



THE UPR PROJECT AT BCU

Submitted by:

The UPR Project at BCU
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About the UPR Project at BCU:

Birmingham City University's Centre for Human Rights was created in 2014 to promote human rights, ensure access to justice, and enhance the rule of law around the world. We seek to achieve this through leading research, education, and consultancy. We submit expert reports to international human rights regions, provide advisory services to governments and nongovernmental organisations, and draft legal opinions and file legal briefs in domestic courts and international human rights courts.

The Centre for Human Rights established the UPR Project in 2018 as part of our consultancy service. We engage with the Human Rights Council's review process in offering support to the UPR Pre-sessions, providing capacity building for UPR stakeholders and National Human Rights Institutions, and the filing of stakeholder reports in selected sessions. The UPR Project is designed to help meet the challenges facing the safeguarding of human rights around the world, and to help ensure that UPR recommendations are translated into domestic legal change in member state parliaments. We fully support the UPR ethos of encouraging the sharing of best practice globally to protect everyone's human rights. The UPR Project at BCU engages with the UPR regularly as a stakeholder and is frequently cited by the OHCHR. You can read more about the UPR Project here: www.bcu.ac.uk/law/research/centre-for-human-rights/projects-and-consultancy/upr-project-at-bcu

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INTRODUCTION

1. Brunei Darussalam [hereinafter Brunei] is party to three of the nine core international human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.¹
2. This Stakeholder Report focuses upon capital punishment and recommends Brunei ratify the International Covenant on Civil and Political Rights (ICCPR) and safeguard the right to life. We make recommendations to the Government of Brunei on this key issue, implementation of which would see Brunei moving towards achieving Sustainable Development Goal 16 which aims for peaceful and inclusive societies, access to justice for all and effective, accountable and inclusive institutions at all levels.
3. We urge the State to make practical commitments in the fourth cycle of the UPR for the abolition of the punishment. As an initial step, we call for the suspension of the capital judicial process through the initiation of an official moratorium on the death penalty. This will enable the government to make a positive commitment towards domestic *de jure* abolition.
4. In this submission, we encourage Brunei to commit to improving its human rights protection and promotion by engaging meaningfully with the UPR. This includes giving full and practical consideration to all recommendations made by Member States, effectively implementing the recommendations Brunei accepts, and actively engaging with civil society throughout the process.

CAPITAL PUNISHMENT

A. Brunei Darussalam and International Law on the Death Penalty

5. While Brunei retains the death penalty in law, it is abolitionist in practice. No known executions have occurred in Brunei since 1957 and there has been a *de facto* moratorium on the death penalty since the country gained independence in 1984. The Constitution of Brunei Darussalam makes no reference to fundamental rights of any nature however the death penalty is referenced twice in Constitutional Matters I and Constitutional Matters II, Succession and Regency Proclamation of 1959.² Specifically, it prohibits anyone who has been sentenced to death from standing as a Member of the Legislative Council.³
6. The death penalty is stipulated for a range of offences in Brunei's domestic laws namely its Penal Code of 1951 (Revised 2001), Syariah Penal Code Order 2013, and Brunei Misuse of Drugs Act 2001. These include terrorism-related offences,⁴ drug trafficking

offences,⁵ treason,⁶ murder,⁷ arson resulting in death,⁸ kidnapping,⁹ rape,¹⁰ and perjury resulting in capital punishment on the accused.¹¹

7. In April 2014, a new penal code, the Syariah Penal Code Order (SPCO) was introduced by Brunei to operate alongside the existing Common Law-inspired Penal Code. The SPCO was adopted to implement elements of Islamic law and provided the death penalty for adultery, sodomy, rape, apostasy, blasphemy, and insulting Islam.¹² Despite plans to reinstate capital punishment by 2019 for offences under the SPCO, the Sultan of Brunei made clear that the *de facto* moratorium on the death penalty would continue following widespread international condemnation.¹³ Nonetheless, the explicit statement of a moratorium on the death penalty has “changed the landscape of controversy surrounding Brunei’s new Islamic criminal code. It reduces the risk of the law developing a life of its own in the hands of potentially zealous enforcers.”¹⁴

International Law Promoting the Restriction and Abolition of the Death Penalty

8. The United Nations’ framework for regulating the application of the death penalty comprises a corpus of international human rights law and jurisprudence. Of particular relevance are Articles 6, 7, and 14 ICCPR,¹⁵ its Second Optional Protocol,¹⁶ the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,¹⁷ the Secretary General’s quinquennial reporting,¹⁸ the Secretary General’s Question on the Death Penalty,¹⁹ and the Human Rights Committee decisions.²⁰ Other relevant treaties include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment²¹ and the Convention on the Rights of the Child.²²
9. The General Comment on the Right to Life²³ provides an interpretive lens on the death penalty and concerning ICCPR Article 6(6), which states, ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment,’ it:

reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights.²⁴
10. The growing international consensus against capital punishment is reflected in the UN General Assembly’s biennial resolution to impose a global moratorium on the use of the death penalty. The ninth and most recent iteration of the resolution was passed on 15 December 2022. A total of 125 votes were recorded in favour with 37 votes against and 22 abstentions. Brunei has voted against all such resolutions.²⁵
11. Brunei’s pro death penalty stance is solidified in its presence as a signatory to the Joint Permanent Missions’ most recent *note verbale* of dissociation, which records a formal

objection to the Secretary General of the United Nations on the attempt to create a global moratorium on the death penalty.²⁶ In fact, Brunei has been a signatory to all such *note verbales* to date.

B. Implementation of Recommendations from Cycle Three in 2019

12. Brunei received 220 recommendations in the Third Cycle of which 115 were accepted and 105 were noted.²⁷ A total of 28 recommendations focused specifically on the death penalty, none of which enjoyed State support.²⁸

Recommendations concerning Brunei's Adoption of International Law

13. Brunei received several recommendations to ratify the International Covenant on Civil and Political Rights and/or its Second Optional Protocol aiming at the abolition of the death penalty. These were received from the **Bahamas, Czechia, Chile, Costa Rica, France, Croatia, Belgium, Switzerland, Uruguay, Australia, Afghanistan, Ghana** (para 121.5), **Luxembourg** (para 121.6), **Kazakhstan, Timor-Leste** (para 121.7), **Ukraine** (para 121.22), **Montenegro**, and **Uruguay** (para 121.23). These were all noted and Brunei has not indicated any change to its position.

Recommendations concerning Implementation of a Moratorium

14. **Costa Rica** (para 121.113) and **Mexico** (para 121.114) recommended Brunei abolish the death penalty and explicitly prohibit its application against minors. A number of States also recommended Brunei “maintain its de facto moratorium on the death penalty” or “establish an official moratorium” with a view to abolition. This included **Austria** (para 121.108), **Namibia** (para 121.109), **Australia, Greece, Brazil, Norway, Croatia, Italy, Denmark, Iceland, Chile, Austria, Holy See, France, Germany, Canada, Belgium**, and **Spain** (para 121.110). These were all noted, with the government stating that despite the presence of a de facto moratorium “it is important that Brunei Darussalam continues to preserve its sovereign rights to implement laws that protect the society against the most serious crimes and ensure justice for the victims and their family.”²⁹ Brunei has not indicated any change to its position.
15. Deterrence is one of the most repeated justifications that is advanced for the imposition of the death penalty. It is extremely difficult, if not impossible, to find empirical data on the deterrent effects of capital punishment. The studies do not provide definitive evidence on the impact of capital punishment when used on an extensive scale and/or for certain crimes such as drugs or economic crimes.³⁰ Therefore, Brunei should not rely on the deterrence argument to inform its position on the death penalty.
16. It is also important to note that whilst recommendations to “establish a moratorium on the death penalty” or “abolish the death penalty” are welcome, it is crucial that they remain specific and measurable in order to assess the level of implementation. Broad

recommendations, whilst easy to accept, lack any impetus to bring about real change.³¹ It is recommended that States adopt a SMART approach to recommendations as recognised by UPRinfo.³² This would help Brunei initiate an incremental approach to reducing the scope of the punishment and map out the process for abolition.

Recommendations concerning Amendment of the Revised Penal Code

17. A significant number of recommendations issued to Brunei focused on the repealing provisions of its revised penal code and ensuring that “any measures introduced are consistent with the State’s international human rights obligations and international human rights law”.³³ Recommendations from **Czechia** (para 121.37), **Denmark** (para 121.38), **Ecuador** (para 121.39), **France** (para 121.40), **Portugal** (para 121.46), **Sweden** (para 121.59), **Uruguay** (para 121.63), and **Malta** (para 121.69) made specific reference to the death penalty and capital offences such as “adultery, homosexuality, apostasy or blasphemy, contrary to the international commitments in human rights freely accepted by Brunei Darussalam”.³⁴
18. Brunei did not accept these recommendations and the provisions of the revised penal code remain in place. We call upon the government to amend its death penalty laws and harmonise them with international human rights law as a matter of priority.

C. Further Points for Brunei Darussalam to Consider

Creation of an Independent National Human Rights Institution

19. No NHRI exists in Brunei. **Ukraine, Costa Rica, Iraq, and Djibouti** (para 121.77) recommended Brunei “establish an independent national human rights institution in accordance with the Paris Principles”. Similarly, **Sudan** (para 121.78) recommended the establishment of “quality and quantitative institutions aimed at ensuring the ability to measure the level of progress in human rights”. These were all noted.
20. In the context of capital punishment, a future NHRI could undertake important work on pushing for the abolition of the death penalty from the country’s legal system, starting by limiting the types of crimes that attract the punishment. The NHRI could advise the government on the abolition process, provide public education on how capital punishment renders harmful effects upon society, and demonstrate its ineffectiveness as a penological policy on deterrence.

Embracing the Pluralism of Islamic Law to Circumvent the Application of the Death Penalty

21. A number of Muslim-majority nations retain the death penalty; however, its application is seen to vary. Some employ the use of capital punishment at alarmingly high levels whilst others apply it in the rarest of cases. Although religious justifications are often invoked by

such states, the diversity of practice implies that there is a lack of consensus amongst Muslims as to the nature and scope of the death penalty and this is reflected in Islamic law.

22. The continued justification of the death penalty by these States appears increasingly untenable as a reasonable interpretation of Islamic law, and this is aggravated by the possibility of judicial errors and unfair trials in capital cases. The notion of Islamic law as an immutable and static ideal inclines to produce, “legal doctrines that are far more rigid, explicitly harsh, and resistant to change than Islam’s historical tradition would have it – especially in criminal law.”³⁵
23. Given that Brunei’s penal code draws upon elements of Islamic law, it is recommended that the state adopts an eclectic approach that draws upon the legal opinions of the different doctrinal schools in Islamic thought which favour the preservation of life.³⁶
24. There should be a greater focus on utilising alternative interpretations on the question of the death penalty which is found under the fiqh genre. Fiqh is a man-made endeavour which is configured to varying degrees on epistemological hurdles and the advancement of alternative viewpoints. It is these alternative viewpoints on the status of the death penalty in Islam that must be given a platform, in order to effect real change.
25. Islam does not teach that the state must execute those guilty of serious crimes and neither does it insist on applying the death penalty. Whilst Muslims cannot deny the legitimacy of the death penalty in Islam, *in theory*, an enlightened reading of the faith demonstrates that it can contribute to the global promotion of flourishing lives and the protection of the right to life by the non-application of the punishment. The death penalty precludes the benefit of amnesty, pardon, or commutation of sentence. An execution is irreversible and an erroneous guilty verdict, whilst possible to be corrected on the record, cannot bring the executed person back to life.³⁷ The finality of the death penalty is recognised in Islam by the Prophet Muhammad’s injunction, which was adapted into a legal maxim, that any doubt must suspend the application of the death penalty for “it is better for the authority to err in mercy than to err in punishment.”³⁸

Adopting the UPR Recommendations to Enable the People of Brunei to Benefit from Advances in Effective Penology

26. The right to benefit from scientific advancement should also apply to the progress in social science research on the death penalty. The Universal Declaration of Human Rights, Article 27, states, “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”³⁹ and the ICESCR article 15 (1)(b) recognises the right of everyone, “[t]o enjoy the benefits of scientific progress and its applications.”
27. Roger Hood and Carolyn Hoyle have produced the leading social science and criminological investigations into the death penalty worldwide and have concluded:

[t]hose who favour capital punishment ‘in principle’ have been faced with yet more convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice. Some of them have set out on the quest to find the key to a ‘perfect’ system in which no mistakes or injustices will occur. In our view, this quest is chimerical.⁴⁰

28. Social science investigations now demonstrate that reflecting appropriate government means that whilst capital punishment could be created within a legitimate parliamentary process,⁴¹ it is now clear that the application of the death penalty renders an illegitimate and inhumane outcome.⁴² Abolition in Brunei would enable the people of the country to benefit from the advancement of the leading social scientific research on punishment policies.

The Universal Periodic Review Recommendations and the Contribution to the Sustainable Development Goals

29. Brunei should consider adopting the UPR recommendations as an expression of mutual reinforcement of the government’s commitment to promoting the Sustainable Development Goals.⁴³ The human rights values expressed in both the UPR and the SDGs can be woven together to promote policy coherence.⁴⁴

30. SDG 16 provides for “Peace, Justice and Strong Institutions” but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and “protect fundamental freedoms,” and to further this, SDG 16.A.1 identifies the importance of relevant national institutions, for building capacity at all levels, to prevent violence and combat terrorism and crime.

31. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society. This was affirmed in the Special Rapporteur’s report on ‘pay-back’ violence and killings.⁴⁵ The death penalty is antithetical to strong institutional processes for the fostering of the human dignity of the people of Brunei.

D. Recommendations

We recommend that, before the next cycle of review, the government of Brunei should:

- i. Adopt an implementation matrix for recommendations received during the fourth cycle of the UPR and effectively implement it.
- ii. Ratify the International Covenant on Civil and Political Rights (ICCPR).
- iii. Whilst it retains the death penalty, ensure it complies with the ‘most serious crimes’ principle under Article 6 ICCPR, restricting punishment to crimes of intentional killing only.

- iv. Develop, in consultation with civil society and relevant regional bodies, a comprehensive action plan to work towards a *de jure* moratorium, with a view to abolition, within the next four years.
- v. Affirm its commitment to SDG 16 on access to justice and strong institutions through its support at the next biennial vote on the UNGA Resolution on the moratorium on the use of the death penalty.
- vi. Accept UPR recommendations on the abolition of the death penalty, as also signalling Brunei's affirmation of commitments to SDG 16 on strong institutions.
- vii. Establish an independent National Human Rights Institution, in line with the Paris Principles, fully independent from the government.

¹ See <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=25&Lang=EN>.

² Cornell Center on the Death Penalty Worldwide, 'Brunei Darussalam (Brunei)', last accessed 30 March 2024, <<https://deathpenaltyworldwide.org/database/#/results/country?id=11>> (citing Constitution of Brunei Darussalam, part XI, art. 84(C); part VI, art. 30(c); Constitutional Matters II, Succession and Regency Proclamation, 1959, part II, art. 10(3)).

³ *ibid.*

⁴ Brunei Penal Code 1951 (Revised 2001), No. 16 of 1951, Laws of Brunei Ch. 22, art 435(1)(a); Brunei Internal Security Act 2008, arts 40-41; Brunei Public Order Act 2002, Laws of Brunei Ch. 133, art 28.

⁵ Brunei Misuse of Drugs, Second Schedule, Rev. Ed. 2001, arts 3–5, 15–16,.

⁶ Brunei Penal Code 1951 (Revised 2001), art 121.

⁷ *ibid* art 302.

⁸ *ibid* art 435(1)(a) and (b).

⁹ *ibid* art 364.

¹⁰ Brunei Syariah Penal Code Order 2013, art 75-76.

¹¹ Brunei Penal Code 1951 (Revised 2001), art 194.

¹² Dominik Müller, 'Brunei's Sharia Penal Code Order: Punitive Turn or the Art of Non-Punishment?' (2020) 1 *Journal of Islamic Law* 167,172-175.

¹³ *ibid* 176-179.

¹⁴ *ibid* 177.

¹⁵ International Covenant on Civil and Political Rights (1976) 999 UNTS 171, Article 6 (right to life); Article 7 (the prohibition against torture and inhuman or degrading treatment or punishment); and Article 14 (the right to a fair trial and the principle of equality of arms).

¹⁶ The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128, December 15, 1989.

¹⁷ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council Resolution, 1984/50; Additions to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic and Social Council Resolution 1989/64; and the Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic Council Resolution 1996/15.

¹⁸ See eg, ECOSOC Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General UN Doc E/2015/49 (13 April 2015).

¹⁹ See eg, Report of the Secretary General, Question of the Death Penalty, A/HRC/27/23, 30 June 2014.

²⁰ For example, *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

²¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 10 December 1984.

²² Article 37(a) Convention on the Rights of the Child, G.A. Res 44/25, 20 November 1989.

²³ UN Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018.

²⁴ *ibid* para 50.

²⁵ Resolution on the Moratorium on the use of the death penalty, UNGA Res. 62/149, 18 December 2007 *adopted by 104 votes to 54, with 29 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 63/168 18 December 2008, *adopted by 106 votes to 46, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 65/206 21 December 2010 *adopted by 109 votes to 41, with 35 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 67/176 20 December

2012, adopted by 111 votes to 41, with 34 abstentions; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 69/186 18 December 2014 *adopted by 117 votes to 37, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 71/187, 19 December 2016 *adopted by 117 votes to 40, with 31 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 73/175, 17 December 2018 *adopted by 121 votes to 35, with 32 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 75/183, 16 December 2020 *adopted by 123 votes to 38, with 24 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 77/222, 15 December 2022 *adopted by 125 votes to 37, with 22 abstentions*.

²⁶ UNGA, ‘Note verbale dated 13 September 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General’ (16 September 2019) UN Doc A/73/1004.

²⁷ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Brunei Darussalam- Addendum’ (3 September 2019) UN Doc A/HRC/42/11/Add.1, paras 1-4.

²⁸ See UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Brunei Darussalam’ (25 June 2019) UN Doc A/HRC/42/11.

²⁹ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Brunei Darussalam- Addendum’ (3 September 2019) UN Doc A/HRC/42/11/Add.1, pg 8.

³⁰ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 294, 393.

³¹ Amna Nazir, ‘A UPR Perspective on Capital Punishment and the Kingdom of Saudi Arabia’ (2022) 19 Muslim World Journal of Human Rights 77-94.

³² See UPRinfo, ‘For impact on the ground the UPR needs SMART recommendations’ <www.upr-info.org/en/news/for-impact-on-the-ground-the-upr-needs-smart-recommendations> (21 October 2015).

³³ Recommendation 121.57: Repeal the revised Penal Code Order, and ensure that any measures introduced are consistent with the State’s international human rights obligations and international human rights law (Slovenia).

³⁴ Recommendation 121.40: Repeal the provisions of the new Penal Code providing for corporal punishment and the death penalty for several crimes, including adultery, homosexuality, apostasy or blasphemy, contrary to the international commitments in human rights freely accepted by Brunei Darussalam (France).

³⁵ Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (CUP 2015) 321.

³⁶ See eg Amna Nazir, ‘Islamic Member State and the Scrutiny of the Death Penalty in the Universal Periodic’ (PhD thesis, University of Birmingham and Birmingham City 2019).

³⁷ Working Group on the Death Penalty in Africa, ‘Study on the Question of the Death Penalty in Africa’ (The Gambia: Baobab Printers) 39.

³⁸ al-Tirmidhī, *Jāmi’ al-Tirmidhī*, Hadith no. 1424.

³⁹ It is further recalled that the Human Rights Council determined that the basis of the Universal Periodic Review includes consideration of the Universal Declaration of Human Rights, see, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1 18 June 2007.

⁴⁰ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 7-8.

⁴¹ John Rawls stated, “[a]t some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy,” in, *Political Liberalism* (Columbia University Press 2005) 248.

⁴² Austin Sarat stated, “law cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves,” in, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press 2001) 21.

⁴³ See the UN Sustainable Development Goals website, <https://sustainabledevelopment.un.org/?menu=1300>.

⁴⁴ The first two cycles of the UPR were reviewed under a data mining procedure and of the circa. 50,000 recommendations, it was possible to link more than 50% of those to SDG targets, see, The Danish Institute for Human Rights, Linking the Universal Periodic Review to the SGGs, p. 2.

⁴⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Mission to Papua New Guinea (3 to 14 March 2014), A/HRC/29/37/Add.1, 30 March 2015, para. 96, “...several interlocutors shared the opinion that the death penalty might actually lead to further killings... given the payback culture. While the Special Rapporteur condemns the existence of the payback culture, he acknowledges that payback-related killings might increase if the death penalty is carried out.