**Aboriginal voice, Changing the Australian Constitution and the idea of a deepened Australian democracy**

**Peter Botsman**

**26 March, 2023**

**Milingimbi**

“It must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the constitution and make a living force of that which would otherwise be a silent and lifeless document.”

Andrew Inglis Clark, Studies in Australian Constitutional Law, 1901 cited by Conference Chief Justice Robert French AC 8 November 2013, Parliament House, Canberra “Inglis Clark — A Living Force Andrew Inglis Clark and the Building of the Australian Nation” p.

**“The Aboriginal voice” is an example of how democracy can be deepened to take into account much more than just the act of voting or being represented by parliamentary representatives. The voice also asks us to think anew about our “horse and buggy constitution” and the possibility of change. The Australian constitution should be seen as a living document that is the responsibility of each generation to adjust and modernize. To see the Australian constitution as cast in stone is to unconsciously advocate autocracy, stagnation and national torpiditude.**

I

Alternately, the sky will fall or nothing will come of the proposed Aboriginal voice to the Federal government according to the conservative commentariat and politicians. Paul Kelly of **The Australian** described the Aboriginal voice as “constitutionally empowered. unlimited representations” but according to Jacinta Price “it will achieve nothing” or David LIttleproud “it will just add another a new layer of bureaucracy” or Warren Mundine “it will achieve nothing, and Aboriginal Australians should enjoy their citizenship like everybody else”.

One wonders what would have happened if this atmosphere of conservatism had prevailed in the Constitutional conventions that led up to the formation of the Commonwealth Constitution in 1900. It is a sort of paralysis by negative analysis.

For conservatives these lines of criticism of the proposed Indigenous voice seem come together around the idea that all Australian citizens should be “equal” as voters and citizens. An Aboriginal voice would create an unequal “racist” divide because it would give an Aboriginal body the right to consult with and advise the Commonwealth parliament and executive government over and above the right to vote for Federal parliamentary representatives.

Where does this idea of ‘conservative equality’ come from? It appears to be very much like that archaic paternalism of Locke where parliamentary democracy was supported so long as only adult male property holders had the right to vote. The new conservatism says ‘parliamentary democracy stops when one ticks a box on a ballot paper’ or is accepted as a citizen.

When conservatives say we don’t want any difference between Australian citizens they hark back to a very narrow and shallow form of democratic representation in which ‘the crowd’ was ultimately controlled by elected elites. It was a doctrine of limited democracy in which the Scottish laird or English Lord voted on behalf of his lodgers and serfs. Only men voted, representing their homes and families including their wives and daughters. Only landholders or business people voted because they had the capacity to make the best decisions on behalf of us all. Male wage earners were paid to look after their families women workers or voters were hardly imaginable.

Conservatism in Australia is reflected in our very hard to change Federal constitution. We should remember that in 1900, in most colonies only people who owned land were eligible to vote to enshrine our Federal constitution. Conservatism spirals back to privilege and power. Whenever conservatives argue that the black letter law of our original constitution must apply they are invariably thinking of these archaic privileges where some people had more rights or voice than others. According to pure conservatism, democracy is the ultimate corrosion of civilization.

The conservative agenda, from Jordan Peterson to Warren Mundine, to even the most basic National party and One Nation hacks, is to pre-suppose that there is just one superior game in town and it is simply a matter of learning the values and responsibilities of our society and playing that game on its merits. That is, work, vote, and live in a suburban home, adopt Christian values, and be like all other citizens. Adorn all this with a sprinkling of Australian jingo-ism.

II

But there is not, of course, just one game of life and democracy and religion and culture in Australia or elsewhere. Voting itself has its own imbalances and narrowness. When Papua New Guinea won independence one of the big shortcomings of Australia’s patronage was the mistaken view that regions and distinct linguistic communities could be represented by way of a parliamentary representative who won a majority of votes. This ignored millennia of customary law in which an elaborate system of exchanges kept the peace and the balance of representation between different clans and power groups, and when ignored, resulted in war. Parliamentary representation was a progressive step forward but democratic representation needed to also properly address traditional law. This is true of all traditional societies and this swings back to recognizing the need to guarantee extra-democratic forms and processes.

There are so many things that are not represented by citizenship or voting rights: animals, nature, environment, spirituality, the universe, customary law.. in the future we may debate how these themes and dimensions of existence might better be included in the framework of our civic life.

Australia as a nation is a nation founded on constitutional democracy. This is something we celebrate but it has its own narrowness. Our colonial Western machine has pulverized first nation cultures to the extent that the constitution of the modern Australian nation did not even recognise these separate cultures and lives existed. The extraordinary resilience of 60,000 year old Aboriginal cultures is exemplified precisely by the 2023 demand for constitutional recognition in the form of a voice that captures Aboriginal difference and vision wherever they exist. The ‘voice from the heart’ will try to make these differences of opinion and vision understood by our national decision makers and representatives and work as a place for communication to and from Aboriginal communities. It is just a reasonable and long overdue enhancement of our national institutions and democratic processes. It will not overturn them, it will improve them.

III

Paul Kelly’s “Albanese’s flawed voice fails the test” (Australian, March 25, 2023) might be the most serious argument so far put up by the conservative side of politics against “the voice”. Knowing his modus operandi over three decades Kelly either writes with a flurry of seemingly unquestionable facts or he writes as part of an editorial brief. The most benevolent way we can describe the editorial brief behind this article is: show up the weaknesses of “the voice”. One might see this as one of the duties of the fourth estate but not if the arguments run over old ground and issues that have been addressed. The final wording for the Constitution amendment, announced by the Prime Minister is as follows:

“1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;  
2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;  
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions powers and procedures.”

Kelly argues that the weakness of the proposition is that Albanese has caved to the Indigenous working group and ignored “the opportunity for bi-partisan consensus, no constitutional convention, no parliamentary committee collaborating on the model”.

By Kelly’s high journalistic standards the article is shameful because it simply leaves so much out. Apart from the five constitutional conventions that were held to create our Federal constitution, they are rarely held and certainly there is no requirement that a convention be held to ratify a proposition to go to the Australian people in the form of a referendum. Brennan argues that a convention is useful. But how many lawyers picnics do we want? Such a proposition would violate our democratic rights and makes our horse and buggy constitution even more entrenched. There is no guarantee that a referendum emanating from a constitutional convention will result in the approval of the Australian people.

As for bi-partisan consensus and parliamentary committees is Kelly purposefully promoting untruthfulness? On any measure there has been a decade of consultation about Aboriginal recognition in the constitution that has got us to this point in our history. There has been endless consultations through Ken Wyatt and the former Morrison government and the truth is that the conservative side of politics seem to have believed that if they ignore the endless deputations and serious well intentioned presentations of Aboriginal Australians they will go away.. The weakness and laziness and sheer bloody mindedness about this issue lies on the conservative side of politics. How can Albanese or the Aboriginal working party change this attitude on the conservative side of politics? They can’t, the only course is to proceed without them and this seems to be what the country demands if the last Federal and State elections are any guide.

What is more this coming week the voice comes before the parliament to be discussed and debated. It is hard not to conclude that the weight of conservatism about the unchanging Australian constitution weighs down all perceptions of the voice concept. When in doubt support the status quo.

As for the “who-haa” and the various tensions and arguments that have been put to the Indigenous working groups which Kelly details citing Louise Clegg the voice will become a ”fourth arm of government” this is a nonsense. Father Frank Brennan’s concern that “the parliament has to be supreme” has been addressed. The third clause of the wording makes it clear that the Australian Federal Parliament has the primary power over the shape, form and capacity of “the voice” body to consult with parliament and executive government.

IV

It is crystal clear, in the wording endorsed by the Albanese government, that the legislature has the final say over the form and function of the voice. Conservatives abrogate their responsibilities in the parliament when they say that “the voice” will be too powerful, too bureaucratic or ineffective. Ultimately the legislature, elected by all Australians, will determine what shape, form and power the voice will have. The parliament will have this opportunity to change, modify and shape “the voice” in Paul Kelly’s terms in a “constitutionally empowered and unlimited” way. Everything that Aboriginal people propose and the very form of “the voice” is tempered by the parliament, the legislature of the day. This is probably one of the weaknesses of the model. Hopefully over time Australians and legislators will recognise the need for a completely independent and autonomous voice mechanism.

If you believe in the good and wisdom of Australian people then the balance will be got right, not by a committee or a solicitor general or a High Court or by a picnic of lawyers and constitutional experts but by public debate and the elected members of parliament. This is the ultimate safeguard and shows up the vacuous anxiety of the conservative side of politics for what it is – a morally questionable ruse.

Those worried about the capacity of Aboriginal people to invoke some higher power that will bind the parliament also have no grounds for concern. This is similar to the scare campaign after the Mabo High Court decision. Many of the matters of law around the rights of Aboriginal people under our Constitution have been settled. The unsaid wolf whistle like presumption of the conservatives is that Aboriginal people might simply stop agitating for their rights and simply accept with good grace what they have. Thankfully this is not the case. Just as any citizen or group has the right to challenge the status quo so too Aboriginal Australians have these rights. This is something to be celebrated and it is a fundamental right enjoyed by every Australian citizen.

V

The Albanese and Labor governments around the country are riding a wave of optimistic Australian voters who believe in something brighter than the gloom of conservatism. Writing in the same edition of **The Australian** as Paul Kelly, Nikki Gemmel maintains “an indigenous voice advising our parliament is about the grace of listening”. Listening, reflecting, growing…

There are so many possibilities. Imagine if the voice consisted of Aboriginal men and women of high degree. One can imagine national cabinet embracing the opportunity to regularly consult with them about a wide variety of issues. The form which the voice takes, if a majority of Australians say yes in the 2023 referendum, will be up to the existing parliament and Aboriginal communities to determine. Recognizing the need for a voice in the constitution means that its form can vary over time. It can evolve and mature.

The prospect of ‘a voice from the Aboriginal heart’ could transform our national economy, society and culture. Even the most benevolent attempts to support Aboriginal life have at their heart the idea that Aboriginal communities and peoples want to work, live, worship and co-exist in the model of Western Christian ethics. Often this is absolutely the case but there is something richer than this. The essence of Aboriginality I think is that Aboriginal communities respect and abide by the best of Western and Eastern ethics and ceremonial culture because they can recognise in them their own deep spiritual and ceremonial life. But Aboriginal people do not want to ditch their own deep values and simply replicate Western or Eastern life. In many situations there is outright rejection of basic behaviour that we assume is natural, logical and “right”. It constantly confounds mainstream Australians. In these points of disagreement and difference there is always so much to learn. The voice is our chance to understand more and to bring the best of our worlds together.

A mature Australian society has to imagine that there is a voice of constructive difference from Aboriginal communities that must be listened to and valued. This does not mean, as the Liberal National Party seems to want to argue, that this different voice will over-ride conventional democratic institutions, values or laws or property rights. More correctly, by constitutionally recognizing an Aboriginal voice from cultures that pre-existed our society, the idea is that we do not put this voice through the bureaucratic meat grinder. This voice will speak differently and directly to our legislature and our executive Commonwealth government unfettered, as much as possible, by not having to fit into bureaucratic or Western democratic forms. The idea is that we welcome this voice as a beacon of understanding and cooperation and mutual learning.

This creates the possibility an exciting period of exploration for both Aboriginal communities and the wider Australian society: How can the voice of Aboriginal Australia best represent the wonderful diversity of values and interests of Aboriginal culture and communities? Should it be through election of delegates? Can traditional forms of authority flow into a national voice? How can the interests of the three regionally different Aboriginal communities in urban, regional and remote areas be best reflected in a voice that speaks to the Australian parliament? What is the most constructive way for this to occur?

If Australians vote yes in the 2023 referendum a majority of Australians in a majority of Australian states will have recognised that the voice of Aboriginality is important and needs to become part of our national life. The great majority will also be saying that these questions need to be explored and they can be explored in a way that enhances the quality of Australia life and our economy, culture and society. How exciting this new era will be!

To consider another of the main arguments of the opponents of the 2023 referendum proposition, that Aboriginal communities do not need a further “bureaucracy” that divides Australians when there is an increasing number of Aboriginal parliamentary representatives and hundreds of Aboriginal advocacy organisations and presences within government departments etc. **The idea is precisely not to replicate the existing bureaucracy and to hear as directly as possible from the heart of Aboriginal communities in ways that are not defined by a white board, or delegated representatives or narrow elections or having to fit into existing governmental structures or fly in fly out consultations.**

It will be a euphoric time for Aboriginal Australia because it will mean that for the first time since colonialization Aboriginal debates and representational forms will be able to be held independently and expressed in their own own terms and enjoy the respect and protection of Australian government. Recognised in our constitution, the process of cross communication can be a long term process. It does not need to happen overnight. It may be difficult but in every respect it will be worthwhile. Everything from the pure forms of Aboriginal decision making through ceremony to questions of how best to communicate with parliament and executive government about nitty gritty policies and basic community life issues – all will be on the table.

My expectation, like so many others, is that the “the voice” will not only improve Aboriginal life it will herald a new era of prosperity and understanding for the nation as a whole.

References

Paul Kelly, “Albanese’s flawed voice fails the test”, **The Australian**, March 25, 2023

Father Frank Brennan, An Indigenous Voice to Parliament, Considering a Constitutional Bridge, Garret Publishing, March, 2023

Nikki Gemmel, “Why the Indigenous voice to Parliament makes sense to me”, The Australian, March 25, 2023

Denis Shanahan, “Defiant PM’s All in One gamble on the Voice”, The Australian, March 25, 2023

Peter Botsman **The Great Constitutional Swindle: A Citizen’s View of the Australian** [**Constitution**](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/) (Australia: Pluto Press, 2000) pp xiii + 231