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Administrative Accountability and the Law in Brunei Darussalam.

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Despite its importance, administrative accountability and the law in Brunei Darussalam is a topic which has been unexplored by academics. This paper attempts to remedy the gap. The accountability of the administration is addressed with reference to the private law claims of tort and contract and to the public law claim of judicial review (1). This paper argues that there is a need to increase the availability of legal measures to address administrative accountability in Brunei Darussalam.

Introduction

The three basic and essential institutions in the administration of modern states are the legislature, the executive and the judiciary. The legislature is the law-making body. The executive is responsible for the administration, consisting of a group of people who have been appointed to carry out the required functions of the state by applying the law in policy implementation. The legitimacy of both institutions of the Government is normally enshrined in the Constitution. The legislature may be elected by the people, as in the case of representative democracies such as the USA, UK and Malaysia, or, it may consist of a group of appointed persons whose legitimacy has been established constitutionally and through tradition as in the case of Brunei Darussalam. The legitimacy of the modern government, whichever style it adopts, is often justified in terms of its ability to reflect, protect and advance the wishes of its people. In theory, laws are made to serve the best interests of the people. The judiciary, an institution of specialists whose role is to interpret the law and to dictate compliance with the law, is often seen as an essential feature for ensuring administration accountability of the executive arm of the government. This latter part of concern, the law and administrative accountability in Brunei Darussalam is the focus of this paper.

The contemporary context for administrative liability

Brunei's dependence upon English law necessitates a discussion of English legal jurisprudential philosophy and practice. As the implementors of law and policy within the state, the functions of the administration are diverse; from duties of the management of state and private property,

maintenance of public order and national security and foreign policy through to the provision and supervision of recognised public services such as health, welfare, education, communications and transportation. In its widest sense, the administration therefore comprises of all appointed to perform vital executive or managerial like functions in all areas of government. Whilst it is used in this paper in its wider sense, it is important to note that within the term 'administration' itself, important distinctions need to be made where necessary as their basis of liability under the law may be different in certain respects. The branches of administration in England (normally in order of hierarchy) may be categorised as follows:

- *The* 'Crown' : This is the collective term for the Sovereign, his ministers, central government executives or the 'civil service' proper and the armed forces

- *Local government and authorities;* Government administrators outside central government and in particular those directly concern with the provision of public services such as education, health, welfare, communications and transportation.

- *Statutory bodies:* Those in agencies which have been set up by statute or through incorporation and are still controlled by the government because they exercise public functions, for example the Independent Television Commission.

The central basis for administrative accountability is the ancient and long accepted maxim that society should be regulated by law and not by force and the administration of government is as much subject to the law as the governed. More commonly known as the 'rule of law', it has been propounded as a guiding philosophy in administrative actions even before the advent of modern democracies. As the 13"' century English judge Bracton famously declared; 'The King is not subject to man but to God and the law, since law made him King'.

Apart from the more obvious liabilities in crime, tort and contract, a useful conceptual tool for the identification of administrative accountability is to categorise the main ways in which the administration applies the law in its activities vis a vis the public. Following Kerwin's (1997) summary, the law is applied when the government makes a determination as to the eligibility of individuals or organisations to receive benefits or services, when government regulates the behaviour of individuals, firms, organisations, and when the law is applied with mixed purposes; to provide a benefit and to achieve regulatory goals simultaneously. When the law itself is not followed in its application, the actions of the administration then become *ultra vires* and the rule of law requires the illegality of such actions to be remedied if the government is to retain its legitimacy in the long run. The accountability of administrators to the law is normally addressed in two stages: the internal inquiry stage and the judicial stage. Disputes on the legality of administrative actions would normally be addressed firstly within the internal inquiry mechanism of the respective administrative department itself. Although this stage is not the focus of this paper, it may be worthy to note that a number of check and balance systems exists: for examples the use of internal tribunals, public inquiry committees and the parliamentary ombudsman to ensure due process of administrative actions without the need to resort to dispute resolution in courts. Failing the first stage, legal redress via the courts or judicial intervention would then be used as the last alternative.

In what ways and circumstances can the judiciary via the mechanism of the courts attempt to address administrative accountability? Purely criminal proceedings, (e.g. corruption) will not be covered in this paper. Otherwise, the main ways in which the courts may be involved are in circumstances where civil suits are filed in courts against the administration for alleged tortious and contractual liability (private law claims) and through applications for judicial review of administrative decisions particularly in claims of maladministration (public law claims).

Private law claims

Early English history shows that aside from the Sovereign, any public administrator and their servants may be held personally liable for wrongful acts or omissions leading to a claim in tort or for breach of statutory duty. This is so even if their actions arose in obedience to superior orders as illustrated in *Entick v Carrington (1765) 19 St. Tr 1029.* In M *v Home Office 919440 1 A.C. 377,* it was held that the executive was not above the law and a government minister could be personally liable for a tort committed or authorised by him in his official capacity. However, accountability under the law for tortious claims remain restricted at that time since it was not possible to sue the administration (and in particular the Crown) per se. On the other hand, although a direct claim against the Crown for contract could be initiated by way of a petition of right, this was also subject to restrictions because a grant of the royal fiat (permission) was required.

Restrictions on administrative liability was gradually reduced with *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) *LR 1 HL* 93 where the principle of vicarious liability of local authorities was established, tortious claims against the administration need not be restricted to the culpable individual and public bodies may be liable for the wrongful acts of its servants or agents committed in the course of employment. With the *Crown Proceedings Act 1947*, the principle of vicarious liability for private law claims in tort and contract was extended to the Crown. The 1947 Act also significantly abolished the traditional prerogative powers of the Crown, establishing that the Crown in her governmental capacity, is subject to the same general principles of liability as any other individual. (2) Thus, citizens and private bodies in England today may sue the relevant administrative agency itself, the Crown with certain limitations, and on the individual level, to include any government employee through to ministers for civil wrongs which have been committed in the course of official duty.

Public Law claims: Judicial Review

The primary objective of both tortious and contractual claims against the administration is that of compensation. The remedy sought by an aggrieved citizen or private body is compensation for the loss and or injury incurred from the wrongful action of the administration in the form of an award of damages and injunction, specific performance or recission as appropriate. These remedies may not be applicable or appropriate when the claim is to challenge the validity of administrative decisions. The purpose would then be to set aside the invalid decision and not to obtain compensation (although damages, injunction and declaration may also be awarded if

appropriate). These public law claims which may in itself have nothing to do with the private law claims in tort and contract are dealt with by the English courts via the procedure of judicial review. In Lord Diplock's words:

> "The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the 'decision maker' or else a refusal by him to make a decision"
> *(Council of Civil service v Minister for the Civil Service (1985) AC 374, pg 408)*

The English *Rules of the Supreme Court (RSC) Order* 53 sets out the procedure for judicial review, well known as the prerogative orders of *certiorari* (to quash or make void the decision), *mandamus* (to compel the administration to reconsider or to do the right thing in its decision) and *prohibition* (to prevent or stop the invalid or part of the decision). Although bodies judicially reviewable were originally confined to those whose functions were derived from statute or from the Crown (including the inferior courts and those performing a quasi judicial function for the public), *R v Panel on Takeovers and Mergers ex parte Datafin (1987) QB 815* has significantly extended the types of bodies amenable to judicial review. Judicial review has since become obtainable against any bodies performing a public function even if their powers did not derive from statute or from the exercise of prerogative powers. At its extreme, the principle was applied by the Privy Council in *Mercury v Electricity Corporation of New Zealand (1994) 1 WLR 521* where the mere fact that the Electricity Corporation exercised monopolistic powers was held to be subject to judicial review. Aside from the rule that judicial review must involve a public and not private law claim (for example, it is not a procedure for resolving tortious and contractual claims which can be proceeded via an ordinary civil suit), the criteria for locus standi is based on 'sufficient interest'. Issues of standing have taken a liberal approach, the applicant need not be immediately affected; relevant pressure groups and forming an association may also provide standing *(R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd (1995) WLR 386.*

The three main grounds for judicial review are illegality (ultra vires or error of law), irrationality (unreasonableness) and procedural impropriety (breach of procedural rules and natural justice). Importantly, the scope of these grounds also cover discretionary decisions made by administrators in the course of official duties. . In *Wheeler v Leicester City Council (1985) AC 1054,* a 12 month ban of a rugby club from using the council's ground solely because of race relations policy was held as an unreasonable discretionary decision and a procedural impropriety and certiorari was awarded. In *R v Secretary of State for the Home Department, ex p. Leech No 2 (1944) QB 198,* a prisoner succeeded in his application to quash the prison governor's censorship of correspondence between himself and his solicitor on the grounds that it was *ultra vires* under the Prison Act. Extensive caselaw of judicial review exist and they show not only the tremendous impact that administrative decisions play on people's lives but conversely the many areas in which these decisions can be challenged in terms of validity. Judicial review can be used to address relatively trivial grievances of a council's decision to impose a ban on usage of sports facilities, refusal to grant trading licences *(Associated Provincial picture Houses Ltd v Wedhesbury Corporation (1948) 1 KB 223),* through to more serious issues such as the failure of a tribunal to allow a police chief constable to appear in person for the hearing for his dismissal (Ridge v *Baldwin (1964) AC 40)* and the wrongful order for deportation of an immigrant (AG *of Hongkong*

v Ng Yuen Shiu (1983) 2 AC 629). The number of judicial review applications in the UK has risen dramatically from a mere 60 cases in 1965 to approximately 4,000 cases in 1998 (Le Suer *et al* 1999), it is the main legal mechanism for setting the limits of decision making by public authorities and administration.

Sources of Brunei Law

The sources of Brunei law are in the form of local statutes and English common law and equity. Statutes of primary importance are:

- *The Laws of Brunei:* These consists of a consolidation of all Acts in force in Brunei since 1908 and before 1984.

- *Emergency Orders:* By virtue of section 83 of the Constitution of Brunei Darussalam, 1959, HM the Sultan can declare a state of emergency. The first such proclamation of emergency was made in 1961 and since then successive proclamations have been made, each of two years duration. A state of emergency is still continuing. Since the first proclamation, legislations have been made by way of Emergency Orders. New Orders are published in Government Gazettes. It is accepted practice that unless stated otherwise by the Emergency Orders, The Laws of Brunei will remain applicable.

- *The Application of Laws Act 1951:* This provides for the inception of English common law and equity, and, pre-1951 English statutes of general application, as administered or in force in England..

- *Syariah law:* This is addressed by the Religious Council and *Kadis* Courts whose jurisdiction is primarily in relation to Islamic family law

By reason of the Application of Laws Act 1951, it would be quite accurate to say that provided the same has not been curtailed by Brunei statutes or decided by Brunei case law itself, Brunei courts will regard English common law and equity and its procedures as binding. Decisions from courts from the same common law tradition such as Malaysia, Singapore and Hongkong will be seen as merely persuasive. Where Brunei does not have its own statute covering a certain situation and where common law and equity is silent on the matter, a relevant English statute prior to 1951, provided that it is of general application, will be applicable in Brunei.

Arguments for Administrative Accountability via the Law

Extensive caselaw and legal provisions to address administrative accountability modelled largely upon the UK context is now practised in most Commonwealth countries. The situation in the US is not dissimilar; a 'Bivens' action- previously known as the Ku Klux Klan Act 1871 for claiming individual liability of public officials, the Federal Tort Claims Act for vicarious liability of the government itself for wrongs committed by their employees, and, judicial review to challenge administrative decisions. As Wise has commented:

> "The days of the road shield of 'sovereign immunity' behind which public officials conducted the public business without fear of court imposed penalties are long over". *(1996:713)*

Ideally, important decisions should be made by the parliament or an elected representative or as in the case of Brunei, His Majesty the Sultan who is the constitutionally legitimate ruler of the country. In reality, a vast amount of discretionary power is conferred upon the administration because the work of governing, even in a small country like Brunei, covers a far too extensive and fractious area for the ruling elite to be effective decision makers cum implementors on their own. For this reason, the work of government including the making of policy and a number of secondary legislation is necessarily delegated to the administration. The need for increased administrative accountability becomes justified not only to address obvious violations of legal obligations but because many statutes now confer wide discretionary powers for carrying out the task of governing upon administrators.

Aside from political legitimacy, a government according to the law provides predictability or certainty in administrative behaviour, and this is especially applicable with the 'reinventing government' movement of the 90s with administrative accountability and transparency as its catchphrases. Few modern administration proponents would disagree that:

> "The election of office holders does not give them or their employees carte blanche. One of the responsibilities of government is therefore, to provide adequate opportunities for citizens to challenge the good sense and lawfulness of its decisions, and seek reparation for harms wrongfully inflicted on them..."
> *(Le Sueur et al ibid, pg: 189)*

The context in Brunei

Despite increased judicial intervention in administration elsewhere, the situation in Brunei is quite different. In fact, attempting to provide an outline of legal mechanisms for challenging administrative actions in Brunei is not an easy task because of the uncertainty that exists in this area of concern. To date, academics have not attempted to write or publish in this very important field of policy analysis. There is very little case law, presumably because it is taken for granted that administrative actions in all its forms, cannot be challenged in courts or because attempts to litigate are prematurely settled via the internal inquiry stage. Has the individual no legal recourse for administrative tortious and contractual liability and invalid administrative decisions?

Kuan Kwai Choi v Ak Zaidi Bin Pg Metali (HC -Suit No 175 of 1990 (Suit No 175), Judgements of Brunei Darussalam, 1992, pg 229-307) and *Zainuddin Dato Seri Paduka Haji Marsal v Pengiraa Putera Negara Pengiran haji Umar bin Pengiran datu Penghulu Pengiran Haji Apohg and seven others (HC - Suit No 40 of 1994 (Suit No 40), Judgements of BruneiDdarussalam, 1996, pg 112-128)* are the rare examples of case law on this matter. Both cases involve civil suits by private litigants against the members of the Royal Brunei Police Force for tortious acts committed in the course of the defendants' official duties (false imprisonment for Suit No 175 and false imprisonment, assault and battery and negligence for Suit No 40). Defendant to Suit

No 40 also included a high ranking administrator, the then Minister of Home Affairs. In both cases, it was held that the defendants' may only be sued in their personal capacity and not as a servant or agent of the Government. Addressed in some detail in Suit No 175, the *ratio decidendi* for this rule is based on *Section 25 of the Succession and Regency Proclamation, 1959, Constitution 11, Vol. 1, Laws of Brunei,* which states that:

> "The following shall be inherent in the exercise of the state function... the Sultan can do no wrong, and effect shall be given to this principle in like manner as, immediately before the enactment of the Crown Proceedings Act 1947 in England, effect was there given to the maxim that the King can do no wrong: Provided that provisions may be made by laws enacted under the Constitution for the bringing of proceedings against the Sultan (otherwise than in his private capacity), or against the Government or any officer, servant or agent thereof, in respect of wrongs committed in the course of carrying on the Government of Brunei Darussalam"

Despite the fact that the 1947 Act may be enforced by reason of the Application of Laws Act 1951, it was held that the intention of Section 25 of the proclamation was to repeal or to nullify the 1947 Act and to make applicable instead the common law tradition of England pre 1948. As we have seen, the only form of remedy for tort in the pre 1948 English context was confined to the suing the administrators or their servants and agents in their personal capacity. Thus it was established in Suit 175 that the Government cannot be sued per se, the Brunei court will only recognise individual liability for administrative actions. As for contractual claims and using the same reasoning as that in Suit 175, it would appear that an aggrieved citizen may only sue the Government in contract by way of a petition of right, just as it was practised in England before 1948.

Although case law does not exist as yet, in terms of challenging the validity of administrative decisions itself (ie: private law claims), judicial review appears to be a potentially promising procedure in Brunei. Apart from the fact that it is a common law remedy and should be applicable by reason of the Application of Laws Act 1951, the Brunei courts appear to view it as a valid procedure as illustrated in *obiter* in Suit No 40:

> "Here, the defendants argue, the plaintiff should not be allowed to proceed in the way that he has and simply bring a claim for damages for what is alleged to be a breach of public law rights. The plaintiff could and should have applied for certiorari to quash the Detention Orders While there is no exact equivalent of Order 53 in Brunei, Preliminary Rule 2 of the Brunei High Court (Civil Procedure) and rules provides that if there is no appropriate procedure in Brunei, the procedure in the UK Supreme Court may be followed. "
> *(pg 117)* (3)

For a private law claim in tort, administrators, their servants or agents are therefore only accountable in their personal capacity, The government *per se* cannot be sued in this respect in Brunei. The problem is that although individual liability is an improvement to ensure administrative accountability, it does not provide a sufficient basis for the liability of growing administrative machineries. In fact, the immunity of the government in Brunei covers a far wider area of public life than that of pre 1948 England. Unlike the latter whereby vicarious liability could be attributed to local authorities *(Mersey Docks,* ibid), in Brunei, there is as yet no distinction between central government and that part of the government which would be categorised as 'local authorities'. Thus government agencies, particularly those concern with the provision of public services such as education, health, communications and transport cannot be sued in Brunei whereas it would have been possible to do so in pre 1948 England. The extent of tortious legal immunity given to the government and their impact upon a citizen's day to day affairs, and, the need for remedying the legal gap should not be underestimated. Apart from individual liability, there is for example, no other legal recourse to address medical negligence in government hospitals (the main provider of health services in Brunei), nor in a situation whereby a person were to be negligently injured by a Government vehicle. Not only would there be strong arguments that the rule of law requires some form of accountability to apply in such cases, but it is also impertinent that an aggrieved citizen is able to sue the employing body, not just the individual officer, since the employer is the more financially able body to make adequate compensation for the loss or injury suffered.

On the other hand, it would seem that in Brunei, contractual liability may be claimed by way of a petition of right subject to a grant of a royal fiat and the validity of administrative decisions may be judicially reviewed. However, whether the latter forms of claims would in reality make the administration more accountable via the judiciary system remains unclear. Particularly for contractual claims, it may be so that a fiat would be unlikely to be granted in the first place because of the maxim of sovereign perfection. In any case the decision would be a made on a discretionary basis without the need to refer to the normal rules and principles of contract law. Case law does not exist in the latter two areas of contract and judicial review. One can only hypothesised that the reasons are due to the lack of public awareness of these mechanisms or that generally such claims have been settled in the internal inquiry stage. That there is a big legal gap to be filled in this area has not gone unacknowledged. The Chief Justice of Brunei for example has lamented in his speech for Brunei's Opening of the Legal Year 2001 that:

> "Unfortunately ...no steps have been taken to enable the government to be sued. I can only repeat that it is unfortunate to make Brunei an investment centre, while at the same time providing that the government shall be immune from the process of law, an immunity that does not exist elsewhere"
> *(Borneo Bulletin, 14 February 2001).*

This blanket immunity of the government from being sued in private law is as indicated above, the result of the country's inheritance of early English jurisprudential tradition and the maxim of sovereign perfection. Whilst the maxim dictated the course of litigation against the Crown, it was not without substantial controversy. Attempts to sue the Crown persisted and lawyers, academics and parliament itself were vocal in their dissatisfaction with the doctrine. (4).

On the other hand, the removal of all legal immunities of the administration need not and should not be seen as the only solution. Excessive legal controls of and litigation against the administration both in private and public law would undermine the stability of the state. In the UK itself for example, the issue of whether an unelected judiciary is qualified to dictate government actions (one of the implications of the *Human Rights Act 1998)* is a major current concern. Furthermore, although there is a need for a neutral party (ie the judiciary) to remedy civil wrongs committed by the administration and to act as a check and balance on administrative procedures and discretionary powers, it must also be noted that conversely, essential flexibility will be lost if administration becomes an excessively formal process. In line with Cooper (1996) , legislators are rarely able to anticipate all specific situations arising in actual administrative activities and so some discretion (even ultra vires ones since the law is not invariable) may be required.

Therefore, wholesale importation of legal mechanisms and practice of England or elsewhere need not and should not be the alternative for the Brunei context. A number of protective mechanisms can be incorporated, some of which already exists in Brunei Darussalam (5) and can be preserved whilst at the same time increasing administrative accountability via the law. As the Chief Justice in the same cited speech has suggested:

> "The removal of the immunity of the government would not affect that of His Majesty, who will remain inviolable"

The Crown Proceedings Act 1947 itself for example, still preserves certain Crown privileges. The Act for example only applies to the Crown in his governmental capacity and preserves the personal immunity of the Sovereign from being sued. Statutory provisions of immunity exists in certain areas of government administration in English law, particularly where special powers and protection are required under the grounds of public policy and the national interest. In the US, government immunity is provided for in statutes, particularly in identified areas requiring high level 'discretionary' functions or under the 'public duty' doctrine Policy reforms within this area of concern in Brunei would therefore necessarily centre on balancing the need for protection against the abuse of administrative power and wrongful action and the importance of ensuring sufficient discretion and the protection of the personal immunity of the Sovereign.

Conclusion

Policy making and administration within the state is sanctioned if it is grounded upon the law and to ensure compliance with this, legal mechanisms to ensure administrative accountability must be available. Very simply, citizens need to be reassured that decisions of administrators affecting them are within the boundaries of the law and if not, there exists a workable form of

remedy for their grievances. Governments also benefit from a check and balance mechanism to ensure that their appointed administrators do not abuse their powers in the way that is not intended in the first place; as defined by the law. On the other hand, a wholesale importation of legal mechanisms is not recommended, there is an urgent need to review the range of protections available to ensure that appropriate remedies are adopted for the specific context of Brunei.

Notes

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2. Halsbury's Laws of England, Vol 11.
3. Whilst not a substantive law, Order 53 as a procedure is in fact provided for and does in fact exist in the *Brunei High Court Rules* and it does not differ significantly from the wording of the English Order 53.
4. See Halsbury's Laws of England, Vol I l and Bradley and Ewing (1997).
5. Such as the Emergency Orders and the Public Interest Immunity Certificate (for non disclosure of evidence). Other statutory provisions already existing but need to be further explored includes the provisions for appeals of the decisions of the judiciary system itself (ie via the Court of Appeal and the Privy Council) and in certain areas such as appeals for taxation review of incorporated companies via the courts (Cap *35 Section 67 Income Tax, Laws of Brunei)* and in certain land disputes *(Cap 40 section 34(1) Land Code, Laws of Brunei)*. Further, government bodies created by statute, the equivalent of the English *'statutory bodies', such* as *Universiti Brunei Darussalam,* are in general liable for private law claims following normal tortious and contractual principles.

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