

CASE STUDY

THE CONSTITUTIONAL POSITION OF CONTINENTAL SHELF IN MALAYSIA: THE CASE OF THE MALAY STATES

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ABSTRACT

The Malay states remain sovereign from the pre-Federation of Malaya in 1957 until today. They acquired external sovereignty through international recognition via membership of Malaya in the United Nations. International law recognises Malaysia's continental shelf, a federation comprising a few coastal states under UNCLOS 1982. A local issue close to this subject is the Malay states' rights in the Federation of Malaysia over petroleum production within the continental shelf adjacent to their territorial waters. Hence, this paper examines a Malay state's rights over Malaysia's continental shelf. This study is a qualitative legal analysis using a case study design promoting the method of watanic jurisprudence. Therefore, the Federal Constitution, UNCLOS 1982, and various statutes are analysed to answer many related issues beforehand. This paper has found that the territorial waters of the Malay states cannot be limited to three nautical miles from the low tide line in pursuance of the Territorial Sea Act 2012 without strict compliance with Article 2 of the Federal Constitution. The legitimacy of the territorial limits of the Malay states' waters is essential as it determines their rights to the continental shelf and its petroleum production.

Keywords: *Malay states' rights, sovereignty, continental shelf, petroleum royalty, watanic jurisprudence*

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Background

Their Royal Highnesses the Malay Rulers had agreed on the purpose of forming a strong central government; their residual legislative and executive powers as rulers in their respective states shall have no limits to the extent that powers are voluntarily agreed to be surrendered or restricted, which allows His Majesty the Yang di-Pertuan and Parliament to exercise legislative powers, as well as to enable the Yang di-Pertuan Agong and the Cabinet of Ministers to exercise executive powers of 'as a single independent self-governing unit' for a Federation (Memorandum of Proposal by Their Royal Highnesses the Malay Rulers Malay, 1956).

For the above purposes, the provisions of Articles 4, 38(4), 71, 77, 150(6A), 159(5), and 181(1) of the Federal Constitution protect the rights of sovereignty, prerogative, powers, positions, privileges, and honours of the Malay Rulers (Wan Husain, 2022). The agreement of the Malay rulers is preserved under their respective state constitutions and Article 160(5) of the Federal Constitution. Malaya became a member of the United Nations on 17 September 1957 as a federation. The name was changed to Malaysia following the admission of Singapore, Sabah, and Sarawak on 16 September 1963 (Malaysia Agreement, 1963).

This paper aims to examine a Malay state's rights over Malaysia's continental shelf. The continental shelf means the seabed and subsoil of the submarine areas that extend beyond the territorial sea of a coastal state. This research focuses on the issue of the Malay states' territorial waters in Malaysia, which are at present limited to three nautical miles from the low tide line. Special focus will be placed on the Territorial Sea Act 2012 [Act 750] and Continental Shelf 1966 (Revised 1972) [Act 83] for legal arguments. This issue will also affect, amongst others, the provision of the National Land Code 1965 (Revised 2020) [Act 828], Petroleum Mining Act 1966 [Act 95], Petroleum Development Act 1974 [Act 144], and Exclusive Economic Zone Act 1984 [Act 311].

The word of the Malay states is used to confine the discussion herein within the nine states of Malaya. The constitutional rights of Malacca, Penang, Sabah, and Sarawak over the continental shelf are excluded from this paper. This research is significant because it can resolve the petroleum royalty claims by the sovereign Malay states that form the Federation. The Malay states are sovereign because Article 181 of the Federal Constitution preserves their rulers' sovereignty. The word sovereign is purportedly used as an affiliation to the Malay states to emphasise that their inherent legal position have not been diluted after the formation of Malaya and Malaysia.

Problem Statement

The rights to the continental shelf have yet to be debated in-depth, looking at its position under constitutional law. The word continental shelf is not enumerated in any List within the Ninth Schedule of the Federal Constitution. However, Article 1 of the Federal Constitution defines the Malay states' territory.

The Federal Government consistently denies the royalty claims by the Malay states, particularly Terengganu and Kelantan, relying on the issue of the Malay states' territorial waters in Malaysia, which are at present limited to three nautical miles from the low tide line (Wahid, 2023; Azalina, 2023).

The real issue in determining the ownership of petroleum within the Malay states' territorial waters in Malaysia is the ownership over the continental shelf.

The claim of petroleum revenue as royalties by the Terengganu and Kelantan State Governments against the Federal Government is the basis for demanding a higher payment amount. To date, there has been no in-depth observation on the question of the sovereignty of the Malay states based on jurisprudence to answer the issue of ownership claim against the continental shelf adjacent to the respective Malay states' territorial waters in Malaysia.

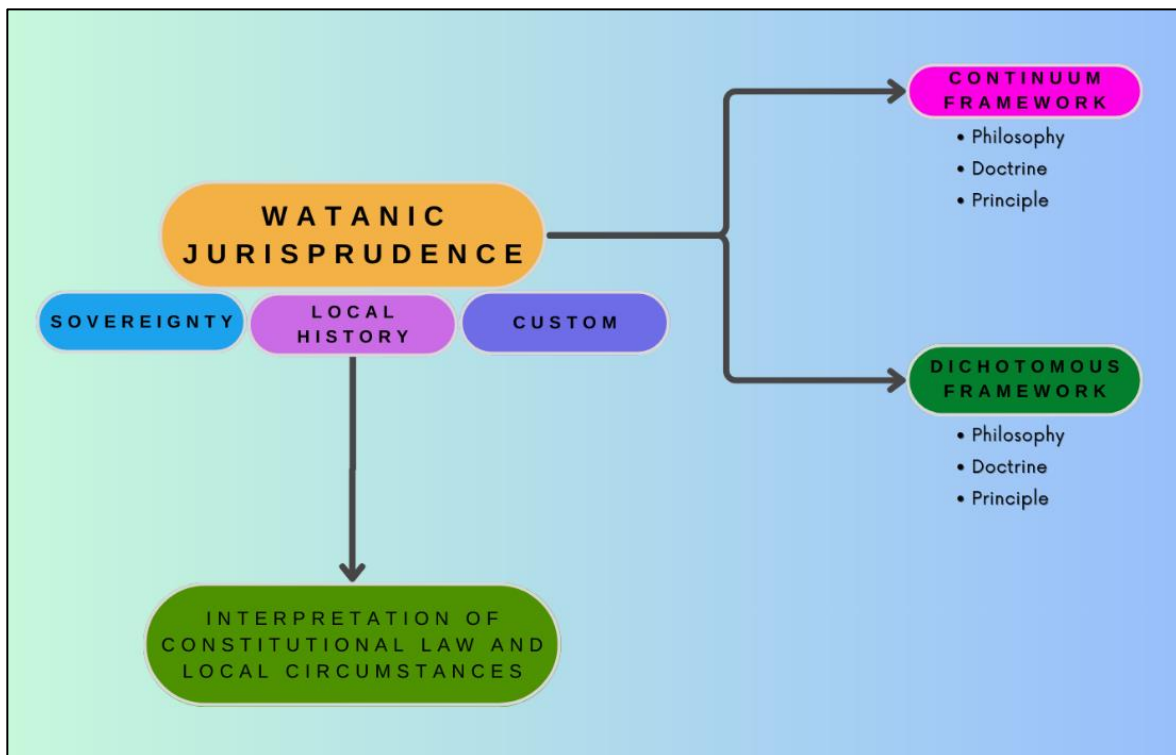
Methodology

This research is a qualitative legal analysis using a case study design. The watanic jurisprudence methodology is applied to interpret the relevant provisions of the Federal Constitution and statutes more clearly because the approach is more local.

The methodology of watanic jurisprudence analyses legal issues and interpretations based on the text of the constitution itself, statutes, and legal principles accepted within the framework of its sovereignty. In doing so, aspects of sovereignty, local history, and customs are analysed to determine the constitutional system of a country or government that contains its philosophy, doctrine, and principles. The custom includes law, practice, culture, convention, and definition of terms, reflecting the local understanding of its philosophical and linguistic perspectives (Wan Husain, 2021a).

The philosophy and linguistics contained in the local customs provide more accurate information about an issue, as illustrated below:

Figure 1: Framework of Watanic Jurisprudence (Wan Husain, 2017)



The method illustrated by watanic jurisprudence is supported by the Federal Court in the case of *Indira Gandhi A/P. Mutho v. Director of Perak Islamic Religious Department & Ors and other appeals* [2018] 1 MLJ 545 when the Federal Court adopts the constitutional method of interpretation by the Supreme Court of Canada as follows:

The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts..... Generally, a constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism, and the rule of law....These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture' or 'basic constitutional structure' ... The notion of architecture expresses the principles that the individual elements of the Constitutional are linked to the others and must be interpreted by reference to the structure of the Constitution as

a whole... In other words, the Constitution must be interpreted to discern the structure of Government that it seeks to implement.

Therefore, in analysing the various issues in this Paper, the reference is not limited to the Reid Commission Report, but also various authoritative sources outlined in the method of constitutional interpretation by the Federal Court to arrive at credible findings.

For the above purposes, the history of Malaya and its customs, including the source of authority, power, and form of legislation that has long been in force, will be examined together with the statutes, legal documents, and cases that have been decided.

The Importance of The Continental Shelf

The ownership of the continental shelf is vital because it is where petroleum is explored. A coastal state that owns the continental shelf directly has rights over its commercial assets and activities therein. Thus, the position of Malaysia, a federation consisting of nine sovereign Malay states, is critically argued to constitutionally determine a party where a coastal state is assigned to it under international law.

Article 1 of The Federal Constitution

Malaysia became a larger Federation when the Federation of Malaya admitted Singapore, Sabah, and Sarawak under Article 2 of the Federal Constitution. They were three British colonies before admission to the Federation of Malaya as a condition for their independence (Malaysia Agreement, 1963). However, the principle of sovereignty and the traditional features of the Federation of Malaya under the Federal Constitution of Malaya 1957 remain after the Malaysia Agreement 1963 (Wan Husain, 2022).

The Federation of Malaya was just a government unit that did not have its land until the Federal Territory of Kuala Lumpur was surrendered, followed by the Federal Territories of Labuan and the Federal Territory of Putrajaya (Abd Aziz et al., 2009).

The territory of a Malay state is defined as “*such one of the Malay States as the circumstances may require and includes all dependencies, islands, and places, which, on the first day of December 1941, were administered as part thereof, and the territorial waters adjacent thereto*” (Federation Agreement of Malaya, 1948).

In the Federation Agreement of Malaya 1957, the Malay states are defined as “*the States of Johore, Pahang, Negri Sembilan, Selangor, Kedah, Perlis, Kelantan, Terengganu and Perak, and all dependencies, islands, and places which, immediately before the thirty-first day of August, nineteen hundred and fifty-seven, are administered as part thereof, and the territorial waters adjacent thereto;*”

By the Federation Agreement of Malaya 1957, the Malay states continue to be recognised as having territories covering all dependencies, islands, and places which are administered as part thereof immediately before 31 August 1957, and the territorial waters adjacent thereto. Territorial sovereignty is a manifestation of a sovereign ruler and nation as recognised by international law. This position is guaranteed by Article 1(3) of the Federal Constitution, that provides:

Subject to Clause (4), the territories of each of the States mentioned in Clause (2) are those comprised therein immediately before Malaysia Day.

Therefore, the territory of each Malay state in the Federation is the territory that belonged to the respective states before Malaysia Day, on 16 September 1963, except for the territories that were surrendered by the states of Selangor and Sabah to the Federal authority. Article 1(4) of the Federal Constitution stipulates the three Federal territories. Article 1(4) reads:

The territory of the State of Selangor shall exclude the Federal Territory of Kuala Lumpur established under the Constitution (Amendment) (No. 2) Act 1973 [Act A206] and the Federal Territory of Putrajaya established under the Constitution (Amendment) Act 2001 [Act A1095] and the territory of the State of Sabah shall exclude

the Federal Territory of Labuan established under the Constitution (Amendment) (No. 2) Act 1984 [Act A585], and all such Federal Territories shall be territories of the Federation.

As of today, no provision in the Federal Constitution vests the ownership of the territorial waters of the Malay states in the Federal authority; even any alteration to the existing Malay state delimitation shall be subject to Article 2 of the Federal Constitution. Article 2 of the Federal Constitution provides for the following:

Parliament may, by law—

(a) admit other States to the Federation,

(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.

Summarily, the territorial waters of the respective Malay states remained within their boundaries before the formation of Malaysia and much earlier, before the establishment of the Federation of Malaya in 1948.

Article 2 of The Federal Constitution

The alteration to the Malay states' territorial boundaries only occurred for the first time on 1 February 1974 when the amendment of the Federal Constitution through Constitution (Amendment) (No. 2) Act 1973 [Act A206] came into force. This amendment only involves the state of Selangor, which surrendered 40,593.14 hectares of its territory to the Federal Government in return for RM3.5 billion to form the Federal Territory of Kuala Lumpur.

This boundary alteration does not involve the territorial water of the state of Selangor, as Kuala Lumpur is not adjacent to the sea. To achieve the legitimacy of the Federal Territory of Kuala Lumpur, the Selangor State Legislative Assembly passed a bill amending the Laws of the Constitution of Selangor 1959. The exact process took place at the Parliament of Malaysia through Act A206 to amend Article 1(3) with the inclusion of Article 1(4) of the Federal Constitution.

Boundary alteration requires the consent of the Conference of Rulers as stipulated in Article 2(b) of the Federal Constitution. The members of the Conference of Rulers may act at their discretion in any proceedings relating to 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 without being subject to the advice of the Executive and Legislative (Federal Constitution, Article 38(6)(c)).

The Selangor State Government was represented by Al-Marhum Sultan Salahuddin Abdul Aziz Shah Al-Haj Ibni Al-Marhum Sultan Hisamuddin Alam Shah, Sultan of Selangor, while the Federal Government was represented by Tuanku Abdul Halim Muadzam Shah Ibni Al-Marhum Sultan Badlishah, His Majesty the Yang di-Pertuan Agong. The Malay rulers at the Istana Negara witnessed the Agreement on the surrender of Kuala Lumpur to the Federal Authority effective 1 February 1974.

The surrender of the Kuala Lumpur territory has complied with the mandatory provisions of Article 2 of the Federal Constitution, which require the following three conditions as follows:

1. through laws passed in Parliament.
2. through legislation passed by the State Legislature for the State involved in the delineation.
3. consent of the Conference of Rulers.

The surrender of the Labuan territory by the State Government of Sabah and the territory of Putrajaya by the Selangor State Government also complied with the provisions of Article 2 of the Federal Constitution. The entry of Labuan and Putrajaya into the Federal Territories was incorporated in the

amendment of Article 1(4) of the Federal Constitution (Constitution (Amendment) Act 2001 [Act A1095] and Constitution (Amendment) (No. 2) Act 1984 [Act A585]). It was also approved by the Sabah State Legislative Assembly through the Federal Territory of Labuan Enactment 1984 and the Selangor State Legislative Assembly through the Federal Territory of Putrajaya Enactment 2000. Hence, the Federal authority acquired the continental shelf measured for the Federal Territory of Labuan since the sea surrounds it.

Article 181(1) of The Federal Constitution

Nine Malay states, Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor, and Terengganu, remained independent throughout the British intervention in their internal affairs. They were protectorate States, not colonised. The position of the Malay rulers as the head of a sovereign government was preserved (Wan Husain, 2022).

Among the shreds of evidence that indicate that the British recognised the sovereignty of the Malay Rulers are the case of *Mighell v. the Sultan of Johore* [1894] 1 Q.B 149 (C.A) and *Duff Development Co. v. The state of Kelantan* [1924] AC 797. Legally, according to Braddell (1931), the relationship of the Government of Great Britain with the Federated Malay States was for protection and assistance in return for intervention in the internal affairs therein as stipulated in the various treaties like the Pangkor Treaty, 1874 and Terengganu Treaty, 1919 whereby the Malay states government remained under the respective Malay rulers. Although a Malay ruler was required to act on the advice of the Resident, the primary duty of the Resident was to give advice, not rule (Simon, 1995).

The sovereignty of the Malay Rulers to date is still guaranteed by the Federal Constitution as provided under Articles 181(1) and 71(1). Article 181(1) reads:

Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers, and jurisdiction of the Rulers and the prerogatives, powers, and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

Meanwhile Article 71(1) stipulates that:

The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of the Ruler of that State in accordance with the Constitution of that State, but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner, as may be provided by the Constitution of that State.

Apart from the Malay states and the Strait Settlements of Penang and Malacca forming the Federation of Malaya, subsequently Malaysia, with the entry of Singapore, Sabah, and Sarawak into the said federation, there are now three Federal Territories comprising Kuala Lumpur, Labuan, and Putrajaya which are placed under the sovereignty of His Majesty the Yang di-Pertuan Agong (Wan Husain, 2021).

The Origin of The Federation

The 1948 State Agreements were the foundation for institutionalising the Federal Constitution of Malaya before it was named Malaysia. Nine agreements were signed on 21 January 1948 by the respective Malay rulers with the British Government. The 1948 State Agreements proved that the Malay rulers remained sovereign and had the ultimate authority over forming the Federation of Malaya, which ended the British intervention on 31 August 1957 (Wan Husain, 2021b).

The position is clearly enshrined in Clause 2 of the 1948 State Agreements, which provides as follows:

Federation Agreement means the Agreement which is to be made between His Majesty and Their Highnesses the Rulers of the Malay States of Johore, Pahang, Negri Sembilan, Selangor, Perak, Kedah, Perlis, Kelantan, and Trengganu for the establishment of the Federation, and includes any amendment thereof;

The 1948 State Agreements also, among others, recorded the consent of the Malay rulers to rule based on a modern written constitution and underlined the basic structure of its constitution (Wan Husain, 2021). Subsequently, as a result of the negotiations between the Malay rulers and the British Government based on the terms of reference of the London Conference in 1956, upon considering the views of the Alliance Party and many others, such as the Partai Islam Sa-Malaya (PAS) and independent bodies representing the voice of the subjects of the Malay rulers in the Malay states, and the British subjects in the Strait Settlements of Penang and Malacca, the Malay rulers set the extent of their powers to be delegated to the Federation under the rule of His Majesty the Yang di-Pertuan Agong through the Federation Agreement of Malaya 1957. The above exercise does not affect the sovereignty of the Malay Rulers (Wan Hussain et al., 2017).

The modern constitutions of respective Malay states were promulgated following the 1948 State Agreements, and thereafter the Federal Constitution of Malaya limited the prerogatives and stipulated the delegation of certain powers of the Malay rulers through the Federation Agreement of Malaya 1957 to the Federal Authority with the conditions enshrined therein.

The Federation Agreement of Malaya 1957 was intended to form new self-government at the federal level, including ceding the sovereignty of Penang and Malacca by the British Government to His Majesty the Yang di-Pertuan Agong, who is the paramount ruler of the Federation of Malaya, and the end of the British intervention therein.

In the Federation of Malaya Independence Act, 1957 (British Legislation, Chapter 60, 5 & 6 ELIZ 2), Section 1(2)(b) enacts as follows:

For the termination of Her Majesty's sovereignty and jurisdiction in respect of the said Settlements, and of all other Her power and jurisdiction in and in respect of the Malay States or the Federation as a whole, and the revocation or modification of all or any of the provisions of the Federation of Malaya Agreement, 1948, and of any other agreements in force between Her majesty and the Rulers of the Malay States.

It is important to note that the Reid Commission is only the drafter of the proposed constitution, while the Malay rulers and the Queen of Britain were the actual makers. The draft of the constitution tabled by the Reid Commission in February 1957 was amended by a Working Committee comprising representatives of the Malay Rulers and Alliance Party and chaired by the British High Commissioner (Wan Hussain et al., 2017).

The Federation Agreement of Malaya was finally signed on 5 August 1957 by all Malay rulers with the High Commissioner Sir Donald MacGillivray on behalf of the British Queen. Without the consent of the Malay rulers, the Federation of Malaya and Malaysia would not exist as it is today.

The Issue of Three Nautical Miles

On May 13, 1969, there was a bloody incident due to racial tensions after the General Election. Following this, the Yang di-Pertuan Agong controlled public safety and order throughout the country with various ordinances.

As a result of the Proclamation, the Emergency (Necessary Powers) Ordinance No. 7 1969 [P.U. (A) 307A/1969] was made pursuant to Article 150(2) of the Federal Constitution. Article 150(2) reads:

A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or 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.

Furthermore, the above Emergency (Necessary Powers) Ordinance No. 7 1969 provides as follows:

For the Continental Shelf Act, 1966, the Petroleum Mining Act, 1966, the National Land Code, and any written law relating to land in force in 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.

The reasonableness of limiting the states' territorial waters to three nautical miles from the low tide line should indeed be questioned because the Parliament and the Federal Government already have sufficient jurisdiction over defence for the Federation and its internal security as stipulated under Items 2 and 3, List 1, Ninth Schedule of the Federal Constitution.

When the Dewan Rakyat on 24 November and subsequently the Dewan Negara on 20 December 2011 annulled all emergency proclamations, the emergency proclamation made on 15 May 1969 and all emergency ordinances made theretofore also ceased to be in force upon the expiration of six months from the date of the said annulment.

As a result, with effect from 21 June 2012, the Malay states' territorial waters extend to cover the continental shelf adjacent to it as far as recognised by international law for a coastal state.

The Territorial Sea Act 2012 [Act 750]

The Territorial Sea Act 2012 [Act 750] was legislated to replace the Emergency (Necessary Powers) Ordinance, No. 7 1969, which ceased to be in force when the Dewan Rakyat on 24 November and the Dewan Negara on 20 December 2011 annulled all emergency proclamations.

Section 3(3) of the Territorial Sea Act 2012 [Act 750] defines the territorial sea as follows:

For the purposes of the Continental Shelf Act 1966 [Act 83], the 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 three nautical miles measured from the low-water line.

Section 3 of the Territorial Sea Act 2012 [Act 750] limits the Malay states' territorial waters to only three nautical miles from the low tide line. This purpose would unconstitutionally alter the Malay states' delimitation. Section 4 of the same Act, on the other hand, vests the right of the territorial waters exceeding three nautical miles measured from the low water line to the Yang di-Pertuan Agong.

The provisions of Sections 3 and 4 of the above Act have unconstitutionally taken away the sovereign rights of the Malay rulers over their respective states as guaranteed by Articles 1, 181(1) and 71(1) of the Federal Constitution. The Territorial Sea Act 2012 [Act 750] also violates Article 2. In the Memorandum of Proposal by Their Royal Highnesses the Malay Rulers (1956), the Malay rulers regarded their state territory as the manifestation of their sovereignty. Thus, any unconstitutional alteration to the boundary of any Malay state is deemed to encroach on the inherent rights of the Malay rulers.

Articles 2(b), 38(4), and 159(5) of the Federal Constitution, as viewed, impose certain conditions if the State boundaries are to be altered. In this regard, Parliament shall first comply with the conditions and restrictions imposed before it is possible to exercise the power to make such laws.

Therefore, Sections 3 and 4 of the Territorial Sea Act 2012 [Act 750] can only be enforced after they comply with the requirements stipulated by the prevailing provisions of the Federal Constitution.

The Continental Shelf Act 1966 (Revised 1972) [Act 83]

The continental shelf is defined under the present law of Malaysia as an area outside the territorial waters of the Malay states. Such a definition limits the territorial waters of the Malay states to no more than three nautical miles from the low-water line is now debatable. This is because the Emergency Proclamation 1969 ceased to take effect on 21 June 2012, while the Territorial Sea Act 2012 [Act 750] is subject to the requirements imposed by the prevailing provisions of the Federal Constitution (Wan Husain, 2018b).

The continental shelf, according to Continental Shelf Act 1966 (Revised 1972) [Act 83], means the seabed 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;

The international law of the sea was made in the United Nations Convention at Montego Bay on 10 December 1982, named after the United Nations Convention on the Law of the Sea (UNCLOS, 1982). Malaysia deposited the instrument of ratification on 14 October 1996; therefore, according to Article 308 of UNCLOS 1982, it came into force as far as Malaysia was concerned on 14 November 1996.

Membership in this Convention is of great importance to strengthening the rule of law in international relations. Bernard H. Oxman (1996) described as follows:

The core idea of the Convention is a fundamental shift to multilateralism from unilateralism in the development of the law of the sea. Basic to the Convention's structure are numerous duties to report to, consult, obtain approval from, and respect rules promulgated by various international organisations, including not only the International Sea-Bed Authority but other competent international organisations, including the International Maritime Organization.

UNCLOS 1982 has recognised the coastal state's sovereignty beyond the territorial land. Article 2(1) of UNCLOS 1982 provides as follows:

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Article 76(1) of UNCLOS 1982 further provides as follows:

The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Although the coastal state in UNCLOS 1982 refers to a country, in Malaysia, as a federation and under the various provisions of the Federal Constitution as examined, the continental shelf is vested in the respective Malay states according to the measurement method set by UNCLOS 1982.

The territorial water, which is under the authority of the Federal in the context of the coastal state, is only adjacent to Labuan within the ambit of Article 1(4) of the Federal Constitution. Such entitlement is due to the State Government of Sabah surrendering Labuan to the Federal authority.

Although federal legislative power in foreign affairs, as stipulated in Item I, List I, Ninth Schedule, is under Parliament, it is subject to conditions and restrictions imposed by the Federal Constitution. The conditions and restrictions give a broad meaning. In international relations, the Federal Constitution provides legislative power to Parliament to make laws in foreign policy. The Federal Constitution also entrusts the Federal Government to implement policies to safeguard the interests of the Federation and represent the interests of the State governments.

Those include all matters expressly falling within the jurisdiction of the Malay states and the residual power of legislation as stipulated in Articles 74 and 77 of the Federal Constitution, respectively. Article 74(1), (2) and (3) reads as follows:

74. (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

Article 77 reads as follows:

77. The Legislature of a State shall have the power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has the power to make laws.

As explained, UNCLOS 1982 recognises the sovereignty of a coastal state beyond its territorial land to cover the continental shelf 200 nautical miles from the measured territorial water area baseline. Since Malaysia is a Federation consisting of the Malay states, Penang, Malacca, Sabah, and Sarawak, the coastal state shall have the meaning of the states in the Federation that are adjacent to the sea.

Territorial lands and waters originally belonged to the Malay states remain in addition to that unless altered under the provisions of Article 2(b) of the Federal Constitution. The Continental Shelf falls under the purview of Article 77 of the Federal Constitution because it is not explicitly itemised in the Ninth Schedule.

The Federal Constitution only provides the power of Parliament to legislate laws for regulating trade, commerce, and industry as stipulated in Item 8, List I, Ninth Schedule. However, it does not extend to acquiring the Malay states' territorial waters and continental shelf. The alteration of the Malay states' boundary, as discussed, must strictly comply with Article 2 of the Federal Constitution. Failing which, it has contradicted Article 1(3) and is void under Article 4 of the Federal Constitution.

Conclusion

Since the purpose of the Territorial Sea Act 2012 [Act 750] is to alter the boundaries of the Malay states in contradiction to Article 1(3), it is void under Article 4 of the Federal Constitution to the extent of its inconsistency. Every coastal state in Malaysia must refer to the court of competent jurisdiction to review the validity of the various statutes that alter their respective boundaries. The Malay state governments that own territorial waters should take proactive steps to recover their sovereign rights over the continental shelf. Thus, it is recommended that the Malay state legislatures enact state continental shelf laws to protect their inherent rights over the continental shelf as recognised by international law for a coastal state.

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