

# **CHAPTER 1-HISTORICAL OVERVIEW**

## **Introduction**

The British Residential system was introduced in Brunei Darussalam by virtue of the Courts Enactment of 1906. Another enactment was later introduced, known as the 1908 Enactment and had repealed the 1906 Enactment. The purpose of this second Enactment was to amend the law relating to the constitution and powers of the Civil and Criminal Courts and the law and procedures to be administered in Brunei Darussalam (hereafter called the “State”).

By virtue of section 3 of the 1908 Enactment, five courts were constituted in the State for the administration of Civil and Criminal justice. There were:

- (1) The Court of the Resident
- (2) Courts of Magistrate of the First Class
- (3) Courts of Magistrate of the Second Class
- (4) Courts of Native Magistrates
- (5) Courts of Kathis.

The first court would be the Court of the Resident, which had and exercised original and appellate jurisdiction in civil and criminal matters. The Officer, which presided the Court of the Resident, should either be the Resident; or the District Judge of the District Court of Labuan or any District Judge of the Colony of the Straits Settlements<sup>1</sup>.

The Court of the Resident had jurisdiction in all suits, matters and questions of a civil nature except the power to authorize any Court in the State to dissolve or annul a marriage lawfully solemnised in the United Kingdom of Great Britain and Ireland or in any British Colony, Protectorate or Possession<sup>2</sup>.

Its appellate jurisdiction in both civil and criminal matters would be to hear and determine all appeals from the decisions of the lower Courts; and in doing so might exercise full powers or supervision and revision in respect of all proceedings in such Courts<sup>3</sup>.

Section 8A of the 1908 Enactment stated that the Courts of Magistrates was of two kinds i.e. Courts Magistrates of the First Class, and Courts Magistrates of the Second Class.

For the Court of Magistrate of the First Class, its criminal jurisdiction would be to try all offences for which the maximum term of imprisonment provided by law did not exceed a term of 7 years imprisonment of either description or which were punishable with fine only and for any other offence in respect of which jurisdiction was given by law; whereas

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<sup>1</sup> Section 4 of the 1908 Enactment.

<sup>2</sup> Section 5(i) of the 1908 Enactment.

<sup>3</sup> Section 7 of the 1908 Enactment.

for civil jurisdiction it would hear and determine all suits when the amount in dispute or the value of the subject matter did not exceed \$1,000<sup>4</sup>.

In addition to that, such Court had power to grant, alter, revoke and annul probates of wills and letters of administration in the estate of all persons leaving movable or immovable property in the State or the time of death having a fixed place of abode within the State where such estate does not exceed in value \$2,500<sup>5</sup>. Such Court also had power to appoint and control guardians of infants and lunatics<sup>6</sup>.

For its appellate jurisdiction, the Court of Magistrate of the First Class had power to hear and determine all appeals from the decisions of inferior Courts both in civil and criminal matters, and had power for revision and supervision in respect of all proceedings in such Courts<sup>7</sup>.

For the Court of Magistrate of the Second Class, its criminal jurisdiction would be to try all offences for which the maximum term of imprisonment provided by law does not exceed 3 years imprisonment of either description or which were punishable with fine only of a sum not exceeding \$100 and any offence in respect of which jurisdiction is given to the Court of a Magistrate of the Second Class.<sup>8</sup>

In its civil jurisdiction, the Court of Magistrate of the Second Class would hear and determine all suits when the amount in dispute or the value of the subject matter does not exceed \$ 100.<sup>9</sup>

Unlike the Court of Magistrate of the First Class, the Court of Magistrate of the Second Class had no power to grant probate of wills or letters of administration, to appoint and control guardians of infants and lunatics, or even to hear appeals in civil or criminal matters<sup>10</sup>.

As for the Court of a Native Magistrate, it could hear and determine all suits brought by or against Malays or other Asiatics in which the amount in dispute or the subject matter does not exceed \$25 while its criminal jurisdiction would be to try and determine cases in which the maximum amount of imprisonment prescribed by law did not exceed three months<sup>11</sup>.

And lastly, the Court of a Kathi that had such powers in all matters concerning Islamic religion, marriage and divorce as may be defined in his "Kuasa."<sup>12</sup>

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<sup>4</sup> Section 8B (i) of the 1908 Enactment.

<sup>5</sup> Section 8B (ii)(a) of the 1908 Enactment.

<sup>6</sup> Section 8B (ii)(b) of the 1908 Enactment.

<sup>7</sup> Section 8B (iii) of the 1908 Enactment.

<sup>8</sup> Section 8C (i) of the 1908 Enactment.

<sup>9</sup> Section 8C (i) of the 1908 Enactment.

<sup>10</sup> Section 8C (ii) of the 1908 Enactment.

<sup>11</sup> Section 9 of the 1908 Enactment.

<sup>12</sup> Section 9 of the 1908 Enactment.

Sentences that might be imposed by the various Courts:

- (1) Court of the Resident – any sentence authorized by law.
- (2) Courts of Magistrate of the First Class – Imprisonment for a term not exceeding two years.  
Fine not exceeding \$1,000.  
Whipping not exceeding 12 strokes.
- (3) Courts of Magistrate of the Second Class – Imprisonment for a term not exceeding fourteen days.  
Fine not exceeding \$50.
- (4) Courts of Native Magistrates and Kathis – Fine not exceeding \$10.<sup>13</sup>

Apart from the five courts mentioned earlier, there was the Supreme Court. The is court or any Judge thereof would have the original jurisdiction in the case of any offence charged to had been committed within the State for which the punishment of death is authorised by law<sup>14</sup>.

The Supreme Court had civil appellate jurisdiction for an appeal from the final decision of the Court of the Resident in any civil action or proceeding where the amount in dispute or the subject matter exceeded \$1,000 except in any of the following cases where no such appeal might be made:

- (1) where the judgment or order was made by the consent of parties;
- (2) where the judgment or order relates to costs only;
- (3) where by any Enactment for the time being in force the judgment or order of the Court of the Resident was expressly declared to be final<sup>15</sup>.

The criminal appellate jurisdiction of the Supreme Court would be to hear appeal from any decision of the Court of the Resident in the exercise of its original jurisdiction whereby any person had been convicted and sentenced to not less than two years imprisonment or to a fine of not less than \$ 500<sup>16</sup>. To make an appeal, the appellant would lodge a petition of appeal at the Court of the Resident addressed to the Supreme Court within seven days from the date when the judgment or order was pronounced or within such further time as may be allowed by the Court of the Resident<sup>17</sup>. Any judgment of order of the Court of Appeal or of the Supreme Court made under this Enactment should be executed, enforced and be given effect by the Court of the Resident<sup>18</sup>.

However, under this Enactment there was still scope for an appeal against any judgment or order of the Court of Appeal in any civil matter. This appeal might be made to His Britannic Majesty in Council (i.e. Privy Council) subject to such rules and regulations as may be prescribed by order of His Majesty in Council<sup>19</sup>.

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<sup>13</sup> Section 13 of the 1908 Enactment.

<sup>14</sup> Section 14 (i) of the 1908 Enactment.

<sup>15</sup> Section 15 (i) of the 1908 Enactment.

<sup>16</sup> Section 16 (1) of the 1908 Enactment.

<sup>17</sup> Section 16(2) of the 1908 Enactment.

<sup>18</sup> Section 17 of the 1908 Enactment.

<sup>19</sup> Section 18 of the 1908 Enactment.

## The coming of Islam to Brunei Darussalam

Being a state where majority of the populations are Muslims, Islam has been made the official religion of Brunei Darussalam. To say that Islam has only been practiced in this country in recent years are quite incorrect as there are sources, which date the establishment of a Muslim sultanate rule. In fact, Islamic laws have always been the governing laws in Brunei Darussalam even before the coming of the British.

There are evidences which show that Islam had come to Brunei since the 10<sup>th</sup> century. However, its reception was slow probably because most of the populations during that time were still holding on to their beliefs in Hinduism. Muslims were comprised of just a small section of the population including those traders who came to Brunei<sup>20</sup>. And it was believed that the acceptance of the Sultans and nobles had started the spread of Islam among the community. Awang Alak Betatar, the first ruler of Brunei, embraced Islam when he married the princess of Johore<sup>21</sup>. He changed his name to Sultan Mohammad Shah and since then Islam slowly spread within Brunei.

Islam was quickly spread among most of the people in Brunei when Sultan Sharif Ali, the third Sultan of Brunei, ascended to the throne. Believed to be a descendant of the Prophet Muhammad (Peace Be Upon Him)<sup>22</sup>, he was a pious person and was the one who had started to build mosque and had been the one who determined the direction of the Qiblat<sup>23</sup>. From then on Islam has become an important aspect in the life of people in Brunei where eventually it has become the official religion of Brunei Darussalam.

Other evidence that shows Brunei was indeed been governed by Islamic law can be seen in written and codified form. There exist two manuscripts, the first manuscript was called the "Hukum Kanun Brunei" which, contained 96 pages and is kept at the Language and Literature Bureau, whilst copy for reference can be found at the Brunei Museum reference no. A/BM/98/90<sup>24</sup>. While the second manuscript was known as "Undang-Undang dan Adat Brunei Lama" (Old Brunei Law and Custom). It consists of 68 pages and is now reserved in the Sarawak Museum<sup>25</sup>.

The content of the first manuscript covered a wide range of laws including the Islamic laws of hudud and qisas. The overall content of the manuscript is in harmony with the Islamic law. For example: Clause One of the manuscript talks about relationship between people and its ruler, conditions of becoming a ruler, responsibilities of the people towards

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<sup>20</sup> Prof. Dato Dr. Haji Mahmud Saedon A. Othman, *Ke Arah Pelaksanaan Undang-Undang Di Negara Brunei Darussalam*, Jurnal Undang-Undang Syariah Brunei Darussalam, Januari-Jun 2002 Jilid 2 Bil. 2 p. 2

<sup>21</sup> Pehin Jawatan Dalam Seri Maharaja Dato Seri Utama Dr. Haji Awang Mohd. Jamil Al-Sufri, *Tarsilah Brunei: Sejarah Awal dan Perkembangan Islam*, Jilid 1, Pusat Sejarah Brunei 2001, p. 33.

<sup>22</sup> Ibid p. 80.

<sup>23</sup> Ibid p. 90.

<sup>24</sup> Prof. Dato' Dr. Hj Mahmud Saedon bin Awang Othman, *Undang-Undang Islam Dalam Kesultanan Melayu Brunei hingga Tahun 1959*, International Seminar on Brunei Malay Sultanate in Nusantara 1999, p. 22.

<sup>25</sup> Ibid p. 23.

its rulers; Clause Four talks about various kind of offences such as murder, stabbing, slaying, hitting, robbery, stealing and many other though no punishment for those offences were stated in this Clause; Clause Five talks about the punishment of qisas for murder and also for the murderer to be killed in return for his crime; Clause Seven talks about offence of stealing, the punishment of which would be to cut off certain part of his hand; Clause Twenty-Five talks about marriage, requirements of marriage and the words to be uttered during the marriage contract; Clause twenty-Six talks about number of witnesses in a marriage contract; Clause Thirty-One talks about the rule and conditions in sale and purchase contract; and other clauses which talks about wide ranges of laws that is in accordance with Islamic laws.<sup>26</sup>

The *Hukum Kanun Brunei* was written during the reign of Sultan Hassan though it was believed that it had been started even earlier than that. It was completed and enforced during the reign of Sultan Jalilul Akbar and then continued during the reign of his son, Sultan Jalilul Jabbar. With the enforcement of this law, Islamic law has been enforced and that it had became the basic law and policy of Brunei Darussalam at that time<sup>27</sup>.

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<sup>26</sup> Ibid p. 26.

<sup>27</sup> Ibid p.26-27.