

Indigenous Peoples, Colonialism and Law Exam Notes  
Semester 1, 2020

Exam Format

- Answer **three** essay-based questions out of a choice of 8
- Each question is weighted equally
- Some questions will be focused on specific areas; others may cover multiple areas

Examinable Material

- Week 2: race as social construct; 'whiteness'
- Week 3: The history of colonisation; legal and philosophical justifications
- Week 4: Indigenous perspectives on law
- Weeks 5 and 6: Historical relationship between Indigenous peoples and the state (different eras; constitutional recognition, Uluru Statement, treaties)
- Week 7: Land rights and native title
- Week 8: Dealing with historical injustice: stolen generations and stolen wages (including the apology)
- Week 9: Indigenous peoples and the criminal justice system
- Week 10: Protection of Indigenous heritage, knowledge, culture
- Week 11: International law and Indigenous peoples

Tips

- 2.5 hours = approx. 50 minutes per question (but that includes reading/planning time)
- Answers should be in essay form (introduction, body, conclusion)
- Introduction:
  - Provide general introduction to issues/relevant background context
  - State your argument/link discussion to specific question
  - Identify the key points you will discuss in establishing your argument
- Body:
  - Set out key points (one or two paragraphs per point)
  - Explicitly link each point back to argument (in first sentence state why point is relevant/how it builds argument and/or builds on previous point; include concluding sentence)
- Conclusion:
  - Summarise argument and key points (should mirror introduction)

No required/set length, but aim for 5-6 points per question (intro, 5-6 paragraphs dealing with different points, conclusion)

Should aim to:

- Demonstrate a knowledge/familiarity with key concepts/legal issues as discussed in lectures, workshops and set readings
  - Identify relevant issues
  - Outline/explain issue(s) clearly and accurately
  - Refer to relevant legal principles/important cases/examples
- Engage with materials and offer analysis
  - Develop an argument across the answer\*\*
  - Outline limitations/obstacles, explore possible reforms etc
  - Draw connections between broader ideas/themes
- Include relevant authorities (readings, cases, legislation)

## Topic Overview

Weeks 1-6: Introduction, key concepts, history	Week 7-12: Case Studies
<ul style="list-style-type: none"> <li>• Some tools for thinking about race, culture, and power</li> <li>• Colonisation in a legal and historical context</li> <li>• Law in an Indigenous worldview</li> <li>• The relationship between Indigenous peoples and the state (protection, assimilation, self-determination, constitutional recognition etc)</li> </ul>	<ul style="list-style-type: none"> <li>• Land Rights and Native Title</li> <li>• Dealing with Historical Injustice: Stolen Generations and Stolen Wages</li> <li>• Indigenous Peoples and the Criminal Justice System</li> <li>• Protecting Cultural Heritage and Knowledge</li> <li>• International law and Indigenous Peoples</li> </ul>

### WEEK 2: RACE AS A SOCIAL CONSTRUCT, 'WHITENESS'

#### POWER, CULTURE, RACE - Key Concepts and Theoretical Frameworks

##### *Thinking about Power*

- Appropriate terminology, representations and protocols of acknowledgement for Aboriginal and Torres Strait Islander Peoples
- Structural forms of power
  - Privilege
  - Social structure
- Structure v Agency
  - 'paths of least resistance'
- Law and power
  - 'Law is simply politics dressed up in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society ... Law is not so much a rational enterprise as a vast exercise in rationalisation ... Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorising, describing, organising, and comparing...'  
(Hutchinson and Monahan, 'Law, Politics and Critical Legal Studies' 1984)

##### *Culture*

- Difference between peoples
  - Race, genetics, religion, economy, development
- Nature (race, genetics etc) v culture (religion, economy etc)
- Culture
  - Culture ... is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.' (Taylor)
  - A 'historically transmitted pattern of meanings, embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which people communicate, perpetuate, and develop their knowledge about and attitudes toward life' (Geertz)
- A universal human nature?
  - Are some cultures more 'advanced' or more 'primitive'?
  - On what basis can we make such assertions?
  - Are our choices regarding the criteria themselves a product of culture?
- Is culture fixed?
  - '...culture as a network of perspectives, or as an ongoing debate.' (Hannerz)

## Race

- Race a 'social construct' not an innate/natural biological category
- The 'science' of race emerged during the enlightenment, designed as a way to scientifically categorise different groups of humans:
  - Linnaeus (1735):
    - Homo Americanus (obstinate, content, governed by habit)
    - Homo Europaeus (gentle, inventive, governed by customs)
    - Homo Asiaticus (severe, covetous, governed by opinions)
    - Homo Africanus (crafty, indolent, governed by caprice)
  - Blumenbach (1795):
    - Caucasian, Mongolian, Ethiopian, American, Malayan
- These 'taxonomies' weren't objective, and clearly included implied preferences
- Social darwinism/Spencerism: stronger races would inevitable eliminate weaker races
- By the second half of the 20<sup>th</sup> centuries, racial categories discredited
  - Considering the infinite differences in physical attributes, why select some and not others as important?
  - Degree of variation within categories often greater than between categories
- Not a 'discovery' but a 'construct' (and still has strong influence as a social construct).

## Race and Whiteness

- 'Whiteness studies'
- Understanding 'whiteness' as a racial category
- Race (as a social construct) isn't something only 'other' people have
- A way to unpack the social power of 'whiteness'
  - 'Universal'; 'view from nowhere'
  - 'it is a privilege of being in a position of dominance that the social markers of dominance are both invisible and regarded as the benchmark of normality' (Davies)
  - 'White people have power and believe that they think, feel and act like and for all people ... White people create the dominant images of the world and don't quite see that they thus construct the world in their own image; White people set standards of humanity by which they are bound to succeed and others bound to fail.' (Dyer)
- Does the Australian legal system reflect universal, objective values, or are its value the product of a specific culture perspective?
  - See: Ransley and Marchetti

## WEEK 3: THE HISTORY OF COLONISATION, LEGAL AND PHILOSOPHICAL JUSTIFICATIONS

### *Indigenous Peoples in Australia*

- Indigenous people have lived on the Australian continent for at least 70,000 years
- At the time of colonisation there were between 500 and 700 separate Aboriginal and Torres Strait Islander nations with their own languages, cultural practices, and complex systems of law and governance

### *Colonisation*

- Captain Cook lands at Botany bay in April 1770
  - 'You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Incriptions, as first discoverers and possessors'