

BRUNEI DARUSSALAM: SMALL BY CHOICE BUT GREAT IN THE EYES OF ALLAH

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This paper considers how Brunei Darussalam successfully became a small state by both accident and design. The interrelationship of key political legal features, how smallness facilitates each and the symbiotic link between the sultan and subjects and the nexus between Islam and Sultan are also addressed.

Dans cet article l'auteur s'intéresse aux circonstances qui ont présidé à la création du Sultanat de Brunei Darussalam. Elle souligne que la taille réduite de cet État est un facteur déterminant qui explique la cohésion entre son système juridique, politique et religieux ainsi que les liens privilégiés entre le Sultan et ses sujets.

I INTRODUCTION

Negara Brunei Darussalam is a small Sultanate in the South China Sea on the much larger island of Borneo. In terms of area, Borneo¹ is the third-largest island in the world, and the largest island of Asia.² Brunei, which is on Borneo's northwest corner, is the third smallest nation³ in terms of area in Asia, placing it after Singapore and the Maldives.⁴ The words, Borneo and Brunei, are derivations from the Sanskrit word *Varuna/Baruna* meaning a region of seafarers and traders. Today the island of Borneo is politically divided into three countries: Brunei, which is less than 1% of the island; the two east Malaysian states of Sabah and Sarawak comprising 26%; and the Indonesian province of Kalimantan, the largest portion at 73%.

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1 743,330 square kilometres.

2 This includes all regions of Asia but excludes the Middle East.

3 5,770 square kilometres/2,226 square miles.

4 Maldives is 300 square kilometres/116 square miles & Singapore is 716 square kilometres/276 square miles.

As well, in terms of its population Brunei is the smallest nation in Asia. Its population of 434,076 is slightly smaller than the Maldives [444,259] and considerably smaller than Singapore [5.82 million].⁵ Brunei is one of only two independent states, which are Sultanates.⁶ Although small, Brunei is one of the wealthiest states in Asia with a GDP per capita PPP of US\$ 71809.30.⁷ The wealth comes its petro-carbon resources and international investments. The benefits flow to the citizens but also give the Sultan considerable personal wealth making him at various times, the richest individual in the world.

Brunei's history reflects Renfrew's wave theory.⁸ Throughout the centuries with each wave of new settlers, governance, laws and religion, the pre-existing practices and beliefs receded but were not totally extinguished. There was an on-going ebb and flow of influences. In the beginning, Brunei, like all of Borneo was once tribal and animistic. Today 6-10% of the population are their descendants, many of whom keep to some of their animistic ways.⁹ In the 13th century, the island became part of the Hindu Majaphit Empire that brought in the institution of divine kingship, *devaraja*, the concept of state, *negara*, and Hindu-derived court ceremonies and class hierarchies. Sometime in the 14th century, Islam came to Brunei. Its raja, *Sang Ali* (reverend monarch), Awang Alak Betatar, converted to Islam¹⁰ for his marriage to the daughter of the Sultan of Jahore¹¹ and took the title of Sultan Mohammad Shah. Many of his subjects also converted. Brunei's current Sultan and *Yang Di-Pertuan* (meaning "He who is made Lord"),¹² Haji Hassanal Bolkiah Mu'izzaddin

5 2018 data from World Population Review <<http://worldpopulationreview.com/countries/>>.

6 The other is the Sultanate of Oman. Malaysia has seven states, which are Sultanates, and Indonesia has the Sultanate Yogyakarta as a special region.

7 <<https://tradingeconomics.com/brunei/gdp>>.

8 Colin Renfrew *Archaeology: Theories, methods and practice* (Thames & Hudson, London, 2012).

9 The Constitution acknowledges seven indigenous groups, the *puak jati* (original tribes): Belait, Bisaya, Dusun, Kedayan, Murut, Tutong and Berunai Malays. There are also substantial numbers of other indigenous people of Borneo including the Iban/Dayaks, Penan and Kelibat resident in Brunei Darussalam. Today, some practice animism exclusively, others Christianity and Islam, or a mix of both. See generally, Ann Black "Survival or Extinction? Animistic Dispute Resolution in the Sultanate of Brunei" (2005) 13 *Willamette Journal of International Law & Dispute Resolution* 1.

10 The official source for the conversion to Islam by a Brunei Raja is from the *Silsilah Raja-raja Berunai* (Books of Succession), where the oral stories and traditions were first committed to writing.

11 There is debate as to whether Johore existed as a sultanate in 1405, and possibly it was the daughter of the Sultan of Malacca he married.

12 This is a Sanskrit title for King during the period of Hindu rule that Malays in Brunei and Malaysia retained.

Waddaulah, is Muhammad Shah's descendent and Brunei's 29th Sultan. From that time, Islamic moral and religious authority, the *daulat*, was superimposed on the Hindu and animistic foundations and a local form of Islamic law mixed with *adat* [custom] operated. Chinese migration and settlement occurred in the late 19th and 20th centuries and the Chinese religions of Buddhism and Taoism came to Brunei. As a result, Brunei was ethnically and religiously plural before the Europeans brought Christianity into the religious mix. Their missionaries bypassed Muslims as fellow travellers in the Abrahamic tradition, to focus their efforts on converting the 'pagans' - the animistic indigenous 'natives' of Borneo. Today, whilst the majority of the population is Muslim,¹³ followers of animism, Hinduism, Buddhism and Christianity make one third of its population; collectively referred to as 'non-Muslim' Bruneians.

Brunei is a small state today but a conflation of events saw the Sultanate contract to its current size in the late 19th century. This was not by design, but accidental and inadvertent. Brunei had several opportunities during the 20th century to join with other entities to be part of a larger nation. As its Sultan Sultan Omar Ali Saifuddin III declined these mergers, Brunei is also small by choice. Part II of this paper reflects on how Brunei became small both by accident and by choice. As a small state, Brunei employs its size, as well as its Malay heritage and the Islamic religion, to deflect international criticism from many of its authoritarian, discriminatory and controversial policies.

Part III considers some of the ways by which Brunei since independence in 1984 charted its own distinctive direction. Selected are three distinguishing aspects of Brunei's politico-legal culture and the paper reflects on the ways in which Brunei's smallness facilitates each. First, Brunei is not democratic and is one of the few nations in the region without elections or a representative model of governance. Second, although it is one of several Muslim majority nations in Southeast Asia, Brunei is the only one that styles itself as fully Islamic, and rejects the secular in any form. The Sultanate's national goal is to create a *zīkr* nation, which is one "that upholds Allah (SWT)'s laws, with noble moral values".¹⁴ Consequently, Brunei was the first nation in East Asia, and one of only a handful in the world,¹⁵ to enact Syariah penal law and procedure including Qur'anic punishments for *hudud*¹⁶ and *qisas* and

13 By law, Sunni Muslims of the Shafi'i school.

14 Anon "A meaningful, quiet exercise" *Brunei Times* (29 March 2011).

15 Saudi Arabia, Iran, Nigeria, United Arab Emirates, Yemen, Qatar, North Sudan, and Pakistan.

16 *Hudud* (plural) means the limits set by God, and so are regarded as crimes against God, which removes the discretion from an Islamic court when imposing the punishment, when, and only when, strict evidentiary requirements for conviction and absence of doubt are met. The Order sets out six

*diyat*¹⁷ offences. Third, Brunei uses law and ideology to create a society in which there can be little variation. Although it is an ethnic and religiously plural society the Sultan and government rejects pluralism as 'deviant' and strives to create a Malay and Muslim monoculture. To attain the objective of one culture and one religion the government adopted and now strongly promotes the national ideology of *Melayu Islam Beraja* [known as MIB],¹⁸ that is, [M] Malay culture, [I] the religion of Islam, and [B] an absolute monarchy. Brunei is one of the most affluent nations in the region with a highly educated population, but its citizens do not have basic freedoms, including freedom of speech, the press, association or genuine religious freedom. Bruneians it seems have traded human rights and liberties for an affluent secure life and the benefits that come from a Sultan who takes care of his subjects from cradle to grave.

II SMALL BY ACCIDENT & BY CHOICE

A By Accident

There was a time in 15th century when Brunei controlled most of Borneo and the southern Philippines. It was a prosperous thalassocracy¹⁹ based on sea and river, rather than land, domination. Four centuries later Brunei was bankrupt and struggling for survival. It had a failing economy; there was widespread dissatisfaction among the people including its nobles; ongoing hostilities with the Sulus of the Southern Philippines; rampant piracy in its northern waters; succession disputes following the death of Sultan Omar Ali Saifuddin 1; and the Brookes' (white Rajas of Sarawak) were keen to further expand their 'kingdom'.²⁰ Brunei had little choice but to accept Britain's offer in 1880 to become a British protectorate. This protection did not prevent Raja Charles Brooke (1868-1917) in 1890 from

hadd (singular) offences and essentially replicates the Quranic punishments for each including execution, whipping, amputation and stoning.

- 17 This category of punishment in the Quran is for offences against person resulting in death, injury or hurt. Victims, or their family choose between *qisas* (retaliation) and *diyat* (compensation or blood money) given to the heirs of the victim, or a third option of forgiveness and pardon. There are also forms of spiritual atonement.
- 18 See generally, Ann Black "Ideology and law: The Impact of the MIB Ideology on Law and Dispute Resolution in the Sultanate of Brunei Darussalam" (2008) 3 Asian Journal of Comparative Law 105-172.
- 19 Although some historians and scholars do use 'empire' to describe the Sultanate's dominance over the surrounding regions, Roger Kershaw prefers thalassocracy as there were no precise borders and control was based on sea not land domination. See "Marginality then and now: Shifting Patterns of Minority Status in Brunei Darussalam" (1998) 29 Internationales Asienforum 83.
- 20 Brunei ceded Kuching, Sarawak to [Raja] James Brooke.

annexing the part of Brunei known as the Limbang,²¹ with the result that Brunei ever since has been divided into two small non-contiguous enclaves. With further incursions from Sarawak imminent, the Sultanate was "about to disappear from the kingdoms of the earth".²²

To save his kingdom, Sultan Hashim acceded to British conditions and signed the Residency Agreement, 1905-6.²³ As there was no Crown governor Brunei was technically not a colony, but the difference was purely semantic. The Sultan retained de jure authority but the British Resident, as representative of the Crown, advised the Sultan who must take his advice on all matters, excluding issues on the 'Mohammadan' religion. British rule transformed the Sultanate. A new system of land ownership,²⁴ a western-style civil service for managing revenue, taxation, customs and excise, postal services, police, prisons, currency, agriculture, public works including roads and wharves, and a new capital city were established. Living standards improved for health, education, and sanitation. There were transplanted English laws and institutions but the Sultan always retained authority for Islam. From Britain's perspective, Brunei had needed "the clearer and stronger rule of the more enlightened European in whose justice and integrity they have perfect confidence".²⁵ 'Enlightened' justice resided in the common law, however, the Agreement was honoured and a place for Islamic law was integral to the new colonial system.

B By Choice

In the 1950s when the colonies of the region first experienced post-colonial self-governance and were in the process of formulating their visions and directions for full independence, Brunei had two opportunities to join with other parts of the region to form a larger governing nation. The first was a plan for a greater Borneo, which envisaged a democratic federation in which the three former colonies of Britain in Borneo merged into a united *Negara Kalimantan Utara*. In an election in 1961, the Brunei People's Party [RPB] with a pro-*Kalimantan Utara* and an anti-Royal policy won 95% of the vote and all elected seats in the Legislative Council [hereafter LegCo]. Brunei's Sultan opposed the concept and dismissed the election results. This

21 This was despite strong protests from the Sultan and his nobles that Britain was not adhering to the central terms of the Protectorate Treaty that guaranteed protection of Brunei territory.

22 Peter Leys letter to Lord Salisbury, 24 December 1885.

23 Sultan Hashim and his *wazirs* (noble advisors) signed the Agreement 3 December 1905 and by Sir John Anderson, representing the British Crown on 2 January 1906.

24 Land Enactment 1907 paid compensation to land holders, including the Sultan. The Land Code 1908 established a system of land titles and transfer of land. It allowed British, Chinese, non-nobles and indigenous groups such as the Kedayans access to land.

25 British Consul General Peter Leys letter to Lord Salisbury, 24 December 1885.

lead to a revolt and uprising that brought emergency rule to Brunei. It also was the end of the idea for a greater Bornean nation.

The second opportunity was for Brunei to join with the other Sultanates and former British colonies in Malaya, and later Malaysia. This was Britain's preferred option. For the Sultan, it meant revenue sharing and power sharing. From the 1930's onwards, Brunei's petro-carbon reserves brought great revenue to the Sultanate and personal wealth to the Sultan. Both could be jeopardised in a revenue-sharing arrangement. The federation envisaged a democracy with elections for two houses of Parliament, which would diminish and restrain the Sultan's considerable powers. Also the proposal for a rotating Kingship in which each Sultan had a five-year term as the Federation's Sultan & *Yang de Pertuan Agong* would have diminished his standing. The Sultan of Brunei withdrew from the federation talks to charter a new course as a small, wealthy and independent nation.

III GOING ITS OWN WAY: BRUNEI'S DISTINCTIVE POST-INDEPENDENCE COURSE

A Absolute Rule in an Undemocratic Kingdom

Brunei has an autocratic and undemocratic system of government that is out of step with the democratization that has taken place throughout Asia especially since the 1980s. Whilst Brunei shares a border with Indonesia and Malaysia, two successful Muslim and democratic nations, recent amendments to the Constitution of Brunei Darussalam (the Constitution) show the Sultan moving the nation further away from accountability and democracy, rather than towards it. Prior to 2004, there was mounting optimism,²⁶ that Brunei, like Indonesia, would have a *reformasi* and allow parliamentary democracy. Prince Mohammad, leader of the Constitutional Review Committee hinted that liberalism was on the agenda, stating "Brunei could not be left out but must move with its neighbours".²⁷ However, the converse occurred. A series of constitutional amendments in 2004 consolidated, rather than lessened the Sultan's unfettered power over each arm of government. Brunei has no separation of powers. Professor Tsun Hang Tey believes that the Constitution is no longer superior law in Brunei because these amendments have "doubly-fortified [the] monarchical regime" pedestalting the Sultan "above the law".²⁸

26 Mohd Yusop Hj Damit "Brunei Darussalam: Steady Ahead" (2004) *Southeast Asia Affairs* 66 at 67.

27 Above n 26, at 137.

28 Tsun Hang Tey "Brunei's Revamped Constitution" (2007) 9(2) *Australian Journal of Asian Law* 264.

The central amendment announced in the Sultan's 2004 birthday *titah*²⁹ was the reconvening of the suspended Legislative Council. This amendment was to:³⁰

Strengthen the monarchy and to better regulate the relationship between Government and people ... [the amendments] reflect his sincere wish to provide opportunities to his people to contribute constructively to the nation's development through a formal structure of consultation.

Consultation is the operative word, not representation. The goal was to strengthen the monarchy; reconvening the LegCo was simply "window-dressing".³¹ Prior to the amendments, the Constitution had required the Sultan's "power to make laws for the peace, order, security and good government of Brunei Darussalam" to be "with the advice and consent of the Legislative Council". The 2004 amendments deleted the requirement for 'consent'.³² Moreover, the Constitution had provided for an elected number of LegCo members.³³ This changed to allow the Sultan to appoint all members. Now, all hold their seats "at his pleasure".³⁴ A member will lose his or her³⁵ seat if there is an intent to be 'disloyal' or 'disaffected' towards the Sultan,³⁶ or can be suspended "for such reason as may appear to him [the Sultan] good and sufficient".³⁷ There are now limits on what the reconvened LegCo can discuss. Forbidden topics include anything that 'directly or indirectly' is derogatory of the "rights, status, position, powers, privileges, sovereignty or prerogatives" of the Sultan and his Royal family³⁸ or of the national ideology of MIB. Consequently, there is little members can freely discuss with the result that it is a chamber which allows for little other than government announcements and endorsements. The LegCo meets in March each year. Commentators note that "debates are rarely

29 *Titah* are royal speeches in which the Sultan announces policy. It is the main avenue for information on government policy. Most *titah* can be accessed in Malay, with some translated into English, from the Government of Brunei's website: <www.rtb.gov.bn/Titah/>.

30 Azlan Othman "His Majesty Announces Big Changes for Brunei" *Borneo Bulletin* (Brunei, 16 July 2004).

31 AVM Horton "Brunei in 2004: Window Dressing in an Islamising Sultanate" (2005) 45 (1) *Asian Survey* 180-185.

32 Constitution s 39.

33 Part VI Constitution allowed for 16 of its 33 seats to be elected via a two-tiered electoral process.

34 Constitution (Amendment) Proclamation 2004.

35 Three women were recently appointed. This fulfils a CEDAW requirement.

36 Constitution s 32 (5).

37 Constitution s 30 (6).

38 Constitution s 53 (1).

heard".³⁹ The Sultan did tell members in 2006 not to be afraid to express their views, as long as these views were positive and led to consensus.⁴⁰ LegCo deliberations are not open to the public except on rare occasions, for example in 2008, when members of the public were invited to observe the Council at work.

Another avenue for lawmaking by the Sultan is by emergency decree. The state of emergency instituted in 1962 to quell the PRB-led uprising has continued and is renewed every two years,⁴¹ most recently in 2017.⁴² The Constitution required that any declared emergency "cease after two years",⁴³ hence the need for routine renewal. The irony that Brunei Darussalam, the 'Abode of Peace', is in perpetual state of emergency seems lost on Bruneians. The constitutions of many nations contain provisions for emergency powers but, as in nearby Singapore and Malaysia, there are checks and balances to prevent misuse which are observed. The Constitution of Brunei allows for emergency powers when an 'occasion of public danger exists whereby the security or economic life of Brunei Darussalam is threatened by war or external aggression or international disturbance'.⁴⁴ Under a state of emergency, the Sultan can make any 'orders whatsoever which he considers desirable in the public interest.'⁴⁵ In this 'Abode of Peace' no preconditions such as public danger, war or international threat have occurred since the initial 1962 proclamation. There are hundreds of emergency orders enacted which bear no link to threats or dangers, for example, the [Emergency] Copyright Order (2000) or the [Emergency] Beauty and Health Establishment Order (2016). Neocleous argues that the normalization of emergency powers not only gives such powers 'formal legal grounding', but has a discernible effect on wider political culture, creating an 'emergency mentality' and 'dependency' in the general population'.⁴⁶ Lawmaking by emergency order was justified by the Sultan in his 2004 birthday *titah* as 'in keeping with tradition and

39 Samuel C Y Ku "Brunei in 2009. Maturity in Doubt?" (2009) 50 *Asian Survey*, 260 at 263.

40 Hj Mohd Yusop Hj Damit "Brunei Darussalam: Towards a New Era" in Daljit Singh & Lorraine Salazar (ed) *Southeast Asian Affairs* (ISEAS Singapore, 2007) at 104.

41 Constitution s 83 (2) & Emergency (Continuation and Validation of Emergency Provisions) Order 2004.

42 <www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2017/EN/S012.pdf>.

43 Section 83 (2): "No Proclamation of Emergency shall be in force for more than two years, without prejudice, however, to the issue of another such proclamation at or before the end of that period."

44 Constitution s 83 (1). Section 83 (2): "No Proclamation of Emergency shall be in force for more than two years, without prejudice, however, to the issue of another such proclamation at or before the end of that period."

45 Constitution s 83 (3).

46 Mark Neocleous "The Problem with Normality: Taking Exception to Permanent Emergency" (2006) 31 (2) *Alternatives: Global, Local, Political* at 191.

values' of Brunei and necessary "for the country's peace and stability" when facing "future challenges".⁴⁷

The Sultan alone can amend the Constitution. He can 'amend, add to or revoke any provisions of the Constitution'⁴⁸ which shall not "otherwise be amended, added to or revoked". No vote in the LegCo, or referendum is required. The 2004 amendments also removed judicial review. Section 84C(1) was inserted into the Constitution to clarify that "the remedy of judicial review is and shall not be available in Brunei Darussalam ... under the provision of this Constitution or any written law."⁴⁹ Interpretation of the Constitution is not for the Supreme Court. The Sultan can set up and appoint members to an Interpretation Tribunal if, and when, he decides an interpretation is required.⁵⁰

The Sultan's control over government extends to the executive. The Constitution stipulates that he shall be the Prime Minister and the Supreme Commander of the Armed Forces.⁵¹ Sultan Bolkiah is also Minister of Defence, and Minister of Finance (following his brother Prince Jefri's misappropriation of state funds).⁵² In mid-2015, the Sultan also took over from his other brother, Prince Mohamed, as Minister of Foreign Affairs and Trade; there was a *fait accompli* announcement with no explanation for his brother's sudden departure. The Sultan appoints all members to the Council of Ministers, Deputy Ministers and permanent secretaries, and to whom they are accountable.⁵³ The Sultan can revoke their appointments at any time without showing cause.⁵⁴ There are race and religion requirements for appointments as

47 Azlan Othman "His Majesty Announces Big Changes for Brunei" *Borneo Bulletin* (16 July 2004).

48 Constitution s 85.

49 Amendments to the Supreme Court Act also have the ouster of judicial review. See Ann Black "Judicial Independence in Brunei Darussalam" in HP Lee & Marilyn Pittard (eds) *Asia Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, Cambridge, 2018) 27 at 73-75.

50 Constitution s 86.

51 Constitution s 4.

52 The misappropriation is alleged to be in excess of B\$40 billion and related to the collapse of the Amedeo construction company which the Prince headed owing 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.

53 Constitution s 4 (3).

54 Constitution s 4 (6).

Ministers and Deputy Ministers, as they "shall be made from among the Malay race professing the Islamic Religion."⁵⁵

The third arm of government, the judicial, comes under the Sultan's protection. The Judicial Department is part of the Prime Minister's office. He appoints all judges. Amendments to the Constitution in 2004 also gave the Sultan considerable control over judicial proceedings in the civil courts in Brunei.⁵⁶ For example, the Sultan can direct a case be heard in camera;⁵⁷ set the time and venue for proceedings;⁵⁸ and exempt 'any person' required to attend court or comply with a summons.⁵⁹ If a party in a case might make a "direct or indirect reference" to the Sultan the trial must be "held in camera"⁶⁰ and any judgment reproduced from proceedings that might have the effect of lowering or adversely "affecting the position, dignity, standing, honour, eminence or sovereignty of the Sultan"⁶¹ cannot be published. Whether the Sultan uses or abuses these powers is open to speculation. An ASEAN study noted that whilst it is difficult to investigate such matters, there have been no serious allegations of improper conduct.⁶²

The Sultan also has immunity from suit, as do all public servants, administrators and any person working for him or on his behalf. Brunei's Sultan of Brunei is not a symbolic figurehead but actively leads all levels of government in the country and in his personal capacity enters into many commercial contracts. The High Court of Australia held the Sultan was entitled to immunity from suit in an Australian court, as his immunity was substantial not procedural.⁶³ This was the decision in a case which arose when the Sultan was in breach of a contract with the Australian company

55 Constitution s 4 (5).

56 Ann Black " Judicial Independence in Brunei Darussalam" in HP Lee & Marilyn Pittard (eds) *Asia Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, Cambridge, 2018) 74 at 75.

57 Supreme Court Act (Cap 5) s 15 (5).

58 Supreme Court Act (Cap 5) s 15 (6).

59 Constitution s 34 (1).

60 Supreme Court Act (Cap 5) s 15 (4).

61 Supreme Court Act (Cap 5) s 15 (8).

62 Joel Ng *Rule of law for Human Rights in the ASEAN Regions* (Human Rights Resource Centre, Jakarta, 2011) 35 at 47.

63 *Garsec Pty Ltd v His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah the Sultan and Yang Di-Pertuan of Brunei Darussalam & Anor* [2009] HCAASP 19 (16 April 2009).

Garsec, over the sale of a A\$10.6 million bejewelled miniature Quran: a gift for the Sultan's third wife.⁶⁴

The Sultan is above the law. He controls both the executive and the legislature and is, as Tey concluded, 'the grundnorm' for the nation.⁶⁵ The Sultan and his government justify autocratic rule in several ways through the MIB ideology, but one justifying Malay concept relates very much to Brunei's smallness. This is the cultural Malay concept of *Sentiasa Bersama Rakyat* (always together with his people) which they argue is superior to western separation of powers. *Sentiasa Bersama Rakyat* places the Sultan and his subjects in a symbiotic relationship thereby negating the need for, 'western' democratic or representative institutions. The Sultan knows his people and in 'his wisdom' only acts in their best interest. In return, the *rakyat*, his subjects give him absolute loyalty. Government sites remind Bruneians that they owe "an undivided and unconditional loyalty to His Majesty the Sultan and *Yang Di Pertuan*."⁶⁶ Like the philosopher kings of old, he not only makes the laws for the benefit of everyone in the Sultanate, but 'personally' funds and implements all services, as would a generous benefactor. Bruneian citizens pay no income or sales taxes,⁶⁷ so all infrastructure, health, education and other services come, they argue, from his generosity out of affection for his people.⁶⁸ In return for his generosity, the special relationship requires gratitude, love and full support from his subjects. Brunei's government cannot be conceptualized as servants of the people. When citizens pay taxes they demand accountability and representation in government, as seen in the old demand 'no taxation without representation' from the days of the American War of Independence. Davies argues that in countries where citizens pay no taxes, a converse principle applies, that is, "without taxation it is possible to do without formal representation altogether".⁶⁹

To showcase and make the 'special relationship' work, a small kingdom allows the Sultan not to be a distant or remote figure. Whilst there is much protocol, he is

64 *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211.

65 Above n 28, 270.

66 Information Department, Government of Brunei <<http://www.information.gov.bn/VER2/content/view/448/54/>>.

67 Brunei Darussalam has no personal income tax. There are no export, payroll, sales or manufacturing taxes. Companies are subject to income tax.

68 A recurring theme in Brunei is personalising the relationship of the ruler and subject in a 'top-down' approach. For example, a newspaper report on Islamic banking contains the line: "The caring ruler issued this noble decree in his birthday *titah*, the Imams noted with high gratitude" in Malai Hassan Othman "Imams praise Islamic banking" *Borneo Bulletin* (5 August 2000).

69 John Davies *Libyan Politics: Tribe and Revolution* (University of California Press, 1986) at 18.

ever-present at all significant events in Brunei. While such events afford no genuine opportunity for frank and open discussion between subjects and their Sultan, they give a veneer of regular contact and genuine interest in the lives of his subjects. For example, during the Hari Raya celebration at the end of Ramadan, more than 100,000 people come to the *Istana*, his palace, for 'open house' over three days during which men pay their respects to the Sultan and women to the Queen.⁷⁰ He gives thousands of personal gifts (*kurnia peribadi*) at the end of Ramadan.⁷¹ As Chancellor of the universities, he is at graduations to congratulate and award the diplomas; he attends the openings of major buildings and ventures, frequently visits each of the ministries and departments, regularly tours the four districts, and each week prays with the men at a different local mosque. At times a gift of B\$1000 from the Sultan is added to every bank account and thousands of gifts are presented to citizens on state occasions.⁷² The media captures these moments. When new homes (1,542 in 2014) funded by the National Housing Scheme⁷³ are built it is the Sultan who hands over the keys. Reciprocal and high levels of gratitude flow to their benevolent king, with the media and government publications repeatedly reporting on this special relationship emphasizing their monarch's "generosity", his "caring nature" and the people's "love and gratitude" in return.⁷⁴

An important legitimising factor for authoritarian rule in Brunei comes from the 'I' - the Islam pillar - of MIB. The Sultan, as head of Islam, draws on the Islamic notion of the caliph who serves as God's ruler on earth. Thus to criticise or disobey the Sultan is to criticise or disobey Islam. To love Allah, one loves the Sultan. He reinforces his Islamic credentials as a descendant of the Prophet,⁷⁵ making the annual hajj pilgrimage, publicly observing all significant events in the Islamic calendar, and

70 Azlan Othman "Istana Open House from 2nd Day of Raya" *Borneo Bulletin* (8 September 2010).

70 Marie-Sybille de Vienne *Brunei: From Age of Commerce to Rentier State* (NUS Press, Singapore, 2015) at 258.

71 Lyna Mohamad and Rokiah Mahmud "Thousands get more Kurnia" *Borneo Bulletin* (2018, 12 June). Dominik Muller "Paradoxical Normativities in Brunei Darussalam and Malaysia" (2016) 56 (3) *Asian Survey* 415 at 422.

72 Mohamad and Mahmud, above note 72.

73 Pushpa Thambipillia "Brunei Darussalam: a time for Stocktaking" (2015) *Southeast Asian Affairs* 64 at 73.

74 For example, see Siti Hajar "Sultan Funds K Ayer Houses" *Borneo Bulletin* (12 April 2011).

75 The basis for this is the claim that the third Sultan, Berkat, was an Arab and a descendant of the Prophet. He married the daughter of the second Sultan of Brunei.

promoting Brunei as a *zikir* nation which upholds "Allah (SWT)'s laws, with noble moral values."⁷⁶

B Creating a Zikir Nation

The *zikir* direction is quite recent. Under the Residency Agreement, 1905-1906,⁷⁷ English law and institutions came into Brunei, and the Sultan retained his dignity, royal position and authority over Islam. Establishing the common law and courts were a priority. Hewett, Acting Consul, advised the Foreign Office in 1904 that the Sultan's record was one of "broken promises, lawless acts and outrages against British subjects, denial of justice, and the protection of wrongdoers",⁷⁸ and McArthur, the first Resident, wrote: "there is a semblance of a judicature, but little justice. Cases are sometimes tried before the Sultan or Pengiran Bandahara...as a rule cases are settled by a system of arbitration among the recognised, if unauthorised headman of kampongs."⁷⁹ A blend of adat (custom) and Islamic law enabled Bruneians to settle disputes in personalised and private ways, based on rank, class and religion, through forms of arbitration and mediation. There were no Syariah Courts, judges, police or prisons. In 1908 Britain set up five courts⁸⁰ to administer civil and criminal laws, and transplanted to Brunei the Codes already operational in the Straits Settlements. One of the five courts was a kathi [Islamic judge] court. Its jurisdiction was set out in the Mohammedan Laws Enactment 1912 and included Islamic family and succession law, with limited criminal jurisdiction for breaches of Islamic religious duties⁸¹ and morality.⁸² For all other matters, the common law applied regardless of a person's religion, gender, ethnicity or standing in Brunei's hierarchical classed society. This was revolutionary⁸³ as it "opened Courts of Justice

76 Anon "A meaningful, quiet exercise" *Brunei Times* (29 March 2011).

77 Sultan Hashim and his *wazirs* (noble advisors) signed the Agreement 3 December 1905 and by Sir John Anderson, representing the British Crown on 2 January 1906.

78 AVM Horton *The British Residency in Brunei, 1906-1959* (Centre for Southeast Asian Studies, The University of Hull, 1984) at 12.

79 McArthur cited in Horton, above n 79, at 6.

80 Courts Enactment 1908 s 3 sets out five courts with civil and criminal jurisdiction: The Court of the Resident with four subordinate courts: Courts of the Magistrate of the First Class and Second Class; Courts of the Native Magistrates & Courts of Kathis (later Kadi) Courts.

81 For example, the religious duty to attend a mosque for Friday prayers (for men).

82 For example, an immoral cohabitation.

83 Iik Mansurnoor "Re-establishing Order in Brunei: The Introduction of the British Legal System during the Early Residential period" (2013) 52(2) *Islamic Studies* 155 at 179.

which know no distinction between races and creeds, between rich and poor, between master and slave."⁸⁴

For most of the 20th century, there were two streams of law: the common law stream known as civil law to reflect its religious neutrality, and the religious stream that applied some Islamic laws for Muslims. The common law had supremacy and applied to all, whilst Islamic law had a limited role. At independence in 1984, the Sultan announced the nation's new direction through the ideology of MIB: *Melayu Islam Beraja* (Malay Islam Monarchy).⁸⁵ The Islam pillar propelled a policy of Islamisation or more accurately Syariahisation to bring the Sultanate's laws in line with traditional, Syariah [*Hukum Shara'*] and reduce its colonial legal legacy. Tasked with this objective, the Committee on the Modification of Brunei Laws embarked on a review of all laws in Brunei to ensure conformity with Syariah.⁸⁶ Reform of legal institutions in line with the Syariahisation policy also occurred. Kathi courts, which had become Kadis Courts in the 1950s,⁸⁷ were replaced by three tiers of Syariah Courts, which replicated in many ways the common law courts. Adjudicating in these courts were Syari'e judges with qualifications and terms of appointment similar to their common law counterparts. This fulfilled the Minister for Law, Hj Bahrin's, objective to reconstitute the Islamic judiciary as the "cardinal system for law and order in the country".⁸⁸

As a small nation, Brunei was able to achieve a legal recalibration from dominance of civil law and universal courts, to religious laws and Syariah courts quite easily. The Sultan and his Ministers promoted it through the MIB justification. With Islam the central pillar, it was logical and inevitable that Islamic laws and

84 WH Treacher "British Borneo: Sketches of Brunei, Sarawak, Labuan and North Borneo" (June 1890) 21 *Journal of the Straits Branch of the Royal Asiatic Society*, 19, at 112.

85 Scholars, such as Muhammad Hadi bin Md Melayong from the MIB Council claim the ideology of MIB commenced in 1360 on the conversion of the first Sultan. It was not however until 1984 that it was first articulated. See "Brunei's golden period of expansion" *Borneo Bulletin* (24 October 2016).

86 First was the prohibition on the sale and consumption of alcohol (1991) and pork products (1992). Next were laws on banking and finance including Islamic Banking Act (Cap 168) with a fully Islamic-compliant bank opening in 1993. The Syariah Courts Act (Cap 184) (1998) upgraded the Kadi Courts to a three-tiered Syariah courts system in followed by the Islamic Family Law Order (1999), Islamic Evidence Order (2001), Islamic Adoption of Children Act (2001), Syariah Financial Supervisory Board Order (2006) and Compulsory Islamic Education Compulsory Religious Education Order (2012).

87 Religious Council, State Council and Kadis Courts' Law Act 1955 replaced the Mohammedan Enactment 1912. Since independence: Religious Council and Kadis Courts Act (Cap 77) Rev Ed 1984.

88 *Borneo Bulletin* (16 June 1995).

institutions should be the dominant system of law, given acceptance that "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."⁸⁹ Although there was local and international respect for the independence and professionalism of the common law system, it countermanded the MIB obligation to put "Islamic laws at their rightful place as the principal legal system in the country and not the colonial system as practised today."⁹⁰ However, this was not a reversion to the Islamic law of pre-colonial Brunei in which *Syariah* mingled with *adat*, but new *Syariah* informed by conservative or orthodox Islam from the Middle-east. Today's *Syariah* criminal law adopts principles from Islam's conservative heartland, especially Saudi Arabia and Pakistan, rather than returning to the moderate Islam that comfortably co-existed with other religions and animism in Brunei.

C *Syariah Criminal Laws*

In 1996, in his birthday *titah* the Sultan announced that the new *Syariah* Courts were not just for the implementation of family laws, but were to apply "*Qunan Jina'I Islam* (an Islamic criminal law Act) in its entirety as required by Allah, the Almighty".⁹¹ He tasked the Ministry of Religious Affairs [MoRA] to work on this and argued it would be a "source of blessing to the country and to the people".⁹² In addition to the religious imperative to create *zikir* nation, the Sultan used the erosion of moral values and the proliferation of social ailments such as drug addiction as evidence of weakness in secular law and penalties. It took over a decade, but in 2013, in his 66th birthday *titah*⁹³ the Sultan told Bruneians, and the world, that he had given his royal consent for the *Syariah Penal Code Order, 2013*. As noted above, this was not a reversion to the pre-colonial application of criminal law in Brunei, but one modelled on literalist Middle-Eastern and Pakistani penal laws. Conservative Pakistani scholar Professor Anwarallah was one of its architects.

Today the majority of Muslim nations adhere to *Syariah* for family matters (marriage, divorce, custody) inheritance, charitable obligations, but regard *Syariah* criminal law as incompatible with modernity and with international human rights.

89 Joseph Schacht *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964) at 1.

90 1984 *Titah*. See Ann Black "Ideology and law: The Impact of the MIB Ideology on Law and Dispute Resolution in the Sultanate of Brunei Darussalam" (2008) 3 *Asian Journal of Comparative Law* 105 at 123.

91 *Titah* delivered 16 July 1996. Reported also in *Borneo Bulletin* (17 July 1996).

92 Above n 92.

93 "In conjunction with my 66th birthday, with all gratitude, which will save us all, especially the king, from (what will be) demanded by *Allah Subhanahu Wa Ta'ala* on Judgment Day".

Modernist scholars consider the Quranic verses and *hadith*⁹⁴ supporting *hudud*,⁹⁵ *qisas* and *diyāt*⁹⁶ offences as 'phenomena of the past' and in a similar category to the verses on slavery.⁹⁷ Literalist and conservative scholars, including Brunei's Mufti, argue that the correctness of the Quran is eternal and reject the contextualisation approach, which considers understanding verses in the context of Arabia of at the time of their revelation. Nations applying Syariah criminal law today argue for Syariah's eternal relevance, effectiveness and superiority over man-made laws. These laws now symbolise a nation's Islamic soul and purity plus reflect the piety and religious devotion of ruler and people. These were attractive motives to the Sultan of Brunei. Even though he reigns over one of the world's smallest Muslim nation, he would increase his standing in the Islamic world by adopting Syariah criminal laws. Furthermore, it demonstrates his rejection of Western values, international human rights, and notions of liberalism and secularism.⁹⁸

The first phase of the 2013 Order commenced in 2014 with *taz'ir* [general offences].⁹⁹ The controversial *hudud* offences with classic penalties of amputation, stoning, executions and whippings, and *qisas* (retaliation) and *diyāt* (blood money) for homicide and bodily injury would follow in two phases 12 months after a companion Syariah procedural order. In March, the 2018 Procedural Order was enacted and *Gazetted* but has not commenced. Bruneians wait to see whether phase two of *hudud* and *qisas* for non-capital punishment offences will commence sometime in 2019. Phase three is for crimes with the death penalty set to follow another year later. The Order specifies that the Minister of Religious Affairs, not the Attorney-General, determines commencement dates.

The Order's jurisdiction marks a significant departure from the previous dual system by which universal application of the civil law Penal Code Cap 22 was for all in Brunei and religious laws limited to Muslims. The new Order applies to everyone regardless of religion and criminalises certain conduct of non-Muslims,¹⁰⁰

94 Practices and sayings of the Prophet recounted, recorded and verified after his death.

95 See above n 16

96 See above n 17.

97 Ann Black, Hussein Esmaeili & Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Edgar, Cheltenham, 2013) at 217.

98 Khal Baharulalam 'Don't let external influence rattle Islamic faith, Muslims urged' *Borneo Bulletin* (15 January 2015).

99 *Ta'zir* is a catch-all category for sinful acts warranting prevention, chastisement or correction.

100 The Order does not have a definition of a non-Muslim, but the Syariah Penal Code Order 2013, s2 (1) states a "religion other than Islam" includes "doctrine, belief, ideology, philosophy, or any group

including when the conduct is not contrary to their faith. Section 3 states: "Save as otherwise expressly provided therein, this order shall apply to Muslims and non-Muslims."¹⁰¹ Some offences apply to all persons; for example, *liwat*, homosexual¹⁰² conduct, or failing to pay the obligatory *zakat* (charity tax).¹⁰³ Some offences are just for Muslims; for example, s 94 of the Order sets out the offence of pregnancy or giving birth out of wedlock.¹⁰⁴ Some apply only to non-Muslims; for example, the offence of deriding the *Quran* or *hadith* of the Prophet in s 222.¹⁰⁵ For a Muslim such conduct would amount to the *hadd* offence of apostasy, in s 111. Offences dealing with drinking liquor or using intoxicants differentiate between Muslims and non-Muslims. For a Muslim the offence is any drinking of alcohol, whereas for non-Muslims the offence is when such drinking occurs in a public place.¹⁰⁶

Brunei's small size again was valuable in managing and justifying this significant transition. The government played on Brunei's small size as a means to amplify the Order's significance. As a small nation, Brunei would become a great nation in the eyes of Allah and accordingly reap Allah's rewards and blessings. The Grand Mufti summarised the argument: "Brunei may be small but in the sight of Allah it is great, because as a nation, it does not doubt, it does not hesitate, to implement the Laws of Allah."¹⁰⁷

The Sultan and government dismiss any objections or human rights concerns about the new Syariah penal laws, in particular *hudud* and *qisas* punishments, as coming from ignorance and misconceptions. These were dismissed as "rumours ... from the mouths and chests of those who do not understand Islam."¹⁰⁸ The Mufti has a positive prediction that murder and theft shall become rare and the "public will

or system of practice and performances" where "one of its natures is the worship of an entity or spiritual power or magic" not recognised by Islam.

101 Syariah Penal Code Order 2013, s 3 (1).

102 Syariah Penal Code Order 2013, s 82. The definition for *liwat* is "anal intercourse between a man and a man, or a man and a woman other than his wife".

103 Syariah Penal Code Order 2013, s 236.

104 The penalties go to a maximum of two years imprisonment and fines up to \$8000 depending on the woman's marital status. The penalty [fine up to \$8000 and imprisonment for up to two years, or both] is halved for an unmarried Muslim woman.

105 Depending on the evidence provided, a convicted non-Muslim could receive the death penalty. If the evidence and testimony is insufficient, the lesser penalty of imprisonment up to 30 years and whipping of 40 strokes.

106 Syariah Penal Code Order 2013, s 104 (1)–(5).

107 Bin Juned *The Shari'ah Penal Code: An Introduction* (State Mufti's Office, Brunei, 2013) at 71.

108 Bin Juned, above n 108 at 71.

have more peace, safety and tranquillity."¹⁰⁹ Non-Muslims are reassured that they have nothing to fear and will come to see that Syariah, as the law of Allah, is "beautiful, neat and perfect".¹¹⁰ The mainstream media echoes such views.¹¹¹ The Mufti condemned human-made law, in particular, laws abolishing the death penalty and called for resistance to United Nations' General Assembly resolutions to abolish the death penalty.¹¹²

Brunei is not a signatory to the ICCPR and voted against the UN general moratorium resolutions in 2007, 2008, and 2010. Human rights exist but only through the lens of Islam with Allah-granted human rights held as superior to fallible 'man-made' rights. The Sultan explained that: "as Muslims, we uphold human rights with the Quran as our foothold".¹¹³ Only when there is no compromise or contradiction with Islam are provisions of 'man-made' international rights instruments valid. This is why there is a general reservation in both the Convention on the Elimination of Discrimination against Women¹¹⁴ and the Convention on the Rights of the Child for any provision "contrary to the Constitution or the beliefs and principles of Islam". Brunei has not ratified or signed many other core UN human rights treaties.¹¹⁵

The International Commission of Jurists (ICJ) wrote an open letter to the Sultan denouncing the human rights violations arising in the Order which it argued will follow when "reintroducing the death penalty and imposing other cruel and inhuman punishment including stoning, even for conduct that should not even be considered criminal."¹¹⁶ Amnesty International claimed the Order took Brunei back to the "dark ages" making a "mockery of the country's international human rights commitments"

109 Bin Juned, above n 108 at 25.

110 Bin Juned, above n 108 at 3.

111 For example, Nurhamiza Hj Roslan "Syariah law is beautiful and fair: State Mufti" *Brunei Times* (13 October 2011).

112 Treaties.un.org (2010).

113 *Titah* cited in "Laws of Islam Seek Blessings Not Oppression" *Borneo Bulletin* (5 November 2013).

114 United Nations Treaty Collection: CEDAW Declaration and Reservations available at <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-8&chapter=4&clang=_en#EndDec>.

115 Not signed are The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; International Convention of the Elimination of all Forms of Racial Discrimination. Not ratified are The Convention of the Right of Persons with Disabilities; Convention against Torture and other Cruel inhuman or Degrading Punishments.

116 International Commission of Jurists (2014) "Brunei: new penal code a blueprint for human rights violations" <www.icj.org/brunei-new-penal-code-a-blueprint-for-human-rights-violations>.

calling for it to be revoked.¹¹⁷ Musawah, [an organisation that advocates for equality and justice in Muslim laws]¹¹⁸ submitted that Brunei's codified Islamic laws are not God-given but 'man-made' adopted by men serving in committees and Councils. Therefore, they are not immutable and could instead reflect Quranic values of "equality, justice, compassion and mutual respect"¹¹⁹ and correspond with contemporary human rights principles.

Criticism, even questioning any of the Order's provisions, is seditious. A blogger posted that whipping was more in line with verses in Quran than was stoning for adultery [*zina*]¹²⁰ which is a widely held academic view. This led to his arrest and a charge and conviction for heresy.¹²¹ The Sultan reminded his subjects that the Order criminalises any negative commentary on matters of Islam, including the Order and his *titah*.¹²²

D Ideology and Law as Agents for Control

As a small nation, Brunei strives for cohesion and unity. Although for centuries, ethnic, religious and legal pluralism was part of the Brunei landscape, MoRA and the Sultan deem pluralism as deviant and undesirable.¹²³ In rejecting pluralism in all forms, the Sultan specifically condemned religious pluralism for diverting Muslim thinking. Pluralism allows "deviant teachings about freedom of individuals to practice a religion of their choice", a notion, he argues, would pollute Brunei.¹²⁴ The judges of the Syariah High Court¹²⁵ and local religious scholars¹²⁶ endorsed his view. They argue that 'liberal Islam', which provides alternative interpretations on Islam

117 Amnesty International <www.amnesty.org/en/latest/news/2014/04/brunei-darussalam-penal-code/>.

118 <www.musawah.org/sites/default/files/Musawah%20Fact%20Sheet_Brunei%20%2859%29%20%281%29.pdf>.

119 Above n 119.

120 Syariah Penal Code Order (2013) s 69.

121 See Muller, above n 72, at 326.

122 "Sultan hits back at rare criticism over sharia" AFP News (26 February 2014). <<https://sg.news.yahoo.com/brunei-sultan-hits-back-rare-criticism-over-sharia-113442265.html>>.

123 Khal Baharulalam "Don't let external influence rattle Islamic faith, Muslims urged" *Borneo Bulletin* (15 January 2015).

124 Azlan Othman "Steer clear of deviant teachings, Muslims told" *Borneo Bulletin* (2 February 2013).

125 Khal Baharulalam "Don't let external influence rattle Islamic faith, Muslims urged" *Borneo Bulletin* (15 January 2015).

126 'Deepen Islamic knowledge to counter contemporary threats, says Islamic scholar' *Borneo Bulletin* (3 November 2016).

and Syariah, including on *hudud* and *qisas* punishments, tarnishes the image of Islam and misguides Muslims.

As was noted at the outset, Brunei has always been a multi-racial/ethnic and multi-religious nation. Two-thirds of the Brunei's population 434,076¹²⁷ are Malay, and one third is comprised of Chinese, Indian, indigenous ethnic groups and expatriates. Many in this ethnic minority are also non-Muslims. Although the Constitution provides that Islam is the state religion, it does specify that the Islamic religion is the "Shafeite sect of Ahlis Sunnah Waljamaah (Sunni tradition)". Section 3 also adds that all other religions can "be practiced in peace and harmony by the person professing them."

1 Other religionsin peace and harmony

In Brunei, the peace and harmony proviso is not to enhance religious freedom of non-Muslims but is to ensure that Muslims do not see or hear any non-Islamic religious practices, or receive information on a religion other than Islam. This includes exposure to 'other religions' in all public places and extends schools, government or private. A Roman Catholic school cannot teach within its grounds its Catholic students any aspect of Catholicism or Christianity, nor a comparative religious course, but is required by the law that its non-Muslim student take classes on Islam and MIB.¹²⁸ Also targeted are the animistic practices, which indigenous Borneans observed for millennia. There are new offences of practising, advertising for, or seeking black magic services, involving "spirits, evil spirits, ghosts and the like".¹²⁹ This includes visiting *keramat* shrines that animists believe contain spirits who can mediate with God¹³⁰ and also using the services of *bomoh* (shamans and magic healers).¹³¹

A fatwa of the State Mufti set out MoRA's position on acceptable practice for non-Muslims:¹³²

[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

127 <<http://worldpopulationreview.com/countries/> 2018>.

128 Compulsory Religious Education Act (Cap 215).

129 Syariah Penal Code Order (2103) s 208.

130 Dominik Muller "Sharia law and the Politics of "Faith Control" in Brunei Darussalam" (2015) 46 *Internationales Asienforum* 313 at 329.

131 Muller above n 131.

132 Fatwa (Siri 03/2005) reported in "Muslims must not follow non-Islamic celebrations" *Borneo Bulletin* (28 December 2014).

community, with the condition that the celebrations are not disclosed or displayed publicly to Muslims.

If any aspect of another religion is visible, it can amount to the criminal offence of propagating a religion other than Islam to a Muslim.¹³³ There is a prohibition on proselytization of Muslims, whilst conversely non-Muslims are encouraged to convert to Islam. A government department *Dakwah* Propagation Unit is devoted to facilitating conversions to Islam, and providing financial and other assistance to convertees. There are many other restrictions on non-Muslims. For example, it is a criminal offence to have religious symbols such as a crucifix worn as an item of jewellery, the trigram from the ancient *I Ching*, or a small Hindu shrine inside a store. There are words listed in the Order's Fifth Schedule that other religions cannot use. One of these is *Allah*, the Arabic, and the Bahasa Malay, word for God. Since the 15th Century, Christian bibles, hymnals and other texts had 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 organisations of that religion" or deal with "an entity, spiritual power or things worshipped by the believers of that religion".¹³⁴ Additionally a further penal offence is committed¹³⁵ if these publications are advertised, sent, or given to a Muslim, or person of no religion. By denying access to materials about their faith, non-Muslims in Brunei have their freedom of belief and worship curtailed and the paternalistic need to protect Muslims reduces their toleration of 'the other'. There are practical restrictions too on the construction and repair of religious and cultural buildings on Brunei's non-Muslim minority.

2 *Shafii School Islam*

Islamic Religion means the Islamic Religion according to the Shafeite sect of Ahlis Sunnah Waljamaah (Sunni tradition): (Constitution of Brunei Darussalam s 2).

The narrow reading of Islam as the Shafi'i school has consequences for intra-pluralism of Brunei's Muslims. It limits the form of Islam that is acceptable and lawful in Brunei. Looking across the Muslim world the evidence of plurality is abundant, with variation and diversity of Muslim voices and practices. The Prophet recognised this too in a *hadith* where he claimed that: "[D]ifference amongst my

133 Syariah Penal Code Order 2013 s 209 (1).

134 Syariah Penal Code Order 2013 s 2.

135 Syariah Penal Code Order 2013 s 125.

community is a sign of the bounty of Allah".¹³⁶ This is a hallmark of Islam. Scholars have tried to capture inter- and intra-religious plurality through notions of "Islams" rather than "Islam",¹³⁷ or by using "Muslim jurisprudence", rather than "Islamic jurisprudence".¹³⁸ Diversity arises from culture, history, and governances as well the different schools of law and jurisprudential orientations. Brunei has always followed the Shafi'i school of thought, which is dominant throughout South-east Asia, however, the current rigidity is recent. The Order prohibits interpretative democracy through the criminal offence of apostasy/*irtidad*, which now extends to denying a *hadith* of the Prophet or *ijma* [consensus of Bruneian scholars] as a source or authority for a particular teaching of Islam.¹³⁹ The Sultan called on the authorities to act strictly enforce the laws against the infallibility of *hadith* and *ijma*.¹⁴⁰

MoRA works diligently to stop Islamic teachings that offer an alternative view to the orthodox Shafi'i teaching. There are regular reminders from the Sultan for vigilance against "the devious teachings virus" insisting the nation's imam give a unified message in their religious sermons, preaching, talks and writings.¹⁴¹ It is reported that MoRA and the Sultan in fact write the Friday sermons given in each mosque.¹⁴² To ensure no departure from a narrow patriarchal conservative form of Islam the government regulates acceptable Islamic practice through its *Aqidah* (Doctrine/Faith) Control Section¹⁴³ and monitors for deviancy.¹⁴⁴ It has a 24-hour hotline for tip-offs from the public. Shia Islam,¹⁴⁵ Ahmadiyah, a range of Sufi groups, Al-Arqam, Ba'hai, Silat Lintau are banned as heretical and deviant. Their teachings which diverge from Shafi'i ones are considered a "poison to security and

136 Black, Esmacili and Hosen, above n 98 at 214.

137 H Patrick Glenn *Legal Traditions of the World* (2nd ed Oxford University Press, Oxford, 2004) at 203.

138 Said Ramadan *Islamic law, its scope and equity* (PR Macmillan, London, 1970) at 62.

139 Syariah Penal Code Order, 2013 s 111 (b).

140 Azlan Othman "Imams remind Ummah against anti-Hadith groups" *Borneo Bulletin* (30 March 2013).

141 Lyna Mohamad "Vigilance on Deviant Teachings" *Borneo Bulletin* (31 December 2006).

142 Mohamad above n 142.

143 Muller, above n 72 at 320.

144 The Sultan's titah for New Year of Hijrah 1439 reminds the country to be wary of Akidah Deviation reported in *Borneo Post* (2017, 23 September) <www.theborneopost.com/2017/09/23/his-majesty-reminds-the-country-to-be-wary-of-akidah-deviation/>.

145 The second largest group of Muslims after Sunni adherents.

could destabilise the country's peace and harmony creating havoc, foes and even spill blood (fighting) among Muslims".¹⁴⁶

What Muller describes as Brunei's "passionate demonization of religious pluralism"¹⁴⁷ is possibly seen as a way to bring unity and cohesion to this small Sultanate. One of the justifications for MIB in the Sultan's *titah* of 1984 was to ensure 'amity among its people' and it seems fear of division propels much of this agenda. If religious teaching is not controlled, then Bruneians might also feel free to question the role of the Sultan as head of Islam.

3 *Censorship to protect the Sultan, Islam and the government*

Although the kingdom is one of the smallest in terms of population and area, the Sultan's palace with 1,800 rooms is the largest inhabited palace in the world, exceeding the dimensions of the Forbidden Palace in Beijing and three times larger than Buckingham Palace. Under the Constitution the Sultan gives himself financial allowances, and can give payments to his consorts [also out of 'compassion' after a divorce],¹⁴⁸ his children, and "to any person who is, in the opinion of His Majesty the Sultan and *Yang Di-Pertuan*, entitled thereto".¹⁴⁹

In the 1990s the Sultan was the "richest man in the world".¹⁵⁰ He and the royal family live in splendour, even decadence, when compared to the simple life style of the Prophet Mohammad. Accounts of the Sultan's and brother Jefri's profligacy, salacious lifestyle, including alcohol, gambling, harems and sexual exploitation of women were published overseas,¹⁵¹ but are not seen or aired in Brunei. Strict censorship applies to ensure there is no negative reporting on the Sultan, the royal family, the government, Islam or MIB. Controls on media ownership, and close monitoring, regulating and censoring of all means of communication including press,

146 Azlan Othman "Imams Warn against Deviationist Teachings" *Borneo Bulletin* (4 January 2004). <<http://nbd.com.bn/2018/07/07/avoid-misguided-teachings-friday-sermon/>>.

147 Muller, above n 131 at 415.

148 Succession and Regency Proclamation s 23.

149 Succession and Regency Proclamation s 30. In addition to his wives and 12 children, the Sultan, has nine siblings, each of whom has a large family which means financial provisions for all of Brunei's princes and princesses is considerable.

150 James Bartholomew *The Richest Man in the World: Sultan of Brunei* (Penguin, New York, 1990). These lists are open to debate but the Sultan's personal wealth is roughly in excess of US\$100 billion.

151 Julie Zeveloff "The Royals of Brunei Lead Lives Of Almost Incomprehensible Wealth" *Business Insider* (9 May 2014); "Prince Jefri, the Sultan Brother and his Extravagant Lifestyle" <http://factsanddetails.com/southeast-asia/Brunei/sub5_10a/entry-3606.htm>; Sex, lies and Sharia Law: The secret life of the Sultan of Brunei, *Sixty Minutes Australia*; Tim Cornwell "So who's telling lies: the swinging Sultan or the 'white slave' beauty" *The Independent* (11 May 1997).

internet and television, means that criticism and expression of alternate views is not possible. Senior Counsel from the Attorney-General Department explained that whilst 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".¹⁵² It prevents "various levels of the community from being exposed to negative information".¹⁵³

International organisations such as Freedom House categorise Brunei as 'not free'.¹⁵⁴ In 2018 Brunei was ranked 153rd on the World Press Freedom Index.¹⁵⁵ Brunei's Newspaper Act requires all newspapers to apply to the Minister of Home Affairs for an annual publishing permit. The Minister has sole discretion whether to grant or not to grant permits, with his decision not subject to appeal nor judicial review.¹⁵⁶ Publishing without a licence attracts a fine of B\$40,000 or imprisonment for 3 years¹⁵⁷ and pursuant to s4 the Minister can shut down a newspaper without having to show cause. The Minister also has unfettered discretion to bar the distribution of any foreign publication in Brunei. Editions of overseas newspapers or other publications are carefully monitored and if content is objectionable, embarrassing, or critical of the Sultan, the royal family, or government, or have a Christian theme, they are not allowed into the country. The government-run *Radio Television Brunei* is the main broadcast medium although satellite channels are available. The country's internet service provider is owned by the government¹⁵⁸ and Brunei's internet practice code¹⁵⁹ stipulates 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."¹⁶⁰ There are reports of persons being monitored whilst on-line and chat rooms subsequently

152 Roz Alai Zin "Rights, social responsibilities of bloggers" *The Brunei Times* (26 September 2010).

153 Yazdi Yahya "Censorship is still important" *The Brunei Times* (19 November 2007).
<www.bt.com.bn/node/25562/print>

154 <www.freedomhouse.org>.

155 <<https://rsf.org/en/ranking>>.

156 As discussed earlier in Part II.1.

157 Under s 3 of the Act.

158 All sites that carry content or discuss issues of a religious or political nature must register with the Broadcasting Authority. Failure to register is punishable by imprisonment for up to three years and/or a fine of up to US\$200,000.

159 Internet Code of Practice Notification, available at <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan006033.pdf>>.

160 Above n 160.

closed. Recently a Facebook post criticising MoRA's new halal certification requirement as too onerous led to a charge and conviction for sedition.¹⁶¹ Several people were detained under the Internal Security Act Cap 133 for making anti-government comments in an internet chat room. Distributing a satirical video via mobile phone that depicted members of the Royal family resulted in conviction and a year's imprisonment for three Bruneians.¹⁶²

IV CONCLUSION

Sixty years ago the Sultan and his father, Sultan Omar Ali Saifuddin III,¹⁶³ made the decision to stay small and not join forces with other former colonies in the region. In many ways it was a wise decision. In not joining Malaysia, or *Kalimantan Utara*, he could reject any form of participatory democracy and control the nation's considerable wealth. The decision ensured that Bruneians have a high standard of living and that he and the royal family are amongst the wealthiest individuals in the world. Brunei claims exemptions from international standards owing to its small population, small size, Malay culture and the Islamic religion.

The Sultan is an autocratic, absolute monarch and aside from criticism from international human rights bodies, in particular for enacting a Syariah penal law, the Sultan enjoys high international standing. He is one of the most decorated of all world leaders receiving honours and respect including from the democracies of Europe.¹⁶⁴ He is revered at home and uses the Sultanate's small size to create and sustain a special pact with his subjects. Through *Sentiasa Bersama Rakyat* he justifies control over every aspect of decision-making in the country, and in return is trusted and loved. Bruneians believe that he will "always have the best interests of his subjects at heart."¹⁶⁵ And there are indications that he does. The government

161 Sedition Act (Cap 24) s 4(1)(c). Case of *Shahiransheriffuddin bin Shahrani Muhammad* 2017 and 2018. Unreported but discussed in The Brunei Project <www.facebook.com/thebruneproject>.

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

163 Sultan Oman abdicated in favour of his son in 1967. He did so to remove pressure for the return of a constitutional form of government after the 1962 revolt and commencement of the state of emergency.

164 In Europe, for example, Sultan Bolkia has been awarded the British Honorary Companion of The Most Distinguished Order of St Michael and St George, Honorary Knight Grand Cross of The Most Distinguished Order of St Michael and St George, and Honorary Knight Grand Cross of The Most Honourable Order of the Bath. In Sweden he was the recipient of the Knight of the Royal Order of the Seraphim award. In France, the Grand Croix of the National Order of the Legion of Honour. In Germany, the Grand Cross Special Class of the Order of Merit of the Federal Republic of Germany.

165 Attorney-General Speech 2006 Opening of the Legal Year, Brunei Darussalam.

funds a generous welfare system, colloquially called "shellfare"¹⁶⁶ with free education, health, cultural events and pensions; subsidised housing and petrol; financial support for hajj pilgrimages; beautiful mosques; and half the population enjoys the security of well-paid government employment. By comparison with democratic but factionalised Malaysia, it appears that the citizens of Brunei are well cared for by their Sultan.

The comparison with Malaysia also re-enforces the Sultan's stance on the inappropriateness of democracy, elections and political parties. Brunei is one of the most politically stable nations in Southeast Asia. This has been achieved by a Constitution that gives the Sultan all law-making powers, control over the executive and stops judicial oversight. There are laws that limit political association, hinder the development of civil society, and repress alternative views or commentary in the media. Sixty years without elections and few political or civic associations give little reason to advocate for any democratic alternative to the status quo. MIB ideology reminds Bruneians of the legitimacy of the direction the Sultan embarked on at independence. Whilst Western scholars such as Braighlinn¹⁶⁷ and Gunn¹⁶⁸ argue MIB is largely "fictitious"¹⁶⁹ or an "invention"¹⁷⁰ to legitimise royal power, MIB is held out as sacrosanct and is constitutionally protected.¹⁷¹ MIB is inculcated in every aspect of government and society supported by its own bureaucracy¹⁷² and the departments of education and religion. The government, private sector and media "tirelessly emphasise how anything they do is in support of and rooted in MIB."¹⁷³ Any criticism or questioning of MIB's role or validity is seditious.¹⁷⁴

166 It was the Royal Shell Company that first discovered and then produced oil.

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

168 Geoffrey Gunn *Language, Power and Ideology in Brunei Darussalam* (Ohio University Centre for International Studies, Athens, 1997). Also, Mark Cleary and Shuang Yann Wong *Oil, Economic Development and Diversification in Brunei Darussalam* (Palgrave Macmillan, Houndmill, 1994); Naimah S Talib "A Resilient Monarchy: the Sultanate of Brunei and Regime Legitimacy in an Era of Democratic Nation-States" (2002) 4(2) *New Zealand Journal of Asian Studies* 134, at 142.

169 Talib above n 169 at 144.

170 Marie-Sybille de Vienne *Brunei: From Age of Commerce to Rentier State* (NUS Press, Singapore, 2015) at 286.

171 Constitution s 53 (1A) (a).

172 MIB Supreme Council and the Academy of Brunei Studies (APB) propagates MIB through mandatory courses in the three levels of education, in all government institutions and departments, and the private sector.

173 Muller above n 131 at 317.

174 Sedition Act (Cap 24) s 4, s 3(g).

In a similar way to the symbiotic relationship between Sultan and subject, which is possible in a small state, the nexus between Islam and the Sultan binds and serves both. As this paper has shown, religion in Brunei is not a private matter between an individual and his or her God, but a matter for the state. Bringing more souls to Islam through *dakwah* [propagation] and to prevent proselytization of Muslims is part of the business of government. The Sultan's duty as protector of Islam is to eradicate deviance, to keep other faiths and non-Muslim practices away from the sight and minds of Muslims, and to make sure Muslims do not neglect their religious duties. In return for protecting Islam, Islam bolsters the Sultan. It justifies an absolute monarchy (*beraja*) in the 21st century because it is 'God's Will' and 'not a choice, it is an *anugerah* (award or honour) from Allah (SWT)'.¹⁷⁵

In 2018, Sultan Bolkiah celebrated his 72nd birthday and there are predictions that the oil will run out in 20-30 years. Whether this small nation, which has been dominated by the charisma and ideology of one man, can continue on the same *zikir* and undemocratic path with its 30th Sultan¹⁷⁶ and the end of 'shellfare' is doubtful.

175 *Titah* commemorating the Sultan's 64th Birthday, "Let history's lessons guide us" 26 July 2010. <<http://www.jpm.gov.bn/>>.

176 Crown Prince Al-Muhtadee Billah, Sultan Bolkiah's third child, and eldest son with the Sultan's first wife/consort and paternal cousin [the same blood line as the Sultan of Brunei] is designated as his "lawful Successor to the throne of Brunei Darussalam." Succession and Regency Proclamation s 2.

