

## Challenges in the Implementation of *Free Prior and Informed Consent* for Indigenous Peoples in Indonesia's National Legal Regulation

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### ABSTRACT

*This research discusses the challenges of implementing Free, Prior, and Informed Consent (FPIC) for indigenous peoples in national legal arrangements in Indonesia. FPIC is a principle that gives indigenous peoples the right to give consent to policies that affect their territories and resources freely, prior to full information, and without pressure. Although the FPIC rights of indigenous peoples are implicitly described and regulated in various national regulations, such as the 1945 Constitution, Forestry Law, Village Law, and environmental regulations, these arrangements do not necessarily guarantee the protection of indigenous peoples' rights over their customary territories. Explicit legal arrangements are needed to guarantee indigenous peoples' FPIC rights over their customary territories. This is because in its implementation, the application of FPIC rights still faces various challenges such as conflicts of interest with the State's Right to Control (HMN), low understanding in the field, and gender injustice being the main obstacles. This study uses a normative juridical approach to identify differences between international and national legal arrangements, and offers recommendations to improve the protection and implementation of FPIC in Indonesia. The research emphasizes the importance of explicit legal arrangements to achieve justice, prosperity and harmony between indigenous peoples and the government.*

### KEYWORDS

Challenges, FPIC, Indigenous Peoples, National Law.



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### INTRODUCTION

*Indigenous communities* can be defined as a unified society whose members are bound not only to a specific area of residence but also by hereditary relations through blood ties and/or kinship, stemming from a shared ancestor, either directly or indirectly through marriage or *customary* (genealogical) relations (Ali et al., 2021; Andrianto et al., 2019; Cajete, 2020; Leonhardt et al., 2023; Teka et al., 2020). *Indigenous peoples* have a close relationship with the environment, land, and natural resources, which constitute a vital part of their identity. According to the Alliance of Indigenous Peoples of the Archipelago (*AMAN*), *indigenous peoples* are

communities with common ancestral origins, living in defined groups, controlling *customary* territories, and upholding systems of *customary* values and laws that regulate their social life.

The existence and rights of *indigenous peoples* are recognized and guaranteed in the Indonesian constitution, specifically in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (*UUD 1945*), which states: “The State recognizes and respects the unity of *customary law* communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia (*NKRI*).” Additionally, Article 28I Paragraph (3) affirms that the cultural identity and rights of *indigenous peoples* are to be respected in harmony with human civilization. These rights are further affirmed in various Indonesian legal instruments. Law Number 41 of 1999 on Forestry states that *indigenous peoples* have the right to manage their *customary* forests. Law Number 6 of 2014 on Villages recognizes *customary villages*, granting them the authority to govern their communities and territories in accordance with *customary* law. Furthermore, Law Number 39 of 1999 on Human Rights, Article 6 Paragraphs (1) and (2), affirms that *indigenous peoples* have the right to protection of their cultural identity, traditions, and *customary* rights, provided these do not conflict with human rights and universal values.

Based on the various legal provisions described above, it can be concluded that *indigenous peoples* not only possess rights over natural resources within their territories, but they also have the right to manage and utilize the wealth contained therein. This legitimizes the role of *indigenous peoples* in managing and benefiting from their local resources. They also have the right to grant or withhold consent regarding any policies proposed by stakeholders concerning their *customary* territories. In international law, this is referred to as *Free, Prior, and Informed Consent (FPIC)*.

In Indonesia, *FPIC* is translated as *persetujuan atas dasar informasi awal tanpa paksaan*, a concept designed to protect the rights of *indigenous peoples*, especially concerning decision-making related to their lands and resources. *FPIC* is a process that allows *indigenous* or local communities to exercise their fundamental right to determine whether to agree or disagree with activities that may impact their territories, resources, and livelihoods. The government and Non-Governmental Organizations (*NGOs*) advocating for *indigenous peoples'* rights recognize *FPIC* as *Consent Based on Preliminary Information Without Coercion*. This affirms the right of *indigenous peoples* to determine the management and utilization of their territories and the resources therein.

However, in practice, *indigenous peoples'* rights to their territories are often constrained by the state's *Right to Control the State (Hak Menguasai Negara – HMN)*, which grants the state authority to manage and control land and natural resources within its sovereign domain. *HMN* reflects an ideological stance that legitimizes state authority over the allocation, use, regulation, and maintenance of land, water, and space; as well as over legal relations involving humans and their environment. Consequently, *HMN* and the rights of *indigenous peoples* may clash if not exercised in a balanced and harmonious manner.

*De facto*, there is evident overlap between *indigenous peoples'* rights and *HMN*. Conflicts often arise when the government makes decisions regarding *indigenous* territories without involving the communities themselves, despite their legitimate rights over the land and resources. Such unilateral decisions frequently result in the erosion of *indigenous peoples'* livelihoods and, in many cases, expose them to harmful conditions. This reality is at odds with the legal frameworks that are supposed to protect their rights.

Achieving balance and harmony between *indigenous peoples'* territorial rights and the state's sovereign control is crucial to realizing justice in accordance with constitutional mandates. The state is obliged to ensure the protection and preservation of *indigenous peoples*, as the government serves as a key policy agent in implementing the constitutional mandate. This can only be achieved through the meaningful inclusion of *indigenous peoples* in the management, utilization, and decision-making processes regarding the resources within their territories—most effectively through the implementation of *FPIC*.

Implicitly, *FPIC* is reflected in various Indonesian legal provisions, acknowledging the right of *indigenous peoples* to participate, grant consent, and make decisions impacting their territories through laws on the environment, human rights, forestry, village governance, and spatial planning. This underscores the government's duty to ensure *indigenous peoples'* free, informed, and active participation in policymaking. However, explicit regulation and enforcement of *FPIC* remain absent from Indonesia's legal system. Formal legal recognition is essential to institutionalize its implementation and guarantee equitable outcomes.

Considering that Indonesia is a state governed by law, as outlined in Article 1 Paragraph (3) of the 1945 Constitution, written legal guarantees for *indigenous peoples*—especially regarding *FPIC*—are essential to ensure harmony between their rights and those of the state. The author argues that further research is needed to explore why *FPIC* remains unrecognized in Indonesia's political legal system and to identify the challenges that hinder its implementation, especially in light of Indonesia's endorsement of *FPIC* in international law through the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*. Hence, this study focuses on the challenges of implementing *FPIC* for *indigenous peoples* within Indonesia's national legal framework.

The implementation of *Free, Prior, and Informed Consent (FPIC)* for *indigenous peoples* in Indonesia remains fraught with challenges, despite its recognition in international law and implicit inclusion in national regulations. Existing studies highlight conflicts between *indigenous rights* and the state's *Right to Control (HMN)*, as well as gaps in legal frameworks that fail to explicitly guarantee *FPIC*. However, there is limited research addressing systemic barriers—such as gender inequality, lack of awareness, and manipulative practices by external actors—that hinder effective *FPIC* implementation. This study seeks to bridge this gap by examining the discrepancies between international standards and national legal practices, while also exploring the socio-political dynamics that undermine *indigenous peoples'* rights in Indonesia.

This research aims to critically analyze the challenges of *FPIC* implementation in Indonesia's national legal system, focusing on conflicts between

*indigenous rights* and state control, as well as the practical obstacles faced by *indigenous* communities. Unlike previous studies that focus solely on legal inconsistencies, this study adopts a normative juridical approach combined with qualitative analysis to uncover nuanced socio-legal barriers, including gendered exclusion and institutional manipulation. The novelty of this research lies in its holistic examination of both legal and practical challenges, offering a comprehensive framework for understanding why *FPIC* remains ineffective despite its constitutional and international recognition.

The findings of this study have significant implications for policymakers, legal practitioners, and advocacy groups. By identifying the root causes of *FPIC*'s ineffective implementation, the research provides actionable recommendations to strengthen legal frameworks, enhance community awareness, and promote inclusive decision-making processes. Ultimately, this study contributes to the broader discourse on *indigenous rights* and environmental justice, advocating for a harmonized approach that balances state interests with the autonomy and welfare of *indigenous peoples* in Indonesia.

## RESEARCH METHOD

The research uses a *normative juridical* approach. The *normative juridical* approach is conducted based on primary legal materials by analyzing theories, concepts, legal principles, and laws and regulations relevant to this study. This approach is used to build legal arguments in response to the issues raised in the research. The *statutory* approach is applied to examine all laws and regulations related to the existence of *Free, Prior, and Informed Consent (FPIC)* in both national and international legal frameworks. The theoretical and conceptual approach is derived from the views of legal experts and doctrines in general legal science and criminal law, which are utilized to classify concepts that are not explicitly regulated in existing legal instruments.

The **primary legal materials** used in this study include international law and applicable Indonesian legal regulations. **Secondary legal materials** consist of legal literature relevant to the issues discussed. Additionally, to support the analysis, **non-legal materials** such as news articles from print and online media are also included. The collection of these research materials is conducted through literature searches in libraries and online sources using *decomposition techniques*. The collected materials are then processed and analyzed qualitatively through legal reasoning and argumentation methods, including *legal construction* and *legal interpretation*. Finally, the overall findings of the study are presented descriptively in the form of narrative explanations.

## RESULT AND DISCUSSION

### **FPIC Arrangements for Indigenous Peoples in International Law and National Law**

Historically, FPIC is an individual *medical normative* clause . Where FPIC was originally used to provide protection for the interests of patients in hospitals.

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Every patient is required to know the entire process and the type of treatment that will be carried out by them. This shows that all treatment procedures for the patient require the consent of the patient himself, this is what later developed into a term known as FPIC. Where FPIC is a form of protection of individual rights of patients. However, as knowledge develops, FPIC has been transformed into various rules of international law that are communal (Haira, 2006).

The development of science related to FPIC has also affected various fields, not only in the field of health, FPIC is internationally recognized and also provides guarantees related to the rights of indigenous peoples in management and utilization as contained in various international arrangements reflected in international declarations and conventions such as *the United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), *ILO Convention No. 107 Indigenous and Tribal Populations on the Protection and Integration of Indigenous Peoples, Indigenous Peoples and Semi-Indigenous Peoples in Independent States* (ILO Convention 107), *Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169), and *International Convention on Civil Political Rights* (ICCPR).

Article 10 of UNDRIP explains that:

*"Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return"*

It means: "Indigenous peoples should not be forcibly evicted from their land or territory. No relocation should be carried out without the free, prior and informed consent of indigenous peoples and after an agreement on fair compensation, and where possible, indigenous peoples have the right to return".

The provision emphasizes the implementation of FPIC rights of indigenous peoples. Where indigenous peoples have absolute rights related to their place of residence in their customary territory. In addition, indigenous peoples deserve the right to be prioritized, especially in terms of obtaining information and making free decisions, as well as receiving the right to fair compensation for the relocation of their territories.

Furthermore, article 7 paragraph (1) of ILO Convention 169 states that:

*"The peoples concerned shall have the right to decide their own 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. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."*

That is: "The community concerned has the right to decide on its own priorities in the development process that concern their lives, beliefs, institutions and spiritual well-being as well as the land they occupy or use, to exercise supervision so as to make possible their own economic, social and cultural development. In addition, they must participate in the formulation, implementation and assessment of plans and programs for national and regional development that can directly affect them".

The role of indigenous peoples in this convention is not just to participate. But more than that, indigenous peoples have their own rights in determining development that concerns their lives, beliefs, institutions, and spiritual well-being as well as the land they occupy or use. This is because decision-making on all policies in their region affects their own economic, social, and cultural conditions. Therefore, this article provides a guarantee of the absolute rights owned by indigenous peoples for the smooth and welfare of their lives. This provision indirectly shows that it is a mechanism of FPIC's rights.

In addition, the rights of indigenous peoples FPIC are also recognized and respected in the ICCPR. As Article 1 Paragraph (1) of the ICCPR which confirms 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"*.

That is: "All nations have the right to self-determination. Based on these rights, they are free to determine their political status and are free to carry out their economic, social and cultural development."

The rights inherent in each nation based on the provisions of article a quo are the right to self-determination, in the form of freedom to determine political status, freedom to carry out economic, social and cultural development. This shows that every decision related to policies that have an impact on a certain area must go through the approval procedure of the residents who inhabit the area. Thus, the rights of FPIC as referred to are reflected in the provisions of article a quo.

According to the United Nations (UN) Special Rapporteur, James Anaya defines FPIC as one of the protections for the right to self-determination over land and resources. FPIC rights can be categorized as a form of authority possessed by indigenous peoples to determine their attitude towards their customary rights in order to achieve their protection and welfare goals so that they are not intervened by outside parties who will only exploit their land and resources.

Based on various international provisions as explained above, it shows that the international world recognizes the rights of indigenous peoples in the management and utilization of all wealth in their territory. The utilization and management of all wealth in the customary territory of indigenous peoples requires the consent of the indigenous people themselves in order to achieve justice and welfare. The entire international legal arrangement on FPIC rights actually wants to provide space for the ownership rights of customary rights owned by indigenous peoples in all countries in the world, including Indonesia.

Basically, the state is a community organization that has the power and authority to regulate and manage natural resources in its territory (Affandi, 1971). The state has the right to determine the direction of policies in the management of natural resources they have. This is done by the state for nothing but the public interest. As mandated in the Indonesian constitution, Article 33 of the 1945 Constitution of the Republic of Indonesia which regulates the economy and principles of natural resource management. The a quo article is the constitutional foundation for the economic system in Indonesia and emphasizes justice for all Indonesian people.



The provisions of Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia state that "The earth and water and the natural resources contained therein are controlled by the state and used to the greatest extent for the prosperity of the people". The state is responsible for ensuring the use of natural resources in order to provide the greatest benefits for the welfare of the people, not for foreign interests or a handful of certain elite groups. Article a quo emphasizes that the power possessed by the state is not only aimed at development but also social justice, national independence, and people's welfare. This is in line with the provisions of international law and this goal can be achieved without neglecting the rights of indigenous peoples by always implementing the FPIC rights of indigenous peoples in Indonesia. The application of FPIC rights can start from recognizing and guaranteeing and implementing the concept of FPIC rights in Indonesian legal arrangements.

Actually, the regulation related to the FPIC rights of indigenous peoples in Indonesia is not explicitly mentioned, but there are several laws and regulations in Indonesia that implicitly show the existence of FPIC rights themselves. Starting from the constitution that recognizes and respects the unity of indigenous peoples and their traditional rights as reflected in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Then Article 6 Paragraph (1) of Law Number 39 of 1999 concerning Human Rights explains that in the context of enforcing human rights, the differences and needs of indigenous peoples must be considered and protected by law, society, and government. Furthermore, article a quo paragraph (2) recognizes the right of indigenous peoples to protect their cultural identity, customs, and traditional rights in line with the times.

Regarding the FPIC rights of indigenous peoples, Article 67 of Law Number 41 of 1999 concerning Forestry explains that indigenous peoples have the right to collect forest products to meet their daily needs and have the right to manage their customary forests. The implementation of FPIC rights in this case is to ensure that indigenous peoples can give consent before forestry projects are carried out on their customary lands. Furthermore, several provisions in Law Number 32 of 2009 concerning Environmental Protection and Management, namely in Article 26 and Article 65 Paragraph (2) concerning Environmental Impact Analysis (EIA) implicitly reflect the existence related to the FPIC rights of indigenous peoples. Where the community has the right to participate in decision-making on environmental protection and management, which includes preliminary information and the opportunity to give approval or refusal. The government has an obligation to provide complete and transparent information to indigenous peoples before starting projects or activities that have the potential to have an impact on the environment. Furthermore, it was explained that everyone who in this case includes indigenous peoples has the right to submit proposals and/or objections to plans and/or business activities that are expected to have an impact on the environment. Thus, some of these provisions implicitly apply FPIC rights as international legal arrangements guarantee them. The rights of FPIC that are indirect in this provision are the right to obtain information, the right to file objections, and the right to participate in decision-making related to policies for their customary territories.

In addition, Law Number 6 of 2014 concerning Villages also implicitly adopts mechanisms related to FPIC rights. As the explanatory part of the a quo law explains the principle of regulating this law. Where this law, in addition to recognizing the existence of indigenous peoples, also ensures the involvement of indigenous peoples related to decision-making related to the interests of indigenous peoples through discussions with various interested parties. In addition, Articles 26 to 32 of Government Regulation of the Republic of Indonesia Number 22 of 2021 concerning the Implementation of Environmental Protection and Management explain and regulate the need to conduct public consultation in the process of preparing AMDAL documents and the need to include the participation of affected communities. This indicates the implementation of indigenous peoples' FPIC rights to environmental policies in their customary territories. Then related to the procedure for the involvement of indigenous peoples in the process of preparing the EIA, including the right of the community to provide input, suggestions, and objections to the project or activity plan has also been regulated through the Regulation of the Minister of Environment Number 17 of 2012 concerning Guidelines for Community Involvement in the EIA Process. Not only in laws and regulations, FPIC rights can be implicitly described in the decision of the Constitutional Court Number 35/PUU-X/2012. Where this Constitutional Court decision stipulates that customary forests are not part of state forests, but are under the management of indigenous peoples. This ruling indirectly supports the FPIC rights of indigenous peoples by affirming that indigenous peoples have the right to give consent regarding the use of their customary forests.

Based on the description that has been described above, the author can simply conclude that the application of FPIC rights is reflected in various legal rules in Indonesia. Where the legal rule guarantees the right of indigenous peoples to be involved in obtaining information, priority to be prioritized, and even play a role in decision-making. However, the author considers that the implicit arrangement as described above is not enough to ensure the implementation of the FPIC rights of indigenous peoples in Indonesia.

In fact, explicit legal arrangements are needed to provide guarantees and protection for the rights of indigenous peoples so that they can be implemented as they should in order to achieve the welfare and prosperity of indigenous peoples without any disadvantaged party. Legal regulation itself has a very important role in creating a fair, orderly and harmonious order of society, nation, and state life. Based on the theory of legal certainty put forward by Hans Kelsen, emphasizing the importance of law as a norm that must be obeyed to create legal certainty (Asshiddiqie & Safa'at, 2006). The law provides clarity and a framework for people to know their rights and obligations.

The constitutional mandate enshrined in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Indonesia is a country of law." This confirms that Indonesia adheres to the principle of the state of law, where all aspects of life must be based on law (Doyle, 2015). In addition, the 5th precept of Pancasila, which reads "social justice for all Indonesian people", shows the importance of law as a tool to achieve social justice in community life. Therefore, the author considers that legal regulation is a fundamental element to achieve



justice, certainty, and order in society. Explicit legal arrangements related to the FPIC rights of indigenous peoples are needed to be able to ensure the implementation of the FPIC rights as they should, in order to achieve harmony and balance and harmony between the rights of indigenous peoples and the right to control the state over the management and utilization of resources in Indonesian territory. Thus, the goals and ideals of the state can be achieved as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia.

### **Challenges in the Application of FPIC to National Law**

The existence of FPIC regulated in international law and national law is something to be thankful for, especially for indigenous peoples in Indonesia. This is because FPIC is a protective tool for indigenous peoples to protect their rights from the outside. Moreover, with the existence of FPIC, indigenous peoples can not only protect or maintain all the rights they have, but more than that, FPIC can provide opportunities for indigenous peoples to sustainably develop their rights such as cultural, economic, political, legal and other rights that they have (Syofyan, 2012).

The presence of FPIC for indigenous peoples, in addition to providing solutions to their problems, also provides its own challenges for the indigenous peoples themselves. Various challenges in the implementation of FPIC must be accepted by indigenous peoples around the world, including differences of views on the meaning of FPIC. Although *the UN Permanent Forum on Indigenous Issues-UNPFII* in the Fourth Session of 2005 (UNPFII Document) has been ratified in the UN permanent forum and has become a reference from various countries. However, many parties have their own understanding of FPIC. Even the interpretation of the law and its political translation by each country is still inconsistent and highly dependent on the situation and conditions of the country (Psipillon & Radon, 2019)

Moreover, this difference also occurs against significant disagreements regarding the meaning, scope and practical implications of FPIC norms.<sup>1</sup> Indigenous peoples also often oppose the approach of the FPIC concept which tends to be centered on the west for their right to participation (Borrws et al., n.d.). This difference of views is a challenge for indigenous peoples around the world, because in the norm of FPIC to have various different views, especially in practice, it will certainly give birth to many differences in the mechanism of FPIC implementation where this condition can actually be detrimental to indigenous peoples. Because, the bad possibility that can happen with this is that outsiders carry out FPIC which in fact in the implementation does not meet the elements of FPIC itself.

In addition, another challenge faced by indigenous peoples with FPIC is that in interaction with external or external parties, there are challenges that can affect the process. Customary guardianship systems can fail to carry out their duties accountably and external institutions may misinterpret or manipulate customary authorities for their own benefit (Saly et al., 2024).

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<sup>1</sup> C.M. Doyle, 2015, *Indigenous Peoples, Title ti Territory, Rigts and Resources : The Transformative role of Free Prior And Informed Consenct* , Routledge, New York

This kind of case once occurred in Nagari Kinali, Pasaman Regency, West Sumatra. This case began with a potential investor who wanted to build a project using the customary land of the Nagari Kinali people and promised that after the project was implemented, the investor would build an oil palm plasma plantation on the land.

The potential investors finally contacted Ninik Mamak in the Pasaman sub-district area, including in the case of Nagari Kinali. In the meeting, the prospective investors asked for land for oil palm plantations to all existing mamak ninik. The Ninik Mamak also welcomed the presence of the prospective investors and suggested that the candidates contact the Regent of Pasaman. After the prospective investors met with the Regent of Pasaman, in this case Rajuddin Nuh, then the Regent held a discussion and tried to persuade the Ninik Mamak to be willing to hand over their customary land to potential investors including Ninik mamak Nagari Kinali. The Regent promised that the construction of the oil palm plantation would benefit their nephew's son because he would be given a plasma plantation.

After the meeting, Ninik Mamak Nagari Kanali finally agreed to hand over their customary land by signing a Land Handover Statement (Letter of Release of Rights) through the intermediary of the Pasaman Regency government. Apparently, this letter became the basis for the company to act cunningly by making the letter obtain the Right to Use Land (HGU) to the government. At that time, the legal rules regarding HGU in Indonesia stipulated that it was possible to give HGU from the state when the state or land owned by a person had been released. So that with this regulation, investors can get an HGU letter from the state.

The cunning actions carried out by the prospective investor were apparently not realized by Ninik mamak Nagari Kinali. In fact, the intention of the signing carried out by Ninik Mamak Nagari Kinali is only limited to handing over land to the local government, not for sale or transfer of ownership. Ninik Mamak Nagari Kinali thinks that the land still belongs to them. However, due to ignorance of the consequences they had to receive from signing the letter and the bad thoughts of the Pasaman Regency land acquisition committee, the customary land owned by Ninik Mamak Nagari Kinali had to be transferred to potential investors.

After the investors enjoyed the customary rights owned by Nagari Kinali, the promise to build a plasma oil palm plantation was not kept. Because of this kinds, it finally encourages the people of Nagari Kinali to move to demand the rights they should get. Various efforts have been made by the Nagari Kinali community, such as the Nagari Kinali community protesting against seven oil palm plantation companies in their area from 1990 to 2006. In fact, more than fifty times collective actions to express the demands of the suppression have been carried out by the Kinali community and the demands are directed at plantation companies. The Nagari Kinali community also tried to lobby the company and local government officials by sending letters and signing local officials, ranging from sub-districts to districts to the provincial level.

Legal steps were also taken by a ninik mamak Nagari Kinali by bringing this case to the district court in Padang City. However, all the efforts made by the Nagari Kinali community did not give satisfactory results. Until they made other efforts by conducting demonstrations to block the activities of oil palm plantation

companies to harvest their oil palm. In the demonstration demands, the two main points they fought for were to demand oil palm plasma plantations from the companies and in 1998, *datuak* MM and his members also protested against the same company to ask for an oil palm plasma plantation covering an area of 900 hectares and as many as 20 Ninik Mamak Nagari Kinali and his members protested against the company to build for them an oil palm plasma plantation covering an area of 7,000 hectares.<sup>2</sup> Furthermore, another demand that Ninik Mamak Lokal fought for was to ask the core company to convert (handover) the oil palm plasma plantation that had been built by the company.

Basically, the oil palm plantation company has built a plasma plantation, but in this case, Ninik Mamak Nagari Kinali demanded that the palm oil company hand over the plasma plantation to the Kinali community. The reason for the Kinali community's demand for plasma plantations is that the land that the community gives to the company is their customary land where the land is not sold to the investor.<sup>3</sup> From the above case, we can see that the challenge that must be accepted by indigenous peoples in implementing FPIC is that the guardian or the party representing them in negotiating with outside parties must be really credible and accountable people. Because, if the community does not have the ability to be selective in finding parties who can represent them and defend their rights, then the misfortune that will occur is that their rights will actually be lost because of the crime of their own guardianship. In fact, what may happen is that when the indigenous people's guardianship is not the right person and does not understand outside information, then the external party itself will be cunning to the indigenous people.

Furthermore, another challenge that indigenous peoples must face in the implementation of FPIC is that they feel doubtful and lack trust in the parties who represent them, especially in the context of issues that are new to them, such as the land market or land expropriation (Colchester & Ferrari, 2007). Not to mention, other challenges such as some norms and customary institutions ignore marginalized groups, such as women, low castes/groups, and groups that are not independent, so that not all their interests can be well represented (Saly et al., 2024). Institutions implemented through government intervention such as land rights distribution programs also often underestimate the role of women and take over weakened customary institutions.<sup>4</sup>

This has happened in Mekar Jaya Village, Indonesia, where a study shows that the implementation of FPIC highlights how women are not always involved in the decision-making process about land and resources. Women in communities affected by oil palm concessions in Mekar Jaya Village stated that they had never heard of FPIC and that most of the men involved in community consultations related to investment were involved, despite the fact that women work side by side with men in Indonesian plantations. The fact that women are not consulted is a particularly problematic issue given the risk of reproductive problems that can arise

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<sup>2</sup> Afrizal Negara and Agrarian Conflict: A Case Study on the Community of Large-Scale Oil Palm Plantation Centers in West Sumatra, FISIP UNAND, p. 11.

<sup>3</sup> *Ibid* p.5.

<sup>4</sup> *Ibid*.

from exposure to pesticides and other harmful chemicals used by palm oil companies. This case shows that the role of women in rural communities and the impact of investment may have on them, so it is important for women to be part of the FPIC process.<sup>5</sup>

ELSAM (2017) also gave an opinion that in the implementation of FPIC in Indonesia, there are several challenges that must be faced by indigenous peoples in Indonesia, including:

1. The community and the private sector negotiate directly without mediation or regulation from the state;
2. Are indigenous peoples/locals strong enough to independently confront the company even if the company says they respect the FPIC;
3. And the community can work as a cohesive social unit,

In addition to the above, there are other challenges that must be faced by indigenous peoples in the implementation of this FPIC, which include:<sup>6</sup>

1. Land tenure and social studies

In the process of obtaining permits, studies on land tenure and social affairs are rarely carried out to identify the communities that inhabit an area and how they utilize and manage the land in it. The lack of clarity on the rights to the land and the right to use not only makes it easier for the appearance of fake claim that is made not in accordance with the applicable law, but also creates a contradiction to the basis of the difference.

2. Approval VS Consultation/deliberation

In practice, what often happens is that the application of FPIC for companies to indigenous peoples is only limited to deliberation and consultation. Indigenous peoples do not have the ability to give consent or not to the actions taken by companies against their rights. In some cases, for example, it shows that indigenous peoples are invited by companies to negotiate on types and conditions so that companies can obtain consent from indigenous peoples. In the case of *a quo*, it shows that instead of people being respected for their right to decide "no" to a project that will be carried out on their land, the opposite happens. While in other cases, the participation of the community in consultation with and *reta* is considered as giving their approval to the project and not as a way to reach the agreement.

3. Awareness of FPIC in the field

Understanding of the principles and implementation of FPIC at the field level and operational management is still low. This low understanding is akin to an understanding of RSPO P&C in a more general context. The lack of understanding can also be seen in the awareness of the affected communities and local government authorities of the

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<sup>5</sup> Nocholas Tagliarino, Strengthening Indigenous Land Rights : 3 Challenges to "Free, Prior and Informed Consent", <https://www.wri.org/insights/strengthening-indigenous-land-rights-3-challenges-free-prior-and-informed-consent>, accessed on January 15, 2025

<sup>6</sup> RSPO, 2018, Free, Prior And Informed Consent, Technical Guide for RSPO Members in the Development of New Areas of Oil Palm Plantations in Indonesia, *INA FPIC TASK Force*, National Interpretation Task Force on RSPO FPIC Guidelines, Appendix 2, p. 7.

principles and requirements of the RSPO so that on the one hand it is difficult for companies to comply with the applicable standards and on the other hand it limits the ability of the community to file complaints and seek damages when the standards are violated.<sup>7</sup>

4. Absence of freedom of choice

Basically, coercion and intimidation carried out by companies are rarely seen directly. However, similar actions often occur through a record of pressure for the public to give their consent through more subtle forms, including the presence of security personnel and soldiers during consultations, the "take or leave" approach used by companies to obtain public approval, repeated attempts to convince the public to give their consent even if they have disagreed with the negotiations being conducted. In fact, it is not uncommon in some cases to show the signatories of agreements with the community where the community is not fully informed of what is regulated in it and the consequences arising from the signatories of the agreement.

5. Access to information

In many cases, it is found that the implementation of FPIC between companies and indigenous peoples often occurs that the information shared by the company to indigenous peoples to be the basis for decision-making is inadequate and/or incomplete information. Moreover, it also often happens that companies do not give indigenous peoples enough time to digest the information, deliberate internally as needed in their position as a society, and agree on joint decisions through joint decision-making mechanisms through decision-making mechanisms that they determine themselves. Usually, indigenous peoples are also not given access to independent assistance and support, both legal assistance and other assistance. In fact, the party who provides or is the source of this information is only asked for help once the problem arises instead of being proactively involved as part of the broad principles of transparency and accountability.

6. Indemnity

Compensation for losses, if there is a tendency to be understood only in the form of money and not in other alternative forms that may be more in accordance with what the indigenous people want, for example compensation for losses or release (the removal of community land from the scope of the concession area). However, until now, there have not been many various forms of compensation (for example, rehabilitation, fulfillment of requests and guarantees for non-recurrence of losses and modes of joint management) that have been explored.

Not to mention the conditional recognition given by the State to Indigenous Peoples, as reflected in the reading of article 18B paragraph (2) that there are provisions as long as they exist and do not contradict laws and regulations. This is

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<sup>7</sup> *Ibid.* p. 9.

very detrimental to the existence of the community in Indonesia, because with the existence of limited recognition or conditional recognition to the state law politics in recognizing and protecting the rights of indigenous peoples, what happens is the subordination of customary law to state law. According to Griffiths, such a concept is referred to as weak legal pluralism, that is, the enforcement of customary law can only be possible with the recognition of state law first (Muazzin, 2014). In fact, Indonesia is one of the countries in the world that is in the ranks of 144 countries that support the existence of UNDRIP as a Convention that provides protection for indigenous peoples around the world. However, it is very unfortunate that the existence of the community in Indonesia is still in a worrying condition as a result of the conditional recognition given by the state to indigenous peoples.

In the Constitutional Court's decision Number 31/PUU-V/2007, the Constitutional Court explained the existence or absence of the (*legal standing*) indigenous peoples in Indonesia to protect their constitutional rights.<sup>8</sup> Conditional recognition of indigenous peoples in the history of the Republic of Indonesia began with the UUPA, the Forestry Law, the Water Law and several regulations of government departments and agencies (Muazzin, 2014). After the 1945 Constitution adopted the four requirements for indigenous peoples, the order of various laws that were born after the amendment followed this flow, including: the Water Resources Law, the Fisheries Law and the Plantation Law. The state's conditional recognition of indigenous peoples in Indonesia can show that the government has not seriously made provisions to respect and recognize the customary rights of indigenous peoples.

In fact, many activists, civil society and other parties criticized the state's politics of conditional recognition of indigenous peoples. In fact, in many studies that have been conducted by Non-Governmental Organizations (NGOs) such as the Bandung Agrarian Reform Consortium (KPA), it is stated that there has been a misconception among Law Scholars or such thinking. Because the characteristic of this kind of model is that the rights of indigenous peoples are formulated in a dual manner, on the one hand the existence of indigenous peoples' rights will be recognized but on the other hand they are absolutely limited and the material is explicitly abrogated from their existence (Syafa'at, 2008).

From this, it can be understood that the emergence of conditional rights for people's customary rights in Indonesia is a challenge for indigenous peoples and for the implementation of FPIC. Because, the state through this kind of mechanism can claim that customary land belonging to indigenous peoples is state land because the state has the legal ability to claim it. The existence of FPIC is no longer a mechanism that needs to be considered by outsiders, because they consider that there is no need for the implementation of FPIC because the land or customary rights are owned by the state, so it is enough to carry out negotiations with the government, without the need to conduct FPIC to indigenous peoples.

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<sup>8</sup> United Nations, General Assembly Adopts Declaration on Rights of Indigenous Peoples; „Major Step Forward“ towards Human Rights for All, Says President, <https://press.un.org/en/2007/ga10612.doc.htm>, Accessed on January 15, 2025



## CONCLUSION

Legal arrangements related to *Free, Prior, and Informed Consent (FPIC)* were initially explained and regulated through various provisions of international law, including *UNDRIP*, *ILO Convention 107*, *ILO Convention 169*, and the *ICCPR*. In Indonesian national law, *FPIC* has also been addressed in various legal and regulatory provisions. *Indigenous peoples* are entitled to the continuity of their *customary* territories, including the right to receive information, to have their existence prioritized, and to have their views and decisions considered in policymaking that affects their territories. However, existing regulations do not explicitly define or guarantee the *FPIC* rights of *indigenous peoples*. In fact, given that the Indonesian constitution upholds the principle that Indonesia is a state governed by law, there is an urgent need for clear, direct, and definitive legal arrangements to ensure legal certainty regarding *FPIC* rights in support of welfare and justice.

Moreover, *FPIC* is not only a concept and mechanism that offers significant benefits to *indigenous peoples*, but it also presents a range of challenges in its implementation—challenges faced both by *indigenous peoples* themselves and by other stakeholders. These challenges include the need for accountable and credible *indigenous* representation capable of negotiating with external parties seeking to exploit *customary* rights; the presence of racism, especially toward marginalized groups and women; limited awareness among *indigenous peoples* regarding *FPIC*; restricted freedom of choice; and numerous serious obstacles faced by *indigenous communities*. In addition to these practical challenges, the regulatory framework itself presents obstacles: the normative formulation of *FPIC* and the conditional recognition of *indigenous peoples* in Indonesia hinder its full and effective realization. Therefore, the government must evaluate the current *FPIC* framework to establish a more ideal and protective mechanism that upholds and safeguards the full range of rights held by *indigenous peoples*.

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