

State Constitutions and Indigenous Peoples: Some Preliminary Observations from a Global Review

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Abstract

This presentation shares our research exploring existing and proposed approaches around the world to transform states' constitutions aimed at recognising and accommodating Indigenous peoples' rights, as well as under Indigenous peoples' constitutions. Our primary focus is on the right to self-determination. We examine developments in, for example, Canada, the USA, Mexico, Chile, Samoa, Vanuatu, Australia, Greenland, Taiwan and Malaysia. Based on that, I hope to be able to make some recommendations for ideal constitutional design in New Zealand to better accommodate Māori.

Our methodology also includes an examination of international legal instruments and their influence on domestic constitutional developments.

We will present:

1. A preliminary overview of approaches to constitutional accommodation of Indigenous peoples
2. Practical insights into the challenges and successes of various constitutional models
3. A framework for states to consider to constitutionally recognize and accommodate Indigenous peoples, with a focus on Aotearoa/New Zealand.

We combine legal analysis with consideration of historical, political, and social contexts in each nation and, with respect to Aotearoa | New Zealand, Māori calls for recognition of our sovereignty since colonisation began.

1. Mihi

2. Introduction

My focus is on developments in states' constitutions globally involving shared state and Indigenous peoples' sovereignty/self-determination, with some attention also to the extent to which developments are influenced by international norms. I am not looking at Indigenous constitutions per se.

These developments might not involve only formal "constitutional amendment", they include constitutional transformation driven by courts and legislative amendments. But, all laws re: Indigenous peoples are inherently constitutional and international because:

- between peoples/pre-existing sovereigns (although not always recognised as such)
- treaties, "discovery" and conquest – rules for colonial oppression – are international norms.

Territories with Indigenous peoples are fundamentally pluri-legal in that multiple constitutional and legal systems exist within one territory, whether recognised by the state or not, and even when the Indigenous legal system has been weakened by legal and political oppression.

NB: I wouldn't usually use the term "vulnerable". Despite the devastating impact of colonisation, Indigenous peoples are invariably incredibly resilient and many, including my own, would certainly and vehemently not like to be described as such.

My conclusions are preliminary and varied and, increasingly, less "legal", albeit bearing in mind the possibility for constitutions to influence change in social and cultural conditions.

3. International Legal Context: UN Declaration on the Rights of Indigenous Peoples

- Adopted in 2007 by the UN General Assembly, only 4 votes against: CANZUS. All now have expressed their support
- Rights to self-determination, including to free, prior and informed consent
- Lands, territories and resources
- Supported by international human rights treaties and ILO Convention 169 on Indigenous and Tribal Peoples
- Few constitutions would meet the obligations under the UN Declaration
- But has influenced constitutional transformation initiatives around the globe.

4. Aotearoa New Zealand

- Adopted the Westminster model
- Unwritten constitution – no “constitutional document”
- Te Tiriti o Waitangi says Māori retain sovereignty, Crown acquires sovereignty over/right to govern: breached almost from the get go, not enforceable unless incorporated into statute: rarely
- Human rights legislation is explicitly subordinate to rights breaching legislation
- Māori do not have territorial jurisdiction
- Declaration: currently active denial of its applicability
- Active dismantling of Māori rights currently e.g., against “co-governance” for example, via legislative change, which courts cannot challenge
- But, still, legal personhood of mountains
- Key development: incorporating Māori law into the common law i.e., integrating Māori law into enforceable state law
- Growing cohesion in the movement for change – united against the dismantling of rights and for constitutional transformation.

5. Canada

Constitutional protection of Aboriginal and treaty rights in s35 of the Constitution Act, and they override human rights guaranteed in the Charter of Rights and Freedoms, bar discrimination on the basis of gender.

a. UN Declaration on the Rights of Indigenous Peoples Act 2021:

- To implement e.g., ensure laws of Canada are consistent with the Declaration
- An Action Plan.

b. Case law to implement:

- Kebaowek First Nation v Canadian Nuclear Laboratories* Federal Court, February 2025 – have to take into account the Declaration when interpreting consultation requirements under s 35 on Aboriginal and treaty rights.
- Reference re an Act respecting First Nations, Inuit and Metis Children* (Feb 2024) Supreme Court of Canada: upholds the constitutionality of a federal statute affirming Indigenous peoples’ right of self-government with respect to child and family services.

- iii. *Dickson v. Vuntut Gwitchin First Nation* - 2024 SCC 10: s 25 – Aboriginal and treaty rights “trump” Charter rights (except right to freedom from discrimination against women).
- c. Contemporary settlements e.g., Musqueam Band in BC, “recognizes Musqueam’s jurisdiction within Musqueam’s reserve lands for a wide range of areas, including: governance, membership, financial management and accountability, land management, natural resources, fish and fish habitat, environment, culture, language, education, child and family, and health and social services.”

6. Australia

Australian Constitution does not protect Indigenous peoples’ rights, albeit the freedom from racial discrimination has provided some protection (native title) and then again not (permitted legislation to discriminate against Aboriginal peoples) (result of 1967 referendum and constitutional amendment).

- a. The 2023 Australian Indigenous Voice referendum resulted in a decisive rejection of constitutional recognition for Aboriginal and Torres Strait Islander peoples.
- o The referendum proposed establishing an Aboriginal and Torres Strait Islander Voice—a representative body that would have advised Parliament and government on matters affecting Indigenous peoples. The *Uluru Statement from the Heart* was a historic declaration written and endorsed by Aboriginal and Torres Strait Islander delegates at the 2017 First Nations National Constitutional Convention. It calls for meaningful constitutional change through three key pillars: voice: A constitutionally enshrined First Nations Voice to Parliament; treaty: a “Makarrata Commission” to oversee agreement-making (treaty) processes between governments and Indigenous peoples; and truth: A formal truth-telling process about Australia's colonial history and its impacts.
- o These reforms acknowledge the continuing sovereignty of Indigenous peoples and aim to address the structural power imbalances that have created significant disparities between Indigenous peoples and non-Indigenous Australians. The statement argues that these elements—voice, treaty, and truth—are essential for meaningful reconciliation and empowerment of First Nations peoples.
- o The proposal failed to achieve the required "double majority," being rejected nationally and in every state. Only the Australian Capital Territory returned a majority "yes" vote. Post-referendum analysis revealed that most "no" voters were concerned about creating different rights for one group of Australians and expressed general apprehension about constitutional change.

- b. Aboriginal title: land rights over large tracts of territories, especially in the Western half of Australia.
- c. Bill to require a Parliamentary body to consider the Declaration when advising on legislation passing through Parliament: rejected in February 2025:
<https://nit.com.au/14-02-2025/16263/thorpes-human-rights-bill-shot-down-by-both-major-parties>.
- d. Treaty making in some states.

7. Greenland/Denmark

- a. Referendum 1979: Home Rule Act:

Greenland became a separate administrative region with some Greenlandic powers although Denmark remained in charge of foreign and security matters, police, court system and monetary issues and a lot of tasks within the social and health area. Natural resources were jointly administered by Denmark and Greenland according to a 50/50 system. Economically Greenland was and still is dependent on the Danish block grant. The block grant is an economic support for running the Home Rule/Self-Government.

- b. Referendum 2008: Self-Government Act 2009

Since 2009, Greenland has had extensive political and economic autonomy. Under the Act, Greenland acquired exclusive rights over its natural resources and the option for full independence from Denmark, should the country so choose in the future. The Home Rule Act contains 33 areas of jurisdiction, including mineral resources, fisheries, environment, justice, policing and law. Denmark only retains control of the constitution, citizenship, Supreme Court, foreign affairs, defence and currency; however, Denmark is expected to involve Greenland on foreign affairs and security matters that affect or are in the interests of Greenland. Denmark contributes between 500 and 1 billion euros a year to Greenland.

- c. Greenland Draft Constitution 2023

Greenland unveiled its draft constitution after six years of development. The draft creates the opportunity for Greenland to enter into a free association agreement, essentially becoming independent but retaining a connection with Denmark.

- d. Election 2025

On 11 March 2025, general elections saw the surprise win of the Demokraatit party, which favours a gradual approach to independence. Its manifesto states that independence is “a necessity”. Demokraatit believe that a “free association” model with another country could be suitable for a sovereign Greenland and cites Denmark and the United States as “the only two realistic options” to make this possible.

e. Trump and “Annex Greenland”

Greenland has been in the news a lot due to Trump’s comments to annex Greenland for strategic military position and rare earth minerals. The US already has had a strong military presence since 1943 at its Greenland base. US President Donald Trump said he wanted “ownership and control” of Greenland, to which outgoing PM Mute Egede responded that the island “is not for sale and never will be.” According to two polls in 2021 and 2024, the majority of Greenlanders want “more cooperation” with the US, but also with the EU, Canada, Iceland and Denmark. However, in January 2025 a poll showed that 85% of Greenlanders do not want to join the US. One of the key debates is how the new state will sustain itself economically. While Greenland’s leaders pinned their hopes on mining in the first two decades of the century, several failures in this area have dampened hopes of independence.

8. Mexico

The reform to Article 2 of Mexico's Constitution, which took effect on 1 October 2024, significantly enhances the rights of Indigenous and Afro-Mexican peoples, completing the Mexico’s obligations under the Zapatista Movement San Andres Accord. This amendment builds upon the landmark 2001 reform that first recognized Indigenous rights at the constitutional level, including to lands, territories and self-determination.

The most notable changes include:

- a. Right to consultation: new Subsection XIII to Section A of Article 2 establishes Indigenous peoples’ right to be consulted on measures that may significantly affect their lives or environment "with the purpose of obtaining their consent or, as the case may be, to reach an agreement on such measures”.
- b. Fair and equitable sharing of benefits: Subsection XIII of Section A, Article 2 mandates that "The individual or legal entity that obtains a profit from the administrative measures subject to consultation must grant the Indigenous peoples and communities a fair and equitable benefit, in the terms established by the applicable laws."

- c. Legal standing limitation: the final paragraph of Subsection XIII, Section A, Article 2 stipulates that "the Indigenous peoples and communities are the only ones entitled to challenge, through the established jurisdictional channels, non-compliance with the right recognized in this section."
- d. Recognition as legal entities: modifies Article 2 to directly recognize Indigenous peoples and communities as "subjects of public law with juridical personality and their own patrimony" rather than leaving this recognition to state legislation.
- e. Self-identification criterion: elevates self-identification to constitutional rank as one of the criteria for the recognition of Indigenous peoples and communities under Article 2.
- f. Collective intellectual property rights: Preserve, protect and develop their cultural heritage, tangible and intangible, which includes all the elements that constitute their culture and identity. Collective intellectual property is recognized with respect to said heritage.

Context:

- The changes were part of a more comprehensive constitutional reform, including of the judiciary. They were made possible by the popularity of Lopez Obrador.
- Indigenous peoples identify proudly with being Mexican.
- Constitutional change is only part of the picture, which includes, for example, "justice plans" with various Indigenous peoples.
- The draft "general law" to implement these changes will be presented soon for 2-3 months of consultation with Indigenous peoples: at least 70 assemblies across Mexico.

9. Chile

Chile entered a constitutional convention process following the October 2019 protests where more than 1 million citizens took over the streets in Santiago (often referred to as "El Estallido"). On October 25, 2020, 78.27% of Chileans voted to replace Pinochet's 1980 Constitution. Chileans also decided (with 78.99% support) that the new constitution would be drafted by a "Convención Constitucional" composed exclusively of 155 members elected by the people: 78 men and 77 women to uphold gender parity.

Background re Indigenous rights: Indigenous peoples in Chile have struggled for constitutional recognition since the resumption of democracy in 1990, but have faced

persistent obstacles. Indigenous peoples in Chile are recognized only through the 1993 Indigenous Act (not in the Constitution), which refers to them as "Indigenous ethnic groups" rather than "peoples". Multiple attempts at constitutional amendments to recognize Indigenous peoples have failed in Congress. In 2000, a constitutional amendment was rejected due to lack of quorum. In 2003, another attempt failed when political parties could not agree on terminology, with the government proposing "Indigenous peoples" while right-wing opposition insisted on "Indigenous ethnic groups". In 2005, when Chile passed 58 amendments to the Constitution, recognition of Indigenous peoples was notably absent.

In 2009, Chile ratified ILO Convention 169, which provides some legal protections for Indigenous peoples' rights, even without constitutional recognition. Opposition to constitutional recognition for Indigenous peoples has often centred on fears that it would threaten Chile's "unitary character" or create "internal authority upon members, goods and resources of these groups".

2022 Proposed Constitution

The proposed 2022 Chilean Constitution placed significant emphasis on pluri-nationalism, recognizing Chile as a plurinational state that acknowledges and incorporates the rights and autonomy of Indigenous peoples. The proposed constitution fundamentally reimagined Chile as a state that recognizes multiple nations within its borders, giving Indigenous peoples significant autonomy, representation, and cultural recognition while maintaining the unity of the state. This represents a significant departure from the traditional unitary nation-state model toward a plurinational framework that formally acknowledges Chile's cultural and ethnic diversity. Here's how plurinationalism is addressed throughout the document:

- Foundational Principles:

Article 1: Explicitly defines Chile as a "plurinational, intercultural, regional and ecological" state, establishing plurinationalism as a core constitutional principle;

Article 5: Recognizes the "coexistence of diverse peoples and nations within the framework of the unity of the State" and identifies pre-existing Indigenous peoples and nations, including the Mapuche, Aymara, Rapanui, Lickanantay, Quechua, Colla, Diaguita, Chango, Kawésqar, Yagán, Selk'nam and others.

- Indigenous Peoples' Rights and Self-Determination:

Article 34: Guarantees Indigenous peoples and nations the right to self-determination, autonomy, self-government, identity, culture, heritage, language, and recognition of their lands and territories;

Articles 58 and 102-104: Recognise Indigenous peoples' rights to water in their territories and collective ownership of lands;

Article 66: Establishes the right to prior consultation on administrative and legislative measures affecting Indigenous peoples.

- Political Representation:

Article 5.3: Obligates the State to guarantee Indigenous peoples' "effective participation in the exercise and distribution of power, incorporating their political representation in popularly elected bodies at the communal, regional and national levels.";

Article 162: Establishes reserved seats for Indigenous peoples in representative bodies at national, regional, and communal levels;

Articles 233-234: Creates "Indigenous Territorial Autonomies" as self-governing territorial entities with their own legal personality and patrimony.

- Cultural and Linguistic Recognition:

Article 12: Recognizes Indigenous peoples' languages as official in their territories and areas of high population density, and mandates the State to promote their knowledge, revitalization, and respect;

Article 13: Recognizes the symbols and emblems of Indigenous peoples and nations alongside national symbols;

Articles 95 and 101: Acknowledges the rights of Indigenous peoples to preserve, revitalize, and transmit traditional knowledge and cultural heritage.

- Justice System Recognition:

Article 308: Recognizes Indigenous legal systems, establishing that they "coexist on an equal footing with the National Justice System" while respecting fundamental constitutional rights;

Article 328: Creates a specialized chamber in the Supreme Court to hear challenges to Indigenous jurisdiction decisions, assisted by technical advisors with expertise in Indigenous culture and law.

- Institutional Integration:

Article 190: Requires territorial entities to act in coordination with principles of plurinationality and interculturality and to "respect and protect the diverse ways of conceiving and organizing the world."

Article 321: Ensures the jurisdictional function incorporates plurinationality, legal pluralism, and interculturality principles;

Article 343: Includes two members elected by Indigenous peoples on the Council of Justice.

The referendum was held on 4 September 2022. Results showed 61.89% of voters rejected the proposed constitution, 38.11% voted in favour of it, The referendum had an exceptionally high turnout of 85.86% of eligible voters.

The following year another draft constitution was proposed, this time taking the constitution to the 'right' by reinforcing property rights and free market principles. This was also rejected by 56% of the vote.

Why rejection for both proposals? Analysts are saying that the public became polarised – the changes were too radical, too much change at one time, lack of trust in the process and huge economic pressure on people during and following Covid19 outbreak. Questions about process.

Commentators have also noted that – in the constitutional commission – Indigenous peoples had the sense that they needed "everything" to be in the constitution lest they miss out. Potentially led to proposals that were too radical and then couldn't be amended.

10. Vanuatu:

Vanuatu's Constitution incorporates customary law as a fundamental element of the nation's legal framework, reflecting the Indigenous ni-Vanuatu peoples' struggle for independence and self-determination.

- a. Explicit Recognition: Article 95(3) explicitly states that "customary law shall continue to have effect as part of the law of the Republic."
- b. Land Ownership: The constitution establishes that all land belongs to Indigenous custom owners (Article 73), with rules of custom forming the basis of land ownership and use (Article 74).

- c. Judicial Guidance: Article 47(1) requires courts to decide matters according to "substantial justice and whenever possible in conformity with custom" when there is no applicable rule of law.
- d. Malvatumauri Council of Chiefs: Chapter 5 establishes this constitutional body composed of elected custom chiefs to discuss matters relating to custom and tradition, and the government must consult with them on bills concerning land, custom, and tradition.
- e. Decentralized Governance: The Constitution recognizes the importance of decentralization (Article 82) and requires chiefs to be represented in Provincial Government Councils (Article 83).

In practice, customary law is applied in a number of ways. However, despite the constitutional recognition of customary law, Vanuatu continues to navigate tensions between Indigenous peoples' legal traditions and inherited colonial legal frameworks. The ongoing challenge involves balancing recognition of custom, which is crucial to ni-Vanuatu cultural identity, with other legal norms in a modern state system.

Practical applications and limitations:

- Judicial Application: Island Courts are required to apply customary law prevailing within their jurisdiction, provided it doesn't conflict with written law or principles of justice, morality, and good order (Island Courts Act, Section 10).
- Land Dispute Resolution: The 2013 Custom Land Management Act and Land Reform Act amendments returned authority over land disputes to customary institutions. Disputes are first heard in nakamals (traditional community gathering places), with appeals to Custom Area Land tribunals. Final substantive decisions of these customary institutions are binding and not subject to appeal in state courts (Article 78(3)).
- Hierarchical Tension: Despite constitutional recognition, customary law faces practical challenges. In *Banga v Waiwo* (1996), the Court of Appeal interpreted Article 95(2) to mean courts must apply written law (including colonial law) before considering custom. This effectively subordinated custom to colonial and written law in the legal hierarchy.
- Validity Test: Customary law must pass a "validity test" under Section 10 of the Island Courts Act, which restricts application of customs if they're "inconsistent with written law or with the principles of justice, morality and good order."

- Limited Practical Authority: While the Malvatumauri Council of Chiefs has constitutional recognition, its practical influence remains largely advisory. The government isn't required to follow the Council's recommendations.

11. Other states include:

- Panama: territorial jurisdiction
- Saami territories: parliaments
- Other Pacific states: customary law prevails e.g., Tonga
- USA
- Colombia
- Guatemala
- Ecuador
- Bolivia
- Argentina
- Brazil
- South Africa: traditional leaders
- Kenya
- Zimbabwe
- Namibia
- Malaysia: land rights
- Taiwan
- Philippines: free, prior and informed consent.

12. Models of Constitutional “Accommodation” of Indigenous Peoples

- Parliaments: personal jurisdiction (Saami) over regional areas
- Demarcated areas with Indigenous peoples’ territorial jurisdiction e.g., US, Mexico, Panama and, increasingly in Canada
- “Voice” within governments e.g., Aotearoa, Saami parliaments and Australia
- Guaranteed seats in government/legislature: New Zealand
- Constitutional recognition of Indigenous law and Indigenous institutions
- Indigenous rights “trumping” human rights, and upheld by the courts: Canada and US (Santa Clara Pueblo v Martinez)
- “Justice plans”
- General legislative effect to Indigenous peoples’ rights
- Incorporation of international treaties and UN Indigenous Peoples’ Declaration
- Enforcement of Indigenous laws by state courts
- Extensive possession and rights over lands, territories and resources e.g., nearly 50% of Australia, with associated property rights

- Cultural rights protected under intellectual property laws (even if not an Indigenous way of protecting rights)
- Practice of Indigenous law de facto irrespective of recognition *de jure*

13. Insights into Constitutional Transformation and Indigenous Peoples

- Political, social, cultural and economic context is pivotal e.g.,
 - Mexico: rejection of neo-liberalism, political focus on judicial reform = meant other reforms could get through under the radar, dominance of the President as representing “the people”, Indigenous peoples attached to the Mexican state and unity as well as autonomy, influence of international law – UN Declaration etc
- Impact of colonisation and desire for sovereignty
- Population proportion of Indigenous peoples relative to the rest of the nation
- Impact/history of colonisation and “by whom” colonised
- Perception that constitutional recognition will result in discrimination against non-Indigenous creating inequality. How do you have equality and elevated rights for Indigenous peoples? New Zealand, Australia
- Unwillingness to see the need for a “constitutional resettlement” based on Indigenous peoples’ sovereignty/self-determination
- Perception that recognition of Indigenous peoples’ rights will undermine “unity” (not realising that many Indigenous peoples feel anything but as a result of colonisation impacts)
- International movement can be important: Australia, Mexico, Canada, Chile...but not really in NZ and the Pacific.
- Reception of international law under the constitutional law also significant e.g., ILO Convention 169 highly influential in Mexico and Chile. Not so much in dualist states like NZ
- Political willingness by government e.g., support by the AMLO/Morena government in Mexico

- Indigenous peoples' agitation: Uluru in Australia, Mapuche, now Māori
- Indigenous peoples' cohesiveness: some more "sovereigntist" than others
- Indigenous peoples' laws regulate in practice, even if not reflected in the Constitution (or not to the extent practiced) e.g., Pacific – Vanuatu, Tonga, Samoa, even NZ
- Public engagement: Mexico with Indigenous. Chile = complaint that was too short
- Whether Indigenous peoples' rights are perceived to contradict human rights e.g., Samoa and other Pacific nations
- Personalities, and combinations of people are important (President Lopez Obrador and Adolfo, Megan in Australia)
- Other "usual" factors such as the strictness of the tests to change "the Constitution"
- How easy is it to "identify" who is Indigenous and who are Indigenous peoples: Finland: "litigation" domestically and before international human rights bodies; Mexico: with Afro-Mexicans and who the state "recognises"; USA: who is federally recognised
- The need to bring along the majority for fundamental change yet also the issue of "tyranny of the majority"
- Role of the courts differs e.g., very important in Canada. In NZ can only provide a "gloss" as can't enforce Te Tiriti or human rights against inconsistent legislation
- Recognise that custom law = a "way of living".

14. Conclusion: Ideal Constitutional Design in Aotearoa/New Zealand

Working on this but some ideas might include:

- Senate in Parliament
- Regional authorities to determine matters, like Saami parliaments
- Vest the conservation estate in Māori, or a unique title vested in relevant tribe
- Designated areas where tikanga applies e.g., on marae

- State law incorporation of Māori law, albeit “policed” by Māori
- Joint governance of natural resources
- Benefits of resource development
- Support for iwi provision of social services e.g., medical centres (Tuhoe, Ngai Tahu?)
- Enforceability of te Tiriti in a written constitution
- Re-negotiation of Treaty settlements so self-determination on the table
- Formal constitutional recognition in a written constitution e.g., Canada
- Incorporation of international agreements including the UN Indigenous Peoples’ Declaration

Tēnā tatou katoa