

Free, Prior, and Informed Consent Principles as Indigenous Peoples' Right: Soft Law or Hard Law?

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Abstract

Ensuring conformity between national laws and international law principles is crucial for states, particularly concerning the adoption of the Free, Prior, and Informed Consent (FPIC) principle to safeguard the natural resource rights of Indigenous Peoples. Numerous development initiatives proceed without indigenous consent, resulting in significant harm. Policies impacting indigenous communities should be established through prior consultation and their explicit endorsement to align with local wisdom and values. This paper explores the imperative to reevaluate the FPIC principle within legal frameworks. Using both conceptual and statutory analyses, it assesses whether FPIC constitutes a binding obligation with legal ramifications that necessitate incorporation into national law (hard law) or remains a non-binding guideline (soft law). The State's role in implementing this principle to shield indigenous groups from detrimental development projects affecting their natural resources and cultures is scrutinized. The foundational ethos of FPIC is rooted in defending Indigenous Peoples' entitlements to natural resources. Lastly, legislative recommendations are offered to define FPIC as a legal norm, ensuring legal certainty and guiding judicial decisions in upholding these rights.

Keywords: Free Prior Informed Consent (FPIC); Indigenous People; Soft Law and Hard Law

A. Introduction

In certain circumstances, development approaches do not consistently foster harmony. Instances arise where conflicts lead to losses and casualties. Many developments initiatives neglect, and thereby harm, the lands and natural resources of Indigenous Peoples due to inadequate inclusion in decision-making processes. This omission is underscored by reports indicating that Indigenous Peoples increasingly face criminalization and harassment, particularly when asserting their rights over territories and natural resources, engaging them into a battle for land.¹ While governmental permits have been secured for policy implementation, consultations with and consent from Indigenous Peoples have often been overlooked.² Consequently, Indigenous Peoples have witnessed deforestation, mining on their lands, flooding of valleys, enclosure of hunting grounds, and occupation of fields, all without their input or benefit.³ These actions lead to a diminution of the customary law community's management area of their land and natural resources as well as the loss of biodiversity.⁴ One critical contributing factor is the lack of consultation with Indigenous Peoples in policymaking processes. Yet, legally, there is no requirement for free, prior, and informed consent of Indigenous Peoples regarding development projects affecting their lands, territories, and natural resources. In practice, state policies frequently place Indigenous Peoples at risk without affording them opportunities to voice objections or propose amendments that would align development with the principles of their local wisdom.

1 Fernanda Canofre, "Criminalizing Indigenous Rights: The Battle for Land in Brazil", *World Policy Journal*, Vol. 4 Num. 3, 2017, p. 68.

2 Deti Mega Purnamasari, "Nasib Masyarakat Adat yang Terancam Investasi Hingga Kriminalisasi", *Harian Kompas* 10 December 2019, <https://nasional.kompas.com/read/2019/12/10/09145461/nasib-masyarakat-adat-yang-terancam-investasi-hingga-kriminalisasi?page=all>: "accessed 24 October 2023

3 Emil Kleden, *Konsep Free Prior Informed Consent*, Bogor: ELSAM, 2017, p.9.

4 E Cohen-Schacham et al, *Nature-Based Solution to Address Global Societal Challenges*, UNDP: Norad German, 2016, p. 2. <https://portals.iucn.org/library/sites/library/files/documents/2016-036.pdf>, accessed 24 October 2023

Free Prior Informed Consent (FPIC) was established as one of the instruments in international law to protect the rights of Indigenous Peoples affected by a development project.⁵ Several international human rights instruments have mandated Countries to apply the FPIC. Environmentally based sustainable development of indigenous and tribal peoples through prior consent and the availability of natural resources for future generations has been mandated in international law that is followed by many countries including Indonesia.⁶ The principle of FPIC is guaranteed in a number of international instruments of the United Nations on Declaration of Indigenous People Rights 2007, Convention on Biological Diversity 1994, and Convention on International Labour Organization 169/1989. This principle aims to protect the rights of Indigenous Peoples to their natural resources. Every policy that has implications for them will be informed in advance for consultation and approval so that each policy is in accordance with and in line with values and wisdom.

The State's disregard for the principle of Free Prior Informed Consent (FPIC) regarding Indigenous People inhabiting their lands and territories causes harms to the Indigenous People and potentially trigger conflicts over natural resources. The critical focus of this research lies in the implementation of the principle of FPIC in the domestic legal system. This entails the transposition of FPIC, as stipulated in international law, into national legislation.⁷ It is expected that this principle could balance relations that are more respectful of the rights of Indigenous Peoples to their territories and provide space to decide what happens in the land and areas of the objects

5 George Barrie, "The Right's to Free Prior and Informed Consent: Evolving Customary International Law", Chapter 8 in *Court and Diversity*, Brill Nijhoff, 2024, p. 196.

6 United Nation Human Right Council, "Free Prior Informed Consent Human Rights Based Approach" Paper, 2018, p.5, <https://documents.un.org/doc/undoc/gen/g18/245/94/pdf/g1824594.pdf?token=KQ7eUsYx79kZ0w9lng&fe=true> accessed 28 December 2023.

7 Anthea Roberts *et al*, *Comparative International Law*, New York: Oxford University Press, 2018, p. 4: How international law is applied in a country? This refers to how international law is perceived, interpreted, and integrated into the national legal system.

of their rights. Several international legal instruments adopt FPIC as a general legal principle or soft law. Meanwhile, developments in international law and the courts demonstrate an evolution in the interpretation of the FPIC principle, from just the right to consult with Indigenous Peoples to the right to obtain prior approval as a requirement for starting development projects in their territory.

Based on previous research conducted Belen Giuppani demonstrates that “a normative gap subsists between the international norms applicable and States’ practice.”⁸ Some agree that FPIC principle is not effective as a right. Even though FPIC is an international customary law there is no legal consequence. As Rodriguez-Garavito has put, “FPIC is still under conceptual, legal and political debate”. It has not yet become a legal norm as a veto requirement.⁹ In another part, Papillon et al stated although FPIC has become very important in the relationship between Indigenous Peoples and the State, FPIC is the product of negotiated and ambiguous compromises that can give rise to different interpretations.¹⁰ Along with implementation issues, the FPIC faces a weakness of enforcement in countries that have adopted it, which non-compliant countries would have to resolve if the FPIC was considered hard law or legally binding.¹¹ This article is different from previous research. This paper aims to explore Free Prior informed consent to be incorporated into existing hard law. The way to enforce international customary law is to integrate it into an existing local law that will have an impact on the courts.

8 Belen Olmos Giuppani, “Free, prior and informed consent (FPIC) of indigenous peoples before human rights courts and investment law tribunals: Two sides of the same coin?”, *International Journal on Minority and Group Rights*, Vol. 25, 2018, p. 485.

9 Papillon, Leclair and Leydet, “Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency”, *International Journal on Minority and Group Rights*, Vol. 27, 2020, p. 230.

10 *Ibid.*

11 Tara Ward, “The Right to Free Prior Inform Consent Indigenous People’s Participation, Rights Within International Law”, *Northwestern Law Journal of Human Rights*, Vol. 10, Issue. 2. 2011, p. 53.

B. Free Prior Informed Consent as a Right: Soft Law or Hard Law

The issue of the need for the approval of indigenous and tribal peoples originated from various protest movements of Indigenous Peoples in many parts of the world such as in North America who demanded development justice after the presence of a number of multinational companies in the mining sector operating in the areas managed by Indigenous Peoples and the development of a number of conservation areas by the United States and Canadian governments.¹² Meanwhile, the ASEAN environment also shows that:

“Forced resettlement of indigenous communities is occurring in many ASEAN countries, often in connection with large infrastructure programs. The Lao government has launched a comprehensive, country-wide resettlement program where almost all of the people affected belong to Indigenous Peoples.”¹³

Indonesia has a strong foundation to harmonize the principle of Free Prior Informed Consent, the provisions of Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia stipulates that:¹⁴ “The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with developments and principles of the Unitary State of the Republic of Indonesia as regulated by law.” Indigenous Peoples in Indonesia are estimated to number 2,359 communities with 17,000,000 individual members.¹⁵ Although there are a number

12 Ilyasa, R.M, “Prinsip Pembangunan Infrastruktur yang Berlandaskan Hak Asasi Manusia Terhadap Eksistensi Masyarakat Hukum Adat di Indonesia”, *Jurnal SASI*, 26(3), 2020, 380-391.

13 Asia Indigenous People's Pact The International Work Group for Indigenous Affairs (IWGIA) “ASEAN's Indigenous Peoples”, AIPP, IWGIA, Forum Asia, 2010, p.12 https://www.iwgia.org/images/publications/0511_ASEAN_BRIEFING_PAPER_eb.pdf, accessed 12 December 2023.

14 Muazin, “Hak Masyarakat Hukum Adat (Indigenous Peoples) atas Sumber Daya Alam (Perspektif Hukum Internasional)”, *Padjadjaran Jurnal Ilmu Hukum* Vol. 1 (2) p. 337. See Budiono, Indro et al, “Internalization Free, Prior, and Informed Consent as Indigenous Alienation Resistance in Structural Agrarian Conflict”, *Jurnal Cakrawala Hukum*, Vol. 14, Num. 3, 2023.

15 Amnesty International, “Lindungi Hak Asasi manusia Masyarakat Adat Maluku dari Eksploitasi Lahan”, *Kumparan*, 21 Pebruari 2020, <https://kumparan.com>

of laws and regulations relating to Indigenous Peoples and natural resources (Agrarian Law, Forestry Law, Plantation Law, Mining and Coal Law, Fisheries Law), Indonesia has not adopted and harmonized the principle of Free Prior Informed Consent in its laws and regulations. In practice, the use of the principle of FPIC in Indonesia is associated with provisions for recognizing forests that have high carbon stocks. The Roundtable on Sustainable Palm Oil (RSPO) requires no development of oil palm plantations in areas of high conservation value unless prior informed consent is obtained and the risks are communicated to Indigenous Peoples.¹⁶

Based on the study by Pappillon, although increasingly recognized as a core element of the rights of indigenous and tribal peoples, the application of the principle of FPIC is dependent on national law. This shows that Indigenous Peoples are the subject of de jure law in a number of international instruments.¹⁷ However, de facto, there is a gap between what is guaranteed in international law and what is stated in national law. The problem of this gap can be overcome by harmonization of the law. Why is the legal harmonization of the principle of FPIC important based on initial comparisons in several ASEAN countries such as Indonesia, Malaysia and Cambodia? Free Prior Informed Consent has not been realized in their national law. The gap between national law and international law in the ASEAN region is influenced by the legal system of ASEAN countries. In Indonesia, the legal framework is shaped by the civil law system, customary law, and Islamic law.¹⁸

Meanwhile, Vietnam is dominated by the influence of the French

aran.com/amnesty-international-indonesia/lindungi-hak-asasi-manusia-masyarakat-adat-maluku-dari-eksploitasi-lahan-1stEsYNS6ve, accessed 12 January 2023.

16 Forest People Programme, *Identifying the Human Rights Impact of Palm Oil*, UK, 2022, <https://globalcanopy.org/wp-content/uploads/2022/08/FPP-Palm-Oil-Report-FINAL52.pdf>.

17 Pappillon Leclair and Leydet, *op cit.*, p. 223.

18 Firma Aditya, Zaka and Riszisyabana Yulistyaputri, "Romantisme Sistem Hukum di Indonesia Kajian Kontribusi Hukum Adat dan Hukum Islam dalam Pembangunan Hukum di Indonesia". *Jurnal Rechvinding*, Vol. 8, Num. 1, 2019, 37-53.

colony, which adheres to a civil law system. Harmonization includes adjustments to laws and regulations, legal principles and the content of legal rules with the aim of legal certainty, benefit and justice as the embodiment of the substance of international law. This harmonization has great significance in the adoption of the principle of FPIC for the protection of Indigenous Peoples over natural resources.

On the other side, Belen Olmos Giupponi stated that scholars have studied that FPIC is a right.¹⁹ The principle of Free Prior Informed Consent (FPIC) or as usual called free, prior and informed consent is a special right related to Indigenous Peoples and is recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Indigenous People Rights/UNDRIP) of 2007), Convention on Biological Diversity/CBD of 1992 derived from the 2002 Bonn Guidelines and Convention on International Labor Organization 169 of 1989. The provisions of Article 19 of UNDRIP determine: “States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Furthermore, FPIC has been reaffirmed in Article 32 of UNDRIP that: “Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

“States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

Along with UNDRIP, the provisions of Article CBD and ILO Convention 169 of 1989 mandate that indigenous and tribal peoples should not be removed from the lands, territories and natural resources they occupy. Where the transfer of Indigenous Peoples to another place is deemed necessary as an exceptional measure, the

¹⁹ Belen Olmos Giupponi, *op cit.*, p. 486.

transfer can only be carried out with their will and consent after being informed beforehand of the consequences. These rules are the basis for regulating free prior informed consent in international law provisions for certainty and justice for Indigenous Peoples.

Etymologically, rights come from the Arabic word *haqq*, which means true, real, certain, permanent and obligatory. Rights are interpreted as the authority to do something.²⁰ In a rights-based view, rights are something that is inseparable from the essence of humanity itself.²¹ Feinberg emphasizes how valuable rights are and that people should feel no shame in demanding them. John Locke argued that rights are claims that can be made simply because we are human. According to Dworkin, a right is a justifiable claim, based on moral and legal grounds, to own or obtain something, or to act in a certain way.²² This claim represents human interests to achieve their goals, therefore, according to Paton, interests are the object of human desire. Interest is a demand or desire of an individual or group that the individual or group wants to fulfil.²³

Based on the above view, rights are interpreted as the authority to carry out or have an interest/claim that is protected by law. These interests are valid and can be prosecuted because they are protected by statutory regulations. International legal recognition of Indigenous Peoples is a recognition based on human rights. International law provides a number of legal instruments to advance the rights of Indigenous Peoples, namely the 1989 International Labor Organization/ILO Convention Number 169 concerning Indigenous and Tribal Peoples in Independent Countries, the 1957 ILO Convention Number 107 concerning Indigenous and Tribal Population and the most comprehensive is the United Nation Declaration the Rights of Indigenous People 2007.

20 Majda El Mumtaz, *Hak Asasi Manusia dalam Konstitusi Indonesia*, Edisi Kedua, Jakarta: Gramedia. 2005, p. 1.

21 Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Prenada Media, 2015, p. 152.

22 Ifdhal Kasim, "Hukum Hak Asasi Manusia Internasional", Paper, ELSAM, 2014, p. 2.

23 Peter Mahmud Marzuki, *op. cit.*, p.150.

In connection with the recognition of the rights of Indigenous Peoples to natural resources, the provisions of Article 3, Article 14 and Article 15 of the 1989 ILO Convention Number 169 which in principle determine that the government must respect the culture and spiritual values of Indigenous Peoples related to their relationship with the land and its natural resources, especially the collective aspect of this relationship. The ownership and control rights of Indigenous Peoples over the land they traditionally occupy must be recognized. Even in the provisions of Article 15, the affirmation of recognition of the rights of Indigenous Peoples is also accompanied by the human rights principle of free prior informed consent (FPIC) that:

- (1) "The rights of Indigenous Peoples concerned over natural resources and related to their lands and territories must be specially protected. These rights include the right of communities to participate in the use, management and conservation of natural resources."
- (2) "In cases where the State retains ownership of natural resources below the surface of the land or rights to other resources related to land, the Government must establish procedures whereby the government will consult with Indigenous Peoples, to ensure that the interests of Indigenous Peoples are not harmed and Indigenous Peoples must wherever possible participate and benefit and receive fair compensation for any damage they may experience as a result of such activities."
- (3) "In cases where the State retains ownership of natural resources below the surface of the land or rights to other resources related to land, the Government must establish procedures whereby the government will consult with Indigenous Peoples, to ensure that the interests of Indigenous Peoples are not harmed and Indigenous Peoples must wherever possible participate and benefit and receive fair compensation for any damage they may experience as a result of such activities."
- (4) "In cases where the State retains ownership of natural resources below the surface of the land or rights to other resources related to land, the Government must establish procedures whereby the government will consult with Indigenous People, to ensure that the interests of communities are not harmed and Indigenous Peoples must wherever possible participate and benefit and receive fair compensation for any damage they may experience as a result of such activities."

According to James Anaya, although these international treaties

in the form of Declarations do not bind countries or are often called soft law, they receive widespread support from countries so that the principles of these declarations and conventions are considered customary international law.²⁴

Several scholars have mentioned FPIC as a principle or right, after being widely discussed based on international law. For example, Phillips and McCorquodale in Belen emphasized that the existence of FPIC in the UN Declaration can be said to be part of customary international law or general legal principles because it is recognized by states and international courts. In another section, it also shows that FPIC is attached to the right to self-determination, which according to McCorquodale there is a consensus acceptance of the UN Declaration and the practices of other countries. Therefore, FPIC can be considered as part of customary international law. This was the Court's position in the Sarayaku case when considering Ecuador's claims and the agreement of the Sarayaku Indigenous Peoples. The court held that "the State, in not consulting with the Sarayaku Indigenous People implementing Development projects that would have a direct impact on their territory, failed to fulfil its obligations, based on those principles."²⁵

Initially, countries recognized the existence of these Indigenous Peoples both officially and informally, which was reflected in the recognition of territorial sovereignty and natural resources. From a legal perspective, the main aspect of the problem of recognition of Indigenous Peoples is related to how to recognize a group with its characteristics which are related to two dimensions of recognition, namely, the external dimension of how outside parties view and re-

24 S. James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, Colorado Law Faculty: 2013, p. 984, <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2385&context=faculty-articles>, accessed 18 December 2023

25 M. Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead", *The International Journal of Human Rights*. Vol. 1, Num.1, 2012, p. 1-2. See also James S. Phillips, "The Right of Indigenous Peoples under International Law", *Global Bioethics Journal*, Vol. 26, Issue 2. 2015, p. 121.

late to customary law community groups. This will refer to how the value system is adhered to, and what forces and actions make them bound. Second, is the internal dimension, namely how group members relate to and manage the institution and how they relate to each other. Once the group is given formal recognition, the function of recognition is expected to strengthen group cohesion.²⁶

In another part, The World Commission on the Social Dimension of Globalization which was initiated by the ILO in 2002 through a progress report with the topic 'A fair Globalization Creating Opportunities for All' discusses the implications of globalization for economic and social life to harmonize economic, social and economic goals and environment. The Commission recognizes that support and efforts are needed to protect and respect the rights of Indigenous Peoples, especially rights to their territories and natural resources, including the importance of implementing the principle of free and prior informed consent (FPIC). When external parties wish to carry out activities in the territory of Indigenous Peoples, they should obtain prior approval before project activities begin.²⁷ Martinez Cobo's study became the reference standard in preparation for the 1992 United Nations Conference on Environment and Development (Earth Summit) within the framework of sustainable development.

International legal recognition of the rights of Indigenous Peoples is UNDRIP and the United States Declaration of Human Rights and Obligations. In the case at The Inter-American Court of Human Rights between Saramaka People v. Suriname's questioning of logging and mining concessions granted by Suriname regarding communal properties traditionally occupied by the Saramaka Community has threatened their physical and cultural survival. The court referred to Article 21 paragraphs (1) and (2) of the American Convention on Human Rights. The provisions of Article 21 recognize that every person has the right to use his property and its use is fully

26 J.S. Fingleton, *Legal Recognition of Indigenous People*, Legal Paper Online: FAO, 1998, p. 7, accessed <https://www.fao.org/3/bb034e/bb034e.pdf>, 27 December 2023.

27 Muazzin, *op cit.*, p. 324.

subject to the interests of society.²⁸

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The declaration as well as various International Conventions provide support for Indigenous Peoples in their struggle to preserve their survival and culture in the face of economic development projects imposed on them that threaten the sustainability of their environment. These international legal cases regarding Indigenous Peoples imply that these groups have the right to determine their own identity which was recognized by the courts and guaranteed in international documents as regulated in Article 33 UNDRIP:

"Indigenous Peoples have the right to determine their identity or membership in accordance with their customary law and traditions. This does not reduce the rights of individual Indigenous Peoples to obtain citizenship of the country where they live".

"Indigenous Peoples have the right to determine the structure and to elect the membership of their institutions in accordance with their procedures".

The turning point for international commitment to issues of Indigenous Peoples' rights was the 1971 UN Economic and Social Council Resolution which authorized the UN sub-commission on the Prevention of Discrimination and Protection of Minorities, an intergovernmental expert advisory body to the Commission on Hu-

28 Taisi Copetti, "The rights of Indigenous People under International Law", 2019, p. 2, accessed https://www.academia.edu/39328532/The_rights_of_indigenous_peoples_under_international_law, 28 December 2023.

man Rights to conduct a study on the Problem of Discrimination against Indigenous Peoples. Special rapporteur Jose Martines Cobo made a series of recommendations to support the demands of Indigenous Peoples. Based on the recommendations of Cobo's study and representatives of indigenous law community groups, the UN Human Rights Commission and its parent body the UN Social Economic Council in 1982 approved the establishment of a UN working group for indigenous law communities. This working group was formed as part of the Sub-commission on Prevention of Discrimination and Protection of Minorities with a mandate to review developments related to the promotion and protection of human rights and basic freedoms of Indigenous Peoples and to pay special attention to the standards of rights of Indigenous Peoples.²⁹ Furthermore, the working group encouraged initiatives to strengthen the existence of Indigenous Peoples and developed a draft Declaration of the Rights of Indigenous Peoples.

Cobo's study became the reference standard in preparation for the 1992 United Nations Conference on Environment and Development (Earth Summit) within the framework of sustainable development. A number of legal instruments adopted at the Earth Summit, such as the Rio Declaration, Agenda 21 and the Convention on Biological Diversity have established international legal standards to protect the rights of Indigenous Peoples to their traditional knowledge and practices in the field of environmental management and conservation. The important thing that has been achieved is that there is an international legal framework that recognizes the unique relationship that Indigenous Peoples have with their land, natural resources and environment.

Based on a number of international legal instruments, states are required to have the approval of Indigenous Peoples before imple-

²⁹ S. James Anaya, *Indigenous People in International Law*, New York: Oxford University 1996, p. 46, https://ftp.columbia.edu/itc/polisci/juviler/pdfs/anaya_ch2.pdf, accessed 22 October 2023. See also S James Anaya, *The Human Rights of Indigenous People: United Nations Development*, 2013, p. 985, <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2385&context=faculty-articles>

menting policies that affect land, territories and natural resources, including mining and the exploitation of other natural resources. The establishment of the principle of FPIC in international law is that in general development projects and conservation schemes are imposed on indigenous and tribal peoples without consultation, participation and negotiation. Some policies are carried out without respecting their rights.³⁰

In Malaysia, without the application of the Free Prior Informed Consent Principle, the existence of Indigenous Peoples is vulnerable to policies that are not in their Favour. In other ASEAN countries, Vietnam is considered successful in harmonizing the principle of FPIC into its national law:

“As Vietnam was the first country to undertake formal preparations for field-based REDD+ activities, the UN-REDD Viet Nam Programme proceeded with the Free, Prior and Informed Consent (FPIC). This pilot Vietnamese FPIC exercise was the first of its kind and lessons can be drawn from it for the future implementation of the FPIC process in Vietnam and elsewhere.” Vietnam was the first to conduct a Free, Prior and Informed Consent (FPIC) process under the UN-REDD Programme. FPIC forms part of the basis of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which Vietnam became a party to in September 2007.”³¹

Vietnam’s success is marked by the application of FPIC in the implementation of environmental policies that relate to local communities. The policy starts when the consent of the local community has been agreed. This is an important aspect in respecting and protecting community rights to natural resources in their management areas. This agreement is interpreted as Vietnam’s commitment and compliance in implementing legal obligations that need to be har-

30 Renee V Hagen and Tessa Minter, “Displacement in the Name of Development How Indigenous Right Legislation Fails to Protect Philippine Hunter Gatherer”, *Society and Natural Resources International Journal*, Vol. 33, Num. 2, p. 66.

31 Nguyen Quang Tan et al, “Evaluation and Verification of The Free, Prior and Informed Consent Process Under The UN-REDD+ Programmes in Lam Dong Province Viet Nam”, The Centre for People and Forest, Working Paper, 2010, p. 2, http://awsassets.panda.org/downloads/fpic_working_paper_01_10_14_small.pdf, accessed 10 December 2023.

monized in national law so that what has been agreed can be realized in the laws of each country. Vietnam's success is a necessary comparison material for Indonesia's future legal development policies to avoid conflicts and problems of disintegration.

Concerning FPIC, several cases in Indonesia illustrate that in the "infrastructure development process, the government often encounters conflicts with indigenous and tribal peoples. Throughout 2018 there were 326 natural resources and agrarian conflicts involving an area of 2,101,858 hectares with a total victim reaching 186,631 of the total victims, 176,637 of that came from Indigenous Peoples. This data makes Indigenous Peoples one of the most vulnerable parties in natural resource conflicts."³²

So far, the practice of how international law applies to national law depends on the legal system and is closely related to the doctrine or theory of monism and dualism, which is reflected in the relations between national law and international law.³³ This situation will be difficult when a country faces a static legal system to apply monism or dualism consistently. In this regard, Dioniso Anzilloti and Fitzmaurice suggest a middle way through harmonization theory which functions as a concept of choice in bridging this theoretical problem as follows:

"the entire monist-dualist controversy is unreal, artificial and strictly beside the point because it assumes something that has to exist for there to be any controversy at all – and which does not exist – namely a common field in which the two legal orders under discussion both simultaneously have their spheres of activity".³⁴

32 Raden Muhammad Arvy Ilyasa, "Prinsip Pembangunan Infrastruktur yang Berlandaskan Hak Asasi Manusia terhadap Eksistensi Masyarakat Hukum Adat", *Jurnal Sasi* Vol. 26 Num. 3, 2020, p. 381. See also Nisa Istiqomah Nidasari, "Peluang Penerapan FPIC sebagai Instrumen Hukum Progresif untuk Melindungi Hak Masyarakat Hukum Adat dalam Kegiatan Usaha Tambang dan Minyak Bumi", *Jurnal Hukum Lingkungan Indonesia*, Vol. 1, Num. 2, 2017, p. 52.

33 Dinah Shelton, *International Law and Domestic Legal Systems in corporation, transformation and persuasion*, New York: Oxford University, 2011, p. 2.

34 Duncan B Hollis *et al*, *National Treaty Law and Practise*. Boston: Martinus Nijhoff, 2005, p.77.

The theory of harmonization of international law and national law avoids the occurrence of superiority or superiority between the two laws (national and international) by emphasizing the coordination approach. The proponents of the harmonization theory assume that there is no conflict between the national legal system and international law so both need to be harmonized. Soft law can become customary international law through adoption or transformation. This practice occurs through legislative acts and judicial precedents that often cite international principles and treaties. Countries are taking action towards new commitments making Free Prior Informed Consent Principle not just a moral principle but more a norm.

C. Establishing Free Prior Informed Consent in the National Legal System

The national objective of the Republic of Indonesia as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia is to protect the entire Indonesian nation and all of Indonesia's soil, to promote general welfare, educate the people and participate in implementing world order based on independence, eternal peace and social justice.

The international treaties that Indonesia participates in are the embodiment of the country's goals. Various international treaties, in the form of law-making treaties and treaty contracts, are part of efforts to achieve world peace and order. Indonesia's participation in an international agreement which later became international law gave rise to legal consequences that could not be avoided. Although international law does not determine how international law will be applied by countries, it cannot be interpreted that countries that bind themselves to a treaty are obliged to implement international law into their national legal system.³⁵

This is in accordance with the provisions of Article 27 of the 1969 Vienna Convention on International Treaties that: "A treaty en-

35 Pierre Hugues Verdier and Mila Versteeg, "International Law in Domestic Legal System: An Empirical Perspective", *American Society of International Law Journal*, Vol. 108, 2014, p. 376.

ters into force in such a manner and upon such date as it may provide or as the negotiating States may agree". The agreement applies as specified in the agreement. This is in line with the provisions of Article 15 paragraph (2) of Law Number 24 of 2000 concerning International Agreements: "An international agreement comes into force and is binding after fulfilling the provisions as stipulated in the agreement." In addition, when the agreement comes into force, countries are obliged to implement and cannot submit national legal reasons as justification for their failure to implement international agreements as stipulated in the provisions of Article 27 that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".³⁶

Consistent with international law, States are required to recognize and carry out their duties and obligations to enforce the FPIC requirements that apply to Indigenous Peoples and recognize the right of forest-dependent communities to participate effectively in the governance of their countries, at a minimum. Forest in good faith on matters affecting them with a view to the agreement. Based on the explanation above, within the framework of harmonization of the principle of FPIC into the policy on the rights of indigenous and tribal peoples, it is necessary to adopt a number of laws and regulations relating to the rights of Indigenous Peoples to natural resources, namely:

- a. 45 Constitution;
- b. Law 39 of 1999 on Human Rights
- c. Law 41 of 1999 on Forestry
- d. TAP MPR IX Year 2001
- e. Law 4 of 2009 concerning Mining and Coal
- f. Law 32 of 2009 concerning Environmental Protection and Management
- g. Constitutional Court Decision 35/PUU-X/2012 on the Judicial Review of Law 41 of 1999

³⁶ A state cannot use the reasons for the provisions of its national law as justification for its failure to implement the treaty (the 1969 Vienna Convention, Article 27).

Some basic principles that need to be developed to harmonize FPIC are transparency, accountability and fairness. The first thing that must be conveyed to the customary law community is the initial desire to agree with the customary law community on what they think is good. This means that decision-making is subject to their customary norms and carried out before the development project starts.

FPIC has four elements, namely Free, Prior, Informed and Consent, which contain the following meanings:

- a. Free means that Indigenous Peoples give their consent or decide not to approve an activity plan, project or policy without any coercion from any party. Indigenous Peoples are free from pressure, and threats to express their opinions; the community is not under the pressure of time and place to negotiate; and Indigenous Peoples are also free to choose who should represent them.
- b. Prior means that the decision whether to agree or not is made before the policy or activity is carried out. However, in a forced situation, the community's consent can also be obtained while the activity is in progress.
- c. Informed means that before the decision-making process, the community must receive complete information in a language and form that is easily understood by the community. Information should be conveyed by personnel who understand the local cultural context, can speak the local language and include aspects of local community capacity building. Information should be complete and objective, including potential social, political, cultural and environmental impacts and provide information to the community about the potential benefits and losses that will be received by the community before approval is given.
- d. Consent means that a decision or agreement is reached through an open and gradual process that respects customary or local laws collectively with all the authorities that are held by them.

The following are the principles of FPIC that need to appear in national laws related to the harmonization of UNDRIP laws, namely:

- a. Self Determination (Article 3)
- b. Right of the land (Article 10)
- c. Redress for taking cultural, intellectual and spiritual property (Article 11)
- d. Adopting FPIC in legislative/administrative measures affecting Indigenous Peoples (Article 19)
- e. Right to redress for land (Article 28)
- f. Project-based on FPIC (Article 32)

As previously explained, according to international legal instruments above, approval authority is the aim of consultation on development actions or projects that have a substantive impact on the land, culture and social life of Indigenous Peoples. However, if the action is ultimately designed or formed to avoid negative impacts on the rights of land, houses, and cultural natural resources of Indigenous Peoples, then approval should not be required so that there is legal certainty for the developers, Indigenous Peoples and judges in the event of a conflict was submitted to the court.

Access to public participation in decision-making is very important so that policies can be accepted or rejected from the beginning. Therefore, this harmonization of law becomes a link so that human rights standards for the protection of natural resource rights of indigenous and tribal peoples can be realized. By ensuring the space for community participation through harmonization of the principles of FPIC in national law, the process of planning and implementing development related to the lands of indigenous and tribal peoples can be achieved. The implementation of the principles of FPIC thus not only prevents conflicts from occurring but also maintains environmental sustainability and strengthens the position of indigenous and tribal peoples.

Learning from the Sarayaku case, based on the provisions of the 1969 Article 27 of the Vienna Convention on the Treaty: "A state cannot use the reasons for the provisions of its national law as justification for its failure to implement the treaty". International law leaves it to the domestic laws of states themselves, to take all necessary measures to ensure the implementation of these rights. Two

specific aspects surrounding FPIC are key to its implementation: interpreted by international courts. First, the obligation to consult lies with the State, which needs to carry it out in accordance with certain criteria stipulated in law. Obligations in international law give rise to international responsibilities on the part of states. Second, the right to consult or give consent has soft law and hard law formulations. In certain cases (previously), this was interpreted as simply the right to express one's voice, namely to be asked for an opinion on a certain matter (soft law). This agreement should function as a requirement or hard law. Countries need to take the option or approach of Indigenous People's consent as a policy requirement framed in the national legal framework. Laws are derived from principles. Free Prior Informed Consent is a principle in international law accepted as customary international law. Legal principles represent or embody moral standards that underlie law-making.

D. Conclusion

Free Prior Informed Consent is a form of expression of a wider range of human rights protections that protect Indigenous Peoples to regulate their lives, livelihoods and lands. Therefore, FPIC needs to be respected by regulating it into national law. This arrangement is expected to be a reference and certainty for all parties in the development process of managing Indigenous Peoples. In this way, PFIC is not just signing a consent agreement, on the contrary, FPIC ensures that Indigenous Peoples have a right to say no or yes to any stage that affects land and natural resources in their managed areas. The relationship between the obligation to consult with Indigenous Peoples and the aspiration to obtain consensus on the consent of Indigenous Peoples to development projects in their natural resource areas is solely to protect their rights. This goal is most effectively achieved when consultations lead to FPIC by setting and establishing conditions that protect the rights involved in Law. One of the important conditions to support making FPIC have legal consequences is the establishment of an institution that has clear authority to carry out

consultation duties. The government can include these regulations in the Draft Law on Indigenous Peoples so that they are integrated as a legal norm. Indonesia, as a part of the countries that signed UNDRIP and is currently preparing the Draft Law on Indigenous Peoples, needs to formulate it in its legislative policy. First, states must seek Indigenous Peoples' consent before development projects can be approved. Second, free, prior, and informed consent is a mandate.

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