

Book Review — Constitutional Recognition: First Peoples and the Australian Settler State

Dylan Lino

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In the aftermath of the rejection of the *Uluru Statement from the Heart*,¹ Dylan Lino's *Constitutional Recognition: First Peoples and the Australian Settler State* provides an important and unparalleled theoretical perspective on the development of Indigenous recognition within the settler constitutional order. The uniqueness of Lino's publication stems from its expansive definition of constitutional recognition, and its discussion of the various ways in which the language of recognition has been adopted by Indigenous peoples and settlers alike to negotiate the distribution of state power. The breadth of Lino's book should be praised; the incomplete nature of constitutional recognition and its numerous manifestations are effectively utilised to frame constitutional recognition as a dynamic vehicle for enhancing the position of Indigenous Australia within existing frameworks.

Throughout *Constitutional Recognition: First Peoples and the Australian Settler State*, Lino identifies historical examples of advancements in the politics of recognition for Indigenous peoples in the settler constitutional framework. Lino identifies the constitutional character of these examples based on the questions they raise about the distribution of public power within the Australian state. Examples like the *Racial Discrimination Act 1975* (Cth) are analysed with reference to three key areas of limitation — the horizons of Indigenous-settler politics, the horizons of Indigenous identity politics and the vagaries of constitutional implementation. Lino's argument makes clear that constitutional recognition can lie outside of the written Constitution. Further, the written Constitution may not always be the most effective vehicle for challenging the distribution of state power.² Lino utilises the limitations of these examples to highlight how they render constitutional recognition as provisional and incomplete. It is because of this incompleteness that constitutional recognition remains a valuable vehicle for the 'ongoing contestation of the settler constitutional order.'³

¹ In May 2017, the Referendum Council released the *Uluru Statement from the Heart*, the product of a convention of 250 Aboriginal and Torres Strait Islander delegates at Uluru. The Statement is directed towards the Australian Government and people to commence a conversation about Constitutional recognition. See Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Commonwealth of Australia, November 2018).

² See also George Williams, 'Does Constitutional Recognition Negate Aboriginal Sovereignty?' (2012) 8 *Indigenous Law Bulletin* 10.

³ Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (The Federation Press, 2018) 266.

Another strength of Lino's analysis is his presentation of recognition politics. As Megan Davis notes in the foreword, notions of recognition have long been ill-defined within the Indigenous sphere as more symbolic than substantive.⁴ For example, the limitations of recognition thus far have begged questions about the capacity of the Australian State to adequately account for Indigeneity on Aboriginal terms.⁵ Yet Lino's analysis demonstrates that there is an inherent mutuality in recognition that is essential for the advancement of Indigenous empowerment. In this sense, Lino highlights the paramount importance of recognition as an object of Indigenous contestation. This does not assure that the type of recognition attainable will be satisfactory;⁶ but from the outset, Lino makes a compelling argument for the opportunities that exist within the politics of recognition to advance Indigenous empowerment.

As Lino concedes, his analysis of constitutional recognition occurs through a western lens.⁷ Indigenous scholar Irene Watson has critiqued the Constitution as being built on the colonial constructs of terra nullius and native savagery.⁸ In putting forth federalism as a framework for creating both shared and self-rule, Lino utilises a vehicle of historical colonialism and oppression. Despite this, Lino effectively draws parallels between federalism and some traditional Indigenous organisational structures.⁹ The extent to which Indigenous Australia will be able to effectively appropriate a federal model remains crucially uncertain, although this uncertainty does not stand in contrast to the broader unknown context in which debates around constitutional recognition occur.

Examples of Indigenous-settler models of federalism elsewhere highlight the complexities implicit in its appropriation. Although smaller in scale, the Canadian *Nisga'a Final Agreement* is one example where the legal and political structure of Indigenous-settler relations are akin to the federal model. Here, Étienne Lacombe has problematized the capacity of federalism to adequately account for the multiplicity of Indigenous voices and identities.¹⁰ In addition, she affirms the need to avoid prescriptive notions of traditional governance.¹¹ Lino is acutely aware of these complexities and situates them within the limitations he identifies in his final chapter. For example, Lino suggests that federalism has the capacity to account for several definitions of Indigenous peoplehood. Similarly,

⁴ Ibid xi.

⁵ Irene Watson 'Aboriginal Recognition: Treaties and Colonial Constitutions 'We have been here forever...'' (2018) 30(1) *Bond Law Review* 7.

⁶ See Megan Davis 'Constitutional Recognition does not foreclose on Aboriginal Sovereignty' (2012) 8(1) *Indigenous Law Bulletin* 12.

⁷ Lino (n 3) 10.

⁸ Watson (n 4) 8.

⁹ Ibid 247.

¹⁰ Étienne F Lacombe 'A Pragmatic Approach to Federalism in the Aboriginal Context' (2017) 22 *Appeal* 59, 65.

¹¹ Ibid 68.

Lino adopts a flexible definition of federalism capable of appropriation. Despite this discussion, there is uncertainty about the capacity of federalism to adequately manage these limitations. This casts the achievability of his proposal into doubt.

The most significant way that Lino seeks to overcome the limitations of the proposal for federalism is by drawing on historical examples to demonstrate that incomplete iterations of constitutional recognition can have a meaningful impact. In this sense, the uncertainty of the future aids the possibility that a federalism model may become more politically feasible moving forward. Despite the unlikely adoption of federalism in the current climate, Lino's proposal remains a valuable and considered contribution to the constitutional recognition debate. As a potential resolution encompassing demands for parliamentary representation, treaties and Indigenous territories, Lino presents federalism as a concept consistent with the Australian constitutional arrangement. Further, his argument that the western origins of federalism enhance its attractiveness to a conservative audience is compelling.

Lino's publication offers an invaluable analysis of constitutional recognition in Australia. By defining constitutional recognition as a re-negotiation of the Indigenous-settler power dynamic, Lino employs a broad range of examples of recognition that are not strictly Constitutional in nature. In doing so, Lino captures the true complexity of recognition politics in Australia, finally presenting federalism as a model that has potential to overcome significant inconsistencies in the multitude of different proposals. Given both the Australian Labour party and the Greens have promised adoption of the *Uluru Statement from the Heart* recommendations,¹² Lino's publication comes at a crucial time in the history of Indigenous-settler relations in Australia. The book is a useful tool for understanding the historical and theoretical complexity of constitutional recognition and potential frameworks for resolving the tension between advancing both shared and self-rule.

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¹² Eddie Synot, 'The Uluru statement showed how to give First Nations people a real voice — now it's time for action' *The Conversation* (online, 5 March 2019) <<http://theconversation.com/the-uluru-statement-showed-how-to-give-first-nations-people-a-real-voice-now-its-time-for-action-110707>>.

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