

ACCESS TO JUSTICE FOR CHILDREN: **BRUNEI DARUSSALAM**

This report was produced by White & Case LLP in January 2015 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.

I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Brunei Darussalam acceded to the CRC on 27 December 1995, but has entered reservations to Articles 14, 20(3) and 21(b),(c),(d) and (e).¹ In 2014, the State expressed a commitment to withdrawing its reservations to Articles 20 (relating to protection of a child without a family) and 21 (relating to adoption) of the CRC.²

It appears that the CRC does not have the force of law in Brunei Darussalam but rather the CRC is viewed as a set of principles to be realised in national law rather than as document to be directly incorporated.

³ The general reservation against applying any provision contrary to the beliefs and principles of Islam, the State and religion can be used to refuse to apply practically all articles of the Convention.

Brunei has acceded to the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography,⁴ however it has not acceded to the other two Optional Protocols to the Convention.

B. Does the CRC take precedence over national law?

No.

C. Has the CRC been incorporated into national law?

No, the CRC has not been incorporated in Brunei.

Bruneian law does not contain a comprehensive Children's Act, although the Children and Young Persons Act⁵ covers many of the areas addressed by the CRC. There are numerous other relevant pieces of legislation addressing matters related to children, including, but not limited to:

¹

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

² Universal Periodic Review, National Report of Brunei Darussalam, para. 13, available at: <https://www.crin.org/en/library/publications/brunei-darussalam-childrens-rights-references-universal-periodic-review>.

³ <https://www.crin.org/en/library/publications/brunei-darussalam-national-laws>.

⁴ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁵ Available at: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap219.pdf.

- i. Adoption of Children Act (2010);⁶
- ii. Islamic Adoption of Children Act (2010);⁷
- iii. Education Act (2011);⁸
- iv. Compulsory Education Act (2011);⁹
- v. The Women and Girls Protection Act (1972);¹⁰ and
- vi. Guardianship of Infants Act (2000).¹¹

Further, the Application of Laws Act¹² provides that the common law of England and the doctrines of equity, together with statutes of general application in force at the date of commencement of the Act - 25 April 1951 - shall be in force in Brunei “so far only as the circumstances of Brunei Darussalam and of its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary.”¹³ The domestic law of Brunei however contradicts the CRC in many ways - see part V below. The UN Committee on the Rights of the Child has expressed concern that the State’s laws “do not sufficiently reflect a comprehensive rights-based approach to the implementation of the Convention.”¹⁴

D. Can the CRC be directly enforced in the courts?

No, it is not possible to enforce the CRC in courts.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

According to research the CRC has not been relied on or cited in the courts.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children’s rights?

Two legal systems operate in parallel in Brunei - one is based on English common law and the other on religious Syariah Law. Syariah Law is applied only to Muslims in areas including divorce, inheritance, and some sex crimes,¹⁵ but the Shariah-based criminal law might be applied to both Muslims and non-Muslims.¹⁶

⁶ Available at: <http://www.agc.gov.bn/AGC%20Images/LOB/PDF/Cap205.pdf>.

⁷ Available at: <http://www.agc.gov.bn/AGC%20Images/LOB/PDF/Cap206.pdf>.

⁸ Available at: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap210.pdf.

⁹ Available at: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap211.pdf.

¹⁰ Available at: <http://www.agc.gov.bn/AGC%20Images/LOB/PDF/Chp.120.pdf>.

¹¹ Available at: <http://www.agc.gov.bn/AGC%20Images/LOB/PDF/Cap191.pdf>.

¹² Available at: <http://www.commonlii.org/bn/legis/aol2239/>.

¹³ Applications of Laws Act, Section 2, available at: <http://www.commonlii.org/bn/legis/aol2239/>.

¹⁴ UN Committee on the Rights of the Child, *Concluding Observations to the initial periodic report of Brunei Darussalam*, CRC/C/15/Add.219, 27 October 2003, para. 6, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=BRN&Lang=EN.

¹⁵ Freedom House, *Freedom in the world 2014: Brunei Darussalam*, available at: <https://freedomhouse.org/report/freedom-world/2014/brunei>.

¹⁶ CRIN news article, *BRUNEI: Tough Islamic penal code introduced*, 30 April 2014, available at:

In general, any person is permitted to bring proceedings in the High Court in person or through a solicitor.¹⁷ Research could not determine whether cases can be brought by or on behalf of children. Prosecutions for violations of children's rights which amount to crimes are brought by the Attorney-General.¹⁸

- B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf? Or must the case be brought by or with the assistance of a representative?

The answer to this questions could not be determined. A 'child' is defined in Brunei's law as anyone under the age of 14 years old.¹⁹ Full legal capacity for the purposes of the Nationality Act is attained at 18 years of age.²⁰ However, it is not clear at what age persons gain procedural capacity allowing them to bring court proceedings.

- C. In the case of infants and young children, how would cases typically be brought?

The answer to this questions could not be determined.

- D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal aid from the State is available to defendants accused of crimes which carry the death penalty,²¹ but in other criminal cases indigent defendants act as their own counsel in court.²²

Research did not identify any other law making provision for free or subsidised legal aid in civil cases.

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g. would a child's parents or guardian have to agree to a case being brought)?

<https://www.crin.org/en/library/news-archive/brunei-tough-islamic-penal-code-introduced>. See also United States Central Intelligence Agency, *The World Factbook: Brunei*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html>.

¹⁷ Supreme Court Rules, order 5, Rule 6, available at: <http://www.commonlii.org/bn/legis/sc5rotsc507/>.

¹⁸ ASEAN Law Association, *Legal Procedure of Brunei*, available at:

http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf and Constitution of Brunei, Section 81, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/bn/bn016en.pdf>.

¹⁹ Children and Young Persons Act, Section 2.

²⁰ Brunei Nationality Act, Section 2, available at: <http://www.commonlii.org/bn/legis/bna15277/>.

²¹ Special Lecture on the Enforcement of the Syariah Penal Code Order by the Attorney General, 30 April 2014, available at: http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2014/EN/english.pdf#search=%22legal%20aid%22.

²² United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Brunei Darussalam*, available at: <http://www.state.gov/documents/organization/220391.pdf>.

No particular conditions or limitations were identified.

III. How can children's rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

It is not known with certainty whether it is possible to bring such a challenge. There appears to be no specific provision of law permitting civil suits for alleged human rights violations. It is customary practice to present written complaints directly to the Sultan, but no further detail could be ascertained.²³ Civil cases in the courts typically concern disputes between private parties relating to contract or compensation.²⁴

The Constitution provides that there is no form of judicial review of official actions in Brunei.²⁵ If a question of interpretation of the Constitution arises before any court, that question should be referred to the Sultan who will then inform the court that they should rule on the issue or redirect the question to the Interpretation Tribunal.²⁶ Decisions by the Tribunal are binding and conclusive and not subject to any type of review or appeal.²⁷

- B. What powers would courts have to review these violations, and what remedies could they offer?

Research could not answer this question with any specificity other than compensation is available in the civil courts.²⁸

- C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

It is possible to challenge a law without naming a specific victim through "representative action - see part III.D below. Furthermore, there are provisions protecting the identity of children in the justice system. The Children and Young Persons Act prohibits the publication of names or details about the identity of a child involved in legal proceedings and imposes criminal penalties for breaches of that prohibition.²⁹

²³ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Brunei Darussalam*, available at: <http://www.state.gov/documents/organization/220391.pdf>.

²⁴ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

²⁵ Constitution of Brunei, Section 84C, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/bn/bn016en.pdf>.

²⁶ Constitution, Section 86.

²⁷ Ibid.

²⁸ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

²⁹ Children and Young Persons Act, Section 95.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Collective action or group litigation is known as “representative action”. A group of people can initiate proceedings before the Supreme Court where they have the same interest.³⁰ Where the proceedings concern the interpretation of a written instrument such as a statute the Court may appoint a representative for a person or a class of persons who cannot be ascertained.³¹ Finally, the Court has the power to consolidate cases in which a common question of fact or law arises.³²

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Research did not identify any provision allowing for cases to be brought by non-governmental organisations on the behalf of victims of human rights abuses. In fact, there appear to be no civil society organisations working in the field of human rights in the country.³³

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Civil actions for compensation, damages or seeking an injunction must be brought in the Magistrates Court and are heard under summary procedure.³⁴ Some cases, including claims based on tort, are initiated in the High Court in the first instance.³⁵

The Supreme Court comprises of the High Court, which has both original and appellate jurisdiction in criminal and civil cases, and the Court of Appeal which has appellate jurisdiction in criminal and civil cases.³⁶

Civil proceedings in the Magistrates’ courts are initiated by the registration of a written statement called ‘plaint’ to the Clerk of the Court.³⁷ It must

³⁰ Supreme Court Rules, Order 15, Rule 12, available at: <http://www.commonlii.org/bn/legis/sc5rotsc507/>.

³¹ Supreme Court Rules, Order 15, Rule 13, available at: <http://www.commonlii.org/bn/legis/sc5rotsc507/>.

³² Supreme Court, Order 4, Section 1, available at: <http://www.commonlii.org/bn/legis/sc5rotsc507/>.

³³ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Brunei*, available at: <http://www.state.gov/documents/organization/220391.pdf>.

³⁴ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

³⁵ Ibid.

³⁶ Supreme Court Act, Section 6, available at: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap005.pdf.

³⁷ Asean Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

include the names and places of residence of the parties and a statement on the substance of the action intended to be brought.³⁸ High Court Proceedings are initiated by writ, originating summons, originating motion or petition.³⁹

There are specialised juvenile courts in Brunei, presided over by magistrates, that hear all criminal cases in which the defendant is under the age of 18.⁴⁰ Offences relating to the ill-treatment or violence against a child are prosecuted only in the High Court.⁴¹

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

For detailed regarding the availability of legal aid, please see part II.D.

A court fee is payable at the time of lodging a plaint,⁴² however there appear to be no provisions allowing child plaintiffs to be exempted from payment.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

There appears to be limited pro bono assistance in Brunei Darussalam, although that does not exclude the possibility of obtaining assistance.⁴³

The Brunei Council on Social Welfare offers free legal advice targeted at socially and economically disadvantaged persons and legal services at a subsidised rate or on a pro bono basis in deserving cases, including cases concerning children's access to education.⁴⁴

The Law Society of Brunei organises semimonthly events where law firms provide free legal consultation on a first come first served basis to persons with low income.⁴⁵

³⁸ Ibid.

³⁹ Supreme Court Rules, Order 5, Section 1, available at: <http://www.commonlii.org/bn/legis/sc5rotsc507/>.

⁴⁰ Children and Young Persons Act, Section 10 and Part III.

⁴¹ Children and Young Persons Act, Sections 28 and 40.

⁴² Asean Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

⁴³ The Brunei Times, *More lawyers needed for pro bono cases*, 22 April 2013, available at: <http://www.bt.com.bn/2013/04/22/more-lawyers-needed-pro-bono-cases>.

⁴⁴ Brunei Council on Social Welfare website, available at: <http://www.mkmbornei.com/#!about1/c1vcd>.

⁴⁵ The Brunei Times, *Law Society to hold free legal advice clinic*, 24 January 2013, available at: <http://www.bt.com.bn/2013/01/24/law-society-hold-free-legal-advice-clinic> and *Legal aid clinic to be held twice a month*, 10 March 2014, available at: <http://www.bt.com.bn/news-national/2014/03/10/legal-aid-clinic-be-held-twice-month>.

Contingency fee arrangements are permissible in cases for damages, personal injury and others, but not in relation to any criminal proceedings, family law matters such as custody or in any case for which legal aid is available to the plaintiff.⁴⁶

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

These time periods are prescribed in the Limitation Act 2000.⁴⁷ Actions founded on tort must be brought within 6 years of the date on which the cause of action accrued.⁴⁸ In cases relating to personal injury, the limitation period is generally three years from the date on which the action complained of occurred or the date on which the complainant learned about that action.⁴⁹ Although the Act makes provision for the postponement of limitation periods in some situation, there are no provisions which explicitly suspend the limitation period until a child reaches adulthood.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Facts must be proven by oral or documentary evidence and the burden of proof lies on the person relying on the fact in question.⁵⁰ The Evidence Act provides that anyone shall be competent to testify unless it is determined that “they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, [...] or any other cause of the same kind.”⁵¹

Where a child is called as a witness, they may be excused from giving oath, provided they understand the importance of telling the truth.⁵² In such cases, however, if the evidence is relied on in a criminal trial by the prosecution, it will need to be corroborated by another source.⁵³

There are also special procedures for hearing testimony by children in criminal proceedings. Witnesses under the age of 14 years old may give evidence through a live television link⁵⁴ and they may not be cross examined.⁵⁵

The Supreme Court may order that the name or other identifying

⁴⁶ Legal Profession Act, Sections 6-7, available at:

<http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Cap132subR6%2806%29.pdf#search=legal%20aid>.

⁴⁷ Available at: <http://www.commonlii.org/bn/legis/l14176/>.

⁴⁸ Limitations Act, Section 6.

⁴⁹ Limitations Act, Section 15.

⁵⁰ Evidence Act, available at: <http://www.commonlii.org/bn/legis/e108123/>.

⁵¹ Evidence Act, Section 118.

⁵² Evidence Act, Section 133A(1).

⁵³ Evidence Act, Section 133A(2).

⁵⁴ Criminal Procedure Code, Article 236B, available at: <http://www.commonlii.org/bn/legis/cpc7254/>.

⁵⁵ Criminal Procedure Code, Article 236E.

information regarding a witness not be published by anyone and impose a fine or a term of one year's imprisonment to anyone who breaches such an order.⁵⁶

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

In civil proceedings in the Magistrates' or High Court a judgment can be delivered at the hearing or at a subsequent sitting.⁵⁷ However, a backlog of capital cases results in lengthy pretrial detention for those accused of serious crimes.⁵⁸

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Under the Magistrates' Courts (Civil Appeal) Rules 2001 appeals must be lodged within a month from the date of the decision under appeal.⁵⁹ If the civil proceedings are started in the High Court an appeal to the Court of Appeal shall be by way of rehearing and must be brought by notice of appeal. Every notice of appeal must be filed and served within one month from the date when such an order is pronounced.⁶⁰

Appeals from the Supreme Court in civil cases lie with the Sultan of Brunei who will refer them to the Judicial Committee of the Privy Council in the United Kingdom.⁶¹ By agreement between Her Majesty and the Sultan, the Judicial Committee's opinion is reported to the Sultan instead of to Her Majesty.⁶²

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

This question could not be answered with certainty. It is worth noting that the judiciary in Brunei is not independent, however there are no recorded instances of interference by the government.⁶³

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

⁵⁶ Supreme Court Act, Article 15(3).

⁵⁷ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

⁵⁸ Freedom House, *Freedom in the world 2014: Brunei Darussalam*, available at: <https://freedomhouse.org/report/freedom-world/2014/brunei>.

⁵⁹ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

⁶⁰ Ibid.

⁶¹ Supreme Court Act, Section 14.

⁶² Judicial Committee of the Privy Council, 'Practice direction 1', available at: <https://www.jcpc.uk/procedures/practice-direction-01.html>.

⁶³ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Brunei*, available at: <http://www.state.gov/documents/organization/220391.pdf>.

It appears that decisions in civil cases are enforced by the magistrates.⁶⁴

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

A particularly serious issue on which Brunei's national law falls short of the requirements of the CRC is inhuman sentencing of children. Severe forms of corporal punishment and life imprisonment are legal and provisions allowing for the imposition of the death penalty on children are due to enter into force in 2015. For more information, please see CRIN's report on inhuman sentencing of children in Brunei Darussalam.⁶⁵

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁶⁴ ASEAN Law Association, *Legal Procedure of Brunei*, available at: http://www.aseanlawassociation.org/papers/Brunei_chp4.pdf.

⁶⁵ Available at: <https://www.crin.org/en/library/publications/brunei-darussalam-inhuman-sentencing-children>.