LEGAL FUNDAMENTALISM AND mabo

Gordon Brysland

Can minority rights be dispensed with whenever Parliament considers it convenient?

The general public must be bewildered (if not appalled) by the course which the *Mabo* debate has taken in recent months. It is important in the national interest to return to what the High Court actually decided and to measure recent assertions and rhetoric against both *Mabo* and the general law. There is a need to focus on the *legal* questions at stake as a means of bringing the political issues back into perspective.

Some arguments put by those resisting national legislation to implement *Mabo* have their basis in the 'literalistic adherence to legal dogma'. The term 'legal fundamentalism' reflects parallels which exist with fundamentalist techniques and motives in other areas of society. Fundamentalist agendas typically involve disrespect for minority rights. This is one reason it was appropriate to raise this aspect of the *Mabo* debate before WACOSS. Legal fundamentalism carries with it the idea of legal revisionism and is different to the legalistic approach sometimes called 'black letter law'.

What Mabo decided

The High Court (*Mabo v Queensland* 66 ALJR 408) held that:

- the concept of native title is part of Australian law;
- native title may exist where evidence establishes that an Aboriginal group has substantially maintained its traditional connection with land based on continued acknowledgment of that group's laws and customs;
- the Meriam people had established native title as a matter of fact;
- native title can be extinguished by legislative or executive action (where the intention to do so is clearly revealed). Extinguishment is not wrongful in the sense that it leads to general compensatory damages;
- Meriam native title had not been extinguished by legislative or executive action (except in minor respects);
- where the Commonwealth extinguishes native title, it must comply with the Constitution and provide just terms;
- where a State extinguishes native title, it must comply with valid Commonwealth laws, including the *Racial Discrimination Act* 1975;
- grants of freehold and leases extinguish native title, but grants of lesser interests may not.

Role of the High Court

Criticism of the High Court is made on two main grounds. First, it is said that the High Court has *changed* the law and, in so doing, has gone beyond its true constitutional role. Second, it is said that, in changing the law, the High Court had regard to public policy. Richard Court says:

> Let judges stick to interpretation of people's law, without presuming to take into their own hands the creation of laws for the people'. [*Australian*, 21.7.93, 9]

Hugh Morgan referred to 'usurpation of Parliament's prerogatives' and said the judges had engaged in 'naive adventurism'. This challenges the legitimacy of the *Mabo* decision rather than its legal correctness. A *Sydney Morning Herald* editorial rightly described the remarks as 'hysterical nonsense' (2.7.93, p.10).[1] Into the same category can be put remarks

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by the Western Australian Attorney-General, Cheryl Edwardes, that the High Court has 'trespassed onto the legislative domain by creating new law'.[2]

Legal fundamentalists say that Parliament is the *only* body with a constitutional mandate to actually *make* law and that the courts may only *interpret* what Parliament says. But the evolution of entire universes of the common law must surely have put to rest any lingering dogma that it is no function of appellate courts to make law. The High Court openly recognises that it makes law and recently said:

> Nowadays nobody accepts that judges simply declare the law — everybody knows that, within their area of competence and subject to the legislature, judges make law. [*O'Toole v Charles David* (1990) 96 ALR 1 at 21-22]

The idea that judges are value-neutral automatons is gone and suggestions that the High Court may not even 'develop' organic law within principled limits are misconceived.[3]

The High Court has *always* made common law, and has a *duty* to do so within the recognised principles of judicial law making. This is even more true now after the *Australia Act* 1986 finally freed the law of this country from residual imperial influences. Judicial law making has always admitted public policy as an important element. Besides, the High Court in *Mabo* was acutely aware of the proper role played by public policy in formulating its decision. Brennan J said:

> This court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. [at 416]

The High Court has been subjected to unprecedented abuse by many who disagree with *Mabo* at the *political* level. The High Court invites public scrutiny of its decisions but uninformed attacks only undermine the rule of law. The quality of public comment on the techniques and limitations of judicial law making has traditionally been very low in this country. One commentator referred to the 'appalling ignorance of the principles of judicial development of the common law, parliamentary democracy, responsible government and federalism'.[4] Particularly misunderstood have been the inductive and analogical principles which control judicial law making, and the role played in this process by public policy.[5]

In a rare response to criticism, Mason CJ defended the High Court in these terms:

> The formulation of legal principle is, and always has been, undertaken in the light of policy considerations . . . Because policy is a relevant factor in determining the shape of legal principle, the formulation of legal principle and a change in legal principle may wear the appearance of being a legislative act, but the principle enunciated by a judicial decision can be overridden by the legislature and replaced by a rule of its choice . . . The fact that in Mabo [and other cases] the Court had regard to policy considerations does not indicate that the Court is trespassing beyond its judicial function or going beyond what courts have traditionally done in the past . . . So, far from being an adventure on the part of the High Court, the decision reflects what has happened in the great common law jurisdictions of the world and in the International Court. [(July 1993) *Australian Lawyer* 18 at 23]

It may be true that the High Court is more judicially activist than at times in the past. This partly reflects the type of cases brought before it and a discernible trend on the part of governments to leave controversial issues to the judiciary (rather than risk electoral backlash). One writer describes the High Court as moving 'to the eye of the storm in public affairs'.[6] However, it is nakedly political to suggest that the High Court has exceeded its proper role on the simplistic basis that it has no mandate to make law, or that it had regard to policy.

The High Court has a constitutional duty to decide cases brought before it and, where appropriate, to declare the law necessary to decide those cases, within proper limits. As Mason CJ says, Parliament may legislate to replace judicial law with the rule of its choice. But, any Commonwealth action to replace native title with another rule would need to take account of Australia's treaty obligations, our international standing and the need for a sound moral basis to justify diminishing minority rights. Since the Commonwealth released draft *Mabo* legislation, Gough Whitlam and others have reminded the Federal Government of its obligations in this regard.

Legal fundamentalist views about the High Court's role only distort the real issues, promote uncertainty and erode the rule of law. This last point is illustrated by State leaders' apparent regard for *Mabo*, not as '*the law*', but as some optional negotiating position. Even more extreme and divisive are Bill Hassell's views implying that the High Court is merely part of a wider conspiracy 'to create an Aboriginal, separate, sovereign state' (*West Australian*, 3.8.93, p.11). Remarks like these need hardly be dignified with a serious reply, except to say that, until now, it was only extreme right-wing groups like the League of Rights which have publicly promoted such views. Of course, the main proponent of a separate sovereign state in WA has been Hassell himself with his fantasy secession views (*The Bulletin*, 22.6.93, p.29).

No less provocative is Hugh Morgan's reported comment that the High Court had now 'given substance to the ambitions of Australian communists and the Bolshevik left' (*Australian*, 13.10.92, p.3). Do comments like these have a proper place in responsible debate about *Mabo*? Suggestions by Morgan that the High Court judges have corrupted their own institution also sit less comfortably these days with revelations that Western Mining Corporation itself was recently guilty of claim-jumping against Savage Resources. Morgan has now been censured by WMC for public remarks on *Mabo* and other matters.

Validity of titles

Governments may extinguish native title and, where they do, it is not wrongful. In other words, taking away native title does not create any general obligation to pay compensatory damages. The High Court has said that grants of freehold and leases necessarily extinguish native title. Richard Court says that native title 'has the potential to override all other rights because it is said to pre-exist all other rights under law in Australia', including it seems, freehold title to Australian backyards (*Australian*, 21.7.93, p.9). Is this consistent with what the High Court decided?

If native title is established, freehold and leases extinguish that native title — the High Court said so. If titles were regularly granted before 1975 (that is, before the *Racial Discrimination Act* (Cth) came into effect), that is the end of the matter. If granted afterwards, the effect of s.10 of the *Racial Discrimination Act* must be considered. Summarised, that provision says:

> If, by reason of . . . a law of the Commonwealth or of a State or Territory, persons of a particular race . . . do not enjoy a right that is enjoyed by persons of another race . . . then, notwithstanding anything in that law, persons of the first-mentioned race . . . shall, by force of this section, enjoy that right to the same extent as persons of that other race . . . .

The argument for invalidity of freehold and leases is based on the fate of Queensland legislation which retrospectively

declared an intention to extinguish *any* native title rights which may have existed on the Murray Islands (the *Queensland Coast Islands Declaratory Act* 1985). But, any analogy between that legislation and granted titles is a false analogy. The suggested argument does *not* lead to freehold and leases (or the legislation under which they are granted) being invalid.[7] Where freehold and leases were regularly granted under a general law in circumstances where that law omitted to give native title holders the same right to compensation conferred on others, s.10 of the *Racial Discrimination Act* operates simply to make the right to compensation universal.

The High Court made this clear in 1985 (*Gerhardy v Brown* 159 CLR 70 at 98-99) and later confirmed the position in these words:

> . . . Section 10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. [*Mabo v Queensland* (1988) 166 CLR 186 at 217]

Section 10 is a self-executing provision where freehold and leases extinguish any incidents of native title. The Queensland legislation was held invalid because it attempted to operate as an express *prohibition* on native title — it was inconsistent with the *Racial Discrimination Act* and invalid by reason of s.109 of the *Constitution*.

Section 10 operates (as it says, 'by force of this section') to allow native title holders to enjoy the same legal rights as do others in comparable circumstances. The spectre of mining and pastoral leases (let alone freehold backyards) actually being declared invalid (whether granted before or after 1975) is a case of jumping at legal shadows. There is a world of difference between legislation which expressly denies native title rights, and titles granted under general statutes which, incidentally, fail to give native title holders equal rights. Neither sovereign risk nor backyard security raise real doubts about title validity.

What *is* increasingly clear is that those leaders who are sending distress signals to both the electorate and the international community (for whatever reasons) will bear some responsibility for any investment breakdown caused by a triumph of rhetoric over what the High Court has actually said. Of course, Aborigines (or anyone else) may commence legal proceedings to establish native title. But, simply to take a map of Western Australia and colour in all the areas comprising unalienated Crown land, pastoral leases and mining titles does not establish that over 80% of Western Australia is 'claimable', as Premier Court suggests. The logical end-point to his argument is that *all* of Western Australia is 'claimable' or, perhaps, 120% if the continental shelf is included.

A realistic assessment of what is actually 'claimable' needs to take close account of the historical circumstances surrounding claims — in other words, the prospects of demonstrating a continuing traditional connection with land. Brennan J in *Mabo* left open the possibility that there may be no successful mainland claims and commentators routinely point to 'formidable problems of proof'.[8] Recent developments in *Utemorrah v Commonwealth* (1992) 108 ALR 225 also indicate courts will insist on strict compliance with *Mabo*. Owen J said that, if the plaintiffs stray too far from *Mabo*, 'it would be to bring into question whether there is a cause of action at all'. New South Wales has asked Mason CJ in the High Court to strike out the *Wiradjuri Claim* as being an abuse of legal process. ATSIC has also indicated it will not fund ambit claims.

The proper assessment of what is 'claimable' also needs to address the fact that, subject to the operation of the *Racial Discrimination Act*, only land which is unaffected by regularly granted titles can ever be successfully 'claimed' in the same way that the Meriam people 'claimed' possession of their land 'as against the whole world'. It is precisely because the figure of 80% is so palpably inflated that there is such a strong political push by Aboriginal leaders for Commonwealth legislation to expand *Mabo* principles to benefit a wider cross-section of Aboriginal society. Aboriginal representatives themselves (and many others) have pointed out that *Mabo* will benefit only a very small number of traditional Aboriginal people in the remotest regions. The argument that freehold and leases extinguishing native title are invalid is simply wrong.

Cape York Claim

The Commonwealth has said it will legislate to confirm title validity and pay any compensation required by the *Racial Discrimination Act* on all titles granted between 1975 and 1993. Constitutional impediments to legislation in these terms raised by Attorney-General Edwardes (WA) and others are largely imagined. However, the Prime Minister indicated he would not support legislation to take away the ability of the Wik people to pursue claims concerning CRA bauxite leases on the Cape York Peninsula. The Wik people are not asserting their primary claim strictly on the basis of native title as established in *Mabo*. If that were the case, their claim would be reduced to an assessment of any compensation payable under the *Racial Discrimination Act* when the Commonwealth legislates.

The Wik claim is based on an argument that Queensland owed a fiduciary duty to the Wik people (either generally or arising from legislation) which was breached by granting the bauxite leases. It is said that Queensland had a duty to deal with Wik land in a manner which preserved those people's best interests and that the bauxite leases were granted in breach of trust. CRA claims that international banks will not finance further development because of the question mark now over the leases. It has been reported that, if the Wik claim succeeds, it may cast doubt on all land titles in Australia going back to 1788 (Brennan, *Australian*, 16.8.93, p.8). Certainly, granted titles taken with notice of any breach of trust would be vulnerable, but statutes of limitation may also have an impact.

In the face of these dramatic consequences, was the Commonwealth not being unreasonable? Before answering that question, we should look first at the legal basis for existence of a general fiduciary duty in Australia. The High Court has said that the question is one of 'fundamental importance' which should be determined in light of facts found in a particular case (*Northern Land Council v Commonwealth [No 2]* (1987) 61 ALJR 616 at 620). However, despite argument on the issue, only Toohey J in *Mabo* was prepared to find a general fiduciary duty. Are the remaining six judges likely to adopt that view? The answer here must be a fairly confident 'no'.[9]

There are a number of reasons for this — first, the majority view recognising that legislative and executive extinguishment of native title is not wrongful is inherently inconsistent with any general fiduciary obligation arising. Second, the majority view that a limited fiduciary duty may arise on surrender of native title is a signal that the High Court would not adopt a wider view, at least where no special legislation operated. Third, if it is correct that recognition of a general fiduciary duty would put in doubt all titles granted since 1788, that recognition may go beyond the judicial function. This is because, to use the words of Brennan J in *Mabo*, it would 'fracture the skeleton of principle which gives the body of our law its shape and internal consistency' (at 416). Fourth, it is arguable that a

general fiduciary duty is largely unnecessary given protections already within the *Racial Discrimination Act*. Fifth, there are problems with the reasoning of Toohey J and the cases on which he relies.

The question then becomes — if the Wik claim is unlikely to succeed, why doesn't the Commonwealth simply legislate to comply with international financiers' wishes to prevent the claim progressing through the courts? The indigenous people would be deprived of nothing of value and development could proceed unimpeded. The answer here is that there is a wider principle at stake. This is that all Australians, including Aboriginal people, have a right to see their claims duly determined according to law. What the Commonwealth considered it was being asked to do was to arbitrarily dispense with that right.

In much the same vein, Richard Court and others have repeatedly called for a referendum to provide authority for the Commonwealth to legislate away the whole concept of native title — that is, to take away property rights given under the law together with the ability to enforce them according to law. There is some irony in suggesting that a minority group's ability to seek compensation for extinguishment of their rights should be legislated away while Western Mining Corporation is testing its right to compensation in the Federal Court for extinguishment of petroleum exploration rights in the Timor Gap. The referendum proposal is no more than a thinly veiled invitation for voters to indulge racist attitudes.

It is the idea, that it is the legitimate business of governments to extinguish property and other rights of minorities when convenient, which represents another example of legal fundamentalism. The belief that 'majoritarianism' may be enlisted at any turn is one reason for the growth of judicial review.[10] We may say it is OK for the majority to take away minority rights, but who will we be invited to vote on next? We might find a majority which resents the fact that people in Dalkeith live in big houses, that ethnic Australians are entitled to vote, that boat people have any legal rights or that people charged with criminal offences are entitled to legal representation. It is little wonder that church leaders have drawn parallels between demands by State leaders that *Mabo* be legislated away, and the actions of totalitarian regimes in the 1930s. These are strong and disturbing analogies indeed.

The Prime Minster argued the Commonwealth's position on the basis of a distinction between an 'innocent' extinguishment of native title by operation of general laws under which land titles were granted and, in the case of the bauxite leases, 'wilful disregard' of Wik interests by Queensland. Certainly, historical fact may support some distinction in these terms (Reynolds, *Australian*, 16.8.93, p.9). On this basis, the Commonwealth offered legislative assistance to validate bauxite leases but *only* if Queensland were able to show that it did not act in wilful disregard of Wik interests or the legislation sought was otherwise non-discriminatory.

Apparently, Queensland has now showed that the legislation it is seeking is non-discriminatory and the Commonwealth has agreed in principle to validate the leases. The Wik people will be free to pursue claims for breach of fiduciary duty against Queensland. If those claims are successful, compensation may be payable. The CRA bauxite leases will remain valid and intact, and the project can proceed. If the Commonwealth had acted in any other way, it would have been sanctioning discrimination and effectively suspending operation of the *Racial Discrimination Act* in breach of Australia's international obligations. For this, the Wik people would have had their international legal remedy.

The Prime Minister is reported as saying:

> The key question here is, are the rights of Australians, including Aboriginal Australians, to be obliterated by acts of the Parliament? [*Australian*, 13.8.93, p.4].

A 'yes' answer to that question would be to entrench legal fundamentalism — that is, promotion of the dogma that minority rights may be dispensed with whenever Parliament considers it convenient. But, while the Commonwealth may have taken a principled approach on this point, whether resolution of the whole issue could have been better managed is another matter.

Legal fundamentalism

Attacks on the High Court and calls for legislation to take away rights of Aboriginal people to have their claims determined according to law are at least partly inspired by what I have called 'legal fundamentalism'. The legal dogma lies in ideas that — first, it is no function of the High Court to make law or have regard to policy and, second, that legislating to take away the right to have claims determined according to law when convenient is a legitimate and proper function of government. Validity of titles does not raise the same issue. Rather, the suggestion that leases and freehold are invalid is simply wrong as a matter of legal analysis.

Protection of minority rights under the *Constitution* and by the processes of judicial review are important safeguards in a democratic society against the arbitrary exercise of executive power. Some people argue that a *Bill of Rights* is also necessary to fully secure that protection. No doubt, the many and complex issues thrown open by *Mabo*, including demands for reconciliation with Aboriginal people, are controversial and highly political. The wider interest in achieving a just settlement of issues, however, needs to be considered by the community at large. This does not mean that we should ignore the critical importance of mineral development to Australia's future in the 21st century or wantonly forego project opportunities which relieve unemployment and create wealth.

However, we should be careful not to lightly sacrifice minority rights for the sake of pacifying the powerful, or diminishing the status of different classes of Australians according to what is considered convenient at the time. In his 1992 Report, then WACOSS President Doug Robertson said: 'We must never deny the need for services and support to the currently disadvantaged'. We should also be vigilant in our support for the legal rights of the disadvantaged and resist legal fundamentalist arguments which seek to erode those rights. Organisations like WACOSS have an important role to play in this process.

References

1. cf. Meadows, (August 1993) *Australian Lawyer* 3.
2. Edwardes Ministerial Statement 4.
3. cf Ludeke, QC, *Australian Financial Review*, 30.7.93, p.19.
4. Brennan, Mabo Misconceptions, 1.
5. cf Mason CJ 67 *ALJ* 568 at 569.
6. Doyle, (1993) 23 *UWALR* 15 at 32.
7. Gray, 12(2) *AMPLA Bulletin* 62 at 84; Hunt, December 1992 *AJM* 23 at 28; Lumb 42 *ICLJ* 84 at 89.
8. Forbes, 11(4) *AMPLA Bulletin* 139 at 141.
9. cf Brennan, 15 *SLR* 206 at 213-218.
10. French J (1993) 23 *UWALR* 120, describes.