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Mabo Case in Australia: Conflicting Approaches

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Abstract

After the expansion of the British empire in the 18th century and the establishment of new colonies overseas, the indigenous individuals and their rights constituted a hot topic for the judges and the Common law legal system specialists. The core of this topic was the dilemma of what status indigenous laws and their pre-existing rights should have. Indeed, the indigenous rights became very critical when the indigenous people went to the courts of the Common law itself to seek the help they wanted. In 1992, Mabo case in the Australian High Court was a tremendous event regarding the indigenous rights issue, and there were two main judicial approaches to rule in that case. Brennan J was the father of the first approach, and Dawson J was the father of the other. The author, in this paper, argues that Brennan J's approach is flexible and consistent with the global context, and pays the required attention to the humanitarian aspect of the law. Additionally, Dawson J's approach is rigid and dehumanizing, and restrictively vests the legitimacy only in the Common law principles themselves.

Introduction

When the English settlers started to sail overseas, they explored new lands and new inhabitants. These inhabitants had laws to govern the social life, but these laws were not comprehensible for the new English settlers. Sometimes they were more complex than their law, the English law.[1]

As a result, the settlers took two types of law with them: the unwritten English law, that is both Equity and Common law on the one hand, and the Statute law which was extended to them.[2] Australian colonies, which include New South Wales, came under the sovereignty of the English Crown. Additionally, the ownership of the land came under the control of the settlers once they landed in these colonies, which had been considered as terra nullius.[3] Such consideration meant that the land has no laws, and consequently with no rights of any kind to recognize.[4]

Keywords