Federalism and Restoration of Sarawak’s Territorial Waters and Boundaries

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Sarawak’s renewed assertion of its rights within Malaysia’s federal constitutional framework in recent times needs to be put in its proper context.

The original agreement for the formation of the Federation of Malaysia\(^1\) by Malaya, Sarawak, Sabah and Singapore involved extensive discussions on safeguards\(^2\) and protection\(^3\). Key features of these safeguards and protection were expressly written into the Federal Constitution. Other material matters are contained in Malaysia’s founding documents\(^4\).

The Federation is half a century old now. It is necessary to revisit the original charter and founding documents and conduct a constitutional audit. This article is an exercise to ensure that the ties that bind Sarawak with the Federation together remain strong.

Sarawak’s position appears to be that the scope of powers and rights over matters that originally belonged to and, were under the control of Sarawak has been accretively taken over by the Federation at the expense of the State. It also appears to be Sarawak’s position that the restoration of such powers and rights will bring the Federation back in line with the original intent as expressed in the founding documents\(^5\). It is long overdue for these powers

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1 Although the focus of this paper is on Sarawak’s position on the matter of territorial waters, we will make a comparative reference wherever possible to Sabah’s position on the same matter. As this paper will show, the position of both Sarawak and Sabah on this matter is substantially similar with some very minor palpable differences.

2 The word “safeguard” is found in Article 161E of the Federal Constitution of Malaysia.

3 The title caption in Part XIIA of the Federal Constitution that covers Articles 161, 161A, 161B and 161E reads as “ADDITIONAL PROTECTIONS FOR STATES OF SABAH AND SARAWAK”.

4 The founding documents include, among others:
   (a) the Report of the Inter-Governmental Committee 1962; Government Printer (1963), that was chaired by Lord Lansdowne (“IGC Report”);
   (b) the Report of the Commission of Enquiry, North Borneo and Sarawak 1962 (CMND 1794) dated 1\(^{st}\) August 1962 that was chaired by Lord Cameron Cobbold (“Cobbold Commission Report”);
   (c) the Malaysia Agreement dated 9\(^{th}\) July 1963 (“Malaysia Agreement”);
   (d) Malaysia Act 1963 (Cap.35) (UK); and
   (e) the Malaysia Act 1963 (Act 26) (Malaysia).

5 Id. There have been many media reports on Sarawak’s position on this matter as stated by the State Government of Sarawak. One example is the report carried by The Star newspaper on Monday, 4\(^{th}\) July 2016
and rights to be properly restored to Sarawak. This should be seen as a process to strengthen the Federation.

For the present, the key area that we will focus on is the matter of Sarawak’s territorial waters and boundaries or, to be more precise, the extent of Sarawak’s territorial waters and boundaries.

To underscore the importance of this matter, it is the natural resources\(^6\) found in the territorial waters and ownership thereof that is at stake. As such, the restitution of Sarawak’s original territorial waters as at Malaysia Day has an important economic dimension in addition to the basic issue of federalism.

**Sarawak’s territory immediately before Malaysia Day**

The starting point of this excursion is to identify where Sarawak’s territorial waters and boundaries were at the time of Malaysia Day. This can be found in Article 1(3) of the Federal Constitution which provides as follows-

\[(3) \text{ Subject to Clause (4), the territories of each of the States mentioned in Clause (2) are the territories comprised therein immediately before Malaysia Day.} (\text{emphasis added})\]

Malaysia Day, as we know, was 16\(^{th}\) September 1963. So, what was Sarawak’s territory immediately before Malaysia Day?

The answer can be found in an Order in Council that was issued on 24\(^{th}\) June 1954 in the United Kingdom section 2 of which provided as follows-

\[2. \text{The boundaries of the Colony of Sarawak are hereby extended to include the area of continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak}^{\text{7}}. (\text{emphasis added})\]

The full import of both the Orders in Council was elucidated, some years later, in a written reply to a Parliamentary question in the House of Commons on 10\(^{th}\) May 1960 by Iain Macleod, Secretary of State for the Colonies:

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\(^6\) As defined in section 2 of the Continental Shelf Act, 1966 (Act 83), “natural resources” means-

\[“(a) \text{ the mineral and other natural non-living resources of the sea-bed and subsoil; and }\]

\[“(b) \text{ living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the seabed or the subsoil.”}\]

\(^7\) Section 2 of The Sarawak (Alteration of Boundaries) Order in Council, 1954 (1954 No. 839) made on 24\(^{th}\) June 1954 in the United Kingdom. In the case of Sabah, it was The North Borneo (Alteration of Boundaries) Order in Council, 1954 (1954 No. 838) that was also made on 24\(^{th}\) June 1954 that applies. The statutory language is exactly the same in respect of the territorial waters of North Borneo. Note also the definition of territorial waters and boundaries in the Sarawak (Definition of Boundaries) Order in Council, 1958, Statutory Instruments 1958 No. 1517 that was made on 11\(^{th}\) September 1958. In the case of Sabah it was the North Borneo (Definition of Boundaries) Order in Council, 1958, Statutory Instruments 1958 No. 1517.
The jurisdiction of the Sarawak Government over the continental shelf for the purposes of exploring and exploiting its mineral resources derives from the Sarawak (Alteration of Boundaries) Order-in-Council, 1954, which extends the boundaries of Sarawak to include the adjacent continental shelf, and not from the Oil Mining Ordinance, 1958, which merely confers powers on the Government to enable it to regulate exploration and exploitation of certain mineral resources on the shelf.

The right to such jurisdiction is now embodied in the 1958 United Nations Convention on the Continental Shelf. The Convention defines the shelf as extending to a depth of 200 metres or beyond that limit where the depth of the superjacent waters admits of exploitation, and contains provision as to the boundaries between the respective shelves of neighbouring countries. There is no intention of exercising jurisdiction beyond the boundaries as defined in the Convention or except for the purposes allowed by the Convention.

So, immediately before Malaysia Day Sarawak’s territory included “the area of continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak”.

The Federation’s unilateral alteration of Sarawak’s territorial waters and boundaries via the 1969 Emergency powers

In the wake of the declaration of a National Emergency arising from the riots of May 1969, there were two Emergency Ordinances that were promulgated which are apposite to our inquiry.

Firstly, by Section 3(1) of the Emergency (Essential Powers) Ordinance, No. 7 1969 (to be referred to as “EO No.7”) that was promulgated on 2nd August 1969 it was declared that Malaysia’s territorial sea and territorial waters shall be limited to twelve nautical miles and, more to the issue at hand, Section 4(2) of the EO No.7 decreed that Sarawak and Sabah’s territorial waters would be fixed at three nautical miles.

4(2) For the purposes of the Continental Shelf Act, 1966, the Petroleum Mining Act, 1966, the National Land Code and any written law relating to land in force in

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8 Hansard, House of Commons Debate, 10th May 1960 Vol. 623, cc41-2W. The expression used by Iain Macleod was derived from Article 1 of the United Nations Convention on the Continental Shelf that was adopted on 29th April 1958. The language used in the same Article 1 had originally been inserted as the definition of “continental shelf” in section 2 of the Continental Shelf Act 1966 (Act 83) but the definition of “continental shelf” was amended by the Continental Shelf (Amendment) Act 2009 (Act A1351) to read as- “continental shelf” means the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea-

(a) throughout the natural prolongation of the land territory of Malaysia to the outer edge of the continental margin as determined in accordance with section 2b; or

(b) to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured in accordance with the Baselines of Maritime Zones Act 2006 [Act 660] where the outer edge of the continental margin does not extend up to that distance, but shall not affect the territory of the States or the limits of the territorial waters of the States and the rights and powers of the State Authorities therein.”


Sabah and Sarawak, any reference to territorial waters therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding three nautical miles measured from the low-water mark. (Emphasis added)

Second, on 3rd November 1969, the Emergency (Essential Powers) Ordinance, No. 10, 1969 (to be referred to as “EO No.10”) was promulgated and, it had the effect of extending the Continental Shelf Act 1966 and the Petroleum Mining Act 1966 to Sabah and Sarawak. The 3rd Preamble to EO No.10 read as follows-

AND WHEREAS the Yang di-Pertuan Agong is satisfied that immediate action is required to extend the Continental Shelf Act, 1966 and the Petroleum Mining Act, 1966 to Sabah and Sarawak. (Emphasis added)

Crucially, Section 2 of EO No.10 provided as follows-

2. The Continental Shelf Act, 1966 (as amended by the First Schedule to this Ordinance) and the Petroleum Mining Act, 1966 (as amended by the Second Schedule to this Ordinance) shall apply throughout Malaysia.

Thus, by two pieces of Emergency legislation, the Federation had unilaterally redefined the territorial waters of Sarawak by reducing it from “the area of continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak” to a mere three nautical miles.

And, more importantly, the Federation assumed control of petroleum mining in the part of the sea that was previously the territorial waters of Sarawak and Sabah.

Legislation under the Emergency: The power of the Director of Operations

The Federation’s emergency powers were embodied in the person of the Director of Operations. It should noted that by Section 2 of the Emergency (Essential Powers) Ordinance No. 2, 1969 (to be referred to as “EO No.2”) that was promulgated on 17 May 1969, the post of the Director of Operations was created, thus-

2. (1) The executive authority of Malaysia referred to in Article 39 of the Constitution and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are hereby delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agong.

(2) The Director of Operations as designated under sub-section (1) shall act in accordance with the advice of the Prime Minister and shall exercise and be responsible for the exercise of the executive authority of Malaysia and of the powers and authorities referred to in sub-section (1); and Article 40 of the Constitution shall not apply to the exercise of the executive authority and the

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14 And, of course, Sabah was equally affected.
exercise of the powers and authorities referred to in sub-section (1).

The Director of Operations was given legislative powers over the states under Article 150(4) of the Federal Constitution-

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

There is ample case law where the courts have buttressed and affirmed the validity of various aspects of Article 150 in the matter of the creation of legislation for the States and, of the creation of subsidiary and delegated legislation under an Emergency.16

However, and, without in any manner trivialising the importance of the case laws to Malaysian jurisprudence, it must be emphasised that the corpus of jurisprudence and case law that has arisen in respect of the invocation of Article 150 of the Federal Constitution, that resulted in various proclamations of Emergency and, the assorted Emergency Ordinances issued, are primarily founded upon cases where the factual matrix involved security threats and criminal acts.

Article 150 is intended to deal with security threats.

The subject matter of EO No.7 and EO No.10 were, with the greatest respect, not matters where, to borrow the language of Article 150(1) of the Federal Constitution, “a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened”.

Nor could it have been a situation where, to borrow the language of Article 150(2) of the Federal Constitution, the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event”.

It is noted that any proclamation of an emergency under Article 150(1) of the Federal Constitution requires the “satisfaction” of the Yang di-Pertuan Agong that a “grave emergency exists”. It is further noted that by Article 40(1) of the Federal Constitution executive acts of the Yang di-Pertuan Agong is, in fact, based on “the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet”. This likely reality of the process, was explained by Dr Cyrus Das18 as follows-

16 See for example Stephen Kalong Ningkan v Government of Malaysia [1968] 2 MLJ 238 (PC) where the Privy Council affirmed the emergency powers of the Parliament, in exercise of the powers under Article 150(5) of the Federal Constitution to amend the Sarawak Constitution; see also Eng Keeck Cheng v Public Prosecutor [1966] 1 MLJ 18 (FC) and Public Prosecutor v Khong Teng Khen & Anor. [1976] 2 MLJ 166 (FC), where the Federal Court in both of the cases affirmed that, by Article 150(6) of the federal Constitution, Parliament has the power to legislate even on matters that are inconsistent with any provision of the Federal Constitution; and, the Federal Court has also affirmed the validity of the sub-delegation of law-making powers in an emergency in Government of Malaysia v Mahan Singh [1977] 2 MLJ 66 (FC) and Johnson Tan Han Seng v Public Prosecutor [1977] 2 MLJ 66 (FC).

17 Supra. at n.15.

The constitutional requirement under Article 40(1) that the Yang di-Pertuan Agong should act on the advice of the Cabinet works in reality as the advice of the Prime Minister. Even if the cabinet-consultation had come later, it is very likely that he would receive ex post facto approval for his actions. If the Prime Minister had worked in tandem with key cabinet personnel like the Deputy Prime Minister, as happened in 1969 and 1977, Cabinet approval comes as a mere formality.

With the benefit of the passage of time since the fateful events of 1969, any keen observer of Malaysian history would quite comfortably surmise that there was no “imminent danger” that could have warranted the Director of Operations to legislate on the matter of altering the territorial waters and boundaries of Sarawak from “the area of continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak” to a mere three nautical miles or, to extend the application of the Continental Shelf Act 1966 and the Petroleum Mining Act 1966 to Sarawak and Sabah.

So, in our constitutional audit of these events, one may surmise that, notwithstanding the ethos of the 1969 Emergency, EO No.7 and EO No.10 were aberrant legislative acts that were not consistent with the spirit of the Federal Constitution.

What would be the proper constitutional procedure to deal with the matter of the territorial waters of Sarawak and jurisdiction over petroleum mining in the territorial waters if there was no use of the sweeping Emergency powers?

Let us test the matter by understanding the process by which the Federation would have to undergo if the Federation wished to alter the territorial waters and boundaries of Sarawak or, any other state in Malaysia.

If there was no “imminent danger” that warranted the Federation to unilaterally legislate on territorial waters and petroleum mining in Sarawak under the Emergency powers conferred by Article 150 of the Federal Constitution what, then, would be the procedure that the Federation is required to follow if the Federation wanted to engage Sarawak to raise the issue of territorial waters and petroleum mining?

Article 2(b) of the Federal Constitution is the starting point for any proposal for the alteration of the boundaries of any State-

Admission of new territories into the Federation

2. Parliament may by law—
   (a) …
   (b) alter the boundaries of any State,

   but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State) and of the Conference of Rulers. (emphasis added)

Article 2(b) clearly and unambiguously require two key preconditions to be met before any alteration of the boundaries of any State can be made by Parliament, namely-
(a) The consent of the affected State in the form of a law made by the State Assembly of the affected State; and

(b) The consent of the Conference of Rulers.

It is submitted that Article 2(b) embodies the federalism principle that pervades the Federal Constitution.

With respect to the role of the Conference of Rulers we have in a previous article made the point that based on the principles of federalism evident in the Reid Report, in the exercise of its constitutional functions of a consultative nature involving matters affecting sovereignty or any State, each member of the Conference of Rulers is required to act in his discretion as a state representative as opposed to “acting on the advice” of their respective Menteri Besar or Chief Minister and, the decision of the Conference of Rulers appears to be based on the will of the majority of the Conference’s members.

In fact, Article 38(6)(c) of the Federal Constitution quite clearly confers a personal discretion to the members of the Conference of Rulers-

(6) The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions, that is to say:
(a) …
(b) …
(c) the giving or withholding of consent to any law altering the boundaries of a State or affecting the privileges, position, honours or dignities of the Rulers;

(emphasis added)

Further, Paragraph 9 of the Fifth Schedule of the Federal Constitution makes provision for the manner in which consent or advice is given by the Conference of Rulers-

“9. Any consent, appointment or advice of the Conference of Rulers required under this Constitution shall be signified under the Rulers’ Seal; and where, in the case of any proposed appointment, a majority of the members have indicated, by writing addressed to the Keeper of the Rulers’ Seal, that they are in favour of the appointment, he shall so signify the advice of the Conference without convening it.”

19 Choo Chin Thye & Lucy Chang Ngee Weng; Constitutional Procedure of Consultation in Malaysia’s Federal System; [2005] 4 MLJ xiii where we highlighted the following point-
In the Government White Paper (Colonial Office; Constitutional Proposals for the Federation of Malaya; Cmd 210, London; Her Majesty’s Stationery Office [1957]; at para. 16.) the Malayan representatives explained their intent in the following manner:-

“The [Reid Commission] recommended that the Conference of Rulers, constituted as it is at present, should meet when necessary to elect a Ruler as the Head of State and to elect a Deputy Head of State. The Commission did not, however, include provisions in the draft Constitution for the establishment and functions of the Conference. By virtue of their position as sovereign Rulers of their States, Their Highnesses have a constitutional right to be consulted on matters affecting their personal position or on matters affecting their sovereignty or the good government of their States [emphasis added]. It is therefore proposed that the Conference should have other functions in addition to those recommended by the Commission.”

Clearly, the Federal Constitution contained ample provisions and mechanism that required the Federation to engage with and, seek the consent of any State to address most, if not all, issues including the matter of alteration of boundaries.

But, unfortunately, the constitutional procedure, the safeguards and protection as enshrined in the Federal Constitution appear to have either failed to work or, in the Federation’s assertion of realpolitik, been ignored.

In examining Article 2(b), JC Fong, the former State Attorney-General of Sarawak and, presently, the Sarawak State Legal Advisor, provided the following description—

"Thus, no law may be passed by Parliament to alter the boundaries of a State (and consequently its territory) unless the Legislature of an affected State gives its consent via a law passed by that Legislature. For example, the Selangor Legislature passed an Enactment to “give its consent under Article 2 of the Federal Constitution” to alter the boundaries of the State of Selangor “by the exclusion of the Federal Territory” as described in the Constitution (Amendment) (No.2) Bill 1973. This Enactment came into force on February 1, 1974 being the same date when the relevant provisions of the corresponding law passed by Parliament to establish the Federal Territory of Kuala Lumpur came into force. Similarly, the Sabah State Assembly passed a law in 1984 to give its consent to the Constitution (Amendment) (No.2) Bill, 1984, altering the boundaries of the State of Sabah “for the purpose of the establishment of the Federal Territory of Labuan”.

Sarawak’s experience on the failure of the principles of federalism and the failure of constitutional safeguards and protection

Tan Sri Jemuri Serjan had provided a good conspectus of the testy attitude of the Federation towards the valiant attempts by Sarawak to hold its ground on this very matter of territorial waters and natural resources. This is what Tan Sri Jemuri wrote—

“What could be considered as a controversy between the conflicting views of the Federal Government on the one part and the State Government on the other arose in relation to the control and jurisdiction over the continental shelf contiguous to the territorial waters of the State and the ownership of any natural resources found thereon. The State’s view that those natural resources, including petroleum in particular, belonged to the State was based on the following premise. Under Article 3 of the Constitution, the territories of each of the component States of Malaysia are the territories comprised therein immediately before Malaysia Day, that is to say, 16 September 1963. On joining Malaysia on that day, the territory of the State of Sarawak, therefore, included the area of the continental shelf referred to in the Sarawak (Alteration of Boundaries) Order in Council 1954, and this was based on the municipal law of the State... In the constitutional context, the continental shelf was regarded as ‘land’ and the fact that it is covered by the sea does not detract from its identity as land. Thus it was within the State’s competency to issue a mining lease on the authority of Item 2(c) of the State List and like other minerals and other natural resources it is submitted that petroleum should by right be vested in the State. Item 2(c) reads as follows: ‘2(c) Permits and licences for prospecting for mines; mining leases and

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21 Fong, JC; Constitutional Federalism in Malaysia; Sweet & Maxwell (2008); at p.50.
22 Tan Sri Datuk Amar Hj. Mohamad Jemuri bin Serjan was a Federal Court judge and, before that, State Attorney-General of Sarawak.
certificates. The controversy fizzled out eventually, presumably as a result of a political compromise on the part of both the central Government and the regional Government. This solution, arrived at under the strong pressure of national interest, obviated resort to the Courts.”\(^{23}\) (emphasis added)

From Sarawak’s perspective and experience, the constitutional safeguards and protection has not worked very well at all. The despair of Sarawak as expressed in Tan Sri Jemuri’s words was palpable-

“Financial constraints have always been the inhibitive factor slowing down developments in this State. It would take many, many years to bring the level of development in the State to that of the Peninsular States and only at the cost of billions of dollars. To the uninformed, it would appear absurd that such constraints should exist considering that the State is producing oil, ignorant as they are of the principle of allocation of revenue in our Federal set-up. The public was used to the idea that petroleum was always vested in the State. How did it become vested in the Federal Government? The subject of ownership of petroleum found in the State both on land and on the continental shelf contiguous to the coast of the State apparently was never a subject for negotiation by the Inter-Governmental Committee. Hence the Report of the Committee was silent on this subject. The Malaysia Act 1963\(^ {24} \) has no provisions relating to the subject either and section 75 or section 76 of the Act can hardly be invoked to support the contention that on Malaysia Day, the Federal Government succeeded to the ownership of petroleum found in the State. The British Government never claimed to have any right over petroleum or, for that matter, any mineral resources in the State.”\(^ {25} \)

**Mala fide: A possible reason for “immediate action”**

Why were those matters, which were in respect of boundaries and economic activities such as petroleum mining, seemingly rushed under the auspices of a national security power? Why was “immediate action” required? There is scant information in the public domain that

\(^{23}\) Jemuri bin Serjan; *The Constitutional Position of Sarawak*; Trindade, FA & Lee, HP (eds) The Constitution of Malaysia: Further Perspectives and Developments; (1986) Penerbit Fajar Bakti; at p.126. As a matter of interest, Tan Sri Jemuri’s point on the “resort to the Courts” is supported by a news report dated 11\(^ th \) March 2010 where the late former Chief Minister of Sarawak, Tun Datuk Patinggi Hj Abdul Rahman bin Ya’kub was reported as having made the following points:

“Abdul Rahman said yesterday that Sarawak had also wanted to sue the federal government for the right to its oil before the PDA (sic) (Petroleum Development Act 1974) was finally put into place. Around 1974, the federal government introduced a Bill in Parliament claiming that Sarawak oil belonged to the federal government. “I then instructed the state Attorney-General to write to the federal Attorney-general to say that if the Bill was not withdrawn I would take the federal government to court.” Abdul Rahman said he was immediately instructed by Tun Abdul Razak Hussein, who was then Prime Minister, to go to Kuala Lumpur. “What’s all this about taking the federal government to court”, he asked me. I told him that Sarawak oil belongs to Sarawak,” he said. Tun Abdul Rahman said he obtained three legal opinions from the former AG of Australia, an expert in public international law from Cambridge University and a former High Court judge to back Sarawak’s claims. The main argument put forward by the three legal experts was based on Queen Elizabeth’s declaration that Sarawak’s territorial waters included offshore and was not confined to the three nautical mile limit.”; reported by Lau, Leslie; *The Malaysian Insider*; 11\(^ th \) March 2010; [Ex-Sarawak CM says Kelantan has no right to oil royalty](https://web.archive.org/web/20100314022944/http://www.themalaysianinsider.com/index.php/malaysia/55898-ex-sarawak-cm-says-kelantan-has-no-right-to-oil-royalty)

\(^ {24} \) Malaysia Act 1963 (Act 26).

\(^ {25} \) Jemuri, op. cit. at p.124.
explains the apparent dissonance of EO No.7 and EO No.10 with other Emergency promulgations.

However, Dr. Shaik Mohd Noor Alam has provided a useful context that may explain the Federation’s intent for EO No.7 and EO No.10. This is what Dr. Shaik wrote-

_In 1966 Malaysia ratified the Convention on the Territorial Sea and the Continental Shelf and consequently enacted the Continental Shelf Act 1966._

_Meanwhile the states of Sabah and Sarawak had already extended their jurisdiction over the continental shelf adjacent to their states. These states were British colonies prior to their independence and membership in Malaysia. It was during the British colonial rule that in 1954, the British Government had by Orders in Council extended the boundaries of the colonies of North Borneo (as Sabah was then known) and Sarawak seaward encompassing the territorial sea and the submarine areas of the continental shelf._

_The scenario in 1966 was that, in West Malaysia, the states owned both the on-shore and so much of the petroleum resources found in the sea bed off-shore in the territorial waters adjacent to the states. Petroleum resources in the areas covered by the continental shelf belong to the Federation. Despite their vast ownership of petroleum resources, the states in West Malaysia do not have specific legislation dealing with petroleum. In East Malaysia, both Sabah and Sarawak had by then established proprietary rights over the petroleum resources found on shore and off-shore including those in the continental shelf._

_In the late 1960s the prospects of the oil discovery became a real probability and the Federal Government was seriously contemplating a greater Federal control over these resources to enable planned and orderly development in the industry. The main obstacles faced by the Federal Government were the legal and constitutional constraints due to the dichotomy of ownership pattern between the West Malaysian and East Malaysian states. In 1966, besides the Continental Shelf Act 1966, the Federal government had also enacted the Petroleum Mining Act by virtue of item 8(1) in the First List of the Ninth Schedule. This gives Parliament the power to legislate in respect of “the development of mineral ores, oils and oil fields ... petroleum products ....” The Act was made applicable to whole of West Malaysia. The Act created two Petroleum Authorities; one for the states and one for the Federal Government._

_The opportunity to extend federal ownership over petroleum resources in the continental shelf of the whole Federation came with the unexpected occurrence of the May 13 Tragedy. Emergency was proclaimed throughout the Federation._

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A state of proclaimed emergency automatically brought into application the wide legislative powers of the Yang Di Pertuan Agong conferred by Article 150(2) of the Constitution. This empowers the Yang Di Pertuan Agong to promulgate ordinance having the force of law and such emergency laws can operate even if inconsistent with the Constitution. This wide legislative power was indeed utilised to the fullest to secure eventual control of the petroleum resources. By the Emergency (Essential Powers) Ordinance No.10, 1969, the Continental Shelf Act 1966 were amended to make them applicable to the East Malaysian states. The amendment to the Continental Shelf Act in effect ended the East Malaysian states’ control and ownership of the petroleum resources in their continental shelf. With this drastic change, the Petroleum Mining Act 1966 had also to be amended to deal with the consequences following this drastic change in ownership. The proprietary rights vested in petroleum companies by virtue of licenses or leases granted will continue in force.27

The distribution of federal and state powers, including territorial waters and boundaries of States are rights forming a part of the basic structure of the Federal Constitution

There is another important aspect of Article 2(b) of the Federal Constitution that deals with the distribution of Federal and State powers. In this case, the subject matter of distribution of powers is the matter of the alteration of territorial waters and boundaries of Sarawak.

Let us be clear about this; Article 2(b) is intended to be a key safeguard and protection for Sarawak’s territorial waters and boundaries within the Federation.

On the matter of the distribution of powers between Sarawak and the Federation, must be had to the principle of federalism expressed by Raja Azlan Shah FJ in Loh Kooi Choon v Government of Malaysia28 that-

“The Constitution is not a mere collection of platitudes. It is the supreme law of the land embodying three basic concepts. One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men29.”

These were the principles set out by the Federal Court in Loh Kooi Choon despite its decision not to adopt the basic structure doctrine enunciated by the Indian courts30.

Seen in this light, it is reasonable to submit that in the matter of the unilateral decree of EO No.7 and EO No.10 by the Director of Operations that resulted in the alteration of the

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29 Ibid., at p. 188.
30 Kesavananda Bharati v The State of Kerala and Others AIR 1963 SC 1461
territorial waters and boundaries of Sarawak, the state’s sovereignty was violated. It was a clear violation of Article 2(b) of the Federal Constitution that is intended to be a key safeguard and protection for Sarawak’s territorial waters and boundaries within the Federation.

**Principles of interpreting the Federal Constitution**

It may be argued that EO No.7 and EO No.10 were both *ultra vires* and violative of the Federal Constitution.

In examining this matter, it is necessary to recall the approach to constitutional interpretation as elucidated by Malaysia’s own jurisprudence.

Constitutional interpretation requires an ambulatory approach that makes reference to the original intent has much credibility and validity in a situation where a constitutional provision is unclear. This approach was explained in *Dato’ Menteri Othman bin Baginda*31, Raja Azlan Shah Ag LP (as His Highness the late Sultan of Perak then was) had this to say-

“In interpreting a constitution, two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – ‘with less rigidity and more generously than other Acts’ (see Minister of Home Affairs v Fisher [1980] AC 319). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation32”.

The learned Acting Lord President went on to say-

“It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to terms on which independence should be granted33”.

The reliance on extraneous matters such as the Reid Report to distil the original and true intent behind constitutional provisions was also evident in the Federal Court decision in *East Union (Malaya) Sdn Bhd*34, a case involving an application for a declaration that section 100 of the National Land Code was *ultra vires* Article 76(4) of the Federal Constitution, where Suffian LP, in rendering the decision of the Court, made extensive reference to pertinent passages from the Reid Report before deciding in the negative with respect to the application by the appellant company.

What this means is that in approaching the matter of Sarawak’s territorial waters and boundary rights vis-à-vis the Federation’s powers, references to documents and instruments

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32 Id.
33 Id.
other than the Federal Constitution is a necessary and relevant process to distill and identify the original intent of the founding of the Federation of Malaysia.

**Importance and relevance of the founding documents in any constitutional audit of the Federal Constitutional safeguards and protection**

In any discussion on the constitutional safeguards and protection accorded to the rights and sovereignty of Sarawak within the Malaysia’s federal system, reference must be made to the original intent for each of the safeguards and protections. These will be found in the founding documents comprising, in particular-

(a) The Report of the Inter-Governmental Committee 1962; Government Printer (1963), that was chaired by Lord Lansdowne (“IGC Report”);

(b) The Report of the Commission of Enquiry, North Borneo and Sarawak 1962 (CMND 1794) dated 1st August 1962 that was chaired by Lord Cameron Cobbold (“Cobbold Commission Report”);

(c) The Malaysia Agreement dated 9th July 1963 (“Malaysia Agreement”);

(d) The Malaysia Act 1963 (Cap.35) (UK); and

(e) The Malaysia Act 1963 (Act 26) (Malaysia).

The sanctity, spirit and intent as embodied in the Malaysia Agreement and, the assurances contained in the IGC Report are clearly justiciable and enforceable in court. In *Pihak Berkuasa Negeri Sabah v Sugumar* 35 Mohd Dzaiddin FCJ said-

> “We are of the view that the spirit and intention of the Agreement relating to Malaysia 1963 and the Report of the Inter-Governmental Committee had not in any way been contravened.”

In both, *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor.* 36 and *Teoh Eng Huat v Kadhi, Pasir Mas & Anor.* 37 the Supreme Court (as Malaysia’s apex court was then known) had adverted to paragraph 15 of the IGC report on the constitutional arrangements in respect of religion and tested the said paragraph 15 of the ICG Report against Articles 3, 9 and 11 of the Federal Constitution.

Even more recently, the Federal Court in *Datuk Hj. Mohammad Tufail bin Mahmud & Ors. v Dato Ting Check Si* 38 had recognised that the safeguards and assurances as provided in the Cobbold Commission Report, the IGC Report and Malaysia Agreement, “were critical and pivotal to secure the participation of Sarawak in the formation of Malaysia”.

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35 [2002] 3 MLJ 72 (FC). See also Sukumaran Vanugopal; *The Constitutional Rights of Sabah and Sarawak; Sweet & Maxwell* (2013) at p.48. On the matter of immigration, the constitutional safeguards on Sarawak’s power over immigration was recently affirmed again in *Ambiga Sreenevasan v Ketua Pengarah Imigresen, Malaysia & Ors.* [2012] 1 MLJ 92 (HC).


37 [1990] 2 MLJ 300 (SC)

38 [2009] 4 MLJ 165 (FC) at pp. 171 and 174.
This body of Malaysian jurisprudence forms a clear affirmation of the relevance and importance of Malaysia’s founding documents.\(^{39}\)

**Debunking the corpus of jurisprudence on the non-justiciability of emergency laws**

The corpus of Malaysian cases on emergency laws have tended to favour jurisprudence that is peculiar to Malaysia; preferring to render challenges to emergency laws and executive actions using such laws as being non-justiciable.\(^{40}\)

We respectfully submit that the body of emergency law cases described should be confined to instances where a threat to national security required certain executive action to be taken. And, to put the position in perspective, we reproduce Articles 150(1) and (2) of the Federal Constitution that provides the basis for the proclamation of an emergency:

\(^{150}\) (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

(2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.

Once again and, this time borrowing the language of Article 150, we ask; where was the existence of a “grave emergency” in the form of Sarawak’s territorial waters and boundaries that threatened “the security”, or “the economic life, or public order in the Federation”? Where was the “imminent danger”?

\(^{39}\) Supra., footnote 4.

\(^{40}\) See for example, Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 139 where the Federal Court said, “whether there was reasonable cause to detain a person under Section 8(1) of the Internal Security Act 1960 [ISA] was a matter of opinion and policy, a decision on which could only be taken by the executive, and which therefore the courts could not go into...”; Re Tan Sri Raja Khalid bin Raja Raja Harun; Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun (Supreme Court) [1988] 1 MLJ 182: “the detaining authorities are not obliged to disclose the facts which led them to so believe nor are they required to prove in court the sufficiency or adequacy of the reasons for such belief in any proceedings for habeas corpus instituted by the detainee. It is sufficient if the detaining authorities show that the person has been detained in exercise of a valid legal power”; Minister for Home Affairs, Malaysia & Anor v Karpal Singh (Supreme Court) [1988] 3 MLJ 29: “... while the grounds of detention stated in the order of detention were open to judicial review, the allegations of fact upon which the subjective satisfaction of detaining authority was based were immune from judicial scrutiny...”; Theresa Lim Chin Chin & Ors v Inspector General of Police (Supreme Court) [1988] 1 MLJ 293: “police power of arrest and detention under Section 73 of the ISA could not be separated from the ministerial power to issue an order of detention under Section 8 thereof...”. In contrast, there is the Privy Council decision in Teh Cheng Poh v Public Prosecutor [1980] AC 458, [1979] 1 MLJ 50 (PC) where a review was made of the Yang Di-Pertuan Agong (meaning the Executive)’s power to make emergency regulations pursuant to section 2 of the Emergency (Essential Powers) Ordinance No.1 of 1969 arising from the powers derived from Article 150(2) of the Federal Constitution. The essential emergency regulations promulgated in 1975 from those powers were found to have violated the Federal Constitution because such legislative power was no longer vested in the Yang Di-Pertuan Agong simply because Parliament had reconvened and had resumed its legislative powers.
The burden of proving this must surely lie with the Federation.

We would also emphasise strongly that EO No.7 and EO No.10 were clearly economic legislation. They were not security legislation.

One may argue that EO No.7 and EO No.10 were the Federation’s action to circumvent the due process set out in Article 2(b) of the Federal Constitution on the alteration of boundaries. Therefore, both the Emergency legislation, not having undergone the proper constitutional due process, had violated the Federal Constitution.

**Comparative experiences on state-federal territorial waters in other federations**

In our review of the experiences of other federations on competing claims over territorial waters between a state and the federal centre, we have a patchwork quilt of jurisprudence that very much depended on the factual matrix of each case.

The experience in the United States started with the Truman Proclamation⁴¹. Edward A. Fitzgerald explains that the Truman Proclamation—

\[\text{… proclaimed exclusive jurisdiction and control over the natural resources of the seabed and subsoil of the continental shelf. The Truman Proclamation stated that coastal nations had jurisdiction over their continental shelf resources because (1) the continental shelf, which extended off the coastal state's land mass, was naturally appurtenant to it; (2) the utilization and conservation of offshore resources required the coastal state's cooperation; (3) the continental shelf resources often commingled with the resources of the land territory; and (4) national defense precluded one nation from developing continental shelf resources off another nation's shore. Following the Truman Proclamation, other nations declared jurisdiction over the continental shelf. By 1949, continental shelf rights were recognized as a principle of customary international law.⁴²} \]

The Truman Proclamation set off a series of cases taken by several states against the U.S. Federal Government. In most of the cases taken by the states against the U.S. Federal Government, the United States Supreme Court applied jurisprudence that has been criticised by Fitzgerald in the following manner—

\[\text{The United States Supreme Court's decision was historically inaccurate and confused dominion with imperium. Dominion refers to ownership, while imperium refers to control.} \]

\[\text{In United States v. California}⁴³\text{, the United States Supreme Court confused property rights, which were determined by domestic law, with sovereignty, which was determined by international law.}⁴⁴ \]

The 1950 case of *United States v. Texas*⁴⁵ is interesting. Texas claimed that before it joined the Union it had in fact actually controlled offshore areas out to a point 9 miles from the low

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⁴⁴ Fitzgerald, op. cit., p.72.
water mark along its coastline. In 1836 Texas became independent of Mexico. Not until 1845 did it become a member of the Union. As an independent nation it established control to a point 9 miles from its coastline. In joining the Union, only sovereignty was relinquished to the federal government. This argument, however, was not fully appreciated by the United States Supreme Court. Fitzgerald criticized the flawed reasoning of the United States Supreme Court-

... from 1836 through 1845, Texas was an independent republic with a three marine league territorial sea. The United States Supreme Court rejected Texas' claim that, when Texas entered the Union, Texas surrendered its imperium, but not its dominion, over its offshore lands. The Supreme Court adopted a novel interpretation of the equal footing clause by recognizing Texas' imperium and dominion over its offshore lands as that of a sovereign nation, but holding that Texas relinquished authority over its offshore lands to the federal government because of the overriding concerns of national defense and international affairs. The Court held that the equal footing clause\textsuperscript{46} precluded the extension of state sovereignty into the domain of political and sovereign power of the United States from which the other States have been excluded. Therefore, property rights were subordinate to political rights.

The United States Supreme Court was mistaken. When Texas was admitted into the Union, it surrendered its imperium, not its dominion, over its offshore lands. This was manifested in the annexation agreement in which Texas granted the federal government limited property for national defense and reserved for itself all "vacant and unappropriated lands lying within its limits. Furthermore, the equal footing clause, which was not included in the Texas annexation agreement, did not require Texas to cede its property to the federal government. The equal footing clause addressed political and sovereign rights, not economic and property rights. This was the first case in which the equal footing clause was interpreted to deprive a state of property which it had heretofore owned.\textsuperscript{47}

The position became clearer in the later case of \textit{Alabama v. Texas}\textsuperscript{48} where the United States Supreme Court modified its jurisprudence and recognized that dominion and imperium could be separated; thus, property rights did not flow from sovereignty\textsuperscript{49}.

Fitzgerald summarised his survey of the jurisprudence in Australia, the United States and Canada in the following manner and, we submit that the insightful observations Fitzgerald made is of great relevance to Sarawak’s current position-

\textit{The Australian High Court}\textsuperscript{50} and the United States and Canadian\textsuperscript{51} Supreme Courts granted their federal governments jurisdiction over offshore submerged lands. The courts determined that the offshore submerged lands below the low-water mark were beyond state jurisdiction and thereby subject to the federal governments’ external affairs.

\textsuperscript{45} 39 U.S. 707 (1950)

\textsuperscript{46} The equal footing doctrine, also known equality of the states, is the principle in United States constitutional law that all states admitted to the Union under the Constitution since 1789 enter on equal footing with the 13 states already in the Union at that time. See https://en.wikipedia.org/wiki/Equal_footing.

\textsuperscript{47} Fitzgerald, op. cit., p.73.

\textsuperscript{48} 347 U.S. 272 (1954) at p. 274.

\textsuperscript{49} Fitzgerald, op. cit., p.74.

\textsuperscript{50} \textit{New South Wales v Commonwealth}, (1975) 135 CLR 337 (Aus).

authority. However, the courts failed to acknowledge the development of offshore rights under the common law and exaggerated the federal governments authority over external affairs. The courts confused dominion, which is based on domestic law, with sovereignty, which is based on international law. The courts' decisions also frustrated the design of federalism in all three constitutional systems. The courts should have relied on their respective common laws, rather than on emerging concepts of international law. The adoption of international law by the courts to resolve domestic constitutional disputes deprived coastal states of their petroleum-rich offshore lands.

As a result, subsequent political settlements were necessary to mitigate the adverse effects of these erroneous decisions. Nevertheless coastal states have continued their struggle in the judicial and political arenas to participate in and share the revenues derived from offshore energy development.

Economic and property rights versus political rights

With the benefit of the evolving jurisprudence from Australia, the United States and Canada on the self-same matter of territorial waters of the states in federal structures, there are several points that should be noted.

There is a difference between imperium or political rights and dominion or property rights. We share and adopt Fitzgerald’s view that the courts in the jurisdictions mentioned above often mistakenly took the position that since the United Nations Convention on the Continental Shelf approached the matter of territorial waters from an international perspective, municipal laws including common law principles on property rights became irrelevant because in all federal systems it is the federal or central government that had jurisdiction over matters such as international relations and defence. The courts took the erroneous view that since these were issues involving national sovereignty, states within federal systems had no standing in these matters and, therefore, the claims made by states over economic and property rights to territorial waters were rejected.

At the risk of over generalisation, we make the observation that those states were claiming their dominion rights or economic and property rights in the territorial waters within a federal framework. None of the states claimed imperium rights or political rights.

Closer to home, Sarawak’s position is to assert its dominion or economic and property rights over the area of continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak.

Sarawak, quite clearly, has no interest whatsoever to make any claims over the Federation’s imperium rights over the territorial waters. There is no question that the Federation has full constitutional responsibility to assert and defend Malaysia’s sovereign rights over its territorial waters internationally.

On this premise, we may move on to examine Sections 75 and 76 of the Malaysia Act 1963 (Act 26) that Tan Sri Jemuri had adverted to in his article.

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52 Fitzgerald, op. cit., pp. 91-92.
53 Supra., footnote 8.
54 Supra., footnote 7.
55 Supra., Jemuri, footnotes 23 and 25.
Malaysia Act 1963

Earlier in this article we had highlighted Tan Sri Jemuri’s perspectives a salient part of which we reproduce here-

\[
\text{The Malaysia Act 1963}\text{\textsuperscript{56} has no provisions relating to the subject either and section 75 or section 76 of the Act can hardly be invoked to support the contention that on Malaysia Day, the Federal Government succeeded to the ownership of petroleum found in the State. The British Government never claimed to have any right over petroleum or, for that matter, any mineral resources in the State.}
\]

We agree with Jemuri’s view. Section 75 of the Malaysia Act only dealt with succession to property by the Federation in respect of land that was in use by either the United Kingdom government or the Sarawak colonial administration. This is not relevant to the matter of territorial waters. As for Section 76 of the Malaysia Act; the provision dealt with succession to rights, liabilities and obligations of the state prior to Malaysia Day. Once again, the matter of Sarawak’s territorial waters does not fit in such criteria.

Power of Parliament to legislate for States in certain cases

There remains the matter of Article 76(1)(a) of the Federal Constitution which we reproduce below-

\[
76. (1) \text{Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:}
\]

\[
(a) \text{for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or}
\]

\[
(b) \text{for the purpose of promoting uniformity of the laws of two or more States; or}
\]

\[
(c) \text{if so requested by the Legislative Assembly of any State.}
\]

The question arises as to whether EO No.7 and EO No.10 can be underpinned and justified by Article 76(1)(a) of the Federal Constitution?

There is no question that Article 76(1)(a) is applicable where the Federation establishes legislation to support Malaysia’s position in the international arena to enforce and uphold the 12 nautical mile limit vis-à-vis any foreign power.

However, we would submit that Article 76(1)(a) has no relevance to the purely domestic and municipal issue of the Federation’s exercise of the Emergency powers to legislate EO No.7 or EO No.10 that effectively and unilaterally altered Sarawak’s territorial waters and its dominion or economic and property rights within the area of the continental shelf being the

\text{\textsuperscript{56} Malaysia Act 1963 (Act 26).}
seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak.

**Territorial Sea Act 2012 (Act 750)**

In 2011, EO No.7 was annulled by the successful passage of the Territorial Sea Act 2012 (Act 750) through both the Dewan Rakyat and Senate on 24 November 2011 and 20 December 2011 respectively. And, that Act come into operation on 22nd June 2012.

For ease of reference we reproduce Sections 3 and 4 of the Territorial Sea Act below-

**Limits of territorial sea**

3(1) Subject to the provisions of this Act, the breadth of the territorial sea of Malaysia shall for all purposes be 12 nautical miles. (emphasis added)

(2) The baselines from which the breadth of that territorial sea is to be measured shall for all purposes be those established in accordance with section 5 of the Baseline of Maritime Zones Act 2006.

(3) For the purposes of the Continental Shelf Act 1966 [Act 83], Petroleum Mining Act 1966 [Act 95], the National Land Code [Act 56/65] and any written law relating to land in force in Sabah and Sarawak, any reference to territorial sea therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding 3 nautical miles measured from the low-water line. (emphasis added)

**Sovereignty in respect of the territorial sea**

4. The sovereignty in respect of the territorial sea, and in respect of its bed and subsoil, is vested in and exercisable by the Yang di-Pertuan Agong in right of Malaysia.

It should be noted that Section 3(3) of the Territorial Sea Act is exactly the same language used in Section 4(2) of EO No.7.

To put things in proper perspective, the Explanatory Statement that accompanied the Bill stated as follows-

The proposed Territorial Sea Act 2012 (“the proposed Act”) seeks to provide for the territorial sea of Malaysia to replace the Emergency (Essential Powers) Ordinance, No. 7 1969 [P.U. (A) 307a/1969]. The Emergency (Essential Powers) Ordinance, No. 7 1969 was made under the Proclamation of Emergency of 1969. The Government has decided to annul all the three Proclamations of Emergency. The three Proclamations of Emergency are the Proclamation of Emergency of 1966, the Proclamation of Emergency of 1969 and the Proclamation of Emergency of 1979. With the annulment, all the Emergency Ordinances and Acts made under the three Proclamations of Emergency will cease to have effect. On 24 November 2011, the Dewan Rakyat passed a resolution that the three Proclamations of Emergency be annulled and on 20 December 2011, the Senate passed a

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57 Supra., footnote 7.
resolution to annul the same. As a consequence, the proposed Act is now necessary to preserve the territorial integrity of Malaysia.

The penultimate phrase holds the key. This Act was intended to preserve the territorial integrity of Malaysia.

This intent was reiterated in the part of the Explanatory Statement that dealt with Section 3-

\[
\text{Clause 3 seeks to provide for the limit of the territorial sea for Malaysia based on the principle of international law and the United Nations Convention on the Law of the Sea 1982.}
\]

It is unfortunate the legislative members from Sarawak and Sabah, regardless of their political persuasion, failed to address the matters arising from Section 3(3) of the Act which rehashed the same provision in EO No.7 that has caused so much mischief from the standpoint of Sarawak and, of course, Sabah.

Be that as it may, the intent of Parliament as expressed in the Explanatory Statement that we have reproduced above points to the desire of the Federation to protect and preserve Malaysia’s imperium or sovereign rights in respect of its territorial sea.

In contrast with the express intention, Section 3(3), which deals with the domestic and municipal matter of the territorial sea of the states that constitute the Federation of Malaysia, sits very uneasily within the Territorial Sea Act.

We submit that Section 3(3) of the Territorial Sea Act 2012 is open to a constitutional challenge by Sarawak and Sabah on the same basis and jurisprudence as that which we have applied in respect of EO No.7. To borrow an American legal phrase, Section 3(3) of the Territorial Sea Act may well be the proverbial fruit of the poisonous tree\(^\text{58}\) in that, just as with EO No.7, it may be argued to have violated the procedural requirements set out so very clearly in Article 2(b) of the Federal Constitution that deals with any alteration of boundaries of states within the Federation of Malaysia. Section 3(3) may be challenged for being unconstitutional.

**Conclusion**

As with all constitutional matters throughout the modern world, there is a time and a place for everything. The circumstances described so excruciatingly by Tan Sri Jemuri Serjan\(^\text{59}\) may well have changed in the current ethos of Malaysia’s federal life. Malaysia’s current political circumstances have strengthened the position of Sarawak and, possibly Sabah.

This appears to be an appropriate time and place for the Federation to work with Sarawak and Sabah to audit key constitutional matters including the matter of Sarawak and Sabah’s

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58 This is actually a phrase that forms part of the jurisprudence on the issue of the integrity of the chain of evidence in both civil and criminal matters of the United States of America. It is said to be an extension of the exclusionary rule established in Silverthorne Lumber Co. v United States, 251 U.S. 385 (1920). This doctrine holds that evidence gathered with the assistance of illegally obtained information must be excluded from trial.

59 Supra., footnotes 23 and 25.
dominion or economic and property rights over their respective territorial seas. This is not about taking away from the Federation so much as the Federation restoring to Sarawak and Sabah the territorial seas that belonged to these states as at Malaysia Day subject to any international treaty obligations Malaysia may have entered into.