Asymmetric Federalism And Protection Of Indigenous Peoples: The Case Of Sabah And Sarawak In Malaysian Federalism

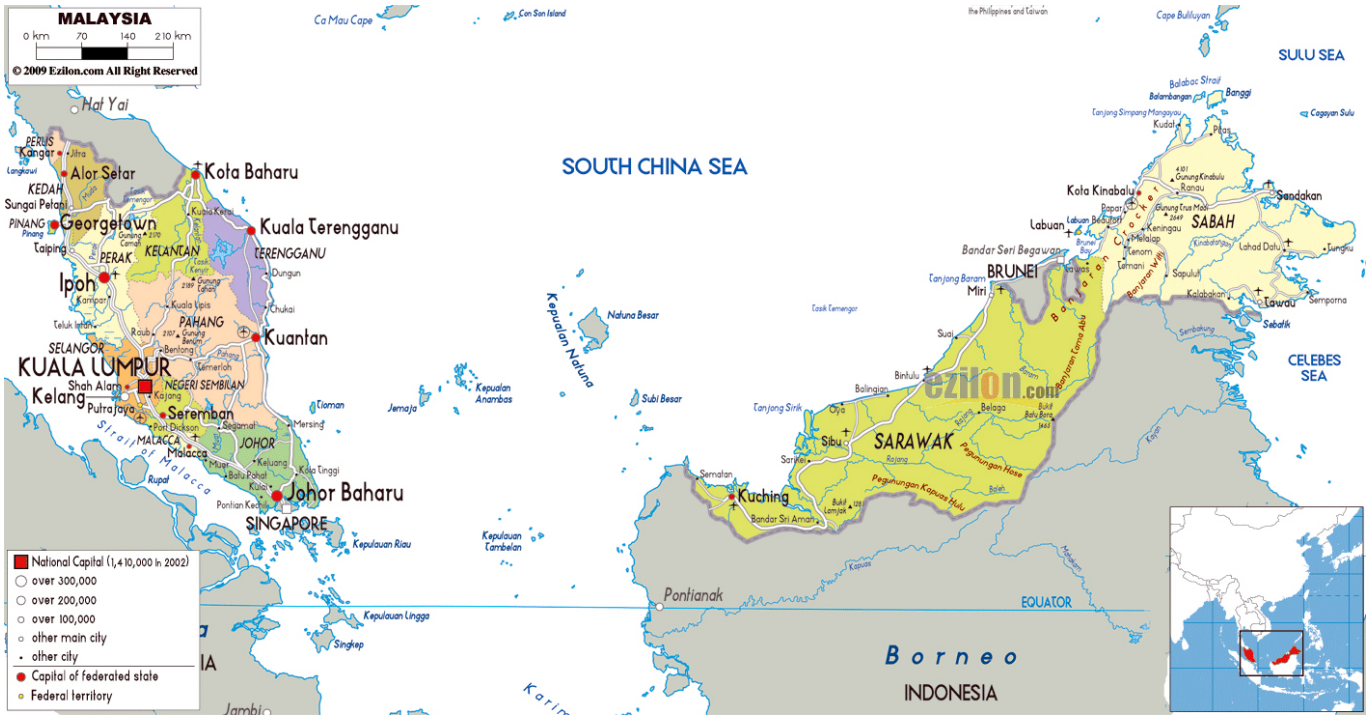
Abstract

In Malaysia, federalism is not in general designed to deal with the problem of ethnic differences. Sabah and Sarawak, on the island of Borneo, are, however, exceptions, as their identity largely reflects the indigenous people of those states. Having been admitted to the federation to form Malaysia in 1963, these states have extra constitutional powers and guarantees compared to the other 11 states of Malaysia. However, over the last six decades the autonomy guaranteed to them has been eroded by political interference, and there is a strong resentment of the federal system as it is, based on the federation's failure, in the eyes of many Sabahans and Sarawakians, to honour the terms of the original agreement, or to respect the land rights and interests of the indigenous people. This paper argues that, despite constitutional safeguards and asymmetric powers, the autonomy of these states has not been protected.

Federalism and Ethnicity

Malaysian federalism did not come about, nor has it been maintained for six decades, because of the diversity that characterises Malaysian society. Rather, ethnic and religious diversity tend to cut *across* state boundaries rather than being defined by them. However, the East Malaysian states of Sabah and Sarawak on the island of Borneo are notable exceptions, and are for two reasons the focus of this study.

First, these two states, unlike the other states of Peninsular or West Malaysia, are defined by ethnicity. The indigenous people of Sabah and Sarawak are officially and legally styled 'native', a term that comprises a large number of tribal people who are defined as indigenous to those two states, including the Iban, Murut, Kadazan, Kenyah, Penan, and many other groups.[1] The Iban constitute around 31% of Sarawak's population, while the Kadazan are the largest group in Sabah at 17%. Taken altogether, the indigenous peoples at around 2.2 million constitute just over half of the population in these two States. Sabah and Sarawak also have about 60% of Malaysia's land area and abundant natural resources, but only about one eighth of its population.



Secondly, having joined an existing federation (the Federation of Malaya), along with Singapore, in 1963 (Singapore left in 1965) to form 'Malaysia' pursuant to the Malaysia Agreement 1963 (TY Tan 2008), Sabah and Sarawak are also an example of asymmetric federalism, as they enjoy more powers than Malaysia's other 11 states.

Many in Sabah and Sarawak would maintain that their experience of federation is a case of failed federalism in terms of non-observance of the original deal, contained in the Malaysia Agreement and parallel documentation, with particular reference to failure to protect these states' indigenous cultural and socio-economic interests, and the undermining of their political and constitutional autonomy. Thus although in many aspects Malaysian federalism can be called successful, from an East Malaysian perspective there are serious issues with how federalism is practised, in spite of the asymmetrical power they enjoy (Chin 2014a).

Evolution of Malaysian Federalism

Federalism emerged as the defining structure of government in Malaya in 1948, due to the fact that the Malays would not accept the abolition of their traditional states along with their ancient monarchies. Accordingly, in 1948 with the Federation of Malaya Agreement[2] the nine Malay states and the two Crown colonies of Penang and Malacca were folded into a federal structure, and it was this federation that gained independence under the Constitution of the Federation of Malaya in 1957. Other ways than federalism were found to deal with inter-ethnic conflicts. Principally, affirmative action was entrenched in the Constitution, by virtue of its Articles 3 and 153, to ensure the continued recognition of the special position of the Malays and of Islam. From the early 1970s the term '*bumiputera*' ('sons of the soil') was used for both the Malay/ Muslim majority and the native peoples of Sabah and Sarawak. *Bumiputera* citizens enjoy special privileges and status in terms of affirmative action, sanctioned under Article 153, as an exception to equality before the law (Tay 2017).

In 1963 the Federation was enlarged to incorporate the three new states on somewhat different terms from those given to the existing 11 states, creating a two-tier federation. Pursuant to consultation between the various territories and the British government, the Cobbold Commission, consisting of representatives of the British and Malayan Governments, visited Sabah and Sarawak in 1962 and reported that the majority supported federation with Malaya, provided due regard was to the special position of Sabah and Sarawak, the ethnic implications of federation for the indigenous people of those territories, the physical distances involved, and the territories' political immaturity compared to the Federation of Malaya and the then colony of Singapore (Fong, JC 2014). The Legislative Assemblies of both Sabah and Sarawak voted in favour of federation 'subject to appropriate safeguards'. An Inter-governmental Committee was then set up, comprising representatives from the same four Governments, to thrash out constitutional safeguards for Sabah and Sarawak, reporting in February 1963. The Malaysia Agreement was eventually signed on 9 July 1963 by all the Governments concerned, and Malaysia came into being on 16 September 1963.[3] There is nonetheless a strong, lingering resentment in Sabah and Sarawak, these two states were rushed into federation although it was unclear, despite the Cobbold Commission Report, that a majority of their populations had expressly favoured this outcome (Welsh 2014).

A principal point of concern for Sabah and Sarawak was the possible effect of migration on land, commerce, and the employment and professional opportunities of East Malaysians now with competition from more qualified people from West Malaysia. Accordingly, these states were given their own powers over immigration, allowing them to control migration from West Malaysia. However, there was also concern about financial arrangements and development; the special position of the indigenous peoples of Sabah and Sarawak; the national language; religion; the legal system; representation in the Federal Parliament; and, naturally, how these states would be protected from future constitutional changes affecting any of these issues. Several of these matters remain concerns long after federation.

The Cobbold Commission had stressed the need for a sense of equality and partnership (not take-over) in the new federal scheme.[4] It was very clearly a primary objective in the Malaysia Agreement to provide special protection for these native peoples in both states, as a condition of Sabah and Sarawak joining the new Federation.

Constitutional Status of Sabah and Sarawak

It is significant that the events of 1963 did not trigger the drafting of a new constitution, as one might have expected. Instead of a new document expressing the structure and aspiration of a new partnership going beyond the parameters of the 1957 Constitution, a process of simply amending the Constitution gave rise to the impression that Malaysia was simply a federation of 14 (later 13) states rather than a new federation of three equal entities. The Government of the Federation of Malaya became the Government of Malaysia, and there was therefore no co-equal partner to Sabah and Sarawak at an equivalent subnational level. This was in effect a design fault: how could two subnational units meaningfully enter into an *equal* partnership with a national and therefore implicitly *superior*, more powerful, unit? The Federation of Malaya continued

to exist as 'Malaya' but only as an entity defined by its own legal system. It did not have a government or legislature distinct from that of Malaysia itself. Accordingly, even the Constitution's first article listing the subjects of the Federation was subsequently amended to abolish the separate listing of Sabah and Sarawak. This Article was the subject of a 2019 Bill to Amend the Constitution so as to revert to the original wording distinguishing Sabah and Sarawak from the other states, but the Bill lapsed when it failed to achieve the necessary two-thirds majority in Parliament.

A close examination of the Constitution indicates that the status of Sabah and Sarawak is indeed higher than that of the other states. State powers in Malaysia are largely limited to Islamic law and custom, local government, land, agriculture, forests and natural resources. The concurrent powers such as social welfare, planning and public health, are in general exercised by the states. Sabah and Sarawak, however, have greater powers, including immigration, separate legal systems and legal professions, more guaranteed revenue, and the right to veto constitutional amendments affecting them. None of these privileges apply to any of the other states (Harding 2014).[5]

Nevertheless, there can be little doubt that over the last six decades autonomy has been undermined and the status of Sabah and Sarawak has been abraded to the extent that in practice they resemble to a great extent the other states, in spite of their special constitutional status and the guarantees given in 1963 (Harding 2019).

While the extra powers conferred on Sabah and Sarawak might not seem very great, importance is attached in those two states to agreements that were reached and set out in the Inter-Governmental Committee Report in 1962, known as the '18 points' (Sarawak) or '20 points' (Sabah). The key issues and outcomes may be summarised as follows (Chin 2014a):

(i) Islam's status as a national religion was not to be applicable to Sabah and Sarawak. Nonetheless, pressure on indigenous people to convert to Islam, and other forms of cultural interference, have been apparent. Reforms to the Islamic legal system, involving constitutional amendment, have proceeded without agreement of the governments of Sabah/ Sarawak.[6] Islam was designated as Sabah's state religion in 1973.

(ii) Immigration control was vested in the state governments of Sabah and Sarawak. This has been undermined due to the federal government's control over granting of citizenship.

(iii) 'Borneanisation' (i.e., gradual inclusion of Sabah/ Sarawak people) of the public service was to proceed as quickly as possible. This has not occurred. In 2013 only 40% of federal heads of department in Sabah were held by Sabahans. Overall only 2% of federal government employees were non-Muslim *bumiputera* from Sabah or Sarawak (Chin 2014a).

(vi) The indigenous peoples of both states would enjoy the same 'special' rights given to the Malay community in Malaya. This occurred in 1971 but in practice it is alleged they are treated as second-class *bumiputera*.

(vii) Sabah and Sarawak were to be given a high degree of autonomy over their financial affairs. With only 5% royalty on natural resource exploitation, these states have been starved of funding and are both under-developed on all criteria compared to other parts of Malaysia (Harding 2017).

Federal Interference

One of the main resentments has been federal interference in state politics. From independence on 31 August 1957 until 10 May 2018 the Federation was ruled by a single inter-ethnic coalition, the Barisan Nasional (BN). This coalition also controlled virtually all state governments most of the time until 2008. Where, as in Sabah and Sarawak, local ethnic parties had emerged, these found it to their advantage to ally themselves with the BN. The assumption was that in BN-controlled states, apart from Sarawak, where the BN's leading party UMNO did not operate, the Prime Minister would in effect appoint the state's Chief Minister. When a state was ruled by the opposition, the federal government tended to do its utmost to make life difficult for the state, even punishing it by use of its fiscal control and withholding development funding in order to weaken the state government and replace it with a BN state government.

The tone was set early on in the Stephen Kalong Ningkan episode in 1966. Ningkan was elected as Chief Minister of Sarawak to protect the rights and interests of the indigenous people, especially their customary land rights. The Federal Government

manipulated the state assembly to deprive him of his majority, leading to litigation that reached the Privy Council in London. It even went so far as to proclaim an emergency in order to amend the state constitution, facilitating Ningkan's removal. The suppression of state autonomy that this episode represents paved the way for subsequent interference by the federal government in Sabah/ Sarawak politics in, for example, 1985 and 1993/4 (Harding 2019).

There are in addition human rights concerns relating to indigenous peoples, especially in the context of development, which impinges on their customary land. Indigenous rights have in fact been strongly advocated by the Malaysian Human Rights Commission ('Suhakam') and in the courts too some progress has been made in recognising customary land rights (Suhakam 2010, Yogeswaran 2017). Native people as a whole 'suffer disproportionately from preventable diseases, have higher infant and maternal mortality rates, are poorly provided with basic services and utilities, and have lower levels of education … the great majority … continue to suffer widespread and persistent poverty, high rates of illiteracy, and limited access to medical care' (Aiken and Leigh 2011).

Implications for Federalism

The lesson to be drawn from Malaysian federalism is that if a single party holds power continuously at the federal level, it can assert overwhelming power and effectively demolish all but the bare appearance of a federal system (Harding and Chin 2014). In both Sabah and Sarawak there have been political parties representing indigenous people's interests, but they have proved powerless and sometimes too corrupt, to protect them. This is in spite of representation in both houses of Parliament, the federal cabinet, and the federal public service.

These conclusions are not comfortable ones for theorists of federalism. They show that, despite the existence of what we may see as normal or tried-and-tested federal mechanisms, and despite also the additional emplacement of asymmetric protective mechanisms, these have all proved ineffective to prevent erosion of both states' rights and the rights and interests of their indigenous peoples.

Given that the native people constitute a majority in both Sabah and Sarawak, one might wonder why they would not vote against parties that simply toe the federal line. However, opposition parties have found it extremely difficult to penetrate outside urban areas in Sabah and Sarawak, at least until the 2018 election, and democratic processes and institutions have otherwise lacked development. Patronage systems have filled the void, locking the indigenous people into BN support. Rare have been the occasions on which Sabah or Sarawak elected representatives have raised concerns as to the autonomy of their states. They appear to have been in effect complicit in the political demise of their states' powers.

Attempts to correct the situation by making demands on the federal government to correct the situation, for example via devolution of powers, were not in general looked upon with favour by federal leaders, at least until the Pakatan Harapan (PH) government came into office in May 2018. However, PH did nothing other than set up a committee and propose a constitutional amendment that failed to get a two-thirds majority. The Perikatan Nasional (PN) government (from March 2020) also promised to deal with Sabah/ Sarawak ; like its predecessor, it established a committee to work on this issue, but it may be some time before the outcome of its deliberations is made known. Meanwhile the problem of disaffection against Malaysian federalism grows in the East Malaysian states, and some even advocate secession.

Meanwhile, advocates in these two states speak variously of devolution; secession; having the Malaysia Agreement invalidated under international law (replying on the recent Chagos Islands case, ICJ 2019)); and suing the Malaysian and British governments to have the Malaysia Agreement enforced. However, the problems in Sabah and Sarawak as we have seen are mainly political and appear to have only political solutions. In a competitive, multi-party system, which Malaysia now has, political parties in these states hold the balance of power at the centre. Leveraging this power is their best hope of renewing state autonomy.

[1] See Federal Constitution of Malaysia, Article 161A, for a complete list of native peoples.

[2] *Federation of Malaya Order-in-Council 1948*, SI 108/ 1948 (UK).

[3] *Malaysia Agreement 1963*, signed 9 July 1963, between the United Kingdom, the Federation of Malaya, Singapore, Sarawak and North Borneo (London, HMSO, 1963).
[4] *The Report of the Commission of Enquiry: North Borneo and Sarawak, 1962*, Cmnd 1794/1962 (HMSO), at para. 237.
[5] Constitution, Schedule 9.
[6] Federal Constitution, Article 121(1)(A).
Harding, A. 2021. 'Asymmetric Federalism and Protection of Indigenous Peoples: The Case of Sabah and Sarawak in Malaysian Federalism', ***50 Shades of Federalism***.

References

Aiken, SR, and Leigh, CH (2011), 'Seeking redress in the courts: Indigenous land rights and judicial decisions in Malaysia' 45 *Modern Asian Studies* 825
Chin, J (2014), 'Exporting the BM/ UMO model: Politics in Sabah and Sarawak', ch.7 of M Weiss (ed), *The Routledge Handbook of Contemporary Malaysia*, Abingdon: Routledge
Chin, J (2014), 'Federal- East Malaysia relations: Primus inter pares?", in Harding, AJ and Chin, J (eds), *50 Years of Malaysia: Federalism Revisited*, Singapore: Marshall Cavendish
Fong, JC (2014), *Constitutional Federalism in Malaysia*, Petaling Jaya: Sweet and Maxwell Asia
Harding, A (2014), 'Protection of the Indigenous peoples of Sabah and Sarawak under Malaysian federalism', in Harding, AJ and Chin, J (eds), *50 Years of Malaysia: Federalism Revisited*, Singapore: Marshall Cavendish
Harding, A (2019), "'A Measure of Autonomy': Federalism as protection for Malaysia's indigenous peoples" 46(4) *Federal Law Review* 557
Harding, AJ and Chin, J (eds), *50 Years of Malaysia: Federalism Revisited*, Singapore: Marshall Cavendish
ICJ (2019), Legal consequences of the separation of the Chagos archipelago from Mauritius in 1965' https://www.icj-cij.org/en/case/169
Suhakam (2010), *Human Rights Commission of Malaysia Annual Report 2010,* Kuala Lumpur: Human Rights Commission of Malaysia, www.suhakam.org.my/c/document_library/get_file?p_l_id=24205&folderId=39678&name=DLFE-10502.pdf.
Tay, Wilson TV (2017), 'Dimensions of *Ketuanan Melayu* in the Malaysian constitutional framework', ch.3 of Harding, A, and Shah, DAH, *Law and Society in Malaysia: Pluralism, Religion and Ethnicity*, Abingdon: Routledge
Tan, TY (2008), *Creating "Greater Malaysia": Decolonization and the Politics of Merger*, Singapore: ISEAS
Welsh, B (2014), Interview with Tan Sri Simon Sipaun; Interview with Tan Sri Sir Peter Mooney, in Harding, AJ and Chin, J (eds) (2014), *50 Years of Malaysia: Federalism Revisited*, Singapore: Marshall Cavendish
Yogeswaran S (2017), 'Legal pluralism in Malaysia: The case of Iban native customary rights in Malaysia', ch.6 of Harding, A, and Shah, DAH, *Law and Society in Malaysia: Pluralism, Religion and Ethnicity*, Abingdon: Routledge

Further Reading

Harding, A (2012), *The Constitution of Malaysia: A Contextual Analysis*, Oxford: Hart Publishing, ch.5.
Harding, A (2017), 'Devolution of powers in Sarawak: A dynamic process of redesigning territorial governance in a federal system' 12(2) *Asian Journal of Comparative law* 257
Harding, A and Chin, J (eds) (2014), *50 Years of Malaysia: Federalism Revisited*, Singapore: Marshall Cavendish
Tan, Kevin YL (2017),'The creation of Greater Malaysia: Law, politics, ethnicity and religion', ch.1 of Harding, A, and Shah, DAH, *Law and Society in Malaysia: Pluralism, Religion and Ethnicity*, Abingdon: Routledge