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SOME OBSERVATIONS ON THE PRE-COLONIAL LEGAL CULTURE AND SYSTEM IN BRUNEI

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ABSTRACT

This paper probes the characteristics of the law and justice system practiced in the pre-colonial Brunei Sultanate. As a Malay Islamic Monarchy, Brunei's legal system, like in most other Malay States in the region, was a mixture of Islam, customary laws and examples drawn from exigencies of situations. Although the justice system was seen at its best during Brunei's glorious period in the 16th and 17th centuries, in the subsequent periods, until the establishment of the British residency system, the practice of law in Brunei courts showed signs of weakness and laxity. Although the Sultans had become dilatory in conducting trials, foreign observers who visited the kingdom were impressed that cases were handled with reasonable thoroughness before the sentences were passed. Nonetheless there remain many vital areas with respect to Brunei legal history that needs further elucidation by prospective scholars.

INTRODUCTION

Like many other aspects of Brunei's past, a comprehensive study of the Sultanate's legal history is yet to be undertaken. Given the importance of the Brunei kingdom as the foremost sultanate in the Borneo Island that continues to prosper, it is to be anticipated that a firm foundation for a legal system had been laid in tandem with other paraphernalia of a strong State. In fact, a few incidental references to Brunei in the medieval Portuguese and Spanish records point in that direction as the kingdom was known to have practiced a reasonably well established legal system. For instance, Ludovico Varthema of Bologna, one of the early visitors to Brunei in about the year 1505 mentioned that justice was well administered in the island of Borneo[Brunei] (cited in Nicholl, 1975: 3). Similarly Tome Pires, a resident in Melaka as supervisor of spice trade from 1512 until 1515 referred to the Borneans as "peaceable men". Antonio Pigafetta, who visited Brunei in 1521 and wrote a comprehensive and authentic account of Brunei, despite not going into details of legal matters, referred to the adherence to Islamic practices including not eating pork, ritual killing of animals, aspects of personal cleanliness and circumcision(Nicholl, 1975: 8-13). Apparently Brunei's emergence as an Islamic power in the South China Sea region in the medieval period was an important factor that transformed a minor port polity into a strong State. The ascendancy of the State as an economic power as well as an Islamic missionary State required a good legal foundation.

The official history of Brunei generally traces the foundation of Islam beginning from the middle of the 14th century when a local tribal leader known as Alak Betatar became a Muslim and assumed the name of Sultan Muhammad. The third Sultan in the official Brunei genealogy was a foreigner Syarif Ali presumed to have hailed from Taif in Arabia and was a descendant of the Prophet Mohammed's cousin and son-in-law, Ali, the fourth Caliph in the Islamic history. The Brunei chronicles refer to the introduction of Islamic Shari'a law during his period. The 9th Sultan of Brunei, Sultan Hassan, is credited with other achievements in writing down the legal texts in Brunei such as the *Hukum Kanun*.

Without getting into controversies about the dates or the names of the early rulers of Brunei, it is safe to conclude that by the early 16th century, Brunei emerged as a rich, prosperous and stable sultanate in the region, a fact well illustrated by the said writings of

Antonio Pigafetta. Another Spanish document, referred to as the *Boxer Codex*, written in 1599 by a Spanish official who had been resident in Brunei, highlights an elaborate and organized form of a state and government of Brunei (Carroll, 1982). Apart from many authentic observations by the writer of the *Boxer codex*, his description of the legal system in Brunei is quite stunning. It indicated, above all, a very systematic administration of justice in the kingdom. The document also delineates details of court proceedings, law of evidence, and various forms of punishments including the capital punishment meted out to wrong-doers. The 19th century foreign references, particularly by the British observers, also help in understanding the practice of law in Brunei. However, it appears that the system was not as ideal as it was during the 17th century, the glorious days of Brunei.

The 19th century witnessed a decline in Brunei's power and status. This seemed to have resulted in a corresponding laxity in the way justice was administered. At any rate, law is not a static subject; it mutates into various forms in keeping with the needs of the time and exigencies. Moreover, the Brunei laws must have undergone changes throughout the period under study until the arrival of the British in the scene. By that time Brunei was on the verge of extinction. M.S.H. McArthur, a British official who was sent to Brunei in 1904 to report on the conditions of State and government in Brunei, for instance, highlighted the impotence of the Brunei legal system when the authorities were dilatory in punishing the wrong-doers. McArthur (1904: 128) concluded that "[In Brunei] there is the semblance of a judicature, but little justice".

Brunei originally comprised a much larger territory including most parts of the present day Sarawak and Sabah which are now Malaysian territories. After 1890, when Charles Brooke annexed the Limbang territory the Brunei kingdom was reduced to the present borders of two separated enclaves, Brunei-Muara, Tutong and Belait on the one end and Temburong on the other end, covering about 5765 km^2 in extent. Much of the discussion in this paper is relevant to the practice of law close to the center of power in Brunei, i.e.; Brunei [city] proper where the Sultan held court. It is to be presumed that in the outlying provincial courts, if there were any, were held under his authority by especially nominated officials. In fact, as the *Boxer Codex* mentions, the indigenous tribes such as the Visayas who lived inland submitted themselves to the law of the Sultan, though not always voluntarily.

SOURCES OF LAW

Like in most other Malay sultanates of the period, the Brunei law was said to have derived from three main sources. The first was *Hukum Shara* or *Hukum Shari'a*, religious law, the second was *Hukum Kanun*, the administrative law, and the third was the *Adat* laws, customary laws. In practice the three elements were indistinguishable and the surviving fragments of the written versions of Brunei *Hukum Kanun* texts juxtapose all three sources.

Hickling Report (1955) on Brunei referred to Islam as the state religion of Brunei based on the Shafii sect of the Sunnis. He also quoted (Withers-Payne, 1932:1) as "the Sunni sources of Muslim law that was based on:

(1) *Al Quran*;

(2) the *Hadis* or *Sunnat*, the tradition derived from the Prophet by word, action or even silence (takrir);

(3) the *Ijma'a-ul-Ummat*, the decisions of the leading disciples the first four *Caliphs*, Abu Bakar, Omar, Osman and Ali; and

(4) *Qiyas*, the exercise of private judgment by the use of reason and analogy in interpreting every implication of the Commandments in the *Quran* and the *Hadis*."

It is doubtful if the strict laws of Islam under Shari'a principles were ever implemented in full in Brunei. There must have been many compromises. The customs of the country and various races dictated the resolution of various issues ranging from laws of succession, land and property rights which evolved throughout the period. Knowledgeable Brunei scholars have referred to the system but only in cursory terms. Asbol (2004)) has cited Hajah Masnon Ibrahim, Pehin Mohd Zain, and Mahmud Saedon as those who have readily accepted the prevalence of *Hukum Kanun Brunei*, a somewhat comprehensive but fragmentary legal text in several versions, as an all inclusive treatise on the legal practice in Islamic Brunei in the pre-colonial era. Western scholars, on the other hand, are reluctant to give importance to such Malay legal texts as will be discussed below. The *Hukum Kanun Brunei* was said to have been written during the reign of Sultan Hassan though it was believed that its principles had been laid down 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. Local scholars believe that despite the enforcement of this law, Islamic law had taken precedence to become the basic law and the basis for policy of Brunei Darussalam.

Several manuscripts of *Hukum Kanun,* mostly in fragments, have surfaced. Mahmud Saedon (2002) referred to two manuscripts of the above: the first manuscript was called the "*Hukum Kanun Brunei*" which, contained 96 pages and is kept at the Language and Literature Bureau (*Dewan Bahasa dan Pustaka*) [1]; and the second was known as "*Undang-Undang dan Adat Brunei Lama*" (Old Brunei Law and Custom), consisting of 68 pages. It is now preserved in the Sarawak Museum (Mahmud Saedon, 1999: 2)

The content of the first manuscript covered a wide range of laws including the Islamic laws of *hudud* and *qisas*. Saedon has said that the overall content of the manuscript was 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 its rulers; Clause Four talks about various kind of offences such as murder, stabbing, slaying, hitting, robbery, stealing and many others, 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 for which would be to cut off certain parts of offender's 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 the number of witnesses in a marriage contract; Clause Thirty-one talks about the rule and conditions in sale and purchase contracts; other clauses which talks about a wide range of laws that are in accordance with Islamic laws.

According to Asbol (2004: 148), several copies of *Hukum Kanun* were in the possession of the Brunei royal descendants. For example, copies were found to have been owned by Pg. Pemancha Mohd. Salleh ibn Sultan Omar Ali Saifuddin II, Pg. Yakob ibnu Sultan Mohd. Tajuddin and other Pengirans.

Almost certainly the *Hukum Kanun* was not indigenous to Brunei. Apparently the Brunei text was a variant of the ubiquitous *Undang-Undang Melaka* found in many parts of the Malay sultanates. Liaw Yock Fang listed more than 40 such texts derived from the original legal digest compiled in Melaka as having been adapted and adopted in Kedah, Pahang, Riau, Pontianak, and was quoted in recent times as authoritative (in civil suits) at Brunei(Liaw Yock Fang, 1976: 1, citing Winstedt, 1923). These were the work of the learned scribes at the courts of Sultans. Gullick (1988: 114). mentioned that "no one ever referred to the codes ....for guidance in settling a dispute" Furthermore, Wilkinson (1908: 3), a leading European authority on Malay law has warned against taking "the so-called codes too seriously". At most, it can be suggested that an aristocrat learned in the codes sat

in judgment and tried to apply them. It is worth remembering that, as in other parts of the Malay world, in Brunei, there was no written law of any significance as established law in the period under discussion.

The Brunei legal circles must have applied the sources of law somewhat selectively to suit various circumstances. Conflicting parties followed convenience and expediency to draw examples from both sources of laws to settle disputes as, for example, in the cases of determining royal succession in Brunei. Based on McArthur's comments, a mid-20th Century observer on Brunei laws and political system, Hickling (1955: 23, para 32) was constrained to admit the following:

> But there exists, alongside the 'hukum shara', the disturbing element of the 'hukum Kannu (sic) , which I cannot attempt to translate by any English phrase, but the bearing of which it is perhaps possible to explain by instances. Malays themselves admit that it is usually invoked to assist in the carrying out of political schemes and intrigues as it gives an excuse for setting aside the usual succession. By the 'hukum kannu', if ever it is put in force, only the descendant of royal ancestors on both sides may succeed as Ruler, though, even so, the property left will be divided according to 'hukum shara'.

The third source was *Adat* laws, practiced mostly at village level to resolve disputes among the civil population. Traditionally the village chiefs could have played their role, although not officially as arbiters of disputes among the people who came under their purview. Almost certainly non-Malay races of Brunei such as Bisayas, Muruts and Dusuns and others must have had their own set of customary laws to settle disputes. Major cases of criminal and civil nature, of course, had to be tried at higher level courts held under the Sultan's jurisdiction, as mentioned specifically in *the Boxer codex* of 1599.

Although reference has been made to the three main sources of law, they were not mutually exclusive. As such, too much importance cannot be attached to any specific source as the basis on which legal disputes were resolved in pre-colonial times. *Adat* itself was the overriding efement in the legal culture of the Malays in general as illustrated by a famous saying in Malay: *Biar mati anak, jangan mati adat* (literally: Let the children die, but not the customs). The *Adat* practice, however, was not intended to be an organized system of legal sanctions. Sometimes, the customs were coded in maxims and proverbial sayings and, apparently, there were knowledgeable elders who advised the village chiefs or the law-enforcers in resolving some minor disputes by reference to hearsay proverbs.

It may be pertinent to remark that in reference to legal practice in Sarawak during the early 20th century, K. H. Digby, a lawyer who wrote his memoir on his legal experience in Sarawak, referred to "native courts" which constituted of native headmen and administered native law and custom. He concluded that "the customary laws were very undeveloped and unsophisticated. They were concerned largely with sexual and matrimonial matters, although they might in some instances include provisions controlling other activities of which the most important was *padi* farming." (Digby, 1980) He further states that "no distinction was made between civil and criminal matters, and most causes were part one and part the other." (Ibid.) Perhaps his remarks applied to the situation in areas under Brunei's control during the period under study, although evidence rests solely on comparative application of similar situation as elsewhere in the region.

THE COURT SYSTEM

The *Boxer Codex* is by far the best source for portraying the workings of Brunei judiciary at the beginning of the 17th century. Nevertheless, the details cannot be compared or corroborated by any similar document, although it is to be presumed that the legal practice must have undergone some changes at a later period. According to this source, the Sultan of Brunei besides his role as the head of the state also occupied the apex of the judicial system. On the whole, Sultans and chiefs administered the law as part of their function in preserving order. As Gullick (1988: 115) emphasized, "in a sense all law was *droit administratif*." If the Brunei Sultan implemented digests of laws which emanated from him, such rules applied to all in his dominion. It is doubtful, however, if the writs ran wide and, more importantly, whether most of his nominal subjects had any knowledge of the laws. In so far as the Sultan was concerned, as God's representative on earth, his laws were universal in scope and 'God inspired'. He rarely sat on judgment in the principal court, however, although he alone had the power of meting out capital punishment and mutilation in addition to issuing amnesty for pardoned offenders.

In practice, the courts were presided over by the Pengiran Bendahara, the principal Minister and/or, (especially after the middle of the 19th century) Pengiran Temenggung. The latter was in charge of legal matters, especially dealings related to land. During the early 17th century, the sources refer to a general Council of judges (*audiencia)* in which all four principal chiefs, including Pengiran Di Gadong and Pengiran Shahbandar, participated. Pengiran Bendahara and Pengiran Temenggung, however, virtually handled all the cases and lawsuits. (*Boxer Codex*, p. 6) The Pengiran Di-Gadong, as a keeper of royal property determined the cases involving the royal property "and of all the slaves of the king and of all the people who were occupied in royal service..." The last Pengiran Shahbandar held duties as the 'general of the sea'. The latter's duty was mainly in the area of conducting and guiding trade and, as such, he must have arbitrated on matters relating to trade disputes and income involving the large number of foreign traders who flocked to the kingdom at various times.

Each of these judges drew their command from the Sultan. According to the nature of the cases and the ranks of those involved in the cases, the judges on occasion passed the cases to be tried by the one below him. The decisions taken in these courts ended there, but the Sultan held the right to hear cases of appeal. Irrespective of the judgment being, it was considered executed and the king never interfered in the process. Usually the courts held the proceedings in the capital city where the king resided. In addition, courts were held in far-lying areas when some chiefs, styled 'captain' in the codex, and their deputies went inland to collect tributes from the local tribes such as the Visayas, For this purpose, they carried a license from the chief Pengirans to try the law suits among the interior people. These judges took with them many 'bailiffs' [enforcers] known in Malay as *Patih*. Although they did not 'carry batons of authority' (Malay: *vara)*, they helped to arrest the delinquents, with the help of people who carried out duties like the modern day policemen.

Brunei did not have jails. Nor was there an elaborate system of deputies to conduct case or keep records. The main judges used oral admissions and judgments. As such, hardly a hearing proceeded beyond its first sitting. If by chance one of the parties was absent, the hearing could go to a second date, in which case the bailiffs guarded the parties in their houses. When the case is heard the second time, the judgment would have been passed but orally. Thus there was no law suit that took two days as stated in the *Boxer Codex*.

The law of evidence (or system of proving a case) in those days followed medieval practice of trial by ordeal. If one party refuses to accept a judgment and wish to proceed with the case there were several methods of proving the guilty by recourse to such ordeals. For instance, the court house lit two candles of equal size, and without any fraud in them,

they were lit at the same time and the person whose candle was the first to be completely consumed lost the case. Similarly, the two contenders would be asked to sink their heads under the water, and the one who withdraws his head first to avoid suffocation lost the trial. The judge rarely changed the verdict thus obtained by such trials. In fact it was not the judge, but the defendant who chose the method of the trial. If, by chance, the plaintiff declined to pass through the test that the defendant chose, he was acquitted of any liabilities that caused the hearing of the case. If "by chance the defendant chose nothing, then the judge would indicate to them that which has to be; and in not wanting any one of them, he is vanquished"(*Boxer Codex*: 7).

MODES OF PUNISHMENT

The Codex also lists various methods of punishments for crimes committed in the kingdom. For instance, the punishment for stealing royal property or counterfeiting money was death by impaling and confiscation of the offender's property by the king. The same applied to foreigners who fled from the kingdom without the permission of the king or the judges. In cases involving the criminal wounding of persons, the wounded was asked to inflict similar act on the accused. The case of theft was dealt by cutting off the hands of the thief, a fact which confirms a common practice recommended by Islamic Shari'a law. The latter punishment was still in vogue until about the late 19th century as reported in the British sources (Treacher, cited in Asbol, 2004). This particular form of punishment has often been highlighted to demonstrate how Islamic *hudud* laws had been practiced in Brunei on the eve of the introduction of the British Residency system(Mahmud Saedon, 2002).

There were also a variety of other capital punishments to those who committed serious crimes such as treason or stealing state property; decapitation, hanging, and impaling were some of them. The Codex further described a specific kind of death sentence that had been carried out in Brunei.

> They make the convict sit on the ground woman-fashion, whether a man or a woman, and on the left shoulder they put a leaf on him and through the leaf and shoulder they insert a dagger of three palms [in length] until the point arrives at the right side and then they withdraw the dagger, doing a manner of return with so that it comes cutting toward the heart. They call this kind of death *salan* (Malay *salang*).

The Codex then goes on to describe other forms of executions, one of which was said to have been more recently introduced i.e., in 1588 C.E.

Cases of adultery were taken seriously in Brunei as the adulterer was punishable by death. Until he was killed, no harm could be done to the woman who was a partner in adultery. If by chance the aggrieved wounded or killed his own wife, he himself was condemned to die. After killing the adulterer, the aggrieved can kill his wife at any place except in front of the king or judges. "In case the adulterer kills the sufferer (or) any other person defending himself, then the adulterous woman must die for the crime for having been instrumental in that death" (*Boxer Codex*: 8). If the adulterer flees without leaving anyone dead, the husband cannot do any harm to the woman. The husband then can divorce the wife and reclaim the dowry.

The above description is suffice to prove that, as early as the 17th century, Brunei practiced an elaborate system of law and punishment which was partly based on Islamic law and mixed with age old conventions and some locally adapted variations.

THE NINETEENTH CENTURY SITUATION

During the 18th and 19th centuries Brunei's fortunes declined. The sultanate underwent a period of considerable turmoil. Internal political strife led to the weakening of its hold on what remained of its empire. With the spread of organized European trading activities in Southeast Asia, Brunei began to shrink in economic importance. Conflicts with the Spanish power based in Manila sapped the energy of Brunei causing further loss of wealth and territories. The worse was to come in the 19th century as a sequel to the active involvement of the British naval power in the region. Brunei gradually lost large chunks of territories due to adventurous intrusions of the Brooke regime in Sarawak and the British North Borneo Company. The history of this has been dealt with extensively elsewhere (Hussainmiya, 2006; Tarling, 1971).

Brunei kingdom not only lost its clout as regional power, but also was on the verge of extinction. In the face of economic crisis, the government institutions could not function properly. That included the judiciary that became so lax as to invite the notice of the European visitors to the kingdom. In the 19th century most accounts agree that the Brunei legal system performed poorly partly because of a weak government at the helm. According to John Leyden (1816: 2, Cited in Asbol, 2004: 146) writing in 1816-18, Brunei was still practicing the laws of ancient times.

Vestiges of the original legal practice seemed to have been still in practice. In accordance with Chapter 6 of the *Hukum Kanun*, the Sultan had the power to try cases involving: (a) murder; (b) taking other people's wives; and (c) running amok. Moreover, the Sultan held the ultimate rights to hear cases in which the punishment would be death or mutilation (Leys: Cited in Brown, 1970: 98). According to one British account, such trials took place with the same significance as if a state matter would be deliberated (C.O. 144/37, Pope Hennessy to Kimberly, 10 August 1871: Cited in Brown, 1970: 98). Many noble and non-noble officials participated during the proceedings. The Sultan gave the judgment which others concurred with. However, this represented one of those special cases involving an official (land chief). He was in principle entitled to hear the cases of appeal from any one, even the inhabitants of private domains who suffered injustice or oppression. Whether the Sultans exercised the rights was a moot point and, as Brown has noted, the Sultan's rights in respect of capital punishment seems to have been imperfectly exercised in the 19th century (Brown: *op.cit*).

In other cases, however, the court was presided over by Pengiran Temenggung, who at this period was responsible for conducting trials although Pengiran Bendahara, as the chief Wazir, and also others might have been involved in the administration of justice in the kingdom. Yet, sources do not agree as to who performed the role of a 'chief justice' in Brunei. According to Pengiran Yusof Rahim's *Book of Brunei Customs (Adat Istiadat)*, (Pengiran Yusof: 1958), it was Pengiran Bendahara as the highest official administering the power or authority of the Sultan was, also, the highest official in matters of law. Brown (1970: 108) has questioned Pengiran Yusof's account of the judicial duties of Pengiran Bendahara as "... unsubstantiated for all periods after about 1850, and is open to question for earlier periods." As Brown, also, states, from the middle of the 19th century the role of principal law-giver has passed into the hands of the Wazir next to him in the hierarchy, i.e. the Pengiran Temenggung. A contemporary British official, Peter Leys, has the following comment to highlight this point.

> The Pengiran Temenggung has by his office the chief administration of justice and his ostensible complaint against the Sultan is that His Highness unduly interferes and prevents his sentences from being carried out.
> (*C.O 144/26, Hugh Low to the Duke of Buckingham and Chandos, 25 October 1867, f.301;* cited in Brown, 1970: 108)

McArthur's Report of 1904, on the other hand, specifically mentions the functioning of Pengiran Bendahara's court in the capital.

Some Brunei scholars have over-emphasized the practice of Islamic law by the Sultan in Court (Mahmud Saedon, 2000; Pehin Mohd. Shukri Zain, 2005). For example, Sultan Abdul Mumin sentenced to death a certain Pengiran Mohamed who was involved in a murder but was protected by the inhabitants of the Kampung Ayer ward of Brunei Pingai (Spenser St. John, Cited in Asbol, 2004: 150). Similarly, a former British Consul, Treacher, mentioned in 1876 a death by hanging of a murderer, one Pengiran Maidin, by the orders of the Sultan Hashim Jalilul Alam. Treacher also mentioned the cutting of hands, on the Sultan's orders, of three thieves alleged to have broken into a British ship anchored in Brunei harbour.

Other British accounts agree that the justice system in Brunei was dilatory to say the least, and the investigation and judgment processes also could be slow, but sensible and yet at times thorough as highlighted by Peter Leys, a British Consul to Brunei (1881-1889).

> The Brunei authorities are extremely dilatory in examining into civil and criminal cases, but once the cases is taken up it is gone into very thoroughly, and usually a very sensible verdict is found.

In real practice, Pengirans (i.e. Brunei nobility) who committed crimes including murder seemed to have escaped the justice system with some exceptions mentioned earlier. Their autocratic behaviour at worst brought them a reputation for cruelty. A senior Pengiran who was known personally to the Consul Peter Leys exercised his rights not only to impose fines on trivial offences, "but actually employs people to seek out little disputes that may exist among families, and by exaggerating them make them occasions for inflicting as heavy fines as the persons can possibly pay." The system allowed these Pengirans to exercise fiscal and magisterial powers in the districts administered by them. Such abuses seemed to have been not uncommon when M. S. H. McArthur visited Brunei in 1904 on his mission to write a report on Brunei to reform the administration. He specially referred to the fact that people shunned the courts of the Sultan and Pengiran Bendahara because, especially in the latter's court, "the fees—not so much for a hearing as for a verdict—are, prohibitive." (McArthur Report: para 55). As a rule, McArthur said the cases "were settled by a system of arbitration among the recognized, if unauthorized, headmen of kampungs". (*ibid.*) In another instances, the Pengiran Bendahara urged the appointments of five Hakims (judges) to inquire into a case of theft that would have supported the claim of one of his supporters.

During Sultan Hashim Jalilul Alam's reign (1885-1906), the Brunei justice system came under further stress for various reasons. Firstly, he lost much of his authority in the face of non-cooperative behaviour by his chief Pengirans, Pengiran Bendahara and Pengiran di Gadong. Secondly, after the annexation of Limbang in 1890 by the Sarawak Rajah, the culprits from Brunei escaped there to return to Brunei under Sarawak flag so that the Brunei Sultan could not punish or try a citizen of a foreign government. The Sultan preferred to avoid confrontation with the White Rajah, Charles Brooke, who was looking for excuses to punish Brunei. Requests by the Sultan for extradition of criminals from Limbang to Brunei were often refused. Thirdly, it cannot be denied that the Sultan scarcely wished to cross swords or sit on judgment with his own kin and the privileged Pengirans for their wrong doings for fear of political alienation, much to the annoyance of the self-righteous visiting British Consuls. Also, by 'the constitution and custom of Brunei', the Sultan could not interfere in other peoples' domains as McArthur admitted. Nonetheless, in order to impress the visiting consuls, especially McArthur, the then Sultan

did constrain to exercise his rights to hear cases with a view to find out the truth behind some bad accusations of, for example, non-settlement of loans.

As a sequel to the 1847 Treaty of Friendship and Commerce between Brunei and Britain, the cases involving the British subjects could not be tried in Brunei courts even if the British Consul would be present during the trials. The Protectorate Treaty of 1888 also reinforced this principle in its article VII:

> It is agreed that full and exclusive jurisdiction, civil and criminal, over British subjects and their property in the State of Brunei, is reserved to Her Britannic majesty, to be exercised by such consular or other officers such as Her Majesty shall appoint for that purpose…

Such clauses avoided much friction between the British authorities and Brunei Sultan.

It is important to mention that Brunei lacked the necessary paraphernalia to impose the sequence of justice system in the community. For example, Brunei did not have a police force or prisons to chastise the culprits. On the other hand, as Brown pointed out, the Brunei Sultans had recourse to some crude methods of inflicting punishments. For example, there were two alternatives available to them for punishment of crimes. They could encourage a segment of the population to take up arms on his behalf, or he could give a permit to an aggrieved party which allowed that party to seek its own retribution. In fact, there had been several instances when the sultan used some fierce inland tribes, such as Kayans and Dayaks, to carry out plunder and killings on his behalf. Fear of incurring heavy fines to the point of losing one's livelihood and landed properties prevented the recurrence of reported crimes in the community.

Despite the shortcomings in Brunei's pre-colonial Brunei justice system, foreigners were but much impressed by the absence of many crimes in a State that suffered from several inadequacies for supporting its population. For instance, McArthur noted that Brunei was surprisingly free of crimes "[T]he offence against person and property are not more frequent. when it is remembered that there is no police system, and that the public peace is allowed to look after itself" (McArthur Report: para 36). Was this the inevitable outcome of the Brunei justice system owing to checks and balances that prevented people from committing blatant wrong doings? It is not out of place to mention that the Brunei people were known for their best behaviours during the Residency era, and there were no reason why they would have behaved differently before that era. In 1913, no crime was reported in the town. At most cattle rustling in Tutong district produced some problems. As late as the 1930s, W. M. Johnson, a member of the Brunei Shell staff (in a 1984 letter to author Horton), appreciated the fact that he, or any of his friends, never had anything stolen even after leaving large sums of money when he went out of the oilfields.

CONCLUSION

The prevalence of a legal culture is a necessary concomitant to the functioning of any decent State. Brunei, thus, practiced law and order and maintained its identity as a Malay Islamic Sultanate during the period under study. The essential function of law and order had been to preserve social cohesion. The justice system in any society was not in itself an absolute thing but something relative to the society. The system in Brunei, or for that matter in any other Malay Sultanates in the past, should not be compared to the system in the West. The European system of justice applied fixed codes of law based on precedence and, more importantly, without fear or favour to all and any. However, European systems evolved through centuries of bitter experiences having matured by an unusual sequence of conditions and events. Brunei, on the other hand, especially on the eve of British expansion in the 19th century, showed signs of declining standards in the practice and

implementation of law. Although Brunei's justice system was defective in many ways, it appears that the Sultanate maintained a tight system of social control through a hierarchy-based royal culture. Any suggestion that only fear among the people kept the system intact is fraught with fallacies.

Except what had been stated in foreign sources, the local sources do not exist in writing to highlight examples of judgments from the perspectives of Bruneians. Foreign sources almost always underscored the injustices attributed to this or that rapacious noble. In reality, the people in power need to be mindful of any failure on their part to neglect their people who expected to get justice from them. For, the people could move out altogether from the areas where the ruling class acted despotically. In theory it was up to the Sultan as the fount of all justice and the embodiment of the unity of the State to keep the chiefs in order and to do justice between them. In practice, however, the Sultan was rather weak in compelling the recalcitrant chiefs not to commit any wrong doings to the people under their control. This was the real situation when the British arrived in Brunei. Hence, the reports emphasise the impotence of the Sultan as a justice-giver unless coerced by an outside element, such as a visiting British-appointed Consul to the kingdom.

Much research is still needed to explain the details of personal law in Brunei, especially related to marriage, family, and inheritance. Usually this was the area of Islamic religious officials, such as Imams and Khadis. How far they carried out their obligations systematically with a fixed code of law based on Islamic Shari'a principles need further probing.

Another area that needs further study is the practice of *Adat* laws in Brunei. Very little is known about the legal practice among the interior tribes and how they settled their disputes: if they held formal courts, village assemblies, or whether they submitted themselves for arbitration to their chiefs and so on. Currently some Japanese experts are collecting evidence regarding native courts in Sarawak and Sabah. As these territories were once ruled over by Brunei Sultans, the ongoing studies may become very useful to clarify these areas.

When the British took over Brunei administration in 1906 under a British Resident, the local ruling class insisted that the laws and customs of the State should not be violated. The British flatly rejected their demand because the sole purpose of their administration was to reform the existing laws and institutions and bring modernity to Brunei. In the beginning they needed to do little by way of introducing drastic laws, except that they, by legislation in 1909, dismantled the land ownership and taxation rights of the chiefs closely intertwined with the traditional law in Brunei. Another important reformation was to codify certain Islamic laws as regards marriage and inheritance already codified among the Indian Muslims and in the Straits Settlements. Other than that the history of law in the Residency period was but a history of their administration, and the laws that were introduced were minimal in keeping with the size of the small State and its population.

END NOTE

[1] A copy for reference can be found at the Brunei Museum. Ref. No. A/BM/98/90)

REFERENCES

Amin Sweeney, P. L. (ed.) (1968). Silsilah Raja-raja Berunai teks 'A'. *Journal of the Malaysian Branch Royal Asiatic Society*, XLI (2): 1-82.

Asbol Haji Mail (2004). *Kesultananan Brunei Abad ke-19: Sistem Politik dan Struktur Pentadbiran*. Unpublished PhD Thesis, University of Malaya.

own, D. E. (1970). Brunei: The Structure and History of a Bornean Sultanate. *Brunei Museum Journal Monograph*, No. 2.

own, D. E. (1974a). Sultan Mumin's Will and Related Documents. *Brunei Museum Journal*, III (2): 156-170.

own, D. E. (1974b). Antonio Pigafetta's Account of Brunei in 1521. *Brunei Museum Journal*, II(2): 171-179.

rol, J. S. (ed.) (1982). Brunei in the Boxer Codex. *Journal of the Malaysian Branch of the Royal Asiatic Society*, LV(2): 1-25.

by, K. H. (1980) *Lawyer in the Wilderness*. Ithaca, N.Y. : Southeast Asia Program, Dept. of Asian Studies, Cornell University.

ee, A. A. A. (1931). *An Introduction to the Study of Mahomedan Law*. London [a.o.] H. Milford, Oxford University Press.

llick, J. M. (1988). *Indigenous Political Systems of Western Malaya*. London: London School of Economics, Monographs on Social Anthropology, No. 17.

kling, R. H. (1955). *Memorandum upon Constitutional Practice in Brunei* . Manuscript.

oker, M. B. (1970). *Readings in Malay Adat Laws*. Singapore: University of Singapore Press.

oker, M. B. (1984). *Islamic Law in Southeast Asia*. Singapore: Oxford University Press.

ssainmiya, B. A. (1995). *Sultan Omar Ali Saifuddin III and Britain: The Making of Brunei Darussalam*. Kuala Lumpur: Oxford University Press.

ssainmiya, B. A. (2000). *Brunei Constitution of 1959: An Inside History*. Bandar Sri Begawan, Brunei Press.

ghes-Hallet, H. R. (1998). A Sketch of the History of Brunei. In *Papers Relating to Brunei*. Kuala Lumpur: The Malaysian Branch of the Royal Asiatic Society.

se, J. (1795) Substance of a Letter, to the Court of Directors, from John Jesse, 20 July, 1795, at Borneo Proper. In Dalrymple, A. (ed.), *Oriental Repertory II*, 1. London: G. Gigg, 1793-1797. Pp. 1-8.

ys, P.(1968). Observations on the Brunei Political System 1883-1885. *Journal of the Malaysian Branch of the Royal Asiatic Society*, XLI(2): 117-130.

w Yock Fang (ed.) (1975). *The Laws of Melaka* (1976). The Hague: Martinus Nijhoff.

G. Maxwell, and W. S. Gibson.(eds.) (1924). *Treaties and Engagements Affecting the Malay States and Borneo*. London: Jes. Truscott.

Arthur, M. S. H. (1987). *Report on Brunei 1904*, introduced and annotated by A. V. M. Horton. Monographs in International Studies, Southeast Asia Series, no. 74.

holl, R. (1975). *European Sources for the History of the Sultanate of Brunei in the Sixteenth Century*. Penerbitan Khas, Bil. 9, Brunei: Muzium Brunei.

hmud Saedon A. Othman, Haji (2002). Ke Arah Pelaksanaan Undang-Undang Di Negara Brunei Darussalam. *Jurnal Undang-Undang Syariah Brunei Darussalam*, 2(2): 2.

njit Singh, D. S. (1991). *Brunei 1839-1983: The Problem of Political Survival*. Singapore: Oxford University Press. (Reprint)

John, S. (1974). *Life in the Forests of the Far East*. Vol. I. Kuala Lumpur: Oxford University Press. (Reprint)

John, S. (1974). *Life in the Forests of the Far East*. Vol. II. Kuala Lumpur: Oxford University Press.(Reprint)

bbs, R. E. (1968). Two Colonial Office Memoranda on the History of Brunei. *Journal of the Malaysian Branch Royal Asiatic Society*, XLI(2): 83-116

nstedt, R. O. (1923). A Brunei Code. *Journal of the Malayan Branch of the Royal Asiatic Society*, I(1) : 1

sof, P. M. (1958). *Adat Istiadat Brunei Darussalam*. Brunei.