Chapter Seven

The People of No Race

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The title I have given to my address today perhaps suggests the recent discovery in some remote tropical mountain range of a tribe of anthropoids who may or may not be a new species of human being; or perhaps a thriller about outcasts.

Would it were so, but I am afraid not. All it does is make a contrast with a paper which I wrote for this Society two years ago titled *The People of any Race*. That was an analysis of s.51(xxvi) of the Constitution, which confers power on the Australian Parliament to legislate with respect to the "people of any race for whom it is deemed necessary to make special laws".

Earlier this year John Stone rang me up and recalled that paper to my mind. In particular, he mentioned my concluding paragraph, in which I expressed the view that an express power to make racially based laws should have no place in an Australian Constitution and that s.51(xxvi) ought to be repealed. I also anticipated that, ironically, the very people who conceive themselves to be opponents of racism would oppose repeal.

What John asked me to do today was to take up where I left off last time and develop the case for repealing the "race power". I am happy to do so.

I will start by considering the opposition to repeal that can be expected. It is likely to come from two quarters: people of goodwill who underestimate the complexity of the subject; and what I call the racism lobby.

As to the former, the greater part of this paper will be concerned with the complexities, but before that it is worth reflecting on the underlying attitude that so often prevents rational discussion of the subject and, in so doing, drives people to adopt extreme positions.

A moment ago I used the expression "racism lobby". That was not a lapse. I said that quite deliberately, because it seems to me to be beyond doubt that there are plenty of people in this country who make a comfortable living out of deliberately exploiting what they claim to be against, which is hostile discrimination on racial grounds, or racism for short. These are the people I describe collectively as the racism lobby.

They are not confined to any one political point of view or any identifiable segment of the population. They buy into any issue that can be labelled racist for what they can get out of it. This is usually money, or power, but often also the self-satisfaction of claiming the high moral ground. Such people flourish because the concept of racism has been allowed to develop into a powerful tool of censorship, otherwise known in the vernacular as a motherhood issue.

That is not unusual. It is just that the subject matter changes from time to time. Galileo Galilei underwent torture merely for pointing out that the Earth is not flat. On the whole things have quietened down a bit, at least in the western world, since the great days of religious bigotry, but the same basic phenomenon flourishes.

Many of you will remember the long and dreary post-War period during which rational discussion of Communism was an invitation to personal ruin, especially in America. More recently, and right here, we have had to endure a lengthy period in which any suggestion that some children are brighter than others, and should be educated accordingly, was guaranteed to attract a storm of indignant abuse from the education lobby.

So it is now with the major phobia of the second half of the 20th Century, racism. We cannot talk about it without fear of personal retaliation, unless we confine ourselves to parroting disapproving dogmas. I will give you two close-to-home examples.

Not very long ago John Stone and I both attended a dinner at which the guest speaker was a distinguished archaeologist who has an encyclopedic knowledge of Australian rock art. Somewhere in the Kimberley region, or thereabouts, he inspected some rock paintings and concluded that they were not Aboriginal, but pre-Aboriginal by many thousands of years. The implications of this discovery seemed, and seem, to me to be enormous. The same thought evidently occurred to John, for when question time arrived he attempted (twice, I think) to elicit a response from the speaker along those lines.

The chairman, who was a distinguished professional in his own right, also a friend of mine, and the last person to be swayed by political correctness, ruled John's question(s) out of order as political. In so acting, I have no doubt that he was seeking to shield the speaker from possible embarrassment. Nevertheless I found it depressing, although understandable, that we are now in such a state of affairs that embarrassment can arise from so worthy and scholarly a cause.

My other example concerns my namesake, Mr John Howard, who of course differs from me in that he happens to be the Prime Minister, and Mrs Pauline Hanson. You will recall that when Mrs Hanson sprang her maiden speech in Parliament on an astonished country, Mr Howard was widely, and in my opinion very unfairly, criticised on the ground that he had not dissociated himself and his government firmly enough from Mrs Hanson's racist views.

I thought that was unfair, because Mrs Hanson was by then not even a Coalition MP, let alone a member of the Government, and the nature of her speech was such that Mr Howard would have been entitled to treat it as beneath contempt, unworthy of any response at all. As it was, he correctly observed, among other things, that distasteful though Mrs Hanson's views might be, she had a right to express them.

To my mind that demonstrated admirable restraint, not to mention clarity of thought, in a highly provocative situation. The significance of the event in the present context, however, is that the Prime Minister, no less, should be taken to task repeatedly because he declined the opportunity to make an inflammatory speech denouncing racism and, in particular, Mrs Hanson.

If Mrs Hanson had made the main focus of her address rabid and uninformed remarks about trade unions, it seems to me unlikely that Mr Howard's response would have attracted any comment at all. As it was, the widespread knee-jerk reaction illustrated yet again the formidable coercive power of the current *de facto* ban on discussion of racism.

The true ground of criticism of the Pauline Hansons of this world is not the subject matter of what they say but their manifest ignorance, their lack of any sense of proportion, and of course the unnecessarily offensive manner in which they are apt to express themselves. The fact that Mrs Hanson seems to have extreme views about race is not the point. She probably has extreme views about fish and chip shops as well, but nobody wants to censor them.

What I have said so far amounts to my first reason for advocating the repeal of s.51(xxvi) of the Constitution. The section operates to seriously discourage freedom of speech about a very important subject. It also seems to me, especially on its recent record in the native title context, to have been the vehicle for a great deal more discord than harmony.

The only two groups of people who have benefited in one way or another, usually materially, from the race power have been the racism lobby and, as usual, a small proportion of litigation lawyers. Not, of course, that I am blaming the latter for simply doing their job. It is an inevitability of life that much legal practice, just like medical and dental practice, depends on the misfortunes of others , even if it is only making a will. That, however, hardly seems a sufficient reason for actively promoting discord by means of s.51(xxvi).

I turn now to what I have termed the complexities of racially based laws. The most fundamental I need not deal with at length because it was the subject of my previous paper. It is that quite literally no-one, and specially not the High Court, knows what s.51(xxvi) means, because it is totally dependent on the concept of race, and nowadays nobody knows what that means either.

Our forebears a century or more ago, not counting enlightened scholars like Charles Darwin, had no problem. Race meant skin colour. Note that, contrary to modern preconceptions, that was actually a quite egalitarian concept. No distinction was drawn between colours. If it was necessary to distinguish between races who were the same colour, say Indians and Afghans or Chinese and Tibetans, secondary characteristics like language or geographical location might be added to the equation. Admittedly there does seem to have been a widespread perception that the darker you were the less white you were, but that, after all, was only logical.

There is in fact a reasonable argument that the modern phobia about racism is directed at the wrong target. The most cursory knowledge of history, and a quick look round the world at the present day, suggests that inter-racial strife in the 19th Century sense is not a problem. It is not a problem because the true causes of strife and oppression have nothing to do with race in the sense of skin colour or other determining physical characteristic.

Hutus and Tutsis are all the same colour, but that has nothing to do with their addiction to slaughtering each other whenever they have the opportunity. As in the former Yugoslavia, the relentless aggression feeds on ancient resentments, not race. The oppressive distinctions drawn in places as diverse as ancient Sparta, between Spartans and helots, and modern South Africa, between official whites and official non-whites, were not based on race for its own sake. They were simply structures created to enable a minority to monopolise power and wealth. In the spectacular South African case, so-called racial distinctions were openly adopted, and indeed carried to absurd lengths, but these were only machinery provisions which came in handy for creating the structure.

I am not for a moment indulging in the fantasy of supposing that there was not intense hostility along black versus non-black lines. Of course there was, as there invariably is when people from totally different backgrounds go to war with each other and the winners oppress and exploit the losers. In the case of South Africa, that situation was inherited from centuries of warfare and conquest, and nurtured by apartheid. Racial dissimilarities were not in themselves prime movers. As elsewhere, far more basic factors were involved.

I do not need to labour the point, but I should mention two other situations. One is the enduring legacy of slavery in the former British colonies which became south-eastern America. That too brought with it an oppressive distinction between black and white, with the difference only that in the end there were a lot more whites than blacks. But once again we find on closer inspection that the whole phenomenon did not originate in racial hostility for its own sake.

It originated in greed and commercial ambition. Slavery under various names is a very ancient institution, which has flourished in Africa as much as anywhere. The slave trade between West Africa and the Americas in the 17th and 18th Centuries was not a crusade against blacks because they were black. It was a sickeningly cruel commercial operation.

Lastly, there is the Nazi Holocaust. This is the major event, at least in modern times, which might be said to qualify as genuinely racially inspired, because its principal victims were tortured, enslaved and killed for no other reason than that they were Jews. That is true. It is also true that persecuting Jews is a long and disgraceful Central and East European tradition which history does not seem to me to satisfactorily explain. I can carry the matter no further.

That excursion into what seem to me to be the misconceptions involved in trying to explain human hostility by reference to the outmoded concept of race, exemplified by s.51(xxvi) of the Constitution, takes me to my second reason for advocating the repeal of that provision. This is that, as long as the race power is around, it will distract attention from the true causes of events to which it may be seen as relevant, and therefore also from consideration of the correct remedies.

As I said in my previous paper, the only way in which the nebulous and manipulable word "race" can be given precision is by accepting that in fact there is only one race, the human race, technically called *homo sapiens sapiens* to distinguish it from closely related earlier anthropoids

called *homo sapiens neanderthalensis*, *homo habilis* and *homo erectus*. If that be accepted as evolutionary fact, and I see no reason why it should not be, it means that s.51(xxvi) is meaningless and cannot support laws of any description, and for that reason too should be repealed.

A further reason is exemplified by a difference of opinion in the High Court which remains at the time of writing unresolved. This is whether s.51(xxvi) can operate only for the benefit of the so-called race to which the legislation applies. On the face of things there is not the smallest warrant for any such interpretation, because the subsection says nothing of the kind. It is moreover historical fact that the power was originally intended to be anything but beneficial.

Until altered by constitutional amendment in 1967, the race power could not support Commonwealth legislation with respect to Aborigines. The reason was twofold. On the positive side, the purpose of the power was to enable the Commonwealth to deal as it saw fit with what was seen as the “yellow peril”, the perceived danger of the country being taken over by huge numbers of Chinese immigrants.

It seems to have been overlooked that if such a problem arose it could be dealt with under the immigration power. Perhaps the idea was that the Chinese who were already here would breed like rabbits and take the country over that way. Whatever the explanation, s.51(xxvi) originally had nothing to do with Aborigines.

All that the former exclusion of them signified was the negative decision not to remove legislative power with respect to them from the States. I note in passing that neither before nor since federation have the Australian Chinese shown any sign of breeding like rabbits or taking the country over. Like every other race-based apprehension, these fears were pure fantasy.

What is not fantasy is that what we now find exercising the High Court is the possibility of its giving its approval to a doctrine which would place a severe and entirely unwarranted restriction on the legislative power of the Parliament. As we have recently seen in the *Wik* debate, if s.51(xxvi) can operate only in favour of the people identified as a race, Parliament’s capacity for amending the legislation is dramatically reduced.

All it would be able to do would be to add further benefits. It would be impossible to repeal the *Native Title Act* 1993, or even amend it in any way that diminished the benefits originally conferred, however urgently it required attention in the interests of other sections of the community. It is hard to believe that such an extraordinary doctrine could for a moment engage the attention of the High Court of Australia. It would make the race power unique in its gross distortion of both the legislative and the judicial functions.

That is my next reason for advocating the speedy abolition of s.51(xxvi). The situation we are now in is also an outstanding instance of the damage that fiddling around with race-based legislation can do, or at least threaten.

Race-based legislation usually claims a moral dimension which is often blatantly hypocritical. Malaysia and Fiji furnish current examples. Malaysian legislation confers employment preferences on native Malays, and in Fiji it is impossible for Fijian Indians to become a majority in Parliament, even though they are 51 per cent of the population. The Fijian situation may change as a condition of readmission to the British Commonwealth of Nations and the Queen’s reassuming her Fijian throne.

The moral dimension involved does peculiar things to the way people think. I remember talking some fifteen years ago to a middle order member of the South African public service who had spent most of his professional life in the administration of the apartheid laws as they affected blacks. At that date apartheid was still going strong. I asked him what kept him in such a depressing occupation. He replied, in tones of positively overwhelming sincerity, that he and his colleagues did not regard their work as an occupation but as a calling.

All I could think of to say at the time was that that was a most interesting point of view which had never occurred to me. I nearly went on to ask him to which particular variant of the

Dutch Reformed Church did he belong, but decided that enough was enough. To this day I do not know whether his ludicrous sincerity was merely a pose or he actually did believe that he was doing God's work.

This aspect of race based legislation, the moral dimension, does not necessarily lead to hypocrisy. Our native title experience illustrates that. Although I have said already that there are plenty of people around who, in my opinion, are only too willing to exploit the situation in one way or another, I certainly do not believe that supporters of native title are by definition hypocrites. That would be a ridiculous proposition and not one that I would entertain for a moment.

What I am getting at is what I described a moment ago as the peculiar way in which racism seems to affect many people's habits of thought. I do not in the least doubt, for example, the personal sincerity of the six High Court Justices who created native title and upheld the *Native Title Act* 1993. I may perhaps be permitted to reserve my position on Mr Keating. He was after all a professional politician, and his sudden enthusiasm for republics and native titles, as opposed to French clocks and Siamese tables, may need no further explanation.

No, what struck me at the time, and still does, is the extraordinary character of much of the reasoning of the majority six judges in *Mabo v. Queensland [No.2]* (1992) 175 CLR 1. Its main characteristics, I am sure, are still familiar to everyone, particularly the truly remarkable version of our national history that they propounded, and the theory of inherited guilt. On that last point, I do not recall that they used that particular expression, but that is certainly what their view of the moral dimension amounted to.

To these oddities there can be added some unduly dramatic turns of phrase in the joint judgment of Justices Deane and Gaudron, and the wholesale departure from precedent on grounds which had, and have, nothing to do with the law of the land. The whole spectacle continues to astonish, especially when one reflects that the result was that our highest court went out of its way to create a racist law.

Surely that alone justifies the thought that the moral dimension of racist laws affects otherwise rational people in peculiar and unpredictable ways. That is my next reason for advocating the repeal of s.51(xxvi) of the Constitution.

Yet another arises from the very concept of a racist law. It is inherent in that concept that, if the law confers a benefit on a group identified as a race, by whatever characteristics are thought relevant, it simultaneously disadvantages everyone else. Exactly the same thing happens the other way round if the law is oppressive: everyone else is advantaged. If you have an elaborate structure like apartheid, you finish up with one group being advantaged by comparison with everyone else, another group which is oppressed by comparison with everyone else, and one or more groups in between who are simultaneously oppressed and advantaged depending who you compare them with.

It is high time that laws based on race be recognised for the irrational nonsense that they are. In saying that, I am in no way involving the good intentions or the moral dimension in which so much racial debate is immersed. I am simply pointing out that, as a basis for rational law making, race is of no utility whatever because it is inherently self-contradictory. An intended benefit along racial lines cannot exist in a vacuum, any more than can an intended oppression. Each immediately creates the other. Native title is no exception.

That is my next reason for advocating the repeal of s.51(xxvi) of the Constitution: that it is not, and can never be, a rational basis for making laws. A practical, as opposed to logical, consequence of that situation is a high likelihood that, contrary to the High Court's aspirations, such a power will promote discord in the general community rather than a somewhat mystical reconciliation.

I move now to my last separately identifiable reason for advocating the repeal of s.51(xxvi). This is that, as we have seen with native title, racially based laws are well capable of

encouraging separatist movements which demand independence. They are of course not in themselves the cause of such movements, which proliferate all over the world. The usual cause is actual or perceived oppression, but racist laws, whether well or ill intentioned, certainly encourage demands for independence.

Where the relevant laws are oppressive the motivation is obvious. Where, as with native title, the intent of the legislation is benign, it still encourages demands for independence, because at least a proportion of the beneficiaries will see the benefits as a good thing, but nevertheless merely the first step in a wider progress. The most vociferous advocates of this attitude are those who fancy themselves as latter day George Washingtons or Nelson Mandelas leading their people into a glorious future, which is all very understandable no doubt.

It does however have its downside, because there will also be a lot of people around who are not in the least pleased at the thought of dividing the country into two or more parts instead of leaving it intact. A spectacular example of what this sort of thing can lead to is the apparently endless civil war in Sri Lanka.

Now, I do not for a moment expect native title to lead to civil war in this country, or anything like it. But separatist sentiments do not have to lead to war, or even terrorism, to be unhelpful and productive of discord. Anecdotal evidence persists of the alarming extent to which remote parts of this country have apparently become “no go” areas for non-Aborigines since native title claims started to multiply.

I cannot personally vouch for the truth of such rumours, but I can and do say that I seem to have met a surprising number of people in the last few years who like taking bush holidays and have some very disquieting tales to tell. I believe it is unwise to simply dismiss these experiences as inventions, because an often belligerent sense of separate nationhood is a very natural consequence of a statute like the *Native Title Act*.

Whether it will ever develop into serious demands for a country within a country I do not know, but if s.51(xxvi) were not there, the likelihood would be that much less.