THE CON-STITUTIONAL RE-COGNITION (S)CAM-PAIN: THE CAMPAIGN FOR THE HIDDEN RECOGNITION OF FIRST NATIONS PEOPLES' RACIAL INFERIORITY

by Gordon Chalmers

INTRODUCTION

The constitutional recognition campaign has received party-wide support and its efforts have been promoted by Prime Minister Tony Abbott as being something that would 'complete our Constitution.'[1] The broader rhetoric surrounding this campaign suggests that it will result in a just, albeit delayed, recognition of indigenous[2] peoples in the Australian legal system. However, beneath the surface of this seemingly benevolent gesture, is a reaffirmation of the colonial subordination and erasure of the several hundred original nations' peoples and ways of being.

This paper will argue that the present constitutional recognition campaign is ultimately a *con* and a *scam* that will continue to cause *pain* to indigenous peoples in their *re-cognition* as a structurally (legally) subordinate class of people. It will argue that the repeal of a generic and explicit "race power" (in s 51 (xxvi)) will result in the entrenchment of an Aboriginal and Torres Strait Islander-specific and hidden race power. This paper will therefore be concerned with revealing the continued legal racialisation of the original peoples of the place called Australia; and will attempt to shift the discussion away from colonially constrained categories towards a re-cognition of aboriginal ways of being in the world.

BACKGROUND

In 2013, the Federal Parliament, under Prime Minister Julia Gillard, allocated $10 million to Reconciliation Australia to conduct a public awareness campaign to support the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.[3] Reconciliation Australia launched the Recognise campaign which has sought to promote what seems to be a general idea about the recognition of indigenous peoples in the Constitution.[4] Many public figures have endorsed the campaign, including Australian of the Year, Adam Goodes, other prominent Aboriginal and Torres Strait Islander sports people, many senior Indigenous activists, Elders, community members, ex-judges of the High Court and politicians from all over the political spectrum.[5]

The rhetoric and wide public backing of this campaign is evidence of a positive spirit in support of correcting a long overdue omission. But *what* is actually being sought to be recognised? And more importantly, *who* is actually being sought to be recognised? And to what end? This is the point at which the façade of the positive spirit begins to be peeled away and things start to look a little different. It's the point at which the devil in the detail is revealed; the neo-colonial devil.

THE EXPERT PANEL

As yet, there is no actual proposed wording for what is going to be put to the Australian people at a referendum. The closest thing we have to a proposed wording is the recommendations of the Expert Panel who reported to the Federal Parliament in January 2012.[6] The Expert Panel was comprised of constitutional law experts, lawyers, politicians from the major parties, indigenous academics and other prominent members of the indigenous community. They undertook extensive consultations all over the country, held public discussion forums, engaged the services of an independent polling organisation, took submissions and conducted research into indigenous peoples and the Constitution. Their comprehensive research and analysis was published in a 303 page report which culminated in several recommendations for both the repeal and inclusion of a number of sections. Perhaps the most key recommendation, and the one that I will focus upon, is the one that directly relates to the public rhetoric; the only one in which the word "recognise" actually appears.

This proposed new s 51A would replace s 51 (xxvi), the race power. It would have the effect of both taking out the long criticised race power and replacing it with some form of recognition provision.

The proposed new section reads as follows:

> 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.[7]

WHO IS BEING RECOGNISED?

There is much in this key section that can be looked at with a critical decolonial eye, but I want to focus on one particular aspect of it—the *people* who are being recognised here. Just who are the Aboriginal peoples who are being sought to be recognised here?[8] The legal definition of "Aboriginal" provides the detail of who is being recognised. Justice Deane in the *Tasmanian Dams Case* said that an "Australian Aboriginal ... [is a] ... person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal."[9]

The descent requirement is key here. Descent is the feature which links identity to biological characteristics; it links aboriginality to particular biological lines of descent from the people who lived in this continent pre-invasion. Descent, like race, involves a biological deterministic construction of identity. Therefore, what we effectively have—in the repeal of s 51 (xxi) and its replacement with s 51A—is the repeal of a generic and explicit race clause and its replacement with an Aboriginal and Torres Strait Islander specific *hidden* race clause. Why is this so, particularly when the Expert Panel was very explicit in their dismissal of race as being, in their words, 'socially constructed, imprecise, arbitrary and incapable of definition or scientific demonstration'?[10]

NOTIONS OF RACE AND RACISM

Much has been written about race and its colonial associations. According to Peruvian decolonial sociologist, Anibal Quijano, who has written extensively on the topic: 'race is the most efficient instrument of social domination produced in the last 500 years.'[11] He says that it is 'the key element of the social classification of colonized and colonizers';[12] the binary of superior and inferior beings that justifies the logic of domination, control and erasure of the subordinate party to this binary.[13]

The Expert Panel would not have disagreed with Quijano. In fact, in their report, they cited numerous anthropologists, social theorists and biological scientists who variously spoke to the scientifically unfounded nature of race and its use as a colonial tool of 'dividing, ranking and controlling colonised people'[14] as 'a justification for [European] colonial expansion.'[15] However, the Expert Panel made a distinction between two forms of racialised thinking: 'unacceptable references to 'race"[16] and by implication, its opposite, acceptable references to race. In the words of the Expert Panel, 'references to 'race' are discriminatory [and hence bad] only where they lack an objective and reasonable basis or a legitimate purpose.'[17]What the Expert Panel is alluding to, in its distinction between acceptable and unacceptable references to race, is the idea that racism, or negative discrimination on the basis of race, is wrong or bad, and in need of stamping out; but that a kind of imposed strategic essentialist[18] racialised thinking aimed at the relief from disadvantage of a racial group, is acceptable or even good; and in need of promoting. This type of thinking is in many ways reflective of a greater collective consciousness on race (particularly in Australia), and it is a distinction that reveals what I would call a "colonial epistemic block"—an inability to fully decolonise our minds from outdated and pseudoscientific colonial categories.

Contesting this type of thinking, Quijano points to the need to at least call into question 'not just "racism" but the very idea of "race" itself.'[19] In one sense, our difficulty in doing so reveals our inability to 'shed the old mental chains of the coloniality of power.'[20] And moreover, it reveals our inability to give up what the Eurocentric racialisation of the world's population was predicated upon: the domination and control of colonised peoples in the pursuit of Eurocentric objectives.

DEFINING 'ABORIGINAL'

One of the major ways that this domination and control occurs is through the use of the legal category of Aboriginality as a broad category of disadvantage for the purpose of enacting assimilatory measures aimed at 'addressing Aboriginal disadvantage'.[21] Australian legal scholar John Gardiner-Garden, in writing about the alignment of Aboriginality and disadvantage, said that:

'Aboriginal' is effectively being used as a surrogate for something else, a poor proxy for 'people with the needs which a piece of legislation is trying to address'. ... Another approach entirely may be required. Perhaps these difficulties will be alleviated only when the surrogate/proxy term [Aboriginal] is abandoned and the 'something else' is spelt out. If legislation is intended to benefit people with a particular need, why not define the need? [22]

The multitude of special measures legislation that rests upon the above legal characterisation of Aboriginality was virtually unquestioned by the Expert Panel and, moreover, great effort was put in to rewording the new s 51A so as to sustain this legislation.[23] Such creative legal thinking may be better put to use in developing

a regime of addressing "disadvantage" without the reliance upon outdated colonial categories of control.

DECOLONISING THE LEGAL SYSTEM

Within the present constitutional recognition climate there exists a great opportunity, but not the one that is found in the public rhetoric as voiced by the Recognise campaign; and certainly not one that is concerned with recognising subordinate, colonially controlled, racialised groups within the Constitution. Instead, I think it's an enormous opportunity to enact a significant decolonisation of the Australian legal system. It is an opportunity to enact a "decolonial turn"[24] away from the colonial trajectory that our colonial forbears had set us upon, and that they confined us to by the laws that they enacted—towards and beyond the erasure of false categories like race; thereby marking 'a definitive entry of enslaved and colonised subjectivities into the realm of thought at before unknown institutional levels.'[25]

Indigenous peoples of Australia were not present at the constitutional convention debates of 1897-98. And more importantly, indigenous knowledges were not present. Who we are as Australians has been constructed on the basis of a canon of thought that has excluded the many canons of thought that have existed on this continent for tens of thousands of years. If race were to be fully erased from the Australian Constitution, then the apparent 'void' will necessitate a reconsideration of the ways that our society presently constructs protective and beneficial provisions for what it now classes as "racial" groups. This reconsideration would invite discussions from positions that are no longer *structurally* precluded from this dialogue. Such a dialogue opens up the possibility for engaging with the many canons of thought that are indigenous to this continent.

CONCLUSION

A decolonial analysis of taken-for-granted terms like "Aboriginal" provide us with another option[26] to reorient ourselves away from continuing to make the same mistakes regarding indigenous peoples' place in this nation. Part of this analysis reveals a mismatch between the legal and non-legal use of the word "Aboriginal". In many ways, the public rhetoric surrounding the Recognise campaign is drawing upon the different and vague notions of the non-legal usage of aboriginality (which includes an acknowledgement of the several hundred distinct First Nations peoples and their legal and cultural realities). However, the constitutional recognition of indigenous peoples will not include much that is contained within this non-legal usage, especially aboriginal peoples' own legal jurisdictional realities. Instead, what the above analysis reveals is that recognising the colonial legal construct of "Aboriginal and Torres Strait Islander peoples" in the Constitution will involve another entrenchment of colonially oppressive heads of power. This is at the heart of a greater system of regulating indigenous lives for the purpose of maintaining the colonial project.

Only with the complete erasure of race from the Constitution can we begin to see a less structurally constrained engagement with indigenous knowledges.

This is not to say that I wouldn't support the constitutional recognition of this continent's First Peoples—if such a thing were even possible by a colonial administration whose very claim to authority is still questionable. But suffice to say, it is much easier to erase false, outdated and pseudoscientific concepts from the Constitution, and to open the space for indigenous voices to be more present in public discourse, than it is to properly recognise the several hundred distinct indigenous peoples in terms of how *they* define themselves.

The country is more ready to decolonise the Constitution by taking out race—more ready than it is to truly recognise First Nations peoples of this continent. Let us reconfigure the present efforts to change the Constitution and call it for what it really should be: the decolonisation of a race-ist Constitution. Only with the complete erasure of race from the Constitution can we begin to see a less structurally constrained engagement with indigenous knowledges and indigenous realities. Only then will a new and differently oriented relationship begin to be forged.

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1 *Tony Abbott Wishes Australia a happy new year* (ABC News, 2013) <https://www.youtube.com/watch?v=tABi5CPRPwM>.

2 I have chosen to use lowercase for "indigenous" and "aboriginal" as a way of distinguishing between what may be regarded as the legal and non-legal meanings of these words: "Aboriginal" being a legal construct of the Australian nation state and "aboriginal" being a non-legal term that includes space for aboriginal peoples' own self-definitions of their own First Nations jurisdictional identities. For more on this see, Gordon Chalmers, 'Indigenous as 'Not-indigenous' as 'Us'? A Dissident Insider's Views on Pushing the

Bounds for What Constitutes 'Our Mob'(2013/2014) 17(2) *Australian Indigenous Law Review*.

3 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia (2014) *Interim Report* (2014) 40-41 ('Interim Report').

4 More particularly, the Recognise campaign is concerned with promoting 'an Australia that recognises and respects the special place, culture, rights and contribution of Aboriginal and Torres Strait Islander peoples; where good relationships between First Australians and other Australians become the foundation for local strength and success; and enhancement of national wellbeing' as per the Interim Report 41.

5 Recognise, *Who Supports This?* <http://www.recognise.org.au/why/who-supports-this/>.

6 Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (Commonwealth of Australia, 2012) ('Expert Panel').

7 Ibid 153.

8 Here I will focus upon Aboriginal people and not Torres Strait Islanders. However, similar arguments would ultimately apply.

9 *Commonwealth v Tasmania* [1983] 158 CLR 1, 551.

10 Expert Panel, above n 6, 139.

11 Quijano, A. (2007a). Questioning "race". *Socialism and Democracy*, 21(1), 45-53, p 45.

12 Quijano, A. (2007b). Coloniality and modernity/rationality. *Cultural Studies*, 21(2-3), 168-178, 171.

13 For a discussion on the hierarchical nature of binary oppositions see Alan Bass and Jacques Derrida, *Positions* (Athlone Press, 1981) 41.

14 Expert Panel, above n 6 140.

15 Ibid.

16 Ibid 146.

17 Ibid 162. The "hubris" of this kind of "zero-point" thinking is very strong here: where there is a claim to universality, objectivity, neutrality etc; a position from which it is assumed that an 'objective and reasonable basis or a legitimate purpose' can be uncontestably articulated. For more on this see, Santiago Castro-Gómez, 'The Missing Chapter of Empire: Postmodern Re - organization of Coloniality and Post-Fordist Capitalism' (2007) 21(2–3)*Cultural Studies* 428–48.

18 Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstructing Historiography' in Ranajit Guha and Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (Oxford University Press, 1988) 13.

19 Quijano, above n 12, 49.

20 Ibid.

21 Gordon Chalmers, 'Indigenous as 'Not-indigenous' as 'Us'? A Dissident Insider's Views on Pushing the Bounds for What Constitutes 'Our Mob'(2013/2014) 17(2) *Australian Indigenous Law Review*.

22 John Gardiner-Garden, *'Defining Aboriginality in Australia'* (Current Issues Brief No. 10, Parliamentary Library, Parliament of Australia, 2003) 17.

23 Expert Panel, above n 6, 144-152.

24 Nelson Maldonado-Torres, 'On the coloniality of being' (2007) 21(2) *Cultural Studies* 240-270.

25 Ibid 262.

26 Walter D. Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press, 2011).