The Continuing Relevance of the Constitution for Indigenous Peoples

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Good afternoon, everyone. And thank you, Aunty Agnes, for your welcome to country.

Ladies and gentlemen, when I first looked at this question of the continuing relevance of the Constitution for Indigenous peoples, it made me wonder if it’s ever been relevant to us. Relevant in the sense of: Does it recognise us? Does it protect us? Does it benefit us in any positive way? Does it recognise and protect our rights? Does it found the relationship between us and the new settler society?

For now, I think I’m compelled to answer all those questions in the negative. I’ll come back to this a bit later in this presentation. There has never really been a moment in the history of our country where there’s been a formal recognition or acknowledgment of the Aboriginal and Torres Strait Islander peoples as the first peoples of this country, the first peoples and nations of this country, the first peoples and nations as the rightful owners, occupiers, and custodians of this land we now call Australia, a land of organised societies, with economies, with spiritual and religious traditions, with kinship systems, with distinctive languages, laws, customs, and thousands of years of connection to, and successive inheritance of, land.

Aboriginal politics were here when Cook arrived, and still there later when the first fleet arrived. There has never been a point in the last 220 years of the non-Indigenous presence in this country where the newcomers have said, ‘Yes, this is all true. We acknowledge that, we accept that, we recognise that, and we want to formally make an agreement about that with you so that we can found our relationship with you on a proper and respectful footing’.

We did not do, in this country, what was done in most other colonised countries. For example, Aotearoa, New Zealand, has the Treaty of Waitangi between Maori and Pakeha. And although ignored and violated by the Pakeha for more than 100 years after its signing, it is today, in its revived, reinvigorated form, the cornerstone of Indigenous–non-Indigenous relationships in that country.

The Treaty of Waitangi is the founding document in New Zealand. It’s the founding document in its history. It affirms the status of Maori as its Indigenous inhabitants. Signed in 1840, the document represents an agreement between the British Crown and the Maori people of New Zealand, and it’s encapsulated in its three main articles. The first is that concerning the right of the British to govern Maori people. The second relates to the rights of the Maori, the Indigenous peoples, to the land and natural resources. And the third affirms the right of Maori to the enjoyment of the same rights as their non-Indigenous counterparts.
Now, although it’s not enforceable at law, there are three fundamental ways in which the principles of the treaty are given effect. And to this end, both the Crown and the courts can apply the principles to legislation where possible, and otherwise have a moral obligation to resolve other conflicts where necessary.

The treaty provides, in what I think is a deeply philosophical way, the foundation to the New Zealand relationship. It provides, in a deeply philosophical way, the foundation. Now we, in this country, have no such philosophical understanding. Canada has its centuries-old treaties, and more modern treaties today, and more recently, constitutional recognition of Aboriginal Canadians in the life and history of that nation.

Section 35 of the Canadian Constitution provides for, ‘The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed’. This is in their Constitution. It has a definition of Aboriginal peoples. Aboriginal peoples in Canada include the Indian, the Inuit, and the Métis peoples of Canada. Their Constitution has a provision for claims agreements. It says, ‘for greater certainty, in subsection (1), “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired’.

And it also has, in subsection four of section 35, a guarantee of Aboriginal and treaty rights. Note they don’t say ‘Aboriginal treaty rights’. They say ‘Aboriginal AND treaty rights’. It’s recognition of the status as first peoples – that Aboriginal people have distinct rights because of that status. And subsection four of 35 guarantees those Aboriginal and treaty rights equally to male and female Aboriginal persons. Now this is not just a recognition, in a philosophical sense, but also in a legal sense.

In the Canadian Constitution, the first part contains a charter of rights, which, among other things, outlaws racial discrimination. Section 15 says:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Now ladies and gentlemen, in the United States of America, Native Americans can rely on their treaty, some constitutional recognition, and the protection of the Supreme Court through the so-called Marshall Decisions of the 1820s and 1830s. The 1820s and 1830s – that’s how far back their philosophical foundation goes. (I should say the Canadian Constitution, in its present form, was adopted in 1982, and the specific treaty-right provisions that I mentioned earlier were elaborated in 1983 and inserted in the Constitution.)

But in the United States, Native Americans rely on their treaty rights; they can rely on their Constitution; and they can rely on the protection of the Supreme Court, their highest court.

And the basis of the relationship there between Native Americans and the Americans is quite clear. It’s a nation-to-nation relationship, in a domestic sense, and that’s what the federal government of the United States and the native nations agree on. Even the administration of President George W Bush honours this relationship and has a policy commitment to dealing with the Indian tribes on a government-to-government basis. President Bush has said that his administration – this quote
makes a bit of sense, unusually – ‘recognises the right of Indian tribes to self-government and supports tribal sovereignty and self-determination’.

Now, I don’t think such a policy approach, such a philosophical approach, is remotely possible in this country. You mention fundamental things like sovereignty and self-determination to do with the status of first peoples in this country and you get howled down, because we in Australia have no equivalent to what I call ‘founding frameworks’ that we find in these three countries.

Now what the crafters of our Constitution have left us with is an instrument that’s frozen in time and almost impossible to change – six times out of 44 in 108 years. And the underlying philosophy of our relationship and our Constitution, so far as Indigenous Australians are concerned, is predicated on exclusion.

Indigenous peoples were not included in the self-governing peoples that came together in the lead-up to 1901 to negotiate Australia’s Constitution and to form a ‘federated Australia’. We were excluded from that act of nation-building. We had no delegates at the constitutional conventions in the 1890s. We were not asked to send representatives to engage in the negotiations of how power would be distributed and order maintained.

We were invisible in the processes that led up to Federation and the adoption of the Constitution – and a Constitution, I must say, that’s very light-on when it comes the rights of peoples of the nation and the privileges of citizenship.

Insofar as Aboriginal peoples of this continent are concerned, those who put together the Constitution shared a common belief that we were a dying race, and therefore there need be no provision for us in the Constitution, in light of that belief. But there was a strong belief at the time that government ought to be empowered to restrict the rights of certain racial groups within the community.

Now one commentator, Peter Botsman, sums up the thinking of the times – succinctly, I think – when he says, ‘The dominant thinking of our infantile Commonwealth was that Aboriginal people were not even worth discussing’. That is why section 126 – I think it’s 127, actually; Peter might have got it wrong – of our original Constitution infamously read:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Now that is a key issue in the conventions, because the number of seats that each state was to be allocated in the lower house rested on population. And certainly if you counted the number of Aboriginal people at that time in Queensland, South Australia, and Western Australia, those populations may well have outnumbered that of Victoria and New South Wales, and given them extra seats and the potential to control the lower house.

But note in this wording we are called ‘aboriginal natives’. We’re not peoples or citizens capable of rights, responsibilities or enjoying privileges of the federated former colonies. I think Botsman also captures the nature of what little discussion there was regarding race, races and Aboriginal peoples at the conventions, as follows. He says, ‘On March the 2nd, 1898, Mr Barton’ – who would later become our first prime minister and one of the first High Court judges – ‘Mr Barton wondered
whether there should be any prohibition of acts that are abhorrent to the ideas of justice and humanity, in relation to Aboriginal people’. And that’s the first prime minister, that’s one of our first High Court justices.

Again on Tuesday, 8 February 1898, Mr Barton notes that it would not be fair to include Aboriginal people in the Australian population. It wouldn’t be fair to whitefellas, because the smaller states would get more seats.

On the 25th of January 1898, Dr Quick described the new Constitution’s ability to exclude foreign coloured races from Australia, and it’s understood in debates that this power was not intended to exclude Aboriginal people.

On this matter, Sir Samuel Griffith had argued on 31 March 1891 that ‘the introduction of an alien race in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth and upon that matter, the Commonwealth should speak, and the Commonwealth alone’.

On April the 17th, 1897, Alexander Downer’s great grandfather John moved a motion to exclude the Commonwealth from having a right to legislate on Aboriginal matters. So you see it’s clear that at its foundation, the Australian Constitution is an exclusionary and discriminatory document for Australia’s Indigenous peoples.

What we had prior to 1967 were two sections of the Constitution that mentioned Indigenous peoples. In Section 51, Subsection 26, the Commonwealth could make laws for the peace, order, and good government of the Commonwealth with respect to the peoples of any race – other than the Aboriginal race in any state – for whom it was deemed necessary to make special laws.

Note again we’re defined as a race, not as peoples, not as citizens, or individual members of a society or a nation. We are not included in the people described in the preamble, who belong to the original states at the founding of the Commonwealth. The original states were New South Wales, Victoria, South Australia, Queensland and Tasmania. My home state Western Australia isn’t there – they hadn’t signed up at that stage.

Now this special laws clause in Subsection 26 of Section 51 prohibited the Commonwealth from making special laws in the states when deemed necessary for Aboriginal people. We had no Commonwealth constitutional protection from discriminatory state laws, but other races did. This was the only restriction on Commonwealth powers in matters of race.

Now the words ‘other than the Aboriginal race’ were removed from the Constitution as a result of the 1967 referendum. The other discriminatory section of the Constitution removed by the 1967 referendum is contained in Section 127, and as I mentioned before it rather infamously read:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Again we’re being personified as ‘aboriginal natives’, not people, not citizens, not individuals capable of rights, responsibilities or enjoying privileges.
Now this section was repealed in its entirety by the ‘yes’ vote in the 1967 referendum. But ironically the referendum again had exclusion at its base. The references to at least the existence of Indigenous people were deleted. Although the mention was negative, our existence was noted and recognised. There is no mention now. The instrument is totally silent about us. It no longer speaks to our existence. So, if it might have been relevant in 1967, it’s no longer relevant. Indigenous Australians still have no express recognition of the place, express recognition in the Constitution of the place we have in the nation or the constitutional rights and protections that we ought to be afforded.

And there’s been, since the referendum, some confusion and myth-building around the impact of the referendum on the situation of Indigenous peoples of this country. There’s a perception among many, including Indigenous Australians, that it delivered citizenship rights, including the right to vote.

So far as the latter is concerned, it’s true the first Commonwealth electoral laws of 1902 prohibited Aboriginal natives of Australia from voting in federal elections. Of course, that was the only reference to us in that federal law. In fact, there were Aboriginal people entitled to vote in the first federal elections.

There were Aboriginal people who were enrolled and allowed to vote in South Australia under South Australian law. And also, before, it wasn’t as if the Commonwealth legislature was silent on Indigenous issues going on before 1967. Over 40 pieces of legislation were passed by the Commonwealth parliament relating to Indigenous issues.

There were laws that dealt with Indigenous issues in mostly negative fashion. And Australian legislators passed a range of laws at state and the federal level that excluded Aboriginal people from the benefits and rights that extended to Australian citizens, natural born and naturalised. Instead, legislators and policy-makers devised laws and policies suitable for people they perceived and treated as non-citizens and aliens.

Now, the referendum in 1967 is rightfully celebrated. It was celebrated last year, its 40th anniversary year. And in a sense I think for many Indigenous people it demonstrated inclusion, a sense of inclusion in Australian society, and an event Indigenous people still hold high, as the pinnacle of a reconciliation in Australia, although perhaps now the apology might take its place. And the changes to the Constitution allowed the Commonwealth government to pass laws that were specifically for Indigenous peoples. But there was and there is no guarantee that such laws will be beneficial.

I think the Constitution remains relevant to Indigenous peoples as unfinished business, as a potential for renegotiation of the relationship between Indigenous peoples, as the first self-governing peoples of this continent. It’s an opportunity, the Constitution is, to reconcile politically and spiritually with the Australian people and develop a shared sense of national identity.

The proposed preamble put forward by Mr Howard during the election campaign last year and supported by the Labor Party is an important opportunity and I think it must be followed through. But I don’t think it should be hurried. I think it is something we need to carefully think about.

And if we are to have another 1967, let’s get it right. We need to ensure that we have the time and resources to enable not only bipartisan support to be developed, but also to engender popular
support for most of the Australian population. So we need to think very carefully about what goes into the preamble.

And I think what’s in the preamble has to be backed by law-binding changes in the body or operative parts of the Constitution, where we can plant the seeds of the philosophical and legal foundations of the relationship between Indigenous and other Australians.

It also has to be accompanied by a structural, administrative and legislative reform. Now what the preamble might say, I’m not sure. Certainly not what was attempted in 1999. But the Victorian example might give us some guidance.

The Victorian Constitution says:

The Parliament recognises that Victoria’s Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established —:

(a) have a unique status as the descendants of Australia’s first peoples;
(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

Now I should say, ladies and gentlemen, at the moment I chair a steering committee on behalf of Victorian Cabinet to develop a framework agreement for settling Native Title and land justice issues in Victoria. One task they have given me is to draft a recognition statement for that agreement. I don’t know if they’ll like my version of it— it will certainly be a bit stronger. But anyway this will give us some point as to where we should go at the federal level I think.

We also need to be brave and trust Australians enough to broaden the referendum to entrench principles of non-discrimination and equality in our Constitution. The three key international principles of human rights I would like to see entrenched in our Constitution are the principles of equality, non-discrimination and the prohibition of racial discrimination.

Now, as we have seen in the legislation underpinning the Northern Territory emergency response intervention last year, and as we have seen with the Native Title Act in both its original form and in its amendments in 1998, and in the Hindmarsh Island Bridge Act, the legislative protection of the Racial Discrimination Act can be overridden whenever it is inconvenient.

And the freedom of all people from discrimination is an inviolable right and cannot be subject to the whim and avarice of the government of the day. We should also in our Constitution include provisions for the protection of the rights of children, particularly Indigenous children.

These are express rights for all Australians, and I think they’ll go somewhere towards meeting our international obligations towards the most vulnerable in Australian society. And we’ll also go towards creating an inclusive society that we all can feel part of and be proud of.

Now we might want to entrench [prohibition of] racial discrimination in terms of the treaty which we’ve signed with the rest of the world through the United Nations, or in some other fashion. Or we might simply say by this Constitution racial discrimination is prohibited.
Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination says:

In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 1 appears in the Racial Discrimination Act. And that’s the one that nails governments – that’s the one they suspended the whole act for. As I said before, we should take advantage of the new ‘apology’ atmosphere. The apology is a great philosophic and psychological fillip for us all, particularly Indigenous peoples and particularly members of the Stolen Generation. We should take advantage of that, give some substance to that psychological boost.

In his apology speech, the Prime Minister stated that:

our challenge for the future is to [...] embrace a new partnership between Indigenous and non-Indigenous Australians. [...] [t]he core of this partnership for the future is closing the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future.

Now, it can’t be just about our physical wellbeing, although that’s very, very important and I support the Prime Minister in that regard. But we also have to fix up our psychological and philosophical wellbeing.

In part of pursuing the Prime Minister’s objectives, in March this year the government and the federal opposition signed a statement of intent to work in partnership with Indigenous peoples and their representative organisations to achieve equality in health, status and life expectancy between Aboriginal and Torres Strait Islanders and non-Indigenous Australians by 2030.

The partnership statement provides bipartisan [commitment]:

To developing a comprehensive long-term plan of action that is targeted to need, evidence-based and capable of addressing the existing inequities in health services in order to achieve a quality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by 2030.

To ensuring the full participation of Aboriginals and Torres Strait Islanders and their respective bodies in all aspects of addressing their health needs.

To respect and promote the rights of Aboriginal and Torres Straight Islander peoples.

To measure, monitor and report on our joint efforts in accordance with benchmarks and targets to ensure that we are progressively realising our shared ambitions.

Now our shared ambition includes respect and promotion of the rights of Aboriginal and Torres Strait Islander peoples. One way we can do that is through fixing our stuck Constitution. And as I said, we also have to go beyond the physical realm and confront the philosophical and moral relationship
and what that is to be. This is also about creating a genuine partnership with government and across society.

In this regard, I support the views of Tom Calma, the Social Justice Commissioner, who outlined some principles about this relationship. He said it should be with a shared ambition, so we’re all working towards the same goals and not in cross-purposes. It should be done with mutual respect, so we’re part of the solutions to the needs of our communities, instead of being treated solely as the problem.

It should be done with joint responsibility, so that we can proceed with an honesty and an integrity whereby both government and Indigenous peoples accept that we each have a role to play, and where we each accept our responsibilities to achieve the change needed to ensure that our children have an equal life chance to those of other Australians.

Finally, and most importantly, it should be done with respect for human rights that affirms our basic dignity as human beings and provides objective, transparent standards against which to measure our joint efforts.

That’s what we need to do, ladies and gentlemen if we want to make our present Constitution relevant to Indigenous peoples. Thank you.