

CHAPTER 2- SOURCES OF LAW

The Constitution

The governing structure of Brunei Darussalam rests on the country's written Constitution along with the three pillars of its national philosophy, namely Malay, Islam and Monarchy.

Brunei Darussalam's written Constitution sets out its governing authorities along with their respective functions and responsibilities. Specifically, the Constitution sets out the executive authority over the affairs of Brunei Darussalam and further creates the Council of Ministers, the Religious Council, the Privy Council, the Legislative Council, the *Adat Istiadat* (Customs and Traditions) Council and the Council of Succession. The basic order, structure, functions, responsibilities and underlying principles of the governing authorities are premised on what is prescribed in the Constitution. In relation to the law making process, it sets out the procedure within Brunei Darussalam with the recent rejuvenation of the Legislative Council, which will be discussed in detail later.

The Constitution of Brunei Darussalam was originally enacted in September 1959 much to the efforts of our then Sultan, Al-Marhum Sultan Haji Omar Ali Saifuddien Sa'adul Khairi Waddien, who is also the present Sultan's late father. The enactment of the 1959 Constitution represented the country's primary stepping stone in its move towards full independence, which eventually came in 1984.

Since 1959, the Constitution has been subject to a number of important amendments, in particular in 1971, 1984 and most recently in 2004. In fact, a newly revised Constitution was published in 2004 incorporating all the amendments that have been made since its birth year of 1959.

Statutes/Legislative Enactments

Brunei Darussalam has in place a set of acts compiled in volumes called "Laws of Brunei." At present, there are 193 Acts in place which are in loose leaf form kept in ring binder volumes that consist of legislations that were passed prior to Independence Day and those that were enacted after it. Some of the legislations are also Acts that were extended from the United Kingdom, some dating back as early as 1958. However, some have been notably repealed, either in whole or in part to reflect updates in the development of the law. There are however some old enactments that have been merely omitted from the Laws of Brunei as authorized by His Majesty for the Attorney General to omit. Nevertheless, its omission does not mean that they do not have the force of law and hence would still be considered valid unless it is otherwise provided.¹

There are also a number of *Government Gazettes* which consists of:

- i) new laws that has not been revised to become an Act;

¹ Section 13 of the Law Revision Act

- ii) amendments to new laws; and
- iii) subsidiary legislations to a particular Act.

Since Brunei Darussalam at present pass their laws in accordance with article 83(3) of the Constitution, any new laws that has been approved by His Majesty will be published in *Government Gazette* form and will come into force on the date His Majesty approves of. Hence that new law will for the time being be referred to as an Order and not an Act.

The Law Revision Act is in place to govern the revision of such *Gazettes* to turn into Acts. After the 1st of January of every year, the Attorney General revises the law and publishes a revised edition of the new law to be included in the Laws of Brunei volumes. He also does this with existing law that has been amended so he will publish a new revised edition of that law incorporating all the recent amendments.²

The following constitutional and legislative documents are also considered part of the Laws of Brunei.³ They are:

- i) Treaty of Friendship and Co-operation between Brunei Darussalam and the United Kingdom dated 7th January 1979;
- ii) The Continental Shelf Proclamation 1954
- iii) The North Borneo (Definition of Boundaries) Order in Council 1958; and
- iv) The Sarawak (Definition of Boundaries) Order in Council 1958.

Islamic Laws

In Islam, the main source of law is the Holy Qur'an then followed by the tradition of the Prophets or Hadith as the second source of the Islamic Laws⁴. Other sources of law in Islam includes *Ijma'* or consensus of opinion⁵, *Qiyas* (Analogical Deduction)⁶, *Istihsan* or Equity in Islamic Law⁷, *Maslahah Mursalah* (Consideration of Public Interest)⁸, '*Urf* (Custom)⁹, *Istishab* (presumption of Continuity)¹⁰, *Saad al-Dhara'i* (Blocking the Means)¹¹.

Similarly, Islamic laws in Brunei Darussalam are guided mainly by the principles in the Holy Qur'an and the Prophet's tradition or Hadith as well as other sources mentioned earlier. Islam as the official religion in Brunei Darussalam is clearly stated in the Constitution of Brunei Darussalam:

² Section 7 of the Law Revision Act

³ Schedule to the Law Revision Act

⁴ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Second Revised Edition, Ilmiah Publishers Sdn. Bhd., Kuala Lumpur 1998, p. 58.

⁵ *ibid* p.168.

⁶ *ibid* p.197.

⁷ *ibid* p.245.

⁸ *ibid* p.267.

⁹ *ibid* p.283.

¹⁰ *ibid* p.297.

¹¹ *ibid* p.310.

“The official religion of Brunei Darussalam shall be the Islamic Religion: Provided that all other religions may be practiced in peace and harmony by the persons professing them.¹²”

Islamic law in Brunei is still governed under the Religious Council and Kadis Courts Act (Chapter 77), an Act which consolidates the law relating to the Religious Council and the Kadis Courts, the constitution and organization of religious authorities and the regulation of religious affairs.

Apart from this Act, there are also other legislations enforced in Brunei Darussalam to govern the conduct of Muslims in this country, these legislations are for example:

- i) the Syariah Courts Act (Chapter 184), an Act which make specific provisions in respect of the establishment of Syariah Courts, appointments, powers of Syar’ie Judge and jurisdiction of Syariah Courts and other matters connected with the proceedings of Syariah Courts, and for the determination and confirmation of the new moon;
- ii) the Syariah Courts Evidence Order, 2001, an Order relating to the law of evidence for the Syariah Courts;
- iii) the Emergency (Islamic Family Law) Order, 1999, an Order that make certain provisions relating to Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected with family life;
- iv) the Islamic Adoption of Children Order, 2001, an Order to make certain provisions on the law of adoption of children according to Islam; and
- v) the Halal Meat Act (Chapter 183) an Act which regulate the supply and importation of halal meat and related matters.

Subsidiary Legislation

We also have in place as part of the Laws of Brunei, a number of subsidiary legislations which include rules, regulations, orders, proclamations or other documents that has the force of law and annexed to their relevant parent Acts. Other government departments whose work is relevant to that particular legislation would usually prepare the drafts for subsidiary legislations.

The power to make subsidiary legislation is conferred under section 13 of the Interpretation and General Clauses Act (CAP. 4). Section 16 further states that the subsidiary legislation should be published in the *Government Gazette*.

Case Law/Judicial Precedent

The Supreme Court of Brunei Darussalam is largely guided by the written Constitution and the Laws of Brunei in executing their responsibility of upholding the law in Brunei Darussalam. However where there are no written laws on a particular matter, the courts would then turn to principles of law that are found in case law or judicial precedent.

¹² Article 3(1) of the Constitution of Brunei Darussalam.

Cases heard in Brunei Darussalam are compiled in annual volumes of what are called “Judgments of Brunei Darussalam.” Similar to other members in the family practicing the English Legal System, Brunei Darussalam also practice the doctrine of *stare decisis*, where decisions of a higher court are binding on the lower courts. The advantages of following binding precedent include certainty, flexibility, comprehensiveness and practicality in its practice. However, it is recognized that sometimes it can be difficult for lower courts that are bound by the decision and therefore cannot alter it. For that reason also, it may create more appeals.

The courts of Brunei Darussalam would also occasionally refer to cases from Malaysia, Singapore, India and the United Kingdom, all practicing the English legal system though the decisions in those cases would not be binding but instead would only be regarded as “persuasive authority” in the courts of Brunei Darussalam.

Common Law of England

Under the Application of Laws Act, the Common Law of England and the doctrine of equity, together with the statutes of general application that are administered or in force in England, also have the force of law in Brunei Darussalam. This provision is however on the condition that the said common law, doctrine of equity and statutes of general application does not contradict the circumstances of Brunei Darussalam, its inhabitants and subject to such qualifications or local circumstances and custom may render necessary.