MABO:

A FUNDAMENTAL TRUTH AND A BASIS FOR JUSTICE

by Daniel Lopez[1]
Winner of the 2012 UNSW Law School Essay Competition

Sixteen years before Kevin Rudd's historic apology to the stolen generations in 2008, another Prime Minister eloquently and sincerely acknowledged the mistakes made by Australia in its treatment of its Indigenous peoples. Never before had there been such a frank acceptance of these grievances when the then Prime Minister, Paul Keating, delivered his speech at Redfern Park in 1992. A catalyst for this speech was to praise the High Court's *Mabo*[2] decision six months earlier, which in Keating's memorable words 'establishes a fundamental truth and lays the basis for justice'.[3] Keating identified that the groundbreaking *Mabo* decision recognised the historical truth that European settlement led to the dispossession of Indigenous lands; and a fundamental truth that Indigenous cultures deserve respect and legal protection. Furthermore, Keating emphasised that the High Court's decision set Australia on a new political and social trajectory: that identified the plight of Indigenous Australia and the need for justice as one of the nation's central challenges as it moved into the future.

The High Court's *Mabo* decision acknowledged the historical truth that lies at the heart of Australia's settlement: the use of the doctrine of *terra nullius* ('land belonging to no-one'), to allow the British Crown to gain absolute sovereignty over the land of Indigenous Australians, had dispossessed them of this land.[4] The case involved Torres Strait Islander Eddie Mabo and others from the Murray Islands in the Torres Strait claiming that the Merriam people held native title over the Islands. The decision, handed down in June 1992, ruled in favour of Mabo and his people. It also overturned the doctrine of *terra nullius* and acknowledged the consequences of it having dispossessed Indigenous Australians who had lived in the Torres Strait and mainland Australia for up to 40,000 years before European settlement in 1788.[5] The High Court's ruling condemned *terra nullius* as a 'fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent' and found that therefore this unjust doctrine had 'no place in the contemporary law of this country'.[6] Keating recognised that the High Court's decision was significant in overturning a historically entrenched notion that allowed injustice to be perpetuated against Indigenous Australians through the dispossession of their land.

Apart from highlighting this historic truth, Keating observed that the High Court's decision in the *Mabo* case also established a fundamental truth that is not only pertinent to Australia, but which transcends continents and cultures, and is therefore universal. That is, the duty of the state to protect the dignity of its citizens and those who occupy its lands, before and after its settlement. When the political and cultural rights of its people are treated with contempt and a lack of dignity, then subsequently it is the dignity of the state itself that is tarnished. Overturning the doctrine of *terra nullius* and recognising the native title rights of Indigenous cultures is also articulated in various international treaties including the International Covenant on Civil and Political Rights (Article 27) to which Australia is a signatory.[7] The human right to retain and practice one's own culture, particularly in the case of Indigenous cultures, is therefore a fundamental truth that governments have a duty and responsibility to uphold.

The recognition of this fundamental truth in the *Mabo* decision highlighted the importance of protecting and respecting the land and cultural rights of Indigenous Australians. The concept of native title is articulated in the *Mabo* decision and is enshrined in statute law in the *Native Title Act 1993* (Cth), which provides a legal framework that recognises that Indigenous peoples have rights and interests in areas of land due to cultural and traditional values and customs.[8] This legal enforcement of Indigenous rights helps to renew the Aboriginal community's confidence in the nation's legal system. Since native title provides numerous benefits for Aboriginal Australians, such as allowing them to develop industry and resources on their land and to use it for ceremonial purposes, it breeds tolerance and respect in interactions with non-Indigenous Australians.

The *Mabo* decision was a significant moment in Australia's political, social and cultural history as it set the nation in

a new direction where the plight of Indigenous Australians went from being an uncomfortable topic in political discourse to a central issue that deserved the attention of political leaders and law-makers. Keating asserted that the decision laid 'the basis for justice' because it established the first step in correcting the injustices created by the use of the doctrine of *terra nullius* in 1788. By placing an emphasis on the concept of justice, Keating stressed the duty incumbent upon the nation and its leaders to correct these injustices. The passage of the Native Title Act through the Australian Parliament was a significant step in legally recognising the existence of Indigenous Australian's ownership of land before European settlement and provided means for them to reconnect culturally and spiritually with their land. The *Mabo* decision, therefore, provided a legal basis for injustices to be corrected. This form of justice is based on the fundamental truth alluded to by Keating and allows for the dignity of Indigenous Australians, their culture and identity to be acknowledged and given legal recognition.

Paul Keating highlighted that the justice laid down in the *Mabo* decision and its recognition of a fundamental truth emphasised the importance of Indigenous cultures and rights. After the decision, Aboriginal rights campaigner, Charles Perkins, reiterated the Prime Minister's remarks that 'there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians'.[9] This focus on developing a more inclusive democracy and enhancing social justice after the *Mabo* decision laid the groundwork for future improvements in the life of Aboriginal Australians. These improvements include symbolic gestures, such as Kevin Rudd's apology to the stolen generations, through to the practical improvements in some aspects of the lives of Indigenous Australians. Through his statement, Keating recognised that the *Mabo* decision was influential in engendering a new national narrative focused on inclusivity, the correction of past injustices and the will to improve the lives of all Australians regardless of cultural and historical differences.

Daniel Lopez, Year 12, Emmanuel School, Victoria, won the 2012 UNSW Law Essay Competition. Daniel's essay was selected from entries submitted by Year 11 and 12 students from schools across Australia addressing the following question: In 1992, Prime Minister Paul Keating said that the High Court decision in *Mabo* 'establishes a fundamental truth and lays the basis for justice'. What did he mean by this statement?

2012 Runner Up: Brigitte Rheinberger, Year 12, Abbotsleigh, NSW

2012 Third Place: Nicholas Yuen, Year 12, Killara High School, NSW

To read Brigitte's and Nicholas's essays visit the ILC News and Events page: http://www.ilc.unsw.edu.au/content/news-and-events/news

1 For the purpose of publication this essay has been edited in line with the *Indigenous Law Bulletin's* editorial guidelines.

2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

3 Paul Keating, 'Paul Keating's Redfern Speech' (December 1992) from ANTAR Reports <http://antar.org.au/reports/paul-keatings-redfern-speech>.

4 Moira Rayner, *Rooting Democracy* (Australia: Allen & Unwin, 1997) 69.

5 A K Macdougall, *Australia: An Illustrated History* (The Five Mile Press, 2004) 11.

6 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Mason CJ, McHugh J).

7 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171.

8 Jim Ouliaris, *The Legal Maze* (Macmillan Educations, 2010) 456.

9 Christine Fletcher, 'Self-determination and managing the future' in Christine Fletcher (ed), *Aboriginal Self Determination in Australia* (Aboriginal Studies Press, 1994) 39.

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