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FREE, PRIOR, INFORMED CONSENT AS A LEGAL PRINCIPLE AND ITS LINK TO THE RIGHT TO FREEDOM OF CONSCIENCE

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Abstract. In two judgments on the judicial review of the Law Concerning Minerals and Coals and the Law Concerning Forestry that related to the existence of indigenous peoples, the Constitutional Court of Indonesia did not recognize free, prior, informed consent (FPIC) as a consideration, even though this concept was discussed in court. The Court emphasized the importance of first proving the existence of indigenous peoples and that indigenous peoples that no longer exist should not be revived. This argument carries the risk of putting aside the possibility to exist of indigenous peoples that may still try to exist after having been expelled or forced out of their territories. FPIC as a legal principle is rooted in the right to self-determination of indigenous peoples who are vulnerable to losing their living space when dealing with the State in the name of public interest and development. This right to self-determination is in line with freedom of conscience, where the recognition of indigenous and tribal peoples means the recognition of a set of expressions of values, beliefs, and ways of life of a community group. Thus, the aim of this article is to discuss the essence of free, prior, informed consent as a legal principle in Indonesian law and its link to the universal right to freedom of conscience as interpreted by the European Court of Human Rights. In the end, the paper concludes that both legal concepts are closely linked, particularly when it comes to indigenous communities and their rights. Both legal concepts are crucial to safeguarding the rights of these communities to preserve their identity, the ways of its expression, and other practices.

Keywords: freedom of conscience, free prior informed consent, FPIC, indigenous people, public participation, self-determination.

Introduction

In decision No. 32/PII-VIII/2010, the Constitutional Court of the Republic of Indonesia heard a case regarding the judicial review of Law No. 4/2009 on Mineral and Coal Mining petitioned by the Indonesian Environmental Watch (WALHI), the Indonesian Legal Aid and Human Rights Association (PBHI) and 19 other petitioners. There were several material review requests submitted – namely, Article 6 paragraph (1) letter juncto, Article 9 paragraph (2) juncto, Article 10 letter b, and Article 162, Article 136 paragraph (2) of Law Number 4 Year 2009 on Mineral and Coal Mining against the 1945 Constitution. The petition for judicial review questioned the constitutionality of the determination of the mining area, which involved the Regional Government, Central Government, and the House of Representatives of the Republic of Indonesia without involving the community. The community can only be subject to criminal sanctions because they are considered to have obstructed or disrupted the implementation of mining business activities that have obtained a mining permit.

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The Court stated in its consideration that the constitutional issue to be answered by it was whether the control by the State over the earth, water and natural resources contained therein, which is used for the greatest prosperity of the people through the government's authority to determine the mining area after coordinating with the local government and consulting with the House of Representatives, is contrary to the constitutional rights of citizens to obtain guarantees, protection, and legal certainty to reside, own property, and obtain a good and healthy environment. In addition, the Court also referred to Constitutional Court Decision No. 21-22/PUU-V/2007 on the review of Law No. 25/2007 on Capital Investment, dated March 25, 2008, which stated that

> ... in Article 33 of the 1945 Constitution there are economic and social rights of citizens as interests protected by the Constitution through the involvement or role of the State. In other words, Article 33 of the 1945 Constitution is a provision regulating the involvement or active role of the State to take action in the context of *respect*, *protection*, and *fulfillment* of citizens' economic and social rights. Therefore, to carry out the mandate of the 1945 Constitution in determining the mining area, the government cannot act arbitrarily, so it must first coordinate with the local government, consult with the People's Representatives Council (Parliament), and take into account the opinions of the community….

The implementation of the obligation to include public opinion must be concretely proven and facilitated by the government. This concrete evidence can prevent conflicts between mining business actors, the community and the state, c.q., the government, in the mining area. In addition, further mechanisms regarding the obligation to include community opinion, who is included in the community group whose territory or land will be included in the mining area, and the community that will be affected are fully under the authority of the government to regulate in accordance with applicable laws and regulations by referring to the legal considerations stated by the Court in Case Decision Number 25/PUU-VIII/2010 dated June 4, 2012, Case Decision Number 30/PUU-VIII/2010 dated June 4, 2012, and the decision in this case, while respecting and upholding human rights.

Another case was submitted by the Alliance of Indigenous Peoples (AMAN), the Indigenous People of Kenegerian Kuntu, Kampar, Riau, the Indigenous People of Masyarakat Hukum Adat Kasepuhan Cisitu, Lebak, Banten through case No. 35/PUU-X/2012. This case challenged the provisions of: Article 1 number 6; Article 4 paragraph (3); Article 5 paragraph (1), paragraph (2), paragraph (4); and Article 67 paragraph (1), paragraph (2), paragraph (3) of Law No. 41/1999 on Forestry (hereinafter referred to as the Forestry Law), which essentially questioned the constitutionality of the existence of customary forests and the conditional recognition of the existence of indigenous peoples.

The applicant argued that the enactment of provisions in the Forestry Law that place customary forests as part of state forests and the existence of provisions regarding conditional recognition of the existence of indigenous peoples have caused constitutional losses to the applicant in the form of loss of access to promote, assist and struggle for the rights of indigenous peoples, along with the loss of customary rights to forests, access to the use and management of customary forest areas, and criminalization for entering forest areas.

The phrase "pay attention" in Article 4 paragraph (3) of the Forestry Law must be interpreted more firmly, namely to suggest that the State recognizes and respects the unity of customary law communities and their traditional rights, in line with the intent of Article 18B paragraph (2) of the 1945 Constitution. As for the terms of recognition and respect for customary law communities, the phrase "as long as in reality they still exist and are recognized for their existence" must be interpreted to suggest "as long as they are still alive and in accordance with the development of society," because customary law is generally unwritten law and is a *living law,* meaning that it is a law that is *accepted*, *observed* and obeyed by the community concerned because it fulfils a sense of justice for them and is in accordance with and recognized by the Constitution.

With regard to the condition that as long as in reality it still exists and its existence is recognized, in reality the status and function of forests in customary law communities depend on the status of the existence of customary law communities. Thus, the possibilities are: (1) the reality still exists, but its existence is not recognized; or (2) the reality does not exist, but its existence is recognized. If the reality is that it still exists but is not recognized, then this can cause harm to the community concerned. For example, their customary land/forest may be used for other purposes without their permission through evictions, thus indigenous peoples can no longer benefit from the customary forests they control.

From the two decisions of the Constitutional Court of the Republic of Indonesia reviewed in this paper, the issue of community involvement, especially indigenous peoples, in government decision-making involves a central issue, namely the recognition of subjects in the participation process, which means the existence of indigenous peoples.

In Decision No. 32/PUU-VIII/2010, the Court emphasized that public opinion must be interpreted as *genuine* involvement (*as it is*). The mandate of "control by the state" carried out by the government and the existence of representative institutions do not necessarily replace the direct participation of communities affected by policies. Thus, in issuing a license covering a certain area, the community in that area has the right to be involved in the participation process.

In relation to the participation process, the Court also underlined the importance of a substantive rather than formalistic process. The substantive meaning is the implementation of the obligation to include a public opinion in the procedures provided by the government, not merely an administrative formality in the form of written consent that may not be given directly by the person concerned.

The issue is: Who is the community with the right to be involved? In the Forestry Law, this becomes problematic with the status of state forests that marginalize customary forests in which customary law communities exist. Therefore, the recognition and respect of customary law communities must also be explained, which in the legislation is interpreted in the phrase "as long as in reality they still exist and are recognized for their existence."

Implementing an accountable public participation process is impossible without identifying the correct subject. When the legal construction of the existence of indigenous peoples opens an arena of choice for the implementer of regulations, there is still the possibility of not involving indigenous peoples in participation. Important decisions on natural resource management are certainly very much related to the living space of indigenous peoples. Quoting I Nyoman Nurjaya's expert testimony, the relationship between the government and the people in natural resource management contains two important principles. First is the *precautionary principle*, namely, the forest as an ecological and living system. Second is *free, prior, and informed consent* (FPIC). Indigenous peoples are legal entities equal to the position of other legal subjects; in this case, indigenous peoples have environmental wisdom. The concept of FPIC was mentioned in the trials of decisions No. 32/PUU-VIII/2010 and No. 35/PUU-X/2012, although it was not directly the focus of the Court's consideration.

Regarding the phrase "as long as it still exists and its existence is recognized," in its decision, the Court still considered the need to prove the existence of indigenous peoples because customary law is generally unwritten law and is a *living law*, meaning that it is law that is *accepted, observed* and obeyed because there can be conditions where (1) it still exists, but its existence is not recognized; (2) it does not exist, but its existence is recognized. According to the Court, recognizing indigenous peoples' existence is not intended to preserve indigenous peoples at their current level of technological development. However, they must continue to obtain facilities in achieving prosperity, ensuring fair legal certainty for both the subject and the object of the law and, if necessary, obtaining special treatment (*affirmative action*).

Indigenous communities have a special bond with their ancestral lands, territories, and resources; their cultural heritage, language, and traditions are integral to their identity (*Saramaka v. Suriname*, 2007). They have the right to maintain, develop, and pass on their cultural heritage to future generations (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001). Therefore, freedom of conscience is crucial as it enables people to express their beliefs and values and practice their religion, customs, and traditions without external coercion (*Kokkinakis v. Greece*, 1993). Without freedom of conscience, people, especially indigenous people, may be compelled to adopt practices and beliefs that are incompatible with their cultural identity. Therefore, freedom of conscience is a vital aspect of indigenous peoples, allowing them to maintain their cultural heritage and make autonomous decisions for their future. As stated in Article 9 ILO Convention No. 169, it is the responsibility of states to safeguard the interests of indigenous peoples to ensure their right to self-determination and preserve their cultural heritage for future generations.

In light of such circumstances, this paper discusses the problem of how the FPIC as a legal concept should be understood in its essence and in relation to the right to freedom of conscience. The paper aims to assess the

interface between FPIC and freedom of conscience. While existing literature has explored the concept of FPIC, no research has specifically addressed its interplay with freedom of conscience. This article further differs from other existing research as it provides new insights into how both concepts may connect and details the standards as well as the implementation of FPIC in real-world cases, including those that have occurred in Indonesia. It subsequently provides a unique perspective on the essential roles of FPIC and freedom of conscience in protecting the values and cultures of stakeholders concerned, especially indigenous groups.

This paper argues that FPIC for indigenous people is not merely an obligatory procedure, but is closely related to freedom of conscience. The relationship between public involvement in governmental decision-making and freedom of conscience ensures that the public make choices based on their values, beliefs, and priorities. The public context in this study notably refers to parties frequently excluded from participation, such as indigenous peoples when interacting with the government and companies in natural resource regulations, particularly forests and mines.

To reach its conclusion, this paper utilizes descriptive, analytical, and comparative legal methods. Primary materials encompassing international conventions and Indonesian statutory laws are analyzed, along with secondary materials such as academic publications. Case laws will also be utilized, which are intended to illustrate how various courts have implemented FPIC. The aim is to provide guidance to Indonesian Courts on the application of such a concept. This article is divided into four main sections. The first section will address the concept of FPIC. Subsequently, the second section will delve into court judgements that have implemented the concept of FPIC. This is then followed by the third section, which puts into light FPIC-related problems and challenges in Indonesia by evaluating real-life cases. Lastly, the connection between FPIC and freedom of conscience is discussed.

1. FPIC as a Concept

1.1 The Definition and Scope of FPIC

FPIC, according to Anderson, means “a locally and culturally specific process in which the affected communities themselves determine the necessary steps” (Anderson, 2011). FPIC was originally used and developed in the context of indigenous peoples. However, in its development, this concept has also been linked to the rights of all people to land and territory based on their customary and historical relationships (Colchester & Ferrari, 2007).

As the name implies, FPIC consists of four elements that are interrelated and form a single unit (UN Permanent Forum on Indigenous Issues, 2005), namely:

1. free should mean without coercion, intimidation, or manipulation;
2. *prior* should mean that consent has been obtained with sufficient time prior to the authorization or commencement of activities, and respects the need for time for indigenous peoples to undertake consultation processes;
3. informed should mean that the information provided covers (at least) the following aspects:
    a. the nature, size, *reversibility*, and scope of the proposed project or activity;
    b. the reason for or purpose of the project and/or activity;
    c. the length of the above;
    d. the locations that will be affected;
    e. a preliminary assessment of the likely economic, social, cultural, and environmental impacts, including potential risks and fair and equitable benefit-sharing in the context of respecting the precautionary principle;
    f. the people who are likely to be involved in the implementation of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees, etc.); and
    g. the procedures that the project may require;
4. consent.

Consultation and participation are very important components of the consent process. Consultations need to be conducted in good faith. Parties should establish a dialogue that allows them to seek appropriate solutions in an

atmosphere of mutual respect based on goodwill and full and equal participation. Consultations require time and a system for stakeholders to communicate effectively. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as is the participation of children and youth, as appropriate. This process may include the option to withhold consent. Consent to any agreement needs to be spelled out in language that is well-understood by the community.
FPIC is the collective right of indigenous peoples and local communities to give or withhold consent to any activity that may affect their lives. Any activity, whether it is infrastructure development by the government or business activities by corporations, can affect the rights, lands, natural resources, territories, livelihoods, and food security of indigenous peoples and local communities (Accountability Framework Initiative, 2019).

FPIC is important because it recognizes the right of indigenous peoples to negotiate all terms that may affect their lives. Furthermore, FPIC ensures that this process is carried out through local processes that are in accordance with local customs and cultures (RECOFT, 2014). This means that the right to give or withhold consent is exercised through their self-appointed representatives and in a manner that they determine in accordance with the customs, values, and norms within those indigenous peoples and local communities. FPIC is thus aimed at promoting, protecting, and ensuring the fulfilment of fundamental human rights; these include the right to property, culture, and self-determination.

The Ministry of National Development Planning of the Republic of Indonesia, in its 2012 Study Report, recognized that development and conservation activities imposed without consultation, participation, and negotiation on the rights of indigenous peoples and local communities often result in the loss of indigenous forests due to logging, the loss of livelihood lands due to mining, damage to ecosystems due to flooding, the narrowing of hunting areas due to boundary fences, and the humiliation of customary institutions. This happens because indigenous communities are not allowed to express their aspirations for development projects or the implementation of business activities (Ministry of National Development Planning of the Republic of Indonesia, 2012).

As a result, indigenous peoples or local communities are forced to relocate, leaving their lands behind for “retraining” which is completely incompatible with their ability to make ends meet. In the end, they become poorer and suffer more. There is a misperception of indigenous peoples that paints them as naive, innocent, poor and needing to be guided. This happens because outsiders do not know how indigenous peoples and local communities live and are unaware that they have the same rights and freedoms as other human beings. This misperception is even allowed to live on to enable outsiders to intervene and take advantage (Ministry of National Development Planning of the Republic of Indonesia, 2012).

While generally required for all projects and business activities that may affect the rights, lands, resources, territories, livelihoods, and food security of indigenous peoples and local communities, FPIC is important in at least the following three specific circumstances (Accountability Framework Initiative, 2019).

First, any expropriation, development, or new operations. FPIC is required before starting or expanding activities. This includes: (i) the acquisition of land or natural resource rights; (ii) new business operations, production, processing, or cultivation methods; (iii) the designation of land for conservation purposes; (iv) the expansion of activities i–iii; and (v) the issuance of permits, concessions, and approvals in the form of legislation or administrative decisions for activities i–iii.

Second, the remediation of past damage. A remedy is required when development projects or company operations have caused or contributed to the destruction of land, territories, and natural resources without first going through an FPIC process. Therefore, an FPIC process needs to be conducted to agree on appropriate remedial measures. These remedial measures include: (i) resuming or temporarily halting operations; (ii) land restitution; (iii) compensation to aggrieved parties; or (iv) new benefit-sharing arrangements.

Third, ongoing land conflicts. Where there is a conflict between indigenous peoples or local communities and an external party such as a corporation, concessionaire, or government, this external party must cease all activities related to the conflict until the conflict is resolved through an FPIC process. Where the conflict involves two or

more indigenous peoples with overlapping claims to land, territories, or resources, the outsider must wait until these issues are resolved to begin the FPIC process.

Generally, it can be explained that FPIC has two aspects: a process and an outcome. FPIC is a series of information exchange, consultation, internal deliberation, and negotiation steps taken to obtain the consent of indigenous peoples and affected local communities before a project or activity is carried out. The FPIC process can result in at least three things: unconditional consent; consent with conditional modifications to the activity proposal; or no consent (Accountability Framework Initiative, 2019).

To conclude this sub-section, the authors feel the need to quote Emil Salim, who describes FPIC as a form of social license as follows:

> "Free prior and informed consent" should not be understood as a one-off yes or no vote, nor as the veto power of an individual or group. Rather, it is a process that allows indigenous peoples, local communities, governments, and companies to come to a mutual agreement in a forum that gives affected communities sufficient power to negotiate the terms of an agreement that allows them to continue to live and prosper. The company must make a sufficiently attractive offer to the communities where the project is located to prefer the project to go ahead and negotiate an agreement on how the project can be implemented and thereby give the company a "social license" to operate. (Salim, 2003)

1.2 The Development of FPIC as a Legal Concept

FPIC has evolved into a legal concept at both the international and national levels, and in some countries it has even become a norm in national laws and regulations. This sub-section will further discuss several international and national legal instruments containing FPIC.

At the international level, FPIC is born out of "*the right* to self-determination," which is a fundamental principle of indigenous peoples' rights (Clavero, 2005). However, the modern concept of the right to self-determination for indigenous peoples does not necessarily include the right to secede from the State. Rather, it encompasses a number of rights, including the right to participate in state decision-making, including autonomy and *self-governance* (Daes, 2014). This right to self-determination is enshrined in Article 1 of the two main human rights covenants, namely: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." Thus, as an extension and implementation of this right, indigenous peoples have the right to give or withhold their consent to development activities or projects in their territory, which may affect their natural resources (Daes, 2014).

The HRC (Human Rights Committee), in General Comments No. 23 to ICCPR Article 27 on the right of participation of indigenous peoples to lands, territories, and natural resources, stated that there are *positive duties* on the part of states to ensure the effective participation of members of minority groups in decisions affecting their lives (UN High Commission for Human Rights, 1994). Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) in General Comments No. 21 interpreted Article 15 of the ICESCR, which provides cultural rights and restitution to lands, territories, and resources used for the livelihood of indigenous peoples that are taken without consent. In its interpretation, the CESCR encouraged Member States to respect the principle of the FPIC of indigenous peoples in all matters concerning their specific rights (UN Committee on Economic, Social and Cultural Rights, 2009).

ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) is the only binding international instrument that specifically regulates the protection of indigenous groups. This convention regulates various forms of involvement of indigenous peoples, including in the form of consultation, participation, and the case of relocation – which must be with *informed consent* (MacKay, 2004). Article 6 paragraph (2) of the convention requires that any consultation efforts are undertaken in "good faith" and "in a form appropriate to the circumstances, to achieve agreement or *consent* to the proposed activity. There is, thus, a moral obligation to seek and obtain *consent*" (MacKay, 2004).

This article must be read in conjunction with Article 7(1), which provides that:

> the people concerned shall have the *right to decide their priorities* for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and *to exercise control*, to the extent possible, over their own economic, social and cultural development.

The two articles above show the spirit of *prior informed consent* and are to be applied to this convention's contents (Baluarte, 2004). This is evident in Article 16 and Article 17 of the Convention, which state that FPIC is required in the event of the relocation of indigenous peoples and outline the requirement to *consult* with indigenous peoples prior to land transfers, with replacement land outside the territory of indigenous peoples.

Another international instrument related to FPIC is, of course, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. This declaration explicitly encourages the implementation of FPIC for indigenous peoples. Some of the provisions of the FPIC requirement in this declaration concern: the case of the relocation of indigenous peoples (Art. 10 UNDRIP); when the government creates legislation or takes administrative measures that affect the lives of indigenous peoples (Art. 19 UNDRIP); or making indigenous peoples' lands or territories hazardous or toxic waste disposal sites (Art. 27 UNDRIP). Furthermore, FPIC is also required in the case of "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" (Art. 32 UNDRIP).

According to Ward, the formulation of FPIC in UNDRIP 2007 is not intended to give indigenous peoples a veto over proposed projects, but to ensure that indigenous peoples are given the opportunity for *meaningful participation* in decisions that directly affect their lands, territories, and resources. Strictly speaking, FPIC in UNDRIP 2007 should be interpreted as a way to ensure that the right to *self-determination* is recognized and protected by the State (Ward, 2011). Ward also argues that the character of this declaration is non-binding; therefore, it is *soft law*. However, this *soft law* norm has been accepted by several human rights bodies under the United Nations, accepted by the human rights enforcement system in the Inter-American country mechanism, and adopted in one case by a country's Supreme Court. Of course, it takes a long time for FPIC to be accepted as *customary international law*. However, at least FPIC in UNDRIP 2007 will shape state practices and implementation more strongly to improve the position of indigenous peoples' right to participation in the form of an obligation to *consent* rather than just to *consultation* (Ward, 2011).

Another international legal instrument related to FPIC is the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Committee on the Elimination of Racial Discrimination (CERD), in General Recommendation No. 23 paragraph 5, encourages member states to recognize and protect the rights of indigenous peoples. Suppose the rights of indigenous peoples to their lands and territories have been violated without a process of *free and informed consent*. In that case, the State must take steps to return the land or territory to the indigenous peoples. This is also the case in the 1993 instrument The Convention on Biological Diversity (CBD). This convention requires that traditional knowledge can only be used with the *approval of* indigenous peoples and local communities, which is interpreted as part of the implementation of FPIC.

At the national level, at least two national legislations explicitly adopt FPIC. The Philippines passed legislation under the Indigenous Peoples' Rights Act (IPRA) 1997. This act explicitly states that FPIC from indigenous peoples must be legally obtained for the following activities: exploration, development, and use of natural resources; displacement and relocation; archaeological exploration; policies affecting indigenous peoples; and entry into military service (Indigenous Peoples Rights Act 1997, sec. 59 (Phil.) and Mining Code 1995, sec. 16 (Phil.)). The IPRA also stipulates that the consensus of all members of an indigenous group shall be determined by the customary laws and practices of the indigenous community, free from external manipulation, interference, and coercion, and obtained after the purpose and scope of the activity have been fully disclosed in a language and process understood by the community (Indigenous Peoples Rights Act 1997, sec. 3(g) (Phil.)).

FPIC is also found in legislation governing mining activities in Australia's Northern Territory, which are conducted or will be conducted on the customary lands of Aboriginal peoples. This legislation is called the

Aboriginal Land Rights (Northern Territory) Act (ALRA) 1976. Similar legislation was subsequently adopted by other states in Australia. Under the ALRA, *consent* is obtained from a Land Council established and overseen by the Aboriginal community, which will approve mining licenses only if the traditional owners of the Aboriginal land understand the mining conditions and all terms and conditions. As a community, the traditional owners of the land must understand that the terms and conditions proposed by the mining company are *reasonable* and have agreed to these terms and conditions (Aboriginal Lands Rights (Northern Territory) Act 1976 (Austl.), sec. 42(6)). *Consent is* deemed given if it is based on a decision-making process operated by the traditional owners of Aboriginal land. Where such a decision-making process does not exist, it is based on the decision-making process agreed upon and adopted by the traditional owners of the Aboriginal land (Aboriginal Lands Rights (Northern Territory) Act 1976 (Austl.), sec. 77A).

To conclude this subsection, the concept of FPIC, or at least elements of this concept, have become part of both binding and *soft law* international instruments. This situation shows that FPIC has become a legal concept. Although this has not yet been widely accepted by countries, this fact does not reduce its value as a legal concept. Some countries have even incorporated the concept of FPIC as a norm in their national legislation. State acceptance shows that FPIC is more than just an abstract legal idea, but a legal concept that has strong roots supported by legal arguments on the *rights to self-determination* of indigenous peoples. Without FPIC, this right becomes less meaningful for the survival of indigenous peoples and local communities.

2. FPIC in Court Judgments

The court judgment most widely referenced to demonstrate recognition of the concept of FPIC is the 2001 judgment of the Inter-American Court of Human Rights (IACtHR) in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In this case, the Court examined Article 21 of the Inter-American Convention on Human Rights (Convention) regarding the right to property. Although Article 21 of the Convention deals with the right to private ownership of property by individuals and companies, the Court held that it also protects the right of members of indigenous groups to collectively own *ancestral lands (Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001*). The Court further held that Nicaragua had violated indigenous peoples' property rights by granting logging concessions on indigenous peoples' lands. In reaching this decision, the Court cited the findings of the Inter-American Commission on Human Rights (IACHR) in 1999, which stated that Nicaragua "is actively responsible for violations of the right to property … by granting a concession … without the consent of the Awas Tingni indigenous community" (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001).

The decision in this case also became jurisprudence and was followed by IACHR judges in subsequent cases (*Comunidad Indigena Yakye Axa v. Paraguay*, 2005; *Sawhoyamaxa Indigenous community v. Paraguay*, 2006; *Saramaka v. Suriname*, 2007). Even in the *Saramaka People* case, the IACHR set a new standard for implementing Article 21 of the Convention on property rights. The Court stated that Article 21 of the Convention protects indigenous peoples' natural resources that are *necessary* for the survival of indigenous peoples, namely natural resources related to agriculture, fishing, and hunting. Article 21 of the Convention does not prevent the State from granting concessions for exploring and exploiting natural resources in indigenous peoples' territories (*Saramaka v. Suriname*, 2007). However, there are four conditions that the State must meet before granting such concessions. First, ensuring the effective participation of members of indigenous groups in any development or investment plans. Second, ensuring that affected communities receive a share of the profits. Third, conducting and supervising the implementation of environmental and social impact assessments prior to project implementation. Fourth, implementing appropriate safeguards and mechanisms to avoid significant impacts on land and natural resources (*Saramaka v. Suriname*, 2007). Barelli argues that this decision's first requirement of 'effective participation' is the most important requirement. The Court has recognized the importance of the elements of effective participation as embodied in FPIC, where it also cited Article 32 of UNDRIP (Barelli, 2012).

The next case is *Mary and Carrie Dann v. United States* (2002), examined by the IACHR. The Danns, members of the Western Shoshone Nation, brought this case, claiming that they had never extinguished their rights to land traditionally used for grazing domestic animals and other activities. The United States argued that the Western Shoshone traditional land rights had been extinguished through legal and administrative procedures; therefore, this case was a legal dispute and not a case of human rights violations (*Mary and Carie Dann v. United States*, 2002). In its decision, the IACHR stated that the State's rejection of the Danns' claim as members of the Western

Shoshone Nation meant that the State had neglected to "fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of *informed and mutual consent* on the part of the Western Shoshone people as a whole" (*Mary and Carie Dann v. United States*, 2002). Thus, the interpretation of this case shows that the IACHR recognizes that determinations regarding indigenous peoples' land rights must be based on the *informed consent* of all community members, meaning that all members are fully informed and have the opportunity to participate (Page, 2004; *Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The above decisions of the judiciary show that the concept of FPIC is accepted and has become the basis for decisions by judges. Although they do not mention and refer directly to the concept of FPIC, important elements of FPIC, such as *consent*, *effective participation,* and *informed consent* have become the basis for courts in making their decisions. Likewise, although court decisions are still limited to those available in the mechanism of the Inter-American Convention on Human Rights, courts at the international and regional levels will often assess each other and take considerations that are considered appropriate and in line with the values of human rights and justice.

2.1 The Case of Sarayaku v. Ecuador (2012)

This was a landmark case in which the IACHR recognized the rights of Indigenous communities and established specific measures to protect those rights (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The case involved an Indigenous community in Ecuador, the Sarayaku people, who were protesting against oil exploration activities in their ancestral lands. The Kichwa People of Sarayaku are to be found in the tropical forest area of the Amazonian region of Ecuador, in different parts of the province of Pastaza, and along the banks of the Bobonaza River. Their territory is 400 meters above sea level and 65 kilometers from El Puyo. They subsist on collective family-based farming, hunting, fishing, and gathering within their territory following their ancestral customs and traditions. Around 90% of their nutritional needs are met by products from their own land, and the remaining 10% with goods from outside the community (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

Without the Sarayaku community's FPIC, the government authorized an oil corporation to conduct seismic testing in the region, which damaged their sacred places and terrified and distressed the locals.

The IACHR ruled that Ecuador had wrongfully authorized the oil exploration activities without the Sarayaku community's agreement and without taking into account its cultural and spiritual values. The Sarayaku community had to be consulted before any choices about the use of their lands and resources were made, according to the Court, which also recognized the value of preserving Indigenous peoples' ability to participate in decisions that impact them.

The Court elaborated on at least five issues of disagreement when talking about the Sarayaku people's consultation, noting the requirements of: a prior consultation; a sincere desire to come to a consensus; an environmental impact assessment; adequate and accessible consultation; and a thorough consultation.

A. Consultation must take place in advance

The Court considered Article 15 (2) of the ILO Convention No. 169, which provides that

> governments shall establish or maintain procedures through which they shall consult these peoples, to ascertain whether and to what degree their interests would be prejudiced, before undertaking or permitting any program for the exploration or exploitation of such resources on their lands.

From the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), an Individual Observation concerning Convention No. 169 in Argentina in 2005 established that prior consultation must take place before taking a measure or implementing a project that may affect these communities, including

legislative measures, and that the affected communities must be involved in the process as soon as possible (Anaya, 2009).

B. Good faith and the goal of reaching an agreement

ILO Convention No. 169 states that consultations must be "carried out … in good faith and a manner appropriate to the circumstances, to reach an agreement or obtain consent regarding the proposed measures" (*Saramaka v. Suriname*, 2007).

This means that the consultation must not serve as a mere formality, but rather must be conceived as "a true instrument for participation" (Federal District Engineers Union, 2006). Moreover, according to an ILO CEACR Individual Observation concerning Convention No. 169 in Bolivia in 2005, it "should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties." Thus, an inherent part of every consultation with indigenous communities is that "a climate of mutual trust be established" (Anaya, 2009), and good faith requires the absence of any form of coercion by the State, agents, or third parties acting with its authority or acquiescence (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012). Moreover, consulting in good faith is incompatible with actions that violate international norms, such as attempting to erode the social cohesiveness of the affected communities by bribing local leaders, establishing alternative leaders, or engaging in direct negotiations with individual community members.

In addition, it should be emphasized that the State is responsible for carrying out the consultation obligation; as a result, the planning and execution of the consultation process cannot be avoided by contracting with a private company or other parties, much less by contracting with a company that is interested in utilizing the resources on the community's territory that must be consulted (Anaya, 2009).

C. Adequate and accessible consultation

The Court has ruled in prior circumstances that discussions with indigenous peoples must be conducted according to their traditions and in accordance with culturally appropriate processes (*Saramaka v. Suriname*, 2007).

D. Environmental Impact Assessment

The Court has also determined that environmental impact assessments

> evaluate the possible damage or impact that a proposed development or investment project may have on the property and community. Their purpose is not only to have some objective measure of the possible impact on the land and the people but also … to ensure that the members of the community … are aware of the potential risks, including the environmental and health risks, so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily" (*Saramaka v. Suriname*, 2007).

Additionally, the Court has ruled that environmental impact assessments must be made in accordance with the pertinent international standards and best practices (*Saramaka v. Suriname*, 2007), respect the traditions and culture of the indigenous peoples, and be finished before the concession is granted. This is because one of the goals of requiring such studies is to ensure that indigenous people have the right to understand any projects being considered for their territory (*Saramaka v. Suriname*, 2007).

E. The consultation must be informed

The indigenous peoples in this situation must be informed of all potential dangers associated with the planned development or investment plan, including any threats to their health and the environment. Hence, prior consultation entails ongoing communication (socialization) between the parties and demands that the State receive and supply information (*Kichwa Indigenous People of Sarayaku v. Ecuador*, 2012).

The Court found that Ecuador violated domestic and international law when it granted an oil concession to a private corporation on indigenous grounds without first consulting the Sarayaku community. In order to ensure that indigenous peoples effectively participate in development and investment projects that impact their property rights, this ruling establishes stricter standards for governments.

The Court mandated several reparation actions, including the removal of all explosives from the Sarayaku territory, community consultation for all future projects, the adoption of necessary measures to uphold their right to consultation, the implementation of a training program for public officials, the payment of damages, and the acknowledgment of international responsibility through the publication of the ruling and performing a public act.

3. FPIC as a Recurring Conflict Between Companies and Indigenous Communities in Indonesia

The conflicts listed below illustrate various FPIC-related problems and challenges in Indonesia, specifically concerning its indigenous communities.

3.1 Moi Tribes v. PT. Sorong Global Lestari

The rise of the palm oil business is one of the elements driving the large transfer of rights. It is expected to contribute significant export value year after year, which fuels its expansion and acquisition of various facilities. The rate of land acquisition for economic interests increased in Papua Province between 1997 and 2017, during which 1,580,847 hectares of agricultural land were converted from serving indigenous peoples to 62 plantation firms (Malinda, 2021).

Among these instances of land use change is the Regent of Merauke, who issued a Decision of the Regent of Merauke on the Location Permit of PT Agrinusa Persada Mulia (APM) in the Muting and Ulilin Districts in January 2010. In the following month, the Regent of Merauke issued Decree No. 42/2010, granting PT Agriprima Cipta Persada (ACP) location permission encompassing 34,869 hectares in the Muting and Ulilin Districts (Indra Nugraha, 2019).

3.2 Hutan Adat Kinipan v. PT. Sawit Mandiri Lestari

This incident began in 2012, when PT. Sawit Mandiri Lestari (PT. SML) notified the indigenous Laman Kinipan community that they would invest in plantations in their village area. The indigenous village of Laman Kinipan then took a firm stand, rejecting the company in writing (WALHI Kalimantan Tengah, 2023). However, on March 19, 2015, PT. SML obtained a 19,091-hectare land release authorization from the Ministry of Environment and Forests (MoEF) via letter 1/I/PKH/PNBN/2015 (Baskoro, 2019).

The community and customary elders believe that the permit was granted without their permission. In this process, there was no FPIC. According to the local authority and customary elders, the approval for the entry of the oil palm plantation company was never signed (Nugraha, Marry, & Saturi, 2020).

The indigenous peoples of Laman Kinipan – in collaboration with the Aliansi Masyarakat Adat Nusantara (AMAN) and the Badan Registrasi Wilayah Adat (BRWA), a civil society organization that promotes the recognition of customary territories and forests – released and verified the results of the mapping of the Laman Kinipan customary territory in April 2016. The customary area of Laman Kinipan consists of 16,169.942 hectares, with 70% jungle forest coverage and 30% communal cultivated land and villages (WALHI Kalimantan Tengah, 2023).

Nevertheless, in February 2018, PT SML arrived with heavy equipment and evicted Laman Kinipan’s traditional woodland to create space for a palm oil plantation. Kinipan villagers’ requests and pressure on SML, the oil palm corporation, to cease operations were ignored. The conflict dragged on continuously without a settlement (WALHI Kalimantan Tengah, 2023).

The Kinipan Community reported to Jakarta in June 2018. They visited the Presidential Staff Office (KSP), Komnas HAM, and the Ministry of Environment and Forestry (KLHK) to complain about this problem (WALHI Kalimantan Tengah, 2023).

According to Amnesty International Indonesia's sources, from January to August 27, 2020, 29 indigenous rights defenders were attacked through arrests, physical assaults, and intimidation (Amnesty Internasional Indonesia, 2020).

Previously, several Kinipan indigenous people were arrested by police officers in connection with land disputes with PT: Riswan (Indigenous Youth); Yefli Desem (Indigenous Youth); Yusa (Indigenous Elder); Muhammad Ridwan; Embang; and Effendi Buhing, the head of the Laman Kinipan Indigenous community, who was arbitrarily arrested at his residence (Amnesty Internasional Indonesia, 2020).

3.3 Samin v. PT. Semen Indonesia

The Samin tribe is located in Central Java and inhabits parts of the Pati, Rembang, and Blora regencies. The Samin Community took action against PT. Semen Indonesia for the construction of a cement factory in the Kendeng Karst Mountains area, which is the residence of the Samin Tribe (Subekti, 2016).

The Kendeng Karst Mountains are limestone mountains that can be used as raw cement materials, so this area is a target for cement companies in Indonesia. However, on the other hand, this area is a water source and agricultural area for all Samin people. This then sparked a conflict between the Samin tribe and PT Semen Indonesia (Subekti, 2016).

In 2016, the Supreme Court cancelled the environmental permit from the Governor of Central Java related to the plan to build a cement factory of PT Semen Indonesia Tbk in Rembang and Pati. This decision was taken after WALHI (the Indonesian NGO forum for the environment) filed a lawsuit against the Supreme Court because the environmental permit was issued illegally and did not pay attention to the rights of indigenous peoples and the environmental impacts that would be caused. In its decision, the Supreme Court affirmed that the environmental permit issued by the Governor of Central Java did not meet the legal requirements and must be cancelled. This decision is expected to provide legal protection for the Samin indigenous people and the environment in the Rembang and Pati regions (Joko Prianto dkk, WALHI vs. I. Gubernur Jawa Tengah, II. PT. Semen Indonesia Persero Tbk., 2016).

The three examples above demonstrate that indigenous groups in Indonesia still frequently struggle for their rights because large corporations are intruding on their area and abusing them to access natural resources. These indigenous tribes, being the most impacted stakeholders, have witnessed their ancestral lands and forests destroyed to create room for huge mining and oil corporations without meaningful consent or discussion. The cases mentioned do not rule out the possibility of the existence of yet more oppressed groups that have gone unnoticed or are not in the media's attention. This further supports the notion that FPIC is still a recurring problem for indigenous people in Indonesia.

4. The Link Between Freedom of Conscience and FPIC

The connection between freedom of conscience and FPIC is tied with established fundamental concepts of conscience, self-determination, autonomy, and self-governance. Albeit distinct, these concepts share similarities which at times cause them to overlap. Conscience is in everything we do, as people live it externally on a daily basis (Macklem, 2006); it essentially reflects the ethical and moral values that each respective individual adopts. Conscience provides guidance on what is right and wrong, serving as a parameter for individuals when making choices. It comprises a larger scope than freedom of religion or belief as it encompasses all ethics and values cherished by humans, regardless of their religious nature. Self-determination, on the other hand, generally alludes to an individual's ability to make decisions and choices without any interference. As previously mentioned, such a concept is reflected in Article 1 of the ICCPR, allowing individuals to pursue their economic, social, and cultural development without any hindrance. Its realization is important for the effective guarantee and fulfilment of individual human rights and for the promotion of those rights (UN High Commission for Human Rights, 1984). One's self-determination is inseparable from the possession of autonomy that provides people the capacity to "organize and direct their lives, according to their own values, institutions and mechanisms, within the framework of the State of which they are part" (UN Human Rights Council, 2021). Such a concept subsequently intersects

with the idea of self-governance, which tends to apply in the context of politics, wherein individuals, including indigenous groups, are able to participate in decision-making processes conducted in national institutions or legislative bodies, or in political, economic, social, and cultural aspects of the State (UN Human Rights Council, 2021).

If one were to attempt to provide a picture of what freedom of conscience means in general, it goes to the heart of human autonomy and identity, as people, first of all, experience it internally (Alegre, 2023). The ideal of freedom of conscience refers to the right to independently re-examine beliefs and convictions received from family, social groups, and society. It implies rational self-determination, and points out the emancipation of the human mind from beliefs and personal prejudices (Laborde, 2011). At least two aspects of freedom of conscience need to be emphasized. From an internal perspective, it is an instinct which lies in the natural state of an individual. Looking externally, freedom of conscience is regarded as the free act of self-determination of an individual or of a community. Freedom of conscience combines both concepts, and consists of aspects of both.

In contemporary reality, the question of freedom of conscience is commonly equated with the practice of conscientious objection. "Here I stand, and I cannot act otherwise" – the words of Martin Luther are common in the vocabulary of contemporary supporters of exemptions on the grounds of conscience and duty. It is important to note that such an approach is too narrow, and does not enable us to reveal the full concept of freedom of conscience. Indeed, conscientious objection makes a person's conscience open and public in the sense that one is dissenting from what secular law expects them to do as an obligation. However, freedom of conscience is more than conscientious objection. True freedom of conscience, according to some scholars,

> depends on the development of an intellectual and cultural environment that is sympathetic to the exercise of conscience in all aspects, namely, an environment in which people are free to develop within themselves an idealized image of themselves as rational beings, reminding themselves of what rationality requires, committing themselves to some portion of what rationality permits, and only then conforming to or dissenting from the expectations of others as reason requires in their case. (Macklem, 2006)

Thus, Macklem claims that the first aspect of why freedom of conscience is a wider concept than conscientious objection is the private domain, as all internal operations of conscience are largely invisible. The other aspect is the conditions of freedom of conscience. Macklem explains that it is our capacity for freedom which depends on suitable conditions for development and here it is part of the role of a state to secure the conditions within which the capacity of freedom of conscience can reasonably be expected to develop (Macklem, 2006).

The legal relationship between FPIC and freedom of conscience stems from their common goal of safeguarding the independence and autonomy of individuals and communities. As in Article 9 of the European Convention on Human Rights, the right to freedom of conscience incorporates the right to choose, transform, or abandon one's beliefs or religion, as well as the freedom to express one's beliefs in worship, observance, practice, and instruction.

On the other hand, FPIC is a legal principle that necessitates that governments and other authorities acquire the voluntary, prior, and informed consent of indigenous peoples and other impacted communities before implementing activities that may infringe on their rights, lands, territories, and resources, and most importantly covers the aspect of identity.

Both freedom of conscience and FPIC are based on respect for individual and collective independence and self-respect. For instance, in the context of natural resource extraction, FPIC may be viewed as a mechanism for ensuring that affected communities are able to exercise their freedom of conscience and make informed decisions about the utilization of their lands and resources without being coerced or manipulated by external forces.

Conclusions

Freedom of conscience and FPIC have a close connection, particularly when it comes to indigenous communities. Both legal concepts are crucial to safeguarding the rights of these communities to preserve their identity, the ways of its expression, and other practices. This means that any plan or action that might impact indigenous communities must respect their cultural and spiritual beliefs and offer them meaningful opportunities to participate

in the decision-making process. This might involve consulting with indigenous communities, providing information in their own language, and taking measures to protect their traditional practices and beliefs. By honoring both freedom of conscience and FPIC, protection of the rights and cultural identities of indigenous communities may be upheld.

The concept of FPIC, or at least elements of this concept, have become part of both binding and *soft law* international instruments. This situation shows that FPIC has become a legal concept. Although it is not yet widely accepted by countries, this does not reduce its value as a legal concept. Some countries have even incorporated the concept of FPIC as a norm in their national legislation. State acceptance shows that FPIC is more than just an abstract legal idea, but a legal concept that has strong roots and that is supported by legal arguments on the *rights to self-determination* of indigenous peoples. Without FPIC, the right to self-determination would lose its meaning and become paralyzed in supporting the survival of indigenous peoples and local communities.

The above decisions of the judiciary show that the concept of FPIC is accepted and has become the basis of decisions by judges. Although these decisions do not mention or refer directly to the concept of FPIC, important elements of FPIC, such as *consent*, *effective participation*, and *informed consent*, become the basis for the courts in making their decisions. Likewise, although court decisions are still limited to those available in the mechanism of the Inter-American Convention on Human Rights, courts at the international and regional levels will often assess each other and permit considerations that are perceived as appropriate and in line with the values of human rights and justice. Sooner or later, the use of FPIC may become widespread in the practice of national, regional, and international courts. When this happens, FPIC may have the potential to transform into a *customary international law*.

In Constitutional Court Decision No. 32/PUU-VIII/2010, it is unfortunate that the Court did not use the FPIC standard even though it was conveyed by one of the expert witnesses when delivering his opinion at the hearing. Meanwhile, the Court's consideration that indigenous peoples that no longer exist should not be revived carries the risk of excluding the possibility of protecting indigenous peoples who may still exist but were expelled or forced out of their territory. Perhaps in the future, the Indonesian Constitutional Court can take an example from the decision in *Mary and Carrie Dann v. United States* (2002).

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