HIGH COURT OF AUSTRALIA

Olcha C.J., Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ.

THE COMMONWEALTH OF AUSTRALIA v. TASMANIA. THE TASMANIAN DAM CASE
(1983) 158 CLR 1
1 July 1983

1. The question according to current legal jurisprudence and thus of primary practical importance, is whether it is lawful for the Hydro-Electric Commission of Tasmania, to build a Hydro-Electric dam on the Franklin River. As such, the High Court is to interpret Section 51 (xxix) of the Constitution, the 'external affairs' power of the Commonwealth. The Court has been called to determine the legal question, of whether the *World Heritage properties Conservation Act* 1983 (Cth), is indeed *ultra vires*.

2. I as the Chief Justice presiding over this case, would conventionally caution that the questions posed to the Court are strictly legal questions. The Court is usually in no way assessing the likely disadvantages or possible advantages of constructing the dam and flooding the Franklin. The question of desirability or undesirability of the dam's construction typically cannot be reflected in the judgement in any shape or form. Yet, the consequences of the Court's decision are not lost on me.

3. Fulfilling my duty as Chief Justice, would demand that I remind lawyers, the parties, and the public, that it is not for the court to weigh the undeniable damage that will be caused to the wilderness of the area in question, to the Aboriginal archaeological sites and to the animals in their homes. I fear doing this would cause deep injustice, this case before the Court presents an opportunity to intervene for the purpose of maintaining, in effect, a sharp focus on law's potential to shift power in society. The law does not easily hear or recognise the language of emotion and urgency, yet this judgement will not be objective or devoid of emotion. In doing so, the Court hopes that the language of law will develop the tools to explore context and the experiences of previously silenced voices.

4. The significance of the following factors in determining that the *World Heritage properties Conservation Act* 1983 (Cth) is wholly valid, are as follows.

i) Whilst the ability to control and develop the natural environment belongs to the State Parliaments as set out in the Constitution, I deeply resent the rhetoric that the environment exists as property. The earth's natural resources pre-exist the institution of law. The pending dangers of the climate crisis, being the destruction of whole habitats, the extinction of animal and plant species, acid rain, increasing sea levels and radioactive fallout, are all because of the blatant disregard for the environment. The natural elements and animals which co-inhabit the Earth, are not commodities to be domesticated, consumed, exploited, or destroyed, at the whims of humanity's savage machismo. Humanity does not exist outside of the laws of nature, equilibrium, and symbiosis. What one does in attempting to conquer and destroy land will affect us all. We cannot be individualistic in our actions; conservation is thus of international concern. In this way, land will always remain outside of the boundaries of human control, it is time we acted as such. Respecting the natural resources which sustain life is paramount, or else the security and peace of the world will be destroyed.

ii) The Crown's sovereignty over the land that we call Australia has never been challenged in an Australian municipal court. The Crown's acquisition of radical title to this land cannot be a judiciable issue, for the consequences of addressing this fact would uncover a very difficult reality. Sovereignty over this land was never ceded, the common law itself stripped sovereignty from, and displaced First Nations people. The ability to deprive the Indigenous inhabitants of their cultural, economic, legal, religious, and spiritual sustenance, was inscribed in law. Imperial, colonial authorities, to which this Court's genealogy lies, rendered Indigenous Australians trespassers in their own land. This is an unjust fact that cannot be captured by legal terms and questions. The ongoing hurt and damage of displacement, genocide and subjugation cannot be captured in a legal language that refuses to explore the subjective nature of the human experience. The law has been established in a way which never ontologically or epistemologically questions itself. Rather, the law establishes itself as neutral, serving the interests of no one or nothing but justice. This is a fallacy. As such, the decision over what happens to the Franklin is beyond the Court's jurisdiction, instead it must be determined by the sovereignty of the Indigenous inhabitants of that land, the palawa people of lutruwita.

iii) The construction and operation of the dam was presented as of severe importance to the Tasmanian economy. Often economic activity is presented to the Court as a kind of alter, to which all other legitimate interests and needs must subordinate themselves to. Accumulation, utility maximisation and growth become God-like, yet the use and distribution of this wealth is never questioned. Deriving value and profit from an inherently exploitative practice is unsustainable and blind to the consequences on the environment, politics, society and even on the economy itself. If the Tasmanian Government is, as it says, seeking to create job-opportunities for *all* Tasmanians, then policy makers should turn to the entire subterranean existence of care work. A large part of care work is unpaid,

unrecognised by the labour market, devalued and ultimately unfactored in the Gross Domestic Product. Economic cycles are cushioned by and dependent upon unpaid care work. Perhaps then, Tasmanian policy makers should look to alter macroeconomic approaches in seeking to stimulate economic activity.

5. The submission presented by the Commonwealth, under its 'external affairs' head power, stands. It follows consequently, that in my view the *World Heritage properties Conservation Act* 1983 (Cth), is a valid enactment. It will be apparent from what I have written that this decision was made upon the basis of emotion, subjectivity, reflexivity, and conscientiousness. Justice cannot be achieved here through notions of 'equality,' objectivity, and logic. These ideals do not exist in application to the human emprise and as such, this moral, legal judgement is not dégagé.

Reflection

Context

In the 1980s, the Tasmanian Parliament sought to build a hydro-electricity power station on the Franklin River (Black, 2015). To prevent the damming, the Commonwealth Parliament added the Franklin to UNESCO's World Heritage Listing, to then pass the *World Heritage properties Conservation Act* 1983 (Cth). The Tasmanian Parliament challenged this in the High Court, claiming the Commonwealth was acting *ultra vires* (*Commonwealth V Tasmania*, 1983, p.505). The High Court was called to interpret the Constitution.

Catharine MacKinnon was greatly influential in the formation and expression of my radical, 'feminist' judgement. The male point of view forces itself upon the world, a systemic and hegemonic solipsism that is unwavering in its inability to recognise others, resulting in an imbalanced distribution of power (Mackinnon, 1983, p.636). Through the lens of Mackinnon's feminist legal theory, the judgment explored the environmental, socio-cultural, political, and economic aspects.

Audience and medium

The primary target audience was the Australian common law itself. The *Tasmanian Dam* case was heard in the High Court and therefore the Court's decision would be wholly binding on all other courts in the nation. The rigid and procedural operation of precedent articulates a universal, normative standard for all to be judged by. The

original judgement arrived at the same conclusion as I did, yet in a manner which only considered the *legal questions* at hand. Whilst I declared that my judgment would venture beyond the scope of law, Chief Justice Gibbs stated in his judgment, that the Court's decision did not reflect the merits of the dispute (*Commonwealth V Tasmania*, 1983, p.505). The Court was very careful to articulate the dry, constitutional issue at hand. Thus, whilst the High Court found for the Commonwealth, they did not do so to save the Tasmanian river. Dr Ruth Fletcher (2002) articulates how the 'impartiality' paradigm exists as a mask for masculine interests and understandings (p.136). By targeting common law, my judgement would bind all courts in Australia to consult the moral, socio-cultural, political, and historical factors of the case. Objectivity would no longer be the 'gold standard,' instead the law's capacity to achieve justice would be greatly widened by an examination of diverse desires and needs.

My secondary target audience is the Australian public, as the institution of law has a principle of 'open justice,' whereby members of the public have the right to observe, know and understand the law which governs them. Whilst this was a highly divisive legal issue for the High Court and for precedent, it was *not* a political issue. In stark contradiction, the public cared deeply at the time precisely *because* of the political nature of this case. The public did not debate legal terms or meanings of the words in the constitution, a constitution which *claims* neutrality, impartiality, and objectivity. My judgement thus provided the Australian public with a feminist, legal judgement that shifts the 'reality' and 'truths' produced and shaped by the interests of the masculine, epistemic claim to power.

Arguments

Firstly, whilst the case was about a pristine, beautiful river in Tasmania, the court could not comprehend the 'non-legal' ideals of environmental protection. In his submission on behalf of the Tasmanian Wilderness Society, Michael Black KC requested to present Peter Dombrovskis's famous *Franklin River* pictures as evidence (Figures 1, 2 &3). In response, Gibbs CJ declared that the photographs were inflammatory and irreconcilably irrelevant (*Commonwealth V Tasmania*, 1983, p.737). As Mackinnon (1983) articulates, few if any aspects of life are free from the domination of masculine power (p.638). Masculine coded ideas about dominating nature manifest through the rhetoric of 'conquering' and 'taming' the 'wild.' Poaching animals for the 'sport' of trophy hunting and extracting minerals for capital gains, are all examples of a reality shaped by masculine power, predicated upon a domination/submission paradigm. Whilst the Court produced favourable outcomes through constitutional interpretation, it utterly failed to address the conditions which discursively produce a masculine coded subordination of nature (Mackinnon, 1983, p.643). My judgement highlighted that private ownership of land and patriarchy are inherently intertwined, foundational to the social meanings of male and female as *owner* and *owned* respectively.

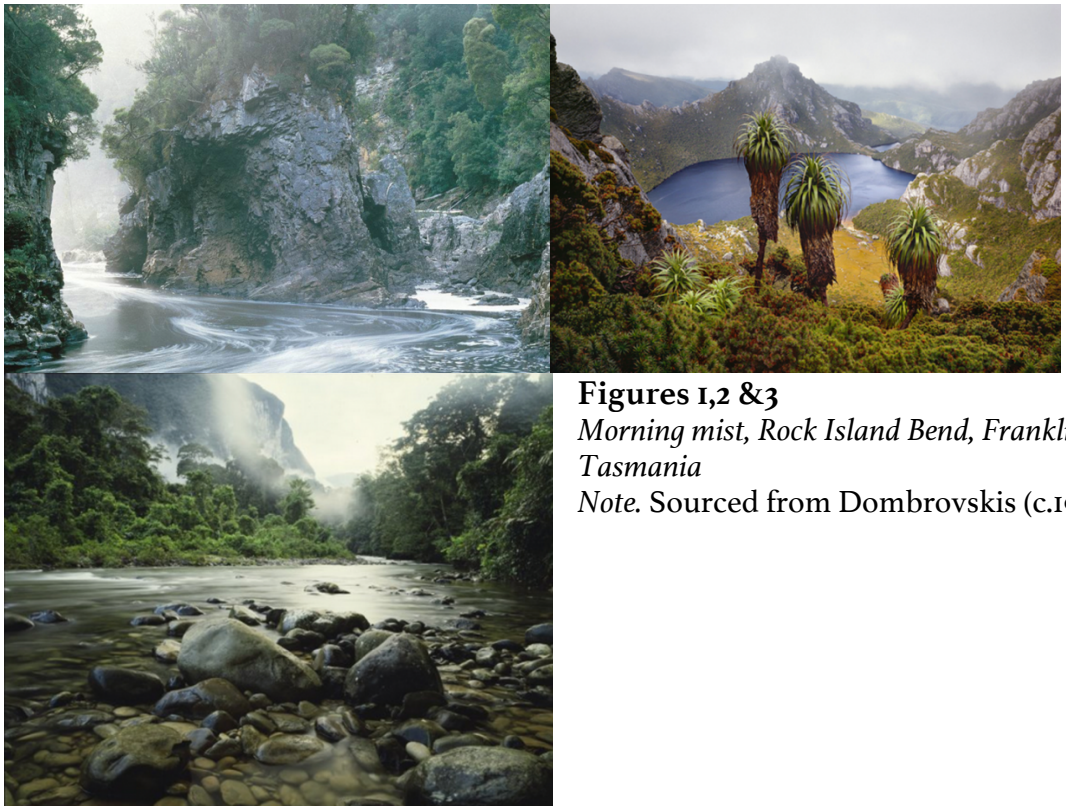
Secondly, claiming that the common law is 'neutral,' plausibly cloaks its patriarchal and colonial genealogy underneath a veneer which transforms the very nature of

that which it conceals (Cover, 1992, p.175). In *Mabo (No2)* (1992), the High Court judgement opened with a preamble that stated, the Crown's acquisition of sovereignty over the lands of Australia were not to be challenged. In stark contradiction, my judgement openly contested the legitimacy of the Crown, the common law and therefore any Chief Justice determination. I stated that the decision should be made by the palawa people of lutruwita. My judgement would thus be binding on all courts to uphold the duty of consulting traditional custodians whenever a dispute regarding the fate of land came before it. Publicly speaking, this judgement would force an Australia, largely silent to the injustice and violence of a colonial heritage, to grapple with the realisation of Indigenous sovereignty. Going beyond mere recognition could enshrine a decolonial disruption of laws which have had patriarchal and hegemonic effects.

Finally, the economy in both theory and practice, richly neglects feminine perspectives. My judgement was greatly critical of Tasmania's appeal to the economic benefits of construction; cheaper electricity, an encouragement of industry and a plethora of open jobs (Black, 2015). Theoretically, the economy is founded upon the pillar of the rational economic man; *he* who works for himself, for *his* merit, capital-gain, and profit (Sinha & Anand, 2021, pp.100-102). In practice the existence of care work becomes subterranean; *she* who works for someone else is unpaid and largely ignored by policymakers and legal professionals. Law not only renders us blind to gender but makes us gender exploitative. When we regard the labour market within this binary construction of the economy, the State's

institutions embody and serve male interests, built upon the subordination of women (McKinnon, 1983, p.643). The construction industry remains one of Australia's most male-dominated markets (Women's Agenda, 2022). Through my judgement, policymakers would come under pressure to restructure and re-assess micro and macroeconomics, to reword and renumerate care workers more appropriately.

Ultimately the State exists as a transient epiphenomenon, both a by-product and orchestrator of patriarchal power (Finely, 1989, pp.886-888). The State's apparatuses and systems of knowledge, such as that of the legal system, are imbued with a patriarchal dominance that is metaphysically presented as the very definition of sovereignty (Mackinnon, 1983, p.639). My judgment spotlights how sexual inequality serves as the epistemology of this dynamic law (Fletcher, 2002). As such, there is little doubt that a feminist counterapplication of law is necessary to achieve positive outcomes for individuals, communities and places that have generally been excluded (Fineman, 2010, p.312-330). Yet, a possible limitation of this approach would be that we continue to work from within the law, with the 'masculine tools' so to speak. Perhaps this approach only further entrenches the legitimacy of a Western, patriarchal, and colonial practice. My judgement however shifts the balance of power, permitting a re-imagination and re-application of a law that defies its 'neutral' and 'objective' configurations. Together, Mackinnon and Olcha CJ, encourage a reflexive approach that analyses the political, cultural, economic, and social interests aligned with such seemingly 'rational' applications of law.



Figures 1,2 &3
Morning mist, Rock Island Bend, Franklin River, Tasmania
Note. Sourced from Dombrovskis (c.1980)

Bibliography

Black, M. (2015). The Tasmanian Dam Case: An Advocate's Memoir. *Griffith Law Review*, *24*(1), 22–40.

Cover, R. M. (1992). *Narrative, violence, and the law: the essays of Robert Cover / edited by Martha Minow, Michael Ryan, and Austin Sarat*. University of Michigan Press, 173-202.

Dombrovskis, P. (c.1980) *Morning mist, Rock Island Bend, Franklin River, Tasmania* [Photographs], Monash Gallery of Art, City of Monash Collection, Victoria, Australia. https://www.mga.org.au/index.php/collection/explore/index/image/450

Fineman, M. (2010). *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory*. Taylor & Francis, 312-333.

Finley LM (1989) Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning. Notre Dame Law Review 64: 886-910.

Fletcher, R. (2002). Feminist Legal Theory, edited by *R Banakar & M Travers, An Introduction to Law and Social Theory*. Hart Publishing. Oxford, 135–154.

MacKinnon, C. A. (1983). Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence. *Signs*, 8(4), 635–658.

Sinha, A. K., & Anand, P. (2021). Feminist Overview of International Investment Law--A Preliminary Inquiry. *Journal of International Economic Law*, *24*(1), 99–125. https://doi.org/10.1093/jiel/jgab008

Women's Agenda. (2022, March 7). *Construction's male-dominated problem is hurting women and the industry*. (https://womensagenda.com.au/latest/constructions-male-dominated-problem-is-hurting-women-and-the-industry/)

Primary Legal Sources

Commonwealth v Tasmania (1983) 158 CLR 1.

Mabo v Queensland [No 2] (1992) 175 CLR 1.