**The Mabo Case**

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# 1. Introduction

The Mabo case decision has had a far-reaching impact. Torres Strait and Aboriginal peoples occupied the country for more than fifty thousand years before the British arrival in Australia in 1788. The British brought with them a new language and a set of new laws and customs. Additionally, they developed a strong connection with the country through the Australian land over the time. Primarily, on their arrival, the British declared Australia to be *terra nullius,* i.e., the land of no people, an empty land that belongs to no body. Under the International Law, this term implies that the territory is inhibited (Fitzmaurice, 2007). For this reason, they refused to recognize the occupation and unique connection of the Torres Strait and Aboriginal peoples to the Australian land. Furthermore, The British took over the Australian land from these peoples without any agreement or payment.

Eddie Mabo was a Torres Strait Islander. He fought to change the Australian laws concerning the ownership of the land because he believed them to be wrong. Since his childhood, Mabo witnessed Queensland Government’s strict regulation of the land in the country. In his heart, he certainly believed that the land belonged to the people of Torres Strait who inhabited there for thousands of years. However, the Australian government also believed that the land belonged to it. In 1981, Mabo took his first step towards changing the lives of the Aboriginal peoples in Australia forever. He made a speech in James Cook University of Queensland exhibiting his and his people’s beliefs concerning the ownership and inheritance of land in the country.

A lawyer heard the speech. He approached Mabo and asked him that if he would like to challenge the Australian government in the courts to declare the true ownership of the land. It is what exactly Mabo did. He challenged the government. The case ran for ten years in the courts. It was not until 1992 when the court decided that the *terra nullius* should not have been applied to the lands in the country. The decision further recognized that the Torres Strait Islander and Aboriginal peoples had the rights on the lands. The judgment further explained that the rights exercised on the lands before the arrival of the British must continue to date. Sadly Mabo never found out about the results of his case. He died in the same year, just five months before the decision came out.

# 2. Importance of Mabo Case

The Mabo case proved to be turning point to the lives of the Torres Strait Islander and Aboriginal peoples in Australia for three prime reasons. *Firstly,* it acknowledged the unique connections of the peoples with the Australian land, and *secondly,* it led the passing of *The Native Title Act* 1993 by the Australian Parliament.

## 2.1 Acknowledgement of the Emotional Connection

The Mabo decision primarily acknowledged the emotional and historical linkage of the Torres Strait Islander and Aboriginal peoples to the lands in Australia. The decision is of considerable importance to the Indigenous peoples in the country due to the fact that the presence of these peoples have now officially been recognized by the Anglo-American laws. Moreover, Australia is no more *terra nullius* now. However, with the passage of time, criticism on the decision increased. Irene Watson, noted scholar, observed that although most people, post Mabo, think that the Aboriginal peoples in Australia has won but as a matter of fact, they are still working hard for same goal, i.e., land rights and self determination (Kirra.austlii.edu.au, 2005). He continued that the peoples are even working harder now due to the fact that they to unmask the illusion as well, the illusion that the blacks have got all of it (Kirra.austlii.edu.au, 2005).

Although the decision of the Mabo case generally seemed welcome, it became increasingly divisive with time. Almost all of the Indigenous people celebrated the victory. They began looking forward to a new age of reconciliation, perhaps (as apparent from some of the public discussions on various platforms) even a new republican constitution. However, with the passage of time, more people began to oppose a particular part of the case, i.e., the white guilt industry (ABC News, 2012). Moreover, mining industry has been really concerned about the after-effects of the Mabo case decision. It worried that the mining industry in Australia will be flooded with land claims in contrary to the national interest. The Minerals Council of Australia (previously known as the Australian Mining Industrial Council) took out full-page advertisements in this regard. Additionally, the claim of Victorian Premiere Jeff Kennett that the Australian backyard was under threat from the Aboriginal peoples only added to the panic. He, since then, has admitted that he wrong in making the claim (The Age, 2002).

## 2.2 The Native Titles

The Native Title Act 1993 recognizes a set of rights and interests over lands and waters of the areas where the Torres Strait Islander and Aboriginal peoples inhibit in Australia (Nntt.gov.au, n.d.). In these areas, the groups of peoples have practiced (and continue to practice) customs and traditional laws prior to British occupation (sovereignty). The native rights can also be seen as a bundle of sticks where each and every stick represents a different type of right such as the right to visit places of cultural importance, build shelters, collect food, hunt and fish, conduct ceremonies, and live and camp in the area (Nntt.gov.au, n.d.). Therefore, selling or leasing parts of the lands reduces the size of the bundle until a time would come when nothing would be left out of the bundle.

For these reasons, native titles must be recognized. Courts need answers to the following two questions in this regard. The first question is if the rights and interests of the Torres Strait Island and Aboriginal peoples are based on their conventional connection to the land under the traditional laws and customs of these peoples. If the answer to this question is in affirmation then the court moves on to the next question that if the conventional connection of the peoples with the lands had partially or entirely been extinguished due to any actions taken by the government such as selling or leasing parts of the claimed lands. The partial extinguishment can be exclusive (the native title holder can access the land) and non-exclusive (the native title holder cannot access the land) (Nntt.gov.au, n.d.).

An issue of validity of land titles has been raged since Mabo decision, which is the foundation of the case. Although the roots of this issue date back to 1975 when the Racial Discrimination Act came into effect. It implemented the country’s obligation to eliminate all kinds of racial discrimination for being a signee of the International Convention on the Elimination of All Forms of Racial Discrimination. Section 9 of the Act prohibits any person from engaging into an activity that is discriminatory on racial basis in nature and thus hinders the enjoyment of any fundamental freedom or human right. Section 10 of the Act states the government cannot prohibit any person of color from enjoying any fundamental freedom or human right that is being enjoyed by any other person, and if the government does so then the act itself will be abrogated by the Racial Discrimination Act.

Since the Mabo case has run for a decade, many decisions surfaced during the process. In an early decision, the court decided that the Queensland Coast Islands Declaratory Act 1985 is in contradiction with the Section 10 of the above mentioned Act, and therefore, is invalid. The Declaratory Act mentioned that the land off the coast of Queensland vested in the government without all competing interests. The effect of this Act would have defeat the claim made in the Mabo case. The view to present here does not comprise of the concern that the land titles granted since 1975 may infringe the particular titles of the Racial Discrimination Act but the fact the extinguishment of native titles is an attribute of the title itself instead of being an outcome of any racial discrimination.

Another issue that the Mabo case failed to address is the issue raised in the case title Guerin vs. the Queen (1984). In this case, the issue was raised that if the State governments were bound by the duty to act in the best interests of the Aboriginal peoples while they deal with the land subject to native title, particularly when the case would likely to be ended in extinguishment of the title. In 1984, the case decision held that the government of Canada retains a fiduciary duty to act in the best interests of its people involved in cases concerning lands with native titles. However, this fiduciary duty was raised in the Mabo case, it was never resolved. Although there is a possibility that the high court will impose a fiduciary duty on the government in Australia but the consequence of breach of that duty would only result in damages rather than invalidity of the land title (Aph.gov.au, 1994). For this reason, it can be argued that one of the consequences of the Mabo case is that the litigation concerning native titles is expensive, time consuming, and difficult in addition to the consequence that it adds to the vulnerability of the native title to extinguishment (Aph.gov.au, 1994).

# 3. Role of Media

The case was not given due importance before its decision. However, it received daily press and media coverage once the general public’s interest escalated in the decision. The *Canadian Native Law Reporter* devoted a complete special edition to the Mabo case decision along with a brief discussion on the Aboriginal Law courses throughout the world in general and in Canada in particular. Moreover, the judgment has also been made a part of text materials in various world-renowned universities such as Osgoode Hall (York University) and the University of British Columbia. Additionally, the judgment was affirmed and liberally quoted in R vs. Van der Peet, a 1996 Supreme Court of Canada’s case on Aboriginal Rights. Because of these reasons, every layman had a list of merits of the case to talk about despite the fact that no one had actually read the 204 pages long decision of the case. An article titled *Mabo, The Plain Story,* was published in 1994 (Trove, 1994). The article discussed the issue from the point of view of an outsider. It explained that the legalistic language of the Mabo case decision was difficult for the uneducated and illiterate people of Australia to understand (Trove, 1994). Wherever it has become possible, it sparked a national debate on the topic. Such national debate has been of considerable importance because it was necessary for the Australian people to fully grasp the meaning of fight of freedom. This article maintains its place in the role of media played back in that time due to the great insight it successfully provides about the views and perspectives of the people not fully involved in the legal part of the Mabo case. It also provided, at that time, an insight into the effect and consequences of the case (Trove, 1994).

# 4. Concluding Remarks

The Mabo decision made a huge impact on Australian life. It made clear that the society and institutions in the country are capable of coping with any kind of enormous shifts. However, some of the people among the general public and the ones with better-heard voice continue to claim that the decision could not go far enough to achieve the justice in real meanings. It indicates that the Australian society can manage to be aspirational in embarking on reform efforts despite the inevitable argument following profound change. Moreover, from the debates over the time, it has also been made clear that the divisive language being used for the debates on the decision is unnecessary. But, the Australian institutions withstood the shock of the change with grace it surely indicates that the researchers and practitioners have been engaging in a respectful and well-modulated public discussion to achieve it. Finally, although apparently significant advances in the Australian laws have been made after the Mabo decision, more work remains to be done. Any single advancement in isolation is not sufficient in approaching to the claims for justice by the Indigenous peoples in Australia. Fulfilling the promise of Mabo is an on-going effort. It needs a suite of reforms embracing the economy, policy and law.

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