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Harmonization of Free, Prior and Informed Consent Principles in the Policy towards Indigenous Peoples' Right on Natural Resources

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ABSTRACT
Every state has its legal system. National legal systems differences do not necessarily constraint the application of international law into national legal systems. Therefore, it is important for every state to harmonize its national law with international law. This research was conducted by using legal research method to discuss the harmonization of laws on the principles of Free, Prior and Informed Consent (FPIC) in implementing the policy of the indigenous peoples' right to natural resources. Harmonization between international law and national law should refer to instruments of 2007 UN on Declaration of Indigenous Peoples Rights, 1994 Convention on Biological Diversity, and the International Labour Organization Convention 169. FPIC aims at protecting indigenous peoples' right to natural resources. Any policy that might give implications on them should be determined in advance through consultation to get their approval so that the policy is in line with the local wisdom and values. Further harmonization should not only on the policy level by ensuring the role of international law in national legal systems but also on the harmonization that includes Judges' consistency in applying FPIC of international law in their decisions.

KEYWORDS
Harmonization of the law, Free Prior Informed Consent (PIC), Indigenous People

1. Introduction

In some conditions and cases, the development approach did not always result in harmony, but there were times when clashes and conflict caused losses and casualties. Some condition of many developments ignores and harms the land and natural resources of Indigenous People because they were not involved in decision-making.

In many cases, it shows that "Indigenous People face a worrying escalation of criminalization and harassment, especially when defending exercising rights to their territories and natural resources. (Fernanda Canofre, 2017, p.64). The policy has been implemented when permits from the government have been obtained, while consultations have not been carried out and the approval of indigenous peoples has not been obtained. (Deti Mega Purnamasari, 2019). Indigenous peoples finally saw that their forests being cut down, their land was mined, their valleys were flooded, their hunting grounds were fenced off, and their fields were occupied. It happens without them being able to say anything and often without getting any benefit. (Emil Kleden, 2017, p. 9) All of these lead to a reduction in the customary law community's management area for their land and natural resources as well as the loss of biodiversity (E Cohen-Schacham et al, 2016, p.2). One of the

reasons for this is the fact that policymakers do not consult indigenous peoples. Legally, there is no provision that indigenous peoples need to be freely asked for their consent in determining development projects that have implications for their land, territory and natural resources. In reality, state policies that are formed often position indigenous peoples as risk recipients without having room to raise objections, let alone proposals for changes so that development is aligned and based on the values of their local wisdom.

Free Prior Informed Consent (FPIC) was established as one of the instruments in international law to protect the rights of indigenous and tribal peoples affected by a development project. A number of international human rights instruments have mandated states to apply the Free Prior Informed Consent Principles (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 agreements that are followed by many countries including Indonesia. The principle of Free Prior Informed Consent (FPIC) is a principle guaranteed in a number of international instruments United Nations on Declaration of Indigenous People Rights 2007, Convention on Biological Diversity 1994, and Convention on International Labor 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 neglect of the State on the principle of Free Prior Informed Consent to the customary law communities inhabiting their lands and territories has an adverse impact on indigenous people and has the potential to cause conflicts over natural resources and threaten sustainable conservation. The urgency of the research is the legal harmonization of the principle of Free Prior Informed Consent in human rights policies based on the protection of the rights of indigenous peoples to natural resources. Through harmonization of the principle of Free Prior Informed Consent as regulated in international law into national law, it is hoped that it will balance relations that are more respectful of the rights of indigenous peoples over their territories and provide space to decide what happens in the land and areas of the objects of their rights.

2. Discussion

The issue of the need for the approval of indigenous and tribal peoples originated from various protest movements of indigenous peoples in various 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. (Besse Sugisati, 2012, p.32) 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.”(Asia Indigenous People’s Pact The International Work Group for Indigenous Affairs (IWGIA) ASEAN’s Indigenous Peoples, 2010, p.12)

Indonesia actually has a strong foundation (Muazin, 2014, p.337) 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: "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, (Amnesty International, 2020) although there are a number of laws and regulations relating to indigenous peoples and natural resources (Agrarian Law, Forestry Law, Plantation Law, Mining and Coal Law, Fisheries Law) however, Indonesia has not adopted

and harmonized the principle of Free Prior Informed Consent in its laws and regulations. The use of the principle of FPIC in Indonesia in practice 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. (Edy Purwanto, 2019, p.9)

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 (Pappilon et al, 2020, p.223). 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, in the context of ASEAN 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. For Indonesia, it is influenced by the civil law system, customary law and Islamic law. (Firma Aditya, Zaka and Riszisyabana Yulistyaputri, 2019, p.46). Meanwhile, Vietnam is dominated by the influence of the French 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.

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 (Belen Olmos Giupponi, 2018, p. 485). The provisions of Article 19 of UNDRIP determine: "*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order 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 own representative institutions in order 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 transfer can only be carried out with their will and consent after being informed beforehand of the consequences.

Based on a number of international legal instruments, states are required to have the approval of indigenous peoples before implementing policies that affect land, territories and natural resources, including mining and the exploitation of other natural resources. The setting 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. (Renee V Hagen and Tessa Minter, 2020, p.66)

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 favor (IWGIA, 2010, p.12). 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.*" (Nguyen Quang Tan et al, 2010, p. 2)

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 harmonized 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.

With regard to 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 customary law communities. This data makes indigenous peoples as one of the most vulnerable parties in natural resource conflicts."(Raden Muhammad Arvy Ilyasa, 2020, p. 381)

So far, the practice of how international law applies in 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. This situation will be difficult when a country is faced with a static legal system to determine which monism or dualism will be applied 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 in fact does not exist – namely a common field in which the two legal orders under discussion both simultaneously have their spheres of activity".* (Ducan B Hollis *et al,* 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 that both need to be

harmonized.

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

Some of the 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 by agreeing 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 contains 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, threats to express their opinion; 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 done 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 actually 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 both 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)

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.

3. Conlcusion

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 must be respected by regulating it into national law. This arrangement is expected to be a reference and certainty for all parties in carrying out the development process in the area of managing customary law communities. In this way, PFIC is not just signing a consent agreement, on the contrary, FPIC ensures that indigenous peoples have a voice to say no or yes to any stage that affects land and natural resources in their managed areas. The arrangement for respecting and guaranteeing FPIC, as a collective right must be harmonized into the national legal system as part of the commitment and implementation steps of binding on a number of international legal instruments that guarantee FPIC.

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