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THE STATE AND THE FEDERATION: FORUM AND STANDING IN FEDERAL-STATE CONSTITUTIONAL DISPUTES

SABAH LAW SOCIETY v GOVERNMENT OF MALAYSIA ATTORNEY GENERAL OF MALAYSIA v SABAH LAW SOCIETY

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This Note discusses the application for judicial review initiated by the Sabah Law Society in respect of special grant reviews and payments between the Federation of Malaysia and the State of Sabah under Articles 112C and 112D of the Malaysian Federal Constitution. It is argued that the Malaysian High Court in granting leave to commence judicial review proceedings, and the Court of Appeal in upholding the High Court's decision, ought to have considered whether the rights of the State of Sabah could be enforced by the Sabah Law Society in judicial review proceedings before the High Court. The Note concludes that any dispute on the special grant ought to be resolved in proceedings between the Federation and the State concerned and falls within the exclusive and original jurisdiction of the Malaysian Federal Court.

I. Introduction

Where a dispute arises regarding the obligation of the Federation on the making or payment of a grant to a State under a provision of the Malaysian Federal Constitution,[1] by whom should those rights be capable of enforcement and in which forum should that dispute be adjudicated? This was the question that ought to have been asked by the Malaysian High Court in the application for leave to commence judicial review proceedings brought by the Sabah Law Society in *Sabah Law Society v The Government of the Federation of Malaysia*[2] and on appeal before the Malaysian Court of Appeal in *Attorney General of Malaysia v Sabah Law Society*.[3]

Disputes and questions about the relations between the Federation and its States are wont to arise in all systems of federal government. While such questions do not often lend themselves to easy answers, much less to answers spelt out within the text of any constitutional document, their resolution benefits from clear and careful

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1 Federal Constitution (Malaysia) [Federal Constitution].

2 [2024] 7 MLJ 537 [*Sabah Law Society*].

3 *Attorney General of Malaysia v Sabah Law Society (State Government of Sabah, intervenor)* [2024] 4 MLJ 436 [*Attorney General of Malaysia*].

consideration of first principles and attention to both the whole text and context of written law.

As this Note hopes to make clear, the answer to the question posed earlier may be found through both of these means.

For clarity, the purpose of this Note is not to address the merits of any dispute between the Government of Malaysia and the Government of the State of Sabah over the value of the special grant or any outstanding payments,[4] which is beyond the scope of the present Note, but to address the legal and constitutional issues arising out of the application for leave to commence judicial review.

II. Background

The Federation of Malaysia was formed in 1963 between the then-existing Federation of Malaya, Sabah (then known as North Borneo), Sarawak, and Singapore.[5] The Constitution of the Federation of Malaya was then amended to include the States of Sabah, Sarawak, and Singapore, and also made special provision in respect of these States and their relationship with the Federation.[6] It is the special provisions which are at the heart of the *Sabah Law Society* case, namely Articles 112C and 112D of the Federal Constitution.

Briefly, Article 112C obliges the Federation to make to the States of Sabah and Sarawak certain special grants specified in Part IV of the Tenth Schedule of the Federal Constitution. For the State of Sabah, this equates to 40% of the net revenue[7] in each year exceeding the net revenue that would have been derived in the year 1963.[8] Article 112D sets up a process by which the Federation and the respective States may review the special grants, and may agree to alter, abolish, substitute, or add to those grants. These grants prescribed in the Federal Constitution shall then be modified by order of the Yang di-Pertuan Agong[9] when necessary to give effect to the agreement.

The first constitutionally prescribed review was held on 1 December 1969, culminating in the modification of the special grant as set out in the Sabah Special Grant (First Review) Order 1970[10] of 17 September 1970. In the 1970 Review Order, the Federation and Sabah agreed to revise the grant for the five years from 1969 to 1973. A second review was due to have been conducted under Article 112D(4) of the Federal Constitution for the period beginning with the year 1974, but this does not appear to have materialised.

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4 A brief summary of the background to this dispute, insofar as it is material to the Note, is set out in the sections which follow.

5 Agreement relating to Malaysia (9 July 1963), United Kingdom, Federation of Malaya, North Borneo, Sarawak and Singapore, 750 UNTS 2 (entered into force 16 September 1963) [Malaysia Agreement 1963]. Singapore would leave the Federation of Malaysia on 9 August 1965.

6 Malaysia Act 1963 (Act 26 of 1963) (Malaya).

7 Revenue accruing to the Federation less the amount received by the State in respect of assignments of the revenue.

8 Subject to some further qualifications regarding the basis of calculation set out in Part IV of the Tenth Schedule of the Federal Constitution, but which are irrelevant for the purposes of this Note.

9 The Supreme Head of the Federation; Federal Constitution, art 32.

10 Sabah Special Grant (First Review) Order 1970 (PU (A) 328/1970) [1970 Review Order].

As the present application for judicial review demonstrates, the controversy regarding the special grant to Sabah by the Federation has been a long-standing one. In the meantime, discussions and negotiations between the Federal Government and the Government of the State of Sabah have been ongoing for a number of years.

On 17 April 2022, following a review conducted by the Federal Government and the Government of the State of Sabah and an agreement reached during that review, the Yang di-Pertuan Agong made the Federal Constitution (Review of Special Grant Under Article 112D) (State of Sabah) Order 2022.[11] The effect of the 2022 Review Order was to revoke the 1970 Review Order and to provide for revised special grant payments of between RM125.6 million and RM142.6 million for the years 2022 to 2026.[12]

In June 2022, the Sabah Law Society applied for leave to commence judicial review proceedings against the Federal Government of Malaysia. These proceedings were brought ostensibly on the basis of upholding the interests of the State of Sabah and its people, which the applicant claimed to be charged with responsibility for doing under the Sabah Advocates Ordinance 1953.[13] Specifically, the applicant claimed that the Federal Government of Malaysia was in breach of its public and constitutional duties towards the State of Sabah and its people. The applicant sought, among others, a declaration that the failure to conduct a second review and to make payments of the 40% excess net revenue from the years 1974 to 2021 was a contravention by the Federal Government of the Federal Constitution. The applicant also sought an order of *certiorari* to quash the 2022 Review Order to the extent that it was inconsistent with the declarations sought, an order of *mandamus* to direct the Federal Government to hold another review for the years 1974 to 2021, and an order for the Federal Government to make payment for the years 1974 to 2021 to the Government of the State of Sabah.

It is notable that no judicial review was sought in the present case against the Government of the State of Sabah, but the Government of the State of Sabah applied to intervene in the leave proceedings and was permitted to do so. The application for leave was objected to by the Attorney General's Chambers of Malaysia.

III. The Decisions of the High Court and Court of Appeal

After hearing the parties, the Judge of the High Court of Sabah and Sarawak granted leave to commence judicial review proceedings. As will be seen later, the High Court perfunctorily determined that leave ought to be granted on the basis that the applicant was a person "adversely affected"[14] by the exercise of statutory or constitutional powers.

The High Court Judge found that the applicant, being the statutory body representing all advocates in Sabah, was not seeking a remedy for a wrong committed

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[11] Federal Constitution (Review of Special Grant Under Article 112D) (State of Sabah) Order 2022 (PU (A) 199/2022) [2022 Review Order].

[12] *Ibid* at [2].

[13] (Sabah Cap 2), specifically ss 13(a) and 13(e) [Sabah Advocates Ordinance]. See *Sabah Law Society*, *supra* note 2 at [24].

[14] Rules of Court 2012 (Malaysia), O 53 r 2(4) [Rules of Court 2012].

against itself but was seeking to uphold the rule of law and constitutional integrity.[15] The relief sought was for "public redress for breach of the [Federal Government's] public duty, a constitutional duty to pay 40% entitlement for each consecutive financial [year] from the year 1974-2022 (sic)".[16] The High Court also found that the application was to address a breach of public duty of the Federal Government "for and on behalf of the public or the people of Sabah for which the [public interest litigation] will redress the breach of their Constitutional Rights."[17]

As this Note will go on to highlight, the High Court Judge did not, with respect, consider the nature of the duty or obligation under Articles 112C and 112D of the Federal Constitution and to whom such a duty or obligation was owed. The High Court Judge's decision lacked discussion of the "public duty owed to the people of Sabah" pursuant to Articles 112C and 112D notwithstanding that the decision was seemingly predicated upon the existence of such a duty or at the very least the characterisation of the duty under Articles 112C and 112D as such. The High Court Judge also appeared to apply the cases on public interest litigation mechanistically without due regard to the vastly different circumstances that prevailed in the cases of *QSR Brands Bhd*[18] and *Malaysian Trade Union Congress*[19] when contrasted with the instant case.

The Court of Appeal upheld the decision of the High Court Judge on appeal, broadly agreeing with the findings of the High Court Judge. The Court of Appeal found that the application for judicial review was a form of "public interest litigation taken for the benefit of a section of the public".[20] The application was said to involve a "matter of high constitutional importance" and was instituted to "vindicate a constitutional right accorded to the State of Sabah and therefore by extension, for the benefit of the people of Sabah."[21] The shutting out of the applicant on the ground of *locus standi* was said to be a retrograde step not consonant with the recent development of the law in the area.[22] As was the case in the High Court, there was no discussion by the Court of Appeal of either the nature of rights of the State of Sabah (and the Federation's duty in respect of those rights) or their connection with the rights of the people of Sabah, enforceable through judicial review proceedings.

IV. Comment

The precis of the background and the decision provided could be expected to raise some queries in the keen-eyed observer. The purpose of this Note is to bring to the attention of the reader lines of analysis which elided mention or recognition, or which were underappreciated by the courts. In doing so, this Note advances the

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15 *Sabah Law Society*, *supra* note 2 at [27].

16 *Ibid* at [29].

17 *Ibid* at [31].

18 *QSR Brands Bhd v Suruhanjaya Sekuriti* [2006] 3 MLJ 164 [*QSR Brands Bhd*].

19 *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi* [2014] 3 MLJ 145 [*Malaysian Trade Union Congress*].

20 *Attorney General of Malaysia*, *supra* note 3 at [43].

21 *Ibid*.

22 *Ibid* at [44].

argument that: (a) any such dispute ought to be brought by the Government of the State of Sabah against the Government of Malaysia or *vice versa* only; and (b) the proper forum for the resolution of any dispute on this subject is the Federal Court and the Federal Court only.

A. *Standing*

1. *The nature of the rights and duties in the dispute*

It is apt to begin with a consideration of the constitutional rights and duties at play within Articles 112C and 112D of the Federal Constitution. This issue was mentioned in passing by the courts and did not receive any extensive consideration. The courts appear to have accepted the view that the Federation owed a duty – a legally enforceable one at that – to the people of the State of Sabah in respect of the special grant payments under Article 112C, reviewable under Article 112D of the Federal Constitution.

The obligations in respect of the special grant arose out of the Malaysia Agreement 1963, a multilateral treaty between various sovereign entities, namely the UK, the Federation of Malaya, North Borneo (now Sabah), Sarawak, and Singapore. The stipulations to which Articles 112C and 112D of the Federal Constitution relate are contained within the Malaysia Agreement 1963.

Article 112C of the Federal Constitution imposes or recognises the obligation on the part of the Federation to make special grants to the States of Sabah and Sarawak, which are receivable by these States. Furthermore, the Federal Constitution in Article 112D recognises that these special grants are modifiable by agreement.[23] The relevant agreement is specified to be between the Government of the Federation and the Government of the State concerned (in this case the Government of the State of Sabah). Absent from the text of Articles 112C and 112D of the Federal Constitution is any separate, independent, and actionable duty on the Federation or Federal Government to the people of the State of Sabah in respect of the subject matter of Articles 112C and 112D. This position is confirmed by the fact that, when dealing with the resolution of any impasse between the Federation and the State on review as detailed in Article 112D(6) of the Federal Constitution, the recommendations of the independent assessor thereon "shall be binding on the governments concerned and shall be given effect as if they were the agreement of those governments."[24] In this is the recognition of the fact that the rights and obligations arising therefrom are the direct result of the agreement between two sovereign entities, and not the result of any exercise of public power. In that respect, any interest on the part of the people of Sabah which is sought to be enforced through the application for judicial review (as claimed by the applicant) is merely reflective, and not independent, of the interest of the State of Sabah. Articles 112C and 112D of the Federal Constitution are not constructed upon a public power and are thus not reviewable *qua* a public power.

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[23] In particular at Federal Constitution, art 112D(1).

[24] Federal Constitution, art 112D(6).

(There is a question, moreover, of the basis on which the 2022 Review Order might be judicially reviewed for failure to account for the period between 1974 to 2021 when the 2022 Review Order is itself the product of an agreement between the Federal Government of Malaysia and the Government of the State of Sabah.[25])

2. *The proper plaintiff and the application of the "adversely affected" test*

As alluded to above, the courts mechanistically applied the "adversely affected" test[26] in determining that the applicant had standing to pursue the application for judicial review. In this author's respectful view, inadequate consideration was given to the fact that the cases of *QSR Brands Bhd, Malaysian Trade Union Congress*, and *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises*,[27] were essentially dealing with the question of who the proper plaintiff might or ought to be when considering the question of *locus standi* for judicial review proceedings. In *QSR Brands Bhd*, the applicant lacked sufficient personal interest in the legality of the impugned action as it was not itself the subject of anything the Securities Commission had done or threatened to do.[28] Apart from that, neither of these were cases in which the right sought to be asserted or the duty sought to be enforced arose from a bilateral agreement or relationship between two sovereign entities. These were cases in which the exercise of particularly public powers (conferred or governed by statute) were questioned. It must be recognised that, in such cases, the question is whether a particular applicant – out of all the potential applicants who might come before a court – is adequately or sufficiently placed to litigate the matter. By contrast, in cases where the "private" right of an individual (or for that matter a State) arising out of an agreement is at stake, there can be no question that the proper plaintiff (or applicant) with standing to enforce such an agreement is the party to the agreement itself. In the present case, the proper construction of Articles 112C and 112D of the Federal Constitution clearly points to the State of Sabah as being the proper party to enforce any breach of duty or obligation on the part of the Federation. Any conclusion to the contrary would suggest that the people could in theory insist upon something else notwithstanding that the State had otherwise or previously agreed to it with the Federation, thereby surpassing or displacing any such agreement between the two sovereign parties.

In that regard, the characterisation of the applicant, the Sabah Law Society, does not take the applicant any further. The statutory objects and powers of the Sabah Law Society[29] may well ground any actions that they take in respect of such consti-

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[25] For instance, is the purported wrong the failure to agree on that specified period? But if neither party sought to agree on that period, would that have rendered the agreement – and consequently the 2022 Review Order reflecting it – a public law wrong? This further demonstrates how the powers in question are not public law powers as typically understood, *cf Attorney General of Malaysia*, *supra* note 3 at [26]–[29].

[26] Rules of Court 2012, O 53 r 2(4).

[27] [2023] 3 MLJ 829.

[28] *QSR Brands Bhd*, *supra* note 18 at 172–173.

[29] Sabah Advocates Ordinance, ss 13(a) and 13(e). Note that ss 13(a) and 13(e) were the sections relied upon by the applicant in *Sabah Law Society*, *supra* note 2 at [24], and implicitly by the High Court

tutional issues from an internal perspective – *ie*, whether they are within their powers to take such action – but they could not be said to confer upon the Sabah Law Society a power or right to enforce obligations owed by the Federation to the State of Sabah. Instead, any such power relies upon the agreement between the parties *inter se* and the standing of a party to a legally enforceable and binding agreement to obtain redress for breach of that agreement.[30] In this respect, the Sabah Law Society does not stand apart from any public-spirited individual citizen residing in the State of Sabah – its statutory status adds nothing further. It is also relevant that it does not assert any independent interest against the Government of Malaysia which is not otherwise predicated upon the State of Sabah's entitlement under Articles 112C and 112D of the Federal Constitution. The relevant question is to whom the duty sought to be enforced is owed.

The peculiarity of the applicant bringing judicial review proceedings only against the Federal Government of Malaysia and not the Government of the State of Sabah was briefly noted earlier. While the Government of the State of Sabah is now a party to the judicial review proceedings, the pursuit of such proceedings against the Federal Government alone would have been legally peculiar and deficient. Given that the underlying obligations arise out of the agreement between the Federation and the State, it would have been impossible to arrive at a final adjudication on the rights of State *vis-à-vis* the Federation without the involvement of the State. As a matter of principle, questions such as the nature and scope of the agreement, estoppel, acquiescence, waiver, and accord and satisfaction, all of which are premised upon the ongoing bilateral relationship between the Federation and the State of Sabah, would be relevant considerations in determining any question of breach of that obligation. This, again, demonstrates how and why the proper party to enforce the agreement is the State of Sabah and not any other person purporting to represent its interests or those whose interests are reflective of it.

Properly understood, the rights and obligations sought to be enforced in the *Sabah Law Society* case are based upon the agreement between entities having a sovereign or at the very least quasi-sovereign character, not based on the exercise of public powers by an organ of the state in a manner which is familiar in public interest litigation.

B. *Forum*

The point just made dovetails with the second argument advanced by this Note about the proper forum for the resolution of these disputes. The Attorney General's Chambers of Malaysia advanced the argument that the proper forum for the dispute regarding the special grant to Sabah was an independent assessor, as prescribed in Article 112D(6) of the Federal Constitution. However, this author's respectful

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Judge at [27]–[28].

[30] While the Court of Appeal recognised the nature of the special grant as arising out of a multilateral agreement in *Attorney General of Malaysia*, *supra* note 3 at [5], this was not taken into account when considering whether the applicant in *Sabah Law Society*, *supra* note 2 had standing to enforce the provisions of the special grant.

view is that this contention is misplaced. While Article 112D(6) does provide for the adjudication of a dispute by an independent assessor, the ambit of the provision only extends to a situation where there has been a review and the Federal Government and the Government of the State are unable to reach agreement. In this author's view, this construction does not extend to, for instance, a dispute on whether a review ought to have been conducted or whether the Federal Government was in breach of a constitutional obligation in failing to conduct a review. This is fortified by the point that the purpose of the review is to reach some form of agreement as to the special grants under Articles 112C and 112D. Similarly the scope of Article 112D(6) would not extend the jurisdiction or authority of the independent assessor to questions about the interpretation of the provisions of the Federal Constitution which would naturally fall within the purview of the Federal Court. Crucially, if there is a dispute about whether special grant moneys are still due and owing to the Government of the State of Sabah, the adjudication of this issue could not be said to be capable of resolution by an independent assessor whose task is to determine the reasonableness or adequacy of the special grant.[31]

Instead, this Note argues that the dispute would fall within the exclusive and original jurisdiction of the Federal Court as set out in Article 128(1)(b) of the Federal Constitution[32] as a dispute between the Federation and a State. Unfortunately, both the decisions of the courts and the submissions of counsel representing the parties elided mention of this crucial – even determinative – provision of the Federal Constitution.

The question then arises as to how disputes between the Federation and the State ought to be construed. In that respect, the experience of the Indian courts may be instructive. In *State of Bihar*,[33] the Indian Supreme Court, in interpreting Article 131 of the Indian Constitution,[34] observed that the subject of the dispute "must arise within the context of the Constitution and the Federalism it sets up."[35] What the scope of Article 128(1)(b) of the Federal Constitution extends to – although it may not be exhaustively restricted to this – is the sort of dispute as to entitlements under the Federal Constitution, including financial entitlements arising out of the special grants which are, relevantly, the subject of Articles 112C and 112D of the Federal Constitution.

Nevertheless, what is clear is that the following questions, among others, arise out of the judicial review in the *Sabah Law Society* case: (a) the proper interpretation

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31 See art 112D(2) of the Federal Constitution which sets out the purposes of review and the principles governing it.

32 Art 128(1)(b) of the Federal Constitution reads: "The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction – … (b) disputes on any other question between States or between the Federation and any State."

33 *State of Bihar v Union of India* AIR 1970 SC 1446 [*State of Bihar*].

34 Which in broad terms is similar to art 128(1)(b) of the Federal Constitution but is arguably not exactly the same in scope. The provisions in the Indian Constitution are arguably more qualified and restrictive than those found in the Federal Constitution. The differences in the reach of the two provisions, however, is beyond the scope of the present Note.

35 *State of Bihar*, *supra* note 33 at [11]. See also *ibid* at [6]: "It is clear from the above that the framers of the Government of India Act, 1935 thought that the Federal Court should be the tribunal for the determination of disputes between the constituent units of the Federation and it sought to lay down the exact nature of the dispute which the Court could be called upon to examine and decide."

and scope of the rights, duties, and obligations under Articles 112C and 112D of the Federal Constitution, and to whom those duties and obligations are owed; (b) whether there has been any breach of Articles 112C and 112D by the Federal Government *vis-à-vis* the Government of the State of Sabah; and (c) whether there are payments due and owing from the Federal Government to the Government of the State of Sabah, and if so in what amount. These questions are inextricably intertwined with the issues raised and the relief sought in the judicial review proceedings of the *Sabah Law Society* case.

Further, the rationale behind such a restriction or designation of forum is a clear one. The disputes of sovereign entities within the Federation (or between the sovereign States and the Federation) ought not to be subjected to the courts of either of them,[36] but to a special court which would be beyond the influence of any one constituent unit of the Federation (whether the Federation itself or the State).[37] In the *Sabah Law Society* case, the proceedings for judicial review were brought in the High Court of Sabah and Sarawak.

Moreover, the question of forum is not merely a pedantic quibble regarding where a dispute ought to be heard. It has real consequences for the relief that may be granted by the courts. In disputes between the Federation and the State which fall within the exclusive purview of the Federal Court, judgment granted shall be declaratory only.[38] This is doubtless a reflection of the mutual recognition of sovereignty between the Federation on the one hand and the States on the other.

In the light of the above, the circumstance in which the interests of a State are permitted to be litigated by another person with the effect of circumventing the constitutional provisions for dispute resolution between sovereign entities would be pernicious. This is particularly so where the effect would be to enable the State to obtain, through the litigation conducted by another, an advantage that it would not otherwise be able to obtain through the constitutionally or statutorily prescribed routes. Taking all of this into account, it is clear that the orders for *certiorari* and *mandamus*[39] are *in limine* incapable of being sustained. (As an aside, the latest position taken by the Government of the State of Sabah in the appeal was that the State does not object to the Sabah Law Society's standing to bring the judicial review

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[36] *Ibid* at [5]: "… this jurisdiction [of the Federal Court] is to be an exclusive one, and in our opinion rightly so, since it would be altogether inappropriate if proceedings could be taken by one Unit of the Federation against another in the Courts of either of them." (quoting the Government of India, *Report of the Joint Committee on Indian Constitutional Reform* (London: His Majesty's Stationary Office, 1933) Session 1933–34, Vol 1, Part I at [324]).

[37] *Ibid* at [10]: "So far as the proceedings of the Joint Committee on Indian Constitutional Reform and the report of the Committee on the same are concerned, they make it clear that the object of conferring exclusive original jurisdiction on the Federal Court was that disputes of the kinds specified between the Federation and the Provinces as constituent units of the Federation, should not be left to be decided by courts of law of a particular unit but be adjudicated upon only by the highest tribunal in the land which would be beyond the influence of any one constituent unit." See also: Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (Kuala Lumpur: Govt Print, 1957) at [123].

[38] Courts of Judicature Act 1964 (Act 91 of 1964) (Malaysia), s 82. A similar provision existed in the Government of India Act 1935 (26 Geo 5) (India), s 204, as noted in *State of Bihar*, *supra* note 33 at [8].

[39] This extends to the order for payment of the sum said to be owing from the Federal Government to the Government of the State of Sabah.

proceedings and to the leave granted to Sabah Law Society to commence proceedings in the High Court.[40])

To add to this, the Rules of Court require that the State of Sabah be served as a party directly affected by the judicial review proceedings.[41] There would be no question that the Government of the State of Sabah would be directly affected by proceedings which seek to enforce its alleged rights and interests under Articles 112C and 112D of the Federal Constitution, to the extent of seeking orders for the payment of such sums due and owing representing the entitlements for the years 1974 to 2021. Natural justice would require that the State be heard before any ruling on its rights could be made. As such, even if it were argued that the State was not a party at the beginning of the proceedings, and that the matter did not attract the application of Article 128(1)(b) of the Federal Constitution,[42] that could not or should not reasonably continue to be the case as the matter progressed. Crucially, in the present case, the State of Sabah intervened, as it was entitled to do, and the High Court properly allowed the intervention on the basis of the State of Sabah's undoubted legal interest in the matter.

With respect, had the courts asked themselves the questions posed at the beginning of this Note, they would have arrived at a different conclusion on whether the proceedings for judicial review ought to be allowed to continue. The Federal Constitution contains mechanisms for enforcement of alleged breaches of constitutional duties and obligations between the Federation and the States *inter se*, undermining the perceived need for expansion of the rules of standing in such cases to fragment or shift the powers of enforcement away from the States and to individual citizens or even to esteemed statutory professional bodies such as the applicant.

V. The Way Ahead?

Subsequent to the decision of the Court of Appeal, an application for permission to appeal against the Court of Appeal's decision was made to the Federal Court by the Attorney General's Chambers.[43] A brief perusal of the Court of Appeal's grounds of decision and the written submissions filed by the parties in the appeal, however, suggests that the considerations raised in this Note were not put before the Court of Appeal, or at the very least not in the manner done here. This Note respectfully submits that the true dispute is between the Federation of Malaysia and the State of Sabah and that the purported rights of the State of Sabah are not enforceable by way of suit initiated by another.

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40 *Attorney General of Malaysia*, *supra* note 3 at [4].

41 Rules of Court 2012, O 53 r 4(2): "Upon extraction of the sealed copy of Form 110 [*ie*, the notice of hearing for an application for judicial review], the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support [*ie*, the cause papers in the judicial review application] on all persons directly affected by the application not later than fourteen days before the date of hearing specified in Form 110."

42 Which for the reasons set out in this section ought to be an unpersuasive argument to begin with.

43 Timothy Achariam, "AG turns to top court in bid to block SLS' challenge over Sabah's 40% revenue rights" *The Edge Malaysia* (25 July 2024) <https://theedgemalaysia.com/node/720388>.

On the application for permission to appeal before the Federal Court, the Attorney General's Chambers did eventually raise the question of the exclusive jurisdiction of the Federal Court to hear the dispute pursuant to Article 128(1)(b) of the Federal Constitution. Nevertheless, the Federal Court dismissed the application for permission to appeal and rejected the arguments raised by the Attorney General's Chambers premised on the applicability of Article 128(1)(b) of the Federal Constitution and the lack of *locus standi* on the part of the Sabah Law Society to bring the present dispute.[44]

It is noteworthy that the Federal Court did not foreclose the possibility that the issue regarding Article 128(1)(b) of the Federal Constitution would need to be revisited at a later date, namely during the substantive judicial review proceedings.[45] This, the Federal Court held, was because the State of Sabah was not a party to the proceedings and thus the proceedings could not be said to fall within the definition of Article 128(1)(b) of the Federal Constitution which envisages a dispute between a State and the Federation.[46] There was also said to be no dispute between the State of Sabah and the Federation as no claim had been made by the former against the latter,[47] and that the ambit of Article 128(1)(b) of the Federal Constitution did not extend to circumstances where a suit merely affects the Federation and/or any State.[48] The Federal Court also continued to resort to similar arguments on *locus standi* as had been canvassed in the courts below.

The Federal Court's decision premised upon the supposition that the Government of the State of Sabah was not a party to the dispute or proceedings is, with the greatest of respect, readily refutable. For one, it is clear that the State of Sabah has intervened in the proceedings and is a party to the litigation including at the stage of substantive judicial review. This being the case, it may no longer be supposed or accepted that the State of Sabah is a stranger to the litigation.[49] Even if this were not the case, the Rules of Court 2012 clearly provide for the eventuality, or even inevitability, of such an intervention after leave to commence judicial review proceedings had been granted.[50] Separately, the Federal Court's finding that the State of Sabah has "made no claim on its own behalf and therefore there cannot be said to be a dispute between them and the Federation"[51] should, if true,[52] be fatal

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[44] *Attorney General of Malaysia v Sabah Law Society* [2025] 1 MLRA 17 [*Attorney General of Malaysia* (FC Leave Decision)]. As explained in the main text, the application is for permission to appeal to the Federal Court against the decision of the Court of Appeal. These decisions on permission to appeal are generally not considered binding precedent in Malaysian law. Accordingly, the issues arising out of this decision will be dealt with briefly.

[45] *Ibid* at [10]–[13].

[46] *Ibid* at [12(a)].

[47] *Ibid* at [12(b)(2)].

[48] *Ibid* at [12(c)].

[49] And as a party to the litigation, it will be bound to either admit or dispute any allegations raised by the Federal Government in the litigation. As it has thus far been universally accepted that the rights in question are those of the State of Sabah, virtually the entire case will be relevant to the State of Sabah and thus demand a response.

[50] See Rules of Court 2012, O 53 r 4(2) and the text accompanying *supra* note 41.

[51] *Attorney General of Malaysia* (FC Leave Decision), *supra* note 44 at [12(b)(2)].

[52] This is unlikely as the Federal Court could well have taken judicial notice of the fact that the Government of the State of Sabah had intervened in the proceedings and that its representatives had made demands

to the proceedings rather than buttress them. As for the question of *locus standi*, it is unfortunate that the Federal Court had, like the courts below, failed to properly ascertain to whom the duties or obligations under Articles 112C and 112D of the Federal Constitution were owed.[53]

Therefore, while the Federal Court was correct not to dismiss the applicability of Article 128(1)(b) of the Federal Constitution *in toto* and *in limine*, it did not go far enough on the basis of the evidentiary and legal material available to the Federal Court at that juncture.

On a final note, the Government of the State of Sabah had earlier indicated its intention to submit a formal claim to the Federal Government of Malaysia.[54] To the author's mind, this is a welcome, and indeed preferred, step towards the resolution of the dispute between the Federation and Sabah through the proper and constitutionally prescribed channels. In the event that any dispute persists, the matter would be apt for adjudication by the Federal Court in its original and exclusive jurisdiction. The right of the State of Sabah to do so cannot reasonably be questioned; indeed, no one appears to have questioned this. But this raises an issue of fundamental – but also practical – importance: what should happen to the judicial review proceedings in the event that the State of Sabah institutes proceedings on its own account? The mere availability of that avenue of dispute resolution between the Federation and the State – and *a fortiori* the eventual pursuit of it – should give the reader and the courts reason for pause when considering the propriety of the grant of leave to a third party to commence judicial review proceedings in such cases.

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of the Federal Government on issues relating to the subject matter of the judicial review proceedings. At the very least, these would have merited investigation. Be that as it may, the fact remains that the only party with standing to bring any claim would be the State of Sabah, the party to whom the duties and obligations under arts 112C and 112D of the Federal Constitution are owed.

53 See *inter alia* Part IV.A above.

54 Bernama, "Sabah to Officially Submit Claim for 40 Pct Revenue to Federal Government – Jeffrey", *Bernama* (29 May 2024) <https://www.bernama.com/en/general/news.php?id=2302625>.