Chapter 2

Constitutions I Have Known

The Honourable Gary Johns

I am no fan of recognising any group in a constitution. There are many reasons. For example, the Constitution of Indonesia reads in part, "cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations".

In other words, culture, as a way of life, is too fluid a concept to preserve in law.

The proponents of recognition should be reminded, for example, that the famous Papunya dot paintings date from 1971. Geoffrey Bardon, a "white" teacher, initiated them as therapy to counter Aboriginal men's violence and drunkenness.[1]

Fiji's Preamble to its Constitution recognises "the unique culture, customs, traditions and languages" of indigenous peoples, the descendants of the indentured labourers from British India and the Pacific Islands, and the descendants of the settlers and immigrants to Fiji. In Fiji, everybody gets a mention – except those leaders of the opposition presently exiled, who, incidentally, are excluded by the Constitution from voting at the forthcoming election.

Recognition has not solved Fiji's interminable inter-ethnic jealousies, the problem that Gough Whitlam famously described as "too many Indians and not enough chiefs". Thinking of people as nothing more than bundles of separate cultures can cause strife.

The Constitution of India refers to measures for the benefit of tribes and other groups considered "weak and backward", while the Constitution of Tanzania regards some as "weak or inferior" and requiring special measures "aimed at rectifying disabilities in the society".

The Aboriginal leader, Noel Pearson, recently described a common cultural practice in Aboriginal society – "demand sharing" or "humbugging" – in relation to alcohol. Pearson stated, "The ideal position is that we don't have alcohol in Aboriginal communities because alcohol and strong kinship don't mix, they drink until nothing is left".[2] Is this combination of culture and grog a "weakness" or sign of "inferiority"?

Should the Constitution acknowledge either that Aboriginal people are presently so "backward" that they cannot function as ordinary citizens or that Australian society is so unjust that Aboriginal people require state intervention, forever?[3]

Recognise what?

Whatever qualms I may have about recognition, there are many who want Aborigines recognised in the Australian Constitution. Members of the organisation, Recognise What?, have had the temerity to ask the Abbott Government what they propose Australians should recognise about Aborigines in the Constitution.

The Attorney-General, Senator George Brandis, and Marcia Langton, author of the disavowed "experts" report on recognition,[4] have berated members of Recognise What? for "jumping the gun".[5]

Jumping the gun? When the experts reported more than two years ago, and when the Coalition promised to recognise Aborigines in the Constitution almost as long ago? We do not think so.

Indeed, the Attorney-General is considering further funding for Recognise, which is the propaganda arm of Reconciliation Australia. Recognise promotes the experts report and works on the mistaken assumption that all the Australian electorate requires to support recognition is to know about recognition.

Time is fast approaching when the Prime Minister, Tony Abbott, will have to make good his promise to propose a form of words.

Somewhat like the promise to abolish, and then merely to amend, Section 18C of the *Racial Discrimination Act*, what seemed like a good idea prior to the election now looks a tad more difficult. Perchance, he will ditch the idea and save us all the bother, but he may be encouraged by the huge success of the 1967 amendment. Indeed, the effect of the 1967 referendum was that the Commonwealth recognised Aborigines in the Constitution. It was, moreover, recognition consistent with the Constitution understood as a federal rulebook.

Is that not recognition enough?

The 1967 vote clearly reflected a desire among Australians to help Aborigines. And what help there has been in the ensuing years. Total expenditure on Commonwealth, State and local government programs for Aborigines is a staggering $25bn per year.[6]

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Aborigines are recognised in matters of parenting in the *Family Law Act 1975* (Cth). Aborigines are recognised in matters of adoption in, for example, the *Adoption Act 1984* (Vic). Aborigines are recognised in matters of claiming rights to bury the deceased in, for example, the *Coroner's Act 2008* (Vic). Aborigines are recognised in criminal sentencing in, for example, the *Sentencing Act 1995* (WA). And, in addition, there is a plethora of land rights and associated acts throughout the nation.

Are these all not recognition enough?

The minimalist "Yes" case

It appears not. Both major parties and the Aboriginal industry want more.

That being so, I believe that there is a plausible "Yes" case to suit constitutional conservatives and policy non-romantics. It may not be acceptable to Aboriginal leaders, but it would almost certainly appeal to a large number of Australians.

A minimalist "Yes" case must have three elements.

First, it must sit in a Preamble with an express statement that "The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth". This formulation was contained in the Howard Government's *Constitution Alteration (Preamble) Act 1999*.

Our late colleague, Bryan Pape, who regarded such a preamble as "cosmetic" and "an irrelevant adornment" has nevertheless confirmed the validity of this device to keep it safe from constitutional interpretation.[7]

Second, it must contain the words, "The Parliament, on behalf of the people of Australia, recognises that the continent and the islands now known as Australia were first occupied by

Aboriginal and Torres Strait Islander peoples". This formulation was contained in the Gillard Government's *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

Waking up to the fact that its expert panel was not so much expert as radical, the Gillard Government sponsored this Act to play for time. The aim was to "build the support necessary for successful constitutional change".

Third, it must not mention any characteristics of a people, such as "culture".

Other matters, such as the removal from the Constitution of section 25 or substituting "Aborigine" for "race" in section 51(xxvi) are, frankly, not worth the candle. After all, the Constitution of the United States contains some very quaint language. Section 2, on the apportionment of numbers of voters for State representation, excludes Indians "not taxed".

If these three conditions for a "Yes" case were not met, I would back a "No" case and demand government funding for it.

Labor heading down the human rights road

Unfortunately, Labor is heading down an altogether different track. The Leader of the Opposition, Bill Shorten, has announced that he wants an anti-discrimination clause written into the Constitution along the lines the experts recommended:

> *Section 116A – The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.*

What happened to recognition? And why only one ground of discrimination? Why not all manner of other bases for discrimination such as women, children, disability, older persons, sexual orientation, gender identity and so on?[8]

If an anti-discrimination provision is a "human right", why not include any of the 32 civil and political rights, seven economic, social and cultural rights for which the Australian Human Rights Commission claims responsibility?

Is the race discrimination provision to have precedence over fundamental rights not explicit in the Constitution, such as freedom of expression, freedom of association or property rights?

Why the obsession with race discrimination?

Race is not a permanent marker of success – the persistence of families

What Labor and others must come to grips with is that race is not a permanent blocker to success. Among people who have suffered from racism, bad habits may persist. Indeed, it is precisely those who claim to be most "cultural", and who are most racially identifiable, whose habits are most likely to deny them a good life.

Gregory Clark's study, *The Son Also Rises*, suggests that race and ethnicity slow both upward and downward social mobility but that they are not ultimate determinants of success. Race is not a permanent category of disadvantage or advantage in the way that, for example, genes or ability or application are. Clark observes that social mobility is strongly inherited within families and that social programs can do little to increase it.[9]

If Clark is right, the prospects for Aboriginal social mobility are poor, and money will be wasted on programs where Aborigines remain confined to socialise with families of similar

achievements. Social mobility can, however, be improved where the chance of meeting a partner from families where ability and application have been evident for generations is greater.

In short, Aborigines who reach outside the group are most likely to do best. Group solidarity reduces opportunity. Have you got a constitutional amendment for that, Prime Minister?

Stop blaming racism

The Aboriginal industry does not want to hear these arguments. They would rather indulge the bogey of racism. A particularly egregious example comes from those paid to look for racism, the Aboriginal and Torres Strait Island Social Justice Commissioner, Mick Gooda, and the Race Discrimination Commissioner, Tim Soutphommasane.

These two claim that "one in five Australians have experienced race-hate talk and one in ten Australians have experienced race-based exclusion . . . and that a recent survey of Aboriginal people in Victoria found 97 per cent of respondents had experienced at least one racist incident in the past 12 months".[10]

Unfortunately, they do not name the study to back the claim. Almost certainly, however, it is a recent study instigated and promoted by the Lowitja Institute, which attempts to attribute Aboriginal psychological problems to racism. The survey, *Experiences of Racism*, among Victorian Aborigines linked "self-reported" racism to "self-reported" measures of psychological distress.[11] Participants were asked, "How often have you seen people being treated unfairly because of their race, ethnicity, culture or religion?" This question is biased.

A positive response may indicate that the participant is prejudiced, not the "perpetrator", or that the treatment may have been among non-Aboriginal groups, or that the unfairness was not unfair, or that there may have been a good reason for the perceived unfair behaviour. The survey prompted participants to look for racism as the cause of the problem, which the participant was able to define, after it was suggested they should look for one.

Where, under prompting from the survey, fault was found, participants were corralled to conclude that racism was the cause. Having been sent in search of racism, they were bound to attribute whatever stress they were experiencing to racism and, assuming that if there were racism, they would have to be suffering from it.

40 per cent of participants indicated that they had experienced racism "within the justice system", which presumably means that at least 40 per cent had dealings with the justice system.

A group of Aborigines, who are highly likely attending an Aboriginal-run centre for those who have problems, are asked if they feel good about being Aboriginal. When they answer, "no", it is inferred that racism is the cause. The survey noted, however that the most frequent difficulties reported by community workers in conducting surveys were low levels of literacy and numeracy.

These factors, not racism, may be plausible explanations for the perceived problems reported.

The survey was undertaken in two rural and two metropolitan local government areas. The degree to which Aborigines in Victoria marry outside of their community is very high – 82 per cent for men and women in Melbourne and 72 per cent for men and 75 per cent for women elsewhere in Victoria.[12]

These figures reinforce the suspicion that the sample was not random.

Victorian Aborigines are a far less identifiable people than, for example, full blood Aborigines in remote Australia. As the report suggests, "someone who can be visibly identified as belonging to an ethnic minority group is likely to have higher exposure to racism than someone who is not visibly identifiable".[13] The survey, however, does not take the "visibility status" of Aborigines into account as there is no accepted way of assessing visibility for Aboriginal people and "questions to this effect were likely to be highly offensive to communities".

Which poses the question, how would a person know that an Aborigine was an Aborigine in order to display prejudice? A person could also be offended because they were not identified as an Aborigine.

The survey, on which the commissioners relied, suffers from sampling, pre-judgment, self-interpretation, suggestibility and invalid comparison errors. The survey not only promotes a cause; it also runs the risk of promoting highly suspect solutions to problems suffered by some Aborigines by attributing all problems to racism.

Not all cultures are civilised

Those who want to recognise culture in the Constitution play a dangerous game. They are, in effect, confusing culture with civilisation. Civilisation is a good thing. Getting it, however, has proved to be a messy and long process. Many societies and peoples have failed to achieve it.

It is no use deriding colonialism and invasion and frontier struggle if, in the Australian Aborigine's case, little progress had been made along the road to civilisation. Aborigines may have lost the war, but they inherited a "culture" the very best that mankind has to offer.

The many measures and treasures of civilisation, where life is built around literature, science, commerce as well as material wealth, were not plucked from the soil. They were imported.

There are many theories as to why some societies progress and others stagnate. Few have anything to do with race.

Max Weber suggested that culture, inasmuch as Protestant disciplines were meant to provide the necessary focus for the industrial revolution, was important. McClosky suggested that, in northwest Europe in the 17th and 18th centuries, the bourgeoisie achieving liberty, dignity, and respectability drove innovation.[14]

Pinker suggested that the long pacification of humans occurred through political processes such as state monopoly force, and "gentle" commerce that overcame mistrust. It occurred also by overcoming bad habits such as polygamy, which left young, sometimes angry men, out in the cold.

These many changes gave succour to the better angels of our nature, and lessened the chances of being speared by an angry neighbour. [15]

Our colleague, Stephanie Jarrett, reminds us how violent Aboriginal society was and, in an echo of its past, remains.[16]

Acemoglu and Robinson suggest the achievement of institutions that engender trust between those who barely know each other, such as property rights and power sharing or inclusive political arrangements, were essential.[17]

A great part of the political arrangements that secured a less violent society, with obvious exceptions, was the nation-state. As Collier argues, nations are "important and legitimate moral units".[18] Indeed, the nation-state may be one of mankind's greatest achievements.

When an Aboriginal clan uses the term, "Aboriginal nation", they insult the achievement. Families roaming the desert do not make a nation.

The past was not an idyll. Australian law does not allow for killing based on superstition. Indeed, Australians will be punished for harming their pets, let alone each other. Australian civilisation is built on the lessons of history. Every Australian is a beneficiary of the civilisation transplanted to this land.

Recognising alone that part of Australian history, which secured no element of civilisation, is to damn the achievements of a civilised nation, including Australians of Aboriginal descent.

Perhaps this debate is a good thing. It may force the intellectual malcontents and their adherents to appreciate "the other" – the violent world that existed before civilisation.

None of these profoundly important messages of progress in human affairs can be assisted by constitutional change.

The Aboriginal tent embassy still stands on the lawns opposite Old Parliament House, Canberra: a curio of a forgotten period when treaties were in vogue. Like a treaty, recognition is a curio best forgotten.

The organisation, "Recognise What", is ready to enter the fray.

We wait upon the Government to answer our question, recognise what?

Endnotes

1. Bardon, G. and J., *A Place Made After the Story: The Beginnings of the Western Desert Painting Movement*, Miegunyah Press, 2004.

2. Quoted in Johns, G., "Already Recognition Enough". In Johns, G., *Recognise What?* Ballarat, Connor Court, 2014, 30.

3. Pholi, K. and Johns, G. (2014). "Great Constitution", Shame About the Nation". In Johns, G., *Recognise What?* Ballarat, Connor Court, 110.

4. Expert Panel (2012). *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution.* Canberra.

5. Patricia Karvelis, "Race shift must be minimal, says Wesley Aird", *The Australian*, 23 July 2013.

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7. Pape, B. (2014). "Cosmetic preamble an irrelevant adornment. In Johns, G. *Recognise What?* Ballarat, Connor Court, 37.

8. https://www.humanrights.gov.au/rights-and-freedoms-right-right-0 accessed 18 August 2014.

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13. Ferdinand, *op. cit.*, 7.

14. McClosky, D., *Bourgeois Dignity: Why Economics Can't Explain the Modern World* (Electronic.), University of Chicago Press, 2010, location 5227.

15. Pinker, S., *The Better Angels of Our Nature: A History of Violence and Humanity*. Penguin, 2012, 825.

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