

An Independence of Judicial Power Under the System of Justice: Study Case In Indonesia, Malaysia and Brunei Darussalam

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ABSTRACT

This paper is based on the concept of judicial independence. Judiciary is one of the organs of the state. The independence of the judiciary is the cornerstone of a democratic system. Without independent judiciary, people cannot get justice. Only the independent, impartial and accountable judiciary can protect the rights of the minorities and the indigenous communities. Independent judiciary can maintain the delicate balance between the three major organs of the state. Some of internationally recognized principles have been incorporated in our present constitution. But judicial autonomy, freedom of expression and association, professional immunity are not incorporated. Our judiciary lacks functional autonomy to determine the jurisdiction of the court, selecting its support staff. Another issue concerning the financial independence of judiciary which are must for an independent judiciary. Judicial training and judicial education is necessary for independence of judiciary. Role of national judicial academic is satisfactory in this regard. Competent, independent, and impartial courts will also depend also on the judges who have integrity, ability with appropriate training and higher qualifications in law enforcement. It is influenced by several factors. The guarantee of judicial power independence by the constitution, the competence and capacity of judges in carrying out judicial functions and the quality of court. Judicial power as an independent and autonomous power must be free from any intervention and power, thus ensuring that judges possess independence and impartiality in handling cases. In this way, judicial independence means freedom from direction, control or interference in the exercise of judicial power by either the executive or legislature. Independent judiciary is backbone of the democratic state. In the beginning of the development of the concept, functional independence of the judiciary was regarded as sufficient requisite. But in modern era both structural and functional independence are equally important for independence of the judiciary. Beside these, the court must be impartial and competent.

Keywords : Judicial, Independent, Impartial, Courts, Power

1. INTRODUCTION

Independence of judicial power requires individual judicial qualities such as integrity, legal ability (with appropriate training and qualifications) so that the background of a judge is beyond reproach. The independence of the judge is maintained by the judge performing his/her functions as part of the system of justice on behalf of the public and not for personal gain or advancement [1]. Any attempts to reduce the independence of the judge in performing his/her judicial functions including political influence should not be tolerated.

The judiciary is a power of the State responsible for the administration of Justice in society, through the application of legal standards. In the resolution of conflicts. "Power", in the sense of public power, refers to the Organization, institution, or set of organs of the State, which in the case of the judiciary are legal or jurisdictional organs: courts and tribunals,

exercising the judicial power, which usually enjoy autonomy and impartiality.

Independence of judiciary means it is free from other organ of the state, especially executive, and legislative body. It must be free from power pressure or other undue thing. Here the researcher is going to define the word independence and judiciary separately. Independence means "the state or condition of being free from dependence, subjection, or control. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power [2]. The word judiciary means "that branch of government invested with the judicial power; the system of court in a country; the body of judge, the bench that branch of government which is intended to interpret, construe and apply the law [3].

The concept of independence of judiciary has two aspects-functional and structural independence of judiciary. Functional independence means the freedom of the

individual judges or the judiciary to decide the issues before it. The judiciary shall decide matters before them. Impartially, on the basis of fact and accordance with the law, without any restrictions, improper influences, pressures, threats or interferences, direct or indirect, from any quarter or for any reason [4]. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decision is within its competence as defined by law [5]. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law [6].

Structural independence of the judiciary denotes mainly the autonomy of the judiciary or it is free from other organ of the state so that all probable interference can be exclusive. It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions [7]. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice [8].

2. CONCEPT OF JUDICIAL POWER

The concept of Independence of the judiciary is one of the cardinal principles of a democracy [13]-[15]. According to this theory, all components of the judicial system, including the Supreme Court should be free from extraneous pressures, intervention and compulsion, whether direct or indirect brought to bear by other institutions, colleagues, superiors or third parties outside of the judicial system, with the result that all judges are free to decide the cases that come before them based only on law and their conscience [2].

According to the classical theory of Montesquieu's separation of powers, which distinguishes between legislative, Executive and judicial, the division ensures the freedom of the citizen. Montesquieu wrote his theory after a trip to England where played an independent judiciary can be an effective executive power brake. Under the separation of powers, is born the so-called State of law, in which the public authorities are also subject to the rule of law. The judiciary must be independent in order to undergo the remaining powers, especially the Executive, when they contravene the law and become responsible for making effective the idea of law as a regulatory element of social life.

2.1. Definition of Judicial power

The judiciary is one of the three powers of the State, the which and in compliance with the law

in force, is in charge of the administration of Justice in society through precisely the application of legal norms in the disputes which arise. Meanwhile, the judiciary is embodied by different jurisdictional or judicial bodies such as courts, courts, which exercise jurisdictional authority and impartiality are and autonomy, in ideal cases, of course, because it is unfortunately a reality that this autonomy is not always real, there still the division of powers.

Especially in underdeveloped countries it justice or judiciary is closely linked to the Executive Branch and often this is usually run over independence in its favor, in those cases in which the Government is involved in any judicial case committed. If it follows the classical theory proposed by Montesquieu opportunely, the division of powers guarantees the freedom of the citizen. In the ideal, according to Montesquieu, an independent judiciary is an effective brake to the Executive branch. Mentioned separation of the powers of the State is what is referred to as rule of law, within which public authorities are subject to the law equally. Then, within this framework, the judiciary must be independent to submit the rest of the powers, especially the Executive, when this contravene in any way the legal system.

In addition, the judicial branch it will be an arbitral role when they occasionally face the other two branches, the legislative and the Executive, something that is quite common these days. The three powers of the State are fundamental, while the justice needs constant protection because of the depends on that the democratic system does not stop working. In structural terms, the Organization of the Judicial power will vary from nation nation as well as the methodology used for the appointments. The most common is the existence of various levels of courts being the decisions of the plausible appeal superior court and a Supreme Court lower courts or Supreme Court that will have the last word in any resolution.

2.2. Meaning of Judicial power

The judiciary is one of the three branches that in a democratic State (the others being the Executive Branch and the legislative branch) meets the very important mission of administering justice, applying general laws issued by the legislative power, to the specific cases referred to its decisions, by which its independence from political power is very important. Judges must resolve the cases raised, in Continental law, based on the legal framing of the facts that come to its knowledge, its sound discretion, and the contribution of the doctrine and the jurisprudence. At Common law (English system) is the jurisprudence, by not having written law, the source of predominantly right.

Judicial independence is the doctrine that decisions of the judiciary should be impartial and not subject to influence from the other branch of government or from private or political interests. In most cases, judicial independence is secured by giving judges long, and sometimes lifetime, tenure and making them not easily removable [3]. Judicial independence means that judges are free to decide cases fairly and impartially, relying only on the facts and law [4].

3. BASIC PRINCIPLES OF INDEPENDENCE OF JUDICIARY

(Adopted by seventh United Nations Congress on the prevention of crime and treatment of offenders held at Milan from 26 August to September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985)

3.1. Legal Authority

The independence of judiciary should be guaranteed by the constitution or law of the country. The judiciary shall decide matters before them impartially based on facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. All issues of judicial nature must come into the ambit of jurisdiction of the court. The judiciary must be free from any improper and unwarranted interference and the decisions of the court should not be the subject of review everyone have the right to be produced in an ordinary court or tribunal for trial and there should not be any encroachment on the jurisdiction of the court [1].

3.2. Freedom of Expression and Association

According to section 8 and 9 of basic principle of the independence of judiciary freedom of expression, belief, association and assembly of the members of the judiciary like other ordinary citizens. The judge should exercise this freedom in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. This freedom for the judge is to promote their professional training and to protect their judicial independence [1].

3.3. Qualification, Selection and Training

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judge, there shall be no discrimination against a person or the grounds of race, color, sex, religion, political and other opinion national or social origin, property, birth or status, except that a requirement, must be a

national of the country concerned, shall not be considered discriminatory [1].

3.4. Condition of Service and Tenure

The term of the office of judge, their independence, security, adequate remuneration and conditions of service, pensions and the age of retirement must be adequately secured by law. The tenure of the judges except their voluntary retirement must be fixed by the law. Promotion of judge should be based on objective factor, in particular ability, integrity and experience. The promotion proceedings should be in the initiation of the judiciary itself or of a board or commission where there is a majority of judicial person. The judges should maintain professional secrecy and immunity in the course of their duty. There must be an atmosphere for the judges to enjoy personal immunity from civil suits for monetary damages for improper acts or commissions in the exercise of their judicial functions.

3.5. Discipline, Suspension and Removal

Judges have a right for fair hearing when a charge is against him. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct [1].

Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings [1].

3.6. Transform of Judge

Improper transfer of the judge may affect the independence of the judiciary though timely transfer in essential sometimes for fair and impartial justice. Judge must not be transferred by the executive from are jurisdiction or functions to another without their consent, but when a transfer is in pursuance of an uniform policy formulated by the executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge [1].

3.7. Professional Immunity

The judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omission in the exercise of their judicial duty. A judge should enjoy immunity from legal action and the obligation to testify concerning matters arising in the exercise of his official functions. The judiciary has also the power to punish in the case of contempt of court this power of the judiciary helps it to enjoy professional immunity.

3.8. Autonomy

Unless there is judicial autonomy there can be no judicial independence. Judicial autonomy has various dimensions i.e. financial autonomy,

administrative autonomy and rule making autonomy.

Financial autonomy includes the self-regulatory right of the judiciary for its annual budget. The judiciary must have right to submit its budget directly to the legislature. It must be able to allocate its budget internally within the judiciary. Administrative autonomy means right to regular organizational structures, improvement of its staffing and remuneration system, filling up of positions, disciplinary actions of the employers subject to the personal management policies and civil service rules.

4. JUDICIAL POWER IN INDONESIA

The independent Indonesia is structured and based on a single philosophy that we call "PANCASILA" which consists of 5 principles namely: "Belief in God, Humanitarian, Unity, Democracy, and social justice for all the people". Based on this philosophy along-with other doctrines namely democracy, rule of law, social welfare, respects for human rights and the independence of judiciary we have formulated our Constitution [12].

4.1. The System of Justice

Indonesian judicial system is regulated in the constitution of the Republic of Indonesia of 1945 and other implementing regulations. The Supreme Court as the Court of cassation is the highest judicial institution, and constitutes the apex of the judicial organs vested with judicial power, as stated in article 24 of the 1945 constitution:

- a. Power shall be vested in one Supreme Court, and inferior Courts as established by law.
- b. The composition and competency of the Courts shall be regulated by law.

The judicial power is an independent power, which means free from any interference from other branches of government. In this connection the status of judges must be guaranteed by law. Articles 24-A Section (3) of the amended Constitution says: "Candidates for justice of the Supreme Court is recommended by a judicial commission to the parliament for approval, and then decreed by the President."

As a state based on the rule of law, the government and all state activities are based on a constitutional system, and any form of arbitrary behavior or misuse of power is against the Constitution. The explanation of these articles shows clearly, that the purpose of these articles is to create the foundation for an independent judiciary, as one of the main pillars of a democratic state. These constitutional ideas were further stipulated, among others by the law No. 14 of 1970, which was replaced by the subsequent

enactment of the law No. 4 of 2004 concerning Basic Judicial Powers.

According to this, the Supreme Court stands at the apex of state organs, which consists of all the courts of justice throughout the country. There are four branches of the judicature, namely:

- a. The General Courts
- b. The Islamic Courts
- c. The Military Courts
- d. The Administrative Courts

The judicial and technical legal aspects of all the Courts throughout the country are under supervision of the Supreme Court. All those branches of judicature are also vested with non-judicial functions as determined by the Basic Judicial Power Law. This system is often called the pyramidal structure of judicature. Each of the four jurisdictions mentioned above i.e. Courts of general jurisdiction, administrative Courts, military Courts and religion Courts, has its own district Courts as Courts of first instance, as well as High Court as Court of Appeals. All courts culminate at the Supreme Court.

There is a growing opinion supporting the formation of special courts to guarantee accuracy and quality of court verdicts. To avoid misunderstandings, many people refer to these as chambers, which means that they still remain under the courts as laid out in current regulations. Forming special courts (meaning Courts/chambers outside the four current divisions), would not be an easy task as it would have to be based on a regulation which would involve the government and legislative assembly, and would also affect the state budget. Lastly it would require specialization of the judges in specific areas of law, all this would entail a lot of time and effort to bring forth.

4.2. Independence Of Judiciary

There are a number of international legal instruments that enshrine the importance of judicial independence. These include: The universal Declaration of Human Rights (article 10), the international Covenant on Civil And Political Rights (ICCPR) (article 14), the Vienna Declaration and Program for Action 1993 (paragraph 27), the International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982, the Universal Declaration on the Independence Of Justice, Montreal 1983, and so forth.

Prior to the enactment of the third amendment to the 1945 Constitution in 2001, the judicial power was dealt under two articles. Article 24(1) of the 1945 Constitution states that the judicial power in Indonesia shall be exercised by the Supreme Court and such other judicial bodies as may be established by law. The composition and powers of the judicial bodies shall be, as provided for by law. Whereas, article 25 of the 1945

Constitution states that the requirements for the appointment and removal of judges shall be as provided for by law.

The law No. 4 of 2004 concerning Basic Judicial Power also stresses the independence of the judiciary by stating that the judicial power constitutes an independent organ of the state whose duty it is to administer justice for the sake of upholding the law and faculty based on Pancasila, and ensuring that the republic of Indonesia is administered as a state of laws.

The constitutional guarantee, legal rules or law in general do not guarantee the reality of independence of judicial powers. The independence of judicial powers mostly depends on external factors.

As a matter of fact, the government system and organs, are not the only factors that would influence the independence of judiciary, it is very much influenced by the social and cultural factors also. The culture of permissiveness or tolerance on the breach of law and social system are very significant in the effect on the independence of judicial powers. Therefore, in the efforts to uphold the independent powers of judiciary, besides managing a democratic government, as based on law, it is also very important to manage social life and promote a culture of law obedience, and the respect for judges and judicial powers.

Almost all literatures or the opinions of legal scholars state that "the independent power of judiciary is a strengthening tool for the implementation of democracy, and upholding rule of law". The independent powers of judiciary are undoubtedly the strongest pillar of democracy. However, that has not guaranteed the independence of judicial powers in any sense of the word.

Our experience of the past years show that we have lost the independence of judicial powers, and that rule of law was not carried out properly in those times, because there was no democracy. From this, we can safely assume that if we want a culture where judiciary is independent than we should strive for a true democracy.

Based on this analysis, since 1998 we have worked hard to restore democracy, that was ever lost in the past. We are grateful that we have tackled various problems during the life and maturity of our nation. We as Indonesians are now enjoying the life of democracy including the independence of judges from any influence of the government.

In the backdrop of the whole debate there is yet another issue which needs careful scrutiny. It often happens that the Courts or judges sense some pressure from various individuals and opinion groups, including the press/media. We always hope that such pressures are not more

than a phenomenon of the freedom of expression, which is necessary in the development of democracy. In facing this particular thing, our Supreme Court is very careful to search for a balance between the growth of judicial independence on the one hand, and the freedom of expression on the other. The Supreme Court of Indonesia recently decided a press case which has drawn international attention, by discharging the defendant and rejecting the civil claim, based on consideration that protection of the freedom of press is a fundamental concept in democracy, we have taken the biggest leap towards the separation of Judiciary from other Government bodies, at the same time asserting our views according to pure judicial principles.

5. JUDICIAL POWER IN MALAYSIA

5.1. The System of Justice

The term "judicial power" can be broadly defined as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subject whether the rights relate to life, liberty or property. The exercise this power does not begin until some tribunal which has power give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

This statement of the Australian Chief Justice was cited with approval by Justice Zakaria Yatim in *Public Prosecutor V Dato'Yap Peng* [1987] 2 MLJ 311 when the corresponding term in the Federal Constitution was the subject of interpretation. It is clear that the judicial power is normally exercised by the courts.

However, since the Constitution Amendment Act 1988 which, among others, amended article 121, judicial power may no longer vest exclusively in the courts. The amendment was indirect response to the decision of the court in *Public Prosecutor V Dato' Yap Peng*, *ibid.*, where a provision of a federal law which attempted to confer judicial power on the Attorney-General (who is also the Public Prosecutor) was struck down on the ground of unconstitutionality. According to the Supreme Court, the power conferred by section 418A of the Criminal Procedure Code on the Public Prosecutor was both a legislative and executive intrusion into the judicial power of the Federation.

The original version of Article 121 "vested" judicial power in the courts and provided for the High Court and the Mahkamah Agung (Supreme Court) to exercise that power.³ In the amended version, the provision merely states that the courts shall exercise "such jurisdiction and powers as may be conferred by or under federal law". The terms "judicial power" and "vested"

were deleted. However, the word "vested" remains in respect of the legislative and executive branches.⁴ A new clause was added to article 145 to allow the Attorney General to exercise certain "judicial power" struck down by the court. Clause 3A provides: "Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred".

The effect of the decision in *Public Prosecutor V Dato' Yap Peng* was neutralised and the particular power of the Attorney General restored.

The constitutional amendment was also intended, *inter alia*, to place the judiciary in what the executive perceived was its "proper place", given the executive view that it had gone too far reviewing executive acts. The executive had moved to establish executive and legislative dominance by diluting the co-equal authority previously enjoyed by the judiciary. The scale is now tilted towards executive government, thus ensuring its dominance in the system that has emerged.

While it might have been the intention of the executive to put the judiciary in its "proper" place, it did not intend to remove its inherent jurisdiction. The amendment in its current form does not remove the "judicial power" despite its disappearance from the provision. Part IX of the Constitution which includes article 121 clearly provided for the exercise of judicial power. The absence of the relevant words does not affect the exercise of the express constitutional powers. A leading scholar on the subject wrote: "Art. 121 read with other provisions of Part IX, evinces an intention notwithstanding the omission of the term 'judicial power' from Art. 121, to vest the judicial power in the ordinary courts. If Parliament had intended such serious encroachment on the judicial power, it would have had to enact provisions far more drastic than the amendment under consideration. It would have to find some means of excluding totally and expressly the inherent jurisdiction of the courts to exercise exclusively the judicial power, and of vesting such jurisdiction in some other organ or organs. Accordingly the courts can still strike down an Act of Parliament which purports to interfere with the judicial power".

5.2. Independence Of Judiciary

There is little doubt that the courts' inherent jurisdiction remains. Despite the amendment, courts have continued to determine the constitutionality of governmental actions and in the recent case of *Repcos Holdings Bhd V Public Prosecutor* [1997] 3 MU 681, Gopal Sri Ram JCA declared certain provisions of two Acts

of Parliament to be null and void, having contravened article 145(3) of the Federal Constitution. His Lordship declared that "the Supreme Law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings". Article 145(3) should be read with section 376(i) of the Criminal Procedure Code which provides that the Attorney General is the Public Prosecutor who has "the control and direction of all criminal prosecutions and proceedings under the Code."

Despite the purported downgrading of the judiciary vis-a-vis the other branches of government, it would appear that it still enjoys a degree of independence absolutely necessary for the proper discharge of its duties. Judicial independence is secured by a number of constitutional provisions, namely:

- a. Judges of the superior courts do not hold office at the pleasure of the Yang di-Pertuan Agong. Unlike public servants, once appointed they hold office till 65 years of age although they are removable by His Majesty on the limited grounds of breach of the code of ethics or of inability from infirmity of body or mind or any other cause properly to discharge the functions of their office, and then only in accordance with an elaborate procedure set out in article 125 (3), (4) and (5) of the Constitution. The procedure includes the appointment by His Majesty of a tribunal consisting of not less than five judges or ex-judges to inquire into any allegation properly made. The Yang di-Pertuan Agong may then act upon the recommendation of the tribunal. This procedure was invoked twice in 1988 which culminated in the removal of the Lord President, who was then the head of the Judiciary, and two Supreme Court judges. The code of ethics for judges came into being in 1994. The Constitution (Amendment) Act 1994 deleted removal of judges on the "ground of misbehaviour" and substituted it for the code of ethics prescribed under article 125 (3A). Article 125 (3A) reads: "The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court".
- b. The code of ethics, which is cited as the Judges's Code of Ethics 1994, came into effect on 2 December 1994. The code is reproduced as Appendix A. It includes such

mundane items as not absenting himself or herself during office hours without reasonable excuse or without prior permission of the head of the various courts. The actual office hours are also prescribed in the code. It is reported that a system of clocking in and out of office has been introduced in the court. It is also interesting to note that in the past while the Prime Minister's role in the discipline of judicial personnel was limited to making representation to the Yang di-Pertuan Agong for their removal, under the new provision he must also be consulted in the making of a code of ethics. If nothing else, it does mean that he has now spread his tentacles a little further in matters relating to judicial conduct.

- c. Judges' salaries are provided by an Act of Parliament and charged on the Consolidated Fund. Thus it is paid automatically and not subject to annual approval as is the case of money bills for other purposes.
- d. Judges' salaries and other benefits of office including pension rights may not be altered to his or her disadvantage after appointment.
- e. Judges are entitled to their pension and retire at 65 years old. Other public servants are only eligible for pension and they retire at 55 years old.
- f. The conduct of a judge may not be discussed in either House of Parliament except on a substantive motion of which notice has been given by at least a quarter of the members of that House. The State Legislative Assembly may not discuss the conduct of a judge at all and rightly so, bearing in mind that the administration of justice and appointment of judges are the preserve of the Federal Government.

6. JUDICIAL POWER IN BRUNEI DARUSSALAM

6.1. The System of Justice

There are two parallel justice systems, one presided over by the Supreme Court and the other by the Sharia courts. The Supreme Court comprises the Court of Appeal and the High Court. Criminal cases that do not carry a death sentence and less serious civil cases are conducted by the intermediate courts before judges or the subordinate courts before magistrates.

Appeals are heard by the Court of Appeal, which in criminal cases is the final court of appeal. In civil cases, however, appeals may be made to the Privy Council in the UK. Judges are appointed by the Sultan for three-year terms.

Brunei Darussalam is an absolute monarchy, ruled by Sir Haji Hassanal Bolkiah, the Sultan and Yang Di-Pertuan (Supreme Ruler) of Brunei. Since an abortive uprising in 1962, Brunei has been governed by an absolute, but benevolent, monarchy under an underpinning political philosophy is that of a 'Malay Muslim Monarchy'. Brunei is an independent sovereign Sultanate that has been ruled by the same family for more than 600 years. Governing on the basis of a written constitution, the Sultan has broad powers under the Internal Security Act put into effect in 1983 that placed few limits on his power. Brunei adheres to a Malay Islamic Monarchy belief system, which promotes moderate Islamic values within a monarchical political system.

His Majesty, Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, Sultan and Yang Di-Pertuan of Brunei Darussalam, the 29th monarch in succession to the throne, is the prime Minister as well as the Defence and Finance Minister and Head of Religion of Brunei Darussalam. As Sultan, His Majesty is advised and assisted by 5 constitutional bodies, namely, the Council of Succession, the Privy Council, the Council of Cabinet Ministers, Religious Council and the State Legislative Council. The State Legislative Council which was reconvened in September 2004, consists of Cabinet Ministers, local dignitaries, people who achieved distinctions in business, religion and society as well as district representatives.

A Council of Ministers, or cabinet, which currently consists of 14 members (including the Sultan himself), assists in the administration of the government. The Sultan presides over the cabinet as Prime Minister and also holds the positions of Minister of Defense and Minister of Finance. His son, the Crown Prince, serves as Senior Minister. One of the Sultan's brothers, Prince Mohamed, serves as Minister of Foreign Affairs. In May 2010, the Sultan appointed the first female Deputy Minister and elevated the position of both State Mufti and Attorney General to ministerial rank.

The Legislative Council, with appointed seats and minimal powers, was re-introduced following 2004 constitutional amendments issued by the Sultan. Later, a small number of the Legislative Council seats were indirectly elected by village leaders. The Legislative Council (LegCo) is comprised of: 14 Ex-Officio members that included the Prime Minister, His Majesty the Sultan of Brunei, the Senior Minister at Prime Minister's Office, the Crown Prince, the Minister of Foreign Affairs and Trade, Prince Mohammad, and twelve appointed cabinet ministers. The non-government appointed members included seven dignitaries and one representative each from the

four districts (Brunei-Muara, Tutong, Kuala Belait and Temburong). His Majesty has stated that members should express their views without fear, doubt or hesitancy.

6.2. Independence Of Judiciary

Brunei's legal system is based on English common law, with an independent judiciary, a body of written common law judgments and statutes, and legislation enacted by the Sultan. The local magistrates' courts try most cases. More serious cases go before the High Court, which sits for about 2 weeks every few months. Brunei has an arrangement with the United Kingdom whereby United Kingdom judges are appointed as the judges for Brunei's High Court and Court of Appeal. Final appeal can be made to the Judicial Committee of the Privy Council in London in civil but not criminal cases. Brunei also has a separate system of Islamic courts that apply Sharia law in family and other matters involving Muslims.

Under Brunei regulations and conventional practice, vacancies for Kampong (village) and Mukim (collection of villages) Chiefs are advertised in the government-owned, Malay language newspaper 'Pelita Brunei' two months prior to Election Day. Candidacy forms must be signed by a nominator and seconded by two persons (citizens or permanent residents only) and submitted to the Mukim and Kampong Institution Section of the District Office.

Eligible candidates must be male Bruneian citizens between 30 to 60 years of age and have completed at least form 3 (equivalent to eighth grade) schooling. Candidates must have been residents of the village for at least two years, have no involvement in any associations deemed a threat to national security, nor have declared bankruptcy. Candidates must possess good leadership skills, knowledge of Islam, the community, and the customs & traditions practiced by the village residents. Civil servants and political party members must retire from these positions if appointed as village chiefs. Private businessmen may continue conducting their business under terms & conditions set by the Ministry of Home Affairs. Chiefs are elected for a term of five years which can be renewed without further election at the pleasure of the Sultan until the chief reaches the age of 65.

Solicitations for Mukim Chiefs are conducted in the same manner as Kampong Chiefs, but prospective candidates must be Muslim males between the ages of 40 and 60. Mukim chiefs are appointed by the Head of State (the Sultan). If a candidate was previously a Village Chief, he must have held that post for at least 5 years.

The Government of Brunei assures continuing public support for the current form of government by providing economic benefits such as

subsidized food, fuel, and housing; free education and medical care; and low-interest loans for government employees.

The Internal Security Act (ISA) permits the government to detain suspects without trial for renewable two-year periods. The government regularly convenes an independent advisory board consisting of executive and judicial branch officials to review individual ISA detentions and recommend whether they should be renewed for an additional two years. There were no detainees held under the ISA during recent years. Under the Sedition Act, it is an offense to challenge the authority of the sultan or members of the royal family. The act also makes it an offense to challenge "the standing or prominence of the national philosophy, the Malay Muslim Monarchy concept." This ideology permeates the country's life and government administration, promoting Islam as the state religion and monarchical rule as the sole acceptable governing system, and upholding the rights and privileges of the Brunei Malay race.

There is one official political party, the National Development Party (NDP), which pledges full support to the Sultan. The Brunei National Solidarity Party (PPKB) was deregistered in September 2007 for failure to submit fiscal report to the Government of Brunei's (GoB). The PPKB had been too vocal about seeking the Legislative Council (LegCo) to become a fully elected body as soon as possible, with the Sultan giving up the post of Prime Minister and the cabinet selected from the majority party ranks.

NDP is not an opposition party but a party for engaging people in civic affairs. This is not a challenge to the monarchy. It is clear through NDP's vision and mission that the party has no intention in exercising power within Brunei but provides a connection between government and society. The NDP seeks an interim step of a partially elected LegCo, as Sultan Hassanal Bolkiah has promised when he restored the LegCo in 2004.

Brunei has a two "party" system of sorts; with Brunei's overwhelming dominant ruling party as the caucus-cadre party (or what might be called elite-based parties) and NPD as the branch-mass (or membership-based) party. The difference between the political parties in Brunei is about the vitality and openness of the political process.

7. CONCLUSION

The main principles of a state based on the rule of law are legality, an independent judiciary, and the protection of human rights. The judiciary must be "free" from influence by the government or by any other party. The recognition that judicial

power should be independent, free from any influence by other branches of power, is a universally accepted principle.

There are some suggestions to maintain judicial independent, such as :

- a. State should provide adequate resource for the due administration of justice. The judiciary should be allocated a fixed percentage of the national budget by law.
- b. The provision of appointment of ad hoc and additional judge and the chief justice assigned to another work than his regular job are against the international standards of independent judiciary. So it should be revised the constitutional provision.
- c. State should provide reasonable remuneration and other privileges for the judge and it would be subject to periodic change.
- d. Separate judicial service act should be formulated and implemented.
- e. There should not be any inappropriate interference with the judicial process by public official of other branches of government or private individuals.
- f. Judges should perform their duties free from improper influences and without undue delay
- g. Judges should ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.
- h. Fundamental freedom of judge i.e. freedom of expression and association should be incorporated in new constitution.
- i. Judges must have guaranteed tenure until retirement of the expiration of their term of office.
- j. The constitution should provide the judges immunity from all risks that come in the course of carrying their official duty.
- k. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that render them unfit to discharge their duties.
- l. Judicial information and court decisions should be made available to the public.
- m. The composition of judicial council has been redesigned by the majority members of the judiciary.
- n. Decision solely based on the law and facts, without influence of political figure, and media.
- o. The process of appointment of judge should be transparent.
- p. Special types of courts, judicial institutions and tribunals should not be created to displace the jurisdictions of the ordinary court.
- q. Decisions of the court should be enforced fairly and effectively.
- r. Parliament hearing of the chief justice and another judge of the Supreme Court makes judge accountable and responsible to people representative. However present hearing procedural is not satisfactory. It should be reform.

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