

EXPORTING A CONSTITUTIONAL COURT TO BRUNEI? BENEFITS AND PROSPECTS

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Abstract

Negara Brunei Darussalam (Brunei) is Asia's only, and one of the world's few remaining, absolute monarchies. Brunei's much-venerated Sultan and Yang Di Pertuan Agong is accountable to only Allah as his "shadow on earth". Within the Sultanate he is head of religion, Prime Minister, and as Sultan he appoints all members to the nation's six advisory Councils. He is above the law and is the country's legislator. He can amend the constitution and bypass the Legislative Council without court oversight. Judicial review was formally abolished in 2004. The accrual of power – judicial, religious, legislative, and executive – in the hands of one man is only possible by the continued renewal of a state of emergency. Since 1962, the state of emergency has been renewed every two years and once Brunei is in a state of emergency, all powers devolve to its Sultan. There is an absence of any effective checks and balances mechanism such as a democratically elected Legislative Council, a free and open media, a judiciary with powers of constitutional review, an accountable executive government, or an engaged civil society. Because the constitutionality of sixty years of emergency rule in Brunei has never been judicially determined, this paper argues it would be the first task for an independent Constitutional Court. The need for such determination on the legitimacy of Brunei's biennial emergency proclamations is set out and a case made as to why a Constitutional Court could be the circuit breaker for a return democratic participation, rule of law, and fundamental human rights in the Sultanate. There is reflection on the obstacles to any reform which make the prospects for this unlikely in the lifetime of the current Sultan.

Keywords: Brunei, Constitutional Court, State of Emergency, Sultan, Judicial Review.

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I. INTRODUCTION

1.1. Background

Brunei is a small independent Malay Sultanate on the island of Borneo, which it shares with the Malaysian states of Sabah and Sarawak and the Indonesian provinces of Central Kalimantan, East Kalimantan, North Kalimantan, South Kalimantan, and West Kalimantan. Like neighboring Malaysia and Indonesia, the majority (70%) of its 450,000 population is Muslim but unlike its neighbors, Brunei is not a democracy. Nor does it have separation of powers. The judiciary is “formally subordinate to the executive”¹ which, in effect, means subordinate to His Majesty, Sultan Haji Hassanal Bolkiah Mu’izzaddin Waddaulah, the 29th Sultan and Yang Di-Pertuan² of Brunei Darussalam (hereafter the Sultan). The Sultan is also Prime Minister.³ He is head of religion⁴ with Islam the state religion⁵ supported by a Ministry of Religion, a State Mufti Department, and an advisory Religious Council.⁶ The Sultan is the nation’s legislator,⁷ Supreme Commander of the Armed Forces,⁸ and head of the Council of Ministers⁹ (the executive) to which Sultan Bolkiah allocated himself three additional portfolios: Minister of Defense, of Finance (following his brother Prince Jefri’s misappropriation of state funds)¹⁰ and of Foreign Affairs and Trade. The other advisory councils are the Privy Council¹¹ (for rank and honors); *Adat Istiadat* Council¹² (to advise on State customs); the Council of Succession & Regency (to advise on the monarchy and

¹ Joel Ng, “Rule of Law as a Framework within the ASEAN Community,” *Journal of East Asia & International Law* 5, no. 2 (2012): 335.

² *Yang Di-Pertuan* means “He who is made Lord.” It is a title for king, originally used during a period of Hindu rule. Malays in Brunei and Malaysia use it in conjunction with the term Sultan.

³ Constitution of Brunei Darussalam, Article 4, revised edition 2011, 1959, accessed 11 December 2022.

⁴ *Ibid.*, Article 2.

⁵ *Ibid.*, Article 3(1).

⁶ *Ibid.*, Part II with more details in the Religious Council and Kadis Courts Act (Cap. 77).

⁷ The Sultan can enact legislation through four constitutional provisions: see Constitution of Brunei Darussalam, Articles 83, 47 (1), 584 (2), and 43.

⁸ Constitution of Brunei Darussalam, Article 4 (1B), which was a 2004 constitutional amendment.

⁹ *Ibid.*, Part III.

¹⁰ The misappropriation is alleged to be more than B\$40 billion and the collapse of the Amedeo construction company which Prince Jefri headed owed billions of dollars of debt. There was a long-running trial ending in an out-of-court settlement upheld by the Privy Council. *State of Brunei Darussalam & Brunei Investment Agency v. HRH Prince Jefri Bolkiah and others* (2001) UKHL 67; (2002) 2 AC 357.

¹¹ Constitution of Brunei Darussalam, Part IV.

¹² *Ibid.*, Part II.

royalty).¹³ The argument has been made by Tsun Hang Tey that the cumulative effect is that the Sultan is now the nation's "*Grundnorm*"¹⁴ from which all norms and laws in Brunei derive validity.¹⁵

Power aggregation in the entity of the Sultan lies in part in the design of the 1959 Constitution, which transferred to the Sultan many of the exclusive powers previously held by the British Resident,¹⁶ but the 1959 Constitution did provide for a modicum of representative democracy. The Legislative Council (LegCo) required 16 popularly elected members to sit with 17 appointed members (ex-officio, official, and nominated).¹⁷ The Constitution gave Brunei's citizens an opportunity to vote for their LegCo representatives as contributors to political and legislative debate. High on the political agenda in 1959 was a decision on Brunei's post self-government direction: to remain a hereditary monarchy, join Malaysia as a state, or be part of an independent democratic *Negara Kesatuan Kalimantan Utara* (United States of North Kalimantan, which would have comprised North Borneo, Sarawak and Brunei). Elections were held in 1962. More than 90% of Bruneians voted.¹⁸ The result was strongly for the *Parti Rakyat Brunei* (PRB), the Brunei People's Party, which secured all 16 elected seats in the 33-seat LegCo. The voter turnout runs contrary to the Sultan's subsequent assertion that he needs to see "evidence of a genuine interest in politics on the part of the responsible majority of Bruneians"¹⁹ before he could consider having elections again in Brunei. Clearly, 60 years ago there was genuine interest with 90% of Bruneians voting in what would be their first and only election. However, despite the people's clear message, because the PRB and thus the result was pro-democracy and

¹³ Constitutional Matters: Succession and Regency Proclamation, Part II.

¹⁴ Grundnorm is a term coined by Austrian jurist Hans Kelsen to mean the norm, or rule, that forms an underlying basis for a legal system. It signifies the source of legitimacy for the constitution and all laws.

¹⁵ Tsun Hang Tey, "Brunei's Revamped Constitution: The Sultan as the *Grundnorm*?" *Australian Journal of Asian Law* 9, no. 2 (December 2007): 264.

¹⁶ Ann Black, "The Syariah Factor: One of many Challenges for Foreign Judges in the Courts of Brunei Darussalam," in *The Cambridge Handbook of Foreign Judges on Domestic Courts*, eds. Anna Dzedzic & Simon Young (Cambridge: Cambridge University Press, 2023), forthcoming.

¹⁷ Constitution of Brunei Darussalam, Part VI allowed for eight ex-officio, six official and three nominated members, with the Sultan having power to remove any of the official and nominated members at will. See Constitution of Brunei Darussalam, Article 31 (1).

¹⁸ Tey, "Brunei's Revamped Constitution," 267.

¹⁹ Sultan Bolkiah in an interview reported in Clark Neher and Ross Marley, *Democracy and Development in Southeast Asia* (Boulder: Westview Press, 1995), 145.

anti-monarchy, it was not accepted by the then Sultan (Omar Ali Saifuddien III) the father of the current Sultan. Thwarted from joining the government, PRB members staged an armed coup against the Sultan, who immediately proclaimed a state of emergency. Within days, British forces quashed the uprising. The coup leaders fled or were imprisoned,²⁰ the PRB banned and remains so today. The same state of emergency continues six decades later.²¹

Against this background, the research question is whether a Constitutional Court with judicial review could act as a circuit breaker to end absolute autocratic rule in Brunei and to pave the way for restoring LegCo elections. Thirty consecutive emergency proclamations have disfranchised Bruneians of their constitutional right to vote and allowed absolute power to concentrate in the hands of one man. Was this constitutional? This question has never been determined by Brunei's judiciary. The question of constitutionality is ripe for determination. The following part of this paper analyses arguments for judicial review of Brunei's constitutional provisions on emergency proclamations particularly in the absence of any effective checks and balances mechanisms, LegCo debate, or media scrutiny. The third part assesses additional consequences from perpetuating a state of emergency on constitution amendment and interpretation, on the independence and functioning of the courts of law, and on fundamental rights and freedoms in the Sultanate. The fourth part asks whether an independent constitutional court could have advantages over the current common law-informed Supreme Court. The last part comes back to the realities of entrenched power in Brunei by evaluating the practicalities and obstacles to reform, concluding that the possibility is, at best, remote during the reign of Sultan Bolkiah. All is not futile, as an increasing role for Syariah has brought changes to Brunei's legal landscape, which makes a conversation on constitutional reform worthy of debate and dialogue.

²⁰ The last coup member was released from prison in 2009.

²¹ The most recent two-year extension was proclaimed in March 2021 and will require renewal in March 2023. The Emergency (Confirmation and Validity of Emergency Provisions) Order (2004) gives the Sultan discretion to issue emergency orders which are "desirable in the public interest". No judicial review of these emergency orders is possible.

II. SIXTY YEARS OF EMERGENCY POWERS

Emergency powers are found in many of the world's constitutions including in those of neighboring Malaysia,²² Singapore,²³ and Indonesia.²⁴ Their function is to lawfully enable the executive, for the duration of the emergency, to enact laws and to take actions necessary for the nation's security, its law and order; to protect lives and property; to safeguard essential services; and provide relief until normalcy returns.²⁵ Such powers may include (1) allowing a government to limit or suspend constitutional rights when the pre-conditions for an emergency arise; (2) specifying expiry to prevent normalization of emergency powers; (3) concentrating decision-making in the executive by temporarily bypassing the legislature or postponing elections; and (4) having a checks and balances mechanism against abuse of such powers. Each will be considered in turn.

2.1. Precondition for a Proclamation of Emergency

Article 83 (1): Whenever it appears to His Majesty the Sultan and Yang Di-Pertuan that an occasion of emergency or **public danger** is imminent, exists or has arisen whereby the security or economic life of Brunei Darussalam, or any part thereof, is or may be threatened, whether by **war or external aggression or internal disturbance**, actual or threatened, he may by Proclamation [hereinafter a "Proclamation of Emergency"] declare a state of emergency either in the whole of Brunei Darussalam or in such part of Brunei Darussalam as may be specified in the Proclamation [emphasis added].

The events of 1962, known as the Brunei Rebellion, met these pre-conditions. There were constitutional grounds by which Sultan Omar could hold that there was public danger and actual internal aggression threatening Brunei's security and its economy. The vital oil town of Seria was under siege and the military wing of the PRB was armed and on the streets. The first proclamation on 12 December 1962 was valid. With the assistance of British forces and local police, the coup or rebellion was defeated within days. Sporadic acts of violence occurred over the next five months until the capture of PRB strategist Yassin Affandi, and

²² Constitution of Malaysia, Article 150.

²³ Constitution of Singapore, Article 150.

²⁴ Constitution of the Republic of Indonesia, Articles 12 and 22.

²⁵ "Emergency Powers in Constitutions," ConstitutionNet, accessed 30 May 2022.

PRB leader Azahari went into exile in Indonesia. The PRB was declared illegal and acts of its armed members held treasonous. Forty of the rebels died and 3,400 captured and went on trial. The same justification of emergency from 60 years ago, is no longer applicable. The opposite is true: Brunei is stable, peaceful and prosperous, which is reflected in its name – Brunei Darussalam, an Abode of Peace. The State Mufti described it as a blessed nation “where citizens and residents enjoy prosperity, feel content and are at peace and ease”.²⁶

2.2. Specifying Expiry for A State of Emergency

Article 83 (2): No Proclamation of Emergency shall be in force for more than 2 years, without prejudice, however, to the right of His Majesty the Sultan and Yang Di-Pertuan to issue another such Proclamation at or before the end of that period. 2A. Notwithstanding Clause (2), His Majesty the Sultan and Yang Di-Pertuan may by another such Proclamation declare the cessation of a state of emergency in the whole of Brunei Darussalam or in such part of Brunei Darussalam as may be specified in the Proclamation before the end of 2 years.

This sets two years’ duration for a proclamation with automatic expiry at the end of that period. It does, however, permit the Sultan to issue another proclamation predicated on the continuing application of the pre-conditions of public danger, war, internal unrest as contained in Article 83 (1), as discussed above. The legality of issuing further proclamations when the constitutional preconditions are absent warrants judicial review.

2.3. Concentrating Decision-Making: Powers of the Sultan During a State of Emergency

Article 83 (3): When a Proclamation of Emergency has been made and so long as such Proclamation is in force, His Majesty the Sultan and Yang Di-Pertuan may make any Orders **whatsoever which he considers desirable in the public interest**; and may prescribe penalties which may be imposed for any offence against any such Order; and may provide for the trial by any court of persons charged with such offences [emphasis added].

This Article gives full discretion to the Sultan to enact civil and criminal laws which impact on the rights, liberties and lives of Bruneians. It is subjective,

²⁶ Rokiah Mahmud, “Blessed as a Zikir Nation,” *Borneo Bulletin*, 12 May 2021.

lacking an objective component, such as reasonableness, but is required to correlate with the public interest. The breadth of the discretion highlights why lawmaking under Article 83 should be done sparingly and only when a genuine need as outlined in Article 83 (1) arises. A rule of construction is that a section must be read in light of its context which, here, is when Brunei is in an emergency or crisis and the laws emanating should thus correlate. Since the 1960s, Emergency Orders of the Sultan pursuant to Article 83 (1) lack this correlation. In the hundred or so Emergency Orders currently on the government website²⁷ few are crisis measures – for example, the Arbitration Order 2009, Beauty and Health Establishments Order 2009, Tobacco Order 2005, Employment Agencies Order, Halal Certificate and Halal Label Order 2005, and the Pawnbrokers Order 2002. Two of Brunei’s most contentious pieces of criminal legislation – the Syariah Penal Code Order 2013 (hereafter SPCO) and the Syariah Courts Penal Code Procedure Order 2018 – were by emergency lawmaking. The only reason for this was to avoid public commentary prior to the Orders taking effect and to minimize debate within the LegCo. To use royal fiat emergency powers for a major change to the legal landscape of multi-ethnic, multi-religious Brunei without prior consultation with the men or women of Brunei, both Muslims and non-Muslims, on whose lives the Orders will have a major impact, raises questions of political expediency and lack of accountability. The SPCO was proclaimed as law in a *titah*²⁸ (a royal speech). Once proclaimed, open and honest discussion especially criticism or questioning of any aspects of the SPCO was prohibited. In addition to comprehensive censorship laws, the SPCO has its own penal sanctions, criminalizing any person who publicly opposes the SPCO (as a law dealing with Islam)²⁹ or his Majesty’s *titahs*.³⁰ The Sultan faced considerable international condemnation, but such criticism was not legally possible from within Brunei. The International Commission of Jurists (ICJ), for

²⁷ Government of Brunei Darussalam website, accessed 12 November. <https://www.agc.gov.bn>.

²⁸ Announced in a *titah* for His Majesty’s birthday on 15 July 2013. *Titah* are royal speeches in which the Sultan announces policy. Most *titah* can be accessed in Malay, with some translated into English, from the Government of Brunei’s website, accessed 12 November, 2022. www.rtb.gov.bn/Titah.

²⁹ Syariah Penal Code Order, Article 220 (d), 2013.

³⁰ Syariah Penal Code Order, Article 230, 2013.

example, denounced the Order “as a blueprint for human rights violations”,³¹ and Amnesty International claimed it took Brunei back to the “dark ages” making “a mockery of the country’s international human rights commitments” and called for its immediate revocation.³² The Sultan strongly defended the SPCO, warning critics in Brunei that they “cannot be allowed to continue committing these insults, ...the first phase of implementing the Syariah Penal Code Order will be very relevant to them”.³³ This was a reference to sections of SPCO which make it a heresy to question any aspect of this Emergency Order. When a blogger posted that rather than stoning for *zina*³⁴ (adultery), whipping was more in keeping with Quranic passages such as 24:2, he was arrested and charged with heresy.³⁵

2.4. Checks and Balances

Checks and balances in constitutions are to limit arbitrary or excessive discretionary power and prevent overuse or abuse of powers. To ensure the executive does not exceed its authority, the checks and balances come from both the legislature and the judiciary. These are discussed below. Brunei is not a democracy, but even in democracies there are also additional checks from the media, civil society, and the citizenry. By voting, citizens hold their representatives to account, and through petitions, protests, consultations, submissions, and letters to their elected representatives, they act a check on the power of those who enact and who implement the law.

2.4.1. Legislative Council Scrutiny

Article 83 (7): Every Order made under this Article shall, at the next meeting of the Legislative Council, be **laid before that Council** and that Council may resolve that any such Order shall, to the extent and as from such date as may be specified in such resolution, either cease to have effect (and any such cessation shall, if assented to by His Majesty the Sultan and Yang Di-Pertuan, have the same effect as the repeal of a written law) or be passed by that Council [emphasis added].

³¹ “Brunei: New Penal Code a Blueprint for Human Rights Violations,” International Commission of Jurists, 27 January 2014.

³² “Brunei Darussalam: Revoke new Penal Code allowing stoning, whipping and amputation,” News, 30 April 2014.

³³ “Sultan hits back at rare criticism over sharia,” *The Star Online* 26 February, 2014.

³⁴ Syariah Penal Code Order, section 69, 2013.

³⁵ See Ann Black, “Casting the first stone: the significance of the Syariah Penal Code Order for LGBT Bruneians,” *Australian Journal of Asian Law*, 20 no.1 (2019).

This Article is designed as a check on abuse of emergency power. Every Order made pursuant to Article 83 (1) must be laid before (presented to) the Legislative Council. Scrutiny of the workings of the LegCo over six decades shows this check on abuse of power is meaningless.

Following the Brunei rebellion of December 1962, the LegCo was dissolved by the Emergency (Suspension of Constitution) Order, 1962. As the PRB had resoundingly won that year's election, the Sultan had no appetite to restore elections or have any elected representatives in the LegCo. With the 1967 abdication of Sultan Omar and the coming to power of Sultan Bolkiah, the new ruler used his emergency powers to change the composition of the LegCo³⁶ to a body entirely appointed by him. It guaranteed continuation of rule by royal decree. When full independence from Britain came in 1984, the Sultan's independence *titah* announced Brunei "shall forever be a sovereign **democratic** and independent Malay Muslim Monarchy [emphasis added]"³⁷. The word "democratic" belied the meaning. It did not mean elections and a return to participatory representative government: the exact opposite. Parts VI and VII of the Constitution on the Legislative Council were suspended. Instead, an ideology called *Malay Islam Beraja* (MIB) was unveiled to justify absolute rule based on Brunei tradition: because pre-colonial Sultans ruled absolutely, then all later Sultans could legitimately rule absolutely. This misinterprets the checks and balances that existed in pre-colonial Brunei's stratified society especially from the wazirs and nobles. It is also illogical as slavery was part of pre-colonial Brunei but that would not *ipso facto* make it valid today. Braighlinn argues that MIB promotes "royal absolutism under a divine mandate"³⁸. It uses Islam "as a special, legitimising prop to 'B' (*Beraja*/the Monarchy), which is reciprocally protected"³⁹. MIB provided an alternative to representative democracy. Mindful perhaps of the PRB and the events of 1962, there was, and one suspects still is,

³⁶ Emergency (Council of Ministers and Legislative Council) Order, 1970.

³⁷ *Titah* at the Promulgation of Brunei Independence, 1 January 1984.

³⁸ G. Braighlinn (pseudonym), *Ideological Innovation under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei* (Amsterdam: VU University Press, 1992), 43.

³⁹ *Ibid.*, 22.

concern that a democratic participatory process would challenge the Sultan's absolutist control politically and financially over the nation.⁴⁰

Twenty years on from independence there was optimism⁴¹ that the “winds of change” from Indonesia would spread to Brunei to bring a *reformasi* (reform) from which there could be a transition to a constitutional monarchy with parliamentary democracy. In 2004, the Sultan gave a speech noting coming constitutional reforms would increase political participation through a reinstated LegCo.⁴² Whilst the LegCo was re-instated it was as an entirely Sultan-appointed body.⁴³ It met once in 2004 in a wonderful new LegCo building where the members “rubber-stamped” a series of major constitutional amendments further entrenching the Sultan's powers. These included his avenues for law-making,⁴⁴ abolishing judicial review,⁴⁵ strengthening the Sultan's executive control,⁴⁶ and, enshrining protection for MIB, Islam, the Sultan and the royal family,⁴⁷ from criticism. It was a retreat from, not a move toward, democracy, inclusivity, transparency, and accountability.

The LegCo continues to meet once each year, with considerable pomp and ceremony. Four features demonstrate how in reality it is a subservient show chamber with no genuine legislative power. First, members⁴⁸ are appointed by the Sultan, serve “at his pleasure”⁴⁹ and can be removed by him, without giving reasons. Second, there are censorial limits on what can be said. The 2004 amendments clarified that a LegCo member can lose their seat or be suspended⁵⁰ if “disloyal” or “disaffected” toward the Sultan.⁵¹ The meaning of

⁴⁰ Tey, “Brunei's Revamped Constitution,” 267.

⁴¹ Mohd Yusop Hj Damit, “Brunei Darussalam: Steady Ahead,” *Southeast Asia Affairs* (2004): 63, 66, 67.

⁴² M. Salleh, “Brunei: New era dawns in Brunei,” *Borneo Bulletin*, 17 July 2004.

⁴³ It was dissolved in 2005 and another Legislative Council established again with appointed members.

⁴⁴ Constitution of Brunei Darussalam, Articles 39 & 47.

⁴⁵ *Ibid.*, Article 83.

⁴⁶ *Ibid.*, Article 84 C.

⁴⁷ *Ibid.*, Article 53 (1A).

⁴⁸ The 33 members include the Sultan with the Crown Prince, 13 cabinet ministers (ex officio members) with 18 other appointed members, two titled persons, seven prominent citizens, and eight representatives from the four districts who are indirectly elected. A Selection Committee appointed by the Sultan approves them and after the district vote makes recommendations to the Sultan. If he rejects a candidate, then an alternative candidate must go before the Selection Committee. See: Constitution of Brunei Darussalam, Schedule 2.

⁴⁹ Constitution of Brunei Darussalam, Articles 40, 47.

⁵⁰ *Ibid.*, Article 31(4).

⁵¹ *Ibid.*, Article 30.

what amounts to “disloyalty” or “disaffection” is undefined, but subjective. Third, the Constitution prohibits comments derogatory to the Sultan, the royal family, and the MIB state ideology.⁵² Given the dominant role of the Sultan and MIB in every aspect of Brunei’s political life, open, free and fearless debate on laws, policies and future directions for the Sultanate is impossible. Commentators note that “debates are rarely heard”.⁵³ The Sultan told members in 2006 not to be afraid to express their views, if these views were positive and led to consensus;⁵⁴ which results in acquiescence or endorsement of his views. Fourth, another of the 2004 constitutional amendments establishes that laws enacted by the Sultan do not require the LegCo’s “advice and consent”. Any member of the LegCo can, in theory, introduce a bill, propose a motion for debate, have it passed by a majority of the Chamber, to become law with the Sultan’s royal assent,⁵⁵ but His Majesty can amend it without reference back to the LegCo. If a bill fails to pass to LegCo, Article 47 of the Constitution gives the Sultan reserve powers to declare it has legal effect anyway.

Cumulatively, the 2004 amendments render Article 83 (7) impotent as a check on executive power during this ongoing state of emergency. They are directly counter to the ASEAN Human Rights Declaration (AHRD), signed by Brunei in 2012, in which Article 25 specifies that:

- (1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.
- (2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

⁵² Ibid., Article 53 (1A).

⁵³ Samuel C.Y. Ku, “Brunei in 2009. Maturity in Doubt?” *Asian Survey* 50, (2009): 263.

⁵⁴ Hj Mohd Yusop Hj Damit, “Brunei Darussalam: Towards a New Era,” in *Southeast Asian Affairs*, eds. Daljit Singh & Lorraine Salazar (Singapore: ISEAS, 2007), 104.

⁵⁵ Constitution of Brunei Darussalam, Article 40 (1).

2.4.2. Judicial Review

An accepted mechanism for curtailing extension of emergency powers beyond constitutional parameters lies with the judiciary, acting as an independent arm of government ensuring constitutional integrity. Brunei's constitution does not contain a guarantee of judicial independence⁵⁶ and judicial review was specifically excluded in the 2004 constitutional amendments. Article 84 C (1) clarified that "the remedy of judicial review is and shall not be available in Brunei Darussalam". Article 84 C (2) added:

For the avoidance of doubt, there is and shall be no **judicial review in any court** of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, **or any party acting on his behalf or under his authority** or in the performance of any public function, under the provisions of this Constitution or any written law or otherwise... [emphasis added].

The Supreme Court Act (Cap. 5) was similarly amended. It also stated that the only review power for the Supreme Court is its supervisory power over inferior courts.⁵⁷ The Attorney-General justified the ouster of judicial review on cultural grounds, namely that "an adversarial system of judicial review may not be suitable for Brunei".⁵⁸ In 2015, the President of Brunei's Law Society called for the return of judicial review as there were "no checks and balance" on government authority and it was necessary in "the interests of justice ... in upholding the rule of law".⁵⁹ He asked whether section 84 C can "produce order and justice in the relationship of man and man and between man and the state".⁶⁰

III. CONSEQUENCES OF OPEN-ENDED EMERGENCY POWERS

3.1. Constitutional Amendment and Interpretation

Article 85. (1): His Majesty **the Sultan** and Yang Di-Pertuan may, by Proclamation, **amend, add to or revoke any of the provisions of this**

⁵⁶ Ann Black, "Judicial Independence in Brunei Darussalam," in *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity*, eds. H.P. Lee and Marilyn Pittard (Cambridge: Cambridge University Press, 2018), 57.

⁵⁷ Supreme Court Act, Cap. 5, section 20.

⁵⁸ Attorney-General Kifrawi, "Speech of the Opening of the Legal Year 2007" (Government Website, 27 March 2007).

⁵⁹ Attorney-General Rozaiman cited in Quratul-Ain Bandial, "Law Society Calls for Return of Judicial Review," *Brunei Times*, 14 April 2015.

⁶⁰ Attorney-General Rozaiman.

Constitution including this Article; and this Constitution shall not otherwise be amended, added to or revoked [emphasis added].

This grants the Sultan sole power for constitutional amendment. He is required to consult with the Privy Council, whose advice he need not take,⁶¹ and also, as he did in 2004, to lay a draft of the proclamation for constitutional amendments before the Legislative Council for debate and receive a report from its speaker.⁶² Once again, the Sultan can ignore the speaker's advice by declaring his proclamation has effect in its original form or with any amendments he thinks fit.⁶³ Although, unlike Article 83, there is a requirement here for debate and for a report from the speaker, the shackles imposed on the LegCo, (discussed above) makes opposition or genuine input unlikely.

Brunei's Supreme Court does not have power to interpret the Constitution. When a question arises in a case "involving, arising from, relating to, or in connection with, the meaning, interpretation, purpose, construction, ambit or effect of any of the provisions of this Constitution"⁶⁴ the Court must refer the question to the Sultan or make a submission to him requesting the question be referred to an ad hoc Interpretation Tribunal.⁶⁵ The Sultan appoints members to the tribunal⁶⁶ who serve "at his pleasure"⁶⁷ and are remunerated by him. There are no reports of the tribunal being constituted to consider a constitutional matter. The Judicial Committee of the Privy Council cannot hear any question involving "the meaning, interpretation, construction or effect of any of the provisions of that Constitution".⁶⁸ This is a void a Constitutional Court could fill.

3.2. Adjudication

The 2004 ousting of judicial review was not only a constitutional amendment, but was included in other legislation including the Supreme Courts Act (Cap.

⁶¹ Constitution of Brunei Darussalam, Article 85 (2).

⁶² *Ibid.*, Articles 85 (3) & (4).

⁶³ *Ibid.*, Article 85.

⁶⁴ *Ibid.*, Article 86 (1).

⁶⁵ *Ibid.*, Articles 86 (2) & (3).

⁶⁶ *Ibid.*, Article 86 (7).

⁶⁷ *Ibid.*, section 86 (7).

⁶⁸ Brunei (Appeals) Order 1989.

5),⁶⁹ the Intermediate Courts Act (Cap. 162),⁷⁰ Syariah Courts Act (Cap. 184),⁷¹ the Special Relief Act (Cap. 109)⁷² and Internal Security Act (Cap. 133).⁷³ The latter is of concern as it does not include a presumption of innocence and allows for detention without trial for up to two years with indeterminate extensions. Additionally, the common law equitable remedies of *mandamus*, prohibition and *certiorari*, *habeas corpus*, and applications for declarations and injunctions were excluded.⁷⁴ These amendments give the Sultan unprecedented control over both streams of courts: Syariah⁷⁵ and common law courts, which are directly administered by the Department of the Prime Minister. The Sultan appoints judges to both Syariah and common law courts, all of whom serve “at his pleasure”.⁷⁶

From 2004, additional discretionary powers over courts’ adjudication were given to the Sultan including power to direct the court to hear cases *in-camera*⁷⁷ (that is, not open to the public) including any cases in which a party may “directly or indirectly” reference the Sultan.⁷⁸ He can direct the Supreme Court (and Intermediate and Syariah courts) to hold proceedings at a time and venue he orders,⁷⁹ reiterating that his directions cannot be appealed or reviewed.⁸⁰ Any reproduction or publication of a judgment that might lower or adversely affect the “position, dignity, standing, honour, eminence of sovereignty” of the Sultan is prohibited.⁸¹ The Sultan cannot be compelled to attend any court proceeding⁸² and can exempt “any person required by the court to attend” or who has been to summoned from the duty to do so.⁸³ Legalizing closed trials, witnesses exemptions and allowing non-disclosure or non-reporting of court decisions,

⁶⁹ Sections 20A to 20 E.

⁷⁰ Section 6.

⁷¹ Syariah Court Act, Cap. 184, section 27 (B).

⁷² Section 6 (A).

⁷³ Section 6 (2).

⁷⁴ Constitution of Brunei Darussalam, Article 84 I (3).

⁷⁵ Syariah Courts Act, Cap. 184, section 27 (B).

⁷⁶ Supreme Court Act, Cap. 5, section 8 and Syariah Courts Act (Cap. 184) section 12.

⁷⁷ *Ibid.*, Cap. 5 section 15 (5).

⁷⁸ *Ibid.*, Cap. 5 section 15 (4).

⁷⁹ *Ibid.*, Cap. 5 section 15 (6).

⁸⁰ *Ibid.*, Cap. 5 section 15 (7).

⁸¹ *Ibid.*, Cap. 5 section 15 (8).

⁸² *Ibid.*, Cap. 5 section 34 (1) and is also in the Succession and Regency Proclamation 1959, section 25(b).

⁸³ *Ibid.*, Cap. 5 section 34 (2).

are an anathema to an open accountable judicial system, whether these powers are employed frequently or rarely. Reports from practitioners in Brunei are that courts do operate fairly and openly, with judicial independence. However, the provisions set out above give rise to *de jure* concerns on judicial independence.⁸⁴

This is reflected in Brunei's decision not to be a signatory to the International Covenant on Civil and Political Rights which carries through into other civil and political freedoms considered below. Brunei is however a signatory to the ASEAN Human Rights Declaration (AHRD) with Article 10 affirming "all the civil and political rights in the Universal Declaration of Human Rights".

3.3. Freedoms of Speech, Association, and Religion

A core role of many constitutional courts is protection of human rights and civil liberties. This arises through constitutional guarantees for specific freedoms often through a bill of rights, or as a signatory to international rights-based conventions of the United Nations. Brunei is the only state in Southeast Asia whose constitution contains neither a bill of rights nor protections for fundamental liberties, except for religion in Part II. Although a signatory to the Universal Declaration of Human Rights (UDHR), Brunei is not a state party to the International Covenant on Civil and Political Rights (ICCPR), while its ratification of the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contained both general reservations for provisions "contrary to the beliefs and principles of Islam" and some express reservations.⁸⁵ Brunei is a signatory to the Universal Islamic Declaration of Human Rights, and the ASEAN Human Rights Declaration. It is possible in a common law context, for fundamental liberties to be deemed inherent, and for this reason, together with UDHR and AHRD, a brief overview will follow of four core freedoms: freedom of religion, speech, association, and equal protection of the law.

⁸⁴ Ann Black, "Judicial Independence in Brunei Darussalam," 62-68.

⁸⁵ Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS. 3; Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, in force 3 May 2008, 2515 UNTS 3; Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

Whilst a constitutional court could hold these to be inherent and thus incorporated into Brunei's legal system there is however a paradigm difference. Brunei sees human rights not as universal but through its prism on Islam and Syariah requirements. The Sultan summed up that, "as Muslims, we uphold human rights with the Quran as our foothold",⁸⁶ prioritizing Allah-granted human rights over fallible "man-made" rights. Brunei's Mufti bin Juned affirms that "Islam has its own human rights" which "never change".⁸⁷ Only when there is no compromise or contradiction with Islam are provisions of "man-made" international rights instruments valid.

3.3.1. Freedom of Religion

Part II of the Brunei Constitution defines Islam as the state religion with the definition section specifying the Islamic religion is "according to the Shafeite [Sunni] sect of Ahlis Sunnah Waljamaah",⁸⁸ adding that "all other religions may be practiced in peace and harmony".⁸⁹ The peace and harmony provision is not, as it would seem at first glance, to grant religious freedom to non-Muslims but ensures Muslims do not see or hear any non-Islamic religious practices,⁹⁰ or receive information on a religion other than Islam. If any aspect of another religion is visible, it can be subject to the criminal offense of propagating a religion other than Islam to a Muslim.⁹¹ Exposure to "other religions" in public places includes schools, where non-Muslims must take courses of Islam and MIB,⁹² but who are forbidden from receiving instruction in their own religion. Other criminal law restrictions on non-Muslims include having religious symbols such as a crucifix or trigram from the ancient *I Ching* as an item of jewelry or on clothing, or saying words reserved only for Muslims. The SPCO has a list of words⁹³ not

⁸⁶ *Titah* cited in "Laws of Islam Seek Blessings Not Oppression," *Borneo Bulletin*, 5 November 2017.

⁸⁷ "Syariah not against Human Rights," *Borneo Bulletin*, 24 October 2013, 4.

⁸⁸ Constitution of Brunei Darussalam, Article 2.

⁸⁹ *Ibid.*, Article 2.

⁹⁰ Fatwa (Siri 03/2005) reported in "Muslims must not follow non-Islamic celebrations," *Borneo Bulletin*, 28 December 2014. The Grand Mufti asserted, "[B]elievers of other religions that live under the rule of an Islamic country, according to Islam, may practise their religion or celebrate their religious festivals among their community, with the condition that the celebrations are not disclosed or displayed publicly to Muslims."

⁹¹ Syariah Penal Code Order, section 209 (1), 2013.

⁹² Compulsory Religious Education Act, Cap. 215.

⁹³ Syariah Penal Code Order, Fifth Schedule, 2013.

to be used including *Allah*, the Arabic and Malay word for God. Since the 15th Century, Christian bibles, hymnals and other texts used ‘Allah’ in their Malay versions. Prohibitions on religious publications extend to “quotations, excerpts or citations” from holy books and texts, or ones which “state the history, principles, teachings, characteristics, policies, performances, ceremonies, customs, charitable deeds, dogmas, orders or organizations of that religion”.⁹⁴ The animistic practices which indigenous Borneans observed for millennia are also criminalized, such as visiting *keramat* shrines, which animists believe have spirits who can mediate with God⁹⁵ or using services of *bomoh* (shamans and magic healers).⁹⁶

The “practice in peace and harmony” provision does not extend to Muslims who do not follow Shafi’i school interpretation. The SPCO Order prohibits interpretative Islamic democracy through the criminal offense of apostasy/*irtidad*, which extends to denying a *hadith* of the Prophet or *ijma* (consensus of Bruneian scholars) as a source or authority for a ruling.⁹⁷ The Sultan called on the authorities to strictly enforce the laws against the infallibility of *hadith* and *ijma*.⁹⁸ There are regular reminders from the Sultan for vigilance against “the devious teachings virus”,⁹⁹ insisting the nation’s imams give a unified message in their religious sermons, preaching, talks and writings. A government *Aqidah* (Doctrine/Faith) Control Section¹⁰⁰ monitors for deviancy.¹⁰¹ Shia Islam,¹⁰² Ahmadiyah, a range of Sufi groups, Al-Arqam, Ba’hai, and Silat Lintau are banned as heretical and deviant.

These features compromise Brunei’s commitment to the AHRD, where Article 22 guarantees citizens of member states “the right to freedom of thought, conscience and religion” adding that “all forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated”.

⁹⁴ *Ibid.*, section 125.

⁹⁵ Dominik Muller, “Sharia law and the Politics of “Faith Control” in Brunei Darussalam,” *Internationales Asienforum: International Quarterly for Asian Studies* 46 (2015): 329.

⁹⁶ Muller, “Sharia Law”: 313.

⁹⁷ Syariah Penal Code Order, section 111 (b), 2013.

⁹⁸ Azlan Othman, “Imams remind Ummah against anti-Hadith groups,” *Borneo Bulletin*, 30 March 2013.

⁹⁹ Lyna Mohamad, “Vigilance on Deviant Teachings,” *Borneo Bulletin*, 31 December 2006.

¹⁰⁰ Muller, “Sharia law,” 320.

¹⁰¹ The Sultan’s titah for New Year of Hijrah 1439 reminded the country to be wary of Akidah Deviation, reported in “His majesty reminds the country to be wary of Akidah Deviation,” *Borneo Post*, 23 September 2017.

¹⁰² The second-largest group of Muslims after Sunni adherents.

3.3.2. Freedom of Speech

In addition to limitations on what members of the six advisory Councils can say (outlined earlier), there are criminal and regulatory laws limiting freedom of speech in the wider community – public forums, in print, electronic and social media. In essence, any statement verbally, in print, online or visual, that could be interpreted as criticism of the Sultan, the royal family, Islam, the government or MIB is subject to criminal sanction. For example, the Sedition Act (Cap. 24) makes statements which are “derogatory of the Sultan, the Royal family, Islam or MIB” seditious.¹⁰³ The Internal Security Act (Cap. 133) criminalizes any act, “speech or publication done with the intention of inciting disaffection for the Sultan” or his government.¹⁰⁴ The SPCO criminalizes “printing, disseminating, importing, broadcasting, and distributing publications contrary to Islamic law”.¹⁰⁵ There are controls on media ownership,¹⁰⁶ with close monitoring, regulating and censoring of all means of communication – press, internet¹⁰⁷ (government-owned) and television. It makes expression of alternate, as well as critical, opinions not possible. Senior Counsel from the Attorney-General’s Department explained that while there are laws protecting freedom of expression in many Western countries, in Brunei “there are no such rights of freedom of expression as the likes of in the US and in the UK... censorship in more conservative countries like Brunei is crucial” as it prevents “various levels of the community from being exposed to negative information”.¹⁰⁸ Distributing a satirical video via mobile phone depicting members of the royal family resulted in conviction and a year’s imprisonment for three Bruneians.¹⁰⁹ Brunei’s comprehensive restrictions run contrary to Article 23 of the AHRD, which guarantees “the right to freedom of opinion and expression,

¹⁰³ Sedition Act, Cap. 24, section 4.

¹⁰⁴ Sedition Act, Cap. 24, section 53 (1)(i); Internal Security Act (Cap. 133), which allows detention without trial for up to two years with indeterminate extensions, specifically ousts judicial review of detention orders.

¹⁰⁵ Syariah Penal Code Order, sections 213, 214 & 215, 2013.

¹⁰⁶ Newspaper Act (Cap. 105) gives considerable powers to the Minister to issue permits, which he can rescind with showing case.

¹⁰⁷ Internet practice codes stipulate that content must not be subversive, promote illegitimate reform, incite disharmony or instability, or fall out of line with “Brunei Darussalam’s religious values, social and societal mores. Yazdi Yahya, “Censorship is still important,” *The Brunei Times*, 19 November 2007.

¹⁰⁸ Roz Alai Zin, “Rights, Social Responsibilities of Bloggers,” *The Brunei Times*, 26 September 2010.

¹⁰⁹ Offense under the Sedition Act (Cap. 24). Reported in Amnesty International Submission to the UN Periodic Review on Brunei Darussalam.

including freedom to hold opinions without interference and to seek, receive and impart information”. It explains why international organizations such as Freedom House categorize Brunei as “not free”.¹¹⁰ In 2021, Brunei was ranked 153rd on the World Press Freedom Index.¹¹¹

3.3.3. Equality

Whilst there are passages in the Quran which emphasize equality between men and women (for example Quran: 4:1, 9:71, 33:35) Brunei has no national legislation endorsing gender equality or protection from discrimination in line with Article One of CEDAW.¹¹² Currently, in Brunei’s six advisory Councils to the Sultan, only two – the Executive and Legislative Councils – have had female appointees. Brunei’s Constitution makes accession to the throne strictly paternal and lineage is based on lawful sons of the reigning Sultan, or sons of sons of the Sultan’s “blood line”.¹¹³ Islamic morality offences in the SPCO impact disproportionately on women, LGBT people and anyone who does not conform to strict norms on gender and sexuality. Under Brunei’s Islamic law, women are not the equal of men when giving evidence¹¹⁴ and are disqualified from providing testimony for some offenses.¹¹⁵ Women victims of homicide or personal injury receive half the criminal compensation (*diyat*) of the amount received by men, and in inheritance a daughter inherits half the portion of her brother, and a wife half that of her husband.¹¹⁶ Women are also disadvantaged in marriage¹¹⁷ and divorce¹¹⁸ and a father is the legal guardian¹¹⁹ for children.

¹¹⁰ “Expanding Freedom and Democracy,” Freedom House.

¹¹¹ “The Ranking,” Reporters without Borders. <https://rsf.org/en/ranking>.

¹¹² For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

¹¹³ Succession and Regency Proclamation, section 4, 1959.

¹¹⁴ Syariah Courts Evidence Order, sections 106 and 107, 2001.

¹¹⁵ These include *hudud* (crimes) in Brunei’s SPCO Part IV Ch.1, including theft, robbery, adultery, same-sex intimacy, false accusations of adultery, alcohol consumption and apostasy, and *qisas* (equal physical retaliation for injury to a person known as ‘talion’ or ‘an eye for an eye’) including murder, manslaughter, and grievous bodily harm.

¹¹⁶ Inheritance law is not codified, so principles of Shafi’i jurisprudence apply.

¹¹⁷ Islamic Family Law Act, Cap. 217: polygamy is available for a husband: section 23(1) and only women require wali (guardian’s) permission to marry, in section 8.

¹¹⁸ Section 41 allows a husband divorce by pronouncement (*talaq*) notified to the Registrar, whereas a wife needs a court determination (sections 43, 44, 45, 46, and 48) to establish her ground for divorce.

¹¹⁹ Section 95: “the father shall be the first and primary natural guardian of his minor child”, which devolves along the paternal line. A mother loses custody if she remarries after a divorce.

3.3.4. Freedom of Association

The Societies Act (Cap. 66) requires registration of any group with five or more members whether commercial, social, religious, political, employment, advocacy or community sector based. Registration with the Registrar of Societies is refused if the purpose is “unlawful” or “incompatible with the peace, public order, security or public interest” of Brunei. For this reason, political groups who oppose the current political regime cannot be registered. When the Brunei National Development Party (BNDP) announced its policy calling for parliamentary democracy, elections, repeal of emergency laws and constitutional monarchy it was de-registered and its leader arrested under Internal Security Act (Cap. 133). Similarly, as same-sex intimacy is criminalized under the Penal Code and the SPCO, LGBTIQ organizations cannot register in Brunei. To be a member of an unregistered group risks imprisonment for up to three years and fines of up to B\$10,000.¹²⁰

IV. ADVANTAGES OF A CONSTITUTIONAL COURT

Judicial review is found in more than 80% of the world’s constitutions¹²¹ and is inherent in superior courts’ jurisdiction in common law nations. There are theories on whether judicial review is a product of the increasing importance accorded to human rights protection since World War II;¹²² or is a way to constrain parliamentary majorities and/or the executive branch of government;¹²³ or comes with progressive change in Third Wave Democratization after authoritarianism;¹²⁴ or is implemented by elites to preserve what Ran Hirschl argues is their own “political hegemony”¹²⁵ rather than as a tool for democratic “horizontal accountability”.¹²⁶ Judicial review in theory and practice may not

¹²⁰ Societies Order, sections 41 and 42, 2005.

¹²¹ Yasushi Hazama, “Hegemonic preservation or Horizontal Accountability,” (Paper for 2010 Annual Meeting of the American Political Science Association, 2-5 September 2010).

¹²² Alec Stone Sweet, “Constitutional Courts,” in *The Oxford Handbook of Comparative Law*, eds. Michel Rosenfeld and Andras Sajó (Oxford: Oxford University Press, 2012), 817.

¹²³ Hazama, “Hegemonic Preservation”, 1.

¹²⁴ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 34.

¹²⁵ Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

¹²⁶ *Ibid.*

be a liberal panacea but its absence, as in Brunei, means no accountability, no constraint on authoritarianism, no parliamentary input, and minimal human rights protections. To address any of these, judicial review is both a desirable and necessary precondition.

For Brunei, there are distinctive features of the constitutional court model that warrant consideration. First, the nature of the constitutional court's design for review allows for abstract and *principaliter* review, which may better suit the Bruneian context. Second, there is a lack of tradition and thus association with judicial review in Brunei's current common law and Syariah courts. Third, and importantly, Brunei's current dual legal system is moving gradually toward a hybrid system of common law and Syariah with one court system administering both sets of laws. As the constitutional court model has been incorporated in many Muslim nations, like Brunei, which have Syariah a source of law and with a monarch or emir as ruler, there is experience from which to draw.

Tracing the history of constitutional courts, Albert Chen writes that both the concept and the institution are relatively new inventions in legal history.¹²⁷ Common law principles of judicial review go back to the early 19th century. The US Supreme Court case of *Marbury v Madison*¹²⁸ is a benchmark. In it, Chief Justice Marshall articulated that power of a legislature is limited by its constitution; any law made by a legislature which is repugnant to it must be void; and the court has the power and authority to determine the outcome of any conflict between legislation and the constitution.¹²⁹ The common law model, known as the Anglo-American model, vests the power of constitutional review in the ordinary courts, which also hear cases involving civil, criminal, and public law. The power to decide constitutional questions with finality rests with its superior (apex) court typically the High or Supreme Court. By contrast, the European (civil law) model, conceived by Kelsen and adopted in 1920 in Austria then extended to other civil law jurisdictions vests this power in a specialist centralized

¹²⁷ Albert H.Y. Chen, "Constitutional Courts in Asia: Western Origins and Asian Practice," in *Constitutional Courts in Asia*, eds. Albert H.Y. Chen and Andrew Harding (Cambridge: Cambridge University Press, 2018), 1.

¹²⁸ 1 Cranch 137 (1803).

¹²⁹ 1 Cranch 137 (1803).

constitutional court, outside the ordinary court hierarchy. It performs the function of negative legislation or nullifying an unconstitutional norm.¹³⁰ Importantly, a constitutional court can employ abstract review, which unlike the common law model, does not rely on the facts and circumstances of an actual case being in litigation before the court.¹³¹ The constitutional court can therefore review when the only or principal issue is the constitutionality of a law (*principaliter*) whereas in common law, constitutional review is incidental to the decision a court will make as to which litigating party wins the case (*incidenter*).¹³² These three features of nullification, abstract review and *principaliter* are arguably more suitable for a small jurisdiction like Brunei with a generally non-litigious legal culture and where questions of unconstitutionality are ripe for judicial interpretation.

A second advantage is that because the common law courts were constrained by Brunei's laws rendering judicial review outside the courts' powers, no tradition of review developed in the Sultanate. Although senior international judges from other common law jurisdictions do sit on the High Court, their judicial review experience from their own common law jurisdictions is neutered by Article 84 C of the Constitution, and Section 20 of the Supreme Court Act (Cap. 5). Whilst the courts' reputation for independence, professionalism and impartial decision-making is high, especially for commercial, civil and criminal law matters, the lack of human rights protections in the Constitution and legislation means the common law courts are unlikely to be seen as protectors of citizens' human rights. Brunei's ethnic and religious minorities¹³³ experience discrimination in legislation such as the SPCO and the Compulsory Religious Education Act (Cap. 215) but cannot turn to courts as their protectors. Despite Brunei's CEDAW obligations, the courts would not be seen as guardians and protectors for gender equality nor sexual orientation. Without this association of an established tradition in the common law courts, it would seem a fresh approach with a dedicated review role from a constitutional court could better change current perceptions.

¹³⁰ Chen, "Constitutional Courts in Asia," 3.

¹³¹ *Ibid.*, 4.

¹³² *Ibid.*

¹³³ Two-thirds of the Brunei's population of 434,076 are Malay, and 16% are Chinese with 10% Indian, indigenous and other ethnic groups, and expatriates. Many in the ethnic minorities are also non-Muslims.

The third reason is that Brunei is no longer a nation where the common law is the main or superior source of law; nor are common law courts the sole venues for conflict resolution. Since independence in 1984, the Sultan's stated goal was to reduce Brunei's colonial legal legacy and to align the Sultanate's laws with Islam by ensuring Syariah compliance. Today, the jurisdiction of the Syariah courts mirrors that of the common law courts and the recent SPCO gives both courts concurrent jurisdiction for a range of criminal offenses.¹³⁴ There are moves toward a "hybrid"¹³⁵ legal system, signaling a desire to move from two separate parallel courts to one court administering both Syariah and common law. If the transition to hybrid does occur, a constitutional court could contribute by guiding its efficacy in a way neither the common law nor the Syariah courts could. Constitutional courts are found in many Muslim nations today where, like Brunei, the constitution specifies Islam as its state religion and where courts administer Syariah law. Many of these nations, including Bahrain, Kuwait and Morocco, have a royal family. Powell and Rothkopf identified and compared 22 Muslim-majority nations: 84% with Islam as the state religion have a constitutional court for some degree of judicial review.¹³⁶

A constitutional court could also consider the validity of the Syariah exemptions in CRC and CEDAW. The CEDAW Review Committee noted that, in its opinion, the principles of the Convention did not run counter to the fundamental principles of Islam, a stance Musawah, (an organization that advocates for equality and justice in Muslim laws)¹³⁷ supports. Musawah's submission questioned the assumption underpinning Brunei's CEDAW reservations by advocating that diversity of opinion has been well accepted and celebrated in Islamic jurisprudence and means there is not a unified, monolithic "divine law".¹³⁸ Moreover, it argued that Brunei's codified Islamic laws are not God-given per se but adopted by men

¹³⁴ Syariah Penal Code Order, 2013; Syariah Penal Code Procedure Order, 2019.

¹³⁵ "Unique hybrid legal system mooted," *The Brunei Times* (5 January 2012); Human Rights Resource Centre, *Keeping the Faith: A Study of Freedom, Conscience and Religion in ASEAN* (Indonesia: Human Rights Resource Centre, 2015): 57, 79.

¹³⁶ Emilia Justyna Powell and Ilana Rothkopf, "Constitutional Courts and Rule of Law in Islamic Law States: A Comparative Study," *JLC-Mena* 1 (2020), accessed 11 November 2022. [_](#)

¹³⁷ "Musawah Thematic Report on Muslim Family law: Brunei Darussalam," 59th CEDAW Session (October 2014).

¹³⁸ *Ibid.*

serving on committees. It means they are “man-made” and can change to be equal and just¹³⁹ to better reflect Quranic values of “equality, justice, compassion and mutual respect”¹⁴⁰ whilst aligning with contemporary international human rights principles.

V. PROSPECTS: OBSTACLES AND REALITIES

If past acts predict future directions, it is unlikely that Sultan Bolkihah will implement any form of constitutional review in Brunei. If he did so now, like his 2004 commitment to restore the Legislative Council, there would be legitimate concerns that a constitutional court could become another tool for Sultan to control. As Powell and Rothkopf found, the establishment of a constitutional court does not “automatically improve the quality of these countries’ good governance or rule of law” and can in Muslim nations become an institution for a ruling elite to impose a “politicized, top-imposed one interpretation”¹⁴¹ of Islam and cite “tradition” to endorse their own position. This accords with Ran Hirschl’s theory that judicial review is not automatically the liberalizing and democratizing tool it is assumed to be but can instead operate for the hegemonic preservation of threatened elites.¹⁴²

As it stands, the Sultan, the royal family, traditional conservative Islamic scholars, and Brunei’s elites do benefit directly from the continuation of the state of emergency, which generates concentration of power, and an absence of accountability through elections, judicial oversight or community commentary. For 60 years, Bruneians have lived with and come to accept a state of emergency that ignores their nation’s Constitution that allowed for democratic participation. Sultan Bolkihah justified lawmaking by Emergency Order as “in keeping with tradition and values” of Brunei and necessary “for the country’s peace and stability” when facing “future challenges”.¹⁴³ This rationale feeds the Sultan’s paternalism that he sees no signs of Bruneians being sufficiently responsible, interested, or

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Powell and Rothkopf, “Constitutional Courts and Rule of Law.”

¹⁴² Hirschl, “*Towards Juristocracy*.”; and Hazama, “Hegemonic preservation,” 3.

¹⁴³ Azlan Othman, “His Majesty Announces Big Changes for Brunei,” *Borneo Bulletin*, 16 July 2004.

ready to participate in elections.¹⁴⁴ It flies counter to Brunei's high level of literacy, educational attainments, and standard of living. Instead, the MIB ideology draws on nationalism, religion and tradition to justify the authoritarian status quo with MIB systematically inculcated in schools, universities, workplaces, government departments, mosques, and through the media. The government and media "tirelessly emphasise how anything they do is in support of and rooted in MIB".¹⁴⁵ As no alternative view can lawfully be presented the concept is uncontested.

The people of Brunei appear to forgo democratic participation and freedoms in return for stability, economic security, and financial benefits. Brunei's wealth from petro-carbon resources and international investments¹⁴⁶ gives them one of the highest standards of living in Asia with a gross domestic product (GDP) of US\$71,809.30 per capita, based on purchasing power parity (PPP), without the need for income tax or sales tax and ranks fifth in the world by GDP per capita PPP.¹⁴⁷ Brunei is a rentier state with most revenue coming from "rents" exploiting natural resources, not from domestic taxation. History shows that when citizens pay taxes they demand accountability and representation in government, but rentier arrangements do the opposite, giving support to undemocratic authoritarian regimes.¹⁴⁸ Overlooking the vast wealth personally accrued to the Sultan and the royal family, Bruneians are told that it is only because of his personal generosity that they have such a high standard of living with comprehensive social welfare benefits, universal health care and education, subsidized hajj pilgrimages, preferential government loans, well-paid public sector employment, infrastructure, and splendid public buildings.¹⁴⁹ It fosters a deep sense of gratitude, loyalty and acceptance of the status quo which the government website describes as "an undivided and unconditional loyalty to His Majesty the Sultan and Yang Di Pertuan".¹⁵⁰

¹⁴⁴ Neher, *Democracy and Development*, 145.

¹⁴⁵ Muller, "Sharia law," 317.

¹⁴⁶ The oil and gas sector accounts for two-thirds of Brunei's GDP, 98% of its exports, and 93% of government revenues.

¹⁴⁷ Robert Bociaga, "Brunei: Spoiled Subject of the Sultan," *The Diplomat*, 11 February 2020.

¹⁴⁸ Ahmet T Kuru, "Authoritarianism and Democracy in Muslims Countries: Rentier States and Regional Diffusion," *Political Science Quarterly* 129, no. 3 (2014): 399.

¹⁴⁹ Ann Black, "Marching to the Beat of a Different Drum: Royalty, Women, and Ideology in the Sultanate of Brunei Darussalam," *Royal Studies Journal* 7, no. 2 (2020): 108; Noraini Ahmad, "Policy Implications for Working Women in Brunei," *Japan Labour Issues* 3, no. 1 (2019): 40.

¹⁵⁰ "Information Department, Government of Brunei," *The Borneo Post*, accessed 12 November 2022.

These factors, it would seem, mitigate against a constitutional court or any form of judicial review being introduced any time soon, but circumstances can change in a country. Given Brunei's economic dependency on petro-carbon resources, which are diminishing, along with the world's support for them, economic and financial restructure is inevitable in coming decades. The Sultan has reigned for over sixty years and in time the crown prince, Billah, will inherit the throne. With this will come political change and a renegotiation of the personal bond between Sultan Bolkiah and his people. Known as *Sentiasa Bersama Rakyat* (always together with his people) Sultan Bolkiah is said to know and love his people who accept that in 'his wisdom' he will only act in their best interest. This personal intimate symbiotic relationship contrasts with western separation of powers, and democratic representative institutions but will need renewing by Bolkiah's successor. Brunei's strategic position and proximity to the South China Sea brings future uncertainties to the region, and international tensions may necessitate realignments and future changes. Lastly, today's global interconnectedness means that all the Sultanate's censorship and restrictions on human rights cannot stop new generations of Bruneians gaining awareness of alternative ways of governing.

VI. CONCLUSION

As Asia's only absolute monarchy, Brunei is an outlier and is out of step with the democratization that has taken place throughout Asia. It is one of the most affluent nations in the region and has a highly educated population, but citizens lack basic freedoms valued and protected in other nations, including freedom of speech, the press, association, and genuine religious freedom. Despite the constitutional provision for elections to the LegCo, Bruneians today are disenfranchised. All of this is possible because a state of emergency implemented for genuine reasons 60 years ago continues unchallenged today. The repugnancy of emergency proclamations, law-making by emergency orders, and denial of elections warrants judicial determination. To do so would undermine the supremacy of the existing power elite, making it unlikely to happen but that

does not negate the need to raise and canvass options in forums outside Brunei, including ASEAN. Were reforms to come to Brunei one day, an independent separate constitutional court would have advantages over an Anglo-American integrated model.

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