INDIGENOUS PEOPLE' PARTICIPATIONS IN THE LAW-MAKING PROCESS: A COMPARATIVE STUDY OF INDONESIA AND CONSULTA PREVIA LENS IN BOLIVIA

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Abstract

Indonesia constitutionally defines itself as a *rechtsstaat* grounded in democracy and popular sovereignty, where every law must reflect the will and welfare of the people. The Constitutional Court affirms that legislation-making must guarantee public participation as a manifestation of democratic legitimacy. However, the involvement of *indigenous peoples* in Indonesia's legislative process remains weak, limited to symbolic participation without meaningful influence on policy outcomes. This study aims to compare Indonesia's mechanism for indigenous participation in law-making with Bolivia's *consulta previa* system, which institutionalizes the *Free, Prior and Informed Consent* (FPIC) principle as a constitutional right. Employing a normative juridical method and comparative legal analysis, this research examines constitutional provisions, statutory frameworks, and international norms, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169. The findings reveal that while Indonesia has acknowledged indigenous rights through Article 18B (2) of the 1945 Constitution and sectoral regulations such as the Forestry Law, the absence of a specific legal mechanism for consultation leads to repeated conflicts, especially concerning land and resource governance. In contrast, Bolivia's *consulta previa* establishes a binding consultation process that empowers indigenous communities to influence decisions affecting their territories. This research method is a normative legal study with concludes that adopting a contextualized version of *consulta previa* in Indonesia could enhance substantive democracy, ensure equitable development, and prevent state-driven marginalization of indigenous communities within legislative and policy frameworks.

Keywords: ***Consulta Previa*, Meaningful Participation, Indigenous Peoples, Legislative Process.**

I. INTRODUCTION

A. Background

Indonesia, constitutionally, is a state governed by the rule of law (*rechtsstaat*) and upholds democracy based on the sovereignty of the people. Pancasila and the Preamble to the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Constitution) affirm that independence and social justice constitute the ultimate goals of the state, thereby placing the highest authority "in the hands of the

people."[1] The concept of "from the people, by the people, and for the people" signifies that the administration of government and the formulation of regulations must involve the participation of society as the bearer of sovereignty.[2] The Constitutional Court also emphasizes that in the process of lawmaking, there must be space for public participation as a manifestation of the people's sovereignty.[3] The Constitutional Court explicitly asserts that the lawmaking process cannot be separated from public involvement, as it represents the manifestation of popular sovereignty within a democratic state governed by the rule of law.

The Constitutional Court affirms that the utilization of natural resources is fundamentally carried out by the State as a unified entity, with the primary objective of achieving the greatest possible prosperity for the people. This objective is elaborated into four key aspects: first, the utilization of natural resources for the benefit of the people; second, the equitable distribution of welfare derived from natural resources among the populace; third, the level of public participation in the utilization of natural resources; and fourth, the continuous recognition of communities in the sustainable use of natural resources.[4] Based on the foregoing, it is essentially recognized that the public at large possesses the right to participate in determining the allocation and utilization of natural resources, including the right to decide on development projects to be implemented within their territories. In addition, the State is obliged to respect the rights of communities that have existed and been exercised hereditarily. Such recognition has been widely acknowledged both in the realm of international law and within the framework of national law.[5]

Indonesia officially recognized the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13 September 2007. UNDRIP is a declaration adopted by the United Nations aimed at protecting the rights of indigenous communities.[6] One of the core substances of UNDRIP is the principle of *Free, Prior, and Informed Consent (FPIC)*[7] which is often translated as *consent based on prior*

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1 Muhamad Irsyad Hanafi et al., "Penerapan Partisipasi Masyarakat Dalam Pembentukan Peraturan Perundang-Undangan," *Constitution Journal* 3, no. 2 (2024): 193–210, https://doi.org/10.35719/constitution.v3i2.113.

2 Hanafi et al., "Penerapan Partisipasi Masyarakat Dalam Pembentukan Peraturan Perundang-Undangan."

3 Muhamad Khoirul Wafa, "Peran Dan Partisipasi Masyarakat Dalam Pembentukan Undang-Undang," *Siyasah Jurnal Hukum Tatanegara* 3, no. 1 (2023): 85–100, https://doi.org/10.32332/siyasah.v3i1.6883.

4 Maria S.W Sumardjono, *Semangat Konstitusi Dan Alokasi Yang Adil Atas Sumber Daya Alam* (Penerbit Fakultas Hukum Universitas Gadjah Mada, 2014).

5 Winarsih and Cahya Wulandari, "Implementation of the Principles of Free, Prior and Informed Consent in the Field of Natural Resources Utilization within the Indonesian Regulatory Framework," *Annual Review of Legal Studies* 1, no. 2 (2024): 289–322, https://doi.org/10.15294/arls.vol1i2.6136.

6 This Declaration enshrines their rights to culture, identity, language, employment, health, education, and other fundamental entitlements. It proscribes discrimination against Indigenous peoples and advocates for the clarity of their rights and the realization of their self-determined vision for their own economic and social development. Furthermore, the Declaration reiterates the concept of 'free, prior, and informed consent' (FPIC—often translated here as 'persetujuan atas dasar informasi awal tanpa tekanan') concerning the safeguard of customary lands and resources. *Ibid*.

7 Initially, the concept of FPIC (Free, Prior, and Informed Consent) was utilized to safeguard the interests of patients in hospitals, who should personally be apprised of every process and type of medical treatment they would undergo. One of the formal codifications of Prior Informed Consent (PIC) is the 1947 Nuremberg Code, which pertains to the prerequisites for conducting medical research and experiments on human subjects. It is from this foundation that the PIC concept, which subsequently evolved into FPIC, was diffused to various

information given freely and without coercion, as stipulated in Article 9 of UNDRIP, which states 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.*

Based on these provisions, prior to the implementation of any development or investment project, it must first be ensured that any project to be carried out within the territory of local or indigenous communities has obtained prior consent freely given by those communities. This implies that the communities possess the right to express either acceptance or rejection of any proposed development project or business plan intended for their territories. Furthermore, Indonesia has previously played an active role in several conventions and declarations that embody the principle of *Free, Prior, and Informed Consent (FPIC).*[8]

The participation or access of indigenous or local communities in the formulation of regulations is stipulated in Law Number 41 of 1999 concerning Forestry.[9] This indicates that, ideally, forestry regulations should incorporate public aspirations in every stage of policy formulation. One such policy concerns the issuance of forest utilization permits by the government for forests located within the territory of Indonesia. Furthermore, forests within Indonesian territory, by virtue of their control and management, are vested in the State and are to be utilized to the greatest possible extent for the prosperity of the people[10] including customary forests located within the territories of indigenous communities.[11]

According to data from the *Indigenous Peoples Alliance of the Archipelago (AMAN),* the indigenous population in Indonesia is estimated to range between 40 to 70 million people, comprising more than 2,000 groups. However, state recognition of their rights remains limited, particularly in the process of lawmaking. Moreover, the recognition of indigenous peoples is still weak at the implementation level due to the absence of a specific law that comprehensively regulates their special and distinct rights. On the other hand, AMAN observes that the situation faced by indigenous peoples in Indonesia is expected to deteriorate further by 2025. The majority of

non-medical activities. FPIC, originally an individually-focused medical-normative clause, has currently been metamorphosed into various communal tenets of international law. *Ibid.*

8 Winarsih and Cahya Wulandari, "Implementation of the Principles of Free, Prior and Informed Consent in the Field of Natural Resources Utilization within the Indonesian Regulatory Framework."

9 The preamble of the Forestry Law (*UU Kehutanan*) acknowledges that sustainable and globally-minded forest management must accommodate the dynamic aspirations and participation of society, customary practices, and culture, as well as the societal value system based upon national legal norms.

10 Article 4 paragraph (1) of Law Number 41 of 1999 concerning Forestry

11 One of the prerequisites for an Indigenous community to be entitled to rights over customary forests (*hutan adat*) is to secure local government recognition. This is stipulated in Article 67 paragraph (2) of the Forestry Law, which asserts that the affirmation of the existence and cessation of customary law communities shall be established by a Regional Regulation (*Peraturan Daerah*).

conflicts involving indigenous communities concern land disputes, with large-scale plantation sectors being the predominant source of such conflicts.[12]

Revisiting the FPIC principle as stipulated in international standards concerning the rights of indigenous peoples, the exclusion of indigenous communities from the lawmaking process essentially constitutes a violation of the FPIC principle by the Government.[13] The Government should, therefore, involve and obtain the consent of indigenous communities prior to making any decision that may affect them. Legislation formulated without adherence to the FPIC principle results in regulations that fail to represent the interests of indigenous peoples. In fact, indigenous communities play a vital role, particularly given the diversity and frequency of conflicts that often involve them within customary territories targeted for development by both the government and private corporations.[14]

Learning from lessons in another countries with comprehensive regulatory frameworks, Bolivia stands out as one of the most progressive nations in the world in recognizing the rights of indigenous peoples enshrining such recognition, including the right to *Consulta Previa* (Prior Consultation), as a fundamental right explicitly guaranteed in its 2009 Constitution. In contrast, in Indonesia, indigenous peoples who are among the groups most affected by legislative policies in the fields of natural resources and development often find themselves marginalized in the legislative process. The core issue lies in the absence of a specific mechanism governing the involvement of indigenous communities in lawmaking, where their participation should, in principle, be treated on an equal footing with public participation in general.

Therefore, this study seeks to describe and analyze the comparative mechanisms of indigenous community participation in the lawmaking process in Indonesia and the Consulta Previa system in Bolivia, as well as to examine the extent to which the principles applied in Bolivia can be adapted within the Indonesian legal system to strengthen the involvement of indigenous communities in the legislative process.

B. Research Question

Based on the introduction, the identification of problems serving as the scope and limitation of the issues addressed by the author is as follows:

1. How is the realization of the participatory rights of indigenous communities in the lawmaking process in Indonesia?
2. How is the conceptualization of meaningful participation for indigenous communities in Indonesia compared with the Consulta Previa mechanism in Bolivia?

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12 Tempo.co, *AMAN Catat Ada 110 Konflik Melibatkan Masyarakat Adat Pada Januari-Maret 2025*, 2025, https://www.tempo.co/lingkungan/aman-catat-ada-110-konflik-melibatkan-masyarakat-adat-pada-januari-maret-2025-1220964.

13 Nadya Demadevina, *FPIC: Sering Mengemuka, Jarang Diperdalam*, 2020, https://www.huma.or.id/masyarakat-adat/opini-huma-fpic-sering-mengemuka-jarang-diperdalam.

14 Apriadi Gunawan, *Mendorong Masyarakat Adat Pastikan Implementasi FPIC*, November 30, 2022, https://aman.or.id/news/read/1505.

C. Research Method

This research applies a normative juridical method combined with a comparative legal approach. The normative juridical method is used to analyze legal principles, statutory provisions, and constitutional norms governing indigenous participation in law-making. Meanwhile, the comparative approach examines differences and similarities between Indonesia's legislative framework and Bolivia's *consulta previa* model. The study relies on primary legal materials such as the 1945 Constitution of the Republic of Indonesia, Law No. 12 of 2011 (as amended by Law No. 13 of 2022), and the 2009 Constitution of Bolivia, as well as secondary sources including scholarly articles, legal commentaries, and international instruments like UNDRIP and ILO Convention No. 169. The data are analyzed qualitatively through doctrinal interpretation to evaluate the extent to which *consulta previa* principles can be integrated into Indonesia's legislative system.

II. DISCUSSION

1. The Realization of Indigenous Peoples' Participatory Rights in the Lawmaking Process in Indonesia

A. Theoretical Review on Public Participation

Public participation may take the form of any process that directly involves the public in decision-making and gives full consideration to public input in the course of such decision-making.[15] Public participation is a process rather than a single event. It consists of a series of activities and actions undertaken by parties that may affect the public and make decisions throughout the entire lifespan of a project, aimed at informing the public and obtaining their input. Public participation provides stakeholders those who have an interest or stake in an issue, such as individuals, interest groups, and communities with the opportunity to influence decisions that will affect their lives.

It can thus be concluded that the existence of public participation is not merely about opening spaces for involvement, but about how such aspirations are actively sought, adequately accommodated, and ultimately reflected in the decisions made. This also entails reaffirming the principle of transparency in the lawmaking process itself. Neglecting these essential aspects of public participation in legislative formation leads to the creation of discriminatory legal products from their inception, thereby violating the principles of legislative content as stipulated in Article 6 of Law Number 12 of 2011 concerning the Formation of Laws and Regulations, since such laws accommodate only a portion of the interests or needs of stakeholders. Furthermore, the Constitutional Court, in its consideration of Case Number 91/PUU-XVIII/2020, elaborated on the purpose of public participation.[16]

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15 EPA, *Public Participation Guide: Introduction to Public Participation*, 2025, https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation.

16 M Nurul Fajri, "Legitimacy Of Public Participation In The Establishment Of Law In Indonesia," *Jurnal Konstitusi* 20, no. 1 (2023): 123–43, https://doi.org/10.31078/jk2017.

In its ruling, the Constitutional Court stated that public participation in the lawmaking process aims, among other things, to: *(i)* create strong collective intelligence that can provide better analysis of potential impacts and broader considerations in the legislative process, thereby enhancing the overall quality of outcomes; *(ii)* build a more inclusive and representative legislature in decision-making; *(iii)* increase citizens' trust and confidence in legislative institutions; *(iv)* strengthen shared legitimacy and responsibility for every decision and action taken; *(v)* improve public understanding of the roles of parliament and its members; *(vi)* provide opportunities for citizens to communicate their interests; and *(viii)* establish a more accountable and transparent parliament.[17]

A typology of eight levels of participation may help in analysis. For illustrative purposes the eight types are arranged in a ladder pattern with each rung corresponding to the extent of citizens power in determining the end product.[18] The bottom rungs of the ladder are (1) *Manipulation* and (2) *Therapy.* These two rungs describe levels of "non-participation" that have been contrived by some to substitute for genuine participation. Their real objective is not to enable powerholders to "educate" or "cure" the participants. Rungs 3 and 4 progress to levels of "tokenism" that allow the have-nots to hear and to have a voice: (3) *Informing* and (4) *Consultation.* When they are proffered by powerhorders as the total extent of participation, citizens may indeed hear and be heard. But under these conditions they lack the power to insure that their views will be heeded by the powerful. When participation is restricted to these levels, there is no followthrough, no "muscle", hence no assurance of changing the status quo. Rung (5) *Placation,* is simply a higher level tokenism because the groundrules allow have-nots to advise, but retain for the powerholders the continued right to decide.[19]

Further up the ladder are levels of citizen power with increasing degrees of decision-making clout. Citizens can enter into a (6) *partnership* that enables them to negotiate and engage in trade-offs with traditional powerholders. At the topmost rungs, (7) *Delegated Power* and (8) *Citizen Control,* have-not citizens obtain the majority of decision-making seats, or full managerial power.[20]

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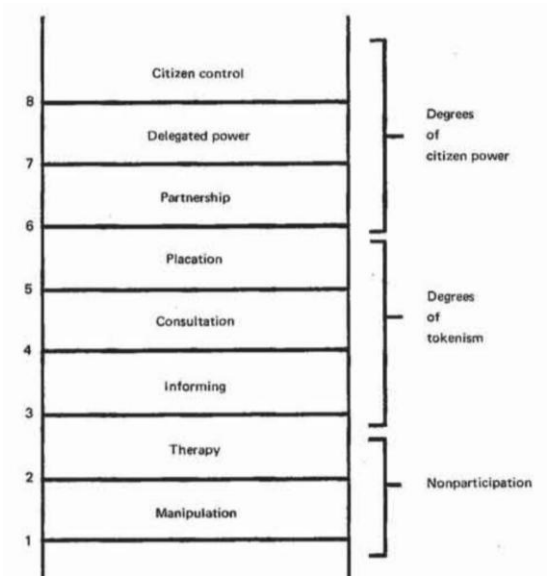
17 Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020.

18 This typology is one of about 350 produced in May or June 1968 at Atelier Populaire, a graphics center launched by students from the Sorbonne's Ecole des Beaux Art and Ecole des Arts Decoratifs.

19 Sherry R. Arnstein, "A Ladder Of Citizen Participation," *Journal of the American Institute of Planners* 35, no. 4 (1969): 216–24, https://doi.org/10.1080/01944366908977225.

20 Arnstein, "A Ladder Of Citizen Participation."



Picture 1 : Ladder of Participation[21]

Public participation reflects the extent of community involvement. It is understood as a process in which the public mutually influences and shares control over the initiation, implementation, and evaluation of public policies. Therefore, it is essential to establish participatory policies and substantive processes that continuously and proportionally involve all stakeholders. The underlying assumption is that the higher the degree of participation, the greater the level and scope of the policy's or legislation's benefits for society. To realize this, the development of a strong state and a strong society must proceed in tandem.[22] In general, the relational patterns of public participation can be divided into two approaches, namely:[23]

1. Passive participation: public participation is limited solely to involvement in general elections.
2. Active participation: participation that extends beyond merely taking part in elections.

Public participation in the lawmaking process may be undertaken either individually or collectively.[24] Although lawmaking is a prerogative jointly exercised by the legislative and executive branches, it does not preclude public participation, whether by individuals or groups. This is because public policies or laws are ultimately implemented within and upon society itself. The main ideas underlying the necessity of public participation, according to Hardjasoemantri, are as follows:[25]

a) To provide information to the government;
b) To increase public willingness to accept decisions;

21 Arnstein, "A Ladder Of Citizen Participation."
22 Muchlis Hamdi, *Kebijakan Publik: Proses, Analisis, Dan Partisipasi* (Ghalia Indonesia, 2014).
23 A. Rahman, H.I., *Sistem Politik Indonesia* (Graha Ilmu, 2007).
24 Ramlan Surbakti, *Memahami Ilmu Politik* (Gramedia Widiasarana, 1999).
25 Erwan Agus Purwanto and Dyah Ratih Sulistyastuti, *Implementasi Kebijakan Publik: Konsep Dan Aplikasinya Di Indonesia* (Gava Media, 2012).

c) To assist in ensuring legal protection; and
d) To democratize the decision-making process.

B. Indigenous Peoples as Affected Communities *(Masyarakat Terdampak)*

The normative issue that arises lies in the lack of a clear guarantee of participation for the public (in general) who have relevant concerns, resulting in a narrowed interpretation of which segments of society may provide input, as Article 96 paragraph (3) of the Law on the Formation of Laws and Regulations (UU P3) only regulates participation for directly affected communities.[26] Such a guarantee is granted only to individuals or groups who possess an interest in the substance of the draft legislation. Furthermore, from a grammatical interpretation, this nomenclature provides two possible conditions under which public participation may be accommodated namely, those who are "directly affected" and/or those who "have an interest."[27] The phrase "directly affected" does not specify the nature of the impact whether such impact is beneficial or detrimental.

Given this issue, the Author deems it necessary to interpret indigenous peoples as communities that are directly affectedor have an interest, particularly with respect to legislation that is directly related to the environment, natural resources, or customary territories. This interpretation will be developed through grammatical and systematic interpretations, as explained below:

1. Grammatical Interpretation of Article 96 Paragraph (3) of the Law on the Formation of Laws and Regulations (UU P3)

The article *a quo*, which contains the phrase "groups of people", can be grammatically understood to include indigenous peoples. This interpretation aligns with the definition provided by the Indigenous Peoples Alliance of the Archipelago (AMAN), which defines indigenous peoples as "communities possessing historical continuity of origin and occupying their customary territories through hereditary succession."[28] Thus, it can be understood that indigenous peoples constitute a collective entity possessing their own social, cultural, and legal systems.

Furthermore, the phrase "directly affected" may be understood as not limiting the form of impact. Consequently, such impact may encompass ecological, social, cultural, or economic dimensions, and may be either positive or negative in nature. Therefore, from a legal-linguistic perspective, indigenous peoples may be regarded as a group of people directly affected by the lawmaking process.

2. Systematic Interpretation Concerning Affected Communities

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26 Article 96 paragraph (3) of the Law on the Formation of Statutory Regulations (*UU P3*) stipulates: 'The public, as referred to in paragraph (1), constitutes individuals or groups of people who are directly impacted and/or have a vested interest in the subject matter content of the Draft Statutory Regulation (*Rancangan Peraturan Perundang-undangan*).

27 Luna Dezeana Ticoalu and Ahmad Ghiffari Rizqul Haqq, "Pemenuhan Meaningful Participation Dalam Rangka Mewujudkan Procedural Justice Terkait Pembentukan Peraturan Perundang-Undangan," *Jurnal Legislasi Indonesia* 22, no. 3 (2025): 375–88, https://doi.org/10.54629/jli.v22i3.1500.

28 Nurdiyansah Dalidjo, *Mengenal Siapa Itu Masyarakat Adat*, 2021, https://aman.or.id/news/read/1267.

The interpretation of the term "affected communities" in Article 96 paragraph (3) of the Law on the Formation of Laws and Regulations (UU P3) must reflect synchronization with the constitutional and sectoral recognition of indigenous peoples as rights holders over their territories, resources, and environment. As explicitly stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), the State recognizes and respects the existence of indigenous peoples along with their traditional rights.

This interpretation is further reinforced by the Constitutional Court Decision No. 35/PUU-X/2012, which recognizes customary law communities as rights holders, legal subjects, and legitimate owners of their customary territories. In addition, several sectoral laws such as the Forestry Law, the Environmental Management Law, and the Village Law also provide both existential and functional recognition of indigenous peoples.

C. Indigenous Peoples' Participation in the Lawmaking Process in Indonesia (A Reality-Based Perspective and Case Study Analysis)

The participation of indigenous peoples in the lawmaking process in Indonesia constitutes a central issue in the discourse on substantive democracy[29] and social justice.[30] Normatively, the Indonesian Constitution guarantees the rights of customary law communities as an integral part of the national legal system. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that the State recognizes and respects the unity of indigenous law communities along with their traditional rights, insofar as they remain alive and are in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.

This provision provides a strong legal foundation for the recognition of the collective rights of indigenous peoples, including the right to participate in public decision-making processes that directly affect them. However, political realities and the actual practice of lawmaking reveal that the participation space for indigenous peoples often remains merely procedural and has yet to reach the level of meaningful participation.[31] This situation creates a gap between the constitutional ideal and its practical implementation, resulting in the aspirations of indigenous peoples often being marginalized in the legislative process.[32]

Demographically, indigenous peoples in Indonesia comprise thousands of communities with extraordinary social, cultural, and geographic diversity. The Indigenous Peoples Alliance of the Archipelago (AMAN) records that there are

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29 Larry Diamond and Leonardo Morlino, *Assessing the Quality of Democracy* (Johns Hopkins University Press, 2005).

30 Amartya Sen, *Development as Freedom* (Alfred A. Knopf, 1999).

31 Imam Syafi'i, "KONFLIK AGRARIA DI INDONESIA: CATATAN REFLEKTIF KONFLIK PERKEBUNAN SAWIT DI KOTAWARINGIN TIMUR," *Jurnal Masyarakat Dan Budaya* 18, no. 3 (2018): 415–32, https://doi.org/10.14203/jmb.v18i3.572.

32 Dian Agung Wicaksono, "Dynamics of Granting Legal Standing to the Indigenous Community in Constitutional Review of Law: Dinamika Pemberian Kedudukan Hukum Pemohon Bagi Masyarakat Hukum Adat Dalam Pengujian Undang-Undang," *Jurnal Konstitusi* 20, no. 3 (2023): 494–513, https://doi.org/10.31078/jk3037.

more than 2,400 indigenous communities in Indonesia, with an estimated population exceeding 20 million people. Using a broader cultural identity approach, this number may even reach approximately 50–70 million people. These communities are spread across various regions, from the interior areas of Kalimantan, Papua, and Nusa Tenggara to the coastal regions of Sumatra and Sulawesi. They live according to customary law, maintain their own social structures, and rely on land, forests, and natural resources as the foundation of both their economic and spiritual life.[33] In this context, any policy or legislation related to land, environment, energy, and forestry has the potential to directly impact the livelihoods of indigenous communities. Therefore, their involvement in the lawmaking process is not only a moral obligation of the State but also a prerequisite for ensuring substantive justice.

However, in practice, the involvement of indigenous communities is often hindered by a centralized, top-down legal structure. In many legislative processes, public consultation is still perceived merely as an administrative obligation rather than a mechanism for substantive dialogue. Numerous indigenous communities lack access to draft laws, are not invited to public hearings (RDPU), or are only involved at the final stages of deliberation when the legal substance is nearly finalized. This situation demonstrates that, despite formal progress through Law Number 12 of 2011 on the Formation of Laws and Regulations (later revised into Law Number 13 of 2022), its implementation remains far from the intended spirit of openness and participation. This is particularly notable since Article 96 of the law explicitly stipulates that the public has the right to provide oral or written input in the lawmaking process.

A concrete example of indigenous community involvement in the lawmaking process can be found in the formulation of forestry policies following Constitutional Court Decision No. 35/PUU-X/2012. This decision established that customary forests are not part of state forests but rather fall within the territories of indigenous law communities. The ruling created a new legal space for the recognition of customary rights and obliges the government to involve indigenous communities in policies and regulations concerning forest management. In several cases, such as the recognition of Customary Forests in Lebak Regency (Banten) and Kapuas Hulu Regency (West Kalimantan), this principle has been applied,[34] Indigenous communities successfully obtained the formal recognition of their customary forest management rights through regional regulations. This process serves as a positive example of how public consultation mechanisms can operate inclusively when local governments, civil society organizations, and indigenous communities collaborate within a framework of mutual legal respect.

33 IWGIA, *The Indigenous World 2023: Indonesia*, March 29, 2023, https://iwgia.org/en/indonesia/5120-iw-2023-indonesia.html.

34 Nurul Elmiyah, "Ketidakberdayaan Masyarakat Adat Di Bidang Pertambangan Pada Suku Dayak Basap Di Kecamatan Bengalon Dan Kecamatan Sangkulirang, Kutai Timur, Kalimantan Timur" (Skripsi, Universitas Muhammadiyah Surakarta, 2011), https://publikasiilmiah.ums.ac.id/handle/11617/4189?show=full.

Nevertheless, such successes remain sporadic and have yet to become a widespread practice across Indonesia.[35]

Conversely, numerous cases demonstrate how legislation can adversely affect indigenous communities when it is drafted without their meaningful involvement. One of the most prominent examples is Law Number 11 of 2020 on Job Creation, also known as the Omnibus Law. During the deliberation of this law, indigenous communities and organizations such as AMAN openly stated that they had never been substantively involved in the consultation process.[36] Many provisions in the law were considered to potentially threaten the rights of indigenous communities, particularly those related to **l**and tenure, business licensing in customary territories, and the exploitation of natural resources. The strong reaction from civil society and indigenous organizations to the Job Creation Law ultimately led to a judicial review being filed with the Constitutional Court. In Constitutional Court Decision No. 91/PUU-XVIII/2020, the Court declared that the lawmaking process was "conditionally unconstitutional" because it failed to uphold the principle of meaningful public participation. This ruling marks a significant milestone, affirming that public participation, including that of indigenous peoples, is not merely a formality but an integral component of legal legitimacy.[37]

In addition, the implementation of Law Number 41 of 1999 on Forestry has also generated numerous disputes with indigenous communities. Although the law regulates the conservation and management of forests, its implementation often neglects the traditional rights of customary law communities. Prior to Constitutional Court Decision No. 35/PUU-X/2012, all forest areas were considered state property, resulting in indigenous communities losing management rights over their customary lands (ulayat lands).[38] As a result, numerous cases of evictions, criminalization, and land conflicts have arisen between indigenous communities and forestry or plantation companies. For example, the case of the Pandumaan-Sipituhuta indigenous community in North Sumatra serves as a concrete illustration of how state forestry policies that exclude indigenous participation can trigger social tensions and human rights violations. This community fought for years against a pulp and paper company's concession, which cleared their styrax forest without consent, before ultimately obtaining recognition of their territory as customary land following intervention by legal institutions and civil society.

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35 Imam Syafi'i, "KONFLIK AGRARIA DI INDONESIA: CATATAN REFLEKTIF KONFLIK PERKEBUNAN SAWIT DI KOTAWARINGIN TIMUR."

36 Aliansi Masyarakat Adat Nusantara (AMAN), *Laporan Tahunan 2022: Refleksi Dan Gerak Perjuangan Masyarakat Adat Nusantara* (AMAN Press, 2022).

37 Wicaksono, "Dynamics of Granting Legal Standing to the Indigenous Community in Constitutional Review of Law."

38 Yance Arizona, *Peluang Hukum Implementasi Putusan MK 35 Ke Dalam Konteks Kebijakan Pengakuan Masyarakat Adat Di Kalimantan Tengah*, 2015, https://epistema.or.id/wp-content/uploads/2015/07/Yance_Arizona-Peluang_Hukum_Implementasi_Putusan_MK_35.pdf.

2. How is the conceptualization of meaningful participation for indigenous communities in Indonesia aligned with the Consulta Previa mechanism in Bolivia?

A. The Consulta Previa Mechanism in Bolivia

The concept of consulta previa, or prior consultation, is a legal instrument born from the commitment to recognize the rights of indigenous peoples within modern democratic systems. This principle is based on the idea of Free, Prior, and Informed Consent (FPIC), which grants indigenous communities the right to provide free, prior, and informed approval before the implementation of any policy, project, or regulation that affects their territories and livelihoods. The FPIC principle was first codified in the International Labour Organization (ILO) Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples and was later reinforced by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. Both instruments affirm that the State has an obligation to consult indigenous communities through mechanisms that are consistent with their traditions, customary law, and representative systems before making legislative or administrative decisions that impact these communities.[39] This principle is not only an international ethical norm but has also been constitutionally adopted by several Latin American countries, including Bolivia, which explicitly enshrines the right of indigenous peoples to be consulted in its Constitution.

The 2009 Constitution of the Plurinational State of Bolivia provides a strong legal foundation for the implementation of consulta previa. Article 30 of the Constitution states that indigenous peoples "must be consulted through procedures consistent with their practices and customs whenever legislative or administrative decisions that may affect them are to be made."[40] his provision not only reflects the commitment to recognize collective identity and rights but also establishes consulta previa as a legally binding obligation for the State. In practice, the Bolivian government conducts consultations through the official representatives of indigenous communities before approving development projects, natural resource exploitation, or environmental policies that directly affect customary territories.[41] One of the instruments for its implementation is Law No. 3058 of 2005 on Hydrocarbons, which stipulates that any oil and natural gas exploration and exploitation activities must be preceded by a consulta previa process with the affected indigenous communities. This mechanism is implemented based on the principles of deliberation, transparency of information, and the right of indigenous peoples to approve or reject projects that are considered contrary to their cultural values and livelihoods.

The implementation of consulta previa in Bolivia demonstrates that consultation is not merely an administrative procedure, but rather a form of

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39 International Labour Organization, *Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO, 1989).

40 Constitución Política del Estado Plurinacional de Bolivia (2009), Artículo 30

41 Penelope Anthias, "Indigenous Peoples and the New Extraction: From Territorial Rights to Hydrocarbon Citizenship in the Bolivian Chaco," *Latin American Perspectives* 45, no. 5 (2018): 136–53, https://doi.org/10.1177/0094582X16678804.

recognition of indigenous sovereignty. In practice, the consultation is carried out in several stages, beginning with the provision of adequate information by the government to the indigenous communities, followed by deliberative dialogue in forums consistent with local customary mechanisms, and culminating in a final decision that is binding both morally and legally.[42] Thus, consulta previa is not merely a form of public participation but a constitutional right of indigenous peoples that must be respected by the State. This principle ensures that development is no longer understood in a top-down manner, but rather as the result of an equal dialogue between the State and indigenous communities. Moreover, the mechanism serves as a means to prevent potential conflicts from the policy formulation stage, as the aspirations of indigenous communities are accommodated before the policy is enacted. Theoretically, this consulta previa model reflects substantive democracy, in which legal legitimacy arises not solely from formal procedures but from the social acceptance of the affected communities.[43]

The difference between consulta previa and ordinary public participation lies in the degree of authority and legal consequences. In the typical public participation mechanisms implemented in many countries, including Indonesia, the public is given the opportunity to provide input through forums such as public hearings, parliamentary hearings (RDPU), or written submissions of opinions.[44] However, this form of participation is often formalistic and does not legally bind government decisions. Conversely, *consulta previa* mandates the requirement of free, prior, and informed consent (FPIC) as a legal prerequisite before any decision is made. This effectively means that without a valid consultation, any policy or project can be deemed a violation of the fundamental human rights of Indigenous communities. This concept positions Indigenous peoples not merely as stakeholders, but as subjects of law endowed with the right to self-determination. Within the framework of international law, this approach is recognized as the rights-based approach, where the right to participation is acknowledged as a substantive right, rather than a mere participatory instrument.[45]

When contextualized within the Indonesian legal system, the *consulta previa* mechanism shares a principled congruence with the constitutional mandate, yet fundamentally differs in terms of implementation and legal enforceability. Indonesia formally recognizes the existence of indigenous customary law communities (*masyarakat hukum adat*) via Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which stipulates that the state recognizes and respects these indigenous customary law community entities,

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42 Almut Schilling-Vacaflor, "Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?," *European Review of Latin American and Caribbean Studies*, no. 90 (April 2011): 3–22, https://doi.org/10.18352/erlacs.9248.

43 Diamond, L., and Morlino, L., *Assessing the Quality of Democracy* (Johns Hopkins University Press, 2005).

44 Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Statutory Regulations (State Gazette of the Republic of Indonesia of 2011 Number 82).

45 Mauro Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead," *The International Journal of Human Rights* 16, no. 1 (2012): 1–24, https://doi.org/10.1080/13642987.2011.597746.

along with their traditional rights, provided they remain extant and are in accordance with social development and the principles of the Unitary State of the Republic of Indonesia. Despite this recognition being normatively accommodated, the execution of meaningful consultation with Indigenous communities has not yet become a systematic practice in the formulation of statutory regulations. While Law Number 12 of 2011 concerning the Formation of Statutory Regulations (as amended by Law Number 13 of 2022) does contain stipulations regarding the public's right to provide oral and written input, it crucially fails to provide specific guarantees for Indigenous communities as a distinct group directly impacted by policy. Consequently, Indigenous participation often remains perfunctory or ceremonial, as exemplified by the drafting of the Job Creation Law (*Undang-Undang Cipta Kerja*), where Indigenous organizations such as AMAN (the Indigenous Peoples' Alliance of the Archipelago) stated that they were never substantially consulted during the formulation process of the said law.[46]

The absence of a specialized mechanism like *consulta previa* leads to numerous policies that potentially detrimentally affect Indigenous communities. The conflict case involving the Pandumaan-Sipituhuta Indigenous community in North Sumatra, for instance, illustrates how the Forestry Law was utilized to grant concession permits to a company without prior consultation with the Indigenous communities who are the traditional custodians of the benzoin forest.[47] Similarly, the conflict involving the Dayak Basap community in East Kutai resulted in the loss of their communal customary land (*tanah ulayat*) due to a mining project approved by the government without the consensus of the Indigenous community.[48] Such cases underscore the critical necessity for the implementation of the principle of meaningful consultation before policies or projects are executed. Consequently, the adoption of *consulta previa* in Indonesia would constitute a progressive measure to reinforce the legitimacy of public policy, mitigate social conflict, and enhance a sense of substantive justice for Indigenous communities.

Normatively, Indonesia possesses the legal foundation to adopt the *consulta previa* model. Beyond the 1945 Constitution (UUD 1945), Indonesia has expressed its support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the provisions of which, particularly in Article 19, affirm that states are obliged to consult and cooperate with Indigenous peoples before enacting any policy concerning their interests.[49] Within the context of national law, the *consulta previa* principle could be integrated either through the revitalization of the Law on the Formation of Statutory Regulations or through the long-overdue ratification of the Indigenous Peoples Law. The implementation of this principle would assure a

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46 Aliansi Masyarakat Adat Nusantara (AMAN), *Undang-Undang Omnibus Law Merampas Wilayah Adat Ditengah Ketidakpastian Pengesahan Undang-Undang Masyarakat Adat*, 2020, https://www.aman.or.id/wp-content/uploads/2020/10/SIARAN-PERS-Sikap-AMAN-terhadap-UU-Omnibuslaw.pdf.

47 Komnas HAM, *Laporan Situasi HAM Masyarakat Adat Di Indonesia: Kasus Pandumaan-Sipituhuta* (Komnas HAM, 2018).

48 Nurul Elmiyah, "Ketidakberdayaan Masyarakat Adat Di Bidang Pertambangan Pada Suku Dayak Basap Di Kecamatan Bengalon Dan Kecamatan Sangkulirang, Kutai Timur, Kalimantan Timur."

49 United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN, 2007), Article 19.

deliberative process that respects the rights of Indigenous communities, strengthens legal legitimacy, and expands the scope of participatory democracy in Indonesia. By adopting *consulta previa*, Indonesia would not only solidify the position of Indigenous peoples within national law but also demonstrate its commitment to substantive democracy and social justice as the foundation of a democratic rule of law.

B. What is the Ideal Concept of Indigenous Participation in Indonesian Lawmaking: A Framework Based on Bolivia's *Consulta Previa?*

The conceptualization of ideal Indigenous peoples' participation in Indonesian lawmaking must transcend the formalistic framework of general public consultation, shifting towards the adoption of binding collective rights principles, a model substantiated by the experience of *Consulta Previa* in Bolivia. This paradigm shift is imperative because legislative practices in Indonesia are still characterized by an elitist, top-down process, frequently overlooking the most profoundly affected groups and consequently failing to achieve the requisite standard of meaningful participation. Conversely, Bolivia has successfully institutionalized the right to consultation, establishing it as a constitutional prerequisite for the legitimacy of its legislative process.

The author delineates five conceptual pillars for the ideal participation of Indigenous peoples in Indonesia by examining them through the prism of *Consulta Previa* practice in Bolivia. The elaboration of the aforementioned five pillars is as follows:

1. Normative Pillar: The Shift from General to Compulsory Rights

The ideal conceptualization concerning the recognition and protection of Indigenous peoples must commence by disengaging them from the framework of general public participation, which has thus far remained merely procedural. While Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) does acknowledge the traditional rights of Indigenous communities, this recognition must be translated into a legal mechanism that is specific, binding, and guarantees their standing as the primary subjects in the legislative process. Furthermore, the principle of Free, Prior, and Informed Consultation (*Consulta Previa, Libre, e Informada* - CPLI), as a derivative of the international FPIC standard, needs to be integrated as a constitutional collective right. This, in turn, will necessarily mandate an amendment to the Law on the Formation of Statutory Regulations (UU P3) so that specific consultation with Indigenous peoples is distinct and separate from general public hearings (*RDPU*) or ordinary public testing, particularly regarding issues of agrarian affairs, forestry, environment, and natural resources.

2. Procedural Pilar: (CPLI as the Operational Standard)

The procedural pillar in the implementation of CPLI (Free, Prior, and Informed Consultation) underscores the crucial importance of the timing of execution, access to information, and equality in the decision-making process. First, the prior principle ensures that consultation is conducted from the initial

stages of policy formulation, before any decision is taken. Consultation must be executed starting from the preparation of the Academic Draft (*Naskah Akademik*) and the preliminary planning of the Bill (RUU), thereby allowing Indigenous input to influence the substance, rather than merely serving as a response to a final draft. Early identification of the affected communities is also vital before the Bill is included in the National Legislation Program (*Prolegnas*), in order to guarantee relevant and well-targeted involvement. Second, the informed principle necessitates the provision of clear, open, and readily comprehensible information. The substance of the Bill, the impact assessment, and alternative solutions must be presented in a language and format appropriate to the local cultural context. Full transparency is a mandate, including disclosing all supporting documents and studies that underpin the policy formulation. Third, the free and equality principle highlights that consultation must proceed without coercion, on a basis of parity between the state and Indigenous peoples. The dialogue must be horizontal, not a unilateral power relationship. Customary procedures must be respected and integrated into the consultation mechanism, including the recognition of traditional councils (*musyawarah* or *dewan adat*) as the legitimate representation of the community. Based on these points, CPLI is not merely an administrative procedure, but a substantive mechanism that guarantees the sovereignty of Indigenous peoples within the legislative process

3. Institutional Pillar: (Institutional Capacity and Specialization)

The institutional pillar in CPLI implementation emphasizes the critical need to build robust and specialized institutional capacity, moving beyond reliance on *ad-hoc* mechanisms within the Parliament (DPR) or technical ministries. To guarantee meaningful and equitable consultation, Indonesia should establish a dedicated body to permanently manage the consultation process with Indigenous peoples, such as a National Commission for Customary Consultation or a similar structure that operates independently from both political and executive branches. Its role as a neutral mediator is key to bridging the information and power asymmetry between the state and Indigenous communities. Ideally, this Commission would consist of a multidisciplinary team possessing cultural sensitivity and expertise in law, sociology, environment, and crucially, involving representatives of the Indigenous communities themselves. With this structure, the consultation process can be conducted professionally, measurably, and justly.

4. Substantive Pillar: (Connecting Consultation to Territorial Rights)

As exemplified by Bolivia's Article 403 of the 2009 Constitution, the preliminary consultation must function as a safeguard mechanism for Indigenous peoples' rights over their communal lands (*tierra ulayat*), natural resources, and the environment. Consultation in this context is not solely confined to development projects but also applies to legislation that potentially alters the legal status of customary territories. The intended participation must also encompass the right to partake in the determination and formulation of sustainable development plans aligned with their local wisdom (*kearifan lokal*). This conceptualization is expected to preclude the reduction of participation into merely a tool for negotiating

compensation and restitution, which remains an ongoing implementation challenge even in Bolivia.

5. The Pillar of Legal Culture: (Acknowledging Legal Pluralism)

This pillar is crucial as it transforms the perspective of the national legal system, shifting it from a paradigm that is still formalistic and centralistic toward one that recognizes legal pluralism. It becomes an inescapability that customary law (*hukum adat*) must be viewed as an acknowledged and respected source of legal legitimacy within the national legal system, thereby transcending the limited recognition of being acknowledged 'provided they remain extant and are in accordance with the principles of the Unitary State of the Republic of Indonesia.' Furthermore, there is a necessity for a massive educational program, particularly targeting lawmakers and law enforcement officials, concerning customary culture and law, with the aim of altering the prevailing top-down political dynamics

III. CONCLUSION

The current reality of indigenous peoples' participation in the law-making process in Indonesia remains weak and is characterized as symbolic or tokenism, often confined to the levels of informing or consultation on the ladder of participation. Although the Indonesian Constitution guarantees the rights of customary law communities (Article 18B paragraph 2 of the 1945 Constitution) and the Constitutional Court affirms the necessity of meaningful public participation, the absence of a specific legal mechanism for indigenous consultation leads to their participation being marginalized and non-substantive. This is evident in cases such as the Job Creation Law *(Omnibus Law)* and agrarian conflicts involving the Minerba Law and the Forestry Law, where indigenous communities reported never being substantively consulted and their interests were disregarded, frequently resulting in land conflicts and criminalization.

The conceptualization of meaningful participation for indigenous communities in Indonesia can be significantly enhanced by adopting the principles of *Consulta Previa* (Prior Consultation), which is constitutionally guaranteed in Bolivia. The fundamental difference lies in the binding nature and legal consequences. While general public participation in Indonesia is often formalistic and does not legally bind government decisions, *Consulta Previa* (derived from the FPIC principle) in Bolivia mandates Free, Prior, and Informed Consent (FPIC) as a legally binding prerequisite before any policy or law affecting their territories is enacted. The adoption of a contextualized version of Consulta Previa in Indonesia through five conceptual pillars, including elevating it to a compulsory collective right and an operational standard (CPLI), would enhance legal legitimacy, mitigate social conflict, and ensure substantive justice for indigenous communities.

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