Introduction

The content and proof of aboriginal title under common law that is expounded by the Malaysian courts has been shaped by *Mabo [No 2] v Queensland*. As the emerging concept of aboriginal and native title develops its own character within the constitutional and legislative framework and native laws and customs, the principles that were enunciated in *Mabo [No 2]* will continue to resonate through the decisions of the Malaysian courts on Indigenous land rights.

This chapter outlines the initial application of the principles articulated in *Mabo [No 2]* and shows how it continues to impact the development of customary land rights in Malaysia.

*Mabo [No 2]* and its influence on aboriginal and native land rights

Since 1997, the Malaysian courts have applied the doctrine of common law native title to Indigenous land rights, starting with *Adong bin Kuwau bin Kerajaan Negeri Johore (Adong)*. In *Adong*, 52 Orang Asli aboriginal families successfully claimed compensation for their ancestral lands that were taken to build a dam. Although the land was not gazetted as aboriginal reserve, the High Court, which was the court of first instance, found that they had been deprived of their heritage lands and that their traditional livelihoods of foraging, hunting and gathering on the land had been affected. Referring to precedents from other common law jurisdictions Mokhtar Sidin JCA followed *Calder v AG of British Columbia* and *Mabo [No 2]* and said:
My view is that ... the aboriginal peoples’ rights over land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself. It is not [a right] in the land itself in the modern sense that the aborigines can convey ... they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial ... I believe that it is a common law right which the natives have and which the Canadian and Australian courts have described as native title. I would agree that in Malaysia the aborigines’ common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of aboriginal people would be entitled to this right.6

Mokhtar Sidin JCA noted that Mabo [No 2] established that there was a concept of native title at common law, based on occupation and in accordance with the laws and customs of Indigenous inhabitants.7 Mindful of the statutory provisions under the Aboriginal Peoples Act 1954 (APA) he held that Orang Asli had rights under common law to their ancestral lands but that these rights had to be looked at conjunctively with the statutory rights for ‘both are complementary’.8 The APA does not extinguish the rights enjoyed by aboriginal people under common law. His Honour held that both the common law and statutory rights are proprietary rights protected by Article 13 of the Federal Constitution, and any deprivation and compulsory acquisition of those rights must be compensated.

Adong was soon followed by Nor Nyawai & Anor v Borneo Pulp Plantations9 and Sagong Tasi v Kerajaan Negeri Selangor.10 In Nor Nyawai, Ian Chin J said:

If necessary, another apt description of native customary right would be that used to describe native title in Mabo [No 2] ... which is that it ‘has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’. It is therefore not dependent for its existence on any legislation, executive or judicial declaration ... though they can be extinguished by those acts.
His Honour also said:

It is common ground — arising from the decisions in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong* ... and which decision was affirmed by the Court of Appeal in *Kerajaan Negeri Johor v Adong* ... the common law respects the pre-existing rights under native law and customs though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak.11

To deal with the restrictive provisions of the Sarawak Land Code 1958, *Nor Nyawai* emphasised the doctrine of continuing recognition of the pre-existing native rights to their lands, which may be proved by continuous occupation. The court also held that the customary tenure based on the native Iban territorial concept of *pemakai menoa*, meaning ‘land to eat from’,12 has not been abolished by the Land Code or any other statute, and so the natives had rightful possession of their land.13

The characteristic of aboriginal title was further clarified in *Sagong Tasi*. The High Court accepted oral histories as evidence to prove customs and occupation of land by Orang Asli. Taking the cue mainly from *Mabo [No 2]* the Orang Asli had to prove aboriginal identity, their traditional occupation and their exclusive use and enjoyment of the land, the existence of a traditional community and their customary practices on the land. Since the claim in *Sagong Tasi* involved a settlement area, Mohd Noor J declared that the Orang Asli not only had a right over the land but also an interest in the land. Drawing from *Mabo [No 2]* and other cases, he outlined the features of aboriginal title,14 stating that: it is a right that is acquired in law and not based on documentary title;15 enforceable by the courts and does not depend on legislative, executive or judicial declaration;16 the radical title of the sovereign is encumbered with native rights,17 it is a communal title and is inalienable,18 the right may be extinguished through clear and plain intention or executive act but compensation should be paid,19 and aboriginal people do not become trespassers in their own lands by establishment of a colony or sovereignty.20
Contention against the applicability of *Mabo [No 2]*

At the Federal Court in *Superintendent of Land & Surveys v Madeli Salleh bin Salleh*\(^{21}\) the Sarawak Attorney General vehemently contended that *Adong* and *Nor Nyawai* should not be followed because they were decisions rooted upon *Mabo [No 2]* and *Calder*. He argued against the reception of common law from Australia and Canada on grounds that s 3 of the *Civil Law Act 1956* (Malaysia) only allowed for reception of ‘English common law’. The Federal Court rejected that argument. The Court viewed that, ‘the proposition of law as enunciated in those two cases reflected the common law position with regard to native title throughout the Commonwealth’\(^{22}\). In *Bato Bagi v Kerajaan Negeri Sarawak*\(^{23}\) the full bench of the Federal Court applied these common law decisions in arriving at their conclusions, further entrenching the doctrine in Malaysia.

Beyond *Mabo [No 2]*

The interpretation of the Brennan Court’s decision in *Mabo [No 2]* set out in the *Native Title Act 1993* (Cth) would later reflect a narrower legal framework for native title in Australian courts, marking a point of departure from how the doctrine would be applied by the Malaysian court to local circumstances within its own legislative framework.

One significant difference turns on Article 160 of the Malaysian Federal Constitution, defining law to include written law, common law and customs and usages, therefore providing a crucible for rights under customary laws to be interpreted on their own terms\(^{24}\) as protected under the Constitution that could not be constrained, even by principles that developed under common law. It has even been suggested that statutes such as the APA which provide for aboriginal rights is, ‘fundamentally a human rights statute’ and acquires a ‘quasi constitutional status’.\(^{25}\) One might have a glimpse of that direction in the recent case of *Bato Bagi*, where the Federal Court held that deprivation of lands is not only a deprivation of fundamental (and constitutional) right to property which must be compensated but the corresponding (loss of) right to life and livelihood also required adequate compensation. It also cautioned the courts below to take a pragmatic, purposive, and liberal interpretation of the constitutional provisions to safeguard not just the textual but also implicit rights.\(^{26}\)
6. Ripples of Mabo: Aboriginal and native customary land rights in Malaysia

Conclusion

It is now settled law that the common law of Malaysia recognises aboriginal or native customary title. There are reportedly more than a hundred native title cases pending in the Malaysian courts, many of which involve Indigenous communities against the state or large corporations’ commercial interests and most turn on interpretation of legislation, occupation at common law, customary laws and practices on land and the fundamental questions of right to livelihood. New challenges arise, in cases of aboriginal rights including some religious aspects. Although the growing common international jurisprudence on Indigenous title, couched in justice and human rights, may well influence native title in Malaysia along with other common law precedents. As Mabo [No 2] had provided a springboard for the articulation of some of those concepts, these principles that have become part of the Malaysian common law legacy will continue to resonate through the courts.

Notes
1. (1992) 175 CLR 1 (Mabo [No 2]).
3. The High Court is the lowest court in the hierarchy of the superior courts. An appeal from the High Court goes to the Court of Appeal and any further appeal on questions of law would go to the highest court, the Federal Court.
4. Judge of the Court of Appeal, sitting in the High Court.
5. (1973) 34 DLR (3d) 145 (Calder).
6. [1997] 1 MLJ 418, 430. This view was upheld by the Court of Appeal as reported in Kerajaan Negeri Johore & Anor v Adong bin Kuwau [1998] 2 MLJ 158.
11. [2001] 6 MLJ 241, 245. At 250, Ian Chin J also said ‘native customary rights are similar to the rights under native title of the Australian Aboriginals which have been held to be enforceable as common law rights’ referring to Wik Peoples v Queensland (1996) 187 CLR 1, 84, per Brennan CJ.
12. The term pemakai menoa refers to an area of land held or controlled by a distinct longhouse or village community exercised within a garis menoa — a territorial boundary marked by river, or hill or clumps of trees. The
pemakai menoa includes cultivated areas, old longhouse sites, burial sites, and pulau galau which is an area of forest reserved for communal use. The High Court in Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd [2010] 4 MLJ 204 noted that the customary practice is valid even if it is not codified.

13. The Court of Appeal allowed the defendant’s appeal against grant of compensation on grounds of insufficient proof of occupation of the disputed area but notably did not disturb the High Court’s finding that the concept of pemakai menoa exists and endorsed the decision.

15. Following Calder and Mabo [No 2].
17. Quoting Mabo [No 2]. This was affirmed by Ariffin Zakaria FCJ in the Federal Court in Superintendent of Land & Surveys v Madeli Salleh bin Salleh [2008] 2 MLJ 677.
18. Sagong Tasi, following Mabo [No 2].
19. Mabo [No 2].
20. Referring to Ward v Western Australia (1998) 159 ALR 483, 598.
22. Ibid., 692.
27. For example, Canada’s Delgamuukw v British Columbia [1998] 1 CNLR 14 and South Africa’s Alexkor Ltd & Ors v Ritcherveld Community & Others (2003) 12 BCLR 1301.