

Devolution of Powers in Sarawak: A Dynamic Process of Redesigning Territorial Governance in a Federal System

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Abstract

This article is based on a case study of the developing process of devolution of powers in Sarawak as an aspect of the operation of cooperative federalism in Malaysia. The argument developed is that devolution can be seen and used in conjunction with and in reinforcement of federalism, rather than being simply an alternative method of decentralizing powers. The study finds that this approach may be more promising than a more confrontational approach based on arguments around the fulfilment of the original federal bargain, and is also potentially more open-ended and creative (a process rather than an event), embracing issues within the federal bargain but also issues that are not dealt with in that bargain. The study is based on a unique opportunity to canvass the views of Sarawak leaders at the iteration of the devolution process.

Federations have long been recognized to be dynamic in trajectory, complex in operation, and fraught with political tensions.¹ Centrifugal and centripetal tendencies often appear to be locked in a perpetual wrestling match. Sustaining federalism is a task which requires continual adjustment, compromise, and close attention to a range of relevant factors – political, administrative, economic, social, and cultural. Federations can therefore often get out of balance, in which event corrective mechanisms are required. Where this does not work, the federation will tend to break up or dissolve into a unitary state. Across the world we see states in the throes of redefining their territorial governance and experimenting with the new methods that this type of governance produces.² They do this by dealing with demands for independence or secession; redesigning or strengthening local government; establishing local or regional democratic institutions; amending and rebalancing constitutions; devolving powers to regional units on a symmetrical or asymmetrical basis; and finding new ways of

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1. Kenneth C Wheare, *Federal Government* (4th edn, OUP 1963); Ronald L Watts, *Administration in Federal Systems* (Hutchinson Educational 1970).
2. Ronald L Watts, *Comparing Federal Systems in the 1990s* (Institute of Intergovernmental Relations, Queen's University 1996).

coordinating administration and legislation. All this has been as true of Asia as it is of the rest of the world.³

This study looks at the emerging devolution process for Sarawak within the Federation of Malaysia, and attempts to discover the reasons for making a claim for particularized devolution within a federal system that is already asymmetrical (at least with respect to Sarawak); the tools appropriate for the task; and the discourse surrounding it. The process of devolution of powers to Sarawak is well under way as of mid-2017, and since it is supported at least in principle by both the state and federal governments, it is likely to produce some form of devolution for Sarawak in the near future. Indeed, in state elections held in May 2016, the electorate strongly endorsed the state government's policy of pursuing 'greater autonomy' for the state.⁴ Whether devolution will be enough to appease a growing sense of disquiet in regard to federalism as practised in Malaysia/Sarawak over the last half century remains to be seen: 'devolution', according to British political scientist Anthony King, 'is a process not an event'.⁵ Questions at issue currently include how the debate should be framed and iterated, and whether devolution will make modest or far-reaching changes.⁶

The argument of this article, based on the Sarawak case study, is that the neat distinction often drawn between devolution and federalism obscures the important potential of devolution to provide for increased autonomy within a federal structure, not just within a unitary state. The importance of the study is that the case of Sarawak supports the idea that power in Asia is being dispersed from centres to peripheries during a period in which powerful Asian developmental states are being deconstructed politically and territorially.⁷ It also supports the idea that context-sensitive, flexible arrangements in the interface between state and federal government, via a process of devolution facilitating a cooperative form of federalism, offer the most likely way of creating or restoring autonomy as the dispersal of power becomes an evident fact.

Devolution is a process that needs to be distinguished from federalism, even though in this case study they overlap. Federalism is an arrangement which pools the sovereignty of previously or supposedly independent entities in an arrangement that preserves the sovereignty of both federation and states within their areas of operation. It is clearly necessary to have a written constitution defining these areas and a means (usually in practice the apex court or a constitutional court)⁸ of enforcing the bargain. Devolution, on the other hand, is the 'transfer of powers from a superior to an inferior

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3. Andrew Harding and Mark Sidel (eds), *Central-Local Relations in Asian Constitutional Systems* (Hart Publishing 2015) ch 1; John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An East and Southern African Perspective* (CUP 2004) 184.
 4. See several articles listed in live coverage in Malaysiakini, at 'LIVE Reporting' (*Malaysiakini*) <<http://live.malaysiakini.com/sarawak2016/>> accessed 6 February 2017.
 5. Anthony King, *The British Constitution* (OUP 2007) 212.
 6. Andrew Harding and James Chin (eds), *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish 2014) 50; Andrew Harding, 'Will things fall apart in the Malaysian federation?' (*East Asia Forum*, 28 August 2015) <www.eastasiaforum.org/2015/10/28/will-things-fall-apart-in-the-malaysian-federation/> accessed 6 February 2017.
 7. Harding and Sidel (n 3).
 8. Andrew Harding and Peter Leyland, *Constitutional Courts: A Comparative Study* (Wildy, Simmons and Hill 2010).

political authority ... involving ... transfer to a subordinate elected body, on a geographical basis, of functions at present exercised [centrally].⁹ Federalism is thus a condition of existence usually dependent on a prior bargain, whereas devolution is a process of change which does not necessarily have any defined ultimate outcome. It is quite possible, as we will see in this case study, to have devolution within a federal state, although its significance and implementation may differ from devolution within a unitary state. In this context, devolution indicates the transfer to the state(s) of powers beyond those already constitutionally reserved for exercise at the state level.

Two assumptions underlie current official thinking in the state government about devolution in Sarawak within Malaysia's federal system. The first is that the devolution exercise rejects secession as an unrealistic option,¹⁰ given the current weakness of the state in terms of development and governance; indeed, as the discussions have unfolded it has become clear that nobody in the state government, which has the capacity to deliver change, expresses support for secession. Moreover, advocating secession is virtually tantamount – in the eyes of the federal government – to the crime of sedition in Malaysia, rendering hazardous the building of any kind of movement or momentum for secession.¹¹ Nonetheless, secession is clearly supported by many people, even if not the key players in this exercise.¹² Further, the leaders of both of the main Sarawak *Barisan Nasional* (BN) parties have indicated that Sarawak will go its separate way if Malaysia moves ahead with the implementation of *hudud* (Islamic criminal) laws, which is currently an issue under discussion.¹³

The second assumption is that devolution can be achieved without constitutional amendment, using the existing flexibility of the *Federal Constitution of Malaysia* (Federal Constitution).¹⁴ It is the limits to that flexibility, evident in the process of devolution, which this article explores.

The word 'redesigning' in the title of this article, it should be noted, refers to the totality of defining federal-state relations rather than to the constitutional text as such. The study, focusing as it does on the state of debate in mid-2017, finds that underlying the problems giving rise to the demand for devolution are profound constitutional questions that have remained unresolved for over half a century. For this reason,

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9. Peter Leyland, 'The multifaceted constitutional dynamics of UK devolution' (2011) 9(1) *International Journal of Constitutional Law* 251, 256.
 10. There are many who think secession is desirable and that Sarawak could survive and prosper outside Malaysia as an independent state: Sheridan Mahavera, 'Slight majority of East Malaysians want to secede, warns academic' (*Movement for Change Sarawak*, 16 February 2014) <<https://mocsarawak.wordpress.com/2014/02/16/slight-majority-of-east-malaysians-want-to-secede-warns-academic/>> accessed 9 May 2017. This issue nonetheless falls outside the scope of this article.
 11. The Malaysian Prime Minister has indicated hostility to the notion of secession: 'Sabah, Sarawak secession issue non-negotiable' (*The Star Online*, 30 November 2014) <www.thestar.com.my/News/Nation/2014/11/30/Sabah-Sarawak-secession-issue-nonnegotiable/> accessed 6 February 2017. In March 2015 four people were charged with sedition for advocating secession: '4 charged with sedition over Sabah, Sarawak secession, report says' (*Yahoo News*, 16 March 2015) <<https://sg.news.yahoo.com/4-charged-sedition-over-sabah-sarawak-secession-report-042938718.html>> accessed 9 May 2017.
 12. Mahavera (n 10); Harding and Chin (n 6) 184.
 13. 'Hudud will be the Last Straw for Sabah, Sarawak' (*Free Malaysia Today*, 6 April 2016) <www.freemalaysiatoday.com/category/nation/2015/04/06/hudud-will-be-last-straw-for-sabah-sarawak/> accessed 6 February 2017.
 14. Federal Constitution of Malaysia (adopted 1957; last amended 2009).

constitutional amendment may well reappear as an option in the future, in spite of the pragmatic decision of the state government not to ‘play’ devolution in this way. However, for the reasons set out below, constitutional amendment does not feature overtly in these debates at the present time, and this article does not explore these issues, and the history giving rise to them, in any detail. There is, however, a strong feeling in Sarawak that its history has been misunderstood and its constitutional position eroded over time, rendering it one of the thirteen states of the federation rather than one of three partners (with Malaya and Sabah) in an intergovernmental arrangement.

Discussion of this case was facilitated by my attendance at an intra-state-government seminar in Kuching, Sarawak, in October 2015, attended by the Chief Minister of Sarawak, most of the government members of the state legislature, government-side Sarawak Members of the Dewan Rakyat (the Federal Parliament), and leading state officials, notably the State Secretary. The Sarawak government is controlled by the BN coalition which also rules at the federal level; in Sarawak, the BN is composed of four parties: PBB, SUPP, PRS, and SPDP. The late Chief Minister, Tan Sri Adenan Satem, voiced a clear intention to obtain devolution for Sarawak and campaigned in the state elections for the authority – which he obtained – to do so.¹⁵ I had an unusual opportunity to study at first hand the debate and the thinking amongst these members of Sarawak’s political elite. The discussion was not, however, a political or formal event for public consumption. No press were invited, and there was accordingly no need for posturing or political rhetoric. It was, rather, a strategic consensus-building discussion around pragmatic measures to achieve actual devolution of power. The discussion had, in my assessment, an air of level-headed determination. It came at a time of unusual weakness of the federal government, beset as it was by unprecedented corruption scandals, and followed by a change in leadership at the state government level due to the retirement in 2014 of long-time Chief Minister Abdul Taib Mahmud, who ‘for 33 years lorded it over’ Sarawak,¹⁶ but in February 2014 took up the ceremonial position of head of state, the Governor of Sarawak. Taib handed over the leadership of the government to Adenan, a long-time associate. This moment presented a unique window of opportunity for the state to claim devolved powers. This claim is not currently officially opposed by the federal government, but remains to be defined in its scope. Currently, following the general election of 2013, the federal government is composed of BN parties which secured less than half of the vote nationally. It depends on Sabah and Sarawak as the BN’s ‘fixed deposit’ (in the Prime Minister’s own words) in terms of seats in the Federal Parliament.¹⁷ This article sets out

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15. ‘Finer details on Sarawak’s devolution of powers in the works, says Adenan’ (*The Rakyat Post*, 4 November 2015) <www.therakyatpost.com/news/2015/11/04/finer-details-on-sarawaks-devolution-of-powers-in-the-works-says-adenan/> accessed 6 February 2017; Adenan claimed, according to this report, that 45 policies have already been changed in pursuit of this devolution policy. Adenan passed away on 17 January 2017; his policies, said his successor, will be continued.
 16. ‘Last of the rajahs: Powerful chief minister bows out – or does he?’ *The Economist* (London, 15 February 2014) <www.economist.com/news/asia/21596592-powerful-chief-minister-bows-out-or-does-he-last-rajahs> accessed 9 May 2017.
 17. ‘Sabah-Sarawak to remain as BN’s fixed deposit, says local leader - Bernama’ (*Yahoo News*, 16 November 2015) <<https://sg.news.yahoo.com/sabah-sarawak-remain-bn-fixed-deposit-says-local-071131990.html>> accessed 9 May 2017.

the background to the devolution claim, examines its logic, and sets this process within a comparative perspective.

I. SARAWAK: THE LAND OF THE WHITE RAJAHS

Sarawak is a large territory in the northern part of Borneo with a very diverse but small population of around 2.6 million. In fact, its total area (around 125,000 square kilometres) is almost equivalent to that of Peninsular or West Malaysia (around 130,000 square kilometres), which contains eleven of Malaysia's thirteen states. Malaysia includes the eleven states of the Federation of Malaya that was formed in 1948 and became independent in 1957; and Sabah (formerly North Borneo) and Sarawak which joined the Federation, along with Singapore, under the Malaysia Agreement 1963,¹⁸ to form the enlarged Federation of Malaysia. Singapore left the Federation in 1965, while Brunei was asked but refused to join it. The Federation was a partially successful attempt to unite all the former British territories in South East Asia.¹⁹

Prior to World War Two, Sarawak had a history unique in world experience.²⁰ Having long been part of the Islamic Sultanate of Brunei, in 1842 it came under the rule of the so-called 'White Rajah', James Brooke, an English adventurer who was given power over Sarawak in return for dealing with a rebellion against the Sultan's rule. Brooke consolidated his rule under the prevailing customary political order and by military force, so that the throne passed to two of his descendants, Charles Brooke and Charles Vyner Brooke. Between them, the three White Rajahs ruled Sarawak for a century until the Japanese took over the territory in 1942. Returning to Sarawak in 1946, the last of the White Rajahs handed over power to the British Crown, so that Sarawak was a British colony for seventeen years before attaining independence a symbolically significant few days before joining Malaysia on 19 September 1963.²¹

In 1963, Sabah, Sarawak, Brunei, and Singapore were the unswept dust of Britain's South East Asian empire.²² Singapore had attained self-government in 1958. The solution ultimately adopted, following (in the absence of any electoral arrangements) a process of public consultation by a commission under the chairmanship of Lord Cobbold, was that Sabah, Sarawak, and Singapore joined the existing Federation. The Federal Constitution was amended to take account of the accession of these three states. The result was a two-tiered federation in which the three acceding states held more powers and had more guarantees than the existing eleven states of the Federation

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18. Malaysia Agreement 1963, signed 9 July 1963, between the United Kingdom, the Federation of Malaya, Singapore, Sarawak, and North Borneo.
 19. Tan Tai Yong, *Creating 'Greater Malaysia': Decolonization and the Politics of Merger* (Institute of Southeast Asian Studies 2008).
 20. Steven Runciman, *The White Rajah: A History of Sarawak, 1841-1946* (CUP 2011).
 21. This common understanding of the events of July-September 1963 has recently been disputed by historian Michael Leigh. See 'July 22 1963 not the day Sarawak gained independence – Prof Leigh' (*The Borneo Post*, 9 November 2015) <www.theborneopost.com/2015/11/09/july-22-1963-not-the-day-sarawak-gained-independence-prof-leigh/> accessed 9 May 2017.
 22. Constance M Turnbull, 'British Planning for Post-War Malaya' (1974) 5(2) *Journal of Southeast Asian History* 239.

of Malaya.²³ The Federation of Malaya involved a substantial centralization of power at the centre, as the best alternative for Malaya short of a unitary state, which had been rejected by the Malays on the basis of a desire to keep the ancient monarchy system of Malaya and its autonomous states.²⁴ The 1963 Federation was thus a federation of the existing Federation of Malaya of 1948/1957 with the three acceding states. As such, its ostensible purpose was to create a partnership between these four entities, not to render the position of the acceding states uniform with that of the other existing eleven states.²⁵ The resulting amended Federal Constitution contained many provisions providing for the special status of Sabah and Sarawak.²⁶ In addition to extra legislative and executive powers and grant funding beyond those given to the other states, they were to enjoy enlarged representation in the Federal Parliament; and a requirement was inserted that constitutional amendments affecting them could not be enacted without the consent of the relevant state government(s). In theory, then, the new Federation recognized the special position and needs of these two states, which had been discussed in Inter-Governmental Committee meetings beforehand.²⁷ Of particular concern was the position of the majority of indigenous people (in Sabah and Sarawak). Sarawak has more than forty indigenous (referred to as ‘native’ in Sarawak law) sub-ethnic groups having different languages, culture, and subsistence. In addition, the number of its minorities has over the years been swelled by migrants from China, Malaya, India, and Indonesia. A similar mix is presented when religion is in question, with substantial numbers of Muslims, Christians, Buddhists, Hindus, and animists. Sarawak is the most diverse territory in Malaysia, if not in South East Asia.²⁸

What gives rise to the current issues about devolution is the eroded position of Sarawak within the federal structure.²⁹ In general terms it is clear that the state has inadequate resources for its development (fiscal federalism is discussed later in this article), and has serious problems of poverty and infrastructure, despite being natural-resource rich in terms of oil, gas, and timber. The prevailing view amongst politicians of all stripes – officials and community leaders in Sarawak – is that the state is dominated by the federal power, which acts as though Sarawak were equivalent to any of the other states of West Malaysia with their much attenuated powers in a highly centralized, quasi-federal rather than strictly federal, structure.³⁰ In short, many

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23. Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing 2012) ch 5.
 24. Khong Kim Hoong, *Merdeka! British Rule and the Struggle for Independence in Malaya 1945-57* (Institute for Social Analysis, 1984) 108ff; see, further, Albert Lau, *The Malayan Union Controversy 1942-1948* (OUP 1991).
 25. Harding and Chin (n 6) 18, 103.
 26. These are contained in the Federal Constitution, Part XIII, and are discussed in detail below.
 27. Harding and Chin (n 6) 34, 154.
 28. Andrew Harding, ‘Protection of the Indigenous Peoples of Sabah and Sarawak under Malaysia’s Constitution’ in Harding and Chin (n 6) 187; Andrew Harding, ‘Legal Pluralism and the Constitutional Position of East Malaysia’s Indigenous Peoples: The View from the Longhouse’ in Gary Bell and Veronica Taylor (eds), *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of MB Hooker* (Institute of Southeast Asian Studies 2017).
 29. Peter Sibon, ‘Masing Wants Review on State’s Position in Malaysian Federation’ (*The Borneo Post*, 16 November 2013) <www.theborneopost.com/2013/11/16/masing-wants-review-on-states-position-in-malaysian-federation/> accessed 9 May 2017.
 30. James Chin, ‘Federal-East Malaysia Relations: Primus Inter Pares?’ in Harding and Chin (n 6) 153ff.

Sarawakians consider that the state is treated virtually as a colony rather than as an equal partner in a federation of three units, and resent federal interference in the state government.³¹ This study does not assume that these beliefs are wholly correct, although they are strongly supported by statistics, as discussed below. Nonetheless, it is clear that there are serious problems of territorial governance, and even of the perception of territorial governance, that need addressing. The question that arises and that was discussed in the state capital, Kuching, in October 2015, was how to correct an obvious and unsustainable constitutional imbalance, and how to achieve that without appearing to pursue the path of secession.

II. CONSTITUTIONAL DESIGN: FORMAL OR INFORMAL CHANGE?

Designing territorial governance³² is a complex and difficult task which is not simply an afterthought to centralized constitution-making: it implicates everything in the constitutional order, from the separation of powers to representative democracy and fundamental rights. Territorial governance allows for local difference and local preference; autonomy; ownership; the liberation of political and administrative energies; and the avoidance of duplicated or counter-productive efforts. Moreover, scholarly discussion of federalism and devolution, as two models of territorial governance, stresses always the need for a sense of the spirit of the enterprise, for both federal and devolved structures involve a need for deep coordination, collaboration, and cooperation between different levels of government.³³ Designing territorial governance needs to be taken therefore in the broadest sense, including potentially all kinds of devolution, subsidiarity, decentralization, deconcentration, and (crucially in this case study) delegation. Across Asia, with developmental states facing challenges of legitimacy, there are now many examples of devolved powers and redefinition of central-local relations.³⁴ This is due not just to issues of identity but to the fact that local ownership of, for example, development projects, produces better results because decision-makers at the local level know more – and care more – than those higher up. In an example from Kuching referred to in the discussions, a state-funded bridge was said to have been completed more than three years before a federal-funded bridge, construction of which had started earlier (a subtext is that in Sarawak, with its many rivers and dense jungles, bridges are of supreme infrastructural importance).

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31. James Chin, 'Politics of Federal Intervention in Malaysia, with reference to Kelantan, Sarawak and Sabah' (1997) 35(2) *Journal of Commonwealth and Comparative Politics* 96.
32. For territorial governance in the Malaysian context, see J C Fong, *Constitutional Federalism in Malaysia* (Sweet & Maxwell Asia 2008); Harding (n 23) ch 5.
33. Watts (n 1); Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987); Cheryl Saunders, 'Constitutional Arrangements of Federal Systems' (1995) 25(2) *Publius* 61; Cheryl Saunders, 'Collaborative Federalism' (2002) 61(2) *Australian Journal of Public Administration* 69. Elazar (at 5) refers to federalism as an arrangement 'of partnership, established and regulated by a covenant, whose internal relationship reflects the special kind of sharing that must prevail among the partners, based on mutual recognition of the integrity of each partner and the attempt to foster a special unity among them'.
34. Harding and Sidel (n 3) ch 1.

Devolution recognizes the logic that ownership and knowledge create incentives, efficiency, effectiveness, and the ability simply to prioritize in line with what is valued locally. That this is recognized in Sarawak was palpable in the Kuching discussions. At the same time, there was a clear recognition of the fact that an issue like devolution can lead to consequential changes and chain reactions. In pursuing devolution, some longer-term and even from-left-field implications of change need to be expected and carefully canvassed where possible. Reversing fifty years of understanding as to local-central relations would have impacts both in Sarawak and on Malaysia as a whole; indeed, it could have geopolitical impacts given the Philippines' historic claim to Sabah.³⁵ In rejecting both secession and constitutional amendment, the Sarawak policy-makers displayed an acute understanding of these issues. Whether their stance continues to satisfy public opinion in this regard, given the heightened expectations of the 2016 state elections, remains to be seen: the danger is that the result might prove too little for the electorate, and too much for the centre.

In the Malaysian context, it is perhaps fortunate that the constitution-makers of 1957 and 1963 provided several methods of modifying the extent of state powers in practice *without formal constitutional amendment*. They recognized the need for a *cooperative form* of federalism. New forms of constitutional federalism may in this way be allowed to wrap around the fundamental constitutional structures, using devolution as a decentralizing mechanism. Federal constitution-makers and territorial-governance advocates are well advised to keep this in mind.

Federalism and devolution can both be designed in an asymmetrical manner. This means that powers granted to lower-level governments do not follow a single consistent pattern, but are customized to the conditions or desires of the lower-level territory or territories in question. Symmetry is generally a characteristic of federalism; nonetheless, Quebec, Yukon, and Nunavut have asymmetrical powers within Canada's federal constitution,³⁶ as do Sabah and Sarawak within Malaysia's.³⁷ Devolved powers, on the other hand, do tend to be asymmetrical. Within the emerging devolved constitutional structure in the United Kingdom, it can be seen that Scotland, Wales, and Northern Ireland display different models of devolution, offering a useful laboratory of recent experience.³⁸ Indeed the Scottish experience, in addition to that of Quebec's, had particular traction in the Kuching discussions: traction in terms of revealing what is technically and politically possible, and perhaps also legitimate, rather than offering very precisely a model to follow. For present purposes, this study takes 'devolution' of powers in Sarawak to embrace devolution equivalent to that which might occur in a unitary (non-federal) state, or enhancement (if necessary, asymmetrically) of powers within the existing federal structure. On this basis, I assume that use of the word 'devolution' does not actually prejudice the relevance of various ways, short of constitutional amendment, of giving more power in

35. Noel Tarrazona 'Philippines under Duterte to Stake Claim on Sabah Despite Malaysia's Warning' (*Asia Times*, 6 June 2016) <<http://atimes.com/2016/06/philippines-under-duterte-to-stake-claim-on-sabah-despite-malaysias-warning/>> accessed 6 February 2017.

36. Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart Publishing 2014) ch 6.

37. Harding (n 23).

38. See Leyland (n 9).

practice to the state of Sarawak than it currently has, and therefore a broad definition is implied. Devolution in Sarawak could, and probably will, involve statutory delegation and specific administrative procedures. For example, in education it is possible (indeed highly desirable in this instance) for the federation to delegate statutory powers to the state, and for teachers to be appointed, and curriculum changes to be made, as an administrative matter, by state authorities.³⁹ In this context, a major policy issue is the medium of instruction in schools, which is clearly a matter closely related to the ethno-linguistic makeup of the state, having deep cultural as well as political and even economic importance. A main plank of Sarawak's devolution demand is to embrace English as the medium of instruction and as an official language equal in status to the Malaysian national language (Bahasa Malaysia).

III. THE PARAMETERS OF SARAWAK DEVOLUTION AS A CONSTITUTIONAL ISSUE

Here, it is necessary to understand in general terms the position of Sarawak in the Malaysian federal system, and why issues of territorial governance arise.

The Malaysia Agreement of 1963⁴⁰ was an international treaty between Sarawak, North Borneo (now known as Sabah), Singapore, the UK, and the Federation of Malaya, establishing the basis for a new, or rather amended, federal bargain. Prior to that Agreement, discussions had taken place giving rise to an understanding of the *modus operandi* in the new structure. The Malaysia Agreement and consequent amendments to the Federal Constitution were designed to give legal effect to the new federal arrangements. Thus, in Sarawak, considerable attention is given to the '18 Points' (in Sabah the equivalent is the '20 Points') reflecting the pre-Agreement discussions, which operate in popular imagination (although not directly in law) as a kind of Bornean 'Magna Carta'. One very plausible view of this is that over half a century these rights have been disregarded and eroded.

Space precludes detailed consideration of the history and controversy of the 18/20 Points. James Chin⁴¹ has summarized the key issues as follows:

- (i) Islam's status as a national religion was not applicable to Sabah and Sarawak. While there was no objection to Islam being the national religion of Malaysia there should be no State religion in Sabah and Sarawak, and the provisions relating to Islam in the Constitution would not apply to them.

39. As this article was being written, a disagreement broke out between the Sarawak Government and the Federal Government over the non-recognition of Malaysia's Unified Education Certificate (UEC) for Chinese schools, described by Sarawak's Chief Minister as 'stupid'. Sarawak wishes to control education policy, and as an illustration of how devolution might impact such issues, the Sarawak Government has recognized the UEC for state employment purposes: Sulok Tawie, 'Putrajaya Stupid for Not Endorsing Unified Examination Certificate, Says Sarawak Chief Minister' (*Malay Mail Online*, 3 November 2015) <www.themalaymailonline.com/malaysia/article/putrajaya-stupid-for-not-endorsing-unified-examination-certificate-says-sar> accessed 6 February 2017.

40. Malaysia Agreement 1963, signed 9 July 1963, between the United Kingdom, the Federation of Malaya, Singapore, Sarawak, and North Borneo.

41. Harding and Chin (n 6) 154-55.

- (ii) Immigration control was vested in the state governments of Sabah and Sarawak.
- (iii) 'Borneanisation'⁴² of the civil service should proceed as quickly as possible.
- (iv) No amendments or modification of the safeguards granted under the 18/20 Points could be made by the federal government without the agreement of the Sabah and/or Sarawak government.
- (v) There would be no right to secede from the Federation.
- (vi) The indigenous peoples of both states would enjoy the same 'special' rights given to the Malay community in Malaya.⁴³
- (vii) Sabah and Sarawak were to be given a high degree of autonomy over their financial affairs. They would retain control of their own finance, development expenditure, and tariff.

The 18/20 Points do not take legal form, and seemingly cannot independently be the basis of litigation for their enforcement. Nonetheless, in the case of *Fung Fon Chen*, the High Court in Kota Kinabalu and the Court of Appeal accepted that in principle the Malaysia Agreement could form the basis of a legal suit, even though the plaintiffs' suit on the basis of failure to observe the 'Borneanization' provisions of the Agreement was ultimately denied by a majority in the Court of Appeal on the issue of standing.⁴⁴

Nonetheless the 18/20 Points have political potential, at the very least. According to Sarawak's Legal Counsel and former Attorney-General, Datuk JC Fong, devolution 'has to be in reality, the "reclaiming" of autonomy which Sarawak ought to have as a truly "equal partner" in the federation'. In this sense, devolution can, in his view, be seen as a fulfilment of the obligations under Article VII of the Malaysia Agreement to implement the above principles, which it is felt in Sarawak to not have been honoured in practice.⁴⁵ This echoes the words of the Cobbold Commission, which in recommending federalism for Sarawak in 1963 laid down the idea that the new federation was a partnership as opposed to a take-over of the new states by the federal power.⁴⁶

Many Sarawakians consider that the original guarantees, constitutionalized or otherwise, have been eroded or simply ignored in practice and that the Federal Constitution, despite its guarantees, has failed to prevent this from happening. If the idea is literally to reclaim, in the name of Sarawak, autonomy lost to the centre 'unconstitutionally', or contrary to original agreements and understandings, then the answer to the problem is constitutional amendment. Here, the implication would be that the process stops right there because autonomy according to the original bargain would have been achieved. However, to argue on the basis of history, while it has political appeal, somewhat precludes the possibility of a complete rethink in light of

42. ie, gradual conversion of public service positions so that they would be held by Sarawakians or Sabahans.

43. See Federal Constitution, art 153.

44. *Fung Fon Chen @ Bernard & anor v Government of Malaysia & anor* [2012] 6 MLJ 724; revd on appeal, Civil Appeal S-01-295/7-2012; see also *Robert Linggi v Government of Malaysia* [2011] 2 MLJ 741; revd on appeal, Civil Appeal S-01-247-2011.

45. Draft paper on file with the author: J C Fong, 'Federalism: Distribution and Devolution of Powers within the Framework of the Federal Constitution in Malaysia', 12. This involves implementing assurances, undertakings and recommendations in Annexes A and B of the *Report of the Inter-governmental Committee, 1962* (Government Printer 1963).

46. *Report of the Commission of Enquiry, North Borneo and Sarawak, 1962*, para 237.

experience and modern conditions. The prevailing (and it is suggested, mature) opinion in Sarawak at the official level is that approaches leading towards constitutional amendment are unlikely to produce substantial and relevant change. Having said that, I noticed that in workshop discussions in Kuching, much attention was paid to the larger issues of formal constitutionalism that are raised when devolution is discussed; in doing so, one group which I was involved in completely and automatically disregarded the list of questions that had been ‘set’ for it to answer by the organizers, focusing instead on a number of fundamental constitutional concerns. This is an illustration of the difficulty in setting limits to devolution.

As an example, we can examine the issue of Sarawak’s parliamentary representation, which was raised in the discussions. Originally, the three acceding states were given, collectively, 33 per cent of federal parliamentary seats, which in effect enabled them, acting together, to block constitutional amendments at the threshold, given the requirement of two thirds’ majorities in both houses to pass a bill amending the Federal Constitution.⁴⁷ When Singapore departed in 1965, the Singapore seats were simply discounted, and Sabah and Sarawak were left between them with around 25 per cent of the seats, which remains the position today.⁴⁸ As a result the only effective bulwark against adverse constitutional amendments, from a Sarawak perspective, is the state government; in other words, in reality only the state’s Chief Minister stands in the way.

To make matters worse, there is a penumbra of uncertainty surrounding the issue of which amendments do actually ‘affect’ Sarawak. For example, a notorious, far-reaching constitutional amendment (to Article 121 on judicial power) affecting the judicial power and the *Syariah* (i.e. religious) Courts, which are state and not federal courts, was passed in 1988 without reference to Sarawak. This amendment has spawned an immense literature, which does not, however, address the matter from a Sarawak perspective, and assumes the formal validity, as opposed to the problematical consequences, of the amendment.⁴⁹ The 1988 amendment, as Sarawak officials and lawyers plausibly maintain, is invalid in Sarawak due to a lack of prescribed constitutional process, which requires the consent of the state government for amendments affecting Sarawak.⁵⁰ The issue does not stop short at constitutional amendments. There may be many issues of legislation and administration at the federal level that affect Sarawak, where state consent does not even formally arise. Do such measures affecting Sarawak even have to be adverse to the state’s interests to make the constitution and federalism relevant? Federal and state officials might, one may imagine, differ on these questions. Judicial pronouncements seem to indicate that the Malaysia Agreement as well as the Federal Constitution’s provisions protecting Sarawak come into play at this juncture. But the issue is still murky implemented in practice.

47. Federal Constitution, art 159(3).

48. Harding (n 23) ch 3. Currently Sabah (25) and Sarawak (31) have 56 seats out of 221 in the Federal Parliament.

49. The literature is too much and too marginal to present concerns to cite here, but for further discussion and citations, see Jaclyn Neo, ‘What’s in a name? Malaysia’s “Allah” controversy and the judicial intertwining of Islam with ethnic identity’ (2014) 12(3) *International Journal of Constitutional Law* 751.

50. Federal Constitution, art 161E(2).

I have digressed on this issue to indicate that in the final analysis, a neat and complete excision of formal constitutional questions is ultimately not, in devolution, necessarily entirely possible, advisable, or supported.

For all that, there can be no doubt that, if constitutional change were contemplated, other strategic questions would arise. What would be the implications for Sabah, which has similar issues to Sarawak? Would a common case, or at least a common cause, have to be made, and would that be possible? Indeed, what about the other eleven states? Princes of the royal house of Johor, for example, have during 2015 rattled states-rights sabres, reminding the federation of what they allege to be its 'right to secede if their [federation] agreement is not honoured'.⁵¹ The echoes of a debate on constitutional change would sound differently in every part of the country. What indeed would persuade the federal government and two-thirds of the MPs that constitutional amendment was even required, particularly given the scope of existing powers as well as the devolution that is possible without amendment? Moreover, the two-thirds' majority requirement means that opposition parties, not just the federal government (the BN coalition government has 122 seats in a 221-seat lower house), would need to support an amendment before it could be carried. If Sarawak were to propose such an amendment, we can therefore envisage a very protracted debate that might well result in a negative answer. To compare, a debate about Islamic criminal laws affecting state-federal relations has been under debate publicly since the early 1990s and is still far from being resolved.⁵²

Sarawak leaders have already canvassed the problems involved in formal constitutional change. The complex nature of the constitutional politics involved makes this direction look hazardous, as we have seen. In spite of this, however, the *symbolic* effects of change will be of great importance to many people, whichever road is taken. It did not go unnoticed even outside Sarawak, for example, that in July 2013 the Sarawak Government re-enacted the ceremony ending British rule in Sarawak on the equivalent date in 1963. The implication of this is profound. It is nothing less than a powerful statement that Sarawak was originally independent, if only for a few days. This implied that Sarawak's adherence to the federation is a matter of choice, not compulsion. It bespeaks an original sovereignty. It was also noted that the ashes of the last *Rajah Muda* (crown prince) of the Brooke dynasty had been returned to Kuching from New Zealand for reburial in the family graveyard at Fort Margherita on the Sarawak River. Where pride is involved, symbolism is indeed powerful.⁵³ For this reason, current politics indicates that devolution will need to be a real assertion of autonomy, not just some kind of efficiency gain. Unfortunately, the federal government appears to consider devolution to be an underwhelmingly modest form of administrative streamlining.⁵⁴ One cannot help thinking that they will be forced to have second thoughts.

51. 'Johor crown prince warns that the state may secede if putrajaya breaches federation's terms' (*Straits Times*, 16 October 2015) <www.straitstimes.com/asia/se-asia/johor-crown-prince-warns-that-state-may-secede-if-putrajaya-breaches-federations-terms/> accessed 6 February 2017.

52. See Andrew Harding, 'The Keris, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia' (2002) 6 *Singapore Journal of International and Comparative Law* 154.

53. Harding and Chin (n 6) 11.

54. See below n 90 and related text.

The question then might be, what is the best division of powers now, fifty years after the original bargain, and irrespective of that bargain? This approach is an attractive option as it is relatively easier to make practical gains looking forward, compared to arguing about history. It has the disadvantage that autonomy would not be formally guaranteed, except insofar as it already is – that is, inadequately.⁵⁵ Accordingly, it should be possible to proceed with devolution in an inductive and experimental fashion. Hopefully, a few years of experience under more devolved powers would persuade the federal government that pursuing flexible devolution using the Federal Constitution's existing provisions contains no serious danger. Further changes could then be made in the light of experience and perhaps also changing perceptions of Malaysian central-local relations more generally. Undoubtedly the experience since 2008 that several states can be governed by federal opposition parties without the sky falling in is instructive and positive, despite the existence of some political tensions arising from this situation.⁵⁶ There is also to be taken into account the demand for a return to elected local government.⁵⁷ This too may impact on Sarawak, even though (or perhaps because) local government is within the state's power. If devolution is gained, one might ask, why not take the logic further, devolving power *within as well as to* the state?⁵⁸ It may turn out that in unleashing and building on national sentiment in Sarawak, a large territory with much local diversity, democratic aspirations may be unwittingly encouraged to go further than the present leaders have imagined. This may be one of the unpredictable consequences of devolution.

The critical issue, however, is of course finance. Without adequate fiscal provision, extra powers – even existing powers – are mere illusion. In fact, more powers would quickly become a burden, not a boon. Here again the Federal Constitution offers great flexibility, especially for Sabah and Sarawak. To this issue we now turn.

IV. REVENUE SOURCES UNDER THE FEDERAL CONSTITUTION

In fulfilment of the idea of a strong central government with limited powers for the states, the Reid Commission in 1957 placed financial matters firmly in the hands of the Federal Government. Nonetheless, the then Prime Minister, Tunku Abdul Rahman, viewed a centralized federalism as a way of equalizing wealth among the states.⁵⁹ The Commission refused on grounds of efficiency to give states the power to tax income, as a result of which the imbalance between federal and state finances is marked. State governments are hard pressed to avoid an operating deficit, and development

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55. Khairil Azmin Mokhtar, 'Confusion, Coercion and Compromise in Malaysia's Federalism' in Harding and Chin (n 6) 221.
 56. Tricia Yeoh, *States of Reform: Governing Selangor and Penang* (Penang Institute 2012).
 57. Andrew Harding, 'Local democracy in a multi-layered constitutional system: Malaysian local government reconsidered' in Harding and Sidel (n 3) ch 7.
 58. *ibid.*
 59. Shafruddin Hashim, 'The Constitution and the Federal Idea in Peninsular Malaysia' (1984) *Journal of Malaysian and Comparative Law* 138, 156.

funding normally (and especially in Sarawak) has to come from federal sources.⁶⁰ The problem therefore was and still is how to resource the execution of state powers.

The solution adopted was to enable the states to draw on federal resources while exploiting the possibilities for maximizing their own revenue. To avoid annual battles over the amount of federal funding, states are entitled under the Federal Constitution to certain grants, which are calculated according to formulae based on the following rules and policies.

The Capitation Grant, based on the annual population projection for the State,⁶¹ was argued in Kuching to take no account of the fact that Sarawak's population is small and highly dispersed.⁶² The State Road Grant is calculated by multiplying an average maintenance cost per mile by the number of miles of road in the state. Arguably this leaves states that need infrastructural *development* (such as Sarawak) at some disadvantage. The view from Sarawak is that the funding regime does not take account of: the generally low level but high cost of maintenance in Sarawak; the dire need for more roads; and the reliance on wharfs, jetties, and pontoons in a riverine state.

These grants are constitutionally guaranteed and set out in detail in Schedule 10 of the Federal Constitution, so that there is no element of discretion involved. In theory, therefore, state finance does not depend on federal approval; but in practice the situation tends to be otherwise. Mandatory grants are in general terms barely sufficient for state governments to keep their doors open, and states have usually been run on deficit funding which is then made up by the federation.⁶³ In order to take development initiatives, however, states need finance over and above the mandatory grants. In the context of the budget debate in the Federal Parliament in October 2015, Sarawak, following through on devolution-speak, made an unprecedented demand for an extra RM500 million of rural development funding.⁶⁴

Nonetheless, states also have some sources of revenue based on their own powers, which are similarly guaranteed by the Federal Constitution.⁶⁵ In practice, the most important element is the royalties and other revenue derived from land and natural resources, which in Sarawak means oil, gas, and timber. However, Parliament may restrict the levying of royalties or similar charges made in respect of mineral concessions.⁶⁶

The need for states to obtain royalties on natural resource exploitation has given rise to conflict between states that have such resources (such as Sarawak) and the federal government.⁶⁷ States have attempted to claim the right to royalties on the

60. Fong (n 32) ch 5. For an example, see 'What AG's Report Says about Selangor' (*Malaysia Today*, 25 October 2011) <www.malaysia-today.net/what-ags-report-says-on-selangor/> accessed 6 February 2017.

61. Federal Constitution, Schedule 10, Part I.

62. Federal Constitution, art 109; for details as to how this works, see Fong (n 32).

63. Fong (n 32) 107, states the total State deficit for 2006 as RM193 million.

64. 'Sarawak to Seek RM500 Million More from the Federal Government for Rural Development' (*Bernama*, 31 October 2015) <www.bernama.com/bernama/v8/sp/newssports.php?id=1185366/> accessed 6 February 2017. This is intended mainly for bridges and roads.

65. Federal Constitution, art 114.

66. Federal Constitution, art 110.

67. Fong (n 32) 98-103.

exploitation of resources (oil and gas, for example) found under the continental shelf adjacent to but beyond territorial waters. These are areas that – in their view – belong to the state, but in the view of the federal government, they belong to the federation.⁶⁸ This conflict was initially resolved by the *Petroleum Development Act 1974*,⁶⁹ Sections 2-4, under which all oil and gas rights were vested in the federation in the form of Petronas, the national oil company, in return for ‘such cash payment as may be agreed between the parties’. This in itself was controversial. In 1975, the payment was agreed at 5 per cent of the price of oil and gas found and sold by Petronas,⁷⁰ and has been a continuing source of dissatisfaction. Currently, Sarawak is demanding a royalty hike to 20 per cent.⁷¹ However, Sabah and Sarawak are also the recipients of the largest amount of development funding from the federal government. As JC Fong comments, this outcome indicates dependency on federal development funds.⁷² It is highly persuasive that the 5 per cent royalty payment is a long way below what is reasonable, but the federal government has the power to impose its will, even if unreasonably. One might also question why 100 per cent of royalty payments should not belong to the people of Sarawak.

As JC Fong has also written, ‘[t]he financial arrangement between the federation and the states ... has enabled Malaysia to maintain financial stability, economic progress and transformation ... it may not be perfect, but it has proved to be one which seems to be best suited for the federation’.⁷³ Whether this will continue to be true, especially in the context of Sarawak, remains to be seen.

The real issue is that between them Sabah and Sarawak have about 60 per cent of Malaysia’s total land area and a vast proportion of the country’s natural resources, and yet rates of poverty are high and development is weak. Consider the following statistics.

Sarawak’s annual GDP slowed in 1991-2013 to 4.4 per cent (national average 5.9 per cent) compared to 10.6 per cent (national average 7.4 per cent) in 1967-1990. The average state royalty 2005-2014 was just RM2.2 billion compared to the federation’s annual payment of RM 75.5 billion. Mean household income in Sarawak is 14.1 per cent lower than the rest of Malaysia. The incidence of poverty is the third highest of the Malaysian states at 2.4 per cent. Treated water supply is available only to 77 per cent of the people in Sarawak compared to almost 98 per cent in Peninsular

68. Considerable disquiet was expressed in Kuching over the enactment of the Malaysia Territorial Seat Act (Act 750) which in the eyes of many in Sabah as well as Sarawak was an attempt to plunder Borneo’s natural resources: see, for example, Winston Way ‘Petronas-Putrajaya Has No Rights in Borneo Waters’ (*Free Malaysia Today*, 31 March 2014) <www.freemalaysiatoday.com/category/nation/2014/03/31/petronas-putrajaya-has-no-rights-in-borneo-waters/> accessed 6 February 2017.

69. Petroleum Development Act 1974 (Act 144).

70. Under Tripartite Agreements of 1975, involving the Federal Government and the Governments of Sabah, Sarawak, and Terengganu.

71. Desmond Davidson, ‘Adenan Pledges to Keep Fighting for 20% Royalty’ (*The Edge Markets*, 6 August 2015) <www.theedgemarkets.com/article/adenan-pledges-keep-fighting-20-oil-royalty> accessed 9 May 2017.

72. Fong (n 32) 103. See also n 24.

73. Fong (n 32) 120.

Malaysia; electricity supply to only 88 per cent compared to almost 100 per cent in Peninsular Malaysia.⁷⁴

The tools are already there to make improvements benefitting Sarawak. The most pressing need is to make effective use of them, and that requires resources. While the Federal Constitution provides many opportunities to exercise power and to rethink the arrangements affecting Sarawak, ultimately it is the politics of devolution that provide the practical answers. That politics commenced in 2014, a full fifty years after federation.

V. SCOTTISH DEVOLUTION AS A COMPARATOR

In Kuching in October 2015, Scotland was seen as a totemic example of claiming and obtaining devolved powers in a (crucially) Westminster-system government within the Commonwealth. The comparison is apt, or at least of interest, if only because it was considered to be so. The differences between the two situations are of course very great, but in some respects Scotland affords some useful ideas for Sarawak and the comparison indicates that devolution has traction both in unitary states and federal systems.

First, it is important to note that the UK does not have a federal constitution, nor is its constitution written or supreme law, as is the case with Malaysia. This is important in that the UK constitution is the outcome of processes of development taking place over 800 years (these include devolution since 1999); whereas the Malaysian Federal Constitution is programmatic, the foundation of a new nation. Fortunately, Sir Ivor Jennings, who was an expert in federal systems, did such a good job as a member of the Reid Commission⁷⁵ that his 1957 design of federal, state, and concurrent powers has scarcely had to be tinkered with except to take account of Sarawak and Sabah's accession in 1963.

The form of federalism embraced by the Malaysian Constitution is, as we have seen, very much an asymmetric form with regard to Sabah and Sarawak, which compares well with the UK's asymmetric arrangements with regard to Scotland. An important consequence of the distinction between devolution within a unitary state and a federal state, as we have also seen, is that in the former situation sovereignty remains vested at the centre – in the case of the UK, with Parliament. In Malaysia's case, the Federal Constitution is supreme and sovereignty is technically shared between the federation and the states. As indicated above, this is symbolically and constitutionally very important. There is actually an advantage here for Malaysia in the sense that in the UK, there was no existing structure to work with to achieve either a process or an outcome for devolution. Devolution was achieved via special legislation and a referendum, and

74. Official statistics adduced by the State Secretary of Sarawak October 2015, on file with the author.

75. Joseph Fernando, 'Sir Ivor Jennings and The Malayan Constitution' (2006) 34(4) *Journal of Imperial and Commonwealth History* 577; *Report of the Federation of Malaya Constitutional Commission 1957*, Colonial No 330 (London, Her Majesty's Stationary Office, 1957); see also Harshan Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia' in Harshan Kumarasingham (ed), *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (Routledge 2016) ch 1.

has been implemented via administrative ‘concordats’ and special arrangements, both administrative and legislative.⁷⁶ Of critical importance, however, for the UK, was that although there was no existing Scottish legislature or executive, there was a civil service in the form of the Scottish Office, whose functions were simply transferred to the new Scottish institutions. That the civil service for Scotland was therefore derived from that of the UK itself is without doubt a major reason for the relatively smooth devolution in Scotland’s case.⁷⁷ This is one aspect at least from which Sarawak can learn much to its advantage. However, the clear disadvantage of devolution is that devolved powers, once given, can be taken away. For this reason, the relevance of devolution in a federal state is coloured by implications regarding sovereignty. This has not gone unnoticed in Sarawak.

There are nonetheless advantages in having a written constitution, which the UK is not able to enjoy. If that constitution is also capable of flexibility, then the best of both worlds may be expected. If it is federal, then there is also no need to create new legislative or executive bodies. All that is required is to enhance the powers available and find means to sustain and check those powers. There is no need, for example, to hold a referendum on constitutional change, because processes already exist under the constitution to accomplish what is required.

Scotland has, to express it summarily, devolved powers over education, the legal and judicial system, economic development, agriculture and fisheries, local government, the environment, housing, transport, forestry, and the arts. The *Scotland Act 2016* confers further powers, mainly over social welfare.⁷⁸ This list, to a large extent, mirrors the list of functions that Sarawak already has. We may note that the environment is seen as a separate topic in the UK: regarding Malaysia, ‘environmental regulation is ... [an instance] where powers are spread across all three levels of government, leading to complexity in environmental policy and decision-making, and confusion over water supply, water resources, and drainage.’⁷⁹ As for the division of powers in Malaysia’s federal system, it has been summarized as follows:

State powers in Malaysia are largely limited to Islamic law and custom, land, agriculture, forests and natural resources; however local government and therefore all of its functions are also under State control. The concurrent powers such as social welfare, planning, and public health, are in general exercised by the States. Sabah and Sarawak have powers over immigration, as well as over native customary law and personal law, and some other functions such as harbours and posts. They also have power to impose a sales tax but have not exercised it ... It is immediately apparent that the Federation has much more power than the States, and that Sabah and Sarawak have much more power than the Peninsular Malaysian States. Sabah and Sarawak’s control over immigration, not only from outside Malaysia but also from the rest of the country, is very unusual in a Federal system. The most expensive functions too, such as defence, health care, and education, lie with the Federal power. On the other hand the States are in charge of many functions that impact directly and visibly on the environment and on the lives of communities. It will be noted

76. For eg, the Sewel motion which has been invoked on many occasions: Leyland (n 9) 259.

77. *ibid* 256.

78. *Scotland Act 2016*, c.11.5

79. Harding (n 23) 136.

that most of these relate to the physical environment. Local government itself too has significant functions such as building and development control, and market regulation.⁸⁰

Concurrent powers are extensive as applied to Sarawak under Schedule 9 of the Federal Constitution. They include social welfare, family law (including protection of women and children), national parks, physical planning, public health, water supply, and shipping. Health and education are also major areas potentially for devolved powers in Sarawak. If one looks at the Federal Constitution one can see that if one adds together: (1) existing general state powers; (2) extra powers given to Sabah and Sarawak; (3) the possibility of exercising concurrent powers; and (4) the possibility of obtaining further (administrative) powers under the 'flexibility' provisions (discussed further below), the conclusion must be that the state already has a great deal of power within its grasp and could easily have more.

There are, however, two relevant issues here. The first is that, under current political and administrative practices, Sarawak does not sufficiently exploit the opportunities it already has. For example, it has political representation at the federal level, in the lower and upper houses of the legislature. MPs and Senators appear to be inactive in asserting the state's interests at the centre. Indeed, the current Prime Minister of Malaysia has gone so far as to refer, in terms of elections, to Sabah and Sarawak as his 'fixed deposit'.⁸¹ This is explained in these terms by Bridget Welsh:

[T]he elite have considerable representation, but ordinary ... Sarawakians face electoral mechanisms and processes that marginalize their voices ... [Sarawakians] have a degree of formal representation in Parliament, [but] in terms of substantive representation there is very little discussion of issues relevant to the people [of this state].⁸²

The second issue is that, assuming federal cooperation in delegating powers, the problem is not so much the formal extent of power as *how to pay for its exercise*. This, in turn, focuses attention on the fundamental issue for Sarawak of natural resources and how to obtain revenue therefrom, as discussed in the last section.

Another comparison with Scotland can be made regarding compliance with the relevant arrangements. In theory, the judiciary acts as the main guarantor of devolved powers in the sense that legislation under devolved powers can be struck down as contrary to the Federal Constitution in Malaysia, or contrary to the Scottish devolution legislation in the courts of England and Wales, and of Scotland.⁸³ But in practice, what has proved effective in the UK to avoid litigation on these issues is pre-legislative consideration under 'concordats'. These have been described as a form of 'bureaucratic soft law', memoranda of understanding, linked to informal, mostly bilateral, agreements between the Westminster government and the devolved administrations.

The Concordats are intended to promote constructive co-operation and communication. They set out a working framework within which Ministers may continue and develop relationships

80. *ibid* 137.

81. See above n 12.

82. Harding and Chin (n 6) 41.

83. See *Axa General Insurance Ltd v The Lord Advocate* [2011] CSIH 31.

between the administrations. The primary aim is to ensure that if either is planning action impinging on the responsibilities of the other, it gives adequate forewarning.⁸⁴

In practice, these concordats have secured transition, continuity, and coordination of policy. In terms of federalism, they can be called an example of cooperative federalism. In the UK, they are the outcome of careful consideration within the administration rather than at the political level, implemented 'by a cadre of civil servants schooled in the traditions of the UK home civil service'.⁸⁵ Importantly, it should be noticed that devolved functions in Scotland are largely those previously carried out by the Scottish Office under the UK government. Continuity and coordination have been the bywords. In Sarawak with its somewhat federally-oriented public service, it might be considered whether continuity is more important than obtaining a complete break with the past. Either way, the lesson is that in devolution bureaucrats do become very powerful.

Of course, Sarawak, unlike Scotland pre-devolution, has its own legislature. In Scotland, the point was to make the exercise of Scottish powers a matter for Scotland itself and subject to accountability to the Scottish Parliament, which has become more significant as devolution has become entrenched and political alignments have altered in favour of the Scottish National Party, which seeks full independence for Scotland from the UK but within the European Union. Although the SNP lost the referendum vote in 2014 by about 10 per cent of the votes, it won 56 out of the 59 Scottish seats in the 2015 general election, indicating voter preference for 'devolution-max' short of independence. Scotland already has more devolved powers than any part of the UK including England, and in 2016 achieved even more autonomy. Political awareness and demand have been an important part of Scotland's devolution; in Sarawak, there is both awareness and demand, but the majority of its people live with simple subsistence in remote villages under customary law, where modern politics has not yet intruded significantly.

Scotland is funded via the Barnett Formula, which is very different from Sarawak's federal-grant system based mainly on fixed-formula grants.⁸⁶ Scotland has its own powers of taxation, but obviously governments do not like to announce tax increases, so these powers have not been used in practice, rather like the sales tax power in Sarawak. In the words of Peter Leyland, a leading expert on devolution:

[The] Barnett formula works by establishing a ratio by which the total spending is fixed in relation to England. Thus, the levels of spending made available to Scotland, Wales, and Northern Ireland are related to the sums allocated in the same designated policy areas by the Westminster Parliament. An overall budget is fixed annually by the Westminster Parliament in each departmental field. The allocations for an increase or decrease in expenditure are made according to a ratio calculated on relative population size.⁸⁷

As we have seen, fiscal arrangements for Sarawak are currently inadequate. Its condition in terms of development and the special needs of its majority indigenous

84. Leyland (n 9) 255.

85. *ibid* 256.

86. Federal Constitution, Schedule 10.

87. Leyland (n 9) 258.

populations are pressing concerns. In Sarawak, there are also natural-resource-economy issues to be resolved.⁸⁸ It is clear that the state does not get an adequate share of the profit from exploitation of its oil and gas; this unfortunately indicates a failure by Sarawak politicians over half a century to protect the state's interests. In Scotland also, funding is not specifically related to the government activity in question (except in the purely mathematical sense, as explained above). The idea is that once the correct ratio is established and applied, the Scottish government can use the funding in whatever way it chooses so long as it is used in the execution of its legal powers. This is perhaps unusual in that it is in effect a block grant with no strings attached. For example, the Scottish government can, and has, devoted a greater proportion of funding to education, refusing to impose tuition fees for university education, than England and Wales, which have done so.⁸⁹ The lack of capacity to raise revenue locally has been identified as a major issue in Scottish devolution, and the same would apply – perhaps even more so – in Sarawak. It is imperative that any extra funding is not linked to specific subjects in order to provide flexibility in how it is spent; herein lies an important facet of autonomy.

In conclusion of this part, the main features of Scottish devolution that were attractive to participants in Kuching were the concordats and the idea of block-grant funding. Adoption of something like the concordat arrangements in UK devolution is very much needed in Sarawak, where it was consistently noticed during the Kuching discussions that the lack of a proper interface between federal and state administrations was an omission explaining (and failing to resolve) many grievances. This aspect needs careful attention moving forward, the point being that Sarawak needs to engage, as Lord Cobbold envisaged, as an equal partner, not just as one of thirteen states.

VI. MOVING FORWARD WITH DEVOLUTION

Given the conclusions about the general parameters for devolution, the question then arises: what claims should be made and how they should be taken forward legally and politically. Given the asymmetrical federal system, there is no logical reason to assume that devolution in Sarawak should involve other states. Obviously, however, Sabah will be watching this process as the position of that state is analogous to that of Sarawak.

Speaking in Kota Kinabalu in September 2015, the Prime Minister had only a very modest proposal for devolution. He referred to deciding on tenders for federal development projects in Sarawak through a committee involving the state secretary and federal representatives; interviewing for public-service positions in places accessible to people in the interior; placing a 90 per cent target for Sarawakian teachers in the state (currently the figure is about 75 per cent); and empowering state legal officials as opposed to the (federal) public prosecutor to prosecute state offences.⁹⁰ However, none of these proposals would give much pause even to a devoted centralist.

88. Harding and Chin (n 6).

89. Michael Keating, 'Policy Convergence and Divergence in Scotland under Devolution' (2005) 39(4) *Regional Studies* 459.

90. 'PM Explains Devolution of Power to Sabah, Sarawak' (*Bernama*, 16 September 2015) <www.bernama.com/bernama/v8/fe/newsfeatures.php?id=1171884> accessed 6 February 2017.

Critical to the strategy for devolution is the legal concept of delegation. Delegation is possible under statute law, including areas that are crucial for Sarawak, such as education and health; it involves a number of propositions.

First, delegation does not need to be expressly provided for by the relevant statute.⁹¹ To be lawful, it must, however, be consistent with the *Delegation of Powers Act 1956*.⁹² This means that delegation is subject to the terms and conditions laid down by the Minister, and must be gazetted.⁹³

Second, regarding the protection of Sarawak's interests, parliamentary representation can be dealt with as part of the electoral-boundary review process, but increasing representation beyond that of other parts of Malaysia (for example requiring Sabah and Sarawak to hold jointly 35 per cent of seats) raises issues of constitutional amendment which would involve Sabah too, and there could be objections from other states.

Much more important for Sarawak is that Article 161E(3) of the Federal Constitution (see above for discussion of what 'affects' Sarawak) needs to be clarified and adhered to. Discussants in Kuching felt that this provision had been effectively ignored by the Federal Government in passing legislation, as is indicated by the passage of the *Malaysia Territorial Sea Act 2012*⁹⁴ and the case of *Robert Linggi*.⁹⁵ Beyond this it seems clear that Sarawak MPs, senators, and officials at Putrajaya could do more to represent the state's interests at the centre.

Third, Article VIII of the Malaysia Agreement 1963 states:

The Governments of the Federation of Malaya, North Borneo [i.e. Sabah] and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings, and recommendations contained in Chapter 3 of, and Annexes A and B [these are the 18 or 20 points] to the Report of the Inter-Governmental Committee signed on 27th February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.

Thus, reconvening the IGC would acknowledge a need to fulfil the intention of the original bargain.

Fourth, there is state revenue as discussed above. In general, there is a felt need for more transparency about how figures are arrived at, and how some sources fluctuate. One payment was said not to have been reviewed since 1967, while another will disappear under the provision for the ASEAN Free Trade Area. It was argued that Goods and Services Tax on petroleum should be returned to the state and tax on government goods and services should be waived, as is possible under the *Goods and Services Tax Act 2014*.⁹⁶ Taxes collected incidentally in the state (for example under

91. Relevant statutes such as the Education Act 1996 (Act 550), s 5, and the Federal Constitution itself (art 95C: order of the Yang di-Pertuan Agong) envisage such delegation.

92. Delegation of Powers Act 1956 (Act 358) (revised 1988).

93. *M Ratnavale v Government of Malaysia* (1961) 1 INS 58; *Azman Abdullah v Ketua Polis Negara* (1997) 1 CJ 257. I am indebted to JC Fong for information regarding these issues of delegation; precedents for Orders under the Federal Constitution, art 95C, may be found in his paper (n 45) 13.

94. Malaysia Territorial Sea Act 2012 (Act 750).

95. See n 43.

96. Goods and Services Tax Act 2014 (Act 762).

immigration law, where powers are exercised by the state on behalf of the federation) should be returned to the state. State boundaries should be redefined to include the continental shelf.⁹⁷ Development funding should be increased dramatically. These demands indicate that a new deal can be and needs to be struck over state finance.

Fifth, much can be done administratively by way of consultation and information at early stages to ensure smooth and effective development planning. Federal projects could be based on state development planning and coordinated with it, according to state priorities, timing preferences, and decision-making processes. This could apply even to the discharge of federal functions such as defence. Disbursement of funds could be accelerated. Funding could be provided for relocation and compensation. Greater numbers of engineers could be trained in light of state projects' needs. Overlaps and gaps in administration created by the proliferation of federal and state agencies in the same field of activity could be avoided. Federal agencies often have state-level offices that cut across state agency efforts. State agencies and state offices of federal agencies could in general be given more autonomy; in particular, the State Government could be given more control over public-sector hiring.

Sixth, the Federal Constitution itself is a resource. The federation can, under Article 76(1)(c), legislate where simply requested to do so by a state legislature.⁹⁸ This offers the possibility for special legislative requests where state powers are insufficient or unclear. This is a major reason for supposing that constitutional amendment is unnecessary in order to effect devolution. Although executive powers follow legislative powers,⁹⁹ Article 80(4) provides similar flexibility to Article 76(1)(c): 'Federal law may provide that the executive authority of a State shall extend to the administration of any specified provisions of federal law and may for that purpose confer powers and impose duties on any authority of the State'. A relevant example is the *Immigration Act 1959/1963*,¹⁰⁰ which gives the governments of Sabah and Sarawak control over immigration in their respective states. It is also permissible for state and federal authorities to exercise executive powers on behalf of each other (i.e. by delegation). State powers must also be exercised so as to ensure compliance with federal laws, and not to impede the exercise of federal powers.¹⁰¹

VII. CONCLUSION

The case of Sarawak is highly significant in a region that is embracing decentralization in various forms, a trend that seems likely to continue, creating new forms of territorial governance. What we can see in this process led from Kuching is that what is likely to succeed in creating autonomous spaces is not a confrontational and aggressive demand for secession or special privileges, but rather a form of cooperative federalism operating at the administrative level, making creative use of the legal and constitutional tools already available. This is likely to offer more opportunities in the short term, but also in

97. Fong (n 45) 99.

98. Federal Constitution, art 76(1)(c). See also art 76A, which gives States limited powers to pass laws on Federal matters.

99. Federal Constitution, art 80(1).

100. *Immigration Act 1959/1963* (Act 155).

101. Federal Constitution, art 80(5).

the medium and long term, as the cooperative creativity inherent in the law is exploited more fully. In this case, a momentum is building around the notions of autonomy and local ownership, enabling the state to make demands in a firm but non-confrontational manner. The task will be for the state government to steer a line between losing support from the electorate for failing to fulfil their needs, and losing support from the centre for making too many unrealistic or unfair demands, thereby threatening the integrity of the federation as a whole.

It is too early to say how this will work in the long term, but this article has seen how the iteration of this process of cooperative federalism is finding ways of using existing or easily realized powers and pragmatic measures to deliver real autonomy in decision-making and realizable practical benefits to the state in terms of development.

Finally, we can express the thesis of this article simply with a Sarawakian proverb: '*Jamah lubah jampat datai, berumban bemalam rantau jalai*'. This means, 'If you are patient you will arrive soon enough, if you are in a hurry you will spend the night half way'. In other words, 'more haste, less speed', especially in the dense jungle that is Sarawak's devolution.