# DEVOLUTION OF JUDICIAL POWERS IN EAST MALAYSIA: A COMPARATIVE ANALYSIS WITH THE MOROCCAN INITIATIVE FOR THE AUTONOMY OF THE SAHARA REGION

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## Introduction

The East Malaysian states of Sabah and Sarawak offer dual case studies for how the devolution of judicial powers has operated in practice within the Federation of Malaysia. This paper begins in Part I by offering the historical and constitutional context for the integration of the Borneo states of Sabah and Sarawak into the Malaysian Federation under the Malaysia Agreement of 1963.

Part II of this paper provides an overview of the devolved system of judicial powers in East Malaysia. It describes the design and operation of the semi-autonomous court system, judicial appointments, and legal profession within these states. Under the Malaysian model, Sabah and Sarawak exercise independent and concurrent powers with federal judicial power.

In Part III, the paper evaluates how the devolution of judicial powers in East Malaysia has operated in practice over the past six decades. To illustrate the challenges in the devolution process over this period, it identifies several tensions that have arisen in the relations between the federal and state powers.

Finally, Part IV of this paper considers how the East Malaysian experience might inform the proposals for the devolution of judicial powers outlined in Morocco's 2007 Initiative for the Autonomy of the Sahara Region. It concludes with broad observations on judicial authority, constitutional safeguards, and constitutionalism in practice.

## I. Malaysia: Historical and Constitutional Context

### A. The Malaysian Federation and the Malaysia Agreement of 1963

The Constitution of Malaysia – then Malaya – was created for a nation at the brink of independence.[2] The Independence Constitution was founded when the Federation of Malaya ceased to be a British colony following successful negotiations in London between the elected local Malayan leaders and the British colonial powers.

On 31 August 1957, the Independence Constitution came into force when the Federation of Malaya became a fully independent state. Six years later, on 16 September 1963, Singapore as well as the Borneo states of Sabah and Sarawak joined Malaya, creating the new Federation of Malaysia.

The Malaysia Agreement of 1963 creating the new federation was signed by the United Kingdom, Malaya, Singapore, Sabah (then called North Borneo), and Sarawak. Under the 1963 Agreement, the states of Sabah and Sarawak were granted an extensive degree of autonomy in the

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[2] Parts of this section on Malaysia's history and constitutional context are drawn from YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS 35-38 (2020) and Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. L. REV. 673 (2016).

proposed federation.[3] Autonomy was a matter of high priority for the leaders of Sabah and Sarawak, who "then and now," feared "being taken over by those on the peninsula if they did not retain a high degree of autonomy."[4]

In return for supporting the formation of the new federation, the Borneo leaders sought to maintain autonomy for their states as reflected in a "Twenty Point" agreement, which included areas such as religion, language, immigration, positions in the civil service, constitutional safeguards for amendment, the special position of the indigenous races, tariffs and finances.[5] As a result, the Federal Constitution was amended in 1963 to include provisions providing for the special status of Sabah and Sarawak. The Borneo states were granted "extra legislative and executive powers and grant funding beyond those given to the other states in the Federation," "enlarged representation in the Federal Parliament," and safeguards inserted in the Constitution in relation to any amendments relating to these states.[6] It is worth noting that the terms of Sabah and Sarawak's entry into Malaysia were more favourable than those accorded to Singapore – the other state that joined the Federation in 1963 – in significant areas such as citizenship rights and representation in the federal legislature.[7]

### B. Malaysia's Constitutional Context

The Malaysian Constitution created a federal system of government with a bicameral legislature, federal executive, and judiciary.[8] Malaysia has a parliamentary system of government like Westminster, where the Prime Minister and Cabinet are drawn from the majority party in Parliament and the King – the *Yang di-Pertuan Agong* – is the constitutional head of the Federation.[9] Unlike the United Kingdom, however, Malaysia has a codified Constitution with a justiciable bill of rights.

The Malaysian Constitution's supremacy clause, Article 4(1), declares that the "Constitution is the supreme law of the Federation and any law . . . shall, to the extent of the inconsistency, be void." The fundamental liberties guaranteed under Part II of the Constitution include the right to life and personal liberty, freedom from slavery and forced labour, the right to equality, freedom of speech and assembly, freedom of religion, and the right to property.[10]

The requirements for amending the Federal Constitution differ depending on the provision that is to be amended.[11] The most common rule is that an amendment must be supported by two-thirds of the total membership of each House of Parliament.[12] There are some exceptions to this rule. Amendments to citizenship, the Conference of Rulers, the Malay national language, and the special position of the Malays as well the indigenous people of Sabah and Sarawak require the consent of the Conference of Rulers in addition to the two-thirds legislative majority.[13]

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[3] James Chin, *'New' Malaysia: Four key challenges in the near term*, LOWY INSTITUTE 6 (2019), https://www.lowyinstitute.org/sites/default/files/Chin_%27New%27%20Malaysia_Four%20key%20challenges_Web.pdf.
[4] *Id.* at 7.
[5] *Id.* at 6. *See also* James Chin, *Federal-East Malaysia Relations: Primus-Inter-Pares?, in* 50 YEARS OF MALAYSIA FEDERALISM REVISITED 153, 154 (Andrew J. Harding & James Chin eds., 2014).
[6] Andrew Harding, *Devolution of Powers in Sarawak: A Dynamic Process of Redesigning Territorial Governance in a Federal System*, 12 ASIAN J. OF COMP. LAW 257, 262 (2017).
[7] TAN TAI YONG, CREATING 'GREATER MALAYSIA': DECOLONIZATION AND THE POLITICS OF MERGER 182 (Inst. of Southeast Asian Studies 2008). For example, Singapore was allocated fifteen seats in the federal parliament, whereas Sabah and Sarawak attained a forty-seat representation as a "special concession" to ensure that their interests would be protected in the new federation. *Id.* at 170. In 1965, Singapore left the Federation of Malaysia to form a separate, sovereign nation.
[8] FED. CONST. (MALAY.), arts. 39–65, 121–31.
[9] *Id.* arts. 32–37.
[10] *Id.* arts. 5–13.
[11] *Id.* art. 159.
[12] *Id.* art. 159(3).
[13] *Id.* art. 159(5).

Significantly for our discussion, as part of the arrangement agreed to in 1963, amendments to provisions concerning the position of Sabah and Sarawak require the consent of the respective state governments.[14] Sabah and Sarawak can veto constitutional amendments affecting their states – a special power not possessed by any of the other states. Article 161E(2) of the Malaysian Constitution specifies that no constitutional amendment shall be made without the concurrence of the government of Sabah or Sarawak, if the amendment would affect the operation of the Constitution with regard to the equal treatment of persons born or resident in the State; the State's legislative and executive powers and financial arrangements between the Federation and the State; religion and language in the State, and the special treatment of natives of the State. Of particular relevance to our discussion of the devolution of judicial powers, these matters include "the constitution and jurisdiction of the High Court of Sabah and Sarawak, and the appointment removal and suspension of its judges."[15]

**C. The Judicial System in the Federation of Malaysia**

Malaysian courts have a strong power of judicial review to strike down legislation and executive actions for unconstitutionality as a corollary of the Constitution's supremacy clause.[16] Malaysia has a civil court system, consisting of superior (or appellate) courts and subordinate courts, as well as a system of religious Sharia courts.[17]

The apex appellate court is the Federal Court of Malaysia, which was known as the Supreme Court from 1985 to 1994.[18] Prior to 1985, the court of last resort was the Judicial Committee of the Privy Council, but the possibility of final appeal to the Privy Council was abolished in 1985, leaving the Federal Court as Malaysia's court of final resort. The Federal Court has appellate jurisdiction to hear appeals from the Court of Appeal, original jurisdiction over whether a federal or state legislative body has legitimately made a law within its power, and advisory jurisdiction to give an advisory opinion on matters referred to it by the federal government.[19] It consists of the Chief Justice of the Federal Court, the President of the Court of Appeal, the two Chief Judges of the High Courts in Malaya and Sabah and Sarawak, and not more than eleven other Federal Court judges.[20] The other superior courts consist of the Court of Appeal and two High Courts of co-ordinate standing: the High Court of Malaya and the High Court of Sabah and Sarawak.[21]

Unlike the appellate courts, which are designated in the Malaysian Constitution, subordinate courts in Malaysia are created pursuant to the Subordinate Courts Act of 1948. The lower courts in Peninsular Malaysia are made up of the Sessions Court, the Magistrate's Court, and the *Penghulu* Court. In 1981, the Subordinate Courts Act was extended to Sabah and Sarawak.[22] The East Malaysian subordinate courts consist of the Sessions Court, the Magistrate's Court and the Native Courts.

In addition to the civil courts, Malaysia has a system of state religious courts. These Sharia courts established under individual state governments have jurisdiction over Muslims in respect of matters governed by state Islamic law, such as personal and family law.[23]

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[14] *Id.* art. 161E(2).
[15] *Id.* art. 161E(2)(b).
[16] *Id.* art. 4(1).
[17] *See* Yvonne Tew, *The Malaysian Legal System: A Tale of Two Courts*, 19 COMMONWEALTH JUD. J. 3, 3 (2011).
[18] FED. CONST. (MALAY.), art. 121(2).
[19] *Id.* arts. 128, 130.
[20] *Id.* art. 122(1). The Malaysian Federal Court is currently composed of eleven judges in total.
[21] *Id.* arts. 121(1B), 121(1).
[22] "Lower Court: Historical Background," OFF. OF THE CHIEF REGISTRAR FED. CT. OF MALAYSIA (last visited April 26, 2020), http://www.kehakiman.gov.my/en/about-us/court/lower-court/historical-background.
[23] FED. CONST. (MALAY.), NINTH SCHEDULE, LIST II, art. 1.

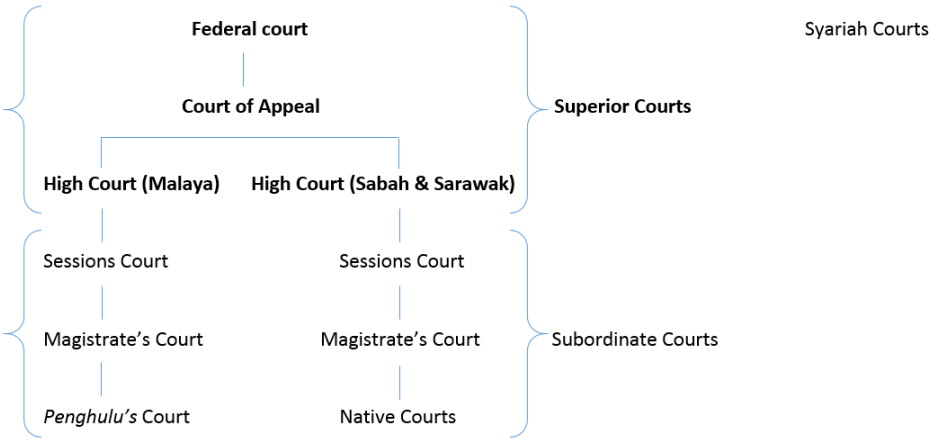


*Chart of Malaysia's Judiciary System*[24]

## II. Devolution of Judicial Powers in East Malaysia

### A. Judicial System in Sabah and Sarawak

In addition to executive and legislative competencies, the East Malaysian states possess some independent control over judicial powers within Sabah and Sarawak. In addition to executive and legislative competencies, the East Malaysian states possess some independent control over judicial powers within Sabah and Sarawak. Prior to the formation of Malaysia in 1963, there was a combined judiciary in place for Sarawak, North Borneo (Sabah), and Brunei.[25] When Sabah and Sarawak joined the Federation of Malaysia in 1963, that judicial system was altered. Under the new federation's framework, the High Court of Sabah and Sarawak retained its jurisdiction, and appellate jurisdiction was assumed by the Federal Court of Malaysia.[26]

East Malaysia's judicial system is partly integrated into the federal judiciary, but it maintains a High Court of its own. Malaysia's federal judicial system consists of two High Courts: one for Malaya (West Malaysia) and one for Sabah and Sarawak (East Malaysia).[27] These High Courts have general supervisory and appellate jurisdiction as well as unlimited civil and criminal jurisdiction and each is headed by its own chief justice.

In addition to the High Court of Sabah and Sarawak, the East Malaysian states also have subordinate courts: the Sessions Court, the Magistrates' Court, and the Native Courts. The Native Courts in Sabah and Sarawak have original and appellate jurisdiction over native law and customs as well as some matters on land disputes.[28] Native courts are treated in a similar fashion to the Sharia

[24] Chart taken from "Malaysia: IALS Library Guides," INST. OF ADVANCED LEGAL STUD. (last visited May 19, 2020), https://libguides.ials.sas.ac.uk/malaysia.
[25] Y.A.A. Tan Sri Dato' Abdul Hamid Omar, *Administration of Justice in Malaysia*, 2 THE DENNING LAW J. 1, 10 (1987).
[26] *Id.* at 11.
[27] FED. CONST. (MALAY.), art. 121(1).
[28] "Malaysia: IALS Library Guides," *supra* note 23.

courts in that civil courts do not generally interfere with, or enforce judicial precedent over, the decisions of the Native Courts.[29]

Sabah and Sarawak also have a system of state Sharia courts that handle matters of Islamic Law over "persons professing the religion of Islam." [30] In recent years, the issue of whether the civil courts or the religious courts have jurisdiction has been the subject of legal and political contention in Malaysia.

Apostasy cases illustrate these tensions. The issue of individuals who wish to convert out of Islam has been fraught matter in Malaysia's legally pluralistic system, particular in cases involving individuals who are ethnically Malay (and constitutionally designated as Muslim).[31] In Sabah and Sarawak, apostasy cases involving the conversion of indigenous people to Christianity or Islam present an additional complication, particularly when these individuals later wish to leave the religion. The High Court of Sabah and Sarawak has shown greater willingness than other Malaysian appellate courts to resolve cases involving religious conversion out of Islam. In a 2016 case, the High Court of Sabah and Sarawak upheld the petition of Rooney Rebit, an indigenous applicant, to have the religion "Islam" removed from his national identity card. The court held that the exercise of the constitutional right to religious freedom is outside the bounds of the Sharia courts' jurisdiction, declaring that the "right to choose his religion lies with the applicant himself and not the religious body."[32] However, the Malaysian Federal Court, maintained in a 2018 decision that matters of apostasy must be handled by the Sharia courts.[33]

It is relevant to note that, unlike West Malaysia, Sabah and Sarawak have a large number of non-Muslims.[34] Sabah and Sarawak's historical, legal, and cultural background differs in many ways from the Malay states that constitute Peninsular Malaysia, and the leaders of the Bornean states have often expressed unease at perceived growing Islamization in Malaysia. For example, in 2017, leaders in Sabah and Sarawak opposed a bid to strengthen Sharia law advanced by the Malaysian Islamic Party, issuing a statement that declared: "Not only was the Federation of Malaya established as a secular federation where Islam as the 'religion of the Federation' plays only ceremonial roles, but more importantly, Sabah and Sarawak, which have never been part of the 'Negeri-Negeri Melayu' [the Malay states], proudly embrace their diverse ethnic and religious heritage."[35]

**B. Independent and Concurrent Judicial Powers**

Judicial powers in Sabah and Sarawak are exercised both independently and concurrently with Malaysia's federal judicial powers. The Malaysian Federal Court and Court of Appeal have appellate jurisdiction over the High Court of Sabah and Sarawak; as such, East Malaysia does not have a completely autonomous judicial system.[36]

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[29] Murtala Ganiyu Murgan, Abdul Ghafur, & Abdul Haseeb Ansari, *Operation of judicial precedent in Malaysia and Nigeria: A comparative analysis*, INT'L J. OF LAW 29, 32 (2015).
[30] FED. CONST. (MALAY.), NINTH SCHEDULE, LIST II, art. 1.
[31] *See* Lina Joy v. Majlis Agama Islam Wilayah Persekutuan (2007) 4 MALAYAN L.J. 585 (Fed. Ct. of Malay.).
[32] Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak and Others, (2016) 6 CURRENT L.J. 562.
[33] Sulok Tawie, *Federal Court defers to Shariah courts in Sarawak apostasy cases*, MALAY MAIL (Feb. 27, 2018), https://www.malaymail.com/s/1586381/federal-court-defers-to-shariah-courts-in-sarawak-apostasy-cases#T0oU16GPfv0fDdUQ.99.
[34] United States Department of State, *2016 Report on International Religious Freedom – Malaysia*, REFWORLD (Aug 15, 2017), https://www.refworld.org/docid/59b7d87d13.html.
[35] *Sabah, Sarawak leaders urge Malaysians to reject PAS's Syariah law Bill*, STRAIT TIMES (May 7, 2017) https://www.straitstimes.com/asia/se-asia/sabah-sarawak-leaders-urge-malaysians-to-reject-pass-syariah-law-bill.
[36] Andrew J. Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?, in* 50 YEARS OF MALAYSIA FEDERALISM REVISITED 187, 203 (Andrew J. Harding & James Chin eds., 2014).

Still, the East Malaysian states do possess some independent judicial powers. Sabah and Sarawak have their own High Court and subordinate courts, which handle matters within their jurisdiction. While the High Court of Malaya hears cases and disputes within Peninsular Malaysia, the High Court of Sabah and Sarawak hears cases and disputes that take place in Sabah and Sarawak.[37] The High Court has original criminal and civil jurisdiction, and appellate jurisdiction from sessions and magistrate courts, within its specific territory.[38]

The Malaysian Constitution grants Sabah and Sarawak special power to veto amendments to the Constitution that affect their states.[39] These matters include "the constitution and jurisdiction of the High Court of Sabah and Sarawak, and the appointment removal and suspension of its judges." [40] The reference to the judiciary has been described as "unusual," and appears aimed at preserving "the separate nature of the High Court [of Sabah and Sarawak] and the legal profession serving it."[41] The constitutional special protection for the judicial system in Sabah and Sarawak was in line with a guarantee that each state would essentially maintain autonomy over its judicial system and legal profession—another nod to the special position of Sabah and Sarawak compared to the other states in the Federation, which have no such special protections for their legal systems.

In terms of the exercise of judicial powers, according to the Federal Constitution, a judge of the High Court of Sabah and Sarawak exercises "all or any powers" available to a judge of the High Court in Malaya.[42] In terms of judicial precedent, "the attitude and assumption" of High Court Judges has been that "one High Court Judge is not bound by decision made by another High Court Judge either of original or appellate jurisdiction."[43] But although not regarded as binding authority, High Courts may rely on the decisions of another High Court of coordinate jurisdiction as persuasive authority.

Cases cannot be transferred between the High Court in East Malaysia and the High Court of Malaya, or vice versa. The Federal Court affirmed this position in 2016 decision,[44] where it held that "the power to transfer any proceeding must be confined to transfer within a particular local jurisdiction and not between the two local jurisdictions."[45] According to the apex court, "'local jurisdiction' is defined to mean in the case of the High Court in Malaya, the territory comprised in the states of Malaya, and in the case of the High Court of Sabah and Sarawak, the territory comprising of the states of Sabah and Sarawak, respectively."[46]

The High Court's decisions are enforceable throughout the entire country, not only within a particular territorial jurisdiction.[47] A judgment by the High Court of Sabah and Sarawak is thus effective

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[37] "Jurisdiction of the High Court," OFF. OF THE CHIEF REGISTRAR FED. CT. OF MALAYSIA (last visited April 21, 2020), http://www.kehakiman.gov.my/index.php/en/about-us/court/high-court/jurisdiction.
[38] *Id.*
[39] FED. CONST. (MALAY.), art. 161E(2).
[40] *Id.* art. 161E(2)(b).
[41] Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?, supra* note 35, at 202.
[42] FED. CONST. (MALAY.), art. 125(a)(1)(b) (specifying that "a judge of the High Court in Malaya may exercise all or any of the powers of a judge of the High Court in Sabah and Sarawak, and vice versa.").
[43] Murgan et al., *supra* note 28, at 32. As examples, Murgan et al., discusses the cases of Ng Hoi Cheu v Public Prosecutor, 1 MALAYAN L. J. 53 (1968), where Justice Chang Min Tat did not follow the decision of Justice Smith while exercising appellate jurisdiction, as well as Joginder Singh v Public Prosecutor, 2 MALAYAN L. J. 133 (1984), where the High Court while exercising appellate jurisdiction ruled that it would not follow the decision of High Court in an appeal presided over by three judges.
[44] Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd, 3 MALAYAN L. J. 553 (2016). *See also* Gan Khong Aik, *High court cannot transfer proceedings to another high court of coordinate jurisdiction*, INT'L LAW OFFICE (May 17, 2016).
[45] Hap Seng Plantations (River Estates) Sdn Bhd, 3 MALAYAN L. J. at 554.
[46] *Id.* at 554.
[47] *See* Pantai Bayu Emas Sdn Bhd & Others v Southern Bank Bhd (2009) 2 CURRENT L. J. 630.

throughout the Federation of Malaysia. Decisions of the High Court are subject to appeal, however, and the Federal Court and the Court of Appeal both have appellate jurisdiction over the High Court. Decisions by the Court of Appeal is binding on the High Courts, and the decisions by the Federal Court bind all courts.[48]

**C. Judicial Appointments and Legal Practice**

Judges of the Federal Court, Court of Appeal, and the High Courts – of Malaya and Borneo – are appointed by the King (the constitutional monarch), "acting on the advice of the Prime Minister, after consulting the Conference of Rulers."[49] According to the Constitution, to qualify for appointment as a judge of the superior courts, appointees must be a Malaysian citizen and have practised as an advocate of those courts or have been a member of the judicial and legal service of the Federation or a state for ten years.[50]

Additionally, a Judicial Appointments Commission was formed in 2009 with the goal of ensuring "that the process for the nomination, appointment, and promotion of Superior court judges is more transparent and comprehensive."[51] The Judicial Appointments Commission is empowered to report to the Prime Minister the names of selected persons with reasons why they merit appointment to judicial positions.[52] The Commission is composed of judges and lawyers, including representation from Sabah and Sarawak. Its members include the Chief Judge of the High Court of Sabah and Sarawak, and "four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies members from Sabah and Sarawak."[53] Members of the Commission hold office for a period of two years; members are eligible for reappointment but no member can hold office for more than two terms.[54] So far, at least three individuals from Sabah and Sarawak have been appointed to the Judicial Appointments Commission by the Prime Minister since its inception, not including the Chief Judge of the High Court in Sabah and Sarawak.[55]

The Chief Justice of the High Court in Sabah and Sarawak is the highest position within the East Malaysian judicial system. Judges and lawyers from Sabah and Sarawak may, of course, be appointed to the higher federal appellate courts. Indeed, in 2018, Richard Malanjum, a former Chief Justice of Sabah and Sarawak, became the first Bornean to be appointed as Chief Justice of Malaysia.[56] Justice Malanjum served for only nine months before retiring in 2019 when he reached the mandatory

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[48] Murgan et al., *supra* note 28*,* at 31.
[49] FED. CONST. (MALAY.), art. 122(B)(1).
[50] *Id.* art. 123.
[51] "Introduction," JUDICIAL APPOINTMENTS COMMISSION (last visited May 15, 2020), http://www.jac.gov.my/spk/en/commission/introduction.html.
[52] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (2012) at 200-01; *see also* M. Ershadul Bari, M. Ehteshamul Bari and Safia Naz, *The establishment of the Judicial Appointments Commission in Malaysia to improve the constitutional method of appointing the judges of the superior courts: a critical study,* 41 COMMONWEALTH LAW BULLETIN 2 (2015).
[53] Kevin YL Tan, *Judicial Appointments in Malaysia, in* SECURING JUDICIAL INDEPENDENCE: THE ROLE OF COMMISSIONS IN SELECTING JUDGES IN THE COMMONWEALTH, 114, 125-26 (Hugh Corder & Jan Van Zyl Smit eds. 2017), https://www.biicl.org/documents/1834_corder_and_smit_-_securing_judicial_independence.pdf?showdocument=1.
[54] Judicial Appointments Commission Act of 2009 (Act 695), §6(1).
[55] *See "*Former members of the Judicial Appointments Commission," JUDICIAL APPOINTMENTS COMM'N (last visited May 17, 2020), http://www.jac.gov.my/spk/en/commission/former-members-of-jac.html. These members were Haji Abdul Razak Tready, former Sarawak Chief Judge; Sulong Matjeraie, former Judge at the High Court of Sabah and Sarawak, Court of Appeals judge and Federal Court judge; and Amar Steve Shim Lip Kiong, former Chief Justice of Sabah and Sarawak.
[56] *See* Ida Lim, *Richard Malanjum's epic journey from Tuaran in Sabah to Palace of Justice in Putrajaya,* MALAY MAIL (April 13, 2019), https://www.malaymail.com/news/malaysia/2019/04/13/richard-malanjums-epic-journey-from-tuaran-in-sabah-to-palace-of-justice-in/1742903.

retirement age, but his appointment to the nation's top position was well received by East Malaysians as a sign of Sabah being regarded as "an equal partner in the federation."[57]

In terms of legal practice, there are separate bars for Peninsular Malaysia, Sabah, and Sarawak: these are the Bar Council of Malaysia, the Sabah Law Association and the Advocates Association of Sarawak.[58] Members of one bar association are not admitted to practice at the other state bars. To wit, a member of the Bar Council is not entitled to practice in Sabah and Sarawak, and no member of the Bar in Sabah or Sarawak can practice in the other state or in Peninsular Malaysia. Some workarounds exist: a lawyer from West Malaysia can be admitted by the court to practice in Sabah or Sarawak "on an ad hoc basis, but this is without prejudice to the need to obtain an entry permit from the immigration authorities, which are under state, not federal, control."[59] Efforts for a more unified bar have generally been opposed by lawyers in Sabah and Sarawak, who appear concerned about an "influx of lawyers from West Malaysia to East Malaysia."[60]

**III. Evaluation of the East Malaysian Experience**

Close to six decades ago, Sabah and Sarawak joined the Federation of Malaysia in 1963 with an arrangement that envisaged that judicial powers in East Malaysia would be exercised both independently and concurrently with the Federation's national judicial powers. This section concludes with several observations of the East Malaysian experience with the devolution of judicial powers in practice.

One issue that has arisen in the Malaysian context is the lack of effective legal constraints on the federal government's power to interfere with the state government, especially when invoked through a regime of emergency powers.[61] An illustrative example involves the dismissal of the Sarawak Chief Minister in 1966.[62] Chief Minister Stephen Kalong Ningkan refused to accept his dismissal by the *Yang di-Pertua Negeri* (Governor) of Sarawak, and applied to the High Court for a declaration that he was still the Chief Minister. The High Court held that the dismissal of the Chief Minister was unlawful, allowing Ningkan to resume office, reasoning that a vote on the floor of the state legislature was necessary to determine the confidence of the majority.[63] In response, the federal government proclaimed an emergency, under which the federal and state constitutions were temporarily amended so that the *Yang di-Pertua Negeri* was given the power to dismiss the Chief Minister.

The episode of the dismissal of Sarawak Chief Minister illustrates, as scholar Andrew Harding observes, that there are "no legal or even… political limitations, on the power of the Federation to interfere with the State Constitution, State Government or the division of state and federal powers."[64] By invoking emergency powers, the federal government in effect overruled the decision of the High Court in Sabah and Sarawak, and evaded a crucial constitutional safeguard afforded to the East

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[57] *See MA63 honoured with appointment of Richard Malanjum as Chief Justice,* BORNEO TODAY (July 12, 2018), https://www.borneotoday.net/ma63-honoured-with-appointment-of-malanjum-as-chief-justice/.

[58] Shaikh Mohamed Noordin and Shanthi Supramaniam, *An Overview of Malaysian Legal System and Research*, NYU Law (June 2016), https://www.nyulawglobal.org/globalex/Malaysia1.html#JudicialAuthority.

[59] Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?, supra* note 35, at 203.

[60] Sheila Ramalingam, Johan Shamsuddin bin Hj Sabaruddin & Dr. Saroja a/p Dhanpal, *The history of the legal profession in Malaysia*, CLJ LAW 31 (2018), https://umexpert.um.edu.my/public_view.php?type=publication&row=NzQwNzc%3D.

[61] Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?*, *supra* note 35, at 208.

[62] *Id.* at 204-207.

[63] Stephen Kalong Ningkan v Government of Malaysia (1968) 2 MALAYAN L.J. 238.

[64] Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?, supra* note 35, at 208.

Malaysian states – the ability to veto constitutional amendments affecting the state. Emergency powers may thus provide the federal government with extensive ability to intervene in the autonomy of particular state governments, despite the special constitutional protections for the East Malaysian states' judicial power and constitutional amendments.[65]

A related, but distinct, matter of concern for the East Malaysian states has been the protection of the interests and rights of their indigenous people. The "native"[66] peoples of Sabah and Sarawak constitute approximately 40 percent of the population in Sarawak and 60 percent in Sabah.[67] Taken together, indigenous communities constitute about half of the total population of these states. From 1971, the indigenous population of East Malaysia have joined Malay-Muslims in their constitutionally guaranteed special position as "*bumiputera*,"[68] which allows for privileges such as positions in public service and special quotas for scholarships, trade licenses, and in other areas.

The devolution of judicial powers in Sabah and Sarawak appears to have developed, at least in part, in recognition of these states' unique customary laws, which are deeply rooted and enforced through the legal system.[69] The design of these states' judicial system and legal profession appears to be aimed at protecting the monopoly of the legal profession in Sabah and Sarawak and preserving their unique legal history, laws, and legal culture. The special position of the East Malaysian judiciary is also attributed in part by their native law, which "represents a substantial part of the legal systems of Sabah and Sarawak and is not a legal subject necessarily known to the Malaysian judiciary as a whole."[70] Additionally, the Constitution prohibits the federal Parliament from passing any laws where exercised in pursuit of international law with respect to "any matters of native law or custom in the States of Sabah and Sarawak."[71]

Nonetheless, the Malaysian Federal Court and Court of Appeal oversee the High Court of Sabah and Sarawak and are thus the final arbiter of legal issues. Since these appellate courts located in Malaya retain final authority over the courts of Sabah and Sarawak, this affects these states' overall judicial autonomy as decisions rendered by the state courts are ultimately reviewable by the federal courts.

A third issue relates to the special status granted to the states of Sabah and Sarawak, an integral part of their agreement to integrate into the Malaysian Federation, and its subsequent implementation in practice. The 1963 Federation was joined by four entities: the Malayan Federation, Singapore, Sabah, and Sarawak. At that time, Article 1(2) of the Constitution provided that "the States of the Federation" shall be: (a) the States of Malaya, comprising the eleven states in Peninsular Malaysia, and (b) the Borneo States of Sabah and Sarawak.[72] In addition, the Federal Constitution was amended to include various provisions providing for the special status of Sabah and Sarawak.[73]

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[65] *Id.* at 210.

[66] *See* FED. CONST. (MALAY.), art. 153(1) (referring to the "the special position of the Malays and natives of any of the States of Sabah and Sarawak.").

[67] *Indigenous peoples and ethnic minorities in Sabah*, MINORITY RIGHTS (last updated Jan. 2018), https://minorityrights.org/minorities/indigenous-peoples-and-ethnic-minorities-in-sabah/.

[68] FED. CONST. (MALAY.), art. 153, as amended by the Constitution (Amendment) Act 1971. *Bumiputera* translated from Malay means "sons of soil."

[69] *See* Harding, *Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia's Federal System?, supra* note 35, at 203.

[70] *Id.*

[71] FED. CONST. (MALAY.), art. 76(2).

[72] The State of Singapore was part of this original formulation but was removed after Singapore left the Federation on August 9, 1965.

[73] FED. CONST. (MALAY.), art. 161E(2).

However, in 1976, Article 1(2) of the Malaysian Constitution was amended to list all thirteen states of the Federation – including Sabah and Sarawak – within a single category. For many in Sabah and Sarawak, this amendment appeared to downgrade the East Malaysian states to equivalence with the other eleven states of Malaya, contributing to a growing discontent against the federal government fuelled by a perception that the spirit of the 1963 agreement has not been upheld.[74]

The status of Sabah and Sarawak has been a topic of focus in recent Malaysian political discourse. In 2019, the Pakatan Harapan government announced that it would amend Article 1(2) of the Constitution to restore the constitutional status of Sabah and Sarawak as a step toward restoring the status of the Borneo states in compliance with the Malaysia Agreement of 1963. [75] The constitutional amendment bill was tabled on April 9, 2019, but the government fell short of enough votes—ten shy of the two-thirds legislative majority—to pass the bill.[76]

In February 2020, Malaysia experienced an unexpected change of federal government. The Pakatan Harapan government, which had swept into power two years earlier after Malaysia's first democratic transition of government in 2018, collapsed due to political defections and coalition realignments.[77] It was replaced by the Perikatan Nasional coalition headed by Prime Minister Muhyiddin Yassin. In the political tussle, Sabah and Sarawak has held a position of some significant leverage over the federal government. Given the razor-thin margins of legislator support for the coalitions in power, any governing coalition requires the support from the Borneo legislators to hold a parliamentary majority. The newly appointed Sabah and Sarawak Affairs Minister has promised to strengthen the region's autonomous status and to restore the "original status" of these states within the federation in line with the Malaysia Agreement of 1963.[78]

## IV. Observations from Comparative Practice for the Moroccan Initiative for the Autonomy of the Sahara Region

Devolution of judicial powers is a complex undertaking in practice as much as in theory. Although the constitutional and legal design of autonomous judicial powers should form an initial focus, much depends on its implementation and exercise in practice.

Western Sahara, formerly a Spanish colony, has been the subject of a decades-long regional dispute. In response to calls by the United Nations Security Council since 2004 to the parties to end the political deadlock, Morocco presented to the UN Secretary General, on 11 April 2007, its proposal entitled the "Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara region". The Moroccan initiative for negotiating an autonomy statute for the Sahara region proposes a framework that allows for the Sahara Region to safeguard the autonomy of the Sahara populations to "run their

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[74] *See* Wilson Tay Tze Vern, *Restoring the Constitutional Status of Sabah and Sarawak: First Step in a Long Journey of Redemption*, CONSTITUTIONNET (Mar. 29, 2019), http://constitutionnet.org/news/restoring-constitutional-status-sabah-and-sarawak-first-step-long-journey-redemption.

[75] The Edge Markets, *Malaysian government agrees to amend Constitution to comply with 1963 Agreement and restore status of Sabah and Sarawak*, CONSTITUTIONNET (March 11, 2019), http://constitutionnet.org/news/malaysian-government-agrees-amend-constitution-comply-1963-agreement-and-restore-status-sabah.

[76] Andrew Ong, *Fresh bill on Article 1(2) of the Federal Constitution to be tabled next year*, MALAYSIAKINI (Dec. 17, 2019), https://www.malaysiakini.com/news/503997.

[77] Hannah Beech, *Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html.

[78] *See, e.g.,* Durie Rainer Fong, *Restoring equal status to Sabah, Sarawak my first priority, says Ongkili*, FREE MALAYSIA TODAY (March 12, 2020), https://www.freemalaysiatoday.com/category/nation/2020/03/12/restoring-equal-status-to-sabah-sarawak-my-first-priority-says-ongkili/.

affairs domestically" through "judicial bodies enjoying exclusive powers,"[79] within the framework of Morocco's sovereignty, national unity, and territorial integrity.

The structure proposed by the Moroccan Initiative bears certain similarities to Malaysia's federal court system. The Initiative provides in Article 22 that: "Courts may be set up by the regional Parliament to give rulings on disputes arising from enforcement of norms enacted by the competent bodies of the Sahara Autonomous Region" and that they may do so "with complete independence."[80] Article 23 goes on to state that a High Regional Court would be made the highest jurisdiction of the Sahara Autonomous Region, but would be subject to review under the Moroccan Kingdom's Supreme Court or Constitutional Council.[81] In Malaysia, the High Court of Sabah and Sarawak retains power within their respective territories, but are subject to review by the Court of Appeal and, ultimately, the Malaysian Federal Court, which is the final judicial arbiter.

As a matter of constitutional design, the Malaysian federal system was thought to afford some autonomy over judicial powers for the regional body. In this respect, it might be thought there is potential for such a model to allow an autonomous region to preserve its own legal history, culture, and profession, rather than being subsumed into a federal legal system.

Still, constitutional design is one thing; constitutional practice is another. The East Malaysian experience over the last six decades in practice provides insights that can help inform the proposals for the devolution of judicial powers in the Sahara Region.

Foremost among these is that the location of final judicial authority is crucial in determining the extent of autonomy exercised in practice by a judicial system. In designing a separate regional court system for the Sahara Region, actual autonomy will depend on which institution is able to exercise final authority of judicial review. As set out under Article 23 of the proposal, the Moroccan Supreme Court or Constitutional Council will have the power to override decisions of the Sahara Regional High Court. It is thus important to consider whether, and to what extent, the regional court in the Sahara Region will be able to exercise autonomy in practice if final judicial authority will rest with a higher judicial body in Morocco. It would be worth considering conferring the final say over some or all judicial matters to the members of the High Regional Court in the Sahara Region rather than with an outside judicial body.

A second observation relates to the legal and constitutional constraints on federal power intervening into autonomous regions. Article 23 of the Moroccan Initiative for the Sahara Region states: "Laws, regulations and court rulings issued by the bodies of the Sahara autonomous Region shall be consistent with the Region's autonomy Statute and with the Kingdom's Constitution." Here, too, there are resonances with the Malaysian experience. As illustrated by the 1966 episode involving the Sarawak Chief Minister discussed above, the federal government used its executive power under the Federal Constitution to declare a state of emergency, which allowed it to override the decision of the Sarawak High Court. A detailed analysis of the Kingdom of Morocco's Constitution is beyond the scope of this paper, but the lessons from Malaysia show that it is of particular importance to note how

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[79] Annex to the letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council: Moroccan initiative for negotiating an autonomy statute for the Sahara region, UN Doc. S/2007/206 ¶ 5.

[80] *Id.* at 22 (April 13, 2007) ("Courts may be set up by the regional Parliament to give rulings on disputes arising from enforcement of norms enacted by the competent bodies of the Sahara Autonomous Region. These courts shall give their rulings with complete independence, in the name of the King.").

[81] *Id.* at 23 ("As the highest jurisdiction of the Sahara Autonomous Region, the High Regional Court shall give final decisions regarding the interpretation of the Region's legislation, without prejudice to the powers of the Kingdom's Supreme Court or Constitutional Council.").

regimes of exception – like the invocation of emergency powers or national security laws – can be wielded by a federal government to undermine even explicit protections for the judicial power of an autonomous region. The Moroccan Initiative contains some textual safeguards against federal power: Article 29 of the Autonomy Initiative provides that the "Moroccan Constitution" will be amended and the Autonomy Statute incorporated into it to guarantee its sustainability and reflect its unique place in the country's national juridical architecture." Additionally, Article 25 of the Moroccan Initiative guarantees that the Sahara Region's populations shall enjoy all the guarantees afforded by the Moroccan Constitution in the area of human rights as they are universally recognized**. It will be crucial for these textual provisions to be upheld in practice if they are to function as effective safeguards.**

This paper concludes on a final, and broader, observation on the importance of constitutionalism in practice. Textual constitutional or legal guarantees for the special status of autonomous regions may play out in unanticipated ways over time. If the "special status" promised to an autonomous region is perceived as not being given effect in practice, that risks aggravating existing tensions between the territory and the federal government, which may give rise to discontent and even calls for secession. For the constitutional experiment to succeed—whether in East Malaysia, the Sahara region, or elsewhere—good faith and continued efforts in practice will be required to maintain the agreed-on balance of powers between the federal and autonomous regions, whether in relation to legislative, executive, or judicial competencies. A constitutional text can only go so far; effective constitutionalism must stem from the ongoing practice of all institutional actors involved for the constitutional experiment in devolution to succeed.