A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia

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On 3 June 1992 a majority of the High Court ruled in favour of Mr. Eddie Mabo and others in the claim against the Queensland government for recognition of their ownership of most of Mer, one of three islands in the Murray Group in eastern Torres Strait. In Mabo the court effectively overturned the long-held legal doctrine of terra nullius, which maintained that Australia was land belonging to no one prior to Crown acquisition of sovereignty. The High Court established that the people of Mer hold a “native title” to their island which is recognized under Australian law. The case has changed the political and legal setting in which indigenous issues are being considered in Australia. This article considers the question of whether native title rights apply to the traditional use of coastal and other waters. Are native title claims to areas beyond the foreshores—e.g. to the sea-bed and territorial sea areas—capable of determination on Mabo principles?

Background

Eddie Mabo was a member of the Meriam people of Murray Island in the Torres Strait. In May 1982 he and four other Islanders began action in the High Court of Australia seeking confirmation of their traditional land rights.

They claimed that Murray Island (Mer) and surrounding islands and reefs had been continually inhabited and exclusively possessed by the Meriam people who lived in permanent communities with their own social and political organization. They conceded that the British Crown (in the form of the colony of Queensland) became sovereign of the islands when they were annexed in 1879. Nevertheless, they claimed continued enjoyment of their land rights and that these had not been validly extinguished by the sovereign. They sought recognition of these continuing rights from the Australian legal system. This was the High Court’s first

opportunity, since its establishment in 1901, to deal with the question of the existence and nature of native title in Australia.

The case was heard over a period of ten years, through both the High Court and the Queensland Supreme Court (which took evidence to establish the Islanders' ongoing association with their land). During this time, three of the five plaintiffs, including Eddie Mabo, died, as did several important witnesses.

In 1985 the then Queensland Government attempted to pre-empt the case when it legislated to extinguish retrospectively the Islanders' claimed rights. The Queensland Coast Islands Declaratory Act 1985 declared that, upon the islands being annexed, they were "vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever". However, in 1988, the High Court ruled that this Act was invalid as it was contrary to the Commonwealth's Racial Discrimination Act 1975.¹

On 3 June 1992 the High Court, by a majority of six to one, upheld the Islanders' claim and ruled that "the lands of this continent were not terra nullius or 'practically unoccupied' in 1978" and that the Meriam people were "entitled as against the whole world to possession, occupation, use and enjoyment of the lands of Murray Island".

In upholding the claims of the plaintiffs—from Murray Island in the Torres Strait—the Court held that Australia was not terra nullius when settled by the British in 1788, but occupied by Aboriginal and Torres Strait Islander peoples, who had their own laws and customs, and whose "native title" to land survived the Crown's annexation of Australia. In recognizing the existence of native title, the Court has introduced an important new concept to the common law of Australia.

The profound significance of this development has already been acknowledged by governments, by the media, by indigenous people themselves, and by the pastoral and mining industries concerned at the "uncertainties" the decision may introduce to Australia's system of land tenure. Apart from its practical effects, however, the Mabo judgment also has great political and symbolic importance. It has set a new agenda for debate on relations between indigenous and non-indigenous Australians.

Summary of Mabo Judgment

All seven High Court judges in Mabo explicitly accept that (by varying names) traditional native property rights (TNPR) existed before European colonization of Australia. Even Dawson J, who was the lone dissentient, assumed this was the case.⁴ Not that this made much difference: he laid emphasis on the need for the crown to recognize any form of native interest in land and noted that had not occurred. In the absence of that recognition, on the assumption of crown sovereignty, any TNPR as may have existed were extinguished.⁵ The other six judges found

³ Ibid., 480–481.