

On Land, Rights and Justice

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A century ago an Aboriginal activist picketed Australia House in London wearing small, white toy skeletons pinned to his overcoat and a placard that declared, ‘This is all Australia has left of my people.’

According to historians, Anthony Martin Fernando (1864-1949) was born in Woolloomooloo, Sydney, to an Aboriginal mother and an unknown father, taking the name ‘Fernando’, in his words, as a gesture of respect for the working people of Italy he lived among during his extraordinary travels in Europe before WW1.

When he appeared before English courts on several occasions, this brave and eloquent man challenged the might and morality of the British Empire, declaring that whites were shooting, starving and hanging his people in Australia. After witnessing the murder of an Aborigine by white men he discovered that being a ‘native’ he was not allowed to give evidence in an Australian court. Rarely in the first century after the invasion did Aboriginal people achieve an equal measure of legal rights, let alone justice.

After walking with Aboriginal people around the shallow stone graves of numerous massacre sites, I know that as a nation we are yet to face our violent past and therefore remain delusional. We have amnesia about the past and so we cannot understand the present.

From the overcrowded communities of Maningrida and Galiwinku to the town camps in Alice Springs, Traditional Owners are raising their voices like Fernando, pleading for the same standard of justice, an end to the assault on their land, their rights and the very essence of their being.

The current neo-liberal fondness for insulting Aboriginal Culture demands that people “modernise” and leave their homelands but refuses to understand how this notion of modernism is also an invader bringing the upheaval to traditional patterns of life.

Look around the world and you can see the impact of mining, the clamour for natural resources to feed and shelter 7 billion people in our human family. The British earth scientist, Norman Myers calculates that since WW2 humans have consumed more raw materials than in all of human history. This predatory pattern, taking what we need to fuel the growth, is at the core of why so many Indigenous people in so many lands feel life is ‘out of kilter’. Yet Australians, on the whole, remain unaware or in deep denial of the damaging assault that continues on Aboriginal land, rights and justice.

Here in the 21st Century it is time to reflect on why government, judiciary, law enforcement and our society as a whole have been unable to deliver an equal measure of justice to Indigenous Australians.

As former High Court Judge Michael Kirby said in a magnificent speech recently, with the vote by more than 90% in the 1967 Referendum “We hoped that with one resolve, we could move beyond the past, beyond the pain and sorrow of violence, dispossession, prejudice and disadvantage.” But we have betrayed all of that trust by our treachery.

As we commemorate the mightily important legal victories achieved for Aboriginal and Torres Strait Islander peoples by John Koowarta, Eddie Mabo and the Wik People, we need to face the truth that Aboriginal people continue to be denied justice from Redfern to Palm Island, dying in the dry bed of the Todd River in Central Australia or a sweltering prison transport van in Western Australia.

We keep building prisons and seem unashamed that one quarter of our prisoners are Indigenous. It is why the Governor of NSW, Professor Marie Bashir has championed the call by numerous Aboriginal people for a re-investment in young lives to break this cycle of pain. Yet we blatantly disregard the inequity and injustice that denies so many Aboriginal people equal treatment in the eyes of the law. Ask the Supreme Court judges in the Northern Territory who have raised a storm over the Intervention’s interference with their responsibility to consider all aspects of a case in sentencing because Customary law, a Cultural right, has been taken away from Aboriginal people living there. The proposed ten year extension of the Intervention, the ironically named *Stronger Futures Legislation*, would cover the desecration of Sacred Aboriginal sites but still not afford an Aboriginal defendant the same legal right to have other Cultural issues and Customary Law considered by a judge.

Why have we denied Aboriginal people the full measure of protection of our Racial Discrimination Act?

Why do we discriminate, officially and unapologetically, by inflicting alcohol laws, income management and numerous forms of punishment aimed overwhelmingly at just one group of citizens?

Why do we trample our domestic and international laws by refusing to allow Aboriginal communities the self-determination that is their legal right?

There is still no equal measure of justice in this country if you are black.

Once we the people have entrusted elected politicians with great power, governments pursuing ideological agendas can so easily weaken the rulings of our most important courts. Even the seven member High Court is influenced by a Government's appointment of a single man or woman, a power that Michael Kirby points out, has produced setbacks and major defeats for Aboriginal legal cases including the Maningrida leader, Reggie Wurridjal's 2009 challenge to the Northern Territory Intervention.

Politicians reply that this is how it works in a Democracy and is what our Constitution intended. If we vote for them, we get what we deserve. But the lasting lesson of the 1967 Referendum, as Michael Kirby observes, is that even if more than 90 % of voting Australians clearly intended our government to make laws that advanced the wellbeing of Aboriginal people, Government has failed its responsibility.

Aboriginal people see no real consistency in Australian law despite its recourse to legal precedent. The Koowarta, Mabo and Wik decisions were soon followed by 'bucket loads of extinguishment'. Amendment after amendment to Native Title weakened this shaky grasp of Aboriginal rights. Even in a contest for the scraps of land left over or won after years of costly legal battle, Aboriginal people still struggle to harness any resource profit from their lands. So many successful land claims have been followed by State Government appeals or the threat of compulsory acquisition.

On the bigger stage, Australia's legal responsibility to observe the International laws on human rights are ignored. Our Governments can barely conceal their contempt for the world's most respected human rights authorities who have dared to pass a negative judgement on the Northern Territory Intervention's on going discrimination and the Government's crushing, controlling and punitive policies towards Aboriginal people.

Much of the fault for this legal mess in the 21st Century, especially the delays and unfair burden on Aboriginal people to prove continuous association with their land to regain their birth-right, can be sheeted home to the politicians who lacked the will and the belief in the crucial hours. In the recent Four Corners Program, *Judgement Day*, Paul Keating told reporter Liz Jackson that towards the end of the Mabo Native Title negotiations the biggest pressure came from the Labor Caucus, members of his own party who wanted the Prime Minister to give up. To Keating, "legislative rights are a gift...this was a crack of light to deal with fundamental Colonial dispossession."

What the *Four Corners* program did not emphasise is that Paul Keating was never prepared to give Aboriginal people the power to veto mining on their land. While sub-soil mining rights belong to the Commonwealth, access by mining companies ultimately will be determined by Government, especially with the increased powers demanded by the new 'Chief Protector', Indigenous Affairs Minister, Jenny Macklin.

So where do we stand 45 years after the 1967 Referendum, 30 years after the Koowarta High Court decision and 20 years after Mabo? An honest appraisal finds that our democracy has been terribly weakened. The will of the people has been denied and this is clearly reflected in the historic low standing of our political leaders. On land, rights and justice Aboriginal people remain the most deeply aggrieved.

In his Lowitja O'Donoghue Oration at the University of Adelaide on May 29th 2012, former High Court judge Kirby made a strong case for both desperately needed political activism and a highly principled judicial process and legal reform to address the persistent injustice faced by Indigenous Australians. He captured the failure of Australian political leadership to seize an historic opportunity and offered a vision of what might have been.

"If in the heady aftermath of the 1967 referendum, we were starting again, what would hindsight suggest that we should have done in Australia? Probably, our Parliament should have struck with bold legislation while the iron was hot. We should have moved quickly to include a preambular acknowledgement of the Aboriginal and Torres Strait Islander people in the Constitution. Embarked on a process to create a national properly representative

body of all Australia's indigenes. Plunged into negotiation of a treaty, which after all, was common British practice with dispossessed peoples...Any such treaty would have addressed the material disadvantages of the Indigenous peoples, viewed as a whole and from a perspective of a comparison with the majority population. In a proper exercise of the self-determination, promised to every 'people' by international law, Australians should probably have created a much larger body than the Aboriginal Land Fund Commission. One with proper powers to establish a national Equality Fund, designed to improve rapidly the conditions of all of this country's Aboriginals and Torres Strait Islanders. By this I mean all, not just those who could trace their ancestry to specific undemised Crown land. With goodwill and great effort. Had we done these things immediately after the 1967 referendum, we would probably now be much further advanced. A return to paternalistic, unconsulted impositions such as the Northern Territory Intervention would then probably have been unnecessary. With a little luck we might have been able to consign the 'races power' in our Constitution to the historic aberration it represents...But we did none of these things."

Former High Court Judge Michael Kirby 2012

I suggest that our unity of purpose as a nation, our so called 'white virtue' displayed in the 1967 Referendum, the years of active Reconciliation, the Sydney Harbour Bridge Walk, the Apology to the Stolen Generations and other symbolic expressions of goodwill, have been rendered hollow.

Many of the historic opportunities that Michael Kirby sees lost after 1967 are still capable of being negotiated if Government can only bring itself to deal honourably, face to face with Aboriginal community leaders.

Constitutional rights and recognition; a well supported National Congress of First Peoples; a Treaty or series of legal agreements; genuine self-determination; respect for international human rights covenants; an end to racial discrimination; genuine Land Rights and sovereignty; and an end to assimilation and paternalism, are the milestones by which we can measure the road to a truly great society in which we are all equal.

If we are to forge a new and hopeful relationship to close that space between us we must insist that our parliament, our judiciary, our law enforcement agencies and each and every one of us brings a genuine commitment to equity, to fairness...to justice.