

# A COMPARATIVE ANALYSIS OF CONSTITUTIONAL RECOGNITION OF ABORIGINAL PEOPLES

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*This article furnishes a comparative analysis on the constitutional recognition of Indigenous peoples in four jurisdictions. The analysis looks at two jurisdictions that share a similar colonial heritage with Australia, namely New Zealand and Canada; and two jurisdictions at the forefront of plurinational constitutional recognition of Indigenous rights (Ecuador and Bolivia). Experience in these countries suggests that constitutional recognition (of Indigenous peoples) occurs in a variety of ways, including the protection and promotion of Indigenous cultures, their land titles and their political representation. This variety stems largely from a common denominator: the need for protecting the political, collective rights of marginalised groups. This protection is generally intended to alleviate these groups' economic and social disadvantages. The analysis identifies two dimensions for constitutional recognition: a wide-versus-narrow dimension and a dynamic-versus-static dimension. Both dimensions break along colonial lines, with recognition in the two postcolonial countries exhibiting a wide and static approach and recognition in the two plurinational countries exhibiting a narrow but dynamic approach. These jurisdictions could provide guidance in the Australian context, where resolving the tension between our colonial heritage and our postcolonial aspirations holds the key to alleviating the disadvantages facing Indigenous Australians.*

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## I INTRODUCTION

This article provides guidance on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. The issue is of great importance. Internally, the recognition is intended to advance efforts towards national reconciliation. It registers a retreat from cultural hegemony. Externally, Australia's leadership in the international community stands to suffer given the constitutional recognition afforded to Indigenous peoples in other countries, and the international law stance on this point as reflected in the (non-binding) *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')<sup>1</sup> and international treaties such as the International Labour Organisation's ('ILO') *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* ('ILO Convention No 169').<sup>2</sup> This recognition is as important a milestone as was the 1967 inclusion of Indigenous peoples in the national census. It has been debated since 1999, when a constitutional recognition proposal by then Prime Minister John Howard was defeated alongside the republic referendum. During the next 15 years, there were a number of efforts to bring about this constitutional change. Sub-national (state) constitutions were also modified to register some form of recognition, albeit symbolic rather than substantive.<sup>3</sup>

Part of the current drive for constitutional recognition comes from the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth). Final proposals have now narrowed the recognition to three main elements:

- 1 'the placement of a statement of recognition;'
- 2 'removal of section 25' of the *Australian Constitution*; and

<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) annex.

<sup>2</sup> *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('ILO Convention No 169').

<sup>3</sup> For example, the changes introduced to the Constitutions in Queensland, New South Wales, Victoria and South Australia: see below Part II.

3 're-formulation' of s 51 (xxvi) of the *Australian Constitution*.<sup>4</sup>

This article gives more attention to the first element. This element is analysed comparatively with four other jurisdictions. The analysis in Part III suggests that current proposals for recognition are neither wide (addressing the sui generis nature of Indigenous collective rights<sup>5</sup> from within Indigenous jurisprudence<sup>6</sup>) nor dynamic (allowing for evolutionary improvement).

The article is structured as follows. Part II provides a topology of the idea of constitutional recognition to the end of distilling its essential elements. Once the definition of constitutional recognition is clarified, the Part goes on to measure the current proposals for the constitutional recognition against this definition. The analysis suggests that a key part of constitutional recognition, relating to legal authority, is at best 'anaemic' in the current proposals, leaving as symbolic the current drive for recognition. An analogy is then drawn between this approach and the precedents seen in recent constitutional recognition of Indigenous Australians in some of our sub-national

<sup>4</sup> John Anderson, Tanya Hosch and Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (2014) 5; cf *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 3.

<sup>5</sup> Collective rights are rights that attach to groups, rather than their individual members, and serve to maintain these groups' distinct identities. Following the taxonomy of Karel Vasak, there are three 'generations' of human rights: (1) 17<sup>th</sup> century individual rights, (2) 19<sup>th</sup> century economic, social and cultural rights, and (3) 20<sup>th</sup> century collective rights. Their origin stems from jurisprudential systems that counterbalance the individualist formulation favoured by Western jurisprudence. The quintessential example of these collective rights is the right to self-determination: Karel Vasak, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the *Universal Declaration of Human Rights*' (1977) 30(11) *UNESCO Courier* 29, 29. For more details on Indigenous collective rights, see also Benjamin F Gussen, 'The Marginalisation of Localism in Current Responses to the Ecological Crisis' (2012) 16 *New Zealand Journal of Environmental Law* 167, 188–92; Miodrag A Jovanovic, 'Recognizing Minority Identities through Collective Rights' (2005) 27 *Human Rights Quarterly* 625; Allen Buchanan, 'The Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 *Transnational Law and Contemporary Problems* 89; Robert N Clinton, 'The Rights of Indigenous Peoples as Collective Group Rights' (1990) 32 *Arizona Law Review* 739; Douglas Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368, 379–80.

<sup>6</sup> I define Indigenous jurisprudence as theories of law that derive from Indigenous knowledge, including mythology, customs and religion. The prime example of such jurisprudence is *Tikanga Māori* (traditional rules) of the Indigenous population of New Zealand. This can also be seen in the existence of Indigenous courts such as the Murri courts of Queensland, Koori courts in Victoria and the Nunga courts in South Australia. For Indigenous jurisprudence in Australia, see Christine Faye Morris, *A Dialogical Encounter with an Indigenous Jurisprudence* (PhD Thesis, Griffith University, 2007); C F Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011).

Constitutions (namely in Queensland, New South Wales, Victoria and South Australia).

The analysis in Part III looks at two jurisdictions that share a similar colonial heritage with Australia, namely New Zealand and Canada; and two jurisdictions at the forefront of plurinational constitutional recognition of Indigenous rights (Ecuador and Bolivia).<sup>7</sup> This analysis could provide guidance in the Australian context.

## II A TOPOLOGY OF CONSTITUTIONAL RECOGNITION

Experience in other countries suggests that constitutional recognition (of Indigenous peoples) occurs in a variety of ways, including the protection and promotion of Indigenous cultures, their land titles and their political representation. This variety, however, stems largely from a common denominator: the need for protecting the political, *collective* rights of marginalised groups.<sup>8</sup> This protection is generally intended to alleviate Indigenous peoples' economic and social disadvantages.

Given the power dynamic underlying all constitutions, constitutional recognition would invariably have a *realpolitik* (practical rather than moral) dimension embedded in a field of scalar calculus (qua Indigenous peoples' relative population size). The options available for recognition depend on the size of the Indigenous population as a percentage of total population. As a rule of thumb, the larger the percentage, the wider the constitutional recognition. Australia, with an Indigenous population of around 2.5 per cent of the total population is not likely to secure constitutional recognition as wide (that is, inclined towards legal pluralism) as that in a country like New Zealand (17 per cent) or Ecuador (14 per cent).<sup>9</sup> The same calculus applies in the case of

<sup>7</sup> For the latest developments in Bolivia and Ecuador, and in Latin America generally, see Eduardo Silva, 'Indigenous Peoples' Movements, Developments, and Politics in Ecuador and Bolivia' in Paul Almeida and Allen Cordero Ulate (eds), *Handbook of Social Movements across Latin America* (Springer, 2015) 131; Todd A Eisenstadt et al (eds), *Latin America's Multicultural Movements: The Struggle between Communitarianism, Autonomy, and Human Rights* (Oxford University Press, 2013).

<sup>8</sup> These groups are usually also minority groups, although there are some exceptions (for example in Bolivia): see below n 11 and accompanying text.

<sup>9</sup> In the case of Ecuador, estimates vary widely: from as low as 7 per cent to as high as 40 per cent. The figures used in this article are largely based on those given by the Expert Panel: Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) 51 ('*Expert Panel Report*').

Canada, where the Indigenous population is less than 5 per cent (3.5 per cent) of the total population.<sup>10</sup> The constitutional recognition of Indigenous peoples takes a completely different political dimension (through the democratic process) when the percentage is above 50 per cent, as in the case of Bolivia where the Indigenous population comprises 62 per cent of the total population.<sup>11</sup>

While scalar constraints are significant to questions of constitutional reform and recognition of Indigenous peoples, they only touch on the realpolitik of settler colonial theory, which is even more significant in terms of evaluating the constitutional recognition of Indigenous peoples. Any analytical framing should hence acknowledge that these are also very different types of states. Bolivia and Ecuador are now technically postcolonial, whereas Canada and New Zealand constitute settler colonies. In particular, the analysis cannot avoid engaging with one of the central logics of settler colonialism — that is, ‘the logic of elimination’.<sup>12</sup> A degree of focus on the implications of this logic for the models of recognition being assessed and compared adds depth to the analysis. The analytical framework presented in this article captures the colonial influences through a contrast between narrow–dynamic versus wide–static constitutional recognition. The former approach is found in Canada and New Zealand, and attempts to fit the recognition within the jurisdictional mould of the majority, while the latter is situated in a postcolonial zeitgeist that envisages the legal pluralism seen today in Bolivia and Ecuador.<sup>13</sup>

The above scale implications, on top of a shared British heritage, would suggest following the Canadian approach (to constitutional recognition) in Australia. Notwithstanding, it would behove the Australian debate to learn from the shortcomings of the Canadian approach. The following analysis explains the issues involved and potential mitigation options. First, however,

<sup>10</sup> Ibid. This calculus applies even though, as delineated later in the article, Canada’s recognition is wider than that in New Zealand.

<sup>11</sup> Ibid.

<sup>12</sup> The term ‘logic of elimination’ was coined by Patrick Wolfe, ‘Settler Colonialism and the Elimination of the Native’ (2006) 8 *Journal of Genocide Research* 387. See also Dan Tout, ‘Stabilise, Normalise, Eliminate’ (2012) 118 *Arena* 40; Scott Lauria Morgensen, ‘The Biopolitics of Settler Colonialism: Right Here, Right Now’ (2011) 1(1) *Settler Colonial Studies* 52; Alissa Macoun and Elizabeth Strakosch, ‘The Ethical Demands of Settler Colonial Theory’ (2013) 3 *Settler Colonial Studies* 426; Elizabeth A Povinelli, ‘The Governance of the Prior’ (2011) 13 *Interventions* 13, 20.

<sup>13</sup> See below Part III.

we will take a closer look at the abstract nature of constitutional recognition and its formulation in the Australian context.

### *A Definition of Constitutional Recognition*

The ordinary (dictionary) meaning of the verb ‘to recognise’ can be broken down into three elements:

- a) to know and remember;
- b) to accept as true and existing; and
- c) to accept and approve of as having legal authority.<sup>14</sup>

Note how the first element of this breakdown corresponds to the past, while the second is locked into continuing existence (the present). The third element is forward looking, basically ensuring that what is being recognised has the power to continue to exist (and hence, reasonably, to also develop) into the future. It follows then that recognition is about accepting the legitimacy and legal authority of what is being recognised (for our purposes, Indigenous peoples). Unfortunately, more often than not, this legal authority comes in the (narrow) form of individual and collective legal *rights* (that is, legal constructs that limit or enable state action) granted by the ‘recogniser’ to the ‘recognised’ party. This is an approach that presupposes a monopoly on legal authority as opposed to an approach versed in legal pluralism.

When the qualifier ‘constitutional’ is added to the act of ‘recognising’, legal authority is accepted and approved through political power, a paradigm which heightens the division between the ‘recogniser’ and the ‘recognised’. In the Australian context, constitutional recognition is about accepting as valid the claim or title of Aboriginal and Torres Strait Islander peoples to their heritage, their traditional lands and waters, and, most importantly, their claim for self-determination.<sup>15</sup> Such recognition is intended to further national reconciliation and to guard Australia’s reputation internationally vis-à-vis Indigenous Australians’ wellbeing. To secure such results, (political) structural protection would be required, probably either in the form of division of

<sup>14</sup> See, eg, Susan Butler (ed), *Macquarie Dictionary* (6<sup>th</sup> ed, 2013) 1227; Angus Stevenson and Maurice Waite (eds), *Concise Oxford English Dictionary* (12<sup>th</sup> ed, 2011) 1201.

<sup>15</sup> *UNDRIP*, UN Doc A/RES/61/295, art 3. The Rudd Government endorsed the *UNDRIP* in 2009: ‘Experts Hail Australia’s Backing of UN Declaration of Indigenous Peoples’ Rights’, *UN News Centre* (online), 3 April 2009 <<http://www.un.org/apps/news/story.asp?NewsID=30382>>.

powers between the Commonwealth and Indigenous Australians,<sup>16</sup> or in the form of parliamentary seats reserved for Aboriginal peoples at the national and/or sub-national level.<sup>17</sup> A constitutional recognition would see Australia move closer to the position in other former British colonies, including Canada and New Zealand, where the state enters into treaties with Aboriginal peoples to the end of conferring a wider margin of autonomy on them.<sup>18</sup> Under this approach, regional agreements would be negotiated between the Commonwealth and Indigenous regional representative bodies.<sup>19</sup>

It is with this understanding that I now outline current constitutional recognition proposals to gauge their compatibility with the essence of constitutional recognition and the (expected) benefits that would flow from each approach.

### B Current Proposals

Current recommendations by the Australian government's Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples<sup>20</sup> and the Expert Panel on Constitutional Recognition of Indigenous Australians<sup>21</sup> provide an insight into the elements of the proposed constitutional recognition. For example, the Expert Panel recommendation for a new s 51A to give constitutional recognition to Aboriginal and Torres Strait Islander Peoples incorporates three elements:

<sup>16</sup> After all, the primary function of any constitution is the division of powers both horizontally (within the same level of government) and vertically (between different levels of government). An interesting example of this model of recognition can be found in the Canadian territory of Nunavut, where the Inuit control territorial government and politics: Peter Jull, *Indigenous Autonomy in Nunavut: Canada's Present and Australia's Possibilities*, Discussion Paper (1998).

<sup>17</sup> Māori representation in New Zealand's parliament is a notable example, although in New Zealand the Māori seats were only meant to be a temporary measure when voting was limited to property owners: 'The Origins of the Māori Seats' (Research Paper, Parliamentary Library, New Zealand, 2003).

<sup>18</sup> See, eg, Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57, 66–71.

<sup>19</sup> Examples of such Indigenous regional representative bodies include the Torres Strait Island Coordinating Council and the Torres Strait Regional Authority: see Garth Nettheim, Gary D Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 456.

<sup>20</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014) 43–4.

<sup>21</sup> *Expert Panel Report*, above n 9, 227 [10.6].

- 1 a recognition of Aboriginal and Torres Strait Islander peoples as first occupiers of Australia and a recognition of their cultures, languages and heritage;
- 2 an acknowledgement of Aboriginal and Torres Strait Islander peoples' heritage as part of Australia's national heritage, including Indigenous Australians' relationship with their traditional lands and waters; and
- 3 a power conferred on the Commonwealth Parliament to make laws for the good governance of Aboriginal and Torres Strait Islander peoples.<sup>22</sup>

I will now 'map' these three elements onto the three elements identified earlier in the meaning of constitutional recognition.

The first element of the ordinary meaning of the verb 'to recognise'<sup>23</sup> corresponds to the first element of current proposals for constitutional recognition, namely a remembrance of the place of Indigenous Australians as first occupiers of Australia, and recognition of their cultural heritage. The second element of the ordinary meaning<sup>24</sup> corresponds to the second element of the current constitutional recognition proposals, which acknowledges the continuing existence of the Aboriginal and Torres Strait Island peoples' cultural heritage as part of our living heritage.

What seems to be missing from the current proposals is the third element,<sup>25</sup> where 'to recognise' suggests an acceptance of the legal authority of Aboriginal and Torres Strait peoples in relation to their own population and in relation to their traditional territories. Instead, the current proposals contemplate an indirect route where the Commonwealth Parliament has the power to make laws with respect to Indigenous Australians.<sup>26</sup> Under this approach, the legal conception of Indigenous Australians exists within a margin defined almost exclusively by other Australians.

At this point, it is helpful to elaborate on the typology of constitutional recognition using the principle of consociation.<sup>27</sup> Consociation is an anthro-

<sup>22</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 20, 43 [3].

<sup>23</sup> 'To know and remember': see above Part II(A).

<sup>24</sup> 'To accept as true and existing': *ibid.*

<sup>25</sup> 'To accept and approve of as having legal authority': *ibid.*

<sup>26</sup> An approach very similar to that adopted in Canada, almost 150 years earlier: see below Part III for a discussion on the Canadian approach.

<sup>27</sup> For background information see Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15(2) *Journal of Democracy* 96; Arend Lijphart, 'Consociation and Federation: Conceptual and Empirical Links' (1979) 12 *Canadian Journal of Political Science* 499;



political concept where the state *recognises* and equally *protects* individual as well as collective rights of various ethnic communities. Under direct consociation, states expressly recognise and protect various ethnic communities. This would inevitably lead to constitutional asymmetry, evolving towards an ideal where different ethnic communities have separate jurisdictions within one polity — in one word, plurinationalism.<sup>28</sup> Under indirect consociation, which is analogous to current constitutional proposals in Australia (and is seen in states with lingering colonial influences), the protection of these communities flows from Western principles. Indirect consociation is based on a scalar calculus where Indigenous peoples remain a minority within a jurisdiction governed by a majority of European extract. Such ideology bestows a dominance over Aboriginal peoples through the principle of sovereignty (Westphalian, absolute sovereignty, to be precise).<sup>29</sup> Nevertheless, this approach could also result in ‘short-circuiting’ the onerous requirements of constitutional change, through enacting treaty agreements that can see greater self-government rights transferred to Aboriginal peoples without the need for constitutional amendment.

Current constitutional recognition proposals in Australia adopt a form of cultural authority where the majority culture is seen to possess the power to create laws for other cultures — an approach not very different from the one seen in Canada. Aboriginal peoples are seen as legal minors under the tutelage of the state. The *Canada Act 1982* (UK) c 11, sch B (*Constitution Act 1982*) adopts a language insensitive to cultural diversity; a language that attempts to masquerade the calculus of (economic and social) power distribu-

Brendan O’Leary, ‘Consociation: Refining the Theory and a Defence’ (2003) 3 *International Journal of Diversity in Organizations, Communities and Nations* 693; Stefan Wolff, ‘Complex Autonomy Arrangements in Western Europe: A Comparative Analysis of Regional Consociationalism in Brussels, Northern Ireland and South Tyrol’ in Marc Weller and Stefan Wolff (eds), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005) 117; André J Hoekema, ‘Reflexive Governance and Indigenous Self-Rule: Lessons in Associative Democracy?’ (2001) 4 *Critical Review of International Social and Political Philosophy* 157, 165–6.

<sup>28</sup> See, eg, Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001); Helder De Schutter, ‘A Plurinationalist Political Theory of Federalism’ (Paper presented at ECPR Summer School on Federalism, Regionalism and Governing Diversity in Europe and Beyond, Kent, 3–4 September 2011).

<sup>29</sup> It could be argued that within international law the term ‘Indigenous’ is possible only with reference to the colonial subjugation from which it emanates: see, eg, S James Anaya, ‘International Human Rights and Indigenous Peoples: The Move toward the Multicultural State’ (2004) 21 *Arizona Journal of International and Comparative Law* 13, 13.

tion in terms of legal rights.<sup>30</sup> It is an approach of *assimilation* where Aboriginal cultures are seen as part of the national heritage and hence as subsumed by the cultural hegemony of the dominant majority culture. For example, ss 25 and 27 of the *Constitution Act 1982* pt I ('*Canadian Charter of Rights and Freedoms*') use a legal rights paradigm to manage the struggle of Aboriginal peoples for political rights. Moreover, under the equality guarantee in s 15(1) of the *Canadian Charter of Rights and Freedoms*, rights are seen as primarily belonging to individuals rather than groups. The Canadian approach is based on a comparative analysis of the treatment of Aboriginal groups with non-Aboriginal groups. This approach is a narrow approach to constitutional recognition as it excludes any plurinationalism where other cultures are afforded equality with the dominant majority culture.<sup>31</sup> The Canadian approach will be discussed further in Part III.

### C Recognition in Australia's Sub-National Constitutions

An approach that supports the thesis of the missing third element (namely, legal authority) can be seen in constitutional recognitions at the state level. For example, South Australia now recognises Aboriginal peoples in the *Constitution Act 1934* (SA) s 2.<sup>32</sup> While this section acknowledges past injustices, recognises the present status of Aboriginal peoples, and postulates for a continuing role of Aboriginal peoples in South Australia, it provides a mere *symbolic* recognition. Section 2(3) states expressly that 'Parliament does not intend this section to have any legal force or effect.' Similarly, in New South Wales since October 2010, s 2(3) of the *Constitution Act 1902* (NSW) ensures that a similar recognition does not '[create] any legal right or liability, or [give] rise to or [affect] any civil cause of action or right to review an administrative action, or [affect] the interpretation of any Act or law in force in New South Wales.'<sup>33</sup> The same trend can be seen in s 1A(3) of the *Constitution Act 1975* (Vic) where the recognition of Aboriginal peoples is not intended 'to create in any person any legal right or give rise to any civil cause of action' or 'to affect in any way the interpretation of [the *Constitution*] or of

<sup>30</sup> See, eg, Mary Ellen Turpel, 'Aboriginal Peoples and the *Canadian Charter*: Interpretive Monopolies, Cultural Differences' (1990) 6 *Canadian Human Rights Yearbook* 3.

<sup>31</sup> An example of the equality rights analysis can be found in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 163–72 (McIntyre J).

<sup>32</sup> *Constitution Act 1934* (SA) s 2, as inserted by *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* (SA) s 3.

<sup>33</sup> *Constitution Act 1902* (NSW) s 2(3), as inserted by *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW) s 3.

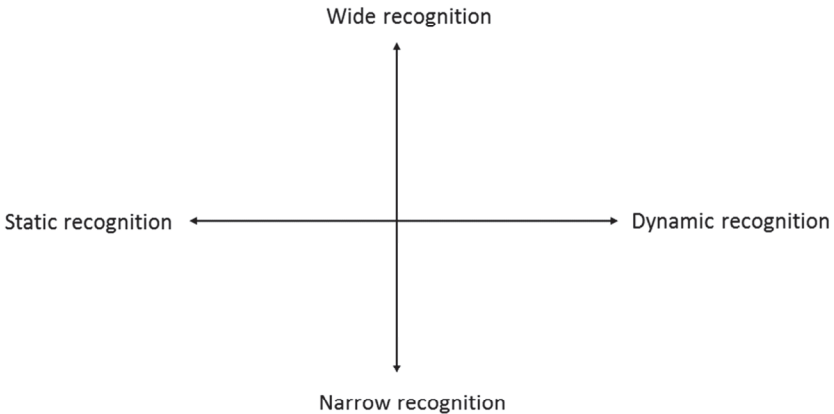
any other law in force in Victoria.<sup>34</sup> In Queensland, the recognition in the Preamble to the *Constitution of Queensland 2001* (Qld) is limited to honouring and paying tribute to ‘Aboriginal peoples and Torres Strait Islander peoples, the First Australians’.

It could still be argued that this approach ensures that legal implications of a constitutional recognition will be limited to a relationship between Aboriginal Australians and the Crown in right of the Commonwealth (as opposed to the Crown in right of the several States), which would be advantageous given the common issues raised by Aboriginal governance and the large geographic area where Indigenous Australians have a collective presence.

### III COMPARATIVE ANALYSIS

The analysis below is based on a stylised classification of constitutional recognition in relation to two dimensions: ‘efficiency’ and ‘prestige’.<sup>35</sup>

*Figure 1: The two dimensional analytical framework*



The first dimension is based on the scholarship of Walter Bagehot, who distinguished between the dignified constitution and the efficient constitu-

<sup>34</sup> *Constitution Act 1975* (Vic) s 1A(3), as inserted by *Constitution (Recognition of Aboriginal People) Act 2004* (Vic) s 3.

<sup>35</sup> For an earlier version of this model, see Benjamin Franklen Gussen, ‘Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador’ in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 247, 248.

tion.<sup>36</sup> This dimension represents recognitions identified as part of the efficient constitution to the extent they allow for ameliorating Indigenous rights to optimise the net benefits flowing from a given constitutional recognition. The axis of abscissas represents increasing efficiency through the continuum from a static recognition to a dynamic recognition. This dimension is evolutionary in nature. It measures the consequences of a given constitutional recognition on the wellbeing of Indigenous peoples over time. This efficiency dimension could be understood as representing political rights as opposed to ‘ideal type’ rights.<sup>37</sup> The political nature of these rights allows for a ‘contingency’ approach where Indigenous rights are adapted to specific objectives in a given jurisdiction. Under a dynamic recognition, there is an elasticity that allows for a plurality of options through which the recognition can be actioned. It allows for a constitutional recognition that continues to ameliorate the socio-economic conditions of the Indigenous population through the adaptation of a variety of policies. This dynamism can be seen in recognition approaches flowing from, or leading to, treaty formation between the recogniser (the central or federal government) and the recognised (the Indigenous population).<sup>38</sup> The abscissa is hence a measure of the effectiveness of a given recognition in improving the wellbeing of Indigenous peoples. Where the recognition is dynamic, the varieties of ways through which the recognition can be actioned are left open, and statutory interpretation can add to the dynamism of such recognition (as seen in Canada and New Zealand).<sup>39</sup>

In contrast, static recognition illustrates a steady state or equilibrium (time-invariant) approach. This approach constitutionalises an inertia to change both through the rigidity of the constitutional amendment process,

<sup>36</sup> Walter Bagehot, *The English Constitution* (Champan and Hall, 1867) 4–6. Another useful dichotomy is that of Thorstein Veblen, where he distinguishes between the ‘ceremonial’ constitution (looking at the past) and the ‘instrumental’ (or ‘technological’) constitution (looking at the future): Thorstein Veblen, *The Theory of the Leisure Class* (Penguin Books, first published 1899, 1994 ed). See also David Reisman, *The Social Economics of Thorstein Veblen* (Edward Elgar, 2012).

<sup>37</sup> See, eg, Thomas Campbell, ‘Political Approaches to Human Rights: An Interactive Model’ (Paper presented at the International and Comparative Law Colloquium 2016: Legal Transplants in the 21<sup>st</sup> Century, School of Law and Justice, University of Southern Queensland, 24–5 November 2016).

<sup>38</sup> For problems with the dynamic approach, see, eg, Andrew Erueti and Claire Charters (eds), *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, 2007), who elaborate on issues surrounding Māori claims on the seabed and foreshore in New Zealand.

<sup>39</sup> Note, however, that there are limits to, and dangers from, judicial activism. For an example of these inefficiencies, see *ibid* 1–3.

and through the specificity with which the constitution has limited the rights flowing from the recognition.<sup>40</sup> A static recognition would be less efficient in that it does not allow for changes over time to optimise the consequences flowing from constitutional recognition. This type offers a dignified version for constitutional recognitions where emphasis is on reconciliation. It includes symbolic recognitions lacking legal authority, as seen in state constitutional recognitions in Australia. The static approach adopts 'subject matter' recognition rather than 'persons power'.<sup>41</sup> The recognition targets specific areas such as culture, language and heritage, as opposed to a recognition of Indigenous peoples as a *sui generis* group.

The second dimension is based on Alan Watson's 'legal transplants' model for analysing the diffusion of legal constructs from one jurisdiction to another.<sup>42</sup> Through the 'legal transplants' model, the act of 'transplanting' is understood as the constitutional promulgation of Indigenous rights. This dimension is associated with a recognition that is morality-based. It represents a closed set of rights based on Weberian (ideal-type) abstract versions of Indigenous rights, largely derived from international instruments such as United Nations Conventions. The axis of ordinates (in Figure 1) represents this dimension through a continuum from a narrow recognition to a wide recognition. The dimension could be thought of as a proxy for legal pluralism where collective Indigenous rights could be either absorbed into the Western mould of individual human rights, or given their own jurisprudence. The first approach results in a narrow recognition, while the latter results in a wide recognition. Under a narrow recognition, the political intention is to *assimilate* Indigenous rights under a legal paradigm dominated by colonial influences. Such constitutional recognition limits the prospects for improving the wellbeing of Indigenous peoples by perpetuating their existence at the margin only within the limits predefined by the majority's jurisprudence.

The wide recognition, however, allows for a legal pluralism that accentuates the *sui generis* nature of Indigenous legal systems. This recognition provides a platform for Indigenous jurisprudence to contribute to the design of Indigenous governance structures. It envisages the language of

<sup>40</sup> For example, through enumeration of these rights as seen in Ecuador: see below Part III(C).

<sup>41</sup> See especially Anne Twomey, 'A Revised Proposal for Indigenous Constitutional Recognition' (2014) 36 *Sydney Law Review* 381, 396–9. For problems with the 'subject matter' approach, cf Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the Australian Constitution' (2014) 25 *Public Law Review* 83, 84–5, 88.

<sup>42</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2<sup>nd</sup> ed, 1993).

‘interculturalism’, ‘multiculturalism’ and ‘decentralisation’, as seen in the Constitutions of Ecuador and Bolivia, for example.<sup>43</sup> Moreover, wide recognition allows for an explicit acknowledgement of the role of the principles of subsidiarity and solidarity as guiding constitutional principles that inform any given constitutional recognition.<sup>44</sup>

Note that when a narrow and dynamic recognition is opted for, there is emphasis on efficiency.<sup>45</sup> In other words, the focus is on reducing the costs flowing from constitutional recognition. Hence, the input requirements for the recognition are kept to a minimum by ruling out legal pluralism and fitting the recognised rights within the existing legal system. To compensate for this emphasis, the output from the recognition (legal authority leading to the welfare of Indigenous peoples) is allowed to progress over time, albeit in a piecemeal fashion. In contrast, when the recognition is wide but static, emphasis is on equality. It is the output (benefits) from the recognition that takes centre stage here. A wide recognition would afford Indigenous peoples their own legal systems and thus constitute legal pluralism. But the cost now could be prohibitive. Therefore, a cap in the form of a static recognition is imposed by weakening possibilities for progress to non-enumerated rights and a strategy of decentralisation (in the form of subsidiarity) is adopted, delegating the responsibility for meeting costs to the local level.

It should be noted that dynamism is more important than the width of the constitutional recognition. Over the long run, accumulated quantitative change brought about by a dynamic recognition (for example, through a treaty-based approach) is likely to lead to qualitative change that widens the constitutional recognition in favour of Indigenous jurisprudence and thus leads to a plurinational approach to governance. An example of this possibility is the recognition of the Māori. New Zealand does not have a written constitution, and changes to its laws (with a few exceptions relating to national elections) are mostly governed by securing a simple majority in Parliament. Moreover, New Zealand’s approach to recognition of the Māori is

<sup>43</sup> See below Parts III(C)–(D).

<sup>44</sup> On the principle of subsidiarity, see Benjamin F Gussen, ‘Is Subsidiarity a *Conditio Sine Qua Non* for Sustainability?’ (2015) 36 *Policy Studies* 384; Benjamin F Gussen, ‘Subsidiarity as a Constitutional Principle in New Zealand’ (2014) 12 *New Zealand Journal of Public and International Law* 123.

<sup>45</sup> In economics, efficiency is understood largely in a Pareto improvement sense, where a reallocation of resources (flowing from a constitutional recognition) would make Indigenous peoples better off without making anyone else worse off. This criterion is usually in tension with economic equity, where the focus is on giving Indigenous peoples an equal opportunity to pursue their own social welfare.

based on the *Treaty of Waitangi* of 1840.<sup>46</sup> Over time, the recognition of this treaty as binding on the (New Zealand) Crown has shifted from considering it a simple nullity to recognising the treaty as a constitutional document.<sup>47</sup> During this process, Māori were able to continue to secure new ‘rights’ including the ability of *Tikanga Māori* (Māori customary law) to influence the dominant (common law) legal system. A recent case that illustrates this dynamic relates to the burial of James Takamore.<sup>48</sup> The issue there was whether a person of Māori descent should be buried in his ancestral burial ground, or where his *Pākehā* (non-Māori) wife wished for him to be buried. Even though the Supreme Court of New Zealand decided that the common law was to trump in this instance, the very fact that Māori burial practices were taken into consideration, including the effect of the *UNDRIP*, suggests a progression from a quantitative to a qualitative recognition of Māori identity and constitutional role.

In the remainder of this Part, the article discusses the four jurisdictions (Canada, New Zealand, Ecuador and Bolivia) and their approach to constitutional recognition of Indigenous peoples.

#### A Constitutional Recognition in Canada

The relationship between the Canadian Crown and Indigenous Canadians evolved over 300 years of treaty formation, starting with the *Nanfan Treaty* signed at Albany in 1701.<sup>49</sup> It is there that we can discern the genesis of later constitutional recognition under the *Constitution Act 1867* (Imp).<sup>50</sup> Section 91(24) of the Act gives the Canadian Parliament exclusive power ‘to make Laws for the Peace, Order, and good Government of Canada’ in matters relating to Indigenous Canadians.<sup>51</sup> Under this power, the *Indian Act*, RSC 1876, c I-5 was introduced to regulate the governance of Canada’s First

<sup>46</sup> See *Treaty of Waitangi Act 1975* (NZ), which gave the *Treaty of Waitangi* a form of legal recognition in New Zealand for the first time.

<sup>47</sup> For an in-depth discussion of the *Treaty of Waitangi*, see Claudia Orange, *The Treaty of Waitangi* (Bridget Williams Books, first published 1987, 2011 ed).

<sup>48</sup> *Takamore v Clarke* [2013] 2 NZLR 733.

<sup>49</sup> See, eg, J R Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009) 57.

<sup>50</sup> *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3 (*Constitution Act 1867*).

<sup>51</sup> This is similar to the language adopted by the Joint Select Committee on a proposed new s 51A for the *Australian Constitution*: see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 20, 11. It is worth querying whether the language used in Canada in 1867 is still apposite to meeting Australia’s objectives for a constitutional recognition in 2017.

Nations. Over 140 years later, the influence of treaty formation is still discernible in Canada's constitutional recognition of its Indigenous population.<sup>52</sup> Part II of the *Constitution Act 1982* ('Rights of Aboriginal Peoples of Canada') provides the current recognition of Indigenous Canadians' constitutional rights. This part defines the 'aboriginal peoples of Canada'<sup>53</sup> and recognises existing aboriginal and treaty rights,<sup>54</sup> including land claims agreements.<sup>55</sup> The recognition of such rights supports the proposition that these rights are not created or conferred by the *Constitution Act 1982*. In this sense, they pre-date the Act.<sup>56</sup> To be precise, the *Constitution Act 1982* does not create any aboriginal rights but only recognises them, which it does even without defining what these rights are.

In some respects, the constitutional recognition of Indigenous Canadians continues to involve the question of sovereignty, where sovereignty still carries the absoluteness it enjoyed in yesteryears.<sup>57</sup> For example, the Union of

<sup>52</sup> Notwithstanding this long evolution between the Canadian Crown and Indigenous Canadians, a 2014 report submitted to the United Nations' Human Rights Council on '[t]he situation of indigenous peoples in Canada' states that:

The relationship of Canada with the indigenous peoples within its borders is governed by a well-developed legal framework and a number of policy initiatives that in many respects are protective of indigenous peoples' rights. But despite positive steps, daunting challenges remain. The numerous initiatives that have been taken at the federal and provincial/territorial levels to address the problems faced by indigenous peoples have been insufficient. The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the past several years; treaty and aboriginal claims remain persistently unresolved; indigenous women and girls remain vulnerable to abuse; and overall there appear to be high levels of distrust among indigenous peoples towards the government at both the federal and provincial levels.

James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN GAOR, 27<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/27/52/Add.2 (4 July 2014) 1.

<sup>53</sup> *Constitution Act 1982* s 35(2).

<sup>54</sup> *Ibid* s 35(1).

<sup>55</sup> *Ibid* s 35(3).

<sup>56</sup> Note, however, that unlike 'the American doctrine of domestic independent nations... the Canadian government [has] explicitly rejected the notion that [Indigenous Canadians] are sovereign': C E S Franks, 'Rights and Self-Government for Canada's Aboriginal Peoples' in Curtis Cook and Juan D Lindau (eds), *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, 2000) 101, 108.

<sup>57</sup> Benjamen Franklen Gussen, 'On the Problem of Scale: The Inextricable Link between Environmental and Constitutional Laws' (2015) 13 *New Zealand Journal of Public and International Law* 39, 55 (emphasis in original), quoting Scot Macdonald and Gunnar Nielsson, 'Linkages between the Concepts of "Subsidiarity" and Sovereignty: The New Debate over Allocation of Authority in the European Union' (Paper presented at European Community



British Columbia Indian Chiefs ('UBCIC'), formed in 1969 as a political organisation advocating for the rights of Aboriginal Canadians, maintains that the First Nations within the Canadian Commonwealth are sovereign nations in their relationship with both Canada and the United Kingdom.<sup>58</sup> As a result, the exigencies of recognition of Aboriginal rights were driven (if only partially) by the demands of international law, rather than any domestic law of Canada.<sup>59</sup> In this regard, Canadian courts have been more responsive to

Studies Association Fourth Biennial Conference, Charleston, May 1995) 4; Jeremy A Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, 2005) 51:

sovereignty is not possible on a global scale. Sovereignty 'evolved from a judicial concept focusing on the fight to make laws *domestically* to a political-science definition focusing on power and a state's independence from outside actors'. Sovereignty '[implies] a community that can regulate itself without the approval or direction of *higher powers outside the community*'. ... Sovereignty is therefore the essence of the meso scale: an intermediate scale between the micro-scale of the individual and the macro-scale of the nation-state. At scales beyond the national, sovereignty fractures into a multitude, either through federalism, or the wider principle of subsidiarity.

In the Canadian context, both the Crown and First Nations seem to argue for this independence from outside intervention. They do not seem to appreciate the 'fractured' nature of sovereignty in the 21<sup>st</sup> century.

<sup>58</sup> Union of British Columbia Indian Chiefs, 'The Constitution Express Moves to Britain', *Constitution Express* (Vancouver) 11 April 1981 <<http://constitution.ubcic.bc.ca/node/157>>. From first principles, there is a valid argument that First Nations had de jure or legal sovereignty in pre-contact times, while the Crown obtained only de facto sovereignty through actual control. It is this tension that is at the heart of the reconciliation process in Canada. This understanding seems to be a driver in the 2015 findings of the Truth and Reconciliation Commission of Canada: Truth and Reconciliation Commission of Canada, *Calls to Action* (2015) <[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)>. For example, the Commission stresses the need for '[repudiating] concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius': at 4 [45]. Similar calls can be found at 5 [46], 5 [47], 5 [49].

<sup>59</sup> My argument is best articulated by this excerpt from the House of Commons Special Committee on Indian Self-Government, Parliament of Canada, *Second Report* (1983) 135 [56] ('*Penner Report*'), quoted in Peter Grose, 'Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia?' (1997) 4 *James Cook University Law Review* 68, 77-8:

Canada is obliged to protect and promote the rights of the peoples of the Indian First Nations in a manner consistent with the rights guaranteed in the international covenants Canada has signed — the United Nations *Covenant on Economic, Social and Cultural Rights*, the *Covenant on Civil and Political Rights*, and the *Helsinki Final Act of 1975*. These agreements guarantee both the fundamental collective right of peoples to be self-governing and the basic human rights of individuals.

Generally, the area of indigenous rights has been affected by international law doctrines from the beginning of the Age of Discovery, through doctrines such as discovery, occupation, conquest, cession, etc.

Indigenous demands relative to provincial and federal governments.<sup>60</sup> The recent findings of the Truth and Reconciliation Commission of Canada affirm the aspirational role that United Nations instruments such as the *UNDRIP* play in the current discourse on the relationship between the Crown and First Nations.<sup>61</sup>

During the initial stages of drafting the *Constitution Act 1982*, there were no plans for any extensive inclusion of Aboriginal rights.<sup>62</sup> The initial proposal by then Prime Minister Pierre Trudeau was never put to consultation with the Aboriginal population.<sup>63</sup> It was only through public pressure that the Canadian government included these rights.<sup>64</sup> This pressure was largely due to movements such as ‘The Constitution Express’, a movement organised in the early 1980s to advocate for recognition of Aboriginal rights in the proposed

<sup>60</sup> For more on this point, see Renée Dupuis, *Justice for Canada's Aboriginal Peoples* (Robert Chodos and Susan Joanis trans, Les Éditions du Boréal, 2001); Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, 1997); John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010).

<sup>61</sup> See Truth and Reconciliation Commission of Canada, above n 58.

<sup>62</sup> See, eg, Arthur Manuel, ‘Introduction to First Nations Studies’ (Guest lecture delivered at University of British Columbia, Vancouver, 24 March 2009).

<sup>63</sup> Eric Hanson, *Constitutional Express* (2009) Indigenous Foundations <[http://indigenousfoundations.arts.ubc.ca/constitution\\_express/](http://indigenousfoundations.arts.ubc.ca/constitution_express/)>. See also Union of British Columbia Indian Chiefs, above n 58.

<sup>64</sup> During the 36<sup>th</sup> Annual General Assembly of the First Nations on 7 July 2015, Justin Trudeau, the eldest son of Pierre Trudeau and the current Prime Minister of Canada, laid out a new plan for Canada's relationship with Indigenous peoples. This plan includes repealing legislation unilaterally imposed on First Nations, as well as implementing all recommendations of the Truth and Reconciliation Commission: Justin Trudeau, ‘Real Change: Restoring Fairness to Canada's Relationship with Aboriginal Peoples’ (Speech delivered at Assembly of First Nations 36<sup>th</sup> Annual General Assembly, Montréal, 7 July 2015) <<https://www.liberal.ca/justin-trudeau-at-assembly-of-first-nations-36th-annual-general-assembly/>>. The Truth and Reconciliation Commission of Canada made a number of recommendations on reconciliation: see above n 58. In particular, the Commission ‘call[ed] upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation’: at 4 [43]; and ‘call[ed] upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*’: at 4 [44]. The Commission also called for ‘a Covenant of Reconciliation that would identify principles for working collaboratively to advance reconciliation in Canadian society’, including at 5 [46]:

Repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and terra nullius, and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts.

patriation of a Canadian Constitution.<sup>65</sup> The first step in their campaign was to organise large-scale demonstrations to pressure the Canadian government to recognise Aboriginal rights in the Constitution.<sup>66</sup> When this failed to convince the Trudeau Government to act, the strategy moved to lobbying international rights organisations. Delegations to the United Nations and then to Europe eventually succeeded in pressuring the Trudeau Government to agree to recognise Aboriginal rights within the *Constitution Act 1982*.<sup>67</sup> Again, the key point to reiterate is that the Canadian experience with the constitutional recognition of Aboriginal rights was essentially in compliance with international pressures, including an interpretation of the relationship between the First Nations and Canada as governed by international treaties, that resulted in Aboriginal rights. The existence of these rights is hence extrinsic to Canadian municipal law.

Part II s 35.1 of the *Constitution Act 1982* links the recognition to pt I s 25.<sup>68</sup> Section 25 'guarantee[s]' that the *Canadian Charter of Rights and Freedoms* 'shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights that pertain to the aboriginal peoples of Canada'. Some commentators argue that, by doing so, this section confers a unique (sui generis) constitutional status on Indigenous Canadians in Canadian law.<sup>69</sup> However, this status is still assimilated within a legal system

<sup>65</sup> For a detailed discussion of the public pressure advocating for a recognition of aboriginal rights, see Louise Mandell and Leslie Hall Pinder, 'Tracking Justice: The Constitution Express to Section 35 and Beyond' in Lois Harder and Steve Pattern (eds), *Patriation and Its Consequences: Constitution Making in Canada* (UBC Press, 2015) 180.

<sup>66</sup> For example, thousands of activists travelled from Vancouver to Ottawa to publicise concerns that Aboriginal rights would be abolished in the proposed Constitution: see *ibid*.

<sup>67</sup> In particular, as Hanson above n 63 notes:

A group of activists led by George Manuel, then president of the Union of BC Indian Chiefs chartered two trains from Vancouver that eventually carried approximately one thousand people to Ottawa to publicize concerns that Aboriginal rights would be abolished in the proposed Canadian Constitution. When this large-scale peaceful demonstration did not initially alter the Trudeau government's position, delegations continued on to the United Nations in New York, and then to Europe to spread their message to an international audience. Eventually, the Trudeau government agreed to recognize Aboriginal rights within the Constitution.

<sup>68</sup> For a discussion of the interaction between ss 25 and 35, see Michael Asch and Patrick Macklem, 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R v Sparrow*' (1991) 29 *Alberta Law Review* 498.

<sup>69</sup> See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001); Paul L A H Chartrand (ed), *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Purich Publishing, 2002); Borrows, *Canada's Indig-*

that defines Aboriginal rights from its own point of reference, rather than from an Indigenous perspective. The latter would result only if 'Aboriginal rights' are defined through Aboriginal jurisprudence,<sup>70</sup> leading to multicultural, multinational jurisdictions under the *Constitution Act 1982* (as seen in Ecuador and Bolivia). In other words, an Indigenous perspective would require mechanisms of self-determination and self-governance.<sup>71</sup>

Based on my analytical model, the Canadian constitutional recognition of Aboriginal rights is a narrow one. The recognition is one of 'indirect consociation'. Canada adopts a universal approach to human rights where minority human rights are defined in reference to majority political rights. The rights discourse in Canada is largely the product of the British majority jurisprudence rather than based on Indigenous narratives. The position of Quebec within the Canadian federation is a prime example of this approach where constitutional recognition (qua the division of powers between the federal and provincial governments) is the result of pragmatic considerations given the size of the French community (almost eight million out of a total of 36 million Canadians).<sup>72</sup> This is in contrast to a direct approach where political Indigenous rights would be recognised expressly and protected based on equality rather than assimilation.

*enous Constitution*, above n 60; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); Renée Dupuis, above n 60.

<sup>70</sup> By 'Aboriginal jurisprudence', I refer to legal theory emerging from Aboriginal sources rather than from European ones. These sources would include native religion and mythology: see Borrows, *Recovering Canada*, above n 69.

<sup>71</sup> In Canada, Indigenous rights are mostly assimilated under what is a largely British legal system.

<sup>72</sup> See Michael Asch, 'Aboriginal Self-Government and the Construction of Canadian Constitutional Identity' (1992) 30 *Alberta Law Review* 465. To be precise, s 35 of the *Constitution Act 1982* recognises both treaty rights and common law Aboriginal rights. As pointed out by one of the reviewers of this article, most of British Columbia and the east coast of Canada still assert common law title and rights with very little treaty history. In addition, these common law rights are not dependent on the Royal Proclamation of 1763: see *Calder v A-G (British Columbia)* [1973] SCR 313. However, my point is based on the 'contingent right' position in the following paragraph. Regardless of whether the rights are common law rights or treaty-based, they have to originate or be affirmed by the state. These rights are not 'inherent'. Some would still suggest that this is an awkward proposition given that it is clear that these rights are understood to be (at least in part) the common law rights that survived colonisation: *R v Sparrow* [1990] 1 SCR 1075 ('*Sparrow*'). It is true that there is no 'recognition' required for them to exist, however, they await clear articulation by court determination (or treaty). The US recognises a distinction between 'recognised' and 'unrecognised' title — traditionally, 'recognised' refers to treaty-recognised rights, 'unrecognised' refers to non-treaty rights. For more on the 'contingent approach', see *Sparrow* [1990] 1 SCR 1075; Asch and Macklem, above n 68.

On the other hand, the Canadian approach is a dynamic one, if only because of the treaty-based approach that defines the relationship of Indigenous Canadians to the Canadian Crown.<sup>73</sup> The Canadian approach recognises only existing rights as delineated in treaties between Indigenous peoples and the Crown. For example, pt I s 35(1) of the *Constitution Act 1982* talks about 'existing aboriginal and treaty rights'. These rights outlined in s 35 were to be specified through a series of conferences under ss 37 and 37.1.<sup>74</sup> The conferences ended in 1987 without a definition of the rights referred to in s 35. This left open the possibility of evolving these rights through case law. It is this possibility that confers a dynamic nature on the constitutional recognition in Canada.

Today, these rights are open to interpretation under the 'contingent right' position, which assumes the Canadian state is the originator of these rights. Here, 'existence' is synonymous with recognition by the state (through parliament or the courts). The 'inherent right' approach argues instead that Indigenous peoples' rights pre-exist colonisation and hence do not require recognition by the state to come into effect.<sup>75</sup> Notwithstanding these differences, the key point on Indigenous rights is that Canada formally endorsed the *UNDRIP* on 12 November 2010,<sup>76</sup> but it is part of customary international law that has no legally binding status.<sup>77</sup> This brings Canadian jurisprudence closer to the developments in other jurisdictions such as Australia, New Zealand, Ecuador and Bolivia.<sup>78</sup>

<sup>73</sup> Nevertheless, it should be stated that the Canadian *Constitution Act 1982* is not only 'long and detailed, but [also] difficult to amend.' This is in contrast to the United States Constitution which is short but hard to amend, and the Swedish and Swiss Constitutions which are 'detailed ... but easy to amend': Franks, above n 56, 120.

<sup>74</sup> Section 37 was repealed on 7 April 1983 by *Constitution Act 1982* s 54. Section 37.1 was inserted by the *Constitution Amendment Proclamation 1983* sch 2 cl 4 and repealed on 18 April 1987 by *Constitution Act 1982* s 54.1.

<sup>75</sup> See especially *Sparrow* (1990) 1 SCR 1075, 1094; Douglas Sanders, 'Pre-Existing Rights: The Aboriginal Peoples of Canada' in Gérald A Beaudoin and Ed Ratushny (eds), *The Canadian Charter of Rights and Freedoms* (Carswells, 2<sup>nd</sup> ed, 1989).

<sup>76</sup> Government of Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (30 July 2012) <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

<sup>77</sup> See Equality Team of the International Labour Standards Department, 'ILO Standards and the UN Declaration on the Rights of Indigenous Peoples: Information Note for ILO Staff and Partners' (Information Note, ILO) 2 <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_100792.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100792.pdf)>.

<sup>78</sup> All these countries have adopted the *UNDRIP*, UN Doc A/RES/61/295. 143 states including Ecuador and Bolivia adopted it on 13 September 2007, while Australia, Canada, New Zea-

As far as the political arena is concerned, in the mid-2000s, Aboriginal Canadians formed their own political party, the Aboriginal Peoples Party of Canada in Manitoba, which later united with the First Peoples National Party of Canada as a federal political party. However, by 2013, the party was deregistered by Elections Canada.

### B *Constitutional Recognition in New Zealand*

The treaty formation approach is also followed in New Zealand. The relationship between the Indigenous people, the Māori and the Crown was formalised in 1840 through the *Treaty of Waitangi*. The Treaty came after the *Declaration of Independence* of 1835, which affirmed the political role of Māori in New Zealand.<sup>79</sup> The Treaty was signed 70 years after the British explorer James Cook mapped New Zealand's entire coastline, and eight years after James Busby was appointed as the first British Resident. The Treaty was entered into after four decades of intertribal war, which led to a large reduction in the Indigenous population.<sup>80</sup> While there are considerable differences in the interpretation of the Treaty, New Zealand courts have developed a large body of jurisprudence around what came to be known as the principles of the Treaty.<sup>81</sup> Note, however, that court cases established the principle that the

land and the United States initially voted against it and 11 states abstained: *General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President*, 61<sup>st</sup> sess, 107<sup>th</sup> and 108<sup>th</sup> plen mtgs, UN Doc GA/10612 (13 September 2007). Australia later adopted the *UNDRIP* on 3 April 2009: 'Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights', above n 15. New Zealand adopted the *UNDRIP* on 19 April 2010: Pita Sharples, Minister of Maori Affairs, 'Supporting UN Declaration Restores NZ's Mana' (Media Release, 20 April 2010) <[https://www.beehive.govt.nz/sites/all/files/100420\\_UNDRIP.pdf](https://www.beehive.govt.nz/sites/all/files/100420_UNDRIP.pdf)>. The other key international instrument in this regard is the *ILO Convention No 169*, which, unlike the *UNDRIP*, is an international treaty and has not been ratified by Canada, Australia or New Zealand. Bolivia ratified *ILO Convention No 169* on 11 December 1991, while Ecuador ratified on 15 May 1998: ILO, *Ratifications of C169 — Indigenous and Tribal Peoples Convention, 1989 (No 169)* (2016) <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314)>.

<sup>79</sup> Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 250.

<sup>80</sup> It is important to note that the *Treaty of Waitangi* is only one of many similar treaties that were entered into by the British Crown in the 19<sup>th</sup> century. For a discussion of the similarities and differences, see Paul Moon, *Hobson: Governor of New Zealand 1840–1842* (David Ling Publishing, 1998) 77–82. By the dawn of the 20<sup>th</sup> century, almost half of the Māori population had been decimated: see Raeburn Lange, *May the People Live: A History of Maori Health Development 1900–1920* (Auckland University Press, 1999) 50.

<sup>81</sup> See Claire Charters, 'Fiduciary Duties to Māori and the *Foreshore and Seabed Act 2004*: How Does It Compare and What Have Māori Lost?' in Andrew Erueti and Claire Charters (eds),

Treaty was ‘a simple [legal] nullity,’ only 37 years after its signing.<sup>82</sup> The *Treaty of Waitangi* has never been incorporated into New Zealand municipal law, even though it is referred to in numerous Acts. It still does not have a firm position in New Zealand jurisprudence.

The reasons expounded below explain why the New Zealand approach is more dynamic than that in Canada (see Figure 2). The fact that New Zealand does not have a written constitution makes changes to Indigenous rights under the ‘constitution’ a matter of securing a simple majority in a unicameral parliament. Moreover, while the recognition is made operational through a treaty-based approach just like in Canada, in New Zealand there is only one treaty. This has allowed the Māori a better position for political organisation and negotiations with the Crown.

The Preamble to the English text of the *Treaty of Waitangi* deems it necessary to recognise the British monarch as the New Zealand sovereign. Article 1 cedes sovereignty as envisaged in the Preamble, while art 3 confirms that the sovereign ‘extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.’ In art 2, the Sovereign:

guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess ...

The Māori text of the Treaty suggests that the purpose was to provide a government while securing tribal autonomy. In the Māori text, under art 1, Māori leaders gave the Queen ‘*te Kawanatanga katoa*’, or complete government over their land. In the Māori text, art 2 states that Māori were guaranteed ‘*te tino rangatiratanga*’, or ‘the unqualified exercise of their chieftainship over their lands, villages and all their treasures.’ Article 3, similar to the English text, assures Māori of the Queen’s protection and all the rights (*tikanga*) accorded to British subjects. This article is usually interpreted as expressing the ultimate goal of British Māori policy as the assimilation and eventual amalgamation of the Māori with settlers as one people,<sup>83</sup> or in the words of Captain William Hobson upon the signing of the Treaty, “*He iwi*

*Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, 2007) 1, 143, 164–5.

<sup>82</sup> See especially *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72, 78 (Prendergast CJ).

<sup>83</sup> Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, 1977) 14–15.

*tahi tatou*” (“We are now one people”).<sup>84</sup> However, as I have previously noted, ‘this article would also show that the intention of the Māori was to cede governance only in relation to British settlers. Otherwise it would be redundant. Article 1 would have sufficed.’<sup>85</sup> Notwithstanding, an idea of amalgamation opens the door to a wide interpretation of ‘self-governance’ to encompass not only Māori but also the British settlers. Article 3 was an expression of an ideal of early Victorian humanitarianism: racial equality between Māori and the British settlers. This humanitarianism in the New Zealand context was an extension of efforts leading to the emancipation of slaves, the abolition of apprenticeship, and a report by the House of Commons Committee on Aboriginal Tribes (British Settlements) in 1837.<sup>86</sup>

Notwithstanding the *Declaration of Independence* of 1835 and the *Treaty of Waitangi*, Māori political rights were not forthcoming. New Zealand had two constitutional acts in the 19<sup>th</sup> century: the *New Zealand Constitution Act 1846* (Imp) 9 & 10 Vict, c 103, and the *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict, c 72. Neither advanced the collective rights of the Māori, even though they provided ample constitutional recognition. In 1846, the Māori population was larger than that of the settlers,<sup>87</sup> and the implementation of the first Constitution was suspended by legislation passed in 1848 ‘for fear that the local governance structures created under the Act could not be trusted to act in the best interest of Māori.’<sup>88</sup> As previously noted,

a more credible motive was that the provincial division envisaged under the [*New Zealand Constitution Act 1846* (Imp) 9 & 10 Vict] would have

<sup>84</sup> Alan Ward, *A Show of Justice: Racial ‘Amalgamation’ in Nineteenth Century New Zealand* (Auckland University Press, first published 1974, 1995 ed) 42.

<sup>85</sup> Gussen, ‘Subsidiarity as a Constitutional Principle in New Zealand’, above n 44, citing Paul Moon, ‘Three Historical Interpretations of the *Treaty of Waitangi* (1840)’ [1999] *Electronic Journal of Australian and New Zealand History* 1, 10 <[www.jcu.edu.au/aff/history/newcastle/moon.htm](http://www.jcu.edu.au/aff/history/newcastle/moon.htm)>.

<sup>86</sup> House of Commons Parliamentary Select Committee on Aboriginal Tribes (British Settlements), Parliament of Great Britain, *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (1837). See Adams, above n 83, 57.

<sup>87</sup> The Māori were around 71 000 (compared to around 13 275 settlers) and therefore constituted 84 per cent of the population. By 1852, the settler population more than doubled (27 633) and Māori fell to 70 per cent of the population. By 1896, Māori population reached its lowest figure of 42 114, comprising only 6 per cent of the total population. For further information, see Statistics New Zealand, *Long-Term Data Series: A Population*, (Statistics New Zealand) A1.1 <[http://www.stats.govt.nz/browse\\_for\\_stats/economic\\_indicators/NationalAccounts/long-term-data-series/population.aspx](http://www.stats.govt.nz/browse_for_stats/economic_indicators/NationalAccounts/long-term-data-series/population.aspx)>.

<sup>88</sup> Gussen, ‘Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador’, above n 35, 250.



given Māori a majority in at least one of the two provinces it created ... (in New Ulster comprising the whole of the North Island), even though most Māori would have been denied voting rights for lack of property ownership.<sup>89</sup>

Similarly, the *Constitution Act 1852* (Imp) 15 & 16 Vict, c 72 provided, in s 71, for the creation of self-governing Māori districts. In reality, however, the section was never implemented<sup>90</sup> and was finally repealed by the *Constitution Act 1986* (NZ) s 26(1)(a). This marginalisation of the Māori as a political partner led inevitably to tensions between the colonists and the Māori who were resisting pressures to sell their lands but did not have the legal protection to do so. Notwithstanding efforts to avert a wide-spread armed conflict, a minor dispute over land in Taranaki, a region in the west of North Island, furnished the pretext for an escalation of the New Zealand wars from 1860 to 1872. During these wars, which could be traced back to as early as 1845 in the form of localised conflicts, the *Kingitanga* movement crowned the first Māori King (in 1858) in order to secure political rights.<sup>91</sup> This resulted in a number of legislative interventions to decide Māori governance issues.<sup>92</sup>

By 1918, the *Rātana* movement was established, adding to the political presence of Māori.<sup>93</sup> By the middle of the 20<sup>th</sup> century, Māori consolidated their political presence, which led to further legislative intervention. This included the *Maori Welfare Act 1962* (NZ), which established a national Māori Council to advise the government on policy matters related to Māori;<sup>94</sup> the *Treaty of Waitangi Act 1975* (NZ), which established the Waitangi Tribunal to report on breaches of the *Treaty of Waitangi*<sup>95</sup> and to ensure that future legislation is not repugnant to the principles of the Treaty;<sup>96</sup> the *Maori*

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> See, eg, *Native Land Act 1862* (NZ) 26 Vict 42; *Native Lands Act 1865* (NZ) 29 Vict 71; *Maori Representation Act 1867* (NZ) 31 Vict 47, s 3 (which established four Māori seats in the New Zealand Parliament); *Maori Councils Act 1900* (NZ) 64 Vict 48 (which conferred local self-government on Māori); *Maori Lands Administration Act 1900* (NZ) 64 Vict 55.

<sup>93</sup> While it could be argued that most of these Acts are only of historical relevance, their brief treatment here is indispensable to provide a sketch of the evolution of Indigenous rights in New Zealand.

<sup>94</sup> *Maori Welfare Act 1962* (NZ) ss 17–18.

<sup>95</sup> *Treaty of Waitangi Act 1975* (NZ) s 5.

<sup>96</sup> Ibid s 5(1)(b), (2).

*Language Act 1987* (NZ); and the *Treaty of Waitangi (State Enterprises) Act 1988* (NZ).<sup>97</sup> As stated by Gussen:

Māori political representation in the [New Zealand] parliament grew from four seats at the end of the 19<sup>th</sup> century (5.3 per cent of total seats), to over seven seats (5.8 per cent of total seats) at the beginning of the 21<sup>st</sup> century. Even though Māori representation is governed by an Act of Parliament (the *Maori Representation Act 1867* (Imp)), which suggests a narrow recognition that draws on Western jurisprudence, we can see how Māori representation continues to maintain a relatively stable percentage vis-à-vis the total population of New Zealand.

The push for Indigenous rights continues to be championed by political organisations such as the Māori Party, established in 2004, and the Mana Party, established in 2011. In 2015, the Māori Party held 2 seats in Parliament while the Mana Party held none (out of 121 seats). This suggests a common denominator with Ecuador and Bolivia where Indigenous peoples have even stronger political representation. Another common denominator is the *UNDRIP* which New Zealand endorsed (with caveats) on 19 April 2010.<sup>98</sup>

These important developments, aided largely by the fact that New Zealand does not have any written constitution,<sup>99</sup> did not lead to a wide constitutional recognition. Notwithstanding the *Treaty of Waitangi*, Aboriginal rights are recognised in New Zealand only as part of the Westminster system — through a piecemeal legislative approach. Jurisprudence flowing from *Tikanga Māori* does not influence any of the rights recognised by the Crown until it is incorporated into municipal law. Similar to the approach in Canada, the New

<sup>97</sup> As noted in Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 251 n 9 (citations omitted):

According to current New Zealand case law, the *Treaty of Waitangi* has no binding legal significance unless it is legislatively recognised and incorporated into the domestic law of New Zealand, a position still echoing that of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72 ('[A] treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law') .... This is unlike the 19<sup>th</sup> century situation in the US, where Marshall CJ took the lead by declaring the legal foundations of what became known as federal 'Indian' law. In New Zealand, the legislature must take the lead to develop a 'bicultural jurisprudence' of the *Treaty of Waitangi*, while the courts play only a subordinate role through statutory interpretation and case-by-case application of enacted legislation.

<sup>98</sup> Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 252 (citations omitted).

<sup>99</sup> This facilitates the evolution of the relationship between the Crown and the Māori without the onerous requirements for constitutional amendment seen in Australia.

Zealand approach to constitutional recognition is narrow, as it does not recognise Indigenous jurisprudence.<sup>100</sup> Comparatively, the New Zealand recognition is even narrower than that adopted in Canada (see Figure 2). Section 25 of Canada's *Constitution Act 1982* gives a clear signal as to the sui generis nature of Indigenous Canadian rights, even though it is still interpreted by constructs borrowed from a Western legal system. In New Zealand, such recognition came only from the judiciary, when in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General (New Zealand)*,<sup>101</sup> Cooke P affirmed that '[t]he sui generis nature of Indian title [to land], and the historic powers and responsibility assumed by the Crown constituted the source of ... a fiduciary obligation'.<sup>102</sup> In light of the fact that New Zealand does not have a written constitution, and the *Treaty of Waitangi's* failure to elaborate on the nature of the rights given to Māori, constitutional recognition in New Zealand is relatively narrower than that given to Indigenous Canadians.<sup>103</sup>

<sup>100</sup> In 2011, the United Nations Special Rapporteur commented on the situation in New Zealand as follows:

Especially in recent years, New Zealand has made significant strides to advance the rights of Maori people and to address concerns raised by the former Special Rapporteur. ... The Special Rapporteur emphasizes the need for the principles enshrined in the *Treaty of Waitangi* and related, internationally protected human rights to be provided security within the domestic legal system of New Zealand so that these rights are not vulnerable to political discretion. ...

Additionally, efforts to secure Maori political participation at the national level should be strengthened, and the State should focus special attention on increasing Maori participation in local governance. New Zealand should also ensure that consultations with Maori on matters affecting them are applied consistently and in accordance with relevant international standards and traditional Maori decision-making procedures. ...

Finally, the Special Rapporteur cannot help but note the extreme disadvantage in the social and economic conditions of Maori people in comparison to the rest of New Zealand society. While some positive developments have been achieved since the visit of the former Special Rapporteur, more remains to be done to achieve the increased social and economic parity that is necessary for Maori and non-Maori New Zealanders to move forward as true partners in the future, as contemplated under the *Treaty of Waitangi*.

James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN GAOR, 18<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/18/35/Add.4 (31 May 2011) 1–2, quoted in Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 251–2 n 11.

<sup>101</sup> [1993] 2 NZLR 301.

<sup>102</sup> Ibid 306, quoting *Sparrow* (1990) 1 SCR 1075, 1108.

<sup>103</sup> Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 251–2.

### C Constitutional Recognition in Ecuador

Unlike New Zealand, the Indigenous population of Ecuador is heterogeneous.<sup>104</sup> It includes nations such as the Achuar, Awá, Chachis, Cofán, Épera, Huaorani, Mantas, Quichua, Secoya, Shuar, Siona, Tsachila, Huancavilcas and Záparo.<sup>105</sup> However, approximately 96 per cent of Ecuador's Indigenous population are Quichua speakers, which helps provide a unified national front.<sup>106</sup> Just like New Zealand (and Canada), the constitutional recognition in Ecuador was a product of Indigenous political mobilisation.<sup>107</sup> The largest Indigenous organisation, the Confederation of Indigenous Nationalities of Ecuador ('CONAIE'), has been advocating for the welfare of various Indigenous communities since it was established in 1986.<sup>108</sup> CONAIE was responsible for organising popular uprisings (*levantamientos populares*) since 1990, which resulted in a number of institutional gains such as the Office of Indigenous Health and the Directorate of Bilingual Education.<sup>109</sup> As discussed below, the wide constitutional recognition in Ecuador stems from the united political front of Indigenous Ecuadorians. The fact that there are a number of Indigenous nations did not detract from their ability to secure a wide recognition.

Two other factors explain the wide recognition seen in Ecuador. First is the strength of the Indigenous population as a percentage of the total population of Ecuador. The second factor is geographical concentration. Today, Ecuador has five ethnic groups, two of which are Indigenous: the Amerindians and the Montubio (Afro-Ecuadorian), each accounting for around 10 per cent of the population (roughly 3.5 million).<sup>110</sup> Moreover, the Amerindians

<sup>104</sup> For a recent update on the situation of Aboriginal peoples in Ecuador and Bolivia, see Mario Blaser et al (eds), *Indigenous Peoples and Autonomy: Insights for a Global Age* (UBC Press, 2010).

<sup>105</sup> Allen Gerlach, *Indians, Oil, and Politics: A Recent History of Ecuador* (Scholarly Resources, 2003) xx.

<sup>106</sup> They include the Caranqui, the Otavaleno, the Cayambi, the Pichincha, the Panzaleo, the Chibuelo, the Salasacan, the Tungurahua, the Tugua, the Waranka, the Puruhá, the Cañari and the Saraguro: *ibid* 8.

<sup>107</sup> See Xavier Albó, 'Indigenous Movements in Bolivia, Ecuador and Peru' in Renato Boschi and Carlos Henrique Santana (eds), *Development and Semi-Periphery: Post-Neoliberal Trajectories in South America and Central Eastern Europe* (Anthem Press, 2012) 105, 111–12.

<sup>108</sup> Silva, above n 7, 135.

<sup>109</sup> *Ibid*.

<sup>110</sup> Gussen, 'Constitutional Recognition of Indigenous Peoples in New Zealand and Ecuador', above n 35, 254. The Montubio were recognised as Indigenous only in 2001, aided by their

are geographically concentrated in the Sierra region, while the Montubio occupy the coastal areas.<sup>111</sup> This geographic concentration did not only prevent diffusing the Indigenous identity within the larger population, but also provided these nations with the ability to exercise their own jurisprudence in these areas. These factors, together with the creation of CONAIE, suggest a unified Indigenous front closer to that seen in New Zealand than that seen in Canada and Bolivia. This explains why in Figure 2 (see below) Ecuador is shown as having a wider recognition than the other three counties.

As to political structures, the Indigenous population, together with civil society organisations, advocated for an anti-capitalist ‘plurinational state’.<sup>112</sup> CONAIE formed the *Pachakutik* Pluricultural Movement which has won between 6 per cent and 10 per cent of national votes since 1996. Other organisations such as the Confederation of Indigenous Nationalities of the Ecuadorian Amazon, which is one of the three major regional organisations constituting the CONAIE, also provided political representation to the Indigenous people of Ecuador. Indigenous political organisation led eventually to the *Constitution of the Republic of Ecuador 1998* (Ecuador), which enabled the recognition of Ecuador as a multicultural and multiethnic state (paving the way to a wide recognition of Indigenous constitutional rights). This Constitution enunciated rights for Indigenous Ecuadorians. In particular, ch 7 (art 62) guaranteed cultural diversity, while ch 8 (arts 66–79) was about access to a bilingual and intercultural system of education. The *Constitution of the Republic of Ecuador 1998* (Ecuador) also created the Nationalities and Peoples from Ecuador Development Council, which recognised Indigenous Ecuadorians as part of the state.<sup>113</sup>

The widening of the constitutional recognition of Indigenous Ecuadoreans culminated with the current *Constitution of the Republic of Ecuador 2008* (Ecuador) (*Constitution of Ecuador 2008*). This 2008 Constitution not only makes explicit reference to ‘collective rights’ and to Indigenous mythology, in

political organisation under the banner of the Council for the Development of the Montubio People of the Ecuadorian Coast and Subtropical Zones of the Littoral Region.

<sup>111</sup> See Gerlach, above n 105, 1–3; Karem Roitman, ‘Hybridity, Mestizaje, and Montubios in Ecuador’ (Working Paper No 165, Queen Elizabeth House, University of Oxford, March 2008) 10.

<sup>112</sup> Kenneth P Jameson, ‘The Indigenous Movement in Ecuador: The Struggle for a Plurinational State’ (2011) 38(1) *Latin American Perspectives* 63.

<sup>113</sup> Notwithstanding these achievements, Indigenous Ecuadorians remain the most disadvantaged group of Ecuadorian society: see Veronika Minkova, *Ecuador: Model of Successful Integration of Indigenous People* (GRIN Verlag, 2007).

‘*Pacha Mama*’ or ‘Mother Earth’,<sup>114</sup> but also gives special recognition to Indigenous legal practices in areas where Indigenous peoples constitute a majority of the population. For example, art 57 ‘recognize[s] and guarantee[s], in conformity with the *Constitution* and human rights agreements, conventions, declarations and other international instruments’, 21 collective Indigenous rights. These include the rights to ‘strengthen their [Indigenous] identity’,<sup>115</sup> ‘[t]o keep ownership of ancestral lands’,<sup>116</sup> and ‘[t]o create, develop, apply and practice their own legal system’ — provided the system does not ‘infringe [other] constitutional rights’.<sup>117</sup> This constitutional recognition does not only acknowledge Indigenous jurisprudence, it also acknowledges that Indigenous jurisprudence comes from multiple Indigenous nations and is thus an embrace of legal pluralism or ‘plurinationalism’.<sup>118</sup>

However, given that the *Constitution of Ecuador 2008* enumerates rights, the possibility of adding to these rights relies upon amending the Constitution, which is a disincentive and a hurdle to change. Coupled with the need for referenda to bring about constitutional amendments, the enumeration of Indigenous rights means that Ecuador is adopting a static recognition.

While the *Constitution of Ecuador 2008* gives clear acknowledgement of collective rights,<sup>119</sup> a closer look at the Constitution suggests that there are venues where these rights can nevertheless be dynamic at the local level. Chapter 4 of title II specifically elaborates on the rights of Indigenous peoples. Here we find the collective rights to identity,<sup>120</sup> communal ownership of land,<sup>121</sup> consultation,<sup>122</sup> and most importantly, their own legal systems.<sup>123</sup>

<sup>114</sup> *Constitution of Ecuador 2008* Preamble.

<sup>115</sup> *Ibid* art 57(1).

<sup>116</sup> *Ibid* art 57(5).

<sup>117</sup> *Ibid* art 57(10).

<sup>118</sup> *Ibid* art 257.

<sup>119</sup> Article 10 states that ‘[p]ersons, communities, peoples, and nations are bearers of rights’ that are guaranteed by the *Constitution of Ecuador 2008* and by international instruments. Moreover, art 11 states that ‘[r]ights can be exercised, promoted and enforced individually or collectively’. The rest of title II proceeds to elaborate on other rights including the right to water and food (at arts 12–13), healthy environment (at arts 14–15), information and communication (at arts 16–20), culture and (benefits of) science (at arts 21–5), education (at arts 26–9), habitat and housing (at arts 30–1), health (at art 32), labour and social security (at arts 33–4), specialised care (for the elderly and children, and people with disabilities) (at arts 35–9, 44–9), retirement (at art 37(3)), freedom of movement (at art 40–2), and freedom from discrimination in relation to pregnant and breastfeeding women (at art 43).

<sup>120</sup> *Constitution of Ecuador 2008* art 57(1).

<sup>121</sup> *Ibid* art 57(4).

Title II continues to enumerate rights to participation, freedom, nature and protection.<sup>124</sup> The title ends with a much shorter enumeration of duties and responsibilities on all Ecuadorians,<sup>125</sup> including abiding by the *Constitution of Ecuador 2008*,<sup>126</sup> and respecting and recognising ethnic differences.<sup>127</sup> In a nutshell, the approach is a ‘menu’ approach where rights are listed under headings or groupings. Notwithstanding, art 238 provides for ‘[d]ecentralized autonomous governments’ guided by the principles of, amongst other things, ‘subsidiarity’ and ‘solidarity’. Similar emphasis on financial autonomy of lower levels of government can be found in art 270. In particular, art 240 stipulates that ‘decentralised autonomous governments of the regions, metropolitan districts, provinces and cantons shall have law-making powers within the scope of their competences and territorial jurisdictions’. Given this emphasis on subsidiarity, Indigenous rights could continue to develop at the local scale. Although the Indigenous population makes up only 14 per cent of the population of Ecuador,<sup>128</sup> such a percentage is enough to allow for such evolution.

The constitutional developments in Ecuador give effect to international jurisprudence in relation to Indigenous rights. In particular, the non-binding *UNDRIP* was inspirational.<sup>129</sup> For example, the *procedural* right to a ‘free, prior and informed consent’ (arts 10, 11(2), 19 and 28(1), 29(2)) finds recognition under the watered down version in art 57 of the *Constitution of Ecuador 2008* as the right to ‘free, prior and informed consultation.’<sup>130</sup> Again, it cannot be emphasised enough how what many countries view as non-binding, aspirational goals in international law documents have actually become part of the enforceable domestic law in Ecuador. This was possible only because of the ability of the Indigenous population to exert pressure on consecutive governments through political organisation. The fact that there

<sup>122</sup> Ibid art 57(17).

<sup>123</sup> Ibid art 57(10).

<sup>124</sup> Ibid title II chs 5–8.

<sup>125</sup> Ibid title II ch 9.

<sup>126</sup> Ibid art 83(1).

<sup>127</sup> Ibid art 83(14).

<sup>128</sup> *Expert Panel Report*, above n 9, 51.

<sup>129</sup> *UNDRIP*, UN Doc A/RES/61/295.

<sup>130</sup> For the effect of *ILO Convention No 169*, see also Suzana Sawyer, ‘Empire/Multitude — State/Civil Society: Rethinking Topographies of Power through Transnational Connectivity in Ecuador and Beyond’ in Edward F Fischer (ed), *Indigenous Peoples, Civil Society, and the Neo-Liberal State in Latin America* (Berghahn Books, 2009) 64, 77.

were already international instruments that provided guidance on Indigenous rights meant that the most efficient way forward (as far as obtaining consensus is concerned) was to import these instruments into municipal law, and give a constitutional weight to ensure their implementation.

#### D *Constitutional Recognition in Bolivia*

The genesis of Indigenous rights protection in Bolivia can be traced back to 1991, when the Bolivian government signed the *ILO Convention No 169*.<sup>131</sup> In 2007, the Bolivian government voted in favour of the *UNDRIP*.<sup>132</sup> But it was only in 2009 that Indigenous Bolivians were finally able to break the chains of subjugation and marginalisation imposed on them for over 500 years. On 25 January 2009, the country held a referendum on a new Constitution that proved to be pivotal for South America. On the road to this Constitution, the Bolivian president, Evo Morales, who belongs to the country's Indigenous majority, had to make concessions to his conservative opponents in the eastern lowlands, including protection from land confiscation if they could show that their lands were productive. Nevertheless, the *Plurinational State of Bolivia Constitution 2009* (Bolivia) ('*Constitution of Bolivia 2009*') granted important self-determination to Indigenous groups, including polycentric reforms such as recognising Indigenous systems of justice alongside conventional courts (art 192(III)).

Bolivia was the first country in the world to incorporate the *UNDRIP* into its Constitution,<sup>133</sup> which also suggests that the main impetus behind the constitutional recognition was pursuit of the right to autonomy or self-determination.<sup>134</sup> The objective was to redefine state–society relations to the

<sup>131</sup> ILO, *Ratifications of C169*, above n 78.

<sup>132</sup> United Nations, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" towards Human Rights for All, Says President' (Press Release, UN Doc GA/10612, 13 September 2007).

<sup>133</sup> Roberta Rice, 'UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada' in The Centre for International Governance Innovation (ed), *The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context — Special Report* (2014) 59, 59 citing Xavier Albó, 'Las Flamantes Autonomías Indígenas en Bolivia' in Miguel González et al (eds), *La Autonomía a Debate: Autogobierno Indígena y Estado Plurinacional en América Latina* (FLACSO, 2010) 355; Almut Schilling-Vacaflor and René Kuppe, 'Plurinational Constitutionalism: A New Era of Indigenous–State Relations?' in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Ashgate Publishing, 2012) 347, 348.

<sup>134</sup> *Constitution of Bolivia 2009* arts 30, 270. See also James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the*



end of creating a more inclusive polity, which explains why the *Constitution of Bolivia 2009* designates the country as ‘Unitary Social State of Pluri-National Communitarian Law’,<sup>135</sup> and the official name of the Constitution: the ‘*Plurinational State of Bolivia Constitution 2009*’. Hence, under the Constitution, Indigenous territories and municipalities may convert themselves into autonomous, self-organising entities, but this applies only to rural Indigenous communities.<sup>136</sup> These constitute less than half the Indigenous population of Bolivia.<sup>137</sup>

Unlike the other three countries discussed earlier, the Indigenous population in Bolivia (around 6.5 million) constitutes a majority (over 60 per cent of the population).<sup>138</sup> The 2012 data from the National Census suggests that 2.8 million people over the age of 15 are Indigenous (around 40 per cent of the population).<sup>139</sup> This majority status probably also explains why Indigenous Bolivians are more diverse relative to the Indigenous populations in New Zealand, Canada and Ecuador. There are in fact 36 recognised peoples, but only five groups dominate: the Quechua, the Aymara, the Guarani, the Chiquitano and the Moxeño.<sup>140</sup> The largest group, the Quechua people (who also live in Peru and Ecuador) account for 18 per cent of the total Indigenous population (around 1.3 million) and the second largest group accounts for 17 per cent of the Indigenous population (around 1.5 million). These groups are scattered across the Bolivian territory, usually in small patches. It is hence no surprise that Indigenous organisations have been ‘divided since 2012’ and have not been able to provide ‘a coordinated Indigenous response’ (unlike in the 2009 general elections).<sup>141</sup>

Unlike in Ecuador, the political organisation of Indigenous peoples in Bolivia remains fragmented on the national level.<sup>142</sup> This could be partially

*Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 184, cited in Rice, above n 133, 59.

<sup>135</sup> *Constitution of Bolivia 2009* art 1.

<sup>136</sup> *Ibid* pt III title I ch VII.

<sup>137</sup> Albó, above n 133, 356.

<sup>138</sup> See *Expert Panel Report*, above n 9, 51.

<sup>139</sup> Leonardo Tamburini, ‘Bolivia’ in Cæcilie Mikkelsen, *The Indigenous World 2015* (International Work Group for Indigenous Affairs, 2015) 172, 172.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid* 173.

<sup>142</sup> See Laurence Whitehead, ‘Bolivia and the Viability of Democracy’ (2001) 12(2) *Journal of Democracy* 6. Recently, there have been fractures in the Indigenous political scene even in Ecuador: Marc Becker, *Pachakutik: Indigenous Movements and Electoral Politics in Ecuador* (Rowman and Littlefield, 2012) xi–xii, 207–9.

explained by their proportion relative to the population. The largest Indigenous movements operate in different geographical areas:

- the Unified Confederation of Rural Workers of Bolivia in the highlands (formed in 1979),<sup>143</sup>
- the Coca Growers Federations in the valleys (since the 1990s),<sup>144</sup> and
- the ethnic Confederation of Indigenous People of Bolivia ('CIPOB'), in the lowlands (since 1982).

However, this fragmented movement was able to produce one of the most faithful revivals of Jacobin constitutions from the French Revolution.<sup>145</sup> The Unified Confederation of Rural Workers of Bolivia was instrumental in bringing down the Bolivian president in 2005 and, in the creation of the *Pact of Unity and Commitment* (*Pacto de Unidad y Compromiso*), supporting the current president, Evo Morales. The Pact is a grassroots alliance formed in 2002 in support of Indigenous rights.<sup>146</sup> CIPOB has also been the organiser of a series of national marches, which, inter alia, led to the ratification of the *ILO Convention No 169* in 1991.<sup>147</sup> In 2010, the CIPOB also marched to demand greater political autonomy for the Indigenous population, including additional seats in the Plurinational Legislative Assembly.<sup>148</sup> This march resulted in passing *Framework Law 31/10 on Autonomies and Decentralisation 2010* (Bolivia). This included the right of Indigenous peoples to form their own governments, with legislative, executive, patrimonial and jurisdictional powers in territories they occupy.<sup>149</sup> To date, the Bolivian constitutional court has declared only two Indigenous Autonomies compliant with the *Constitu-*

<sup>143</sup> Rafaela Pannain, 'Social Movements, State and Indigenous Autonomy Demands in Bolivia' (Paper presented at the 7<sup>th</sup> ECPR General Conference, Bordeaux, 4–7 September 2013) 6 <<http://ecpr.eu/Filestore/PaperProposal/9e31c3f7-e9f0-4c66-9b37-a9fc6d7efdb5.pdf>>.

<sup>144</sup> Whitehead, above n 142, 10.

<sup>145</sup> See José María Monzón, 'The Constitution as a Post-Colonial Discourse: An Insight into the *Constitution of Bolivia*' (2014) 12 *Seattle Journal for Social Justice* 821, 827, 836–7.

<sup>146</sup> For further details, see Pannain, above n 143.

<sup>147</sup> At the time of publication, the latest of these marches took place in August to October 2011 to lobby against a proposed highway: see, eg, Associated Press, 'Indigenous Protesters March against Jungle Highway' *The Guardian* (online) 20 October 2011 <<https://www.theguardian.com/world/2011/oct/20/indigenous-protesters-march-highway>>.

<sup>148</sup> Frank Chávez, '69-Year-Old Native Leader Heads 1 500-Km March' *Inter Press Service* (online), 25 June 2010 <<http://www.ipsnews.net/2010/06/bolivia-69-year-old-native-leader-heads-1500-km-march/>>.

<sup>149</sup> Tamburini, above n 139, 177.

tion of Bolivia 2009.<sup>150</sup> Another way of achieving Indigenous self-government is through ‘territorial titling.’ This option is currently being pursued by a number of Indigenous settlements.<sup>151</sup>

In the 2014 general elections, CIPOB supported the alliance between the Greens, and the Indigenous Freedom Movement-TIPNIS.<sup>152</sup> The Greens, however, was not able to secure the minimum 3 per cent of the national vote and lost their legal identity.<sup>153</sup> Notwithstanding, Indigenous peoples hold seven seats in the Plurinational Legislative Assembly. Six of these seats were won by the Movement to Socialism party, the party of President Morales.

Similar to the *Constitution of Ecuador 2008*, the *Constitution of Bolivia 2009* recognises collective Indigenous rights to a strong identity,<sup>154</sup> to collective ownership of land, territories and intellectual property,<sup>155</sup> and, in art 30(II)(14), ‘[t]o practice ... their political, juridical and economic systems in accord with their world view.’ But Bolivia follows the same enumeration strategy seen in Ecuador. There are in total 18 rights enumerated in art 30(II). This closes the door, without constitutional amendments, to the recognition of other collective rights that might not have been either identified or considered in 2009. It should, however, be added that pt III title I ch III of the *Constitution of Bolivia 2009* provides for regional autonomy to be established. Similarly, pt III title I ch IV provides for municipal autonomy. Based on the higher percentage of Indigenous peoples in Bolivia (around 62 per cent),<sup>156</sup> it is likely that further development of Indigenous rights could take place at the local scale.<sup>157</sup>

Figure 2 below provides a summary of the analysis so far, in relation to the classification of constitutional recognition in Canada, New Zealand, Bolivia and Ecuador.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid 173.

<sup>153</sup> Ibid 174.

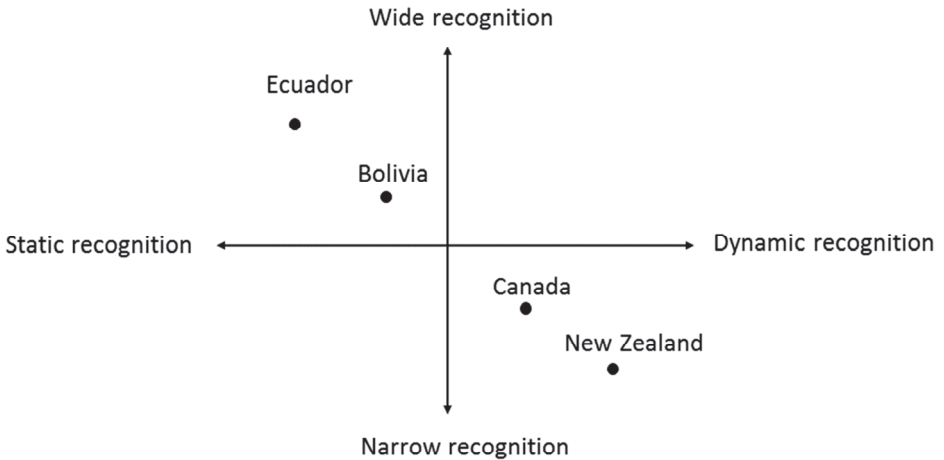
<sup>154</sup> *Constitution of Bolivia 2009* arts 30(II)(2)–(3).

<sup>155</sup> Ibid arts 30(II)(6), (11).

<sup>156</sup> *Expert Panel Report*, above n 9, 51.

<sup>157</sup> It should be noted, however, that Indigenous Bolivians continue to suffer from extreme poverty: see Ivan Omar Velasquez Castellanos, *Extreme Poverty: Vulnerability and Coping Strategies among Indigenous People in Rural Areas of Bolivia* (Cuvillier Verlag, 2007).

Figure 2: Mapping of the four jurisdictions discussed in this article onto the analytical model



#### IV ENVOI

I have furnished a critique of the current drive for constitutional recognition in Australia, arguing that current proposals seem to miss a key element of the idea of ‘recognition’ in its constitutional context. To be precise, these proposals do not see the act of recognition as acknowledging the legal authority of Indigenous Australians, for example, over their territories. From a consociation perspective, current proposals provide a mere indirect consociation analogous to Canadian and New Zealand approaches, where the protection of Indigenous peoples is feasible only through the application of Western jurisprudence, as opposed to a plurinational approach, as seen in Ecuador and Bolivia. The latter affords Indigenous peoples separate jurisdictions with a wide margin of self-governance under their own legal systems. The general approach in the current debate seems to support only a ‘cosmetic’ recognition as seen at the sub-national level, in state constitutions.

This article’s cogitations on the constitutional recognition of Indigenous Australians were stylised along two dimensions: dynamic/static recognition and wide/narrow recognition. The first dimension could be interpreted as the evolution of Indigenous wellbeing through continuous improvement in their affairs, unhindered by the inertia of constitutional amendment processes or by ossified constitutional lists of enumerated rights. The second dimension is a proxy for legal pluralism and looks at the nature of the rights flowing from

any recognition and whether the rights are assimilated under Western jurisprudence or accepted as *sui generis* in nature.

This analytical model informed our comparative analysis of Canada, New Zealand, Ecuador and Bolivia. The four jurisdictions could be mapped along a diagonal line that cuts across both dimensions (see Figure 2). New Zealand is identified as the most dynamic and most narrow. Ecuador occupies the other polar position, being the most static and most wide. In between these polar positions we find Canada and Bolivia, with Canadian recognition being more dynamic and narrower than that of Bolivia. Generally, the two colonial countries were more dynamic and narrower than the two Latin American counterparts. But neither group was 'optimal', in the sense that no recognition was both dynamic and wide. To achieve a dynamic recognition in Australia, the actual rights should not be enumerated in the *Australian Constitution*, but left for legislative intervention based on the Constitution, as well as their further development through the courts. To secure a wide recognition, we would need a 'plurinational' approach as seen in Ecuador and Bolivia, which in itself was inspired by international law instruments such as *ILO Convention No 169* and the *UNDRIP*.

For any recognition proposal to pass muster, a deft case for the (economic) positive externalities from a dynamic and wide recognition is vital. Only securing a buy-in from the Commonwealth, the States and the Australian public will see this country girded for action towards a non-symbolic recognition. Indigenous Australians would do well to seek inspiration from their New Zealand counterparts, even if this means putting off the recognition drive until such an opportune juncture where these prerequisites have been secured.

In contrast to orthodox legal analysis, this article introduces an analytical methodology based on 'model building'. This is more mainstream in economics than law. There is, however, no reason in principle to prevent the use of such models, especially under a comparative canopy. While not an analytical paragon, the two-dimensional model developed in this article will hopefully usher researchers towards a systematic use of models as part of their jurisprudence toolbox. Another key advantage of using these models is their ability to bridge constructs from various traditions, hence allowing for greater possibilities in interdisciplinary research. There is also scope for using mathematical (and statistical) models to provide more rigorous treatment in legal analysis.

It would be useful to see this analytical model enhanced by a larger sample of countries and potentially with time-series data that tracks the wellbeing of Indigenous peoples before and after their constitutional recognition. The question of interest is whether constitutional recognition has an identifiable

causal link (or at least informed correlation) with improvement in the well-being of Indigenous peoples. In other words, are Indigenous peoples better off where there is recognition? There will be a need to develop a composite measure that can capture wellbeing, for example through the economic contribution by Indigenous peoples, although such (GDP) measures are only poor substitutes for wellbeing. There might also be a need to bolster the model with more analytical dimensions that capture further nuances in constitutional recognition between different jurisdictions. A (centralised) national Australian monitor of these variables would be critical to conducting a 'health check' on the effects of any recognition that finally materialises, and how the same can be optimised.