

Protection of the Constitutional Rights of Indigenous Peoples in Mining Management: A Comparative Study of Indonesia and the Philippines

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Abstrak: Indonesia sebagai negara kepulauan dengan sebaran sumber daya alam yang luas menghadapi tantangan dalam menyeimbangkan pengelolaan pertambangan dengan perlindungan hak masyarakat hukum adat. Penelitian ini bertujuan menganalisis dan membandingkan perlindungan hak konstitusional masyarakat hukum adat dalam pengelolaan pertambangan di Indonesia dan Filipina serta mengidentifikasi persamaan dan perbedaannya. Penelitian menggunakan metode hukum normatif dengan pendekatan perundang-undangan, konseptual, dan perbandingan melalui studi kepustakaan terhadap bahan hukum primer, sekunder, dan tersier. Kebaruan penelitian terletak pada analisis komparatif yang menghubungkan landasan konstitusional, regulasi pertambangan, kelembagaan, mekanisme persetujuan dan partisipasi, implementasi, serta efektivitas perlindungan. Hasil penelitian menunjukkan kesamaan antara Indonesia dan Filipina terkait hak yang di miliki masyarakat hukum adat atas wilayah. Kedua negara mengintegrasikan hak-hak ini dalam kerangka kontrol negara atas sumber daya mineral, meskipun melalui pendekatan metodologis yang berbeda. Di Indonesia, pasal 18B ayat (2) tahun 1945 pengakuannya bersifat kondisional, memerlukan legislasi selanjutnya melalui undang-undang sektoral. Akibatnya, mekanisme perlindungan yang ada beroperasi secara reaktif dan saat ini belum memiliki legislasi khusus atau dukungan kelembagaan yang komprehensif. Sebaliknya, Filipina telah mencapai konsolidasi komprehensif atas pengakuan ini melalui Undang-Undang Hak-Hak Masyarakat Adat tahun 1997 dan pembentukan Komisi Nasional untuk Masyarakat Adat. Lebih lanjut, Filipina menerapkan mekanisme persetujuan bebas, sebelumnya, dan berdasarkan informasi yang mengikat secara hukum sebagai prasyarat untuk operasi pertambangan. Di area komunitas adat. Model Filipina ini bersifat antisipatif dan dianggap lebih efektif dibandingkan dengan model Indonesia, meskipun masih ada tantangan yang harus dihadapi dalam pengawasan pelaksanaannya di lapangan. berdasarkan hasil penelitian ini ada tiga hal yang penulis usulkan sebagai saran, penguatan pengakuan terhadap hak konstitusional masyarakat hukum adat, harmonisasi sistematis regulasi sektoral yang berkaitan wilayah adat secara sistematis dan jaminan demi mewujudkan kepastian hukum, keadilan substantif.

Kata Kunci: Hak; Konstitusi; Adat; Pertambangan

Abstract: As an archipelagic nation with widely distributed natural resources, Indonesia faces the challenge of balancing mining management with the protection of the rights of customary law communities. This study aims to analyze and compare the constitutional protection of customary law communities' rights regarding mining management in Indonesia and the Philippines, identifying their similarities and differences. The research employs a normative legal method utilizing statutory, conceptual, and comparative approaches based on a literature review of primary, secondary, and tertiary legal materials. The study's novelty lies in its comparative analysis linking constitutional foundations, mining regulations, institutional frameworks, consent

and participation mechanisms, implementation, and the effectiveness of protection. The findings reveal similarities between Indonesia and the Philippines regarding the rights customary law communities hold over their territories. Both nations integrate these rights within a framework of state control over mineral resources, albeit through differing methodological approaches. In Indonesia, recognition under Article 18B, Paragraph (2) of the 1945 Constitution is conditional, requiring further implementation through sectoral legislation. Consequently, existing protection mechanisms operate reactively and currently lack specific legislation or comprehensive institutional support. In contrast, the Philippines has achieved comprehensive consolidation of this recognition through the Indigenous Peoples' Rights Act of 1997 and the establishment of the National Commission on Indigenous Peoples. Furthermore, the Philippines implements a legally binding Free, Prior, and Informed Consent (FPIC) mechanism as a prerequisite for mining operations in indigenous community areas. This Philippine model is anticipatory and considered more effective than the Indonesian model, although challenges regarding the oversight of its implementation in the field remain. Based on these findings, the author proposes three recommendations: strengthening the recognition of the constitutional rights of customary law communities; systematically harmonizing sectoral regulations concerning customary territories; and ensuring legal certainty and substantive justice.

Keywords: Rights; Constitution; Customary Law; Mining



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A. INTRODUCTION

Indigenous peoples are part of Indonesia's social and legal structure, and their existence predates the establishment of the Unitary State of the Republic of Indonesia. The existence of indigenous peoples is not only related to cultural identity but also encompasses legal relationships with territories, land, natural resources, institutions, and customary laws that have developed and been preserved from generation to generation. In a democratic state governed by the rule of law, this condition necessitates the recognition and protection of the rights of indigenous peoples as part of the respect for constitutional rights. Similar issues have also developed in Southeast Asia, where the interests of indigenous peoples confront the pressures of development and natural resource exploitation. The issue of protection becomes increasingly complex when the rights of indigenous peoples intersect with natural resource management, particularly mining. Exploration and exploitation activities may directly affect territories, land, and resources that have traditionally formed an integral part of the lives of indigenous peoples. In the Indonesian context, Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides the constitutional basis for the recognition of customary law communities, while Article 33 paragraph (3) places the management of natural resources within the framework of state control for the greatest prosperity of the people. Such state control must be exercised with due regard to the rights of indigenous peoples and cannot be construed as authority that disregards rights that have historically existed and been maintained.[1]

Within the Indonesian legal system, constitutional recognition of indigenous peoples has not yet fully resulted in effective protection in the management of mining activities. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia establishes requirements concerning the existence of customary law communities, their development, the principles of the Unitary State of the Republic of Indonesia, and further regulation through legislation. This legal construction makes protection highly dependent on sectoral regulations and administrative recognition processes.[2] At the same time, mining regulations continue to face challenges in ensuring the protection, participation, transparency, and accountability of affected communities. In contrast to Indonesia, the Philippines has developed a framework for the protection of indigenous peoples through a combination of constitutional provisions and specific legislation. The Indigenous Peoples' Rights Act (IPRA) of 1997 recognizes indigenous peoples' rights to ancestral domains and ancestral lands, cultural identity, indigenous governance, and participation in natural resource management. This framework is supported by the National Commission on Indigenous Peoples (NCIP) and the Free, Prior and Informed Consent (FPIC) mechanism. In the context of mining, FPIC positions the consent of indigenous peoples as a preventive instrument that must be obtained before activities affecting indigenous territories are carried out.[3]

Previous studies have generally examined various aspects of indigenous peoples' protection in Southeast Asia, the impact of Indonesian mining regulations, the protection of indigenous peoples' human rights in the mining sector, and, more specifically, FPIC. Other studies have focused on indigenous peoples' participation in the formulation of mining laws, the recognition of customary territories, and the protection of land rights. Although previous research has provided an important foundation, a research gap remains. Existing studies tend to address these issues separately, whether from the perspectives of customary rights, mining regulations, human rights protection, recognition of customary territories, or FPIC. Comparative studies between Indonesia and the Philippines have also tended to focus primarily on the FPIC mechanism. There remains limited research that comprehensively connects constitutional foundations, regulatory design, institutional arrangements, consent and participation mechanisms, implementation, and the effectiveness of protection within a single comparative framework.[4]

The novelty of this research lies in its analytical construction, which comprehensively compares the protection of the constitutional rights of indigenous peoples rather than merely comparing the existence of legal norms or FPIC mechanisms. The comparison encompasses the constitutional foundations, legal frameworks governing the protection of indigenous peoples in the mining sector, consent and participation mechanisms, implementation, effectiveness, as well as the similarities and differences between the Indonesian and Philippine legal systems.[5] This research aims to analyze and compare the protection of the constitutional rights of indigenous peoples in mining management in both countries and to identify the similarities and differences between their respective legal systems.[6]

B. METHOD

This research employs a normative (doctrinal) legal research method, examining law as norms or rules applicable within the legal system through library research involving primary, secondary, and tertiary legal materials. The research approaches include the statute approach, conceptual approach, and comparative approach. The statute approach is used to examine provisions concerning the constitutional rights of indigenous peoples and mining management in Indonesia and the Philippines. The conceptual approach is employed to analyze the concepts of constitutional rights, indigenous peoples, customary rights, Free, Prior and Informed Consent (FPIC), and legal protection. The comparative approach is used to identify the similarities, differences, strengths, and weaknesses of each legal system. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, legislation concerning mining and environmental management, Constitutional Court Decision No. 35/PUU-X/2012, the 1987 Constitution of the Philippines, the Indigenous Peoples' Rights Act of 1997, and the Philippine Mining Act of 1995. Secondary legal materials consist of relevant scholarly journals and legal literature, while tertiary legal materials comprise sources that provide explanations of primary and secondary legal materials. The legal materials are analyzed qualitatively through legal interpretation and legal reasoning to produce a comparative analysis of the legal framework, institutional arrangements, consent and participation mechanisms, implementation, and the effectiveness of legal protection in both countries.[7]

C. DISCUSSION

1. Constitutional Foundations for the Protection of the Rights of Indigenous Peoples.

Konstitusi The Constitutions of Indonesia and the Philippines both recognize indigenous peoples as part of the constitutional structure of the state, but they adopt fundamentally different formulations. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides for state recognition of customary law communities and their traditional rights on a conditional basis, namely insofar as such communities remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia, with implementation further regulated by legislation. The 1987 Philippine Constitution formulates such recognition differently: Article XII, Section 5, explicitly mandates the State to protect the rights of Indigenous Cultural Communities to their ancestral domains in order to ensure their economic, social, and cultural well-being, without making such recognition contingent upon the continued existence of indigenous communities as stipulated in Article 18B paragraph (2) of the Indonesian Constitution. Jimly Asshiddiqie emphasizes that one of the characteristics of constitutional rights is their fundamental nature; therefore, any action by a state organ that violates such rights should be capable of being declared null and void by a court. When this benchmark is applied to Article 18B paragraph (2) of the Indonesian Constitution, it becomes apparent that recognition is subject to two cumulative conditions, thereby making the constitutional rights of customary law communities conditionally recognized rather than rights that can automatically be defended before a court.[8]

Indonesia's constitutional system, to date, primarily provides a mechanism for reviewing legal norms through the Constitutional Court, while challenges against concrete actions by

public officials—for example, the issuance of mining business licenses over customary territories that have not yet been formally recognized—do not have a dedicated constitutional forum. Constitutional Court Decision No. 35/PUU-X/2012, which excluded customary forests from the category of state forests, constituted an important legal breakthrough. Nevertheless, it still requires stages of identification, verification, and determination by local governments as regulated under Minister of Home Affairs Regulation No. 52 of 2014. Consequently, the conditional nature of recognition remains applicable even after a judicial decision favorable to indigenous communities. When analyzed using Philipus M. Hadjon's dichotomy of preventive and repressive legal protection, Indonesia's mining regulatory framework provides predominantly repressive forms of protection.[9] The participatory principle under the Mineral and Coal Mining Law has not been accompanied by clear legal consequences, as the absence of consultation with affected communities is not expressly formulated as grounds for the revocation or annulment of a mining business license. This condition is further exacerbated by difficulties in proving customary rights. According to Boedi Harsono, the existence of customary rights can only be established when three elements can be demonstrated in practice: the existence of a community group, a territory recognized as jointly owned, and a customary authority exercising its powers. This burden of proof is often difficult for indigenous communities to satisfy when their territories have not been administratively mapped.[10]

The Philippine legal framework demonstrates a different pattern. The constitutional mandate to protect the rights of Indigenous Cultural Communities is articulated in a unified and consolidated manner through the Indigenous Peoples' Rights Act (IPRA) of 1997, rather than being dispersed across various sectoral laws as in Indonesia. IPRA designates a single specialized institution, the National Commission on Indigenous Peoples (NCIP), as the principal authority responsible for implementing these rights. A significant distinguishing feature is the incorporation of the Free, Prior and Informed Consent (FPIC) principle as an absolute prerequisite before mining exploration or exploitation activities may be carried out within indigenous territories. FPIC represents a concrete form of preventive legal protection because the consent of indigenous communities constitutes a prerequisite for the lawful establishment of a business activity, rather than merely a non-binding consultation procedure. Nevertheless, a critical perspective remains necessary. Article XII, Section 2 of the Philippine Constitution continues to place all mineral resources under state ownership through the Regalian Doctrine, which is philosophically comparable to the doctrine of state control over natural resources.[1] Consequently, recognition of ancestral domains remains situated within the framework of state sovereignty over natural resources. Moreover, the issuance of a Certificate of Ancestral Domain Title by the NCIP still requires proof of traditional and intergenerational possession, which, in substance, imposes an administrative burden comparable to the process of formally recognizing customary law communities through regional regulations in Indonesia.[11]

2. Regulation on the Protection of Indigenous Peoples in Mining Management.

At the level of statutory regulation, the differences in the legal architecture of the two countries become increasingly apparent. In Indonesia, the regulation of indigenous peoples in the context of mining is dispersed across various sectors. Law No. 4 of 2009 on Mineral and Coal Mining, as amended by Law No. 2 of 2025 (the "Mineral and Coal Mining Law"),

regulates mining business licensing without establishing a specific and binding mechanism concerning the consent of indigenous peoples. The Village Law recognizes customary villages but does not specifically regulate the mining sector, while the recognition of the existence of indigenous peoples remains dependent on regional regulations. The Draft Law on Indigenous Peoples, which could serve as a unifying *lex specialis*, has yet to be enacted, despite having been discussed for more than a decade. The Philippines has taken a different approach by enacting the Indigenous Peoples' Rights Act (IPRA) of 1997 as a comprehensive special law. IPRA recognizes ancestral domains and ancestral lands through the instruments of the Certificate of Ancestral Domain Title and Certificate of Ancestral Land Title, while establishing the National Commission on Indigenous Peoples (NCIP) as a permanent institution authorized to issue certification before any government agency, including the mining sector regulated under the Philippine Mining Act of 1995, may issue an exploitation permit within ancestral domains. The sharpest difference lies in the mechanism for involving indigenous peoples before mining permits are issued. Through its certification precondition, IPRA requires every government agency to obtain certification from the NCIP confirming that the FPIC process has been conducted and approved by the relevant indigenous community before any concession, license, or permit affecting ancestral domains may be issued. Within this framework, FPIC is not merely a consultation forum but a legally determinative requirement—a *gatekeeping requirement*—that grants indigenous peoples the right to approve or reject proposed mining activities within their territories. Indonesia has not yet established a nationally binding FPIC norm in the mining sector. Public participation is primarily accommodated through public consultation mechanisms in the preparation of Environmental Impact Assessment (AMDAL) documents under Law No. 32 of 2009, which essentially functions as a forum for hearing public views rather than a legally binding consent mechanism determining whether a mining business license may be issued. The theory of customary rights emphasizes that the authority of indigenous peoples over land and natural resources (*beschikkingsrecht*) should also encompass the authority to consent to or reject resource utilization by external parties. Indonesia's mining law framework has not fully accommodated this power of rejection, resulting in customary rights being reduced in practice to a right to be heard rather than a right to determine.

At the implementation level, both countries demonstrate a similar gap between written norms (*das Sollen*) and actual practice (*das Sein*), although the patterns of the problems differ. In Indonesia, the implementation of Constitutional Court Decision No. 35/PUU-X/2012 remains dependent on the enactment of regional regulations and administrative processes for recognizing indigenous peoples, which have progressed slowly and inconsistently across regions. Consequently, many areas factually inhabited by indigenous communities remain classified as state forest areas that are open to mining business licenses without the consent of the local communities. In the Philippines, the issuance of certificates for ancestral territories by the NCIP is known to take years, resulting in continued overlaps between mining claims and uncertified ancestral domains. Several studies have also noted that FPIC processes in practice remain vulnerable to manipulation through local elite influence, thereby reducing the substantive meaning of the “free” and “informed” elements of FPIC to an administrative formality.

Assessing the effectiveness of legal protection requires a benchmark based on the extent to which preventive and repressive protection genuinely function to prevent and remedy violations of the rights of indigenous peoples. Legal protection in Indonesia can be characterized as having a low level of effectiveness due to four cumulative factors: the conditional nature of constitutional recognition, the absence of an integrated special law, the absence of a binding FPIC norm, and the slow and inconsistent administrative recognition process through regional regulations. Legal protection in the Philippines can be characterized as having a moderate level of effectiveness because it possesses a constitutional basis of recognition, a comprehensive special law, a permanent institutional framework, and a formally preventive FPIC mechanism. Nevertheless, its effectiveness is diminished by governance problems, the potential manipulation of consultation processes, and the institutional capacity limitations of the NCIP. Comparatively, the Philippines is relatively stronger in terms of legal design and institutional architecture, whereas Indonesia faces more fundamental problems because its weaknesses arise from the legal design itself.[12]

A comparison of the legal systems of the two countries reveals four fundamental similarities. First, both legal systems subject indigenous peoples' rights to the doctrine of state control over natural resources, through the doctrine of state control (*hak menguasai negara*) in Indonesia and the Regalian Doctrine in the Philippines. Consequently, indigenous peoples' rights remain positioned as derivative rights rather than as independent ownership rights. Second, both countries require an administrative recognition procedure as a prerequisite for the concrete application of legal protection. Functionally, therefore, both countries adopt a *conditionally recognized* model, although the degree of formalization differs. Third, both national legal frameworks are influenced by international legal norms concerning indigenous peoples, particularly ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Fourth, both systems designate specific institutions as the final safeguards when administrative mechanisms fail to protect the relevant rights, namely the Constitutional Court in Indonesia and the NCIP dispute-resolution mechanism in the Philippines.[13]

The differences between the two legal systems can be identified across five aspects. First, in terms of legal instruments, Indonesia regulates the rights of indigenous peoples through dispersed legislation without a specific law, whereas the Philippines has consolidated such rights into a single comprehensive statute, namely IPRA. Second, in terms of the nature of protection, FPIC in the Philippines constitutes a legal prerequisite for mining activities and is therefore preventive and binding, whereas the participatory principle in Indonesia is not accompanied by the legal consequence of license annulment and is therefore predominantly repressive. Third, in terms of institutional arrangements, the Philippines has the NCIP as a specialized and integrated institution, whereas Indonesia has no equivalent institution, with authority instead distributed among various sectoral ministries. Fourth, in terms of the trajectory of legal development, FPIC in the Philippines emerged proactively a decade before the adoption of UNDRIP, whereas Indonesia's Minister of Home Affairs Regulation No. 52 of 2014 was enacted reactively following Constitutional Court Decision No. 35/PUU-X/2012.[14] Fifth, the legal consequences of violations of rights differ significantly: violations of FPIC obligations in the Philippines may constitute grounds for the annulment of a mining permit, whereas in Indonesia violations affecting the interests of indigenous

peoples generally result only in an obligation to provide compensation, without automatically annulling an already-issued mining business license.

Table 1. Comparison of the Protection of Indigenous Peoples' Rights in Mining Management: Indonesia and the Philippines

Aspect	Indonesia	Philippines
Constitutional basis	Article 18B paragraph (2) of the 1945 Constitution: conditional recognition (<i>conditionally recognized</i>)	Article XII, Section 5 of the 1987 Constitution: recognition without a requirement concerning the continued existence of indigenous communities
Legal instruments	Dispersed across the Mineral and Coal Mining Law, Village Law, and regional regulations, without a specific law	IPRA 1997 as a comprehensive special law
Institutional framework	No equivalent specialized institution; authority is distributed among sectoral ministries	NCIP as a specialized and integrated institution
Consent mechanism	Public consultation through the AMDAL process; functions as a forum for hearing views and is not legally binding	FPIC as a certification precondition; legally binding
Nature of protection	Predominantly repressive, without clear legal consequences	Preventive, as a prerequisite for the lawful establishment of mining activities
Consequences of violations	Generally an obligation to provide compensation, without automatic annulment of the permit	May constitute grounds for the annulment of a mining permit

Source: Prepared by the author based on the analysis and comparison presented in Discussion Sections 1–4.

The dynamics of protecting indigenous peoples' rights in Indonesia did not emerge suddenly but rather represent the result of a lengthy legal construction. A fundamental distinction exists between indigenous peoples as a social reality existing within society and indigenous peoples as a legally recognized form of that social reality. At first glance, this distinction may appear to be merely an academic classification; however, it determines who possesses rights over a territory and who does not. It also functions as an instrument of legal policy that indirectly facilitates state control over access to mineral resources through selective and conditional recognition mechanisms. Interpreting Article 33 paragraph (3) of the 1945 Constitution as placing state control over natural resources in an absolute position constitutes a departure from the spirit of the Constitution. State control should instead be understood as a form of public authority to regulate, protect, and balance various interests in the management of natural resources, rather than as a basis for eliminating or taking over the customary rights of indigenous peoples.[15]

From this perspective, mining conflicts occurring in various indigenous territories are not merely conflicts between communities and mining companies. Rather, they represent

conflicts between the state's interpretation of its authority and the rights of indigenous peoples that have existed long before the establishment of the state. The recognition of indigenous peoples should not be positioned as the granting of rights by the state, but rather as the recognition of rights that have historically, sociologically, and legally existed. The comparative findings from the Philippines demonstrate that a declaratory recognition mechanism accompanied by a binding consent requirement through FPIC provides more substantive protection than a constitutive recognition mechanism that depends entirely on the discretion of the legislative authority. Therefore, resolving mining conflicts in Indonesia's indigenous territories cannot be adequately addressed solely through administrative or licensing approaches. Instead, it requires a paradigm shift in the state's approach—from viewing recognition as a right dependent upon a state decision toward a paradigm that recognizes the rights of indigenous peoples as constitutional rights that predate the establishment of the state.

D. CONCLUSION

Perlindungan hak konstitusional masyarakat hukum adat Indonesia dan Filipina dalam pengelolaan pertambangan sama-sama berangkat dari pengakuan terhadap keberadaan dan hak masyarakat adat serta tetap berada dalam kerangka penguasaan negara atas sumber daya alam, tetapi berbeda pada desain hukum dan tingkat efektivitasnya. Indonesia menganut pengakuan konstitusional yang bersyarat, pengaturan yang tersebar dalam berbagai rezim sektoral, serta belum memiliki mekanisme FPIC yang mengikat secara nasional sebagai prasyarat penerbitan izin pertambangan, sehingga perlindungannya cenderung reaktif. Filipina mengonsolidasikan perlindungan melalui IPRA, NCIP, pengakuan ancestral domain, dan FPIC sebagai mekanisme preventif yang lebih kuat, meskipun implementasinya tetap menghadapi persoalan pengawasan dan kapasitas kelembagaan. Persamaan kedua negara terletak pada pengakuan hak masyarakat adat dan tetap berlakunya kewenangan negara atas sumber daya alam, sedangkan perbedaannya terletak pada konsolidasi regulasi, kelembagaan, mekanisme partisipasi, dan konsekuensi hukum. Berdasarkan temuan tersebut, penguatan perlindungan di Indonesia perlu diarahkan pada kepastian pengakuan wilayah adat, harmonisasi regulasi, penguatan partisipasi dan persetujuan masyarakat hukum adat, serta kelembagaan perlindungan yang lebih terintegrasi

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