The First Nations Voice: Investigating constitutional reform through the lens of proceduralism

BERNARD LAO

Abstract

Law is dependent upon the collective consciousness of the people it governs. It is enacted in the legislatures of this country, elected by the people and enforced by the officials of the executive. For much of Aboriginal and Torres Strait Islander history since 1770, Indigenous Australians have lived outside the recognition afforded by the law while simultaneously being victims of its worst excesses. Yet, in spite of the progress we have made in combatting systemic injustice, Indigenous Australians continue to be left without constitutional recognition, without a voice, and without representation. This article will argue in favour for the establishment of a First Nations Voice ('FNV'), as proposed by the *Uluru Statement from the Heart*, arguably Australia's most critical constitutional law reform initiative in recent years. Rather than outlining all of its empirical benefits, of which there are presumably many, this article will instead seek to consider the FNV from a theoretical perspective of proceduralism and establish that its quality as a procedural right grants it special complementarity with the Australian legal–political framework. Ultimately, my hope is to offer a legally proceduralist rationale for the FNV and reiterate its necessity as the next step in constitutional law reform.

Introduction

> Australian governments have become comfortable with the idea of symbolic forms of Reconciliation. We have endured years of lemon myrtle-dusted morning teas, flag raising and screenings of *Rabbit Proof Fence*, yet institutionalised racism prevails everywhere I look.[1]

Since before Federation, Australian history has involved no shortage of systemic injustice experienced by Aboriginal and Torres Strait Islander peoples. The scale and impact of the Stolen Generations and their forced removal by Australian authorities throughout the twentieth century continues to leave a devastating imprint on our national consciousness.[2] Dishearteningly, the 'institutionalised racism' that Aboriginal lawyer Gemma McKinnon speaks of here has continued to persist today. With respect to incarceration rates, Indigenous Australians comprise 25 per cent of the national prison population despite accounting for only 3 per cent of the general population overall.[3] If we recognise the pattern that many of these crises find their roots in being facilitated by the operation of Australian laws, only a monumental effort in the reform of the law would be sufficient in combatting systemic discrimination. Without effective and politically viable constitutional reform, progress towards equality and justice for Indigenous Australians will continue to stagnate.

This essay will consider the First Nations Voice model ('FNV') as proposed by the *Uluru Statement from the Heart*.[4] At its core, the FNV consists of a deliberative body that advises the Australian

---

[1] Gemma McKinnon, 'Symbolic Recognition Not the Way Forward', *National Indigenous Times* (online, 22 May 2020) <https://www.nit.com.au/symbolic-recognition-not-the-way-forward/>.

[2] It is estimated that as many as 1 in 7 Indigenous Australians presently aged 50 and over are members of the Stolen Generations. Empirical evidence shows that the long-term effects are persistent and pervasive, including, but not limited to, a widespread lack of access to health, housing, legal and community services. See also Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations* (Report, November 2018).

[3] Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016).

[4] Referendum Council, *First Nations Design Report* (Report, June 2017) 47.

Commonwealth Parliament on matters relating to or impacting Aboriginal and Torres Strait Islander peoples. The body would be enshrined in the Australian Constitution by amendment and would have the benefit of shaping laws and policies on relevant issues with the input of the Indigenous community. While some of the specifics of the FNV are still very much up for debate, this essay will argue that the model is the optimal choice of constitutional reform from a theoretically legal perspective. In particular, I will argue for its effectiveness and political compatibility by reference to the doctrine of proceduralism —a doctrine that emphasises the importance of procedural rights as critical to the Australian democratic context. In doing so, this essay will emphasise the importance of political participation and political suitability to the current Australian legal context and justify how the FNV complements our current public law system.

Precursor: Why proceduralism matters

In order to understand the FNV as a function of proceduralism, we must first define the doctrine and highlight its relevance to the Australian body politic. In its broadest conception, proceduralism is the notion that 'no rule is acceptable apart from a formal method, and that the acceptable method yields an acceptable rule'.[5] For the purposes of state law, it would be helpful to refine this definition to read: 'no law is valid unless it is procured by an acceptable procedure'. What is an 'acceptable procedure' then? There is no singular conception among all nation states, but in most liberal democracies, we may assume that it entails some system of voting and some minimum level of democratic participation.[6] Therefore, a right possesses a procedural quality to the extent that it seeks to uphold or reinforce these standards. In any case, proceduralism focuses on the importance of the 'procedural element' of lawmaking in our society as opposed to the outcome or policy that is ultimately approved (i.e. the 'substantive element'). This is not a fundamentally new concept and the idea that members of a society might disagree on substantive matters yet 'respect the outcomes of democratic decisions in the public sphere' is a foundational given in many liberal states.[7] Yet, and as a result, we must appreciate its importance.

Practically, it could be argued that the legitimacy of the substantive element is in fact contingent upon that of the procedural element. This has been characterised as a sub-concept of 'fair proceduralism' whereby, in our lawmaking example, the legitimacy and authority of a law is derived from whether everyone had an equal role in determining the outcome.[8] In other words, the establishment and improvement of rights that enhance this procedural element will legitimise political authority, and conversely, the removal or undermining of them will subvert legitimacy.[9] Exploring the philosophies that underpin these concepts is beyond the scope of this essay, but we can recognise that history has been unkind to legal systems that are deficient in their procedural elements. The classical example (at its most extreme) concerns the laws passed by the National Socialist German Workers' Party during interwar Germany, facilitated by the abolishment of the procedural rights of free and fair electoral participation in 1933.[10] Relevantly, we may also question the legitimacy of Apartheid-era policies passed by the ruling National Party in South Africa (from a procedurally legal and not exclusively a

[5] Benjamin Gregg, 'Proceduralism Reconceived: Political Conflict Resolution under Conditions of Moral Pluralism' (2002) 31(6) *Theory and Society* 741.

[6] The right to vote is a necessary but not sufficient conceptualisation of what we may consider to be an 'acceptable procedure' of lawmaking and is also subject to its own qualifications. In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court considered whether Commonwealth legislation excluding prisoners from the franchise constituted an impermissible breach of this right. While the Court did not refer to the concept of 'proceduralism' by name, the case raised questions as to the delineation of what is an 'acceptable procedure'. The Court ultimately ruled that the arbitrary disenfranchisement of prisoners would not be acceptable as a matter of constitutional compatibility, but it is still an illustrative case nevertheless.

[7] Gregg (n 5) 742.

[8] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2007) 66; Gerry Mackie, 'The Values of Democratic Proceduralism' (2011) 26(4) *Irish Political Studies* 439, 443.

[9] Alexander Kirshner, 'Proceduralism and Popular Threats to Democracy' (2010) 18(4) *Journal of Political Philosophy* 405, 409.

[10] Ron Levy, *Five Concepts of Rights in Australia* (ANU Course Materials, 2021) 5–6. Of course, a great number of other factors facilitated the policies passed under the Nazi Government, including before 1933. My intention is to highlight how no policy had the grounding of democratic legitimacy post-Enabling Act.

moral perspective), facilitated by the segregation and exclusion of the 'non-White' South African majority from the electoral process.[11]

In both cases, procedural rights were suppressed through a process of disenfranchisement, enabling the passage of subsequent racial laws. It is difficult to claim that such laws, operating at the detriment of a certain social group, possess the quality of procedural legitimacy if the disenfranchised are themselves the subjects of the law. Admittedly, these are extreme examples selected from history. However, my aim is to illustrate that, as a matter of principle, proceduralism may serve as a fundamentally useful ground in thinking about law reform. I would argue that the procedural element of a law is equally if not more important than the content of the law or decision, partly because the procedure may ultimately determine the content of that and future decisions.[12] As I will demonstrate, the FNV by design encapsulates the concept of proceduralism and its philosophy.

Political participation: An approach of representation reinforcement

By its nature and object, the FNV facilitates the political participation of the First Nations in the Commonwealth legislative process. To the extent that the matter in deliberation relates to Indigenous affairs, there will be at minimum some extent of enhanced political representation on the Commonwealth level. This equality in democratic participation is fundamental as a procedural right, although the FNV in particular adds a local–national dimension to this equality which must be appreciated. The design principle agreed upon at all First Nations Regional Dialogues was a 'bottom-up', grassroots representative structure, placing emphasis on the representation of *local* First Peoples over any national First Nations council.[13] Specifically, local First Nations would be politically empowered with decision-making and input, engaging directly with the Commonwealth where appropriate, while also vested with greater responsibility and accountability to their members and the public.[14]

While a smaller, national body could support First Nations in engaging productively with the Government and Parliament, it would likely function as an 'interface' for discussion as opposed to being the 'discusser' themselves.[15] If we view the legitimacy of any subsequent legislative decisions of concern to Indigenous Australians as dependent on its procedural quality, facilitating participation by a greater number and diversity of First Nations in the legislative process would enhance that legitimacy. As a procedural right in itself, an approach which emphasises a grassroots design for the FNV strengthens it as a procedural right. One may also describe the effect of this design as 'representation reinforcing', mitigating the tendency for local voices to be overwhelmed and effectively excluded from decisions by a larger, federalised body.[16]

Detractors could argue that the FNV would be ineffective due to its similarity to the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which was abolished in 2005. However, the operation and structure of ATSIC, and its subsequent downfall, arguably reinforces the importance of local political participation rather than diminishing it. Several issues and limitations to ATSIC's effectiveness can be identified, in particular its emphasis on being an administrative body of the executive branch, 'answerable to the government of the day',[17] rather than a representative one where Indigenous

[11] The *Representation of Natives Act 1936* (South Africa), the *Separate Representation of Voters Act 1951* (South Africa) and similar electoral laws had the effect of complete or substantial disenfranchisement of 'black' and 'coloured' voters from the electoral process.

[12] From a 'Schumpeterian' perspective, the method in which political decisions are made, as opposed to the content or outcomes that may result, is in fact definitive of procedural democracy itself. It is the capacity of democracies to 'replace violence with votes', even future violence, by reference to the procedural element that gives them their 'normative defensibility': Maria Paula Saffon and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41(3) *Political Theory* 441, 455.

[13] Referendum Council (n 4) 30–31.

[14] Ibid.

[15] Ibid 32.

[16] Levy (n 10) 5.

[17] Referendum Council (n 4) 33.

participation in the actual governing process could be facilitated.[18] Problematically, ATSIC manifested as a body with two minds, tasked with administering government programs while being a public advocate for Indigenous 'self-sufficiency and self-management'—public servant and public interest representative simultaneously.[19] While similar in objectives, the FNV would be significantly distinguishable from ATSIC in design. The FNV would of course be proactive in deliberating and reviewing bills in the Commonwealth Parliament, representing the concerns of local First Nations, and therefore facilitating their involvement in the 'processes of Australian democracy'.[20] Secondly, the FNV would be entrenched as a constitutional body, rather than an executive one, protecting its independence.[21] Hence, the FNV's devolved nature and focus on the procedure of lawmaking and local representation makes it fundamentally distinct from ATSIC, likely avoiding the pitfalls that doomed the latter.

Political suitability: Advantages of a procedural right

I have endorsed proceduralism as grounds for law reform in general. However, I wish to return to some broader yet related principles in order to reinforce the second tenet of this essay: the FNV's suitability to the Australian legal–political context. The FNV's priority in improving access for the First Nations to the democratic and legislative process is, as discussed, consistent with the idea of proceduralism in general. A related principle is how the model embodies the idea of 'procedural fairness', or the fairness in the procedure in which a decision is made as opposed to the actual substance of that decision or law.[22] In this sense, 'justice comes not necessarily from the outcome' but from the 'opportunity to be heard'—a principle that, similar to fair proceduralism, should not be understated.[23] Speaking generally in *F.A.I. Insurances Ltd. v Winneke*,[24] Mason J stated that '[a] statutory authority having power to affect the rights of a person is bound to hear him before exercising the power'.[25] The FNV distinctively encapsulates this idea by providing an avenue for Indigenous Australians to 'be heard' in the governing process of Indigenous matters, in comparison to law reform in the mode of broader, more substantive rights.[26]

I would contend that such an approach as a mode of constitutional reform aids the FNV in its suitability with the Australian political system. A procedural right has the benefit of complementing and adapting to the current structure of the Australian government, a benefit that a substantive right (which may consist of a constitutional anti-discrimination provision or a quota for Indigenous representation in the Parliament, for example) may not hold, as I will consider later. Perhaps the most apparent example is the model's respect for the principle of 'parliamentary supremacy'. Prominent Indigenous land rights lawyer Noel Pearson suggested that,

> Indigenous people [can] get a fair say in laws and policies made *about us* without compromising the supremacy of Parliament. Perhaps we could consider creating a mechanism to ensure that Indigenous

[18] Kingsley Palmer, 'ATSIC: Origins and Issues for the Future: A Critical Review of Public Domain Research and Other Materials' (2004) 12 *AIATSIS Research Discussion Paper* 11; John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Journal of Public Administration* 419, 422.

[19] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s 9.

[20] Referendum Council (n 4) 34.

[21] Ibid 35.

[22] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report No 129, 2016) 393–394.

[23] François Kunc, 'The Case for Adopting the Uluru Statement on its Second Anniversary' (2019) 93(5) *Australian Law Journal* 339, 342.

[24] (1982) 151 CLR 342.

[25] Ibid 360.

[26] Kunc (n 23) 342.

> people can take more responsibility for our own lives, *within the democratic institutions already established*.[27]

This is a strong distinguishing factor between the FNV and the embedding of a more wide-ranging, substantive right. Decisions by the FNV are intended to be non-binding and therefore do not establish a 'veto point' on the 'inner workings of Parliament' and its lawmaking power.[28] Several legislative mechanisms have been considered, such as its constitutional enshrinement, to imbue the FNV with substantial 'political and moral authority'—authority and advice of which Members of Parliament are expected to not disregard without consideration.[29] As acknowledged by the *Uluru Statement from the Heart*, 'it is a request to be heard, not a demand to be obeyed'.[30] The deference accorded to the Parliament as the paramount lawmaking body, as expected by the Australian public and the Constitution, is an inherent quality in a body which focuses on the justness of the *procedure* in which a bill is consulted on and made, rather than the substantive *content* of the bill.

If we consider the nature of commonly proposed substantive rights as an alternative method of law reform (for example, a constitutionally enshrined right to be protected against discrimination from policing, additional land or property rights, minimum political representation, or a combination thereof), such methods would by their very nature be content-specific. Such a provision is not procedural and therefore renders parliamentary legislation 'justiciable under the jurisdiction of the High Court'.[31] In other words, judicial interpretation (and consequently legal uncertainty) over that right or provision is likely to be inevitable—interpretations that may not be entirely consistent and subject to the political convictions of judges.[32] Arguably, this is indicative of the main weakness of 'liberal constitutionalism', the maximalist practice of simply endorsing more rights and more protections.[33] Yet, it is important to be cognisant of the fact that legal guarantees, even on a constitutional level, do not necessarily and always translate into social justice or practical change. At minimum, this raises the persisting question and uncertainty of judicial interpretation. This uncertainty is not present with the FNV, which attends to the procedure of lawmaking, meaning its decisions are non-justiciable.[34] It is this deference to parliamentary supremacy that ensures the FNV's suitability when operating *as part of* the Australian system of government.

Federalism

I would like to conclude the discussion on political suitability by acknowledging the counterargument that the FNV, as a constitutional body affecting the affairs of Parliament, would diminish the principle of federalism (or the relationship between the Commonwealth and the states), and is therefore uncharacteristic of a 'de-centralised' Australian federation. I would argue that the opposite is true. The Australian Constitution upholds federalism through the division of powers between the states and the Commonwealth, 'guaranteeing fair representation of various constitutional constituencies … [and] protecting minority interests from majoritarian power'.[35] Historically, Australian public and constitutional law have developed in tandem with this principle, and a rich literature exists which justifies the benefits of federalism in comparison to a top-down unitary state. Indeed, even states with significantly disproportionate populations are guaranteed equal representation in the Senate, and

[27] Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 66, 66–67 (emphasis in original).

[28] Shireen Morris, 'The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) *University of New South Wales Law Journal* 629, 652.

[29] Ibid 631.

[30] Ibid.

[31] Ibid 653.

[32] Levy (n 10) 4.

[33] Ibid 3.

[34] Morris (n 28) 653.

[35] Referendum Council (n 4) 23.

minimum representation in the House of Representatives.[36] The FNV as a body representing the First Nations greatly encapsulates the sentiment of this—the protection of a minority population against a centralised, federal power, both in its purpose as a voice for the First Nations and in its design with its local member prioritisation. If we consider a value-based perspective, in *New South Wales v Commonwealth of Australia*,[37] Callinan J stated that 'the whole Constitution is founded upon notions of comity, comity between the States [and] the Commonwealth … Federations compel comity, that is to say mutual respect'.[38] As a matter of righteousness, this 'comity' must extend to the First Nations. The FNV, encapsulating this sentiment of federalism, would ensure this.

Conclusion

Effective law reform is difficult to achieve when addressing a problem as systemic and potent as racial injustice. The unrelenting history of such injustice since 1770 simply cannot be resolved by efforts which Gemma McKinnon describes as merely 'symbolic'—that is to say nugatory.[39] However, the First Nations Voice as a method of constitutional reform would arguably be optimal in moving forward. As this essay has demonstrated, the FNV fundamentally enhances the quality of political participation in government and affirms Australia's high standards of procedural fairness. This type of political inclusion is an essential quality of proceduralism. Politically, the model is a viable method of reform that complements the operation of our current system of government, protecting parliamentary supremacy and minimising judicial uncertainty. Of course, it is certainly not the case that the FNV is the panacea to all systemic injustice in Australia, and far from it. However, it may very well represent the first effective leap towards reconciliation on a national level in this country in decades. Perhaps with a prospective referendum, as announced by the Albanese Government, the promise of an Indigenous Voice to Parliament may finally become a reality.

Bibliography

Articles/books/reports

Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016)

Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations* (Report, November 2018)

Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report No 129, 2016)

Chesterman, John, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Journal of Public Administration* 419, doi.org/10.1111/j.1467-8500.2008.00599.x

Estlund, David, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2007)

Gregg, Benjamin, 'Proceduralism Reconceived: Political Conflict Resolution under Conditions of Moral Pluralism' (2002) 31(6) *Theory and Society* 741

Kirshner, Alexander, 'Proceduralism and Popular Threats to Democracy' (2010) 18(4) *Journal of Political Philosophy* 405, doi.org/10.1111/j.1467-9760.2010.00370.x

Kunc, François, 'The Case for Adopting the Uluru Statement on its Second Anniversary' (2019) 93(5) *Australian Law Journal* 339

Levy, Ron, *Five Concepts of Rights in Australia* (ANU Course Materials, 2021)

[36] *Australian Constitution* ss 7, 24. See especially the electoral representation of the State of Tasmania, particularly in the Senate, accounting for the distribution of the Australian voting population.

[37] (2006) 229 CLR 1.

[38] Ibid 322.

[39] McKinnon (n 1).

Mackie, Gerry, 'The Values of Democratic Proceduralism' (2011) 26(4) *Irish Political Studies* 439, doi.org/10.1080/07907184.2011.619730

McKinnon, Gemma, 'Symbolic Recognition Not the Way Forward', *National Indigenous Times* (online, 22 May 2020) <https://www.nit.com.au/symbolic-recognition-not-the-way-forward/>

Morris, Shireen, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) *University of New South Wales Law Journal* 629, doi.org/10.53637/qkqa5656

Palmer, Kingsley, 'ATSIC: Origins and Issues for the Future: A Critical Review of Public Domain Research and Other Materials' (2004) 12 *AIATSIS Research Discussion Paper* 11

Pearson, Noel, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 66

Referendum Council, *First Nations Design Report* (Report, June 2017)

Saffon, Maria Paula and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41(3) *Political Theory* 441, doi.org/10.1177/0090591713476872

Cases

F.A.I. Insurances Ltd. v Winneke (1982) 151 CLR 342

New South Wales v Commonwealth of Australia (2006) 229 CLR 1

Roach v Electoral Commissioner (2007) 233 CLR 162

Legislation

Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)

Australian Constitution

Representation of Natives Act 1936 (South Africa)

Separate Representation of Voters Act 1951 (South Africa)