INSTITUTE OF CURRENT WORLD AFFAIRS

EPW-29
The B.S.I.P.-II:
The Significance of Protectorate Status

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Papua,
Territory of Papua
and New Guinea

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Dear Mr. Nolte,

The territories for which the High Commissioner for the Western Pacific is responsible are governed under probably one of the most curious combinations of constitutional arrangements ever devised by a colonial government. Since the beginning of 1953, when the High Commissioner's authority was taken from the Governor of Fiji and vested in a full-time representative of the Queen based in Honiara, the High Commissioner for the Western Pacific has been responsible for overseeing British interests and government in the British Solomon Islands, the New Hebrides, and the Gilbert and Ellice Islands. Constitutionally, the trio compose a unique combination of protectorate, joint French and British condominium, and Crown colony respectively, part of the last of which, the Gilbert and Ellice Islands Colony, contains two islands, Canton and Enderbury, which are themselves legally under joint British and American condominium. The constitutional structure of the Western Pacific High Commission is truly an eccentricity of empire.

However, this "Newsletter" is not specifically concerned with the legal status of the High Commission territories as a whole, especially as their various statuses are changing as self-government approaches in the Solomons and the Gilbert and Ellice Islands. Rather, it represents the fruits of my own personal, rather wearying, attempt to understand precisely what the significance of protectorate status may be. Curiously, for a term that was so widely used throughout the colonial world, there has been relatively little discussion of the meaning and importance of protectorate status.

Two Kinds of "Protectorate"

"In international law," according to Sir Kenneth Roberts-Wray (former Legal Adviser to the Commonwealth Relations Office and the Colonial Office), "whenever one country is under the protection of another it is a Protectorate." Thus, the term has been in more or less regular usage in international law since the very early years of the nineteenth

century, when it was employed, for example, to refer to Austria's suzerainty over the Italian states.

However, British constitutional law has tended to distinguish between "protectorates" and "protected states" since the establishment of a British protectorate over the south-eastern portion of New Guinea (present-day Papua) in 1884, although the former term has often been used loosely so as to embrace the latter. They were both products of the late nineteenth century policy or state of mind which tended to favour only "minimum intervention" in the affairs of the colonising areas where Great Britain sought to do no more than to secure her subjects' trading rights, to exercise some control over the activities of her subjects, and to prevent another European power from claiming sovereignty. In general, again according to Roberts-Wray, "the internal administration of ...[a protectorate]is usually as much under the control of the United Kingdom and Parliament as is that of a Colony, the Crown possessing unlimited jurisdiction ...,[while in]a Protected State, the Crown's jurisdiction is limited and there is always a local Ruler." In the so-called "uncivilized areas", the Crown could unilaterally declare a protectorate in order to gain control over immigration at least, without having to incur the responsibilities and expenses which usually went with Crown colony status. The protected states were established by agreement between Great Britain and a local ruler, who thereby transferred responsibility for his kingdom's or people's external affairs and defence to the Crown. As L.L. Kato, another lawyer, has remarked, the foregoing "agreements saved the colonisers the task of having to fight in order to gain control over land. Thus it was no surprise that these agreements only effectively bound the protected peoples not the protector. They could be scrapped unilaterally and effectively by the protector." They were, in a sense, no more than legal fictions to allow for a type of indirect rule over areas in which the British government did not presently wish to become involved in the day-to-day business of internal administration. In an "uncivilized area", there was, of course, no other single body which had effective domestic jurisdiction. Thus, in the end, the British government held effective sway in both "protectorates" and "protected states", although this was probably not its original aim, except in relation to their external relations, in a number of cases.

The Declaration of the British Solomon Islands Protectorate

Throughout the last thirty years of the nineteenth century, successive British governments were generally reluctant to acquire additional possessions in the Pacific. They were, however, willing, in varying degrees, to secure British (commercial) and Australian (defence) interests there, and therefore to keep other European powers out; and to exercise some control over the activities of those British subjects who were engaged in the labour trade. The upshot of these conflicting tendencies in British policy was the passage of the Pacific Islanders Protection Acts of 1872 and 1875, which empowered the government to control the entry of British subjects into those islands which had not been annexed, and to govern their conduct there (subject to the normal processes of the law). However, under section 7 of the Act of 1875, the

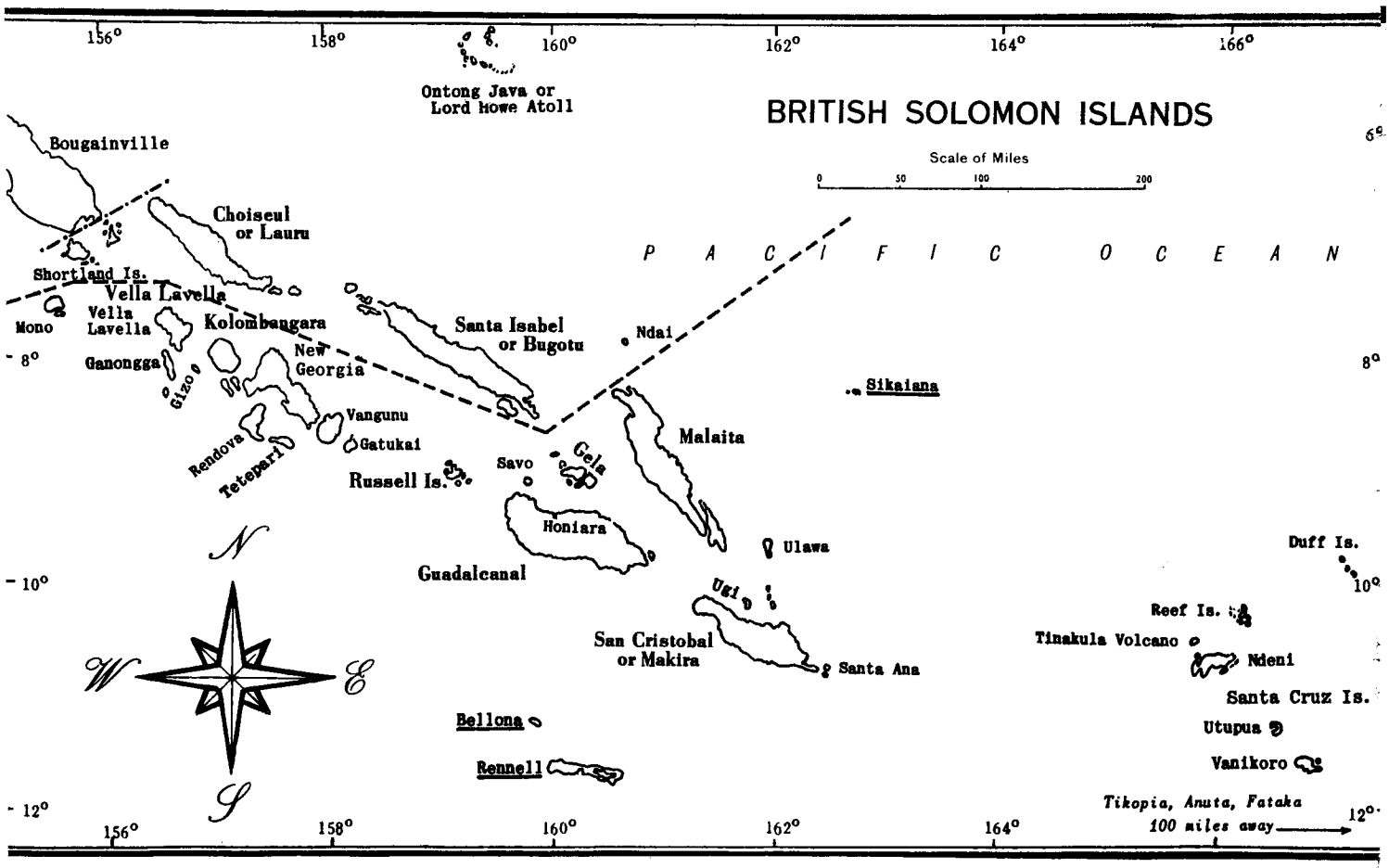
government hastened to point out that the issuance of an Order in Council applying the provisions of the Act to an area was not equivalent to annexation:

> "Nothing herein or in any ... Order in Council ... [issued under the provisions of this Act] shall extend or be construed to extend to invest Her Majesty with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid [that is, islands or places that are neither within Her Majesty's dominions nor within the jurisdiction of any civilized power], or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion ...."

Thus, as readers of pages 3 and 4 of EPW-20 will recall, the administration of British New Guinea was unable to legislate for the Papuans from the time of the protectorate's declaration there in 1884 until annexation in 1888. The distinction between protectorate and colony status observed in the case of British New Guinea was not, however, adhered to by the Germans in New Guinea.

With the issuing of the first Order in Council under the Act in 1877, the British government sought to exercise control over the entry and behaviour of its subjects in the islands, though, as Professor J.M. Ward has said, "no British sovereignty was claimed therein." In fact, as several historians have observed, the procedures for arrest and trial were so much more cumbersome under the thinly spread High Commission staff's administration that British subjects were probably less severely supervised after the High Commission's establishment than they had been under the old system of "commodore justice" which had been administered by the Royal Navy. Nonetheless, the labour trade gradually faded by the 1890s, and Great Britain's role in the Pacific islands began to require that more positive action be taken than the simple exercise of extraterritorial jurisdiction over British subjects in the region.

Thus, to secure British rule against the French, to bring an end to "blackbirding" for the Queensland sugar plantations, and partly in response to the imperialistic ambitions and xenophobic fears of the Australian states, the British government declared a protectorate over the south-eastern Solomon Islands in 1893, and gradually extended it (as shown on the map on page 4) until 1900, when Britain completed a complicated series of deals with Germany, in which the latter recognised Great Britain's rights in the Solomon Islands south and east of Bougainville in exchange for British recognition of German claims elsewhere (especially in Samoa). (The reciprocal British acknowledgement of German sovereignty over Bougainville is, incidentally, seen nowadays by the latter island's wouldbe secessionists from Papua and New Guinea as but part of a cynical attempt by the colonial powers to divide the Bougainvilleans from their southern Melanesian brothers.) That the British claim to the area was asserted with a certain cynical delight cannot, in fact, be doubted, judging from the minute of one, Fuller, in the Colonial Office, upon



The Extension of the Protectorate

In April 1886, Germany and Great Britain agreed to recognise the line marked ---------- as demarcating the boundary between the German Protectorate of New Guinea and a British sphere of influence.

In June and July 1893, Great Britain proclaimed a Protectorate over the islands to the south and east of the line marked ----------, as far south and east as San Cristobal and its outliers, with the exception of the three islands with their names underlined (Bellona, Rennell, Sikaiana).

In 1897, Bellona, Rennell and Sikaiana were included within the boundaries of the Protectorate.

In 1898, the rest of the islands on the map to the east and south of the line marked ·-·-·-·-·-·-· were included within the British Protectorate.

In 1900, Germany recognised Great Britain's claim to all of the islands shown to the east and south of Bougainville, and the line marked -.-.-.-.-.-.- became the final boundary between German (and later Australian) New Guinea and the British Solomon Islands Protectorate.

the Protectorate's declaration:

> "The object in view — to keep out foreign powers — has been obtained, whether the Union Jacks are used up by the natives as articles of clothing or not."

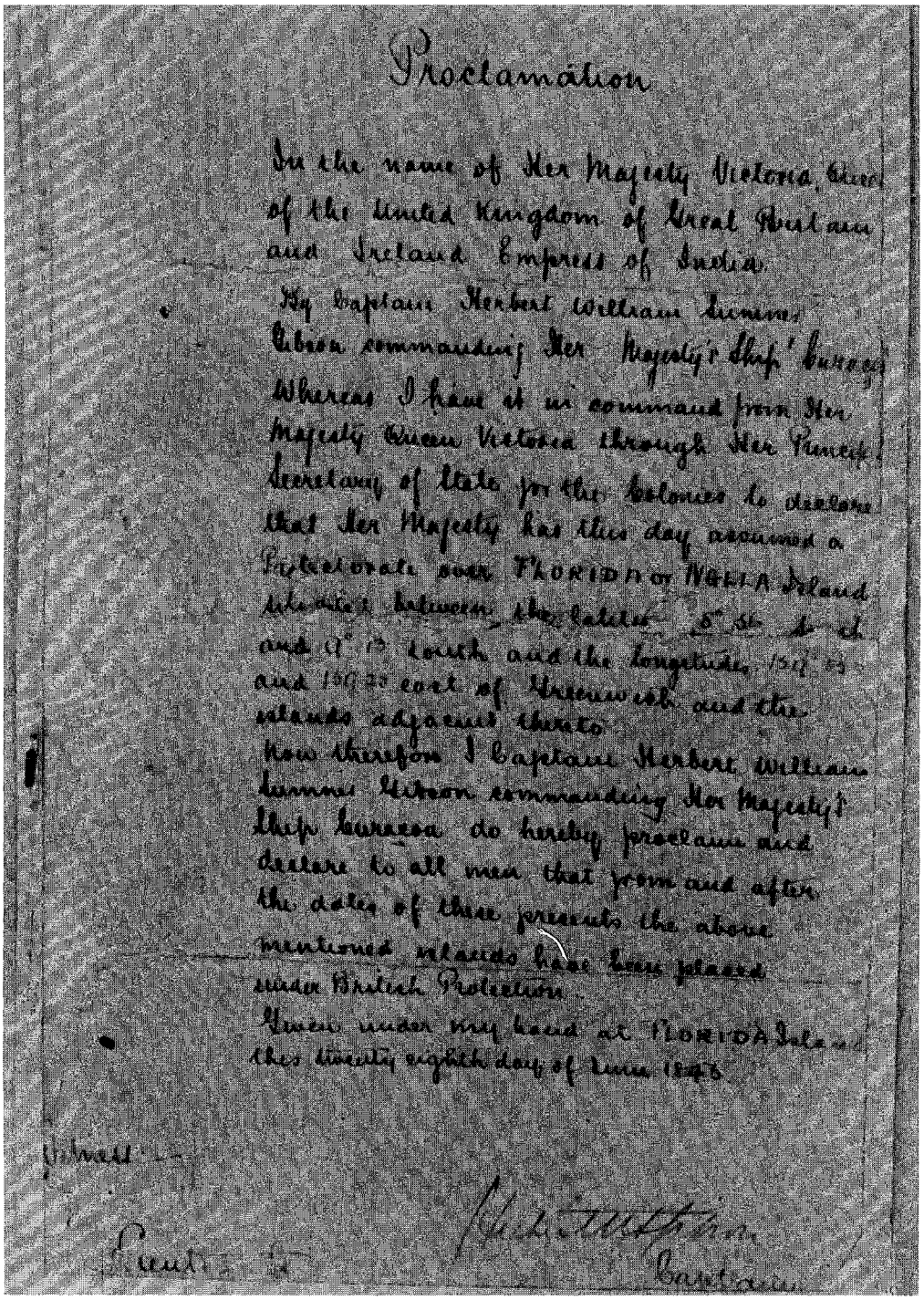
In rather more balanced fashion, C.M. (later, Sir Charles) Woodford — who became the Resident Commissioner for the Solomons (that is, the High Commissioner's representative "on the spot") in 1896 — had observed some three years earlier that other considerations and attitudes were also relevant to the proclamation of the Protectorate:

> "The regulations of the High Commissioner for the Western Pacific forbid, and rightly forbid, any retaliation upon the natives upon the part of the resident white men. The traders have, therefore, a right to expect that adequate protection should be afforded them in the pursuit of a lawful and peaceable calling. I know no place where firm and paternal government would sooner produce beneficial results than in the Solomons. The numerous small tribes into which the population is split up would render any organised resistance to properly constituted authority quite futile, while I believe that the natives themselves would not be slow to recognise the advantages of increased security to life and property. Here is an object worthy indeed the devotion of one's life."

For the usual complex mixture of reasons which led Britain to annex territories elsewhere in the Pacific during the last quarter of the nineteenth century, then, a Protectorate was gradually extended to embrace the whole of the present-day Solomon Islands. While individual planters, traders and recruiters went to the islands for financial gain, the British government became involved for a variety of nationalistic, humanitarian, and defence reasons; its main economic motive in declaring the Protectorate, however, was simply to save money in the process of safeguarding its subjects' interests in the area.

Although many (especially, British) writers on the area have written as if the traditional societies of the Solomons were governed by "kings" and "chiefs", it seems clear that the British government had no real alternative but to declare the Protectorate (in the narrow, constitutional sense) unilaterally. And this it did. Except on some of the small Polynesian outliers, there were no institutionalised leaders with wide-ranging powers with whom an agreement for protection could have been negotiated. As S.G.C. Knibbs, the first Crown Surveyor and later the Commissioner of Lands in the Solomons, once wrote, a "chief", "king" or "government" as he described him (on the Polynesian island of Bellona) was more like a typical Melanesian "big man" than his chiefly, kingly or governmental counterparts abroad:

> "In despair [at the people's constant enquiries as to whom he and the Resident Commissioner might be], and not thinking for a moment that they would understand the significance of the word, I announced that we were of the Government. Oh, Government! Their astonishment was remarkable to behold. They understood what "Government" meant. Why, the



Proclamation

In the name of Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland Empress of India.

By Captain Herbert William Lumsden Gibson commanding Her Majesty's Ship 'Curacoa'

Whereas I have it in command from Her Majesty Queen Victoria through Her Principal Secretary of State for the Colonies to declare that Her Majesty has this day assumed a Protectorate over FLORIDA or NGELA Island situated between the latitude 8° 58' 0" and 9° 0' South and the longitude 159° 53' and 160° 00' east of Greenwich and the islands adjacent thereto

Now therefore I Captain Herbert William Lumsden Gibson commanding Her Majesty's Ship Curacoa do hereby proclaim and declare to all men that from and after the date of these presents the above mentioned islands have been placed under British Protection

Given under my hand at FLORIDA Island this twenty eighth day of June 1893

Captain

A recently re-discovered copy of the proclamation of the Protectorate over Florida (Gela, Ngela, or Nggela) Island
(The photograph was taken, and kindly supplied, by Ted Marriott of the B.S.I. Information Service)

> one-toothed "old buffer" [who stood before them] was a Government himself! And so were numerous others whom we had met! These all had to be brought back, and the handshaking repeated. Each was quite apparently our social equal, and carried a large wooden club like an enormous walking-stick as the insignia of his gubernatorial rank. The Commissioner carried one, did he not said they [although Knibbs himself was stick-less],....
>
> "We had all the "Governments" about us, and each insisted upon showing us the realm over which he exercised his sovereign jurisdiction. One was lord paramount of the **beach**, another of the land immediately to the rear. But not of the place where the high seas flung their sand and sea-shells, explained the former chief. That should be understood without equivocation! Where the sea left its flotsam was his realm, and none should encroach upon that! Quite so.
>
> "The next Government's sphere of influence commenced at the rear of the beach, and extended to the base of the hill, no more than a couple of chains away. Here he held undisputable sway over everything within these bounds. And then the next territory commenced, still within a stone's-throw of the beach, the guardianship of which lay in the hands of the unlimited monarch whose territory extended over the face of the earth to the extent of one hundred yards!"

But, curiously for a document for the **drafting** of which the superior power had sole effective responsibility, the Pacific Order in Council of 1893 under which the Protectorate was declared has probably occasioned more discussion since its publication than before, when pressure was a-building for its proclamation. Its very format seems to have given rise to more doubts and (largely false) expectations than it resolved.

The Pacific Order in Council, 1893

The Pacific Order in Council of 1893 professed to have been drafted subject to the provisions of the Pacific Islanders Protection Acts of 1872 and 1875, the British Settlements Act of 1887, and the Foreign Jurisdiction Act of 1890. And, subject to these Acts, and to some other, mainly procedural, provisions contained within the Order itself, it empowered the High Commissioner (according to the 1958 rewording, which applies retroactively to the original Order) "to make regulations ... for the peace order and good government of the British Solomon Islands Protectorate ...." The first three Acts were measures which empowered the British government to legislate for British subjects who were resident outside her dominions (in the Pacific islands or a British settlement). While the Pacific Islanders Protection Act of 1875, it will be recalled, specifically denied any claim to dominion or sovereignty in the islands, but sought jurisdiction only over British subjects there,

the British Settlements Act empowered the Queen in Council "to establish all such laws and institutions, and constitute such courts and officers ... as may appear ... to be necessary for the peace, order, and good government of Her Majesty's subjects and any others within any British settlement." Both Acts claimed extra-territorial jurisdiction over British subjects outside the Queen's dominions, and the second (it could be argued, to make government over British subjects effective) over "others" within British settlements too.

However, the Foreign Jurisdiction Act of 1890, under which the Order of 1893 claimed also to have been issued, went much further than the earlier Acts. It dealt with any foreign jurisdiction acquired by Her Majesty whether "by treaty, capitulation, usage, sufferance, and other lawful means" and declared:

> "1. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.
>
> * * *
>
> "3. Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country."

In other words, the British government was empowered to claim jurisdiction as and where it chose. There was only one restriction:

> "12.—(1) If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in that country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be void."

Thus, the British Solomon Islands Protectorate came under the Foreign Jurisdiction Act only to the extent that it did not conflict with the Pacific Islanders Protection Acts. For that reason, the British Solomon Islands Protectorate seemed to be differently constituted, to have restrictions placed upon the jurisdiction of its government, that did not apply in the other British protectorates in Africa and Asia. Elsewhere, while it was clear that the Foreign Jurisdiction Act was specifically intended to grant extraterritorial jurisdiction to the government over British subjects who were abroad, the Act was so broadly framed that it could be applied to anyone at all. Only in the Pacific did its application seem to be restricted, and especially in the Solomons (which were never annexed to the Crown as were the Gilbert and Ellice Islands in 1916).

Thus, according to one scholar (Dr. John Hookey), the Crown Law Officers in Britain tended to argue until the early years of the twentieth century that "Protectorates were, and are, considered to lie outside the Territorial Dominions of the Crown":

> "In Melanesian Protectorates where jurisdiction was not obtained by treaty or agreement with local rulers or chiefs, the Law Officers ... advised that jurisdiction was limited by the Foreign Jurisdiction Acts, to British subjects, and did not extend either to European foreigners or the Melanesian inhabitants of the Protectorates."

In fact, of course, the Protectorate's development eventually required that the government's jurisdiction be extended, and especially that land for administration buildings, forestry, planting, and grazing be acquired, so that section 7 of the Pacific Islanders Protection Act of 1875 (see page 3 above) became increasingly irrelevant. Nonetheless, a widespread belief persisted in the supposed illegality of many government actions, and especially in the illegality of its land dealings, as the Special Lands Commission (C.H. Allen) reported in 1957:

> "It is suggested that the advice of the constitutional legal advisers at the Colonial Office should be sought as to -
>
> (a) a definition of the implications and limitations of the Crown's supreme title in the Protectorate;
> (b) a definition of the extent to which legislation can be enacted to control native land.
>
> "In connection with this question, it must be emphasised that while today it is generally believed that no difference exists between a "colony" and a "protectorate", the fact remains that for Solomon Islanders the two possess very different meanings and implications. As they see it, a Protectorate is a country under the protection of an alien, yet friendly and benevolent power, which protects and administers the people in accordance with their own wishes and interests. A colony, on the other hand, is a territory whose resources and people are enslaved and exploited in the sole interest of the colonising power. Implicit in the term "colony" for them is the loss of all land interests. This attitude was given full expression during the political troubles [between the government and the proto-nationalistic Marching Rule movement] of 1946-1952, is still extant, and regardless of how naive it might be held to be, it is one which cannot be lightly disregarded."

Even more recently, during the middle of last year, I met villagers and plantation workers in the eastern part of Guadalcanal who firmly believed that most of the government's present-day activities (and, especially, those involving land) were illegal in that they derogated from their rights to sovereignty or dominion. Organised into the Peoples Protection Party with the aid of a local expatriate planter, they had even sent emissaries to tour the rest of the central and western

Solomons to raise support (in the shape of money and signatures to a petition) for their plan to have their alienated lands returned to them, and to prevent the granting of forestry leases or mineral prospecting authorities over their unalienated lands. With the ambivalent understanding of central politics and national development which characterises those who are encapsulated in small political communities on the periphery of national politics and neither see nor appreciate the nature of national priority allocation, they complained both of the absence of development in their area as well as of its cost (in land alienation and taxation). In time, they planned to challenge the constitutionality of the Protectorate's land policies, if not of its entire government, and had retained a solicitor to act on their behalf.

In two respects, their intention was, of course, quite quixotic. No British government government would be prepared to allow the entire constitutional structure of one of its territories to be so simply overthrown, and to have the legitimacy of the institutions for development and disengagement so openly undermined: a retroactively applicable Act was a certainty in the event of the challenge's success. Otherwise, under section 4 of the Foreign Jurisdiction Act, the government could have sought to persuade the High Court of the Western Pacific to refer the question to a Secretary of State, who shall legally "send to the court within a reasonable time his decision on the question, and his decision shall for the purposes of the proceeding be final."

However, when the same constitutional question was raised in another case, in October and November of last year, it was resolved by the Fiji Court of Appeal in another manner, and so the sense of disaffection from the government felt by the villagers should have been quietened, at least insofar as it derived from a sincere questioning of the legality of some of the government's activities under the terms of the Acts under which the Pacific Order in Council of 1893 and its succeeding Orders had been issued.

The Judicial Verdict

The particular case (J.B. Tura and 1. The Commissioner of Lands and Surveys, 2. Levers Pacific Plantations Pty Limited) in which the main constitutional question posed in this "Newsletter" was seemingly resolved concerned an appeal by a Melanesian against the disallowance of an objection he had made to the registration by the Commissioner of Lands of the Crown as owner of a piece of land (leased to Levers as plantation land) in the Russell Islands. The appeal against an earlier decision by the High Court of the Western Pacific was disallowed by the Fiji Court Of Appeal on the ground that it was "out of time", but, lest the Court be held to be wrong on this point (in the event of an appeal to the Privy Council), Tompkins, J.A. went on to examine the plaintiff's main arguments.

The main argument that was advanced for the dismissal of the appeal was derived from a much-quoted judgment of Lord Justice Denning (in Nyali v. Attorney-General), in which it had been held:

> "Although the jurisdiction of the Crown in the Protectorate [in this case, Kenya] is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown have jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan .... Once jurisdiction is exercised by the Crown, the Courts will not permit it to be challenged."

And the foregoing quotation was supported by quotation from a case (Ibralebbe v. R.) cited by Sir Kenneth Roberts-Wray to the effect that the power to make laws for peace, order and good government of a territory is said to connote "the Widest law-making powers appropriate to a sovereign."

In short, the Solomons Land Claims Regulation No. 8 of 1923 was valid in that (a) it lay within the Crown prerogative in governing the Protectorate — and was an "act of state which cannot be questioned in a Court of Law" (as Viscount Haldane said in his judgment in Sobhuza II v. Miller); and (b) it was made "for the peace, order and good government" of the Protectorate in that it established a legal mechanism for the resolution of land disputes. In adding that he found it "noteworthy that this King's Regulation has stood unchallenged now for more than 47 years," the learned judge seemed to be echoing L.L. Kato's belief that the sole difference between a colony and a protectorate was their name, and that "even if there are limitations as to the exercise of jurisdiction, these limitations are in fact self-imposed limitations which may be and have always been extended by usage and sufferance. They are limits set by acts whose sanction is not law but that of sovereign Power."

In his supporting judgment, T.J. Gould, Vice President of the Court of Appeal, agreed with the foregoing judgment, but added an interesting point of his own. Section 5 of the 1893 Order in Council states that:

> "In islands and places which are not British settlements, or under the protection of Her Majesty, jurisdiction under this Order shall be exercised (except only as in this Order otherwise expressly provided) only over Her Majesty's subjects ...."

It is to that class of territory that section 7 of the Pacific Islanders Protection Act of 1875 (see page 3 above) applies, as section 6 of the same Act limits its scope to "any islands and places in the Pacific Ocean not being within Her Majesty's Dominions, nor within the jurisdiction of any civilised power." However, as Gould said, "Once a territory becomes a Protectorate, of the kind which involves internal administration, it is not thereby made part of Her Majesty's Dominions, but it is brought within the jurisdiction of a civilized power, viz. Great Britain." Thus, the very declaration of a Protectorate over the British Solomon Islands seemingly removed them from the jurisdiction of section 7 of the Pacific Islanders Protection Act. In a sense, then, that part of the preamble to the Order of 1893 which refers to the continued applicability of section 7 of the last-mentioned Act is irrelevant in those islands to which the Order itself applies.

Conclusion

Although the subject-matter of this "Newsletter" may seem somewhat recondite when compared with that of others in this series, it is perhaps worth pointing out, by way of justification for its existence, that the issues at stake were not just lawyers' quibbles. They were of quite practical political importance, both to some of the people and to the government of the British Solomon Islands, in that they concerned a challenge to the past activities of the Western Pacific High Commission in the Solomons, as well as to the new constitution which was introduced (through an Order in Council) in 1970, and which purported to have been issued under the Foreign Jurisdiction Act of 1890. Had the doubts resolved by the judgment described above remained unresolved, the whispers and campaigns of doubt would have persisted; had they been vindicated, the disaffection in some areas might have reached a crescendo, after which a retroactive validating Act might have been able to re-establish only the legality of government, at least in the short-term: its (re-)legitimation would have been the work of a much slower and more painful process than the passage of a law.

In the end, the judgment summarised above reolved an interesting point on which both lawyers and historians had differed; and it resolved it in much the same manner as similar points had been resolved elsewhere.

In conclusion, then, it seems fair to say that Great Britain sought initially to intervene in the Pacific islands in as inexpensive a manner as possible. The British government sought to control the activities of its own subjects, and the entry of foreigners too, in the area, without incurring the expenses and responsibilities which customarily accompany Crown colony administration (with a legislature, a full system of internal administration, etc.). Later, as development became a colonial concern, the government — quite legally — took as much legislative authority unto itself as it chose, and thought necessary, to accomplish its aims. Today, then, the word "protectorate" is of no legal importance in distinguishing between different kinds of colonial rule and possession. It is but a memory of an old distinction, in which humanity (towards the Melanesians in their dealings with outsiders), foreign rivalries (especially with the French), and parsimony, combined to persuade the British government to seek to exercise an initially limited jurisdiction in the Solomons. In retrospect, it now appears that the lawyers who drew up the Order in Council under which the Protectorate was proclaimed were, probably unconsciously, laying the groundwork for what became, in effect, a form of Crown colony administration. Today, they seem rather like the lawyers whom Sir Thomas More described (in Utopia) "as a sort of people whose profession it is to disguise matters."

Yours sincerely,

Edward Wolfers.

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