

# SPECIAL FINANCIAL PROVISIONS FOR SABAH UNDER THE FEDERAL CONSTITUTION: THE ISSUE OF THE 40% SPECIAL GRANT

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## Abstract

In the asymmetrical and consociational federal system of Malaysia, the special position of the Borneo States is prescribed in the Malaysian *Federal Constitution*. The financial provisions in the *Federal Constitution*, include exclusive assignment of special revenues and resources to the Borneo States. Specifically, the two-fifths or 40% Special Grant to Sabah under Article 112C and part IV of the Tenth Schedule of the *Federal Constitution* is popularly highlighted in recent times. This provision originates from the Malaysia Agreement 1963 and the Malaysia Act 1963. The implementation of the 40% Special Grant appears as a conundrum and will be deliberated on an analytical basis in this article. Before embarking on the discourse of the provisions of allocation of grants, revenue and the issue of the 40% Special Grant to Sabah, this article shall first discuss the special position of the Borneo States in the *Federal Constitution*. An analysis on the 40% Special Grant shall then be made. This article will address the relevant provisions on the 40% Special Grant including its review, the constitutional issues and the implementation of the 40% Special Grant through voyage of time, as well as an analysis of the Federal Estimates of Revenue and Expenditure from 1964 onwards. To address issues pertaining to the 40% Special Grant, several actions are recommended. Any dissensions pertaining to the issues of review of the 40% Special Grant or determination of revenue for purposes of calculation of the 40% Special Grant must be conciliated in strict compliance with the provisions of the *Federal Constitution*. Redress may be sought from different avenues such as appointment of an independent assessor, public litigation in the courts of law or political negotiations on mutual consensus.

**Keywords:** Malaysia Agreement 1963, Malaysia Act 1963, *Federal Constitution*, Special Grant.

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## I INTRODUCTION

Through the Malaysia Agreement 1963,<sup>1</sup> Sabah, Sarawak and Singapore<sup>2</sup> joined hands with Malaya, to re-constitute the Federation of Malaya into a consociation of a larger and more diverse Federation of Malaysia. Pursuant to the Malaysia Act 1963,<sup>3</sup> the Federal Constitution of the Federation of Malaya was significantly amended and was adopted as the *Federal Constitution*<sup>4</sup> of Malaysia which granted a number of iron-clad guarantees on the autonomy and special position of the Borneo States. 87 Articles out of (the then) 181 Articles and 10 out of 13 Schedules of the *Federal Constitution* were amended and 35 new Articles were inserted into the *Federal Constitution* to accommodate the consociation. Through this consociation the Borneo States were given a constitutional special position in certain matters including but not limited to, legislative powers, safeguards against constitutional amendment and award of special grants under the financial provisions of the *Federal Constitution*. The sources of revenue of the Borneo States as provided in the *Federal Constitution* is encapsulated in Part III of this article which includes grants and assignments. Despite the special position given to the Borneo States in all the enumerated matters and the variety of sources of revenue available to the Borneo States, it is unfortunate that Sabah and Sarawak were still ranked as the poorest States in Malaysia.<sup>5</sup> The aspirations that were set in theory is yet to be translated to a successful reality.

On reflection many factors may have caused the delayed success, however in this article, an analysis of the Ministry of Finance's Federal Estimates of Revenue and Expenditure from 1964 onwards is conducted to discover the bridging gap between the constitutional financial provision and the reality of its execution. The article also scrutinises the provisions related to the two-fifths<sup>6</sup> growth revenue grant or popularly coined as the "40% Special Grant" including its review, constitutional issues and its implementation through voyage of time in juxtaposition with the foundational documents such as the Malaysia Report of the Inter-Governmental Committee ('IGC Report').<sup>7</sup>

It may be surmised that the availability of crucial information such as contribution of revenue from the relevant States is critical in addressing the conundrum of the 40% Special Grant. Previously, from the year 1964 up till 1972 the information of estimated revenue contributed from Peninsular Malaysia, Sabah and Sarawak to the Federal government was made available by distinct segregation of columns labelled :(i) Malaya/Malaysia Barat,

<sup>1</sup> *Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, The Federation of Malaya, North Borneo, Sarawak and Singapore*, signed 9<sup>th</sup> July 1963, UN Treaty No.10760.

<sup>2</sup> By virtue of the *Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State*, Signed 7<sup>th</sup> August 1965, UN Treaty No.8206, and the Constitution and Malaysia (Singapore Amendment) Act 1965, Act 53/1965, Singapore was separated from Malaysia on 9<sup>th</sup> August 1965.

<sup>3</sup> *Malaysia Act No.26 of 1963* (Malaysia).

<sup>4</sup> *Federal Constitution* (Malaysia).

<sup>5</sup> Bernama "Sabah's Hardcore Poverty Six Times the National Rate, Says Rafizi", *The New Straits Times*, (Online 14 March 2024) < <https://www.nst.com.my/news/nation/2024/03/1025727/sabahs-hardcore-poverty-six-times-national-rate-says-rafi> > ; "Most Hardcore Poor are from Sabah and Sarawak", *The Star* (Online 21 August 2023) < <https://www.thestar.com.my/news/nation/2023/08/21/most-hardcore-poor-are-from-sabah-and-sarawak> >.

<sup>6</sup> *Federal Constitution* (Malaysia) Tenth Schedule, Part IV, item 2.(1).

<sup>7</sup> *Malaysia, Report of The Inter-Governmental Committee* (Signed 27<sup>th</sup> February 1963).

(ii) revenue from Sabah and (iii) revenue from Sarawak respectively.<sup>8</sup> The segregation however could not be seen in the contemporary. Internalization and compliance of the *Federal Constitution* and re-dedication to the pacts of the past may be the key to address the issues of the 40% Special Grant.<sup>9</sup>

## II SPECIAL POSITION OF THE BORNEO STATES

### A *Special Position of Sabah and Sarawak*

The special position of Sabah and Sarawak within the *Federal Constitution* is evident from the following characteristics.

#### 1 *Legislative lists*

The supplementary State List IIA in Schedule 9 of the *Federal Constitution* confers additional powers on the Borneo States in eight<sup>10</sup> matters including native law and custom, ports and harbours and the Sabah Railway in Sabah. The Supplementary concurrent list for Sabah and Sarawak extends the legislative competence of these States to cover nine matters including shipping under fifteen tons, charities and theatres.

#### 2 *Federal powers to have uniform laws not applicable to the Borneo States*

Parliament may legislate on state matters for promoting uniformity of laws of two or more states as provided under Article 76(1)(b). However, this power of the federal parliament in terms of land and local government is not applicable to Sabah and Sarawak pursuant to Article 95D. Land, agriculture, forestry and local government are generally state matters, however the exclusivity to Sabah and Sarawak of these matters are provided in Article 95E.

#### 3 *Federal powers and international treaties*

Pursuant to Article 76(1)(a), Parliament may make laws with respect to any matter enumerated in the State List for implementing any treaty with a foreign nation or any decision of an international organisation. However, in the event that the aforesaid law affects among others, native law and custom in Sabah and Sarawak, duty to consult the States concerned must be exercised, pursuant to Article 76(2). Though the duty to “consult” does not impose a duty to obey,<sup>11</sup> consultative process do help to safeguard the interest of the Borneo States.

<sup>8</sup> See Abstracts of the Estimated Revenue of Malaysia, Estimates of Malaysia Federal Revenue for the years 1964 to 1972, Malaysia Ministry of Finance.

<sup>9</sup> Muguntan Vanar, ‘Sabah’s 40% Special Grant cannot be Displaced by Mere Political Agreement, says Constitutional Expert’ *The Star* (online, 11 May 2022). <<https://www.thestar.com.my/news/nation/2022/05/11/sabah039s-40-special-grant-cannot-be-displaced-by-mere-political-agreement-says-constitutional-expert>>.

<sup>10</sup> Initially, pursuant to the Malaysia Agreement 1963 and Section 36 of the Malaysia Act no.26 of 1963, six matters were enlisted under Schedule 9, List IIA. Through the course of time eight matters were enlisted however only six matters of the additional powers are currently conferred after considering the repealed items.

<sup>11</sup> Shad Saleem Faruqi, *Our Constitution* (Sweet & Maxwell 2019) 79.

#### 4 *Amending the Constitution*

The power of amending the *Federal 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 concurrence of the Yang di-Pertua Negeri of Sabah and/or Sarawak is required in a constitutional amendment affecting any of the matters enumerated therein. The case of *Loh Kooi Choon v Government of Malaysia*<sup>12</sup> sets out the different methods prescribed for the amendment of the *Federal Constitution*, that *inter alia* includes Article 161E which is of special interest to East Malaysia.<sup>13</sup> Parliament's power to legislate on matters enumerated under Article 161E, is circumscribed by strict rigors of the article.<sup>14</sup>

A constitutional amendment that greatly diluted the special position of Sabah and Sarawak is the Constitution (Amendment) Act 1976,<sup>15</sup> 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. Since 1976 Sabah and Sarawak were included in Article 1(2) as two of the thirteen states. This was a status down-grade, which was recently rectified by virtue of the Constitution (Amendment) Act 2022.<sup>16</sup> It is worthy to explore whether the Constitution (Amendment) Act 1976,<sup>17</sup> to amend Article 1(2) was submitted to the Governors of Sabah and Sarawak for their concurrence.

#### 5 *Islam in Sabah and Sarawak*

- (i) In 1963 there was no state religion in Sabah or Sarawak. However, pursuant to Enactment No.8 of 1973,<sup>18</sup> the Constitution of the State of Sabah<sup>19</sup> was amended by the addition of Article 5A which recognised Islam as the official religion of Sabah.
- (ii) In 1963, the *Federal Constitution* contained Articles 161C and 161D; however these were repealed in 1976 pursuant to the Constitution (Amendment) Act 1976.<sup>20</sup>
- (iii) The repealed Article 161C 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 the Borneo States.
- (iv) The repealed Article 161D provided an exception to Article 11(4). In the Borneo States a state law restricting the propagation of any religious doctrines to Muslims may not be passed without a special two-thirds majority in the legislative assembly.

<sup>12</sup> [1977] 2, MLJ 187.

<sup>13</sup> Also See *Robert Linggi v Government of Malaysia* [2011] 2 MLJ 741 and *Government of Malaysia v Robert Linggi* [2015] MLJU 2156.

<sup>14</sup> Note also, the decision in the case of *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119.

<sup>15</sup> *Constitution (Amendment) Act 1976, Act A354* (Malaysia).

<sup>16</sup> *Constitution (Amendment) Act 2022, Act A1642* (Malaysia).

<sup>17</sup> See (n 15).

<sup>18</sup> *Enactment No.8 of 1973* (Sabah, Malaysia).

<sup>19</sup> *Constitution of the State of Sabah* (Sabah, Malaysia).

<sup>20</sup> See (n 15).

- (v) The native, “non-islamic” 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.<sup>21</sup> This arouses deep discontent within the non-Muslim natives of Sabah and Sarawak.<sup>22</sup>
- (vi) State Syariah laws have been enacted in Sabah and Sarawak to provide that in the case of Muslims, native law will not apply and the syariah courts shall have jurisdiction. This has led to conflicts between syariah and native courts.
- (vii) Authorities in West Malaysia have imposed hurdles in the path of import into Sabah and Sarawak of Bibles in Bahasa Melayu. The Kalimah Allah controversy raised in the case of *Titular Roman Catholic Archbishop of KL v Menteri Dalam Negeri & Ors*<sup>23</sup> has aroused the anger of Christians in the Borneo States. But note the heartening case of *Jill Ireland bt Lawrence Bill v Menteri bagi Kementerian Dalam Negeri Malaysia & Anor*<sup>24</sup> which upholds the rights of non-Muslims in Sarawak.

## 6 Native Courts

In Sabah and Sarawak, besides Syariah Courts there is a system of native law and native courts as provided in the item 13, List IIA, 9<sup>th</sup> Schedule of the *Federal Constitution*.

## 7 High Court for Sabah and Sarawak

The High Court has two wings – one in Malaya and the other in the States of Sabah and Sarawak. Appointment of the Chief Judge of the Sabah and Sarawak High Court requires consultation with the Chief Minister of these States.<sup>25</sup>

## 8 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 Judge of Sabah and Sarawak. Accordingly, Article 122AB (as 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 was declared to be a violation of Article 161E(2) (b) and therefore unconstitutional as decided in the case of *Robert Linggi v Government of Malaysia*.<sup>26</sup> However, the decision was overruled by the Court of Appeal.<sup>27</sup>

<sup>21</sup> Syaza Shukri, ‘Islamist Civilisation in Malaysia’, *Religions* 2023 Vol.14 Issue 2, <<https://www.scopus.com/inward/record.uri?eid=2-s2.0-85148886423&doi=10.3390%2frel14020209&partnerID=40&md5=1eb61ddf038c9fa1797e11611381e63a>>.

<sup>22</sup> Vanitha Nadaraj, ‘Will Islamisation Provoke Sabah, Sarawak Split From Malaysia?’, *Eurasia Review News and analysis*, 25<sup>th</sup> September 2023, < <https://www.eurasiareview.com/25092023-will-islamization-provoke-sabah-sarawak-split-from-malaysia-oped/>>.

<sup>23</sup> [2014] 4 MLJ 765.

<sup>24</sup> [2021] 8 MLJ 890.

<sup>25</sup> *Federal Constitution* (Malaysia) Art 122B(3).

<sup>26</sup> See (n 13).

<sup>27</sup> *Ibid*.

## 9 *Representation in Parliament*

Ideally, a state's representation in the elected House should be proportionate to the state's population. Sabah has 25 members of parliament ('MPs'), whereas Sarawak has 31 MPs respectively. Together, Sabah and Sarawak have 56 out of 222 or 25.2% of the MPs in the Dewan Rakyat. This is disproportionately large based on their population. However, it must be noted that it 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.

## 10 *Emergency powers*

Even during an emergency under Article 150, the native law or customs of Sabah and Sarawak cannot be extinguished by emergency law.<sup>28</sup>

## 11 *Development plans*

Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak.<sup>29</sup>

## 12 *Fiscal federalism*

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 the other states. In several areas Sabah and Sarawak enjoy fiscal privileges that are not available to the Peninsular States:<sup>30</sup>

### (a) *Loans*

Sabah and Sarawak are allowed to raise loans for their purposes with the consent of Bank Negara.<sup>31</sup>

### (b) *Special sources of revenue*

These States are allocated special revenues to meet their needs above and beyond what other States receive.<sup>32</sup> Sabah and Sarawak are also entitled to earnings (taxes, fees and dues) on eight sources of revenue including ports and harbours, import and excise duty on petroleum products, export duty on timber and other forest produce and state sales tax.<sup>33</sup>

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<sup>28</sup> *Federal Constitution* (Malaysia) Art 150(6A).

<sup>29</sup> *Ibid* Art 95E(2).

<sup>30</sup> Shad Saleem Faruqi, (n 11) 80.

<sup>31</sup> *Federal Constitution* (Malaysia) Art 112B.

<sup>32</sup> *Ibid* Art 112 C(1)(b).

<sup>33</sup> *Ibid* Art 112C & Schedule 10, Part V.



### (c) *Special grants*

These States enjoy some special grants.<sup>34</sup> However, Sabah and Sarawak are deeply unhappy about the lack of fiscal federalism. It is alleged that the Borneo 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. There is discontent about inequitable sharing of wealth derived from Sabah and Sarawak. 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.<sup>35</sup> It is asserted that the Tenth Schedule Part IV promises 40% share of the States' revenues.<sup>36</sup>

Money represents power and is at the heart of government,<sup>37</sup> therefore it is understandable that to cement the special position of the Borneo States of Sabah and Sarawak in Malaysia's asymmetrical<sup>38</sup> and consociational federal system, the *Federal Constitution* included financial provisions for assigning special revenues and resources to the Borneo States in addition to the allocations to all States. Finance is the lifeblood of every administration, and no government can implement its promises and programmes without money.<sup>39</sup> A statement made by the late Tun Suffian rings truth till this day, wherein the subject of division of revenue between the central government and the state government is a rather neglected subject despite it being vital.<sup>40</sup> This article aims to provide a clear picture of categorization of financial provisions afforded to the Borneo States within a contemporary and historical dimension; and an emphasised discussion on the real-time issue of the special grants to the State of Sabah, specifically the 40% Special Grant.

## B *Special Financial Position*

The regulation of Malaysia's financial matters presented in the *Federal Constitution* originate from the Reid Commission Report, IGC Report, the Malaysia Agreement 1963,<sup>41</sup> and the Malaysia Act 1963,<sup>42</sup>. The Reid Commission Report made recommendations for the financial provisions in the 1957 Constitution of the Federation of Malaya, which

<sup>34</sup> Ibid Art 112C and 112D.

<sup>35</sup> JC Fong, 'Federal State Relations: Sabah and Sarawak', *Malayan Law Journal*, [2019] 3 MLJ xxviii.

<sup>36</sup> Roger Chin, Official Statement of the President of the Sabah Law Society (Facebook, 26 March 2022) < [https://m.facebook.com/story.php?story\\_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BA4pKpV3zCX3M6qxdvDnUMwc21QXypl&id=100522628235153](https://m.facebook.com/story.php?story_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BA4pKpV3zCX3M6qxdvDnUMwc21QXypl&id=100522628235153)>.

<sup>37</sup> RH Hickling, *Malaysia Public Law* (Pelanduk Publications (M) Sdn Bhd, 1997) 60.

<sup>38</sup> Shad Saleem Faruqi, 'The Constitution Amendment Act 2021: A Step Towards redemption or mere symbolism, Wisdom Foundation Policy Talk Webinar: The 2021 Constitutional Amendment MA63 and the Status of the Borneo States in Malaysia', (Facebook, 25<sup>th</sup> January 2022, 8.00pm) < <https://fb.watch/dYSFNpx5Ji/>>.

<sup>39</sup> Tun Mohamed Suffian Bin Hashim, *Tun Mohamed Suffian's an Introduction to the Constitution of Malaysia*, eds Tunku Sofiah Jewa et al (Pacifica Publications, 3<sup>rd</sup> ed, 2007) 221.

<sup>40</sup> Tun Mohamed Suffian, 'Division of Revenue', ed GW Bartholomew, *Malayan Law Review Legal Essays* (Malayan Law Review, 1975) 1-23.

<sup>41</sup> Popularly coined as "MA63".

<sup>42</sup> *Malaysia Act No.26 of 1963* (Malaysia) is distinguished from *Malaysia Act 1963 Chapter 35* (United Kingdom) which was passed in the Parliament of the United Kingdom.

provides grants and revenues to the states in general.<sup>43</sup> Upon the formation of Malaysia and the adoption with amendments of the 1957 Constitution of the Federation of Malaya, the IGC Report made recommendations on the special financial provisions for the Borneo States in the 1963 *Federal Constitution*. The Financial Provisions recommended by the IGC Report are stated at paragraphs 24(1-25) of the report.<sup>44</sup>

The background of the special financial position of the Borneo States in the *Federal Constitution* is attributed to the condition and bargaining power held by the Borneo States at the inception of Malaysia. The abundance of natural resources owned by the Borneo States, the size of the area of the Borneo States and the requirement of development and infrastructure of the Borneo States were all factors that afforded a higher bargaining power on the financial terms for the Borneo States. As interestingly put:

‘Essentially, The Federation of Malaya was the suitor in this marriage, and the more favorable financial treatment was part of the bride-price’.<sup>45</sup>

Furthermore, the need for infrastructural and economic development of the Borneo States was also one of the key factors in determining the special financial position of the Borneo States.

Constitutionally, Sabah and Sarawak have some advantages fiscally over the other states.<sup>46</sup> It is important to understand on a constitutional perspective, that prior to the formation of Malaysia, the Federation of Malaya practiced an equal status position among its 11 States with a strong central government. However, upon the formation of Malaysia, the constitutional position of the Borneo States was special over and above the other States in Malaya. The concept that the Borneo States are partners in the Federation of Malaysia must be distinguished from the concept of equal status. Simply put, the situation is one of equal partner versus equal status. The former concept is about being two of the founding partners from the four different territories and the latter concept is about having equal status or “equal footing”<sup>47</sup> in terms of constitutional rights. The 11 states experienced an equal status position in the Federation of Malaya. The Borneo States however have special constitutional position in the Federation of Malaysia.

The concept of equal status among member states were broken<sup>48</sup> because an asymmetrical position in the Federal set-up of Malaysia was put into being, which gives a special position to the Borneo States on several aspects including but not limited to immigration, legislation<sup>49</sup> and financial aspects. The original constitutional design as an asymmetrical federation as envisaged under the Malaysia Agreement 1963<sup>50</sup> was made true

<sup>43</sup> KC Vohrah, Philip TN Koh, Peter SW Ling, *Sheridan & Groves the Constitution of Malaysia* (Malaya Law Journal, 5<sup>th</sup> ed, 2004) 384-399 and see also *Federal Constitution* (Malaysia) Art 96 to 112.

<sup>44</sup> Malaysia, *Report of the Inter-Governmental Committee* (n 7) 8-12.

<sup>45</sup> KC Vohrah, Philip TN Koh, Peter SW Ling (n 43) 428.

<sup>46</sup> Kevin YL Tan and Jaclyn L Neo, *Constitutional Principles and Institutions Text, Cases & Materials* (Thomson Reuters Asia Sdn Bhd, 2023) 122.

<sup>47</sup> Ibid 116.

<sup>48</sup> RH Hickling, *Essays in Malaysia Law* (Pelanduk Publications (M) Sdn Bhd, 1991) 160.

<sup>49</sup> *Federal Constitution* (Malaysia) Art 161E, List IIA, List IIA of the Ninth Schedule.

<sup>50</sup> Kevin YL Tan and Jaclyn L Neo (n 46) 116.



at the inception of Malaysia prior to the constitutional amendments and re-amendments which were made thereafter.

On the special financial position of the Borneo States, the *Federal Constitution* in Chapter 2, of Part VII encompassing Articles 112A-112D are for the exclusive application to Sabah and Sarawak only. The 40% Special Grant is derived from Articles 112C and 112D. A view of the Federal Estimates of Revenue and Expenditure in the Year 1965 will concisely show the special financial position of the Borneo States. There is clear separation of segregated columns of the estimated revenue between Malaya, Sarawak and Sabah.<sup>51</sup> Further, a view of Lampiran B of the 1965 Federal Estimate and Revenue<sup>52</sup> will show the existence of a dedicated column on the 40% Special Grant to Sabah pursuant to Para 2(1) of Part IV of the Tenth Schedule of the *Federal Constitution*, which were made true to the financial constitutional provisions.

### III SPECIAL FINANCIAL PROVISIONS UNDER THE *FEDERAL CONSTITUTION* FOR SABAH AND SARAWAK

#### A *Provisions that Assign Special Revenue, Resources and Grants*

The *Federal Constitution*, the supreme law of the land, sets out provisions that, among other things, regulate the financial arrangements for Federal-State relations. The extent of efficacious operation of these provisions however is a subjective matter and in order to have a successful federal fiscal arrangement a good deal of negotiation and compromise is apparently required.<sup>53</sup> The financial provisions encapsulated under Part VII of the *Federal Constitution* include provisions that assign revenue, resources, and grants which can be categorized as discretionary and mandatory. Generally, the revenue for states is derived from two categories of sources,<sup>54</sup> namely grants and other sources such as taxes and fees. A summary of the sources of revenue and their corresponding constitutional provisions is provided in Table 1 herein.

**Table 1**

Source of Revenue		Constitutional Provision	Mandatory/ Discretionary	Enforceability
Grants	Capitation Grant	Article 109(1)(a) Part I, Tenth Schedule	Mandatory	In force
	State Road Grant	Article 109(1)(b) Part II, Tenth Schedule	Mandatory	In force
	Special Grant	Article 112C Part IV, Tenth Schedule	Mandatory	In force and subject to review

<sup>51</sup> Abstract of the estimated revenue of Malaysia for the year 1965, Extract of the Estimates of Malaysia Federal Revenue and Expenditure for the year 1965, Malaysia Ministry of Finance.

<sup>52</sup> Appendix B-Lampiran B, Statutory Grants and other Payments to State Governments 1965, Extract of the Estimates of Malaysia Federal Revenue and Expenditure for the year 1965, Malaysia Ministry of Finance.

<sup>53</sup> Kevin YL Tan and Jaclyn L Neo (n 46) 122.

<sup>54</sup> Tun Mohamed Suffian Bin Hashim (n 39) 224.

Table 1 (continued)

Source of Revenue		Constitutional Provision	Mandatory/ Discretionary	Enforceability
	Aid for Borneo States for Social welfare	Article 161C	Mandatory	Repealed by Act A354 <sup>55</sup>
	Grant equal to the State's Cost of the State Road Transport Department	Section 3, Part IV, Tenth Schedule	Mandatory	No longer enforceable L.N 17/63 as amended by P.U.(A) 33/1974, P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980 <sup>56</sup>
	30% customs revenue in lieu of medicine and health	Section 4, Part IV, Tenth Schedule	Mandatory	No longer enforceable Item 18, List IIIA, Ninth Schedule Health <sup>57</sup>
	Specific Purpose Grant	Article 109(3)	Discretionary	In force
	Contingency Fund	Article 109(5), 103	Discretionary	In force
	State Reserve Fund	Article 109(6)	Discretionary	In force
Other Sources	Assignment of taxes and fees to States	Article 110 Part III, Tenth Schedule	Mandatory	In force
	Revenue collected from State List	Article 74 List II & IIA Ninth Schedule	Mandatory	In force
	Revenue collected from Concurrent List	Article 74 List III & IIIA Ninth Schedule	Mandatory	In force
	Additional Sources of Revenue assigned to the Borneo States	Part V, Tenth Schedule	Mandatory	In force except for Sections 4, 5, 6 of Part V
	Raising of Loans	Article 111	Discretionary	In force
	Royalty	Article 110(3B) Article 112C(4)(a)&(b)	Mandatory	In force

<sup>55</sup> Repealed by *Constitution (Amendment) 1976 Act A354* (Malaysia) on 27<sup>th</sup> August 1976.

<sup>56</sup> The grant equal to the State's Cost of the State Road Transport Department is subject to the condition that the State of Sabah and Sarawak has the power to make laws with respect to the carriage of passengers and goods by land or mechanically propelled road vehicles. Sabah and Sarawak had this power only until the end of the year 1977 as no further amendment was made after the Borneo States (Legislative Powers) Amendment Order, 1979. See L.N 17/63 which were subsequently amended by P.U.(A) 33/1974, P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980.

<sup>57</sup> Tun Mohamed Suffian Bin Hashim (n 39) 234: 'Since 1<sup>st</sup> January 1971, medicine and health in Sabah has become a Federal responsibility and the assignment of the customs revenue (30%) has been discontinued', (The additional source of revenue assigned to Sabah in the form of 30% of all customs revenue is subject to the condition that medicine and health remains as an item in the concurrent list and that the expenses of that item are borne by Sabah. Consequently, in Sabah, medicine and health remained as an item in the concurrent list until the end of year 1970); See Federal Constitution (Malaysia) Item 18, List IIIA, Ninth Schedule.

## **B Special Grant of 40%**

### **1 Provisions on the 40% Special Grant**

The constitutional provision of special grants is found at Article 112C of the *Federal Constitution*. It provides among others that, subject to review pursuant to Article 112D, the Federal Government shall annually pay to the States of Sabah and Sarawak the special grants specified in Part IV of the Tenth Schedule. This provision was incorporated verbatim in the *Federal Constitution* from Section 46 of the Malaysia Act 1963 which is derived from Annex A of the Malaysia Agreement 1963. The detailed provisions on the 40% Special Grant for Sabah is encapsulated in Section 2 (1) of Part IV of the Tenth Schedule. The recommendations made in the IGC Report at paragraph 24(8) and (9), may be referred as a directive in providing insight and explanation of the intended application of this special financial provision.

In Part IV of the Tenth Schedule, of the *Federal Constitution* under the heading of Special Grants to the States of Sabah and Sarawak it is among others stipulated that:

*'2.(1) In the case of Sabah, a grant of an amount equal in each year to two-fifths of the amount by which the net revenue derived by the Federation from Sabah exceeds the net revenue which would have been so derived in the year 1963 if -*  
*(a) the Malaysia Act had been in operation in that year as in the year 1964; and*  
*(b) the net revenue for the year 1963 were calculated without regard to any alteration of any tax or fee made on or after Malaysia Day;*  
*("net revenue" meaning for this purpose the revenue which accrues to the Federation, less the amount received by the State in respect of assignments of the revenue)'.*

In fortifying the comprehension of the abovementioned Section 2(1)(a) and (b) of Part IV Tenth Schedule of the *Federal Constitution*, reference can be made to para 24(8) of the IGC report which stipulates that:

*'24(8) Subject to the provisions of review made in sub-paragraph (9) below, North Borneo should receive each year a grant equal to 40% of any increase in Federal revenue derived from North Borneo and not assigned to the State over the Federal revenue which would have accrued in 1963 if these financial arrangements had been in force in that year. The sum payable would be calculated on the basis of actual revenue received in each year.'*

The provision altogether appears complex, however it essentially means that Sabah will receive a yearly grant of 40% of the difference in growth revenue that the Federation received from Sabah. This difference in growth is derived by subtracting the 1963 net revenue amount from the current year net revenue amount. The year 1963 is taken as the base year<sup>58</sup> for calculation, and the amount used for the 1963 net revenue is a

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<sup>58</sup> Harry E Groves, *The Constitution of Malaysia* (Malaysia Publications Ltd, 1964) 145.

hypothetical net amount<sup>59</sup> of which the Federation would have derived from Sabah. It is to be noted that in achieving the figure of the current year net revenue amount, the deductions of assignments to Sabah must be taken into account. Further discussion on deduction of assignments may be found in this article at paragraph titled: “3 (c) *Permissible Deductions*”.

A simple analogy to assist in the comprehensions of this provision is a typical arrangement between a sales agency and its sales company:

The Sales company promises to reward the salesperson a special incentive along these lines: “*For every increase in monthly sales by the salesperson, the Company will give the salesperson a special incentive of 10% of the amount of that increase*”. Presupposing that the salesperson manages to make a total sale of RM1000 in January, thereafter a total sale of RM1500 in February. To obtain the increased amount of RM500, the amount of RM1000 will be subtracted from the amount of RM1500. The Company will pay to the Salesperson the incentive amount of RM50 being the 10% of the RM500 increase.

Applying the same concept, the special grant is two-fifths or 40% of the annual growth of revenue received by the Federation from Sabah.

It is axiomatic that the actual calculation of the 40% net growth revenue is not as straightforward as the simple illustrated analogy. The calculation of “net revenue” involves meticulous financial details and application of complex accounting formulation expertise. Basically, in approaching the matter of the 40% Special Grant it is imperative to ascertain what constitutes the net revenue and what are the amounts to be deducted to obtain the net revenue. It will involve calculation of the items due to the Federal Consolidated fund. It is therefore crucial that the Federal financial statements reflect the specific amounts of revenue derived from the Borneo States as previously implemented.<sup>60</sup>

It is also important to note that a great amount of autonomy is afforded to the Borneo States in terms of the federal fiscal arrangement of the 40% Special Grant. The existence of an entrenchment clause<sup>61</sup> as encapsulated in Article 161E of the *Federal Constitution* solidifies this position. Furthermore, matters arising from the review of the 40% Special Grant does not require consultation with the National Finance Council<sup>62</sup> and thus indicates the autonomous federal fiscal arrangement with the Borneo States.

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<sup>59</sup> Ibid.

<sup>60</sup> See (n 51).

<sup>61</sup> The entrenchment clause carries a considerable weight in terms of autonomy of the Borneo States in federal fiscal arrangement, Michael Hein, “Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe”, *International Journal of Constitutional Law*, 18/1(2020), 78-110, “Entrenchment Clauses are not just symbolic declarations without legal and political consequences but important instruments in constitutional struggle”.

<sup>62</sup> *Federal Constitution* (Malaysia) Art 112D (7).

## 2 *Review of the 40% Special Grant*

The provisions of review of the 40% Special Grant emanates from Annex A of the Malaysia Agreement 1963 and from Section 47 of the Malaysia Act 1963. Recommendations in the IGC report regarding the constitutional provisions for review of the special grant may also be referred to, as a directive to understand the operation of the provisions of review. The pertinent questions to be answered in the operation of these provisions are: *What is the special grant review; How is the review conducted; and How are review disputes resolved.* These questions will be addressed within the constitutional dimension in juxtaposition with its foundational documents.

### (a) *The special grant review*

Essentially a review is carried out as an appraisal or assessment to determine whether the financial arrangement regarding the special grant is feasible or otherwise. The provision of the special grant review is encapsulated under Article 112D (1) until (8) of the *Federal Constitution*. The matters that can be reviewed are the annual balancing grant,<sup>63</sup> escalating annual grant,<sup>64</sup> growth revenue grant<sup>65</sup> and any substituted or additional grant made by virtue of Article 112D.

During the review, certain items assigned under the Part V of the Tenth Schedule and the provision of Article 112C(4) may be varied, subject however to notice being given by the Federal Government to the State or States concerned. The items assigned under Part V of the Tenth Schedule that may be varied are items under Sections 1,2,3,9 and 10; whereas items under Section 4,7 and 8 cannot be varied.<sup>66</sup> Items under Section 5 and 6<sup>67</sup> can only be varied during the ‘projected second review’.<sup>68</sup> During the review it is important to consider the financial position of the Federal Government as well as the needs of the States or State concerned.<sup>69</sup> The recommendations made at paragraph 24(9)(i) and (vi) of the IGC Report provides an insight of the constitutional provisions of review and variation. The review (when an independent assessor is involved in the process) must also bear in mind that the revenue to the State will be sufficient to meet the cost of State service at the existing time with the reasonable anticipation of expansion of the State (or States)<sup>70</sup>. The IGC report is explicit in enunciating that these rights of revenue recommended is an “as of right” entitlement.

<sup>63</sup> *Federal Constitution* (Malaysia) Tenth Schedule, Part IV, s 1(1).

<sup>64</sup> See *Ibid* s 1(2).

<sup>65</sup> *Ibid* s 2(1).

<sup>66</sup> *Federal Constitution* (Malaysia) Art 112D(5).

<sup>67</sup> *Ibid* Art 112D(5).

<sup>68</sup> *Federal Constitution* (Malaysia) Art 112D(4), stipulates that the second review of the special grant is to be held in the year 1974.

<sup>69</sup> *Ibid* Art 112D(2).

<sup>70</sup> Paragraph 24(9)(ii) IGC Report.

(b) *Conducting the review*

In conducting a review, the parties involved are the Federal Government and the relevant State Government.<sup>71</sup> Simply put, the review involves a government to government ('G2G') interaction. The review procedure requires the making of an Order by the Yang di-Pertuan Agong, modifying Part IV of the Tenth Schedule and Article 112C(2),<sup>72</sup> of which the Order shall be laid before both the House of Representatives and the Senate.<sup>73</sup> It is viewed that the alteration of the special grant constitutes an amendment to the financial arrangement between the Federation and the State; therefore there is a requirement to obtain concurrence of the Yang di-Pertua Negeri of the respective State, as circumscribed under Article 161E(2)(c).<sup>74</sup> Though enshrined in the *Federal Constitution*, the requirement of concurrence of the State government instead of the Legislative assembly is remarked by some views as odd.<sup>75</sup>

The review is to be conducted every five years or any longer period as agreed between the Federal Government and the State Government.<sup>76</sup> However, the first review must be done in the year 1969 and thereafter the second review is to be done in the year 1974.<sup>77</sup> A detailed discussion of the performance of the review is found in this article at paragraph titled: "3 (d) *Matters that have transpired through the voyage of time on the implementation of the 40% Special Grant*".

(c) *Resolving review disputes*

In resolving disagreements or disputes pertaining to the review of the special grants, an independent assessor may be mutually appointed by the Federal and State Governments.<sup>78</sup> The recommendations of the independent assessor shall be binding on the governments concerned. The National Finance Council need *not* be consulted on matters related to the review of the special grants under Article 112D.<sup>79</sup> The *Federal Constitution* is silent on the method, guideline or criteria of appointment of the independent assessor. However, there are views that, on the assumption of similarity in the process of appointment of an arbitrator, the arbitration system or rules may be applied to assist in the appointment of

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<sup>71</sup> *Federal Constitution* (Malaysia) Art 112D(1).

<sup>72</sup> *Ibid*.

<sup>73</sup> *Federal Constitution* (Malaysia) Art 112D(8).

<sup>74</sup> Sukumaran Vanugopal, *The Constitutional Rights of Sabah and Sarawak* (Sweet & Maxwell Asia, 2013) 381.

<sup>75</sup> Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing Ltd, 2012) 147.

<sup>76</sup> *Federal Constitution* (Malaysia) Art 112D(3).

<sup>77</sup> See *Ibid* Art 112D(4) ; The years 1969 and 1974 were selected as the years for the first and Second review pursuant to recommendations in the IGC Report, particularly at Paragraph 24(9)(iii) &(iv). It is noteworthy that items under Section 5 and 6 under Part V of the Tenth Schedule of the *Federal Constitution* cannot be varied until the projected second review in 1974. This may be attributed to the passing of the Borneo States (Legislative Powers) Order 1963 of which certain Legislative powers of the Federation was extended to the Borneo States pursuant to Article 76A and 95C of the *Federal Constitution*. The award of the grant is conditional upon the Borneo States having the prescribed legislative powers. This Order however has been amended vide P.U(A) 33/1974, P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980.

<sup>78</sup> *Federal Constitution* (Malaysia) Art 112D(6).

<sup>79</sup> *Ibid* Art 112D(7).



an independent assessor, whereby a modern construct approach is adopted.<sup>80</sup> In practice however, there is preference of resolving financial problems between federal-state relation on an official level<sup>81</sup> whereby matters are dealt with between the Federal Finance Minister and the Chief Minister of the State.<sup>82</sup>

### 3 *The Constitutional issues surrounding the 40% Special Grant*

The special provision on the 40% Special Grant raises riveting issues of law and accounting. Suffice to say that these issues may be the reason why the 40% Special Grant appears as a conundrum. These issues need to be identified and analysed, to uphold the rule of law and the sanctity of the *Federal Constitution*. As the constitutional issues are live contemporary issues, the list below is not conclusive of the issues surrounding the 40% Special Grant and may be subject to discovery of future related issues.

#### (a) *Determining 'revenue which accrues to the Federation'*

The *Federal Constitution* at Section 2(1) of Part IV of the Tenth Schedule defines: ‘..(“*net revenue*” meaning for this purpose the revenue which accrues to the Federation, less the amount received by the State in respect of assignments of revenue)’. The discerning question is, how does one determine the “revenue which accrues to the Federation”? Are they revenues derived from the Federal list, State List, Concurrent List and the special List for the Borneo States all together? Or is it only in respect of the revenue derived by the Federal Government directly or indirectly from items in the State list?

Tourism, oil and oilfields are in the Federal List. Are Federal earnings in Sabah from these Federal items part of the ‘revenue which accrues to the federation’? Or is it only in respect of indirect Federal earnings from items in the State List? For example, land is in the State List. Thus, Assessment and Quit Rent are collected by the State. However, Real Property Gains Tax for properties transferred in Sabah is collected by the Federal government. Is Real Property Gains Tax part of the revenue derived by the Federal Government from Sabah?

A clue to answering these conundrums may rest on the provision of Consolidated Funds. Article 97 and 112C(2) of the *Federal Constitution* provides a crystal clear mandate.

Article 97(1) provides:

*All revenues and moneys howsoever raised or received by the Federation, shall subject to the provisions of this constitution and of federal law, be paid into and form one fund, to be known as the Federal Consolidated Fund.*

<sup>80</sup> Roger Chin, “Negotiate the Special Grant Conferred by Article 112D Thus Extinguishes Sabah’s 40% rights conferred by Article 112C of the *Federal Constitution*?”, Wisdom foundation Policy Talk 37 (Facebook, 10 May 2022) < <https://fb.watch/g63H0Jfe8a/>>.

<sup>81</sup> Sukumaran Vanugopal, (n 74) 383.

<sup>82</sup> Nicholas Fung, ‘The Constitutional Position of Sabah’ FA Trindade (ed) *The Constitution of Malaysia Further Perspectives and Developments* (Oxford University Press, 1986) 92-113.

Further, Article 112C(2) stipulates:

*The amounts required for making the grants specified in the said Part IV, and the amounts receivable by the State of Sabah or Sarawak under Section 3 or 4 of the said Part V, shall be charged on the Consolidated Fund; and the amounts otherwise receivable by the State of Sabah or Sarawak under the said part V shall not be paid into the Consolidated Fund.*

The *Federal Constitution* clearly mandate that the 40% Special Grant is to be paid from the Federal Consolidated Fund. It is submitted that in determining ‘revenue which accrues to the Federation’, only the amounts paid into the Federal Consolidated Fund shall be considered, and these are revenues from the Federal List and the Concurrent List. A clearly segregated reporting of the Federal’s Estimated revenue from Sabah is also crucial in determining the ‘net revenue’.

#### (b) Territories of Sabah

In the provision ‘two-fifths of the amount by which net revenue derived by the Federation from Sabah’ in Section 2(1) of part IV of the Tenth Schedule, is it important to define the territories of Sabah in order to determine the net revenue derived by the Federation from Sabah. Do the territories cover only the land mass, or do they include Territorial waters, the continental shelf, and the exclusive economic zone? These issues require thorough examination by reason of the Latin doctrine of *Nemo Dat Quod Non Habet*.<sup>83</sup> It may be crucial to establish the parameters of territorial sovereignty in order to determine the amounts to be considered in the calculation of the net revenue derived by the Federation from Sabah.

#### (c) Permissible deductions

How do we determine the permissible deduction to calculate the 40% Special Grant? What is the meaning of “less the amounts received by the State in respect of assignments of the revenue” in Section 2(1) Part IV of the Tenth Schedule?

Article 112C(2) stipulates among others that, the amounts receivable by the State under Section 3 and Section 4 of Part V of the Tenth Schedule are charged on the Federal Consolidated Fund. It is submitted that, the assignments under Section 3 and 4 received by Sabah, are the permissible deductions. This is because these assignments are distinguishable from other items assigned to Sabah in Part V of the Tenth Schedule because they are charged from the Federal Consolidated Fund. Whereas the other assignments are paid directly to the State Consolidated Fund.

Section 3 involves assignment of export duty whereas section 4 involves assignment of 30% customs revenue. Export duty and customs revenue are items under the federal list (See item 8(b) List I), however by virtue of Article 112C they are assigned to the Borneo States. These assignments however are subject to the conditions set out in the provisions.

<sup>83</sup> Oxford Dictionary of Law, 2018, Ninth Edition, Oxford University Press - Latin doctrine of *Nemo Dat Quod Non Habet* (‘No One can give what he has not got’), a basic rule that a person who does not own a property cannot confer it on another except with the true owner’s authority.

It is opined that these items are identified as the permissible deductions because, the duty export and customs revenue which ought to be paid into Federal Consolidated Fund, is paid to the Borneo States as assignments instead. Therefore, in calculating the net revenue, these items are deducted accordingly.

In the contemporary dimension however, can the '*amounts received by the State in respect of assignments of the revenue*' be distinguished easily as per, for example the Federal Estimates of Revenue and Expenditure of 1968 and the Sabah Estimates of Revenue and Expenditure 1968? The answer would be in the negative because a view of the contemporary Estimates of Revenue and Expenditure will show that the particular item is no longer stated. Perhaps the fact that Section 4 of Part V of the Tenth Schedule is no longer applicable<sup>84</sup> has resulted to non-necessity of the deduction of this assignment. On the other hand, Section 3 of Part V of the Tenth Schedule involves assignment of export duty to the State which is subject to the levy of royalty by the State. These matters of royalty are intertwined with the riveting matters of territories which, though intricate must be addressed expeditiously.

*(d) Matters that have transpired through voyage of time on the implementation of the 40% Special Grant*

From the year 1964 up till 1972, one may see clearly the estimated revenue contributed from Peninsular Malaysia, Sabah and Sarawak to the Federal government. This is attributed to the distinct segregation of columns labelled : (i) Malaya/Malaysia Barat, (ii) revenue from Sabah and (iii) revenue from Sarawak respectively.<sup>85</sup> Thus, the revenue from the Borneo States were easily identified previously compared to currently. Thereafter, the abstract of the estimated revenue of Malaysia is combined as a whole and no longer distinctly segregated.

Similarly, the 40% Special Grant was also mentioned in the relevant appendices known as "Lampiran C or B" (respectively) of the Estimates of Malaysia Federal Revenue and Expenditure from 1965 until 1970. The financial statements were made true to the Constitutional provisions.<sup>86</sup> From 1971 onwards however, there was no longer any mention of the 40% Special Grant but instead it was identified as "Sabah Annual Grant" or "Pemberian Tahunan Sabah". This may be due to the grant review pursuant to the Sabah Special Grant (First Review) Order, 1970<sup>87</sup> whereby instead of the 40% Special Grant, a fixed amount at the following rates were given:

- 1969 – RM20 million
- 1970 – RM21.5 million
- 1971 – RM23.1 million

<sup>84</sup> *Federal Constitution* (Malaysia) Ninth Schedule List IIIA, Item 18 provides that medicine and health (including matters specified under item 14(a) to (d) in the Federal List) are in the concurrent list only until the end of the year 1970.

<sup>85</sup> See Abstracts of the Estimated Revenue of Malaysia, Estimates of Malaysia Federal Revenue for the years 1964 to 1972, Malaysia Ministry of Finance.

<sup>86</sup> See Lampiran C or B of the Estimates of Malaysia Federal Revenue and Expenditure for the years 1964 until 1970.

<sup>87</sup> P.U.(A) 328/1970.

- 1972 – RM24.8 million
- 1973 – RM26.7 million

It was opined that the review of 1969 may have been possible because information was made available then to the Sabah State Government to show that the amounts in the review amounted to approximately 40% of the revenue collected from Sabah then, as well as the projected growth of such share in ensuing years in the five-year period.<sup>88</sup>

Thereafter no other review was made and the payment of RM26.7million was paid annually from the year 1974 until the year 2019. In the year 2020 RM53.4million was paid following a negotiation between the State Government and the Federal Government.<sup>89</sup> In the year 2021 however, the amount reverted to the previous amount of RM26.7million.<sup>90</sup> Consequently, further negotiations between Federal and Sabah State Government ensued<sup>91</sup> resulting in the gazette of the *Federal Constitution* (Review of Special Grant Under Article 112D) (State of Sabah) Order 2022<sup>92</sup> whereby instead of the 40% Special Grant, another interim fixed amount at the following rates were given:

- 2022 – RM125.6 million
- 2023 – RM129.7 million
- 2024 – RM133.8 million
- 2025 – RM138.1 million
- 2026 – RM142.6 million

On 22<sup>nd</sup> November 2023, another order was made, named the *Federal Constitution* (Review under Special Grant under Article 112D)(State of Sabah) Order 2023<sup>93</sup> whereby instead of the previous fixed interim amount, grants of the following amounts were given:

- 2022 – RM125.6 million
- 2023 – RM300 million
- 2024 – RM306 million
- 2025 – RM312 million
- 2026 – RM318 million
- 2027 – RM325 million

<sup>88</sup> Roger Chin, Official Statement of the President of the Sabah Law Society (Facebook, 26 March 2022) < [https://m.facebook.com/story.php?story\\_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BA4pKpV3zCX3M6qxvdnDnUMwc21QXypl&id=100522628235153](https://m.facebook.com/story.php?story_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BA4pKpV3zCX3M6qxvdnDnUMwc21QXypl&id=100522628235153)>.

<sup>89</sup> Chong CT, Warisan Plus in Government: A retrospective from the Campaign and Beyond, Bridget Welsh et al (eds), *Sabah from the Ground: The 2020 Elections and the politics of survival* (SIRD and ISEAS Publishing, 2021).

<sup>90</sup> Ibid.

<sup>91</sup> “Federal Government, Sabah agree in 4.7% fold increase in Special Grant”, *The Edge Markets* (Online, 14 April 2022) < <https://www.theedgemarkets.com/article/federal-govt-sabah-agree-47fold-increase-special-grant>>.

<sup>92</sup> P.U. (A) 119/2022.

<sup>93</sup> P.U.(A) 364/2023.

A Public litigation case has been filed by the Sabah Law Society to obtain answers pertaining to the 40% Special Grant.<sup>94</sup> Simultaneously a civil case pertaining to the 40% Special Grant was also filed<sup>95</sup> before it was withdrawn.<sup>96</sup>

Negotiations abound on the application of the 40% Special Grant formula. In any event should there be departure from the original formula, the constitutional provisions and constitutional safeguards must be strictly complied with.

It is interesting to observe the evolution of the label for the 40% Special Grant column found in the “Lampiran B, C or E” (respectively) of the Federal Estimates of Revenue and Expenditure for the years 1965 up until 2022.<sup>97</sup> This “Lampiran B, C or E” (respectively) is essentially the table of the statutory grant and other payments to the State government. Initially, from the years 1965 until 1970 the 40% Special Grant column was labelled as “Pemberian Mengikut Per. 2(1) Bahagian IV Jadual Ka-Sapuluh dalam Perlembagaan” or Grant under Para 2(1) of Pt. IV of the Tenth Schedule of Constitution. Thereafter, from the years 1971 until 1995 the column was labelled as “Pemberian Tahunan-Sabah or Annual Grant -Sabah”. From the years 1996 until 2008 the column was labelled as “Pemberian Khas” which included the award of grants to other states such as Kedah and Selangor. From the years 2009 until 2022 the column was labelled as “Pemberian Khas Tahunan” which also still included the award to other states. The label of the column may continue to change and evolve in the future, however due to the current turn of events there appears to be a need to specify the column as the 40% Special Grant, true to the Constitutional provisions.

It is not clear why the Article 112D reviews stopped in 1970, however there may be several reasons for the absence of review:

#### (i) *The 1969 Emergency*

An emergency proclamation does not *ipso facto* suspend any provision of the *Federal Constitution* or of the Federal-State relations unless there is an explicit provision in an

<sup>94</sup> E-Kehakiman Sabah dan Sarawak, Case No.: BKi-25-14/6-2022 < [https://ekss-portal.kehakiman.gov.my/portals/web/home/list\\_search\\_case/?state\\_id=12&case\\_no=BKi-25-14/6-2022&name=&ic\\_no=>](https://ekss-portal.kehakiman.gov.my/portals/web/home/list_search_case/?state_id=12&case_no=BKi-25-14/6-2022&name=&ic_no=>). >[https://m.facebook.com/story.php?story\\_fbid=pfbid0zUu1tuJ9RajxBs7LWR1QGtynTfWa5wB3VXcYyzkTNqzEqxbSqGVR8GzZWWwSxMJl&id=100522628235153](https://m.facebook.com/story.php?story_fbid=pfbid0zUu1tuJ9RajxBs7LWR1QGtynTfWa5wB3VXcYyzkTNqzEqxbSqGVR8GzZWWwSxMJl&id=100522628235153)>, Bernama, ‘Sabah Law Society applies for Judicial Review on Special Grant to State’, *Daily Express* (online, 9 June 2022) <<https://www.dailyexpress.com.my/news/193829/sabah-law-society-applies-for-judicial-review-on-special-grant-to-state-/>>.

<sup>95</sup> E-Kehakiman Sabah dan Sarawak, Case No.: BKi-24NCvC-84/6-2022 < [https://ekss-portal.kehakiman.gov.my/portals/web/home/list\\_search\\_case/?state\\_id=12&case\\_no=BKi-24NCvC-84/6-2022&name=&ic\\_no=>](https://ekss-portal.kehakiman.gov.my/portals/web/home/list_search_case/?state_id=12&case_no=BKi-24NCvC-84/6-2022&name=&ic_no=>), FMT Reporters, ‘Sabah PH Reps Go To Court Over 40% Revenue Share for State’, *Free Malaysia Today.com* (online, 3 June 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/06/03/sabah-ph-reps-go-to-court-over-40-revenue-share-for-state/>>.

<sup>96</sup> Paul Mu, ‘PH Sabah to withdraw originating summons’, *New Straits Times* (online, 20 September 2023) < PH Sabah to withdraw originating summons | New Straits Times (nst.com.my) >.

<sup>97</sup> See Estimates of Malaysia Federal Revenue and Expenditure from 1965 until 2022, Ministry of Finance.

Emergency Ordinance or Emergency Act of parliament. In any case, the Proclamation of Emergency of 1969<sup>98</sup> came to an end in 2011.<sup>99</sup>

(ii) *Agreement between the parties*

Article 112D allows the parties to “agree on the alteration or abolition of any of those grants, or the making of another grant instead of or as well as those grants...”. However, this requires a formal order by the Yang di-Pertuan Agong. Further, the constitutional requirements and safeguards must also be satisfied.

(iii) *Political agreement*

A mere political arrangement between a political alliance partner at the Federal and State level is not enough to displace Article 112C. The Constitution cannot be set aside by a mere political or administrative arrangement.

(iv) *Unilateral declaration*

Even more so a unilateral declaration by any one party that the 40% Special Grant provision is no more applicable has no legal effect.

(v) *Atrophy*

Has the time lapse since 1970 caused Articles 112C and 112D to lapse? The answer is “No”. Constitutional law does not recognise atrophy of constitutional provisions. The case of *Lembaga Tata tertib Perkhidmatan Awam, Hospital Pulau Pinang v Utra Badi A/L Perumal*<sup>100</sup> applied the case of *Francis Coralie V Union of India*<sup>101</sup> which states among others that, “....*This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but, in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible*

<sup>98</sup> As a result of the 13th May 1969 riot tragedy, a Proclamation of Emergency of 1969, was proclaimed by the Yang di-Pertuan Agong on 15<sup>th</sup> May 1969 and published in the gazette on the same day. Following this proclamation several laws were promulgated including the Emergency (Essential Powers) ordinance no. 2 of 1969 which lead to the formation of a National Operations Council (NOC) and the creation of the post of a Director of Operations, whom was vested with legislative and executive powers. It is worthy to note that the Sabah Special Grant (First Review) Order 1970, P.U.(A) 328 was made on 18<sup>th</sup> August 1970 which was during the period of NOC government.

<sup>99</sup> Pursuant to the *Federal Constitution* (Malaysia), Art 150(7), at the expiration of six months from the date a proclamation of emergency ceased to be in force, any laws made while the proclamation was in force shall cease to have effect. Resolutions to annul the Proclamation of Emergency of 1969 (including the Proclamation of Emergency of 1966 and the Proclamation of Emergency of 1979) was passed at the House of Representatives on the 24<sup>th</sup> November 2011, and at the Senate on the 20<sup>th</sup> December 2011: See Malaysia, *Parliamentary Debates*, House of Representatives, 24<sup>th</sup> November 2011, Bil 61 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-24112011.pdf>> and Malaysia, *Parliamentary Debates*, House of Senate, 20<sup>th</sup> December 2011, Bil 22 <<https://www.parlimen.gov.my/files/hindex/pdf/DN-20122011.pdf>>.

<sup>100</sup> [2000] 3 MLJ 281.

<sup>101</sup> AIR 1981 SC 746.



*enough to meet the newly emerging problems and challenges applies with greater force in relation to a fundamental right enacted by the Constitution ... ”.*

#### 4 *What needs to be done to address the issues of the 40% Special Grant*

In conciliating the issues of the 40% Special Grant, understanding and internalizing the *Federal Constitution* together with its ‘constitutional foundation documents’<sup>102</sup> is crucial. This is to encourage and uphold the sanctity of the *Federal Constitution*, the rule of law as well as recapture the spirit of accommodation, moderation and compassion that animated the leaders of the Malaysia Agreement in 1963.<sup>103</sup> The Federal Government and West Malaysians must re-dedicate themselves to the pacts of the past.<sup>104</sup>

All factions within Sabah must unite to adopt a common front. Transparent negotiations with the Federal Government must be reopened under Article 112D. This provision permits a mutual agreement to alter, abolish or replace the constitutional provisions by order of the Yang di-Pertuan Agong. There is also no bar to reinforcing, reinstating or renegotiating the terms of Malaysia Agreement 1963 and incorporating them in a constitutional amendment. Consequently, an independent assessor under Article 112D is required by the *Federal Constitution* if no agreement can be reached. The Federal government can seek an advisory opinion of the Federal Court under Article 130 of the *Federal Constitution*.

Court redress may be sought to recover monies due since 1973. Reliance may be made on the authority of the Federal Court case of Ministry of Finance, *Government of Sabah v Petrojasa Sdn Bhd*<sup>105</sup>. It was held in this case that the non-payment of a debt is a denial of a right to property under Article 13 of the *Federal Constitution*. Mandamus may be issued for the purpose of enforcing the right of a person who has been deprived of his property not accordance with law. It is also noteworthy that Article 98(1)(b) of the *Federal Constitution* provides that all Federal debts are to be charged on the Federal Consolidated Fund. In the event that the matter does go through litigation process, interesting questions will arise such as: Will estoppel apply due to the agreement of Sabah leaders since 1973 to forgo their right? It is opined that estoppel cannot be applied against a constitutional right; and Will the time limit of 36 months shield the federal government under the various limitation laws. These matters require due deliberation.

## IV CONCLUSION

The laws and constitutional financial provisions related to the Borneo States and the 40% Special Grant has been set out from the inception of Malaysia. The events that unfold from the beginning of Malaysia to this day has been recorded in the passages of history.

<sup>102</sup> Jeyan Marimuttu, ‘Malaysia Agreement: Malaysia Act 1963 Safeguard and guarantees for the Borneo Territories’, *Malayan Law journal*, 4, lxvi, ‘The Constitutional Foundation Documents comprises of *inter alia*, The Malaysia Agreement 1963, The Malaysia Act 1963 and The IGC Report.

<sup>103</sup> Shad Saleem Faruqi (n 11) 85.

<sup>104</sup> Shad Saleem Faruqi, “Federal -State Relations with Special Emphasis on Sabah and Sarawak” Webinar conducted by the Faculty of Law University of Malaya, 20<sup>th</sup> September 2022.

<sup>105</sup> [228] 4 MLJ 641 FC.

The actions that are taken today determines the success of tomorrow. There must be a balance between the deliberated design of yesterday and the life of tomorrow.<sup>106</sup>

It is submitted that, in the wake of the circumstances that prevail today, the issue of 40% Special Grant requires attention and efficacious action on all levels of society including but not limited to the three branches of the federal government and State governments respectively.

If it appears at the Federal-State level, there is mutual consensus to alter or abolish the grants or make another grant (Article 112D(1)) or there is mutual agreement to have a longer period of review of the special grant (Article 112D(3)), or acknowledgement of the State's acceptance of notice from the Federal Government on the variation of assignments (Article 112D(5)), then such outcome can only be binding subject to the strict compliance of the procedural requirement of an order made by the Yang di-Pertuan Agong to modify the special grant in Part IV of the Tenth Schedule and Article 112C(2). Further, any unconstitutional acts done in violation of the constitution or any agreements between the Federal and State governments cannot supersede the laws set out in the *Federal Constitution*.<sup>107</sup> The requirement of concurrence pursuant to the safeguards of the constitutional position of the Borneo States (Article 161E) must also be fulfilled.

On the other hand, if there is disagreement or dissensions between the Federal Government and the Borneo States pertaining to the review of the special grants, then it is high time for the Federal and State government to jointly appoint an independent assessor according to the constitutional provisions to give way to the independent assessor to provide his binding recommendations.<sup>108</sup>

The cornerstone to uphold the rule of law and harmony is through understanding and acquiescence of the *Federal Constitution* together with the directives in constitutional foundation documents. With mutual co-operation towards a common ground, the halcyon days will be upon us.

<sup>106</sup> Shad Saleem Faruqi, "Constitutional Amendments and the Basic Structure of Malaysia", UM-NUS Joint Hybrid Symposium (University of Malaya, 14 & 15 October 2022).

<sup>107</sup> Vanar M, "Sabah's 40% Special Grant Cannot Be Displaced By Mere Political Agreement, Says Constitutional Expert", *The Star Online* (Online, 11 May 2022) < <https://www.thestar.com.my/news/nation/2022/05/11/sabah039s-40-special-grant-cannot-be-displaced-by-mere-political-agreement-says-constitutional-expert>>.

<sup>108</sup> Malaysia, *Report of the Inter-Governmental Committee* (n 7) Paragraph 24(9)(i).