Case Note

The Co-Existence of Native Title and Common Law Proprietary Interests: the Hawaiian Style – *Public Access Shoreline Hawaii and Angel Pilagro v Hawaii County Planning Commission and Nansay*

In 1995, the Hawaii Supreme Court heard a case concerning Native Hawaiian rights which bears a great deal of similarity to the Australian High Court's *Wik* decision.[1] The larger issue was framed in the context of an objection to a building consent order for development of a tourism resort complex over 450 acres on the Big Island of Hawaii. *Public Access Shoreline Hawaii and Angel Pilagro v Hawai'i County Planning Commission (HPC) and Nansay*[2] became known as *PASH II*[3] and appears to be the Hawaiian people's version of *Wik* where indigenous land rights in the mid-Pacific is concerned.

Hawaii's indigenous people have a history, culture and circumstances very different to Australian Aborigines; however there is judicial recognition of indigenous customary rights, practices and laws in relation to land in both jurisdictions, and in both jurisdictions that recognition extends to the simultaneous co-existence of indigenous and colonial land title.

In the *PASH II* case, the first issue to be argued was that of *locus standi* and jurisdiction; the Hawaii Supreme Court recognised that Native Hawaiian interests represented by PASH were distinct from those of the general public and held that

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1 (1996) 141 ALR 129

2 79 Haw 425, 903 P 2d 1246 (1995); *cert denied*; US 116 S Ct 1559, 134 L Ed 2d 660 (1996). Available on the world wide web (WWW) at the Internet Homepage of the Nation of Hawaii http://hawaii-nation.org./pash.html.

3 *PASH I* was the earlier case before the Intermediate Court of Appeals in Hawaii, from which HPC and NANSAY appealed to the State Supreme Court in *PASH II. Public Access Shoreline Hawaii v Hawaii County Planning Commission* Haw. App. Jan 28, 1993.

that matter was conclusively settled in the Intermediate Court of Appeals (ICA).[4] The next question to be addressed was whether the Hawaii Country Planning Commission had an obligation to 'require protection of traditional and customary Hawaiian rights'.[5]

The Hawaii Supreme Court is quite progressive in these matters and had in the past overturned Special Management Area permits granted by the HPC or its equivalents on other Hawaiian islands.[6] The Supreme Court found the HPC has power to place conditions on permits, to protect customary and traditional rights to the extent feasible under Hawaii's constitution and relevant statutes, and that the *Coastal Zone Management Act* (CZMA)[7] requires the HPC to give 'full consideration' to the cultural interests asserted by PASH.[8]

Hawaii's antecedent history as an indigenous constitutional monarchy prior to its seizure by the United States in 1893 has left unhampered many protections for Native Hawaiians, though these have been observed more in the breach than in the observance in the century since the United States' seizure. Article XII, section 7 of the Hawaii State Constitution (1978) provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a[9] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

In Hawaii, native custom constitutes an exception at law to the Common Law as ascertained by English and United States decisions.[10] Since the Statutes of Kamehameha III in the 1840s 'native usages in landed tenures' have been protected and although the status of the native Hawaiians in relation to their landlords, aristocratic or otherwise, has changed dramatically since the days of the Kingdom, many still trace their roots to an ahupua'a, which bears quite a resemblance to a feudal estate, despite the fact that the aristocratic Chiefs have been abolished and overthrown in the course of the past 200 years.

In the course of determining whether the HPC had to protect the traditional and customary rights asserted by PASH, the Supreme Court reviewed its own analysis of the two principal modern gathering rights cases; *Kalipi v Hawaiian Trust Co*[11] and *Pele Defense Fund v Pty.*[12]

Kalipi involved an individual's attempt to gain access to private property on the island of Moloka'i in order to exercise purportedly traditional Hawaiian gathering

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4 *Ibid* at 426, 903 P. 2d 1249

5 *Ibid.*

6 *Ibid,* citing *Hui Alaloa v Planning Commission*, 68 Haw. 135, 705 P 2d 1042 (1985)

7 Hawaii Revised Statutes (HRS) chapter 205A

8 *PASH II*, at 451, 903 P 2d at 1271.

9 An 'ahupua'a' is a native Hawaiian land division usually extending from the mountains to the sea along rational lines, such as ridges or other natural characteristics. In *re Boundaries of Pulehunui*, 4 Haw 239, 241, (1879) it was acknowledged that these 'rational' lines may also be based on tradition, culture or other factors.

10 *Ibid,* and fn 21

11 66 Haw. 1, 656,P 2d 745 (1982)

12 73 Haw 578,615, 837 P 2d 1247 (1992), *cert denied* 507 US 918, 113 S Ct 1277, L Ed 2d 671 (1993).

rights. The court prefaced its consideration of Kalipi's claims with a discussion of the State's obligation to preserve and enforce traditional Hawaiian gathering rights under article XII, section 7 of the Hawaii Constitution:[13]

> We recognise that permitting access to private property for the purpose of gathering natural products may involve conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishment of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.[14]

The Hawaii Supreme Court based this decision on an 1851 law now incorporated into the Hawaii Revised Statutes (HRS) section 7-1 which guaranteed to tenants of ahupua'a rights:

> ...to take firewood, house timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have the right to drinking water and running water and the right of way. The springs of water, running water and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses which individuals have made for their own use.[15]

This statute was interpreted by the Court so as to,

> conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right to exclude is perceived to be an integral part of fee simple title.

Accordingly the Court fashioned a rule permitting, 'lawful occupants of an [ahupua'a].....[to] enter undeveloped lands within the [ahupua'a] to gather those items enumerated in the statute.'(HRS 7-1).[16]

Despite this 'undeveloped land exception' Kalipi lost his case as he did not reside within the ahupua'a where he claimed gathering rights and there was, 'an insufficient basis to find that such rights would, or should, accrue to persons who did not actually reside within the [ahupua'a] in which such rights are claimed.'[17]

In fashioning this 'undeveloped land exception' the Hawaii Supreme Court recognised the continuing importance of the old statute noting that,

> the gathering rights of 7-1 were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways.[18]

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13 *PASH II* at 451, 903 P 2d at 1272.

14 *Ibid*, citing: *Kalipi v Hawaiian Trusts Co Ltd.* 66 Haw at 4, 656 P. 2d 745 at 748 (1982).

15 *Ibid.*

16 *Ibid*, 1st quote - citing *Kalipi*, at 7, 656 P 2d at 749, 2nd quote - citing *Kalipi* at 7-8, 656 P 2d at 749

17 *Ibid, PASH II* at 446, 903 P 2d 1268 citing *Kalipi*, at 12, 656 P 2d at 752

18 *Ibid*, citing *Kalipi*, at 8-9, 656 P. 2d at 749-750; See also DG Mueller 'The Reassertion of Native Hawaiian Gathering Rights Within the Context of Hawaii's Western System of land

The Hawaii Supreme Court also made room for future cases as it:

> did not foreclose the possibility of establishing, in future cases, traditional Hawaiian gathering and access rights in one ahupua'a that have been customarily held by members of another ahupua'a.[19]

The Hawaii Supreme Court seized the opportunity to restate the principles it had elucidated in *Pele* in 1992.[20] *Pele* established the principle that where there was sufficient basis in fact presented, 'gathering rights can be claimed by persons who do not reside in the particular ahupua'a where they seek to exercise those rights.' The Pele Defense Fund asserted that members exercised customary rights in the Wao Kele 'O Puna Natural Area reserve on the Big Island, Hawaii. *Pele* established that,

> rights primarily associated with residence in a particular ahupua'a under HRS s.7-1 might have extended beyond those bounds through ancient Hawaiian custom preserved in HRS s.1-1.....Traditional and customary rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in Article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property'.[21]

The Hawaii Supreme Court balanced the 'undeveloped usage' exception with the 'so long as no actual harm is done' requirement in *Kalipi* and this was reiterated in *Pele* and *PASH II*.[22] The Court sets out a fascinating historico-legal exposition on the development of private property in Hawaii,[23] where all land was communally owned until the 1820s and then expounds in some detail, on Customary Rights under Hawai'i law.[24]

The Court next addresses the matter of 'taking' of property; finding that as no 'alterations' had been made by their ruling to Hawaii property law there could not be said to have been a 'judicial taking' which might have amounted to an unconstitutional confiscation of property. [25] The Hawaii Supreme Court notes,

> Nansay's [the developer] argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights, as discussed in section IVB., *supra* [fn 24], does not constitute a judicial taking.[26]

As to the question of 'taking' by regulation from Nansay the Hawaii Supreme Court held that whilst the State could not deny a property owner all 'economically beneficial use of his or her property without providing compensation, ...

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tenure.' (1995) 17 *U Haw L R* 165.

19 *Ibid.*

20 *Supra,* fn 12

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid,* at 13-16 of 27

25 *Ibid,* at 16 of 27 noting support for their position from the High Court of American Samoa

26 *Ibid,* at 452, 903 P 2d 1273.

'c]onditions may be placed on development without effecting a 'taking' so long as the conditions bear an 'essential nexus' to legitimate State interests and are 'roughly proportional' to the impact of the proposed development.'[27]

As to native Hawaiian rights being 'taken' the Hawaii Supreme Court remanded this case back to the HPC for consideration of the customary rights alleged by PASH. The Court held that the State was authorised to 'impose appropriate regulations' to govern native Hawaiian rights in conjunction with permits for development but made it clear that 'the State does not have the unfettered discretion to regulate the rights of ahupua'a residents out of existence.'[28]

Interestingly, in *PASH II* the Hawaii Supreme Court adopted the wording of the US Supreme Court's *Morton v Mancari*[29] decision which held that Indian nations were not *racially* based entities, but *politically* based ones - thus allowing the US Supreme Court to escape charges of racial discrimination in favour of Indian nations. The US solution is hardly better than the disingenuous language of Australia's High Court in *Gerhady v Brown,*[30] which flaunts the spirit of the *International Convention on the Elimination of All Forms of Racial Discrimination by* pretending that 'special measures' under Australia's *Racial Discrimination Act* can continue indefinitely.[31] Australian jurisprudence fails to adequately tackle the difficult question of 'collective rights' in relation to indigenous peoples although this would seem to be a global problem. There is a need for the UN to address this matter in relation to its Convention.

Adopting *Mancari,*[32] the Hawaii Supreme Court states:

> [c]ustomary and traditional rights in these islands flow from native Hawaiian's pre-existing sovereignty. The rights of their descendants do not derive from their race *per se*, and were not abolished by their inclusion within the territorial bounds of the United States.'[33]

TRANS PACIFIC LINKS: WIK IN LIGHT OF PASH

History has dealt very different hands to the native Hawaiians and the Australian Aborigines. The Australian High Court's judgment in *Wik* was a great leap forward for indigenous Australians, but not too surprising, given the weight of advocacy by legal and academic writers in the lead up to the case, for the co-existence position eventually adopted.[34] Whereas the native Hawaiians have established and entrenched customary rights, Australian Aboriginal rights were

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27 *Ibid*

28 *Ibid,* at 454, 903 P 2d 1274.

29 417 *US* 535

30 [1985] 59 *ALJR* 311

31 *Ibid,* Mason J at 326 -327, Brennan J at 342

32 *Supra, n 29* see Blackmun J's famous footnote 24 at 553 establishing the US position. The Hawaii Supreme Court refers to *Mancari* in fn 41

33 *PASH II, Ibid*at 449, 903 P 2d at 1270.

34 Amankwah, H.A., Poynton, P, 'Mabo: Australian Aboriginal Native Land Title in Two Syllables' (1993-95) 19 *University of Ghana Law Journal,* 145 and any number of articles by Henry Reynolds, Hal Wooten and many other commentators.

judicially and legislatively blocked following *Murrell's* Case in 1836.[35] The long overdue recognition of customary Aboriginal native title, and by implication - at least - customary succession laws, has forced the Australian judiciary to take a new look at the extent and persistence of Aboriginal customary rights and practices in Australia.[36]

The black letter lawyers are opposed to reading down the letter of Australian land law, as received from the English tradition. In *Wik*, the Chief Justice, Brennan CJ, was with the minority in strictly interpreting the letter of the law to deny the possibility of co-existence of Aboriginal native title rights on pastoral leases. The Chief Justice is fond of stating that 'it is too late'[37] to recognise native title rights and that to do so would be akin to developing 'a new theory of land law that would throw the whole structure of land title based on crown grants into confusion'.[38] Of course, it is never too late to work towards righting an old injustice. The judicial imagination is sometimes fettered by notions of what can and cannot be 'accepted' and gets bogged in dogmas about the sanctity of doctrinaire feudal principles such as tenure, the relevance of which is questionable in the pre-dawn glow of the twenty-first century.[39]

The Hawaii Supreme Court has it right when it criticises the wisdom that 'western' property law principles are inviolable and declares for native Hawaiian customary rights, which were so long the established law of the Hawaiian islands. Hawaii's State constitution protects those customs - but that Australia's State and Federal constitutions offer no such protection to indigenous rights and customs in Australia is the injustice. Australian judges and politicians are wont to say, 'Oh, but the laws are so different in Hawaii' or the United States for that matter. The scandal is that the laws protecting indigenous rights are so deficient in otherwise progressive Australia.

Australia's historical legislative frameworks reflect nineteenth century social realities and perspectives on extermination of indigenous peoples, and hence they do not address Aboriginal customary rights. The discourse of conquest - ideologically, politically and judicially - continues in Australia. Despite his *Mabo No. 2* judgment, the Chief Justice takes up the discourse of conquest and the blinkered vision of extermination in his *Wik* judgment; he relies upon the law to deny justice. His conclusion that leases revert to the Crown as full beneficial title upon expiry[40] - effecting a complete extinguishment of native title rights - is

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35 (1836) 1 *Legge* 72. This policy shift and objections to it is discussed in *The Recognition of Aboriginal Customary Laws*, *ARLC*, Report No.31, 1986, Volume 1 at pp 34-41

36 *Mabo v The State of Queensland (No.2)*(1991-92) 175 CLR 1. See also HA Amankwah 'Post *Mabo*: The Prospect of the Recognition of a Regime of Customary Law in Australia'. (1994) 18 *UQLJ* 15.

37 Wik, supra, at 158 also Mabo No 2, supra, at 47

38 *Ibid.*

39 Edgeworth, 'Tenure, Alloidialism and Indigenous Rights at Common Law: English, United States and Australian Land Law compared after *Mabo v Queensland*.' (1994) 23 *Anglo-American Law Review* 397; Devereaux and Dorsett, 'Towards a Reconsideration of the Doctrines of Estates and Tenure'. (1996) 4 *APLJ* 30; Buck, '*Attorney-General v Brown* and the Development of Property Law in Australia.' (1994) 2 *APLJ* 128; Stuckey, 'Feudalism and Australian Land Law:a shadowy, ghostlike survival?' (1994) *Uni Tas LR* 102; Buck, 'Torrens Title, Intestate Estates and the Origins of Australian Property Law.' (1996) 4 *APLJ* 89.

40 An idea he floated as *obiter dictum* in *Mabo No. 2* n 36 at 72-73

particularly harmful.[41] Gummow, Kirby and Toohey JJ's findings that this interpretation is seriously flawed are to be preferred.[42]

Kirby J's criticism of placing too strong a reliance upon outmoded fictions like the doctrine of tenure,[43] is a particularly timely and poignant denouncement of the kind of law the minority in *Wik* are propounding. The minority repeat the conquest/extermination discourse but without the recognition of customary law that conquest (at international law) entails. The continued failure of the Court to right the 'settlement' fiction and recognise the fact that the colonisation of Australia was a conquest lies at the base of this problem.[44]

The problem is political as well as judicial and the media jackals have delivered a public whipping to the Court's majority for outpacing the national political stance on indigenous rights. In the judgments of Gummow, Kirby and Toohey JJ we have an expansion of the human rights approach in the High Court. This is recognition that indigenous custom has not been statutorily extinguished, as yet, and that the dogmas of feudal tenure along with those who continue to expound them are so much flotsam and jetsam washed up by the tide of history on the shifting sands of international jurisprudence.

Co-existence of customary Aboriginal rights and 'western property principles', even on freehold land, is recognised and protected by the Courts in Hawai'i in part due to the different course the conquest of those islands took. The customary rights and practices of many Australian Aboriginal peoples are still as practised and as alive as those of the native Hawaiians, yet many Australian jurists and politicians have refused to consider the positive practical outcomes that continued co-existence of the two types of rights may give rise to. The negatives have been expounded, explored and exploited in a vicious campaign[45] - to create an atmosphere of panic and further empower the extinguishing hand.

Calls for extinguishment invoke the discredited and dysfunctional discourse of conquest. Coexistence remains the preferred option of the indigenous peoples and Australia might learn from the Hawaii Supreme Court's, 'understanding of the traditional Hawaiian way of life in which co-operation and non-interference with the well-being of other residents were integral parts of the culture.'[46]

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41 Wik, *supra*, at 159

42 Toohey J at 186, Kirby J, at 280, Gummow J at 236

43 *Ibid*, at 280

44 G. Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An unresolved Jurisprudence' (1993) 19 *MULR* 195

45 B. Lane *et al*, 'PM backs Fischer over Court attacks,' *Weekend Australian*, Mar. 1-2, 1997; J. Short *et al*, 'PM talks of farm justice,' *Weekend Australian*, Feb. 1-2, 1997, 2; J. Kirby, 'Wik puts $500m burner on banks,' *Australian* 28-1-97, 19; J. Short *et al*, 'Native title deters investors says Parer,' *Australian*, 31-1-97, 5; Fiona Kennedy, et al, 'Fischer seeks anti-Wik alliance,' *Weekend Australian*, Jan. 18-9, 1997, 2; M. Gordon, *et al*, 'Gibbs backs legislation to overturn Wik,' *Australian*, 10-3-97, p 1; L Taylor, 'Conservatives stall Wik talks,' *Financial Review*, 21-3-97; National Farmers Federation, 'Dear John' - advertisement - *Australian*, 24-3-97, 5; L. Taylor, 'PM's spirit willing but flesh is Wik', *Financial Review*, 17-4-97, 4; S. Maher, 'Wik won't work for the man on the land.' *Sunday Mail*, 18-5-97, 5. etc.

46 *PASH II*, at 455, 903 P 2d 1279citing *Kalipi* at 9, 656 P 2d at 750.

Co-existence is strained across the Pacific from Hawaii to Australia, but it remains a route to reconciliation, the principled cooperation and non-interference.

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