Arresting the Tide of History: the Uluru Statement from the Heart

'Spent time hating it but that ain't changing it.'

Mos Def, 'Quiet Dog (Bite Hard)'

Eddie Synot[1]

The Uluru Statement from the Heart was issued by First Nations to the Australian people on 26 May 2017. Calling for 'constitutional reforms to empower our people' the Uluru Statement marked an unprecedented event in Australian history. Twelve regional dialogues conducted deliberatively across the country enabled a representative cross-section of the Indigenous community to have their say on reforms they wanted in their communities. These dialogues culminated in the First Nations National Constitutional Convention in May 2017 where over 200 delegates elected by their communities endorsed, by an overwhelming majority, the Uluru Statement and its reforms of Voice, Treaty and Truth.[2] To achieve this empowerment, the Uluru Statement called for reforms to the constitution of Australia – both the legal text and the broader cultural existence of the Australian nation. These reforms are the enshrinement in the Constitution of a First Nations Voice to Parliament and a Makarrata Commission to oversee agreement-making and truth-telling.

Many myths persist about the Uluru Statement from both Indigenous and non-Indigenous sources. Their reasoning is as diverse as an understandable distrust of the Australian state to achieve meaningful reform to ever-present ideological and race-based prejudices. Neither end of this spectrum is the sole territory of Indigenous or non-Indigenous people alone. These myths vary from the implication that any government involvement – such as funding the Referendum Council that facilitated the regional dialogues and the National Constitutional Convention – means the process and resulting reforms are assimilationist; to accusations that a First Nations Voice to Parliament would offend principles of constitutional democracy, equality and the rule of law by becoming a 'third chamber of parliament'.[3]

Some myths originate from Indigenous peoples who remain committed to an absolute Indigenous sovereignty, cultivating a scepticism of all things related to the Australian state viewed as illegitimate. Others, from organisations such as the Institute of Public Affairs (IPA) (a conservative Australian think tank that advocates on public policy from the far right), conflate ideals of law and politics with dated ideas of race better suited to a bygone age of social and biological racism. Responses to the Uluru Statement informed by these myths pivot

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[2] Megan Davis, 'The long road to Uluru', in Julianne Schultz and Sandra Phillips (eds.), *Griffith Review 60: First Things First*, (Griffith University, 2018).

[3] It is important to note that even those such as former Deputy Prime Minister Barnaby Joyce have since apologised for such characterisations of the proposed reforms as amounting to a 'third chamber of parliament'. See Amy Remeikis, 'Barnaby Joyce 'apologises' for calling Indigenous voice a third chamber of parliament' (July 2019) https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament (accessed 22/01/2020).

between two extremes. These include denying the need for reform and instead offering limited incorporations of Indigenous people within the Australian state. This response perpetuates paternalistic attitudes and limits substantive reforms that would otherwise address structural injustice. Other responses have also included a complete disengagement from the Australian state, an attitude which refuses a responsibility to engage beyond ourselves.

What follows is a reflection on my own development against these myths while seeking legal reforms within the Australian state. I have developed my position over the past decade working within Indigenous affairs across higher education, state and federal governments, non-governmental and Indigenous controlled organisations and within the law. To do so, I discuss the symbolic and practical power of myth through what Justice Brennan in *Mabo (No2)* described as the 'tide of history' to explain the impact of colonialism upon Indigenous peoples.[4] My use of myth is not intended to be negative. Myths are important. Myths sustain national, political, and cultural institutions and peoples. *Mabo* is no different.

Myths and the Tide of History

Mythologised by many, *Mabo* has come to represent not just the achievement of Indigenous land rights, but also a modern Australia coming to terms with its colonial past. Having overturned the doctrine of *terra nullius* that had justified over 200 years of Indigenous dispossession, *Mabo (No 2)* recognised a common law native title right that survived British invasion and continued to exist where circumstance allowed. Yet the importance of *Mabo* reaches beyond its limited recognition of native title; *Mabo* offered recognition where it had otherwise been erased.

Reviewing Australia's political history from the 1990s however reveals such an idyllic reading of *Mabo* to be a myth. The 1996 election of the Howard Government fundamentally shifted the Commonwealth's attitude toward Indigenous peoples within a charged political and cultural environment of which *Mabo* was key. The consequences of this change, that preferenced 'practical measures' over self-determination, continues to impact Indigenous peoples today.[5] Prime Minister John Howard's politics echoed and cajoled a conservative backlash against Indigenous rights and the 'introspection and examination'[6] that had resulted from successive national inquires such as the Royal Commission into Aboriginal Deaths in Custody, the Bringing Them Home Report, and the legislative enactment of *Mabo* under the *Native Title Act 1993* (Cth).

Like myths about the Uluru Statement, myths about *Mabo* originate from Indigenous and non-Indigenous sources. For some, *Mabo* was an act of judicial overreach; a moralistic intervention in the legislative authority of parliament. For others, it was a progressive step brining the Australian legal system in line with contemporary standards of civilisation and human rights. For many Indigenous people, however, the overturning of *terra nullius* left the

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[4] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at page 60.

[5] Perhaps the most well-known of these is the Northern Territory Intervention of 2007 which continues today in modified form. However, the impact of changes extend much further. They include the disbandment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005 (a legislatively enacted self-determining representative body) and the subsequent untold amount of lost progress toward self-determination.

[6] Prime Minister John Howard quoted in Carol Johnson, 'John Howard's 'Values' and Australian Identity' (2007) 42:2 *Australian Journal of Political Science* 195, at 205.

foundations of the Australian state exposed as illegal. *Mabo* confirmed a violent dispossession that begged the question of the future justification of the Australian state. The narrow reality of *Mabo* however has always been more sombre. According to the High Court, at least, there is no residue sovereignty – of the law-making type, of nations and states – that continues to exist with Indigenous peoples. This is plainly ridiculous to Indigenous peoples and part of the successive function of legal fictions – such as 'radical title' and the 'doctrine of tenure' – that operate to deny Indigenous peoples. Yet beyond the narrow legalism of *Mabo* and its strict restatement of state sovereignty, which the High Court could not (or would not) question, is a reality that Indigenous peoples must reconcile with. That reality – however unjust – is our position in comparison to that of the Australian state when considering the enforcement and protection of our rights. *Mabo*'s greater symbolic weight in this sense has always been as a result of its inability to answer those foundational questions of the Australian state and its relationship with Indigenous peoples; those lasting questions that continue to animate Indigenous demands today.

One of the lasting legacies of this symbolic weight of *Mabo* is not just its achievement of land rights, nor its perpetually unrealised latent threat to non-Indigenous Australians, but the judgement's re-authorisation of the Australian state by operation of the 'tide of history'. Justice Brennan's reference to the 'tide of history' and its operation with the 'skeleton of principle which gives the body of our law its shape and internal consistency' set the limits of native title recognition by avoiding the undermining of Crown sovereignty, the mythical and unilateral act of discovery and possession from which the High Court draws its authority. It is Justice Brennan's insistence that 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared' that continues to echo today in the persistent failure of the Australian state to address these foundational questions.[7]

Justice Brennan's 'tide of history' operates as metaphor and structural mechanism of the Australian state. It is an affective concept bloodied with what Maurice Blanchot described as the 'excessive theoretical freight' of its own (re)production and affect.[8] It becomes a convenient description for Justice Brennan to operationalise in place of what his honour is unwilling or unable to address. It further represents the paradigmatic operation of the Australian state – and a progressive liberalism common across the globe – to redeem itself and the law. Redemption is achieved by the law having shed its exclusionary and oppressive histories and by offering limited accommodations to Indigenous peoples without having addressed the structures of the relationship which are at the core of injustice. Australia, or the common law, is *cleansed* and *renewed* by the 'tide of history' and the promised 'civilized standards' of modern society that authorise the common law's correction less it be 'frozen in an age of racial discrimination'.[9]

The 'excessive theoretical freight' of the 'tide of history' works to scaffold further the Australian state's 'skeleton of principle' providing inculpability for Indigenous dispossession while preforming re-authorisation. The 'tide of history' is a vehicle for the Australian state to survive the challenge of its legitimacy by washing away the stain and insinuation of

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[7] Ibid, at page 60.

[8] Maurice Blanchot, *Writing of the Disaster,* (University of Nebraska Press, 1995) 87.

[9] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at page 42.

accusations otherwise. By doing so, and once having produced redemption and legitimacy, the law's – and the Australian state's– authorizing circle is complete, without having faced seriously and *justly* the question of its origin. Yet it is that question of origin and its contemporary relevance which remains core to the original grievance of both the socio-economic position of Indigenous peoples and the respect, dignity and recognition afforded Indigenous peoples.

Those questions erased by the 'tide of history' were not entirely unanswered following *Mabo*. In response, the Keating Government promised a social justice package to address the broader position of Indigenous people. This included funds to purchase land for those that would not benefit from native title and asking the Aboriginal and Torres Strait Islander Commission (ATSIC) (a legislatively enacted self-determining representative body) to suggest measures to 'address the dispossession of Aboriginal and Torres Strait Islander people'. ATSIC's report, *Recognition, Rights & Reform*, was extensive. Chaired by Charles Perkins (Indigenous activist, leader and bureaucrat), the report focused 'on institutional, structural, collaborative, cooperative reform', emphasizing the need for improved relationships between Indigenous and non-Indigenous peoples. Importantly, the report insisted on constitutional reform as being key to facilitating substantive and lasting reforms.[10]

The social justice package however was only ever minimally implemented. Had the 1996 federal election resulted differently (it was a landslide) and had ATSIC been supported rather than disbanded in 2005, the current state of Indigenous affairs would be very different. Yet this history precisely demonstrates the 'powerlessness' that the Uluru Statement references in its call for empowerment. This history shows that in the absence of meaningful reform, and facing retrograde decisions in Indigenous affairs, Indigenous peoples have been restricted by an enlarged application of the 'tide of history' that refuses to address foundational questions or to recognise the continued impact of the 'dispossession which underwrote the development of the nation'.[11]

Arresting the Tide of History

My concern beyond this history is how do we confront and arrest this continued 'tide of history'? This raises complex questions, answers to which are too often thrown about as simplistic solutions to otherwise serious and entangled problems. Sovereignty, treaty and decolonisation are perhaps the clearest examples, but each with serious differentiation in their shared meaning and importance for achieving the substantive reforms required for an Indigenous future.

Many have drawn on international examples of Indigenous *refusal* and *resurgency* to overcome the 'tide of history' and progressive liberalism's confinement of Indigenous peoples within the politics of recognition. Glen Coulthard in *Red Skins, White Masks* for example advocates for refusal and resurgency as alternatives to recognition.[12] Coulthard maintains that the politics of recognition is problematic because it confines Indigenous people within limited

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[10] ATSIC, 1995. *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures,* ATSIC Strategic Planning and Policy Branch, Woden ACT, ix-xiii.

[11] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at page 69.

[12] Glen Coulthard, *Red Skins, White Masks* (University of Minnesota Press, 2014).

and symbolic incorporations within the settler-state.[13] Rather than empower Indigenous people, recognition fails to engage with Indigenous peoples as equal sovereigns and forces them – through limited options backed by the material and ideological force of the state – into subordinate positions.[14] Recognition not only fails in this regard, but Coulthard argues that recognition is a distraction from the fact that illegitimate societal structures are incapable of reform.[15] For Coulthard, recognition ends up subjectifying Indigenous people where we come to invest in settler-colonial ways of being that further assimilate and dispossess us by the very emancipatory acts supposed to empower us.[16]

Tony Birch has adopted this critique in his argument against constitutional reform in Australia. Birch, drawing also on Audra Simpson's *Mohawk Interruptus*,[17] insists that symbolic recognition granted from coloniser to colonised fails Indigenous peoples for the very reasons Coulthard identifies.[18] Birch argues that in a rejection of symbolic recognition 'direct activist campaigns'[19] have enabled a 'bypassing [of] symbolic gestures' which will force the Australian state to negotiate 'fresh and meaningful approaches to Indigenous/non-Indigenous relationships'.[20] Refusal has, for Birch, 'raised the political conscience of young Aboriginal people who have decided that Australian governments are unable to move beyond the mentality of the colonial master'.[21] Like Coulthard drawing on Taiaiaike Alfred,[22] for Birch the Australian state is fundamentally incapable of change and therefore Indigenous peoples must turn away to realise an Indigenous future.[23]

Birch is explicit about the inability of the Australian state to change. This is clear when Birch asks 'why any group or individual would seek formal recognition in such a document. The Australian constitution should be torn up and rewritten as a bill of universal human rights'.[24] For Birch, '[a]s Aboriginal people, we must refuse the invitation to sit at the big table where, ultimately, we are made fools of'.[25] Birch is right about the failure of symbolic recognition; that failure also informed the development of the Uluru Statement. Whether one can proclaim other's fools however within a history enmeshed with one another as much as ours is, is another issue. Yet beyond agreement on the failure of recognition there

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[13] Ibid, 3-4.

[14] Ibid, 42, 140.

[15] Ibid, 151-179.

[16] Ibid, 42.

[17] Audra Simpson, *Mohawk Interruptus*, (Duke University Press, 2014).

[18] Tony Birch, 'On what terms can we speak? Refusal, resurgence and climate justice' (2018) 24 & 25 *Coolabah* 2.

[19] Ibid, 6.

[20] Ibid, 9.

[21] Tony Birch, 'On Sovereignty' (2017a) 229 *Overland* 88, at 89.

[22] Coulthard (2014), 158-159.

[23] Birch (2018), 10.

[24] Tony Birch, 'On Recognition' (2017b) 227 *Overland* 43, at 44.

[25] Birch (2017a), 89.

are specific issues with Birch's adoption of refusal that overstate and understate the challenge, Indigenous agency and opportunities for reform.

Birch is mistaken about the origin and symbolic nature of the Uluru Statement and the meaning of any government engagement. This is evident in Birch's conflation of the Referendum Council (that facilitated the regional dialogues) with the prior 'Recognise' campaign that ended once it was clear the Uluru Statement had marked a change in direction for constitutional reform.[26] 'Recognise' *was* purely symbolic, change that an overwhelming majority came to refuse because it didn't offer substantive structural reforms. Yet this *refusal itself* led to the Referendum Council being formed (following Indigenous leaders presenting the Indigenous community's refusal to the Prime Minister and Opposition Leader in 2015) and the Uluru Statement's claim for substantive structural reform.[27]

It is clear Birch's position beyond the limits of recognition is that *any* engagement with the settler-state (believed unchangeable) *whatsoever* is assimilationist and makes fools of Indigenous peoples. Rallying against symbolism, Birch himself relies on the symbolic power of myth, substituting individuals as symbolic of, and as having controlled the entire development of, the Uluru Statement.[28] Birch further refuses to engage with the constitution of the Australian state beyond the narrow and violent structure he is willing to recognise, that if taken to its logical conclusion of representation, would have eradicated us all already. Symbolism here is a further misplaced critique of the Uluru Statement. The Uluru Statement is symbolic, but it is also more than that. It is an invitation to the Australian people to address the constitution of 'Australia' – its symbolic and cultural existence and the power and effect of its institutions. Unlike 'Recognise', the Uluru Statement is both a *refusal* and an *invitation*; it addresses the symbolic and practical needs of reform by providing the respect and recognition that should be afforded Indigenous peoples coupled with the required structural changes to ensure substantive reforms are achieved.

Indigenous peoples absolutely should be building our own resurgencies and refusing to be recognised in limited ways. Yet without addressing our relationship with non-Indigenous Australia we are unable to achieve the 'fresh and meaningful approaches to Indigenous/non-Indigenous relationships' that Birch rightfully argues for.[29] My reflection is of course not meant to excuse continued oppressive practices that deny Indigenous people nor the exploitive operation of capital or criminal negligence toward our environment. However, it does mean that we must take up the responsibility to engage with non-Indigenous peoples and institutions and understand clearly the local nature of our position. This means understating important Australian differences in play that too many adaptions of the North American experience fail to appreciate. We have not had the same history and experience of recognition (such as treaties that grant or recognise rights) that Indigenous peoples in North America have. That does not mean that we cannot deploy refusal to our benefit, but it does mean there exist important institutional differences in Australia that we must also contend with in our attempt to maintain ourselves while also forging new relationships with non-Indigenous Australia. We need to be able to develop institutional mechanisms (however limited they have

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[26] Birch (2018), 5.

[27] Davis (2018).

[28] Birch (2018), 5.

[29] Ibid, 9.

been elsewhere) capable of enabling us *locally* to have our existence as Indigenous peoples recognised and respected as well as providing the foundation upon which to negotiate our future relationship.

My concern is that absolute refusals incapable of engaging, no matter how unfair, with our entanglements with non-Indigenous Australia leaves us as confined as the politics of recognition does. Both Coulthard and Simpson address this accepting the continued need to engage with the settler-state.[30] However, many Australian practices of refusal – such as Birch's – appear more absolute and tend to mirror the violence of the settler state's own pretensions of sovereignty and right. By focusing too much on who is *ideally* recognised, the representational politics, structural forces and material circumstances that produce the issues animating Indigenous demands risk remaining occluded from reform. Practices of refusal that refuse outright the other in our shared space are refusals of unfulfilled transformative potential. This doesn't mean adopting a perverse centrism that would deny our expectations because of a need to 'compromise'. It would rather involve a commitment to resolving existing tensions through the building of required institutional relationships to continue to be able to resolve those tensions. This means a commitment to the transformative potential of political institutions to provide for what Tamara Jugov and Lea Ypi describe as 'understand[ing] that empowerment means not to play by the rules (even when one individually benefits) but to be an equal contributor to their making'.[31]

There exists within this politics a responsibility across Indigenous and non-Indigenous peoples. From within our own understandings and experience, responsibility exists not as a pure gift of justice but is rather thrust upon us imperfectly and unexpectedly. It is that forceful, imperfect and unexpected demand of responsibility that makes it that much more important and impossible to deny. That responsibility requires us to engage across our differences and the tensions of our relations. Our greatest responsibility then is attending to the difficulty of accompanying one another; from having to engage and acknowledge someone, not simply and violently by our own terms of reference, but via genuine engagements that respect one another and commit to a process of mutual engagement and transformation. It should be obvious to many that such a situation for transformation does not currently exist. But that does not mean it cannot. The Uluru Statement provides a road map for that required commitment to institutional reform that will enable us to answer the demand of our respective responsibilities to one another.

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[30] Coulthard (2014), 179; Simpson (2014), 177-194.

[31] Tamara Jugov and Lea Ypi, 'Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed' (2019) 50:1 *Journal of Social Philosophy* 7, at 21.