

Gender Bias in the Draft Bill on Customary Law Communities: A Reconstruction Based on Substantive Justice for Indigenous Women

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Abstract

The Draft Law on Customary Law Communities is a legal instrument aimed at strengthening the recognition and protection of indigenous communities in Indonesia. However, the normative framework of this draft law remains dominated by an approach of formal neutrality and the recognition of collective rights, which risks overlooking gender-based power relations within indigenous communities. This research specifically aims to identify and analyse gender bias in the Draft Law on Customary Law Communities, particularly where it potentially overlooks the rights, participation, and protection of indigenous women within the structure of indigenous communities as well as in state policy, to explain the causes of gender bias, and to formulate a legal reconstruction oriented towards substantive justice for indigenous women, so that the recognition and protection of indigenous communities is no longer merely superficially neutral, but is truly responsive to the experiences and vulnerabilities of indigenous women. This research employs a non-doctrinal legal method, utilising the *Feminist Legal Method* approach and the *Critical Theory* paradigm. The analysis was conducted by identifying provisions in the Draft Law on Customary Law Communities that reflect gender bias, using the framework of *the Feminist Legal Method* and intersectionality. The research findings indicate that gender bias in the Draft Bill on Indigenous Legal Communities is structural in nature, reflected in three main aspects: the dominance of collective rights that obscures internal power relations; the neglect of the historical dimension of injustice in the practice of *living law*; and the assumption of homogeneity within indigenous communities that erases the experiences of indigenous women. Furthermore, the formal neutrality approach in the Draft Bill on Customary Law Communities has proven incapable of guaranteeing substantive justice, as it actually risks legitimising discriminatory practices. Through a comparative analysis of the Philippines (an institutional model via the IPRA 1997 and the NCIP), Bolivia (the 2009 plurinational constitutional model combined with Law 348/2013 on violence against

women), and South Africa (judicial model through the rulings in *Bhe v. Magistrate Khayelitsha* 2004 and *Shilubana v. Nwamitwa* 2008), this study finds that the integration of a gender perspective requires a multi-level approach involving institutional, constitutional, and judicial dimensions. The novelty of this research lies in the development of a legal reconstruction framework based on substantive justice that positions indigenous women as active legal subjects within both customary and national legal systems.

Keywords: Gender; Intersectionality; Draft Law on Customary Law Communities; Substantive Justice.

Introduction

Culture plays a role and serves a function within local communities, where cultural values form the basis for the emergence of customs. Customs govern various aspects of life, ranging from social interactions to humanity's relationship with nature and God; thus, customs serve as a means of applying cultural values in everyday life. Customs reflect the identity and character of a nation and embody the collective spirit of a society that evolves and is passed down from generation to generation. Therefore, every nation in the world possesses distinctive customs and traditions that differ from one another (Bayo et al. 2023). The customs and traditions alive within a community serve not only as social guidelines but also as one of the primary sources for the emergence of the customary law system in Indonesia. The foundations of customary law are rooted in traditions, history, and cultural values that are alive and held in high regard by indigenous communities. Unlike state law, which is generally formally codified, customary law is more often passed down orally and maintained through practices and customs that are continuously upheld by the community from generation to generation (Arman Arroisi Hatta and Josua Arya Subagiyo 2023). Customary law recognises the kinship systems adopted by indigenous communities, namely (Farel Asyofil U. et al.. 2023) : (1) The Matrilineal System, which is a kinship pattern that places the maternal line as the basis for tracing ancestry. In this system, women, particularly daughters, play a more dominant role than men in the inheritance structure. This pattern is primarily found in the Minangkabau, Enggano, and Timor communities; (2) The Patrilineal System, which is a kinship system based on the paternal line. This system places men in a

more central position in both inheritance and the management of family assets, so that women tend to occupy a less prominent position. The patrilineal system is practised by the Gayo, Alas, Batak, Nias, Lampung, Buru, Seram, Nusa Tenggara, and Irian Jaya communities; (3) The Parental or Bilateral System, which is a kinship pattern that traces descent equally through both parents. In this system, there is no significant difference between the status of men and women in the mechanism of inheritance. This model of kinship has developed in the regions of Aceh, Riau, Java, Kalimantan, and Sulawesi.

In its application, customary law still employs decision-making mechanisms based on deliberation or the consensus of the local indigenous community, which operates in tandem with the provisions of local regulations (Setiawan, J. and Idris 2021). The existence of indigenous customary law communities within the Indonesian legal system cannot be understood merely as a relic of the past. Recognition of indigenous communities is constitutionally enshrined in Article 18B(2) of the 1945 Constitution of the Republic of Indonesia, which affirms the state's obligation to recognise and respect the unity of indigenous communities and their traditional rights, provided they remain viable and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia. The significance of this recognition indicates that the existence of customary law communities has been recognised normatively but has not yet fully provided substantive protection (Winata 2021). In practice, this recognition still tends to be symbolic and has not yet fully become a comprehensive and just regulatory framework (Aisyah and Alexia 2022). In this context, the Draft Bill on Customary Law Communities in the 2026 Priority Legislative Programme is expected to bridge the gap between normative recognition and effective legal protection. This Draft Bill on Customary Law Communities is not only intended as a form of formal recognition of the existence of indigenous communities, but also as a mechanism for the protection of their collective rights amidst economic pressures, agrarian conflicts, and state interventions that often disregard local social structures. The substance of the draft Bill on Customary Law Communities as of April 2026 covers recognition, rights to customary territories and lands, traditional and cultural rights,

economic and educational empowerment, and dispute resolution. Consequently, to date, the Bill on Customary Law Communities does not explicitly recognise the rights of indigenous women, guarantee women's participation in customary institutions, or regulate protection against gender-based discrimination. Normatively, the Draft Bill on Customary Law Communities has not yet been fully harmonised with the national legal framework or international legal instruments, particularly regarding the protection of women.

The absence of explicit provisions regarding the rights of indigenous women indicates a discrepancy with the principle of non-discrimination as enshrined in Pancasila, through its five principles and the values contained therein, which instil various principles, such as the recognition of equality, equal rights and obligations without distinction of ethnicity, religion, race or social status (the second principle), as well as the role and obligation of the state to guarantee social justice for all the people of Indonesia (the fifth principle) (Sukirno and Natalis 2025) . This is subsequently guaranteed in the 1945 Constitution of the Republic of Indonesia. Article 28I(2) states that every person has the right to be free from discriminatory behaviour on any grounds and has the right to protection against such discriminatory treatment. Furthermore, as a state party to *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, Indonesia has an obligation to eliminate all forms of discrimination against women, including within the context of customary law communities. As set out in Article 2, which states that States Parties condemn discrimination against women in all its forms and agree to take all appropriate measures without delay to implement policies that eliminate discrimination against women. Under Article 5 of *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, States Parties must take appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices, as well as all other practices based on the notion of the inferiority or superiority of either sex, or on stereotyped roles for men and women. Reinforced by *CEDAW General Recommendation No. 39 of 2022*,

which specifically addresses the rights of indigenous women and girls, affirming that states are obliged to ensure the full and meaningful participation of indigenous women in all decisions affecting them (CEDAW Committee 2022), this international instrument serves as a normative reference that must be used as a guide in the drafting of the Bill on Indigenous Legal Communities.

A fundamental problem arises when the normative framework in the Draft Bill on Customary Law Communities still tends to adopt a formally neutral legal paradigm, without seriously considering the structural inequalities inherent in society, particularly gender-based inequalities (Setyowati 2021). Formal neutrality has long been positioned as the foundation of legal objectivity. However, from a critical perspective, this neutrality actually has the potential to conceal unequal power relations. As argued by Catharine A. MacKinnon, law that appears neutral is in fact a reflection of the experiences of the dominant group, thereby systematically disregarding the experiences of women as a marginalised group. Consequently, legal norms that do not explicitly acknowledge gender inequality risk perpetuating existing injustices (Catharine A. MacKinnon 1989). Furthermore, the neglect of realities within customary law communities, particularly for indigenous women facing multiple layers of marginalisation. They not only experience gender-based subordination but also find themselves in a vulnerable position as part of indigenous communities. This phenomenon is referred to as “*multiple-layer* marginalisation”. Such marginalisation is not abstract, but manifests itself in everyday practices. In terms of control over natural resources, indigenous women are often positioned as users, not as owners. Yet, in many communities, women play a central role in maintaining ecological sustainability through local practices such as forest management, subsistence farming, and traditional food systems. Furthermore, within indigenous institutional structures, women often lack equal opportunities for participation. Patriarchal cultural norms frequently limit women’s involvement in strategic decision-making processes. Consequently, women’s voices are not accommodated in the formulation of customary policies or in interactions with the state legal system. This situation reinforces what is

termed ‘legal invisibility’, namely the absence of explicit recognition of women as autonomous legal subjects.

A number of previous studies have shown that the recognition of indigenous peoples without a gender perspective has the potential to reinforce existing patriarchal structures. A study conducted by Emily Snyder confirms that policies recognising the rights of indigenous peoples that are not gender-sensitive can reproduce inequalities within those communities (Snyder 2014). This is also consistent with the findings of Benda-Beckmann and Turner, which show that in the context of legal pluralism, gender-based power relations are often overlooked in the normative construction of state law (Benda-Beckmann and Turner 2018). Furthermore, Errico emphasises in her research that recognition of indigenous peoples’ rights that is not accompanied by a gender perspective actually has the potential to reinforce patriarchal structures within indigenous communities (Stefania Errico 2015). Pardosi and Fathony also demonstrate that gender bias is found in the lives of indigenous communities, as well as in government regulations and policies in Indonesia, thus requiring more responsive legislative measures (Pardosi and Fathony 2022). Therefore, it is crucial to ensure that any legislative efforts concerning indigenous communities also take gender dimensions seriously and systematically into account. The comparative experience of the Philippines, through *the Indigenous Peoples’ Rights Act (IPRA) 1997*, explicitly integrates the protection of indigenous women into the national legal framework (Stefania Errico 2015). This demonstrates that the recognition of indigenous communities need not conflict with the principle of gender equality. This demonstrates that the recognition of indigenous peoples need not conflict with the principle of gender equality, but can instead be designed to be complementary.

The urgency of this research to integrate a gender perspective into the Draft Law on Indigenous Peoples is growing in line with the increasing number of conflicts experienced by indigenous women. The absence of gender-sensitive protection mechanisms suggests that the recognition of indigenous peoples’ rights actually risks reinforcing patriarchal structures (Davis 2017). Women’s involvement in resource management has been shown to enhance environmental

sustainability and social justice (Agarwal 2009). Therefore, a reconstruction of the Draft Bill on Customary Law Communities is required to achieve substantive justice. Sandra Fredman emphasises that substantive justice demands structural transformation within the law to address systemic inequalities, rather than merely guaranteeing formal equality (Fredman 2016). In the context of the Draft Law on Customary Law Communities (RUU MHA), this means that legislation must explicitly recognise and protect the rights of indigenous women and ensure their participation in all aspects of community life. Consequently, an analysis of gender bias in the Draft Law on Customary Law Communities is crucial not only as a critique of normative shortcomings, but also as an effort to drive a more inclusive and just legal transformation. Recognition of indigenous communities must not stop at legal symbolism, but must become an instrument of emancipation that guarantees the rights of all community members equally and with dignity. Consequently, a substantive justice approach is also key to this endeavour—an approach that not only emphasises formal equality but also considers unequal social conditions and provides affirmative action for marginalised groups. This research offers a novel contribution in its attempt to reconstruct the Draft Law on Customary Law Communities through a substantive justice approach grounded in gender and intersectionality, which has not yet been explicitly integrated into normative analyses of indigenous legislation in Indonesia. Based on the background outlined above, the main issue in this research lies not only in the normative recognition of customary law communities, but also in how such recognition operates within a framework of inclusive justice, particularly towards indigenous women. Therefore, the research questions are formulated as follows: (1) How does the Draft Law on Customary Law Communities potentially perpetuate gender bias against indigenous women? (2) How do the limitations of a formal neutrality approach hinder the guarantee of substantive justice for indigenous women in the Draft Law on Customary Law Communities? (3) What form of reconstruction of the Draft Law on Customary Law Communities is required to achieve substantive justice for indigenous women?

Research Method

This is a non-doctrinal study employing *the Feminist Legal Method* as an approach to analysing the content of the Draft Bill on Customary Law Communities. The *Feminist Legal Method* is an approach developed to unpack gender bias in the law, which is often concealed behind claims of neutrality and objectivity. This research specifically adopts three main methods formulated by Bartlett in her work *Feminist Legal Method*, namely: (1) *The Woman Question*, used for critical questioning. This question aims to reveal the implicit gender bias within articles that appear neutral; (2) *Feminist Practical Reasoning*, which emphasises the importance of context and women's concrete experiences in legal analysis; and (3) *Consciousness-Raising*, which highlights women's collective experiences as a legitimate source of knowledge in legal analysis.

The application of these three Bartlett methods is directly linked to the three main findings of the research. Firstly, *'The Woman Question'* was applied to analyse Article 1(1) of the MHA Bill by asking: 'Where are women in this normative definition?'. This question led to the finding that the collective definition of indigenous communities obscures women's position as active legal subjects. Second, *Feminist Practical Reasoning* was used to interpret Articles 3 and 10 within the context of women's concrete experiences in patrilineal communities, such as those of the women of Pubabu Besipae (NTT) and the Adat Balik women (East Kalimantan), yielding the finding that the "neutral" formulation of participation actually legitimises structural exclusion. Thirdly, *Consciousness-Raising* was activated through the collective voices of indigenous women from various communities (Papua, Aru, Java, West Nusa Tenggara) regarding the practice of gathering as women's ecological knowledge that is not recognised as a right. Thus, these three methods do not function as methodological rhetoric, but rather as analytical instruments that yield specific findings regarding gender bias in the articles of the Draft Law on Indigenous Legal Communities.

This approach is reinforced by an intersectional perspective to understand how gender identity interacts with other factors such as ethnicity, social class and geographical location in shaping experiences of injustice. The research employs

the *Critical Theory* paradigm as its primary philosophical framework. This research is based on a research approach that does not merely map the existence of legal norms in the Draft Law on Customary Law Communities, but seeks to unpack the power relations, structures of domination and hidden assumptions behind these legal constructs, particularly in the gender dimension. The *Critical Theory* paradigm provides an appropriate foundation for analysing how the Draft Bill on Customary Law Communities, presented in gender-neutral language, can harbour deep-rooted structures of inequality within the social construction of indigenous women. The relevance of this paradigm to the issues of the Draft Bill on Customary Law Communities and gender lies in two key points. Firstly, customary law and the positive law governing it never emerge in a power vacuum; they are the result of intertwined relations of patriarchy, colonialism, and the modern state. Secondly, indigenous women occupy a doubly vulnerable position: as part of an indigenous community marginalised by the state, whilst simultaneously being subjects who are frequently subordinated within their own indigenous communities. The critical theory paradigm enables researchers to interpret the MHA Bill not merely as a legal text, but as a field of ideological struggle requiring deconstruction and reconstruction.

This research is descriptive-analytical in nature and employs comparative analysis. The primary data sources consist of secondary data of three types. Firstly, primary legal materials, which include the 1945 Constitution of the Republic of Indonesia, the draft Bill on Customary Law Communities of April 2026, *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* along with *General Recommendation No. 39 of 2022*, *the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, as well as the Philippines' *Indigenous Peoples' Rights Act of 1997*, Bolivia's 2009 *plurinational constitution*, and the South African Constitutional Court's rulings in *Bhe v. Magistrate Khayelitsha 2004* and *Shilubana v. Nwamitwa 2008*. As a comparison; secondly, secondary legal materials in the form of Scopus and Sinta-indexed journal articles, reports from state institutions and international organisations; thirdly, tertiary legal materials in the form of legal dictionaries, encyclopaedias, and other supporting policy documents. The type and technique

of data collection employed was a literature review (*Library Research*) involving a systematic search of legal documents and academic literature. Data analysis was conducted qualitatively. Data validity was ensured through triangulation of sources and cross-checking between primary and secondary legal materials.

Results and Discussions

Gender, Formal Equality and Substantive Justice

Gender is generally defined as the social relations between the sexes as constructed by society, as stated by Margaret L. Andersen (Margaret L. Andersen 1988) “Gender refers to socially learned behaviours and expectations associated with the two sexes. Whereas ‘maleness’ and ‘femaleness’ are biological facts. Similar to the social categories established by race and social class, gender shapes what others expect of us and what we expect of ourselves. Gender also largely determines our life chances and directs our social relations with others” (Gender refers to socially learned behaviours and expectations associated with the two sexes. Whereas “maleness” and “femaleness” are biological facts. Much like the social categories defined by race and social class, gender shapes what others expect of us and what we expect of ourselves. Gender also largely determines our life chances and directs our social relations with others). Meanwhile, gender bias is a form of *gender inequality*. This factor arises from social systems and constructs that place men in a privileged position, whilst women are placed at a disadvantage. The forms of gender inequality are (Afandi 2019) : (1) Marginalisation is a process of exclusion due to gender differences that leads to poverty; (2) Subordination is the belief or assumption that a role performed by one gender is inferior to that of the other; (3) Stereotypes or negative labelling is the attribution of a fixed image, label or stigma to a person or group based on a false or misguided assumption; (4) Violence is an act of aggression, whether physical or non-physical, committed by a gender or a family institution; (5) Double burden refers to the greater workload borne by one gender compared to the other. Furthermore, intersectionality helps us to see that gender does not stand alone but intersects with other identities. Intersectionality in the

understanding of gender can be categorised as a person's identity that does not stand alone or consist of just one aspect, but is a combination of many factors such as gender, social class, race, religion, disability, age and others. The impact of this leads to multiple layers of discrimination against certain groups and communities, who are minorities in society, particularly women (Kiranantika 2022). An individual experiences several forms of discrimination simultaneously because their identities intersect. *Formal equality* is rooted in the principle of *equality before the law*, which demands identical treatment for all legal subjects regardless of their background. This approach assumes that justice is achieved when rules are applied consistently to everyone. In contrast, *substantive equality* focuses on fair outcomes by recognising that legal subjects are in different socio-economic circumstances.

The concept of substantive justice serves as the primary theoretical framework for this study. Sandra Fredman formulates four dimensions of substantive justice that form the main basis of this study, namely: (1) the redistributive dimension (*redressing disadvantage*), which corrects the socio-economic disadvantages experienced by vulnerable groups; (2) *the recognition dimension*, which eliminates stigma, prejudice, violence and identity-based hatred; (3) the participatory dimension (*participation*) ensures the voice and presence of affected groups in decision-making; and (4) the transformative dimension (*transformation*) changes the social structures that are the root of inequality, rather than merely adapting victims to existing structures (Fredman 2016). These four dimensions will be used as instruments for a critical evaluation of the articles of the Draft Law on Customary Law Communities in the subsequent analysis. In the context of indigenous women, the difference between these two approaches is crucial. Formal equality would accept the wording of Article 3(c) of the Draft Bill on Customary Law Communities, which states "providing space for participation", as sufficient, since the article does not explicitly discriminate against anyone. However, substantive justice would examine whether, with such neutral wording, indigenous women facing cultural and structural barriers can truly participate on an equal footing? International court rulings provide concrete references. In *Bhe v. Magistrate, Khayelitsha*

2004, the South African Constitutional Court ruled that the rule of primogeniture (inheritance to the eldest son) in *Xhosa* customary law was *unconstitutional* because it violated women's rights to equality and dignity, even though the rule was 'neutral' as part of the customary system. The Court emphasised that recognition of customary law must not be used to justify gender-based discrimination, and that customary law must continue to evolve in line with constitutional values (. The *Shilubana v. Nwamitwa* 2008 ruling was even more progressive in recognising women's rights. Valoyi became a hosi (tribal chief), challenging the assumption that traditional leadership is exclusively a male domain. These two rulings serve as concrete examples of how substantive justice operates in dismantling the gender bias hidden behind claims of customary autonomy.

The Draft Bill on Customary Law Communities Risks Perpetuating Gender Bias Against Indigenous Women

Customary law recognises the kinship systems adopted by indigenous communities, namely: (Farel Asyofil U. et al. 2023) : (1) The Matrilineal System, a kinship pattern that places the maternal line as the basis for tracing ancestry; (2) The Patrilineal System, a kinship system based on the paternal line. This system places men in a more central position regarding inheritance and the management of family assets, so that women tend to occupy a less prominent position; (3) The Parental or Bilateral System, which is a kinship pattern that traces descent through both parents equally. In this system, the status of men and women does not show significant differences in inheritance mechanisms. Pluralism helps us understand that 'local wisdom' today is not a pure entity, but rather a product of complex interactions. This includes colonial interventions that have reinforced aspects of patriarchy. An illustration of the patriarchal system can be seen in the patrilineal kinship system, where kinship is based on the paternal line and places men in a more central position. It is important to understand the history of customary law, within which gender bias exists. Gender bias in customary law in Indonesia is not merely an 'indigenous' product but has been formed through a

complex historical process. During the Dutch colonial period, the policy of customary law codification (*adatrechtspolitik*) pioneered by *Van Vollenhoven* actually formalised and reinforced the patriarchal aspects of customary law because the primary informants consulted were male traditional elders, whilst women were rarely involved in the process of drafting customary law texts. Consequently, many customary practices that were previously fluid and dynamically negotiated within communities crystallised into written norms that tended to disadvantage women. The codification of colonial customary law produced what he termed “*plural legacies*” that reproduced colonial patriarchal power structures into the contemporary era (Manse 2024). In the post-colonial context, this structure has been reinforced through modern state policies that recognise customary law without critiquing its gender dimensions. This demonstrates that tradition is not a static and pure entity. Rather, customary law has been dynamically shaped and reinforced in its patriarchal aspects. The Draft Law on Customary Law Communities consists of twelve chapters, each addressing: Chapter I general provisions; Chapter II principles and objectives; Chapter III recognition and designation of customary law communities; Chapter IV rights and obligations of customary law communities; Chapter V customary territories; Chapter VI customary institutions; Chapter VII customary law and customary courts; Chapter VIII participation and empowerment; Chapter IX the role of the government; Chapter X: dispute resolution; Chapter XI: transitional provisions; and Chapter XII: final provisions. Essentially, the Draft Law on Customary Law Communities is designed as a legal instrument to recognise, protect and empower customary law communities in Indonesia. However, several articles demonstrate a normative construction that perpetuates gender bias, as will be analysed below:

Firstly, Gender Bias in the Normative Definition (Article 1(1)). Article 1(1) concerns the definition of customary law, which states: “A Customary Law Community is a group of people who have lived for generations as a unified entity bound by ancestral lineage and/or a shared place of residence within a specific geographical area, a cultural identity, customary laws that are still observed, strong ties to the land and the environment, and a value system that

determines economic, political, social, cultural and legal institutions”. This article defines customary law communities as a collective entity with a territory, laws and institutions. The wording of this article positions indigenous communities as the primary subjects of law without acknowledging internal diversity, including gender relations. This collective approach often obscures internal power relations within indigenous communities, particularly between men and women. This approach reflects a collectivist construct that assumes equality among community members. In reality, some indigenous communities are still influenced by patrilineal kinship systems within which patriarchal structures exist (Dinny 2023). This indicates that gender bias in the Draft Bill on Indigenous Legal Communities is not incidental, but rather is structured within the normative construction of collective rights itself. Applying Bartlett’s *‘The Woman Question’* to Article 1(1) yields the following analysis. When the question is asked, “Where are women in this definition?”, the answer is that women are subsumed without a specific identity within the phrase “a group of people”. The definition in Article 1(1) does not take women’s experiences into account. The value system that determines the institutions is assumed to operate equally for all. Yet these institutions were historically formed within patriarchal power relations. This finding validates the first indicator of gender bias in this study. The dominance of collective rights obscures internal power relations.

Secondly, Gender Bias in the Sphere of Participation (Article 3(c)). Article 3 of the Draft Law on Customary Law Communities regulates matters relating to the recognition, protection and empowerment of customary law communities with the aim of: (a) providing legal certainty regarding the status and existence of Customary Law Communities so that they may grow and develop in accordance with their dignity and worth; (b) providing guarantees to Customary Law Communities in exercising their rights in accordance with their traditions and customs; (c) provide space for participation in political, economic, educational, health, social and cultural aspects; (d) preserve their traditions and customs as local wisdom and part of the national culture; and (e) enhance socio-cultural resilience as part of national resilience. Article 3(c) provides space for participation in political, economic, educational, health, social and cultural

aspects. This article has the potential to perpetuate existing gender bias. In the reality of indigenous communities in Indonesia, the majority adhere to a patrilineal kinship system that places men in the highest position. The role of men is considered central in customary decision-making. Article 3(c), in its formulation, fails to take existing gender bias into account; rather, it perpetuates such bias. The wording of the Draft Law on Customary Law Communities in Article 3 fails to consider the issues and conflicts regarding indigenous women that persist to this day. From the perspective of substantive justice Article 3(c) merely fulfils the formal dimension of participation without addressing the participatory dimension in its true sense, which demands affirmative action to ensure the voices of vulnerable groups are genuinely heard. The formulation of a “gender-neutral space for participation” within the context of a patrilineal community is tantamount to the absence of space for women, as the mechanisms of customary deliberation are structurally dominated by men. This lack of women’s involvement in decision-making processes is felt by women in Pubabu Besipae (NTT), where the conflict over customary forests in Pubabu Basipae demonstrates how indigenous women are affected by non-participatory policies (Komnas Perempuan 2026).

Thirdly, Gender Bias in Dispute Resolution Mechanisms (Article 45(1)). Article 45(1), which states that “internal disputes within Customary Law Communities shall be resolved through customary institutions”, reflects the fact that, historically, many customary legal systems developed within patriarchal social structures, where women tend to occupy subordinate positions. In the practice of customary dispute resolution, this is often reflected in mechanisms that do not provide equal space for women’s participation, whether as parties to the dispute or as decision-makers. In some cases, women are not even recognised as full legal subjects. This situation demonstrates that *living law* does not always reflect justice, but is often a historical product of unequal power relations. Indigenous women are often the most affected. When state law is applied with a formal approach of neutrality without considering the historical dynamics of customary law, the state risks legitimising practices that discriminate against indigenous women.

Fourth, Gender Bias in Institutional Recognition (Article 10). Article 10 concerns the procedures for establishing community committees. The wording of Article 10 of the Draft Law on Customary Law Communities tends to view indigenous communities as homogeneous entities. It also overlooks the issues faced by indigenous women. There is a lack of attention to the heterogeneity of indigenous communities, such as gender, social class and various socio-cultural aspects that make an important contribution (Linda Dewi 2020) . The clause recognising indigenous institutions as the legitimate representation of the community, without affirmative mechanisms for indigenous women, will perpetuate gender bias. The application of double standards places women in a subordinate position within the law, reflecting the legal culture of a patriarchal society (Luh Putu 2025) . Double standards for women relate to situations where women face a conflict between their roles and responsibilities both at home and within the indigenous community (Ridwan 2023) .

The construction of formal neutrality within the Draft Law on Customary Law Communities reveals three structural weaknesses that have the potential to perpetuate gender bias, namely: (1) the Draft Law on Customary Law Communities essentially focuses on the recognition of the collective rights of indigenous communities, including rights to territory, natural resources and customary institutions; (2) the Draft Law on Customary Law Communities tends to overlook the historical dimension of the injustices experienced by indigenous women; and (3) the wording of the Draft Law on Customary Law Communities tends to view indigenous communities as a homogeneous entity. The formal neutrality of the Draft Law on Customary Law Communities fails to consider and broadly acknowledge that there remain numerous issues regarding discrimination against indigenous women. This should be taken into account in the Draft Law on Customary Law Communities. In some communities, indigenous women face restrictions on land ownership and inheritance rights (Yulita 2025). Furthermore, there are issues surrounding the Nusantara Capital City (IKN) project and the Balik indigenous women in East Kalimantan, where women were not provided with comprehensive information regarding the project's impacts, resulting in important sites such as ancestral

graves being levelled without the community's full consent. Indigenous women only took action after the tangible impacts had already occurred. This demonstrates that the decision-making process is neither inclusive nor transparent, particularly towards women. Consequently, indigenous women are often merely 'recipients of the impacts' rather than decision-makers, despite their strong ties to their ancestral lands (M. Syafiq 2026). 64.7% of indigenous women are not involved in decision-making (*The Situation of Indigenous Women in Indonesia* 2023). Indigenous women experience multiple layers of oppression (Elsa Faturahmah 2025). *Crenshaw's* intersectional approach is highly relevant. Intersectionality does not simply mean that indigenous women experience two forms of discrimination (gender and ethnicity) added together, but rather that these forms of discrimination are interconnected and produce a unique experience of injustice that cannot be reduced to just one axis. One concrete layer of oppression experienced by indigenous women in Indonesia is as follows:

Concrete case studies illustrate how these layers interact. Indigenous Mollo women (NTT) opposing marble mining on Mount Mutis face: (a) threats of violence from security forces due to their identity as environmental activists; (b) cultural pressure from male traditional leaders who side with the company; (c) barriers to accessing the judicial system due to their geographical location; and (d) stigma as 'rebellious women' both within their community and in media coverage. These four layers of discrimination based on gender, class, ethnicity and geography—are inseparable in their experience. Without an intersectional approach, legal interventions based on a single category will fail to fully understand the situation of indigenous women. An intersectional approach is a key prerequisite for achieving the 2030 SDGs within the context of Indonesia's indigenous communities.

The Draft Law on Customary Law Communities is not in line with the principle of non-discrimination as enshrined in the second and fifth principles of Pancasila. This principle is further guaranteed in the 1945 Constitution of the Republic of Indonesia. In Article 28I paragraph (2), as well as Indonesia's obligations as a state under *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, in Articles 2 and 5. The absence of

a gender perspective in the Draft Law on Customary Law Communities has the potential to perpetuate gender bias in its formulation. This relates not only to substance but also to the perspective used in understanding indigenous communities as legal subjects. Without the integration of a gender perspective, the resulting law tends to reproduce existing inequalities, particularly for indigenous women. Within the framework of *feminist legal theory*, law is never truly neutral, but is shaped by the dominant realities of power that are patriarchal in nature. This underscores that the law often represents men's experiences as a universal standard and tends to disregard women's experiences (Muliana 2025). The Draft Bill on Customary Law Communities demonstrates this tendency through an approach of *legal neutrality*, wherein norms are formulated without considering the differing positions of men and women. This indicates that legal neutrality actually becomes a source that perpetuates gender bias because it fails to account for structural inequalities (Saraswati 2025). Consequently, the resulting laws are "formally neutral" but "substantively biased". In *Participatory Governance* Theory, participation is a key requirement for legal legitimacy. When affected groups are not involved, the resulting policies tend to be biased. Recent studies show that the involvement of indigenous women in policy-making remains very limited, meaning that gender perspectives are often overlooked (Tridewiyanti et al. 2023). Indigenous women are not directly recognised as a group with specific needs and interests. Consequently, recognition of indigenous communities as a whole risks obscuring internal injustices, including the marginalisation of women in access to resources and decision-making. This disparity highlights a gap between women's actual contributions and the normative recognition of indigenous women's rights.

Gender bias in the Draft Law on Customary Law Communities not only affects internal social relations within communities, but also disrupts the ecological conservation efforts that have long been carried out by indigenous women. Bina Agarwal's studies in India and Nepal, which serve as a global reference, demonstrate that the presence of women in community forest management bodies is positively correlated with conservation success: forests managed with at least 25–35% female representation show significantly higher

rates of vegetation regeneration and compliance with conservation regulations (Agarwal 2015). Women's ecological knowledge of plant cycles, rainfall patterns, soil quality, local seed varieties, clean water sources, and medicinal plants is a legacy passed down from generation to generation, functioning as an adaptive knowledge system in response to climate change. In Indonesia, the contribution of indigenous women to environmental conservation faces several challenges, such as: Iban Dayak women in West Kalimantan maintain tembawang (traditional forest fruit gardens) as an agroforestry system that preserves the biodiversity of over 300 plant species; Baduy women store and maintain over 60 varieties of huma rice through the leuit system (traditional granaries), contributing to food security and genetic diversity; DKU Region Papu stated, "We don't know who planted the durians and mangoes in the forest, but we used to take them for our food. Gathering fallen fruit was a custom for women to feed the family. Now there are none left, since our forests have been destroyed." Gathering is a distinctive custom of women as one way to meet the family's food needs and to survive. However, foraging is not yet recognised as a right, and as a result, there is absolutely no protection. Consequently, foragers are considered unimportant and are often criminalised. Foraging has become a cultural custom among Indonesian communities; this can be seen in various terms, such as: 'Tremboso' (Javanese) meaning to collect rubber sap or its residue, 'Ngunuh' (NTB) meaning to gather spilled rice during the harvest season, 'Ba meti' (Aru) meaning to gather fish along the coast, 'Mai buru' (Aru) meaning to gather forest products, 'Keyou' (Isam) meaning to go into the forest to gather, . Related issues include indigenous women having limited access to decision-making and land ownership. Regarding inheritance rights, women still face problems in some regions; many cases are still dominated by men, with women having no right to inherit. Women are often recognised only as users, not as subjects with control over the inheritance. This inequality highlights a gap between women's actual roles and the normative recognition of their rights. In some indigenous communities, women have no voting rights in customary deliberations regarding the management of customary lands (Noor et al. 2024) . When the MHA Bill overlooks the gender dimension, it also automatically erases women's ecological

knowledge from the legal protection framework—a phenomenon termed ‘*epistemic injustice*’ against indigenous women. Consequently, the recognition of rights to customary territories granted solely to customary institutions (which are generally male-dominated) risks marginalising the traditional management practices carried out by women. Equitable environmental governance can only be realised if the diversity of local interests—including those of indigenous women—is recognised as an integral part of the natural resource management regime. Therefore, the integration of a gender perspective into the Draft Law on Indigenous Legal Communities is not merely a matter of social justice, but also a prerequisite for the effectiveness of ecological conservation which is the objective of Indonesia’s national environmental policy and climate commitments.

The Limitations of the Formal Neutrality Approach in Ensuring Substantive Justice for Indigenous Women in the Draft Bill on Indigenous Legal Communities

The approach of formal neutrality is understood as the principle that the law must apply equally to everyone regardless of background, such as gender, ethnicity or social status. Within the framework of formal neutrality, justice is measured by the consistency of the application of rules, rather than by the outcomes experienced by specific individuals or groups. Conceptually, formal neutrality is rooted in the idea of *equality before the law*, whereby every individual is positioned as an equal subject of law. However, Mery Joe Frug’s critical thinking emphasises that laws that appear formally neutral often continue to reproduce structural inequalities (Green S 2023). Formal neutrality also reveals various fundamental limitations in achieving substantive justice. Substantive justice demands not only equal treatment but also fair outcomes, taking into account real-world conditions, structural inequalities, and the socio-cultural context surrounding specific individuals or groups. The limitations of the formal neutrality approach are as follows:

Firstly, the Inability to Recognise Layered Structural Inequalities. The main limitation of the formal neutrality approach lies in its inability to recognise the

structural inequalities experienced by indigenous women. Indigenous women are in a complex position because they experience *multiple layers of marginalisation*. The marginalisation experienced by women occurs in their roles as women, as members of indigenous communities, and as part of economically disadvantaged groups. This situation is reflected in women's limited access to natural resources, their minimal involvement in indigenous decision-making, and the weak protection of their rights within both formal and informal legal structures (Mia Siscawati 2014). Layered discrimination is a form of social injustice that does not exist in isolation. Rather, it arises from the intersection of various social identities gender, class, ethnicity and other statuses. Socially and culturally, intersectional discrimination is evident in the stereotypes and norms that have developed within society. Women are often positioned in domestic roles that limit their participation in the public sphere. When combined with ethnic or social class identities, these restrictions become even more pronounced (Hastuti 2022).

Secondly, it fails to create inclusive spaces for participation. Formal neutrality does not explicitly create inclusive spaces for indigenous women to participate. Decision-making forums within indigenous communities remain dominated by men, particularly within patrilineal kinship systems. Consequently, the policies that result often fail to reflect the needs and experiences of indigenous women. Thirdly, it fails to ensure the fair distribution of land rights. The formal neutrality approach has also proven ineffective in the context of protecting land rights and natural resources for indigenous women. In many cases, state recognition of customary land rights is granted primarily to communities collectively, without mechanisms to ensure fair distribution within those communities. Consequently, indigenous women often lack real control over the land, even though they are formally recognised as part of the rights-holding community. Without policies that explicitly recognise and protect women's rights within customary structures, formal neutrality cannot guarantee substantive justice.

Fourth, Inability to Address Gender-Based Violence. This approach also has limitations in addressing gender-based violence experienced by indigenous

women. Violence against indigenous women often occurs in private spaces or within indigenous communities governed by customary norms. In some cases, customary dispute resolution mechanisms do not provide adequate protection for victims, and may even tend to blame the victim. When the state adopts a neutral stance and fails to intervene in a gender-sensitive manner, indigenous women are denied the protection that is their right as citizens.

Fifth, Failure to Address the Specific Needs of Indigenous Women. Formal neutrality fails to address the specific needs of indigenous women, which are heavily influenced by geographical, cultural and linguistic factors. Many indigenous women live in remote areas with limited access to basic infrastructure. In this context, access to justice is not merely a matter of the existence of legal rules, but also the ability to understand, access and utilise these legal mechanisms. For example, formal legal procedures often use official language that indigenous women do not understand, as well as mechanisms that are bureaucratic and geographically distant. Without affirmative policies specifically designed to address these barriers, the formal neutrality approach will remain merely an abstract, non-operational norm.

When the law adopts a formal neutrality approach in the draft Bill on Customary Law Communities without taking into account the circumstances of indigenous women, who face multiple layers of injustice such as poverty, geographical isolation and limited access to education, This will result in gender-based discrimination. This contradicts the principle of substantive justice, which should form the basis for the creation of gender-responsive law. Within the framework of *feminist* legal theory, formal neutrality is criticised because it essentially reflects men's experiences and perspectives as a universal standard. Laws deemed 'neutral' are often built upon assumptions that are insensitive to women's experiences. In the context of indigenous women, this becomes even more problematic because their experiences are also shaped by cultural identity and their relationship with nature. Therefore, a truly just approach must be able to accommodate this diversity of experiences, rather than simplifying them into homogeneous 'neutral' categories. Given these various limitations, it is clear that a formal neutrality approach is insufficient to guarantee substantive justice for

indigenous women. A more contextual and transformative approach is required, one that not only acknowledges differences but also actively corrects inequalities. This approach can be realised through affirmative policies, recognition of gender-sensitive legal pluralism, and increased participation of indigenous women in all decision-making processes.

Furthermore, it is important to integrate an intersectional perspective into policy and law-making. This approach enables a more comprehensive analysis of the various forms of injustice that are interlinked and influence one another. In the context of Indigenous women, intersectionality helps to understand how gender, ethnicity, class and geographical location interact in shaping experiences of injustice. Consequently, an intersectional approach is essential to ensure substantive justice for Indigenous women. Substantive justice requires the active involvement of affected groups in policy formulation. Even within the framework of international human rights law, when discussing the rights of Indigenous Peoples as well as the rights of women as individuals, the rights of Indigenous women are included (Agung Wibowo 2021). Ultimately, substantive justice for Indigenous women can only be achieved if the law is no longer understood as a seemingly neutral instrument, but as a tool for social transformation that favours vulnerable groups. This demands political commitment, institutional reform, and a paradigm shift in how we view the relationship between law, society, and justice itself.

One aspect that has not received sufficient attention in the Draft Law on Customary Law Communities is the role of government bodies in upholding gender equality within indigenous communities. Currently, the state's institutional mechanisms relating to indigenous communities and women are spread across several agencies with poor coordination: the Ministry of Environment and Forestry (designation of customary forests), the Ministry of Home Affairs (recognition of indigenous communities through Ministerial Regulation No. 52/2014), the Ministry of Women's Empowerment and Child Protection (PPPA), the National Commission on Human Rights (Komnas HAM), the National Commission on Women (Komnas Perempuan), and local governments. This lack of inter-agency coordination creates significant

enforcement gaps: the recognition of customary forests proceeds without gender considerations, whilst women's empowerment programmes rarely reach remote indigenous communities. Three main gaps in enforcement can be identified. First, a conceptual gap: there are no mandatory gender indicators to be met in the process of indigenous community recognition by local governments, meaning the verification process can proceed without ever asking whether indigenous women are involved and protected. Second, a procedural gap: mechanisms for objections and complaints for indigenous women experiencing discrimination within their communities are virtually non-existent; the National Commission on Violence Against Women (Komnas Perempuan) receives complaints but lacks the authority to intervene in decisions made by indigenous institutions. Third, an implementation gap: government programmes that are gender-sensitive (such as the PKH and women's economic empowerment) often fail to address the indigenous power structures that are the source of injustice. To ensure compliance with gender-sensitive legislation, the following mechanisms must be explicitly incorporated into the Draft Law on Customary Law Communities: (1) Mandatory gender mainstreaming in the verification and designation of indigenous communities by local governments, with indicators of women's participation as a formal requirement for recognition; (2) The establishment of a Special Task Force for the Protection of Indigenous Women at central government level, comprising multiple ministries (Ministry of Environment and Forestry, Ministry of Home Affairs, Ministry of Women's Empowerment and Child Protection, National Commission on Violence Against Women), with a specific mandate for monitoring and rapid response; (3) An independent complaints mechanism accessible to indigenous women without having to go through customary structures, with guarantees of protection from retaliation; (4) A requirement for periodic gender audits of the implementation of the Draft Law on Indigenous Legal Communities every two years, with reports published and discussed jointly with indigenous women's representatives. It must be understood that without robust institutional frameworks, gender-sensitive regulations will remain merely on paper.

A Reconstruction of the Draft Law on Indigenous Legal Communities to Achieve Substantive Justice for Indigenous Women

Based on an analysis of gender bias in the normative framework of the Draft Law on Customary Law Communities and the limitations of the formal neutrality approach, a comprehensive normative reconstruction is imperative. This reconstruction must be grounded in a commitment to substantive justice that is not merely oriented towards formal equality before the law, but towards structural transformation capable of addressing deep-rooted inequalities. It is emphasised that substantive justice must be pursued through a more progressive and gender-responsive approach. Firstly, the explicit recognition of indigenous women as legal persons with equal rights. The general provisions of the Draft Law on Indigenous Legal Communities must include a definition that acknowledges the heterogeneity of indigenous communities and gender differentiation. This is in line with the principle of non-discrimination enshrined in the second and fifth principles of Pancasila, Article 28I(2) of the 1945 Constitution of the Republic of Indonesia, and *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* in Articles 2 and 5. This explicit recognition must include: recognition of indigenous women as holders of rights to land and natural resources, both individually and collectively; recognition of women-led knowledge-based practices such as gathering and forest management; and recognition of women's right to inherit property on an equal footing with men. In her report as the UN Special Rapporteur on the Rights of Indigenous Peoples, Tauli-Corpuz explicitly stated that recognition of the rights of indigenous peoples that is not accompanied by explicit recognition of the rights of indigenous women constitutes an incomplete and unjust recognition: ‘ . This explicit recognition must be formulated into specific and operational provisions, not merely declarative statements. This research proposes the following concrete wording: Addition to Article 1 (General Provisions): “Indigenous women are members of Indigenous Legal Communities who possess specific identities, experiences and

interests based on gender, recognised as legal subjects in their own right with equal rights in all aspects of indigenous community life, including rights to land, natural resources, political participation and cultural heritage.” Addition to Article 4 (Rights of Indigenous Legal Communities): “The rights stipulated in this Law apply equally to indigenous men and women, with specific recognition of the rights of indigenous women as the lawful holders of: (a) customary lands, both individually and collectively; (b) non-timber forest products and gathering practices as part of the indigenous economic system; (c) traditional knowledge, local seeds, and ecological management practices; (d) family and communal property inheritance.”

Addition to Article 10 (Customary Institutions): “Customary institutions recognised by the state must fulfil the principle of at least 30% female representation in decision-making structures, both in consultative forums and customary courts. Institutions that do not meet this principle cannot obtain state recognition.” Addition to Article 45 (Dispute Resolution): “The resolution of internal disputes through customary institutions must ensure the full participation of women, both as parties and as decision-makers. In the case of disputes relating to gender-based violence, indigenous women have the right to choose to bring the case before a state court without first having to go through customary mechanisms.” Addition of a New Article on the Non-Discrimination Clause: “Recognition of customary law, customary institutions, and customary practices cannot be used as justification for gender-based discriminatory treatment. Customary practices proven to be discriminatory must be progressively reformed to align with the principle of gender equality.” Explicit recognition through these provisions aligns with Indonesia’s obligations under *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and *the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which affirm the right of indigenous women to full and equal participation in decisions affecting their communities.

Secondly, the principle of non-discrimination as a binding fundamental norm. The principle of non-discrimination must be established as a fundamental norm that underpins all recognition of customary law. Every provision in the

Draft Law on Customary Law Communities that recognises customary institutions or practices must be accompanied by a clause stating that such recognition must not be used to justify gender-based discriminatory treatment. This constitutes a form of harmonisation between the recognition of the collective rights of indigenous communities and the protection of women's individual rights, as mandated by *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*. This non-discrimination clause must be binding and not merely an appeal, with clear sanction mechanisms for customary institutions proven to apply discriminatory practices against women. In his study on the transformation of customary land rights, Warman 2010 demonstrates that the recognition of customary communal rights must be accompanied by internal oversight mechanisms ensuring the fair distribution of benefits among community members including women(. It adds that Indonesia's commitment to *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* demands a more systematic harmonisation between customary law and international non-discrimination principles (Setyowati 2021) .

Thirdly, affirmative action policies to increase women's participation in customary institutions. Affirmative action policies to increase women's participation in customary institutions. From the perspective of substantive justice, affirmative action is not a form of discrimination, but rather a strategy for achieving genuine equality. The Draft Bill on Customary Law Communities must include provisions for a minimum representation of women in customary decision-making bodies, including in the procedures for the recognition and designation of customary law communities. *Feminist legal theory* asserts that every public policy must be evaluated from a gender perspective to ensure that no provisions directly or indirectly disadvantage women (Helena 2025) . These affirmative measures may take the form of minimum quotas for women's representation on customary councils and customary deliberative forums, requirements for specific consultation with indigenous women in the process of defining customary territories and rights, and complaint mechanisms for women experiencing discrimination within indigenous communities. This demonstrates

that the challenges of implementing gender affirmative policies within the context of indigenous communities in Indonesia are immense, yet this only further underscores their urgency as part of the national legislative framework (Pardosi and Fathony 2022) .

An intersectional approach must be integrated into policy-making to ensure that the diverse needs of indigenous women are accommodated. This approach, as developed by Crenshaw, helps to understand how gender, ethnicity, class and geographical location interact in shaping experiences of injustice (Carbado et al. 2013) . Without an intersectional perspective, legislative interventions risk reaching only a small proportion of indigenous women who have the access and capacity to utilise formal legal mechanisms. An intersectional approach to indigenous women's rights enables the formulation of policies that are more responsive to the diverse conditions and needs of indigenous women across various communities and regions, as a single-dimensional approach fails to capture the multiple layers of oppression experienced by indigenous women (Nayak Lohariya 2025) . Effective and equitable environmental governance can only be achieved if it takes into account diversity and interests at the local level, including the interests of indigenous women as reliable managers of natural resources (Brondizio and Tourneau 2016) .

Harmonisation with international instruments, in particular *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, must form an integral part of the Draft Law on Customary Law Communities. It is therefore recommended that, once enacted as law, the government issue a Government Regulation implementing the Draft Law on Customary Law Communities within a maximum of 12 months from its promulgation, with provisions ensuring the operationalisation of affirmative action mechanisms, the establishment of a Special Task Force for the Protection of Indigenous Women, and the allocation of a specific budget for indigenous women's empowerment programmes. Furthermore, monitoring and evaluation should be conducted periodically using clear indicators (level of women's participation in customary institutions, the number of and follow-up on complaints of gender discrimination, indigenous women's access to customary

lands, and the impact on the ecological conditions of customary territories). The results of the evaluation are published and discussed in an annual public forum. These recommendations align with the international legal framework, particularly CEDAW General Recommendation No. 39 (2022), which specifically reaffirms the state's obligation to guarantee the rights of indigenous women through an intersectional and participatory approach. The implementation of these recommendations will transform the MHA Bill from merely an instrument of collective recognition into an instrument of structural transformation that guarantees substantive justice for all members of indigenous communities, including and especially women. In the Philippines, the IPRA 1997 has demonstrated that integrating the protection of indigenous women into the national legal framework is achievable (Stefania 2017) . The IPRA explicitly recognises indigenous women's rights to land, regulates women's representation in indigenous institutions, and provides protection against gender-based violence within indigenous communities. This model could serve as a reference for Indonesia in formulating provisions that integrate the collective rights of indigenous peoples with the individual rights of women. Harmonisation with these international standards is not only an obligation under international law for Indonesia, but also a strategic step to ensure that the Draft Law on Indigenous Legal Communities is aligned with global developments regarding the rights of indigenous peoples and women's rights.

This process of normative reconstruction requires a commitment that is not merely enshrined in the text of the law, but is also embodied in concrete implementation mechanisms. The recognition of land rights from the perspective of economic, social and cultural rights necessitates effective safeguard mechanisms, not merely normative declarations. The gap between formal commitments and actual implementation is a key challenge that must be addressed through appropriate institutional design. From a conservation perspective, it is also emphasised that the rights of indigenous peoples, including the rights of indigenous women, can only be effectively protected if there are clear and accountable mechanisms in place. This normative reconstruction aligns with the view that the law should not be understood as a seemingly neutral

instrument, but as a tool for social transformation that favours vulnerable groups. This demands a strong political commitment from policymakers, systemic institutional reform, and a fundamental paradigm shift in how we view the relationship between law, society, and justice. The patriarchal culture embedded within a society is often reflected in existing legal texts. Therefore, the reconstruction of legal texts is an integral part of broader efforts to transform legal culture. The application of *feminist legal theory* can ensure that the formulation of new policies is undertaken through a gender-sensitive approach. Consequently, every new public policy must be evaluated from a gender perspective to ensure that no provisions directly or indirectly disadvantage women (Yanika Helena and Abdul R 2025). In the specific context of the Draft Law on Indigenous Communities, such an evaluation must directly involve indigenous women as the parties who best understand the realities of their lives. *Feminist* legal theory asserts that laws responsive to indigenous women must be built from the bottom up, placing the voices and experiences of indigenous women as the normative foundation, rather than as an add-on to the existing legal *framework*. Thus, the normative reconstruction of the Draft Bill on Customary Law Communities towards substantive justice for indigenous women is not merely an ethical and moral imperative, but also a binding constitutional and international obligation for Indonesia as a state governed by the rule of law committed to the protection of human rights. Recognition of indigenous communities must truly become an instrument of emancipation that guarantees the rights of all community members equally, fairly and with dignity. It is important for the Draft Law on Customary Law Communities to learn from the experiences of the Philippines, Bolivia and African nations in integrating a gender perspective into their regulations governing indigenous communities. The three selected countries have different yet complementary models in addressing similar challenges.

The Philippine experience with the Indigenous Peoples Rights Act (IPRA) of 1997 demonstrates a model of integration through institutional mechanisms. The IPRA established the National Commission *on Indigenous Peoples* (NCIP), which explicitly mandates the representation of indigenous women within the

commission's structure ("Indigenous Peoples Rights Act of 1997 / IPRA" 1997). Furthermore, the IPRA recognises the right to *Free, Prior and Informed Consent* (FPIC) of indigenous communities, the implementation of which must provide space for women's voices. A concrete example of the IPRA's implementation can be seen in Article 21, which explicitly states: "*The State shall, with due recognition of their distinct characteristics and identity, accord to the members of the ICCs/IPs the rights, protections and privileges enjoyed by the rest of the citizenry. It shall extend to them the same employment rights, opportunities, basic services, educational and other rights and privileges available to every member of society.*" Article 26 of the IPRA further states: "*ICC/IP women shall enjoy equal rights and opportunities with men, as regards the recognition, development, and protection of their rights.*" In practice, the NCIP has issued Administrative Order No. 1 Series of 2012 (*Revised Guidelines on FPIC*), which mandates separate consultation with indigenous women in every decision-making process concerning indigenous territories (Republic of the Philippines 2019). A prominent case study is the Lepanto Mining Case (2008), in which the NCIP refused to issue a *Certificate of Pre-Condition* because Kankana-ey indigenous women were not equally involved in the consultations; the absence of women's participation can invalidate the entire rights recognition process. The implementation of legal frameworks such as the Indigenous Peoples' Rights Act (IPRA) in the Philippines demonstrates that the recognition of indigenous communities can open up space for women's participation within formal structures. However, its effectiveness is highly dependent on the existence of inclusive institutional mechanisms. Without such support, legal recognition risks becoming mere rhetoric with no substantive impact on gender equality.

Bolivia's experience through the 2009 Plurinational Constitution and the 2010 Law on the Rights of Mother Earth (*Ley de Derechos de la Madre Tierra*) demonstrates a progressive model of integration between indigenous cosmology and modern principles of gender equality. Article 11 of the Plurinational Constitution stipulates that Bolivia adopts a democratic-participatory form of government with "equivalencia de condiciones entre hombres y mujeres" (equality of conditions between men and women). Article 30(II), points 14 and

18, explicitly recognise the right of indigenous communities to practise their own political, legal and economic systems, but this is followed by a mandatory clause in Article 190(II) which affirms that customary law must not conflict with constitutional rights, including gender equality. To complement this, Bolivia enacted Law No. 348 of 2013 (Comprehensive Law to Guarantee Women a Life Free from Violence), which applies universally, including within indigenous communities. McNulty's (2024) study on the Cocalera movement in Bolivia demonstrates that the combination of plurinational recognition with specific legislation for women has led to an increase in the political participation of indigenous women to 46% in the Senate and 56% in the Chamber of Deputies—including from the Aymara and Quechua communities (Farthing and Grisaffi 2024) . The ruling in *Sentencia Constitucional Plurinacional* 1422/2012, in which the Plurinational Constitutional Court of Bolivia rejected the expulsion of an Aymara indigenous woman from her community on the grounds of “violating customary rules”, stated that indigenous autonomy does not encompass the authority to commit human rights violations. This ruling set an important precedent affirming the supremacy of the constitution over customary law in human rights issues. Fernández Martinet explains how the Agro-Environmental Tribunal and the Plurinational Constitutional Court of Bolivia have developed a body of case law that consistently places gender equality as a limit on indigenous autonomy (Fernández Martinet 2022) . Within this framework, Bolivia recognises itself as a plurinational state that respects the existence of various indigenous communities with their own legal systems and governance structures. However, this recognition is not absolute, as the exercise of indigenous autonomy remains situated within the framework of human rights, including the principle of gender equality. Bolivia's approach has successfully opened up a space for dialogue between the values of ‘vivir bien’—as a philosophy of life for Andean communities—and the universal principles of human rights.

The South African experience demonstrates a model of integration that positions the judiciary as the primary instrument in reconciling customary law with the principle of equality. The South African Constitutional Court has

consistently affirmed that customary law practices that are discriminatory against women must be brought into line with the guarantees of equality enshrined in the 1996 Constitution. Through a number of landmark decisions, such as *Bhe v. Magistrate Khayelitsha* (2005), *Shilubana v. Nwamitwa* (2008), and *Mayelane v. Ngwenyama* (2013), the Constitutional Court struck down the rule of male primogeniture in Xhosa customary law which prohibited women and daughters from inheriting the estate of a deceased father or husband. The Court ruled that this rule violated Section 9 (equality) and Section 10 (dignity) of the 1996 Constitution, whilst emphasising that customary law must continue to evolve in line with constitutional values. *Shilubana v. Nwamitwa* (2008) The Court recognised Tinyiko Shilubana's right to become hosi (chief) of Valoyi, challenging the assumption that traditional leadership is inherently male and establishing that indigenous communities have the right to develop their own customary practices to align with equality. *Mayelane v. Ngwenyama* 2013 The Court ruled that the first wife in a customary polygamous marriage has the right to be informed of and consent to her husband's second marriage, thereby protecting women's rights within a previously patriarchal customary structure. This ruling established "*transformative customary law jurisprudence*": customary law is not abolished, but is progressively developed through judicial interpretation to align with human rights. For Indonesia, this model offers three lessons: (a) the Constitutional Court plays a strategic role as a catalyst for the transformation of customary law; (b) a dynamic "living customary law" approach is more constructive than a static "frozen customary law" approach; (c) the power of transformation lies in the combination of strong constitutional provisions (Article 9 of the South African Constitution guarantees substantive equality) and a judiciary that dares to engage in judicial activism to protect vulnerable groups.

These comparative experiences yield a number of important lessons for efforts to reconstruct the Draft Bill on Customary Law Communities, namely: Firstly, recognition of indigenous communities need not be positioned in opposition to the protection of women's rights. On the contrary, both can be designed synergistically through legal formulations sensitive to gender

dimensions; Secondly, the integration of a gender perspective into regulations governing indigenous communities requires a multidimensional approach. This can be achieved through the strengthening of inclusive institutions, constitutional provisions affirming equality, and the active role of the judiciary in interpreting and developing the law in a progressive manner; and Third, legal transformation oriented towards substantive justice will not be achieved without the direct involvement of indigenous women as the primary subjects. Their participation must not be merely procedural, but must be placed at the very foundation of the process of formulating and redefining customary norms. Without the inclusion of indigenous women's perspectives, state intervention risks becoming a new form of domination that merely reproduces inequalities and perpetuates the very gender biases it seeks to address.

Conclusion

This study concludes that the drafting of the Draft Bill on Indigenous Communities contains systemic gender bias as a result of a collective approach that disregards internal gender-based differentiation. The lack of explicit recognition of the rights of indigenous women, the absence of affirmative action mechanisms within indigenous institutions, and the absence of gender non-discrimination clauses in the substance of the Draft Bill serve as clear evidence of this structural bias. Such a normative framework risks perpetuating the multiple layers of marginalisation experienced by indigenous women in accessing resources, decision-making, and legal protection. A collective approach that disregards internal heterogeneity, including gender-based differentiation, effectively reproduces unequal power relations and reinforces gender bias.

The formal neutrality approach adopted by the Draft Bill on Indigenous Legal Communities has proven to have fundamental limitations in ensuring substantive justice for indigenous women. Formal neutrality fails to recognise multi-layered structural inequalities, disregards the historical dimensions of injustice, does not promote inclusive participation, does not guarantee a fair distribution of land rights, is unable to address gender-based violence within indigenous communities, and fails to address the specific needs of women

influenced by geographical, cultural, and linguistic factors. In other words, a law that is formally neutral can be substantively biased because it does not take into account the vulnerable position of marginalised groups. This situation underscores that a formal neutrality approach is insufficient in realising justice for indigenous women.

The normative reform of the Draft Law on Indigenous Communities to achieve substantive justice for indigenous women requires five complementary steps: the explicit recognition of indigenous women as legal persons with equal rights in all aspects of indigenous life; the integration of the principle of non-discrimination as a fundamental norm binding on all state-recognised indigenous institutions and practices; Affirmative policies in the form of quotas and special consultation mechanisms to ensure meaningful participation of women in customary institutions; Substantive harmonisation with *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and international *best practices* such as the 1997 Philippine IPRA; and Integration of an intersectional perspective into every policy formulation process to accommodate the diversity of conditions and needs of indigenous women. Recognition of indigenous communities must not be limited to legal symbolism, but must serve as an instrument of emancipation that guarantees the rights of all community members equally, fairly and with dignity.

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