
JUSTIFICATION, NOT RECOGNITION

by Duncan Ivison

INTRODUCTION

The debate over the constitutional recognition of Indigenous peoples in Australia should be seen as a deeply political one. That might appear to be a controversial claim. After all, there has been much talk about minimising the scope for disagreement between ‘constitutional conservatives’ and supporters of more expansive constitutional recognition. And there is concern to ensure that any potential referendum enjoys the maximum conditions and opportunity for success.

However, my argument shall be that any form of constitutional recognition of Australia’s First Peoples needs to be seen as part of an ongoing transformation in the relations between Indigenous peoples and the Australian state. I do not underestimate the huge practical and political challenges of amending the Australian *Constitution* given its history and the nature of its provisions. And I well understand the considerations that are required to undertake a referendum in Australia, given how rarely they succeed (only 8 out of 44 since Federation).¹ So I am very sympathetic to those who must make a complex set of judgments about when and how the referendum should occur.

But there is a danger in confusing the referendum process and its outcome with the necessary and sufficient conditions for establishing a just set of relations between Indigenous peoples and the state. To not seek to understand and address these deeper political claims would not only be an opportunity missed, but unjust. And it would not only be unjust from the perspective of Indigenous peoples, but also on the basis of the very grounds upon which liberal democratic political orders—like Australia—claim their legitimacy. We need to shift the perspective and overall frame within which we understand claims for recognition in these contexts. The justificatory onus is not on Indigenous peoples, but on the state, especially when it is a self-consciously liberal democratic one. In this paper I want to explore the philosophical basis of this perspective shift and why it is necessary.

There are two crucial elements to my argument. The first is to explore the relationship between legitimacy and justice. In recent political theory, there is a tendency to see these two concepts as either synonymous, or radically distinct. Neither position is correct. Legitimacy and justice are interdependent, but not synonymous. However, it is important to understand the nature of this interdependency. This is particularly important with regard to the relations between Indigenous peoples and settler states. The coercive powers of the state are justified only to the extent that they provide the conditions within which justice can be provided for the members of that community. The conundrum is this: a Constitution may be considered legitimate because its procedures and processes are endorsed by the majority, despite producing unjust laws and outcomes. But laws and outcomes that are considered just may also be illegitimate, especially if they are imposed without due consideration for the standing and agency of those subject to them. What is the best way of making sense of this tension between legitimacy and justice?

There are at least two ways in which the apparently justified coercive power of the state can become illegitimate. The first is that the state and its agencies consistently produce distributive outcomes that undermine the basic freedom and equality of particular members of that community. (Of course, there are different ways of understanding what a just distributive outcome should be. I leave aside those specifics here.) The second way justified authority becomes merely coercive is when the operation of its constitutional procedures and processes, respect for and the standing of the basic moral and political agency of members of that community are either ignored or are denied in various ways. These two critical elements of liberal democratic justice—distributive equality and respect for the political agency of the members of the community—are the focus of my discussion here.

The reason equality and agency are so important in the case of Indigenous peoples is that they present two of the most challenging aspects for reimagining the relationship between

them and liberal settler states. It almost goes without saying that Indigenous peoples are among those who suffer from the worst distributive outcomes in our community today—for example, in terms of life expectancy, overrepresentation in the criminal justice system and health and educational outcomes overall. And respect for, as well as acknowledgement of, the distinct moral and political agency of Indigenous peoples within the constitutional and political structures of Australia remains unresolved.

Of course, the distributive and agency aspects of justice are deeply connected. The reason why Indigenous peoples have suffered from terrible distributive outcomes stems in part from the formal and informal discrimination that has been imposed on them by the state since settlement. It has not simply been the lack of formal recognition of their collective political agency, but the proactive denial of that agency, that has undermined their wellbeing. The capacities of individuals and communities to gain access to and develop their fair share of what John Rawls calls the ‘primary goods’ in his book *Justice as Fairness: A Restatement*—that is, those fundamental goods required to live a decent life (resources, basic liberties, equality of opportunity)—have been regularly denied and undermined through formal and informal means.²

All states are to some degree unjust and illegitimate, just because justice and legitimacy can never be settled at one point in time, once and for all (this is a very general point, but an important one that I will return to in my conclusion). However, there comes a time when the illegitimacy of the political constitution and the procedures it endorses threatens to undermine the distributive outcomes it produces. Similarly, there comes a point where the unjustness of the outcomes threatens the very legitimacy of the political order that produces them. I believe we are at such a crossroads in Australia today.

LIBERALISM AND THE CHALLENGE OF HISTORIC

There are two familiar responses among contemporary political philosophers to the challenges outlined above. The first is that they demonstrate the fundamental moral and political complicity of liberal political theory and the liberal state with imperialism and colonial domination. The most powerful versions of this argument have come from Indigenous political theorists, which I shall explore in a moment.³ The second response is that, in fact, there is no *special* problem here for liberal political theory to deal with: it represents a spectacular failure in practice (and perhaps exposes the limits of the historical context within which liberalism was developing), but not with liberal principles or concepts themselves.⁴

I think this second response is too complacent. But I also believe it’s possible that in reflecting on the history of

liberalism’s entanglement with colonialism, we can reshape some of our master concepts and practices to at least address the fundamental challenges colonialism poses to the self-understanding of liberal political communities. Two of the most important concepts in this regard are *recognition* and *justification*. These are two of the most dominant modes of dealing with questions of the legitimacy and justice of liberal political orders. They constitute two of the most influential ‘moves’ in the language game of contemporary liberal justice. As I have argued above, Indigenous peoples’ claims for recognition presents a deep challenge to liberalism, namely: how can the legitimacy and justice of liberal political orders be redeemed in the presence of deep and ongoing historical injustices?⁵

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Before turning to the concepts of recognition and justification directly, we need to understand the sense in which injustices are said to be ongoing or enduring.⁶ The challenge is grasping the extent to which historic injustices continue to shape not only the distribution of ‘primary goods’, but also the meaning and equal value of those very goods (as well as the boundaries of the political community within which they are to be distributed).⁷ So how do past injustices continue to shape the present, especially one in which a political community has embraced conceptions of democratic citizenship as a central aspect of its collective political identity? We might fail to live up to those ideals in a myriad of ways, so one argument goes, but they still continue to serve as normative benchmarks against which we judge the outcomes of our political processes—including (and especially) for the most vulnerable and marginal members of the society. The question then becomes: how do historic injustices undermine the value of democratic equality?

Of course, you might reject the claim that historic injustices do actually possess the kind of moral and political significance I am suggesting they have in this case. Jeremy Waldron, for example, has argued that in some contexts, after a certain point, historical injustices can become ‘superseded’.⁸ According to Waldron, the changes in social, economic and political circumstances over time, and especially since settlement, are such that there is no plausible way of restoring a state of affairs that has been deeply disrupted by colonialism, without possibly generating more (contemporary) injustice in the process. Indeed, some have argued that this is

precisely the case with regard to at least the legal circumstances of the settlement of Australia. How could the Australian state reverse the circumstances of its own founding? The problem with this argument, however, is that it tends to assume that the rather narrow conditions in which supersession might occur (for example, an original theft now incorporated into radically different circumstances) applies generally to the colonisation of a territory.⁹ It also presupposes that nothing further can be done to address the original injustice. One doesn't have to believe that justice is impervious to changes in circumstances, to think that this still leaves open considerable scope for the political claims of Indigenous peoples. And yet, there remains a key point worth considering at the heart of the supersession argument: to what extent does the legitimacy of a political order turn on its origins, as opposed to its present behaviour?¹⁰ This returns us to the question of the relation between legitimacy and justice. If liberal political orders are to be justified on terms that those subject to the coercive powers of that order could not reasonably reject,¹¹ then historic injustices matter insofar as they shape the contours of the justificatory game within which struggles for recognition take place. I will return to this point below.

How can the legitimacy and justice of liberal political orders be redeemed in the presence of deep and ongoing historical injustices?

GAMES OF RECOGNITION AND JUSTIFICATION

I want to look more closely now at what I am calling the 'recognition game' in liberal political theory.

According to the liberal version of this approach, we can only become a truly self-conscious and self-determining agent when we enjoy the *mutual* recognition of other, similarly constituted beings.¹² At the heart of this account of recognition is a claim for mutual respect: individuals (and groups), understood to be both fundamentally free and equal, are owed respect, which is reflected and made manifest through genuine mutual recognition. Misrecognition, then, is a form of disrespect, and more strongly, denotes an absence of genuine mutual *esteem*. Depending on the theorist, misrecognition then results in at least two possible outcomes. First, it undermines an individual's (or group's) capacity for self-development and autonomous agency, because they internalise perceptions of inferior social worth and inequality.¹³ And second, it reinforces existing structural and material inequalities that impede the equal participation of minority groups in democratic institutions (whatever their internal

subjective mental states).¹⁴ The first represents a psychological account of the role of recognition (and misrecognition) in politics. The second focuses on the way struggles over recognition reflect deeper, more fundamental material and structural inequalities that block equal participation.

Regardless of which strand of this discourse on recognition one endorses, it has become one of the master concepts for understanding struggles for minority rights—including Indigenous peoples' claims—more generally. However, I want to argue that it plays *too* dominant a role as a framework for addressing these issues. In fact, this is one of the conclusions we should draw in reflecting seriously on the history of Indigenous peoples' claims within liberal democratic states.

There are at least two main lines of critique here. First, the focus on recognition often misconstrues the motives and aims of social and political actors in political struggles. Recognition is often part of what is at stake, but it shouldn't be seen as the privileged driver of *all* social and cultural interaction (*pace* Honneth). In the most psychologically focused accounts of recognition, these struggles become dominated by the quality of the individual's sense of self-respect or esteem *vis-a-vis* their recognition by others. But this overemphasises the need for mutual recognition as a condition for effective political agency. At the very least, history suggests that individuals and groups form a sense of their own identity and self-worth both prior to and in the midst of often deeply unequal struggles for justice. After all, Hegel's slave ultimately gains his freedom only after turning *away* from his master and focusing on his own work. In short: the sense of who I am (or we are) depends neither morally nor practically upon recognition by the majority, or at least not primarily so. And nor should the aim of such struggles be for mutual esteem—the conditions for which are extremely demanding in the context of social and cultural pluralism—but rather to be respected as political equals. I shall return to this distinction in a moment.

The second line of critique is more specific. The crucial question here is: who is recognising whom, and on what basis? Casting the claims of Indigenous peoples as claims for recognition by the state, or the broader political community, can become something of a trap or, at the very least, a dead end.

Among the most powerful versions of this critique are those developed recently by a number of Indigenous political theorists. Each takes a slightly different tack, but focus in on a similar set of concerns. If it is fundamental to the liberal versions of the recognition game—especially those inspired by Hegel's master/slave dialectic—that the recognition that occurs between individuals

(and groups) must be genuinely *mutual*, then colonialism renders this impossible. Franz Fanon, in his masterpiece *Black Skin, White Masks*, provided a devastating version of this argument: the colonial master is not dependent on the slave, as Hegel thought (paradoxically), for securing his own self-consciousness, but rather needs his work (and crucially, his *territory*).¹⁵ The colonial subject, in turn, subjects himself to a regime of recognition in which he internalises the gaze of the coloniser and thus the discipline they impose on his desires, as well as the conceptual schemes and values imposed on the interpretation of his political and cultural structures. As Audra Simpson puts it, this means that the production of anthropological and political knowledge about Indigenous people ends up being wed ‘elegantly, effortlessly and very cleanly’ to the imperatives of the colonial project and the desire for territory.¹⁶ This can result in deeply divisive, overlapping and enduring injustices within Indigenous communities as well. The situation of Aboriginal women in Australia and Canada, for example, is one such example. The effects of a racist and patriarchal Canadian *Indian Act*, combined with diminished territory and constrained rights of self-government, ends up generating yet more grounds for legislative intervention in Aboriginal communities—which, in turn, generates new conflicts and divisions therein. As Glen Coulthard well summarises it, this results in the absurd paradox of the injustices of colonialism generating the grounds for yet more colonialist interventions.¹⁷

What these critiques have exposed is the ‘sting in the tail of recognition’: to seek recognition is to seek to be valued by others, which unavoidably involves a critical evaluation and judgment about the beliefs and practices of the person (or peoples) making the claim.¹⁸ Interestingly, this formed a major part of Charles Taylor’s original and influential essay on the ‘Politics of Recognition’, but has been less prominent in subsequent debates. For Taylor, the demand for recognition also called for an expansion of our horizons of mutual understanding, as well as our beliefs about the presumptive worth of what other cultures had to offer.¹⁹ But in colonial contexts, this generous and inclusive spirit struggles to overcome the deep historic legacies of domination and exclusion. The ‘recogniser’ inevitably exercises considerable power over the ‘recognisee’ in being the one with the capacity to grant recognition. In fact, it’s difficult to make sense of recognition being something that one can *demand* in the first place, as if it were a right that triggered a necessary obligation.²⁰ The conditions that attend genuine recognition make it difficult to be interpreted as something akin to a rights claim.

This challenge becomes particularly acute if mutual recognition requires recognition and mediation through the *state*, as Coulthard and Simpson have argued so powerfully. If the legitimacy of the

state is under serious question given the ongoing injustices of enduring colonial practices, attitudes and institutions, then the conditions for genuine mutuality and respect are absent. Thus the legacy and continuing reality of enduring injustices render the politics of recognition deeply problematic, both in terms of its explanatory power and as an appropriate normative framework for constitutional and political reform.

The critique of recognition has led Indigenous and other political theorists to increasingly turn towards other explanatory and normative frameworks, including a self-conscious reconstitution of Indigenous identities and ways of life as independently as possible from the liberal settler state. This often takes the form of a refusal to accept the terms of the recognition game through a daily counter-assertion and enactment of alternative, grounded ways of life and sovereignties.²¹ The focus here is on *resurgence*, as opposed to recognition, and on the means necessary for rebuilding Indigenous communities on terms not defined in advance by the state and its agencies.²² For the purposes of this essay, I believe the important insight we gain from these critiques is the decentering of the recognition game as primary to the formulation of our understanding of the interdependency between legitimacy and justice in liberal political orders. But then what should replace it?

POWER AND JUSTIFICATION

A political theory that took these critiques of the liberal recognition game seriously would need to conceptualise liberal settler states very differently. They should be seen as being composed of constellations of normative orders that overlap and intersect in complex ways both above and below the state, as opposed to a singular people or sovereign.²³ And it should take seriously the historical and political legacies of the way those normative orders came into being and the interactions between them over time.

A deeper challenge is to the ostensible universalism of the metaethical and normative structure underlying many of the dominant modes of political theorising today. Human rights and social justice theorists often struggle to see the extent to which embracing and responding to the critique of colonialism entails leaving moral or political universalism behind. Of course, one could argue that the most powerful critiques of colonialism *depend* on forms of ethical and political universalism, which ought to provide the terms in which to reject the racist and imperialist justifications for the subjection of Indigenous peoples. That shift, however, can often seem glib in light of the historical and structural features of global politics.

The challenge, therefore, is to put the question of power at the heart of our accounts of justice and equality. This has

often been missing, given the dominant focus on recognition. Justice is not only a matter of how resources ought to be distributed, but also how they came about and how decisions about allocations should be made. The shift is, therefore, from a focus on recognition to a focus on power, and thus to relations of *justification*. Despite the focus on justification in recent contemporary political theory, it's still not clear that liberal political theorists, broadly construed, really do put this question at the heart of their approach. In relation to the constitutional and political situation of Indigenous peoples in Australia, I believe it shifts the onus of justification from resting almost entirely with Indigenous communities, to one (at the very least) equally shared with the state. Let me try to explain.

The first question of liberal justice is indeed the question of power, for it is the promise of liberal political orders that an individual's basic freedom and equality can be reconciled with subjection to political authority. Hence the promise of the justification game and the appeal to the existence of something like an underlying 'right to justification'. This is the signature move of Rainer Forst's work, for example, but builds upon similar claims present to differing extents in the work of John Rawls, Thomas Scanlon, Jeremy Waldron, Jurgen Habermas, Nancy Fraser, Seyla Benhabib and others.²⁴ Once again, there is an appeal to an underlying notion of respect for the autonomy of persons, but now on the basis of their 'right to justification'. That is, to the recursive general principle that every norm appealed to in order to legitimise the use of force must claim to be reciprocally and generally valid, and therefore needs to be justified by reciprocally and generally non-rejectable reasons. *Reciprocity* is required in the sense of both content and reasons: I can't claim rights or resources that are denied to others and I can't simply impose my reasons on others in making those claims. *Generality* is required in the sense that the reasons for accepting those norms need to be shareable among all persons affected.²⁵ The underlying normative ground here is the moral demand for respect of each other's moral and political autonomy as a reason-giving and reason-receiving being, living in a community of similarly constituted agents.

In political terms, this translates into a right to justification for all individuals, on terms they couldn't reasonably reject, of those exercises of power that affect their most vital interests and concerns. Power needs to be construed broadly here. It can be put to good use or bad, depending on the context. And it can be exercised both in the physical sense—I prevent you from leaving the room by locking the door—and in the 'space of reasons': that is, the power to shape the frameworks within which the legitimacy of certain social and political relations are determined and justified.

This returns us to the discussion of the interdependency between legitimacy and justice. The focus on relations of power shaping both my freedom and the 'space of reasons' within which power is justified can help us understand the deep and systematic nature of the injustices that characterise Indigenous/state relations.

Now, there are complex debates about the nature of justification that we can't explore here. But at the heart of the underlying conception of normativity upon which this conception rests is the idea that the validity (or bindingness) of norms is grounded in a form of *practical deliberation* among equals (as opposed to some external source). A norm is valid to the extent that it withstands a certain kind of justificatory procedure. There are, of course, elaborate and sophisticated accounts of the kind of justificatory procedures required to meet the appropriate threshold; for example, in the work of Habermas, Scanlon and Forst. These influential neo-Kantian approaches seek to establish the validity of a procedure that avoids both moral particularism and dogmatism: we can't appeal to an underlying conception of the good that everyone already accepts, or to an external set of pre-ordained interests or needs. Instead, we have to construct the appropriate terms of our fundamental moral and political relations collectively, from the ground up, respecting each other's fundamental freedom and equality at each step in the process.

However, it's also true that there is a limit to what justification can do. The source of normativity of the justificatory procedure *itself* is, more often than not, presumed. Forst, for example, following Kant, accepts that, in the end, there are limits to our being able to justify the normativity of justification; he argues it is implicit in the way we grasp the nature of practical reason itself.²⁶ In other words, and very crudely, it's tied to what it means to be a competent moral agent, living with other similarly situated agents and needing to justify claims made to them in morally appropriate ways.

Of course, this invites the charges of circularity and arbitrariness that the neo-Kantian tradition has long sought to avoid. I will leave this critique aside here. The key point, for our purposes, is that the ground of this form of normativity is modeled on 'our' practices and conceptions of practical reason. And this returns us to the question of power, as well as the legacies of historic injustices, such as colonialism. It's not that the project of (re)constructing the ground of normativity is in itself impossible. Rather, it's the challenge of redeeming this mode of normativity in ways that stay true to its own aspirations in light of the complex histories of the development of political communities. Practical reasoning, however else we might conceive of it, is a social practice.²⁷ It has a history. And that means that there is always the possibility (and probability) that those practices have been—and continue to

be—shaped by various relations of subordination and domination that often evade our extant conceptual and justificatory schemes.

CONCLUSION

What does this mean for the constitutional recognition of Indigenous peoples in the Australian *Constitution*? I think there are at least three important lessons to be drawn from the arguments above.

First of all, the nature of the interdependency between the legitimacy and justice of a political order requires that we are constantly subjecting both the principles and practices of our constitutional and political order to justificatory challenge. Any form of constitutional recognition needs also to be complemented with an ongoing process of negotiation and engagement with the relevant political entities representative of the complex community of Indigenous peoples in Australia. Thus any form of constitutional recognition is fundamentally incomplete, just because it can only ever be part of what it means to establish just relations between the state and Indigenous peoples. An important corollary of this argument (sometimes missed by critics of liberal legitimacy) is that settler states that began with injustice are not thereby condemned to remain unjust. But this is only possible if they remain open to processes of critical reflection and challenge regarding the outcomes our institutions produce, and the standing and agency of the constituent peoples that make up that political order.

Second, what recent Indigenous political theory has made vividly clear is the extent to which we are often blind to those structures of domination that shape our political practices and the theories we use to justify them. And this can mean that the forms of mutual justification envisaged by Habermas or Forst, and the forms of mutual recognition as envisaged by Taylor and Honneth, are often rendered cognitively and juridically impossible from the perspective of Indigenous peoples.²⁸ The dominant focus on recognition, in particular, needs to be dislodged and a greater attention paid to the ways in which current social and political arrangements manifest distinct forms of unjustified exercises of power. And so another thing we learn from Indigenous political theory is that our political community is always a constellation of normative orders, as opposed to one in which the questions of sovereignty and authority have already been answered. This then raises the acute challenge of how we understand and justify the terms of engagement, mediation and adjudication between these different orders.²⁹

Finally, a deep, underlying question to this whole discussion is the extent to which any political community can be forged in ways that do not entail an incessant desire for mastery—either of humans

over each other, or of humans over nature (or indeed both). Of course, the neo-Kantian and neo-Hegelian accounts of political association that still inform so much of contemporary political theory proclaim this as their ultimate end as well. But the history of liberal colonialism demonstrates how that promise is, more often than not, experienced by so many, especially minority groups, as colossal bad faith.

But then what kind of politics of hope does this leave us with? In one sense, the global structures of liberal sovereignty and capital might seem so entrenched, and based on such flagrant violations of liberalism's self-understanding, that Indigenous peoples can't be expected to play in that game anymore, given the meagre returns to date. Thus one response, mentioned above, has been a focus on Indigenous 'resurgence' that attempts to stand outside of liberal democratic practices altogether. And it is no surprise that this is an increasingly attractive option for many Indigenous theorists and activists. However, even with resurgence, and a turn towards the building of alternative normative worlds, there will be a need for common concepts to structure relations between the complex, interconnected communities that make up our political order. For this reason, a project focused on attempting to re-conceptualise our concepts of legitimacy and justice, in the full light of our colonial past, is still worth pursuing.

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- 1 See Megan Davis, George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Books, 2015).
- 2 John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001).
- 3 Glenn Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014). See also (from a non-Aboriginal perspective, but taking his lead from it) James Tully, *Public Philosophy in a New Key vol II: Imperialism and Civic Freedom* (Cambridge University Press, 2009).
- 4 For one extreme version of this argument, see Brian Barry, *Culture and Equality: A Liberal Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002).
- 5 Needless to say, these aren't the only injustices liberal orders need to grapple with.
- 6 See Jeff Spinner Halev, *Enduring Injustice* (Cambridge University Press, 2012); Duncan Ivison, 'Historical Injustice' in John Dryzek,