



SABAH & SARAWAK'S SPECIAL POSITION UNDER THE FEDERAL CONSTITUTION

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INTRODUCTION

- ▶ The 61st anniversary of Malaysia's formation is approaching. Regrettably, we take note of a large reservoir of discontent in our sister states across the South China Sea.
- ▶ We need to put our heads and hearts together to defuse the tensions and find just and lasting solutions.



- ▶ Federal-state tensions are inherent in all of the 30 or so federal systems around the world. In Malaysia, we saw federal-state discord as early as 1966 when Sarawak CM Stephen Kalong Ningkan was deposed after a federal declaration of emergency.
- ▶ In subsequent years many other areas of discord went unnoticed because of the overwhelming power of the Alliance/BN government.

- ▶ But since the four GEs of 2008, 2013, 2018 and 2022, politics has become more competitive, and democracy and free speech are finding greater expression.
- ▶ Consequently, we are witnessing the open airing of grievances. This is not an entirely bad development. It shows an emerging democracy.

SABAH & SARAWAK'S SPECIAL, ASYMMETRICAL POSITION

- ▶ In plural societies around the world, it is not uncommon to allow ethnic or other groups that claim a distinct identity to exercise autonomy over affairs of special concern to them.
- ▶ Kashmir in India (till Aug 2019), Quebec and Nunavut in Canada, and regions in Switzerland, Spain, Russia, Philippines, Thailand and Indonesia enjoy such “asymmetrical” arrangements.

When Sabah, Sarawak and Singapore “federated” with Malaya to re-constitute the Federation of Malaya into the much larger and more diverse Federation of Malaysia, the significantly amended Federal Constitution granted them a number of seemingly iron-clad guarantees of their autonomy and special position.

Though the existing Constitution of the Federation of Malaya was retained -

- ▶ 89/181 Articles (49%) and 12 out of 13 Schedules of the Federal Constitution were amended.
- ▶ Thirty-seven new Articles were inserted
- ▶ 11 Articles were deleted.
- ▶ The nation was given a new name.



JUSTIFICATION FOR SPECIAL POSITION

Sabah & Sarawak's special position was justified for many political, geographical, cultural and economic reasons:

1. The 1963 Malaysia Agreement (MA1963) between the Federation of Malaya, the UK, North Borneo (Sabah), Sarawak and Singapore was drawn up after a lengthy process of bargaining and negotiations. The delegates of Sabah and Sarawak made it very clear to the Inter-Governmental Committee (IGC) headed by Lord Lansdowne and the then DPM Tun Abdul Razak as the deputy chairman, that special treatment was a pre-condition for constituting Malaysia. Sabah summarized its demands in the famous “20 points” Memorandum. Sarawak expressed them in similar “18 points”.

2. QUASI-CONSTITUTIONAL STATUS :Though the IGC Report 1963 and the Malaysia Agreement 1963 were not fully incorporated into the Malaysia Act 1963 and the Federal Constitution, their sanctity and quasi-constitutional status have been reiterated by our courts in several cases:

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 4 CLJ 105; *Datuk Hj Muhammad Tufail Mahmud v Dato' Ting Cheuk Sii* [2009] 5 AMR 281 *Robert Linggi v Government of Malaysia* [2011] 6 MLJ 741; *Fung Fon Chen@ Bernard v The Government of Malaysia* [2012] 6 MLJ 724; the scintillating dissenting judgment of the then CJ of Sabah and Sarawak, TS David Wong Dak Wah in *TR Sandah Ak Tabau* (2019); and *Maria Chin Abdullah v KP Imigresen* [2012] 1 MLJ FC, 907.

- ▶ Nevertheless, till the 2022 amendment, controversy remained about the LEGAL status of these historical documents and international treaties. Do they have the status of ‘law’? Are they legally enforceable under Article 160(2) of the FC?



3. DISTINCTIVENESS: Coming back to the reasons for more autonomy, Sabah and Sarawak's cultural and religious distinctiveness from Peninsular Malaya justifies special treatment.

4. SIZE: Sabah and Sarawak contribute huge territories (approx. 60% of total land area) of Malaysia. Their combined area is 198,069 sq km, exceeding Peninsular Malaysia's 131,681 sq km. The coastline of the two States is 2,607 km compared to the peninsula's 2,068 km.

5. MAJOR SOURCE OF NATURAL RESOURCES: S & S are a major source for petroleum, natural gas, and timber.

6. POVERTY: There are severe problems of poverty and underdevelopment in these states, esp in Sabah. Such necessities of life as piped water, roads, social and health facilities and internet are not on par with West Malaysia.

7. INTERNATIONAL BASIS: The 1963 Malaysia Agreement was not a mere domestic agreement but an international treaty giving international law basis to the guarantees for Sabah and Sarawak.

8. The Malaysia Act was a constitutive statute which provided the foundation for a new legal order. As was stated by FCJ Abdul Rahman Sebli in *Maria Chin Abdullah* [2021]:

“...the Malaysia Act ... was without doubt a radical change so fundamental and material in nature ... that it brought about a new and valid legal order not provided for or contemplated in the older order of the 1957 Constitution”.



CONSTITUTIONAL PROVISIONS FOR SABAH & SARAWAK'S SPECIAL POSITION

A: LEGISLATIVE MATTERS

1. SCHEDULE 9, SUPPLEMENTARY STATE LIST

The law-making powers of the 11 Peninsular State Assemblies are allocated in Sch 9 List II paras 1-12A.

However, for S & S, there is a supplementary State List which confers additional powers on S & S in six matters including native law and custom, incorporation of state authorities, ports and harbours, land surveys, the Sabah Railway (in Sabah) and water supplies and services.

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2. S&S ALSO HAVE A SUPPLEMENTARY CONCURRENT LIST

This special List extends the legislative competence of S & S to cover 9 matters including personal law, adulteration of food, shipping under fifteen tons, water production and supply, forestry research, charities, theatres and in Sabah (until 1970), medicine and health.

3. ARTICLE 76A AND 95C(1)

Under these Articles the Yang di Pertuan Agong by order has conferred on S & S special powers to legislate on the federal matter of carriage of goods by land: Borneo States (Legislative Powers) Order 1963.

4. FEDERAL POWER TO HAVE UNIFORM LAWS IS NOT APPLICABLE TO S & S

Parliament may legislate on state matters for promoting uniformity of laws of two or more states: Article 76(1)(b). This power of the federal Parliament is not applicable to Sabah and Sarawak: Article 95D. Therefore, land, agriculture, forestry and local government are exclusive to Sabah and Sarawak.

▶ 4.

B: AMENDING THE CONSTITUTION

1. The power of amending the Constitution which belongs to the federal parliament is not as extensive in relation to Sabah and Sarawak as it is in relation to the West Malaysian States.

Under Article 161E(2) the consent of the Governors of Sabah and Sarawak is required to a constitutional amendment affecting the special position of these states on matters of citizenship, judiciary, federal-state relationships, religion, language, native rights, quota of MPs in Parliament: *Robert Linggi v Government of Malaysia* [2011] and *Fung Fon Chen@ Bernard v The Government of Malaysia* [2012] 6 MLJ 724.

2. Regrettably some constitutional amendment have diluted the special position of Sabah and Sarawak. An example is Amendment Act A354 (1976) to amend Article 1(2). In 1963 the Article stated that the states of the Federation shall be (a) the 11 States of Malaya ... (b) the two Borneo States ...; and (c) Singapore. Sabah and Sarawak were mentioned separately to underline their special status. In 1978, Sabah and Sarawak were included in Article 1(2) as two of the thirteen states. This was a status down-grade without their consent.

3. Federalisation of critical state matters such as water (Act 26/1963) has taken place.
4. Tourism (Act A885) has been transferred to the Concurrent List.
5. SS argue that the Territorial Sea Act 2012 reduces their territorial waters from 12 to 3 nautical miles in violation of their territorial integrity guaranteed in Article 2(b).
6. The power of Governors to appoint Judicial Commissioners to the High Court of Borneo was handed over by constitutional amendment to the Yang di-Pertuan Agong.

7. Article 121(1) was amended to emasculate the powers of the courts including the High Court of Borneo.

8. Likewise, Article 121(1A) was inserted to reduce the powers of the courts including the High Court of Borneo.

9. Labuan was federalized in 1984. Was this done in accordance with the procedures of Articles 2(b) and 161E?

C: POSITION OF ISLAM IN SABAH AND SARAWAK

1. In 1963 there was no official state religion in Sabah or Sarawak. Sabah later amended its State Constitution to insert Islam as a state religion. In Sarawak, there is no state religion though the YDPA is recognised as the head of Islam in the state.
2. In 1963 the Federal Constitution contained Articles 161C which provided that that if financial support is given by the federal government for Islamic institutions and Islamic education in the Borneo states, the consent of the state Governor must be obtained. Further, an equivalent amount will be allocated for social welfare in these states. Article 161C was repealed in 1976.

3. In 1963 there was an Article 161D which provided an exception to Article 11(4). Article 11(4) allows the regulation or banning of any religious teaching to Muslims. In the context of S & S, Art 161D provided that a state law restricting the propagation of any religious doctrines to Muslims may not be passed without a special two-thirds majority. Art 161D was repealed in 1976.

4. All in all, the native, indigenous, autochthonous character of Sabah and Sarawak has been diluted over the years and Islamisation has been a key policy of the federal government since the eighties.

5. In recent years, the moves towards an Islamic state, the plan to introduce hudud laws (RUU355), the attempt to export the peninsula's hardline Islamic trend, the restriction (now lifted) on import of Bibles in Malay, and the Federal Court decision in the *Titular Roman Catholic Archbishop of KL v Menteri Dalam Negeri* (2014) arouse discomfort in Sabah and Sarawak.

6. State Syariah laws have been enacted to provide that in the case of native Muslims, native law will not apply and the Syariah courts shall have jurisdiction. This has led to some conflicts between Syariah and native courts, especially in those cases when the parties prefer to be tried under native law in native courts.

D: COURT SYSTEM & INDIGENEITY

1. NATIVE COURTS

In Sabah and Sarawak, native law is widely used and is partly codified. There is a developed, multi-tier system of native courts. However, native judges need better training, professionalism and independence.

However, it is noteworthy that unlike Syariah courts under Art 121(1A), native courts are not independent of the High Court in matters within their jurisdiction.

2. A HIGH COURT FOR SABAH & SARAWAK

The federal High Court has two wings - one in Malaya and the other in the States of Sabah and Sarawak. The appointment of the Chief Judge of the Sabah and Sarawak High Court by the YDPA on the advice of the PM and the Judicial Appointments Commission, requires consultation with the Chief Minister of these States: Article 122B(3).

3. APPOINTMENT OF JUDICIAL COMMISSIONERS

Prior to 1994 it was the law that Judicial Commissioners in the High Court for Sabah and Sarawak shall be appointed by the Yang di-Pertua Negeri on the advice of the Chief Justice of Sabah and Sarawak. However, Article 122AB was amended in 1994 to transfer this power to the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court.

4. EMPANELMENT OF FEDERAL COURT

The IGC recommendation (para 26(4), Ch 3, 1962) that when an appeal involves the rights of Sabah and Sarawak, the Federal Court panel must have at least one judge from Sabah or Sarawak with Borneo judicial experience has not always been honoured. See *Keruntum v Director of Forests* (2018); *TR Sandah Ak Tabau* (2019).

E. NATIVE LAW INVOLVING LAND, LIVELIHOOD & CUSTOM

The Federal Constitution in Art 160(2) defines 'law' to include (i) written law, (ii) common law, and (iii) any custom or usage having the force of law.

Regrettably, many native land cases are heard by peninsular judges with no Borneo experience or appreciation of the way of life of the natives. The result is that native rights over traditional lands are often rejected by the federal courts: *Supt of Lands v Nor Anak Nyawai* (2005); *Dir of Forests v TR Sandah Ak Tabau* (2017); *Ketua Pengarah Jab. Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23.

There are however some sympathetic decisions which recognize that 'life' includes 'livelihood' and for the natives, land is part of their life: *Supt of Land v Madelli Salleh* (2007); *Bisi Jinggut v Supt* (2013).

F: REPRESENTATION IN PARLIAMENT

- ▶ Sabah has 25 MPs; Sarawak 31 in the Dewan Rakyat. Together, Sabah and Sarawak have 56 out of 222 or 25.2% of the MPs in the Dewan Rakyat. From the political point of view, 56 MPs mean 50% of the 112 MPs needed for a working majority.
- ▶ However, it must be noted that the present 25.2% representation is lesser than the 33% envisaged for Sabah, Sarawak and Singapore in 1963 in order to give these States protection against constitutional amendments requiring a two-thirds majority.

G: EMERGENCY POWERS

Even during an emergency under Article 150, the native law or customs of Sabah and Sarawak cannot be extinguished by emergency law: Article 150(6A). But note the abuse of emergency power in 1966 in Sarawak to remove the then CM, SKN.

H: DEVELOPMENT PLANS

Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak: Article 95E(2).

I: FISCAL FEDERALISM

“Money represents power”. The federal government's stranglehold over most of the lucrative sources of revenue is not as strong in relation to Sabah and Sarawak as it is in relation to other states. In several areas Sabah and Sarawak enjoy fiscal privileges that are not available to the Peninsular States:

SPECIAL SOURCES OF REVENUE

1. These States are allocated special revenues to meet their needs above and beyond what other States receive: Article 112 C(1)(b), Schedule 10, Part IV. No unilateral review without the consent of S & S is allowed: Art 112D(6).
2. Sabah and Sarawak are entitled to earnings (taxes, fees and dues) on eight sources of revenue like import and excise duty on petroleum products, export duty on timber and other forest produce, royalty on minerals, 30% customs revenue on medicine and health products, state sales tax, state ports and harbours, state water supplies, revenue from licences connected with water supply: Article 112C & Schedule 10, Part V.

STATE SALES TAX

3. There is a serious dispute between Petronas and Sarawak about Sarawak's constitutional right to impose State Sales Tax (SST) on the sale of petroleum products under Article 95B(3) of the FC and the State Sales Tax Ordinance 1998.

Fortunately, the dispute has been resolved - it appears in favor of Sarawak.

SPECIAL GRANTS

4. Sabah and Sarawak enjoy some special grants: Articles 112C(a) and (b) and Part IV and V of the 10th Schedule. For example, these states are entitled to import duty and excise duty on petroleum products.

NO FISCAL FEDERALISM

5. Regrettably, there remains justifiable discontent about the inequitable sharing of resources and the lack of fiscal federalism. There are allegations that these states do not derive the kind of financial benefit they deserve as a result of their contribution to the national coffers from petroleum, hydroelectricity and tourism. It is alleged that federal allocations to the Borneo states do not take into account the huge direct and indirect federal earnings from these states.

MANDATORY ALLOCATIONS NOT GIVEN

6. Another major and extremely intricate complaint is that Sabah and Sarawak have not received the mandatory financial allocations that are due to them under the 1963 provisions. It is alleged that Malaysia Agreement 1963 of 9 July 1963 and the 10th Schedule (Part IV Para 2(1)) had promised to Sabah 40% of the net revenue derived by the Federation from the state minus amounts received by the state.

OIL ROYALTY

7. Of special interest is the meagre 5% oil royalty these states receive.

J: ARTICLE 153 PROTECTION

1. Under Article 153, the natives of Sabah and Sarawak enjoy a special position similar to that of the Malays of Peninsular Malaysia. It is alleged that the protection of the special position of the natives under Article 153 is not vigorously enforced in contrast with strong affirmative action for peninsular Malays throughout the nation.
2. Borneonization of the public services is proceeding too slowly.

K: IMMIGRATION

1. To safeguard Sabah and Sarawak from being overrun by people from the Peninsula, the mobility of non-residents to Sabah and Sarawak is restricted: Articles 9(2), 161B, 161E(4) and Part VII Immigration Act, Act 155.
2. However, it is widely recognised that the constitutional right of the Borneo states to control immigration has been defeated by naturalisation of millions of illegal immigrants into Sabah. This is because citizenship is exclusively a federal power.

► L. MANY NATIVES DENIED CITIZENSHIP

1. The granting of citizenship is a federal monopoly. But native status is a state power.
2. Further, citizenship is a prerequisite to being a native.
3. This has created the human rights problem that thousands of indigenous people like the Bajau Laut, who are not granted citizenship, are also deprived of native status. This leads to a cascade of human rights problems.

M: LAWYERS

- ▶ There is restriction on non-resident lawyers practicing before the courts of Sabah and Sarawak and in cases originating from S & S: Article 161B: *Datuk Hj Muhammad Tufail Mahmud v Dato' Ting Cheuk Sii* [2009].

N: ENGLISH & NATIVE LANGUAGES

- ▶ Sabah and Sarawak enjoy special protection in relation to the use of English and native languages (Article 161). The National Language Act does not apply in Sabah and Sarawak unless adopted by the States. Sabah has adopted the NLC but Sarawak has exercised its rights to not adopt it.

O: MALAY RESERVES

There is non-application of Malay reserve lands to these States: Article 161A(5).

P: APPOINTED MEMBERS IN SABAH ASSEMBLY

The Sabah Assembly is allowed six appointed members in addition to 48 elected Assemblymen.

MISCELLANEOUS GRIEVANCES

Q. POVERTY

There are serious problems of poverty and underdevelopment in Sabah and Sarawak. The natives are often deprived of customary land titles. Lands on which the indigenous people rely for their basic necessities of life are often acquired without any compensation. Predatory development policies are adopted and implemented. Serious violations of human rights take place.

R. FEDERAL CONTROL OVER POLITICS

- ▶ Despite the autonomy of states in prescribed areas, the federal government controls political and administrative processes in Sabah and Sarawak.
- ▶ The federal government manipulated the political processes to remove popularly elected Chief Ministers in Sarawak in 1966 and in Sabah in 1994.
- ▶ In order to topple Stephen Kalong Ningkan the federal government went to the extent of resorting to a declaration of emergency in 1966.

S. THE NATION'S AGE

- ▶ There is yearly controversy about the nation's age.
- ▶ East Malaysians note with displeasure that Malaysia Day was not celebrated as a holiday till 2010. Even now the celebrations are mostly in Sabah and Sarawak.

T. SECESSION

- ▶ In the light of the above rights violations, a movement has sprung up asking for Sabah and Sarawak to secede from the Federation. Legally speaking, our Constitution contains no provision for the secession of any state from the Federation. The disintegration of the Federal union is not contemplated by the Constitution. Any attempt at separation or incitement to secede will actually amount to treason and sedition under our criminal laws.
- ▶ Even the 20-Point Agreement with Sabah explicitly states in para 7 that there is no right to secession.

▶ U. “PERIBUMI”

- ▶ For many years, SS Natives were designated as “others” on many special forms. This was insulting.
- ▶ There was a political attempt some years ago to introduce the concept of “peribumi” to unite all natives under one concept and to extinguish individual nationalities. The attempt was abandoned due to strong opposition.

REDEMPTION AT LAST! CONSTITUTION (AMENDMENT) ACT 2022

This Act seeks to remove some of the discontents and restore the special position of Sabah and Sarawak through four major amendments.

First, Article 1(2) of the Federal Constitution, (which defines the territories of the Federation) is amended to place the States of Malaya and the Borneo States of Sabah and Sarawak in separate categories.

Second, the term “Federation” is redefined to include the Federation established pursuant to the Malaysia Agreement of 9 July 1963 along with the Federation established under the Federation of Malaya Agreement 1957.

Third, Article 161A is amended to delete the federal definition of who is indigenous to Sarawak and thereby qualifies as a “native”. The power to determine these is now, rightly, assigned to the legislature of the State.

Fourth, the definition of “Malaysia Day” is inserted.

SIGNIFICANCE OF THE 2022 AMENDMENT

1. **Amendment of Art 1(2):** This federal amendment reverts to the constitutional position of 1963 when the territories of the Federation were described in three separate categories: (a) the States of Malaya (b) the Borneo States of Sabah and Sarawak, and (c) Singapore.
2. Though widely applauded, the amendment is primarily symbolic as it confers no additional rights or powers. However, it has significance because it indirectly recognises that Sabah and Sarawak are special, and have a different, autonomous and 'asymmetrical' position in the federal set-up of Malaysia – something that was clearly envisaged by the IGC 1962, Malaysia Agreement 1963, the Malaysia Act 1963 and the significantly amended Federal Constitution of Sept. 1963.
3. The autonomous and asymmetrical position was immediately asserted by Sarawak by amending its State Constitution in Art 6(3) to redesignate its Chief Minister as Premier.

4. Note, however, that the 2021/2022 amendment does not and cannot satisfy the popular assertion that Sabah and Sarawak are now “equal partners to the federation in the Peninsular states”. The amendment nowhere divides the country into two “equal regions” of (a) the Malay States and (b) the Borneo States.

In this respect, it is noteworthy that:

- (i) In some executive, legislative, judicial and financial areas, Sabah and Sarawak are not equal but more than equal and enjoy autonomy and special powers not assigned to the Peninsular States. Equality will actually be a downgrade!
- (ii) From the point of view of legal personality, there is no separate legal entity called Peninsular states and Borneo States. Sabah and Sarawak and each of the 11 Peninsular States have their own separate Constitutions and along with the 3 Federal Territories each entity has its own juristic personality.

(iii) In some areas Sabah and Sarawak (SS) suffer disadvantages compared to the Peninsular States:

- ▶ Malaysia's Head of State, the Yang di-Pertuan Agong is, by law, always from the Peninsula.
- ▶ In the King's election or dismissal, the Governors of Sabah, Sarawak, Melaka and Penang have no role.
- ▶ In the Dewan Rakyat, SS have 56/222 (or 25.22% of the MPs). West Malaysia has 166/222 MPs!
- ▶ In the Senate, out of 26 indirectly elected members, SS has only 4 Senators; West Malaysia has 22. Additionally, there are 44 appointed Senators.

- ▶ In the Annual Budget allocation, SS do not receive 50% of the allocation! No law requires that. For example, it is reported that in the 2022 Budget, Sabah and Sarawak's development allocation was 9.8b compared to the Peninsula's 67.8 b. (Joe Samad, quoting Kitingan in the *FMT*, Nov 14, 2021). Such unequal resource allocation will remain a significant point of contention that will not immediately be resolved by the 2022 amendments...
- ▶ The popular notion of “equal partners with Malaya” is not based on any law or any historical document.
- ▶ In many areas, SS are more than equal.
- ▶ In others they face serious disadvantages.

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5. Definition of Federation: Article 160(2) is amended to re-define the term “the Federation”. Prior to the amendment “the Federation” meant “the Federation established under the Federation of Malaya Agreement 1957”. The new definition rightly acknowledges (though 58 years out of time) both the 1957 and the 1963 Federation Agreements. It specifically mentions the new Federation pursuant to the MA63 Agreement of 1963. Mention of MA63 is most significant.

6. Significance of the constitutional reference to the Malaysia Agreement 1963: The reference to the Malaysia Agreement (MA63) in the constitutional amendment is significant because it amounts to incorporation of MA63 into our Constitution. MA63 is now constitutionalised. In our dualistic legal system, International Treaties, Agreements and Covenants, signed by the executive are not enforceable locally unless given the kiss of legal life by Parliament. Up to now, MA63 was merely an International Agreement (and thereby not enforceable in local courts). Now it is upgraded to constitutional status by our Parliament.

7. Along with MA63, the IGC Report 1962 is also indirectly constitutionalised:

Article VIII of MA63 makes a clear reference to the Inter-Governmental Committee Report, 1962.

The relevant passage in MA63 is: “*The Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other actions as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27th February 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia*”.

8. The IGC Report has 37 sections and 4 Annexes and is rich with legal, political and financial provisions which must now be taken note of as legal rules.

For example, there are provisions on religion, immigration, education, citizenship, financial provisions, judiciary, and special position of the indigenous races that have been partly overlooked or breached in post-1963 laws and practices. However, they are now revived. A few examples may illustrate the point:

8.1 Judiciary with Bornean experience: Section 26(4) of IGC Report states that when the Supreme Court hears a case arising in a Borneo State, at least one judge should be with Bornean judicial experience. This IGC prescription was rejected as having no force of law in the cases of *Keruntum v Director of Forests* (2018) and *TR Sandah Tabau v Director of Forests* (2019). These cases now need review.

8.2 Forty per cent of net revenue derived from Sabah: Another provision not fully enforced is FC's Art 112C and the 10th Schedule, Part IV, s. 2(1). This is about Special Grants to SS in the IGC Report, Para 24(9)(i)(c) and Malaysia Act 1963 s.46(1)(a), 5th Schedule. Sabah is supposed to receive 40% of the net revenue in excess of the 1963 revenue derived by the Federation from Sabah.

8.3 Para 24(9)(i)(c) of the IGC Report calls for the joint appointment of an independent assessor for the purpose.

8.4 Research at UM reveals that in the 1964 Estimates and Revenue Expenditure, there is precise mention of the 40% grant allocation to Sabah. However, from 1969 onwards such mention is no longer evident.

8.5 Essential Provisions: In relation to Essential Provisions set out in the 8th Schedule, Parliament has the power to insert these provisions in Peninsular State Constitutions and to remove the inconsistent provisions: Art 71(4). In relation to SS, Parliament has no such power. The power is transferred to the courts: MA63 section 12(2); IGCR s. 20(2).

8.6 Election Commission: Art 114(1)
provides for the composition of the Election Commission. There is no requirement that a member should be from SS. But Para 25(1) of the IGCR requires that one member shall be from SS.

8.7 Borneo States: This term was repealed from the Federal Constitution in 1976. Will it now be reinstated due to the 2021/2022 amendment?

All in all, it appears that with the passage of the 2021/2022 amendment, the provisions of MA63, the IGC Report and the vocabulary of “Borneo States” have been constitutionalized.

A new judicial approach is needed to the interpretation of our Constitution. The existing provisions must be interpreted, as far as possible, in harmony with these historical documents.

- ▶ **Definition of a Native:** The Federal Constitution's definition of who is a 'native' of Sarawak in Article 161A(6)(a) and 161A(7) is deleted and the State is rightly allowed to specify by state law who should be regarded as indigenous to the State.
- ▶ The federal definition for Sarawak was problematic because it excluded people of mixed marriages and provided a list of natives that contained many errors. These errors have now been rectified.
- ▶ What is surprising, however, is that Article 161A(6)(b) in relation to native status in Sabah is retained. It would have been better to allow Sabah the same right as Sarawak.

In immediate response to the amendment of the Federal Constitution, the (Sarawak) Interpretation (Amendment) Ordinance of 2022 was amended.

- ▶ In section 3 it provides a list of 31 races indigenous to Sarawak.
- ▶ It states in clause (a) that the term native includes a person who is a citizen and a natural born child of a person of a race indigenous to Sarawak. Children of mixed parentage will now be regarded as native provided at least one parent is a native.
- ▶ What is regrettable, however, is that in clause (b) an additional requirement is inserted that to be a native, a person “satisfies the conditions and requirements imposed by Majlis Mesyuarat Kerajaan Negeri for recognition of such person as a native”.

Malaysia Day: The term “Malaysia Day” occurs in the Constitution scores of times. However, it was nowhere defined.

This amendment defines it in Article 160 which is the Interpretation clause of the Constitution.

CONCLUSION

- ▶ Sixty-one years down the road, not all is well with the (former) Borneo states' relationship with the centre. As has been pointed out above, in many areas Sabah and Sarawak's autonomy has suffered retreat due to constitutional, political, social and religious developments.
- ▶ What can be done to douse the embers of controversy?
- ▶ Leaders of the federal government must recognise that Sabah and Sarawak's restiveness is real and must be addressed. A thorough study of constitutional, legal, financial and political instruments needs to be undertaken. The MA63 Committee (2018) and (2020) made some progress. Perhaps a Royal Commission is necessary.

- ▶ Balancing the concerns of equity and efficiency in intergovernmental financial relations is paramount.
- ▶ Petrol royalty issues have triggered separatist movements in many federations. An amicable settlement is necessary to ensure that investors are not scared off.

- ▶ There is a need to strengthen institutional mechanisms for regular, non-partisan dialogue between the federal government and Sabah and Sarawak so that the inevitable tensions that are inherent in a federal set-up can be resolved with the least friction.
- ▶ We need to recapture the spirit of accommodation, moderation and compassion that animated the leaders of the Malaysia Agreement in 1963. The federal government and West Malaysians must re-dedicate themselves to the pacts of the past.

- ▶ We need greater constitutional literacy to appreciate the scheme of things in 1963.
- ▶ People of the peninsula should open their eyes to the much better inter-ethnic and inter-religious harmony in the Borneo states.
- ▶ Sabah and Sarawak, on their part, must recognize that growth and evolution are natural and necessary in any federal set-up. Federalism is a journey and not just a set of institutions and procedures.

