

Trials and Tribulations of Decolonizing and ‘Constitutionalising’ Brunei.” A critical study of R. H. Hickling’s 1955 Constitutional Memorandum on Brunei.

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I

Introduction

R. H. Hickling, then serving as the Assistant Attorney General of the Sarawak Government, visited the neighbouring sultanate of Brunei on 9 November 1954. His was a special mission¹ : Among other things to conduct research on Brunei’s (prevailing) constitutional status and to write an aide memoir to the Colonial Officials as the British required a clearer picture of the country’s history and political traditions before introducing a written constitution.²

Exactly fifty years earlier, Malcolm Stewart Hannibal McArthur (1872-1934), a member of the Strait Settlements civil service (later known as Malayan civil service) came to Brunei on a somewhat similar but more decisive mission. The British sent him to Brunei with a more pressing agenda than Hickling’s. On McArthur’s report: the fate of the Sultanate hung;³ whether it was to continue as an independent State or to be partitioned between neighbouring Sarawak ruled by the white Rajah Charles Brooke,⁴ and North Borneo ruled by the British North Borneo Company.⁵ Having examined various options for the future of Brunei McArthur took the view that the truncated sultanate must be preserved as an independent entity. His recommendation was to introduce a British Resident and to reform the institutions of governance. As a sequel the British introduced a supplementary Treaty in 1905/1906 along

¹ CO 1030/113, Hugh Ellis (Chief Secretary Sarawak) to CO, 19 November 1954 mentioned that Hickling ‘moved to Brunei ten days ago.’ In fact, Hickling’s visit was originally meant to brief the Sultan and his advisers about the British proposals for the new constitutional status for Brunei, and at the end of this mission, Hickling was asked to stay on and prepare the Memorandum.

² ‘Much research and inquiry on the spot would be necessary to establish authoritatively the details of the traditions and customs governing the succession to the Sultanate and other matters of constitutional importance.’ Ibid.

³ The report is now available in the form of an excellent printed edition. See, M. S. H. McArthur, *Report on Brunei 1904*, introduced and annotated by A. V. M. Horton, Athens: Ohio University, Monographs in International Studies, Southeast Asia Series, No. 74. 1987.

⁴ For details of Brooke Rule in Sarawak, see R. H. W. Reece, *The Name of Brooke: The End of White rajah Rule in Sarawak*, Kuala Lumpur: Oxford university Press, 1982., Steven Runciman, *The White Rajahs: A History of Sarawak from 1841 to 1946*, Cambridge: Cambridge University Press, 1960. R. Payne, *The White Rajahs of Sarawak*, London: Robert Hale, 1960., S. Baring-Gould and S. Bamfylde, *A History of Sarawak under its two White Rajahs, 1839-1908*, London: Henry Sotheran, 1909.

⁵ See, K. G. Treggoning, *A History of Modern Sabah (North Borneo- 1881/1963)*, Singapore: University of Malaya press: 1965. K. G. Treggoning, *Under Chartered Company Rule,(North Borneo, 1881-1963)*, Singapore: University of Malaya Press, 1958

the lines of similar treaties signed with the Malay rulers in peninsular Malaya.⁶ As a result Brunei survived.

The Hickling memorandum does not have the same significance in so far as changing the status quo of Brunei.⁷ Nor it is appropriate to compare the two. McArthur's report is by far a more original and piercing study of the Brunei society than whatever Hickling attempted. Indeed, the latter relied heavily upon McArthur's report.⁸ Hickling certainly lacked the passion and persuasion of McArthur, who with a missionary zeal prevented Rajah Brooke from snuffing out the last remnants of Brunei's (monarchic) sovereignty. Understandably, his report earned much kudos from the Colonial Office notwithstanding the old Rajah Charles Brooke's protestations about McArthur's bias against Sarawak.⁹

If McArthur spent six months in Brunei (from May to November 1904) to prepare the Report, Hickling had a period of less than two months from November to December 1954. Unlike McArthur, Hickling had not served in the colonial establishment for long, and he therefore lacked the same level of experience. His first posting in the colonial legal service was in Sarawak in 1950, and he was still learning his job as a young deputy attorney general. Besides lacking time and experience, Hickling did not have access to critical primary sources as he himself admitted 'my researches have to some extent been impaired by lack of material.'¹⁰ The rudimentary archives maintained by the British Resident's office in Brunei were scanty in the first place. Records, if there were any, had been destroyed during the Pacific War when the Japanese occupied Brunei from December 1941 until June 1945, and during the Allied bombings. Consequently Hickling's introductory remarks on history and the background of Brunei were mostly culled from secondary sources. Unlike McArthur, Hickling seemed to have not interviewed many people: McArthur was fully conversant in Malay and interacted very well with Bruneians in all walks of life.¹¹ Moreover, while McArthur became the first British Resident in Brunei in the aftermath of his Report, Hickling went on transfer to Malaya immediately after he submitted his memorandum.¹²

Despite these shortcomings, the Hickling memorandum did alert British officialdom to treat Brunei deferentially before taking any decisions about the country's future. After all, his objective was to study the government of Brunei and to help producing a draft constitution, as 'it is necessary to establish beyond doubt exactly what form of government is constituted by the State of Brunei'.¹³ Consequently he became convinced of the fact that Brunei 'is a Malay State with a living constitution based upon a strong sense of history.'¹⁴ And that conviction is clearly articulated throughout his memorandum. Since he was also part of the legal team of

⁶ On the origins of the first of such agreements, namely the Pangkor Engagement, see C. N. Parkinson, *British Intervention in Malaya 1867-1877* (Singapore: University of Malaya Press, 1960); E. Sadka, *The Protected Malay States 1874-1895* (Kuala Lumpur and Singapore: Oxford University Press, 1968). See also article VI of the Pangkor Agreement, in W. G. Maxwell and W. S. Gibson, eds., *Treaties and Engagements Affecting the Malay States and Borneo* (London: Jes. Truscott, 1924); also in J. de V. Allen, A. J. Stockwell and L. R. Wright, eds., *A Collection of Treaties and other Documents affecting the States of Malaysia 1761-1963*, 2 vols. (New York and London: Oceania Publications, 1981).

⁷ In fact, at the request of the higher British officials the exact nature of McArthur's mission was to be concealed from the Brunei Malays. See Horton, 'McArthur Report on Brunei', p. 4

⁸ See Hickling *Memorandum*, pp 14-18

⁹ See for instance see, Whitehall's remarks on McArthur Report. "far the best that has ever been written", "excellent" and "exhaustive and very useful" Quoted in Horton, 'Report on Brunei', p.3 citing C.O. sources. Crisswell, Rajah Charles Brooke, p. 197.

¹⁰ Hickling *Memorandum*, para 84.

¹¹ McArthur was 'popular with the people of Brunei generally, and when he revisited the country in 1958, after an absence of ten years, he received a friendly reception'. Horton, McArthur Report, p. 10

¹² CO 1030/113, High Commissioner to CO, No 47, Secret, 23 March 1955.

¹³ Hickling *Memorandum*, para 134.

¹⁴ *Ibid*, para 41.

the Sarawak Government that was drafting the initial constitutional legislation for that Colony, his ideas naturally percolated into the ideas concerning the sharing of power between the colonial administration and Brunei monarch.

Hickling memorandum is undoubtedly valuable to the students of modern Brunei history in several respects. Above all, it reflected colonial officials' perceptions of the de facto constitutional status of the Brunei sultanate especially in the aftermath of the Pacific War. Despite its relevance for a study of Brunei's constitutional history, few have accessed this report in any detail before Hussainmiya summarised it in his book on 'Sultan Omar Ali Saifuddin III'.¹⁵ Copies of the memorandum are to be found in the Brunei National Archives,¹⁶ Sarawak Archives in Kuching and the British National Archives. Hickling also retained a copy that was lent to the authors for the preparation of this edition.¹⁷ The memorandum has never been published in full. Like McArthur's report, its content deserves to be read by the public, especially in Brunei. In view of its intrinsic value for Brunei historians, administrators, lawyers, researchers, students and others interested, the authors have sought to make it accessible to the public by publishing this annotated edition which should appear in print soon.

Hickling completed his memorandum when Governor Abell was away in England spending his furlough. 'Hickling had made such a good progress with the work' were the words from *locum tenens*, the Acting High Commissioner for Brunei, C. J. Thomas who forwarded the Hickling memorandum (as annexure 'A' to his despatch No. 47 of 23 March 1955)¹⁸ for the perusal of the officers in the Colonial Office in London. The acting High Commissioner commended Hickling:

"Hickling's memorandum is a most valuable summary of past constitutional history and practice in Brunei; it will make accessible to your advisers, who are aware of the strong sense of tradition in evidence today in the Malay States, much information not otherwise readily available."¹⁹

Hickling also proved himself a valuable addition to the Sarawak legal team responsible for drafting the constitution for Sarawak. He was praised for 'his untiring labour in research and skill in drafting prior to his arrival in Brunei [in November 1954.]'²⁰ His work on the memorandum started even before he reached Brunei.

Prior to that Sultan Omar Ali Saifuddin had instructed the Malay Constitutional Committee to submit a report to make its own recommendations, from a Brunei Malay perspective, for action by the Colonial Office. The Committee was expected in the main to advise the Sultan on the drafting of a constitution, the establishment of district councils, and the reorganisation of the State Council. Before he completed his own report Hickling did have access to the draft received by the Sarawak authorities in November 1954.²¹ Some of its recommendations were too drastic contrary to the British expectations to organise the political future of Brunei by safely and gradually transferring power to the Bruneians. Among

¹⁵ See, Hussainmiya, Sultan Omar Ali Saifuddin and Britain, pp 149-150.

¹⁶ The version available in the Brunei National Archives in Bandar Ser Begawan is slightly different from the original version found in Kuching and with the author, Hickling. It is typed in a different format and contains minor alterations of some words.

¹⁷ The authors of this edition wish to express their deep gratitude to Professor Hickling for his kindness to loan his own copy.

¹⁸ We have not been able to trace the original annexed report in the correspondence series, however.

¹⁹ CO 1030/113, High Commissioner to CO, No 47, 23 March 1955, para 5.

²⁰ CO 1030/113, High Commissioner to CO, Saving, 104, 5 August 1954.

²¹ The English translation of the report of the Brunei Constitution Advisory Committee as it was known enclosed as Annexure I to Brunei Despatch No 46, CO 1030/114, and High Commissioner to CO, 23 March 1955.

the contentious proposals was regarding the appointment of a Menteri Besar who would replace the British Resident. The authorities believed that such a move meant handing over the power from the British authority to the Sultan without any safeguards. Yet, the British officials felt 'on the subject of constitutional advance the Committee's main recommendations were sound and could be accepted in principle by the Sultan in Council'.²² It was left for Hickling to counter the Malay Committee's demands and his version in some ways served as a rejoinder to the Malay report.²³ He, however, refrained from commenting point by point directly on all the recommendations which were listed at the end of the Memorandum.

Both the memorandum and Malay committee report were produced at a time of changing political reality in Brunei in the early 1950s under a new Sultan, Sultan Omar Ali Saifuddin III, *Sa'adul Khairi Waddien*, who was crowned in June 1950. He was a man of remarkable character as a man with an iron will determined to restore effective sovereignty of the Brunei Ruler. In pursuant of his predecessor Sultan Ahmad Tajuddin's wish, the new Sultan stepped up efforts to renegotiate the 1905/06 Treaty with Great Britain.

Unlike his two predecessors, ascending the throne as a 35 year old, Sultan Omar Ali Saifuddin, the Brunei's twenty-eighth ruler, was already a mature person.²⁴ Gone were the days of penury; he ruled over a little sultanate that was now one of the British Commonwealth's major oil-producing countries and on its way to becoming a super-rich state. For better or worse, the Western-style government introduced by the British had ended the political instability caused by disunited and too frequently self-seeking nobility. More importantly the British administration had laid the foundation for a strong and centralised state machinery, which helped to revive the prestige of the Brunei monarchy itself.

Having ascended the throne in 1950 with the full blessings of the British Government, Sultan Omar Ali Saifuddin was determined to advance his country socially, politically and economically.²⁵ In measured steps, he began to assert his independence and challenge the British administration by the Resident. The 1905/06 agreement was becoming untenable because it could not restrain this strong-willed sultan. Moreover, the ruling class sought more latitude to make political decisions and to enjoy the fruits of Brunei's swelling wealth. Both

²² CO 1030/113, Saving, No 104, High Commissioner to CO, 5 August 1954. Para 3 of the despatch mentioned that "But on the whole the report is moderate in tone and stresses the sincere friendliness and permanence of the relationship between the United Kingdom and the State of Brunei".

²³ In a nutshell, the committee recommended an administration to be conducted by a Brunei Malay Menteri Besar (i.e. Chief Minister), with a Brunei Malay State Secretary as the Government's Chief Spokesman, and a number of other Malay officials. A British Adviser was to offer *nasihat* (good advice-translation, palatable advice!) to the Sultan and administration, while the powers of the High Commissioner were to be transferred to the Sultan in Council. See Hussainmiya, *Sultan Omar Ali Saifuddin III and Britain*, p. 148

²⁴ Sultan Omar Ali Saifuddien III was born on 23 September 1914 in Kampung Sultan Lama, a ward of the famous Kampung Ayer (the Water Village). As a young prince, known as Pengiran Muda Tengah, Omar Ali Saifuddien had been well prepared for his future duties. He was the first of the Brunei sultans to receive formal education in a foreign institution. In 1932 he, along with his two royal cousins, enrolled at the Malayan College in Kuala Kangsar, Perak. Dubbed the Malay Eton, this was a model residential school established to educate the children of the Malay ruling class.

²⁵ The State's income of \$1.5 million in 1932 multiplied to a staggering \$276.6 million in 1952, an 18,000% increase. Income from oil alone (\$1.1 million) had been 73% of the State revenue in 1932 but in 1952 it was 98% (\$270.1 million) of the total exports. Government revenue came substantially from the royalty payments and taxes paid by the oil company. Between 1932 and 1941 the royalty payments had been \$8.5 million, which then increased to a total of \$75.5 million between 1946 and 1952. After the introduction of a 20% flat tax on the income of companies stipulated in the Income Tax Enactment of 1949 (rose to 30% in 1953), the government received an additional \$81.6 million from that source in 1951/52. B. A. Hussainmiya, *Sultan Omar Ali Saifuddien III & Britain*. Chap. 3.

the British administration and the sultan faced another lurking danger around the corner: a rising nationalist movement, modelled on the Sukarno-style Indonesian freedom movement, demanding a lion's share of power to the common people.²⁶

In the face of a growing demand by the sultan and his Pengirans to revise the British-Brunei treaty, as well as to formalise the issue of succession to the throne,²⁷ it was timely for the British to review and re-organise the power structure in Brunei. In view of changing British-Brunei relations, Abell wanted to limit the autocratic powers of the Sultan either through a treaty, or more importantly through constitutional safeguards based on British democratic ideals. The crucial question was: did the British government have the legal authority to frame a constitution for Brunei? Under the 1905/06 supplementary agreement, the Brunei sovereign was an independent ruler, and enjoyed equal status with a British monarch. Thus as Brunei was an independent monarchic state rather than a colony, the British could not launch a constitution through an order-in-council. In effect, Britain could do nothing to contravene the terms of a treaty that recognised the sultan's sovereignty.

The Memorandum

This was the context in which the Hickling mission to Brunei took place in November 1954. During his short stay in Brunei in November and December in 1954 Hickling worked feverishly to complete the memorandum with available meagre resources.²⁸ His knowledge of constitutional law, and some ideas on Islamic legal matters proved handy.²⁹ As for the 'protectorate' background of the sultanate, Hickling consulted mostly the confidential prints of the British Foreign Office, copies of which were available in both the Sarawak secretariat and the Resident's office in Brunei. As for the history of the sultanate the Brunei Annual Reports provided useful information, especially the 1946 edition while Inche Raus Amin's version of Brunei history³⁰ also proved a handy reference. Besides, Hickling did interview some important members of the local intelligentsia including Chinese community leaders.

The completed memorandum was presented to the Sultan by the acting Governor (*locum tenens* to Anthony Abell who was on leave) Lieutenant High Commissioner, Cecil James Thomas. The meeting in which Hickling, the Brunei Resident, J. O. Gilbert, and the two principal wazirs participated. took place at the palace, the Istana Darul Hana,³¹ on 16 and 17 December 1954. Thus during the drafting of the preliminary version, and during the discussions in both Sarawak and Brunei, Hickling played an important role, especially because he was acting for the Attorney General, George Strickland, who also went on leave to England.

²⁶ See Hussainmiya, *Sultan Omar Ali Saifuddien III & Britain*, Chp. 4.

²⁷ A Bruneian scholar, Metassim Haji Jibbah, underscores this issue based on his interview with Pengiran Pekerma Seti Di Raja Sahibul Bandar Pengiran Dato Haji Ali bin Pengiran Haji Daud, a close associate of the Sultan: 'One may argue that the reason why Sultan Omar Ali intended to give a Brunei Constitution was to regulate the succession issue'. (The Sultan's nomination in 1950 had been contested by the daughter of Sultan Ahmad Tajuddin). 'Political Developments in Brunei with reference to the reign of Sultan Omar Ali Saifuddin III (1950-1967), Unpublished MA Thesis, University of Hull, 1983, p.23 n 7.

²⁸ Hickling Memorandum, para.84.

²⁹ Hickling cited A.A.A.Fyzee, *An introduction to the Study of Mahomedan law*, London[etc.] H.Milford, Oxford University press, 1931, p. 44.

³⁰ Raus bin Haji Muhammad Amin, "Stories of Brunei", August 1942- with an introduction by Che Harun and translated by Mr. P. Scanlon, 1951, Mss Pac s55 (in the Rhodes House, Oxford.)

³¹ CO 1030/113, High Commissioner to CO, Secret No. 46, 23 March 1955, para 2.

R. H. Hickling (1920-)

Hickling's autobiography *Memoir of a Wayward Lawyer* that appeared only very recently published by the University Kebangsaan Press, Bangi³² reveals his mindset and assumptions. In it he was looking back on many past events with a current perspective. A prolific writer he was also penned several other works, mostly novels and short stories,³³ some of which contain reflections of his own experiences in the east.

Reginald Hugh Hickling is now living a quiet retired life in England at Malvern, Worcestershire.³⁴ He had a distinguished career in the Colonial legal service and besides his service in Southeast Asia he offered legal advice to many countries including Sri Lanka, Yemen Arab Republic, and Gibraltar. In the early phase of his career he was not keen to become an academic. But close upon reaching his fifties he became a Lecturer in South East Asian Law in the School of Oriental and African Studies in London, U.K. where he obtained his PhD in law. He followed his old footsteps to Southeast Asia but this time as Professor of Law and spent most of his academic life in Southeast Asia in Singapore and Malaysia and he still holds an adjunct Professorship of Southeast Asian Law at both the Universiti Kebangsaan Malaysia where he taught law for six years and the Charles Darwin University (formerly the Northern Territory University) in Darwin, Australia. Besides fiction, he also published serious academic treatises on various legal topics including Malaysian Law.

Hickling was born in Derby, Derbyshire, England on 2 August 1920. His father was a policeman who had high expectations for his son, hoping that he would win a scholarship to Oxford or Cambridge and so join the elite. However, Hickling did not enter Oxford. At the interview, which was a part of the entrance examination he was asked to evaluate poems of William Wordsworth and a lesser-known poet, A.E. Housman. Although the answer was clear, Hickling rated the poetry of the Housman as being worthier than those of Wordsworth. The answer shocked the examiner and Hickling failed. Reminiscing on the event, Hickling says the examination system is based essentially on "diplomacy, rather than scholarship". From the time of that fateful interview, I have been suspicious of brilliant achievement."³⁵ It showed a streak of rebelliousness in the young man who wanted to do the things that he liked most. By his own admission, he felt somewhat uneasy with the Englishmen of Oxbridge educated elite especially those who held power in the colonial establishment. A grammar school pupil, he felt uncomfortable with the Winchester trained boys.³⁶

After 6th form education, he became an articled clerk in a law firm, and enrolled for one year of approved academic study at the East Midland School of law.³⁷ When he sat for the law finals in 1939, the war broke out and he became an ordinary seaman in the navy. At the end of the war, he sought employment with law firms in London and after 1946 he worked as deputy solicitor for the newspaper *Evening Standard*.

Hickling and his wife were heart broken when their firstborn child died. They sought a change in environment. On his wife's suggestion they wanted to move as far away as possible from England. So he applied to join the colonial legal service. He had a choice for his first posting overseas-- Sarawak or Swaziland. He preferred the former as a result of encouraging

³² R. H. Hickling, *Memoir of a Wayward Lawyer*, Bangi: UKM Press, 2000.

³³ For example, see R. H. Hickling, *Festival of Hungry Ghosts*, London: Macdonald, 1957, *Dog Satyricon*, (A collection of short stories), Petaling Jaya: Pelanduk Publications 1994. *The Prince of Borneo*, Singapore: Graham Brash, 1985., *Lieutenant Okino*, London: Hutchinson, 1968

³⁵ Hickling, *Memoir of a Wayward Lawyer*, p. 40.

³⁶ *Ibid.*

³⁷ Hickling, *Memoir of a Wayward Lawyer*, p.56

words from Sir Charles Arden Clarke, the outgoing Governor.³⁸ Despite his unfamiliarity with the eastern and especially the Malay way of life, Hickling moved to Sarawak with much satisfaction. Little did he think in those days that 'I was destined to be one of the Englishmen who cheerfully assisted in the dissolution of Empire.'³⁹

In Sarawak, he first worked under Arthur Grattan-Bellew, the Attorney General who was succeeded by George Strickland, the only legal officers in government service. The latter doubled as ex-officio legal adviser for Brunei. Obviously this was an unsatisfactory arrangement, 'but with not enough people available in service, nothing could be done'.⁴⁰ In any case, there were political proposals to join Sarawak, Brunei and North Borneo. The launching of a central judiciary in 1951 for all three Bornean States, which the Bruneians resented, was part of this scheme. When the Application of Laws Enactment was passed in 1951 giving effect to new legal changes in all the three territories simultaneously, the Brunei State Council had to approve the legislation, albeit after much dilly-dallying.⁴¹

In his capacity as an ex-officio legal adviser based in Sarawak, Hickling learnt more about Brunei laws. Thanks to his academic background and wider knowledge of colonial laws he had the credentials for making a study on Brunei in 1954.⁴² In contrast, Denis McGilligan from the Sarawak Civil Service who had been appointed as Deputy Legal Adviser in Brunei in the previous year lacked local experience. Moreover, the Attorney General was on leave in England. In fact, Hickling was to have been transferred to Malaya, but his transfer had been held up because of this new assignment.⁴³

Hickling was a man of fond of traditions. By his own admission, "when I joined the navy as an ordinary seaman I had discovered - to my own surprise - that what held war together was tradition."⁴⁴ As far for the traditional Malays in particular, he became convinced, that 'Adat' played a leading role in influencing local custom that was vital in dealing with local societies. Other 'dominant themes' of his life were 'democracy, justice and tradition.'⁴⁵

Apparently Hickling's mindset was inclined to gradualism, and conservatism. For him, novel ideas could be 'introduced after much conditioning of the people to be affected, a view he applied to Sarawak's case. In an article he wrote in 1956, he quoted Malinowski, a sentiment that could also have been attributable to James or Charles Brooke. "Rashly applying our morals, laws and customs to native societies would lead to 'moral atrophy' and extinction of culture and race, the anthropologist had written", words as Hickling put it 'terrifying to the colonial servant'. But self-government, the contemporary objective of colonial administration, could not be attained without bearing them in mind. Self-government had to be 'attained, if possible, by the maintenance of a stable society, whilst at the same time that society is being persuaded, and indeed urged, advanced to a point at which it is capable of survival in the modern world.... the laws must have its roots in society, lest it prove meaningless.'⁴⁶

As a person who loved traditions, what were his feelings and attitude towards the Brunei Sultan Omar Ali Saifuddin who led his state on a 'neo-traditionalist' path? In retrospect, Hickling seemed to have had a soft spot for the Sultan who was 'sensitive, thoughtful, modest

³⁸ Letter Ibid, p from Hickling to Tarling, 18 November 1997.

³⁹ Hickling, *Memoir*, p.23.

⁴⁰ Letter from Hickling to Tarling, 18 November 1997.

⁴¹ It regulated the application in the State of the common law of England, the doctrines of equity and statutes of general application. Details in Hussainmiya, Sultan Omar Ali Saifuddin & Britain, p. 132.

⁴² Hickling to Nicholas Tarling, Correspondence, 7 November 1997p. 3.

⁴³ CO 1030/113, Saving No. 194, High Commissioner to CO, 5 Aug 1954, para.13.

⁴⁴ Letter from Hickling to Tarling, 18 November 1997.

⁴⁵ Ibid.

⁴⁶ R. H. Hickling, 'The Flight of the Hornbill', *Sarawak Gazette*, 30 March 1956, No 1185.

and democratic spirit.’⁴⁷ In fact, Hickling later admitted that he ‘felt closest to the Sultan’ compared to the High Commissioner and the Resident with whom he had official dealings. Moreover, Hickling’s main objective as far as he could remember was to confirm the authority of his Highness [the sultan] to promulgate a constitution for the State. And that ‘the Sultan could properly do what he sought to do.’⁴⁸ In the context of his own admissions, therefore, it seems clear at least in hindsight that Hickling’s sympathies were very much with the Sultan who enjoyed a royal prerogative to *grant* a constitution for his people, and British could only advise him in the process.

But could Hickling, being a colonial servant, so blatantly underwrite the Sultan’s powers to promulgate a constitution? What would be responsibility of the British who had preserved the sultanate under their protection for so long? One must remember that Hickling wrote his memorandum while he was still a newcomer in the colonial service. Wanting in much needed experience, he chose to walk a tightrope, contriving to prop up the official line of thinking on the political future for Brunei. As long as he found the right sources to support his views he thought he would be on safe ground by offending neither the British officialdom nor the Sultan’s party.

The memorandum deals with many salient aspects of Brunei history, society, law government, politics, and above all its constitutional status vis-à-vis British protection. It provided succinct summaries on all these issues. Though his sources were not exhaustive, Hickling actually was not off the mark with his findings given the state of knowledge we have even today on Brunei politics and history. He was not a scholar of Malay history and politics to refer extensively to systems practised in other states of the Malay Peninsula in understanding Brunei’s traditional government. Even so, despite limitations of time and sources, Hickling achieved something worthwhile to make us understand the situation of Brunei politics and government of the 1950s. When Hickling wrote his memorandum, as mentioned earlier, he referred mostly to second hand information dealing with sources on Brunei history and traditions. Since then more details have come to light from the writings of scholars on Brunei.⁴⁹ However, Hickling was among the earliest to highlight some important sources, using them to support cogent arguments for treating Brunei with care, albeit sternly. In effect he endeavoured to persuade by implication rather than conviction.

Among British officials who reported on Brunei in the past, Hickling emphatically underscored the fact that Brunei had a ‘constitutional government’ of old vintage implying that whatever changes were proposed must respect the sultanate’s age-old strong traditions and history. The Sultans of the pre-residential era governed with a set formula. Although these were not very complex, the system provided clear cut rules about land and tenurial rights on a hierarchical basis. The government structure, at the apex of which was the Sultan, was organised specifying rights and duties for functioning officials. As early as the 16th century Brunei practised elaborate statecraft similar to the legendary kingdom of Melaka which is regarded as an archetypal Malay State. A sixteenth century document written by a Spanish official from Manila who had been to Brunei explains minute details of its

⁴⁷ Hickling Memorandum, para 41. Hickling in his story ‘The Chief Minister’s House’-where he appears in the guise of The Gin and Tonic-he quotes an old Towkay at a meeting on the proposed constitution:” would you please go back to His Highness the Sultan and explain that we are very grateful to him for his thoughtfulness, and we have no doubt that this democracy business you mention is a good idea but, if is all the same to him, tell him we are quite happy with the present system, and shall be content if he would leave things as they are.’ The Gin and Tonic reacted with horror, now he thinks that ‘I was being clever,...but he was simply wise’. *The Dog Satrycon*, Petaling Jaya:Pelanduk Publications, 1994, p.4

⁴⁸ Ibid,

⁴⁹ Eg., D.E. Brown, B. A. Hussainmiya, A.V.M. Horton, G. Saunders.

government and institutions including its legal system.⁵⁰ Furthermore, the nineteenth-century sources provide fairly lengthy description both the ideal and actual government of Brunei.⁵¹ Hickling cited local authorities listing the duties and obligations of the traditional state officials, namely the Pengiran Bendahara, the Pengiran di Gadong, the Pengiran Pemancha, the Pengiran Temenggong, and Pengiran Shahbandar. The Sultan was not an absolute monarch, but must consult his principal officers before taking major decisions for the State as Hickling concluded "...in theory it will be clear that the Sultan has always been regarded as constitutional monarch, acting on the advice of his Ministers."⁵² In reality, however, on the eve of the British protectorate rule, the Sultan only possessed, as McArthur says 'the shadow of power conferred by his so-called sovereign rights'.⁵³

Hickling's approach was a marked departure from the viewpoint of several nineteenth-century Western observers who commented disparagingly about the Brunei system of government. Such portrayals by the British officials were influenced by certain objectives: either to end the monarchy in Brunei or to recommend modern methods of reforming it. Thus James Brooke saw his original task in Sarawak, as 'restoring legitimate Government' in an area in which it had collapsed.⁵⁴ Brunei virtually lacked Government according to the British Consul Hewett, who said that 'properly speaking it cannot be said that anything in the nature of a Government has up to the present existed in Brunei'.⁵⁵ McArthur was no exception when depicting Brunei as having 'no system of Government in the usual acceptance of the term-- but only ownership'.⁵⁶

For Hickling, Brunei did have a government and its form was not peculiar to Brunei. One must bear mind that in the Malay states in general government was conducted more on a personal basis than in a bureaucratic style. In the words of a modern scholar of the Malay States, 'Authority was not specific, functional and institutionalised, but personal and generalised'.⁵⁷ Such a form of government was different from that in the modern West, but it was still very much a form of government. Some accounts likened the Brunei situation to the ancient feudal system in Europe.⁵⁸ The government in Brunei followed not only customary law, but as Hickling would argue it formed part of its *own* (unwritten) Constitution. To illustrate, Hickling quoted extensively from a letter of 1885 in which the Sultan described key features of the Brunei 'Constitution' and said, 'Since we became Sultan this long time we have followed the ancient custom of former Sultans. After our death our successor must follow these customs, in order that no complications may arise in the country'.⁵⁹

⁵⁰ J. S. Carrol (ed.); 'Brunei in the Boxer Codex', *JMBRAS*,

⁵¹ Brown, op. cit., pp. 86-118.

⁵² Hickling Memorandum, para 34.

⁵³ Citing from McArthur's *Report on Brunei*, Hickling, p.17

⁵⁴ Nicholas Tarling, 'Brooke Rule in Sarawak and its Principles'. *JMBRAS*, 65(1), 1992, p. 15.

⁵⁵ Quoted from Hickling Memorandum, para 16. Hickling described Hewett 'as a prejudiced observer'.

⁵⁶ McArthur, *Report on Brunei*, para 54.

⁵⁷ Heather Sutherland, 'The Taming of the Trengganu Elite', Ruth McVey (ed.), *Southeast Asian Transitions: Approaches through Social History*, New Haven and London, Yale University Press, 1978, p.

⁵⁸ 'I cannot better convey an idea of this Form of Government, than to say it bears a near resemblance to our ancient feudal system; for, although there is more respect paid to the Regal Power here, than in any other Malay country I have been in, (for this obvious reason, that the Sultan has entirely the power of appointing the great Officers of state, and each of course can always influence the public councils) yet, however, each Pengiran has the entire sway over his particular Dependants, whose cause they never fail to espouse, even where he may stand in opposition to the Sovereign Authority'. John Jesse, 'Substance of a Letter, to the Court of Directors, from John Jesse, 20 July, 1795, at Borneo Proper'. In Alexander Dalrymple, (ed.), 1791-1797 *Oriental Repertory* II, 1, pp. 1-8 Bigg, London, p. 6. Cited in Brown, *Brunei: The Structure and History*, p. 90.

⁵⁹ *Ibid.*, p. 10. See also D. E. Brown, 'Sultan Abdul Mumin's Will and Related Documents', *BMJ*, 3 (1974), pp 156-70.

One of the difficult issues which Hickling had to deal with was in regard to the nature of sovereign powers of the Sultan under the British protection because there was 'some difficulty in deducing the true constitutional position of sovereignty in Brunei', given the wide powers in the supplementary agreement and subsequent constitutional practice.⁶⁰ Hickling also entered into the perennial arguments about the nature of British control over the Protected States. Colonial authorities and scholars have not agreed on a clear definition of a protected state and a colonial protectorate. In the former, as Halsbury puts it, the administration is conducted in the name of the local sovereign and in the latter by the British Crown.⁶¹ As for Brunei, the authorities generally agreed that it was a protected state, but for Hickling its exact position was 'far from clear'. His argument was that Brunei indeed was such a protected state under the 1888 agreement.⁶² But the provisions of the subsequent 1905-06 supplementary Agreement had changed the status of the Sultanate to that of a colonial Protectorate as defined by Halsbury. Under the new Agreement the Sultan had to act on the Resident's advice, and therefore in Hickling's view 'the status of Brunei approximates more closely to that of a colonial protectorate than to that of a protected State'.⁶³ Although the discussion may seem pedantic, an understanding of the distinction between a protected state and colonial protectorate was all the more important to the way in which Hickling would suggest constitutional reforms for Brunei.

Connected with the distinction was the Crown's ability or inability to legislate under the Foreign Jurisdiction Act of 1890. In a protected state, the Crown was in theory merely exercising its jurisdiction over British subjects, so far as this was conferred by treaty with the sovereign of the territory concerned, though in practice it generally extended further. In a colonial protectorate, however, the jurisdiction was more or less complete. Having understood Brunei's status, it was logical for Hickling to conclude that a Brunei constitution can be imposed 'by means of an Order in Council under the Foreign Jurisdiction Act'.⁶⁴

No doubt he was thinking in terms of political correctness. His legal argument may, however, have been faulty. The fact that a sovereign has to take advice does not necessarily mean that the adviser shares or absorbs sovereignty. Indeed the British government did not itself take that view in respect of the peninsular states. The main object of the notorious mission of Sir Harold MacMichael to the Peninsula late in 1945 was after all to secure revised treaties with the Malay rulers conferring on the British government full powers to legislate under the FJA, for even in the FMS the British did not conceive of themselves as sovereign. Their powers under the FJA themselves did not amount to sovereignty, though they were not anxious to clarify the point. The attempt to increase their authority indeed created a hornet's nest of political uproar among the Malays against the proposed Union. That, of course, only underlined the correctness of Hickling's political judgment, whatever the validity of his legal reasoning.

His memorandum discussed a further issue that had been crucial in the British plans developed for Malaya and which Malay protests led them to modify. This was the question of nationality and citizenship. Raging controversies marred the Malayan Union proposals over this issue in particular. Since then the issue of Chinese citizenship rights based on *jus soli* principle complicated Malayan nationality reforms. The Chinese in the Federation became unhappy when the Malayan legislators refused to recognise the *jus soli* principle in the case of Chinese born in the Peninsula. They considered this as a breach of international law. But their rights got enshrined in later acts giving many Chinese and others the right to acquire

⁶⁰ Hickling Memorandum, *para* 84.

⁶¹ *Ibid* *para* 138.

⁶² *Ibid*, *para* 141.

⁶³ *Ibid*, *para* 142.

⁶⁴ *Ibid*, *para* 141.

Malayan nationality. It was known that the Brunei Sultan's subjects resented the admission of the Chinese in their own State on the *jus soli* principle, while the visiting Malayan dignitaries to the Brunei court, according to British reports, advised the Bruneians not to repeat the Malayan experience.⁶⁵

It was not surprising therefore that Hickling devoted perhaps disproportionate space to the discussion of this one issue in such detail. Much reluctance was evident on his part in defining Brunei citizenship or nationality. On the other hand, the Malay Committee recommended clear cut legislation to determine the status of the subjects of the Brunei Sultan. By solely acknowledging the birth rights of the seven indigenous nationalities in the context of rising nationalist fever in Brunei, it was becoming evident that recent immigrants, mostly Chinese, were in danger of being sidelined under the proposed nationality enactment. It seemed that during the recent visit of the Malay Committee to the peninsula, they were reminded everywhere 'about the danger of Chinese expansion.'⁶⁶ As such throughout their report there were references to citizenship and immigration laws so as to protect the sultanate from foreign influence and infiltration. Thus the Malay Committee proposed in part 'F' of its report very severe restrictions on the acquisition of Brunei citizenship by foreigners other than Malays.

In the Peninsular Malay States the absence of a Nationality enactment left undefined the status of the large Chinese community. There was much correspondence on this issue between the FMS High Commissioner, Sir Cecil Clementi and the Colonial Secretary J.H. Thomas. At no stage in the discussion was there any doubt as to whether the Chinese born in the Malay States were, in fact, subjects of the Rulers or that their status as British protected persons was derived other than from the fact of their being subjects of the local rulers. British Nationality policy in the FMS derived from the concept of *jus soli* had always assumed that the local-born persons were subjects of the protected states and thereby accorded British protected person status.

While soft pedalling such issues as the Nationality Enactment, in other areas Hickling preferred a strict legal approach, straightening up the language in the proposed legislation, especially in such areas as the High Commissioner's powers. That should remove the ambiguities of the past Agreements relating to de facto British control of Brunei. One of the principal demands of the locals had been to abolish the position of the British Resident and to replace the office with either a person to be styled as the British Adviser, or better still to have a High Commissioner resident in Brunei. In both cases the powers of the Resident or the Adviser would be transferred to a local Menteri Besar as the Malay Committee desired. That was indeed a drastic demand which the British would not yield to. In the past British authority in Brunei was exercised on thin legal grounds under the purview of the Advice Clause in the Supplementary Agreement. The proposed constitution/Agreement should be drafted, as Hickling suggested, with as few complications and in as clear language as possible if the British were to be effective in their future role in Brunei vis-à-vis the Sultan.

So how does this episode explain his approach to Brunei? What was Hickling's actual stand in the 1950s as a colonial servant? Was Hickling an 'imperialist' who wanted to perpetuate the British supremacy over Brunei and subjugate the sovereign Sultan to the High Commissioner's authority until such time as the British could withdraw nominally? Or did Hickling unduly caution the Colonial Office from taking an affirmative, if not an aggressive, stand towards Brunei and its ruler during the negotiations leading to the introduction of the Constitution? In view of the difficult position the British authorities faced at the time and the middle path treaded by people like Hickling, it became hard for producing a definitive

⁶⁵ See Hussainmiya, *Sultan Omar Ali Saifuddin*, pp, 166, 285

⁶⁶ CO 1030/113, Saving, 104, High Commissioner to CO, 5 August 1954. para 3.

Constitution be it in the British mode or local mode. Throughout the negotiations that followed after the launching of initial Constitutional draft the British offered as many compromises as possible for approval by the sovereign Sultan, and every time they were rejected by the palace party.

As a loyal colonial servant Hickling did indeed had his own views and perceptions and given the need to reform Brunei he was on the side of his masters. His task was to draft a constitution, and as he says ‘the principles of which had already been settled’.⁶⁷ All what he could achieve was to advise the legal department and where possible to rid the draft constitutional proposals of ambiguities. It was not up to him to implement them, but he stood firmly behind the High Commissioner to define the future of role of the British in Brunei. Whether he was sympathetic to the Sultan is hard to determine. In fact, he reminisced on the Sultan in his later years saying ‘he was a quiet but remarkable Ruler’⁶⁸. Elaborating on he further says: As head of a small state Sultan Omar Ali Saifuddin “needed the protection of a powerful friend such as Britain, but he was a thoughtful, careful man, and not one to be hurried into precipitate action, either in the establishment of a Borneo Federation, or a state within Malaysia. He cherished the independence of his state, and successfully maintained it to the limits that were possible, appreciating Pope’s lines--for forms of government let fools contest, Whatever is administered is best.--”⁶⁹

Whatever the outcome of the Hickling memorandum may have been at that time, the British deferred to Hickling’s advice at least in one area that is to introduce a constitution for Brunei was not merely a legal issue, but more of a political matter. It was true that the British Government could have bulldozed its way to introduce a Constitution for Brunei by means of an Order in Council under the Foreign Jurisdiction, but Hickling’s last words in the Memorandum “however neat and secure such a method of promulgation might be, it does not offer the correct solution’⁷⁰ -- carried the day.

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⁶⁷ Hickling, Memoir, p. 106.

⁶⁸ Hickling, Memoir, p. 108

⁶⁹ Epistle III.

⁷⁰ Ibid, p. 144