



# CONSTITUTIONAL SAFEGUARDS FOR SABAH & SARAWAK'S AUTONOMY

EMERITUS PROFESSOR DATUK DR SHAD SALEEM FARUQI

*Holder, Tunku Abdul Rahman Chair, Faculty of Law, University of Malaya*

Senior Visiting Fellow, ISEAS-Yusuf Ishak Institute

# INTRODUCTION

- ▶ On the 58<sup>th</sup> anniversary of Malaysia, we take note with concern 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.
- ▶ Such tensions are inherent in all of the 30 or so federal systems in 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 three GEs of 2008, 2013 and 2018, 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.

# ASYMMETRICAL ARRANGEMENT

- ▶ 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.

# SPECIAL POSITION OF SABAH & SARAWAK

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 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 into the Federal Constitution. 11 Articles were removed.
- ▶ The nation was given a new name.



# JUSTIFICATION FOR SPECIAL POSITION

This special position was justified for many reasons:

**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 with the then deputy prime minister Tun Abdul Razak as the deputy chairman, that special treatment was a precondition for constituting Malaysia.

Sabah summarized its demands in the famous “20 points” Memorandum. Sarawak expressed them in similar “18 points”.



**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]; *Robert Linggi v Government of Malaysia* [2011] 6 MLJ 741; *Fung Fon Chen@ Bernard v The Government of Malaysia* [2012] 6 MLJ 724 and the scintillating dissenting judgment of the then CJ of Sabah and Sarawak, TS David Wong Dak Wah in *TR Sandah Ak Tabau* (2019).

Controversy remains about the LEGAL status of these historical documents and international treaties. Are they 'law' and legally enforceable under Art 160(2) of the FC?



Around the world, historical, pre-constitutional and foundational documents are often employed to interpret the Constitution and other domestic laws: *Govt of Kelantan v Govt of Malaya* (1963); *Datuk Tufail v Dato Ting* (2009); *Azmi Sharom* (2015); and *Indira Gandhi Mutho* (2018).

**DISTINCTIVENESS:** Sabah and Sarawak's cultural and religious distinctiveness from Peninsular Malaya justifies special treatment.

**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.

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

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

**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.

- ▶ For the above reasons, Sabah and Sarawak were conferred special powers not allocated to the *Malayan states*.

# GUARANTEE OF SPECIAL POSITION

## A: LEGISLATIVE MATTERS

### SCHEDULE 9, SUPPLEMENTARY STATE LIST

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

However, there is a supplementary state list for S & S 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.

.

## **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.

## **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.

## **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.



## **B: AMENDING THE CONSTITUTION**

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.

- ▶ 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). Previously 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. Now, Sabah and Sarawak are included in Article 1(2) as two of the thirteen states. This was a status down-grade without their consent.

- ▶ Federalisation of critical state matters such as water (Act 26/1963) and tourism (Act A885) has taken place.
- ▶ SS argue that the Territorial Sea Act 2012 reduces their territorial waters from 12 to 3 nautical miles in violation of Article 2(b).
- ▶ 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.

- ▶ Article 121(1) was amended to emasculate the powers of the courts including the High Court of Borneo.
- ▶ Likewise, Article 121(1A) was inserted to reduce the powers of the courts including the High Court of Borneo. Was the consent of the Governors of Sabah and Sarawak obtained?
- ▶ Labuan was federalized in 1984. Was this done in accordance with Articles 2(b) and 161E?

## C: POSITION OF ISLAM IN SABAH AND SARAWAK

- ▶ In 1963 there was no official state religion in Sabah or Sarawak. Sabah later amended its State Constitution to insert a state religion. In Sarawak, there is no state religion though the YDPA is recognised as the head of Islam in the state.
- ▶ In 1963 the Federal Constitution contained Article 161C which provided 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.

- ▶ 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, however, 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.

- ▶ The native 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.



- ▶ 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.
- ▶ 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 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

### **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.

It is noteworthy that unlike Syariah courts under Art 121(1A), native courts are not independent of the High Court.

### **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).

## **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.

## 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)*.

## NATIVE LAW CASES INVOLVING LAND, LIVELIHOOD & CUSTOM

These cases are often heard by peninsular judges with no Borneo experience or appreciation of the way of life of the natives : *Supt of Lands v Nor Anak Nyawai (2005)*; *TR Sandah Ak Tabau (2019)*. 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)*.

## E: 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 amendments requiring a two-thirds majority.

### **F: 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.

### **G: DEVELOPMENT PLANS**

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

## H: 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***

- ▶ 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).
- ▶ 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

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*

- ▶ Sabah and Sarawak enjoy some special grants: Articles 112C(a) and 112D.
- ▶ These states are entitled to import duty and excise duty on petroleum products.

## **NO FISCAL FEDERALISM**

There is discontent about inequitable sharing of resources and 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**

Another major and extremely intricate complaint is that Sabah and Sarawak have not received the mandatory financial allocations that are due to it 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**

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

## I: ARTICLE 153 PROTECTION

- ▶ 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.

- ▶ Borneonization of the public services is proceeding too slowly.



## J: IMMIGRATION

- ▶ 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.
- ▶ However, it is alleged that the constitutional right of the Borneo states to control immigration has been defeated by naturalisation of millions of illegal immigrants into Sabah.

### K: 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].

### L: 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.

### **M: MALAY RESERVES**

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

### **N: APPOINTED MEMBERS IN SABAH ASSEMBLY**

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

## O: 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.

## ▶ P. 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.

### Q: SECESSION

- ▶ In the light of the above, 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.

## ▶ R. “PERIBUMI”

- ▶ 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.

# CONCLUSION

- ▶ Fifty-eight 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 commendable example of 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.

