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Rule of Law for Human Rights in the Asean Region: A Base-line Study



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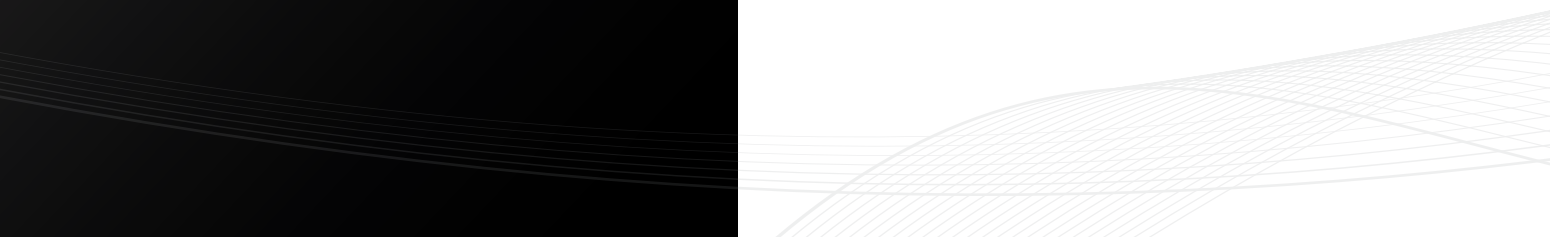


The State of Brunei Darussalam



Brunei Darussalam

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Snapshot Box

Formal Name	Negara Brunei Darussalam
Capital City	Bandar Seri Begawan
Independence	1 January 1984
Historical Background	Brunei entered into a formal agreement to become a British Protectorate in 1888, and a Resident appointed in 1906. Oil was discovered here in 1929 that would eventually become the country's chief export. In 1950, Sultan Omar Ali Saifuddin III assumed the throne after the sudden death of his predecessor Sultan Sir Ahmad Tajjudin, and immediately began reforms designed to lead Brunei toward self-government while maintaining the authority of the Sultan. At the same time, the first political party, Partai Rakyat Brunei (PRB), was founded in 1956 and largely comprised non-aristocratic Malays, dissatisfied with colonial and monarchic rule. The first Constitution was proclaimed in 1959 and established a Legislative Council, but was criticised by the PRB for granting too much power to the Sultan. In 1962, the PRB's military wing revolted, but was quickly suppressed by British troops. A state of emergency was declared which remains in effect today. Brunei formally gained independence in 1984 after negotiations with the British, with the Sultan as the head of state. An Emergency Order was immediately announced that suspended the Legislative Council, but this was lifted in 2004 after further Constitutional amendments that broadened the Sultan's powers.
Size	5,765 km ²
Land Boundaries	Two unconnected parts situated on the northwest coast of the island of Borneo, with Malaysia bordering its south and 161 km of coastline on its north
Population	395,207 (July 2010 est.)
Demography	26.6% from 0-14 years, 70.1% from 15-64 years, 3.3% from 65 years and over (2010 est.)
Ethnic Groups	67 percent Malay, 11 percent Chinese, 22 percent from Belait, Bisaya, Brunei, Dusun, Kedayan, Murut, Ukiis (indigenous ethnic groups)
Languages	Malay is the official language. English is widely spoken and all laws are published in English. Other languages spoken include Mandarin and Chinese dialects, Dusun, Iban, Hindi and Tamil
Religion	Islam is the state religion, but other religions are also practiced
Adult Literacy	92.7%
Gross Domestic Product	\$11.96 billion, \$50,300 per capita (2010 est.)
Government Overview	Malay Islamic Monarchy under State of Emergency
Human Rights Issues	Brunei's emergency is still in force, good governance is entirely dependent on a single individual without institutional frameworks to ensure durability of peace and stability, freedom of speech restrictions through the Defamation Act, Newspapers Act, Sedition Act, Internal Security Act, permissibility of corporal punishment for immigration offences, unequal rights of women in civil matters such as divorce and inheritance, non-Malay Muslims face constitutional discrimination
Membership in International Organizations	ADB, APEC, ARF, ASEAN, C, CP, EAS, G-77, IBRD, ICAO, ICRM, IDB, IFRC, ILO, IMF, IMO, IMSO, Interpol, IOC, ISO (correspondent), ITSO, ITU, NAM, OIC, OPCW, UN, UNCTAD, UNESCO, UNIFIL, UNWTO, UPU, WCO, WHO, WIPO, WMO, WTO
Human Rights Treaties Ratified	CRC (1995) and optional protocol on sale of children (2006) – reservations on CRC articles 14, 20 & 21 CEDAW (2006) – reservations on articles 9(2) & 29(1)

Overview

Brunei is officially a Malay Islamic Monarchy (*Melayu Islam Beraja*), with absolute powers invested in the Sultan and Yang Di-Pertuan (head of state), who is also the Prime Minister, Chief of Defence Forces (Minister of Defence), and Minister of Finance. The Sultan is advised by six Councils: the Privy Council which advises on customary ranks and honours, the Religious Council which deals with Islamic matters, the Council of Ministers (executive matters), the *Adat Istiadat* Council which advises on State custom, the Legislative Council on legislative matters and the Council of Succession. All Councils are appointed by the Sultan, and while they have consultative rights, he is not required to act on their advice.

The Judiciary is instituted through individual Acts relating to the status of each Court.¹ Thus Brunei law is based on English Common Law but with a parallel Syariah law structure on Islamic matters. The objective of the Judiciary, as stated at its website, is “Upholding the Rule of Law.”ⁱⁱ The judicial authorities in this system are the UK Privy Council, the Supreme Court, the Intermediate Courts, the Subordinate Courts and the Syariah Courts. The Common Law courts have authority over both civil and criminal matters, as well as personal matters of non-Muslims. Syariah law was instituted by the Syariah Courts Act (1998, 2000) and its courts have authority on Islamic family law, as well as criminal jurisdictions involving Syariah offences. These courts succeeded the indigenous traditional courts known as *Kadi* courts and gave the courts greater powers.

A grassroots tier exists for local administration, with elected *Penghulus* (head of *mukims* or wards) and *Ketua Kampung*s (head of villages). They are charged with local welfare and may be answerable to District Officers or the Village Consultative Councils. They must also be Muslim and approved by the government. Small claims and arbitral tribunals have also recently been instituted.

Bruneians are officially “subjects” of the Sultan and as such technically have only fully derogable rights accorded by the Sultan, to whom they must swear allegiance. Thus there is no list of fundamental rights in the Constitution, which is primarily a document that maps the structures of government. The Sultan has full immunity from the law, and partial immunities extend to officials and those working on behalf of the Sultan under Section 84B of the Constitution.

The Constitution was first promulgated in 1959 while under British rule. Previously, a Residential System had been in place that granted absolute power to the Resident, a British colonial officer. As part of moves towards decolonisation, the British installed Sultan Omar as successor to the Resident, and vested full powers in the Sultan under the terms of the 1959 Constitution. It also set up and held elections in 1961, and all electoral seats were won by the Partai Rakyat Brunei (Brunei People’s Party, PRB). However, only 16 seats of 33 were designated for elected members and PRB was unable to form a government. As tensions rose over the Sultan’s proposal to merge with Malaya, rebels of the military wing of the PRB, calling themselves the North Kalimantan National Army, staged a revolt against the government. The Sultan proclaimed a state of emergency and British troops from Singapore quelled the revolt within days. The PRB was banned, and the leaders were arrested or fled.

On attaining independence in 1984, the new Sultan of Brunei, Hassanal Bolkiah (his father Omar abdicated in 1971), immediately abolished the Legislative Council under an Emergency Order. The Legislative Council was not reinstated until 2004, when amendments to the Constitution reduced all legislative powers to advisory ones. These amendments also broadened and clarified the Sultan’s powers, including granting supreme executive authority, assuming the role of Prime Minister, command of the armed forces, and absolute immunity under the law. The current 28-member Legislative Council meets annually to discuss policy and only four of the members are elected officials.

Technically, Brunei remains in the same state of emergency declared in 1962, with that declaration renewed every two years since. Thus in Bruneian legal terminology, “Orders” are legislation instituted by the Sultan under his emergency powers in Section 83(3) of the Constitution, while “Acts” are those enacted through normal processes involving the Legislative Council. The intention is that emergency Orders will be eventually promulgated as Acts over time.ⁱⁱⁱ However, Acts are also frequently replaced by Orders, so it is difficult to recognise any trends to these institutional changes. A raft of legislation has been adopted, sometimes verbatim, from Singaporean law since independence and these include laws for which Singapore is often criticised by human rights groups, such as the Internal Security Act (Cap. 133) and the Newspapers Act (Cap. 105). The Internal Security Act was enacted at independence and revised in 2002, while the Newspapers Act was greatly revised at independence and also revised in 2002.

Brunei argues that its small size makes for special exceptions to systems in other countries, such as the lack of judicial review. On this, the Attorney-General has remarked:

In some countries, the courts have powers to review administrative actions but such countries usually have an army of lawyers to deal with the complaints (lawyers for the courts, lawyers for the victims or complainants and lawyers for the Government or public authority). Such adversarial system of judicial review, furthermore, may not be suitable for Brunei Darussalam.^{iv}

Thus two counterarguments to standard rule of law principles can be inferred: firstly, that Brunei is too small with insufficient human resources to operate expediently in such a system, and secondly that it does not resonate culturally with the country’s system. Nevertheless, the government’s legitimacy rests on serving the public good and public servants are regularly encouraged to uphold this principle. For a country as small as Brunei, it does not have large bureaucracies and there is relatively greater access to organs of government for its population. At the same time, few institutional arrangements exist for review or reform of existing mechanisms, and this is compounded by relatively small amount of data on judicial activities that is released to the public.

The difficulty in addressing fairly the questions posed by the study is that the unique constitutional structure of the Bruneian state requires exceptional status for the Sultan, otherwise on nearly every indicator, one must note the Sultan remains above the law. It thus raises questions as to the relative protection from the law of his closest kin and associates, as direct challenges to the Sultan or his family’s actions have only ever reached trial outside of the country.^v As a relatively rich, peaceful Sultanate, the structures in place have long cultural histories and there appears little desire to make fundamental changes, although one must bear in mind that the philosophy of Malay Islamic Monarchy cannot be discussed by any member of the Legislative Council. Thus rule of law is relatively strong as long as the institutional edifice on which it stands is unquestioned and subjects maintain absolute loyalty to the Sultan.

Administration of Justice Grid

Indicator	Figure
No. of judges in country	Magistrate Courts: 5 Magistrates Intermediate Courts: 2 Judges Supreme Courts: 3 Judges, 6 Registrars Total: 16 (information from Profiles available at judicial.gov.bn)
No. of lawyers in country	Unknown, 33 law firms listed at judiciary website
Annual bar intake? Cost/fees	Not applicable as Brunei accepts qualifications from a variety of institutions, including from outside the country.
Standard length of time for training/qualification	Qualifications can be obtained from numerous jurisdictions, on average about 4 years, though less for Syariah advocates.
Availability of post-qualification training	Yes
Average length of time from arrest to trial (criminal)	Unknown
Average length of trials (from opening to judgment)	Unknown
Accessibility of individual rulings to public	Yes, in <i>Judgments of the Courts of Brunei Darussalam</i>
Appeal structure	<div style="display: flex; justify-content: space-around; align-items: flex-start;"> <div style="text-align: center;"> <p><u>Civil</u></p> <ul style="list-style-type: none"> • UK Privy Council • High Court • Intermediate Court • Magistrates Court </div> <div style="text-align: center;"> <p><u>Criminal</u></p> <ul style="list-style-type: none"> • Court of Appeal • High Court • Intermediate Court • Magistrates Court </div> <div style="text-align: center;"> <p><u>Syariah</u></p> <ul style="list-style-type: none"> • Syariah Court of Appeal • Syariah High Court • Syariah Subordinate Courts </div> </div>
Cases before the National Human Rights Commission (NHRC)	Not applicable
Complaints filed against police, judiciary or other institutions (per year)? How many resolved?	Unknown

A. The government and its officials and agents are accountable under the law.

1. The powers of the government under the constitution

There is no formal separation of powers. The 1959 Constitution was developed around an Executive and Legislative Council. The Judiciary was not defined in this Constitution and instead is instituted in the Supreme Court Act. The Constitution has been amended subsequently, with major changes in 1984 and 2004. Furthermore, the Emergency (Constitution) (Amendment and Suspension) Order 1984 suspended Parts VI and VII of the Constitution relating to the Legislative Council, and this Order was not lifted until 2004, after amendments to the Constitution that removed checks on the Sultan and granted complete immunity.

Both the 1984 and 2004 amendments broadened the powers of the Sultan. At independence, his powers were widened beyond the scope originally granted by the British, using Emergency (Constitution) (Amendment and Suspension) Order 1984 to remove the ability of the Legislative Council to perform checks on the Executive. These included, for example, Section 39 of the 1984 Constitution, which required the Sultan to make laws “with the advice and consent of the Legislative Council”. The 2004 Constitution reinstated the Legislative Council, but with only advisory powers and nothing in the Constitution could be deemed to derogate from the prerogative of the Sultan (Section 84(2)).

Historically, attempts under the British in 1962 to place checks on the Executive by the Legislative Council failed after an insurgency attempted to seize power. The insurgency was quickly suppressed by British forces. However, a state of emergency was declared and this has been renewed every two years since then and is still in force today. Emergency powers in Section 83(3) of the Constitution (and Section 3(1) of the Emergency Regulations Act) grant the Sultan absolute discretion to issue Orders as long as the Sultan himself considers such Orders to be “desirable in the public interest” and thus there are no external limits to these powers according to the Constitution.

In practice, however, most orders affecting subjects relate to welfare stipulations such as the Children and Young Persons Order 2006, the Children Order 2000, the Compulsory Education Order 2007, the Employment Order 2009, Legitimacy Order 2001, or to technical matters, such as the Arbitration Order 2009, Disaster Management Order 2006, Halal Certificate and Halal Label Order 2005, International Banking Order 2000, Syariah Courts Civil Procedure Order 2005, as well as a few criminal matters, such as the Criminal Registration Order 2008 and Trafficking and Smuggling of Persons Order 2009.

The majority of Orders under emergency powers have been uncontroversial and within reason, arguably in the public interest. However, the main exception was the Emergency Order 1984 that lasted until 2004 which abolished the Legislative Council (it was reinstated following the removal of laws requiring them to approve the Sultan’s amendments, among others). The Emergency (Continuation and Validation of Emergency Provisions) Order 2004 that replaced the 1984 Order remains in force.

2. Amendment or suspension of the law

Section 85(1) of the Constitution grants the Sultan the power to amend the Constitution. While required to consult the Privy Council, their advice is nonbinding. Under the 1984 Constitution, states of emergency notwithstanding, the Legislative Council’s approval was required for amendments or revocations made by the Sultan under Section 85(3). Under the 2004 Constitution, however, this was altered to only require that they review and if necessary, propose changes to any amendments sent to them, after which the Sultan is free to adopt or reject their proposals. The Legislative Council is further proscribed from discussing any matters that might reduce the rights and powers of the Sultan and his family, nor may they discuss matters relating to the national philosophy of the Malay Islamic Monarchy. The Sultan is not required to give reasons for any decisions he makes.

The judiciary are not allowed to interfere with the constitutional structure through interpretation or construction of its provisions, and judicial review is explicitly prohibited. If questions arise on the interpretation of the Constitution, an Interpretation Tribunal is appointed by the Sultan with binding powers on interpretations of the law (Sections 86(6) and 86(7)).

3. Accountability of officials under the law

The 2004 Constitution granted the Sultan absolute immunity in both private and official capacities under Section 84B(1):

His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity. His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him during or after his reign in either his personal or any official capacity.

Section 84B(2) further grants officials working on behalf of the Sultan immunity for actions taken in their official capacity, although provisions can be made by written law against these officials to initiate proceedings against them.

The Penal Code and Prevention of Corruption Act outlines abuses of power for which state officials may be charged. Police are further stipulated not to be exempt from ordinary processes of the law under Section 34 of the Royal Brunei Police Force Act.

As the press is tightly controlled, the extent of official investigations into misconduct, corruption or other offences performed by officials is difficult to assess. The majority of corruption cases that make the news involve petty sums usually relating to traffic offenses. The Anti-Corruption Bureau lists 355 cases that it received in 2010, but it is unclear what the outcomes for any of these were. The last accessible outcomes it noted are cited in purely numerical

terms (numbers of cases resulting in investigation, referrals, “enclosed in existing file”, “KIV”, and no further action) – some 215 cases from 2008 (oddly, no cases from 2009 are listed) of which roughly 30 percent resulted in investigations and a similar number resulted in no further action.^{vi} It is unclear how many cases were charged in court under the Prevention of Corruption Act.^{vii}

The most prominent corruption case has been that of the Sultan Hassanal Bolkiah’s brother Prince Jefri, who allegedly embezzled billions of dollars from the Brunei Investment Agency into Amedeo Development, both of which he ran until the Asian financial crisis of 1997-1998. The original charges against Prince Jefri were settled in 2000 after he agreed to relinquish assets thought to be around US\$5 billion. Further complications led Prince Jefri to appeal to the Privy Council in London but the Council ruled against him and in 2008 an arrest warrant was even placed on him in London. Nevertheless, he has since claimed to have reconciled with Sultan Bolkiah and the matter appears to have been settled privately, and so the manner in which he might have been held accountable is unknown.

Another prominent case involved the former Minister of Development, Dr Haj Ismail bin Haj Damit and his associate in a five-year trial from 2005 and 2010. Charged under the Prevention of Corruption Act and Penal Code, the case resulted in a conviction, a B\$4.2 million (approximately US\$3.2 million) fine with costs and a seven-year sentence for the Minister. Most cases reported by the Anti-Corruption Bureau, however, involve low-ranking officials and relatively small amounts of money.

B. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

1. Availability of laws

Acts and Orders have been accessible from the website of the Attorney-General's Chambers free of charge since 2008. Printed copies may also be purchased from the Attorney-General's Chambers in Bandar Seri Begawan at nominal sums. However, most laws are published only in English and very few, mostly pertaining to Islamic code, have been officially translated into Malay. There may thus be some difficulties in accessibility for the general population, although court-appointed interpreters mitigate this risk.

Cases heard in Brunei are published in the annual *Judgments of the Courts of Brunei Darussalam* (JCBD) published by the government. Details on individual cases may only be obtained by request of parties to the respective decisions and are not publicly accessible. As such, a case law archive would be relatively inaccessible.

2. Accessibility and application of laws

It is an oft-stated principle that laws must be applied equally and predictably within the Sultanate. However, the Sultan and government authorities are granted immunity for actions carried out in their official capacities under Section 84(b) of the Constitution. Nevertheless, provision may be made by written law for proceedings against anyone except the Sultan for wrongs committed in the course of official duties. Indeed much of the legal procedures stipulated by the Criminal Procedure Code would be rendered meaningless if this were not so. Under Chapter IV of the Code, clear procedures for search, arrest and seizure are outlined that should in theory ensure consistent application of the law in respect of the subject's rights. Being an English Common Law system, the laws are readily accessible and, at least for advocates, understandable and applied consistently. Under the

Application of Laws Act, precedents in British law are applicable provided they do not supersede Bruneian law and custom. Furthermore, case law from Malaysia, Singapore, and other English Common Law systems can be used but are nonbinding, having the weight of "persuasive authority".

Thus the difficulty in answering this question is that where laws are clearly and narrowly defined, they can be assessed for their equal application, but where broad rules with wide discretionary power are defined, their application is difficult to assess, especially when they have been rarely tested. For example, the Societies Order (2005) has been allegedly used to disband several associations, including two opposition parties, leaving only one legal opposition party in the country.^{viii}

3. Preventive detention

Under normal circumstances, police may detain a suspect for up to 48 hours with a warrant. However, under the Internal Security Act, detention of persons who are deemed by the Sultan or Minister to be "acting in any manner prejudicial to the security of Brunei Darussalam" (Section 3(1)) is permitted for two years without warrant, charge or trial and is renewable.

Known applications of the Internal Security Act are not complete, but Muhamad Yasin Abdul Rahman, a leader of Partai Rakyat Brunei involved in the uprising was detained from 1962 to 1973 when he escaped to exile in Malaysia. When he returned in 1997, he was immediately rearrested and detained until 1999 when he was released after swearing an oath of loyalty to the Sultan and admitting his "crimes". Several nationals were detained in 1998 for distributing pamphlets alleging misconduct of the royal family and government officials relating to the collapse of Amedeo Development, and several Christians were detained in 2000 and 2001 over alleged subversive activities, although it was denied these were religious in nature. It is thought that since the release in 2008 and 2009 of individuals accused to be part of a counterfeiting ring and three others said to have leaked government secrets, the government has no more prisoners held under the Internal Security Act.^{ix}

4. Protection from arbitrary treatment or punishment

Section 40(i) of the Internal Security Act prohibits the use of “personal violence” against a detainee but this may be waived “in the case of repeated refusal to obey a lawful order, self-defence, defence of another officer, person or detained person.” Sanctioned corporal punishment (caning) is permitted for numerous offences in the Penal Code as well as for immigration offences.

Detention without trial is permitted by the Internal Security Act. *Habeas corpus* is provided for in the Criminal Procedure Code (Criminal Procedure Code) Chapter XXXIV, but is overruled where the Internal Security Act applies (Section 61(b) of Internal Security Act). In practice, emergency powers may also be used to deny bail if the court deems it necessary. Detainees may not be remanded by more than 15 days under the Magistrate’s orders. However, this limit is inapplicable if ordered by the High Court.

5. The presumption of innocence

The presumption of innocence is not explicitly provided for in law. Nevertheless, in practice, the accused in criminal cases is presumed innocent before trial. As stated by Chief Justice Yang Amat Arif Mohammed Saied:

I say that our criminal justice system is time honoured, has been tested over the centuries and has survived with on-going amendments to the laws to meet the demands of changing times and for dealing with more sophisticated and white-collar crimes, but what has not altered an iota are the three fundamental principles upon which the fate of an accused person is decided by our courts; those being first, the presumption of innocence, that is, an accused is presumed to be innocent until proven guilty, the second that the burden that is on the prosecution of proving the accused guilty is proof beyond reasonable doubt, and the third that all are equal before the law and are treated alike by the country’s courts, so that the personality of the parties does not matter.^x

However, detainees under the Internal Security Act do not benefit from such considerations. The determination for detention is made by the Sultan, and the reports of the advisory board (under Section 5(4)) which reviews the grounds of such detention orders are nonbinding on the Sultan’s discretion (Section 6(2)).

6. Access to counsel and rights to information

Qualified advocates and solicitors have the right to appear and plead in all courts of justice in Brunei.^{xi} Accused persons may choose to represent themselves as well. However, access to counsel for Internal Security Act detainees is less clear.

Legal aid is provided to defendants facing capital charges (i.e. where the death penalty applies). A Syariah legal aid body was also said to be under consideration,^{xii} and a legal advice clinic was formed in 2010 serving people whose incomes were less than BND750 per month.^{xiii}

Brunei law guarantees accused persons of the right to be informed of the charges against them. The police officer must read an accused person their rights and explaining the charges under Article 117 of the Criminal Procedure Code. However, no stipulations exist requiring a length of time for preparing a defence or conferring with their legal counsel. Under English Common Law, most fundamental rights are listed in the Constitution, but Brunei’s Constitution does not contain any rights. Thus gaps may appear in areas such as a right to counsel, which is not explicitly stated.

With a relatively small population, Brunei’s courts do not suffer from serious backlogs of cases, though the more complex the case, the longer it may take to get to trial and be concluded. The principle of timeliness is set forth by the Attorney-General: “To do Justice we should avoid unreasonable delay in investigation, prosecution and hearing of cases.” Conversely, “if you dispense justice too fast to the extent of not giving enough time to either prosecutors or plaintiff or defendants to prepare their cases then you are not doing justice.”^{xiv} Nevertheless, delays may occur for example due to lack of forensic expertise within the country, requiring external reports or

else foregoing the process. Again the exception is that trial is not required for detainees under the Internal Security Act, though an advisory board discusses the grounds for their order with no requirement that such discussions be made public.

7. Right of Appeal

The Right of Appeal for criminal convictions is granted under Section 414 of the Criminal Procedure Code. Court hierarchy starts from the Subordinate Court to Intermediate Court to High Court and Court of Appeal, and finally the Supreme Court. Civil appeals may be made under provisions in the Subordinate Court Act, Intermediate Courts Act and Supreme Courts Act. Section 14 of the Supreme Courts Act grants that civil cases may be further referred to the UK Privy Council on recommendation by the Sultan, but the Supreme Court rulings are final for criminal appeals. A parallel appeals structure exists in the Syariah courts with Syariah Subordinate Courts, the Syariah High Court and the Syariah Court of Appeal. In the case of charges under the Internal Security Act, the detainee has no access to redress under preventive detention.

8. Protection against coercion

Brunei laws prohibit the use of coerced confessions as a form of evidence and guarantee the accused person's right to remain silent. Section 119 of the Criminal Procedure Code requires that statements of confession must be made voluntarily. Section 57(2) of the Internal Security Act also prohibits statements made under threat, inducement or promise from being admissible, and further that they must be notified that they need not answer any question before any statements are taken.

The laws also prohibit persons from being tried or punished again for an offence for which they have already been finally convicted or acquitted. Section 269 of the Criminal Procedure Code prohibits persons who have been convicted or acquitted of being tried for the same offence again. Separately, Section 63 of the Internal Security Act also prohibits multiple punishment of a person for the same offence for those offences committed under the Internal Security Act.

9. Remedy under the law

Damages between victims and perpetrators are often granted, though it is less clear whether this applies as regularly in cases where the officials of the government are the offender. While Brunei's laws do not list fundamental rights unlike most Constitutions, Brunei has explicitly stated it "recognises the importance of promoting and protecting human rights" in its submissions before the UN Human Rights Council during its Universal Periodic Review.^{xv} The Attorney-General has also established a connection to a commitment to protect human rights via Islam:

Brunei Darussalam's Constitution provides that the official religion is the Islamic religion, provided that all other religions may be practiced in harmony. Respect for human rights is one of the fundamental purposes of Islam. Our laws do guarantee basic human rights such as right to life, which is considered inviolable under Islamic laws, the right to own property, the right to justice and fair trial and most importantly protecting the rights of women and children.^{xvi}

In domestic violence matters, the Attorney-General has instructed that cases be brought to court even in the event of withdrawal by the victim, with trials taking place under the Penal Code and Women and Girls Protection Act. Assault is also a recognised ground for divorce under Syariah laws.

Subjects may appeal to the Sultan to look into cases of human rights violations, but any such outcome is typically handled in private and it is unknown whether any reparations were granted. The law does provide that those acquitted of charges may be awarded compensation if the charges were deemed frivolous or vexatious by the court.^{xvii} Conversely, the courts may also order a convicted person to pay compensation to victims or costs for the prosecution.^{xviii} In one case in 1990, a police officer arrested a woman on a Friday, but failed to bring her to the court until the following Monday. She subsequently sued the officer privately and the judge found that the officer had failed to follow Section 47 of the Criminal Procedure Code that stipulates that arresting officers must bring the suspect to court without unnecessary delay.^{xix} As Lee notes:

The trial judge held that there existed a right in the injured party to sue a government servant in his private capacity prior to the English Crown Proceedings Act. The same right would therefore exist in Brunei so that a private person may sue a government servant in his private capacity and that wrongs committed in the course of carrying on the government of Brunei is meant to refer only to those torts which the crown in England could not be held liable before the passing of the Crowns Proceedings Act of 1947. Damages for wrongful imprisonment were subsequently awarded against the defendant.^{xx}

As such, the possibility of seeking damages was allowed and this is recognised under Section 84(b) of the Constitution which, despite granting immunity to officials working on behalf of the Sultan, also allows that provision may be made by written law for proceedings against anyone except the Sultan for wrongs committed in the course of official duties.

C. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

1. Legislative proceedings

Legislative proceedings are not open to the public. As an absolute monarchy under a technical state of emergency, legislative matters are not subject to public review. The Legislative Council is said to meet only once a year and has relatively limited powers under the 2004 Constitution.

Public participation and feedback in the drafting of laws is not provided for under Brunei law, and so there is no requirement for publishing draft laws for the public. Furthermore, under Emergency powers, the Sultan may issue Orders entirely at his own prerogative and these may come into force without review. Once issued, they may be found at the Attorney General's website (www.agc.gov.bn). Ad hoc consultative mechanisms may exist in the creation of laws, but these are not systematic whether in law or policy. As such, drafts of laws are not readily available to the public, and there is no official feedback mechanism outside the Legislative Council. In addition, under Section 67 of the Royal Brunei Police Force Act, Police Orders need not even be published in the Government Gazette.

2. Judicial hearings and rulings

Criminal hearings are open to the public under Section 6 of the Criminal Procedure Code. Cause lists for all courts are accessible from the Judiciary website.^{xxi} Section 7 of the Subordinate Court Act states that courts are open and public, though it may hold court in camera in the interests of justice, public security or propriety. All decisions are also published in the *Judgments of the Courts of Brunei Darussalam* annually.

3. Equality before the law

Brunei professes equality for all before the law.^{xxii} However, there is no constitutional guarantee for the maintenance of equality, as the Constitution contains no list of fundamental rights of the subjects of Brunei. In technical terms, there is also unequal application, particularly in matters of religion

and gender. Women face unequal rights under several laws, particularly in matters relating to divorce, inheritance, custody of children and transmission of citizenship,^{xxiii} and these contravene Articles 9 and 16 of the Convention on the Elimination of Discrimination against Women.

One question that hangs over assessing equality before the law is where wide discretionary powers exist. This is most especially pronounced for non-specific and ambiguous crimes such as “acting in any manner prejudicial to the security of Brunei Darussalam or any part thereof or to the maintenance of public order or essential services therein”, as listed in Section 3(1) of the Internal Security Act. Under such broad terms, these have included members of the banned political party Partai Rakyat Brunei accused of fomenting rebellion but without trial. It has also been used to detain dissidents and more recently, Christians allegedly engaging in subversive activities.

It should be noted that Brunei is considered a non-practicing capital punishment state, in which capital punishment is not carried out despite laws mandating it for certain offences. Those sentenced to death, of which there have been relatively few, must have the orders for their executions signed by the Sultan, and the current Sultan is not known to have ever signed such an order. Nevertheless, future application of the death penalty will depend entirely on the character of the current and future rulers of Brunei.

Homosexuality may be criminalised under Section 377 of the Penal Code for sexual acts “against the order of nature”, although this is inferred rather than explicit (cf. Singapore’s Section 377A of the Penal Code), and it is usually outlawed in Islamic tradition. However, it is unclear if any prosecutions under this Section have been made in Brunei.

The Children and Young Persons Order 2006 instituted a juvenile court for dealing with young persons below the age of 18. However, the UN Committee on the Rights of the Child raised concerns during Brunei’s Universal Periodic Review in 2009 that the minimum age of criminal responsibility – seven years of age – was too low and a

concern for fair proceedings.^{xxiv} In Brunei however, age is regularly taken into consideration in court cases, including capital offences,^{xxv} and prosecution of minors rarely makes it to court.^{xxvi}

4. Legal access

The Legal Profession Act stipulates that associated costs must be fair and reasonable, though this is left to the court’s discretion. Court fees are generally nominal or set at cost prices. Legal aid is provided to defendants facing capital charges (i.e. where the death penalty applies). A Syariah legal aid body was also said to be under consideration,^{xxvii} and a legal advice clinic was formed in 2010 serving people whose incomes were less than BND750 per month.^{xxviii}

5. Protection of witnesses

Section 15 of the Supreme Court Act and related legislation (e.g. Section 7 of the Subordinate Court Act) state that courts may hold court in camera in the interests of justice, public security or propriety. Section 8(1) of the Women and Girls Protection Act also requires the use of in camera proceedings for girls below the age of 16 years. Witnesses are also afforded protection with the court having powers to prevent anyone from publishing details of their identity if necessary.

Detailed measures for the protection of female witnesses in cases relating to sexual offences are stipulated by the Women and Girls Protection Act. However, these rules also permit the detention of victims with punitive consequences for their failure to adhere to detention orders. While these laws are largely written in concern with prostitution cases, Section 10(1) also state the courts may order detention of the woman or girl in cases under Sections 354 (Assault or criminal force to person with intent to outrage modesty), 375 (Rape), 498 (Enticing or taking away or detaining with criminal intent a married woman), or defined in Sections 360 and 361 (Kidnapping) of the Penal Code. Such provisions are inconsistent with Article 15(4) of the Convention on the Elimination of Discrimination against Women.

D. Justice is administered by competent, impartial and independent judiciary and justice institutions.

1. Appointment of judicial officials

The Sultan has absolute discretion over judicial appointees and there are no guidelines as to how he must act to ensure independence and accountability in the judiciary. Retired judges from Hong Kong have been the mainstay of High Court judges for much of Brunei's history. Following British practice pre-independence, the Chief Justice of Hong Kong was usually also appointed as the Chief Justice of Brunei. Brunei's previous Chief Justice, Dato' Sir Denys Roberts, however, broke tradition to retain the Brunei post despite stepping down in Hong Kong in 1988. The new Hong Kong Chief Justice, Sir Ti-liang Yang, was instead appointed President of Brunei's Court of Appeal. Sir Denys Roberts continued in his role of Chief Justice of Brunei until 2001 when he was appointed President of the Court of Appeal.

The present Chief Justice is the first Chief Justice to be Bruneian by nationality, Dato' Seri Paduka Awg Kifrawi bin Kifli, appointed in 2009. However, the Sultan has stated as early as 1984 that senior judicial positions should be taken up increasingly by Bruneians.^{xxxix} Most positions within the courts today are filled with Bruneians. Several Attorney-Generals have been Judges or Registrars in the High Courts prior to appointment.

For Syariah judges, the Sultan appoints judges on advice from the President of the Majlis Ugama Islam. Nevertheless, there has been no evidence of interference by the Executive in the courts process and judges have technical security of tenure^{xxx} until the age of 65 after which they may remain at the discretion of the Sultan.

In 1996, the High Court ruled that the courts have powers independent of whether the prosecution decides to drop a case, and ordered a discharge amounting to an acquittal in an auto theft case.^{xxxi} This ruling has not been challenged to date.

In recent years, the present Chief Justice has stated:

Over the years this principle of judicial independence has matured and is now firmly established and highly respected in the Common Law world, which includes the jurisdiction of Brunei Darussalam.^{xxxi}

2. Training of judiciary

Prosecutors, judges and judicial officers typically receive legal training in England or Malaysia. Syariah law training is available from the Department of Syariah at Sultan Omar Ali Saifuddien Institute of Islamic Studies and qualifications obtained in Malaysia may also be accepted. Judges must have several years of practice in lower courts before being appointed to higher courts.

Key appointees such as the Chief Justice and Attorney-General are paid equivalent salaries to ministers, and in general, judiciary pay is linked with salaries in the civil service, which places them among the higher earners in Bruneian society. A Human Resource Development Committee was in the planning stages in 2010 and would eventually be tasked with ensuring the professional upgrading of judicial officers and other appointees.^{xxxi} Outside the courts, the Law Society was established by the Legal Profession Order 2003, and one of its aims is to improve the standards of professional conduct and learning in the profession.

3. Judicial proceedings

The impartiality and any external influence on judicial proceedings is difficult to investigate in any situation but to date, there have been no significant allegations of improper influence in the proceedings of the court. The former Chief Justice Dato' Sir Denys Roberts has stated:

... Brunei continues to enjoy an admirable judicial system, though there are minor faults in this. This system has suited the requirements of a society which is multi-cultural and is, I have no doubt, well respected here and abroad for its independence and integrity. These qualities have never been questioned, as has happened in some countries. Nor has there been any effort to influence the courts improperly in their decisions by any outside authority or persons.^{xxxiv}

4. Legal representation

Regulations for practice are governed by the Legal Profession Act. Advocates and solicitors must have valid practicing certificates that prove a minimum level of competence, usually obtained through qualification as an advocate, barrister or solicitor in England, Northern Ireland, Singapore, Malaysia or Australia (Section 3). Bruneians or Bruneian permanent residents may be admitted if they have obtained alternative qualifications as prescribed. The Chief Justice may however declare there are sufficient advocates in Brunei after which no further applications may be admitted.

Syariah lawyers must have obtained a recognised Syariah degree, passed the Syariah lawyer's certificate examination, or have practiced Syariah law for at least three years in order to qualify when the Syariah Courts Act came into effect.

5. Security of court and judicial officials

In general, Brunei is a peaceful country with relatively few incidents of violence or threats to persons in general. Given the lack of evidence to show systematic threats against court participants and judiciary, there is no specific stipulation to ensure their safety and security. They are also legally protected from suits arising from the discharge of judicial duties under Section 23 of the Subordinate Court Act.

Endnotes

- i. The Supreme Court Act (Cap 5, 2001 Ed.), Intermediate Courts Act (Cap 162, 1999 Ed.), Subordinate Courts Act (Cap 6, 2001 Ed.), and Syariah Courts Act (Cap 184, 2000 Ed.), last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- ii. Header, Judiciary of Brunei Darussalam webpage, last accessed 7 April 2011, <http://www.judicial.gov.bn>.
- iii. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 18 March 2008, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- iv. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 27 March 2007, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- v. For example, United States District Court for the District of Hawaii, "*Jane Doe v. Haji Jefri Bolkiah et al.*", 74 F. Supp. 2d 969; 1998.
- vi. Anti-Corruption Bureau, Prime Minister's Office, Brunei Darussalam, "Statistic Terkini", last accessed 10 February 2011, http://www.bmr.gov.bn/english/page_StatDetails.php?STAT_ID=67.
- vii. The Attorney-General stopped giving statistics of corruption cases in his annual speech after 2000.
- viii. Roberts, Christopher, and Lee Poh Onn, "Brunei Darussalam: Cautious on Political Reform, Comfortable in ASEAN, Pushing for Economic Diversification," *Southeast Asian Affairs* Vol. 2009, p. 63.
- ix. Roberts and Lee, "Brunei Darussalam", p. 65.
- x. The Chief Justice of Brunei Darussalam, Justice Yang Amat Arif Mohamed Saied, in a Speech made at the Opening of the Legal Year, on 6 March 2003, last accessed 7 April 2011, <http://www.judicial.gov.bn>.
- xi. Legal Profession Act (Cap 132, 2006 Ed.), section 17.
- xii. *Brunei Times*, 17 May 2009.
- xiii. Under US\$600 per month. *Brunei Times*, 26 September 2010.
- xiv. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 1 March 2005, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- xv. Brunei Darussalam, 2009, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to the Human Rights Council Resolution 5/1*, A/HRC/WG.6/6/BRN/1, para. 16.
- xvi. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 7 April 2009, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- xvii. "Criminal Procedure Code" (Cap 7, 2001 Ed.), section 187, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- xviii. "Criminal Procedure Code", section 382.

- xix. The High Court of Brunei Darussalam, "*Kwan Kwai Choi v AK Zaidi Bin Pg Metali*" (Civil Suit No. 175 of 1990, Judgment delivered on 12 September 1992, by Denys Roberts CJ), [1993] 2 MJJ 207.
- xx. Lee, Yew Choh. "Recent Legal Developments in Brunei Darussalam." *Singapore Journal of Legal Studies*, 1993, pp. 668-677. Last accessed 11 Feb 2011, www.judicial.gov.bn.
- xxii. CJ Mohamed Saied, "Speech made at the Opening of the Legal Year", 6 March 2003.
- xxiii. Report of the Working Group on the Universal Periodic Review, A/HRC/WG.6/BRN/2, p. 5.
- xxiv. UN Human Rights Council, 2009, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, Brunei Darussalam, A/HRC/WG.6/6/BRN/2*.
- xxv. See for example The High Court of Brunei Darussalam, "*Public Prosecutor v. Abdul bin Turkey and Chong and Chong J.*" [1996] BNHC 44 (6 July 1996).
- xxvi. Response by Brunei to recommendations in UN Human Rights Council, 2010, *Report of the Working Group on the Universal Periodic Review, Brunei, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/13/14/Add.1*, Recommendation No. 15.
- xxvii. *Brunei Times*, 17 May 2009.
- xxviii. *Supra note xiii*
- xxix. The Attorney-General of Brunei Darussalam, Yang Berhormat, Datin Paduka Hajah Hayati Binti POKSDSP Hj Mohd Salleh, in a Speech made at the Opening of the Legal Year, on 16 March 2010, last accessed 7 April 2011, <http://www.agc.gov.bn/>.
- xxx. Subject to incapacity to perform the functions of his office or for misbehaviour only, "Supreme Court Act", section 8.
- xxxi. The High Court of Brunei Darussalam, "*Chong Kim Bui v. Public Prosecutor*" [1996] BNHC 65 (21 September 1996)
- xxxii. The Chief Justice of Brunei Darussalam, Justice Mohamed Saied, in a Speech made at the Opening of the Legal Year, on 2 March 2008, last accessed 7 April 2011, <http://www.judicial.gov.bn>.
- xxxiii. AG Datin Paduka Hajah Hayati, "Speech made at the Opening of the Legal Year", 16 March 2010.
- xxxiv. The Chief Justice of Brunei Darussalam, Dato Seri Paduka Sir Denys Tudor Emil Roberts, KCMG., SPMB., in a Speech made at the Opening of the Legal Year, on 13 February 2001, last accessed 7 April 2011, <http://www.judicial.gov.bn>.

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