values dominate developing ideas, domination will influence and shape the rule of conduct, the rules of behavior, and together will form a cultural pattern.

f. *Proactive Action*

In the perspective of social capital, proactive action has a higher level of quality when compared to participation in a network. Proactive actions not only require someone to be involved but also seek ways for their involvement in a community activity.

⁵¹ Aditya, *supra note* 49.

⁵² ERIC A. POSNER, *LAW AND SOCIAL NORMS* (Cambridge, Harvard University Press, 2000).

In addition, so that the implementation of licenses based on social sensitivity can be implemented well, it must be supported by the implementation of the principles of good governance. Because, without this, the principle of licensing based on social sensitivity is only limited to ideas that cannot be implemented perfectly by the government. There are several principles and implementation of good governance that can support the implementation of licensing based on social sensitivity, including:

a. Principle of Legal Certainty

The principle of legal certainty has two aspects, one of which is material law, and the other is formal Law. Aspects of material law relate to the principle of trust. While formal aspects are related to favorable decisions and must be arranged in clear words. The aspect of legal certainty in the material sense emphasizes the certainty of protection of citizens' rights and the fulfillment of expectations that have been grown by government organs. Kuntjoro Purbopranoto in his book entitled "Beberapa Catatan Hukum Tata Pemerintahan" argues that the principle of legal certainty requires the respect of one's rights that have been obtained based on a government decision.⁵³ That is, every decision made by the Government is not revoked, unless there are important things that are the basis of the withdrawal and this must be proven through a legitimate judicial process. In the State Administrative Court, the Principle of Legal Certainty is one of the test tools for judges in deciding state administrative matters.

b. Principle of Public Interest

The principle of the implementation of public interest requires that in every decision which is the realization of the implementation of the principal duties of the official / agency, always prioritizing the

⁵³ RIDWAN HR, *supra note 41*.

public interest above personal and group interests. According to Kuntjoro Purbopranoto, the weakness of the principle of legal certainty is rigid and requires a long time to make changes, while the dynamics of people's lives continue to move and experience rapid changes, so that the Government often acts or issues decisions based on policies to organize public interests.⁵⁴ The principle of public interest is very important in its position in the administration of government. This principle is important for government officials as public servants, that is, they must prioritize public welfare by understanding and accommodating people's hopes and desires carefully. This principle requires that in carrying out government duties, the government always prioritizes public interests rather than personal interests or interests of certain groups. Public interests are more important than personal interests, which does not mean that personal interests are not recognized as the essence of individual human beings. However, in the public interest there are restrictions on personal interests, because those interests are essentially included in the interests of the community and national interests based on the principle of social justice for all the Indonesian peoples.

c. Principle of Openness

The principle of openness also provides an opportunity for the people to provide responses and criticisms built on the government, giving consideration to the running of the government. The government as the party that agrees must provide information needed by the community, requesting information provided to the community that is guaranteed by the Act. In addition, the information conveyed by the government to the

⁵⁴ *Id.*

public must be truthful, not engineered. The correct information must also be conveyed sincerely to all citizens / communities.⁵⁵

The existence of rights from the community to obtain/obtain information is intended as part of the active participation of the community in improving and managing the country. However, the application of this principle must continue to heed the applicable legal, moral and social rules. That is, the openness of obtaining information must not exceed the limits that touch personal/group rights, protected the state's secrets and safety, which cannot/can be known, owned and utilized by unauthorized parties.⁵⁶

d. Principle of Carefulness

The principle of Carefulness actually presupposes an attitude for decision makers to always act cautiously, namely by comprehensively considering all aspects of the decision material, so as not to cause harm to the community.⁵⁷ The principle of carefulness requires that government bodies before taking a provision, examine all relevant facts and include all relevant interests in their consideration. If important facts are under-researched, that means not being careful. If the government mistakenly does not take into account the interests of third parties, that also means being inaccurate. In this framework, the principle of carefulness can require that those who are interested be heard (obligation to listen), before they are faced with an adverse decision.⁵⁸ This principle requires carefulness of the government apparatus in every time they do an act. Every time the actions of

⁵⁵ IDUP SUHADY, *KEPEMERINTAHAN YANG BAIK* (Jakarta, Lembaga Administrasi Negara Republik Indonesia, 2009).

⁵⁶ *Id.*

⁵⁷ SAFRI NUGRAHA, *LAPORAN AKHIR TIM KOMPENDIUM BIDANG HUKUM PEMERINTAHAN YANG BAIK* (Jakarta, 2007).

⁵⁸ PHILIPUS M. HADJON, *PENGANTAR HUKUM ADMINISTRASI INDONESIA* (Yogyakarta, Gadjah Mada University Press, 1993).

the government apparatus which have legal consequences always give rise to rights and obligations, not only to themselves as legal subjects but also to other parties.

CONCLUSION

LICENSING can be used as an instrument in preventing human rights violations caused by multinational companies considering the constitutive character of licensing (resulting in rights and obligations), namely by strengthening the licensing principle. The agreement on the contract of investor cooperation with the government that does not pay attention to the licensing aspect will result in injustice in the community and arbitrariness. In licensing must also pay attention to the general principles of good governance, community participation and legislation in force.

There are several principles that must be built to create a strengthening of licensing principles based on social sensitivity, among of them: Participation In a Network In a Society, Reciprocity, Trust, Social Norms, values, and Proactive Action.

In addition, the implementation of mining permits must be strengthened to protect the public from the company's arbitrariness, namely by: (1) Removing one-stop service patterns, (2) Paying attention to the general principles of good governance, (3) Involving society near the project, (4) strengthening AMDAL document, (5) Obedient to UNGP Pillar where licensing must also be looked at in the 3 pillars in UNGP (namely protect, respect and remedy), (6) Controlling where the government as the party that issued the license must provide supervision on activities carried out by the applicant and this is done to prevent the occurrence of irregularities committed

during the activity/activity process, and (7) Making cooperation must be based on the Law.

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