Chief Justices and Lost *Tjurungas*

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In the last two weeks of July, two former Chief Justices of the High Court, Murray Gleeson and Robert French, came out publicly to endorse the concept of a "Voice" in parliament for Australia's Aboriginal population. Both agreed that a national advisory board, with a membership composed of people of indigenous descent, was needed for their interests to be put to the parliament. Both felt the need to go public to persuade the government to go ahead with a referendum to change the Constitution so the Voice could be established.

In his speech to the Garma Festival yesterday, Noel Pearson lavished praise on Gleeson's paper in particular. He called it "the last word on the legal integrity of the Voice and its seamless compatibility with the constitutional history of the Australian Commonwealth". Pearson said the judge had demolished the conservative case put by the Institute of Public Affairs and journalist Andrew Bolt that "race has no place" in the Constitution. Pearson said:

This argument succeeds only if you ignore the truth that our claim is on the basis of our being indigenous to this country, not on the basis of race. Bolt and the IPA remain steadfastly obscurant on this.

However, it should be noted that Gleeson, and French after him, both acknowledged that, rather than fitting seamlessly into the Constitution, the Voice does not actually need constitutional change to be established. Parliament already has the power to set up such a board itself. In fact, a proposal of this kind would not be controversial and Scott Morrison would have little trouble getting it supported by a majority in both houses of parliament. Since 1967, when the referendum that year gave the Commonwealth the power to make laws specifically for Aboriginal people, successive governments have been able to

establish advisory bodies of this kind without any further Constitutional change. There have been Aboriginal advisory groups recognised by the federal government more or less continuously for the past fifty years: the Council of Aboriginal Affairs 1967–1973; the National Aboriginal Conference 1977–1985; the Aboriginal and Torres Strait Islander Commission 1990–2005; and the current peak body, the National Congress of Australia's First Peoples 2010–present.

See also: *There's more to the Voice than Gleeson says*

So why did Gleeson and French enter this fray? The sticking issue is not so much the Voice itself but the question of how to embed it in the Constitution. From their perspective, this is the weakest link in the proposal, since it ultimately puts the issue in the hands of Australian voters, who might be sympathetic now, but in the polling booth at a referendum might just turn around and reject it. So both judges have stepped outside the sanctum of their legal territory to rest their case on interpretations of Australian politics and history. Here is French's case:

Australia's national identity today encompasses many histories. There are the post-Federation histories of those who, from every part of the globe, have made this country their home. There is the history of the European colonisation of Australia and the creation of our constitutional representative democracy. Overshadowing all of those histories in its temporal sweep is that of Australia's First Peoples. Their laws, traditions, stories, art and ceremonies form an intricate lacework over the whole Australian landscape … Recognition of that history and of the special relationship of Australia's First Peoples to the country is a part of knowing who we are as a nation.

There are two claims here that are seriously mistaken. First, the Aborigines were not the "first peoples" of the nation. This confuses the history of the continent with the history of the nation. The ancestors of the Aborigines were the first people who made landfall on Sahul, the much larger, ice-age version of what we now call Australia and New Guinea, more than 50,000 years ago. The nation called Australia was created just 119 years ago by a union of the colonies established on the continent by the British after 1788. The Constitution this nation adopted in 1901 recognised its founders simply as "the people" and did not identify anyone as "first peoples", let alone specify a privileged position for indigenous people or any other ethnic group. The nation was not created on the accomplishments, talents, laws or social structure of the Aborigines. It was a different creature altogether, a combination of British sovereignty, Westminster politics, American federalism and English rule of law.

Second, in his claim that the history of the Aborigines “overshadows” that of the people who arrived here later, French wants his readers to believe that the time Aboriginal people have spent here is a greater historical determinant than the achievements everyone else has made. But the kinship-based social structures of the Aborigines never came close to the degree of authority, sophistication and justice the British transplanted here. It is true that, because this continent was the last large, inhabitable place where humanity’s original hunter-gatherer way of life prevailed up to 1788, it then housed “the world’s oldest living culture”. But it is just as true that the ancestors of all the other people of the world were once hunter-gatherers too, only most of them advanced well beyond that way of life. In terms of political and legal organization, land use, invention, construction, trade and every other measure of social amelioration, the achievements made by the post-1788 colonists and their institutions always dwarfed those of the far humbler customs and traditions of Aboriginal society. To think otherwise is a romantic delusion.

Gleeson’s case is more formidable. He argues that the decision to treat Aborigines as a special group was made at the referendum in 1967 that gave the Commonwealth the power to do this. As a result of that referendum, Section 51(xxvi) of the Constitution allows the Commonwealth to make laws for “the people of any race for whom it is deemed necessary to make special laws”. This is true. Indeed, all the instrumentalities made by the Commonwealth since 1967, including the myriad of indigenous-only bureaucracies in welfare, health, housing, education and land rights, depend for their existence on the constitutional change made then.

Hence, Gleeson says his case does not depend on any inherent problem with the concept of race. He says that, although history has often shown racism to be evil, “it does not follow that the term is unmentionable, or that any governmental action predicated upon race must be wrong. It has a firm footing in the Constitution.” Some of the federal laws specifically for indigenous people are beneficial, he notes, while others have come under criticism. These are “political issues”, he says, and the Constitution’s references to race are not morally objectionable. Moreover, being indigenous is not necessarily a racial matter:

In whatever country is under consideration, being Indigenous could be regarded as a matter of history, or geography, or ethnicity … If, as our leaders often say, we have among us a group of people who have a special place in our history, and we are satisfied they deserve a certain form of recognition on that account, it would be driving ideology to an extreme to decline them that recognition because they form what could be regarded, and is regarded by the Constitution itself, as a racial group.

In short, if Australia's political leaders believe that Aborigines have "a special place in our history", then Gleeson's position is that there is nothing wrong, and nothing racist, about inserting that sentiment in the Constitution itself.

However, what Gleeson says about the 1967 referendum seriously misrepresents why it was conducted and why more than 90 per cent of Australian electors voted for it. The Coalition government of Harold Holt that initiated the constitutional change, and most people who voted Yes, did not do so because they thought Aborigines had a "special place" in our history, let alone because they were regarded as the "first peoples".

At the time, educated opinion in both anthropology and history accepted that the Aborigines were not one people with a common origin but rather members of several waves of hunter-gatherer peoples who came to Australia from India and other parts of Asia over the millennia before the British arrived. In Manning Clark's popular Volume One of *A History of Australia*, published in 1962, his first two pages argued the then academically respectable view that the first people had been the Barrineans, a negrito people resembling the New Guinea highlanders, who were forced off their land by later arrivals into remote enclaves on Cape York and Tasmania. School textbooks repeated the same story.

The concept that indigenous people had a special place in our history did not emerge until the decade after the referendum has passed. It was a product of the 1970s, when white advisors and lobbyists headed by the left-wing economist H.C. "Nugget" Coombs put this agenda in place in Canberra (details are in Chapter 10 of my book *The Break-up of Australia*). The notion that Aborigines had a "special place" because they got here first was only fully embedded within the Canberra mindset when the Hawke government established ATSIC in 1990.

In contrast, in 1967, most electors voted Yes because, thanks to a sympathetic media, especially the ABC and *The Australian*, they were ashamed that many Aborigines remained impoverished at a time when the rest of the country was growing rich. The states could not, or would not, spend money to rectify this but voters recognised that the Commonwealth, with its greater access to funds, could act if the Constitution was changed. They also voted to end various discriminations against Aborigines, such as being banned from drinking in hotels and swimming in municipal pools, and being confined to an authoritarian system of reserves in Queensland. I know all this because I was a left-wing student activist and editor from 1966 to 1971, and Aboriginal rights were one of the three big issues (along with the Vietnam War and South African apartheid)

on which my colleagues and I campaigned, spoke and wrote about all through those years.

Apart from the success of the 1967 referendum, Gleeson offers only one piece of historical evidence why Aboriginal people deserve a special place. He states that the case for special treatment of indigenous people can be summarised in one sentence he quotes from the 1992 Mabo judgment on land rights: "Their dispossession underwrote the development of the nation." However, Gleeson does not acknowledge that a lot has happened since 1788 and that history has changed the very nature of the ancient Aboriginal society that was dispossessed by the modern British colonisation.

For people to be recognised as agents of some kind of historical continuity they need to have a coherent cultural connection with those from whom they are descended. For instance, Australians of Anglo descent recognise the Magna Carta of 1215 as one of the foundations of our liberty today. It is a distant connection but none the less still real for that. The same goes for the Bill of Rights the English parliament demanded after the Glorious Revolution of 1688, which still provides a liberal framework for our present society. In the case of Australian Aborigines, however, it is hard today to find any of the defining elements of the traditional way of life that existed before they were dispossessed by British settlement.

The demography of the Aboriginal population alone suggests that, the great majority of people of Aboriginal descent today do not have a coherent connection of this kind. As I have written several times in these pages, 80 per cent of those who identify as indigenous now live in what the Australian Bureau of Statistics calls urban and regional centres, while only 20 per cent live in remote Australia. The historical movement has all been from the latter to the former. Two decades ago, the comparable figures were 70 per cent urban/regional and 30 per cent remote. Moreover, urbanised Aborigines today are completely assimilated. Their lives are not fundamentally different from other Australians. Almost 100 per cent of them are people of part descent, and for many that part is a very slim bough on their family tree.

The remote Aborigines today live in about 1100 communities, composed mainly of between 20 and 100 people. Many inhabitants of these communities look as if they are people of full biological descent. However, this does not mean they are guardians of some ancient culture, as they are now promoted in the media. Instead, they are the products of a social experiment devised mostly by the white bureaucrats and political activists in the 1970s who created the "Aboriginal Homelands Movement". Their aim was to turn the old missions, government welfare stations and reserves into self-governing communities,

where some of the ancient traditions could be preserved. The last, however, was never a real possibility.

Traditional or pre-colonial Aboriginal culture came to an end in the south-east of the Australian continent as long ago as the late nineteenth century. By the 1890s traditional tribal law, ceremonies and rituals were no longer preserved in the Aboriginal communities of New South Wales. For his major work *The Native Tribes of South-East Australia* (1904), anthropologist A.W. Howitt recorded the last vestiges of traditional culture he found on New South Wales missions and Aboriginal welfare stations before 1889. 'Since then,' he wrote, 'the tribal remnants have now almost lost the knowledge of the beliefs and customs of their fathers.'

The few cultural beliefs and practices remembered by Aboriginal elders had not been passed on to the younger generation, Howitt found. Instead, the Aborigines in the camps inhabited something quite different. At best, it was a combination of old family loyalties and the missionary ideal of small, patriarchal religious communities governed by a daily timetable decreeing the hours for meals, work, school and religious worship. At worst, it was a violent, chaotic, binge-drinking, sexually promiscuous, heavy-gambling lifestyle little different to the worst remote communities in central and northern Australia today.

In the south-west of the continent, the situation was much the same. In 1934, the young journalist Paul Hasluck investigated living conditions of Aboriginal communities across the southern half of Western Australia. In *Shades of Darkness* he observed that all but a handful were peopled by those of part descent who had never inhabited a society based on traditional laws, economy or culture. He spoke to almost every Aboriginal adult in the region and a large number of part-Aboriginal youths but found few of them had any connections to traditional Aboriginal culture or ways of thinking. They had never been deprived of the traditional hunter-gatherer economy or social system, because that was all gone long before their time. Most of these people were born within the farmlands of the Great Southern districts and made a living as seasonal and casual employees of white farmers. They identified more with white people than as Aborigines.

Traditional culture lasted longer in the central and northern reaches of the continent but little of it survived beyond the Second World War. In the 1950s, the anthropologist Bill Stanner found traditional laws and social hierarchy in the Northern Territory had largely broken down. In the 1930s, when he did his original fieldwork in the Daly River district, Stanner found physical evidence of the already obsolete High Culture of the Nangiomeri people, including ovoid,

circular and linear piles of man-arranged stones, deep excavations and the fragmentary memories of rites last celebrated before the turn of the century. This High Culture had persisted longer further south in the Victoria River district when, in the 1920s, Stanner's chief informant, an Aboriginal warrior named Durmugam, attempted to restore it in the Daly River region. However, a revival of the culture was beyond him. Through his fieldwork, Stanner found a widespread conviction among the Daly River people that their own culture-hero, Angamunggi, the All-Father, a local variant of the almost universal Rainbow Serpent, had deserted them. Moreover, he observed, the material preconditions for revival of the cult were long gone:

Many of the preconditions of the traditional culture were gone — a sufficient population, a self-sustaining economy, a discipline by elders, a confident dependency on nature — and, with the preconditions went much of the culture, including the secret male rites.

Stanner said the young of both sexes were not interested in preserving traditional Aboriginal ways. Young men openly derided the secrets of traditional culture and dared to seduce and elope with the young wives of grey-haired Aboriginal elders, escapades that would once have cost them their lives.

In central Australia, the missionary and anthropologist Ted Strehlow acknowledged the same. He did the anthropological fieldwork for his classic study *Songs of Central Australia* between 1932 and 1960, by which time knowledge of the old ceremonial languages were already extinct in several of the areas where he collected myths and songs. Young men had abandoned traditional society in order to break down the marriage monopoly held by the old men. Young Aboriginal men sought work with white pastoralists freely, acting in the hope of gaining the girls of their personal choice — and the protection of their white masters against the wrath of their outraged elders — in return for faithful service in the white man's employment.

By the 1930s, some of the old, initiated men of the Arrernte people confided in Strehlow that they were selling their sacred objects to the whites and giving up their old customs. None of them had sons or grandsons responsible enough to be trusted with the secrets of their sacred objects, chants and ceremonies. Believing their secrets would die with them, they confided their knowledge to this white anthropologist and missionary, but for him they would be 'ceremonially dead'. At Barrow Creek in the Northern Territory, Strehlow wrote in his diary in May 1932:

Tom came back from the camp and told me how the men everywhere wanted to sell their tjurunga [sacred stone and wooden objects] to the whites, and to settle down like white men: the only reason for their walkabout was their duty to

protect the sacred caves. Now they would sell not newly manufactured tjurunga but the really old treasures made by the erilknibata [ancestral beings], so that they could change their old ways of living.

The dominant Aboriginal culture that remains in these regions today is the post-colonial culture that emerged after Federation. This is a series of attitudes and assumptions, much of it hostile to white Australia, that emerged first in the 1930s under the influence of the Communist Party, but primarily in the 1960s, the latter under the influence of the American civil rights movement and the anti-imperialist theories of the New Left. Its authentic Aboriginal content is marginal, even in the remote north. Stanner described the remnants as a "Low Culture" — "some secular ceremonies, magical practices, mundane institutions, and rules-of-thumb for a prosaic life" — in contrast to the rigour and profundity of traditional society's High Culture. Today at Port Keats, a mission turned remote community that Stanner helped establish, the gangs of teenage youths who roam the streets identify themselves not by names of tribes or kinship groups but by heavy metal rock groups: Judas Priest, Evil Warriors, German Boys, Metallica, Fear Factory and Bullet for My Valentine. Girl gangs go by such names as Kylie Girls, Madonna Mob and Celine Dion gang.

If today's Aboriginal culture is not the authentic derivative of the culture that was here before the First Fleet arrived, and if it is merely the kind of low culture that Stanner describes, then this has implications for the constitutional recognition of today's Aborigines. This is because "the lost secret life" of the High Culture, whose passing Stanner found tragic, was, as he said, "fundamental to the local organization, the conception of descent, the practices of marriage, residence and inheritance".

In short, Aboriginal notions of ownership and inheritance of country were tied inextricably to the now extinct High Culture. If the latter no longer exists, and if there is such an impassable ditch separating pre-colonial and post-colonial Aboriginal culture, then it would be improper to amend the Constitution to reflect it. We would be acknowledging an inauthentic, artificial entity, and professing a respect that was inherently insincere.

There is one more issue here that goes to the core of what a constitutional amendment should be recognising. In the absence of the ancient High Culture, we would be left recognising Aboriginal people simply for their genetic inheritance, in other words, their "race". If Stanner's version of the fate of Aboriginal culture is correct, then "race", or in most cases a partial genetic inheritance, is all there is left to recognise. No matter how much Noel Pearson assures us that indigeneity, not race, is the issue, this is what it comes down to.

In fact, it is impossible to separate Aboriginal identity from Aboriginal ethnicity. Even if Stanner, Howitt, Hasluck and Strehlow were all found to be wrong about the demise of traditional culture, and some academic anthropologist could credibly argue that enough aspects of the ancient High Culture still survive to be worth preserving, ethnic inheritance remains an inseparable component of what is involved in both Aboriginal identity and constitutional recognition.

As both older and younger generations of Aborigines and their supporters have argued, it is this combination of bloodlines and custom that make them Australia's sovereign people. In 2015, the Warriors of the Aboriginal Resistance declared:

We, the Aboriginal people, are the original owners of the lands now known as "Australia". Our ownership over these lands is inherited through our ancestral bloodline connection to country, and our ancient system of customary law.

In his 1996 book *Aboriginal Sovereignty*, Henry Reynolds frankly acknowledged that he was advocating what he calls "ethnic nationalism". In his view, ethnic nationalism means that Aboriginal legal rights should be based not only on previous occupation of the continent but on the fact that Aborigines are an ethnically distinct people:

Ethnic nationalism challenges the widespread belief that the state should be the sole repository of sovereignty and the individual citizen "the sole vessel for political rights". It seeks to devolve sovereignty and to accord special rights to indigenous communities which occupy an intermediate place between the individual and the state.

Hence, the argument that special rights for Aborigines have nothing to do with race, is something that only white Australians are expected to believe. The other stakeholders in this game openly confess it isn't true.

Moreover, while Murray Gleeson, Robert French and Noel Pearson might argue that prior occupation is the *reason* to give Aboriginal people special rights in the Constitution, and that their ethnicity is not relevant, the Australian population at large will not see it that way. They will make their assessment on the likely *outcome* of granting special rights, which would give one "race" of Australians an elevated status that is denied to all those who lack the correct forebears. In Australian eyes and values, such an outcome would be widely seen as unjust.

In fact, most Australians will see these claims for what they are, something seriously at variance with their country's egalitarian values, and an instrument

for creating a privileged class. The IPA and Andrew Bolt are not wrong. Writing an institution like the Voice into the Constitution would not make our nation complete. It would divide it permanently.

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