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Compare the approaches to recognition, proof, and content of aboriginal title in Australia and Canada and to what extent have the Malaysian court decisions reflected either one or both of these approaches?

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Abstract
Aboriginal title which becomes most important substance for indigenous people in recent time because this title and rights originated from the traditional laws, practices, traditions and customs of the natives. This paper explains how Malaysia can eliminate the problems of indigenous people regarding aboriginal title. Malaysia does not protect aboriginal title and customary rights of indigenous people when Australia and Canada protect the rights of aboriginal title. If the indigenous people lose their title, they will be abolishing their status and title. Under the common law, the recognition, proof and content and proof are developed by the Malaysian courts has been designed by Mabo [No 2] v Queensland and Calder vs British Colombia. Malaysia should follow constitutional and legislative framework, native laws and customs for defending the indigenous rights since these principles were pronounced in Mabo [No 2] and Calder case through the decisions of the Malaysian courts on Indigenous land rights.

Keywords: indigenous people, aboriginal title, land rights, customary law, common law

1. Introduction

The approaches of the aboriginal are approximately alike jurisprudence in both Australia and Canada, recognition, proof and contents on the aboriginal title which compare significantly. According to customary rights, tribes demand their right to gain legal cognizance for land and natural resources in the second half of the twentieth century in Canada and Australia. Until the breakthrough era, the courts had generally declined to intervene in the management of Crown relations with the tribes, on land matters especially. That all changed in the breakthrough era spanning the two decades from 1973 (the Calder case in Canada) through 1992 (Australia's Mabo No 2) [1]. In Australia, the High Court recognizes the aboriginal in *Mabo v Queensland (No 2)* in 1992 as the first time [2]. On the contrary, the approaches of aboriginal title started through *Calder vs British Colombia* in Canada. However, the purpose of this paper is whether current Australian and Canadian approaches to protect aboriginal rights or not? This assignment clarifies how aboriginal title under the common law became built through the three legal stages of recognition, proof, and content. Nevertheless, I will critically compare aboriginal titles in both Australia and Canada that how recognition, proof, and contents of aboriginal titles work for indigenous people in both countries. Finally, the decisions of the Malaysian case will be discussed which reflects in Australia and Canada and try to provide own view regarding approaches.

2. The approaches to recognition, proof, and content of aboriginal title in Australia

Australia recognizes the aboriginal title when indigenous title rights on the lands are violated in Australia. Before, no agreements and compensation were completed with the aboriginal for the land granted to settlers. However, aboriginal title is not provided to the indigenous people unless the *Mabo* [3]. decision is passed in 1992. That's why, the high court of Australia decided in a 6:1 pronouncement that native title will be documented by the common law, and that there is a right of aboriginal people in their traditional lands according to their laws and customs [4]. The decision held also that the Murray Islanders are allowed on the occupation, practice, and enjoyment as the aboriginal title. Thus, approaches arrived by this Mabo decision and the implications of this revolutionary change in the common law were potentially vast [5]. *Building on Mabo, in Commonwealth v Yarmirr [1998] FCA 771*, the High Court documented that aboriginal title over water, marine areas, sea, seabed, fishing [6]. There is a public right for fishing or navigation of aboriginal people in Australia [7].

In fact, "aboriginal title" mentions mainly the privileges of indigenous people in Australia, according to their traditional

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[1] Mchugh, G. P, Aboriginal Titile: The Modern Juriprudence of tribal Lan Rights, Doctrinal Pathways in Canada and Australia—The Devil in the Detail of a Maturing Jurisprudence (Oxford University Press, 2011) at 113.

[2] Stephenson, M. A. 'Resource development on Aboriginal lands in Canada and Australia' (2002) James Cook UL Rev., 9, 21

[3] In Relation to the Mabo decision see M A Stephenson (ed), Mabo: A Judicial Revolution (1993); R H Bartlett, The Mabo Decision (1993)

[4] Stephenson, above n 02.

[5] Sanders, William, 'Mabo and Native Title: Origins and Institutional Implications, Canberra, Act' (2018) Centre for Aboriginal Economic Policy Research, Research School of Social Sciences, College of Arts & Social Sciences, The Australian National University, 01.

[6] Durette, Melanie, 'A comparative approach to Indigenous Legal Rights to Freshwater: Key Lessons for Australia from the United States, Canada and New Zealand' (2010) '74(04)'); Environmental and Planning Law Journal, 296

[7] Gawirrin Gumana v Northern Territory of Australia (No 2) [2005] FCA 1425

land and water recognized by Australian common law.[8] Consequently, Brennan approach recognized by the common law of Australia *in Fejov Northern Territory (1998)* when *in the case of Ward,* the High Court emphasizes traditional law and custom, rather than possession, as saying the content of the native title. On the other approach, the High Court of Australia passes the aboriginal title for providing the ownership of the land and claims that billions of dollars for compensation will be needed to pay by governments to indigenous groups [9].

However, the aim of the *NTA* act 1993 of Australia is to 'recognize the native title and make a mechanism for determining claims and ways in which future dealings distressing native title may progress [10]. Nonetheless, this native title 1993 legislation provides a statutory effect in the decision of *Mabo*, while also presenting new fundamentals involving with native title. However, this act is amended considerably in 1998 in relation to some key provisions.

The question is raised whether the native title is regarded as 'ownership or not'. However, it is considered alternatively as a 'bundle of rights' because the Miriuwung and Gajerrong peoples demand a native title claim in 1994 which was about 8,000 square kilometers in the East Kimberley and the Northern Territory [11]. Justice Lee confirmed that their native title covered the whole area. This bundle of rights approaches taken by the majority full federal courts when Lisa strleian explained that the concept of 'bundle of rights' was usual in common law property-talk and access to its remedies [12]. Consequently, the High Court documented, in that case, the relationship between Indigenous people and their land as a spiritual one [13]. because these relationships make a spiritual dimension of the land [14].

According to the legal system of Australia, Indigenous people get recognition of their outdated land [15]. To get the land, they must apply their determination to the Federal Court of Australia, which exists aboriginal title including specific rights and interest [16]. On the other hand, It is negatively said that the legal framework in Australia does not adequately protect indigenous inters in this area [17]. According to *David Bennett* has commented that,

"The important as land is, the foundation of native title is broader than real estate [18].

The High Court also ruled in *Western Australia v The Commonwealth,* "that the State Land Act 1993 *(*WA) is invalid which Denys equality before the law to Indigenous people and unpredictable with the provisions of the Racial Discrimination Act 1975 *(Cth)* [19].

Nevertheless, for the proof of aboriginal title in Australia, the parties are encouraged to take accountability for determining aboriginal title claims without taking litigation [20] and claims by negotiation [21]. The Federal Court of Australia claims the native title which is directed as legal proceedings under the *Native Title Act* [22] and make the burden of proving defined in s 223 [23].

As, for example, in the *Miriuwung Gajerrong* said that Indigenous people must prove all the fundamentals of the title, which contains in section 223 (1) of the NTA [24]. I think that this proof is discriminated because most of the time they cannot prove their aboriginal title. It is noticed *in the case of Yorta Yorta* whereas the traditional practice of proof is interrupted due to forces of colonization and customs are altered and the native title no longer exists [25]. As clarified in by Gleeson CJ, Gummow and Hayne JJ, the practice of aboriginal title rights may establish influential indication of both the survival of those rights and their content [26].

The possible pathways of the arriviste legal system have been set as being acknowledgment, accommodation, exclusion, codification reference, and translation. However, that proof of continuity of connection under traditional law and custom was not an irrelevant one, especially where oral traditions were involved. Native title in Australia appears to be sourced in the 'traditional laws and customs' of the aboriginal peoples who have a connection with the relevant lands or waters. Therefore, Justice Hayne, Kiefel and Bell JJ in Akiba HCA [27]

"The content of the native title rights and interests is 'founded upon' the traditional laws and customs of Aboriginal and Torres Strait Islander peoples. This is ascertained by reference to the evidence brought in each claim."

In 2002, the high court of Australia is mentioned in the case of *Western Australia v Ward that*[28] there is a connection with the waters and lands by those laws and customs as a prime source of aboriginal title. The Court also says whether the aboriginal title can exist minerals and petroleum, which is recognized as a legal right and protected by the equitable remedies [29].

The Commonwealth aboriginal title act confirms the possession of natural resources such as petroleum,

[8] Code, Bill, 'Australia Aboriginals Win Right to Sue for Colonial Land Loss' (15 March, 2019) News Aljazeera, <https://www.aljazeera.com/news/2019/03/australia-aboriginals-win-sue-colonial-land-loss-190315062311052.html> at 20 May 2019

[9] Ibid.

[10] Native Title Act 1993 (Cth) s 3 ('NTA').

[11] Mchugh, above n 01.

[12] See, above nn.

[13] 'Native Title Report 2002: 'Recognition of Native Title' (n.d) Australian human rights commission Retrived from <https://www.humanrights.gov.au/publications/native-title-report-2002-recognition-native-title> at 20 April 2019

14 Ibid.

15 Ibid.

16 Section 61 and 225 of the Native Title Act of Australia 1993.

[17] Howden, Kristin, 'Indigenous Traditional Knowledge and Native Title' (2001) '24 UNSWLJ at 63.

[18] David, Bennett, 'Native Title and Intellectual Property' (April 1996) Australian Institute of Aboriginal and Torres Strait Islander Studies

[19]Kristin, above n 17.

[20] Lovett on behalf of the Gunditjmara People v Victoria [2007] FCA 474

[21] North Ganalanja Aboriginal Corporation v Queensland (1996) 185 CLR 595, [18] (Brennan CJ, Dawson, Gaudron, Toohey and Gummow JJ)

[22] Native Title Act 1993 (Cth) ss 13(1), 61(1

[23] 'Proof and Evidence Proof of native title' (n.d) Australian Government and Australia Law Reform Commission. Retrieved from <https://www.alrc.gov.au/publications/proof-native-title> at 22 April 2019

[24] Native Title Report 2003, below n 61.

[25] Yorta Yorta v Victoria [2002] 214 CLR 422, 458.

[26] Akiba v Queensland (No 2) (2010) 204 FCR 1, [526].

[27] Hayne., et al, 'The Nature and Content of Native Title: Confirming the Nature and Content of Native Title rights and Interests' (n.d) Australia Government and Australia Law Reform Commission. Available at <https://www.alrc.gov.au/publications/nature-and-content-native-title-rights-and interests-0>

[28] Western Australia v Ward [2002] HCA 28; 213 CLR 1; 76 ALJR 1098; 191 ALR 1

[29] See, Mabo (1992) 175 CLR 1, 61 (Brennan J).

minerals, quarry materials and fauna and rights to use or control water. Authorization of ownership of resources will not of itself extinguish native title rights and interests. So, the aboriginal title will not be infringed through the Racial Discrimination Act 1975 (Cth) and the Native Title Act 1993.

3. The approaches to recognition, proof, and content of aboriginal title in canada

In Canada, all important cases highlight the connection of common-law aboriginal title to the nature of Crown sovereignty. The Canadian Supreme Court has emphasized to the object of common-law appreciation of aboriginal title, and the constitutionalizing of section 35 of The Constitution Act, 1982 which identify the prior occupation of North America by aboriginal peoples, and to resolve that prior presence with the declaration of Crown sovereignty [30]. The Canada contains specific Aboriginal rights to hunt animals, birds throughout the claim area for the determinations of securing animals for work, transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses [31].

Federal policy does not recognize the land claims outside reserves in Canada, but this altered after the in *Calder v Attorney General of British Columbia* [32]. which confirms aboriginal and common law. For aboriginal land claims, the federal government's statement acknowledged in 1973 whereas negotiations with aboriginal peoples are able to establish their traditional interests. This tradition interests would be led to compensation.

Negotiations of Canada results in numerous inclusive land claims agreements with First Nation peoples in the British Columbia and North West Territories. The Canadian constitutional act standard the present indigenous privileges of the native peoples of Canada in 1982. In *Attorney General for Quebec v Attorney General for Canada*, Dean and Gaudron JJ renowned the Privy Council's gratitude that Indian usufructuary title was a right, but personal only in the sense of its inalienability [33]. However, the Canadian supreme court recognizes the aboriginal title by both common law and constitutional law [34].

In the matter of proofing native title, the court supposes that nation must prove its claim when an Indigenous nation carries a title claim. In this approach, legal scholar John Borrows asks that Why aboriginal group should accept the burden of resolution by proving its occupation of the land? Why should the Crown not have to prove its land claims?

Nonetheless, the Chief Justice of Canada stressed that this kind of proof must be from both the common law and the aboriginal perspectives [35]. The United States and Canadian court decisions have looked for occupancy in the context the initial cases on native title in the common law world arise from the fact of occupation of their Indian homelands from time immemorial [36]. That's why Dr. Ramy Bulan expressed that,

"It is this that led Hall J to observe in Calder v British Columbia that, in enumerating the indicia of ownership, 'possession is of itself at common law, proof of ownership' Acknowledging the existence of these common law rules, in Delgamuukw v British Columbia, Lamer CJC said that the fact of physical occupation is proof of possession at law, which in turn will ground title to land [37].

The nature and content of aboriginal title continue uncertain until the Supreme Court decides the decision of *Delgamuukw v British Columbia* [38]. in 1997. After *Delgamuukw*, the Supreme Court gives the decision in *Guerin v The Queen* that aboriginal title includes a legal right to occupy and possess lands.

However, the Court approves that aboriginal title in *Delgamuukw* case which is inalienable. That's why, the aboriginal title cannot be sold, removed, transferred, leased to third parties because its source is exceptional as comes from occupancy before sovereignty.

Nonetheless, the policy and practice as approaching in Australia were dramatically different from that Canada relating the right of land as being based on occupation and possession. In contrast, the approach involves the documentation of each right and formation of that right through proof according to law [39]. Both countries follow the common law, Australia follows the relationship with indigenous people when Canada wants to make negotiation with indigenous people for protecting aboriginal title rights.

4. To what extent have the Malaysian court decisions reflected either ONR or both of these approaches?

I think that some Malaysian case decisions are followed by Australia and Canadian common law and custom which reflected in Malaysian cases, but there are constitutional and other acts problem of protecting the aboriginal title in Malaysia. However, in 1997, the Orang Asli had magnificently confronted the State's deficiency of their lands in the case of *Adong bin Kuwau v Kerajaan Negeri Johor*. It is important because there is a right of Orang Asli under the common law right to their inherited lands.[40] The Court also approves their legal rights under the provisions of the *Aboriginal Peoples Act 1954* and a constitutional right.

Nevertheless, the content and proof of the native title under common law are explained by the Malaysian courts have been formed by *Mabo [No 2] v Queensland* [41]. On the other side, the courts in *Adong*, *Nor Anak Nyawai* and *Amit bin Salleh* mentions the ideas of the recognition of aboriginal title under the common law of Australia which documented in *Mabo & Ors v Queensland (No2)* [42]. The High Court of Australia recognizes the aboriginal title as the

[30] Tsilhqot'in Nation v British Columbia [2007] BCSC 1700. 112

[31] Young, Simon, 'Land Rights Laws: Issues of Native Title: Native Title in Canada and Australia post Tsilhqot' in, Shared Thinking or Ships in the Night' (2009) '04 (02)'); Native Tittle Research Unit Retrieved from <https://aiatsis.gov.au/sites/default/files/products/issues_paper/young-ntip-v4n2-native-title-canada-australia-post-tsilhqotin_0.pdf>

[32] Calder v Attorney General of British Columbia [1973] SCR 313.

[33] Mabo (No 2) (1992) 107 ALR 1, 68 (Dean and Gaudron JJ).

[34] (1997) 3 SCR 1010

[35] Mchugh, above n 01.

[36] Bulan, Ramy, 'Proof of Native Customary Title through Evidence of Occupation on the Cultural Landscape' (2018) '42 (2)'); Journal of Malaysian and Comparative Law, 1-26

[37] Ibid.

[38] Delgamuukw [1997] 3 SCR 1010; (1998) 153 DLR (4th) 193.

[39] [2001] SydLawRw 4; (2001) 23 Sydney Law Review 95, 103.

[40] Bulan, Ramy, 'Title in Malaysia: A Complementary' Sui Generis Proprietary Right under the Federal Constitution' (2007) '11 (01)'); Australian Indigenous Law Review, 54-78

[41] Bulan, Ramy, 'Ripples of Mabo: Aboriginal and Native Customary Land Rights in Malaysia' (n.d)

[42] (2002) 175 CLR 1 ('Mabo (No 2)').

laws and customs of the Indigenous peoples.
In Adong Mokhtar Sidin JCA (as he then was) said:

"My view is that, and I get support from the decision of Calder's case and Mabo's case, the aboriginal peoples' right over the land includes the right to move freely about their land, without any form of disturbance or interference. I believe this customary right of the aborigines in Peninsula Malaysia is a common law right which the natives have, and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the Calder case [43].

Illustrating from Adong, it is said that common ground is raised from the decision in *Mabo v State of Queensland (1992) 66 ALJR 408* which is trailed in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor [1997] I MLJ 418* and that pronouncement confirms by the Court of Appeal *in Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors v [1998] 2 MLJ 158*. The case mentions that common law respects the pre-existing rights under native law and custom though such rights may be taken away by clear and unambiguous words in legislation.
The common law perception of aboriginal title adopted in *Mabo (No 2)* which stays to be mentioned by Malaysian courts and courts of other jurisdictions in common law pronouncements [44]. Mokhtar Sidin JCA said that *Mabo [No 2]* recognized that according to laws, custom and aboriginal populations, there was a common law for concept of native based on occupation [45].
Adong I stated to the Australia Parliament's implementation of the *Native Title Act 1993* (Cth), which provides compensation on the basis of taking indigenous lands illegally. So, if any land is taken by the Malaysian government, the compensation should be made on the same basis [46]. However, Adong *II* refereed the serving of *Adong I* that depend on Mabo *(No 2)* for its holding that aboriginal title involved the right to move freely on the land [47].
The Sarawak Attorney General heatedly opposed at the Federal Court *in Superintendent of Land & Surveys v Madeli Salleh bin Salleh* [48]. *that* Adong and Nor Nyawai should not be surveyed because their decisions entrenched upon Mabo [No 2] and Calder. He argued against the greeting of the common law from Australia and Canada on grounds that s 3 of the Civil Law Act 1956 (Malaysia) only allowed in the reception of 'English common law'. However, the Federal Court disallowed this argument. The Court said that the proposal of law as pronounced in those two cases reflected the common law position regarding native title throughout the Commonwealth'.
That's why in the case for recognition of aboriginal title, Dr. Ramy Bulan and Amy Locklear said that
"In Madeli III, the Federal Court reviewed and commented on a number of Privy Council, High Court of Australia, and Supreme Court of Canada decisions stating the common law on indigenous property rights [49].
In the Director of Forest, Sarawak & Anor v TR Sandah & Ors [50] the Federal Court delivers a major blow to Native Customary Rights of the indigenous Dayak people. Justice Zainun holds that the explanation of 'law' under article 160 (2) says customary law a vital part of the legal system; and drawing inspiration from the Australian case of *Mabo & Others v The State of Queensland* ('*Mabo (No. 2)* and the English case of *Tyson v Smith* went on to rule that – Custom is a source of unwritten law. In general, for a custom to be regarded as conferring legally enforceable rights. It is essential that such customs are immemorial, certain, reasonable and acceptable in the locality [51].
The full bench of the Federal Court *in Bato Bagi v Kerajaan Negeri Sarawak* [52] applies common law verdicts in entrenching the doctrine in Malaysia. The court says that a deficiency of lands is not only a deprivation of the important and the constitutional right to property which must be compensated but also the loss of the right to life and livelihood which wants satisfactory compensation.

5. A preferred approach in Malaysia with case references (recommendations)

The common law of Malaysia identifies the aboriginal customary title and more than one hundred cases are hanging in Malaysia related common law, customary law, and fundamental questions. However, the courts in Malaysia have generally allowed oral evidence to be adduced to prove customary practice [53]. The aboriginal title protects the rights are well-defined by the customs in which that title is controlled [54].
The *case of Adong, in Superintendent of Land & Surveys v Madeli Salleh bin Salleh, Director of Forest, Sarawak & Anor v TR Sandah & Ors case of Malaysia* refer Australia and Canadian common law and customs for protecting the indigenous aboriginal rights.
However, Malaysia is trying day by day to approach by the common law, customary law for safeguarding the indigenous people's rights. As, for example, in the case of *bin Salleh & Ors v The Superintendent, Land & Survey Department, Bintulu & Ors* [55], Whereas Abdul Azizi bin Abdul Rahman, J supposed that though the common law rights and the statutory rights over land in *Adong bin Kuwau* are rights belonging to the aboriginal people of the Peninsula Malaysia, these rights in my view are similar to the aboriginal customary rights over the native communal reserve of the natives of Sarawak [56].
On the contrary, Adong was soon surveyed by *Nor Nyawai*

[43] [1997] 1 MLJ 418, 430.
[44] Ramy, above n 40.
[45] He referred to Paroulitja v Tickner (1993) 117 ALR 206, 213
[46] Adong I [1997] 1 MLJ 418, 435
[47] Adong II [1998] 2 MLJ 158, 162
[48] Superintendent of Land & Surveys v Madeli Salleh bin Salleh [2008] 2 MLJ 677.
[49] Bulan, D. Ramy, and Locklear, Army., 'Legal Perspectives on Native Customary Land Rights in Sarawak' (2008) Alkauthar Press Sdn. Bhn, ISBN 978-983-2523-52-9, 69.
[50] [2017] 2 MLJ 281Director of Forest, Sarawak & Anor v TR Sandah & Ors
[51] Yunus, D. S. M. Hishamudin, 'Protection of Marginalized Minorities Under The Constitution' (2018) Legal Herald (Faculty of Law, University of Malaya
[52] Bato Bagi & Ors v. Kerajaan Negeri Sarawak and another Appeal, (2011). M.L.J.6 297
[53] Ramy, above n 49.
[54] Ramy, above nn 58.
[55] [2005] 7 MLJ 10
[56] [2005] 7 MLJ 10, 22. Land laws are governed by different statutory regimes in the three regions. In Peninsula Malaysia the National Land Code 1965 applies. In Sabah it is the Land Ordinance and in Sarawak the Land Code 1958.

& Anor v Borneo Pulp Plantations [57] *and Sagong Tasi v Kerajaan Negeri Selangor* [58] In Nor Nyawai, Ian Chin J said: If necessary, another apt description of the native customary right would be that used to define native title in Mabo [No 2]. *The case of Selangor Pilot Association v Government of Malaysia* [59] refers that aboriginal rights are propriety rights under statuary law and common law which is protected according to article 13 of the Federal Constitution.

Nevertheless, I think about solving the problem of Malaysian aboriginal title that Canadian policy is best for protecting the aboriginal title in Malaysia than Australia because the essence of aboriginal title in Canada is a treaty or agreement process for indigenous people [60]. However, Australian High Court said to follow the Canadian jurisprudence in the *Delgamuukw* case that aboriginal title carries the broad overarching right to the land itself which includes rights to natural resources of indigenous people [61]. Malaysia should follow that Canadian process because the settlement process of Canada progresses under Imperial direction which continues with the federal government of Canada. The jurisdiction permits the federal government 'to safeguard the aboriginal interest of indigenous people [62].

The Malaysian approaches are so nearer to Canadian authorities than the Australia which decision is taken by the courts of Malaysia [63]. In Delgamuukw case, The Supreme Court of Canada said straight to the problem of occupation, hunting, fishing or otherwise exploiting its resources [64]. So, I think that the Calder case protects customary, common law, indigenous rights Malaysia should be also the same basis in Malaysia.

The lawsuit in Canada, despite or perhaps because of its recognition, for over two hundred years, has been much less than that motivated in Australia [65]. In 1973 the federal government issued willingness to aboriginal people by negotiating. Another approach, in 1987 and 1995 comprehensive land claims by indigenous people negotiated through settlement may be constitutionally protected by section 35 of the Constitution Act.

As, for example, the place of Quebec in Canada no treaties or agreements are signed with the aboriginal peoples before 1975 but recently the provincial government wants to develop the lands of northern Quebec without any agreement with the aboriginal peoples [66]. That's why, in 1998, the federal government made a relationship between aboriginal people and the Crown Agreements [67]. As I think that Malaysia will make above procedures like a relationship, agreement, negotiation with indigenous people. The Canadian courts remain a clear function in section 35 of the constitution which provides for aboriginal people's rights [68]. So it supports the Canadian law system when Australia fails to progress the fiscal and social prospects for preserving aboriginal title [69].

Drawing on the jurisprudence of Mabo, Chief Justice Lamer of the Supreme Court of Canada said about the native title as a settlement of prior occupation by Indigenous peoples with the declaration of Crown sovereignty [70]. However, this is my opinion that Malaysia should recognize native title throughout settlement like Canada. In this position, Malaysia can be taken such an approach as follows.

- Federal constitution and aboriginal title act 1954 will be applied, whereas article 153 and 161A (5) of the Federal *Constitution* provides protection the position of the Malays and nations of Sabah and Sarawak, correspondingly.
- All the agreements should be provided for the surrender and exchange of native title in return for the rights conferred by the Agreements.
- All the settlements and negotiation will be protected.
- Access to land and protection of resources
- Connection with land, resource supervision and development
- Cultural resources and activities
- Fiscal arrangements
- Economic development initiatives

6. Conclusions

In nut a shell, it can be said that recognition of customary laws depends on traditional laws which have become a new approach in Canada and Australia. This approach should be established in Malaysia and must be in tandem with universal expansions in protecting the aboriginal title. Another thing is that Malaysia can make a new act for aboriginal title or apply the recent acts for well approaching as a reflection of the case decision in Malaysia when Australia native title passed after the decision of Mebo case. In the Malaysian framework, the growing rights are safeguarded under a 'constitutional' canopy that holds the bridge together. The safety of aboriginal rights is protected in the Federal Constitution of Malaysia which must also preserve the cultural organizations and customary laws as the basis of those rights. Finally, article 13 and 163 of the Malaysian constitution should be changed or applied properly when Canadian article 35 protects the indigenous rights suitably. Moreover, Malaysian courts recognize the protection of aboriginal title according to international human rights law. That's why; Professor Dr. Abdul Ghafur Hamid said there is no reason that Malaysia should not apply an established rule of customary international law.

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[57] Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors. [2001].

[58] Kerajaan Negeri Selangor v. Sagong bin Tasi, [2005] 2005 M.L.J.6 289

[59] [1975] 2 MLJ 66, 69 (Suffian LP) ('Selangor Pilot Association'). The construction placed on the Indian article by the Indian Supreme Court on the unamended art 31 was adopted by Suffian LP.

60 Native Title Report 2003: 'Native Title and Agreement Making : a Comparative Study' (2003) Australian Human Rights Commission, <https://www.humanrights.gov.au/publications/native-title-report-2003-chapter-4-native-title-and-agreement-making-comparative-study> at 21 April 2019

[61] Stephenson, above n 02.

[62] Delgarnuukw v British Columbia [1997] 3 SCR 1010, 1118-1119 para 176-178

[63] Ramy above n 40.

[64] Ibid.

[65] Bartlett, P. Richard, 'The Different Approach to Native Title in Canada' (2001) '11 (01)'); Australian Law Librarian Retrieved from <http://classic.austlii.edu.au/au/journals/AULawLib/2001/5.pdf> at 02 May 2019

[66] Ibid.

[67] Gathering Strength, Department of Indian Affairs & Northern Development, Ottawa (1998)

[68] Mchugh, above n 01.

[69] Morris, Shireen, 'Re-evaluating Mabo: the case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity' (2018) '05 (03)'); University of Melbourne - Law School, 01

[70] Strelein, Lisa. 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 UJL & Pol'y at 225.

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