RAWLS AND THE LEGITIMACY OF AUSTRALIAN GOVERNMENT

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I Introduction

For much of the 19th century, Indigenous Australians were excluded from the rule of law and denied any say over the institutions and procedures by which they were governed. When the Commonwealth of Australia was established on 1 January 1901, it was on the basis of a constitution drafted at two conventions during the 1890s, at which there were no Aboriginal representatives. Aboriginal people were not consulted about its adoption. The *Constitution* explicitly denied the Commonwealth power to make specific laws regarding 'Aboriginal natives' (s 51(xxvi)) and excluded them from being counted in the population tables used to calculate States' entitlements to electorates and to portions of Commonwealth revenue (s 127). It is widely although wrongly believed that, until the amendment of these two provisions at the 1967 referendum, the *Constitution* excluded Aboriginal and Islander people from the benefits and duties of citizenship.[1] However, since the framers of the *Constitution* envisaged a power under s 51(xxvi) that in most cases would enable adverse discrimination against those regarded as 'inferior races', it was in some ways arguably to the benefit of Aboriginal people that they were excluded from this provision.[2] Moreover, the Commonwealth could still make laws affecting Aboriginal people under other constitutional powers.[3] In fact, the systematic exclusion of Aboriginal and Islander people from the rights and duties of citizenship was largely a consequence of ordinary Commonwealth and State legislation and administrative practice. Legislation such as the *Naturalisation Act 1903* (Cth), the *Invalid and Old Age Pensions Act 1908* (Cth) and the *Maternity Allowance Act 1912* (Cth) routinely excluded 'Aboriginal natives' from the relevant duties and benefits. The *Commonwealth Franchise Act 1902* (Cth) prohibited 'Aboriginal natives' from being included on the Federal electoral role unless they were already entitled to vote in their home State. As Chesterman and Galligan point out, it was primarily by means of this category of 'Aboriginal native' that 'the boundaries and meaning of Australian citizenship would be worked out, and the exclusion of Aboriginal Australians would be ensured'.[4]

While these explicit exclusions from the rights and benefits of citizenship under Commonwealth and State legislation have been removed, and while there has been some redress in relation to their dispossession and removal from traditional lands, Australian Indigenous peoples still live under a constitution over which they were not consulted and that makes no mention of their prior occupation of the land or their distinctive identities. They continue to suffer injustice as a consequence of government policies adopted in the course of the colonial period during which they were not considered, in Rawls's phrase, 'self-authenticating sources of valid claims'.[5] Under these circumstances, can the Commonwealth of Australia be regarded as a legitimate government? Questions of legitimacy may be posed in a number of different senses: procedural, moral and political. I examine further below the manner in which these different concepts of legitimacy arise in the case of governments whose authority ultimately derives from acts of colonisation, before turning to the political philosophy outlined by John Rawls in *Political Liberalism* to suggest an answer to the questions posed above.[6] In contrast to Rawls's earlier work, *Political Liberalism* proposes a conception of justice and a corresponding conception of legitimacy that is political rather than purely procedural or moral. His principles of justice are presented as political in the sense that they are supposed to regulate the terms of social co-operation in a democratic society without relying upon any of the particular comprehensive moral, religious or philosophical doctrines present in the society. Rather, they are supposed to depend upon an overlapping consensus among

reasonable representatives of the different moral, religious or philosophical points of view present in the society. Even though Rawls does not discuss government established by colonisation, I argue that his political conception of legitimacy provides us with resources to answer the question of the conditions under which government can be legitimate in postcolonial societies such as Australia.

II Legitimacy in Colonial States

The question of legitimacy is acute for formerly colonial states in a way that it is not for other democracies. Richard Mulgan explains why:

> The assumptions that underlay colonial settlement, including the supposed civilising mission and ethnic superiority of Europeans, have been discredited. With this discrediting has come the realisation that the regimes of the settlers were imposed on the indigenous peoples by force and with callous disregard for their cultures and rights. For the indigenous minorities themselves, there is little reason to owe allegiance to a legal and political system to which they have never consented and by which they continue to be dispossessed. While the legitimacy of their residence in the country is beyond doubt, they must question the legitimacy of the imposed regime and the citizenship it confers.[7]

The question of legitimacy arises not only from the perspective of those colonised but also from that of the settler and immigrant peoples who now make up the majority of the population:

> They must face the fact that their own political community rests on unjust colonial conquest, on the type of invasion, even genocide, that is now widely condemned, say, in Tibet or East Timor. This tends to undermine the legitimacy of their citizenship, which they had assumed was securely founded in the supposed benevolence of their settlement and in their liberal and democratic institutions. … Can this conflict be resolved? Can indigenous and non-indigenous people come to share a common citizenship that both groups recognise as legitimate? Or are societies such as ours condemned to harbour a continuing legacy of unjust dispossession and illegitimacy in their constitution?[8]

Before attempting to answer Mulgan's question we need to be clear just what kind of legitimacy is at issue. In legal terms, a regime might be illegitimate if its claim to sovereignty over a given territory is unjustified in law. This question is at the heart of the debate over Aboriginal sovereignty in Australia. To the extent that the sovereignty of the present Australian government is derived from that of the British Crown, any legal illegitimacy of the original claim will infect the sovereignty of the present regime. There are at least two ways in which the legitimacy of the original British claim to sovereignty might be questioned. First, to the extent that the legal basis for the acquisition of British sovereignty relies upon the claim that it involved settlement of a territory in which there were no prior sovereigns, then the claim that Aboriginal peoples were sovereigns who never consented to any transfer of sovereignty tends to undermine the legitimacy of the British claim.[9] Second, to the extent that international law in the 19th century required effective occupation of a territory as a condition of the acquisition of sovereignty, it is an empirical question when the Australian colonies and the Commonwealth acquired sovereignty over all parts of the country.[10] Historical examination of this question might well raise questions about the legitimacy of claims to sovereignty that pre-dated effective occupation.[11]

Another legal path to questioning the legitimacy of the present *Constitution* arises as a result of affirmations of the democratic principle of legitimacy by the Australian High Court. In a series of cases involving rights supposedly implied in the *Constitution*, the Court asserted that the sovereignty of the Commonwealth derives directly from the constituent power of the people.[12] However, since Aboriginal people were not consulted in the conventions leading up to the *Constitution* or in the referendum that approved it, and since they were denied the vote in some states until the 1960s, Frank Brennan suggests that 'the Constitution could not be said to have represented the will and intentions of Indigenous Australians' and that, in the light of these circumstances, contemporary Aboriginal people 'might assert their sovereignty by actions other than acquiescence, thereby calling into question the ongoing legitimacy of the Constitution'.[13]

Despite the theoretical possibilities of challenging the legitimacy of Australian sovereignty over some or all of the continent, there are formidable obstacles in the way of any such case being heard. In the domestic legal arena, Australian courts have relied upon the common law rule that acts of state are not subject to challenge in municipal courts, and have thereby avoided ruling on questions of sovereignty. In the international arena, only states have standing in the International Court of Justice and disputes

may only be brought before the Court with the support of parties involved. In view of the reluctance of Australian governments to address the issue of the basis of their claim to sovereignty in the domestic political arena, it seems highly unlikely that a future government would agree to have the matter adjudicated in the International Court.

If the issue of legal legitimacy appears settled for all practical purposes, perhaps there is more scope to argue the case for moral or political illegitimacy? Mulgan raises the question of legitimacy as a political and moral problem rather than a strictly legal or procedural problem. Although Mulgan does not clearly distinguish between them, moral and political legitimacy are, from a Rawlsian perspective, different issues. On the one hand, Mulgan proposes that the solution to the problem of legitimacy is given by

> a theory of constitutional legitimacy that equally legitimates Aboriginal rights and the general citizenship rights of all Australians and the institutional framework that creates and supports these rights … This raises the general issue of unjust origins. We are required to believe that a state can be legitimate though it was founded in injustice.[14]

His explanation of how a state founded in injustice can become legitimate follows Jeremy Waldron's argument for the 'supersession' of historic injustice in relation to property in land.[15] He appeals to the theoretical, practical and moral consequences of the passage of time in order to argue that injustice at the origin of a colonial regime becomes less and less important to the question of legitimacy as time passes. These consequences include the need for 'increasingly complicated counterfactual assessments of people's likely situation if the original occupation had not occurred', the practical difficulty of disentangling legitimate and illegitimate claims and 'the imposition of penalties on innocent beneficiaries of other people's wrong doing'.[16] Following Waldron, Mulgan assumes that these consequences provide sufficient reason for discounting claims based upon historical injustice in favour of claims based upon relative disadvantage in the present. Waldron's conclusion is open to question.[17] However, we do not have to accept these claims about the supersession of the historical injustices wrought by colonisation to agree with Mulgan that 'the question of the legitimacy of a regime turns less on its origins than on its present behaviour'.[18] We need only accept, as Rawls does (see below), that there is a link between legitimacy and justice to agree that 'the test of legitimacy for the present-day Australian state becomes whether it upholds the rights of its present citizens, whatever these may be'.[19] Mulgan makes it clear that these rights must include 'additional distinctive rights for Aboriginal citizens as descendants of the original inhabitants. A state that denies these rights is no longer legitimate'.[20] He notes that there is room for disagreement about the nature of these rights and therefore about the content of the legitimacy test, but asserts that whatever rationale we accept for specifically Indigenous rights, the postcolonial state is only legitimate provided that it recognises 'certain reasonable rights for the Aboriginal minority'.[21]

Mulgan's proposed test of legitimacy and his appeal to 'reasonable' rights suggest that he has in mind a political concept of legitimacy. However, his remarks about why the question of legitimacy is acute for colonial societies also make reference to discredited assumptions about the supposed ethnic superiority of Europeans, injustice, force and callous disregard for rights and cultures, in a manner that suggests it is not political but moral legitimacy that he has in mind. In the context of discussing the formal reconciliation process undertaken between 1991 and 2000 (remember that Mulgan's article was published in 1998), Mulgan endorses Frank Brennan's suggestion that colonised Aboriginal people 'have an exclusive power to withhold their agreement to the *moral legitimacy* of the nation-state built upon their dispossession'.[22] More generally, a central concern of his article is the manner in which non-Indigenous citizens are supposed to cope with the feelings of responsibility and guilt for past mistreatment of Indigenous peoples. How, he asks, can non-Aboriginal people 'come to terms with their past injustice and recognise Aboriginal rights with the "respect and pride" sought by the Australian Council for Aboriginal Reconciliation?'[23] He suggests that the success of the formal reconciliation process would depend on some form of acceptance of responsibility by non-Indigenous Australians, and points to the importance of public acts of apology or atonement insofar as these amount to 'an expression of *moral condemnation* of such dispossession and a determination to deal justly in the future'.[24]

The suggestion that the legitimacy of a post-colonial state is a moral issue encounters a number of difficulties. Ever since the first forms of legislative recognition of land rights in the 1970s, Australian debates over distinctively Aboriginal rights have been bitterly divided. Surveys of public opinion show evidence of long-standing ambivalence and even contradictory views toward Indigenous rights.[25] In the light

of this ambivalence, it is not surprising that the Australian reconciliation process foundered in part on the unwillingness of some citizens to take responsibility for the consequences of past unjust treatment, especially the discriminatory policies of forced removal of Aboriginal and part-Aboriginal children. There was no official acceptance of the 'unjust origins' of the Australian state and no agreement on any document of reconciliation. Together, these events provide stark evidence of the plurality of religious, moral and philosophical views on the basis of which different citizens address the question of the rights of Indigenous people. Agreement on the moral basis or lack of basis for distinctively Aboriginal rights seems unlikely. For this reason, to pose the question of legitimacy in moral terms risks rendering it insoluble.

In any case, it is not clear that moral legitimacy is sufficient to ensure political legitimacy. If, as Rawls does, we take seriously the plurality of moral points of view in a liberal democratic society, then we must find grounds of political legitimacy that are not beholden to any particular moral view. In Australia since 2007, there has been a formal apology by the newly elected Labor Government, especially for the policies of child removal but more generally for the laws and policies of successive parliaments that inflicted 'profound grief, suffering and loss' on Indigenous peoples.[26] There have been promises of constitutional reform to recognise Indigenous peoples' distinctive rights, but no concrete steps in that direction.[27] Constitutional reform to address the injustices that accompanied the establishment of the Commonwealth of Australia seems a long way off. These shortcomings of moral legitimacy, along with the difficulties of achieving agreement on moral grounds, provide reason to think that we should do better to focus on a purely political legitimacy of the kind suggested by Rawls.

III Why Rawls?

Rawls's political philosophy may seem an unlikely resource for pursuing the question of legitimacy in states established by colonisation. Although he is widely regarded as the most influential liberal political philosopher of the 20th century, and his 1971 *Theory of Justice* is often credited with having revived normative political philosophy throughout the English-speaking world, injustices involving racism and colonisation receive little mention in his work. As Charles Mills points out, racism and racial oppression are only marginal to his thought while colonialism and the fate of Native Americans are completely absent.[28] Despite these limitations, there are reasons to think that the later versions of Rawls's political philosophy from *Political Liberalism* onwards are useful for addressing at least some of these issues. In particular, I suggest that Rawls's later work allows us to determine the conditions of legitimate government in a postcolonial society in a way that supports Mulgan's claim that this must include certain reasonable, distinctive rights for Indigenous citizens.

Rawls proposes a conception of legitimacy that is political rather than moral, that is compatible with deep and persistent divergence between comprehensive moral views, and that has immediate implications for the constitutional form of a just and democratic society. His criterion of legitimate government is clear, namely when political power

> is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.[29]

As he points out, this principle links the legitimacy of political power closely to the requirements of a well-ordered society: a society is 'well-ordered' when it is effectively regulated by a public conception of justice. This implies the public justification of a political conception of justice and acceptance that this frames the kinds of reasons that citizens can put forward in arguing for or against particular laws. The legitimacy of government depends on its being conducted in accordance with a constitution the governing principles of which are those of a conception of justice that would be accepted by all reasonable parties. This principle also implies the schema of successive stages through which Rawls envisages the application of basic principles of justice. These stages correspond to the institutional structure of a liberal constitutional democracy. First, citizens' representatives must decide on basic principles of justice in the 'original position'; this is Rawls's version of a social contract in which, to ensure fairness, parties are supposed to decide behind a veil of ignorance that prevents them from knowing details about their society or their own place within it. Second, there is need for a constitutional convention at which the parties should agree on a system for the constitutional powers of government and the basic rights of citizens.[30] The third stage involves legislation passed in accordance with the requirements of the constitution, while the fourth involves judicial review of legislation and acts of government. The sequence refers neither to an actual political process nor a purely theoretical one. It is rather

> part of justice as fairness and constitutes part of a framework of thought that as citizens in civil society we who accept justice as fairness are to use in applying its concepts and principles … This framework extends the idea of the original position, adapting it to different settings as the application of principles requires.[31]

This sequence makes it clear that the question of rights may be posed at different levels of the political order and that different information will be relevant at each level. Each stage or level represents a point of view from which certain kinds of questions about the conditions of just and legitimate government can be considered. The general principle governing the successive stages is that the veil of ignorance is supposed to be partially lifted so that progressively more information about the society is made available to the parties. I argue further below that this principle provides a powerful lever with which to support the case for specifically Indigenous rights in societies established by colonisation.

A second feature of Rawls's criterion of legitimacy that is helpful for thinking about the conditions under which postcolonial governments may become legitimate is the connection that it establishes between legitimacy and justice. Habermas objects that Rawls's political liberalism overlooks the important conceptual difference between these and, by so closely linking legitimacy and justice, imposes unduly strong constraints on the principle of legitimacy. In contrast to Rawls, Habermas defends the possibility of a procedural moral and legal theory that limits itself to the clarification of 'the moral point of view and the procedure of democratic legitimation' rather than seeking to spell out the requirements of justice.[32] In reply, Rawls agrees that legitimacy and justice are different concepts but denies that there can be a conception of procedural legitimacy that is independent of substantive questions. The example of monarchical government, where a monarch is legitimate by virtue of his or her pedigree and manner of access to the throne, shows that legitimacy is an institutional concept. Legitimate monarchs may or may not rule justly. Taking this conceptual difference into account suggests that similar leeway might apply in the case of a democratic regime:

> It may be legitimate and in line with a long tradition originating when its constitution was first endorsed by the electorate (the people) in a special ratifying convention. Yet it may not be very just, or hardly so; and similarly for its laws and policies. Laws passed by solid majorities are counted legitimate, even though many protest and correctly judge them unjust or otherwise wrong.[33]

The converse is also true insofar as laws can be just but not legitimate. They become legitimate only once they have been properly enacted in accordance with procedures underwritten by a sufficiently just constitution.[34] It follows that legitimacy is a weaker idea than justice. Democratic decisions are legitimate if they are enacted in accordance with legitimate democratic procedures. These procedures may not be just, but they must be 'sufficiently just in view of the circumstances and social conditions'.[35] For example, procedures that are long-established customs and accepted as such may be legitimate although not just. At the same time, Rawls insists that, even though neither procedures nor the laws which result need be acceptable 'by a strict standard of justice', they cannot be 'too gravely unjust.' At some point, the injustice of the political constitution or the injustice of the outcomes of a legitimate democratic procedure will corrupt the legitimacy of the regime.[36] The effect of this concession is to weaken the link between legitimacy and political justice, while at the same time insisting that there is no room for a concept of purely procedural democratic legitimacy. The important implication for our purposes is that there is a connection between legitimacy and justice. The question for governments established by colonisation is how far they remain unjust and to what degree this undermines their claim to legitimacy.

A third feature of Rawls's conception of a well-ordered society that is relevant to the postcolonial case is that it does not presuppose agreement on any particular comprehensive moral point of view or way of life. Rather, its point of departure is the fact of 'conflicting and even incommensurable religious, philosophical and moral doctrines'.[37] The public justification of a conception of justice is possible because of an overlapping consensus achieved on the basis of diverse religious, philosophical and moral views. Overlapping consensus does not mean agreement on particular principles that are already implicit in the diverse comprehensive views present in a given society, nor does it mean compromise between these views. Rather, it refers to the kind of publicly endorsed consensus that occurs when reasonable members of a political society affirm a particular conception of justice that they can each justify in the terms of their respective comprehensive views, and when they are aware that others do likewise. Rawls suggests that only the achievement of such a consensus justifies the legitimate

exercise of coercive political power. Achieving such a consensus provides citizens with 'the deepest and most reasonable basis of social unity available to us as members of a modern democratic society'.[38]

For Rawls the possibility of an overlapping consensus among reasonable members of a society implies the achievement of a 'reflective equilibrium' between the principles of justice on which there is consensus and the 'settled' or 'considered' convictions of the society. These considered convictions include such things as commitment to the equality of all citizens and the toleration of diverse religious and moral points of view. These commitments are not just matters of opinion but embedded in the public political culture of the society, its laws and institutions, along with the traditional ways in which these are interpreted. A fourth and final reason to suppose that Rawls's political liberalism is an appealing perspective in which to approach the question of legitimacy in postcolonial states is that the principles of justice that underpin political legitimacy are not laid down once and for all but remain open to being checked against the considered judgments or settled convictions of the people at any time.[39] At any given time, these principles must be ones that all reasonable citizens might *now* be expected to endorse, subject to the conditions of the hypothetical original position in which representatives of the society are supposed to agree on principles behind a 'veil of ignorance'. In his 'Reply to Habermas', Rawls notes that all societies are more or less unjust and that the idea of a just society has the status of an ideal: it is something to be worked towards. In this sense, he agrees with Habermas, Kant and others that a just regime 'is a project to be carried out'.[40] It follows that the political conception of justice embodied in the institutions and procedures of a given society, including its constitution, is subject to modification in response to change in the considered opinions of citizens on matters of justice. To the extent that citizens' considered convictions have changed, this may have implications for constitutional principles and the conditions of legitimate government. This aspect of Rawls's approach rules out the defence of existing institutions that appeals to the limited knowledge or moral perspective of the founding fathers who drew up the existing constitution without consultation or consideration of the interests of Indigenous people.

Applying this approach to the Australian Commonwealth, it is clear that significant changes in the considered judgments of the people have occurred since 1901. These are reflected in the removal of restrictions initially imposed on the access of 'Aboriginal natives' to the rights and duties of citizenship and in changes to the *Constitution* approved at the 1967 referendum. In 1967, the overwhelming majority of the Australian people no longer considered it reasonable to exclude Aboriginal people from the population count or to deny the Commonwealth the power to make special laws with regard to Aboriginal people. However, while such historical data may provide evidence of change in the moral sensibilities of a people, the question of what is now reasonable is not simply an empirical question to be decided by opinion polls. Nor is it a purely procedural question to be decided by referendum. Rather, the principles that should govern a just constitutional order should be determined by reference to the original position and subsequent iterations of its deliberative process at the levels of constitutional convention, legislation and judicial review.

IV Ideal Versus Non-Ideal Theory

At this point, a further objection arises to the suggestion that we can use Rawls's theory to ask what principles of justice should govern a society established by colonisation: his aim was to determine the principles that should apply in an ideal situation, where this assumes an ordered society, favourable circumstances and strict compliance with the chosen principles of justice. Only after the fundamental principles of social justice are settled for the 'normal conditions' of an idealised 'modern democratic society' can we take up issues raised by the particular historical injustices of colonisation.[41] In short, colonial society is a special case that Rawls's theory was not designed to address.

The methodological rationale for beginning with such an ideal case is familiar and compelling: it is sensible to leave aside difficult questions in order to work out a theory for the simplest case. The hope is that it will then be possible to extend it to cover more complex situations including the aftermath of colonisation. Thus, in *The Law of Peoples* Rawls outlines the characteristics of a 'people' as including a reasonably just constitution and citizens united by 'common sympathies' of a moral political nature. He notes that historical conquests and immigration have caused intermingling of cultural groups within the same territory, but defends his approach by appealing to the familiar hope that

> if we begin in this simplified way, we can work out political principles that will, in due course, enable us to deal with

> more difficult cases where all the citizens are not united by a common language and shared historical memories.[42]

He is encouraged to proceed in this manner by the thought that 'within a reasonably just liberal (or decent) polity it is possible … to satisfy the reasonable cultural interests and needs of groups with diverse ethnic and national backgrounds'.[43]

Clearly, in taking up the question of the conditions under which a government established by colonisation can become legitimate, we are dealing with non-ideal theory. However, there are good reasons to modify the terms of Rawls's problem in order to consider what principles might be agreed to in the colonial case. First, this is an enduring problem within the political culture of many modern liberal democracies, no less important than the ongoing disagreement within the liberal tradition over the appropriate balance of liberty and equality that Rawls's ideal theory sought to address. Second, the fact that he offers a plausible way to approach the question of justice in the simplified case is in itself reason to experiment in order to see what principles it might lead to in the case of colonial societies. Third, as suggested above, some elements of Rawls's reformulation of the problem of justice in *Political Liberalism* are potentially helpful in relation to the colonial case.

So how do the circumstances of societies established by colonisation differ from those assumed by Rawls's ideal case? He begins with the idea of society understood as 'a co-operative venture for mutual advantage' and described only in the most general terms under which 'circumstances of justice' could be said to obtain.[44] Two kinds of circumstances of justice are supposed to obtain: first, objective conditions such as the coexistence of people 'at the same time on a definite geographical territory', where they are supposed to be roughly similar in physical and mental powers;[45] second, subjective conditions such as roughly similar or at least complementary needs and interests such that 'mutually advantageous cooperation among them is possible'.[46] With regard to the objective conditions, geographical coexistence clearly does apply in the colonial case, but the peoples involved may have such different mental and physical powers that there is no need for mutually advantageous co-operation since the domination of one group by another is possible. Where coexistence on the same territory was not established by negotiation or mutual consent, as in the Australian case, it is doubtful whether the relevant peoples ever participated in a co-operative venture for mutual advantage or, if they might be said now to do so, at what point they came to form a single society.[47] With regard to the subjective conditions, even if we ignored the historical facts about the manner in which coexistence came about, along with the cultural conditions that enabled the domination of Indigenous people, there is reason to doubt whether the subjective circumstances of justice apply. The needs and interests of Indigenous and settler peoples are sometimes antithetical rather than complementary, for example in relation to land where their different economic interests and forms of land use may come into conflict, or where the interests of settlers may take no account of the ways in which land is also a spiritual and cultural dimension of Indigenous people's identity. Such differences imply that we cannot assume agreement about primary social goods. They point to the idea that, in a society established by colonisation, the political conception of justice should allow for specific rights available only to Indigenous people.

A second way in which the conditions of the non-ideal colonial case depart from the terms of Rawls's ideal case involves the kind of information that is relevant in determining the principles of justice. The political conception of justice that underpins judgments of legitimacy should be one that rational individuals would agree to under the restrictions on information imposed by the original position. The contingencies of colonisation are precisely the kinds of information expressly excluded by the veil of ignorance. The purpose of the exclusion of certain kinds of information is so that the principles agreed upon cannot reflect the interests of particular groups. Thus, in Rawls's initial formulation individuals are not only supposed to be ignorant of their own place in society, they are also assumed not to know 'the particular circumstances of their own society', including its 'economic or political situation, or the level of civilization and culture it has been able to achieve'.[48] Their situation is one in which 'the course of history is closed to them'.[49] If, as Rawls suggests, the parties to the original position are only supposed to know the most general facts about human society, including that it is subject to the circumstances of justice described above, then it seems clear that they should not be supposed to know that peoples with very different kinds of civilisation and culture coexisted on the territory in question as a consequence of colonisation.

We should bear in mind that in the terms of Rawls's later formulations, the original position is only a device

of representation designed to enable citizens to devise principles that accord with their considered intuitions. As such, 'it models what we regard – here and now – as acceptable restrictions on the reasons on the basis of which the parties … may properly put forward certain principles of justice and reject others'.[50] Rawls's initial justification for the exclusion of information pertaining to the particular circumstances of the society in question is reinforced by his suggestion in 'Kantian Constructivism in Moral Theory' that the veil of ignorance should be supposed to be maximally thick in order to tie the principles adopted as closely as possible to the limited assumptions about the moral nature of persons and the nature of society that define the terms of the problem in the ideal case. This is achieved by stipulating that the veil begins from the position that the parties have no information and then adds 'just enough so that they can make a rational agreement'.[51]

However, we should also note that in *Political Liberalism*, immediately after stating the principle of legitimacy cited above, Rawls suggests in a footnote that this might be stated more rigorously from the point of view of the original position in which '[w]e suppose the parties to know the facts of reasonable pluralism and of oppression along with other relevant general information'.[52] Does this point to the possibility that, as a people's sense of what is reasonable changes over time, so should the kinds of information that passes beyond the veil of ignorance? Should the general knowledge about human society available to the parties include the fact that many societies have been established by colonisation, some of them relatively recently, and that culturally different peoples still coexist side by side on the same territory?

Whatever we decide in relation to the information available to the parties in the original position when deciding upon basic principles of justice, the situation is different with regard to the further decision about constitutional principles. While there may be good reason to exclude the historical contingencies of colonial society from the information available at the first stage, the same cannot be said in relation to the second stage of the proposed four-stage sequence. At the second stage, the principles of social justice agreed to in the first stage are supposed to be applied to the particular history and political culture of a given society to produce a just constitution, where this means one that rational delegates subject to the relevant restrictions on information would adopt for their society.[53] Whereas at the initial stage of the original position parties were supposed to be ignorant of the particular circumstances of their own society, at the constitutional stage the general facts about their society are supposed to be available to them. Rawls allows that, while individuals remain ignorant of their own social position, they now know

> the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on. They are no longer limited to the information implicit in the circumstances of justice. Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective just constitution …[54]

In deciding upon the terms of a political constitution in the narrow sense, we are bound by the principles of justice accepted in the first stage of this sequence but also, as Rawls points out in his 'Reply to Habermas', by 'general information about our society, the kind framers of a constitution would want to know'.[55] At this point he raises, only to skip over, the difficult question of what is the relevant information when the society in question contains grave injustices such as slavery and denying suffrage to women or those who do not meet certain property qualifications. However, in the case of colonial societies, it seems entirely reasonable to suppose that the relevant facts of colonisation and its aftermath should be available. The framers of a postcolonial constitution should know that the society includes among its members the descendants of Indigenous peoples who were in possession of the land at the time of European settlement and that many of these live in accordance with the elements of Indigenous cultures that survived the process of colonisation.

In the Australian case, this process began a little over 200 years ago, although in some parts of the country it was not fully achieved much more than 50 years ago. Moreover, there are Aboriginal citizens who wish to 'maintain and develop their distinct characteristics and identities'.[56] So long as they are prepared to do so within the framework of national laws regulating the exercise of fundamental rights and freedoms, Rawls's principle of legitimacy allows us to argue that their right to self-determination as Aboriginal people ought to be protected. Rawls's principle of legitimacy refers to constitutional essentials that *all* citizens may reasonably be expected to endorse. On the one hand, it is not unreasonable to suppose that Aboriginal and Torres Strait Islander citizens will endorse basic liberal principles of justice. On

the other hand, the reasonableness of particular rights available only to Indigenous citizens might be defended in a variety of ways. Firstly, we can point out, as Mulgan does, that the denial of the right to live as Aboriginal people was only made possible by assumptions about the superiority of European cultural ways that have now been discredited. Secondly, we can point out that maintaining equal treatment in respect of the uniform principles of justice accepted in the original position might require differential rights at the legislative or constitutional stages. For example, so long as primary social goods include 'the social bases of self-respect',[57] there may be grounds for special measures to protect the conditions of maintaining self-respect within the communities of those descended from colonised peoples. Thirdly, we might follow Kymlicka's argument that the burden of justification rests upon those who would deny to colonised Indigenous peoples the same nation-building powers that settler majorities took for granted in drawing up their constitutions. In countries such as Australia, Canada and New Zealand, Indigenous peoples have fought long and hard against the loss of their traditional lands, the non-recognition of their laws and customs, and the loss of their languages. Kymlicka suggests that it is possible to see such resistance as 'a response to perceived injustices that arise out of nation-building policies'.[58] Acceptance of specific rights and a distinct constitutional status for Indigenous peoples goes some way towards removing those injustices and thereby helps to ensure the legitimacy of the postcolonial state.

V Legitimacy and Justice

It is clear from Rawls's remarks on the relationship between legitimacy and justice, as it is from Mulgan's suggestions about the role of reasonable rights for Indigenous citizens, that the legitimacy of the postcolonial state will depend upon the degree to which it has removed the injustices that attended its foundation and accompanied its subsequent history. In other words, its legitimacy will depend upon the degree to which it has *become* sufficiently just. Taking the Australian constitution (in the broader sense of the term) as a typical case, we can suggest that the relevant injustices will be of the following kinds:

1. exclusion of colonised peoples from the constituent power of the people, for example when they are not consulted at the stage of drawing up and adopting a constitution.
2. special status accorded to colonised peoples under the constitution, to the extent that this status perpetuates injustice.[59]
3. explicit exclusion from rights and duties of citizenship as specified in legislation under the constitution, as occurred with most initial Acts of the Australian Parliament.
4. failure to uphold equal treatment in regard to basic social rights (to property, to freedom of employment, to control of children) under the law as developed within the constitutional framework. In some cases, particularly in relation to property and child removal, this unequal treatment created systematic inequalities with significant psychological and moral consequences that have been passed from one generation to the next, thereby reinforcing inequality as a result of damage to individual and collective capacities (capabilities) to maintain or make use of primary social goods.
5. in part as a consequence of (4), systematic although informal exclusion from equal access to positions and offices, and to a fair share of primary social goods.

Injustices 2 and 3 have been largely removed in the Australian case. Injustices 4 and 5 have been partially addressed to varying degrees. It is an open question whether there has been sufficient compensation for past injustices to meet the commitment to fair equality of opportunity. Injustice 1 remains entirely unaddressed. Assuming that it is not reasonable to suppose that peoples living on their own lands under their own laws and customs should have accepted to live under the laws and customs of another people without consent, the only way in which it could be removed from the list of ongoing injustices would be by means of a treaty or other form of comprehensive agreement. Such an agreement would need to recognise Indigenous people as different although equal members of society as a fair system of cooperation and ensure their ability to survive in keeping with their own laws, customs, traditions and values.[60]

To conclude, given the manner in which the justice and therefore the legitimacy of a given constitutional democratic regime is open to perpetual re-evaluation and reform, and assuming that the relevant historical facts should be included among the information available to parties – if not in the original position then at the stage of the constitutional convention – it follows that Rawls's political liberalism does allow for a negative answer to Mulgan's question posed at the outset. That is, colonial governments founded in injustice

are not 'condemned to harbor a continuing legacy of unjust dispossession and illegitimacy in their constitution.' Despite their unjust origins and the history of unjust treatment of Indigenous peoples, such regimes may become legitimate in the eyes of the colonised as well as in the eyes of the descendants of colonisers and other more recent arrivals. Rawls notes that we always find ourselves governed in accordance with institutions which are the work of previous generations: 'We assess them when we come of age and act accordingly'.[61] He also points out that there is no general answer to the question of how the injustices of the political institutions we inherit should be addressed. The details of a given constitution, such as whether or not it should include provision for treaty rights or other forms of protection for rights of Indigenous peoples specified in legislation, should be decided in part as a function of the 'particular history and democratic culture of the society in question'.[62] Whether or not the constitution is sufficiently just to count as legitimate will depend on the degree to which the consequences of past injustices continue to inhibit the capacity of some citizens to participate fully in the rights and benefits available to all, and on the degree to which the specifically Indigenous rights to which all reasonable citizens would agree have been implemented. In the Australian case, it is clear that we still have some way to go.

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1 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2007).

2 John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 108, 111; Tim Rowse, 'The Practice and the Symbolism of the "Race Power": Rethinking the 1967 Referendum' (2008) 19(1) *Australian Journal of Anthropology* 89.

3 Attwood and Markus, above n 1; Rowse, above n 2, 89–90.

4 John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (1997) 86.

5 John Rawls, *Political Liberalism: Expanded Edition* (2005) 32.

6 Ibid.

7 Richard Mulgan, 'Citizenship and Legitimacy in Post-Colonial Australia' in Nicolas Peterson and Will Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998) 179.

8 Ibid 179–80.

9 Henry Reynolds addresses these issues in Henry Reynolds, *The Law of the Land* (1988); Henry Reynolds, *Aboriginal Sovereignty* (1996); Henry Reynolds, 'Sovereignty' in Nicolas Peterson and Will Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998) 208. See also Michael Dodson, 'Sovereignty' (2004) 4 *Balayi* 13; N L Wallace-Bruce, 'Two Hundred Years On: A Re-examination of the Acquisition of Australia' (1989) 19(1) *Georgia Journal of International and Comparative Law* 87; Senate Standing Committee on Constitutional and Legal Affairs Report, Parliament of Australia, *Two Hundred Years Later ...: Report on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (1983).

10 Henry Reynolds, 'Reviving Indigenous Sovereignty?' (2006) 6 *Macquarie Law Journal* 5.

11 Paul Patton, 'Response to Henry Reynolds' (2006) 6 *Macquarie Law Journal* 21.

12 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104.

13 Frank Brennan, *One Land, One Nation* (1995) 128.

14 Mulgan, above n 7, 186.

15 Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4.

16 Mulgan, above n 7, 186.

17 For counter-arguments to show that Waldron does not provide sufficient reason to discount claims based on historical injustice, see Paul Patton, 'Historic Injustice and the Possibility of Supersession' (2005) 26 *Journal of Intercultural Studies* 255.

18 Mulgan, above n 7, 186.

19 Mulgan, above n 7, 187.

20 Ibid.

21 Ibid 188. What are reasonable rights and how these might be justified is a further question that I do not pursue here. Mulgan's justification for such rights relies on two quite different arguments, invoking both Kymlicka's case for minority cultural rights and the fact of prior occupation of the territory by Indigenous peoples.

22 Frank Brennan quoted in ibid 180 (emphasis added).

23 Ibid 184.

24 Ibid 188 (emphasis added).

25 Goot and Rowse suggest there is overwhelming support for the proposition that all Australians should be treated equally, but also

considerable support for 'policies that would treat Indigenous Australians differently from other Australians.' On their view, such contradictions should not be attributed to an ill-informed or irrational public. The ambivalence derives from the fact that 'Australian political culture is liberal and liberalism itself is ambivalent about the rights of Indigenous people'. Muray Goot and Tim Rowse, 'Equality Eludes Understanding' *The Australian* (Sydney), 25 May 2007, 14. See further Murray Goot and Tim Rowse, *Divided Nation?: Indigenous Affairs and the Imagined Public* (2007).

26 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

27 Natasha Robinson, 'Rudd Revives Push to Recognise Indigenous Rights in Constitution', *The Australian* (online), 23 July 2008 <http://www.theaustralian.com.au/news/rudd-revives-indigenous-rights-push/story-0-1111116995854> at 26 December 2009; Lindsay Murdoch, 'Place for Aborigines in the Constitution', *The Sydney Morning Herald* (online), 24 July 2008 <http://www.smh.com.au/news/national/place-for-aborigines-in-the-constitution/2008/07/23/1216492541163.html> at 26 December 2009.

28 Charles W Mills, 'Rawls on Race/Race in Rawls' (2009) 47 *Southern Journal of Philosophy* 161, 169, 171.

29 Rawls, *Political Liberalism*, above n 5, 137; John Rawls, 'Reply to Habermas' in *Political Liberalism: Expanded Edition* (2005) 372, 393.

30 John Rawls, *A Theory of Justice* (revised ed, 1999) 172.

31 Rawls, 'Reply to Habermas', above n 29, 397.

32 Jürgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*' (1995) 92(3) *Journal of Philosophy* 109, 131.

33 Rawls, 'Reply to Habermas', above n 29, 427.

34 Samuel Freeman, 'Introduction: John Rawls – An Overview' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (2003) 1, 38.

35 Rawls, 'Reply to Habermas', above n 29, 428.

36 Ibid.

37 Rawls, *Political Liberalism*, above n 5, 133.

38 Rawls, 'Reply to Habermas', above n 29, 391.

39 Ibid 402.

40 Ibid 399.

41 Rawls, *A Theory of Justice*, above n 30, 109; John Rawls, *Collected Papers* (1999) 224.

42 John Rawls, *The Law of Peoples* (1999) 24–5.

43 Ibid 25.

44 Rawls, *A Theory of Justice*, above n 30, 109.

45 Ibid 110.

46 Ibid.

47 Charles Mills comments that acknowledging the origin of white settler states as established through invasion and conquest 'would explode the foundations of a conceptual framework predicated on treating society as "a cooperative venture for mutual advantage"'. Mills, above n 28, 171. He points out (at 173) that Rawls's assumption indicates that his presumed audience is really the white settlers of North America and their descendants: 'Only for this population could it not be ludicrously inapposite to represent the society as "a co-operative venture for mutual advantage" as Rawls suggest we do in *Theory*'.

48 Rawls, *A Theory of Justice*, above n 30, 118.

49 Ibid 175.

50 John Rawls, *Justice as Fairness: A Restatement* (2001) 80.

51 Rawls, *Collected Papers*, above n 41, 336.

52 Rawls, *Political Liberalism*, above n 5, 137.

53 Rawls, *A Theory of Justice*, above n 30, 176.

54 Ibid 173.

55 Rawls, 'Reply to Habermas', above n 29, 398.

56 Patrick Dodson, 'Lingiari – Until the Chains are Broken' (Speech delivered at the 4th Annual Vincent Lingiari Memorial Lecture, Darwin, 27 August 1999) in Michelle Grattan (ed), *Essays on Australian Reconciliation* (2000) 264, 270–1.

57 Rawls, *Justice as Fairness*, above n 50, 59.

58 Will Kymlicka, *Contemporary Political Philosophy* (2nd ed, 2002) 365.

59 It remains a disputed question whether the status of Aboriginal people in respect of the races power and the population count as specified in the Australian constitution in 1901 did amount to injustice: see above n 2.

60 Patrick Dodson, above n 56, 266.

61 Rawls, 'Reply to Habermas', above n 29, 399.

62 Ibid 416, cf 409.