**EDDIE MABO**

HUMAN RIGHTS LECTURE

James Cook National University

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Noel Pearson

Executive Director, Cape York Land Council

Mrs Mabo, students and teachers of James Cook University of North Queensland, Organisers of this annual Eddie Mabo Human Rights Lecture and friends. No small privilege has been extended to me here today. I am honored to have been invited to speak on this occasion in the presence of Mrs Mabo and at this particular university. Over the past 3 years I have had numerous opportunities to speak on aspects of the native title legacy which the late Eddie Mabo left for this country. Today I would like to take the opportunity to reflect on the dimension of his achievement and to make some observations about what I think Eddie Mabo has left for us in relation to the prosecution of human rights. I particularly wish to reflect on the lessons on indigenous political strategy which I at least interpret from the struggle which he and his fellow Murray Islanders undertook over 10 years ago.

Of the colonies which inherited the common law tradition of England and its concept of native title to land vesting in the indigenous peoples of a colony, Australia had steadfastly refused for 204 of its 207 years, to acknowledge that the recognition of traditional title to land formed part of the law which was**, according to the fiction,** brought to these shores on the shoulders of Englishmen. The Supreme Court of the United States had confirmed traditional title in 1823, in the famous decision of Chief Justice Marshall in Johnson v McIntosh. Mr Justice Chapman's decision in R v Symonds, confirmed Aboriginal title in New Zealand as long ago as 1859. These cases formed part of a tradition of common law recognition of beneficial title vesting in Aboriginal peoples subject to the radical power of the new sovereign, particularly in decisions of the Privy Council in Asian and African

colonies. Despite this, Australia tenaciously clung to the legal fiction of terra nullius; a land without owners.

Terra nullius underwrote the real property law of the country and informed the colonial relationship between the indigenes and colonists for two centuries. It had not only legal and political force, but set a moral and psychological tone. It justified the theft of the land and the murder and mistreatment of its owners. It was indeed the imprimatur for dispossession.

This false doctrine was so embedded in the legal and constitutional foundations of the nation, that even on the eve of the High Court's decision in the Mabo's Case, terra nullius held a moral force in our country that was still compelling. It was so much an accepted founding stone of the country's colonial identity, few in Australia would have anticipated that it could now be overturned.

It was a founding stone which a motley group of Anglo academics, Jewish lawyers and indigenous leaders of a small island in the eastern extremities of the Torres Straits, refused to accept. Led by a Murray Islander who was a lone voice in a wilderness of faithlessness, the late Eddie Mabo would succeed in the destruction of terra nullius and lay the basis and the opportunity of a moral community in the Antipodes. It is true that no Australian has never heard of him, indeed many beyond Australia have, but the dimension of Mabo's achievement in redeeming history, is yet to be appreciated. He already stands as a seminal figure in the nation's history, but his contribution will be the most significant of any Australian, past, present of future. For Mabo's achievement was that he had confronted the colonial past, established the opportunity for indigenous justice in the present, and laid for all Australians a new foundation for a society in the future.

Australian history tells us that 150 years ago there were those in the Colonial office and indeed administrators and individuals who insisted that respect and recognition of

traditional title was a legal right of the Aboriginal people as subjects of the Crown. This movement, called the First Land Rights Movement by historian, Professor Henry Reynolds, eventually folded in the face of a vehement insistence on the frontier that the indigenous peoples were possessed of the **legal** status of wildlife: without rights to their homeland and without rights to their livelihoods and even their lives. The gap between the law of England and the reality of the frontier left a tragic legacy, described by Justice Deane and Gudrun of the High Court of Australia as a legacy of unbelievable shame.

Australia had justified the disparate treatment of its indigenous peoples in respect of recognition of native title, for the same reasons advanced by the Privy Council in its 1919 decision in Re Southern Rhodesia. Lord Summer said in that case:

> The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institution or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to out law and then to transmute it into the substance of transferable rights to property as we know them.

The gulf which could not be bridged was the social Darwinian gulf of evolution, which became the philosophical underpinning of Australian racism towards its Aboriginal people from the frontier days until the end of terra nullius. The Aboriginal peoples of Australia, peculiar and astounding amongst the diverse peoples of the world, were said to be particularly backward. Not human enough to have rights to land.

This racism was quite different from the racism which formed the anti-Asian White Australia Policy, which was bipartisan policy for most of Australia's post federation history. The prejudice against the teeming Yellow hordes and anxiety that Anglo-Irish integrity be maintained, was less based on ideas of evolutionary gulfs than on preserving

economic opportunity and maintaining racial integrity. Indeed a Labor advocate of the white Australia Policy once commented that it was no the bad qualities of the Japanese that justified the policy, but their good ones.

Racism towards the indigenous peoples has been different. Not until the 1960's would the entrenched ideas about innate inferiority come to be questioned in Australian society.

The true history of the betrayal of English law was obfuscated for more than a century of historiography and popular belief. Australia endured what, in 1968, the eminent anthropologist Bill Stanner called 'The great Australian Silence'.

*[there are no records of the remaining of this speech]*