

INDIGENOUS RIGHTS AND THE CONSTITUTION: MAKING THE CASE FOR CONSTITUTIONAL REFORM

by Megan Davis

Recently, Prime Minister Kevin Rudd revived John Howard's 2007 pre-election proposal to amend the preamble to the *Australian Constitution* to recognise Aboriginal and Torres Strait Islander people.¹ Rudd's announcement was prompted after Yolgnu and Bininj elders presented him with a Statement of Intent at the Federal Government's Community Cabinet meeting in Yirrkala, Northern Territory.² Prior to that, constitutional reform had been raised by participants in the Indigenous stream at the Federal Government's 2020 Summit in Canberra³ and at the Barunga Festival in the Northern Territory.⁴ In fact, it has been a perennial focus of unfinished business between Indigenous peoples and the state.

Given the presence of section 51 (xxvi) — the races power — in the Constitution that permits discriminatory legislation on the basis of race, it is a strange symmetry indeed to have a symbolic showcase like the preamble lauding the first peoples of Australia as being important to the Australian state, yet an operative provision that permits discrimination on the basis of race.⁵ Moreover, only eight out of 44 referendums have been successful in Australia's history and the difference between success and failure has been bipartisan support.

This article considers the slow momentum toward Constitutional recognition of Indigenous peoples. It will consider the difficulty in changing the *Australian Constitution* and canvass why Indigenous Australians will need to be more specific in articulating the importance of Indigenous recognition in the operative provisions of the Constitution. Indigenous peoples know that our rights are inherent and that few jurisdictions actually require Indigenous peoples to justify their recognition. We also know that the evidence is strong from comparative common law jurisdictions that constitutional recognition does result in better outcomes in employment, health, education and women's wellbeing. Yet given the inertia of the state in recognising Indigenous rights and because of the tenor of debate on Indigenous issues in Australia, we must establish the causal relationship between rights

recognition and improving the wellbeing of Indigenous peoples' lives.

Therefore, this paper argues that in advocating for constitutional reform, we need to emphasise the connection between dealing with disadvantage - an urgent and immediate priority - and the 'big picture' in terms of addressing unfinished business between Indigenous peoples and the state. The Indigenous community is diverse enough in leadership and expertise and committed enough to work toward both outcomes.

CONCEDING LITTLE GROUND

The Australian state has conceded little ground to the first peoples of this continent in terms of its public law and public institutions. While *Mabo* continues to be cited internationally as an example of Australia's progressive regard for Indigenous rights, Indigenous Australians know that what the High Court determined in *Mabo* and its statutory expression was diminished by Parliament and through flawed interpretation by the common law.⁶

The recent Apology to the Stolen Generations is another example of the state conceding little ground.⁷ Prior to the Apology, the preoccupation of the media, the Government and the Opposition was to assure Australians that no compensation would be granted. The state would cherry-pick the recommendations of *Bringing Them Home* and international principles of reparation to provide an apology without compensation. The state wanted to make a gesture without having to give anything up. This is despite the fact that the state had in the past made reparation without link of direct responsibility. For example, in 2001-2002, John Howard committed *ex gratia* payments of \$25,000 to Australian Defence Force prisoners of war, civil internees and detainees or their surviving spouses.⁸

Similarly, the public conversation about the preamble proposal to recognise Aboriginal and Torres Strait Islander peoples is based on a similar premise - that recognition is acceptable as long as it has no effect or creates no legal rights. Moreover, it will be acceptable as long as the Australian

state doesn't have to give anything up. As Tony Abbott argued about the preamble proposal, he is supportive as long it is done, 'without in any way detracting from the role of the rest of us.'⁹ Thus, the idea of apologising to Indigenous peoples or recognising Indigenous peoples in the preamble can only be done as long as it doesn't 'detract' from the dominant historical narrative and mythologies of Australia. Brendan Nelson even extraordinarily made this point in his Stolen Generations speech:

In offering this apology, let us not create one injustice in our attempt to address another. Let no one forget that they sent their sons to war, shaping our identity and place in the world. One hundred thousand in two wars alone gave their lives in our name and our uniform, lying forever in distant lands; silent witnesses to the future they have given us ... Theirs was a mesh of values enshrined in God, King and Country and the belief in something greater than yourself ... Neglectful indifference to all they achieved ... will be to diminish ourselves.¹⁰

Thus, despite the Apology being a day for a specific group in the Australian community, the Stolen Generations, the gesture couldn't occur without an assurance that it doesn't impinge upon Australia's established narrative about itself.

SISYPHEAN TASK: CONSTITUTIONAL REFORM

The task of amending the Constitution is fraught with difficulties, as Australia has a rigid Constitution that is almost impossible to amend. Section 128 of the *Australian Constitution* requires the amendment proposal to be passed by a majority of people in a majority of states and an overall national majority. Since Federation in 1901, Australia's Constitution has only been amended eight times out of 44 attempts.

One of the most important factors in successfully changing the *Australian Constitution* is manufacturing bipartisan support. Any proposal requires both sides of politics being on side. The Australian Labor Party has the worst record as a political party when it comes to constitutional change. They have propositioned 25 of the 44 amendment proposals and the last time they succeeded was in 1946.

Many Constitutional lawyers also speculate that the bipartisan support is required because of the poor civics knowledge of Australians, who have a tendency to *vote no if they don't know*. Comparatively speaking, Australians have a poor knowledge of their legal and political system and this is particularly damaging when it comes to ideas of reform in Indigenous affairs.¹¹ A recent ANU study found that 63.5 percent of Australians thought the High

Court could change the Constitution or didn't know how it was changed.¹² Therefore, where there isn't bipartisan support, any level of disagreement will confuse voters particularly when 'Australians have little understanding of how the current system of government works'.¹³

It has been 31 years since the *Australian Constitution* has been altered and this is the longest period Australia has gone without any Constitutional amendment. It may be likely that the next attempt to alter the Constitution is on the issue of four year parliamentary terms, which has already attracted support from both sides of politics. Furthermore, Rudd has also indicated his intention to hold a referendum on the Republic following national plebiscites dealing with questions of whether Australians want to become a republic and what model they want. It is clear there is growing momentum for Constitutional reform and a sense that the current compact as drafted is ill-suited to our modern democracy. Given the already crowded agenda, Indigenous peoples have to carefully consider how we fit with those proposals.

'KIDS CAN'T EAT THE CONSTITUTION': MAKING THE CASE FOR CONSTITUTIONAL CHANGE

The preamble proposal may get support because the very attractive marketing message for Australians would be that it will provide Indigenous peoples with no rights and have no impact upon their own rights. The preamble has no legal effect and has virtually no interpretive value in terms of the operative provisions of the Constitution.¹⁴ Rudd immediately assumed the Yolgnu elders were talking about preambular recognition, however, the Yolgnu elders weren't simply speaking about preambular recognition – they were talking about recognition of their pre-existing land rights in the body of the Constitution. Any proposal to have pre-existing Indigenous rights to land recognised in the Constitution will require a more targeted, long-term campaign that must seek to overcome poor civics knowledge, community racism and division and the idea that it involves giving rights to one group over another.

Keeping in mind the importance of strategy in effective constitutional reform, the strongest argument to the recognition of Indigenous rights in the Constitution must be one predicated upon the idea of democracy and the rule of law. This is because in a utilitarian democracy like Australia, a race-based critique is regarded as dissent and is neutralised by 'widespread apathy' and denigrated by those powerful agendas who have most to lose from a liberal polity that welcomes and accommodates diversity. Indigenous legal activists' use of democratic principles and

the rule of law was critical to the successful adoption of international standards on Indigenous rights – the *United Nations Declaration on the Rights of Indigenous Peoples*.¹⁵ It is a powerful argument to match the contemporary democratic *milieu*.

A well planned strategy designed around the language of ‘democracy’ rather than ‘sovereignty’ is suggested not to diminish the claim of sovereignty nor to alter the substance of the claim but because it is *realpolitik*. Any long-term strategy needs to be realistic about Australian politics and avoid the simplistic and divisive debates of state sovereignty, national borders and security. The language of political participation will be more effective in an era of ‘democratisation’, than continuing the post-colonial struggle for the recognition of sovereignty which gets mired and distorted in semantic debates.

CONCLUSION

In shifting the ground in public debate, Indigenous Australia needs to be strategic about adopting a new direction in advocacy for self-determination as underpinned by the *United Nations Declaration on the Rights of Indigenous Peoples* and informed by an emerging right to democracy at international law. Self-determination is regarded as the ‘oldest democratic entitlement’.¹⁶ This is a powerful argument that fits within the framework of the rule of law and equality for all.

For this reason, one of the strongest cases for Constitutional change is deleting or amending the races power. It is unacceptable for a modern liberal democracy like Australia to have a races power in the Constitution. Particularly with nascent discussions about a Charter of Rights and political rhetoric about Australian respect for human rights and the rule of law, a races power would be at odds with a non-discrimination clause in a statutory Charter. A more significant proposal for Indigenous peoples would be the repeal of the races power and the inclusion of a non-discrimination and equality provision in the Constitution. Given the universal appeal of a national commitment to non-discrimination and equality as underpinning our popular sovereignty, this proposal is more likely to succeed at a referendum.

The success of the wedge between ‘practical’ measures and ‘rights’ measures is possibly related to the failure of those advocating a rights approach to establish a causal relationship between Indigenous rights and improved outcomes in education, health or employment. It is not enough for advocates to amorphously refer to ‘Canada’ or ‘the Harvard project’ as evidence of that link.

Indigenous Australians have to emphasise the importance of addressing disadvantage immediately and urgently while also pursuing recognition of rights. Any strategy for Constitutional change needs to be well orchestrated and tailored to an Australian polity, to Australian conditions. It needs to appreciate the low level of civics knowledge, the limited media forum in which to have these debates and the stamina required for such a long-term project. It will require the Australian state to give something up, but it will require us to give ground as well. The hard work has only just begun.

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- 1 Communique to the Australian Government from Yolgnu and Bininj Leaders at Yirrikala (23 July 2008) *Yolgnu and Bininj Leaders’ Statement of Intent* (Copy on file with Author); See, eg, Natasha Robinson, ‘Rudd revives push to recognise Indigenous rights in Constitution’, *The Australian* (Sydney) (23 July 2008) <<http://www.theaustralian.news.com.au/story/0,25197,24065029-601,00.html>>.
- 2 Ibid.
- 3 See, *Options for the future of Indigenous Australia* <http://www.australia2020.gov.au/docs/final_report/2020_summit_report_7_indigenous.doc>.
- 4 ABC, ‘Indigenous leaders call for Constitutional recognition’ *ABC News* (Sunday June 8) available at <<http://www.abc.net.au/news/stories/2008/06/08/2268308.htm>>.
- 5 Section 51 (xxvi) *Commonwealth of Australia Constitution Act 1900 (UK)*. See generally, *Kartinyeri v Commonwealth* (1998) 152 ALR 540.
- 6 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; For example the common law’s misinterpretation of section 223, *Native Act 1993* (Cth).
- 7 The Hon. Prime Minister Kevin Rudd, ‘Apology to Australia’s Indigenous peoples’ (Speech delivered at House of Representatives, Parliament House, Canberra, 13 February 2008) available at <http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm>.
- 8 Megan Davis and Andrea Durbach, ‘Rudd must make amends’ *The Canberra Times* (Canberra), 3 December 2007.
- 9 ‘Coalition concerned over Indigenous rights in the Constitution’ *The World Today*, Thursday 24 July, available at <<http://www.abc.net.au/worldtoday/content/2008/s2313335.htm>>.
- 10 The Hon Dr Brendan Nelson MP, Leader of the Opposition, ‘We are sorry – Address to Parliament’, Speech delivered at Parliament of Australia, Canberra, 13 February 2008.
- 11 Civics Education Group *Whereas the People ... Civics and Citizenship Education — Report of the Civics Expert Group* Australian Government Publishing Service, Canberra 2002; Megan Davis, ‘Civics Education and Human Rights’ (2003) *Australian Journal of Human Rights* 11.
- 12 *Australian Election Study 2007 Public Responses: Civics & Other Issues*.
- 13 George Williams, ‘Why Australia kept the Queen’ (2000) 63 *Saskatchewan Law Review* 477-501.
- 14 Anne Winckel, ‘The Contextual Role Of A Preamble In Statutory Interpretation’ (1999) 23 *Melbourne University Law Review* 184; Mark McKenna, Amelia Simpson and George Williams, (2001) 24 ‘First Words: The Preamble To The Australian Constitution’ *University of New South Wales Law Journal* 382-400.
- 15 G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).
- 16 Thomas Franck ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 52.