

Love v the Commonwealth and constitutional recognition; is Australia getting close?

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Before I get started, I would like to acknowledge all first nations people in attendance and also the traditional owners of the land I am tuning in from today, the Gimuy Walaburra Yidingi and Yirrangangi people. I acknowledge that they are the traditional lore makers and caretakers of this land and I pay respects to their elders, past, present and emerging.

I am going to go in a different direction and look at what real-world impact the decision of *Love v The Commonwealth* has had on Indigenous peoples. To do that, I'm going to share with you some conversations I have had with four Aboriginal and Torres Strait Islander women, conversations I have had about the case since it was handed down. Ultimately, through these conversations I found that this case is seen as a powerful symbol of recognition, it is seen as helping to build momentum towards recognition, but it is not a substitute for constitutional recognition.

Before I get into what these women have had to say about the case, I want to publicly thank them for their time and for opening up to me. This topic and the discussions about 'the test of aboriginality' and past events that have happened to their family, especially around dates like national sorry day, is an extremely personal and emotional experience.

So, I thank them for their time and their words and for those same reasons I also will not be mentioning their names. I have received their permission to share their views and I wish to make it clear that these views and my own do not represent all Aboriginal and Torres Strait Islander people.

The first woman's story I would like to share is the story of a woman I have come to know since visiting Mornington Island, up in the Gulf of Carpentaria. At 89 she is the oldest lady on the island but that is not stopping her. Her memory is as sharp as it was when she was five months pregnant marching in the 1967 marches when she was in Townsville. She recalled the buzz in the town at the time and the presence of Eddie Mabo. She has read the Constitution, many times, and still has a copy of it printed in her house.

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When we were discussing the case, she did not know that this had been going on and was not aware of the aliens power in s 51(xix) of the Constitution. It just did not occur to her that the aliens power might speak to her or her people. She did not realise that Aboriginal and Torres Strait Islander people were being deported.

I read out to her the introductory paragraph of Gordon J's decision (*Love v Commonwealth* [2020] HCA 3, [289]):

The fundamental premise from which the decision in Mabo v Queensland [No 2] proceeds – the deeper truth is that indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous people of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European 'settlement'.

I skipped to another paragraph later in the judgement (at [335]):

Aboriginal Australians are not outsiders or foreigners – they are the descendants of the first peoples of this country, the original inhabitants, and they are recognized as such. None of the events of settlement, Federation or the advent of citizenship in the period since Federation have displaced the unique position of Aboriginal Australians.

There was a really long pause. That is typical of her as she likes to take it all in. Then she said quite abruptly 'You know what darling?' I said 'What?' 'Good on that fella [referring to Stephen Keim SC] for taking this to the High Court, because he must know that you can't take the blood from the people!'

The decision for her was entirely uncontroversial and she was glad that the four judges of the majority had come to the conclusion that the two Aboriginal men could not be aliens. She felt that citizenship was white man law and she explained that in her law, her Aboriginal law, being able to stay here is your ancestral right and in her mind Aboriginal blood was stronger than any other. It certainly did not matter where you happened to be born. What mattered was where your community was.

She recalled that when her grandson had decided he wanted to enlist in the Army she could not understand why. She recalled that she said to him, 'Why would you want to fight for a country that won't even recognise us in the Constitution?' I must say this is not the first time I had heard that question posed by First Nations elder.

She expressed great disappointment in the fact that she was still not recognised in the Constitution. She told me that as an 89-year-old woman she knows her days are numbered and has already written her letters for her children and grandchildren for them to read when she passes away. Constitutional recognition is so important to her that in those letters she has told her children and grandchildren to never give up the fight that sees them recognised in the Constitution as the first peoples of this land and for them to have a voice.

One of my extended family members is nearly 70. She and her mum walked off the Mona Mona mission (up in Far North Queensland) when she was just five years old to what we now call Kuranda (near Cairns). Her mother had to apply for an exemption from the mission to be able to leave. She still, to this day has that exemption. It is framed and hangs proudly in her lounge room.

She too had no idea that it was being decided and she could not stop shaking her head. She said:

How does any of that make sense when my mum had to get an exemption to leave a mission that she was taken to against her will and when she was taken there she was never asked to prove her aboriginality? It was just assumed and we were discriminated against because of it.

I read out to her a passage from Nettle J's judgement (at [265]):

But by the mid-nineteenth century, James Dredge, the Assistant Protector of Aborigines at Port Phillip, could acknowledge that those connections were 'sacredly recognised from one generation to another' and that, within the 'boundaries of their own country, as they proudly speak, they feel a degree of security and pleasure which they can find nowhere else'. And even that was a profound understatement of the position, which Michael Dodson has since explained thus:

'Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. ... Removed from our lands, we are literally removed from ourselves.'

A connection of that kind runs deeper than the accident of birth in the territory or immediate parentage.

She said, 'Now that makes more sense to me' and was happy that 'someone up there gets it'.

She too was under that same, very common misconception that the 1967 referendum had solved these issues. She was hoping that we would have a treaty by now, but when reflecting, said that she thought that nothing has happened recently to make her think she was going to see one brought in during her lifetime.

The last two women with whom I had spoken to are young Torres Strait Islander women.

One is among the most recent indigenous female admissions to the profession, so recent that she was admitted via video link due to the COVID-19 pandemic.

Her family's story is not an uncommon one. Her grandmother was born on Thursday Island without a birth certificate. During World War 2 her grandmother was evacuated from the island against her will. She was put on a boat and she thought she was coming here to Cairns. Instead she was taken to Cherbourg Mission. She was not allowed to leave the mission without a permit. After seven or eight years after her father was discharged from the army she was allowed to leave and go back to the Torres Strait. Thankfully she was allowed to go back because it meant that if her family needed to prove their aboriginality they could.

This led us to the parts of the judgment that discuss the *Mabo* three-part test.

She said that her family is very lucky as they have a traceable history. She was able to use written records but even those have gaps and holes and she knows and understands that the test is hard for some families to trace back. She believes that if you are respected by your community that should be enough.

She expressed to me that when reflecting, she too thought that the 1967 referendum had fixed these types of issues facing first nation people. She knew that the referendum had created so much momentum but then when you really dig deep and you find out that you and your people are not in the Constitution, it is really shocking, especially when comparing us to other Commonwealth countries. She too felt there was a lot of mistrust out there but believed we are getting close.

When I asked her if she thought that we would have constitutional recognition in our lifetime she said should would hope so. She referred to the trail blazers and wanted more people to be aware, more people (Indigenous and non-Indigenous) turning up to protests and staying informed and then hopefully there will be some change.

For her, it was important to hear recognition of our deep connection to country from the judges. She was glad it was decided in that way, because in her mind, if it had it of gone the other way it would have been a huge step back. At the end of the day, she said it is what it is and that you are connected to the land no matter what.

The last lady I spoke to is a young woman whose family was directly affected by this case. She is a Murray Islander but born in Canberra. Her story perfectly captures what the decision is all about.

She grew up in the Torres Strait and one of her grandfathers was Eddie Mabo.

Her mother moved to Canberra for a job taking her young children with her. One of those was her older brother. He is now 34 but when he was a young boy, he broke the law. His first offences, stealing two-minute noodles and bread. That lead him down the path of a life in juvenile detention and later in adult prisons. He has never been out of prison long enough to even visit Murray Island since leaving with his mother as a child.

No one who was there at the birth of her brother is alive today to testify that he was born on Murray Island. Her mother is not the biological mother and her father was not there at the time of his birth. He does not have a birth certificate. Her father, also born on Murray Island, still to this day does not have a birth certificate despite being a signatory to the Mabo agreement. Her whole family has been initiated into Island life and for them that is their most significant acknowledgement.

The government took the stance that her brother could have been born on Daru Island, Papua New Guinea and therefore he had to prove that he was not an alien. That is despite him being on ABstudy, having access to all the Indigenous programs at school and having access to Indigenous support in prison.

How do you prove you are Indigenous when no one in your family has birth certificates, no one who was there when you were born is alive anymore and you have been in detention since you were a teenager?

Luckily, he had a pro bono lawyer in Melbourne and his sister was very accepted in the community and could rally the support of the Mer Gedkem le, the peak body on Murray Island. That body is hesitant to get involved with such matters as they are a small and not empowered group. For them writing a piece like this for a Federal Court is really daunting. It took a lot of negotiation on his sister's behalf.

It took the combination of her father being a signatory to the Mabo agreement, many photos of her brother in traditional kit as a child and a pro bono lawyer to get him 'over the line'. Simply because they did not have a birth certificate. A requirement imposed on them by a statute they did not create. As mentioned earlier for them their initiation to Island life is more important than a birth certificate.

After *Love v the Commonwealth* was handed down, it still took a month for him to be released. This whole experience and the intergenerational mistrust of the government and the courts have meant that she and her family have not had the big celebration that might have been expected after such a long, hard battle. They are still so worried that he might get taken back.

This has motivated her to go home, get her nieces and nephews birth certificates. However, there is still the fear that they might not accept what her family have to say about where they were born and this has not encouraged her to have her brother go get one, for fear of drawing attention to him and that the goal posts placed by the government might change.

When reflecting on the decision of *Love v the Commonwealth* she remembered wondering if it was ever going to be handed down. The journey went for over two years and she genuinely thought that her brother would end up being deported to PNG where they know no one and do not have any family. He would be there, alone.

To her and her family after being black enough to have your wages stolen and to be forced to live on rations, it was the ultimate betrayal: the sheer audacity of the government – in her words, 'You didn't want us here and now you want to deport us so that is what they will do. In 2020 that is pretty heart wrenching to hear across the table from a 24-year-old woman. So yes, for her she said it felt like a win in a sense, but so was the decision of Mabo and yet in 2020 she is dealing with having to prove that her brother is not an alien.

Constitutional recognition is very important to her old people. They feel that it is very necessary. That was instilled in them from the Mabo times and being there with Eddie.

When Aboriginal and Torres Strait Islander people are more than 15 times more likely to go to jail and thus are more likely to end up in this awful loophole that basically puts them in no man's land, a decision like this was more than due.

This decision and the discussions I had really highlight that a case like this really distils into a simple message. We belong to this Country. Decisions like this are in my view incremental and important steps for momentum building to big changes such as a formal referendum for constitutional change.

For Indigenous people who aren't lawyers, decisions like this make sense as it accords with what they know to be obvious and it can in some instances make them feel seen and heard. Feeling seen and heard by your country even in a symbolic sense goes a long way against a background of feeling continual powerlessness and struggle. It draws on the same momentum

that was necessary for the success of the 1967 referendum. A lot of the people I spoke to thought that all of these issues were covered in that referendum but when one looks back on that referendum through modern eyes, it is hard not to think that it was inadequate.

The judgment in *Love v the Commonwealth* makes sense. We are one with the land. Born here or not, it runs in our veins. The fight for some recognition, some voice to parliament, some engagement so that we can contribute to law and policies that will ultimately shape the future of our children is far from over.

There is one aspect of the judgment which does not match up with the common sense understanding of the women I spoke to, and that is the idea of sovereignty. As much as the majority acknowledged our deep connection to the land, they were also at pains to distinguish that from the idea of sovereignty.

For example, Gordon J said (at [356]):

Recognition of Indigenous peoples as a part of the "people of Australia" is directly contrary to accepting any notion of Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown.

Sovereignty is one of those words that can mean different things to different people, but for the women I spoke to, it cannot be separated out from our connection to country.

As the Uluru Statement from the Heart put it:

... sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

These conversations only offer a snapshot of the Indigenous take on *Love v the Commonwealth*. But the conversations with the women I spoke to offer a number of insights. First off, the case and decision came as a bit of a surprise. For the elder on Mornington Island, it just never occurred to her that our people might be 'aliens'. It was also a welcome surprise. Four judges recognised what we already knew: that we belong to our country. But that recognition, powerful as it is, is only a step towards constitutional recognition. In my view, the way that some of the majority judges stumbled over the idea of sovereignty really shows that.

I hope that everyone was able to take away something from these women's stories and I again thank them for sharing their stories with me and thank you all for listening.

Happy Mabo Day.

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