

Chapter Twelve

Recognition History yes, Culture no

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To those who want to have Aboriginal people recognised in the Australian Constitution I say, “relax, neither does anyone else get a mention”. In case the proponents remain unpersuaded, however, it is important to have an alternative argument.

I proceed, therefore, on the assumption that a referendum to recognise Aborigines in the Constitution has a real possibility of success. The task is to draft a “Yes” case that eliminates the flaws of those on offer, which generally can be characterised as forms of “cultural” recognition. That is, they endeavour to describe the characteristics of a people.

The here-proposed history “Yes” case is that the mention of the historical fact that an Aboriginal people lived on the continent prior to its settlement by the British should be recognised in a preamble to the Constitution. Describing characteristics of Aboriginal people in the body of the Constitution, the cultural “Yes” case, should be opposed. The risk of the culture “Yes” case is that, while it may purport to seek protection for some individuals on the basis of particular characteristics, in doing so, it introduces group rights. Group rights are both inequitable and illiberal.

Group rights are inequitable because they increase the likelihood that people in similar circumstances will be treated differently. In 2013, Ernest Munda of Fitzroy Crossing was sentenced to seven years and nine months with a non-parole period of three years and three months for killing his wife. He complained to the High Court that his Aboriginality had not been sufficiently considered in mitigation. The High Court sent him away empty-handed because the law can and did take into account a person’s circumstances in sentencing.¹ Recognising Aboriginal characteristics in the Constitution, however, may get Munda, but not others, even less time in gaol.

Group rights are also illiberal. The Constitution of Australia places limitations on government power. Group recognition may be used to protect some citizens from government actions, but inevitably government will use any extension of power to intervene in the lives of all. According to the Human Rights Commission, the Constitution contains no protections against racial discrimination and the Parliament is capable of suspending statutory protections. The Northern Territory Emergency Response in its original application, for example, was not subject to the *Racial Discrimination Act*. Recognition may improve the chances of stopping some allegedly illiberal acts such as the Emergency Response, but it is highly likely to increase government power to intervene in the lives of all other Australians, specifically through taxation, because all other Australians, including successful Aborigines, continue to pay for government programs. It is most unlikely that there will be fewer programs for Aborigines as a consequence of “cultural” recognition, and such programs are arguably the cause of much Aboriginal strife.

Above all, the culture “Yes” case would be an abuse of the Constitution as a legal instrument. As well as placing limits on government power over citizens, the Constitution is a guide to the distribution of powers and responsibilities among governments. It is not a guide to the distribution of powers and responsibilities among people. The Constitution is not a storybook; it is a rulebook, and every Australian should play by the same rules.

Should Aboriginal leaders reject the history “Yes” case, the Government would be faced with the following options and possible outcomes.

1. It could withdraw the offer to hold a referendum. In doing so, it would create the impression that Aboriginal leaders had a veto over the process, disenfranchising other Australians.
2. It could put the cultural case to a plebiscite. Many Australians would vigorously oppose the option at a plebiscite and, if it fails, the Government would be justified in letting the matter lapse. If it succeeds, the No case would be given time to gather its forces.
3. It could put the history case to a plebiscite. Depending on the result, the Government could proceed to referendum, or let the matter lapse. Australians, however, would not feel disenfranchised.
4. It could put both the “culture” and the “history” cases in a plebiscite. Depending on the result, the Government could proceed to a referendum, or let the matter lapse.

Other matters

The suggestion that the word “Aborigine” be substituted for the word “race” in Section 51(xxvi), as a way of maintaining Commonwealth powers to make laws in favour of Aborigines, is arguable. It is, however, unlikely to satisfy the desire for recognition. It could, nevertheless, be a further option, joined to the history “Yes” case.

I believe that all agree that Section 25 should be removed.

A new broad anti-discrimination provision recommended by the expert committee is a separate matter to recognition per se and should be debated on its merits. It should be not allowed to sneak in under cover of a recognition debate.

Political judgments

Those thinking of supporting a “No” case from the outset should be very careful because this referendum may succeed.

The group, *Recognise*, is the officially sanctioned propaganda arm of the Australian Government. *Recognise* self-promotes as “the people’s movement to recognise Aboriginal and Torres Strait Islander peoples in our Constitution”.² It is hardly a people’s movement because *Recognise* is part of Reconciliation Australia which, despite being a charitable institution, is heavily funded by the Australian Government. In February 2013, Reconciliation Australia was promised \$14.4 million for the next four years to assist in its task of, among other things, changing the Constitution.³

Those thinking of supporting the cultural “Yes” case should also be very careful because, as is likely, when the new Constitution fails to change Aboriginal lives for the better, the intended consequences, such as continued litigation to “close the gap”, may be costly and ineffective and the unintended consequences, such as delayed recovery

by blaming others for behavioural problems, may be serious.

It will be the job of those arguing for the history “Yes” case (or, if forced to, a “No” case) to remind voters that Aboriginal despair will not be banished by constitutional change. The nation is not in need of healing, as advocates would have it. Rather, some people within the nation are in need of help. Constitutional change may well increase the chances that help will be in the form of separate rules and institutions, which are sure to isolate further the neediest Aborigines.

Few Australians would be unaware of the gap that exists between the prospects of some Aborigines and the rest of Australia across a host of measures. Data on crime and violence, however, seem to be most illustrative for our purposes. Constitutional change, for example, is unlikely to alter the fact that, in 2012, Aborigines constituted 60 percent of defendants in the Northern Territory higher court (excluding traffic offences), 69 percent of defendants in the magistrate’s court and 76 percent of defendants in the Children’s Court. Aborigines constitute 30 percent of the population of the Northern Territory.

The percentages in NSW for the three courts respectively were 12 percent, 13 percent, and 31 percent. The percentages in Queensland for the three courts respectively were 16 percent, 21 percent, and 40 percent.⁴ Aborigines constituted between two to three percent of the NSW and Queensland populations.

Allowing for the facts that children aged less than 15 years comprised 38 percent of the total Aboriginal population compared with 19 percent in the non-Aboriginal population and that people aged 15-24 years comprised 19 percent of the Aboriginal population compared with 14 percent,⁵ the number of Aborigines in the Children’s Courts is shocking.

Furthermore, Aboriginal women are between nine and 16 times more likely to offend than their non-Aboriginal counterparts and Aboriginal men are between eight and 10 times more likely to offend than their non-Aboriginal counterparts.⁶ These numbers may be under-reported because it is likely that a high proportion of violent victimisation among Aborigines is not disclosed to police. It also appears that around 90 percent of violence against Aboriginal women is not disclosed, nor most cases of sexual abuse of Aboriginal children.⁷

New Zealand and Canadian experiments in recognition

The proponents of Aboriginal recognition will use these statistics to press their case. They will find no joy in doing so, as both New Zealand and Canadian indigenous people have found no joy in recognition, at least in so far as escape from crime and violence is concerned.

In New Zealand, the Treaty of Waitangi of 1840, which, although not a powerful instrument, has nevertheless in recent years been given great effect. Through the *Treaty of Waitangi Act* 1975, the Waitangi Tribunal was set up to look at Maori grievances under the Treaty and a host of other legal measures.⁸ Recent statistics indicate that Maori are more likely to be victims of violent crime than any other New Zealanders.

The rate of violence prevalent in New Zealand as measured by two surveys shows that Maori are more likely to be victims of violent crime than any other ethnic group in New Zealand. As a proportion of total violent victimisation, Maori suffered at between 160 and 180 percent and European and Asian around 90 percent. Pacific peoples were

around 100 percent.

Maori are also more likely to commit a crime than other New Zealanders. Relative to their numbers in the general population, Maori are over-represented at every stage of the criminal justice process. Though forming just 12.5 percent of the general population aged 15 and over, 42 percent of all criminal apprehensions involve a person identifying as Maori, as do 50 percent of all people in prison. For Maori women, the picture is even more acute: they comprise around 60 percent of the female prison population.⁹

The true scale of Maori over-representation is greater than a superficial reading of such figures tends to convey. For example, with respect to the prison population, the rate of imprisonment for New Zealand's non-Maori population is around 100 per 100,000. If that rate applied to Maori also, the number of Maori in prison at any one time would be no more than 650. There are, however, currently 4 000 Maori in prison – *six times* the number one might otherwise expect.¹⁰

Neither does Canada bring much joy to the recognition camp. The Canadian Constitution was amended in 1982 and 1983 to recognise “aboriginal rights”. The *Constitution Act* 1982 recognised and affirmed the Aboriginal and treaty rights of Canada's Aboriginal people, who were defined as including Indians, Inuit and Métis (those of mixed ancestry). In 1983, the Act was amended to include rights that exist or might be acquired through land claims agreements and to state explicitly that Aboriginal rights are guaranteed equally for both men and women.¹¹

Concentrating again on crime statistics, and only on the Inuit, the data on police-reported crime in a 2010 survey, almost thirty years after constitutional recognition, indicate that crime is, in the best-understated bureaucratese, “a significant challenge” in Inuit Nunangat, the Inuit autonomous region. Compared with the rest of the country, Inuit Nunangat has an overall crime rate that is six times higher and a violent crime rate that is nine times higher.

In Inuit Nunangat, rates of accused persons are very high for men aged 15 to 29, with more than four accused of every five young men. Women in Inuit Nunangat are more likely than women elsewhere in Canada to be accused of a criminal offence. The victimisation rate for women was 12 times higher in Inuit Nunangat than in the rest of Canada.¹²

Recognition in Canada appears to have failed the Inuit. I doubt the Indian and Métis have fared much better. The Queensland, NSW and Victorian State constitutions recognise characteristics of Aboriginal and Torres Strait Islander peoples. The culture “Yes” case has to prove that the changes it promotes would change Aboriginal lives for the better. The data for Queensland and NSW presented above suggests that, as with New Zealand and Canada, recognition appears to do no good.

Culture trap and group think

The cultural “Yes” case suffers from the assumption that there is a cultural solution and a group solution to the problems that befall Aborigines. Both assumptions are flawed.

Aboriginal culture was formed as a result of isolation from centres of innovation and civilisation. Indeed, it had a genius for survival in isolation.¹³ Anymore complimentary description than that, however, is, with great respect, gilding the lily. Hunter-gatherer societies were among the most violent societies in human history.¹⁴ Australian Aborigines were no exception to the rule.¹⁵ To preserve a violent culture would seem

wholly unsavoury. Of course, culture cannot be preserved once isolation has been removed. Although Aborigines living in remote communities on their own land are the most “disadvantaged” of all Aborigines, isolation from the mainstream, especially with access that Aborigines have to modern communications, is no longer possible. More than 98 percent of 12 to 14-year olds access the Internet (the difference in participation rates between children living in major cities and remote and very remote areas of Australia was not statistically significant)¹⁶ and there are more than 17 million subscribers with Internet access connections via a mobile handset in Australia.¹⁷

It may be possible to preserve a culture in stagnant or hermit societies, but it is not possible unless it thrives in an open society, as, for example, the Jewish culture and beliefs, which are consistent with commerce and learning. The pattern of behaviour often exhibited by Aborigines, mostly living in remote Australia, does not seem consistent with commerce and learning. If anything, the adaptation has been for the worse. It is also apparent, as my colleague, Ron Brunton, has pointed out, that at particular times Aborigines were not interested in passing on traditional practices and beliefs, nor were younger Aborigines keen to receive them.

In her book, *Race, Wrongs and Remedies: Group Justice in the 21st Century*, Amy Wax argues that while racial inequalities suffered by blacks in the US are the result of historical oppression, the remedies that follow from identifying the sources of racial injustice are unlikely to be found in group solidarity. American blacks as a group have continued to lag in educational and occupational achievement and have been plagued by the same problems as those that plague Australian Aborigines – high rates of criminality, drug addiction, family fragmentation and economic dependence.

The inability or unwillingness of black Americans and Aboriginal Australians to take advantage of changed societal attitudes hobbles progress towards racial equality. Those programs that focus on everything but the person fail, in Australian terminology, to close the gap.

As Wax argues:

No one knows how to ensure that others make good choices or engage in constructive behaviour. Nor do we know how to make someone obey the law, study hard, develop useful skills, be courteous, speak and write well, work steadily, marry and stay married, be a devoted husband and father, and refrain from bearing children they cannot or will not support.¹⁸

Thinking in Australia has begun to shift toward behavioural management, especially following the imposition of income management as part of the Northern Territory intervention. A successful strategy for Aborigines who want to escape their poor lives is to escape the group. There are, for example, Aboriginal “traditional owners” in the Pilbara and Kimberley who have left “country” for town and fly in and fly out to regional mines. There may be solace in the group, but there is unlikely to be a success. It seems apparent that dysfunctional behaviour and the inadequate development of the person, not discrimination, are now the most important factors holding back Aborigines. There are different pathways to success, but few rely on change to the law, and none relies on constitutional change.

The ambit claim

The Labor Government hand-picked an “Expert Panel” to advise on changes to the Constitution to recognise Aborigines. The report of the panel to the Prime Minister in January 2012 recommended that Australians should vote in a referendum as follows:

1. That section 25 be repealed.
2. That section 51(xxvi) be repealed.
3. That a new section 51A be inserted, along the following lines:
Section 51A *Recognition of Aboriginal and Torres Strait Islander peoples*
Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;
Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;
Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.
4. That a new section 116A be inserted, along the following lines:
Section 116A *Prohibition of racial discrimination*
(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.
5. That a new section 127A be inserted, along the following lines:
Section 127A *Recognition of languages*
(1) The national language of the Commonwealth of Australia is English.
(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.¹⁹

Rebuttal

There are three distinct elements in the panel’s log of claims that require rebuttal: recognition of prior occupation; respect for culture, language and heritage; and the power to make laws for Aborigines.

Recognition of prior occupation is a reasonable aspiration, but it should not be placed in the Constitution. It would be difficult to predict the consequences, and the risk of future adverse interpretations is unacceptable. Rather, the aspiration should be accommodated by words being placed in a preamble to the Constitution. The substance of the suggested words, “Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples” is acceptable.

Future jurists would be hard pressed to imply any rights from these words, especially as they appear in a preamble and are expressly not part of the Constitution.

The option should be withdrawn if legal opinion judges that it is not possible to accommodate historical recognition in such a manner. It is important, however, to consider the matter and not to dismiss the possibility on the basis of any perceived risk.

Demonstrating “respect” by “acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters” and “respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples” are not acceptable.

Respect is a much greater leap into the idea of the character of a people than is recognition. “To respect” implies not only recognition, but also a deference. In deference to what, one may ask? Another culture, language, or heritage, and, if so, whose and what weight is to be attached? What degree of deference should be afforded? This is a journey of exploration on which no responsible person would embark.

It is not true to suggest that all people who claim Aboriginal heritage have “a continuing relationship with their traditional lands”. As most Aborigines live in cities, it is not credible to assert that they have a continuing relationship to traditional lands. A tiny minority of Aborigines, perhaps as few as 5 000 though no more than 50 000 of the 500 000 who claim Aboriginal heritage, has successfully claimed native title.²⁰

Australia has seen a recent example of the stultifying effect on free speech that occurs when a culture is given respect. *Herald Sun* journalist Andrew Bolt and his 2009 articles on light-skinned Aborigines have offended the gods of identity. The Federal Court found that Bolt and the *Herald and Weekly Times* contravened the *Racial Discrimination Act 1975* (RDA) because the comments were not made reasonably or in good faith. They offended the sensitivities of those about whom the articles were written.

Cultural identity is arguable and should be discussed in a free and open manner. If not, then Australia is entering a world where Aboriginal people, especially those of light colour and claiming discrimination (or favours) based on their race, become a laughing-stock. All that happens under constitutional change is that Australians will get into trouble for laughing.

The expert panel was aware of the risk to the race powers by removing 51(xxvi). It advised new words both to forbid racial discrimination and preserve the Commonwealth’s powers to make laws for Aborigines.

The new words are intended to entrench anti-racial discrimination in the Constitution, which is an altogether different matter to the recognition of Aboriginal culture and prior occupation. My advice to the cultural proponents is to keep the matters of recognition and anti-discrimination separate, as it is easy prey, given its bill of rights overtones, to a “No” case.

Conclusion

There is a real possibility that a consensus will form around a case to recognise Aborigines in the Constitution. It is essential to formulate a “Yes” case based on history, in order to forestall one based on culture.

The history “Yes” case is the most likely strategy to –

Forestall costly and ineffective as well as unintended and damaging consequences of the cultural “Yes” case

Provide historical accuracy
Assuage a sense of wrong among some, and
Do no harm.

A “Yes” case based on culture would be a retrograde step for Australian Aborigines, Australians, and the Constitution.

Endnotes

1. *Munda v Western Australia* [2013] HCA 38 (2 October 2013).
2. The term Aboriginal will be used to represent Aboriginal and Torres Strait Islanders.
3. Australian Government, “Continued funding for Reconciliation Australia”, <http://www.formerministers.dss.gov.au/13216/continued-funding-for-reconciliation-australia/> accessed 20 September 2013.
4. Australian Bureau of Statistics, *Criminal Courts, Australia, 2011–12*, Indigenous Status Data.
5. Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 2010.
6. Lorana Bartels, *Indigenous Women’s Offending Patterns: a literature review*. Australian Institute of Criminology, Research and Public Policy Series, 107. 2010, ix.
7. Australian Institute of Criminology, “Non-disclosure of Violence in Australian Indigenous Communities”. *Trends and Issues in Crime and Criminal Justice*, No. 405 January 2011, 1.
8. Rt Hon. Sir Geoffrey Palmer QC, “Maori, the Treaty and the Constitution,” *Maori Law Review*, June 2013.
9. Statistics New Zealand 2010, *Crime Victimisation Patterns in New Zealand: New Zealand General Social Survey 2008 and New Zealand Crime and Safety Survey 2006 compared*, 25.
10. Department of Corrections New Zealand 2007, “Over-representation of Maori in the Criminal Justice System: An Exploratory Report.” *Policy, Strategy and Research Group*, 6.
11. Government of Canada, *Justice Laws*. <http://laws-lois.justice.gc.ca/eng/const/page-16.html#docCont> accessed 21 September 2013.
12. Mathieu Charron, Christopher Penney and Sacha Sénécal, *Police-reported Crime in Inuit Nunangat*, Canadian Centre for Justice Statistics, 2010, 13.

13. Quoting Jared Diamond in Gary Johns, *Aboriginal Self-determination: The Whiteman's Dream*, Ballarat, Connor Court, 2011, 24.
14. Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity*, London, Penguin Books, 2011, 59.
15. Stephanie Jarrett, *Liberating Aborigines from Violence*. Ballarat: Connor Court, 2013.
16. Australian Bureau of Statistics, *Children's Participation in Cultural and Leisure Activities, Australia*, April 2012.
17. Australian Bureau of Statistics, *Internet Activity, Australia*, December 2012.
18. Amy Wax, *Race, Wrongs and Remedies: Group Justice in the 21st Century*, Maryland, Rowman and Littlefield, 2009, 37.
19. Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 2012, xviii.
20. See my paper on Native Title, presented at the 2012 Samuel Griffith conference.