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Public Consultation in the Acquisition of Customary Land in Indonesia: An FPIC Perspective

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To this day, the indigenous community is stigmatised as an obstacle to development. In reality, indigenous peoples are marginalised in the development process because the government has not yet fully recognised their rights. This research is juridical-normative research, in which it aims to identify the importance of free, prior, and informed consent (FPIC) in land acquisition law for indigenous communities and to understand the problem of public consultation on customary land and find solutions to these problems. Land acquisition law for public use in Indonesia is inseparable from FPIC. One of the new nomenclatures that come together with the Land Acquisition Law is a public consultation, where the mechanism of public consultation is fundamental to build public participation. Based on this research, it is found that there is a contradiction in the manifestation of the principle of consent in the positive law of land acquisition in Indonesia. The author offers the ideal concept of public consultation in FPIC-based land acquisition. This concept will help to provide more substantive justice to indigenous communities whose land is the object of land acquisition.

Keywords: *Public Consultation, Land Procurement, Customary Land, FPIC*

Introduction

To create a prosperous society based on the ideology of the nation, Pancasila and the Republic of Indonesia State Constitution of 1945 (UUD 1945), the government is required to implement national development in all aspects of the citizen's lives. To ensure the implementation of development, the government needs to carry out land acquisition (Ernis, 2013). Land acquisition is made by prioritising the principles of humanity, democracy and justice under national agrarian law (Winarsi, 2020).

The land has an essential meaning for every individual in the society (Ginting, 2012). Besides having an economic value that can be reserved as a source of living, the land also contains spiritual aspects in the environment (Ginting, 2012). In its development, the problem around the land is increasingly complex. Therefore, its dimensions continue to follow the dynamics of the pace of development in this nation, including the juridical, economic, political, social, religious magical dimensions, even for the state, the land has a strategic dimension (Ginting, 2013). Therefore, it is not uncommon to find prolonged conflicts arising from land acquisition projects (Ernis, 2013). Conflicts that arise rooted from the process of determining the initial location, the form and amount of compensation, the execution of land acquisition, and various other problems.

One of the community groups that often become victims in development is the indigenous community with their customary rights (National Legal Development Agency, 2014). Based on data from the 2010 Population Census conducted by the Central Statistics Agency (BPS) of the Republic of Indonesia, it is known that the number of tribes in Indonesia that were successfully recorded consisted of 1,128 ethnic groups ("Indonesia has 1128 tribes", 2010). Furthermore, the data from the Customary Territory Registration Board also shows that there are 1081 indigenous territories spread throughout Indonesia. Of all the customary territories, only 17 customary territories have been certified. The lack of certification, moreover, recognition from the government has caused indigenous and tribal peoples to be unable to protect themselves.

At the constitutional level, the government is obliged to recognise and respect customary law that still applies in an indigenous community. This was affirmed in Article 18B paragraph 2 of the 1945 Constitution as it stated, "The state recognises and respects the indigenous community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Republic of Indonesia which are regulated in Constitution." Then in Article 28, paragraph 3 of the 1945 Constitution stated, "Cultural identity and traditional community rights are respected in accordance with the development of time and civilisation."

But in reality, indigenous peoples are marginalised in the development process because the government has not yet fully recognised their rights, for example, concerning the recognition of indigenous territories and customary rights belonging to indigenous peoples (Kadir, Normawati & Halik, 2019). When indigenous peoples' lands are controlled by private companies or certain parties who want to establish companies in their customary land territories, they do not have the power to fight against certain parties who come to control these indigenous people' lands. Sometimes there is speculation and political manipulation of customary land and private lands of indigenous and tribal peoples for various purposes. For example, the case of customary land that occurred in Rokan Hilir District, Riau Province arose because the regent was reluctant to make local regulations on customary law communities in the area (Yunus, 2013).

So far, the stigma attached to indigenous peoples as "obstacles to development" is incorrect. Indigenous and tribal peoples desperately need the exchange of information and explicit socialisation about the good and bad impacts of the development. After the socialisation, prior to the Government carrying out its development program, there was the first confirmation of agreement from indigenous peoples who are free without coercion, thus free, prior, and informed consent (FPIC) applies. By recognising the right of indigenous peoples to be treated as owners and managers of their customary territories, FPIC guarantees that they have a decisive voice in each stage of development planning and implementation for projects that affect them and requires project developers to carry out a communication process that is continuous with the community and obtaining approval for each key stage in the process (Anderson, 2011).

The author considers that there needs to be an enhancement in managing the relationship between the government and regional government with indigenous communities in the legal framework of land acquisition for infrastructure provision. One of the media is through public consultation. Therefore, this study will analyse the concepts of free, prior, and informed consent and their relationship with public consultation in land acquisition and arrangements related to public consultation and the root of the problems of public consultation on customary land.

Methods

This type of research in this particular scientific paper is juridical-normative legal research. Juridical-normative writing or normative legal research is the one through studies reviews (Soemitro, 1998). This legal research uses an approach commonly used in legal research which is the statute approach and the conceptual approach (Marzuki, 2005). Legal research through the statute approach is carried out by reviewing the laws and regulations relating to the indigenous community and land acquisition law for the development of the public interest

(Nugraha, Izzaty & Putri, 2019). The conceptual approach is carried out by analysing and criticising the customary legal system in regulating customary rights and bridging these rights with the principles of free, prior, and informed consent in the context of land acquisition law in accordance with Law No. 2 of 2012.

This study will try to describe and understand a problem by finding and collecting data and information so that it is expected to provide answers to the problems in question (Soemitro, 1998). This research is normative legal research, so the data collected is secondary data (Soemitro, 1998).

Material obtained from the results of research in the form of secondary data is collected systematically and classified according to the subject matter, which then analysed qualitatively that is in accordance with the quality of the fact. Data processing is then carried out based on legal interpretation (hermeneutics), namely grammatical and sociological interpretation methods. The results of the study are outlined in the form of a description that answers the problem formulation comprehensively. Another expected outcome is the ultimate correct solution which then applied to resolve the land conflicts problem in Indonesia.

The results of the study were then arranged systematically to clarify the search for new ideas or the solution of the problem; which then leads to becomes a conclusion and suggestion. The conclusion is the ultimate meaning of the data that has been collected, directed at the main problem and the solution to the problem to be studied further (Amiruddin & Asikin, 2004).

Important Meaning of Free, Prior, And Informed Consent (FPIC) in Land Procurement Law for Indigenous Law Communities

A. The Relationship between the Concepts of Free, Prior, and Informed Consent with Public Consultation on Land Procurement

As an autonomous entity, indigenous and tribal people hold the right to self-determination (Lehr, 2012). FPIC, a concept born of the right to self-determination, is an important part of efforts to provide justice for their rights when dealing with the state. The embodiment of the FPIC was originally born from the agreement of the global community that FPIC is the right of indigenous people and, at the same time, is a state obligation (Charters & Stavenhagen, 2009). Regarding each element in FPIC, the author will explain it in Table 1.

Table 1: Explanation of the Elements of FPIC

Free	Agreements are given voluntarily without coercion, intimidation or manipulation. This element also refers to a process aimed at all kinds of people to be directly involved in the decision-making process.
Prior	Agreements are made in the early stages of an activity, or in the initial stages of development and investment plans, not only when a situation arises which requires the approval of indigenous and tribal communities. This element also refers to the time needed for the community to be able to process and analyse the information that has been obtained, as well as sufficient time to think about the best decision.
Informed	The nature of the activity conducted must be clearly explained. The information must be easily accessible, clear, consistent, accurate and transparent. In addition, information must be delivered objectively - the good and the bad of activity and the consequences of the relevant agreement. The information must also be complete without being covered up which includes the core of activity, objectives, area, impact, area affected, socio-economic and cultural impact, risk, personnel, and procedures for carrying out the activity.
Consent	This element refers to collective decisions by right-holders and is achieved through the customs and habits of the indigenous peoples concerned. Participation and consultation are an important part of reaching an agreement.

Sources: Food and Agriculture Organisation of the United Nations, 2016 and OHCHR, 2013.

Declarations on the Rights of Indigenous Peoples (UNDRIP) dan Convention concerns Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention No. 169). There are two main legal instruments to explore the principles of FPIC, namely Universal Declarations on the Rights of Indigenous Peoples (UNDRIP) and Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention No. 169). Based on the UNDRIP, FPIC involves the following aspects: forced displacement and relocation (Article 10); reparations and restitution as a tribute to cultural, intellectual, religious, spiritual expressions (Article 11); consultations regarding legislative policies (Article 19); compensation and restitution on land (Article 28); and environmental protection (Article 29). Specifically, in the context of national development, Article 32, paragraph 2 in which the UNDRIP has concretely explained:

*States shall **consult and cooperate** in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.*

Through textual interpretation, the author believes that UNDRIP firmly places the process of "consultation and cooperation" as an integral part of manifesting FPIC into the development projects of each country. The same thing has also been stated in ILO Convention No. 169. Based on the quo convention, in the context of respecting and protecting the rights of indigenous and tribal people, the government is obliged to consult with the community through proper procedures and involving representatives from the community when the state will draw up legislative and administrative policies that affect them directly. Then, Article 6 paragraph 2 confirms that "The consultations carried out in the application of this Convention shall be carried out, in good faith and in a form appropriate to the circumstances, to achieve agreement or consent to the proposed measures. "

Although the concept of FPIC contained in the UNDRIP and ILO Convention No. 169 emphasises the above statement, it does not mean that indigenous and tribal peoples can veto government policies when an agreement is not reached. The main reason is the above declaration does not place the indigenous community to own greater rights compared to other community groups. In addition, FPIC does not guarantee "consent" as a result (obligation of results) (Food and Agriculture Organisation of the United Nations, 2016).

The issue that has been established in the two conventions is the obligation of the government to make efforts and steps in the form of consultation and cooperation in obtaining an agreement (obligation of conduct). In certain perspectives, FPIC can be interpreted as a process, namely, a process of consultation and participation (Food and Agriculture Organisation of the United Nations, 2016; OHCHR, 2013). If it can be implemented properly, it will resolve various conflicts related to customary land.

Land acquisition law for public use in Indonesia is also inseparable from FPIC. One of the stages of land acquisition which, according to the author, is the actual form is public consultation. According to Article 19 paragraph (1) of the Land Procurement Law it is stated that public consultation on development plans is carried out to obtain an agreement on the location of the development plan from the Entitled Party.

Ter Haar has stated that indigenous communities are often understood as entities that can carry out an orderly law, legal personality, and even hold assets (Haar, 1962). Thus, it requires a different way of law enforcement in general. In terms of state development and land acquisition, FPIC exists as a process that encourages the creation of justice for indigenous and tribal people. Therefore, it can be concluded that public consultation, which is the process of making agreements on development plans normatively is part of FPIC.

B. Public Consultation and Problems on Customary Land

Juridical Construction of Public Consultation in Land Procurement

The Land Acquisition Law is the first law in Indonesia that specifically regulates land acquisition. This Law does not stand alone but is followed by further arrangements contained in Presidential Regulation Number 71 of 2012 governing the technical implementation of land acquisition, which was later amended again with Presidential Regulation Number 40 of 2014 and Presidential Regulation Number 99 of 2014 (Sudjarwo et al., 2015). In 2015, a *quo* Presidential Regulation changed again for the third and fourth time with Presidential Regulation Number 30 the Year 2015 and Presidential Regulation Number 148 the Year 2015.

Land acquisition for development in the public interest in Indonesia consists of several stages, starting from the planning stage, in which the agency that requires the land to convey to the governor up to the result delivery stage, namely the submission of the results of land acquisition by the head of the executor of the land acquisition to the agency that requires the land. Land acquisition is carried out through four stages, namely the stages of planning, preparation, implementation, and delivery of results.

One of the new nomenclatures that come along with the Land Acquisition Law is public consultation. Public consultation mechanisms are especially important to build public participation (Silalahi, Suhadi, & Anitasari, 2017). Public consultation in the land acquisition scheme is in the preparation stage carried out by the preparation team. Legally speaking, public consultation is a process of dialogical communication or consultation between interested parties to reach an understanding and agreement in the planning of land acquisition for the development of the public interest. This illustrates that in the positive law regarding land acquisition, there is a manifestation of the principle of consent. Therefore, the preparation team members must be able to provide confidence that the development in addition to having a public interest value will also provide economic and social benefits to indigenous and tribal people both whose lands are affected at large (Sumardjono, 2015).

In positive law, public consultation is regulated in Article 19-22 of the Land Acquisition Law and Article 29-40 of the Presidential Regulation on Land Acquisition which the author tries to describe the public consultation. The public consultation is carried out by agencies that require land by explaining, regarding the development plan and how to calculate compensation to be carried out by the appraiser, involving the rightful parties and affected people (for example the community directly bordering the location of the land), and is carried out at the place of the public interest development plan or at the place that has been agreed by both parties beforehand (Sudjito *et al.*, 2012).

Public consultation is held within 60 (sixty) working days. If up to a period of 60 (sixty) working days of the public consultation of the development plan there are parties who object to the planned location of the development, a redo on public consultations will be held with the opposing party no later than 30 (thirty) working days. However, if in the later public consultation there were still parties who objected to the planned construction site, the agency requiring the land reported the objection referred to the local governor.

The governor forms an objection review team to conduct a study of objections to the development plan, in which the results of the study are in the form of recommendations of whether or not objections to the development site plan are rejected. Based on the letter of recommendation, the governor issues a letter of acceptance or rejection of the quo objection, which must be issued within a maximum period of 14 (fourteen) working days from the day of the application received by the governor.

Criticism of the Governor's Decree on the Review of Public Objection

Gunanegara, in his book, states that there needs to be an opportunity for those affected by land acquisition to express their opinions and stand on government policies (Gunanegara, 2016). Apart from that, the party affected by land acquisition must have the opportunity to submit a rebuttal or objection to the construction site, the determination of the construction site, as well as the amount and form of compensation (Gunanegara, 2016). However, this is a contradiction as the governor holds the final decision against objections to the proposed construction site. If examined closely in the Land Acquisition Law and the Presidential Regulation on Land Acquisition, no criteria were found for the governor to accept or reject the objections of the indigenous community.

The absence of criteria for the governor to accept or reject an objection and the absence of a regulation that the governor must follow the recommendations made by the objection review team, causing the governor's decision on this objection to only be a decision based on political considerations. That is, when the governor is confronted with existing interests, often the interests of the indigenous and tribal peoples are defeated. If the rejection of the objection to this development plan is finally only based on the interests of what is prioritised by the governor, then the principle of consent that has been manifested in the positive law on land acquisition has become irrelevant.

The Ideal Concept of Public Consultation in Free, Prior and Informed Consent Land-Based Procurement

After analysing the root causes, the author will elaborate on FPIC that can be adjusted to the land acquisition law, especially concerning public consultation. **First**, the recognition and

legality of customary land as an integral problem from the main discussion of this research. As stated in Presidential Regulation No. 71 of 2012, indigenous and tribal people are one of the "Rightful Parties" - those who can control or own the object of land acquisition. Even so, the existence of indigenous and tribal people is recognised after conducting research and determined by local, regional regulations under Article 22 paragraph 2 of a quo Presidential Regulation. The arrangement is symmetrical with Ministry of Religious Affairs Regulation/ KaBPN No. 5 of 1999. A quo regulation formulates the implementation of customary land tenure, which determines whether there are still customary rights carried out by the relevant regional regulations.

The basic question is if there is no local regulation: whether the indigenous community is not an "Entitles Party" in the matter of administration of land acquisition, and at the same time, is not a holder of customary rights over customary land. Therefore, the author found that before carrying out a development plan in an area, the Regional Head in that area must carry out the process of identifying, verifying, and determining all customary territories that are scattered around in the area in question. The process of recognising and protecting customary rights should not only be carried out when the development in an area begins. The step was taken so that the Regional Head is not become held hostage by self-interest and politics when there is development in customary land; the purpose of pure recognition is to carry out the 1945 Constitution's command to respect the rights of indigenous and tribal peoples. This idea is in accordance with the "prior" principle of FPIC.

Second, as explained above, it is necessary to set a criterion for the Governor in rejecting or accepting objections from customary law communities. This idea provides more opportunities for indigenous and tribal people to determine their destiny and certainly under clear legal parameters.

Third, the public consultation process is carried out in accordance with the customary law of the indigenous community concerned. This idea is based on the writer's desire to meet the interests of the state with the interests of indigenous and tribal peoples because basically, public consultation is two-way communication. By respecting the legal order and the way of life of the indigenous and tribal communities, then the society is freer and have informed knowledge about a development project so that agreements will be easier to find a way. One example is carrying out deliberations and traditional meetings following local community representatives, namely traditional/tribe leaders. In addition, it is also necessary to carry out using local languages so that the information exchange process be held with no miscommunication.

The ideas conveyed by the author are part of the form of protection of the rights of indigenous and tribal people to their customary land by taking applicable land acquisition law in Indonesia into account (In the end, public consultation becomes a crucial part because without the

agreement in the public consultation the location cannot be determined and the development will be moved to another location. In addition, there will not be any problems related to compensation in the future. This is because if the Entitled Party has agreed in advance with the free, prior. Informed consent of the development plan, it will certainly anticipate conflict in the compensation issue, as it explains the role of the Appraiser in determining the value of Compensation, the object being assessed, and the form of Compensation as a part of the preparation by the Preparatory Team in the Public Consultation.

Conclusion

Legal instruments such as the UNDRIP and ILO Convention No. 169 is the main source in identifying concepts in FPIC. FPIC is not only understood as the rights of indigenous and tribal communities but is part of a long process to protect the rights of indigenous and tribal communities. The most important process in implementing FPIC in its entirety is the participatory and consultative process of cooperation. In the context of land acquisition law, FPIC can be manifested in a Public Consultation.

Public Consultation is part of the land acquisition preparation stage which is carried out by the preparation team in order to reach an understanding and agreement in land acquisition planning. The root cause of the Public Consultation problem is that there are no criteria for the Governor to accept or reject an objection to a development plan that causes the Governor's decision on this objection to only be a decision based on self or political interests. This contradicts the FPIC principle that should be applied in the land acquisition process. Regarding these problems, the government is suggested to take steps, namely (a) to acknowledge the indigenous community in the regions; (b) establish criteria for the Governor to refuse or accept objections; and (c) public consultations (as well as an overall land acquisition) that adjust to local customary law.

The government needs to conduct comprehensive socialisation to the community, not only for the indigenous community, but also related to land acquisition processes based on FPIC. This should be conducted so that all parties know their rights. The government also needs to harmonise a variety of legal instruments relating to indigenous communities and their customary lands. As this because regulation regarding land acquisition on customary land is not explained in detail in the Land Acquisition Law and its implementing regulations, but is spread in various regulations. Our specific recommendation to the regional government is to immediately formulate a Regional Regulation related to the livelihood of the indigenous and tribal peoples in their area. Thus, development planning can be done carefully and to not cause friction with these communities.

Indigenous and tribal communities must be proactive in fighting for their rights under FPIC. The community needs to explore information from the land acquisition organiser and continue to be critical of the work plans and performance of these institutions. The two-way approach is needed so that land acquisition practices do not deviate from national interests and the protection of indigenous and tribal communities.

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