

## **The political status of Indigenous Australians**

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So, we mark another reconciliation week, with the question of the political status of Indigenous Australians as far from resolved as it has always been.

The past year has been marked by the highpoint of the Uluru Statement, a profound call to complete the great democratic project of Australia, and then the low point, the Prime Minister's outright rejection of the key recommendations.

The Uluru Statement emerged from a nationwide deliberative process of discussion and negotiation with indigenous communities, peak bodies and individual leaders, conducted by the federal parliament appointed Referendum Council.

The negotiations culminated in a meeting at Uluru, drawing together representatives from across the country, and the statement calling, amongst other things, for a truth and justice process, a move to drafting a makarrata (a Yolngu word from Arnhem Land acknowledging making peace after a struggle).

The Uluru Statement sought to blend the fundamental spiritual sovereignty of Indigenous people with the political sovereignty of the Commonwealth. Its key recommendation: an Indigenous body – a voice – enshrined in the Constitution to ensure Indigenous people some input into policy making directed toward them.

But the Prime Minister dismissed it out of hand, he claimed it would establish a “third chamber” of the parliament and extend to Indigenous people a political right not enjoyed by other Australians. Malcolm Turnbull's position emerges out of what is seen as a classic liberal argument that privileges the right of the individual above the group.

Constitutional recognition, treaties, raise fundamental questions about the intersection of identity, history, and the tradition of liberal western democracy. Most obviously, who would the Commonwealth be recognising or negotiating with?

Indigenous clans and groups have been dispersed, traditional boundaries have been blurred and new affiliations have been formed. Who are Indigenous people today? The overwhelming majority of people identifying as indigenous share mixed racial heritage.

That presents no impediment to identifying and being accepted as Indigenous, but the shifting sands of identity can be a flimsy premise for the political and legal recognition of group rights. It is a dilemma confronted by other liberal democracies trying to incorporate notions of racial or ethnic based claims for justice.

How do the groups represent themselves? How do they make a coherent and persuasive case? The African American philosopher, Tommie Shelby, differentiates between “thin” and “thick” forms of identity: what he groups as ‘Black Nationalism’ and ‘Pragmatic Black Nationalism’.

The Black Nationalist favours a “thick” conception of blackness, promoting black autonomy and “the politics of difference”. Pragmatic Black Nationalists conceive of a “thin blackness” what Shelby calls, “a vague social marker imposed from the outside”.

Shelby favours the latter, a solidarity not motivated by the fact of blackness – a binding back identity – but the pursuit of racial justice. Shelby steers away from group rights to subtly pivot to the rights of individuals within those groups, as he says “black individuals are the primary units of moral concern”.

Shelby seeks to navigate the fundamental dilemma for liberalism, can group rights exist in a system that seeks to recognise and liberate the individual? Framing political questions around acknowledging the rights of constituent groups, poses the question: what constitutes the relevant group?

Identities are complex and in flux. Individuals can inhabit hybrid, overlapping identities. Historian and philosopher, David Hollinger, reminds us that “the word identity implies fixity and givenness”. Hollinger says we live in “an age not of identities but of affiliations”.

Hollinger argues not for a plurality of distinct communities but of a post-ethnic cosmopolitan world of multiple affiliations, none of them permanently proscribed by race or ethnicity. As he writes, “a postethnic perspective recognises that most individuals live in many circles simultaneously”.

The Indian philosopher and economist, Amartya Sen, shares a similar outlook, rejecting what he calls exclusive “solitarist identities” in favour of “layered identities”. If identities are not permanent, fixed or essentialist, how does a nation make treaties with constituent groups when those groups themselves are never settled, but in a constant state of transformation?

The complexity of group rights is just one problematic factor among many when we ponder the efficacy of treaty or recognition. Proponents of the rights of Indigenous Australians often make claims of restorative justice; some form of reparations. The claim is linked to historically rooted and ongoing socio-economic disadvantage.

Again, this is unconvincing. As a self identifying indigenous person, who enjoys an urbanised and socio-economically privileged life, a treaty/constitutional voice would have minimal material impact on my life. And there are increasing numbers like me.

This is not to deny that a compensatory component would not bring some respite to others, but so do myriad extant government programs. Political philosophers, Duncan Ivison, Paul Patton and Will Sanders confront this issue head on in their book “Political Theory and the Rights of Indigenous Peoples”:

“The case for remedial rights depends on their being a temporary measure intended to address specific disadvantage caused by historic injustice. But Indigenous claims appeal to ‘inherent’, not temporary, sovereignty”.

Clearly this is a much deeper challenge, with potentially nation changing consequences. So, there is a demand for a much more robust political justification for recognition of rights beyond socio-economic disadvantage or historic discrimination.

Some Indigenous leaders make the case that such agreements would create more effective dispute resolution mechanisms and provide clarity for all Australians, navigating issues of land ownership, shared access, mineral and water rights, heritage protection etc. Yet, a range of legislation and our courts currently fulfil that function.

The Indigenous case is often presented as a moral one: it is the right thing to do. To those supporters, treaty/recognition performs a metaphysical function; somehow it will psychically complete the nation.

By settling the account of the past – so the argument goes - non Indigenous Australians attain legitimacy, deepen their sense of belonging on a foundation of Indigenous spiritual sovereignty that forms the bedrock of a renewed, collective Australian identity.

This may be a fine poetic notion, but there are deep flaws: many Australians may already be very much at peace with their place here, and I am not convinced it is the responsibility of Indigenous Australia to absolve others of colonial guilt.

These are just some of the dilemmas that the proposition of recognition presents. None of this should be taken as an argument against Indigenous claims per se, but a more persuasive case is required, located within a broader liberal democratic tradition.

Indigenous rights pose critical questions for liberalism. The liberal project emerging out of the 17<sup>th</sup> century Age of Enlightenment, encompassed also the age of discovery, dispossession and subjugation of indigenous peoples.

As Duncan Ivison has pointed out indigenous peoples “were excluded from participating equally in the establishment of the international state system”. Some indigenous people reject liberalism as an ideology fundamentally incompatible with their claims for justice.

It is a self defeating view that ignores potentially liberating ideas contained in the western tradition. As Ivison has argued “it is not matter of simply discarding European thought but seeing how it can be taken hold of, translated and renewed “from and for the margins”.

Ivison, Patton and Sanders pose this question: “Can liberal democracy become genuinely intercultural? They point out that the claims of Indigenous peoples can “question the source and legitimacy of state authority”.

They ask how a nation can become “morally rehabilitated”; can a nation’s fundamental documents, its constitutions be reinterpreted? As they say, “how might the narratives of nation be retold”.

Rival political philosophers have wrestled with the limits of liberalism; or whether there is space for innovation. British political theorist, John Gray, argues that liberalism is focused on the freedom of the individual, as he writes in “Enlightenments Wake”, “the bottom line in political morality is the claims of individuals”.

This clearly has potentially negative implications for indigenous claims of justice. Gray wrote that “the diverse claims of historic communities, if they are ever admitted, are always overwhelmed by the supposed rights of individuals.”

Gray, rejects the liberal focus on the primacy of the individual, he says there is no “view from nowhere”, as human beings, Gray argues, we are formed by our histories and allegiances.

As he writes:

“In the real world, human beings think of themselves, not as essentially persons having a diversity of contingent relationships, and attachments but as being constituted by their communities and their histories”.

Canadian philosopher, Will Kymlicka, acknowledges that groups rights may appear antithetical to “existing conceptions of representative democracy”, but there is also a long standing practice of “drawing the boundaries of local constituencies so as to correspond with ‘communities of interest’”. In an urban society for instance, rural and agricultural groups may warrant special consideration.

Kymlicka though concedes that this can become ‘a source of major controversy when it involves racial groups’. Acknowledging the distinct claims of racial or ethnic groups, often focuses on issues of separate representation or self-determination which potentially challenges the sovereignty of the state.

As Duncan Ivison has pointed out: “The danger with the discourse of self-determination is the extent to which it encourages political mobilisation that fixes rather than pluralises political identities”. Very simply, we are not tied to any particular identity, in a healthy democracy we should be free to explore multiple and over-lapping affiliations.

It brings us back to the crux of recognising the rights of groups over its constituent individuals. It is not a dilemma easily resolved.

Duncan Ivison has put forward the idea of a “postcolonial liberalism”, that holds to fundamental liberal democratic principles while also acknowledging and incorporating the claims of colonised groups. He calls it a “mutually acceptable coexistence”.

For all of the innovation of thinkers like Kymlicka and Ivison, incorporating indigenous rights into liberal democracy is ideological quicksand, each step risks being further bogged down and swallowed up.

How can liberalism founded on a belief in the rights of individuals, complicit in a history of colonialism possibly contain the prospect of recognition and justice for the group rights of indigenous peoples? The search for a comfortable fit is elusive, and there is always the risk that finding an accommodation can undermine the very foundations of liberalism to begin with.

I am drawn to a cosmopolitan view of the world, a capacious humanity built on our universalism. It is the basis of the recognition of human rights.

Yet its universalism leads some cosmopolitan thinkers like Jeremy Waldron to see indigenous rights claims as anti-cosmopolitan. But others like Kwame Anthony Appiah offer up a concept of “rooted cosmopolitanism”; implicitly acknowledging that for all of the aspirations of global citizenship we are all from somewhere.

As Appiah says a “cosmopolitanism with prospects must reconcile a kind of universalism with the legitimacy of at least some forms of partiality”. But when it comes to political rights and recognition, who has primacy: the group or the individual members of the group?

There is the possibility of acknowledging both, drawing on national citizenship and international recognition of human’s rights. Duncan Ivison has written of an “emergent cosmopolitanism”; indigenous people seeking to ensure their rights at a national level “in terms of their membership

within the states in which they currently reside, and yet also secure international standing as members of particular peoples”.

Iverson says they are “territorially rooted, yet also cosmopolitan in orientation”. All of this is opening up new ways of exploring the potential of liberalism to meet the demands for justice of those whom liberalism has traditionally excluded or ignored.

There is also the potential of a more neutral position that creates space for the recognition of indigenous claims. This is where liberalism, with its emphasis on the rights of individuals, can appear most compatible with group rights.

The American political philosopher, John Rawls, talks of a “civic friendship” built among people with “disparate aims” but who recognise “a shared conception of justice”. As he writes in his seminal work “A Theory of Justice”: “Men may disagree about which principles should define the basic terms of their association. Yet we may still say, despite this agreement, that they have a conception of justice”.

Rawls framed his ideal society around his famous “veil of ignorance”: people agree on the principles of fairness and justice with no knowledge of the particulars of their lives: what class they are, their gender, sexuality, racial or ethnic affiliations. How could someone argue in favour of racism or gender discrimination if they are not sure they may indeed be black or female?

Conversely though critics have taken Rawls to task for not paying enough attention to race; his veil of ignorance, they claim, too readily brushes aside a history of racial violence and discrimination.

Philosopher, Tommie Shelby, has argued conversely, that Rawls’ ideas capture the essence of justice, as he has written: “Rawls holds that within political conception of justice all persons, regardless of their racial identity, should be regarded as free and equal”. Shelby adds that “when the distorting effects of racial prejudice and bias pervade the operation of an institution, the institution as realised is itself injustice”.

Here is a coherent claim for recognition of the rights of indigenous groups, rooted in the principles of liberalism. It is inarguable that the institutions of Australia have historically discriminated against those people descended from the first Australians.

These individuals coalesce under Tommie Shelby’s formulation of “Pragmatic Black Nationalism”, that “what holds blacks together as a unified people with shared political interests is the fact of their racial subordination and their collective resolve to triumph over it”.

Contemporary political philosophers like Duncan Ivison, Tommie Shelby, Will Kymlicka and others point the way to a new appreciation of the enduring and innovative nature of liberalism. Even those historically locked out can find a way back in.

They challenge liberal democracies to be better and ask hard questions of those – like Indigenous groups – seeking recognition of rights.

As Kwame Anthony Appiah writes “identity is at the heart of human life, liberalism takes this picture seriously, and tries to construct a state and society that takes this account of the ethics of identity without losing sight of the values of personal autonomy”.

The 19<sup>th</sup> century German philosopher, Georg Wilhelm Friedrich Hegel, saw the history of the world as “the progress of the consciousness of freedom”.

He believed that freedom came in the struggle for recognition.

Treaties, constitutional recognition, can be consistent with Australia’s democratic principles, indeed it can be argued, Australia would be strengthened.

Rather than locked into exclusive, restrictive group identities, individuals, previously marginalised in Australia, would be freed to explore the full range of their affiliations, ambitions and desires and identify themselves how they would wish.

They could believe in an Australia that had not always believed in them.

As Yothu Yindi sang in “Treaty”: “now two rivers run their course, separated for so long, I’m dreaming of a brighter day when the rivers will be one”.