Looking Ahead: Resolving the Incomplete Vision of Indigenous Sovereignty

STEVEN CURRY[+]

Introduction

I must begin by acknowledging that this paper was written in Aboriginal country and first presented on the lands of the Eora Aboriginal nation in Sydney. I wish to pay my respects to the people of this country, their elders, and the authority of their law in this land.

I also wish to thank the organisers of the 2005 conference of the Australian Society for Legal Philosophy for their hospitality, and all the members of the ASLP for their generosity in hosting the symposium that originated these papers.

In particular I would like to thank the three respondents who have written these detailed and thoughtful responses to my work. I am humbled that people whom I respect so much should take the time to do this. They have been both far more generous in their praise and far more reserved in their criticism than I think the work deserves.

Rather than use this opportunity to write a whole new essay on the matters covered in the book, I would like to extend the principle of dialogue that motivated the symposium by responding to specific points raised by the commentators. While the commentators have raised a wide range of issues and specific points, I think much of their criticism can be placed in two broad categories. The first set of issues involves the practicability of my proposals. The second set has to do with limitations in the scope of my original analysis. I shall address each of these sets of criticisms in a separate section before offering, by way of a conclusion, some comments about how we might proceed in the Australian context. This conclusion is somewhat limited because of the nature of our discussion and limitations of space.

[+] Centre for Applied Philosophy and Public Ethics, University of Melbourne

Practicality

Jennifer Clarke asks rhetorically if there is any chance that my proposals might be put into practical operation and replies "of course not!" All three commentators raise serious concerns about the viability or practicability of the robust responses I argue sovereignty requires. An axiom of ethics, often attributed to Kant, is that "ought implies can".[1] There is no point in mounting a normative argument if those to whom it is addressed simply cannot respond. We can't be held accountable for failing to do the impossible. However I am not in violation of the axiom because what I am asking for is not impossible. Clarke and the other commentators raise concerns not about the logical possibility of my proposals being realised but the vanishingly small likelihood, as they see it, of the majority of Australians and their politicians actually trying.

Clarke's concerns are entirely practical ones. She describes the current state of policy and politics in indigenous affairs, focussing on the "policy lurch and rights trade-offs" that have been consistent features of the governmental response. Clarke and Davis share a profound pessimism, rooted in experience, about the possibility of non-Indigenous Australians coming to recognise or care about the legitimate demands of their Indigenous neighbours. This is a point about politics. The book is principally a work in political philosophy. It draws upon legal theory and legal history, analyses legal concepts and has implications for law reform. It might be tempting to mistake it for a work of legal theory, or perhaps a guide to political activism, but it isn't (or at least not directly). Many of the limitations of the book are the result of me choosing to stop at the boundaries of philosophy. The philosopher might explore, clarify, and develop the terms of a normative debate, but it is not the academic's place *qua* academic to tell people how to proceed in a political struggle. Clarke and Davis do not appear to have mistaken my purpose, but do point out the limitations of using a normative argument for political purposes.

I believe that the directions indicated in the book are achievable, in principle. In practice political reality will fall far short of these standards, at least for the time being. This is the entire purpose of a normative argument of the sort developed in my book. When Jennifer Clarke mentions rights trade-offs she has put her finger on one of the major problems infecting the dialogue between Indigenous people and government. It is frustrating to see how the debate is re-framed every time as a policy debate, one where

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1 There is a large literature on the Ought Implies Can Principle. Two useful articles are John Kekes "'Ought Implies Can" and Two Kinds of Morality' 34 *Philosophical Quarterly* 459, 467 and Walter Sinnott-Armstrong "'Ought" Conversationally Implies "Can"' 93 *Philosophical Review*, 249, 261.

government must balance the competing demands and interests of all citizens. It is one of the hidden costs of citizenship for indigenous people.[2] This re-framing serves to legitimise the idea that Indigenous people should be prepared to "compromise", to "meet us half way". The problem is that the goal posts are re-set after each cycle of policy formation and reform, so that halfway turns out to be a mid-point between the insatiable demands of the state and whatever Indigenous people had already given up last time. In reality, a reasonable definition of 'fair' shares would place the half-way mark a very long way behind us already.[3] One important function of a normative argument is to de-legitimise the kind of rhetorical moves that allow for incessant demands and unreasonable burdens. The very strong moral dimension of the work provides a frame of reference against which real world demands and policies can be measured. From this philosophical perspective the achievement of the program suggested by the normative argument is less important than the likely results of shifting the ground of legitimacy that underpins what political actors do.

That said, the normative argument does also shape an ideal, an image of what a just, post-colonial society would look like (or at least one, hopefully attractive version). In producing ideal images of future societies philosophy can easily fall into the trap of political utopianism. Indeed philosophers and political theorists can easily be seduced by this utopianism, making up pleasing stories about how the world could be better and passing these off as political programs. One of the reasons why I

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2 The arguments about the limitations and hidden costs of formal citizenship are canvassed thoroughly in Attwood and Markus et al, *The 1967 Referendum, or When Aborigines Didn't Get the Vote* (1997).

3 The idea of a "fair share" is complex at best in the context of indigenous affairs. On the one hand I am unconvinced by claims that first nations had no right to deny entry to European migrants on the grounds that it would be unjust to hoard an abundance of space and natural resources. To put it simply, if modern states enjoy the prerogative of controlling their borders then so should any political community of the sort I describe in my book. However, I am also inclined to endorse the general principle that the political community is not sacrosanct. The prerogatives of the state or the tribe can be outweighed by the moral weight of a general duty of benevolence. A state is morally culpable for turning away refugees and the very poor. The European colonists of course mostly were not refugees or in desperate straights. Nevertheless we might think there was some duty on Indigenous nations to cooperate with foreigners and to share some resources. The exact extent of that duty of benevolence is a matter of purely theoretical interest, since whatever it is it must have been long ago exceeded and cannot be reasonably said to keep shifting relative to whatever resources are now left. For a useful discussion of the possibility of "supersession" of indigenous rights in Australia see Paul Patton, 'Historic Injustice and the Possibility of Supersession' 26 *Journal of Intercultural Studies* 255, 266.

stopped short of including a substantive set of prescriptions in the book was my fear of becoming one more in a long line of academics misled into substituting my own "expertise" for the real political experience of actual people. While a work of normative political philosophy cannot expect to be a guide for political action, there is still a role for ideals in politics. The kind of sketch I have offered might be termed a "regulative ideal". This sort of image is not necessarily realisable as such, but serves rather as a cardinal point on our moral compass, providing a yard stick against which real world decisions can be measured and thus a definition of "better" and "worse" in a particular context. A policy or political decision that takes us closer to the ideal is better than one which takes us further away. The normative arguments in the book, and the ideal solution suggested by them do not need to be fully realised to be useful. If they serve to guide choices, to de-legitimise certain rhetorical tactics used by the defenders of the colonial status quo, and if they help us choose between the compromises and partial solutions on offer, then they would have done about as much good as philosophy can do in a real political struggle.

Will Sanders has offered a somewhat different criticism on the grounds of practicality. He has argued that the seven necessary features of Indigenous sovereignty are far too demanding. Perhaps they are so demanding as to violate the ought-implies-can rule. Looking back on these conditions now I can see his point! If these were to be presented to the public as the terms of a political debate we can reasonably anticipate people recoiling from them. It would backfire by giving people extra reasons for disengagement. However, in my defence this is an analytical list that provides the framework for generating the regulative ideal described above. Those of us in the theory business might make use of such an analytic tool, but the political uses of the tool are obviously limited. To the extent that all seven conditions are not met a real world solution will fall short of what I believe is the complete fulfilment of the demands of justice, but then most of us probably already expect a solution to be imperfect. All of the commentators have referred to the fact that demands for recognition of Indigenous sovereignty have not resonated with non-Indigenous Australians, and that few people outside the immediate compass of the struggle have felt that the legitimacy of mainstream institutions is threatened. This is true. In practice people can go on indefinitely ascribing a robust legitimacy to a system of laws and government heedless of profound injustice. Nevertheless, this can simply be a mistake. Moral philosophy is not concerned with what people do, nor with what they can get away with doing, but with what people ought to do and should believe. In this sense the legitimacy of Australia's democratic institutions is on thin ice. The means by which people can come to recognise this fact are yet to be determined.

Limitations of the Analysis

All of the commentators point to significant limitations in the scope of my arguments. Apart from the rhetorical limitations of my analyses, Will Sanders also points out that the book makes very little use of relevant Australian examples. He points to the emerging idea of jurisdiction sharing with its attendant implications for the recognition of sovereignty and the practicality of self-determination. Sanders describes this as his "one disappointment with this book". If this really is his only disappointment then I'm doing well. In retrospect I am disappointed about this, too. It is a weakness, and a great deal could have been gleaned from a more direct study of these arrangements. I was perhaps too broadly concerned with the general concept of sovereignty, and too little concerned with the practical implications of non-constitutional approaches. Any future work towards a practical model for the recognition of sovereignty should start from these sorts of co-management arrangements and jurisdictional recognitions, as they provide a working example of how post-colonial institutions can combine Indigenous and non-indigenous legal and political systems in a single, coherent framework.

Megan Davis asks a very pertinent question: "what about the women?" and wonders what I might say about gender issues in this context. In the book I have argued that the self-determination of Indigenous peoples cannot be regarded as a retreat to some essentialised pre-contact social order. As Davis herself argues "Aboriginal law ... is complex and is not frozen in time but evolves and adapts". As soon as we recognise an adaptive capacity in a system of law we recognise the political capacities of the people whose law it is. The marginalisation of women in Indigenous affairs that Davis identifies has a complex aetiology. On the one hand it is, as she points out, a function of the imposition of alien forms of authority and governance, which come from a society which itself continues to struggle with the demands of women for an equal share of wealth, power and opportunity. Western society struggles to recognise that women are not simply demanding to be treated as honorary men, but to be able to make their own lives and their own, unique contributions. The same struggle occurs within Indigenous nations. It is a natural part of the development of a dynamic society struggling both to honour and advance its own forms of law, and to respond to and make use of powerful ideas derived from the interaction of two cultures. The future promises only more complexity. If Indigenous sovereignty is recognised, it will only serve to uncover continuing tensions within indigenous communities about the role of traditional authority, the place of "Western" ideas of formal equality, and competing ideas about the role of women in law and government. As Indigenous women increasingly find their voices in their communities I would anticipate that we will hear more diverse articulations of the Law and

of different aspects of tradition which will serve to alter how institutions develop. It is even probable that this diversity will serve to teach mainstream Australia something about complex gender equality. In this way the issue of gender politics illustrates two important points about my argument. First, it is necessary to see the development of modern Indigenous society as dynamic and political. Even ideas about what traditional law and authority require are contested. Second, we must remember that we are in the midst of a complex interaction between numerous Indigenous and imported cultures. Each of these will continue to be affected by the others. We will continue to see the impact of Western concepts on the thinking of Indigenous leaders, hopefully we also increasingly see the impact of Indigenous ideas on mainstream thinking too. The recognition of sovereignty doesn't put an end to politics inside or between communities, but merely opens up the terms of dialogue and recasts the power relations that condition our political behaviour.

Jennifer Clarke has raised what I regard as a serious challenge to my conclusions. She points out that my enthusiasm for the Nunavut agreement, and the conclusions I draw from it, may be excessive or misguided. Clarke's insight appears a little obvious in retrospect. The indigenous majority in Nunavut is contingent on large numbers of non-Indigenous people keeping out. She suggests that global warming or the discovery of oil could tip the balance easily, and she is quite right. Perhaps we must be careful what lessons we draw from the example. A new and important lesson is that without strong enough protections of sovereignty it can be easily lost. For me, the example of Nunavut is still of great interest just because it suggests how Indigenous law can be recognised as part of the common law of a post-colonial state. However I think it appropriate to acknowledge Clarke's point that this is still not sovereignty and remains insecure. This serves to remind us that until the constitution of a state, the shared law of our shared land, recognises and makes a place for Indigenous law, no amount of self-government will be enough to shield Indigenous peoples from further colonisation and the dread "tides of history".

Looking Forward

So where to from here? The commentators are all quite right when they identify a lack of political will in Australia, and a lack of interest among the broader public. Until the people of Australia come to see that they really are undermining the legitimacy of their own institutions through injustice, and do see that their standing as a morally upright global citizen is undermined by this and other forms of hypocrisy then little is going to change. However there is no need for complete pessimism. I believe that the road to reconciliation is open to us, and that the normative arguments rehearsed in the book are of use. As Martin Luther King demonstrated, change comes

when people come to see their own self-image and most cherished ideals bound up with someone else's struggle. Luckily the way ahead is likely to be easiest when paved with positive and hopeful messages. We can and must articulate a vision, not of difference and disadvantage, but of opportunity. We must continue to describe the contributions that Indigenous Australians have and are making to this country, as Megan Davis has done. We must describe for people in vivid terms what a reconciled nation will look like, and everything that non-Indigenous people stand to gain. We must describe how our most cherished common values will flourish in such a society. Not the tepid substitutes offered by current Ministers of the Crown, but real values such as fairness, openness, opportunity, cooperation and acceptance. Normative arguments like mine serve a function in helping us articulate this vision, even if some of the analytical framework must be left behind. It is at this point that one stops being a philosopher and must become instead a citizen. It is where the book stops, but the journey really begins.