

Customary Law and Indigenous Rights: A Comparative Study of Legal Recognition and Cultural Preservation

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ABSTRACT

The legal recognition of customary law and indigenous rights has emerged as a defining challenge of contemporary pluralist legal orders, yet the relationship between formal recognition and substantive cultural preservation remains undertheorized. This study examines how international, regional, and domestic legal frameworks recognize customary law and protect indigenous cultural rights through a comparative analysis spanning Latin America, Africa, Southeast Asia, and the Arctic. Drawing on a normative juridical methodology with a comparative-analytical design, the research synthesizes the jurisprudence of the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, constitutional courts in Indonesia, South Africa, and Colombia, and the evolving practice of Arctic states regarding the Sámi. The analysis reveals that legal recognition of customary law operates through three distinct modalities—constitutional entrenchment, statutory delegation, and judicial construction—each generating different patterns of protection and contestation. A central finding is the persistent gap between formal recognition and material control: states increasingly acknowledge indigenous customary rights in principle while simultaneously re-scaling indigenous authority into administrative and market-compatible forms that constrain substantive self-determination. The study develops the concept of "recognition without redistribution" to capture this mechanism, demonstrating how international norms such as the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 are domesticated through configurations of state authority that prioritize regulatory legibility over indigenous autonomy. A second finding concerns the internal tensions within customary law systems, particularly regarding gender equality and the rights of internal minorities, where absolute deference to customary authority may entrench discrimination while excessive state intervention may undermine cultural integrity. The study proposes a proportionality-based framework for resolving such conflicts that recognizes customary autonomy while establishing constitutional minimum guarantees. The theoretical contribution lies in integrating legal pluralism theory with vulnerability analysis to explain why indigenous communities remain structurally disadvantaged despite unprecedented normative recognition.

Keywords: Cultural Preservation, Customary Law, Free Prior And Informed Consent, Indigenous Rights, Legal Pluralism, Recognition Theory

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1. INTRODUCTION

The relationship between customary law and indigenous rights has become a central preoccupation of comparative legal scholarship, international human rights practice, and constitutional politics across the Global South and beyond. Over the past five decades, a remarkable normative transformation has occurred: the United Nations

Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, affirmed a comprehensive set of collective rights including the right to maintain and strengthen distinct political, legal, economic, social, and cultural institutions; ILO Convention No. 169, adopted in 1989, obligated states to recognize and protect the customary laws and institutions of indigenous peoples; and a growing number of constitutions—from Ecuador and Bolivia to South Africa and the Philippines—have entrenched indigenous rights in their foundational legal instruments. Regional human rights courts have contributed decisively to this transformation. The Inter-American Court of Human Rights' judgment in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) established that indigenous communal property rights originate in customary practice and that possession of land suffices for official recognition where indigenous communities lack formal title. The African Court on Human and Peoples' Rights' decisions in the *Endorois* and *Ogiek* cases similarly recognized indigenous customary land rights and ordered structural remedies, including demarcation and collective titling.

Yet this proliferation of recognition has not resolved the fundamental question of whether legal acknowledgment translates into substantive protection. A growing body of comparative research suggests that recognition reforms increasingly operate as instruments for regulating indigenous territories within developmental and market-oriented governance frameworks, expanding formal rights while simultaneously re-scaling indigenous authority into administrative and market-compatible forms. The legal recognition of indigenous peoples' customary rights in Indonesia, for example, remains largely normative and has not been supported by an effective legal framework, with judicial developments strengthening formal recognition while their impact remains limited due to inconsistent administrative enforcement. Indigenous communities in Indonesia remain among the most vulnerable actors in natural resource governance despite constitutional recognition of their customary rights, their marginalization exacerbated by overlapping land claims, fragmented regulations, and limited representation in decision-making. This paradox—expanding recognition alongside persistent vulnerability—demands theoretical explanation and comparative analysis.

Three theoretical traditions inform the study's analytical framework. The first is legal pluralism, which challenges the state-centric assumption that law emanates solely from state institutions. Hooker's pioneering work highlighted that legal systems typically combine ideas, principles, rules, and procedures originating from a variety of sources, while Griffiths distinguished between "weak" legal pluralism, in which the state recognizes customary law within its own framework, and "strong" legal pluralism, which acknowledges multiple autonomous normative orders. The second tradition is vulnerability theory, which posits that vulnerability is universal but differentially distributed through social institutions, and that the state's obligation is to ensure that institutions are responsive to vulnerability rather than to treat it as an exceptional condition. The third tradition is recognition theory, which examines how legal acknowledgment of cultural difference can become a mechanism of governance rather than emancipation, incorporating indigenous authority into state structures on terms that constrain rather than enable self-determination.

The existing literature has examined customary law recognition and indigenous rights protection within specific jurisdictions and before individual tribunals, but comparative analysis across regional systems and domestic legal orders remains fragmented. The Inter-American Court's jurisprudence on indigenous land rights has been extensively analyzed, as have the African Court's Endorois and Ogiek decisions. Constitutional recognition of customary law in Indonesia, South Africa, and Latin America has attracted scholarly attention. However, no study has systematically compared how these different legal orders construct the relationship between customary law recognition and cultural preservation, or how they address the tensions between collective autonomy and individual rights within indigenous communities. This gap is particularly significant because the most contentious contemporary issues in indigenous rights law—free prior and informed consent, gender equality within customary systems, and the interface between customary and statutory land tenure—require precisely the kind of cross-jurisdictional analysis that existing scholarship does not provide.

This study addresses that gap. The central research questions are: (1) Through what legal modalities do states and international tribunals recognize indigenous customary law, and what are the implications of each modality for cultural preservation? (2) How do regional human rights systems and domestic constitutional courts balance collective indigenous autonomy against individual rights, particularly the rights of women and internal minorities? (3) What explains the persistent gap between formal recognition and substantive control over land, resources, and governance? (4) What theoretical framework can account for both the achievements and the limitations of customary law recognition?

The significance of this study lies in its integrated comparative framework. By examining customary law recognition across multiple levels of legal governance—international, regional, and domestic—the research demonstrates that recognition is not a unidimensional concept but a complex process whose outcomes depend on the interaction between normative content, institutional design, and political economy. The findings have implications for constitutional design, judicial practice, and international monitoring mechanisms. The study also contributes to theoretical debates about legal pluralism and vulnerability by developing the concept of "recognition without redistribution" to explain the structural dynamics that constrain indigenous self-determination even under conditions of formal legal recognition.

2. LITERATURE REVIEW

2.1 Legal Pluralism and the Recognition of Customary Law

The theoretical foundation for examining customary law recognition lies in the rich tradition of legal pluralism scholarship. Hooker's *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975) established the field by documenting how colonial legal orders incorporated indigenous customary norms within state law regimes, creating hierarchical relationships in which national legal systems functioned as dominant law and indigenous systems as servant law. Griffiths (1986) advanced a

more radical conception, distinguishing between "weak" legal pluralism—the state's recognition of customary law within its own framework—and "strong" legal pluralism, which acknowledges multiple autonomous normative orders coexisting within the same social field. Griffiths' strong pluralism challenged the "legal centralism" that treats state law as the exclusive source of legal obligation and drew on Sally Falk Moore's concept of the "semi-autonomous social field" to theorize how non-state normative orders maintain their authority.

Subsequent scholarship has extended and critiqued these foundations. Tamanaha (1993) questioned whether legal pluralism could sustain a coherent analytical framework, arguing that the concept risked collapsing into a general sociology of normative ordering that lacked legal specificity. More recent work has moved toward "adaptive legal pluralism," which challenges the prevailing conflict-of-laws approach to the interaction of state and indigenous legal systems and emphasizes negotiated relationships rather than hierarchical subordination. The Indonesian case illustrates this negotiated approach: legal pluralism in Indonesia should be understood as a relationship between collective self-determination and individual rights rather than as a hierarchy in which one automatically prevails.

2.2 International Normative Frameworks: UNDRIP and ILO Convention No. 169

The international normative architecture for indigenous rights rests on two principal instruments. ILO Convention No. 169, adopted in 1989, is a binding treaty that obligates states to recognize the customary laws and institutions of indigenous peoples in so far as they do not conflict with internationally recognized human rights. Article 8 requires governments to take indigenous customs and customary law duly into consideration when applying national laws, and Article 9 obligates states to respect indigenous methods of dealing with offenses committed by their members. The Convention's supervisory mechanism, the Committee of Experts on the Application of Conventions and Recommendations, has consistently emphasized that recognition of customary law is not merely permissible but obligatory for ratifying states.

UNDRIP, adopted in 2007, is not formally binding but articulates a comprehensive vision of indigenous rights that has influenced constitutional and judicial development worldwide. Article 11 affirms the right of indigenous peoples to practice and revitalize their cultural traditions and customs, including the right to maintain, protect, and develop the past, present, and future manifestations of their cultures. Article 31 recognizes the right to maintain, control, protect, and develop cultural heritage, traditional knowledge, and traditional cultural expressions. Article 32 requires states to consult and cooperate in good faith with indigenous peoples through their own representative institutions before approving any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources.

The empirical record of implementation, however, reveals significant gaps. A comparative analysis of Indonesia, the Philippines, and Aotearoa New Zealand found that international indigenous rights norms—particularly UNDRIP and related standards

associated with ILO Convention No. 169—are domesticated through distinct configurations of state authority, market integration, and legal pluralism, with recognition reforms increasingly operating as instruments for regulating indigenous territories within green developmental and market-oriented governance frameworks. In Indonesia, the recognition of indigenous peoples' customary rights remains largely normative and has not been supported by an effective legal framework, despite Constitutional Court decisions strengthening formal recognition.

2.3 Regional Jurisprudence: Inter-American and African Systems

The Inter-American Court of Human Rights has been the most influential regional tribunal in developing jurisprudence on indigenous customary law and cultural preservation. *Awas Tingni* established three foundational principles: that indigenous communal property rights derive from customary practice rather than state grant; that possession of land suffices for official recognition where formal title is absent; and that remedies for violations must respect indigenous customary law, values, customs, and mores. The Court's subsequent jurisprudence in *Saramaka* and *Sarayaku* extended these principles to require free, prior, and informed consultation regarding development projects affecting indigenous territories. In *Sarayaku v. Ecuador* (2012), the Court held unanimously that Ecuador violated the rights to consultation, indigenous communal property, and cultural identity by permitting oil operations on Sarayaku ancestral territory without adequate prior consultation.

The African Court on Human and Peoples' Rights has developed a distinctive reparative approach. In the *Endorois* case, the African Commission found that Kenya's eviction of the Endorois community from their ancestral lands around Lake Bogoria violated rights to property, culture, religion, and natural resources. The Commission's decision, later endorsed by the African Union, ordered Kenya to recognize Endorois ownership rights and restitute the community to its ancestral land. The *Ogiek* case, decided by the African Court in 2017, involved a forest-dwelling community forcibly evicted from the Mau Forest Complex. The Court found Kenya in violation of multiple provisions of the African Charter, including rights to land, property, natural resources, culture, and development, and ordered Kenya to identify, delimit, demarcate, and grant collective title to Ogiek ancestral lands. In its 2025 compliance hearing, the Court found that Kenya had largely failed to comply with its reparations orders and emphasized the urgent need for implementation.

2.4 Domestic Constitutional Recognition

Constitutional recognition of customary law and indigenous rights varies significantly across jurisdictions, reflecting different legal traditions, colonial histories, and political configurations. Latin American constitutions have been at the forefront of collective rights recognition. Ecuador's 2008 Constitution and Bolivia's 2009 Constitution recognize indigenous peoples' right to exercise juridical functions according to their own customary laws and grant indigenous autonomy at the territorial level. Colombia's 1991 Constitution recognized indigenous territorial autonomy and customary jurisdiction,

and the Constitutional Court has developed extensive jurisprudence on prior consultation and cultural rights.

In Asia, recognition patterns are more fragmented. The Philippines' 1987 Constitution is among the most progressive in the region regarding indigenous rights, and the Indigenous Peoples' Rights Act of 1997 (IPRA) provides a comprehensive statutory framework for recognition and protection. India's Constitution contains special provisions for Scheduled Tribes, particularly the Sixth Schedule applicable to tribal areas in the northeast. Indonesia's 1945 Constitution recognizes customary law communities (*masyarakat hukum adat*) and the Constitutional Court has issued landmark decisions strengthening indigenous land rights, though the absence of a dedicated special law has left recognition fragmented across sectoral legislation.

South Africa's post-apartheid constitutional order provides a particularly instructive case. The 1996 Constitution recognizes customary law as an integral part of the legal system and obligates courts to apply it subject to the Bill of Rights. The Constitutional Court's decision in *Shilubana v. Nwamitwa* (2008) addressed the tension between customary law and gender equality, holding that customary law is living and evolving and must be interpreted in light of constitutional values. This jurisprudence reflects a negotiated approach that recognizes customary autonomy while establishing constitutional minimum guarantees.

2.5 Cultural Preservation and the Cultural Rights Framework

The preservation of indigenous culture is addressed through multiple legal frameworks: UNDRIP's provisions on cultural traditions and heritage, the International Covenant on Economic, Social and Cultural Rights' Article 15 on cultural life, and the Convention on Biological Diversity's provisions on traditional knowledge. The Human Rights Committee's General Comment No. 23 on minority rights recognized that culture manifests in various forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. The Committee emphasized that indigenous peoples' right to enjoy their culture may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions affecting them.

The relationship between customary law recognition and cultural preservation is not automatic. Critics have argued that human rights language of preservation can freeze cultures or become an excuse to regulate them, and that cultural rights operate as a double-edged sword enabling recognition of difference in theory while often being subordinated to a singular human rights frame in practice. The challenge is to design legal frameworks that protect cultural continuity without essentializing indigenous cultures as static or homogeneous, and that enable indigenous communities to engage in the dynamic processes of cultural reproduction on their own terms.

2.6 Tensions Between Collective Autonomy and Individual Rights

A critical issue that has received increasing scholarly attention is the tension between collective indigenous autonomy and the individual rights of community

members, particularly women and internal minorities. The Indonesian case illustrates this tension vividly. Indigenous customary law occupies an important position within Indonesia's legal pluralist system, yet its recognition raises difficult questions when customary norms potentially conflict with constitutional principles of equality and individual rights. Research focusing on women, children, and internal minorities whose interests may not always correspond with dominant customary practices has argued that neither unconditional state intervention nor absolute deference to customary authority provides an adequate framework for resolving such conflicts. Absolute deference may entrench internal discrimination, whereas excessive state intervention may undermine indigenous autonomy and cultural integrity.

Comparative analysis of gender equality in customary inheritance law has revealed significant variation across jurisdictions, with some customary systems excluding women from land and property rights while others have evolved to incorporate more egalitarian norms. The South African Constitutional Court's jurisprudence on living customary law has been influential in recognizing that customary law is not static but evolves in response to changing social conditions, including constitutional commitments to gender equality.

3. METHODOLOGY

This study employs a normative juridical methodology with a comparative-analytical design. Normative juridical research examines legal norms, principles, and doctrines through the analysis of primary legal sources—treaties, constitutional provisions, legislation, and judicial decisions—as well as secondary sources including scholarly commentary and reports from international organizations. The comparative dimension systematically examines how different legal systems recognize customary law and protect indigenous cultural rights, identifying patterns of convergence and divergence and explaining variation through reference to institutional, doctrinal, and contextual factors.

The research design is qualitative and multi-level. Primary sources include UNDRIP, ILO Convention No. 169, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and constitutional texts from Indonesia, the Philippines, South Africa, Colombia, Ecuador, and Bolivia. Jurisprudential sources include selected judgments of the Inter-American Court of Human Rights (*Awas Tingni*, *Saramaka*, *Sarayaku*), the African Court on Human and Peoples' Rights (*Ogiek*), the African Commission (*Endorois*), and constitutional courts in Indonesia, South Africa, and Colombia. Secondary sources include peer-reviewed journal articles, monographs, and reports from the United Nations Permanent Forum on Indigenous Issues and the Special Rapporteur on the rights of indigenous peoples.

The analytical framework integrates three dimensions. First, doctrinal analysis examines the content, structure, and internal coherence of legal norms governing customary law recognition. Second, comparative analysis identifies patterns of convergence and divergence across jurisdictions and legal traditions. Third, political economy analysis examines how recognition reforms interact with market integration,

state authority, and the material conditions of indigenous communities. The integration of these dimensions enables a holistic assessment of customary law recognition as a multi-level governance phenomenon rather than a collection of isolated legal instruments.

The selection of jurisdictions and legal instruments was guided by three criteria: (1) jurisprudential significance, understood as the influence of a decision or legal order on subsequent legal development; (2) diversity of legal tradition and colonial history; and (3) availability of authoritative texts and scholarly commentary. The analysis prioritizes developments from 2010 to 2026, with reference to foundational instruments and jurisprudence where necessary for contextual understanding.

4. RESULTS AND DISCUSSION

4.1 Three Modalities of Customary Law Recognition and Their Implications

The comparative analysis reveals that legal recognition of customary law operates through three distinct modalities, each generating different patterns of protection, contestation, and vulnerability. The first modality is constitutional entrenchment, in which indigenous customary rights are recognized in the foundational legal instrument of the state. Ecuador's 2008 Constitution and Bolivia's 2009 Constitution exemplify this approach, recognizing indigenous peoples' right to exercise juridical functions according to their own customary laws and establishing indigenous autonomy as a territorial principle. Colombia's 1991 Constitution similarly recognized indigenous territorial autonomy and customary jurisdiction. The constitutional modality provides the strongest formal protection but does not automatically resolve questions of implementation, as the experience of Ecuador and Bolivia demonstrates: despite constitutional recognition, indigenous communities continue to face challenges in exercising their customary rights due to legislative inertia, administrative obstacles, and political opposition.

The second modality is statutory delegation, in which the state recognizes customary law through dedicated legislation. The Philippines' Indigenous Peoples' Rights Act (IPRA) of 1997 represents the most comprehensive example of this approach in Asia, providing a statutory framework for the recognition of ancestral domains, self-governance, and cultural integrity. Indonesia lacks a dedicated special law on indigenous peoples' rights despite advocacy since 2011, resulting in fragmented recognition across sectoral legislation. The Indonesian Constitutional Court has confirmed the need for a special law but has held that until such legislation is enacted, scattered laws in mining, forestry, and coastal sectors can be justified. This fragmented statutory approach produces legal uncertainty and inconsistent protection, as indigenous communities must navigate multiple regulatory regimes with different recognition criteria and procedural requirements. The study's analysis of Indonesian natural resource governance revealed that legal pluralism remains weakly integrated, producing persistent uncertainty over the recognition of customary territories and inconsistent safeguards across sectors and jurisdictions, with institutional roles diffuse and administrative procedures for recognizing customary communities and lands uneven.

The third modality is judicial construction, in which courts develop customary law recognition through case law. The Inter-American Court of Human Rights has been the most influential judicial body in this regard. *Awas Tingni* established that indigenous communal property rights originate in customary practice, and that possession of land suffices for official recognition where formal title is absent. The Court held that indigenous peoples' customary law must be especially taken into account for the purpose of determining property rights, and that the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. The African Court's *Ogiek* judgment similarly constructed customary law recognition through judicial interpretation of the African Charter, finding that Kenya's eviction of the *Ogiek* from their ancestral lands violated rights to land, property, natural resources, culture, and development. The advantage of judicial construction is its flexibility and responsiveness to specific factual contexts, but its limitations include the dependence on litigation capacity, the absence of systematic enforcement mechanisms, and the risk of inconsistent jurisprudence across different courts and jurisdictions.

The three modalities are not mutually exclusive; indeed, the strongest protection regimes combine constitutional entrenchment with statutory implementation and judicial enforcement. South Africa's post-apartheid constitutional order exemplifies this combined approach: the Constitution recognizes customary law as an integral part of the legal system, the Recognition of Customary Marriages Act and the Traditional and Khoi-San Leadership Act provide statutory frameworks, and the Constitutional Court has developed substantial jurisprudence on living customary law. The Indonesian case, by contrast, illustrates the consequences of fragmented modality: constitutional recognition without dedicated statutory implementation and with inconsistent judicial enforcement produces a protection deficit that leaves indigenous communities vulnerable despite formal legal acknowledgment.

4.2 Free, Prior, and Informed Consent as a Contested Standard

Free, prior, and informed consent (FPIC) has emerged as the central procedural mechanism for protecting indigenous rights in the context of development projects. UNDRIP Article 32 requires states to consult and cooperate in good faith with indigenous peoples through their own representative institutions before approving any project affecting their lands or territories and other resources. The Inter-American Court's *Sarayaku* judgment held that Ecuador violated the *Sarayaku* people's rights to consultation, communal property, and cultural identity by permitting oil operations without adequate prior consultation, and that consultation must be conducted in good faith, through culturally appropriate procedures, and with the objective of reaching agreement. The Court emphasized that consultation is not merely a procedural formality but a substantive obligation that must respect indigenous decision-making processes and customary law.

However, the comparative analysis reveals significant gaps between the normative standard and its implementation. FPIC remains widely violated or hollowed out by box-ticking, proponent-led consultations that erode community trust and

legitimacy. A comparative study of FPIC protocols in North and South America indicates a growing consensus among analysts that while FPIC is increasingly recognized as a global standard, its implementation in domestic contexts remains limited from indigenous peoples' perspective. The ASEAN context presents particular challenges: although the principle of FPIC is recognized in some domestic legal frameworks in Malaysia, the Philippines, and Indonesia, its application is constrained by weak enforcement mechanisms, limited institutional capacity, and the political economy of resource extraction.

A critical gap in the FPIC framework concerns the relationship between consultation and consent. The Inter-American Court's jurisprudence distinguishes between consultation, which is required for measures that may affect indigenous interests, and consent, which is required for measures involving the relocation of indigenous peoples or the storage or disposal of hazardous materials on indigenous territories. However, the boundary between these categories is contested, and states frequently characterize projects as requiring only consultation when indigenous peoples argue that consent is required. The Indonesian experience illustrates this contestation: despite the Constitutional Court's recognition of customary land rights, the absence of a dedicated legal framework for FPIC has left indigenous communities dependent on sectoral regulations that provide limited procedural protections.

4.3 Internal Tensions: Collective Autonomy and Individual Rights

The comparative analysis reveals that the most difficult challenges in customary law recognition arise not from conflicts between state law and customary law but from conflicts within customary law systems—specifically, tensions between collective indigenous autonomy and the individual rights of community members, particularly women, children, and internal minorities. The Indonesian case provides a particularly clear illustration. Indigenous customary law occupies an important position within Indonesia's legal pluralist system, yet its recognition raises difficult questions when customary norms potentially conflict with constitutional principles of equality and individual rights. Absolute deference to customary authority may entrench internal discrimination, particularly against women in inheritance and property matters, while excessive state intervention may undermine indigenous autonomy and cultural integrity.

The South African Constitutional Court's jurisprudence offers instructive guidance. In *Shilubana v. Nwamitwa*, the Court addressed the tension between customary law and gender equality in the context of traditional leadership succession. The Court held that customary law is living and evolving and must be interpreted in light of constitutional values, including gender equality. This approach recognizes that customary law is not static but responsive to changing social conditions, and that constitutional interpretation can guide customary law's evolution without displacing indigenous authority. However, the Court's approach also raises questions about the legitimacy of judicial intervention in customary law development, particularly when the intervention reflects values that may not be shared by all members of the indigenous community.

Comparative analysis of gender equality in customary inheritance law across jurisdictions reveals significant variation. Some customary systems have evolved to incorporate more egalitarian norms, while others continue to exclude women from land and property rights. The research on feminism and gender equality among Orang Asli women in Malaysia examines the legal tensions between indigenous customary laws and Malaysia's constitutional commitment to gender equality as perceived and experienced by indigenous women themselves. This scholarship emphasizes the importance of attending to the voices and agency of women within indigenous communities rather than imposing external solutions that may be perceived as culturally imperialist.

The study proposes a proportionality-based framework for resolving conflicts between customary autonomy and individual rights. Such a framework would recognize customary autonomy as a protected interest while establishing constitutional minimum guarantees for equality, dignity, and fundamental rights. Proportionality analysis would require courts to assess whether the limitation of individual rights is justified by the importance of the customary norm, whether the limitation is suitable for achieving the norm's purpose, whether less restrictive means are available, and whether the limitation is proportionate to the objective pursued. This framework would enable more nuanced judicial and legislative responses than either absolute deference or unconditional state intervention.

4.4 Recognition Without Redistribution: The Structural Limits of Legal Acknowledgment

The most significant finding of this study is the persistent gap between formal recognition of customary law and substantive control over land, resources, and governance. The comparative analysis of Indonesia, the Philippines, and Aotearoa New Zealand demonstrates that recognition reforms increasingly operate as instruments for regulating indigenous territories within green developmental and market-oriented governance frameworks. While legal recognition expands formally, it simultaneously re-scales indigenous authority into administrative and market-compatible forms, enabling new forms of assetization, investment eligibility, and ecological commodification without substantive redistribution of territorial sovereignty.

This mechanism—which the study terms "recognition without redistribution"—operates through several interconnected processes. First, recognition procedures impose administrative requirements that indigenous communities must satisfy to obtain legal acknowledgment of their customary rights. These requirements—documentation of traditional land use, proof of continuous occupation, and compliance with standardized procedural rules—privilege forms of evidence and organization that align with state administrative rationality while disadvantaging communities whose customary practices do not produce the requisite documentary record. The Indonesian experience illustrates this dynamic: administrative procedures for recognizing customary communities and lands are uneven, and remedies for rights violations are limited, collectively sustaining a protection deficit in resource governance.

Second, recognition reforms frequently re-scale indigenous authority from territorial sovereignty to administrative participation. Indigenous communities are granted the right to be consulted about development projects but not the right to veto them; they are recognized as stakeholders in resource governance but not as decision-makers. The Inter-American Court's FPIC jurisprudence, while progressive in its recognition of consultation rights, stops short of recognizing a general right of indigenous peoples to withhold consent to development projects that affect their territories. This limitation is significant: consultation without the possibility of consent becomes a mechanism for legitimizing projects that indigenous communities oppose, transforming a right of self-determination into a procedure for obtaining social license for extractive industries.

Third, recognition without redistribution is embedded in the political economy of green capitalism. The global transition to renewable energy and sustainable development has generated new demands for land, minerals, and ecosystem services, often located in indigenous territories. Recognition reforms enable states and corporations to access these resources through legal mechanisms that appear to respect indigenous rights while actually facilitating their commodification. The study's analysis of green capitalism in Indonesia, the Philippines, and New Zealand demonstrates that legal recognition of indigenous land rights enables new forms of assetization and investment eligibility without substantive redistribution of territorial sovereignty. This finding contributes to debates in critical political economy by showing how rights-based reforms can become embedded within contemporary regimes of extraction and accumulation.

The concept of recognition without redistribution has significant implications for the theory and practice of indigenous rights law. It suggests that legal recognition is a necessary but insufficient condition for cultural preservation and self-determination. Recognition must be accompanied by substantive redistribution of land, resources, and governance authority if it is to achieve its transformative potential. This requires not only legal reform but also political mobilization, institutional innovation, and economic transformation—domains that lie beyond the reach of legal instruments alone.

4.5 Cultural Preservation as a Dynamic Process

The comparative analysis reveals that cultural preservation is not a matter of freezing indigenous cultures in their present form but of enabling their dynamic reproduction and development. Critics of human rights approaches to cultural preservation have argued that preservation language can freeze cultures or become an excuse to regulate them, and that cultural rights often operate as a double-edged sword enabling recognition of difference in theory while subordinating it to a singular human rights frame in practice. The study's findings support this critique while also identifying pathways for a more dynamic approach.

The Inter-American Court's *Awas Tingni* judgment articulated a conception of cultural preservation that is relational and dynamic rather than static and essentialist. The Court held that for indigenous communities, relations to the land are not merely a

matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. This formulation emphasizes the transmission of cultural legacy across generations rather than the preservation of a fixed cultural content. It recognizes that indigenous cultures are living traditions that evolve over time while maintaining continuity with the past.

The South African Constitutional Court's living customary law jurisprudence similarly rejects static conceptions of customary law. By recognizing that customary law evolves in response to changing social conditions, the Court creates space for indigenous communities to adapt their customary norms to contemporary circumstances—including constitutional commitments to gender equality and human dignity—without losing their distinctive cultural identity. This approach recognizes the agency of indigenous communities in shaping their own legal and cultural development rather than treating them as passive objects of state recognition or judicial construction.

The study's findings suggest that effective cultural preservation requires legal frameworks that support three conditions. First, security of land tenure and territorial control, without which indigenous communities cannot maintain the material basis of their cultural practices. Second, institutional space for indigenous self-governance, enabling communities to make collective decisions about cultural reproduction and adaptation. Third, respect for indigenous knowledge systems and practices, including traditional ecological knowledge, customary dispute resolution, and cultural expressions. The comparative analysis reveals that all three conditions remain inadequately met across the jurisdictions examined, despite significant advances in legal recognition.

4.6 Cross-Border and Transnational Dimensions

The comparative analysis reveals that customary law recognition and indigenous rights protection increasingly involve cross-border and transnational dimensions that challenge the territorial logic of state-based legal systems. The case of the Sámi people, whose traditional territory spans Norway, Sweden, Finland, and Russia, illustrates these challenges. The Norwegian Supreme Court's *Saarivuoma* judgment revealed a degree of disquiet among judges over the impact of recognizing indigenous rights on domestic law, with the Court suggesting that a court of law is not an appropriate forum for balancing multiple interests arising in respect of indigenous rights, nationality, and resource management. The judgment treated these as essentially political questions, which could be undermined by the application of a rights model for determining the position of indigenous people.

The Canadian experience offers a contrasting approach. In *R v. Desautel*, the Supreme Court of Canada addressed the question of whether an Aboriginal right under section 35 of the Constitution Act, 1982 can be exercised by a non-resident, non-citizen Indigenous group whose traditional territory straddles the Canada-United States border. The Court recognized that the Lakes Tribe, whose members are citizens of the United States, hold Aboriginal rights in Canada based on their descent from the Sinixt people

whose territory historically included British Columbia. This judgment reflects a judicial approach that prioritizes the continuity of indigenous rights over the territorial boundaries of the modern state, and it contrasts with the Norwegian Supreme Court's treatment of cross-border Sámi rights as non-justiciable political questions.

The contrast between the Canadian and Norwegian approaches has significant implications for the comparative analysis of customary law recognition. It suggests that the recognition of cross-border indigenous rights depends not only on the content of international norms but also on judicial conceptions of the judicial role, the justiciability of indigenous rights claims, and the relationship between law and politics. The Canadian courts have moved from a more restrictive position to one closer to what UNDRIP requires, while the Norwegian Supreme Court's judgment suggests a degree of resistance to the full implications of indigenous rights recognition. These divergent trajectories underscore the importance of institutional and doctrinal factors in shaping recognition outcomes.

4.7 Synthesis: Toward a Coherent Framework for Customary Law Recognition

The comparative analysis reveals that customary law recognition is characterized by three persistent tensions. The first is the tension between recognition and redistribution. Legal recognition of customary rights has expanded globally, but the material conditions of indigenous communities have not improved commensurately. Recognition reforms often operate as mechanisms for regulating indigenous territories within market-oriented governance frameworks rather than as instruments for redistributing power and resources. Resolving this tension requires attention not only to legal norms but also to the political economy of recognition, including the interests of states, corporations, and international financial institutions in indigenous lands and resources.

The second tension is between collective autonomy and individual rights. Recognition of customary law creates space for indigenous self-governance but also raises the risk that customary norms will be used to justify discrimination against women, children, and internal minorities. The study's proposed proportionality-based framework offers a principled approach to resolving such conflicts, but its implementation requires institutional capacity, cultural sensitivity, and sustained dialogue between indigenous communities, state institutions, and human rights bodies.

The third tension is between cultural preservation and cultural dynamism. Legal frameworks for cultural preservation risk freezing indigenous cultures in their present form, treating them as static objects of protection rather than dynamic processes of collective self-creation. The Inter-American Court's emphasis on transmitting cultural legacy to future generations and the South African Constitutional Court's recognition of living customary law point toward a more dynamic approach that recognizes indigenous agency in shaping cultural continuity and change.

A coherent framework for customary law recognition must navigate these tensions without resolving them prematurely. Such a framework should be grounded in

four principles. First, recognition must be accompanied by redistribution: legal acknowledgment of customary rights must be linked to substantive control over land, resources, and governance authority. Second, proportionality must guide the resolution of conflicts between collective autonomy and individual rights: neither absolute deference nor unconditional intervention is adequate. Third, cultural preservation must be understood as a dynamic process that enables indigenous communities to reproduce and adapt their cultural practices on their own terms. Fourth, cross-border and transnational dimensions of indigenous rights must be addressed through mechanisms of coordination and mutual recognition that transcend the territorial logic of state-based legal systems.

5. CONCLUSION

This study has examined the legal recognition of customary law and the protection of indigenous cultural rights through a comparative analysis of international, regional, and domestic legal frameworks. The analysis reveals a global landscape characterized by unprecedented normative recognition alongside persistent structural vulnerability.

The principal findings can be summarized as follows. First, customary law recognition operates through three distinct modalities—constitutional entrenchment, statutory delegation, and judicial construction—each generating different patterns of protection, contestation, and vulnerability. The strongest protection regimes combine all three modalities, while fragmented recognition produces legal uncertainty and inconsistent protection.

Second, free, prior, and informed consent has emerged as the central procedural mechanism for protecting indigenous rights, but its implementation remains constrained by weak enforcement mechanisms, political economic pressures, and contestation over the boundary between consultation and consent. The gap between normative standard and domestic implementation is a persistent feature of indigenous rights law.

Third, the most difficult challenges in customary law recognition arise not from conflicts between state law and customary law but from tensions within customary systems—specifically, between collective autonomy and individual rights, particularly the rights of women and internal minorities. The study proposes a proportionality-based framework that recognizes customary autonomy while establishing constitutional minimum guarantees.

Fourth, the concept of "recognition without redistribution" captures the structural mechanism through which legal recognition of customary rights coexists with persistent material disadvantage. Recognition reforms frequently re-scale indigenous authority into administrative and market-compatible forms that facilitate resource extraction and commodification without substantive redistribution of territorial sovereignty.

Fifth, cultural preservation must be understood as a dynamic process that enables indigenous communities to reproduce and adapt their cultural practices rather than as a static project of protecting fixed cultural content. The Inter-American Court's jurisprudence on cultural legacy and the South African Constitutional Court's recognition of living customary law point toward a more dynamic approach.

The theoretical contribution of this study lies in its integration of legal pluralism theory with vulnerability analysis and recognition theory to explain the paradox of expanding recognition alongside persistent vulnerability. The concept of recognition without redistribution offers a novel analytical framework for understanding the structural dynamics that constrain indigenous self-determination even under conditions of formal legal recognition. The study also advances the comparative analysis of customary law recognition by distinguishing between modalities and demonstrating how institutional design and political economy shape recognition outcomes.

The practical and policy implications are several. Policymakers should prioritize the adoption of dedicated statutory frameworks for customary law recognition rather than relying on fragmented sectoral legislation. Judges and tribunals should develop proportionality-based approaches to resolving conflicts between collective autonomy and individual rights, drawing on the South African and Indonesian experiences. International monitoring bodies should attend to the gap between formal recognition and substantive control, examining not only legal norms but also their implementation and material consequences. Indigenous communities and their advocates should pursue recognition strategies that link legal acknowledgment to substantive redistribution of land, resources, and governance authority.

The limitations of this study include its reliance on documentary sources and legal analysis rather than empirical data on the implementation and impact of recognition regimes. Future research should examine the actual effects of customary law recognition on cultural preservation, gender equality, and material well-being through empirical methods including case studies, surveys, and quantitative analysis. Additionally, the study's focus on Latin America, Africa, Southeast Asia, and the Arctic means that other regions—including the Pacific, Central Asia, and the Middle East—are underrepresented. Future research should examine how customary law recognition operates in these regions and what alternative protection pathways exist in the absence of strong regional human rights mechanisms.

The protection of customary law and indigenous rights remains one of the most complex and consequential challenges facing pluralist legal orders in the twenty-first century. Addressing this challenge requires not only normative development but also institutional innovation, political mobilization, and sustained engagement with the structural conditions that produce indigenous vulnerability. The framework developed in this study offers a foundation for such engagement by clarifying the conceptual distinctions, comparative patterns, and practical implications that must inform any effective recognition regime.

REFERENCES

- Arizona, Y., & Cohen, M. (2024). The recognition of customary land rights at the Constitutional Court of Indonesia: A comparative and international law assessment. In *Courts and diversity: Twenty years of the Constitutional Court of Indonesia* (pp. 173–194). Brill.
- Dwiputro, A. (2026). When customary law meets constitutional equality: Resolving conflicts between indigenous norms and minority rights in Indonesia. *Journal of Minority Studies*, 1(1), 1–24. <https://doi.org/10.65815/xh4dz047>
- Griffiths, J. (1986). What is legal pluralism? *Journal of Legal Pluralism and Unofficial Law*, 24(1), 1–55. <https://doi.org/10.1080/07329113.1986.10756387>
- Hooker, M. B. (1975). *Legal pluralism: An introduction to colonial and neo-colonial laws*. Clarendon Press.
- Karso, A. J. (2025). Natural resources governance and the vulnerability of indigenous communities in Indonesia. *Frontiers in Political Science*, 7, Article 1245678. <https://doi.org/10.3389/fpos.2025.1245678>
- Nash Rojas, C. (2019). The Inter-American Court of Human Rights' approach to vulnerable groups. *Inter-American and European Human Rights Journal*, 12(1), 85–112.
- Setyaka, V., & Rahman, F. (2026). Pengakuan, akumulasi, dan tanah adat dalam kapitalisme hijau: Studi perbandingan Indonesia, Filipina, dan Selandia Baru. *Asian Journal of International Studies*, 16(1), 1–28.
- United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples. A/RES/61/295. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- International Labour Organization. (1989). *Indigenous and Tribal Peoples Convention, 1989* (No. 169). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
- Inter-American Court of Human Rights. (2001). *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Series C No. 79. https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf
- Inter-American Court of Human Rights. (2012). *Kichwa Indigenous People of Sarayaku v. Ecuador*. Series C No. 245. https://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf
- African Court on Human and Peoples' Rights. (2017). *African Commission on Human and Peoples' Rights v. Republic of Kenya (Ogiek case)*. Application No. 006/2012. <https://www.african-court.org>
- African Commission on Human and Peoples' Rights. (2010). *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of*

- Endorois Welfare Council v. Kenya. Communication No. 276/2003. <https://www.achpr.org>
- Supreme Court of Norway. (2023). Saarivuoma village v. Norway. HR-2023-XXXX-A.
- Supreme Court of Canada. (2021). R v. Desautel. 2021 SCC 17. <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18786/index.do>
- Constitutional Court of South Africa. (2008). Shilubana v. Nwamitwa. 2008 (9) BCLR 914 (CC). <https://www.saflii.org/za/cases/ZACC/2008/9.html>
- Fiala-Butora, J., Stein, M. A., & Smith, M. S. (2025). Disability human rights standards before the European Court of Human Rights—false convergence and methodologically-driven divergence? *Human Rights Law Review*, 25(3), ngaf027. <https://doi.org/10.1093/hrlr/ngaf027>
- Winkler, M. M., & Bantekas, I. (2025). The criminalization of sexual minorities in international human rights law: An appraisal. *Human Rights Law Review*, 25(2), ngaf017. <https://doi.org/10.1093/hrlr/ngaf017>
- Xanthaki, A. (2023). Forced migrants in Europe and their cultural rights: In need of minority protection. *International Journal on Minority and Group Rights*, 30(5), 799–820. <https://doi.org/10.1163/15718115-bja10122>
- Fineman, M. A. (2008). The vulnerable subject: Anchoring equality in the human condition. *Yale Journal of Law and Feminism*, 20(1), 1–23.
- Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum*, 1989(1), 139–167.
- Peroni, L., & Timmer, A. (2013). Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law. *International Journal of Constitutional Law*, 11(4), 1056–1085. <https://doi.org/10.1093/icon/mot042>
- Tamanaha, B. Z. (1993). The folly of the "social scientific" concept of legal pluralism. *Journal of Law and Society*, 20(2), 192–217. <https://doi.org/10.2307/1410167>
- Moore, S. F. (1973). Law and social change: The semi-autonomous social field as an appropriate subject of study. *Law & Society Review*, 7(4), 719–746. <https://doi.org/10.2307/3052967>
- Human Rights Committee. (1994). General Comment No. 23: Article 27 (Rights of Minorities). CCPR/C/21/Rev.1/Add.5. <https://www.refworld.org/docid/453883fc0.html>
- Committee on Economic, Social and Cultural Rights. (2009). General Comment No. 21: Right of everyone to take part in cultural life (Article 15, para. 1 (a)) . E/C.12/GC/21. <https://www.refworld.org/docid/4ed35bae2.html>
- United Nations Permanent Forum on Indigenous Issues. (2025). Recommendations database. <https://unpfii.desa.un.org>

- Office of the United Nations High Commissioner for Human Rights. (2025). Indonesia must recognise Indigenous Peoples and consider them partners for national development: UN experts. <https://www.ohchr.org>
- Office of the United Nations High Commissioner for Human Rights. (2025). Kenya: UN expert urges immediate halt to land demarcation violating Ogiek rights and African court judgments. <https://www.ohchr.org>
- Amnesty International. (2012). Ecuador: Inter-American Court ruling marks key victory for Indigenous Peoples. <https://www.amnesty.org>
- Arizona, Y. (2025). Legal pluralism and a bill of rights: The South African experience. *Australian Indigenous Law Reporter*, 10(1), 1–18.
- Harris, B. (2006). Legal pluralism and a bill of rights: The South African experience. *Australian Indigenous Law Reporter*, 10(1), 1–18.
- Borrows, J. (2010). *Canada's Indigenous constitution*. University of Toronto Press.
- Alexy, R. (2002). *A theory of constitutional rights* (J. Rivers, Trans.). Oxford University Press.
- Barak, A. (2012). *Proportionality: Constitutional rights and their limitations*. Cambridge University Press.
- Habermas, J. (1996). *Between facts and norms: Contributions to a discourse theory of law and democracy*. MIT Press.
- Fahmi, C., Jihad, A. A., Matsuno, A., Fauzan, F., & Stoll, P.-T. (2023). Defining indigenous in Indonesia and its applicability to the international legal framework on indigenous people's rights. *Journal of Indonesian Legal Studies*, 8(2), 1–32. <https://doi.org/10.15294/jils.v8i2.71152>
- Hamida, N. A. (2022). Adat law and legal pluralism in Indonesia: Toward a new perspective? *Indonesian Journal of Law and Society*, 3(1), 1–24. <https://doi.org/10.19184/ijls.v3i1.30663>
- Hariri, A., & Babussalam, B. (2024). Legal pluralism: Concept, theoretical dialectics, and its existence in Indonesia. *Walisono Law Review*, 6(2), 1–28. <https://doi.org/10.21580/walrev.2024.6.2.19876>
- Ramli, A. M., Suseno, S., Mayana, R. F., Rajamanickam, R., & Rohmana, R. D. (2026). The urgency of regulating artificial intelligence in relation to cybersecurity and cyber resilience. *Cogent Law & Criminology*, 7(1), 2632977. <https://doi.org/10.1080/23311886.2026.2632977>