The Eddie Koiki Mabo Lecture 2006

The Long Path to Land Justice

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In the years since the Mabo case delivered the promise of land justice, many factors have worked to prevent the expectations it gave to Indigenous people across Australia from being delivered.

This lecture will explore the barriers to achieving the vision of Aboriginal rights to land that were articulated in the Mabo case. These include the re-conceptualising of native title as a regime to give certainty to non-Aboriginal interests, the romanticism of Aboriginal culture

When asked why the High Court seems to get so much criticism for the Mabo and Wik decisions, the former Chief Justice noted that the antagonism seems to come from people "

" those who are disadvantaged.

If such a gross misreading of the importance of terra nullius in the Mabo case can cause such hysteria, it really does raise the question as to why this is so? The answer, I can guarantee, will say more about the way non-Aboriginal see their history than it will say about Aboriginal people. At its heart, this quibbling over terra nullius is another attempt to use a semantic debate to hide an historical travesty.

We have witnessed the denials of frontier violence against Aboriginal people, with historians debating whether the accounts in police reports were more valid than the accounts in squatter's diaries and the oral histories of Aboriginal people. We had to listen to the semantic debates about whether the children taken from their families – and living with the legacy of the removal policy – were "stolen" or "removed" for their own good. And while Aboriginal people had to come to terms with the psychological, emotional and sometimes physical trauma of those experiences of being taken from their families or having children taken from them, they had to endure a public debate about whether their experiences could properly be described as "cultural genocide" or not.

I have never believed that these debates amongst academics and commentators, often called "the history wars" or "the culture wars", about how to label and quantify our experiences have ever altered our view of history as Aboriginal people. Their debates have not invalidated the oral histories that we have been told by our elders and they have not changed one iota the way that Aboriginal people live each day and experience the legacies of the very policies that are the subject of those semantic arguments. And that is because

elements. On the left of the news of the fire was another news item. It was headed . At that time, the 'Wik talks' were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and people of Australia.

The media coverage of the Wik case was cloaked with a politically loaded perspective. The Sydney Morning Herald ran the headline that the Wik decision was . It printed a photograph of a farmer, a Mr Fraser, looking forlornly down at his land under the headline . Although he claimed to be a strong supporter of the Aborigines and said he believed in reconciliation he was 'confused' by the decision and Mr Fraser's reaction was one of bewilderment:

been committed are dealing with the end result of government neglect. They are part of dealing with the symptoms and, as such, the judiciary have limited ability to deal with the root causes that lead to that violence and dysfunction. But politicians and their governments are in a position to attack those root causes. They are just continually refusing to do so and instead come up with knee-jerk reactions.

First, they have to accept that there are no quick fixes and the commitment must be for the long term. There will be no picture of them riding in on a white horse to save the Aborigines.

Secondly, they have to provide adequate resources to communities to do the following:

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that there are silences in our constitution about rights; that these silences were intended; and it gives us a practical example of the rights violations that can be the legacy of that silence.

The feeling that our constitution did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum. The result of that constitutional change though is often misunderstood. It has been held out as the moment at which Indigenous people became citizens or Aboriginal people attained the right to vote. It did neither. In reality, the 1967 referendum did two things:

> It allowed for Indigenous people to be included in the census; and
> It allowed the federal parliament the power to make laws in relation to Indigenous people.

The notion of including Indigenous people in the census was, for those who advocated a "yes" vote, more than just a body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation building would overcome an "us" and "them" mentality.

Sadly, this anticipated result has not been achieved. One only need look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of the native title holder(s) are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

> That when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but te 1245(ri)-7(g)-6(i)-8(n)

The other lesson that can be learnt from the 1967 referendum is that the Federal Parliament cannot be relied upon to act in a way that is beneficial to Indigenous people. It was thought by those who advocated for a “yes” vote that the changes to section 51(xxvi) (the “races

added the following provision to the Constitution:

Some of these steps to improve the Australian rights framework for Indigenous people – a constitutional preamble, a bill of rights – would have benefits for all Australians. This reinforces the point that comes out of the litigation in the Kruger case, namely, that many of the rights of Indigenous people that are infringed are not "special rights" but rights held by all people. On the flip side, measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

IV. The Vision of Eddie Mabo

Eddie Mabo had an unwavering belief in the rightness of his claim. He also tested a legal system that had worked well to protect the interests of the middle class members of the dominant culture and pushed that system so that it sought to protect the rights of the poor, the marginalised and the disadvantaged. And this has to be the real test of any law, any policy and our constitution: it is not enough that it works well for those who are already privileged. Its worth is how it delivers for those who are underprivileged, who are on the margins, who have been dispossessed.

The other legacy of Eddie Mabo's vision is that laws need to be just but they also need to be matched with a legal system that can ensure that justice is ongoing. This needs to be complimented with a government commitment to meeting the basic needs of all of its citizens for basic services including health and education, the provision of infrastructure to all communities and investment in the development of human capital, or people. Legal structures and government commitment also need to be matched by a changing of hearts and minds, an alteration of the "us" and "them" mentality that has infested native title debates.

I was a member of the ACT Bill of Rights Consultative Committee that undertook community consultation processes as part of our inquiry as to whether there should be a Bill of Rights in the nations capital. During those consultations, there appeared a strong reluctance to recognise the rights of minorities. Feedback from those consultations included comments such as "if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans" and "if a Bill of Rights mentions Indigenous rights and the rights of other minorities it will have no legitimacy."

What is noticeable in this example is the meanness of spirit about the possible protections that a democratic society can offer. This mentality protectively guards the rights and benefits that are given to citizens within a community and seems to assume that if those rights are extended to the poor, the culturally distinct and the historically marginalised, someone will be worse off. This worldview sees the recognition and protection of the rights of the disadvantaged and culturally distinct as being in direct competition with their own position. It is this “us” and “them” mentality that psychologically separates one sector of the community from the other. And it sees the giving of rights protection as a win-lose.

In order to move away from that mentality, we need to realise that the way to measure the effectiveness and fairness of our laws is to measure them against the test I identified earlier. Namely, measure them against the way in which they work for the poor, the marginalised and the culturally distinct. In order to do that, society needs to understand that when you extend benefits to those who are less well off, you do not lose, but you are securing the social fabric for everyone, that is, it is a win-win. And a key part of this must be that Australians cease to view Aboriginal people a threat, as un