

## Aboriginal Land Rights: A Continuing Social Justice Issue

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**Abstract:** Australian Aboriginals and Torres Strait Islanders have been the original landowners and successful custodians of the Australian landscape for over 50,000 years. In 1788 Britain took possession of the eastern half of Australia without any regard for the original inhabitants and as a result acquired the unassailable legal position of being the first occupants. This unacceptable situation has continued under the doctrine of *terra nullius*, a doctrine supporting the position that prior to 1788 Australia belonged to no one. While *terra nullius* remains at the heart of the Australian legal system there can be no social justice for Australian Aboriginals. The impact of *terra nullius* has been the dispossession of Aboriginal land and a denial of fundamental Aboriginal rights. Social justice is still outstanding.

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**Key Words:** Indigenous Australians; land rights; native title; *terra nullius*; human rights; Mabo; Wik; social justice

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**G**ive us Christ not crucifixion  
Though baptised and blessed and Bibled  
We are still tabooed and libelled  
You devout Salvation-sellers  
Make us neighbours not fringe-dwellers  
Must we native old Australians  
In our land rank as aliens?<sup>1</sup>

Pope Paul III in his declaration *Sublimus Dei* (1537) made the following statement with regard to personal freedom and land rights:

Indians and all other people who may later be discovered by Christians are to be by no means deprived of their liberty or the possession of their property; ... should the contrary happen, it shall be null and have no effect.<sup>2</sup>

These words written long before the “discovery” of Australia clearly recognize the rights of the original native inhabitants – Australian Aboriginals. Yet, on the 7th of February 1788, officials of the First Fleet raised the British flag at Sydney Cove and took possession of the colony comprising the whole eastern half of Australia approximating a million and a half square miles. Competing political interests, unrest in Europe and an expansionary vision of France<sup>3</sup> motivated this claim and given the prevailing attitude of the eighteenth century this claim may not have been unexceptional. What is exceptional was the British justification that the Aboriginals had never actually been in possession of the land. This justification was based on the fact that the Aborigines ranged over the land rather than

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<sup>1</sup> “Oodgeroo of the Tribe Noonuccal,” in Oodgeroo, *My People*, 3<sup>rd</sup> ed. (Milton: Jacaranda, 1990), 36-37.

<sup>2</sup> Pope Paul III, *Sublimus Dei: The Enslavement and Evangelisation of Indians 1537* (article-on-line) (accessed May 13th 2006); <http://www.papalencyclicals.net/Paul03/p3subli.html>

<sup>3</sup> Tim Flannery, *Terra Australis* (Melbourne: Text Publishing, 2000), 7.

resided on it and as a result the Europeans acquired the unassailable legal position of being the first occupants.<sup>4</sup>

This exceptional attitude prevailed under the doctrine of *terra nullius*, a doctrine supporting that prior to 1788, Australia as it was known then, belonged to no-one. Nothing was to change for two hundred and four years until the 1992 Mabo decision in the High Court of Australia recognised that the *Merian* people of the Torres Strait held native title over their traditional lands. This decision finally overturned the concept of *terra nullius* and paved the way for Aboriginal and Torres Strait Islander people to have native title recognised under Australian law.<sup>5</sup> The Mabo decision was welcomed but it was not without serious negative inferences on Aboriginal society. Firstly, the decision inferred that Aboriginal society was 'primitive' and compared Aboriginals to other international native groups and not with white Europeans; secondly the decision viewed Aboriginals as a 'race' and not as a nation of people; thirdly the decision denied Aboriginals economic rights over the land, the title only giving occupational rights.<sup>6</sup> Moores makes a challenging and frightening statement regarding the landmark Mabo decision, "Mabo offers something for those who are grateful for small blessings, but nothing in the way of real justice."<sup>7</sup> How can we as Christians assist the most disadvantaged and least powerful people in Australia to achieve real justice, a task magnified by the fact that the Australian legal system favours the powerful at the expense of the weak?

### *Aboriginal Land Rights: Not Just Real Estate*

To understand the importance of Aboriginal land rights it is essential to comprehend the significance of the land from the Aboriginal perspective. When non-Aboriginal society talks of land the understanding is in terms of real estate divided into cities, suburbia, rural farming and pastoral areas. The value of the land being focused primarily on the economic potential as we seek to maximise this value in terms of ownership for domestic or commercial purposes.

Aboriginal society on the other hand views the land very differently. There exists a deep spiritual love expressed by Aboriginals for the land, this love is expressed in a song from the Oenpelli region:

Come with me to the point  
And we will look at the country,  
We'll look across at the rocks,  
Look the rain is coming!  
It falls on my sweetheart.<sup>8</sup>

This love of the land represents a spiritual as well as an economic relationship because for Aboriginal society the land not only gave life, it *was* life!

As the Aboriginals moved across the landscape they witnessed a richly symbolic and spiritual world shaped by their Dreamtime stories that explained how the world came into being along with the moral rules of the society and spiritual heritage. The land was far

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<sup>4</sup> Henry Reynolds, *The Law of the Land* (Ringwood: Penguin Books, 1992), 13.

<sup>5</sup> National Native Title Tribunal, *Guide to Native Title and Agreement Making* (Commonwealth of Australia Publication, 2003), 3.

<sup>6</sup> Irene Moores, *Voices of Aboriginal Australia Past, Present and Future* (Springwood: Butterfly Books, 1995), 328.

<sup>7</sup> Moores, *Voices*, 331.

<sup>8</sup> Richard Broom, *Aboriginal Australians*, 2<sup>nd</sup> ed. (St Leonards: Allan & Unwin, 1994), 14.

greater than any personal possession; the land was reflective of Aboriginal life past, present and future.

### *Terra Nullius: The Heart and Soul of the Issue*

The concept of *terra nullius* meant denying both the humanity and the existence of Aboriginal people. It also meant marginalizing Aboriginal people from white society. This denial of basic human rights for Aboriginals may be hard for younger generations to comprehend, however it is brought into perspective by the realization that it was only as recent as 1967 when Aboriginal people were recognised as citizens in their own country. In 1967, a referendum proposal was accepted by 89 per cent of all Australians of voting age agreeing that Aboriginals should be included in the census count as citizens.<sup>9</sup>

*Terra Nullius* is still at the heart of the Australian legal system. The law has failed to come to terms with Australian reality. It takes no cognisance of everything that has been learned about Australian history and Aboriginal society since the British claimed sovereignty over the east coast of Australia in 1788. Reynolds comments on this failure of the law:

While *terra nullius* remains there the gap will yawn between jurisprudence and historical reality, there will never be real accommodation between black and white."<sup>10</sup>

The challenge is to effect change in our Australian legal system. It is not possible for Aboriginals to fully respect the law unless the law respects the basic human rights of Aboriginal society. *Terra nullius* must be removed from the legal system and the recognition of Aboriginal prior possession of the land then becomes the starting point for legal and social argument.

### *Christian Ethics and Dignity*

Jesus declared the supreme worth of every individual and in particular the disadvantaged, "As you did it to the least of my brethren, you did it to me" (Mt 25:40). This supreme worth is analogous to "human dignity" and is the basis of Christian ethics. Pope John Paul II confirmed that the dignity of the human person is rooted in His creation, in the image and likeness of God.<sup>11</sup>

Gascoigne has written extensively on the topic of human dignity and Christianity. He makes the following observation in relation to human dignity and the problem created by those who would try to force sovereignty over an indigenous society:

If the individual human person is a being who lives in a personal and intimate relationship with God, then no earthly authority can have the right to assert total sovereignty over him or her.<sup>12</sup>

Gascoigne's words are pertinent to the issues facing Aboriginal society. It is only recently that recognition has been given to the fact that Aboriginals traditionally lead a very spiritual life with the essence of that spirituality being founded in their love of the land that gave them life and meaning.

Gascoigne comments further on this subject in reference to the goodness of nature expressing that Christians must recognize that they (Christians) have much to learn from the religions of indigenous peoples, who are informed and practice a reverence for

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<sup>9</sup> Broom, *Aboriginal Australians*, 178.

<sup>10</sup> Reynolds, *The Law of the Land*, 178-179.

<sup>11</sup> John Paul II, *Catechism of the Catholic Church*, 2<sup>nd</sup> ed. (Strathfield: St Pauls Publications, 2000), 424.

<sup>12</sup> Robert Gascoigne, *Freedom and Purpose* (Sydney: E.J. Dwyer, 1993), 96.

nature.<sup>13</sup> This is a telling message to a society who professes to be Christian. A message to respect not only the dignity and rights of indigenous societies but also to learn from the traditional owners of the land how to look after and nourish the land over which native society has been practising responsible stewardship.

Australian Aboriginals have been successful custodians of the Australian landscape for over 50,000 years (2,000 generations).<sup>14</sup> In contrast non-Aboriginals have been custodians for two hundred years and during that time we have seen the rainforests decimated, natural fauna and flora depleted and the introduction of unwelcome plant and animal life. In such a short space of time we have neither learnt nor respected the values practised by the original owners of the land. Yet, we hold sovereignty over the land and deny the original inhabitants their dignity and due recognition of prior ownership.

*Christian Ethics and Aboriginal Rights*

John Finnis<sup>15</sup> defines seven immutable basic rights that he states are mandatory and essential to human well-being. Finnis further argues to the extent that evil is done when any one of them is directly violated. These basic rights as described by Finnis serve as a framework by which we can more fully appreciate the compromised position of Aboriginal society, a society having been denied their birthright. The seven rights include the right to life, knowledge and play; the right to aesthetic experience and sociability (friendship); the right to practical reasonableness and the right to religion. By denying land rights, denying social justice and excluding Aboriginals from Australian society evil has been done not just in reference to one of the rights as described by Finnis but all seven. Even a cursory appreciation of the historical and current problems experienced by our Aboriginal neighbours confirms that the scorecard is a full seven out of seven!

Gascoigne provides further perspective on the issue of human rights by commenting on the importance of society’s positive obligations to ensure an active role of State and society for the individual. Gascoigne states, “If the human person is to fulfil his potential, we are obliged not only to refrain from frustrating that fulfilment, but also actively assist it.”<sup>16</sup> The following table provides a summary of the human rights as described by Gascoigne. In addition to Gascoigne’s listing of the significant human rights there are also comments added to the table in relation to these human rights and specifically the Aboriginal land rights experience since 1788. These comments confirm that we have neither fulfilled nor assisted with positive obligation as Gascoigne exhorts us to do so.

*Human Rights and the Aboriginal Land Rights Experience*

<b>Human Rights as Described by Gascoigne.<sup>17</sup></b>	<b>Comments on Aboriginal Society in relation to this right since 1788.</b>
Physical Rights, as in the preservation of life and protection from harm.	Massacres of Aboriginals since settlement including Myall Creek, Skull Creek, Slaughterhouse Gully plus many others as a

<sup>13</sup> Gascoigne, *Freedom and Purpose*, 94.

<sup>14</sup> Broom, *Aboriginal Australians*, 10.

<sup>15</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

<sup>16</sup> Gascoigne, *Freedom and Purpose*, 107.

<sup>17</sup> Gascoigne, *Freedom and Purpose*, 107-112.

	result of land disputes between blacks and whites. <sup>18</sup>
Spiritual Rights, as in respect for the religious traditions.	The land and spirituality is tied in Aboriginal society. To deny land rights is to deny expression of spirituality.
Moral Rights, expressed as the rights of conscience and the right to object to activities that are against conscience.	Until 1967 Aboriginals were not recognised as citizens and were not eligible to vote against any issues of conscience.
Personal Rights, rights to freedom and the opportunity for development of natural abilities.	Australia still holds to the concept of <i>terra nullius</i> and as a result there are no personal rights in relation to the land.
Social Life, rights to be part of a community and citizenship.	No citizenship until 1967. Still a lot of work to be done until Aboriginal society is accepted by 'white' society.
Sexual Rights, rights to marry and freedom from sexual abuse.	Sexual abuse is common in Aboriginal Society. Police even in 2006 are accused of not treating black on black crime seriously. <sup>19</sup>
Intellectual Rights, rights to education and to develop intellectual abilities	During early settlement Aboriginal children did not receive the same education as whites, even today retention rates are between 20 and 32% depending on the State. <sup>20</sup>
Economic Rights, rights to work, right to own property, right to enter into economic contracts.	Even the Mabo decision does not give economic title to the land, it only gives occupational rights. Economic rights are denied. <sup>21</sup>
Political Rights, the right to vote and to take part in government.	Citizenship not achieved until 1967.
Cultural Rights, characterised by cultural identity, language and cultural tradition	In 1951 the Native Welfare Conference adopted a policy of assimilation that had the effect of socially engineering Aboriginals into "Europeans with black skins". Thereby promoting European values instead of traditional cultural rights.
Artistic Rights, as in creativity and artistic	Only recently have we seen the acceptability

<sup>18</sup> Moores, *Voices*, 487.

<sup>19</sup> Jean Kennedy, *Mundine Weighs into Child Abuse Debate* (Transcript from PM on Radio National on May 17, 2006); <http://www.abc.net.au/pm/content/2006/s1641045.htm>; accessed 20th May, 2006.

<sup>20</sup> Broom, *Aboriginal Australians*, 214.

<sup>21</sup> Moores, *Voices*, 328.

expression.

and popularity of Aboriginal art. Much of the art is related to the land and the traditions of the land. A land over which the Aboriginals still have no right of ownership.

The framework presented by Finnis and Gascoigne in relation to Aboriginal Land Rights presents a report card of shame for white society, the same white people who profess to be Christian and who live by Christian values.

### *Biblical Perspectives and Papal Documents*

As Christians we believe that God became human in Jesus Christ and as such Christ has been our example and inspiration on how to live a moral life. The Catechism of the Catholic Church confirms that at the heart of catechesis is Christ and everything else is taught with reference to Him.<sup>22</sup> Christian ethics also stems from the example of the life of Christ. William May comments on Christian ethics saying:

Christian ethics is the ethics of humanity, a reflection on human existence in the light of the story of Jesus, rather than an ethics for a particular group.<sup>23</sup>

William May's observation goes to the heart of the Aboriginal land rights issue as the ethics practiced by the original (Christian) settlers were highly biased in their favour and even today's Australians retain this ethical bias by not fully recognising Aboriginal land rights.

### *Christian Ethics and Catholic Teaching*

The history of the Catholic Church contains a body of teaching that recognises the rights of the indigenous people to their land. Pope John Paul III as early as 1537 declared in his *Sublimus Dei*<sup>24</sup> that Indians and all other people who may be later discovered by Christians should freely and legitimately enjoy their liberty and the possession of their property. More recently in 1931, Pope Pius XI confirmed in his encyclical *Quadragesimo Anno* (On Reconstruction of the Social Order) the right of ownership based on the grounds of first occupancy stating:

That history proves ownership, like other elements of social life....the natural right itself of both of owning goods privately and of passing them on by inheritance ought always to remain intact and inviolate, since this is indeed a right the State cannot take away.<sup>25</sup>

Following the Second Vatican Ecumenical Council there was a renewed consciousness of the issues of justice and peace and a call to local churches to pay greater attention to the social issues in their communities. Pope Paul VI in his encyclical *Populorum Progressio* (On the Development of Peoples) called Catholics in 1967 to recognise the plight of the underprivileged:

<sup>22</sup> John Paul II, Catechism of the Catholic Church, 107.

<sup>23</sup> W. E. May, "The Church as a Moral Teacher," *An Introduction to Moral Theology*, rev. ed. (Huntington: Our Sunday Visitor, 1994), 186.

<sup>24</sup> Pope Paul III, *Sublimus Dei*.

<sup>25</sup> Pope Pius XI, *Quadragesimo Anno* (Vatican City, 1931); <http://www.ewtn.com/library/encyc/p11quadr.htm>; accessed May 19th 2006.

Freedom from misery, the greater assurance of finding subsistence, health and fixed employment; an increased share of responsibility without oppression of any kind and in security from situations that do violence to their dignity as men.<sup>26</sup>

This encyclical led to the formation of the Australian Catholic Commission for Justice and Peace in 1968. This Commission was significant as it led the Catholic Bishops to be more forthright with regard to the plight of Aboriginal society. In 1972 a statement from the Commission clearly outlines the Catholic Church's position on Aboriginal land rights:

It is as obvious as a tree on the Nullarbor that Aborigines have land rights .... ownership, employment, housing, education and bargaining power are also paramount rights.<sup>27</sup>

Pope John Paul II in his encyclical *Veritatis Splendor* (On the Church's Moral Teaching) proclaims that human freedom is a right for everyone and that freedom is the essential part that is the basis of dignity for each individual

Human freedom belongs to us as creatures; it is a freedom which is given as a gift, one to be received like a seed and to be cultivated responsibly. It is an essential part of that creaturely image which is the basis of the dignity of the person.<sup>28</sup>

Pope John Paul's proclamation that human freedom belongs to everyone echoes the plight of Australian Aboriginals. Freedom without land rights is an anathema to Aboriginal culture as freedom is intrinsically tied to the land, yesterday, today and tomorrow.

### Conclusion

As Christians we are called to respect the dignity of the individual and as such we have a commitment to social justice, a commitment that calls us to respect the dignity and rights of the disadvantaged and those who have been displaced from their traditional land. However, to echo Christ's words in Matthew 25:35-36, Christ is still hungry; he is still a stranger and He is still a prisoner in His own country. We are driven as Christians by conscience and a moral responsibility for past acts, and even though our generation may not have initiated such policies as *terra nullius* we still share responsibility. Ford comments on moral responsibility and the Christian examination of conscience:

We need to be able to assess the moral responsibility that we bear for the acts that we have done, including their foreseen consequences, both intended and unintended.<sup>29</sup>

The consequences of *terra nullius* whether intended or not has resulted in Aboriginal society being displaced from their birthright, there is much to be done until that day when Aborigines have the same rights in land and title as other Australians.

Land rights is a complex issue as there are numerous stakeholders to be considered including: pastoralists, Federal, State and Local governments, the Church, the mining industry and other Australian citizens and landowners. It is true that these stakeholders have not always been the perpetrators of damage to the land. Indeed there are numerous examples of innovation and improved living conditions. Pope Paul VI recognised this dilemma in his encyclical *Populorum Progressio* stating:

<sup>26</sup> Pope Paul VI, *Populorum Progressio* (Vatican City, 1967); <http://www.ewtn.com/library/encyc/p11quadr.htm>; accessed May 19th 2006.

<sup>27</sup> Australian Catholic Bishops' Conference, *Aborigines*, Pastoral Letter, August 1972.

<sup>28</sup> W.E. May, "Veritatis Splendor: An Overview of the Encyclical," *An Introduction to Moral Theology* (Huntington: Our Sunday Visitor, 1997), 274-275.

<sup>29</sup> N. Ford, "Live Out The Truth in Love," in *From Moral Philosophy to Gospel Morality* (Melbourne: Catholic education Office, 1985), 58.

Yet, while recognising the damage done by certain types of colonialism and its consequences, one must at the same time acknowledge the qualities and achievement of the colonizers who brought their science and technical knowledge and left behind beneficial results of their presence in so many underprivileged regions.<sup>30</sup>

Despite the complexity of the issues there are signs of progress. The Mabo decision in 1992 confirmed that native title is recognised under Australian law. The Wik decision went further and recognised native title rights on pastoral leases, this was a highly significant decision as pastoral leases cover 42% of the Australian land mass.<sup>31</sup> The coexistence of native title now provides the foundation and opportunity whereby thousands of Aboriginal people may finally gain some rights to their traditional lands.

The Mabo and Wik decisions came at a cost, Eddie Mabo fought a long and lonely struggle against *terra nullius* and he died before he saw justice. John Koowarta led successive campaigns against the Queensland Government against racial discrimination on behalf of his Wik people; he also died before seeing justice for his title. Eddie Mabo and John Koowarta irrespective of their religious beliefs are modern day "Saints" in the struggle for Aboriginal land rights. We are inspired by their example.

Just as Eddie Mabo and John Koowarta inspire us we are likewise called to action. There is still much work to be done, the Mabo and Wik decisions have provided an opportunity and a platform to move forward on both a legal and political basis, this is an opportunity that is available now, and we should seize it and use it as a means to move towards national reconciliation and justice for all.

The fight for Aboriginal land rights continues and one does not have to look far for to see injustice. One glaring example of injustice is the plight of Tasmania's indigenous society. The history of Australia is at its darkest when discussing Tasmanian Aboriginals; justice is still outstanding and there is a strong cry from the remaining Tasmanian Aboriginals for land rights. The focus is once again on non-Aboriginal people to heed the call in Tasmania, the rest of Australia and the Torres Strait Islands to ensure that justice prevails and that justice is not restricted to hollow political rhetoric. Land rights for Aboriginals!

You make peaceful overtures  
 You talk of reconciliation  
 But our basic rights you still deny  
 Ain't that discrimination  
 Us Mob have to live with it  
 You'll never know our pain  
 The blood is on your hands whiteman  
 One day your attitude might change.<sup>32</sup>

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<sup>30</sup> Pope Paul VI, *Populorum Progressio*, 7.

<sup>31</sup> Justin Healey, *Aboriginal Land Rights* (Rozelle: the Spinney Press, 2002), 16.

<sup>32</sup> Frank Doolan, in Moores, *Voices*, 434.