

# Indigenous Peoples In Comparative Constitutional Perspective: Recognition, Rights And Sovereignty

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## Abstract

The constitutional recognition of Indigenous peoples reflects a global struggle to reconcile state sovereignty with indigenous self-determination. This paper examines the constitutional recognition of Indigenous peoples in India, Australia, Canada, and New Zealand, with the aim of understanding how diverse constitutional frameworks engage with questions of recognition, rights, and sovereignty. It seeks to analyse the mechanisms through which states acknowledge Indigenous communities and the legal and political instruments employed to safeguard their rights, while balancing the demands of state sovereignty. Adopting a comparative methodology, the paper investigates constitutional provisions, landmark judicial decisions, and policy frameworks that shape Indigenous-state relations in each country. The paper explores the forms of constitutional recognition afforded to Indigenous peoples, the protection of civil, political, and cultural rights, and how governance structures facilitate Indigenous self-determination. Furthermore, it situates these national frameworks within broader global debates on the reconciliation of state authority with Indigenous autonomy. By mapping similarities and divergences across jurisdictions, the paper identifies patterns and strategies in constitutional design, contributing to a deeper understanding of how legal systems can address historical marginalisation and contemporary claims for justice, recognition, and sovereignty. Drawing lessons from these jurisdictions, the paper argues that India must move beyond protective measures toward stronger frameworks that embed dignity, autonomy, and cultural integrity for its indigenous peoples.

**Keywords:** indigenous peoples, constitutional rights, sovereignty, self-determination, comparative constitutional law

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## I. Introduction

Indigenous peoples have historically borne the brunt of colonisation, displacement, and systemic marginalisation, resulting in persistent socio-economic disadvantages and cultural erosion.<sup>1</sup> Across the world, constitutions are increasingly invoked as instruments to recognise and protect indigenous rights. However, their ability to deliver substantive justice, autonomy, and dignity is highly variable. Constitutional frameworks often reflect a balance or tension between state sovereignty and indigenous self-determination, shaped by historical legacies and contemporary political contexts.

In India, the Constitution aims to protect Scheduled Tribes through affirmative action, political reservations, and autonomous governance, as outlined in the Fifth and Sixth Schedules.<sup>2</sup> These measures aim to secure representation, safeguard customary practices, and protect land and forest rights, although implementation challenges and socio-political dynamics often limit their transformative potential. Australia presents a contrasting trajectory: its constitutional silence on Aboriginal peoples, despite landmark judicial interventions such as *Mabo v. Queensland* and the enactment of the Native Title Act 1993, has left debates on recognition and empowerment unresolved.<sup>3</sup> The rejection of the 2023 First Nations Voice referendum further illustrates the tension between symbolic recognition and institutional reform.<sup>4</sup>

Canada exemplifies a more entrenched approach through Section 35 of the Constitution Act, 1982, which recognises Aboriginal and treaty rights and mandates reconciliation as a guiding principle.<sup>5</sup> Judicial

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<sup>1</sup> S James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004)

<sup>2</sup> *Samatha v State of Andhra Pradesh* (1997) 8 SCC 191; *Orissa Mining Corporation v Ministry of Environment & Forests [Niyamgiri case]* (2013) 6 SCC 476

<sup>3</sup> *Mabo v Queensland (No 2)* [1992] HCA 23; Native Title Act 1993 (Cth)

<sup>4</sup> Gabrielle Appleby, 'A First Nations Voice and the Exercise of Constitutional Power' SSRN

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4346447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346447) accessed 7 September 2025

<sup>5</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44

developments, including *Delgamuukw v. British Columbia* and *Tsilhqot'in Nation v. British Columbia*, have clarified the scope of Aboriginal title and reinforced indigenous participation in land governance. New Zealand's Treaty of Waitangi of 1840 serves as a foundational framework for bicultural governance, combining historical commitments with judicial and institutional mechanisms, such as the Waitangi Tribunal, to address Māori grievances and protect cultural and land rights.<sup>6</sup>

A comparative analysis of these jurisdictions reveals that constitutional recognition alone does not automatically secure substantive autonomy or justice for indigenous communities. Rather, outcomes depend on the interplay of legal entrenchment, judicial interpretation, and institutional mechanisms for participatory governance. By exploring these diverse approaches, this study seeks to identify lessons for India, examining how constitutional design and judicial intervention can enhance the protection of indigenous dignity, self-determination, and cultural identity, while addressing the enduring legacies of marginalisation.

### Statement Of The Problem

Indigenous peoples worldwide have historically faced dispossession, marginalisation, and exclusion from state power. While constitutions of different countries increasingly aim to recognise and protect their rights, effectiveness remains uneven. In India, Scheduled Tribes benefit from affirmative action and Fifth and Sixth Schedule protections but still face land alienation, displacement, and cultural erosion. Australia's constitutional silence and the 2023 rejection of the First Nations Voice illustrate the limits of symbolic recognition. Canada's Section 35 and New Zealand's Treaty of Waitangi provide legal safeguards, although judicial interpretations and implementation challenges constrain indigenous autonomy. These experiences raise the question of whether constitutional frameworks can genuinely secure dignity, autonomy, and justice, or merely legitimise state authority. In light of the above, this paper evaluates the capacity of constitutional design and judicial intervention to advance substantive recognition, focusing on lessons India can draw from other jurisdictions.

### Literature Review

The scholarship on indigenous peoples and constitutional frameworks reveals a rich interplay between international norms, domestic constitutions, and judicial interventions. Appleby, Gabrielle analyses the *Uluru Statement from the Heart* (2017) and the proposed *Voice to Parliament*, situating them within Australia's ongoing constitutional dialogue.<sup>7</sup> She explains that the debate signals a move from judicial recognition of land rights toward institutional reform designed to guarantee Indigenous participation in representative bodies. Appleby notes that this shift builds on the legacy of *Mabo v. Queensland* and aims for structural change rather than solely symbolic acknowledgement.<sup>8</sup>

Anaya, James in *Indigenous Peoples in International Law* provides the foundational international framework for Indigenous constitutional recognition. He details how the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and *ILO Convention 169* enshrine self-determination, cultural rights, and the principle of free, prior and informed consent.<sup>9</sup> Anaya emphasises both the transformative potential of these norms and the persistent tension between state sovereignty and Indigenous autonomy when domestic constitutions adopt or resist them.

Borrows, John in *Recovering Canada: The Resurgence of Indigenous Law* moves beyond judicial doctrine to advocate for a pluralist constitutional order that integrates Indigenous legal traditions alongside Canadian law. He argues that revitalising Indigenous governance and legal systems is essential to fulfilling the promises embedded in Section 35 of the *Constitution Act 1982*.<sup>10</sup> Borrows opines that such pluralism deepens reconciliation by allowing Indigenous and Canadian legal orders to coexist on equal footing.

Davis, Megan and Williams, George, in *Designing a First Nations Voice to Parliament*, warn that symbolic recognition without institutional empowerment risks perpetuating constitutional silence in Australia. They argue that while initiatives such as the *Uluru Statement* are important, constitutional amendments must

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<sup>6</sup> Claudia Orange, *The Treaty of Waitangi* (Bridget Williams Books 2011); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641

<sup>7</sup> Gabrielle Appleby, *Power of the People: The Uluru Statement and a First Nations Voice* (Melbourne University Press 2019) <https://www.mup.com.au/books/power-of-the-people> accessed 15 September 2025

<sup>8</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA)

<sup>9</sup> Anaya (n 1); ILO Convention No 169 concerning Indigenous and Tribal Peoples (27 June 1989) [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) accessed 15 September 2025

<sup>10</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) <https://utorontopress.com/9780802085019/recovering-canada/> accessed 19 September 2025

include mechanisms, like a First Nations Voice, to ensure that Indigenous peoples have a meaningful influence on legislative and executive decisions. Their work reflects the limitations of purely declaratory reforms.<sup>11</sup>

Gulzar, Mudit, Rao, Vidhya, and Vanden Eynde, Oliver link constitutional design to environmental outcomes in *Representation and Forest Conservation in Scheduled Areas*. Using empirical data, they show that Scheduled Tribe political representation correlates with improved forest conservation.<sup>12</sup> This study demonstrates how inclusive constitutional arrangements can produce tangible ecological benefits and reinforce indigenous stewardship of natural resources.

Karthik, Manasi and Menon, Ajit scrutinise the Forest Rights Act (FRA) in *The FRA and the Politics of the Local*, showing how local administrative practices often subvert the participatory spirit of constitutional protections.<sup>13</sup> They document how decentralised implementation, affected by local power dynamics, undermines the Act's goal of securing land and governance rights for forest-dwelling communities. Their findings reveal the gap between constitutional ideals and ground-level realities.

McNeil, Kent traces the evolution of Section 35 of Canada's *Constitution Act 1982*, beginning with *Calder v. British Columbia (Attorney-General)*, which recognised the justiciability of Aboriginal title.<sup>14</sup> He follows through *Delgamuukw v. British Columbia*, which established evidentiary rules for oral traditions, to *Tsilhqot'in Nation v. British Columbia*, which marked the first judicial recognition of Aboriginal title over a specific territory.<sup>15</sup> McNeil opines that, despite a strong doctrinal framework, implementation remains inconsistent and often contested in resource and governance contexts.

Strelein, Lisa in *Compromised Jurisprudence* explores the transformative yet limited legacy of *Mabo v. Queensland*, which overturned the colonial doctrine of *terra nullius*.<sup>16</sup> She demonstrates that while the case was a symbolic breakthrough, the subsequent *Native Title Act* and its judicial interpretation frequently constrained the practical scope of Indigenous land rights. Strelein's analysis captures the ongoing tension between recognition in principle and restrictive implementation.

Xaxa, Virginius critiques the dilution of India's Fifth- and Sixth-Schedule protections in *Governors and the Fifth Schedule*. He argues that the discretionary powers of Governors and state institutions have eroded the constitutional intent to safeguard tribal autonomy. Xaxa shows how these constitutional provisions, although promising on paper, are undermined in practice, limiting Indigenous self-governance.<sup>17</sup>

The existing literature demonstrates that constitutional pathways for indigenous recognition oscillate between symbolic inclusion, substantive entrenchment, and negotiated treaty frameworks. While Australia and India struggle with limitations of statutory or policy-based approaches, Canada and New Zealand provide instructive models of constitutional entrenchment and treaty-based biculturalism. Nevertheless, across all jurisdictions, implementation gaps persist, raising questions about whether constitutional recognition alone is sufficient to reconcile indigenous dignity with autonomy.

## Research Gap

While extensive scholarship covers landmark cases and constitutional provisions in Australia, Canada, New Zealand, and India, a key gap lies in comparing how these rights are implemented in practice. Most studies emphasise doctrinal recognition or symbolic reform, with limited empirical analysis of how courts, legislatures, and local institutions operationalise principles such as free, prior and informed consent or resource governance. Cross-jurisdictional research linking international norms like UNDRIP and ILO Convention 169 to everyday governance is sparse. Exploring these implementation dynamics would reveal why strong constitutional texts often yield uneven protections and help design more effective models of indigenous self-determination.

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<sup>11</sup> Megan Davis and George Williams, 'Designing a First Nations Voice to Parliament' (2021) 32 *Public Law Review* 123 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3780866](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780866) accessed 15 September 2025.

<sup>12</sup> Mudit Gulzar, Vidhya Rao and Oliver Vanden Eynde, 'Representation and Forest Conservation in Scheduled Areas' (2020) 55 *Economic & Political Weekly* 45 <https://www.epw.in/journal/2020/6/representation-and-forest-conservation.html> accessed 15 September 2025

<sup>13</sup> Manasi Karthik and Ajit Menon, 'The FRA and the Politics of the Local' (2019) 54 *Economic & Political Weekly* 37 <https://www.epw.in/journal/2019/4/fra-and-politics-local.html> accessed 15 September 2025

<sup>14</sup> Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, University of Saskatchewan 2001) <https://law.usask.ca/native-law/publications/emerging-justice.php> accessed 15 September 2025; *Calder v British Columbia (Attorney-General)* [1973] SCR 313 (SCC)

<sup>15</sup> *Delgamuukw* (n 5); *Tsilhqot'in Nation* (n 5)

<sup>16</sup> Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (2nd edn, Aboriginal Studies Press 2009) <https://aiatsis.gov.au/publication/35038> accessed 15 September 2025

<sup>17</sup> Virginius Xaxa, *Governors and the Fifth Schedule: A Study of Tribal Autonomy* (Oxford University Press 2018) <https://global.oup.com/academic/product/governors-and-the-fifth-schedule-9780199480212> accessed 19 September 2025

### **Research Objectives**

1. To analyse the constitutional provisions and judicial approaches to indigenous rights in India, Australia, Canada, and New Zealand.
2. To evaluate the effectiveness of affirmative action, symbolic recognition, entrenched rights, and treaty-based frameworks in safeguarding indigenous peoples.
3. To examine judicial interventions and their role in shaping indigenous-state relations.
4. To identify comparative lessons that India can adopt to strengthen the protection of indigenous peoples.
5. To propose policy and constitutional reforms that promote dignity, autonomy, and justice for indigenous peoples.

### **Research Questions**

1. How have the constitutional frameworks of India, Australia, Canada, and New Zealand shaped the recognition, protection, and self-determination of Indigenous peoples?
  - 1.1 How do the constitutional frameworks in India, Australia, Canada, and New Zealand recognise indigenous peoples and protect their rights relating to land, culture, and political participation?
  - 1.2 How have courts in India, Australia, Canada, and New Zealand shaped the relationship between indigenous peoples and the state, particularly with respect to autonomy and reconciliation?
  - 1.3 What lessons can India draw from the constitutional experiences of Australia, Canada, and New Zealand to strengthen the dignity and justice of its indigenous peoples?

### **Hypothesis**

While India, Australia, Canada, and New Zealand provide varying constitutional pathways for indigenous peoples, these frameworks often remain limited in securing genuine self-determination and cultural protection. India's affirmative action model requires stronger constitutional guarantees for autonomy and land rights, informed by lessons from Canada's entrenched rights and New Zealand's treaty-based approach.

### **Research Methodology**

This paper adopts a doctrinal and comparative legal research methodology. Primary sources such as constitutional provisions, statutes, and judicial decisions are examined alongside secondary sources, including scholarly writings, commission reports, and policy documents. The doctrinal approach enables a systematic analysis of legal principles and frameworks, while the comparative dimension highlights similarities and differences across jurisdictions. A normative evaluation is undertaken to assess the adequacy of existing frameworks in advancing dignity, autonomy, and justice.

## **II. Rights Of Indigenous Peoples: Contours Of Identity, Autonomy, And Constitutional Pathways**

The rights of Indigenous peoples lie at the intersection of identity, autonomy, and constitutional governance. Rooted in distinct cultural and historical experiences, these rights require balancing Indigenous self-determination with state authority. Constitutional frameworks offer pathways to protect these rights through legal recognition, cultural safeguards, and political participation, depicting how law can support Indigenous identity and autonomy within state structures.

### **Who are Indigenous Peoples? Disputes of Definition and Identity**

The term 'Indigenous peoples' resists a single universal definition. International instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) avoid strict criteria, emphasising self-identification, historical continuity with pre-colonial societies, and a distinct social, cultural and political identity.<sup>18</sup> This flexible approach reflects the diverse experiences of communities that have endured colonisation and dispossession. Scholars opine that state definitions often serve political purposes, either expanding recognition to secure legitimacy or narrowing it to limit obligations.<sup>19</sup> In India, the category of 'Scheduled Tribes' captures many Indigenous groups but excludes others whose cultural and historical experiences parallel those recognised, demonstrating the stakes of definitional politics.<sup>20</sup> Similar debates arise in Australia where the 'three-

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<sup>18</sup> United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf) accessed 15 September 2025

<sup>19</sup> Anaya (n 1)

<sup>20</sup> Constitution of India, art 366(25); Xaxa (n 17)

part test' of descent, self-identification and community acceptance developed in *Shaw v. Wolf* reveals both protective and exclusionary potential.<sup>21</sup>

### **From Integration to Sovereignty: Competing Visions of Self-Determination**

The evolution of Indigenous rights reflects a shift from assimilationist policies toward recognition of self-determination as a collective right. Early colonial frameworks sought integration into dominant political and economic systems, eroding distinct cultures and governance structures. Contemporary international law affirms that Indigenous peoples have the right to self-determination and to maintain their own political, legal, economic and social institutions, as articulated in Article 3 of UNDRIP.<sup>22</sup> Nonetheless, states frequently interpret self-determination as limited to 'internal autonomy' rather than a right to secession, balancing Indigenous claims with the principle of territorial integrity.<sup>23</sup> This tension surfaces across jurisdictions: Canada recognises inherent self-government in principle, while New Zealand's Treaty of Waitangi grounds a partnership model; Australia and India remain cautious, offering limited autonomy through statutory or constitutional devices.<sup>24</sup>

### **Pathways of Recognition: From Symbol to Substance**

Constitutional recognition of Indigenous peoples takes varied forms, from symbolic acknowledgments to entrenched rights and treaty-based arrangements. Symbolic preambles or declaratory clauses, while important for nation-building, risk becoming merely aspirational if not coupled with enforceable rights.<sup>25</sup> Entrenched constitutional rights, such as Canada's Section 35, provide stronger guarantees but require sustained judicial interpretation and political commitment to be meaningful.<sup>26</sup> Treaty models, exemplified by New Zealand, combine historical compacts with modern institutions to facilitate ongoing negotiation and shared governance.<sup>27</sup> India's Fifth and Sixth Schedules attempt a hybrid approach, granting limited territorial autonomy while embedding affirmative action; their effectiveness depends on robust implementation and respect for customary governance.<sup>28</sup> Comparative experience demonstrates that legal architecture alone is insufficient without mechanisms for participatory decision-making and protection of land and resource rights.

### **Courts and Constitutions: Arenas of Contestation and Hope**

Courts play a pivotal role in transforming constitutional recognition into substantive rights. Landmark decisions such as *Mabo v. Queensland (No. 2)* dismantled the doctrine of *terra nullius* and acknowledged native title in Australia.<sup>29</sup> In Canada, cases including *Delgamuukw v. British Columbia* and *Tsilhqot'in Nation v. British Columbia* elaborated the content of Aboriginal title and affirmed the duty of consultation.<sup>30</sup> The New Zealand Māori Council case infused Treaty principles of partnership and protection into statutory interpretation.<sup>31</sup> In India, the Supreme Court's rulings in *Samatha v. State of Andhra Pradesh* and the Niyamgiri case strengthened the protection of tribal land and cultural rights.<sup>32</sup> These judicial interventions demonstrate how courts can serve as arenas of contestation and hope, mediating between state sovereignty and Indigenous self-determination. However, judicial activism remains uneven and vulnerable to political backlash, underscoring the need for structural safeguards beyond case-by-case litigation.

## **III. India: Between Constitutional Promises And Lived Realities**

India's constitutional vision towards its tribal and indigenous communities embodies a paradox. On one hand, it promises protection, representation, and autonomy through affirmative action and special provisions; on the other, the lived experience of these communities reveals displacement, paternalistic governance, and fragile rights. This section explores how the Constituent Assembly debates, constitutional safeguards, judicial interventions, and ongoing struggles reflect both the possibilities and limitations of India's approach.

<sup>21</sup> *Shaw v Wolf* [1998] FCA 389

<sup>22</sup> United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295, UN Doc A/RES/61/295, art 3

<sup>23</sup> International Covenant on Civil and Political Rights 1966, art 1

<sup>24</sup> Borrows (n 10)

<sup>25</sup> Megan Davis and George Williams, 'Everything You Need to Know about the Uluru Statement' (2021) 103(3) *Australian Journal of Politics and History* 1

<sup>26</sup> *Delgamuukw* (n 5)

<sup>27</sup> Waitangi Tribunal, 'Treaty of Waitangi' (Waitangi Tribunal) <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/> accessed 15 September 2025

<sup>28</sup> Constitution of India, Fifth and Sixth Schedules (Ministry of External Affairs)

<sup>29</sup> *Mabo v Queensland (No 2)* [1992] HCA 23

<sup>30</sup> *Delgamuukw* (n 5); *Tsilhqot'in Nation* (n 5)

<sup>31</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641

<sup>32</sup> *Samatha* (n 2)

### **The Constituent Assembly and the Tribal Question: Voices at the Margins**

The Constituent Assembly debates reveal deep anxieties about the historical marginalisation of tribal peoples. Leaders such as Jaipal Singh Munda, himself an Adivasi representative, insisted that India's 'first citizens' needed protection not merely as a welfare category but as distinct communities with their own governance structures, cultures, and relationships to land.<sup>33</sup> These debates resulted in provisions under Part XVI of the Constitution and the inclusion of the Fifth and Sixth Schedules, which were designed to grant autonomy to Scheduled Areas and tribal-majority districts.<sup>34</sup> However, the institutional design betrayed a tension between paternalistic oversight and genuine self-determination. Governors were vested with extraordinary discretionary authority, and while Tribal Advisory Councils and Autonomous District Councils were introduced, they remained dependent on state governments for financial resources and subject to centralised control.<sup>35</sup> This created a constitutional framework that appeared to empower tribal communities, but in practice, left significant levers of power in the hands of the state.

### **Affirmative Action and Representation: Reservations in Practice**

Affirmative action provisions sought to transform the structural disadvantages faced by Scheduled Tribes by enabling access to education, employment and political representation. Articles 15(4), 16(4) and 330–342 of the Constitution collectively mandated reservations across multiple domains, while complementary legislation such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 aimed to provide safeguards against systemic violence and exclusion.<sup>36</sup> Political reservations, particularly reserved seats in legislatures, have enhanced descriptive representation of tribal communities. Empirical studies also suggest that increased tribal representation correlates with more effective forest conservation and local governance outcomes in some regions.<sup>37</sup> Nonetheless, the benefits of these policies have often been uneven. Elite capture within Scheduled Tribe communities, bureaucratic hurdles in access to opportunities, and continued alienation from land and resources limit the transformative potential of reservations.<sup>38</sup> As a result, affirmative action has provided important footholds for participation but has not fundamentally redressed structural inequalities or cultural erosion.

### **Judicial Interventions and Deferred Autonomy: The Continuing Struggle for Self-Determination**

The judiciary has occasionally acted as a guardian of tribal rights, intervening to restrain state and corporate encroachment. In *Samatha v. State of Andhra Pradesh*, the Supreme Court invalidated the transfer of tribal land in Scheduled Areas to private mining companies, affirming the principle of community ownership protected under the Fifth Schedule.<sup>39</sup> Similarly, in *Orissa Mining Corporation v. Ministry of Environment and Forests* (the *Niyamgiri* case), the Court upheld the right of Gram Sabhas to decide on mining in sacred hills, thereby recognising the cultural and religious rights of the Dongria Kondh.<sup>40</sup> These judgments stand as important markers of judicial willingness to protect indigenous self-governance. However, the wider jurisprudence has been inconsistent, with subsequent state practices and executive actions undermining their impact.<sup>41</sup> Courts have often deferred to state sovereignty and developmental imperatives, leaving tribal autonomy vulnerable. Thus, while judicial interventions have symbolically reinforced constitutional promises, their fragility in practice underscores the limitations of rights-based litigation alone.

Despite constitutional guarantees, displacement and dispossession continue to define the lived reality of many Scheduled Tribes. Large-scale development projects, extractive industries, and conservation initiatives have repeatedly uprooted communities from ancestral lands. The Forest Rights Act 2006 was intended to secure land tenure and community forest rights, yet its implementation has been plagued by bureaucratic delays, restrictive

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<sup>33</sup> Constituent Assembly Debates, 19 December 1946, Speech of Jaipal Singh Munda

<sup>34</sup> Constitution of India, Part XVI; Fifth Schedule; Sixth Schedule

<sup>35</sup> Xaxa (n 17)

<sup>36</sup> Constitution of India, arts 15(4), 16(4), 330–342; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

<sup>37</sup> Saad Gulzar, Srinivasan Vasudevan Rao and Oliver Vanden Eynde, 'Representation and Forest Conservation in Scheduled Areas' (King Center Working Paper No 1095, 2021) [https://kingcenter.stanford.edu/sites/g/files/sbiybj16611/files/media/file/wp1095\\_0.pdf](https://kingcenter.stanford.edu/sites/g/files/sbiybj16611/files/media/file/wp1095_0.pdf) accessed 15 September 2025

<sup>38</sup> Ajit Menon and Manasi Karthik, 'The FRA and the Politics of the Local' (2019) IPPA Public Policy Papers <https://www.ippapublicpolicy.org/file/paper/593a83d8468ee.pdf> accessed 17 September 2025

<sup>39</sup> *Samatha* (n 2)

<sup>40</sup> *Orissa Mining Corporation* (n 2)

<sup>41</sup> *State of Kerala v People's Union for Civil Liberties* (2009) 11 SCR 142

interpretations, and active resistance from state agencies.<sup>42</sup> This paradox, constitutional protection coupled with systemic disempowerment, depicts the persistence of a paternalistic model of governance. Genuine self-determination for tribal peoples requires more than quotas or sporadic judicial protection. It demands structural reforms that recognise customary governance, strengthen land and resource tenure, and institutionalise mechanisms for free, prior and informed consent in line with international standards such as the UN Declaration on the Rights of Indigenous Peoples.<sup>43</sup> Without such reforms, India's constitutional order risks perpetuating symbolic promises rather than real autonomy.

#### **IV. Australia: From Silence To A Stifled Voice**

Australia's constitutional history reflects a stark trajectory: from the erasure of Indigenous presence in the founding document, through judicial breakthroughs such as *Mabo*, to the contemporary struggle for constitutional recognition through the Uluru Statement and the 2023 referendum. While moments of progress have challenged colonial assumptions, the absence of entrenched rights has left Indigenous sovereignty vulnerable to political compromise and legislative erosion.

##### **Constitutional Silence and the Doctrine of Terra Nullius**

The Constitution of 1901 was drafted without recognition of Aboriginal and Torres Strait Islander peoples as distinct political communities.<sup>44</sup> The founding document entrenched their exclusion by adopting the colonial fiction of *terra nullius*, treating the continent as uninhabited despite continuous Indigenous occupation.<sup>45</sup> Sections 51(xxvi) and 127 entrenched legal invisibility, excluding Indigenous peoples from the census and limiting federal legislative power over them.<sup>46</sup> This constitutional silence validated dispossession and cemented a federation based on the denial of Indigenous sovereignty.

##### **Judicial Recognition and Legislative Response: Mabo and the Native Title Act**

The High Court's landmark decision in *Mabo v. Queensland (No 2)* shattered the terra nullius doctrine and recognised that native title survived British annexation.<sup>47</sup> The Court affirmed Indigenous peoples' enduring connection to land and imposed a fiduciary duty on the Crown, while also making native title vulnerable to extinguishment by valid governmental acts.<sup>48</sup> The federal response, the Native Title Act 1993 (NTA), codified *Mabo*'s principles and created procedures for recognising and protecting native title.<sup>49</sup> Initially celebrated, the NTA has since been criticised for imposing heavy evidentiary burdens, allowing extensive extinguishment, and reducing native title to a managerial regime.<sup>50</sup> Amendments in 1998 further curtailed claims, reflecting political compromises that diluted the transformative promise of *Mabo*.<sup>51</sup>

##### **The Uluru Statement, the Voice Referendum, and the Politics of Recognition**

In 2017, the Uluru Statement from the Heart called for a constitutionally enshrined First Nations Voice to Parliament, a Makarrata Commission for treaty-making, and a national truth-telling process.<sup>52</sup> This vision sought to move beyond symbolic gestures towards structural reform and shared sovereignty. Despite strong

<sup>42</sup> Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (India)

<sup>43</sup> United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295

<sup>44</sup> Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Taylor & Francis 2020) <https://www.taylorfrancis.com/chapters/mono/10.4324/9781003118213-1/introduction-bain-attwood-andrew-markus> accessed 15 September 2025

<sup>45</sup> Henry Reynolds, *The Law of the Land* (Penguin 1987) [https://books.google.com/books/about/The\\_law\\_of\\_the\\_land.html?hl=en&id=IZx1QgAACAAJ](https://books.google.com/books/about/The_law_of_the_land.html?hl=en&id=IZx1QgAACAAJ) accessed 19 September 2025

<sup>46</sup> Constitution of Australia 1901, ss 51(xxvi), 127 (repealed by referendum in 1967)

<sup>47</sup> *Mabo* (n 29)

<sup>48</sup> Lisa Strelein (n 16)

<sup>49</sup> Native Title Act 1993 (Cth)

<sup>50</sup> Lisa Strelein, 'Symbolism and Function: From Native Title to the Recognition and Protection of Indigenous Rights' (2001) 9(1) *Law in Context* 14

[https://www.researchgate.net/publication/285308120\\_Symbolism\\_and\\_function\\_from\\_native\\_title\\_to\\_aboriginal\\_and\\_Torres\\_strait\\_islander\\_self-government](https://www.researchgate.net/publication/285308120_Symbolism_and_function_from_native_title_to_aboriginal_and_Torres_strait_islander_self-government) accessed 15 September 2025

<sup>51</sup> Sean Brennan, 'Native Title in the House of Representatives: A Matter of Conscience?' (1998) 4 *Indigenous Law Bulletin* 4 <https://www.alrc.gov.au/wp-content/uploads/2009/11/Reform-93-web.pdf> accessed 15 September 2025

<sup>52</sup> Uluru Statement from the Heart (2017) <https://ulurustatement.org/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf> accessed 15 September 2025

support from civil society and Indigenous leaders, the 2023 referendum to establish the Voice failed, with a majority of Australians voting “No.”<sup>53</sup> Analysts attribute this outcome to political polarisation, misinformation campaigns, and public unease with constitutional change. The referendum’s rejection underscored the persistent gap between rhetorical acknowledgments of Indigenous history and the reluctance to redistribute constitutional power.

### **Symbolism without Substance: The Limits of Recognition**

Australia’s trajectory illustrates the fragility of Indigenous rights when recognition remains either judicially declared or politically symbolic. While *Mabo* and the NTA represent critical shifts from historical denial, their impact is constrained by legislative supremacy and limited constitutional protection.<sup>54</sup> The failure of the Voice referendum signifies the tension between symbolic inclusion and substantive empowerment. Scholars argue that treaty-based models or entrenched constitutional rights, as seen in New Zealand or Canada, may offer more durable pathways to Indigenous self-determination in Australia.

## **V. Canada: Constitutional Recognition And The Burden Of Reconciliation**

Canada represents one of the most developed models of constitutional recognition of Indigenous rights, combining entrenched protections in the Constitution Act 1982 with a rich body of jurisprudence. Nevertheless, as in other jurisdictions, the promise of recognition has often collided with the realities of implementation, resource conflicts, and persistent socio-economic inequality. The Canadian experience reveals both the strength of entrenchment and the fragility of reconciliation when rights remain contested on the ground.

### **From Calder to Section 35: Laying the Foundations of Entrenchment**

The modern recognition of Aboriginal title began with *Calder v. British Columbia (Attorney-General)*, wherein the Supreme Court acknowledged that Aboriginal title existed at common law, independent of Crown grant.<sup>55</sup> Although dismissed on procedural grounds, the case marked a constitutional awakening, prompting the federal government to negotiate land claims. This momentum culminated in the Constitution Act, 1982, which entrenched in Section 35, “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.”<sup>56</sup> Section 35 does not create new rights but constitutionally secures those already recognised, elevating them beyond ordinary legislation and mandating governments to reconcile Crown sovereignty with Indigenous self-determination. It thus established a durable legal framework for negotiation, co-management, and judicial oversight.

### **Jurisprudence of Reconciliation: From Delgamuukw to Tsilhqot’in**

Canadian courts have elaborated the meaning of section 35 through a series of landmark judgments. In *Delgamuukw v. British Columbia*, the Supreme Court clarified that Aboriginal title is a collective right to the land itself, requiring proof of exclusive occupation prior to sovereignty, while recognising oral histories as admissible evidence.<sup>57</sup> *Tsilhqot’in Nation v. British Columbia* became the first judgement to grant a declaration of Aboriginal title over a defined territory, affirming that government actions inconsistent with that title require consent.<sup>58</sup> These rulings reinforced a doctrine of reconciliation, balancing Indigenous land rights with Crown sovereignty. At the same time, courts have left open the possibility of justifying infringements, illustrating the fragility of judicially constructed reconciliation.

### **Treaty Federalism and Self-Government**

Section 35 operates alongside historic treaties and modern comprehensive claims, producing what scholars describe as a form of treaty federalism.<sup>59</sup> Agreements such as the Nisga’a Final Agreement, 1999, established Indigenous jurisdiction over land, culture, education, and resources, reflecting a negotiated form of

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<sup>53</sup> Appleby (n 4)

<sup>54</sup> Kirsty Gover, ‘Settler-State Recognition and Indigenous Rights: A Legal Comparative Perspective’ (2015) 38(2) *University of New South Wales Law Journal* 914

<sup>55</sup> *Calder v British Columbia (Attorney-General)* [1973] SCR 313

<sup>56</sup> Constitution Act 1982, s 35

<sup>57</sup> *Delgamuukw* (n 5)

<sup>58</sup> *Tsilhqot’in Nation v British Columbia* 2014 SCC 44

<sup>59</sup> Michael Murphy, ‘Treaty Federalism: Aboriginal-Crown Relations in Canada’ (2005) 35(1) *Australasian Canadian Studies* 37 <https://ojs.latrobe.edu.au/ojs/index.php/acj/article/view/1279> accessed 8 October 2025

self-government.<sup>60</sup> However, these processes are lengthy, costly, and often require communities to compromise or surrender certain rights for fiscal certainty. The uneven bargaining power between Indigenous nations and the state has further raised concerns about whether modern treaties secure autonomy or entrench dependency within the Canadian federation.

Despite strong constitutional provisions, Canada faces ongoing tensions in translating recognition into lived realities. Resource extraction projects, pipeline disputes, and persistent socio-economic disparities undermine Indigenous autonomy.<sup>61</sup> The Truth and Reconciliation Commission's Calls to Action emphasise that constitutional recognition must be accompanied by structural reforms in health, education, and child welfare.<sup>62</sup> Without such reforms, entrenched rights risk remaining symbolic, leaving communities burdened by the fatigue of implementation rather than empowered by the promise of reconciliation.

## VI. New Zealand: The Treaty Path To Biculturalism

New Zealand's constitutional framework for Indigenous rights is anchored in the Treaty of Waitangi, signed in 1840 between the British Crown and Māori chiefs. The Treaty has since become a contested but foundational document, shaping judicial doctrine, institutional mechanisms, and political discourse. New Zealand's experience represents the potential of a treaty-based approach to biculturalism, while also underscoring the limits of symbolic commitments in the absence of full entrenchment.

### The Treaty of Waitangi: Foundations and Ambiguities

The Treaty of Waitangi of 1840 is regarded as New Zealand's founding document, but its meaning has been contested since its inception.<sup>63</sup> The English and Māori texts diverged on fundamental issues: while the English version ceded sovereignty to the Crown, the Māori version emphasised governance partnership, creating enduring debates about its constitutional status.<sup>64</sup> For much of the nineteenth and twentieth centuries, the Treaty was sidelined in formal law; however, it retained symbolic and political resonance as Māori communities asserted its promises of partnership and protection.<sup>65</sup>

### Judicial Principles and Institutional Innovation

From the 1970s, courts began incorporating Treaty principles into constitutional interpretation. In *New Zealand Māori Council v. Attorney-General*, the Court of Appeal articulated partnership, protection, and participation as guiding principles of Crown-Māori relations.<sup>66</sup> Parallel to judicial developments, the Waitangi Tribunal was established in 1975 as a quasi-constitutional body to investigate Māori grievances.<sup>67</sup> Its jurisdiction, later expanded to consider historical claims dating back to 1840, has made it a unique forum for restorative justice and cultural redress.<sup>68</sup> Together, judicial recognition and the Tribunal's work reshaped the Treaty from a sidelined document into a living source of constitutional guidance.

### Biculturalism in Practice and the Limits of Recognition

The Treaty framework has fostered greater Māori participation in politics, education, and cultural life. Reserved Māori seats in Parliament, bilingual education initiatives, and recognition of Māori culture in public

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<sup>60</sup> *Nisga'a Final Agreement* (Nisga'a Lisims Government, 1999)

<https://www.nisgaanation.ca/government/nisgaa-treaty/treaty-documents/Nisga%C3%A2%20Final%20Agreement%20-%20Effective%20Date.PDF> accessed 8 October 2025

<sup>61</sup> Amnesty International Canada, 'The Impact of Resource Development on Indigenous Women and Girls in Canada' (2016)

<https://www.amnesty.ca/sites/default/files/Impact%20of%20Resource%20Development%20on%20Indigenous%20Women%20and%20Girls%20in%20Canada.pdf> accessed 8 October 2025

<sup>62</sup> Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg, 2015)

<https://nctr.ca/records/reports/#trc-reports> accessed 8 October 2025

<sup>63</sup> Waitangi Tribunal, *Māori and English Versions* <https://www.waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions> accessed 8 October 2025

<sup>64</sup> Waitangi Tribunal, *Meaning of the Treaty: A Treaty of Two Texts* <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/> accessed 8 October 2025

<sup>65</sup> NZ Law Commission, *Report 53: Justice - The Experience of Māori Women*, Appendix C: Treaty Principles, C8 (Wellington, NZLC) <https://www.nzlii.org/nz/other/nzlc/report/R53/R53-Appendix-3.html> accessed 8 October 2025.

<sup>66</sup> *New Zealand Māori Council* (n 31)

<sup>67</sup> Waitangi Tribunal, *The Claims Process of the Waitangi Tribunal: FAQ*

<https://waitangitribunal.govt.nz/assets/The-Claims-Process-of-the-WT-online.pdf> accessed 8 October 2025

<sup>68</sup> Waitangi Tribunal, *Meaning of the Treaty: A Treaty of Two Texts* (n 64)

institutions have advanced biculturalism. Nonetheless, the limits of the Treaty remain evident. It is not formally entrenched in the Constitution, and its principles are subject to political reinterpretation or rollback. While the Waitangi Tribunal provides moral and political leverage, its recommendations are not legally binding.<sup>69</sup> New Zealand thus illustrates both the promise of a treaty-based model in promoting partnership and the vulnerabilities of leaving Indigenous rights contingent on political will.

## **VII. Constitutional Recognition Of Indigenous Peoples Across Jurisdictions: Comparative Reflections:**

The constitutional experiences of India, Australia, Canada, and New Zealand offer important lessons on how different states attempt to recognise and accommodate the rights of Indigenous peoples. Each jurisdiction reflects a distinct historical context, legal culture, and political settlement, but recurring themes of recognition, land, autonomy, and judicial engagement reveal both convergences and divergences. This comparative analysis demonstrates that while constitutional texts and doctrines provide important platforms for Indigenous rights, their translation into lived realities depends heavily on institutional design, political will, and the balance between state sovereignty and Indigenous self-determination.

### **Models of Recognition: From Quotas to Entrenchment and Treaties**

India represents a quota-based model, relying on reservations in education, employment, and legislatures, combined with constitutional protections in the Fifth and Sixth Schedules.<sup>70</sup> These mechanisms ensure political representation and limited autonomy but remain vulnerable to bureaucratic control and elite capture.<sup>71</sup> Recognition here is essentially redistributive, aiming to integrate Scheduled Tribes within the mainstream rather than entrenching their sovereignty.

Australia exemplifies judicially catalysed recognition. For nearly a century, the Constitution was silent on Indigenous peoples, with their exclusion entrenched by ss 51(xxvi) and 127.<sup>72</sup> The High Court's decision in *Mabo v. Queensland (No 2)* struck down the doctrine of terra nullius, but legislative responses such as the Native Title Act 1993 imposed onerous evidentiary burdens and allowed broad extinguishment.<sup>73</sup> Recognition here has been fragile and reversible, dependent on judicial innovation and parliamentary goodwill rather than constitutional entrenchment.

Canada provides the most robust entrenchment model through Section 35 of the Constitution Act 1982, which recognises existing Aboriginal and treaty rights.<sup>74</sup> Landmark cases like *Delgamuukw* and *Tsilhqot'in* elaborated the scope of Aboriginal title, embedding it in constitutional law.<sup>75</sup> However, implementation challenges in resource governance reveal that entrenchment is not self-executing.

New Zealand presents a treaty-based framework, with the Treaty of Waitangi (1840) serving as a foundational compact. Although long ignored, the Treaty re-emerged through judicial interpretation in *New Zealand Māori Council v. Attorney-General* and the establishment of the Waitangi Tribunal.<sup>76</sup> The Treaty provides a discursive and institutional anchor for biculturalism but lacks constitutional entrenchment, leaving its force contingent on political interpretation.<sup>77</sup>

Comparatively, the spectrum runs from India's integrationist quota model, to Australia's judicially driven recognition, to Canada's entrenched constitutional rights, and finally to New Zealand's treaty-based biculturalism. Each model reveals different strengths: India guarantees representation, Canada secures legal entrenchment, New Zealand fosters dialogue and restorative justice, while Australia illustrates the dangers of constitutional silence.

### **Land and Autonomy: The Heart of the Constitutional Question**

Land is the central axis of Indigenous rights in all four jurisdictions. For Indigenous communities, land is not merely property but the foundation of culture, governance, and identity. In India, constitutional protections

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<sup>69</sup> Waitangi Tribunal, *The Claims Process of the Waitangi Tribunal: FAQ* (n 67)

<sup>70</sup> Constitution of India, arts 15(4), 16(4), 330–342; Fifth and Sixth Schedules

<sup>71</sup> Ajit Menon and Manasi Karthik, 'The FRA and the Politics of the Local' (2019) IPPA Public Policy Papers <https://www.ippapublicpolicy.org/file/paper/593a83d8468ee.pdf> accessed 19 September 2025

<sup>72</sup> Constitution of Australia 1901, ss 51(xxvi), 127 (repealed 1967)

<sup>73</sup> Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2003) *Washington University Global Studies Law Review* <https://journals.library.wustl.edu/lawpolicy/article/1605/galley/18439/view> accessed 8 October 2025

<sup>74</sup> Constitution Act 1982, s 35

<sup>75</sup> *Delgamuukw* (n 5); *Tsilhqot'in Nation* (n 5)

<sup>76</sup> *New Zealand Māori Council* (n 31)

<sup>77</sup> Waitangi Tribunal, *Treaty of Waitangi* (n 27)

under the Fifth Schedule and laws such as the Forest Rights Act 2006 were designed to secure tribal control over land and forests.<sup>78</sup> However, displacement through mining, dams, and conservation projects continues to erode these protections. The gap between constitutional promises and administrative practice reflects the limits of a paternalistic framework that prioritises state sovereignty over tribal autonomy.

Australia's *Mabo* decision recognised native title as surviving colonisation, although it limited its scope to continuous connection and subjected it to extinguishment by valid governmental acts.<sup>79</sup> The Native Title Act further constrained recognition, especially after the 1998 amendments, which privileged pastoral leases and other settler interests.<sup>80</sup> Land rights here remain subject to the overriding power of the state.

Canada's jurisprudence goes furthest in affirming land rights as constitutionally entrenched. *Delgamuukw* recognised Aboriginal title as a right to the land itself, while *Tsilhqot'in* confirmed the Crown's duty to obtain Indigenous consent for inconsistent uses. However, disputes over pipelines and resource extraction reveal that governments often prioritise economic development, testing the boundaries of reconciliation.

New Zealand's Treaty framework has facilitated some land settlements through the Waitangi Tribunal, which has addressed historical confiscations and recommended reparations.<sup>81</sup> While culturally transformative, the Tribunal's recommendations are not binding, limiting its power to secure autonomy.<sup>82</sup>

Thus, across jurisdictions, land recognition oscillates between nominal protection in India, conditional recognition in Australia, constitutional entrenchment in Canada, and restorative settlement in New Zealand. The common thread is that without secure land tenure, broader promises of cultural survival and self-determination remain hollow.

### **Courts, Politics, and the Design of Indigenous Justice**

Courts have played pivotal roles, but their approaches vary in activism and restraint. In India, the Supreme Court in *Samatha* prohibited the transfer of tribal lands in Scheduled Areas to private mining companies,<sup>83</sup> and in *Niyamgiri* required Gram Sabha consent before mining sacred hills.<sup>84</sup> Nonetheless, subsequent jurisprudence has often retreated, deferring to development imperatives and limiting tribal autonomy.<sup>85</sup>

In Australia, the High Court's activism in *Mabo* was followed by narrower interpretations that restricted the scope of native title.<sup>86</sup> Judicial breakthroughs proved fragile in the absence of entrenched constitutional rights. Canada's courts have developed a sophisticated doctrine of reconciliation under Section 35, requiring governments to consult and, in some cases, obtain consent from Indigenous peoples. While doctrinally rich, these principles depend on political will for effective implementation.

New Zealand courts articulated Treaty principles of partnership, protection, and participation, most famously in the *Māori Council* case.<sup>87</sup> The Waitangi Tribunal further institutionalised a forum for historical redress. Judicial and tribunal decisions remain vulnerable to political override, depicting the fragility of non-entrenched recognition.

Courts emerge as catalysts of recognition, but their ability to secure durable justice depends on constitutional entrenchment in Canada, legislative support in New Zealand, or political consensus in Australia and India. Judicial innovation alone cannot substitute for institutionalised Indigenous participation.

### **Designing for Diversity: Comparative Lessons**

These comparative experiences reveal that symbolic recognition alone is insufficient. Australia's failure to constitutionally entrench Indigenous rights, exemplified by the 2023 rejection of the Voice referendum, demonstrates the limits of recognition without legal force. Land and autonomy remain essential, as Canada and

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<sup>78</sup> FRA 2006

<sup>79</sup> *Mabo* (n 29)

<sup>80</sup> Native Title Act 1993 (Cth) <https://www.legislation.gov.au/Details/C2023C00103> accessed 8 October 2025

<sup>81</sup> Waitangi Tribunal, 'Land Settlements' <https://www.waitangitribunal.govt.nz/settlements/> accessed 8 October 2025

<sup>82</sup> Waitangi Tribunal, 'About the Waitangi Tribunal' <https://www.waitangitribunal.govt.nz/about/about-the-waitangi-tribunal/> accessed 8 October 2025

<sup>83</sup> *Samatha* (n 2)

<sup>84</sup> *Niyamgiri Hills v Union of India* (2013) 7 SCC 547

<sup>85</sup> United Nations Human Rights Office, 'India must prevent eviction of millions of forest dwellers, say UN experts' (30 July 2019) <https://www.ohchr.org/en/press-releases/2019/07/india-must-prevent-eviction-millions-forest-dwellers-say-un-experts> accessed 8 October 2025

<sup>86</sup> *Mabo* (n 29)

<sup>87</sup> *New Zealand Māori Council* (n 31)

New Zealand depict. Without secure land tenure and governance rights, constitutional recognition risks remaining rhetorical rather than transformative.

Judicial innovation must be complemented by robust institutional design. Courts can open pathways for recognition, but sustainable change requires mechanisms that embed Indigenous voices in governance, whether through treaties in New Zealand, entrenched rights in Canada, or empowered local institutions in India. Each jurisdiction reflects its own colonial history, legal culture, and political dynamics. Comparative analysis suggests that hybrid approaches, comprising entrenchment, treaties, and participatory governance, offer the most promising path to reconciling state sovereignty with Indigenous self-determination.

### **VIII. India At The Crossroads: Building Dignity, Autonomy, And Justice For Indigenous Peoples**

India's constitutional journey with its tribal and Indigenous communities reveals both achievements and failures. While representation and affirmative action have offered visibility, structural inequalities persist, leaving Scheduled Tribes among the most socio-economically disadvantaged groups.<sup>88</sup> The paradox lies in a constitutional order that acknowledges diversity but often channels it into mechanisms of integration rather than self-determination.<sup>89</sup> A comparative glance at Canada's entrenched rights, New Zealand's treaty-based biculturalism, and even Australia's judicial breakthroughs presents possible pathways for reform. India now stands at a crossroads as to whether to continue with incremental quotas and protections, or to reimagine a constitutional framework that guarantees dignity, autonomy, and justice as fundamental rights.

#### **Beyond Quotas: Towards Substantive Autonomy**

India's reliance on reservations in education, employment, and legislatures has provided Scheduled Tribes with descriptive representation. However, the benefits are uneven. Elite capture within tribal communities and bureaucratic hurdles dilute the reach of quotas.<sup>90</sup> Moreover, reservations are limited to integration within state institutions, leaving little scope for self-governance. As such, quotas mitigate exclusion but rarely transform structural inequalities.

In comparison, Canada's section 35 entrenches Aboriginal and treaty rights beyond the reach of ordinary legislation.<sup>91</sup> This ensures that Indigenous recognition is not left to political discretion. Similarly, New Zealand's Treaty of Waitangi, although not entrenched, serves as a constitutional compass for bicultural governance, providing Māori communities with institutional leverage in cultural and political spheres.<sup>92</sup> India's quota-based approach thus appears narrow, focusing on participation within state structures without recognising alternative forms of authority.

A future-oriented model would move beyond mere numerical presence to substantive autonomy, ensuring that tribal communities exercise control over their institutions, culture, and land. This requires reframing affirmative action not only as redistribution but as a vehicle for genuine self-determination.

#### **Land, Culture, and Constitutional Innovation**

Land remains the anchor of tribal identity and culture. Despite constitutional protections, displacement through mining, industrialisation, and conservation projects has eroded Indigenous tenure. The Forest Rights Act, 2006 sought to restore community control, yet its inconsistent implementation has undermined its transformative potential.<sup>93</sup>

Comparative analysis emphasises that land rights must be constitutionally entrenched. In *Delgamuukw v. British Columbia*, the Canadian Supreme Court clarified Aboriginal title as a collective right to the land itself, requiring governments to secure consent before undertaking inconsistent uses.<sup>94</sup> In New Zealand, the Waitangi Tribunal has facilitated historical land settlements, restoring not just property but cultural belonging. Both examples show that secure tenure requires an institutional design that resists political rollback.

For India, constitutional innovation could include strengthening judicial recognition of customary land tenure, mandating free, prior, and informed consent for projects in Scheduled Areas, and explicitly protecting cultural rights in the constitutional text. Without such measures, promises of autonomy will remain hollow.

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<sup>88</sup> Ministry of Tribal Affairs, *Statistical Profile of Scheduled Tribes in India* (2013) <https://tribal.nic.in/ST/Statistics8518.pdf> accessed 8 October 2025

<sup>89</sup> Xaxa (n 17)

<sup>90</sup> Ajit Menon and Manasi Karthik, 'The FRA and the Politics of the Local' (2019) IPPA Public Policy Papers <https://www.ippapublicpolicy.org/file/paper/593a83d8468ee.pdf> accessed 8 October 2025

<sup>91</sup> Constitution Act 1982, s 35

<sup>92</sup> Waitangi

<sup>93</sup> FRA 2006

<sup>94</sup> *Delgamuukw* (n 5); *Tsilhqot'in Nation* (n 5)

### **Reimagining India's Constitutional Order**

The future of Indigenous rights in India depends on shifting from a welfare-driven model to a rights-based constitutional framework. Welfare measures such as quotas, benefits, and schemes treat Indigenous peoples as recipients of state largesse. By contrast, a rights-based approach recognises them as constitutional actors with inherent sovereignty.

Canada's entrenchment and New Zealand's treaty model provide instructive examples. Section 35 has made Aboriginal rights part of the constitutional order, while Treaty principles in New Zealand serve as a foundation for partnership. India could learn from both by blending entrenched guarantees with treaty-like compacts negotiated between the state and tribal communities. Such an order would affirm dignity, autonomy, and justice not as concessions but as constitutional commitments. It would signal a transformation from paternalistic governance towards genuine partnership, ensuring that India's Indigenous peoples are not simply integrated but empowered.

### **IX. Conclusion**

This comparative inquiry demonstrates that constitutional recognition of Indigenous peoples is meaningful only when it secures substantive autonomy over land, culture, and governance. India's framework of quotas and Scheduled Areas has expanded representation but remains largely assimilationist, subordinating tribal interests to bureaucratic and state authority. Australia illustrates the fragility of judicial breakthroughs without constitutional entrenchment, while Canada shows the potential of entrenched rights, tempered by the difficulties of implementation. New Zealand highlights the value of treaty-based partnership, though its lack of formal entrenchment leaves it exposed to shifting political currents. For India, the lesson is clear: welfare-driven measures must give way to a rights-based constitutional order that guarantees land tenure, strengthens participatory institutions, and acknowledges Indigenous sovereignty. Only then can constitutional promises be translated into lived realities of dignity, autonomy, and justice for its tribal peoples.

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