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First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples’ Right to Self-Determination

Harry Hobbs
Faculty of Law, University of Technology Sydney

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First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples' Right to Self-Determination

Abstract

First Nations peoples assert a right to a distinctive relationship with the state based on their pre-colonial status as self-governing sovereign communities. Ascertaining the scope of First Nations peoples' collective right to self-determination is complex, but there is broad international agreement that it encompasses a right to be consulted on state action that will affect their interests, including in the law-making process. The problem is that the right to be consulted in the development of legislation appears to place a constraint on the power of the legislature to propose, debate, amend, and enact laws as they see fit. Does the right to consultation unduly or impermissibly fetter democratic government by imposing a procedural or substantive restriction on the introduction of proposed laws? Can this entitlement be reconciled with the constitutional value of parliamentary supremacy? In recent years, the highest courts in Australia, Canada, and Aotearoa New Zealand have explored these questions. This paper examines those decisions and considers their consequences for the appropriate constitutional relationship between First Nations Peoples and the State.

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HARRY HOBBS*

First Nations peoples assert a right to a distinctive relationship with the state based on their pre-colonial status as self-governing sovereign communities. Ascertaining the scope of First Nations peoples' collective right to self-determination is complex, but there is broad international agreement that it encompasses a right to be consulted on state action that will affect their interests, including in the law-making process. The problem is that the right to be consulted in the development of legislation appears to place a constraint on the power of the legislature to propose, debate, amend, and enact laws as they see fit. Does the right to consultation unduly or impermissibly fetter democratic government by imposing a procedural or substantive restriction on the introduction of proposed laws? Can this entitlement be reconciled with the constitutional value of parliamentary supremacy? In recent years, the highest courts in Australia, Canada, and Aotearoa New Zealand have explored these questions. This paper examines those decisions and considers their consequences for the appropriate constitutional relationship between First Nations Peoples and the State.

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* Senior Lecturer, Faculty of Law, University of Technology Sydney. Thanks to Dinesha Samararatne, Patrick Emerton, Scott Stephenson, Lynsey Blayden, Genevieve Wilkinson, Adrienne Stone, and participants at the Melbourne Institute of Comparative Constitutional Law Workshop, 9-11 December 2019, for helpful comments on earlier drafts.

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MUST PARLIAMENT CONSULT WITH INDIGENOUS PEOPLES before debating or enacting legislation that will affect their rights? In recent years, the highest courts in Australia, Canada, and Aotearoa New Zealand have considered this question. In *Maloney v. The Queen*,[1] an Aboriginal woman argued that a Queensland statute prohibiting the possession of alcohol in an Indigenous community was inconsistent with a federal law against racial discrimination, because it was implemented without the adequate consultation of her community. In *Mikisew Cree First Nation v. Canada (Governor General in Council)*,[2] the Mikisew Cree sought a declaration that the Canadian Crown owed and breached a duty to consult Indigenous peoples when preparing and enacting legislation that may adversely affect their constitutionally protected treaty rights. Finally, in *Ngāti Whātua Ōrākei Trust v. Attorney General*,[3] the Ngāti Whātua iwi challenged a government proposal to transfer land within the Auckland isthmus to the Ngāti Paoa and Marutūāhu iwis via legislation without their consultation as a breach of their Settlement Act.[4]

The underlying legal dispute, let alone the constitutional framework in which that dispute emerged, differs considerably in each case. When considered together, however, these three cases shed light on several major public law issues, including the nature or character of Indigenous peoples' rights, their

1. *Maloney v The Queen,* [2013] HCA 28 [*Maloney* HCA].
2. 2018 SCC 40 [*Mikisew Cree*].
3. *Ngāti Whātua Ōrākei Trust v Attorney-General*, [2018] NZSC 84 [*Ngāti Whātua*].
4. *Ngāti Whātua Ōrākei Claims Settlement Act 2012* (NZ), 2012/91.

intersection with Westminster-derived constitutional principles, and the role of the legislature in upholding duties owed by the state to Indigenous peoples and communities. At their core, *Maloney*, *Mikisew Cree*, and *Ngāti Whātua* centred on a tension between parliamentary supremacy and Indigenous peoples' right to self-determination. While the force of the doctrine of parliamentary supremacy has waned over time, it remains a foundational constitutional value that does not simply underpin the political and legal framework of each state, but articulates a particular theory and manner of democratic governance. Parliamentary supremacy undergirds the egalitarian notion that "ordinary people have a right to participate on equal terms in the political decision-making that affects their lives."[5] But what happens when legislation will affect one community specifically, and what happens when that community is normatively distinct?

Indigenous peoples assert a right to a distinctive relationship with the state based on their pre-colonial status as self-governing sovereign communities. Indigenous nations have never ceded their sovereignty and they continue to exercise their inherent right to self-government in a myriad of ways. Ascertaining the scope of Indigenous peoples' collective right to self-determination is complex, but there is broad international agreement that it encompasses a right to be consulted on state action that will affect their interests. Under Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), states are obliged to "consult and cooperate" with Indigenous communities "before adopting and implementing legislative or administrative measures that may affect them."[6] The problem is that Indigenous peoples' right to be consulted on the development of legislation appears to place a constraint on the power of the legislature to propose, debate, amend, and enact laws as it sees fit. Does the right to consultation unduly or impermissibly fetter democratic governance by imposing a procedural (and perhaps substantive) restriction on the introduction of proposed laws? Can this entitlement be reconciled with the normative commitment underlying the value of parliamentary supremacy?

Articulating the dispute in this manner reveals that *Maloney*, *Mikisew Cree*, and *Ngāti Whātua* illuminate a fundamental question concerning the appropriate constitutional relationship between Indigenous peoples and the state. Australia, Canada, and Aotearoa New Zealand were built on a foundational illegitimacy that has not been resolved. Each state was formed through the

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5. Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University, 2010) at 9.
6. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) 16 at 20 [*UNDRIP*].

unjust dispossession of Indigenous peoples and communities. That dispossession encompassed the usurpation of Indigenous peoples' land and the displacement of Indigenous communities' governing systems. In their stead, legal and political systems developed in and for the United Kingdom were replicated and planted in new soils.[7] Despite some effort to modify these arrangements to recognize the unique position of Indigenous peoples, these colonial frameworks continue to structure the "legal imagination" in Australia, Canada, and Aotearoa New Zealand by establishing and maintaining a hierarchal relationship between the state and Indigenous peoples.[8] *Maloney*, *Mikisew Cree*, and *Ngāti Whātua* offered an opportunity to revisit and reconsider this fundamental tension by examining whether and how Indigenous peoples and communities could be involved in law making on issues that affect their rights and interests. In this article, I explore how the highest courts in Australia, Canada, and Aotearoa New Zealand responded to this tension.

I begin in Part I by examining the two key principles that form the backdrop to this issue: parliamentary supremacy and Indigenous self-determination. As I argue, a doctrine of parliamentary supremacy may exist in a qualified form in each settler state, but an underlying normative commitment to parliamentary supremacy as a constitutional ethic or value continues to operate in at least two ways. First, parliamentary supremacy influences conceptions of the judicial role. Parliament is the master in its own domain, as courts remain reluctant to interfere with the legislature's internal procedures or to ensure that particular processes are followed when introducing and debating legislation.[9] Second, a broader ethic of parliamentary supremacy shapes understandings of public power. Parliamentary supremacy constructs a singular "people," levelling distinctions among the citizens in a manner that also elides the existence of overlapping political communities. These two conditions function to marginalise Indigenous peoples' inherent right to self-determination. Together they deny Indigenous peoples and communities their status as distinct polities and their consequent right to participate in law-making over matters that affect their interests.

Having outlined the general contours of settler-state parliamentary supremacy and Indigenous peoples' right to self-determination, Part II examines

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7. James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46 Osgoode Hall LJ 461 at 481.
8. Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382 at 394-95; Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70 UTLJ 341.
9. Subject, of course, to manner and form provisions.

the case studies in detail. Situating my discussion in the politico-legal framework of each state, I tease out how the highest courts in Australia, Canada, and Aotearoa New Zealand have dealt with potential clashes between these two principles. As I demonstrate, state courts have adopted a position that prioritizes parliamentary supremacy and marginalizes Indigenous peoples' legitimate claims for political authority. By disregarding Indigenous peoples' normative distinctiveness, the courts subsume Indigenous peoples within the larger citizenry.

In Part III, I sketch an alternative path. Acknowledging that diverse constitutional frameworks make it difficult to outline a coherent common doctrinal trail, I stake out an approach from first principles. If Indigenous peoples are entitled at international law to exercise self-determination, and the state has accepted that position, what follows from this right? Framing the question in this manner shifts our thinking away from conflict to cooperation. Rather than conceive these disputes as challenges to the authority of parliament to introduce and enact legislation, the state should understand them as an invitation to dialogue and discussion between political communities that prompts two questions. Is this issue one in which Indigenous communities should be heard? If yes, how can their right to be heard be given effect? In some cases, though perhaps not all, this may require the legislature to consider the views of Indigenous peoples. Recognizing that operationalizing this right is difficult in practice, my approach does not seek to outline a fixed arrangement but to explore how the relationship between the state and Indigenous peoples can be reconstituted so as to make conceptual and legal space for the exercise of multiple, overlapping sovereignties.

I. FOUNDATIONAL PRINCIPLES

A. PARLIAMENTARY SUPREMACY IN SETTLER-STATE GOVERNANCE

Law and government in Australia, Canada, and Aotearoa New Zealand operate against a set of shared constitutional traditions derived from the Parliament at Westminster in the United Kingdom. One tradition central to the constitutional theory of the United Kingdom is the doctrine of parliamentary supremacy, or parliamentary sovereignty. In the words of its most significant exponent, A.V. Dicey, parliamentary sovereignty is "the dominant characteristic of our political institutions,"[10] a "fundamental dogma of English constitutional law,"[11]

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10. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Macmillan, 1915) at xxxvi.
11. *Ibid* at 78.

and "the very keystone" of the Constitution.[12] The doctrine emerged over centuries in tandem with the gradual evolution of the idea that government authority derives from popular consent rather than the divine right of kings. As the institution of government most representative of the political community (even if that political community was limited by severe restrictions to the franchise), Parliament ultimately stood alone from the judiciary and the Crown in its law-making authority. Successive legislative reforms liberalizing the franchise in the nineteenth and early twentieth centuries solidified the doctrine's philosophical justification.

In his canonical formulation, Dicey outlined an absolutist conception. For Dicey, parliamentary sovereignty meant that Parliament has "the right to make or unmake any law whatever,"[13] and, as a corollary, "no person or body" has "a right to override or set aside the legislation of Parliament."[14] Put another way, "a legislature is sovereign provided that its law-making authority is not limited in any substantive respect."[15] Contemporary scholars question whether Westminster's sovereignty has ever "been as clear and absolute as is often made out,"[16] but the doctrine nonetheless remains central to understandings of British public law. As Lord Neuberger explained recently in *R (Miller) v. Secretary of State for Exiting the European Union*, parliamentary sovereignty stands as "a fundamental principle of the UK constitution."[17] Significantly for our purposes, the principle is also a central value of the constitutional frameworks of Australia, Canada, and Aotearoa New Zealand. As I outline, although the particular scope and application of the doctrine differs across and between each state, it remains an underlying constitutional norm or ethic that shapes the exercise of public

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12. *Ibid* at 25.
13. *Ibid* at xxxvi.
14. *Ibid*.
15. Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Oxford University Press, 1999) at 15.
16. Peter C Oliver, "Parliamentary Sovereignty, Federalism and the Commonwealth" in Robert Schütze & Stephen Tierney, eds, *The United Kingdom and the Federal Idea* (Hart, 2018) 49 at 69. See also Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart, 2015); Nicholas W Barber, "The Afterlife of Parliamentary Sovereignty" (2011) 9 Int J Constitutional L 144; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1993); Lord Woolf, "Droit Public—English Style" (1995) Pub L 57; Mark Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22 LS 340.
17. [2017] UKSC 5 at para 43, Neuberger LJ. See generally *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 at para 42 [*Miller No 2*]. For academic support, see Tom Bingham, *The Rule of Law* (Penguin, 2011) at 160-62; Gordon, *supra* note 16 at 23.

power. That exercise can inhibit the ability of distinct (and demographically smaller) normative communities from exercising their own inherent right to self-government.

1. A QUALIFIED PRINCIPLE

Parliamentary supremacy structures the exercise of public power in Aotearoa New Zealand. As a unitary state with no codified constitution, the principle exerts a particular controlling force. The *Constitution Act 1986* (New Zealand) recognizes and affirms that the Parliament has "full power to make laws,"[18] and no institution is empowered to invalidate or refuse to apply any law that Parliament enacts.[19] Indeed, as the Court of Appeal held in *Rothmans of Pall Mall (NZ) Ltd v. Attorney-General*:

> [t]he Constitutional position is New Zealand…is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.[20]

Nonetheless, perhaps reflecting this increasingly anomalous position globally, scholars and jurists have sought to identify express or implicit substantive limits to Parliament's authority. For example, senior judges have suggested that "some common law rights presumably lie so deep that even Parliament could not override them,"[21] while others have explored whether foundational constitutional values, such as representative democracy and the rule of law, may effectively limit

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18. *Constitution Act 1986* (NZ), 1986/114, s 15.
19. *Supreme Court Act 2003* (NZ), 2003/53, s 3(2); *New Zealand Bill of Rights Act 1990* (NZ), 1990/109, s 4. See also Andrew Geddis, "Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change" (2016) 14 Int J Constitutional L 99.
20. *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*, [1991] 2 NZLR 323 at 330 (HC); See also Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed (Brookers, 2014) at 515 (stating "Parliament enjoys unlimited and illimitable powers of legislation. Parliament's word can neither be judicially invalidated nor controlled by earlier enactment. Parliament's collective will, duly expressed, is law").
21. *Taylor v New Zealand Poultry Board*, [1984] 1 NZLR 394 at 398 (CA), Cooke J. For consideration on this point, see Sian Elias, "Sovereignty in the 21st Century: Another Spin on the Merry-go-Round" (2003) 14 Pub L Rev 148 at 160 [Elias, "Sovereignty"].

parliamentary competence.[22] As I note in Part III, other potential limits have also been proposed.

The principle operates in different manner in Australia and Canada.[23] Unlike the United Kingdom and Aotearoa New Zealand, Australia and Canada are federations with codified and entrenched constitutions. The legislative power of the Commonwealth and Dominion Parliaments are restricted to the heads of power enumerated in each constitution,[24] and the judiciary is empowered to review legislation passed by the parliament.[25] In this sense, neither the Australian nor the Canadian Parliament can accurately be regarded as possessing the Diceyean capacity to make any law whatever, and nor is any person or body prevented from being able to set aside the legislation that their parliament enacts. Recognizing these limitations, scholars have suggested that "the doctrine of parliamentary sovereignty simply does not apply in countries with entrenched constitutions"[26] or perhaps applies "only in a heavily qualified form."[27] However, even if the principle does not have determinative force, the concept of parliamentary sovereignty functions at a deeper level in both states, conditioning

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22. See Matthew SR Palmer, "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders" (2006) 17 Pub L Rev 133; Sian Elias, "Mapping the Constitutional" (2014) NZLR 1 [Elias, "Mapping"]; Edward Willis, "Limits on Constitutional Authority" (2014) 22 Waikato L Rev 87; Robin Cooke, "Fundamentals" (1988) NZLJ 158 at 164.
23. Note that some dispute that the doctrine operates at all in Australia and Canada. See *e.g.* David Kinley, "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law" (1994) 22 Fed L Rev 194 at 195; Peter Russell, "Standing up for Notwithstanding" (1991) 29 Alta L Rev 293 at 294. For an excellent distillation of these issues, see Ryan Goss, "What Do Australians Talk About When They Talk About 'Parliamentary Sovereignty'?" (Paper delivered at the Public Law Conference, University of Melbourne, 13 July 2018) [unpublished].
24. *Commonwealth of Australia Constitution Act 1900* (UK), 63 & 64 Vict, c 12, s 51 [*Australian Constitution*]; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91, 92(10) [*Canadian Constitution*].
25. In Australia, the power of constitutional review has been described as "axiomatic." See *Australian Communist Party v Commonwealth* (1951), 83 CLR 1 at 262 (HCA), Fullagar J; *Canadian Constitution*, *supra* note 24, s 52(1).
26. Robin Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) 29 Osgoode Hall LJ 215 at 236; David E Smith, *The Invisible Crown: The First Principle of Canadian Government,* revised ed (University of Toronto Press, 2013) at 35.
27. Goldsworthy, *supra* note 15 at 1. For discussion as to how Canadian and Australian legal scholars at the turn of the twentieth century sought to reconcile parliamentary sovereignty with federalism, see Oliver, *supra* note 16.

the relationship between the parliament and the judiciary via a broader faith in majoritarian politics and representative government.[28]

In Australia, scholars have acknowledged that parliamentary sovereignty "was never a feature of Australian constitutional arrangements,"[29] but they nonetheless identify a "culture of parliamentary sovereignty"[30] that continues to influence the operation of public power. In *Momcilovic v. The Queen*, for example, the High Court rejected the notion that parliamentary sovereignty applies in Australia,[31] but nonetheless adopted a more deferential approach to the interpretation of human rights acts than courts in the United Kingdom.[32] While this outcome rested in part on textual and constitutional distinctions, the principle retains purchase in other fields. In "politically sensitive areas," for instance, scholars have remarked that the Court's reluctance to interfere may even "cross the fine line that separates 'judicial restraint' from abdication of judicial responsibility."[33] From time to time, individual Justices of the Court have also emphasized the enduring significance of parliamentary supremacy in Australia. The doctrine has been described as "a basic principle of the legal system which has been inherited in this country from the United Kingdom"[34] and as "deeply rooted as any in the common law."[35] Reflecting its connection to faith in majoritarian politics, Justices have remarked that the doctrine is consistent with and reinforces "confidence in a system of parliamentary government with ministerial responsibility,"[36] such that

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28. See Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge University Press, 1991) at 4, cited in Goss, *supra* note 23. See also Leslie Zines, *The High Court and the Constitution*, 5th ed (Federation Press, 2008) at 565-66.
29. Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) at 76.
30. *Ibid* at 93. For a similar argument in Canada, see Elliot, *supra* note 26 at 235-36.
31. See *e.g. Momcilovic v the Queen* [2011] HCA 34 at paras 156-157, Gummow J.
32. Referring to *Ghaidan v Godin-Mendoza* [2004] UKHL 30. For discussion, see Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2015) at 206-209.
33. Tony Blackshield, "The High Court's Implied Rights Experiment" in Matthew Groves, Janina Boughey & Dan Meagher, eds, *The Legal Protection of Rights in Australia* (Hart, 2019) 53 at 76 (Referring generally to immigration cases as well as the recent *Alley v Gillespie* [2018] HCA 11.
34. *Kable v Director of Public Prosecutions (NSW)* (1996), 189 CLR 51 at 74 (HCA), Dawson J [*Kable*].
35. *Ibid* at 76, Dawson J.
36. *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24 (HCA), Barwick CJ. See *Australian Constitution*, *supra* note 24, s 64.

once the judiciary has "ascertained the true scope and effect of valid legislation [it] should give unquestioned effect to it."[37]

Similar support is found in Canada. Patriation of the Canadian Constitution in 1982 "significantly narrowed the principle of parliamentary sovereignty"[38] by imposing limits on the capacity of Parliament to legislate and codifying the authority of the judiciary to review enactments. While this may have transformed the Canadian system of government "from a system of parliamentary supremacy to one of constitutional supremacy,"[39] the broader principle "remains foundational to the structure of the Canadian state."[40] Indeed, as Jean Leclair has noted, sections 1 and 33 of the *Charter* "constitute a partial recognition of parliamentary supremacy,"[41] and the Supreme Court of Canada continues to decide cases on the basis of this principle, suggesting that "some variant of parliamentary sovereignty continues to subsist in Canadian constitutional law."[42] As the Supreme Court has recently confirmed, Parliament is supreme over both the executive and judiciary within its constitutional limits.[43]

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37. *Kable*, *supra* note 34 at 590, Dawson J. See also, *Kruger v Commonwealth* (1997), 190 CLR 1 at 73 (HCA), Dawson J.
38. Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Irwin Law, 2017) at 86.
39. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Reference re Secession*].
40. *Reference re PanCanadian Securities Regulation*, 2018 SCC 48 at para 58 [*Securities Reference*]. See also John Lovell, "Parliamentary Sovereignty in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) at 189.
41. Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389 at 420, citing *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91, 103. Dickson CJ wrote:

    > [I]n the residual area reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the legislatures, not the courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes…[t]he *grundnorm*…[of the Canadian constitution is]…the sovereignty of Parliament (*ibid* at 103).

42. Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21 Rev Const Stud 13 at 13.
43. *Securities Reference*, *supra* note 40 at para 58.

2. CAPACITY OF PARLIAMENT TO CONTROL ITS OWN PROCEDURES

It may make little sense to speak of the parliament being supreme "within limits,"[44] but wherever those limits exist, they do not extend to matters internal to the parliamentary process. A long line of judicial and parliamentary authority, stretching even beyond the English *Bill of Rights 1688*,[45] protects the capacity of Parliament to exercise its constitutional functions as a legislature free from external interference or frustration.[46] Following their shared constitutional foundations, the judiciaries in Australia, Canada, and Aotearoa New Zealand have each confirmed that courts will refrain from interfering in the internal affairs of their parliaments.[47]

Uncertainties do exist: some doubt persists as to whether the principle reflects jurisdictional or prudential grounds;[48] the precise scope of the legislature's exclusive authority remains difficult to identify clearly in the abstract; and some inroads have been made.[49] Nonetheless, the general rule remains that parliaments have exclusive right of control over their own proceedings. Among other conditions, this means that courts will not intervene to compel a minister to introduce a bill or require a particular form of consultation be undertaken before that bill is debated or voted upon.[50] As President Cooke of the New Zealand Court of Appeal explained in *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* (*Sealords*):

> Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament.…public policy

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44. Goss, *supra* note 23 at 18.
45. 1 Will & Mar, Sess 2, c 2.
46. See *e.g. Strode's Case*, 3 Howell's State Trials 294; *Privilege of Parliament Act 1512* (UK), 4 Hen VIII, c 8. For a recent affirmation of this principle, see *Miller No 2*, *supra* note 17 at para 50.
47. For discussion see *Osborne v Commonwealth* (1911), 12 CLR 321 at 336 (HCA); *Canada (House of Commons) v Vaid*, 2005 SCC 30; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, [1993] 2 NZLR 301 (CA) [*Sealords*].
48. In Australia, see *e.g. Cormack v Cope* (1974), 131 CLR 432 (HCA); *Victoria v Commonwealth* (1975), 134 CLR 81 (HCA).
49. For instance, the courts are able to adjudicate whether manner and form provisions have been complied with when enacting legislation. See *e.g. Attorney-General (Western Australia) v Marquet*, [2003] HCA 67; *R v Mercure*, [1981] 1 SCR 234; *Shaw v Commissioner of Inland Revenue*, [1999] 3 NZLR 154 (CA).
50. *Sealords*, *supra* note 47 at 307-8 (CA).

> requires that the representative chamber of Parliament should be free to determine what it will or will not allow to be put before it.[51]

This position reflects the privileges and immunities afforded to the dominion parliaments, but as President Cooke makes clear, in reinforcing the power and authority of a democratic majority, it is also an incident of, or shares a common normative commitment with, parliamentary supremacy.[52] Of course, parliamentary supremacy does not necessarily justify a broad or narrow account of parliamentary privilege, but the doctrine speaks to the powers and capacity of a representative institution to carry out its work.[53] In essence, while parliament's competence may be limited, its authority to develop its own procedures and rules governing the introduction and debate of proposed legislation—and whether particular parties are consulted or not—cannot be challenged.

3. PARLIAMENTARY SUPREMACY AND THE PEOPLE

The principle of parliamentary supremacy operates to preclude external actors from placing constraints on the legislature when it is introducing or considering legislation. This privilege afforded to parliament is consistent with a particular construction of the institution and of the people it represents. Indeed, parliamentary supremacy reflects and constructs a specific vision of democracy. In its democratic ideal, the doctrine presumes homogeneity onto its participants.[54] All citizens within the polity are presumed to be members of a "single-status community,"[55] enjoying an undifferentiated right to participate in political decision making. Consequently, no external actor is entitled to a distinctive or special access to the peoples' body. This formally neutral vision of justice serves the valuable democratic goal of equal citizenship, but it can also "overlook deeply imbalanced relations of power" between *peoples* within the state,[56] such as between

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51. *Ibid* at 308.
52. Alan Blow, "Parliamentary Sovereignty: A Law unto Itself" (Speech delivered at a seminar held by the Australia and New Zealand Association of Clerks-At-The-Table, 22 January 2019) [unpublished].
53. See generally Stuart Larkin, "Parliamentary Privilege, Parliamentary Sovereignty, and Constitutional Principle" (11 February 2013), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org/2013/02/11/stuart-lakin-parliamentary-privilege-parliamentary-sovereignty-and-constitutional-principle>.
54. Audra Simpson, *Mohawk Interruptus: Political life across the borders of settler states* (Duke University Press, 2014) at 16.
55. Geneviève Nootens, *Popular Sovereignty in the West: Polities, Contention, and Ideas* (Routledge, 2013) at 58.
56. Stephen Tierney, "Federalism and the Plurinational Challenge" in Amnon Lev, ed, *The Federal Idea: Public Law Between Governance and Political Life* (Hart, 2017) 227 at 235.

Indigenous and non-Indigenous communities. Incorporating distinct peoples into a larger, undifferentiated mass of formally equal citizens does not negate the reality of contestation between different political communities, but it does ensure that constitutional doctrines and governance institutions are blind to this fact.[57]

These challenges were largely ignored, and their complexities avoided, in the development of government structures and institutions in Australia, Canada, and Aotearoa New Zealand. As Patrick Emerton has explained in relation to Australia, the democratic and popular frame of government that was imposed over hundreds of existing political communities was "predicated on the absence of [ethnic] minorities within the polity."[58] Successive legislative reforms to liberalize the franchise may have subsequently included Indigenous peoples within the settler-state polity, but it erased their status as distinct political communities. This is important because it suggests that parliamentary supremacy, as developed at Westminster, may be inappropriate in circumstances where a state is comprised of multiple political communities. In these circumstances, parliamentary supremacy does not simply countenance but sanctions the capacity of a numerically larger political community to infringe upon the rights of a numerically smaller political community. As the New Zealand High Court has remarked, "[i]f content of legislation offends, the remedies are political and ultimately electoral. The fact those alternatives seem monumentally difficult, indeed unreal, to particular persons, or to those espousing unpopular causes, is no more than a dark side of democracy."[59]

The dark side of democracy offers little for those disconnected from the majority political community. For these three settler states, the nature and history of colonization mean that "not all individuals and groups have the same *ex ante* chance of being in the majority on certain issues."[60] The vision of formally equal citizens empowered "to shape the social context in which they live"[61] by electing members of parliament, which motivates judicial deference to parliament and

57. For discussion, see Harry Hobbs, "Aboriginal and Torres Strait Islander Peoples and Multinational Federalism in Australia" (2018) 27 Griffith L Rev 307 at 312.
58. Patrick Emerton, "Ideas" in Cheryl Saunders & Adrienne Stone, eds, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143 at 156.
59. *Westco Lagan Ltd v Attorney-General*, [2001] 1 NZLR 40 at para 95 (HC).
60. Paul Patton, "The Limits of Decolonization and the Problem of Legitimacy" in David Boucher & Ayesha Omar, eds, *Decolonisation: Evolution and Revolution* (Wits University Press, forthcoming) at 4, cited in Kirsty Gover, "From the Heart: The Indigenous Challenge to Australian Public Law" in Jason Varuhas & Shona Wilson Stark, eds, *The Frontiers of Public Law* (Hart, 2020) at 210-11.
61. Thomas Pogge, "Creating *Supra*-National Institutions Democratically: Reflections on the European Union's 'Democratic Deficit'" (1997) 5 J Political Philosophy 179.

parliamentary processes, omits the situation of Indigenous peoples. To put it simply, the notion that Indigenous communities participate equally in the effective control of government "appears at best a hollow ideal."[62]

B. INDIGENOUS PEOPLES AND SELF-DETERMINATION

Indigenous peoples are members of settler-state polities. On this basis they are entitled to vote in regular elections and have their voices heard through the ordinary means of political participation and electoral accountability. Indigenous peoples are also members of distinct political communities who continue to exercise their inherent right to self-determination in myriad ways. The normative commitment underlying the principle of parliamentary supremacy as it applies in Australia, Canada, and Aotearoa New Zealand ignores the existence of multiple overlapping sites of political authority, potentially clashing with Indigenous peoples' collective right to self-determination. Further, as demographic minorities within the settler state, Indigenous peoples' right to be involved in law making that affects their rights and interests may be inhibited by judicial reluctance to interfere in parliament's internal affairs.

1. A COMPLEX TERM

Self-determination has been described as the "river in which all other rights swim."[63] This is because, at its most basic, self-determination "is the right to make decisions."[64] The right flows from and is connected to Indigenous peoples' status as prior self-governing communities who have not ceded their sovereignty. Palawa lawyer Michael Mansell explains:

> Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the existence of Aboriginal sovereignty.[65]

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62. Patton, *supra* note 60 at 5.
63. Michael Dodson, Address made at the First Session of the Commission on Human Rights Working Group (24 November 1995), cited in Craig Scott, "Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea" (1996) 18 Hum Rts Q 814 at 814.
64. Austl, Commonwealth, Human Rights and Equal Opportunity Commission, *Aboriginal and Torres Strait Islander Social Justice Commission: First Report 1993* (Australian Government Publishing Service, 1993).
65. Michael Mansell, "Finding the Foundation for a Treaty with the Indigenous Peoples of Australia" (2002) 4 Balayi: Culture, L & Colonialism 83 at 87.

The sovereignty that Indigenous people exercised before colonization, at the time of European settlement, and still retain today, deals with authority at its most fundamental level. As Mansell explains, sovereignty is "the bedrock on which Aboriginal rights and entitlements are based"; sovereignty "goes at the heart of the Aboriginal struggle. It sustains land rights, customary law and self-determination."[66]

As a western concept, "sovereignty" may not be able to capture a complete understanding of Indigenous epistemologies and perspectives on law, governance, and culture.[67] It is for this reason that Indigenous peoples have sought to develop an approach to sovereignty "that respects the understanding of power in indigenous cultures."[68] Indigenous peoples across the world consider sovereignty to be inherent to their communities. It is a "spiritual notion,"[69] a basic power derived "from within a people or culture,"[70] "carried by the body,"[71] and located in the hands of Indigenous people, as individuals and as groups, to determine their futures. It stems "from the ancient reciprocal relationship we have with our lands. This relationship finds its roots in our connection to kin and country, manifesting in our song, dance and story, our language, ceremony and law."[72] In this sense, sovereignty is an expression of Indigenous peoples' desire "to continue to exercise our authority in political, social and legal ways, at least among our own people, following our own understandings of our (political authority)."[73] It reflects

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66. Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) at 74.
67. Taiaiake Alfred, "Sovereignty" in Joanne Barker, ed, *Sovereignty Matters: Locations of Contestations and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 33 at 33.
68. Taiaiake Alfred, *Peace, Power Righteousness: An Indigenous Manifesto*, 2nd ed (Oxford University Press, 2009) at 78.
69. "The Uluru Statement from the Heart" (2017), online: *The Uluru Statement* <ulurustatement.org/the-statement> [*Uluru Statement*].
70. Kirke Kickingbird et al, "Indian Sovereignty" in John R Wunder, ed, *Native American Sovereignty* (Garland Publishing, 1999) 1 at 2.
71. See Aileen Moreton-Robinson, "Introduction" in Aileen Moreton-Robinson, ed, *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin 2007) 1 at 2.
72. Pekeri Ruska & Callum Clayton-Dixon, "Words of the Struggle" *Black Nations Rising* (18 January 2015) at 10, online: <issuu.com/blacknationsrising/docs/black_nations_rising_issue_1__onlin>.
73. Patricia A Monture-Angus, *Journeying Forward, Dreaming Aboriginal People's Independence* (Fernwood, 1999) at 30.

Indigenous peoples' aspirations to "take charge of our own affairs and lead our own development agendas."[74]

Yet sovereignty remains a complex and ambiguous term.[75] Despite, or perhaps because of, its normative power as an "important component of Indigenous political culture,"[76] a wide range of views and attitudes towards and about sovereignty exist among Indigenous peoples.[77] Some Indigenous peoples use the language of sovereignty to challenge the political authority of the settler state. Yellowknives Dene political theorist Glen Coulthard, for example, explains that assertions of Indigenous sovereignty are aimed at fundamentally questioning "the legitimacy of the settler state's claim to sovereignty over Indigenous people and their territories."[78] Tanganekald, Meintangk, and Boandik professor Irene Watson understands sovereignty in a similar manner. Watson dismisses efforts to recognize elements of Indigenous sovereignty and self-determination by or within Australian law as "inevitably reinstat[ing] colonial law"[79] and thus leaving Indigenous peoples "subservient to the rules of the state."[80]

Not all Indigenous peoples and communities use the language of sovereignty in this way. Māori professor Roger Maaka and non-Indigenous Canadian academic Augie Fleras have noted that "Indigenous claims to sovereignty rarely entail separation or secession but instead a reconstitutionalising of the first principles upon which Indigenous peoples-state relations are governed."[81] Eualeyai and Kamillaroi scholar Larissa Behrendt explains that sovereignty in this sense is:

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74. Noel Pearson, "In Pursuit of Regional, Reciprocal Responsibility Settlement for Cape York: What is Right Package of Reforms for Indigenous Social, Political, Economic and Cultural Development" (Speech delivered at the National Native Title Conference, Port Douglas, 18 June 2015) [unpublished].
75. For a larger exploration of Indigenous peoples' political aspirations through the language of sovereignty, see Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) at 57-75 [Hobbs, *Indigenous Aspirations*].
76. Sarah Maddison, *Black Politics: Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009) at 49.
77. See Bidtah Nellie Becker, "Sovereignty from the Individual Diné Perspective" in Lloyd Lee, ed, *Navajo Sovereignty: Understandings and Visions of the Diné People* (University of Arizona Press, 2017) 43 at 43.
78. Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) at 36.
79. Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) at 2.
80. *Ibid* at 91.
81. Roger Maaka & Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 89 at 89.

> a device by which other rights can be achieved. Rather than being the aim of political advocacy, it is a starting point for recognition of rights and inclusion in democratic processes. It is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing from which to separate from it.[82]

On this account:

> [s]overeignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our indigenous political institutions.[83]

At root in many, though not all, of these calls is not secession but autonomy: a desire to "get greater control over our lives and future."[84] This approach is consistent with the modern treaties signed between First Nations and the Canadian Crown. First Nations engaged in these processes perceive them as mechanisms to become "full and equal participants of Canadian society"[85] while maintaining a domain of separate jurisdiction.

This understanding of sovereignty is also reflected in the *UNDRIP*. Article 3 of the Declaration provides that Indigenous peoples may "freely determine their political status and freely pursue their economic, social and cultural development." This broad entitlement is particularized in Articles 4 and 5, which guarantee Indigenous peoples the "right to autonomy or self-government" in relation to "internal and local affairs" as well as the right to maintain their distinct political, legal, economic, social, and cultural institutions. Consistent with this right, Indigenous peoples are entitled to "belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned"[86] as well as the right to maintain and manifest their traditions, languages, customs, histories, and cultures.[87] Indigenous peoples are also entitled

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82. Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) at 99.
83. National Aboriginal Island Health Organisation (NAIHO Collective), "Sovereignty" (1983), online: <www.kooriweb.org/foley/resources/story8.html>, cited in *ibid* at 100.
84. Lars-Anders Baer, "The Right of Self-Determination and the Case of the Sámi" in Pekka Aiko & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000) 223 at 230.
85. Edward Allen, "Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement" (2004) 11 Intl J Minority & Group Rights 233 at 234.
86. *UNDRIP*, *supra* note 6, art 9.
87. *Ibid*, arts 11-16.

to participate within the state. Article 5 provides a broad guarantee that Indigenous peoples have the right to "participate fully…in the political, economic, social and cultural life of the State." Consequently, Indigenous peoples are entitled to a nationality[88] as well to participate in any state process that may affect their rights "in accordance with their own procedures" and "decision-making institutions."[89] In other words, the Declaration entitles Indigenous peoples both to participate in the political life of the state and to "preserve and develop their own distinct societies, to exist side-by-side with the majority society."[90]

2. POTENTIAL CLASHES

Two potential clashes can immediately be noted. First, Indigenous peoples' status as members of overlapping political communities challenges the conception of the people constructed by parliamentary supremacy. If a state is comprised of multiple political communities, it may not be appropriate for law making to be undertaken in conditions where one political community constitutes an overwhelming demographic majority. In these circumstances, the ability of numerically smaller political communities to have their interests heard in the law-making process will be severely constrained. Alternative arrangements may need to be devised.

Second, Indigenous peoples' status as sovereign political communities gives rise to a right to be involved in law-making processes. This includes both a right to self-government and a right to shared-government. A right to self-government appears to conflict directly with the principle of parliamentary supremacy. While we have seen that the doctrine itself is subject to differing applications, in its orthodox articulation parliamentary supremacy holds that there is an ultimate law-making authority. Recognizing a separate domain of jurisdiction, within which the state parliament has no authority, poses a challenge to this account. Nonetheless, this conflict can be reconciled relatively simply by adapting federal principles. Treaties or agreements struck between the state and Indigenous communities could recognize a domain of Indigenous jurisdiction that is inherent to that community and within which state law has no application. If constructed equitably, this arrangement could challenge the monolegalism inherent within accounts of parliamentary supremacy and capture the vitality and force of

88. *Ibid*, art 6.
89. *Ibid*, arts 18-19.
90. Matthias Åhrén, *Indigenous Peoples Status in the International Legal System* (Oxford University Press, 2016) at 132. See also ch 5 (*ibid*).

Indigenous legal orders.[91] This account may be idealistic, but the fact that it can be squared with parliamentary supremacy in a somewhat straightforward manner means that it does not form the focus of this article.

The right to participate within the state indicates that self-determination also encompasses a right of shared rule. While it is appropriate for Indigenous peoples to exercise jurisdiction over matters that solely affect their interests, issues that affect both Indigenous and non-Indigenous peoples should be determined in consultation.[92] The *UNDRIP* itself does not outline a precise standard, instead indicating that states should undertake "effective consultation"[93] or "consul[t] and cooperat[e]"[94] with Indigenous peoples, leaving an appropriate norm to develop over time. In recent years, United Nations bodies examining the extant practice have outlined several key points. These bodies have found that consultation should be undertaken at an early stage of any process, in good faith, through culturally appropriate procedures, with representatives freely chosen by Indigenous peoples within their own representative structures. There should be "no coercion, intimidation or manipulation," and there must be sufficient time and information.[95] As they have made clear, consultation as an element of self-determination is not a "mere right to be involved" or simply to be heard but a right "to influence the outcome," including by proposing alternative and distinct models to those offered by government or other actors,[96] as well as the "freedom to guide and direct the process of consultation."[97] Importantly, there must be "a fair, independent, impartial, open and transparent" mechanism to facilitate consultation and alleviate power imbalances.[98] Even if consent is not required, meaningful and genuine consultation is a clear element of Indigenous self-determination and it must be undertaken.

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91. Claire Charters, "Recognition of Tikanaga Māori and the Constitutional Myth of Monolegalism: Reinterpreting Case Law" (15 January 2019) at 5, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3316400>.
92. Åhrén, *supra* note 90 at 138-43; Hobbs, *supra* note 57 at 321-24.
93. *UNDRIP*, *supra* note 6, art 30(2).
94. *Ibid*, arts 15(2), 17(2), 19, 32(2), 36(2), 38.
95. Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UNESCOR, 2005, Supp No 23, UN Doc E/C.19/2005/3, at 12.
96. Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human-Rights Based Approach*, UNGAOR, 73rd Sess, Supp No 53 A, UN Doc A/HRC/39/62, at 5 [*Expert Mechanism*].
97. *Ibid* at 6.
98. *UNDRIP*, *supra* note 6, art 27.

The precise institutional arrangement to meet this standard can take diverse forms. As we will see below, Canada and Aotearoa New Zealand have developed fiduciary-like principles that require the government to consult with Indigenous peoples.[99] However, it is not clear that this is sufficient because, as Article 19 of the *UNDRIP* makes clear, Indigenous peoples' right to self-determination encompasses the right to influence the development and drafting of *legislation*. This right potentially conflicts with the principle of parliamentary supremacy in these settler states by challenging the legislatures' authority to control their own procedures. Is this right recognized in the domestic law of Australia, Canada, or Aotearoa New Zealand? If not specifically protected, how do the courts mediate this apparent conflict? Does the principle of parliamentary supremacy displace Indigenous peoples' collective right to self-determination? If so, should it? In the following Part, I explore how courts in Australia, Canada, and Aotearoa New Zealand have answered these questions.

II. THREE CASE STUDIES

A. AUSTRALIA

In 2008, Joan Maloney was charged with possessing two bottles of liquor in a public place without a permit, contrary to several provisions of a Queensland law. Maloney was an Aboriginal woman from the overwhelmingly Indigenous Bwgcolman community (Palm Island). At this time, Bwgcolman was one of only eighteen places in Queensland declared a restricted area—every one of which was located in an Indigenous community.[100] Maloney did not contest the facts. Instead, she argued that the relevant provisions of the *Liquor Act 1992* (Queensland) were inconsistent with a federal law prohibiting racial discrimination and therefore invalid by operation of section 109 of the Australian *Constitution*.[101] A majority of the High Court accepted that the impugned provisions discriminated against Aboriginal and Torres Strait Islander peoples. The question became whether they could be characterized as a special measure under section 8 of the *Racial*

99. Kirsty Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism" (2016) 38 Sydney L Rev 339. See also Parts II(B), II(C), below.
100. *Maloney* HCA, *supra* note 1 at para 202, Bell J.
101. In the event of conflict between federal and state laws, section 109 of the *Australian Constitution* renders state laws invalid to the extent of the inconsistency. See *Australian Constitution*, *supra* note 24, s 109.

Discrimination Act 1975 (Cth) (*RDA*);[102] if so, the provisions would not be inconsistent.

At issue in *Maloney* was the intersection of parliamentary supremacy and Indigenous peoples' collective right to self-determination. Maloney and the National Congress of Australia's First Peoples argued that consent is an integral element of Indigenous peoples' right to self-determination.[103] Although the views of the community had been sought, they argued that the process was insufficient. The state demurred. There was no obligation on the text to undertake consultation or obtain consent. Whether the provisions were necessary was "principally a matter for the Parliament to assess," and the responsible Minister was ultimately "accountable to Parliament" for their decision.[104] These two competing principles underlay the decision, but the resolution of *Maloney* ultimately turned on the particular legal framework. It is to that framework we now turn before exploring the decision in detail.

The Australian *Constitution* divides responsibilities between the several states and the federal government. Legislative authority over Indigenous affairs is shared; state and federal parliaments enjoy concurrent plenary legislative power in this area.[105] Limited fetter on that authority exists. Alone among common law states, Australia does not possess a national human rights act or constitutional bill of rights.[106] Similarly, unlike Canada or Aotearoa New Zealand, no treaty between Aboriginal and Torres Strait Islander peoples and the Crown was signed at first contact or in the years following settlement.[107]

In the absence of a foundational treaty relationship or constitutional rights protection, there are limited opportunities for courts to protect and promote Indigenous peoples' interests. Commonwealth involvement in Indigenous affairs is primarily exercised through sections 51(xxvi) and 122 of the Australian *Constitution*. Section 51(xxvi) empowers the federal Parliament with the authority

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102. This provision transposes Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. See *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, art 1(4) (entered into force 4 January 1969).
103. See *Maloney v The Queen*, [2013] HCA 28 (Submission of the Appellant at paras 53-61) [*Appellant's Submissions*]; *Maloney v The Queen*, [2013] HCA 28 (Submission of the National Congress of Australia's First Peoples at para 26); *Expert Mechanism*, *supra* note 96 at 6.
104. *Maloney v The Queen*, [2013] HCA 28 (Submission of the Respondent at para 63).
105. *Union Steamship Co of Australia Pty Ltd v King* (1988), 82 ALR 43 (HC).
106. George Williams & Daniel Reynolds, *A Charter of Rights for Australia*, 4th ed (University of New South Wales Press, 2017) at 17.
107. Harry Hobbs & George Williams, "The Noongar Settlement: Australia's First Treaty" (2018) 40 Sydney L Rev 1 at 22-23.

to make laws with respect to "the people of any race." The High Court has never definitively ruled on the scope of the race power, but the orthodox position is that the broadly framed provision permits the Parliament to enact legislation that imposes a disadvantage on Aboriginal and Torres Strait Islander peoples.[108] The situation is similar for section 122. That provision authorizes the Parliament to "make laws for the government of any territory," thus empowering federal action in the Northern Territory. Few express or implied limitations on the scope of the territories power have been found.[109]

Some statutory rights protections do exist. The *RDA* prohibits acts or legislation that discriminate on the basis of race, except where such discrimination is a "special measure" designed to secure the advancement of members of a particular race.[110] Its protections are narrow. As ordinary Commonwealth legislation, the *RDA* is not entrenched against the Commonwealth, and the federal Parliament has passed at least three laws that override or exclude its protections over the last two decades.[111] In each case, that legislation has expressly discriminated against Aboriginal and Torres Strait Islander peoples. Nonetheless, the *RDA* does apply to state legislation and it has been effective in protecting Indigenous peoples by rendering discriminatory legislation in Queensland[112] and Western Australia[113] inoperative. In *Maloney*, the High Court was asked to make a similar finding.

Critical to the determination was the issue of consultation. Article 1(4) of the *Convention on the Elimination of Racial Discrimination* (*CERD*) and section 8 of the *RDA* do not expressly require consultation with an affected ethnic or racial community.[114] Maloney contended, however, that "considerable developments

108. Robert French, "The Race Power: A Constitutional Chimera" in HP Lee & George Winterton, eds, *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180 at 206. See *Western Australia v Commonwealth*, [1995] HCA 47; *Kartinyeri v Commonwealth*, [1998] HCA 22.

109. See generally *Berwick Ltd v Gray, Deputy Commissioner of Taxation* (1976) 133 CLR 603 at 607 (HCA), Mason J; *New South Wales v Commonwealth of Australia*, [2006] HCA 52 at paras 328-45, Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 604-605 (HCA), Gummow J.

110. *Racial Discrimination Act 1975* (Cth), 1975/52, ss 8, 9; *Gerhardy v Brown* (1985), 159 CLR 70 [*Gerhardy*].

111. *Native Title Act 1993* (Cth), 1993/110, Part 2, Division 2; *Native Title Amendment Act 1998* (Cth), 1998/97, Schedule 1, s 3; *Northern Territory National Emergency Response Act 2007* (Cth), 2007/129, Part 4.

112. *Mabo v Queensland (No 1)* (1988), 166 CLR 186 (HCA).

113. *Western Australia v Commonwealth* [1995] HCA 47.

114. For suggestions as to why this is the case, see Rachel Gear, "Commentary: Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of Maloney v The Queen" (2014) 21 James Cook U L Rev 41 at 49.

in international jurisprudence and international standard-setting" evidenced an evolved position at international law relevant for the construction of the *RDA*.[115] Certainly, the Committee on the Elimination of Racial Discrimination ("CERD Committee"), an independent expert body tasked with monitoring the implementation of the *CERD*, has twice confirmed that consultation is required. In General Recommendation 23, the CERD Committee called on states to ensure that "no decisions directly relating to [Indigenous peoples'] rights and interests are taken without their informed consent."[116] Similarly, in General Recommendation 32, the CERD Committee concluded that special measures must be "designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities."[117] These statements are fortified by the development of Indigenous-specific rights instruments articulated above, including Article 19 of the *UNDRIP* and the thematic advice provided by the Expert Mechanism on the Rights of Indigenous Peoples.

The High Court rejected the relevance of these instruments. For five of the six Justices, the question was a simple exercise of statutory interpretation. Although "as a matter of common sense," consultation "is likely to be essential to the practical implementation"[118] of any measure, neither the text of the *RDA* nor the *CERD* expressly required Parliament to consult the community whose interests are intended to be advanced. Consequently, consultation was held not to be a legal requirement.[119] The provision was declared valid, and Maloney's conviction was upheld.

In disclaiming or downplaying the relevance of extrinsic international legal materials in interpreting Australia's treaty obligations,[120] several justices revealed that concerns over parliamentary supremacy motivated their reasoning. For instance, while Chief Justice French considered that the output of treaty

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115. *Appellant's Submissions*, *supra* note 103 at para 53. Maloney also drew on comments in *Gerhardy*. See *Gerhardy*, *supra* note 110 at 28, Brennan J.

116. *Report of the Committee on the Elimination of Racial Discrimination*, UNGAOR, 52nd Sess, Supp No 18, UN Doc A/52/18 (1997) at 122.

117. Committee on the Elimination of Racial Discrimination, *General recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th Sess, UN Doc CERD/C/GC/32 (2009) at para 18.

118. *Maloney* HCA, *supra* note 1 at para 25, French CJ.

119. *Ibid* at paras 24, 91, 131, 176, 240. Justice Gageler reached the same conclusion but on different grounds, holding instead that international law does not impose "a priori procedural constraint" on special measures. See *ibid* at para 357.

120. For criticism on this aspect, see Patrick Wall, "The High Court of Australia's Approach to the Interpretation of International Law and its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28", Case Comment, (2014) 15 Melbourne J Intl L 1.

bodies like the CERD Committee "may illuminate the interpretation of [a] provision," it "does not mean that Australian courts can adopt 'interpretations' which rewrite the incorporated text."[121] Justice Kiefel held similarly, noting that courts can rely on extrinsic materials to aid interpretation only where they "can be accommodated in the process of construing the domestic statute" and have been agreed to by Australia.[122] Other members of the Court were even less accommodating. Justice Hayne held that only material that "existed at the time the [*RDA*] was enacted" would be relevant,[123] and Justice Crennan denied any role to such material. To do otherwise would "elevate non-binding extraneous materials over the language of the text of an international convention to which States Parties have agreed."[124] As Justice Bell warned, the ordinary meaning of the statute "cannot be supplemented by additional [non-binding] criteria."[125]

The case confirms that, absent statutory amendment, there is no requirement in Australian law that legislation designed to secure the advancement of Indigenous peoples either has their support or has been drafted in accordance with their wishes. However, some members of the Court were careful to note that the absence of a genuine consultative process may still be relevant in certain circumstances, leaving open the prospect that inadequate consultation could lead to a provision's invalidation. This is because, Chief Justice French and Justice Bell explained, to satisfy the requirements of a special measure, a law must be "capable of being reasonably considered to be appropriate and adapted to achieving" its purpose.[126] While the Justices noted that it is not appropriate for the judiciary to "determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose,"[127] a "court can determine whether the political branch acted reasonably in making [its] assessment."[128] Whether any consultation actually took place is an evidentiary point relevant for that determination. In the absence of any genuine consultation, "it may be

121. *Maloney* HCA, *supra* note 1 at para 23.
122. *Ibid* at para 175.
123. *Ibid* at para 61.
124. *Ibid* at para 134.
125. *Ibid* at para 235.
126. *Ibid* at para 20, citing *Gerhardy*, *supra* note 110 at 149, Deane J. See also *Maloney* HCA, *supra* note 1 at para 246.
127. *Maloney* HCA, *supra* note 1 at para 20, citing *Gerhardy*, *supra* note 110 at 139, Brennan J [emphasis in original].
128. *Maloney* HCA, *supra* note 1 at para 20, French CJ. See also *ibid* at para 246, Bell J.

open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve."[129]

This reasoning leaves the door to meaningful consultation ajar. Litigants seeking to prise the door open a little further would be advised to build a comprehensive record demonstrating the inadequacy of any consultation.[130] However, any opening may be narrower than it initially appears. Concern over the appropriate role of the judiciary in monitoring Parliament is a feature of the test, but its exercise also reveals that courts may be reluctant to interrogate the extent of consultation in practice or challenge government assertions, particularly where competing evidence is light. The Explanatory Notes to the regulation declaring Bwgcolman a restricted area record that an alcohol management plan was desired by the community, but that the plan ultimately adopted "differ[s] from the recommendations" of the community's representatives.[131] It notes sparingly that "ongoing division…inhibited community agreement," compelling the government to draft "a compromise."[132] The source or intensity of that division is not explored.[133] In response, Maloney tendered fourteen affidavits from senior members of the community, alleging that "there was no or no real or effective consultation."[134] At the District Court, Chief Judge Durward accepted these statements as opinion genuinely held by the deponents but considered them insufficient for determining an issue as broad as community consultation.[135] In light of the Explanatory Notes, Chief Judge Durward held that it was open to infer that consultation had occurred.[136] The Court of Appeal and the High Court accepted this position with little discussion.[137]

The strength of Maloney's affidavits may have been limited when assessing consultation with a community of some two thousand people, but the approach of the Court of Appeal and High Court leaves much to be desired. As Kirsty Gover has argued, this issue was discussed "in only the most rudimentary terms

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129. *Ibid* at para 25, French CJ. See also *ibid* at paras 91, 246.
130. I thank Kate O'Regan for this point.
131. Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld), 2006/79, at para 9.
132. *Ibid*.
133. Though see *R v Maloney*, [2012] QCA 105 at para 46, McMurdo P [*Maloney* QCA].
134. *Maloney v Queensland Police Service*, [2011] QDC 139 at para 38.
135. *Ibid* at paras 43-44.
136. *Ibid* at para 45.
137. *Maloney* QCA, *supra* note 133 at paras 107-12, Chesterman JA & Daubney J; *Maloney* HCA, *supra* note 1 at paras 25, 319.

and with a strong emphasis on the reports provided by government officials."[138] If this approach is adopted in future cases the opportunity for meaningful review will be limited. This is especially so if the onus remains on the appellant to demonstrate that genuine consultation was not undertaken.

The decision in *Maloney* is problematic for another reason. Fundamentally, it misses the key point that makes Indigenous people vulnerable in this case. This is most clearly identifiable in Justice Crennan's judgment. She notes that "ordinarily neither consultation with constituents nor their consent to a law is a precondition to the legality of a statute."[139] This is because robust "democratic mechanisms" such as a "free, informed public debate, a free press and regular elections," through "which representative governments resolve contested policy," permit the electorate to issue their judgment at the end of a parliamentary term.[140] This is an accurate description of Australia's system of government, but it entirely ignores the distinctive position of Aboriginal and Torres Strait Islander peoples. As Indigenous peoples are a marginalized, extreme numerical minority, territorially dispersed across the country, the absence of a requirement of consultation, even when implementing coercive measures supposedly targeted at improving Indigenous peoples' lives, inhibits their capacity to contest and challenge government action. Judicial approaches that prioritize anxieties over parliamentary supremacy further diminish or erode what little opportunities exist for Indigenous peoples to be heard and have their interests considered in the development of legislation. This is problematic in and of itself, but it is especially challenging in a situation where the state has acknowledged that Indigenous peoples have a right to self-determination.

B. CANADA

The constitutional framework that underpins Canada's relationship with First Nations is materially distinct from that of Australia, but similar questions governing the clash of parliamentary supremacy and Indigenous peoples' right to self-determination have arisen. In *Mikisew Cree*, the Supreme Court of Canada confronted this issue. In 2012, the federal Minister of Finance introduced two

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138. "Indigenous-State Relationships and the Paradoxical Effects of Antidiscrimination Law: Lessons from the Australian High Court in *Maloney v The Queen*" in Jennifer Hendry et al, eds, *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave, 2018) 27 at 43. See also Maureen Tehan, "Practising Law and Politics in 1980s' Australia: The Liberating Effect of *Koowarta v Bjelke-Petersen*" (2014) 23 Griffith L Rev 92 at 106.

139. *Maloney* HCA, *supra* note 1 at para 135, Crennan J.

140. *Ibid*.

omnibus bills that would substantially reshape Canada's environmental protection regime.[141] Intended to allow Canada "to capitalize on its resource development potential,"[142] the bills proposed to facilitate the growth of extractive industries. Among other elements, industry would be permitted to build structures on or near waterways without requiring government approval, and protection mechanisms for fish and wildlife would be removed. The bills had the potential to adversely affect the Mikisew Cree First Nation's constitutionally protected treaty rights to hunt, trap, and fish. As the First Nation was not consulted at any stage in their development or prior to the granting of royal assent, the Mikisew Cree sought a declaration that the state owed and breached its duty to consult.

In Canada, the relationship between First Nations and the state is governed by a foundational "constitutional principle"[143] described as the honour of the Crown. This public fiduciary-like obligation is derived "from the Crown's assumption of sovereignty over lands and resources formerly held" by sovereign First Nations[144] and is a mechanism that aims at facilitating reconciliation between the Crown and Aboriginal peoples.[145] The principle "gives rise to different duties in different circumstances."[146] Where, for instance, the Crown has "assumed discretionary control over specific Aboriginal interests," such as reserve lands, a fiduciary duty to act in the Aboriginal group's best interests arises.[147] In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court confirmed that "[t]he honour of the Crown also infuses the processes of treaty making and treaty interpretation."[148] As "[i]t is always assumed that the Crown intends to fulfil its promises,"[149] the honour of the Crown requires any ambiguity to be

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141. The bills received royal assent in June and December 2012. See *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19; *Jobs and Growth Act*, SC 2012, c 31.
142. "Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures," 2nd reading, *House of Commons Debates*, 41-1, No 115 (2 May 2012) at 7470 (Hon Joe Oliver).
143. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.
144. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53 [*Haida Nation*].
145. *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66, McLachlin CJC & Karakatsanis J; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 436.
146. *Haida Nation*, *supra* note 144 at para 18. See also Chris W Sanderson, Keith B Bergner & Michelle S Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty" (2012) 49 Alta L Rev 821 at 824.
147. *Haida Nation*, *supra* note 144 at para 18. See *e.g. Guerin v The Queen*, [1984] 2 SCR 335.
148. *Haida Nation*, *supra* note 144 at para 19.
149. *R v Badger*, [1996] 1 SCR 771 at para 41, Cory J.

"resolved in favour of the Indians" and that treaties generally are "interpreted in a manner that maintains the integrity of the Crown."[150]

Fundamentally, the principle requires that the Crown act honourably "[i]n all its dealings with Aboriginal peoples."[151] For this reason, it also applies in circumstances where First Nations' rights have not been proven or settled by treaty. In these cases, the honour of the Crown gives rise to a duty to consult with and accommodate the interests of First Nations when contemplating conduct that might adversely affect potential or established Aboriginal or treaty rights.[152] Here, the duty to consult serves two purposes. First, it is an element to be considered when assessing whether Crown conduct has justifiably infringed asserted Aboriginal rights protected under section 35 of the *Constitution*.[153] Second, more broadly, as "a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process,"[154] it is intended "to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty."[155]

The extent or scope of consultation required to satisfy the duty differs in accordance with the strength of the claim and the significance of the potential infringement.[156] Owing to its source, however, in all cases consultation "must be consistent with the honour of the Crown";[157] that is, it "must be meaningful and performed in good faith, with the intention of substantially addressing the concerns of the affected Indigenous group."[158] Meaningful consultation may require "the Crown to make changes to its proposed action based on information obtained through consultations."[159] Although it is not possible to determine in advance the steps that must be taken, the Crown should take the interests and concerns

150. *Ibid* at para 9, Sopinka J.
151. *Haida Nation*, *supra* note 144 at para 17.
152. *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]; *Haida Nation*, *supra* note 144 at paras 16-25; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Canadian Heritage*]. See generally Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing, 2014).
153. *Sparrow*, *supra* note 152.
154. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 32 [*Rio Tinto*].
155. *Haida Nation*, *supra* note 144 at para 26.
156. *Ibid* at para 44.
157. *Ibid* at para 38.
158. Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Jennifer Goyder et al, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report (Centre for International Governance Innovation, 2017) 63 at 66. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 29.
159. *Haida Nation*, *supra* note 144 at para 46.

voiced by the affected Indigenous group seriously, by "substantially addressing"[160] them and, "wherever possible," ensuring that they are "demonstrably integrated into the proposed plan of action."[161]

The Mikisew Cree were not consulted, and their interests were consequently not addressed nor integrated into the development of the two omnibus bills. However, it was not clear whether the duty to consult applies to the development of policy in furtherance of the formulation and introduction of a bill. Could the Mikisew Cree successfully challenge the introduction of a bill on the basis of insufficient consultation? While the Supreme Court had previously demurred on this question,[162] several lower courts had considered it and reached different conclusions.[163] How would the Supreme Court respond?

The Court unanimously dismissed the appeal on procedural grounds.[164] Nevertheless, as the parties "made extensive submissions on the substantive issues in [the] appeal,"[165] all members of the Court considered the larger question.[166] A five to four majority confirmed that the honour of the Crown applies to Parliament. By seven to two, however, another majority rejected the proposition that the duty to consult applies to the law-making process. This latter majority was delivered in three separate judgments. Central to each was an overriding concern that extending the duty to consult to the law-making process would impermissibly interfere with parliamentary supremacy and infringe the separation of powers. Both principled and practical concerns were raised.

Consider first the Court's discussion on the separation of powers. While acknowledging that this principle "is not a rigid and absolute structure,"[167] the

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160. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168; *Canadian Heritage*, *supra* note 152 at paras 61-62.
161. *Halfway River First Nation v BC*, 1999 BCCA 470 at para 160.
162. *Rio Tinto*, *supra* note 154 at para 44.
163. For judicial decisions that upheld the applicability of the duty to consult once a bill has been introduced into the legislature, see *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244; *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at para 39. For examples where courts answered this question in the negative, see *R v Lefthand*, 2007 ABCA 206 at para 38; *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 60, de Montigny & Webb JJA [*Courtoreille* 2016].
164. *Mikisew Cree*, *supra* note 2 at paras 16-18, 54, 101, 148. Here, the Court held unanimously that the Federal Court lacked jurisdiction to consider the Mikisew Cree's application for judicial review.
165. *Ibid* at para 19, Wagner CJC, Karakatsanis & Gascon JJ.
166. For an illuminating exploration of the four judgments, see Nichols & Hamilton, *supra* note 8.
167. *Mikisew Cree*, *supra* note 2 at para 119, Brown J, citing *Wells v Newfoundland*, [1999] 3 SCR 199 at para 54.

majority judgments contended that its maintenance protects the process of legislative policy development and allows the legislature to fulfill its constitutional role. Consequently, courts should "exercise restraint"[168] lest they "trespass onto the legislature's domain"[169] and "step beyond the core of [their] institutional role."[170] This view is fortified by pragmatic considerations. As law making "is a highly complex process involving multiple actors across government,"[171] imposing a duty to consult would constrain "legislatures' ability to control their own processes"[172] and "grind the day-to-day internal operation of government to a halt."[173]

The majority judgments also understood the challenge as a threat to parliamentary supremacy. Imposing an obligation or restraint on the introduction of legislation was regarded as "a fetter on the sovereignty of Parliament itself,"[174] with the potential to "undermine its ability to act as the voice of the electorate."[175] This unease was most forcefully given voice by Justice Brown. In language reminiscent of Justice Crennan in *Maloney*, Justice Brown emphatically held that "[l]egislators are not bound to consult with affected parties before passing legislation,"[176] as "the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent."[177] While the surrounding legal context is distinct and First Nations in Canada have alternate means to contest and challenge state conduct—a point critical to the majority's forceful dismissal of the Mikisew Cree claim—the consequences of this approach remain concerning. As in Australia, it magnifies the specific disadvantages First Nations face in ensuring that their interests are considered in the design and formation of legislative policy development. While "it is open to First Nations…to lobby government officials and members of Parliament,"[178] as numerical minorities within the Canadian

168. *Mikisew Cree*, *supra* note 2 at para 2, Wagner CJC, Karakatsanis & Gascon JJ.
169. *Ibid* at para 35, Wagner CJC, Karakatsanis & Gascon JJ.
170. *Ibid* at para 2, Wagner CJC, Karakatsanis & Gascon JJ.
171. *Ibid* at para 164, Moldaver, Côté & Rowe JJ.
172. *Ibid* at para 38, Wagner CJC, Karakatsanis & Gascon JJ.
173. *Ibid* at para 164, Moldaver, Côté & Rowe JJ. See also *Courtoreille* 2016, *supra* note 163 at para 92, Pelletier JA.
174. *Mikisew Cree*, *supra* note 2 at para 122, Brown J, citing *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 560.
175. *Mikisew Cree*, *supra* note 2 at para 36, Wagner CJC, Karakatsanis & Gascon JJ.
176. *Ibid* at para 124, Brown J, citing *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 157.
177. *Mikisew Cree*, *supra* note 2 at para 124, Brown J, citing *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 37.
178. *Courtoreille* 2016, *supra* note 163 at para 62, de Montigny & Webb JJA.

state they will struggle to have their voices heard if their distinct status is erased and they are conceived as simply part of an undifferentiated mass of formally equal Canadian citizens.

A key factor in the majority decisions dismissing the appeal was the existence of alternative avenues for First Nations to seek vindication for their rights. Rather than interfere in the law-making process, the majority judgments considered that the Mikisew Cree could more appropriately challenge the adequacy of any consultation following enactment.[179] Crown conduct that purportedly infringes Aboriginal or treaty rights may be challenged under the test set out in *R v. Sparrow*.[180] Under this test, whether any consultation was undertaken, and its adequacy, is a factor considered by the courts in assessing whether infringement is justified. However, while *Sparrow* has been effective in some cases, its framing is not beyond criticism. Its broad formulation may allow constitutionally protected rights to "be overridden on broad policy grounds,"[181] while its analytical emphasis rests on justifying limitations.[182] The test is also retrospective, aimed at assessing whether Crown conduct that has already occurred can be justified because of prior consultation. As Justices Abella and Martin explained, "[o]ngoing consultation is preferable" as it protects First Nations' "rights from irreversible harm."[183]

In dissent on this point, Justices Abella and Martin struck a different approach. They understood the duty to consult in a holistic sense. "Because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples"[184] and is intended to facilitate "the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty,"[185] the obligation to consult should arise "based on the effect, not the source, of the government action."[186] While parliamentary supremacy and the separation of powers "are central to ensuring that the legislative branch of government is able to do its work without undue interference," they "cannot displace the honour

179. *Mikisew Cree*, *supra* note 2 at paras 52, 145, 154.
180. *Sparrow*, *supra* note 152; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 77-78.
181. Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1996) 8 Const Forum Const 33 at 39. See also *R v Marshall*, [1999] 3 SCR 533 at para 6; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537; John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48 UBC L Rev 701 at 740.
182. Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68 UTLJ 405 at 420.
183. *Mikisew Cree*, *supra* note 2 at para 78, Abella & Martin JJ.
184. *Ibid* at para 63, Abella & Martin JJ.
185. *Ibid* at para 58, Abella & Martin JJ.
186. *Ibid* at para 55, Abella & Martin JJ.

of the Crown."[187] After all, "[t]he duty to consult is not a *suggestion* to consult, it is a duty, just as the honour of the Crown is not a mere 'incantation' or aspirational goal."[188]

If the honour of the Crown "is not only a constitutional imperative" but a limitation on "Crown sovereignty itself," then a strict approach to judicial intervention in the legislative process is not appropriate in issues relating to First Nations.[189] Concerns relating to the separation of powers and parliamentary supremacy, while valid, are thus of less force. Indeed, section 35 of the Canadian Constitution clarifies that First Nations peoples are not simply undifferentiated citizens, but that they are entitled to specific rights and it is the constitutional responsibility of the judiciary to protect and vindicate those rights.[190] While the mechanics of consultation can be modified to consider the specific challenges of law making, there is no principled reason why the duty itself should not extend to the legislative process.[191] The question is how a framework can facilitate the fulfillment of that duty.

C. AOTEAROA NEW ZEALAND

The relationship between Māori and the state in Aotearoa New Zealand is mediated by the Treaty of Waitangi.[192] Under the Treaty, Māori signatories ceded kawanatanga (governorship) to the British Crown, while being promised that their tino rangatiratanga (full authority) over their land, people, and treasure would remain undisturbed. However, for many years the Treaty was simply ignored, and the Crown alienated Māori land without considering their interests or providing compensation. In 1877, this approach reached its zenith, when in *Wi Parata v. Bishop of Wellington*, Chief Justice Prendergast dismissed the Treaty as a "simple nullity."[193]

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187. *Ibid* at para 84, Abella & Martin JJ.
188. *Ibid* [emphasis in original].
189. *Ibid* at para 88, Abella & Martin JJ.
190. *Ibid* at paras 89-91, Abella & Martin JJ.
191. *Ibid* at paras 91-98, Abella & Martin JJ.
192. *Treaty of Waitangi*, 6 February 1840. The Treaty was negotiated between the British Crown and Māori chiefs and exists in both Māori and English versions.
193. [1877] 3 NZ Jur (NS) 72 at 78 (SC). See also David V Williams, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, 2011) at 43. Williams argues that the "simple nullity" *obiter dictum* has overshadowed the more important aspects of the *Wi Parata* case (*ibid*).

Responding to increasing public pressure, in 1975 the government established a tribunal to investigate alleged breaches of the Treaty.[194] Initially, the Waitangi Tribunal was empowered to investigate alleged breaches by the government or any state-controlled body occurring after 1975. The Tribunal could make recommendations about how to redress those breaches,[195] but it did not have legal authority to enforce remedies. In 1985, the *Treaty of Waitangi Act* (New Zealand) was amended to provide the Tribunal with retrospective jurisdiction dating from 1840,[196] though its enforcement powers were not strengthened. Instead, Crown and iwi have engaged in settlement processes to address and rectify alleged breaches of the Treaty.

In 2002, the state and Ngāti Whātua Ōrākei entered into negotiations to resolve outstanding historical claims under the Treaty. The negotiations led to two key outcomes. Under the *Ngāti Whātua Ōrākei Claims Settlement Act 2012* (New Zealand), the state recognized that historical breaches of the Treaty "diminished the ability of Ngāti Whātua Ōrākei to exercise mana whenua" over their traditional lands.[197] The negotiations also eventually led to a Collective Redress Scheme, which sought to resolve the competing claims of the Ngāti Whātua, Ngāti Paoa, and Marutūāhu iwis over Crown land within the Auckland isthmus.[198] Section 120 of the *Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014* (New Zealand)[199] provided that land required for another treaty settlement would be removed from land covered under this Act.

In 2016, the Minister for Treaty of Waitangi Negotiations advised that he intended to transfer several Crown-owned properties located within an area covered by the Collective Redress Scheme to the Ngāti Paoa and Marutūāhu iwis, in part settlement of their claims for historic treaty breaches. Ngāti Whātua Ōrākei challenged this decision, claiming mana whenua over the properties and contending that it would breach the provisions of their 2012 Settlement Act. They sought a declaration that, among other things, the Crown must "appropriately

194. Nicola R Wheen & Janine Hayward, "The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process" in Nicola R Wheen & Janine Hayward, eds, *Treaty of Waitangi Settlements* (Bridget Williams Books, 2012) 13 at 17.
195. *Treaty of Waitangi Act 1975* (NZ), 1975/114, s 5(1)(a) [*Waitangi Act 1975*].
196. *Treaty of Waitangi Amendment Act 1985* (NZ), 1985/148, s 3, amending *Waitangi Act 1975*, *supra* note 195, s 6(1).
197. *Claims Settlement Act*, *supra* note 4, s 6(13).
198. New Zealand, Office of Treaty Settlements, *Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed* (5 December 2012) online (pdf): <www.govt.nz/assets/Documents/OTS/Tamaki-Makaurau/Tamaki-Makaurau-Deed-of-Settlement-5-Dec-2012.pdf>.
199. 2014/52.

consult" them as the iwi having title to the land. The transfer was initially intended to be completed via administrative action, but following the filing of the Ngāti Whātua Ōrākei claim, the Minister determined that the transfer would instead be implemented by legislation. The government then sought to strike out the Ngāti Whātua Ōrākei claim, arguing that judicial review would require the court to impermissibly interfere with proceedings in Parliament. The High Court and Court of Appeal agreed, holding that the claim was a "quintessentially political"[200] decision and that it is "wrong in principle for a court to declare unlawful an outcome intended to be secured only if authorised by Parliament."[201] In *Ngāti Whātua*, the Supreme Court of New Zealand allowed the appeal in part and remitted the matter to the High Court for hearing.

The decision does not recognize a general obligation on the part of Parliament to consult with Māori when their interests are specifically affected. Rather, the decision turned on the characterization of the Ngāti Whātua Ōrākei claim. While the High Court and Court of Appeal held that the claim concerned a challenge to legislative proposals, the Supreme Court characterized it as a claim about their existing rights.[202] Courts have a responsibility to determine existing rights,[203] even if they touch "on the subject-matter of a Bill."[204]

Consequently, although the Ngati Whatua Ōrākei were successful in this case, the decision may be of limited utility for Māori more generally. The Court was careful to acknowledge that the principle of non-interference in the parliamentary process operates to preclude any non-statutory requirement that Parliament consult with Māori in the development and drafting of legislation that will affect their interests. Indeed, the Supreme Court confirmed that the judiciary will not influence "what should be placed before Parliament"[205] and that the principle "exists to ensure that Parliament is free to consider what it will and Ministers are free to put before it suggestions for it to consider."[206] Furthermore, consistent with the application of parliamentary supremacy in Aotearoa New Zealand, while Māori may seek judicial determination of their existing legal rights, "Parliament remains free to legislate to modify or abrogate

200. *Ngāti Whātua Ōrākei Trust v Attorney-General*, [2017] NZHC 389 at para 141, Davison J.
201. *Ngāti Whātua Ōrākei Trust v Attorney-General & Ors*, [2017] NZCA 554 at para 100.
202. *Ngāti Whātua*, *supra* note 3 at paras 48, 104.
203. *Ibid* at para 119, Elias CJ.
204. *Ibid* at para 113, Elias CJ.
205. *Ibid* at para 36, Ellen France J, citing *Sealords*, *supra* note [47] at 308.
206. *Ngāti Whātua*, *supra* note 3 at para 111, Elias CJ.

any existing rights" "without inquiring into [their] existence…or waiting for court determination of them."[207]

III. RECONCILING COMPETING PRINCIPLES

Maloney, *Mikisew Cree*, and *Ngāti Whātua* rest on distinct constitutional frameworks. However, in each case, the highest courts in Australia, Canada, and Aotearoa New Zealand refrained from finding a general duty owed by their parliament to consult with Indigenous peoples when developing and drafting legislation that specifically affects Indigenous communities. Considered together, these three cases shed light on a fundamental tension for settler states with Westminster-derived constitutional frameworks. In each case, the court has been clear to emphasize that the normative commitment underlying parliamentary supremacy does not allow the judiciary to impose such a duty on the parliament. Although it is not specifically characterized in this way, Indigenous peoples' collective right to self-determination has been subsumed within a hierarchical model that privileges the principle of parliamentary supremacy.

This outcome follows parliamentary supremacy's construction of a singular people. Even where Indigenous peoples are recognized by state law as holding distinct rights, Indigenous peoples remain conceived primarily as members of the settler-state polity. Distinctive Indigenous rights are seen (with some suspicion) as an adjunct or "special" entitlement ordinarily in violation of principles of equality and non-discrimination.[208] Reflecting this understanding, Indigenous peoples' rights are treated as human rights or rights of cultural minorities rather than governance rights. More than simply conceiving rights in an individual and not collective sense, this view presupposes some relationship of subordination. Unlike governance rights that inhere within Indigenous communities and exist outside the state, human rights are located entirely within state law. As a consequence of this, there is no need to recognize a sui generis entitlement allowing Indigenous peoples and communities to be heard in the law-making process.

In light of these decisions, it is clear that reconciling Indigenous peoples' right to self-determination and the principle of parliamentary supremacy requires

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207. *Ibid* at para 115, Elias CJ.

208. See Kirsty Gover, "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26 Eur J Intl L 345; Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYUJ Intl L & Pol 189.

"legal reformation."[209] Our understanding of constitutional principles and values, like parliamentary supremacy, must be reconsidered "so as to reshape the law's relation to" Indigenous peoples and allow Indigenous communities "to devise institutional arrangements that conform to and celebrate [their] forms of life."[210] In this Part, I draw back from the particular politico-legal framework within which each case emerged to explore how the constitutional relationship between Indigenous peoples and the state can be restructured by distributing governance rights more equitably.[211]

A. TWO APPROACHES

Two approaches can be considered. The first may be characterized as the "melting pot" approach. This is the position of the unanimous court in *Maloney*, the majority in *Mikisew Cree*, and the accepted grounding across the two judgments in *Ngāti Whātua.* As explained above, this approach posits that, although consultation may be advantageous in practice for both normative and instrumental reasons, absent statutory language, it is not required and the judiciary will not interrogate the parliamentary process. The anomalous position of Indigenous peoples and communities in settler states does not alter the operation of the principle. Although the competence of each settler state parliament may be limited in important respects, its authority to draft, introduce, deliberate, and enact legislation in areas within its competence is unbounded.[212] As a representative institution, the legislature is accountable to the people considered as a whole, and it is not obligated to consult with specific individuals or communities when carrying out its business.

The melting pot approach may reflect existing law in Australia, Canada, and Aotearoa New Zealand, but the foundations on which it is built are dubious to say the least. As many Indigenous and non-Indigenous scholars have explained, the initial and continuing existence of each state is predicated on the unjust displacement of Indigenous peoples and nations from their traditional lands and the ongoing dismissal of Indigenous assertions of sovereignty. In fact, the state

209. Macklem, *supra* note 8 at 395 [emphasis in original].
210. *Ibid*. See also Nichols & Hamilton *supra* note 8
211. Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan L Rev 1311.
212. On the distinction between competence and authority in this context, see Elias, "Mapping", *supra* note 22 at 14. See also Sir Anthony Mason, "One Vote, One Value v The Parliamentary Tradition—The Federal Experience" in Christopher Forsyth & Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford University Press, 1998) 333 at 335.

legal systems that have developed largely continue to marginalize or ignore the fact that Indigenous peoples did not cede sovereignty, constructing an elaborate artifice that elides critical questions concerning how the British Crown acquired Indigenous lands.[213] Although today recognized as a legal fiction, that artifice continues to exert a powerful hold over the state, undergirding state actors' efforts to deny Indigenous peoples' political authority.[214] This legal construct can be marshalled to deny the normative significance of Indigenous peoples' status as prior self-governing communities,[215] erase the existence of their "shared membership in separate or overlapping polities,"[216] and position Indigenous peoples as part of an undifferentiated mass of formally equal citizens. If Indigenous peoples are simply one part of the larger political community, then no conflict with parliamentary supremacy arises. Indigenous citizens may, like all other members of the state, vote, lobby, or seek to be heard before parliamentary committees.[217]

This story does not hold. While the legal artifice may not have been disbanded, each state has partially and belatedly acknowledged the unsatisfactory explanation underlying its claim to political authority.[218] Each has also recognized that Indigenous peoples and communities *are* normatively distinct. In addition to recognizing this both in constitutional instruments and legislation, Australia,

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213. See generally David Ritter, "The 'Rejection of Terra Nullius' in *Mabo*: A Critical Analysis" (1996) 18 Sydney L Rev 5; Daniel Lavery, "No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in *Mabo [No 2]*" (2019) 43 Melbourne UL Rev 233; Douglas (Amo Binashii) Sanderson, "The Residue of *Imperium*: Property and Sovereignty on Indigenous Lands" (2018) 68 UTLJ 319 at 322; NZ, Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (2014) at 526-27; Robert Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012).
214. Claire Charters, "The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism" in Centre for International Governance Innovation, ed, *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS*, Special Report (Centre for International Governance Innovation, 2020) 43 at 51.
215. Robert Nichols, "Contract and Usurpation: Enfranchisement and Racial Governance in Settler-Colonial Contexts" in Audra Simpson & Andrea Smith, eds, *Theorizing Native Studies* (Duke University Press, 2014) 99 at 111.
216. David Myer Temin, *Remapping the World: Vine Deloria, Jr and the Ends of Settler Sovereignty* (DPhil Dissertation, University of Minnesota, 2016) at 96 [unpublished].
217. *Maloney* HCA, *supra* note 1 at para 135, Crennan J; *Mikisew Cree*, *supra* note 2 at para 124, Brown J.
218. See *e.g. Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), 2013/18; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Waitangi Act 1975*, *supra* note 195.

Canada, and Aotearoa New Zealand have endorsed the *UNDRIP*.[219] Endorsement may have been qualified in important respects, including over whether and the extent to which Indigenous peoples are entitled to be consulted in decisions over matters that affect them,[220] but that act nonetheless signals an acceptance that Indigenous peoples hold special and distinctive rights. In some cases, that acceptance has been extended to express recognition that Indigenous peoples' rights could impose restrictions on parliamentary practice.

Consider Aotearoa New Zealand as an example. While the current legal position is that the Treaty of Waitangi is effective only to the extent it is recognized in legislation,[221] there are suggestions that it nonetheless "may indicate limits in our polity on majority decision-making."[222] At this stage, any limits that do exist are largely political rather than legal,[223] though this is not to say that legal limits will not develop. Indeed, writing extra-curially, the Chief Justice of the Supreme Court Dame Sian Elias acknowledged that there is an argument that "the sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty," and noted that the scope of that qualification has "never been fully explored to date."[224]

Inchoate as this instance of recognition may be, it is nonetheless important, for it affirms the position that the melting pot conception is unattractive or

219. See Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Speech, 418T6, "Statement on the United Nations Declaration On the Rights of Indigenous Peoples" (3 April 2009), online: *Parliament of Australia* <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/418T6%22?fbclid=IwAR2faHOHMV4Elj7jkv2RTAmqtwZId5CxYk17XAcS12pilvXexqSEN4xoZKo> ; Carolyn Bennett, Minister of Indigenous and Northern Affairs, Speech, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10" (10 May 2016), online: *Government of Canada* <www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html>; Simon Power, Minister of Justice, Ministerial Statement, "UN Declaration on the Rights of Indigenous Peoples—Government Support" (20 April 2010), online: *Parliament of New Zealand* <www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of>.

220. See UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) at 11, 13, 14. On the complicated nature of these qualifications, see Gover, *supra* note 208.

221. *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] AC 308 at 324-25 (PC); *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* (2002), [2003] 1 NZLR 779 (HC).

222. NZ, Cabinet Office, *Cabinet Manual 2017* (Department of the Prime Minister and Cabinet, 2017) at 2. A former Chief Justice of the New Zealand Supreme Court has cautioned against dismissing this position. See Elias, "Mapping", *supra* note 22 at 16.

223. Palmer, *supra* note 22 at 151-52.

224. Elias, "Sovereignty", *supra* note 21 at 153.

inappropriate for settler states. Indigenous peoples may be members of the state but they also hold differentiated citizenship by virtue of their status as prior self-governing communities who have never ceded sovereignty—whether or not that position is recognized by treaty or in law. If Indigenous peoples have never ceded sovereignty and continue to conceive of and organize themselves as normatively distinct communities within and outside the state, an alternative effort at mediating parliamentary supremacy and self-determination must be adopted.

The current approach takes the existing distribution of political power for granted. We have seen, however, that this approach is built on legal and factual inaccuracies—and that state actors largely accept as much. What is to be done? An alternative approach maintains that the better choice is to begin from the legal, political, and social fact of Indigenous peoples' right to sovereignty and self-determination. In essence, it asks state actors to follow through in their thinking. If the state accepts that Indigenous peoples have a right to self-determination, what follows? This position can also be articulated as the "a priori" conception. While Indigenous peoples' collective rights may or may not be expressly or implicitly recognized or protected in a settler state's constitution, by virtue of Indigenous peoples' status as prior self-governing communities who have never ceded sovereignty, those rights are implicitly reserved or antecedent to the state and its constitution. As such, they operate as a limitation on both each Crown and parliament, albeit a limitation that is, today, largely unrecognized. Justice Joe Williams, now of the New Zealand Supreme Court, explains, noting that if the Treaty of Waitangi "is truly a founding document, and was truly entered into in good faith as between the parties, then the Treaty itself was—is—*the Law*. Either orthodox (English) views of the law must change to accommodate its existence or it really was just a trick to pacify savages."[225]

The consequences of this approach may appear radical. Certainly, in particular forms it carries the potential of fundamentally restructuring the distribution of political power within the state or possibly even overturning the state—a project supported by some, though not all, Indigenous peoples. This is not necessarily the case, however. While Indigenous peoples' rights may be conceptually considered antecedent to the state, the manifestation or exercise of those rights in practice will likely fall along a spectrum. It does not necessarily or inexorably require the rejection of the existing constitutional framework. Rather, it envisages the

225. Joe Williams, "Not Ceded But Redistributed" in William Renwick, ed, *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, 1991) 190 at 193 [emphasis in original].

creation of "space for the articulation of multiple, overlapping sovereignties that can meaningfully accommodate Indigenous self-determination."[226]

This point reflects both pragmatic and principled considerations. Instrumentally, the increasing complexity of personal and legal relations in contemporary society means that the interests and aspirations of Indigenous and non-Indigenous peoples are intertwined; disassembling the existing framework under which people have organized their lives may produce further injustices.[227] At the same time, implementing Indigenous peoples' collective rights to self-determination should be understood as contributing to or reflecting a deeper normative commitment to fair and equitable relationships between political communities. Of course, this encompasses the ability of Indigenous peoples to "exercise some degree of sovereign decision-making power,"[228] but in areas outside the exclusive jurisdiction of Indigenous nations, it also includes a commitment to intercultural dialogue and consultation. In other words, a form of shared rule over issues that affect both Indigenous and non-Indigenous peoples.

A form of shared rule already exists in some domains in Australia, Canada, and Aotearoa New Zealand. For instance, in each state, lands and waters are often managed in partnership. Typically, this is conducted by a board comprising of government-appointed Indigenous and non-Indigenous persons who oversee planning and management of certain areas. If conducted on a firm basis of formal recognition and active participation in decision-making processes, collaborative land and resource planning can empower local communities by ensuring that Indigenous values are considered and expressed in developing management strategies. One noteworthy example is the *Te Urewera Act 2014* (New Zealand), which establishes a board to manage Te Urewera, "a fortress of nature, alive with history" and "a place of spiritual value" in the north island of Aotearoa New Zealand.[229] In undertaking its functions the Te Urewera Board may "give expression to" Tūhoetanga and Tūhoe "concepts of management"[230] and "must consider and provide appropriately for the relationship of iwi and hapū and their culture and traditions with Te Urewera when making decisions."[231] The

226. Nichols & Hamilton, *supra* note 8 at 348. See also Duncan Ivison, "Justification, Not Recognition" (2016) 8 Indigenous L Bull 12.
227. Jeremy Waldron, "Superseding Historic Injustice" (1992) 103 Ethics 4; Douglas Sanderson, "Redressing the Right Wrong: The Argument from Corrective Justice" (2012) 62 UTLJ 93.
228. Stacey, *supra* note 182 at 407.
229. 2014/51, ss 3(1)-(2).
230. *Ibid*, s 18(2).
231. *Ibid*, s 20(1). See also Jacinta Ruru, Special Issue, *Te Urewera Act 2014* (2014) October Maori L Rev 16.

Te Urewera Act does not fully capture all dimensions of Māori worldview and law,[232] but it remains an innovative politico-legal arrangement that re-envisages co-management regimes towards a "bicultural"[233] model of preservation. In any event, even if there are further steps to take, the key point here is that the existence of these institutions demonstrates that shared rule as a concept is not anathema to settler nations. The challenge here is establishing a similar framework for the legislative process.

B. A FRAMEWORK FOR ENGAGEMENT

Introducing a justiciable duty to consult specific communities in the law-making process may run contrary to the principle of parliamentary supremacy, but Indigenous peoples are entitled to be heard in the design and drafting of legislation that affects them. In this section, I argue that these two principles can be reconciled by decoupling the existence of a duty from the question of adjudication. The framework to facilitate engagement between two or more political communities that I outline imposes a political or non-justiciable obligation on each parliament to consult. In doing so, it recognizes that the judiciary is not "the only branch of [government] with a stake in securing the constitutional order."[234] At the same time, the framework starts from the position that Indigenous communities and non-Indigenous communities are both entitled to exercise self-determination within the state. Both Indigenous and non-Indigenous communities share political power within the constitutional order.

Two points should be noted before setting out this approach. First, the framework aims at facilitating engagement; it does not require or guarantee that meaningful consultation will take place. In effect, the framework is a political mechanism that seeks to impose a moral rather than legal obligation on the legislature to engage. In this sense, it aims to bring the rights and interests of Indigenous peoples into conversation with existing governance institutions and

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232. Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, 2016).
233. Jacinta Ruru, "A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 305 at 320.
234. Vanessa A MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65 McGill LJ 175 at 205. See also Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30 King's LJ 43.

state actors with the goal of building a relational ethic.[235] It will not always be simple nor effective. Nonetheless, reflecting its status as a mechanism to facilitate dialogue and discussion across and between political communities that share the land, it is anticipated that failure to abide by or act consistently with the obligation would attract censure within and outside the parliament.

Second, consultation may, but will not necessarily, lead to amendment or alteration to any bill. Although it is expected that consultation will inform and educate members of parliament over the likely impact of their draft legislation on specific communities, potentially enhancing the likelihood of changes to the final draft, there is no justiciable requirement that can compel a parliament to withdraw or amend particular provisions. While the framework may appear weak or inadequate, it aims to meaningfully reconcile Indigenous communities' right to be heard within a modified form of parliamentary supremacy attuned to the position of settler states. It does so by recognizing that "the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts."[236] However, its starting point constitutes a significant step up in existing law.

Commencing from the fact of Indigenous self-determination marks a fundamental shift in the burden of reasoning. Rather than requiring Indigenous peoples and communities to demonstrate how consultation obligations are consistent with parliamentary supremacy or do not interfere with parliamentary processes, this approach constructs a framework for engagement by prompting two questions. First, is this an issue on which Indigenous peoples should be heard? If the answer is yes, the question then becomes: How can their right to be heard be given effect?[237]

Consider the first question. There may be many issues in which Indigenous peoples (and, indeed, non-Indigenous peoples) wish to have their voices specifically heard. It is therefore necessary to draw a clear line for when consultation is or is not required. One approach has been developed by Sámi legal scholar Matthias Åhrén. Although Åhrén's "sliding scale"[238] of self-determination is primarily focused on ascertaining when Indigenous communities may be entitled to

235. See John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016); Harry Hobbs & Stephen Young, "Modern Treaty Making and the Limits of the Law" (2021) 71 UTLJ 234.

236. *Reference re Secession*, *supra* note 39 at para 102.

237. For a similar approach, see *Courtoreille* 2016, *supra* note 163 at para 84, Pelletier JA.

238. Åhrén, *supra* note 90 at 138-43.

exercise jurisdictional powers, it is also useful to consider when consultation may be necessary. As Åhrén explains:

> It perhaps make[s] sense to posit that the more important the issue to the indigenous people's culture, society, and way of life, the greater influence the people should be allowed to exercise over the decision-making process. Conversely, if the matter is of little significance to the indigenous people, but important to the welfare of society at large, indigenous peoples' right to self-determination may only award the indigenous people with limited influence over the decision-making process. Obviously, there are also matters in between.[239]

Åhrén's approach suggests that consultation is only required on issues that affect Indigenous peoples in some material way. It may not, for example, be appropriate for Indigenous peoples to be specifically consulted on issues that affect them only generally, such as in the drafting of a law concerning industrial relations or pay-roll taxation. This is sensible and accords with the views of other scholars. Zachary Davis, for instance, argues that the obligation to consult should be triggered by "conduct leading to the development and enactment of legislation with the potential to adversely affect claimed Aboriginal rights."[240] In a different context, Shireen Morris has argued that Indigenous peoples should be able to comment on laws that are "directed at, or significantly or especially impacting, Indigenous people."[241] Similarly, Cheryl Saunders would require consultation "when Indigenous interests are affected 'directly', but not in relation to 'matters of a general nature…assumed to affect the society as a whole',"[242] while Cobble Cobble woman and law professor Megan Davis, and non-Indigenous scholar Rosalind Dixon would do so when legislation "significantly or disproportionally" affects Indigenous peoples.[243] Notwithstanding the diversity in language, all seem to agree on a key point: Consultation is required only when the particular issue will materially affect Indigenous peoples in some way over and above other citizens of the state, although when that standard is met will be the subject of debate.

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239. *Ibid* at 139.
240. Zachary Davis, "The Duty to Consult and Legislative Action" (2016) 79 Sask L Rev 17 at 18.
241. Austl, Commonwealth, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Submission No 195* by Shireen Morris (Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 2018) at 18.
242. Cheryl Saunders, "Indigenous Constitutional Recognition: The Concept of Consultation" (2015) 8 ILB 19 at 21.
243. Megan Davis & Rosalind Dixon, "Constitutional Recognition through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation," Comment, (2016) 27 Pub L Rev 255 at 262.

Identifying this standard in the abstract will not resolve challenges in practice. Ascertaining when consultation is required may sometimes be politically contentious. Indigenous communities like those in Bwgcolman, the Mikisew Cree First Nation, or the Ngāti Whātua iwi may disagree with the legislature as to whether a bill or draft proposal would affect their rights and interests to the requisite standard. Where that occurs, Indigenous peoples and communities may gain little clear advantage from this framework. This will not necessarily be the case, however. If the framework can be embedded within the constitutional order, the parliament should recognize its moral obligations to take its duty to engage seriously. Whether that occurs may ultimately rely on the initial posture adopted by the parliament, the personal relationships developed between members of the legislature and Indigenous communities, and the quality of the consultation process, but the parliament will remain constitutionally obliged to engage.

The second question may be more difficult. Assuming that consultation is required, how should it occur? Two general points are worth noting at the outset. First, Indigenous peoples and communities will often be ill-prepared to consult with the legislature. Significant financial and material disparities are likely to structure any process, and remote communities may have little time or capacity to engage sufficiently with the detail of proposed legislative changes. Second, there is no one-size-fits-all approach. Each settler state will adopt and adapt a process that makes sense in its circumstances. Reflecting the diversity of Indigenous communities in Australia, Canada, and Aotearoa New Zealand, that process may be different according to the circumstances and aspirations of individual First Nations. This is natural and should not be greeted with anxiety or alarm. One of the very advantages of constructing a framework for engagement built on the recognition of Indigenous peoples' right to self-determination is the fact that it allows for flexibility.

Several examples or proposals exist. In Norway, for instance, a representative body for the Indigenous Sámi people has operated since the late 1980s. Section 2-2 of the Norwegian *Sámi Act 1987* provides that public agencies and bodies "should give the Sameting [Sámi Parliament] an opportunity to express an opinion before they make decisions on matters coming within the scope of the business of the Sameting."[244] In 2005, this general obligation to be heard was transformed into a comprehensive political agreement. The agreement applies to all "matters

244. Norway, *The Sámi Act*, 1987/56, § 2-2.

that may affect S[á]mi interests directly,"[245] which are defined as encompassing all material and immaterial forms of Sámi culture, including land-ownership rights.[246] The agreement also covers all forms of decision making, including legislation, regulations, administrative decisions, guidelines, and governmental reports. Consultation must be "genuine and effective" and may include consideration and debate by the Sámi Parliament.[247] It does not extend to a veto, but Cabinet documents must indicate where agreement has not been reached and the views of the Sameting must "be reflected in the documents submitted."[248]

At times, the obligation appears to have worked well. The agreement was integral to the adoption of the landmark *Finnmark Act 2005*, which recognized Sámi rights to land in the northernmost Finnmark County.[249] The formal consultation procedure also strengthened the position of the Sameting in pushing for amendments to the *Reindeer Husbandry Act 1978*, which recognized the traditional siida, "bringing Norwegian law into closer conformity with traditional S[á]mi land management."[250] Nonetheless, despite some positives, the experience in Norway has been mixed. There is a perception among Sámi politicians that while the consultation process "works well in matters of little significance…in the case of issues of major economic and political importance… Sámi input is incorporated to a very limited degree."[251] These challenges indicate

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245. Norway, Ministry of Local Government and Modernisation, *Procedures for Consultations between the State Authorities and The Sami Parliament [Norway]* (11 May 2005) art 2, online: *Norwegian Government Security and Service Organisation* <www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743>.
246. *Ibid*.
247. *Ibid*, art 6.
248. *Ibid*.
249. *Report of the Special Rapporteur on the rights of indigenous peoples on the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland*, UNGAOR, 2011, Annex, Agenda Item 3, UN Doc A/HRC/18/35/Add.2 (2011) at paras 17-18.
250. *Ibid* at para 19.
251. Adam Stępień, Anna Petrétei & Timo Koivurova, "Sámi Parliaments in Finland, Norway, and Sweden" in Tove H Malloy, Alexander Osipov & Balázs Vizi, eds, *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies, and Risks* (Oxford University Press, 2015) 117 at 130. For a recent example of inadequate consultation, see Tiina Sanila Aikio & Vibeke Larsen, Presidents of Saami Parliament in Finland and Norway, Statement, "The Tana Agreement – A severe violation of the human rights of the Saami" (28 March 2017), online: <www.samediggi.fi/2017/03/28/the-tana-agreement-a-severe-violation-of-the-human-rights-of-the-saami/?lang=en>; Permanent Forum on Indigenous Issues, *Report on the Sixteenth Session*, UNESCOR, 2017, Supp No 23, UN Doc E/C.19/2017/11 at para 24.

that more work needs to be done in entrenching the consultation requirement within Norway's constitutional order.

One novel proposal in Australia seeks to resolve the challenges faced in Norway. In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander people outline their aspirations for structural reform to the framework of governance in Australia. The Statement calls for a First Nations Voice—an Indigenous representative body empowered to advise the federal Parliament on laws that affect Indigenous peoples—to be established in the Constitution.[252] Constitutional amendment in Australia requires a referendum.[253] Supporters of the First Nations Voice argue that the process of constitutional amendment will embed the body within the constitutional order, building legitimacy and "political respect."[254] On this account, constitutional entrenchment will not only strengthen the institution's independence, but by conferring democratic legitimacy through a national referendum, it will insert the body "into the public life (and imagination) of the nation,"[255] enhancing the likelihood that Parliament will take its moral obligations seriously. Whether this results in practice is difficult to determine. It relies on the development of what non-Indigenous law professor Gabrielle Appleby and Wamba Wamba First Nations scholar Eddie Synot have called "constitutionalised institutional listening"; that is, meaningful, constructive, and ongoing relational dialogue that genuinely listens to Indigenous peoples on their own terms.[256] However, even if this form of democratic listening emerges, it is likely that on certain issues the Parliament will ignore advice provided by the First Nations Voice, as the Norwegian Sameting has also found.

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252. *Uluru Statement*, *supra* note 69. The Statement also calls for a process of treaty making and truth telling. On early efforts at treaty making across Australia, see Harry Hobbs & George Williams, "Treaty-Making in the Australian Federation" (2019) 43 Melbourne UL Rev 178; George Williams & Harry Hobbs, Treaty, 2nd (Federation Press, 2020); Harry Hobbs, Alison Whittaker & Lindon Coombes, eds, *Treaty-Making Two Hundred and Fifty Years Later* (Federation Press, 2021).
253. *Australian Constitution*, *supra* note 24, s 128.
254. Austl, Commonwealth, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Submission No 479* by Pat Anderson et al (Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 2018) at 5.
255. Fergal Davis, "The Problem of Authority and the Proposal for an Indigenous Advisory Body" (2015) 8 Indigenous L Bull 23 at 24. See also Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) at 116.
256. Gabrielle Appleby & Eddie Synot, "A First Nations Voice: Institutionalising Political Listening" (2020) 48 Federal L Rev 529. See also Hobbs, *Indigenous Aspirations*, *supra* note 75 at 215-20.

Challenges exist, but the proposal has considerable merit. It is a sophisticated attempt to reconcile Indigenous peoples' right to be involved in law making that affects their interests with the principle of parliamentary supremacy. That political or moral obligations may be inadequate absent legal reformation does not suggest that a framework for engagement and dialogue is not valuable. Rather, it emphasizes the distance that settler states must travel before they are capable of genuinely recognizing Indigenous peoples' right to self-determination. A constitutional framework built on the existence of multiple, overlapping sovereignties is the key for embedding meaningful and substantive engagement across and between political communities. A flexible and culturally appropriate framework for engagement constructed on that edifice could promote dialogue and square the competing principles of parliamentary supremacy and Indigenous peoples' right to self-determination.

IV. CONCLUSION

Australia, Canada, and Aotearoa New Zealand are settler states that have inherited constitutional traditions developed for a state facing very different circumstances. One of these traditions is the doctrine of parliamentary supremacy. In this article, I have argued that while parliamentary supremacy reflects and supports a valuable democratic commitment to equal citizenship, it can serve to challenge the political authority of separate, prior political communities that also share the state. In *Maloney*, *Mikisew Cree*, and *Ngāti Whātua*, the reliance on notions of parliamentary supremacy marginalized Indigenous peoples' legitimate claims to political authority. The central challenge that faces all settler states, the challenge to balance the specific interests of Indigenous peoples with general governance interests,[257] is not satisfactorily met by this approach.

I have argued instead that constitutional traditions should reflect the distinct position settler states find themselves in. Where multiple political communities share the land, it is not appropriate for a numerically larger community to act unilaterally, whether through executive action or legislation, in a manner that materially affects another political community in some differential way. Rather, consultation, discussion, and dialogue should be undertaken to ensure that Indigenous peoples have some control over the development of policy and drafting of legislation. The framework for engagement that I have sketched does not conclusively resolve this issue. Although it is hoped that it will enhance

257. Matthew SR Palmer, "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2007) 29 Dal LJ 1 at 29.

the prospect that the design of legislation will reflect Indigenous communities' priorities, it cannot guarantee this result. Settler states have some way to go before they can accept the fact that they share the land with separate and overlapping political communities that are equally entitled to self-determination.