Advise on the issue of westalia essay sample

Great Britain has recently annexed Westalia which has for some years been without effective government or legal system following a disastrous war with its neighbour Somalia. The British government is anxious to develop the natural resources of Westalia and, to this end, grants to multinational companies land concessions over large tracts of non-urban countryside in Westalia. Most of this land is covered by sparse rough grazing and is occupied by tent-dwelling groups of herdsmen who move across it with their cattle.

The concessions grant unrestricted rights to prospect for and exploit natural resources for fixed periods of years subject to an obligation to pay a proportion of profits to the government at the end of the concessionary period. Euros Investments plc is granted such a concession and locates large reserves of subterranean water which the herdsmen have tapped in the past to water themselves and their cattle. Euros Investments plc polices its concession to prevent the herdsmen drawing off the water.

It constructs a one metre diameter pipeline for 100 miles across country to Somalia where it sells the water. The pipeline is an insurmountable barrier to cattle. Advise Wilber who has been briefed by the charity International Human Rights to bring a claim on behalf of the herdsmen. In order to advise on this issue, it is of the greatest importance to understand if the herdsmen have any rights to their land through a legal system and if there is any kind of fiduciary relationship between the Government of Great Britain and the herdsmen which would allow a claim against the Government.

Bentham, in his article, ‘ The Principles of the Civil Code’, states that, ‘ there is no such thing as natural property, and that it is the work of law. ‘ Thus, he is suggesting that if the herdsmen have no legal system then they have no property rights. This view is further emphasized by his statement that, ‘ Property and law are born together and die together. Before laws were made there was no property; take away laws and property ceases. ‘ Thus from this angle it appears that there is no argument for the herdsmen as they are, ‘ without effective government or legal system. ‘

Alongside this view, Dukeminier and Krier, in their article entitled ‘ Property’ define communal ownership as the right of the community to exclude those not in the community and to be able to include all members of the community. Thus it would appear that the tribesmen do not have communal ownership as they are nomadic and thus have no right to exclude others from the plains. However, a set of rights to property can be seen in Delgamuukw v. British Columbia, 23rd December 1997, Supreme Court of Canada. An argument can be constructed from the initial principles applied by the original trial judge, McEachern CJ.

The trial judge set out four propositions of law. Namely that Aboriginal interest arises from the occupation or use of specific land for an extended period before the assertion of sovereignty. He secondly suggested that aboriginal interests are communal, consisting of subsistence activities and are not proprietary. However, he did say that at common law, aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. Thus there is an argument that

aboriginal property rights exist within the first two principles, and Wilbur must prove these.

Although it is clear from the written statement that the property right is communal as they are herdsmen and that they use specific land, as in the land above the large reserves of subterranean water. However under this view the chances of success are limited due to the fact that McEachern C. J. stated from the proposition, for which he cited St. Catherines Milling [1888] 14 AC 46 PC, that aboriginal rights are not proprietary in nature, but rather ‘ personal and usufructuary’ and dependent upon the good will of the Sovereign. Thus greatly limiting any claim against the Government.

There was an appeal against this case and in this appeal Macfarlane JA set out several principles which were to be initial points for discussing aboriginal property rights. He obtained these principles from previous Canadian cases and from the case of Mabo v. Queensland [No. 2] [1992] 175 CLR 1. The judge stated that these rights arise from historic occupation and possession of the aboriginal peoples’ tribal lands. The rights also exist through the operation of the law and do not depend on a grant from the Crown. The rights are absolute, but they are not subject to regulation and extinguishment.

They are also sui generis communal rights and they cannot be alienated other than to the crown. Finally they have to be related to aboriginal activities which formed an integral part of traditional aboriginal life prior to sovereignty. Thus from this perspective the herdsmen appear to have obtained all the necessary requirements of aboriginal land rights. The

herdsmen are obviously indigenous people and their possession and occupation is historical as they have been drawing water in the past. The rights are also communal as it is a group of herdsmen and no other herdsmen are excluded from the lands in question.

The herdsmen’s activities are also aboriginal as they have drawn water in the past and have made no attempt to revert from this. Macfarlane went as far to say that even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Thus despite the fact the Government has granted Euro Investments plc a concession this does not necessarily mean that the herdsmen have no right of access to their water sources.

It was recognised in this case in the dissenting judgement that the aboriginal title and rights are sui generis, and that they were not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts. Thus it will have to be argued that the herdsmen’s rights and title are the only ones of their kind, and that they exist despite the fact that Western legal concepts do not recognise them. Despite this it is unlikely that International Human Rights will be able to remove the interests of Euro Investment plc altogether as is shown in the case Canadian Pacific Ltd. v. Paul [1988] 2 SCR 654.

In this case it was shown that aboriginal title to lands is only ‘ personal’, in that it can not be sold or transferred and that this title is simply a licence to use and occupy the land and cannot compete on equal footing with other

propriety rights, such as a fee simple. Thus if the herdsmen are said to have title to the land then they may be able to have the pipe changed or altered but will not be able to have the company removed from their land altogether. In Guerin, Dickson J attempts to define aboriginal title as an ‘ interest in land’ which includes ‘ a legal right to occupy and possess certain lands.

This right to occupy and possess is defined in broad terms and is not qualified by reference to traditional and customary uses of those lands. However, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship. Therefore, the herdsmen may argue that they have rights to the land for these cultural reasons but they cannot remove these rights by turning their land into a car park, for example.

An attempt to show the rights of indigenous people can also be seen in Mabo v. Queensland [No. 2] [1992] 175 CLR 1. In this case there was an annexation of the Murray Islands to Queensland. It was decided that the radical title to all the land in those islands was to be vested in the Crown in right of Queensland. However, the traditional title of the Meriam people to the Murray Islands, being their rights to possession, occupation, use and enjoyment of the Islands, survived annexation of the Islands to Queensland and is preserved under the law of Queensland.

It was also decided that the traditional title of the Meriam people to the land in the Islands has not been extinguished by subsequent legislation or executive act and may not be extinguished without the payment of

compensation or damages to the traditional titleholders of the Islanders. The land in the Murray Islands is not Crown land within the meaning of that term in s. 5 of the Land Act 1962. Thus one can advise that there is a genuine claim of land rights belonging to indigenous peoples, and that these rights have been supported by law in the past.

The case of the herdsmen is given additional weight as the facts and situation of the case is very similar to Mabo, in so far as there was an annexation of indigenous people who were believed to have held such an undeveloped system of law that they could be occupied under the extended terra nullius idea. The issue of the Racial Discrimination Act also arose in this case and will thus be applicable in the Westalia case due to such similar circumstances. Normally, land is only acquired for a public purpose on the payment of just terms, whatever the statute may declare.

If the British Government sought to interfere with the herdsmen’s enjoyment of Westalia which their traditional title gives them and fails to do so on just terms, a question arises as to whether that action would be in contravention of ss. 9 or 10 of the racial discrimination act. Thus, an argument could be created that the British Government are in contravention of the Racial Discrimination act because of their actions. In New Windsor Corporation v. Mellor [1975] 1 Ch 380, CA the method by which a community can establish rights was shown.

This case shows that their right to use the land comes, ‘ only in custom from time immemorial. ‘ Thus it is in the interests of the herdsmen to prove that it has been a custom for generations to draw water from the ground. It can

even be shown in Wyld v. Silver [1963] Ch 243, 257 that an individual can sue himself to enforce the right of all be it against, ‘ fences being erected, or any holes being dug,’ or most importantly, ‘ any pipes being laid’ that would interfere unreasonably with the exercise by the villagers of their right.

Thus under British Law the actions of the Government are in effect illegal as they would interfere with the right of the herdsmen to draw water from the ground. They are also illegal as the pipes represent inappropriate use of the land on two levels. Firstly they are denying the herdsmen access to their traditional lands and they are stopping them from obtaining the water which they have a customary right to. These rights are shown in the decision in New Windsor Corporation v. Mellor that the inhabitants of New Windsor have a customary right to play their traditional sports in their traditional area.

However a case which would go against the idea of proceeding in legal action would be Milirrpum v. Nablaco Pty Ltd [1971] 17 FLR 141. This case was also of a very similar nature to the Westalia case and concluded that there was a recognizable system of law. However, it stated that despite the system of law, this did not provide for any propriety interest in any part of the land. This case showed the problem of the estimation of rights of different aboriginal tribes as they all have different levels of social organisation and some have more developed legal systems.

Therefore, some areas can be legally annexed but areas where development is high cannot be. Thus, it may be in the interest of the herdsmen to separate and apply claims separately if they are at different stages of development. Milirrpum also showed that there must be a reasonable use of

the land. This was taken in this case to be religious rituals, but they needed to prove that these rituals existed over time immemorial. Another issue to come from the Mabo and Milirrpum cases is that of the need to be able to exclude people from land to have property, as stated by Cohen in his dialogue on private property.

This could potentially be a problem for the herdsmen as they are nomadic and thus have no particular land from which they can exclude anyone. The only possibility is to claim, as the Aborigines did, that there are grounds of particular religious importance on which other groups of herdsmen would not travel. Another important aspect is that of fiduciary relationships. A fiduciary relationship involves a person who holds a position of trust in relation to another and who must therefore act for that person’s benefit.

Thus if a fiduciary relationship was proven to exist between the British Government and the tribesmen then the pipeline would have to be altered as the Government would not be acting in the interests of the tribesmen. This relationship can be seen in Guerin v R [1984] 13 DLR [4th] 321, where the Supreme Court of Canada recognised the existence of fiduciary duties on the Crown to protect indigenous or aboriginal people, despite the fact that the court was divided on whether the duty was sui generis or ‘ full blown trusteeship’ per Wilson J. This type of relationship can also be seen in Delgamuukw v.

British Columbia. Therefore there is the need for the charity to show a relationship of trust between the parties. This seems a likely outcome as the facts in Delgamuukw v. British Columbia are very similar to the facts in the

tribesmen case. Without more facts it is hard to say whether International Human Rights should continue to bring a claim. One could expect the herdsmen to obtain some sort of rights on their land but it is unlikely that they would be able to obtain total control and that they could remove Euros Investments from Westalia.