Property law: radical rejection of common law by the high court of australia

Law

Topic: Property law - “ The High Court of Australia’s decision in Mabo v of Queensland (No. 2) (1992) was a radical rejection of the Common Law’s previous attitude to the rights of indigenous people.” Discuss. This case involves an important piece of legislation involving the rights and land claims of indigenous peoples in Australia, historically and systematically marginalized by a legal system drawn from Australia’s colonial past under the British. By way of brief background to the case, the case had arisen as a result of an action brought against the government of Queensland, Australia by five Meriam Islanders (from the Murray Islands in the Torres Strait) to assail the Queensland Amendment Act of 1982. The action in effect asked the court to resolve a conflict of rights over the islands of Mer, Dauar and Waier in the Torres state -- considering that the land had been annexed by the defendant government in 1879, but prior to the annexation by the British, the Meriam people had been living in peace and cultivating the land. The plaintiffs, arguing on long possession, sought a declaration from the Court that they were entitled to possessory title over the land. The defendant government, on the other hand, argued that when England had made Australia part of the Crown’s dominions, the law of England automatically applied and therefore the Crown obtained “ absolute beneficial ownership” of all land in the territory. In a landmark decision and a watershed moment for the land rights struggle of aboriginal peoples in Australia, the court – voting five to one -- found in favor of the plaintiffs, and held in very strong words: It is imperative in today’s world that the common law should neither be or be seen to be frozen in an age of racial discrimination... The fiction by which the rights and interests of indigenous

inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country. The Mabo decision, as it had become to be known, signaled a radical shift from the previous paradigm and attitudes held not only by the legal system but by Australian society in general with respect to native titles. Specifically, the Mabo decision heralded a departure from the Terra Nullius (empty lands) doctrine, and in effect reversed the Gove Land Rights Case (Millirpum v. Nabalco Pty Ltd. 17 FLR 141) which involved a 12-year Bauxite mining lease over the Gove Peninsula in Arnhem Land. The Supreme Court of the Northern Territory in 1971 held that native title cannot be recognized in a settled colony, and even if these rights had existed they were extinguished. This is particularly significant because the recognition “ native title” accords more flexibility to the holder, as opposed to English customary rights. The reason is that a native title can be the subject of transfer, via surrender or exchange. Hence, there is greater room for communities asserting the title to evolve and adapt to the changing times and changing conditions. In a sense, the decision has caused a blurring of the lines between private ownership and native title, thus rendering it possible for these two property regimes to co-exist. Further, while the Mabo decision did not go so far as completely dismantle the status of Australia as “ settled colony”, it interrogated the idea that the fact of settlement ipso facto gave rise to absolute beneficial ownership of all lands to England. The decision recognized that contrary to the terra nullius doctrine, which was premised on the colonial idea that prior to annexation the lands were empty/uncivilized/unregulated by any form of law or structure, there was

such a thing as native title, which is determined by the nexus to the land of indigenous occupants and their traditional customs. Justices Dean and Gauldron referred to this as: An established entitlement of an identified community, group, or (rarely) an individual to the occupation or use of particular land and that the entitlement be of sufficient significance to establish locally recognized special relationship between the particular community, group, or individual and that land. It is important to note the nuance of the decision, in that it did not claim that the settlement doctrine is completely dissolved. What it did claim is that common law (which was introduced in Australia by virtue of the settlement) could validly accommodate the concept of native title, for as long as the requisites of establishing native title have been proven. The decision also holds that while native title is not automatically abrogated by the act of annexation, native title can be validly unilaterally extinguished by the Crown for as long as the extinguishment was made clearly and without ambiguity by the legislature or the executive, and it is the burden of the party asserting the extinguishment that such had been clearly and unambiguously made. In a sense, therefore, the Mabo doctrine straddles two opposing paradigms: it provides an important layer of protection to aboriginal communities and indigenous peoples while at the same time still affirming the power and legitimacy of the colonial government. It also led to policy and practical questions being remaining unanswered – such as who owns access to the resources, e. g., minerals (a question that the Court would face a decade later.) It is also simplistic to say that before the Mabo decision, communal property rights were completely unrecognized under British common law and that British law

lived in monolithic blindness of pre-existing systems. If Australia had been designated as a “ conquered colony”, then the laws of the conquered indigenous tribes would apply. It is because Australia has long been considered a “ settled colony” that the persistent debates arise. However, as far as British common law is concerned, English customary rights had already been recognized and accepted. In fact, the “ rights of common” and “ customary rights” with respect to natural resources are long in place. As early as three hundred years ago, customary rights had already been appreciated by the courts, and this was affirmed in the case of Oxfordshire County Council v. Oxford City Council wherein reference was made to a long line of cases demonstrating that customary rights that have been in place “ since time immemorial”, particularly over village greens and similar areas. To quote from Lord Hoffman at paragraph 5 of the stated case, “ village greens are in theory survivals from the mediaeval past, established by immemorial local customs dating back to before the accession of Richard I in 1189”. Of course, current law (CRA 1965 and CA 2006) require registration of rights over land so that its continued use and enjoyment may be guaranteed. Be that as it may, the Mabo decision is a radical sea-change in Australian jurisprudence. It paved the way for policy changes, most notably the enactment of the “ Native Title Act of 1993” which established the National Native Title Tribunal, with the end in view of creating an arbitration mechanism for the resolution of native title claims. But more importantly, the Mabo decision represents a change in attitudes in how indigenous peoples are viewed and how they should be treated. From previous attitudes of conferring “ new rights” upon them by the magnanimity and grace of the

Crown, we now move towards respect and acknowledgement of “ existing rights” – a major shift with important implications for Australian society and even the world. References Allen, CK. (1964) Law in the Making, 7th edition. Oxford: Oxford University Press. Mabo v. Queensland (No. 2.) (1992) 175 CLR 1. Millirpum v. Nabalco Pty Ltd. (1971) 17 FLR 141