

JUDGMENT Express

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Sabah Law Society
v. The Government Of The Federation
Of Malaysia & anor

[2026] 1 MLRH

SABAH LAW SOCIETY

v.

THE GOVERNMENT OF THE FEDERATION OF MALAYSIA & ANOR

High Court Sabah & Sarawak, Kota Kinabalu
Celestina Stuel Galid J
[Judicial Review Application No: BKI-25-14-6-2022]
7 November 2025

Administrative Law: *Judicial review — Certiorari and mandamus — Rules of Court 2012, O 53 — Application in respect of Order “The Federal Constitution [Review of Special Grant Under Art 112D] [State of Sabah] Order 2022” (“Second Review Order”) published by Federal Government — Whether Second Review Order failed to comply with art 112C of Federal Constitution, read with subsection (1) of s 2 of Part IV of Tenth Schedule and cls (1), (3) and (4) of art 112D — Whether decision in relation to Second Review Order illegal, irrational, procedurally improper and/or disproportionate*

Constitutional Law: *East Malaysian States — State of Sabah — Application for judicial review in respect of Order “The Federal Constitution [Review of Special Grant Under Art 112D] [State of Sabah] Order 2022” (“Second Review Order”) published by Federal Government — Whether Second Review Order failed to comply with art 112C of Federal Constitution, read with subsection (1) of s 2 of Part IV of Tenth Schedule and cls (1), (3) and (4) of art 112D — Whether decision in relation to Second Review Order illegal, irrational, procedurally improper and/or disproportionate*

Constitutional Law: *Government — Federal Government — Application for judicial review in respect of Order “The Federal Constitution [Review of Special Grant Under art 112D] [State of Sabah] Order 2022” (“Second Review Order”) published by Federal Government — Whether Second Review Order failed to comply with art 112C of Federal Constitution, read with subsection (1) of s 2 of Part IV of Tenth Schedule and cls (1), (3) and (4) of art 112D — Whether decision in relation to Second Review Order illegal, irrational, procedurally improper and/or disproportionate*

This was an application for Judicial Review (“JR”) filed by the Sabah Law Society (“SLS”) under O 53 of the Rules of Court 2012 (“ROC 2012”). SLS was an entity established under the Sabah Advocates Ordinance (Sabah Cap. 2), while the 1st respondent was the Federal Government and the 2nd respondent the State Government of Sabah. By a Federal Government Gazette publication P.U.(A) 119/2022 dated 20 April 2022, the Federal Government published an Order, ie “The Federal Constitution [Review of Special Grant Under Art 112D] [State of Sabah] Order 2022” (“Second Review Order”) which stated the following: “Special grant – for a period of five years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025 and 2026,



grants in the sum of RM125.6 million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million respectively; Revocation – the Sabah Special Grant (First Review) Order 1970 (“First Review Order”) is revoked.” In addition (and after the filing of this JR application), a Federal Government Gazette publication P.U.(A) 364/2023 dated 24 December 2023 was issued, publishing the Order “Federal Constitution [Review of Special Grant Under Art 112D] [State of Sabah] Order 2023” (“Third Review Order”). It was in respect of the Second Review Order that SLS applied for orders of *certiorari* and *mandamus* in the JR herein. SLS contended that the Second Review Order failed to comply with art 112C of the Federal Constitution (“FC”), read with subsection (1) of s 2 of Part IV of the Tenth Schedule and cls (1), (3) and (4) of art 112D. Article 112C and subsection (1) of s 2 of Part IV of the Tenth Schedule of the FC provided for the special annual grant by the Federation of Malaysia to the State of Sabah in respect of each financial year, commonly referred to as the State of Sabah’s 40% Entitlement.

SLS’ stance was that the Second Review Order was contrary to the imperatives of cls (1) and (4) of art 112D which mandated the Federal Government and the State Government (taking each clause in turn): (i) to conduct a review of the 40% Entitlement (provided under cl (1)(a) of art 112C) and any substituted or additional grant made by virtue of cl (1) of art 112D; (ii) for such review to make provision of a period of five years or (except in the case of the first review) such longer period as agreed between the Federation and the State of Sabah; and (iii) for the period covered by the second review to begin with the year 1974. It was contended that contrary to arts 112C and 112D, there was no review held in 1974 which resulted in the State of Sabah not making its 40% Entitlement in respect of each and all of the 48 years from 1974 to 2021 (“Lost Years”). It was further asserted that: (i) the Second Review Order was therefore *ultra vires* the express provisions of the FC and more particularly art 112C and 112D read together with the Tenth Schedule, Parts III, IV and V thereto; (ii) there was a breach of natural justice as the 1st respondent had failed and/or neglected to hold a Second Review for the period beginning in 1974. This had resulted in the 40% Entitlement of the State of Sabah under the FC to be ignored or discarded for 48 years in breach of the express provisions of the FC; (iii) the Second Review Order was contrary to the express provision of art 112C and art 112D of the FC as it failed to provide for each consecutive year for the period from 1974 to 2021 therein; (iv) the Second Review Order was irrational and unreasonable as it failed to take into account para 24(6), (8) and (9) of the Inter-Governmental Committee Report (“IGC Report”) which entitled the State of Sabah to receive grants based on the 40% formula as provided under art 112C and Part IV of the Tenth Schedule for the period from 1974 to 2021; and (v) the Second Review Order was disproportionate to art 112C and 112D of the FC, particularly the application of the formula as set out in Part V of the Tenth Schedule thereto as the amount that would be derived from the 40% formula would be highly disproportionate to the amount purportedly agreed upon in the Second Review Order.



Held (allowing the application):

(1) The 1st respondent contended that there had been an on-going negotiation between the 1st respondent and the 2nd respondent since 1974. However, there was no evidence at all produced before this Court to support the 1st respondent's assertion on the existence of an on-going review. Not a single document was exhibited, only certain averments by the 1st respondent. One would think that after the lapse of some 48 years, some semblance of evidence would be forthcoming of such on-going review — the people of Sabah (whose interests had been and were directly affected) had a legitimate expectation and indeed deserved to know what exactly their Governments (Federal and State) had done in all those 48 years to realise and ensure the continuity of the conditions and safeguards that their forefathers had insisted on when they agreed to become part of the Federation of Malaysia. It was thus rather troubling, to say the least, that after some 48 years and this application being brought up for the first time, all the 1st respondent could rely on to support its claim as to the 48-year-long on-going review were only affidavit averments. If the argument was that the supporting documents were classified documents or “rahsia”, it certainly did not stop the 1st respondent's counterpart, the 2nd respondent, from disclosing such similar documents. Even then, none of the documents produced by the 2nd respondent suggested that the review process started in 1974 and continued until 2021. Thus, the review therein could not have, by any stretch of imagination, covered the period during the Lost Years. As rightly pointed out by SLS, even if one were to entertain the idea of a 48-year-long and on-going review, such claim would be untenable when considered in the light of the clear constitutional provisions. (paras 155, 156, 157, 159, 160, 164 & 165)

(2) A review as contemplated under art 112D of the FC must include the following elements: (i) meeting between the representatives of the Federal Government and the Sabah Government for the purpose of a review of the special grant; (ii) agreement between them as to a mandated fixed period of 5 years or another agreed period for the annual grant to be made (cls (1), (2), (3) and (4)); (iii) (a) agreement on the specified grant for each year in that mandated or agreed period, and (b) if agreement on the specified grants each year included alteration or abolition of the 40% Entitlement or any substituted or additional grant made on a review, or making of another grant instead of for as well as these grants or any of them for that agreed period; and (iv) then modification of the duty to make the 40% Entitlement and the amounts required for making the 40% Entitlement by an order of the Yang Di-Pertuan Agong. If in the process of carrying out the review under art 112D, the two Governments were unable to reach an agreement on any matter, it would be referred to an independent assessor, and his recommendations would be binding on the two Governments as if they were the agreement of those Governments as provided under cl (6) of art 112D. Taking the 1st respondent's case at the most, the only essential element under art 112D which would have been fulfilled by the purported on-going review would have been that the two Governments had corresponded



and/or met to broach the subject of a review of the special grant in 1974 and that this continued up until 2021. This amounted to procedural impropriety, was irrational and unreasonable. To accept the 1st respondent's argument on this issue would be to re-write art 112D so that the provision only required the Federal and State Governments to meet or correspond with each other on this matter. Taking it further, if accepted, the 1st respondent's interpretation would mean that the grant in 1973 might continue to apply indefinitely and even, *ad infinitum*. Likewise, it would allow the two Governments to embark on a never-ending on-going review. (paras 167-170)

(3) The 1st respondent's assertion that there was an on-going review from 1974 to 2021 and that the First Review Order remained in force until it was revoked by the Second Review Order. Counsel for SLS was quite correct to note that the 1st respondent's stance, if accepted, would result in an interpretation of art 112D, which would allow the outcome of a review conducted on 1 December 1969 between the two Governments to govern the amounts in grants made from the Federation to Sabah as many as 52 years later in 2021. The 1st respondent's stance that there was an on-going review from 1974 to 2021 and that the First Review Order remained in force until the Second Review Order in 2022 was not only irrational and unreasonable but absurd as it failed to consider cl (2) of art 112D, which provided that any review under the Article would consider the following: (i) the financial position of the 1st respondent; (ii) the needs of Sabah; and (iii) whether or not the revenue of Sabah was adequate to meet the cost of the State services. (paras 171-174)

(4) The 1st respondent's further contention that SLS ought to be precluded from contending that the Second Review Order was irrational and amounted to *Wednesbury* Unreasonableness on the ground that it was not pleaded in the Statement filed pursuant to O 53 of the ROC 2012 was not convincing. First, it was not a new or unpleaded ground. On the contrary, they were relevant considerations when construing art 112D and determining the lawfulness or otherwise of the Second Review Order. For the Second Review Order to be a properly conducted and rational review under art 112D, it must encompass at the very least when the last review was done, the period for which the review would cover, the financial position of the Federal Government and the needs of the State Government in regard to the State services with room for expansion, the amount of net revenue derived by the Federation from Sabah for each consecutive year in the period for which the review to agree to and make the special grant would cover, the amount of net revenue derived for the year 1963 to be readily available during the review. Clause (2) of art 112D expressly required this. The Second Review Order, in its omission of any consideration of the special grant, its annual amount, and allocation of payment for that period from 1974 to 2021, was irrational and unreasonable (*Wednesbury* sense). The words 'at the time of the review' appearing in cl (2) of art 112D could not be ignored, so that it could be accepted that the framers of the FC could or would have intended for a review that was outdated, by decades, to continue to govern the grants paid by the Federal Government to the State of Sabah. At the



very least, common sense would dictate that the needs of Sabah in 2020, for instance, would not have been the same as it was in 1974. To put it another way, the sum of RM26.7 million under the First Review Order would have gone a long way towards the development of Sabah in 1974, but the same could not be said in the year 2020. However, that was what Sabah received then. (paras 175-179)

(5) It was argued for the 1st respondent that the absence of a review order in 1974 did not mean that “the Applicant” would by default be granted the 40% Entitlement as stipulated under art 112C(1)(a) read with s 2(1) of Part IV of the Tenth Schedule of the FC. The 1st respondent relied on art 112D(3) to support their justification for the yearly payment of RM26.7 million under the First Review Order from 1974 to 2021. However, the Senior Federal Counsel (“SFC”) might have missed the point that the 40% Entitlement was to be granted to the State of Sabah and not “the Applicant” or SLS. Further, careful consideration of SLS’ arguments showed that the “by default” arguments by SFC were too simplistic and failed to appreciate SLS’ case which could be broken down as follows: (i) the FC in cl (1)(a) of art 112C mandated for the making of the 40% Entitlement from Federation to State; (ii) the only way to modify this provision was as set out in cl (1) of art 112D, by an order of the Yang di-Pertuan Agong; (iii) where there was no modification to the 40% Entitlement, there was no requirement for such an order of the Yang di-Pertuan Agong; and (iv) but the converse was also true – where there was no order, no modification to the 40% Entitlement could be given effect to. The only way that a modification of the 40% Entitlement could be given effect to was by an order of the Yang di-Pertuan Agong. Any purported change to the 40% Entitlement, without such an order, was constitutionally impermissible. While it was true that the First Review Order did modify the 40% Entitlement mandated by cl (1)(a) of art 112C of the FC, it did not have the effect of modifying Sabah’s constitutional rights beyond 1973. The First Review Order, which was an order of the Yang di-Pertuan Agong, was a subsidiary legislation and must yield to the primacy of the FC. To read it otherwise would be *ultra vires* to the FC. A plain reading of the First Review Order would show that there was nothing therein that remotely suggested that its effects went beyond 1973. It only expressly modified the 40% Entitlement in respect of the years 1969, 1970, 1971, 1972 and 1973. While the Second Review Order purported to revoke the First Review Order, there was nothing in it which allowed for the modification of the First Review Order so that it extended beyond 1973. In fact, nothing was stated about those Lost Years at all. (paras 187-194)

(6) The 1st respondent also contended that the First Review Order remained in force pursuant to cl (3) of art 112D during the Lost Years and until revoked by the Second Review Order. The 1st respondent’s stand was that this provision excused the absence of any review or order in 1974 and justified the non-payment of the 40% Entitlement to the State of Sabah in respect of the Lost Years. However, the taking away of the State of Sabah’s constitutional rights to receive the 40% Entitlement in those Lost Years could not, by any means, be left



to inferences or implications when the Second Review Order did not purport to make any (further) modification to the 40% Entitlement. That would have been a clear breach of natural justice and *ultra vires* the express provisions of the FC, in particular arts 112C and 112D read together with the Tenth Schedule, Parts III, IV and V thereto. If it were the case and such right had been superseded by the grant of the Second Review Order as contended by the 1st respondent, it must be expressly stated to be so. The converse would be true – the rights of the State of Sabah since 1974 to 2021 were never constitutionally modified or more importantly, lost. The interpretation by SLS which was preferable was that cl (3) was a temporary savings clause to avoid a constitutional vacuum during the period between the expiry of one review order and the implementation of the next. It preserved legality during the transitional period between two orders. It did not envisage or authorise prolonged non-compliance. Neither did it serve as a mechanism to justify indefinite inaction by the Federal Government or to displace its constitutional duty to conduct periodic reviews and, specifically, a review in 1974. To construe the provision the way the 1st respondent asserted would be to countenance its own breach by the executive. Clause (3) also prevented the Federation from being in breach of its duty to make the 40% Entitlement once the period of the existing order modifying that 40% Entitlement (as the First Review Order did) came to an end, but before the succeeding order came into effect to supersede it. This modification of the 40% Entitlement by the existing order only continued in force (and prevented the Federation from being in breach of its duty to make the 40% Entitlement) up till the point that the Second Review Order – which gave effect to a second review that should have been properly conducted pursuant to art 112D – took effect. (paras 195-200)

(7) On the facts herein, once the First Review Order was revoked by the Second Review Order, which gave effect to the second review, the modification was also thereafter revoked. At that point, the Federation's duty to make the 40% Entitlement to the State of Sabah immediately came into effect for the period of the Lost Years. This event, occurring not in 1974 as was mandated by the FC, but 48 years later, *a fortiori* triggered the Federation's duty to make the 40% Entitlement to the State of Sabah and which the two Governments were mandated to consider in their second review. Here, the two Governments, in breach of their constitutional duties imposed upon and powers vested in them under the FC at art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule and cls (1), (3) and (4) of art 112D, did not consider the 40% Entitlement in respect of the Lost Years. In circumstances where no review took place in 1974, and no review had ever taken place in respect of the period covered by the 48 Lost Years from 1974 to 2021, the 40% Entitlement remained due and payable by the Federation to the State of Sabah for each of those Lost Years. In breach of natural justice and legitimate expectation of the State of Sabah and her people, the Second Review Order made on 17 April 2022 and with effect from 1 January 2022 failed to provide for the making of annual grants for the period of the Lost Years (1974 to 2021). The Federation's duty



to make the 40% Entitlement remained, and remained to be fulfilled, with the lifting of the First Review Order by the Second Review Order on 20 April 2022 (or 1 January 2022). (paras 202-205)

(8) Given the findings above, the Federal Government and the Sabah Government's use of their respective powers under art 112D of the FC not only amounted to an abuse of power but a breach of constitutional duties stipulated in that article and art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule. Hence, the decision in relation to the Second Review Order was illegal, irrational, procedurally improper and/or disproportionate. (paras 211-212)

(9) As for the reliefs sought, SLS had prayed for the remedy of *certiorari* to quash that part of the Second Review Order that was implicitly unlawful for the omission to consider the Lost Years to be read together with the remedy of declarations at prayers (2)(a) and (b) of its JR application. SLS had rightly submitted that the 40% Entitlement would have been a large part of the financial provision that, being revenue derived by the Federation from Sabah, should have been made and paid to the State of Sabah for the development of the public services, including the costs of state services. The State of Sabah, although indubitably rich in natural minerals – oil and gas, and palm oil – remained appallingly poor. This Court was entitled to consider that a person's right to his or her life and livelihood would include the right to the bare necessities of life. This was entrenched in cl (1) of art 5 of the FC, which provided that 'No person shall be deprived of his life or personal liberty save in accordance with law'. In the circumstances, these declarations were necessary in order for the two Governments to carry out the review of the special grant for the Lost Years that had been omitted in both the Second Review Order and the Third Review Order. (paras 213, 223, 224 & 225)

(10) SLS had also prayed for an order of *mandamus* in sub-paragraph 3(a) to carry out the mandatory review for the period since 1974. This was to remedy the omission and failure of the two Governments to review the 40% Entitlement for the Lost Years despite being under a duty and invested with power under the said constitutional provisions of the FC to carry out the mandatory review. The SFC argued that the relief of *mandamus* was not available to SLS, contending that SLS had failed to establish that the 1st respondent had a legal or statutory duty as a matter of course to provide a grant based on the 40% formula. This submission could not stand given this Court's findings on the failure by the two Governments to review the 40% Entitlement for the Lost Years. The order of *mandamus* was necessary to compel the two Governments to hold and conduct the review properly in accordance with the provisions of art 112D and art 112C read with s 2 of Part IV of the Tenth Schedule of the FC. This Court was within its powers to grant such a relief. The relief in sub-paragraph (3)(b) for the consequential payment order was also necessary following the earlier orders. Likewise, the additional remedy of an account would be appropriate to ensure that the efforts and fruits to the Sabah public were not to be frustrated.



The earlier orders would not be sufficient and/or would be futile if the two Governments, who were entrusted by the FC to review the 40% Entitlement in respect of the Lost Years, were not made to account for the review and the results. (paras 226-229)

Case(s) referred to:

Advance Synergy Capital Sdn Bhd v. The Minister Of Finance Malaysia & Anor [2011] 1 MLRA 477 (distd)

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223 (refd)

Attorney General Of Malaysia v. Sabah Law Society; State Government Of Sabah (Intervener) [2024] 5 MLRA 565 (refd)

Attorney General Of Malaysia v. Sabah Law Society [2025] 1 MLRA 17 (refd)

Basheshar Nath v. Commissioner Of Income Tax, Delhi And Rajasthan [1959] AIR (SC) 149 (refd)

Behram Khurshid Pesikaka v. The State Of Bombay [1955] 1 SCR 613 (refd)

Bursa Malaysia Securities Berhad v. Mohd Afrizan Husain [2022] 4 MLRA 547 (refd)

Civil Service Unions & Ors v. Minister Of Civil Service [1985] AC 374 (refd)

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 1 MLRA 602 (refd)

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 2 MLRA 1 (refd)

Dhinesh Tanaphill v. Lembaga Pencegahan Jenayah & Ors [2022] 4 MLRA 452 (refd)

Dominic Lau Hoe Chai v. Maszlee Malik & Ors [2019] MLRHU 1449 (distd)

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 2 MLRA 23 (distd)

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 MLRA 179 (refd)

Gujarat State Co-operative Land Development Ltd v. P.R. Mankad & Anor [1979] AIR 1203 (refd)

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 2 MLRA 1 (folld)

JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 3 MLRA 87 (distd)

Keruntum Sdn Bhd v. The Director Of Forest & Ors [2018] 2 SSLR 167; [2018] 5 MLRA 175 (distd)

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLRA 251 (refd)

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 1 MLRA 101 (refd)

Letitia Bosman v. PP & Other Appeals [2020] 5 MLRA 636 (distd)

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 2 MLRA 453 (distd)



Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal [2022] 6 MLRA 59 (folld)

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 3 MLRA 1 (distd)

Matadeen v. Pointu [1998] UKPC 9 (refd)

Minister Of Finance Government Of Sabah v. Petrojasa Sdn Bhd [2008] 1 MLRA 705 (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2019] 6 MLRA 307 (refd)

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (refd)

Sabah Law Society v. The Government Of The Federation Of Malaysia & Anor [2023] MLRHU 2395 (refd)

Tan Sri Eric Chia Eng Hock v. PP [2006] 2 MLRA 556 (refd)

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLRA 186 (refd)

Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 6 MLRA 103 (refd)

The Government Of The State Of Kelantan v. The Government Of The Federation Of Malaya And Tunku Abdul Rahman Putra Al-Haj [1963] 1 MLRH 160 (refd)

Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 4 MLRA 205 (refd)

TR Sandah Ak Tabau & Ors v. Director Of Forest Sarawak & Anor And Other Appeals [2019] 5 MLRA 667 (distd)

Legislation referred to:

Courts of Judicature Act 1964, ss 74, 96(a), Schedule, para 1

Federal Constitution, arts 5(1), 13, 12, 71, 74, 76, 76A, 77, 96, 97, 110(1), 112C(1)(a), 112D(1), (2), (3), (4), (6), 128(1)(b), 160, Eighth Schedule, Ninth Schedule, Tenth Schedule, Part III, Part IV, s 2(1), Part V, ss 3, 4, Part VII

Interpretation Acts 1948 and 1967, s 3

Rules of Court 2012, O 53 rr 3, 8(1)

Sales Tax Enactment 1998, s 6

Land Ordinance (Sabah) (Cap 68), ss 9, 31, 132

Other(s) referred to:

Jalilah Md Shah, Rosazman Hussin & Asmady Idris, *Poverty Eradication Project in Sabah, Malaysia: New Initiative, New Challenges?*, Planning Malaysia: Journal of the Malaysian Institute of Planners [2023], Vol 21, Issue 6, pp 477 — 492

Mazlianie Mohd Lan & Emeritus Professor Datuk Dr Shad Saleem Faruqi, *Special Financial Provisions for Sabah under the Federal Constitution: The Issue of the 40% Special Grant*, [2023] 50(2) JMCL 1

Tun Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 2nd Edn, Government Printer [1976], p 188, para 24 of the IGC Report



Counsel:

*For the applicant: David Fung (Janice Junie Lim with him); M/s Alex Pang & Co;
Jeyan Marimuttu; M/s J Marimuttu & Partners*

*For the 1st respondent: Ahmad Hanir Hambaly @ Arwi (Atirah Aiman Rahim &
Mohammad Solehheen Mohammad Zaki with him); AG's
Chambers*

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] On 17 October 2025, this court granted the application for judicial review filed by Sabah Law Society (“SLS”) under O 53 of the Rules of Court 2012 (“ROC 2012”).

[2] This judgment contains this court’s reasoning in coming to its decision and is divided into the following sub-topics:

- (i) The proceedings at the leave stage;
- (ii) Salient background facts;
- (iii) What is the 40% Entitlement?;
- (iv) The remedies and orders prayed for by SLS;
- (v) The respective parties’ cases in a nutshell;
- (vi) Preliminary issues;
- (vii) This Court’s decision on the merits (of the application); and
- (viii) Conclusion and orders.

The Proceedings At The Leave Stage

[3] SLS’ leave application (to commence the judicial review) was opposed by the Federal Attorney-General with the 2nd Respondent being allowed to intervene. Leave was granted by Ismail Brahim J (later JCA) on 11 November 2022 — see *Sabah Law Society v. The Government Of The Federation Of Malaysia & Anor* [2023] MLRHU 2395.

[4] The grant of leave was appealed against by the 1st Respondent to the Court of Appeal — see *Attorney General Of Malaysia v. Sabah Law Society; State Government Of Sabah (Intervener)* [2024] 5 MLRA 565. The appeal was dismissed on 18 June 2024.



[5] The 1st Respondent’s leave application to appeal to the Federal Court against the Court of Appeal’s decision was dismissed on 17 October 2024 — see *Attorney General Of Malaysia v. Sabah Law Society* [2025] 1 MLRA 17.

Salient Background Facts

[6] SLS is an entity established under Sabah Advocates Ordinance (Sabah Cap 2). Although its standing to bring the present judicial review was challenged by the 1st Respondent, this issue has been put to rest by the Federal Court which held that SLS has threshold *locus standi* to do so — see *Attorney General of Malaysia v. Sabah Law Society*.

[7] The 1st Respondent is the Federal Government while the 2nd Respondent is the State Government of Sabah. They will be interchangeably referred to herein as the 1st Respondent/the Federal Government and the 2nd Respondent/the State Government.

[8] By a Federal Government Gazette publication P.U.(A) 119/2022 dated 20 April 2022, the Federal Government published the Order “The Federal Constitution [Review of Special Grant Under art 112D] [State of Sabah] Order 2022 (“the Second Review Order”)” which states the following:

“Special grant

2. For a period of five years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025 and 2026, grants in the sum of RM125.6 million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million respectively.

Revocation

3. The Sabah Special Grant (First Review) Order 1970 [PU (A) 328/1970] is revoked.”

[9] It was in respect of the Second Review Order that this judicial review was applied for. SLS contended that the Second Review Order failed to comply with art 112C of the Federal Constitution (“FC”), read with subsection (1) of s 2 of Part IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D.

[10] As a matter of additional background, Sabah Special Grant (First Review) Order 1970 (“the First Review Order”) under art 112D was made on 18 August 1970. By the First Review Order, the Federal Government and Sabah Government agreed that instead of the grant specified in sub-section (1) of s 2 of Part IV of the Tenth Schedule to the FC, another grant be made for the period of five years as follows:



- (i) 1969 — RM20 million
- (ii) 1970 — RM21.5 million
- (iii) 1971 — RM23.1 million
- (iv) 1972 — RM24.8 million
- (v) 1973 — RM26.7 million

[11] The period for the grant was from 1 January 1969 to 1 January 1974. Thereafter, the next review order would be the Second Review Order in 2022.

[12] In addition (and after the filing of this judicial review application), a Federal Government Gazette publication PU (A) 364/2023 dated 24 December 2023 was issued publishing the Order “Federal Constitution [Review of Special Grant Under art 112D] [State of Sabah] Order 2023” (“the Third Review Order”) which states the following:

“Special grant

- 2.(1) For a period of six years with effect from 1 January 2022, the Government of the Federation shall make to the Government of the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025, 2026 and 2027, grants in the amount of RM125.6 million, RM300 million, RM306 million, RM312 million, RM318 million and RM325 million respectively.
- (2) The Government of Federation has made to the State of Sabah, in respect of the financial year 2022, grant in the amount of RM125.6 million on 16 June 2022.

Revocation

- 3. The Federal Constitution (Review of Special Grant under art 112D) (State of Sabah) Order 2022 [PU (A) 119/2022] is revoked.”

What Is The 40% Entitlement?

[13] As the issues in this judicial review revolve on it, it would be helpful to have a brief explanation of what the State of Sabah’s 40% Entitlement is.

[14] Article 112C and subsection (1) of s 2 of Part IV of the Tenth Schedule of the FC provide for the special annual grant by the Federation of Malaysia to the State of Sabah in respect of each financial year. This special grant is commonly referred to as the State of Sabah’s 40% Entitlement.

[15] This 40% Entitlement is to be contrasted from the other grants provided in Part VII of the FC which sets out the financial provisions and the financial management of the Federation applicable to all States. This includes the following:



- (i) Development Grant — the Federation is required to pay into a fund known as the State Reserve Fund (“SRF”) in respect of every financial year as may be determined to be necessary and may make grants out of the SRF for the purpose of development or generally to supplement its revenues.
- (ii) State Taxes, fees and other revenue — the FC allocates certain taxes and revenues to be collected by the States. Article 110(1) of the FC provides that the States shall receive all proceeds from taxes, fees and other sources of revenue specified in Part III of the Tenth Schedule as far as collected, levied or raised within the State.

[16] Exhs “CST-4” to “CST-9” show that over and above the grants provided in Part VII of the FC, the State of Sabah received the 40% Entitlement from 1964 to 1968, then described as “Share of growth of Federal Revenue Derived from Sabah” in the following sums:

- (i) 1964 — RM4,965,167.00
- (ii) 1965 — RM8,199,340.00
- (iii) 1966 — RM13,271,238.00
- (iv) 1967 — RM22,178,172.00
- (v) 1968 — RM21,097,923.00

[17] Illustrative of the matters stated in paragraphs 15 and 16 above, during the same period from 1964 to 1968, the State of Sabah is also shown to have received the following Capitation Grants and State Road Grants (apart from the 40% Entitlement):

<u>Year</u>	<u>Capitation Grant</u>	<u>State Road Grant</u>
1964	RM3,567,684.00	RM5,179,500.00
1965	RM 3,567,684.00	RM5,179,500.00
1966	RM3,567,684.00	RM6,368,760.00
1967	RM3,567,684.00	RM6,368,760.00
1968	RM3,567,684.00	RM6,368,760.00

The Remedies And Orders Prayed For

[18] SLS sought for the following remedies and orders in this application (verbatim):



“(1) An order of *certiorari* to remove into the High Court for the purpose of quashing such part of the decision contained in Gazette publication P.U.(A) 119/2022 dated 20 April 2022 and Gazette publication P.U.(A) 364/2023 dated 24 December 2023 as is or is implied to decide and publish that the duty of the 1st Respondent is otherwise than is as declared under paras 2 (a) and 2 (b) herein.

(2) A declaration that:

- (a) The failure of the 1st Respondent to hold the second review in the year 1974 with the 2nd Respondent is a breach and contravention of its constitutional duty stipulated under art 112D, Clauses (1), (3) and (4) of the Federal Constitution.
- (b) The 40% Entitlement under art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule of the Federal Constitution means an annual grant of two-fifths of the amount by which the net revenue derived by the Federation from the State of Sabah exceeds the net revenue which would have been derived in the year 1963 wherein net revenue is the revenue which accrues to the Federation less the amounts received by the State of Sabah in respect of assignments of that revenue under ss 3 or 4 of Part V of the Tenth Schedule of the Federal Constitution as depicted by the formula as shown:

Federal Revenue derived from Sabah in current Year [A]

Revenue Assigned to State [ss 3 or 4 of Part V of Tenth Schedule] [B]

Net Revenue derived from Sabah in current Year (A — B = C) [C]

Federal Revenue derived from Sabah in 1963 [D]

Revenue assigned to Sabah in 1963 [E]

Net Revenue derived from Sabah in 1963 (D — E = F) [F]

Special Grant due to Sabah in Current Year: $40\% \times (C - F = G)$ [G]

- (c) The 40% Entitlement remains due and payable by the Federation to the State of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021.
 - (d) A failure to pay the 40% Entitlement by the Federation to the State of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021 is a breach of the fundamental right to property of the State of Sabah and ultimately of the fundamental right to life of the people of Sabah as enshrined under the respective art 13 and 5 of the Federal Constitution.
- (3) And for the following orders:
- (a) An order of *mandamus* directed to the 1st Respondent to hold another review with the 2nd Respondent under the provisions of art 112D of the Federal Constitution to give effect to the Federation



making the 40% Entitlement to the State of Sabah under art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule of the Federal Constitution for each consecutive financial year for the period from the year 1974 to the year 2021 within 30 days and to reach an agreement within 90 days from the date of this order.

- (b) An order that the 1st Respondent pays the entitlement as determined under para 3 (a) above to the 2nd Respondent or as constitutional damages for breach of art 5 and 13 of the Federal Constitution or both.
- (c) An order that the 1st and 2nd Respondents account for the entitlement pursuant to the review undertaken under sub-para (3)(a) above.”

The Respective Parties’ Cases In A Nutshell

The Case For SLS

[19] SLS’ stance was that the Second Review Order was contrary to the imperatives of Clauses (1) and (4) of art 112D which mandate the Federal Government and the State Government (taking each clause in turn):

- (i) to conduct a review of the 40% Entitlement (provided under cl 1(a) of art 112C) and any substituted or additional grant made by virtue of cl (1) of art 112D;
- (ii) for such review to make provision of a period of five years or (except in the case of the first review) such longer period as agreed between the Federation and the State of Sabah; and
- (iii) for the period covered by the second review to begin with the year 1974.

[20] It was contended that contrary to arts 112C and 112D, there was no review held in 1974 which resulted in the State of Sabah not making its 40% Entitlement in respect of each and all of the 48 years from 1974 to 2021 (“the Lost Years”).

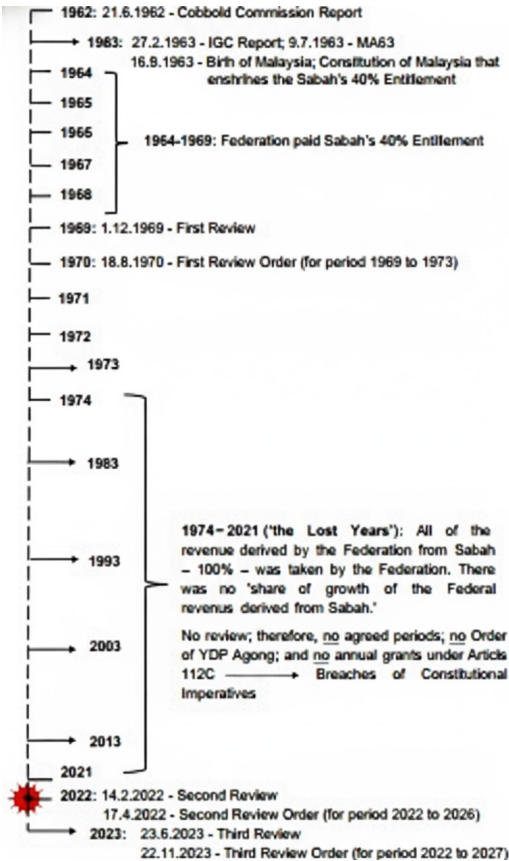
[21] It was further asserted that:

- (i) the Second Review Order was therefore *ultra vires* the express provisions of the FC and more particularly art 112C and 112D read together with the Tenth Schedule Parts III, IV and V thereto;
- (ii) there was a breach of natural justice as the 1st Respondent had failed and or neglected to hold a Second Review for the period beginning in 1974. This has resulted in the 40% Entitlement of the State of Sabah under the FC to be ignored or discarded for 48 years in breach of the express provisions of the FC;



- (iii) the Second Review Order was contrary to the express provision of art 112C and art 112D of the FC as it failed to provide for each consecutive year for period from 1974 to 2021 therein;
- (iv) the Second Review Order was irrational and unreasonable as it failed to take into account para 24(6), (8) and (9) of the Inter-Governmental Committee Report (“IGC Report”) which entitles the State of Sabah to receive grants based on the 40% formula as provided under art 112C and Part IV of the Tenth Schedule for the period from 1974 to 2021; and
- (v) the Second Review Order was disproportionate to arts 112C and 112D of the FC particularly the application of the formula as set out in Part V of the Tenth Schedule thereto as the amount that would be derived from the 40% formula would be highly disproportionate to the amount now purportedly agreed upon in the Second Review Order.

[22] The following illustration was provided by SLS to summarise the relevant timeline of events in this matter:



The Case For The Federal Government

[23] The 1st Respondent's stand was that there was no outstanding payment due and owing to the State of Sabah between 1974 and the Second Review Order.

[24] This was premised on the 1st Respondent's further stand that:

- (i) It had already paid the annual grants of RM26.7 million (which sum was based on the sum paid for the year 1973 under the First Review Order), which payments had been accepted by the State Government from 1974 until 2021;
- (ii) The First Review Order was effective until it was revoked by the Second Review Order in 2022, which in turn was effective until it was revoked by the Third Review Order made on 22 November 2023; and
- (iii) The sum of RM125.6 million, which was both agreed to as payment for the Year 2022 in the Second Review Order and the Third Review Order, was paid on 16 June 2022.

[25] In addition, the 1st Respondent's stand was that the review process was on-going from 1974 up until the year 2021 between the 1st and 2nd Respondents concerning the amount to be granted by way of a substituted grant under Article 112D(1) of the FC taking into account the consideration stipulated in art 112D(2) of the FC.

The Case For The State Government

[26] The 2nd Respondent took a somewhat neutral stand and contended that it had, at all material times, continuously pursued its rights to a review of Sabah Special Grant, that after the First Review Order and up until the year 2020, it had corresponded and or met with the 1st Respondent towards that purpose wherein there was an acknowledgement by the 1st Respondent that a review of Sabah Special Grant was necessary given that the one and only review was conducted in 1969.

[27] Despite this, according to the 2nd Respondent there was no agreement and or subsequent review to the First Review Order that resulted in a substitution of the First Review Order. As a result, the 2nd Respondent had received and continued to receive RM26.7 million for each of the consecutive years from 1973 until 2021.

[28] As the parties were unable to agree on a quantum for the new Sabah Special Grant and/or any outstanding payments due to the absence of a review of Sabah Special Grants since 1973, the 2nd Respondent averred that an "interim arrangement" was agreed upon which resulted in the Second and Third Review Orders.



[29] However, the 2nd Respondent asserted that this was on a “without prejudice” basis and pending further negotiations between the parties with the following express conditions:

- (a) that the 2nd Respondent was entitled to rely on the original formula as stated in art 112C and Part IV of the Tenth Schedule of the FC; and
- (b) that the 2nd Respondent was entitled to recover any outstanding payments due to the absence of a review of Sabah Special Grants since 1973.

[30] The respective parties’ cases would be revisited in the latter part of this judgment and considered on their merits as against the relevant constitutional provisions.

Preliminary Issues

[31] Before delving into the merits of the application, there were two interrelated issues raised by the 1st Respondent which merited this court’s preliminary determinations.

Jurisdictional Point

[32] The first was a jurisdictional point.

[33] It was contended that the Court’s jurisdiction to review under O 53 of the ROC 2012 was ousted given the divergence in the positions taken by the Federal Government and State Government with respect to the constitutional right of the State of Sabah for a review exercise under art 112D(3) and (4) of the FC and the 40% Entitlement for special grant each consecutive financial year from 1974 to 2021.

[34] It was submitted that the Federal Government and Sabah Government were at odds as regards the issue of whether there was an outstanding payment due to the absence of a review of Sabah Special Grants since 1973. Thus, although leave to commence judicial review proceedings had been brought by SLS, according to learned Senior Federal Counsel (“SFC”), the issue has evolved at the substantive stage into a dispute between the Federal Government and Sabah Government.

[35] Indeed, as set out earlier, the case for the 1st Respondent was that there was no outstanding payment for the Lost Years while the 2nd Respondent’s case was that while it had accepted the RM26.7 million for the years from 1973 until 2021 and agreed to the “interim arrangement” in the form of the Second and Third Review Orders, it never waived its rights to the outstanding payments since 1973.



[36] Learned SFC submitted that this “dispute” fell within the original jurisdiction of the Federal Court under art 128 of the FC, reproduced below:

- “(1) 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:
- (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
 - (b) disputes on any other question between States or between the Federation and any State.
- (2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.
- (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.”

[37] The Federal Court case of *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 2 MLRA 1 was cited to contend that whilst all courts are empowered to interpret the FC under its different provisions, the Federal Court has exclusive jurisdiction to determine Federal and State disputes pursuant to art 128(1)(b) of the FC.

[38] The 1st Respondent had in fact already raised this issue in the leave application before the Federal Court. However, the Federal Court was not in favour of the argument, *inter alia*, holding that it was “obvious” that the appeal must involve some form of disagreement between the relevant parties and that since there was no claim by Sabah on its own behalf, it could not be said that there was a dispute between Sabah and the Federation (for art 128(1)(b) to apply).

[39] In revisiting the argument before this court, learned SFC submitted that the 2nd Respondent had become a party to the proceedings at the leave stage by virtue of O 53 r 8(1) of the ROC 2012. Thus, the 2nd Respondent’s stance was not clear at that time as opposed to in the substantive application.

[40] Both SLS and the 2nd Respondent resisted the arguments by the 1st Respondent on this issue on the ground that notwithstanding the inclusion of the 2nd Respondent as a party in the application, it remained true that the State Government has not made any claim, nor has it been sued by, or sued the Federal Government as the inter-Governmental ‘dispute’ envisaged under cl (1)(b) of art 128.



[41] It is instructive to first reproduce in full what the Federal Court in *Dato' Seri Anwar Ibrahim* had stated on the jurisdiction of the Federal Court:

“[13] The general scheme of the FC is to empower all courts to interpret the constitution (*Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 2 MLRA 547 at [35]-[36]). The power to interpret constitutional provisions is not exclusive to the Federal Court. ‘The Federal Court is not a constitutional court, but as the final Court of Appeal on all questions of law, is the final arbiter on the meaning of constitutional provisions’ (A Harding, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at p 138).

[14] The jurisdiction of the Federal Court is of four kinds: appellate jurisdiction, original jurisdiction under art 128(1) of the FC, referral jurisdiction under art 128(2), and advisory jurisdiction under art 130 (*Assa Singh v. Mentri Besar Johore* [1968] 1 MLRA 886, *Kulasingham v. Public Prosecutor* [1978] 1 MLRA 603). The exclusive original jurisdiction of the Federal Court is confined only to Federal-State disputes, disputes between states, and cases where the validity of a law is challenged on the ground that Parliament or a State Legislative Assembly had legislated on a matter on which it had no power to make laws. All other questions of constitutionality are within the jurisdiction of the High Court (*Gin Poh Holdings Sdn Bhd* at [36]).

[15] The limits of the exclusive original jurisdiction of the Federal Court are strictly construed. This is to preserve the role of the Federal Court as a final Court of Appeal on constitutional issues; ‘to extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land’ (*Rethana M Rajasigamoney v. The Government Of Malaysia* [1984] 1 MLRA 233).

[16] Under the constitutional scheme, therefore, the Federal Court is generally a court of last resort for all constitutional questions. It is only in a narrow category of exceptional cases — those expressly stipulated in art 128(1) of the FC — that such questions must be determined by the Federal Court at first instance.”

[42] The above statement of the Federal Court could not be any clearer. As learned SFC submitted, the Federal Court did hold that it has exclusive original jurisdiction when the matter involves Federal and State disputes. However, the Federal Court also went on to add that the High Court has jurisdiction to hear and decide on all other questions of constitutionality.

[43] In my considered view, the facts of the present case fell within those “other questions of constitutionality” for which this court was clothed with jurisdiction to adjudicate.

[44] Further, a careful reading of Justice Nallini’s statement in the judgment of the Federal Court in *Attorney General of Malaysia v. Sabah Law Society* precluded the facts of the present case from falling within the dispute envisaged under cl (1)(b) of art 128.



[45] Her Ladyship held that:

“...art 128(1)(b) says that disputes ‘between’ the Federation and any State fall within the Federal Court’s exclusive jurisdiction; it does not say that disputes **affecting or relating** to the Federation and any State fall within the Federal Court’s exclusive jurisdiction. If the article is intended to impose a substantive restriction on the type of matters that must be brought only to the Federal Court, it would have used different words. **The word ‘between’ suggests that what matters is that the parties to the suit are the Federation and any State not that the suit affects the Federation and/or any State;**”

[Emphasis Added]

[46] The divergence in the stances taken by the Federal Government and the State Government as regards whether there was an outstanding payment for the Lost Years, in my view, did not amount to a ‘dispute’ within the contemplation of art 128(1).

[47] As held by Sarkaria J in the Supreme Court of India case of *Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor* [1979] AIR 1203:

“The term ‘dispute’ means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.”

[48] As would be evident in the later part of this judgment, the divergence in the stances by the 1st and 2nd Respondents merely went to the differences in their respective understanding of arts 112C and 112D of the FC. This by itself was insufficient to oust this court’s jurisdiction. To construe art 128 to apply to the facts and circumstances of the present case would be to apply a liberal interpretation of constitutional provisions that confer jurisdiction to the courts contrary to the general rule — see *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 2 MLRA 23; *Tan Sri Eric Chia Eng Hock v. PP* [2006] 2 MLRA 556.

[49] Additionally, to agree with learned SFC’s contentions on this issue would be to ignore the fact that the judicial review was brought by SLS, whose *locus standi* was challenged by the 1st Respondent to the Court of Appeal and the Federal Court (at the leave stage). Having successfully defended their standing, to invoke art 128 at this stage would not only have denied SLS of their rights to be heard on the merits of the substantive judicial review application but also derail the whole proceedings which at the time already taken three years since its filing.

[50] In contrast, and I found it to be highly significant, the fact that this issue was not raised by the 1st Respondent at the earliest possible time (ie after the close of the affidavits in March 2025) but only through the 1st Respondent’s written submissions strongly suggested that this issue was not at all pivotal to their case in this judicial review.



The 2nd Respondent Not Being An “Appropriate” Party

[51] The second issue raised by the 1st Respondent had to do with the position taken by the 2nd Respondent in the judicial review and related to the 1st Respondent’s arguments on art 128 discussed earlier.

[52] It was asserted that the 2nd Respondent’s stand was “aligned” with SLS namely that the 2nd Respondent was entitled to rely on the original formula as stated in art 112C and Part IV of the Tenth Schedule of the FC and to recover any outstanding payments due to the absence of a review of Sabah Special Grants since 1973.

[53] This, according to learned SFC, rendered the 2nd Respondent’s inclusion as a party to the judicial review, “inappropriate” as it was argued that O 53 r 8(1) of the ROC 2012 applies (only) to persons wishing to be heard in opposition. It was submitted that this amplified the invocation of art 128(1)(b) of the FC.

[54] The Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 2 MLRA 453 and the Court of Appeal case of *Advance Synergy Capital Sdn Bhd v. The Minister Of Finance Malaysia & Anor* [2011] 1 MLRA 477 were cited in support.

[55] I did not find these cases to be of any assistance to the 1st Respondent on the facts of the present case. Here, a High Court order was made on 20 July 2022 granting the 2nd Respondent leave to be joined as a party in the judicial review and for the 2nd Respondent “to be heard in all judicial review proceedings herein”. This necessarily meant including the present substantive judicial review.

[56] The said Order was never appealed against and or set aside, and as such, was valid and must be obeyed — see *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 6 MLRA 103; *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLRA 101. Thus, to accept the 1st Respondent’s contention that the 2nd Respondent was an “inappropriate” party to the proceedings would be to completely ignore the said Order.

[57] In any event, from this court’s own evaluation of the 2nd Respondent’s averments in its affidavits and the submissions by learned State-Attorney General (“SAG”), it could not be said that the 2nd Respondent’s position was “aligned” with SLS. The 2nd Respondent in fact opposed the order for *certiorari* which was the primary remedy sought by SLS in this application. This was sufficient for this court to exercise its wide discretion to hear the 2nd Respondent in this application.

[58] For the above reasons, I did not agree with the 1st Respondent’s contention that this court’s jurisdiction was ousted by art 128. I had therefore proceeded to consider the merits of the application.



This Court's Decision On The Merits

[59] The merits or otherwise of this application turned on the construction of art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D.

[60] It would therefore be appropriate to reproduce the relevant provisions under arts 112C and 112D:

“Article 112C Special Grants and assignment of revenue to States of Sabah and Sarawak

- (1) Subject to the provisions of art 112D and to any limitation expressed in the relevant section of the Tenth Schedule:
 - (a) the Federation shall make to the States of Sabah and Sarawak in respect of each financial year the grants specified in Part IV of that Schedule; and
 - (b) each of those States shall receive all proceeds from the taxes, fees and dues specified in Part V of that Schedule, so far as collected, levied or raised within the States, or such part of those proceeds as is so specified.
- (2) The amounts required for making the grants specified in the said Part IV, and the amounts receivable by the State of Sabah or Sarawak under s 3 or 4 of the said Part V, shall be charged on the Consolidated Fund; and the amounts otherwise receivable by the State of Sabah or Sarawak under the said Part V shall not be paid into the Consolidated Fund.
- (3) In art 110, Clauses (3A) and (4) shall not apply to the State of Sabah or Sarawak.
- (4) Subject to Clause (5) of art 112D, in relation to the State of Sabah or Sarawak Clause (3B) of art 110:
 - (a) shall apply in relation to all minerals, including mineral oils; but
 - (b) shall not authorize Parliament to prohibit the levying of royalties on any mineral by the State or to restrict the royalties that may be levied in any case so that the State is not entitled to receive a royalty amounting to ten per cent *ad valorem* (calculated as for export duty).

Article 112D Reviews of special grants to States of Sabah and Sarawak

- (1) The grants specified in s 1 and subsection (1) of s 2 of Part IV of the Tenth Schedule, and any substituted or additional grant made by virtue of this Clause, shall at the intervals mentioned in cl (4) be reviewed by the Governments of the Federation and the States or State concerned, and if they agree on the alteration or abolition of any of those grants, or the making of another grant instead of or as well as those grants or any of them, the said Part IV and Clause (2)



of art 112C shall be modified by order of the Yang di-Pertuan Agong as may be necessary to give effect to the agreement:

Provided that on the first review the grant specified in subsection (2) of s 1 of the said Part IV shall not be brought into question except for the purpose of fixing the amounts for the ensuing five years.

...

- (3) The period for which provision is to be made on a review shall be a period of five years or (except in the case of the first review) such longer period as may be agreed between the Federation and the States or State concerned; but any order under cl (1) giving effect to the results of a review shall continue in force after the end of that period, except in so far as it is superseded by a further order under that Clause.
- (4) A review under this Article shall not take place earlier than is reasonably necessary to secure that effect can be given to the results of the review from the end of the year 1968 or, in the case of a second or subsequent review, from the end of the period provided for by the preceding review; but, subject to that, reviews shall be held as regards both the States of Sabah and Sarawak for periods beginning with the year 1969 and with the year 1974, and thereafter as regards either of them at such time (during or after the period provided for on the preceding review) as the Government of the Federation or of the State may require."

[61] Subsection (1) of s 2 of Part IV of the Tenth Schedule which provides for special grants to states of Sabah and Sarawak reads as follows:

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

[62] The questions for this court in this judicial review were twofold:

- (i) whether the review conducted by the Federal Government and Sabah Government on 14 February 2022 with the ensuing results contained in the Second Review Order complied with the constitutional duties imposed upon and powers vested in them under the FC at art 112C read with subsection (1) of s 2 of Part



IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D;
and

(ii) if the Governments had failed to comply with their duties and to properly exercise their powers, what was the effect of that failure in relation to the Second Review Order.

[63] SLS had invited this court to consider and approach the construction of these constitutional provisions with the historical facts and the constitutional foundation documents in mind.

[64] These “constitutional foundation documents” included the following:

- (i) Cobbold Commission Report (Cobbold Report);
- (ii) IGC Report;
- (iii) Malaysia Agreement 1963 (“MA 63”); and
- (iv) Malaysia Act 1963.

[65] It was highlighted by learned counsel for SLS that the provisions in the FC comprise part of the conditions that led to the people living in North Borneo agreeing to the formation of Malaysia and that these constitutional foundation documents attest to this fact. Thus, they could not be divorced from the court’s consideration when construing these constitutional provisions.

[66] While not disputing the veracity of the historical facts as set out in SLS’ affidavit, the 1st Respondent rather inexplicably downplayed their significance, stating that:

“... the history of formation of the Federation of Malaysia is not a factor to be taken into account in this judicial review application.”

[67] With respect, the 1st Respondent’s stand was against the decision by the apex court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1, that:

“[29] A constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles.”

[68] This sentiment was later echoed by the Court of Appeal in *Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal* [2022] 6 MLRA 59 which held as follows:

“[12] The historical background is important in determining the clear intention of the framers of the Constitution. It is well- established that a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles. This is because every utterance must be construed in its proper context, considering the historical background and the purpose for which the utterance was made. The background of a



constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of Government in accordance with certain moral and political values. Interpretation must take these purposes into account. (See: *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1)."

[69] It was with the above authorities in mind that this court considered the historical facts as set out by SLS in their affidavit. These facts provided the necessary context as to how the constitutional provisions came into being and how they were to be construed. As noted earlier, these facts were not disputed by the 1st Respondent.

Relevant Historical Facts

[70] The MA63 came into being on 9 July 1963. It was entered into between the Federation of Malaya, United Kingdom, acting as Colonial Governments of Sabah and Sarawak, and Singapore. The States of Sabah, Sarawak and Singapore were federated with Federation of Malaya, and the Federation of Malaya was later renamed as the Federation of Malaysia.

[71] The MA63 together with all the *Annexures* thereto was registered by the United Kingdom of Great Britain and Northern Ireland on 21 September 1970 with the United Nations and endorsed by the United Nations (UN) as an International Treaty and entered in the List Treaties as Registered with the UN as No 10760 in the United Nations — Treaty Series.

[72] The 40% Entitlement was one of the rights granted to Sabah as promised under the MA63. This right, amongst others, was contained in the IGC Report and the reason for the IGC was that the Cobbold Commission found that roughly only one-third of the people in these former colonies were in favour of the formation of Malaysia, one-third were willing to accept the Malaysia idea provided certain specific safeguards and rights were implemented for Sabah and Sarawak as conditions for formation of Malaysia, and the last one-third was a mixed group with the larger part dead set against the idea and wanted independence first and the other part that can be persuaded with assurances in place.

[73] In MA63 at Article II, the Government of the Federation of Malaya promised that Malaysia Act would be enacted by the Malayan Parliament to come into force on Malaysia Day, which was postponed to 16 September 1963.

[74] The financial provisions, including the duty to pay the 40% Entitlement, was contained in Malaysia Act and these were enacted as amendments in the Federal Constitution to constitutionalise the promise to make the 40% Entitlement to the State of Sabah that was at the same time federated with Malaya, Sarawak, and Singapore.

[75] In MA63 at Article VIII, it was also promised by the Governments of Malaya, North Borneo and Sarawak and further assured to the peoples of



Sabah and Sarawak that such rights in Chapter 3, *inter alia*, of the IGC Report, which included the 40% Entitlement, would be implemented.

The Constitutional Foundation Documents

[76] The case of *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 MLRA 205 concerned an application for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964.

[77] Among others, the proposed leave questions included the following 'constitutional law question':

"Whether in the construction of art 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957, and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in art 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?

[78] The Federal Court cited its own decision in *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii* [2009] 1 MLRA 602 and reminded that:

"The various documents, being the initial foundation in the formation of the Federation, must not be cast aside as mere historical artifacts."

[79] In *Datuk Hj Mohammad Tufail Mahmud*, the Federal Court heard arguments on two leave questions namely, (i) whether an advocate and solicitor from Peninsular Malaysia was entitled to appear as counsel in an appeal to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching; and (ii) whether an advocate from Sarawak was entitled to appear as counsel in an appeal to be heard by the Court of Appeal in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching.

[80] In coming to its decision on these issues, the Federal Court noted that "the Cobbold Commission was created to ascertain the views of the people of the Borneo States" and that the "report showed that the people had fears of substitution of one colonisation with another; fear of being taken over by the then Federation of Malaya; fears of the submersion of the individualities of North Borneo and Sarawak within the then Federation of Malaya."

[81] The Federal Court went on to note that:

"[17] These fears were ultimately addressed by the formation of the Inter-Governmental Committee (IGC) on which the British, Malaya (now properly known as Semenanjung Malaysia), North Borneo and Sarawak Governments were represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak relying on the Cobbold Commission Report...



[18] Following the IGC Report, the Malaysia Agreement was concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore and signed on 9 July 1963 (see p 3 of the Malaysia Agreement, see also *The Government Of The State Of Kelantan v. The Government Of The Federation Of Malaya And Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLRH 160)."

[82] More importantly, the Federal Court recognised that:

[23] **It must be noted that without such recommendations in the IGC, Cobbold Commission and the Malaysia Agreement, there may not be a Malaysia** (The Birth of Malaysia (3 Ed 2008), Malaysia Singapore and Hong Kong, Sweet & Maxwell Asia at p 11)."

[Emphasis Added]

[83] The historical facts and the constitutional foundation documents would be relevant as this court considered the counter-arguments by the parties on the issues raised. This included the submissions for the 1st Respondent that the legal right of the State of Sabah as provided under art 112C read with art 112D of the FC could not be extended based on the recommendation in the IGC Report and the Cobbold Report.

Did The Federal Government And The Sabah Government Fail To Comply With Their Duties And To Properly Exercise Their Powers?

[84] As a starting point, it must be noted that it was never the 1st Respondent's stand that the State of Sabah was not ever entitled to the 40% Entitlement under art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule of the FC. The 1st Respondent's stand was that the 40% Entitlement was not an immutable right but subject to review by the Federal Government and the State of Sabah based on the scope of art 112D of the FC.

[85] Neither was it the 1st Respondent's case that the formula expressed in the second declaratory relief sought herein was incorrect or erroneous. The 1st Respondent had no arguments with the said formula. The 1st Respondent's stand was simply that the manner in which the special grant based on the 40% formula was to be calculated had been rendered "academic".

[86] There was also no dispute that after the First Review Order 1970, the next review order ie the Second Review Order was made in 2022, after the lapse of 48 years.

[87] It was submitted by learned counsel for SLS that the plain language used in art 112D expresses the intent that by using the word 'shall', it is imperative or mandatory, rather than permissive or optional. As a rule of thumb, *prima facie*, 'shall' means that it is imperative. However, the word would also take its meaning from the context in which it is used — see *Bursa Malaysia Securities Berhad v. Mohd Afrizan Husain* [2022] 4 MLRA 547 where the Federal Court held



that the word 'shall' in r 16.11(2) of Bursa's ACE Market Listing Requirements was used in a 'directory' sense.

[88] It was further submitted that Clauses (1), (3) and (4) of art 112D use the imperative 'shall' when stipulating that the two Governments shall conduct the review.

[89] Clause (1) states, the special grant 'made by virtue of this Clause, shall at the intervals mentioned in cl (4) be reviewed by' the two Governments.

[90] Clause (3) in stipulating the 'period for which provision is to be made on a review shall be a period of five years or (except in the case of the first review) such longer period as may be agreed between' the two Governments 'but any order under cl (1) giving effect to the results of a review shall continue in force after the end of that period, except in so far as it is superseded by a further order under that Clause.'

[91] The imperative nature of the constitutional intent is further seen in cl (4) of art 112D which reads as follows:

"(4) A review under this Article shall not take place earlier than is reasonably necessary to secure that effect can be given to the results of the review from the end of the year 1968 or, in the case of a second or subsequent review, from the end of the period provided for by the preceding review; but, subject to that, **reviews shall be held** as regards both the States of Sabah and Sarawak **for periods beginning with the year 1969 and with the year 1974**, and thereafter as regards either of them at such time (during or after the period provided for on the preceding review) as the Government of the Federation or of the State may require."

[Emphasis Added]

[92] According to SLS, cl (4) means the following:

- (i) that the first review is mandated to be held for the period of five years from the beginning of the year 1969;
- (ii) that the period for annual payments of the special grant made under the first review would therefore be completed by the end of the year 1973; and
- (iii) that therefore, the second review must be held to make the special grant for the succeeding period beginning from the year 1974. And after the first and second reviews, the Federal Government and Sabah Government would hold such reviews to make the special grant as either of them may require.

[93] I found merits in SLS' reading of this provision. As noted earlier in this judgment, case law has long held that the court must have regards to not only



the historical facts but also the constitutional foundation documents when interpreting the constitutional provisions.

[94] In this respect, it was relevant to note the recommendations by the IGC in its Report to the Governments of the United Kingdom and Malaya that the special grant to the States of Sabah and Sarawak have to be included as amendments to Part VII of the then Malayan Constitution at the formation of Malaysia.

[95] Paragraph 24(8) of the IGC Report stipulates that:

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

[96] At subparagraphs (9)(iii) and (iv) of Paragraph 24 of the IGC Report, it was recommended by the IGC as follows:

“(iii) The first review should be undertaken in time to enable the assessor’s recommendations to be implemented with effect from the beginning of the sixth year after the application of Part VII of the Constitution to the Borneo States, and once implemented should remain in force until superseded by implementation of the recommendations of the second assessor.

(iv) The second review should similarly be undertaken in time to enable the assessor’s recommendations to be implemented with effect from the beginning of the eleventh year and should relate to the ensuing period of five years or such longer period as might be agreed upon by the parties concerned, and once implemented should remain in force until the end of that period and thereafter until superseded by implementation of the recommendations of a subsequent assessor.”

[97] In my considered view, SLS’ reading of cl (4) was consistent with the constitutional intent as illustrated in the recommendations in the IGC Report.

[98] As noted earlier, learned SFC has cautioned against relying on the recommendations in the IGC Report. Citing the Federal Court’s decision in *Keruntum Sdn Bhd v. The Director of Forest & Ors* [2018] 2 SSLR 167; [2018] 5 MLRA 175, it was submitted that SLS could not attempt to enforce terms relating to financial provisions which are not encompassed in the FC on the basis that they had been recommended in the IGC Report and the Cobbold Report.

[99] In *Keruntum*, an application was made to review the Federal Court’s earlier judgment on the basis that there was a coram failure of the Federal Court’s panel which did not consist of a judge of Borneo and therefore with Bornean experience. According to the applicant, His Lordship Hasan Lah FCJ, who sat



and penned the judgment of the Federal Court, was not with Bornean judicial experience.

[100] The applicant's main thrust of argument was grounded on the application of the IGC Report whereby the applicant contended that art 128 of the FC, read together with paragraph 26(4) of the IGC Report stipulate that a Bornean dispute before the Federal Court must be decided by a panel which includes at least one judge with Bornean judicial experience. Reference was made to paragraph 26(4) of the IGC Report which recommended the following:

“(4) The domicile of the Supreme Court should be in Kuala Lumpur. Normally at least one of the Judges of the Supreme Court should be a judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State.”

[101] As regards the arguments on the IGC recommendation, the Federal Court stated as follows:

- “(c) after the IGC Report, the CJA 1964 which came into effect from 16 March 1964 and specifically s 74 CJA 1964 remains unamended. Thus, reading s 74 CJA 1964 together with art 122 of the FC clearly does not impose a legal requirement that the Federal Court, when hearing or disposing of cases, must consist of at least one judge with Bornean judicial experience [17].
- (d) that the recommendation in paragraph 26(4) of the IGC Report was never implemented under art VIII of the Malaysia Agreement 1963. Since paragraph 26(4) of the IGC Report was never implemented by an express provision in the FC or by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak [19], [20].
- (e) Article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in paragraph 26(4) of the IGC Report cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to s 16 and 17 of the CJA [20].
- (f) since the said recommendation of the IGC Report has not and was never implemented under Article VIII of the Malaysia Agreement, the applicant cannot therefore claim any legal right to have a “judge with Bornean experience” in the appeal panel when its appeal was heard and decided by the Federal Court.”

[102] Learned SFC also referred to the majority decision in the Federal Court case of *TR Sandah Ak Tabau & Ors v. Director Of Forest Sarawak & Anor And Other Appeals* [2019] 5 MLRA 667 which held in summary that a recommendation under the IGC Report cannot be enforced if it had not been implemented by legislative, executive or other action by the Governments of the Federation of Malaya, Sabah or Sarawak and incorporated into the Constitution of Malaysia.



[103] Having regard to *Keruntum* and *TR Sandah*, it was then submitted for the 1st Respondent that:

- (i) recommendations relating to financial provisions in the IGC Report and the Cobbold Report which is absent in the FC cannot be read to form part and parcel of the financial provision found in the FC;
- (ii) the legal right of the State of Sabah is as provided under art 112C read with art 112D of the FC and cannot be extended based on the recommendation in IGC Report and the Cobbold Report;
- (iii) it is permissible for the court to refer to the IGC Report and Cobbold Report to the extent of aiding the interpretation of the provision of the FC; and
- (iv) the provisions of the Constitution are to be considered collectively, and every part and every word of a Constitution is to be so interpreted as to effectuate the great purpose of the instrument.

[104] It was additionally contended that the recommendations with regard to the financial provisions in the IGC Report and Cobbold Report had been considered and had resulted in the enactment of the Malaysia Act whereby its provisions had thereafter been incorporated into the FC as art 112C, art 112D of the FC and the Tenth Schedule of the FC.

[105] Before dealing with learned SFC's contentions against relying on the recommendations in the IGC Report, it would not be complete for this court to not also refer to the dissenting judgment by David Wong Dak Wah CJ (Sabah & Sarawak) in *TR Sandah*, where His Lordship discussed on the Federal Court's decision in *Keruntum*.

[106] His Lordship said the following:

“[96] With respect, the *Keruntum* judgment took a simplistic approach and had ignored the importance and the significance of the Malaysia Agreement 1963 and the IGC Report in the context of the formation of this country. Assurances were given by the respective signatories to the Malaysia Agreement and such assurances were not ordinary assurances as without these assurances there would not have been a nation known as Malaysia. To state the obvious, those assurances were given with the intention that the same will be implemented and given the sanctity they deserve. To ignore those assurances could not have been an option for the signatories to the Malaysia Agreement 1963. These assurances cannot with respect be treated as if they were terms of a commercial agreement because they formed the basis of a birth of a nation and hence should be given different consideration. The difference in nature between assurances leading to the formation of a nation and terms of a commercial agreement is so stark and obvious that it requires no explanation.



[97] Hence, it is my view that the *Keruntum* judgment suffers in three aspects:

- (a) firstly, the Federal Court ought to have applied the common law interpretation of international treaties;
- (b) secondly, the Federal Court ought to have had due regard to past judicial decisions on the legal effect of Malaysia Agreement 1963; and
- (c) thirdly, *a fortiori* the Federal Court ought to have accorded the Malaysia Agreement 1963 its proper construction to hold that the Judiciary is under the legal obligation to abide by paragraph 26(4) of the IGC Report.”

[107] His Lordship went on to opine on the status of the recommendations in the IGC Report by firmly stating the following:

“[129] Does it necessarily mean that since the recommendations in paragraph 26(4) of the IGC Report have not expressly been enacted into written law, they are not legally binding on us? Based on my explanation of the common law presumption above, I think the answer is clear. It bears repeating that the discretion of the Chief Justice in s 74 of the CJA ought to be construed in a manner requiring the Judiciary to uphold the recommendations in paragraph 26(4) of the IGC read together with article VIII of the Malaysia Agreement 1963.... Therefore, in my considered view, the recommendations forwarded in the IGC Report qua Malaysia Agreement 1963 ought to apply with equal force to s 74 of the CJA as they do with the Federal Constitution.”

[108] It must first be stated that this court was, at all times, cognisant of the fact that it was bound by the decision of the Federal Court in *Keruntum* and by the majority judgment of the Federal Court in *TR Sandah* by the doctrine of *stare decisis*.

[109] Having said that, this court respectfully found the view by the learned SFC on the function of the IGC Report in the context of construing the constitutional provisions herein to be unduly restrictive or limiting.

[110] From my understanding of SLS’ submissions, their reliance on the IGC Report’s recommendations and the rest of the constitutional foundation documents was to show the rationale behind the special grants promised to the States of Sabah and Sarawak pursuant to art 112C as aid to the interpretation of the relevant constitutional provisions.

[111] As noted in paras 76-79 above, our apex court has long recognised that the constitutional foundation documents play an integral role in the interpretation of constitutional provisions (also see *The Government Of The State Of Kelantan v. The Government Of The Federation Of Malaya And Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLRH 160).

[112] Pausing here for a moment, it will be appropriate to revert to the decisions in *Keruntum* and *TR Sandah*. In both cases, the issue of the composition of the Federal Court was considered, ie whether the absence of a judge with Bornean judicial experience contravened the recommendations in paragraph 26(4) of the IGC Report read with Article VIII of MA63.



[113] Here lies the distinguishing fact from the present — in both of these cases, the Federal Court referred to s 74 of the Courts of Judicature Act 1964 (“CJA 1964”) which provides the following:

“(1) Subject as hereinafter provided, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.”

[114] The Federal Court in *Keruntum* (approved by the majority justices in *TR Sandah*) had opined as follows:

“[17]... It is also to be noted that subsequent to the IGC Report, and the coming into force of the Courts of Judicature Act 1964 throughout Malaysia with effect from 16 March 1964, s 74 remained unamended. It is our considered view reading s 74 of the CJA together with art 122 of the Federal Constitution, clearly does not impose a legal requirement that the Federal Court, when hearing or disposing of cases, must consist of at least one judge with Bornean judicial experience.

...

[20] The said recommendation in paragraph 26(4) was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak. We are in agreement with the submission of learned counsel for the respondent that Article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in paragraph 26(4) of the IGC Report cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss 16 and 17 of the CJA.”

[115] One could immediately see from the above extract of the judgment that the Justices of the Federal Court concluded as they did in part because s 74 of the CJA 1964 had not been amended pursuant to Article VIII of MA63 to expressly provide that the composition of the Federal Court must include at least a judge with Bornean judicial experience as recommended in the IGC Report.

[116] Incidentally, it bears emphasising that Article VIII of MA63 does not specify a specific timeframe for the implementation of the assurances and recommendations contained in the IGC Report. Thus, the fact s 74 of the CJA 1964 has not been amended to give effect to the recommendations in paragraph 26(4) of the IGC Report does not necessarily mean that the issue is settled.

[117] But I digressed. Reverting to the present case and unlike in *Keruntum*, there was no equivalent to s 74 of the CJA 1964 to be also considered by this court. This Court was only invited to interpret art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D which this court was clothed with jurisdiction to do — see *Dato’ Seri Anwar Ibrahim*. On that premise, I was of the respectful view that learned SFC’s



reliance on *Keruntum* and *TR Sandah* to contend that this court ought to shut out its eyes to the recommendations by the IGC was misconceived.

[118] The IGC recommendations at subparagraphs (9)(iii) and (iv) of para 24 of the IGC Report were for the first review to be held from the beginning of the sixth year of Malaysia (ie 1969) and the second review be held from the beginning of the eleventh year (ie 1974).

[119] When juxtaposed with the wordings in cl (4) of art 112D, one could immediately see that cl (4) simply means as what had been recommended in the IGC Report ie the first review is mandated to be held for the period of five years from the beginning of the year 1969 (“not earlier than the end of the year 1968”). The period for annual payments of the special grant made under the first review would therefore be completed by the end of the year 1973. The second review must be held to make the special grant for the succeeding period beginning from the year 1974 and after the first and second reviews, the Federal Government and Sabah Government would hold such reviews to make the special grant as either of them may require.

[120] However, notwithstanding art 112D, it was common ground that there had not been a review from 1974 to 2021. According to SLS, this directly resulted in Sabah not being made a special grant as intended as a 40% share in the revenue derived by the Federation from Sabah. This, as the making of the 40% Entitlement from the Federation to Sabah was subject to an art 112D review.

[121] Consequent from the Federal Government’s failure to make the 40% Entitlement in respect of the Lost Years, SLS argued that the State of Sabah was deprived of funds that it needed for its development to the detriment and harm of the people living within it, which injury remained unaddressed. SLS further argued that this went against the purpose of the 40% Entitlement.

[122] It was highlighted that the IGC noted (at paragraph 24 at subparagraphs (6) to (11) of the IGC Report) that there was a concern of the administration that there would not be sufficient revenue for the Borneo states’ development. This, given that ‘taxation, including in particular customs and excise duties and taxes on incomes and profits’ would be a Federal matter though the Borneo states would retain the power to impose a Sales Tax (at paragraph 24 at subparagraph (1) of the IGC Report). The special grants were to be used to fund the state services and development of both states, which were acknowledged at the time of the IGC Report published in 1963 to be far behind Malaya in their basic structure.

[123] However, SLS said that decades later, the State of Sabah and by extension, its people were still struggling with the lack of development.

[124] In support, SLS has referred to opinions and articles published in the year 2022 which highlighted the deprivation and poverty of the people in Kota



Marudu, Kudat, Pitas, Beluran, Telupid, Nabawan, Tongod, and Kota Belud, Sabah which were stated to be eight out of ten poorest districts in Malaysia according to the data contained in the 12th Malaysian Plan and the enormous challenges faced by the people of Sabah due to lack of better access to basic infrastructure ranging from water, electricity, well-paved roads to health and education facilities.

[125] Indeed, these opinions and reporting were not exaggerations. Drawing from published Government statistics, the learned authors, Jaliyah Md Shah, Rosazman Hussin and Asmady Idris in their 2023 article, *Poverty Eradication Project in Sabah, Malaysia: New Initiative, New Challenges?*, Planning Malaysia: Journal of the Malaysian Institute of Planners, Vol 21, Issue 6 (2023) pp 477 - 492, for instance, stated the following:

“Poverty is a serious issue in Sabah, especially given that this state had the highest absolute poverty rate in Malaysia in 2019 and 2020. As shown in Figure 1, the incidence of absolute poverty in Sabah increased from 19.5% in 2019 to 25.3% in 2020. According to records, Sabah has had the highest incidence of absolute poverty in Malaysia since 1997 (Department of Statistics Malaysia, 2023). Meanwhile, eight of the ten poorest Malaysian districts in 2019 were in Sabah, with an average poverty line income of RM2,537.00 (12th Malaysia Plan, 2021-2025). Many poverty eradication projects have been implemented in Sabah, but the question remains why poverty remains prevalent in the state. According to Ragayah (2002), this high poverty rate is due to several factors, including a lack of infrastructure, the presence of foreigners, and the difficulty of accessing the geographical interior.”

[Emphasis Added]

[126] It was noteworthy that the 1st Respondent did not even attempt to rebut SLS’ assertions on Sabah’s (poor) state of development and the challenges its people endured and continued to endure. It was merely contended by the 1st Respondent that a breach of constitutional duty under art 112C read with art 112D(4) of the FC could not simply be established by reference to reports on the lack of basic amenities and infrastructure development in the State of Sabah and poor socio-economic condition of the people of Sabah.

[127] With the greatest of respect, learned SFC’s rather dismissive stance on this issue was, in my considered view, emblematic of the problem herein — the failure to appreciate that that was not what the people of North Borneo had bargained for when they agreed to the formation of the Federation of Malaysia. It is the legitimate expectation of the State of Sabah and her people under the MA63, the Malaysia Act and the constitutional foundation documents as well as the FC. Unfortunately, as shown in this Judgment, this has been disregarded and unfairly trampled upon.

[128] Mazlanie Mohd Lan and Emeritus Professor Datuk Dr Shad Saleem Faruqi, in their 2023 article, *“Special Financial Provisions for Sabah under the Federal*



Constitution: The Issue of the 40% Special Grant", 50(2) JMCL 1, summarised the situation as follows:

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

'Essentially, The Federation of Malaya was the suitor in this marriage, and the more favorable financial treatment was part of the bride-price'.

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

[129] The learned authors went on to note however that:

"Despite the special position given to the Borneo States in all the enumerated matters and the variety of sources of revenue available to the Borneo States, it is unfortunate that Sabah and Sarawak were still ranked as the poorest States in Malaysia. The aspirations that were set in theory is yet to be translated to a successful reality."

[130] In this respect, I agreed with the contentions by SLS that the nature of Sabah's special grant — the 40% Entitlement was to return to the State of Sabah a 40% share of the revenue derived by the Federation from the state each year in order that such grant could be used to fund the State's services and its development. The words "a grant of an amount equal in each year to two-fifths..." in subsection (1) of s 2 of Part IV of the Tenth Schedule envisaged that the 40% Entitlement was to be calculated yearly.

[131] At this juncture, it was appropriate to appreciate the manner in which the special grant based on the 40% formula was and is to be calculated (see paras 132-147 below). This was succinctly explained in paras 89-99 of SLS' submissions (encl 101). As the 1st Respondent had no arguments on this explanation (see para 64 of encl 120), it may therefore be substantially reproduced herein.

[132] In the Federation of Malaysia, no tax or rate is levied by or for the purposes of the Federation 'except by or under the authority of federal law': Article 96. Federal laws are Acts of Parliament and any existing law that continued in force after Merdeka Day that Parliament has power to legislate: Article 160.

[133] The revenue raised or received by the Federation is paid into and form one fund known as the Federal Consolidated Fund: cl (1) of art 97.

[134] All revenue raised or received by a State shall be paid into and form one fund known as the Consolidated Fund of that State: Clause (2) of art 97.



[135] The State must have the legislation in place before it could raise and receive the revenue or Parliament has put it in place by legislating for the State: Article 96 and art 110 read with Part III and V in the Tenth Schedule and arts 74, 76, 76A, 77 read with the Ninth Schedule, and art 71 read with s 12 in the Eighth Schedule of the FC.

[136] For example, annual rents on landowners under the Land Ordinance (Sabah Cap 68), ss 9, 31 and 132 and the Land Rules and Rent Revision Rules, and sales tax under the Sales Tax Enactment 1998, s 6 for taxable goods, for instance, crude palm oil under the State Sales Tax Order (Rate of Tax) Order 2004.

[137] The revenue raised by the State is paid into the Consolidated Fund of the State. These examples are sources of revenue assigned to States, the annual rent falls under s 2 in Part III and the state sales tax under s 7 in Part III of the Tenth Schedule.

[138] As stated in paras 14 — 17 above, the 40% Entitlement is to be distinguished from all the other grants, capitation grant and road grant, to which the other states of the Federation are entitled to.

[139] Based on the definition in s 2 in Part IV of the Tenth Schedule of the FC, the two-fifths of the amount (40%) by which the net revenue derived by the Federation from Sabah exceeds the net revenue which would have been so derived in the year 1963 places the grant as a growth revenue grant under and after the formation of Malaysia.

[140] Since Malaysia was formed on 16 September 1963 (date defined as Malaysia Day), the whole annual year of 1963 had to be taken to calculate the net revenue but using the pre-Malaysia tax or fee.

[141] Sabah's 40% Entitlement is known as a growth revenue grant which is known in revenue circles as a grant in which the Federation makes grant from its revenue received to the States of the Federation: see Tun Mohamed Suffian Bin Hashim, *An Introduction to the Constitution of Malaysia* (2nd Edn, Government Printer, 1976) at p 188; sub-para (8) of para 24 of the IGC Report. It is to be contrasted from the special grant to Sarawak which is an escalating revenue grant (sub-para (7) of para 24 of the IGC Report).

[142] Based on the above, it was submitted for SLS and as noted earlier, not disputed by the 1st Respondent, that the legislative intent is that the revenue that is captured for growth sharing between the Federation and Sabah is a broad one, for it is the net revenue 'derived by the Federation from Sabah', meaning the net revenue that is sourced, or that originated, from Sabah. SLS further contended that this would necessarily mean that as long as the revenue is obtained from Sabah; it does not matter whether it is declared and/or paid for outside of Sabah and it would be part of the said net revenue.



[143] The growth revenue that is intended to be shared between the Federation and the State of Sabah in the proportion of 60:40 is the revenue derived by the Federation from Sabah, less any amounts the State has received in respect of assignments of that revenue. The assignments of revenue that did not accrue to the Federation would not form part of the Federal Consolidated Fund. The State would have received this revenue in the Consolidated Fund of the State.

[144] SLS further contended that only the amounts received by the State in respect of assignments of that revenue, that is—revenue accruing to the Federation and received into the Federal Consolidated Fund before it is later paid into the Consolidated Fund of that State that would need to be deducted to constitute the net revenue as defined in s 2 in Part IV of the Tenth Schedule.

[145] Article 112C, the provision on the making of the 40% Entitlement from the Federation to the State of Sabah, states how the payment is to be implemented in the context of other payments. After stating that the Federation shall make the special grant to the States of Sabah and Sarawak in each financial year, subparagraph (b) of cl (1) of art 112C says that the States shall also receive all proceeds from the taxes, fees and dues specified in Part V of the Tenth Schedule as collected, levied or raised within the State. These proceeds would therefore go into the Consolidated Fund of the State.

[146] Then in Clause (2) of art 112C, it expressly stipulates that only the amounts receivable by the State under ss 3 or 4 of Part V shall be charged on the Federal Consolidated Fund and the amounts otherwise receivable under Part V shall not be paid into the Federal Consolidated Fund. Amounts receivable under s 3 are export duty on minerals that would be collected and paid into the Federal Consolidated Fund. Since the amounts were assigned to the State but form part of the Federal Consolidated Fund, they need to be deducted before 40% of such revenue, i.e., the net revenue, is made to the State and paid from the Federal Consolidated Fund.

[147] The formula for the calculation of the 40% Entitlement is as follows:

$$\begin{aligned} &\text{Federal Revenue derived from Sabah in current Year [A]} \\ &\text{Revenue Assigned to State [ss 3 or 4 of Part V of the Tenth Schedule]} \\ &\text{[B]} \\ &\text{Net Revenue derived from Sabah in current Year (A — B = C) [C]} \\ &\text{Federal Revenue derived from Sabah in 1963 [D]} \\ &\text{Revenue assigned to Sabah in 1963 [E]} \\ &\text{Net Revenue derived from Sabah in 1963 (D — E = F) [F]} \\ &\text{Special Grant due to Sabah in Current Year: } 40\% \times (C — F = G) \text{ [G]} \end{aligned}$$



Why The 1st Respondent's Case Was Untenable

[148] At the outset, this court noted that the 1st Respondent stayed true to their assertions against placing any relevance on the history of formation of the Federation of Malaysia and the IGC recommendations in this judicial review application and avoided making any reference to them in their discussions on the proper construction of art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D of the FC.

[149] It appeared to this court that the 1st Respondent's reading of the relevant provisions was confined to the cold letters of the FC. This was rather unfortunate given what the Judicial Committee of the Privy Council in *Matadeen v. Pointu* [1998] UKPC 9 had stated on the importance of the underlying values of a constitution:

“... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of Government in accordance with certain moral and political values. Interpretation must take these purposes into account.”

[150] The 1st Respondent has averred that by virtue of the First Review Order, the 1st Respondent ceased to provide the grant based on s 2(1) of Part IV of the Tenth Schedule of the FC and instead, pursuant to Article 112D(1) of the FC the 1st Respondent substituted Sabah Special Grant with another grant for the period of 5 years for 1969, 1970, 1971, 1972 and 1973 in the amount of RM20 million, RM21.5 million, RM23.1 million, RM24.8 million and RM26.7 million respectively.

[151] The 1st Respondent read art 112D(3) of the FC to mean that the First Review Order continued in force after the end of that period, except in so far as it was superseded by a further order which, according to the 1st Respondent, was in fact later superseded by the Second Review Order some 48 years later in 2022.

[152] The 1st Respondent next asserted that the amount to be granted under the new substituted grant pursuant to Article 112D(1) of the FC was subject to ongoing negotiations between the 1st and 2nd Respondents since 1974, taking into account the financial position of the Federal Government and the needs of the State of Sabah.

[153] In the meantime, the amount of RM26.7 million under the First Review Order remained in force as Sabah Special Grant and had been paid from 1973 onwards until the sum was increased to RM125.6 million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million in the respective



financial years 2022, 2023, 2024, 2025 and 2026 under the Second Review Order.

[154] By the Third Review Order the sum of RM125.6 million was maintained for the financial year 2022 but the sum was increased to RM300 million, RM306 million, RM312 million, RM318 million and RM325 million respectively in respect of the financial year 2023, 2024, 2025, 2026 and 2027.

[155] The 1st Respondent's contention that there had been an "ongoing negotiation" between the 1st Respondent and the 2nd Respondent since 1974 may be immediately dealt with.

[156] As rightly pointed out by SLS, there was no evidence at all produced before this court to support the 1st Respondent's assertion on the existence of an "on-going" review. Not a single document was exhibited, only the following averments by the 1st Respondent (at paras 6.1 and 6.2 of Encl 91):

"6.1 starting from 1974 up until the year 2021, the review process was on-going between the 1st Respondent and 2nd Respondent concerning the amount to be granted by way of a substituted grant under Article 112D(1) of the Federal Constitution taking into account the consideration stipulated in art 112D(2) of the Federal Constitution;

6.2 in the negotiations during the review process, the 1st Respondent took note of the fact that there had been no further order to replace the First Review Order dated 18 August 1970 and consistently held that the issuance of any order under Article 112D(1) is subject to art 112D(2) of the Federal Constitution;"

[157] One would think that after the lapse of some 48 years, some semblance of evidence would be forthcoming of such ongoing review — the people of Sabah (whose interests have been and are directly affected) has legitimate expectation and indeed deserve to know what exactly their Governments (Federal and State) have done in all those 48 years to realise and ensure the continuity of the conditions and safeguards that their forefathers had insisted on when they agreed to become part of the Federation of Malaysia.

[158] One must not forget the following assessment by the Cobbold Commission:

"About one-third of the population in each territory strongly favours early realisation of Malaysia without too much concern about terms and conditions. **Another third, many of them favourable to the Malaysia project, ask, with varying degrees of emphasis, for conditions and safeguards varying in nature and extent; the warm support among this category would be markedly influenced by a firm expression of opinion by Governments that the detailed arrangements eventually agreed upon are in the best interests of the territories...**"

[Emphasis Added]



[159] It was thus rather troubling to say the least that after some 48 years and this application being brought up for the first time, all the 1st Respondent could rely on to support its claim as to the 48-year-long ongoing review were affidavit averments and without more.

[160] If the argument was that the supporting documents were classified documents or “rahsia”, it certainly did not stop the 1st Respondent’s counterpart, the 2nd Respondent, from disclosing such similar documents. Even then, none of the documents produced by the 2nd Respondent suggested that the review process started in 1974 and continued until 2021.

[161] In fact, the 1st Respondent’s assertion was quickly shut down by the 2nd Respondent who averred as follows:

- “5. On more than one occasion, the 1st Respondent had acknowledged that a review of Sabah Special Grant was necessary given that the one and only review was conducted in 1969 resulting in Sabah Special Grant (First Review) Order 1970 (P.U.(A) 328/1970) dated 18 August 1970...
6. Despite the various correspondences and meetings between the 1st and 2nd Respondents, there was no agreement and/ or subsequent review to the First Review Order that resulted in a substitution of the First Review Order...”

[162] If the above wasn’t clear enough, when asked by this court during the hearing whether there had been a breach by the 1st Respondent of its obligation to conduct the review, learned SAG, without missing a beat, answered in the affirmative.

[163] Additionally, it is expressly stated in the second paragraph of the preamble to the Second Review Order as follows:

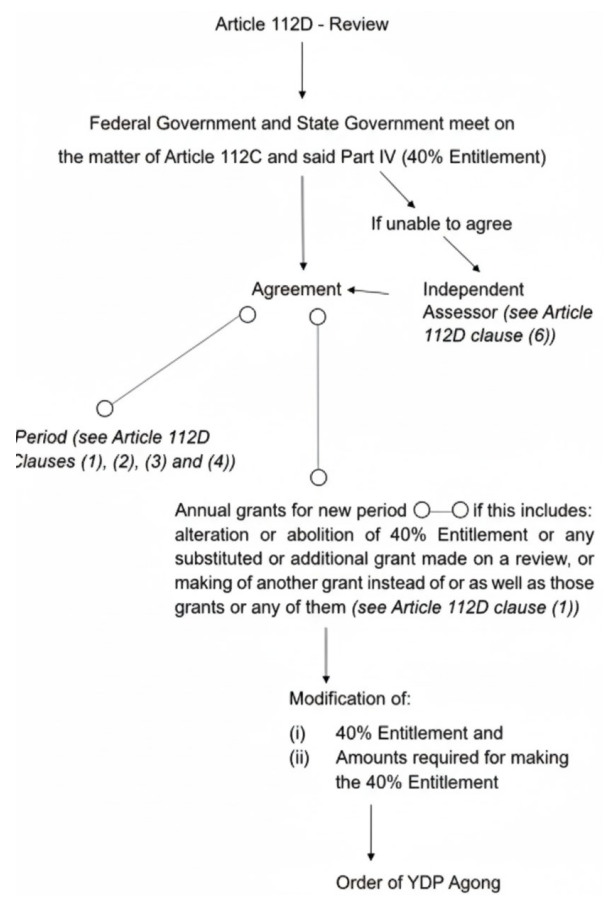
“AND WHEREAS the review was held by the Governments of the Federation and the State of Sabah on 14 February 2022.”

[164] Thus, the review therein could not have, by any stretch of imagination, covered the period during the Lost Years.

[165] As rightly pointed out by SLS, even if one were to entertain the idea of a 48-year-long and ongoing review, such claim was untenable when considered in the light of the clear constitutional provisions.

[166] SLS has provided the flow-chart as to the process involved in the review under art 112D which this court found to be helpful, reproduced in the following page.





[167] A review as contemplated under art 112D must include the following elements:

- (i) Meeting between the representatives of the Federal Government and Sabah Government for the purpose of a review of the special grant;
- (ii) Agreement between them as to a mandated fixed period of 5 years or another agreed period for the annual grant to be made (Clauses (1), (2), (3) and (4));
- (iii) (a) Agreement on the specified grant for each year in that mandated or agreed period,
- (b) If Agreement on the specified grants each year includes alteration or abolition of the 40% Entitlement or any substituted or additional grant made on a review, or



making of another grant instead of for as well as these grants or any of them for that agreed period.

- (iv) Then modification of the duty to make the 40% Entitlement and the amounts required for making the 40% Entitlement by an Order of the Yang di-Pertuan Agong.

[168] If in the process of carrying out the review under art 112D, the two Governments are unable to reach an agreement on any matter, it shall be referred to an independent assessor, and his recommendations shall be binding on the two Governments as if they were the agreement of those Governments as provided under Clause (6) of art 112D.

[169] Taking the 1st Respondent's case at the most, the only essential element under art 112D which would have been fulfilled by the purported ongoing review would have been that the two Governments had corresponded and or met to broach the subject of a review of the special grant in 1974 and that this continued up until 2021. This amounted to procedural impropriety and was irrational and unreasonable.

[170] To accept the 1st Respondent's argument on this issue would be to re-write art 112D so that the provision only requires the Federal and State Governments to meet or correspond with each other on this matter. This, as this was what the 1st Respondent had claimed to have happened in those 48 long years. Taking it further, if accepted, the 1st Respondent's interpretation would mean that the grant in 1973 may continue to apply indefinitely and even, ad infinitum. Likewise, it would allow the two Governments to embark on a never-ending ongoing review!

[171] Next, the 1st Respondent's assertion that there was an ongoing review from 1974 to 2021 and that the First Review Order remained in force until it was revoked by the Second Review Order.

[172] Learned counsel for SLS was quite correct to note that the 1st Respondent's stance, if accepted, would result in an interpretation of art 112D which would allow the outcome of a review conducted on 1 December 1969 between the two Governments to govern the amounts in grants made from the Federation to Sabah as many as 52 years later in 2021.

[173] Clause (2) reads as follows:

“(2) Any review under this Article shall take into account the financial position of the Federal Government, as well as the needs of the States or State concerned, but (subject to that) shall endeavour to ensure that the State revenue is adequate to meet the cost of State services as they exist at the time of the review, with such provision for their expansion as appears reasonable.”

[174] With respect, the 1st Respondent's stance that there was an ongoing review from 1974 to 2021 and that the First Review Order remained in force until the



Second Review Order in 2022 was not only irrational and unreasonable but absurd as it failed to consider cl 2 of art 112D, which provides that any review under the Article shall consider the following:

- (i) The financial position of the 1st Respondent;
- (ii) The needs of Sabah; and
- (iii) Whether or not the revenue of Sabah is adequate to meet the cost of the State services.

[175] The 1st Respondent's contention that SLS ought to be precluded from contending that the Second Review Order was irrational and amounted to *Wednesbury* Unreasonableness on the ground that it was not pleaded in the Statement filed pursuant to O 53 ROC 2012 was not convincing. First, I did not find it to be a new or unpleaded ground. On the contrary, I found them to be relevant considerations when construing art 112D and determining the lawfulness or otherwise of the Second Review Order.

[176] For the Second Review Order to be a properly conducted and rational review under art 112D, it must encompass at the very least when the last review was conducted, the period for which the review would cover, the financial position of the Federal Government and the needs of the State Government in regard to the State services with room for expansion, the amounts of net revenue derived by the Federation from Sabah for each consecutive year in the period for which the review to agree to and make the special grant would cover, the amount of net revenue derived for the year 1963 to be readily available during the review. Clause 2 of art 112D expressly requires this.

[177] The Second Review Order, in its omission of any consideration of the special grant, its annual amount, and allocation of payment for that period from 1974 to 2021, is irrational and unreasonable (in the *Wednesbury* sense).

[178] The words 'at the time of the review' appearing in cl 2 of art 112D could not be ignored so that it could be accepted that the framers of the FC could or would have intended for a review that was outdated, by decades, to continue to govern the grants paid by the Federal Government to the State of Sabah.

[179] At the very least, common sense would dictate that the needs of Sabah in 2020, for instance, would not have been the same as it was in 1974. To put it another way, the sum of RM26.7 million under the First Review Order would have gone a long way towards the development of Sabah in 1974, but the same could not be said in the year 2020. However, that was what Sabah received then.

[180] Further, in stating that the amount of RM26.7 million under the First Review Order had been paid from 1973 onwards until when the sum was increased under the Second Review Order, the 1st Respondent was silent as to what the financial position of the Federal Government and the needs of the



State Government in regard to the state services were or as to the amounts of net revenue derived by the Federation from Sabah for each consecutive year during that period. Thus, how could it be said that there was even an ongoing review under cl 2 of art 112D to begin with?

[181] In relation to this issue, there was submission by learned SFC that this court ought to refrain from considering whether the annual substituted grant of RM26.7 million by the Federal Government to the State Government of Sabah failed to meet the needs of the State of Sabah within the parameters established by art 112D(2) of the FC.

[182] According to learned SFC, these are matters concerning the financial position of the Federal Government and therefore non-justiciable as it involves economic and policy considerations. The following cases were cited in support: *Letitia Bosman v. PP & Other Appeals* [2020] 5 MLRA 636; *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad*; *President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 3 MLRA 87; *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1; *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 MLRA 179; and *Dom inic Lau Hoe Chai v. Maszlee Malik & Ors* [2019] MLRHU 1449.

[183] First, a distinction must be made of the present case from the above cases. Here, the judicial review was not to challenge the policy of the special grants due to Sabah but rather, the legality of the acts and omissions of the 1st Respondent in respect of its powers in making the special grant payments to Sabah under arts 112C and 112D read with s 2(1) of Part IV of the Tenth Schedule of the FC. This was within the powers of this court — *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 4 MLRA 452.

[184] In fact, this issue has been dealt with by the Court of Appeal and the Federal Court in *Attorney General of Malaysia v. Sabah Law Society (State Government of Sabah, Intervener)* and *Attorney General of Malaysia v. Sabah Law Society* respectively. Suffice for this court to just refer to the relevant decisions by the Court of Appeal and the Federal Court on this issue.

[185] Speaking through Ravinthran Paramaguru JCA in *Attorney General of Malaysia v. Sabah Law Society (State Government of Sabah, Intervener)*, the Court of Appeal had said the following:

“[11] The Counsel for the SLS was at pains to point out that the judicial review action seeking *certiorari*, declaration, and *mandamus* is only aimed at compelling the Federal Government to perform its constitutional duty under arts 112C, 112D and the Tenth Schedule of the Federal Constitution, i.e., the failure to conduct a review during the so-called “Lost Years” and pay the 40% entitlement as there is omission of it in the Review Order 2022. It is not sought to ask the court to conduct a judicial review that touches on the merits of the review conducted under art 112D.

...



[50] In our view, at this stage, it cannot be said that the subject matter of the judicial review application is not justiciable. Counsel for the SLS pointed out that in the prayers of the judicial review application, the SLS is not challenging the lawfulness of the special grant. If that were the case, it would immediately attract the justiciability argument as it is a matter agreed by the Federal Government and Sabah Government. Neither is the SLS asking the court to conduct a review under art 112D. A prayer to that effect would also attract the justiciability argument as the court is not equipped to handle such a matter. The overarching focus of the judicial review application, is the alleged omission in the Review Order 2022 to account for the missing “lost years”...

[186] In refusing leave (to appeal to the Federal Court), Nallini Pathmanathan FCJ rejected the complaint of alleged non-justiciability of this dispute by stating as follows:

“On the issue of justiciability, the judgment of the Court of Appeal is comprehensive and sets out the position clearly in paragraph 50. We see no reason to warrant the grant of leave under s 96 CJA. We reiterate that at the leave stage, the court is concerned primarily with threshold *locus standi* and non-justiciability in the present case is not apparent on a *prima facie* construction of the cause papers. This matter, as we have stated earlier, deals with whether the failure to review and provide Sabah’s Special Grant amounts to a breach of the relevant Articles of the Federal Constitution, and for prayers to remedy the same. That is not a matter of policy. Therefore, the grant of leave is not warranted and the matter should proceed to be heard on its substantive merits.”

[187] Next, it was argued for the 1st Respondent that the absence of a review order in 1974 did not mean that “the Applicant” would by default be granted the 40% Entitlement as stipulated under art 112C(1)(a) read with s 2(1) of Part IV of the Tenth Schedule of the FC. The 1st Respondent relied on art 112D(3) to support their justification for the yearly payment of RM26.7 million under the First Review Order from 1974 to 2021.

[188] First, learned SFC may have missed the point that the 40% Entitlement was and is to be granted to the State of Sabah and not “the Applicant” or SLS.

[189] Second, this court’s careful consideration of SLS’ arguments showed that the “by default” arguments by learned SFC were, with respect, too simplistic and failed to appreciate SLS’ case which may be broken down as follows:

- (i) First, the FC in cl (1)(a) of art 112C mandates for the making of the 40% Entitlement from Federation to State;
- (ii) Second, the only way to modify this provision is as set out in cl (1) of art 112D, by an order of the Yang di- Pertuan Agong;
- (iii) Where there is no modification to the 40% Entitlement, there is no requirement for such an order of the Yang di- Pertuan Agong.



- (iv) But the converse is also true — where there is no order, no modification to the 40% Entitlement can be given effect to. That is, the only way that a modification of the 40% Entitlement can be given effect to is by an order of the Yang di-Pertuan Agong. Any purported change to the 40% Entitlement, without such an order, is constitutionally impermissible.

[190] While it is true that the First Review Order did modify the 40% Entitlement mandated by cl (1)(a) of art 112C of the FC, did it have the effect of modifying Sabah’s constitutional rights beyond 1973?

[191] The answer to this question ought to be obvious in that the First Review Order, which is an Order of the Yang di-Pertuan Agong is a subsidiary legislation — see s 3 of the Interpretation Acts 1948 and 1967 and must yield to the primacy of the FC — see *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2019] 6 MLRA 307. To read it otherwise would be *ultra vires* to the FC.

[192] Second, a plain reading of the First Review Order would show that there is nothing therein that remotely suggests that its effects went beyond 1973. It only expressly modified the 40% Entitlement in respect of the years 1969, 1970, 1971, 1972 and 1973.

[193] The First Review Order is reproduced below:

- “2. For a period of five years with effect from 1 January 1969, **the Federation shall cease to make to the State of Sabah the grant specified in sub-section (1) of s 2 of Part IV of the Tenth Schedule to the Constitution and shall make instead another grant for the said period of five years of which the amount in 1969, 1970, 1971, 1972 and 1973 shall be respectively \$20m., \$21.5m., \$23.1m., \$24.8m. and \$26.7m.**
3. Sub-section (1) of s 2 of the Tenth Schedule and Clause (2) of art 112C of the Constitution shall accordingly be read subject to the modifications made by para 2 of this Order, and the amounts required for the making of the grant provided by para 2 of this Order shall be charged on the Consolidated Fund.”

[Emphasis Added]

[194] Third, while the Second Review Order purports to revoke the First Review Order, there is nothing in it which allows for the modification of the First Review Order so that it extends beyond 1973. In fact, nothing is stated about those Lost Years at all.

[195] The 1st Respondent also contended that the First Review Order remained in force pursuant to cl 3 of art 112D during the Lost Years and until revoked by the Second Review Order. This was based on the 1st Respondent’s understanding of the following words in cl 3: “... but any order under cl 1 giving effect to the results of a review shall continue in force after the end



of that period, except in so far as it is superseded by a further order under that clause”. The 1st Respondent’s stand was that this provision (i) excuses the absence of any review or order in 1974 and (ii) justifies the non-payment of the 40% Entitlement to the state of Sabah in respect of the Lost Years.

[196] With respect, the taking away of the State of Sabah’s constitutional rights to receive the 40% Entitlement in those Lost Years cannot by any means be left to inferences or implications when the Second Review Order does not purport to make any (further) modification to the 40% Entitlement. That would have been a clear breach of natural justice and *ultra vires* the express provisions of the FC, in particular arts 112C and 112D read together with the Tenth Schedule Parts III, IV and V thereto.

[197] If it were the case and such right had been “superseded” by the grant of the Second Review Order as contended by the 1st Respondent, it must be expressly stated to be so. The converse will be true — the rights of the State of Sabah since 1974 to 2021 were never constitutionally modified or more importantly, lost.

[198] The interpretation by SLS and which this court found to be preferable is that cl 3 is a temporary savings clause to avoid a constitutional vacuum during the period between the expiry of one review order and the implementation of the next. It preserves legality during the transitional period between two orders.

[199] It does not envisage or authorise prolonged non-compliance. Neither does it serve as a mechanism to justify indefinite inaction by the Federal Government or to displace its constitutional duty to conduct periodic reviews and specifically a review in 1974. With respect, to construe the provision the way the 1st Respondent asserted would be to countenance its own breach by the executive.

[200] Second, (3) prevents the Federation from being in breach of its duty to make the 40% Entitlement once the period of the existing order modifying that 40% Entitlement (as the First Review Order did) comes to an end but before the succeeding order comes into effect to supersede it. This modification of the 40% Entitlement by the existing order only continues in force (and prevents the Federation from being in breach of its duty to make the 40% Entitlement) up until the point that the Second Review Order — which gives effect to a second review that should have been properly conducted pursuant to art 112D — takes effect.

[201] In my view, this interpretation is consistent with the historical facts and the constitutional foundation documents — this is part of the safeguards that the framers of the FC in their wisdom have included to assuage the concerns of the people of North Borneo as recorded in the Cobbold Report.

[202] On the facts herein, once the First Review Order was revoked by the Second Review Order which gave effect to the second review, the modification



was also thereafter revoked. At that point, the Federation's duty to make the 40% Entitlement to the State of Sabah immediately came into effect for the period of the Lost Years. This event, occurring not in 1974 as is mandated by the Federal Constitution, but 48 years later, a fortiori, triggered the Federation's duty to make the 40% Entitlement to the State of Sabah and which the two Governments were mandated to consider in their second review.

[203] Here, the two Governments, in breach of their constitutional duties imposed upon and powers vested in them under the FC at art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule and Clauses (1), (3) and (4) of art 112D, did not consider the 40% Entitlement in respect of the Lost Years.

[204] In circumstances where no review took place in 1974, and no review has ever taken place in respect of the period covered by the 48 Lost Years from 1974 to 2021, the 40% Entitlement remains due and payable by the Federation to the State of Sabah for each of those Lost Years.

[205] In breach of natural justice and legitimate expectation of the State of Sabah and her people, the Second Review Order made on 17 April 2022 and with effect from 1 January 2022 failed to provide for the making of annual grants for the period of the Lost Years (1974 to 2021). The Federation's duty to make the 40% Entitlement remains, and remains to be fulfilled, with the lifting of the First Review Order by the Second Review Order on 20 April 2022 (or 1 January 2022).

Other Issues Raised By The 1st Respondent

[206] There were other issues raised by the 1st Respondent to oppose this application, one of them being the following averment in para 6.7 of encl 85:

"6. I verily aver notwithstanding the preceding averments that the Applicants
(sic) are not entitled to the reliefs sought as:

...

6.7 due to the delay and length of time taken by the Applicant to initiate the judicial review application which spans nearly half-century with respect to the grant allocated between 1974 to 2021 is prejudicial and detrimental to the 1st Respondent."

[207] I found this complaint to be a non-starter as the subject-matter to be reviewed was the Second Review Order which was published in the Gazette Publication dated 20 April 2022. SLS was well within the timeframe under O 53 r 3 of the ROC 2012 when this application was filed on 9 June 2022.

[208] In any event, the 1st Respondent had not explained how the alleged delay was "prejudicial and detrimental" to the 1st Respondent.



[209] Next, it was contended for the 1st Respondent that the 2nd Respondent did not object to the amount of grant from 1974 to 2021. Learned SFC went on to add that had the RM26.7 million not been able to meet the needs of the State of Sabah and/or cost of the State Services inclusive of provision for reasonable expansion of State Services and there was a refusal by the Federal Government to revise the amount by way of review despite the Federal Government having the financial capacity or capabilities to do so, the FC provides a constitutional remedy to State Government of Sabah by way of a reference to an independent assessor under art 112D(6) of the FC.

[210] The short answer to this is the trite principle of law that there can be no waiver of constitutionally recognised right — see *Behram Khurshid Pesikaka v. The State Of Bombay* [1955] 1 SCR 613; *Bheshwar Nath v. Commissioner of Income Tax, Delhi and Rajasthan* [1959] AIR (SC) 149.

What Was The Effect Of The Federal Government And The Sabah Government Failure (To Comply With Their Duties And To Properly Exercise Their Powers) In Relation To The Second Review Order?

[211] Given my findings above, I concluded that the Federal Government and Sabah Government's use of their respective powers under art 112D of the FC not only amounted to an abuse of power but also a breach of constitutional duties stipulated in that article and art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule.

[212] I found the decision in relation to the Second Review Order to be illegal, irrational, procedurally improper and or disproportionate — see *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, where the Federal Court referred to and adopted the following holding by Lord Diplock in the case of Council of *Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374:

“By ‘illegality’ as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts’ exercise of this role, resort, I think, is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though undefinable, mistake of law



by the decision-maker. ‘Irrationality’ by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

[213] As for the reliefs sought, SLS has prayed for the remedy of *certiorari* to quash that part of the Second Review Order that is implicitly unlawful for the omission to consider the Lost Years to be read together with the remedy of declarations at prayers (2)(a) and (b).

[214] The 2nd Respondent opposed this relief on the ground that the Second Review Order has been revoked by the Third Review Order. Additionally, it was contended that the 1st and 2nd Respondents were empowered under Article 112D(1) of the FC to agree upon an amount in special grants to Sabah for particular financial years and thus, the Second Review Order was in accordance with those powers.

[215] In addition, the 2nd Respondent contended that notwithstanding the delay, the position of the 2nd Respondent to claim the sum in special grants that Sabah is entitled from 1974 onwards had been preserved.

[216] As for the 1st Respondent, it was reiterated that there is no obligation pursuant to art 112C read with art 112D of the FC for the State of Sabah to be given a grant based on the 40% formula for the period between 1974 and 2021 or to make up for the difference in amount of grant had the State of Sabah received a grant based on the 40% formula between 1974 and 2021 and as such, the Court ought not grant an order of *certiorari* to quash part of the decision contained in the Second Review Order.

[217] I was not persuaded by either the submissions of the 1st and/ or 2nd Respondents on this issue. While learned SAG was correct to say that the 1st and 2nd Respondents were empowered to agree upon an amount in special grants to Sabah for particular financial years, as shown in the discussions above, the decision-making process was unlawful and procedurally improper — see *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLRA 251. It was not in accordance with the provisions under cl 2 of art 112D and on that basis, may be quashed in part as per prayer (1) of the application.

[218] As for the prayers for declarations at sub-paragraphs (2) (a) and (b), the 1st Respondent contended that SLS was not entitled to the declarations as the review exercise had been undertaken by the Respondents in 1974 and



thereafter. It was asserted that that was no breach of Article 112D(1), (3) and (4) of the FC.

[219] Additionally, the 1st Respondent reiterated that the State of Sabah was not entitled to a grant based on the 40% formula as provided for in art 112C(1) read with Part IV of the Tenth Schedule of the FC for the period between 1974 and 2021 and that in any event there was no dispute arising between the 1st and 2nd Respondents at the material time with respect to the manner in which the 40% formula was to be calculated. Further, even if there was a dispute the matter was to be referred to the independent assessor pursuant to art 112D(6) of the FC.

[220] The 1st Respondent's contentions could not be sustained given this court's earlier findings on this issue. This Court agreed with SLS that the declaratory orders are necessary as the factual matrix has shown that the Federal Government and the State Government are uncertain of their respective rights and duties.

[221] It was submitted by SLS as to the declaration at sub-para (2)(d), that since this is a public interest litigation taken up for the interest of the people living in Sabah, the declaring of the 40% Entitlement from the perspective of that interest in relation to them is vital. Further, this specific declaration would place the interest squarely from their perspective, for the 40% Entitlement is and was intended for the benefit of the people of Sabah, whom as an identifiable section of the Malaysian public, would have suffered for the omission of a timely review and making of the grant in terms of their fundamental liberties enshrined in the Federal Constitution.

[222] I found merits in the submissions by SLS that the 40% Entitlement would have been a fixed sum of money that was overdue, and hence a debt, owed by the Federation to the State of Sabah. That if reflected in an Order by the Yang di-Pertuan Agong under cl (1) of art 112D would be a proprietary interest which Sabah Government is entitled to claim from the Federal Government and recognised as property under art 13 of the Federal Constitution — see *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 1 MLRA 705.

[223] SLS has submitted and to which this court agreed that the 40% Entitlement would have been a large part of the financial provision that, being revenue derived by the Federation from Sabah, should have been made and paid to the State of Sabah for the development of the public services including the costs of state services. As discussed earlier, the State of Sabah, although indubitably rich in natural minerals — oil and gas, and palm oil — remains appallingly poor.

[224] This Court was entitled to consider that a person's right to his or her life and livelihood would include the right to the bare necessities of life. This is entrenched in cl (1) of art 5 of the FC, which provides that 'No person shall be



deprived of his life or personal liberty save in accordance with law' — see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186.

[225] In the circumstances, this court was persuaded that these declarations were necessary in order for the two Governments to carry out the review of special grant for the Lost Years that have been omitted in both the Second Review Order and the Third Review Order.

[226] SLS has also prayed for an order of *mandamus* in sub-para 3(a) to carry the mandatory review for the period since 1974. This is to remedy the omission and failure of the two Governments to review the 40% Entitlement for the Lost Years despite their being and having been under a duty and invested with power under the said constitutional provisions of the Federal Constitution to carry out the mandatory review.

[227] Learned SFC argued that the relief of *mandamus* was not available to SLS, contending that SLS has failed to establish that the 1st Respondent has a legal or statutory duty as a matter of course to provide a grant based on the 40% formula. This submission could not stand given this court's findings on the failure by the two Governments to review the 40% Entitlement for the Lost Years. The order of *mandamus*, in my view, is necessary to compel the two Governments to hold and conduct the review properly in accordance with the provisions of art 112D and art 112C read with s 2 of Part IV of the Tenth Schedule of the Federal Constitution.

[228] This Court was within its powers to grant such a relief — see the Courts of Judicature Act 1964, Schedule, para 1; *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 1 MLRA 705.

[229] This Court also found the relief in sub-para (3)(b) for the consequential payment order to be necessary following the earlier orders. Likewise, the additional remedy of an account would be appropriate to ensure that the efforts and fruits of the Sabah public were not to be frustrated. The earlier orders would not be sufficient and or would be futile if the two Governments who are entrusted by the FC to review the 40% Entitlement in respect of the Lost Years are not made to account for the review and the results.

Conclusion And Orders

[230] Based on the foregoing, this court allowed the application and granted the reliefs as prayed for in para 112 of encl 101 (reproduced in para 18 above) with the following amendments (underlined) to prayer 3(a):

“An order of *mandamus* directed to the 1st Respondent to hold another review with the 2nd Respondent under the provisions of art 112D of the Federal Constitution to give effect to the Federation making the 40% Entitlement to the State of Sabah under art 112C read with subsection (1) of s 2 of Part IV of the Tenth Schedule of the Federal Constitution for each consecutive financial



year for the period from the year 1974 to the year 2021 within 90 days and to reach an agreement within 180 days from the date of this order.”

[231] Upon the delivery of this court’s judgment on 17 October 2025, learned counsel for SLS informed this court that subsequent to the hearing of this application in July 2025, a Federal Government Gazette publication PU (A) 271/2025 dated 27 August 2025 was issued publishing the Order “Federal Constitution [Review of Special Grant Under art 112D] [State of Sabah] Order 2025” which states the following:

“Special grant

- 2.(1) For the period of eight years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial years 2022, 2023, 2024, 2025, 2026, 2027, 2028 and 2029 grants in the amount of RM125.6 million, RM300 million, RM306 million, RM600 million, RM600 million, RM600 million, RM600 million and RM600 million respectively.
- (2) In respect of the financial year 2022, the grant of RM125.6 million was paid by the Government of the Federation to the State of Sabah on 16 June 2022.
- (3) In respect of the financial year 2023, the grant of RM300 million was paid by the Government of the Federation to the State of Sabah on 16 June 2023 (RM129.7 million) and 28 November 2023 (RM170.3 million).
- (4) In respect of the financial year 2024, the grant of RM306 million was paid by the Government of the Federation to the State of Sabah on 11 June 2024 (RM300 million) and 19 August 2024 (RM6 million).

Revocation

3. The Federal Constitution (Review of Special Grant under art 112D) (State of Sabah) Order 2023 [P.U.(A) 364/2023] is revoked.”

[232] SLS prayed that this Review Order be also included in prayer (1) namely for the grant of *certiorari* to also include the Gazette Publication P.U.(A) 271/2025 dated 27 August 2025. While learned SAG did not object to this inclusion, learned SFC objected on the ground that it was not part of the consideration on the merits by this court.

[233] Although learned SFC was correct to state so, I took the view that it would be untenable to exclude this Review Order as it would be inconsistent with the whole of this court’s Judgment and the prayers granted herein.

[234] Prayer (1) was therefore granted as amended (underlined) to read as follows:

“An order of *certiorari* to remove into the High Court for the purpose of quashing such part of the decision contained in Gazette publication P.U.(A) 119/2022 dated 20 April 2022, Gazette Publication P.U.(A) 364/2023 dated



24 December 2023 and Gazette Publication P.U.(A) 271/2025 dated 27 August 2025 as is or implied to decide and publish that the duty of the 1st Respondent is otherwise than is as declared under paragraphs 2(a) and 2(b) herein.”

[235] Given the significance and importance of this application to all parties herein, I made no order as to costs.

