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DECOLONIZATION



A publication
of the United Nations Department of Political Affairs,
Trusteeship and Decolonization

No. 15

July 1979

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ISSUE ON KIRIBATI (GILBERT ISLANDS) *

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* This issue is published to coincide with the accession to independence of the Gilbert Islands as the state of Kiribati.

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I. GENERAL INFORMATION

Prior to its accession to independence in July 1979 as the state of Kiribati the Gilbert Islands was a British dependent territory. It is situated in the south-west Pacific around the point at which the Date Line and the Equator meet. The country includes the Gilbert Islands proper as well as Banaba (Ocean Island), the Phoenix Islands and the Line Islands. Though its total land area is only approximately 684 square kilometres (314 square miles), it is scattered over more than five million square kilometres (two million square miles) of ocean. Christmas Island in the east is 2000 miles from Ocean Island in the west while Washington Island in the north is over 400 miles from Arorae in the south. The country as a whole is also remote from other larger centres of civilization. Tarawa, the capital, is about 1365 miles from Suva in Fiji and about 2500 miles from Sydney in Australia.

The Gilbert Islands like the Phoenix and Line Islands are all coral reefs, many in the form of atolls. In most of the islands the reef encloses a lagoon, on the eastern side of which are long narrow stretches of land ranging in length from a few hundred yards to some ten miles, and in width from one or two hundred yards to nearly a mile. The surface of the islands seldom rises more than twelve feet above sea level. Navigation through the reefs is often difficult and the lagoon itself has schools of coral work which are dangerous, for even small vessels. 1/

The great majority of the people of the Gilbert Islands are of Micronesian stock. At the end of 1977 the total population of the Territory was estimated at 54,500. 2/ Of these over 50,000 lived in the Gilbert Islands proper which account for well under half the Territory's total land area and where therefore the population density is very high. Some 2,500 peoples lived in Banaba, and another 1,500 in the Line Islands while the Phoenix Islands have no permanent population. 3/ In the late 1930s several hundred Gilbertese moved to the Phoenix Islands with the encouragement of the British colonial administration. However, it was subsequently found that the islands could not properly support any permanent population, and by 1963-64 all the residents of the Phoenix Islands had been re-settled in Gizo and Wagina Islands in the Solomon Islands.

1/ Though some good anchorages exist in the lagoons at Tarawa, Butari-tari and Abemana. See Gilbert Islands, Annual Report 1977 (transmitted to the Secretary-General by the administering Power in pursuance of article 73 (e) of the Charter).

2/ Gilbert Islands Annual Report, 1977.

3/ See Report on the 1973 Census of Population (issued by the Office of the Chief Minister, Bairiki, Tarawa, Gilbert and Ellice Islands), table 1. -

Virtually the entire population of the Gilbert Islands adheres to Christianity. The two main Christian churches are the Roman Catholic and the Gilbert Islands Protestant Church, an offshoot of the London Missionary Society, with the former outnumbering the latter by a narrow margin. 4/

The two languages spoken are English and Gilbertese; the latter is a Micronesian language belonging like other language groups in the Pacific to the Austronesian linguistic family.

II. HISTORICAL OUTLINE

A. Pre-colonial period

There are no definitive data on the date when the Gilbert Islands were first settled nor on the exact origin of the settlers. Some sources place the settlement between A.D. 1000 and 1300 5/ whereas others believe it took place considerably earlier. 6/ As for the ethnic origins of the Gilbertese, they are generally thought to be the result of two waves of migration one originating in Polynesia, the other in South East Asia probably in present day Indonesia.

Although the seventeen islands in the Gilbert group are separated by miles of open sea, they developed a strikingly similar social order and a unity of tradition. In the north and central Gilberts several small kingdoms flourished, some of which were still in existence at the time of the British annexation.

Nothing is known with certainty on the other hand about the early inhabitants of the Phoenix and Line Islands but evidence of pre-European habitation has been found at Hull and Sydney Islands in the Phoenix group, where there are burial sites and stone platforms typical of Eastern Polynesia and Micronesia. Archaeological remains have been found in Christmas Island in the Line group suggestive of chance visitors rather than permanent inhabitants whereas at Fanning Island, also in the Line group, there are remains of settlements and stone ruins comparable with Tongan fifteenth century stone work. 7/

4/ Ibid., table 14.

5/ Gilbert Islands Annual Report, 1977.

6/ Austin Coates: Western Pacific Islands, H.M.S.O., 1970, chapter 8.

7/ Gilbert Islands Annual Report, 1977.

B. The European arrival

Some of the Gilbert Islands proper as well as Christmas Island in the Line group were probably sighted during the sixteenth century by Spanish ships in their voyages across the Pacific. After that the islands were "rediscovered" between 1765 and 1826, mostly unintentionally, as a result of increasing commercial activity in the Pacific. ^{8/} One of these early British navigators was Captain Thomas Gilbert from whom the islands bear their name.

From the early days of the European discovery until about 1870 the waters of the Gilbert Islands were a favourite sperm whaling ground. Occasionally the crews of these whalers would desert and settle ashore. With the whalers came a number of beachcombers for the most part castaways, escaped convicts and the like. Trading ships began to visit the islands regularly from 1850 onwards while some of the beachcombers became agents for overseas trading firms and some new European traders settled in the islands.

From 1860 to around 1875 the Gilbert Islands were victims of the notorious labour traffic which ravaged the South Pacific during that time. Unscrupulous recruiters, known as "blackbirders", raided the islands in search of labourers who were then transported in conditions frequently analogous to those in slave ships for work in plantations in Peru and other Latin American republics as well as in Fiji, Tahiti, Hawaii and Queensland. The Gilberts were one of the first places in the Pacific to figure in the labour traffic when in one raid in 1863 over a hundred men were carried off to Peru. But in the long run the Gilberts appeared to have suffered less than did the Ellice Islands (now Tuvalu) and certainly a great deal less than the New Hebrides. One reason was the frequent presence in the waters of the Gilberts of British, American or German warships. Another reason lay in the fierce resistance frequently put up by the Gilbertese themselves when confronted with the "blackbirders"; there are accounts of slave ships being destroyed and the crews slaughtered by the local inhabitants. ^{9/}

With the European arrival came also European diseases, particularly measles, against which the islanders had little resistance and which account in part for the steady decline of the population between the 1850s and the early part of the twentieth century.

^{8/} Fanning Island and Washington Island which with Christmas Island constitute the Line Group, were discovered by an American, Captain Fanning, in 1798. Ocean Island was named after the ship Ocean, which visited the island in 1804, although the island had been discovered three years earlier.

^{9/} Austin Coates: op. cit., chapter 17.

Other than diseases, the Europeans also introduced liquor and arms. Drunkenness became a serious problem in some islands, particularly in Butari-tari while the traffic in arms brought about an increase in internal warfare within the islands. 10/

The traders were soon followed by the Christian missions. The first missionaries to land were Americans, belonging to the Hawaiian Evangelical Mission, who established themselves in the Northern Gilberts. In 1870 pastors of the London Missionary Society, moving northward from the Ellice Islands, began to spread Christianity in the Southern Gilberts. It was then agreed between the American Board for Foreign Missions and the London Missionary Society that the London Mission would carry its activities in the south moving eventually northwards, while the American mission penetrated southward until the two met. In 1917 the American mission withdrew, handing over its responsibilities to the London Missionary Society. 11/

By most accounts the spread of Congregationalism was accompanied by the introduction of stern regimentation in all walks of life, particularly in those islands where the missionaries had gained a foothold with a king and his family. All forms of entertainment were suppressed and rigorous rules were laid down concerning church attendance and Sabbath breaking while stiff fines were imposed for disobedience to the Mission's rules. It is thus not surprising to read in the London Mission's annals that "the missionaries were continually disappointed and chagrined at seeing individuals and sometimes entire islands after years of steady growth, suddenly collapse into a wild orgy of heathenism." 12/

The rigidity - some would say bigotry - of the Protestant missions may account for the success of the Roman Catholic missionaries who first began work in the Gilberts in 1888. By the outbreak of the First World War there were substantial Catholic communities on most atolls.

10/ Morrell: Britain in the Pacific Islands, Oxford University Press, 1960, chapter X.

11/ The L.M.S. in turn withdrew in favour of the Gilbert Islands Protestant Church.

12/ Quoted by Austin Coates, op. cit., chapter 17.

C. The Protectorate

The first step towards British annexation of the Gilbert Islands took place in 1877 with the enactment of the Western Pacific Order in Council which provided for the creation of the office of High Commissioner for the Western Pacific based in Fiji which had been proclaimed a British Crown Colony in 1874. The main object of the Order was to regulate the labour traffic by giving powers to the High Commissioner over British subjects in a wide area of the Western Pacific stretching from Eastern New Guinea to Samoa and including the Gilbert Islands. The 1877 Act did not involve any annexation of territory nor did it provide for an extension of British jurisdiction over the indigenous people of the islands. However by reinforcing the United Kingdom's authority over resident British subjects the Act inevitably brought the islands within the British orbit.

The partition of the Pacific between 1883 and 1886 was in many respects a by-product of the scramble for and partition of Africa amongst the European Powers provoked in large measure by Bismarck's determination to obtain colonies for the recently unified German Empire. A series of negotiations between Germany and Great Britain culminated in the Anglo-German Convention of 1886 under which inter alia Germany agreed to leave the Gilbert and Ellice Islands to Great Britain in return for the Marshalls, the Carolines and the Palaus.

Despite the treaty, Great Britain showed little rush to assert control over the Gilberts; in fact for some years no British warship visited the group to the point that British traders tended to look for protection to the German navy rather than to their own. Eventually German pressure over Great Britain to proclaim a Protectorate over the Gilberts, coupled with fear by Britain that if it did not act, Germany would in its place, led to the proclamation of a British Protectorate over the Gilbert Islands in 1892. Shortly afterwards the Protectorate was extended to cover the Ellice Islands. Despite the different ethnic origins of the two island groups, geographical proximity and administrative convenience led to both groups of islands being administered as one whole. 13/

One, if not the, major factor in British reluctance to extend its overseas empire was Treasury fear of adding a financial burden to British finances. The maxim that colonies must pay for themselves became an axiom of British colonial policy. It is not surprising, therefore, to read that the appointment of a Resident in the newly established Protectorate was made on the understanding that the contributions from the local chiefs together with other receipts would be enough to cover his salary. In the words of a historian of

13/ Morrell, op. cit., chapter X.

the area "decidedly Great Britain's new island territories were to be ruled on the cheap." 14/

The British annexation of the uninhabited Line and Phoenix Islands preceded that of the Gilberts.- Fanning Island, where a British firm had begun to manufacture coconut oil, was annexed as early as 1861, while Starbuck and Caroline Islands both in the Southern Line group, where guano and coconut plantations had been established, were annexed in 1866 and 1868 respectively. But it was the Canadian proposal for a Pacific cable, made at the first Colonial Conference in 1877, 15/ which gave a new importance to unoccupied islands that might serve as cable stations. At the suggestion of the Admiralty Christmas Island, Washington Island and the Phoenix group were in short succession annexed to the British Crown between March 1888 and July 1889.

The last island in Kiribati to be annexed was Ocean Island, or Banaba, which was proclaimed part of the Gilbert and Ellice Islands Protectorate in 1901. Ocean Island was rich in phosphate deposits and the rapid development of the mining industry in the island led to the headquarters of the Protectorate to be moved there from Tarawa in 1907. Ocean Island was to remain the Territory's capital until the start of the Pacific War in 1941.

D. British Crown Colony

In 1916 an Order in Council turned the Gilbert and Ellice Islands Protectorate into a British Crown Colony. 16/ Orders in Council subsequently incorporated between 1916 and 1972 the Line and Phoenix Islands into the Gilbert and Ellice Islands Colony.

14/ Morrell, op. cit., chapter X, p.278.

15/ The Colonial Conferences were the predecessors of the Imperial Conferences which later became the Commonwealth Conferences of today.

16/ The practical distinction between a British colony and a Protectorate is minimal. The legal distinction is that while a colony is part of Her Majesty's dominions and its inhabitants are citizens of the United Kingdom and Colonies, a Protectorate is not so regarded and its inhabitants are classified as British protected persons. But the powers of the Crown in respect of a Protectorate under the Foreign Jurisdiction Acts 1890 - 1913 are virtually identical to the powers enjoyed by the Crown by virtue of the Royal Prerogative (i.e. the common law powers enjoyed by the Crown) in relation to Colonies. See Wade and Phillips, Constitutional Law, sixth edition, Chapter 31.

The administration of the Gilbert Islands prior to the Second World War was characterized by a combination of paternalism and economic neglect, the result of the Treasury axiom, already referred to, that colonies must pay for themselves. ^{17/} Malnutrition and tuberculosis were rampant while education was left almost entirely in the hands of the Christian missions which often proved inadequate to their task.

In the field of local government responsibility for each atoll's affairs shifted from the "maneaba" - or council - to the Native Magistrate's office. Furthermore the new generations of Gilbertese were more interested in going abroad as sailors or wharf labourers than in immersing themselves in local affairs, while those who did tended to become increasingly dependent on Europeans.

This steady abdication of responsibility was compounded by the continuingly oppressive prohibitions of the Christian missions, many of which ran counter to the deep-rooted cultural traditions of the islanders. - Symptomatic of the profound malaise in the islands was the decline in the birth rate. The Gilbertese population fell from an estimated 32,000 in 1900, to 23,200 by 1921. Only in 1924 did the tide begin to turn and the population started to rise for the first time since 1892.

With the outbreak of the Pacific War, the Gilbert Islands including Banaba but not the Ellice, Phoenix and Line Islands, were occupied by Japan in 1942. As a result the Colony's capital was temporarily transferred to Funafuti in the Ellice Islands. After the United States drove the Japanese from the Gilberts in November 1943 ^{18/} the administrative headquarters were moved again from Funafuti to Tarawa in the Gilberts. Tarawa subsequently became the Colony's permanent capital.

In the period following the Second World War, the administering Power considerably expanded its activities in the educational, social and economic fields. With the aid of Colonial Development and Welfare grants from the United Kingdom the Administration set up a Co-operative Department to assist local co-operatives which had been formed well before the war and put into effect overseas training schemes for students, teachers and medical officers. A Lands Commission was created to settle land disputes while Island Councils were established in 1955 with powers over a wide range of subjects including the general health, security and well-being of the inhabitants of the islands.

^{17/} Austin Coates, op. cit., and Morrell, op. cit.

^{18/} Ocean Island remained under Japanese occupation until the end of the Pacific War.

III. POLITICAL DEVELOPMENTS

In common with some other island nations in the Pacific political parties have not taken root in the Gilbert Islands. Though two political parties were reportedly established as early as 1965, ^{19/} none of the four general elections held in 1967, 1971, 1974 and 1978 were fought along party lines, though the existence of a government and an opposition in the legislature almost inevitably has meant the development of a "government party" and an "opposition party" based on personalities rather than ideology.

The first general elections in what was then the Gilbert and Ellice Islands were held in late 1967. Mr. Reuben K. Uatioa was chosen by the House of Representatives to the newly established position of Chief Elected Member.

The next general elections took place in March 1971. Though there were no political parties, 110 candidates stood for the 28 seats open to election. Only five of the 23 elected members of the previous legislature were reelected to the new one. Mr. Uatioa, the former Chief Elected Member, was elected to the new post of Leader of Government Business. Subsequently Mr. Uatioa was replaced as Leader of Government Business by Mr. Naboua Ratieta, who in 1974, following elections under a revised Constitution, became the Territory's first Chief Minister. Mr. Uatioa for his part was appointed Speaker and, after his resignation in 1975, became in 1977 the first Chairman of the Gilbert Islands' Public Service Commission.

In the last general elections prior to independence, held in February 1978, 168 candidates stood for 36 seats in the House of Assembly. In the election for the office of Chief Minister Mr. Ratieta was defeated by Ieremia Tabai who, under the provisions of the Independence Constitution, became the first Beretitenti (President) of Kiribati on the accession of the Gilbert Islands to independence on 12 July 1979.

^{19/} The Gilbertese National Party and the Christian Democratic Party. See Report of the Special Committee on Decolonization, Official Records of the General Assembly, Twenty-second Session, Annexes, addendum to agenda item 23 (part III), (A/6700/Rev.1) Chap. XV, para. 15.

The separation of the Gilbert and Ellice Islands

In the 1960s there developed an increased polarization along ethnic lines between the Gilbertese and the Ellice Islanders. The former resented what they perceived as the disproportionate number of Ellice Islanders in the colony's civil service and other prestigious jobs, whereas the latter feared political domination by the Gilbertese who outnumbered the Ellice Islanders by about eight to one.

In 1971 a motion was introduced in the colony's Legislative Council by several Ellice Islands representatives calling for the separation of their islands into a separate self-governing colony. At the same time the Gilbertese parliamentary group complained inter alia that the existing electoral system favoured the Ellice Islands and that no employment opportunities existed in the Ellice Islands for Gilbertese whereas several Ellice Islanders held senior positions on Tarawa.

In 1972 the British Government appointed Sir Leslie Monson as Specials Commissioner to visit the Colony and report on the relationship between the Gilbert and Ellice Islands. In his report, Sir Leslie recommended that the Ellice Islands should be separated from the rest of the Territory provided that a referendum were held in the Ellice Islands to ascertain that such were the wishes of the population. In the referendum held in October 1974 and observed by a United Nations Visiting Mission, 90 per cent of the voters declared themselves in favour of separation. As a result on 1 October 1975 when the separation of the Ellice Islands came legally into effect the Gilbert and Ellice Islands Colony was restyled the Gilbert Islands. The Ellice Islands, for their part, became known as Tuvalu and achieved independence on 1 October 1978.

IV. BANABA (Ocean Island) 20/

Banaba (Ocean Island) is the most westward island in Kiribati. It is situated just south of the Equator some 160 miles (260 kilometres) east of Nauru and some 250 miles (400 kilometres) west of the Gilbert group. It has a surface area of about 1500 acres or some 2 1/2 square miles. At the time of its annexation by Great Britain in 1901 it was inhabited by approximately 500 people, reported to be of the same stock as the people of the Gilberts and to speak the same language. 21/

20/ The name Ocean Island was given to Banaba in 1804 by the Captain of the ship Ocean who thought he had "discovered" the island. Banaba had in fact been sighted in 1801 by the Captain of the American ship Diane .

21/ A/AC.109/L.506, Appendix VI para. 61.

Today its descendants number roughly 2500 and live in the island of Rabi, Fiji, having been obliged to settle there as a result of their original home having been rendered uninhabitable through the extensive exploitation of its phosphate deposits. The account that follows is based largely on facts contained in the judgement delivered in the Chancery Division of the High Court of England in 1976 by Vice-Chancellor Sir Robert Megarry, in a case brought by the Council of Leaders in Rabi Island and some Banaban landowners against the British Phosphate Commissioners and the Attorney-General of England. 22/

Shortly before the British annexation of Banaba in 1901, extensive phosphate deposits had been discovered in the island by a representative of the Pacific Islands Company who proceeded to enter into a written "agreement" with the "King and Natives of Ocean Island" purportedly giving the Company the sole right to raise and ship all rock and alluviate phosphate in the island for 999 years in return for a payment of £50 a year or trade to that value. 23/ For its part the Crown granted the Company and its subsidiary - the Pacific Phosphate Company - exclusive right to occupy Ocean Island for the purpose of working its phosphate deposits for a term of 99 years from 1st January 1902 in return for a royalty of sixpence a ton.

After that the history of the Banabans was to become intimately intertwined with that of the phosphate industry. At the beginning the Pacific Phosphate Company contented itself with purchasing plots of land from individual owners at a rate of £15 or £16 an acre. When freehold sales of native lands became virtually prohibited under the King's Regulations the Company resorted for a time to what became known as "P and T deeds" under which a landowner, in return for a lump sum payment which varied from £6 to £30, sold to the company all the trees ('T') growing or to be grown on his land and all the rock and alluviate phosphate ('P') that might be found on it. As early as 1909 the acting Resident Commissioner was estimating that over one third of the total land area had become useless to the Banabans as a result of the phosphate extractions and suggestions were already being made in the Colonial Office in London about the possibility of the Banabans being persuaded to move to another island. By 1913 nearly 215 acres had been the subject of P and T deeds. In that year, following an exchange of letters with the Colonial Office the Company proceeded to purchase an additional 145 acres at a price varying from £40 to £60 an acre, the lease to

22/ Tito and others v. Waddell and others (No. 2) and Tito and Others v. Attorney-General (henceforth referred to as Tito v. Waddell) (1977) 3 All England Law Reports, pages 129-323.

23/ Ibid., at p. 149. The learned judge, after mentioning those facts, caustically added: "I do not think that I need comment on this piece of commercial enterprise".

run to 1999. All worked out lands were to be returned to the original owners and to be replanted "whenever possible". In addition the Company agreed to pay a royalty of sixpence per ton in addition to the sixpence royalty already payable under the 1902 agreement.

In 1920 the Pacific Phosphate Company's undertakings in Ocean Island as well as Nauru ^{24/} were purchased by the British Phosphate Commissioners, an unincorporated body consisting of three individuals appointed respectively by the governments of the United Kingdom, Australia and New Zealand. The phosphates so exploited were to be sold to farmers in the three countries at cost price, after allowing for interest on capital and a sinking fund. Only when the requirements of the farmers in those countries had been met could any surplus be sold elsewhere at the best price obtainable.

Since the land purchased in 1913 would not last forever the Commissioners initiated as early as 1923 efforts to acquire further land from the indigenous owners. However it became evident that the Banabans were by then firmly opposed to parting with any more land for phosphate working, or, in those cases where they were willing to do so, the terms requested by them were ones which the Commissioners were not prepared to meet. In view of that and of the steady pressure being maintained on the Colonial Office by the Phosphate Commissioners, the Secretary of State for the Colonies enacted in 1928 an Ordinance authorizing the compulsory acquisition of land needed for mining, and providing that the royalty to be paid for the minerals extracted was to be such as the Resident Commissioner might prescribe. In the meantime the Resident Commissioner of the day, Mr. (later Sir) Arthur Grimble, who had been negotiating with the Banabans on behalf of the Commissioners, wrote a threatening letter to the Banabans advising them to accept the terms offered by the Commissioners. The letter which, in the words of the distinguished judge, "it is impossible to read without a sense of outrage", ^{25/} threatened the inhabitants with the destruction of their village, the compulsory acquisition of their land "at any old price", the "indiscriminate" mining of their lands as well as other unspecified forms of punishment. The letter also accused the villagers of having shamed the "Important Chief, the Chief of the Empire" by rejecting "his kindness" to them and ended with the author referring to himself as "your loving friend and father". ^{26/}

^{24/} Originally a German colony, Nauru became in 1919 a League of Nations Mandate conferred on the British Empire. It subsequently became a United Nations Trust Territory jointly administered by Australia, New Zealand and the United Kingdom. It became an independent republic in 1968.

^{25/} Sir Robert Megarry V-C, in Tito v. Waddell p. 173.

^{26/} The letter, a classic specimen of colonial arrogance and condescension, is reproduced in full in Annex III.

Since despite this and other admonitions the indigenous landowners remained unwilling to part with their lands on the terms offered by the Phosphate Commissioners, the Colonial Secretary authorized in 1930 the compulsory acquisition of 178 acres of land under the 1928 Ordinance. The compensation awarded was £150 per acre but the money was to be paid not directly to the landowners but to the Resident Commissioner to be held by him in trust on behalf of the owners subject to such directions as the Secretary of State might from time to time give. The royalties, as provided by the Ordinance, were fixed by the Resident Commissioner, the very person who had sent the threatening letter to the Banaban owners, at 10 1/2 pence per ton 27/

In July 1931 the then High Commissioner for the Western Pacific visited Ocean Island. In the course of a meeting with the Banabans to hear their grievances he is reported to have told them that while it was the general rule that the surface of the land belonged to the owner, any minerals under the land belonged to the Crown which could do what it pleased with them. This last assertion was dismissed by Sir Robert Megarry V-C as having no basis in English law at all. 28/

By 1938 the British Phosphate Commissioners were again requesting the acquisition of further land and in 1939 the Banabans petitioned the Secretary of State for the Colonies seeking a new home for the Banaban people somewhere in the Fiji group in view of the continued gnawing away of Ocean Island for mining operations. The Banabans made clear that they wanted the other island not instead of Ocean Island but in addition to it as a second home, and in order to preserve their racial identity and culture. In April 1942 the island of Rabi in the Fiji group, 1600 miles from Ocean Island, was purchased for the Banabans out of the Provident Fund which had accumulated money to make provision for the Banabans future.

A few months later Banaba like the islands in the Gilbert group was occupied by Japan, but unlike the Gilberts which were reoccupied by the Allies in November 1943, the Japanese were only driven off Ocean Island in 1945. During those three years most of the inhabitants of Banaba were either killed or deported to Nauru and to the Caroline and Marshall Islands. Of some 150 left on Ocean Island at the time of the Japanese surrender all save one were killed by the retreating Japanese forces before the island was reoccupied in September 1945. Furthermore all the houses on the island had been destroyed and most of the trees as well. It was at that juncture that the British

27/ Of these a 2d. royalty was to be credited to a fund termed the "Banaban Provident Fund" and a 2 1/2d. royalty was to be held in trust on behalf of the Banaban community to be used in such manner as the Secretary of State might direct.

28/ Tito v. Waddell, p. 185.

Government declared that it would be impracticable to return the Banabans to their island and decided to resettle the islanders, at least temporarily, on Rabi Island. In December 1945 a Rabi Island Council was established by Ordinance and empowered, subject to the approval of the Governor of Fiji, to enact regulations on a wide range of subjects.

In 1947 the British Phosphate Commissioners entered into new negotiations with the Banabans in Rabi Island for the acquisition of some 671 additional acres of land representing the whole of the remaining land in Ocean Island that was economically workable. The High Commissioner instructed his representative in Rabi Island to take "no part whatever" in the negotiations between the representative of the Phosphate Commissioners and the Banabans, thus depriving the islanders of needed knowledge and advice if they were to bargain effectively. The negotiations concluded with the Banabans agreeing to sell their land for a total of £A 82,900 and a royalty of one shilling threepence a ton on all phosphate mined. The agreement, though it disposed of phosphate which would take over a quarter of a century to mine, did not contain any provisions for revision or renegotiation nor for varying or reconsidering the royalties which were set at a fixed and unvariable rate. Nor did the Banabans know that the British Phosphate Commissioners were a non-profit making concern designed to enable Australian and New Zealand farmers to reap the benefit of the purchase of phosphates below the market price. 29/

The 1947 transaction was described by Sir Robert Megarry V-C. as a "major disaster" for the Banabans 30/ while the High Commissioner's action in depriving the islanders of expert advice was castigated by the learned judge as neither "good government" nor "the proper discharge of the duties of trusteeship in the highest sense". 31/

Although the royalty rate payable to the Banabans was increased, on an ex-gratia basis, to one shilling and ninepence in 1958 and to seven shillings in 1966 32/ the resentment and anger of the Banaban people did not cease to grow. The treatment meted to them and their transfer to Rabi Island accentuated their feeling of isolation and distinctiveness from the other people in the Gilbert and Ellice Islands. The fact that the royalties paid by the British phosphate

29/ Ibid., p. 241.

30/ Ibid., p. 210.

31/ Ibid., p. 238.

32/ It should ~~be~~ noted that between 1973 and 1978 the Banabans received royalties of over \$A 14 million. See Parliamentary Debates, House of Commons, 13 December 1978.

Commissioners to the government of the Gilbert and Ellice Islands Colony were much higher than those received by the Banaban community and the example of near-by Nauru, which achieved independence in 1968, led the Banabans to demand that Ocean Island become also a separate independent State. - This request addressed on several occasions to the British Government was not granted largely on the grounds that it would deprive the rest of the Territory of its main source of revenue. The fact that the replanting of Ocean Island, after the phosphates became exhausted, in order to render it inhabitable once again, would be a costly proposition must also have played a role though the Banabans did succeed in winning a measure of support with British public opinion and amongst members of all parties in the two Houses of Parliament.

In 1968 the Banabans brought their case to the United Nations Special Committee on Decolonization. Their plight elicited a good deal of sympathy amongst members of the Committee which urged the United Kingdom to take a series of measures to improve the situation of the Banabans but stopped short of supporting the Banabans' request for secession. 33/

The Banabans **also** took legal action to press their case. In proceedings brought before the High Court in London the Council of Leaders in Rabi Island joined by several Banaban landowners claimed (Ocean Island no 2) that the Crown was in a fiduciary relationship to the Banabans and that in respect to the 1931 and 1947 transactions described above the Crown had acted in breach of that relationship through a conflict of duty and interest. They also claimed (Ocean Island no 1) inter alia that the British Phosphate Commissioners had failed to comply with their obligations to replant some 250 acres of worked out lands leased under the 1913 agreement. 34/ The action against the Crown in "Ocean Island no 2" failed since the Court held that any obligation of the Crown towards the Banabans was a governmental obligation not justiciable in the courts rather than a trust in a legal sense. However the senior judge of the Chancery Division of the High Court was, as noted above, highly critical of the British colonial administration. The action in "Ocean Island no 1" succeeded in part and, though the Court refused to order specific performance of the replanting claim, it held that the Commissioners were liable for damages. - In a subsequent order the Court assessed compensation at a rate of \$A 75 per acre for the 186 acres of land contested in the proceedings and awarded the owners a total of \$A 13,950 in damages.

33/ Official Records of the General Assembly, Twenty-third Session, Annexes, addendum to agenda item 23 (A/7200/Rev. 1), chap. XVIII, para. 13. For a more detailed discussion of the Special Committee's action on Banaba see below page 36.

34/ Tito v. Waddell (1977) 3 All ER 129.- The hearings one of the longest in the High Court's history, took 206 court days to complete in addition to 15 additional days for holding a view of the locus in quo .

The Vice-Chancellor ruled, however, that the plaintiffs would have to pay their legal costs which must have far exceeded the damages awarded to them. By way of comparison it may be noted that the legal costs incurred by the British Phosphate Commissioners in the proceedings exceeded \$A 1.15 million. 35/

In 1977 Mr. R. N. Posnett, a senior official at the Foreign and Commonwealth Office, was appointed by the Foreign and Commonwealth Secretary to inquire into the financial and constitutional issues affecting the future of the Banaban community. After visiting the Gilbert Islands and Rabi Island Mr. Posnett recommended, in a report tabled before Parliament, an ex-gratia payment to the Banabans of \$A 7 million - increased by the Australian, New Zealand and United Kingdom governments to \$A 10 million - and that Banaba should remain a part of the Gilbert Islands.

In announcing the offer of \$A 10 million to the British Parliament, Dr. David Owen, the Foreign and Commonwealth Secretary, stated that the ex-gratia payment agreed to by the three governments associated with the British Phosphate Commissioners would come out of funds currently held by the Commissioners which, he revealed, amounted to about \$A 23 million in May 1977. The money would be used to establish a fund for the benefit of the Banaban community as a whole, the annual income to be paid to the Rabi Council of Leaders for development and community purposes. 36/ The payment would be final and on condition that, in the outstanding legal actions, no appeal would be made in the case against the Crown and an early resolution would be sought of the case against the Phosphate Commissioners and that no further claims would be made arising out of past events. The British Phosphate Commissioners for their part renewed an earlier offer of \$A 1.25 million in full and final settlement of the Banabans' claims. The Banabans have reportedly decided to accept both sums subject to certain conditions.

Meanwhile conversations regarding Banaba's constitutional position within the Gilbert Islands took place in London in July 1977 between the British Government and a delegation from the Gilbert Islands' House of Assembly headed by the Chief Minister. The delegation expressed unanimity in its resolve to preserve the territorial integrity of the Gilbert Islands coupled with readiness to find ways to reach agreement with the Banaban community. The discussions in London were continued in October 1977 in Tarawa at a meeting between the Gilbert Islands Government and the Rabi Council of Leaders. Though agreement appeared to have been reached between the two sides on what became known as the Bairiki Resolutions, including the holding under United Nations supervision of a referendum on all the islands of the Territory concerning the separation of Banaba from the Gilberts, hopes for a final resolution of the issue proved ill-founded and the Bairiki Resolutions were never implemented.

35/ Information given by the Australian Minister for Administrative Services to the Australian Senate. A/AC.109/L. 1231, para. 28.

36/ The total amount of development aid and grant in aid allocated to the Banaban Community in Rabi Island between 1947 and 1978 consisted of a single grant of £ 80,000 made in 1968. See Parliamentary Debates, House of Commons, 31 July 1978.

At the Marlborough House Constitutional Conference held in November/December 1978 discussions took place between representatives of the British government, the Gilbert Islands delegation and representatives of the Banaban community regarding the future status of Banaba. The Banaban representatives maintained their demand for complete separation of the island prior to independence, while the Gilbert Islands delegation rejected such request but offered to provide for a special constitutional status for Banaba and the Banabans within a sovereign independent state of Kiribati. Since no agreement seemed possible the Minister of State for Foreign and Commonwealth Affairs and Chairman of the Conference, Lord Goronwy-Roberts, announced the British Government's decision that Banaba should remain part of an independent Gilbert Islands State coupled with the promise to see the interests of the Banabans safeguarded to the fullest extent possible within the boundaries of the new state. 37/ Following this announcement the Banaban representatives walked out of the Conference. In the absence of the Banabans the Conference decided on a set of constitutional provisions concerning Banaba and the Banabans to be written into the Independence Constitution. 38/

Despite continued Banaban protests, both in Banaba itself and in Rabi Island, the new Conservative Government in Great Britain announced that it would not depart from the decision enunciated by the previous Labour administration to grant independence to the Gilbert Islands on 12 July 1979 and to include Banaba within the boundaries of the newly independent state of Kiribati. 39/ The bill granting independence to Kiribati was passed by both Houses of the British Parliament in mid-June 1979. 40/

Efforts to find a mutually acceptable solution to the question are expected to continue in talks, sponsored by the Prime Minister of Fiji, between the government of Kiribati and the Rabi Council of Leaders.

37/ Report of the Gilbert Islands Constitutional Conference, London, HMSO (Cmnd 7445), para. 3.

38/ See below pages 28 and 29.

39/ Statement by the Lord Privy Seal to the House of Commons on 24 May 1979.

40/ Efforts by Sir Bernard Braine (Conservative) in the House of Commons and by Lord Brockway (Labour) in the House of Lords to exclude Banaba from the new independent state were unsuccessful.

V. CONSTITUTIONAL EVOLUTION

A. Crown colony rule

From the proclamation of the British Protectorate and until 1 January 1972 the Gilbert and Ellice Islands formed part of the Western Pacific High Commission under the jurisdiction of the High Commissioner for the Western Pacific. ^{41/} The High Commissioner, whose headquarters were in Suva, Fiji, until 1953 and thereafter in Honiara, Solomon Islands, was represented by a Resident Commissioner. In 1972 the Islands ceased to be part of the High Commission and the Resident Commissioner was redesignated Governor of the Gilbert and Ellice Islands.

Up to 1963 responsibility for the administration of the Territory rested solely with the High Commissioner or the Resident Commissioner. In that year wholly nominated Executive and Advisory Councils were established. ^{42/} The Executive Council was composed of four "official" and four "unofficial" members ^{43/} nominated by the Commissioner who was to consult them in the exercise of almost all of his powers. The Advisory Council consisted of five official and twelve unofficial members appointed by the Resident Commissioner who presided over the Council. Its functions were to advise on such matters as the High Commissioner might determine.

The next constitutional step was taken in 1967 with the enactment of the Gilbert and Ellice Islands Order which provided for the establishment of a Governing Council and a House of Representatives to replace the previous Executive and Advisory Councils. The Governing Council consisted of two ex-officio members (the Assistant Resident Commissioner and the Attorney-General), not more than three official members appointed by the Resident Commissioner and five members elected from among the elected members of the House of Representatives, one of whom was to be styled "Chief Elected Member".

The House of Representatives was composed of the two ex-officio members referred to above, up to five appointed official members and twenty-three members elected by universal adult suffrage.

^{41/} The Western Pacific High Commission, now defunct, consisted of the British Solomon Islands Protectorate, the New Hebrides Condominium, as well as the Gilbert and Ellice Islands Colony.

^{42/} The Gilbert and Ellice Islands Order in Council, 1963.

^{43/} In British Constitutional parlance the term "official member" is used to designate a public servant whereas the term "unofficial member" refers to a person who is not a public official.

The 1967 Constitution did not provide for a real separation of powers between the Governing Council and the House of Representatives. The Council's functions were both executive and legislative in nature whereas those of the House were of an advisory and recommendatory character. The Constitution included a chapter on the "Protection of Fundamental Rights and Freedoms of the Individual", a somewhat unusual feature in British colonial constitutions at such an early stage of political advancement. Its insertion was apparently connected with the growing ethnic tension between the Gilbertese and the Ellice Islanders. 44/

B. Representative government

Representative government was introduced in 1971. 45/ The existing Governing Council and House of Representatives were replaced by Executive and Legislative Councils with enlarged membership and powers. The Legislative Council was presided over by the Resident Commissioner (restyled Governor, after 1972) or his representative and consisted of three ex-officio members (the Chief Secretary, the Attorney-General and the Financial Secretary), two official members appointed by the Resident Commissioner and 28 elected members. 46/

The Executive Council consisted of the three ex-officio members and the two public service members of the Legislative Council, the Leader of Government Business, and four other persons appointed by the Resident Commissioner, after consultation with the Leader of Government Business, from among the elected members of the Legislative Council. 47/ The Leader of Government Business, who replaced the Chief Elected Member under the 1967 Order, was chosen by the elected members of the Legislative Council from among their number. A beginning was made in the direction of a ministerial system of government with the provision that any member of the Executive Council could be entrusted by the Resident Commissioner with responsibility for any subject or subjects relating to the business of government. 48/

The Commissioner was to consult the Executive Council on most matters relating to the administration of the colony but was not bound by the Council's advice. 49/

44/ See Report of the United Nations Visiting Mission to the Gilbert and Ellice Islands, 1974, Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 23 (A/9623/Rev.1), vol. V, chap. XXI, Annex I, para. 157.

45/ The Gilbert and Ellice Islands Order, 1970.

46/ Under both the 1967 and the 1970 Orders-in-Council eight seats in the Legislature were reserved for representations of the Ellice Islands.

47/ Of the persons so appointed at least two had to be members representing districts in the Gilbert Islands and at least one had to be a member for a district in the Ellice Islands. The Gilbert and Ellice Islands Order, 1970, section 31.

48/ The Gilbert and Ellice Islands Order 1970, section 41.

49/ Ibid., sections 26 and 27.

The powers of the Legislative Council with regard to legislation were limited in several ways. First, except on the Commissioner's recommendation it could not proceed upon any bill or motion affecting the finances of the Territory or the salary or other conditions of service of any public officer. 50/ Secondly, the Resident Commissioner retained the power to veto a bill passed by the Legislative Council or to reserve it "for the signification of Her Majesty's pleasure" (in practice, for the decision of the Secretary of State in London). 51/ Thirdly, the Queen, acting on the advice of the Secretary of State, retained a general power of disallowing laws assented by the Resident Commissioner. 52/ Finally if the Resident Commissioner considered it expedient in the interests of public order, public faith or good government, he could declare a bill or motion passed or carried if the Legislative Council had failed to pass or carry it within such time or in such form as the Commissioner thought fit, though in such cases he was to report the matter to a Secretary of State in London together with the reasons for his action and the Secretary of State could in turn revoke the Governor's declaration. 53/

C. Responsible government

In 1974 a new Constitution was introduced 54/ based on proposals put forward by a Select Committee of the Territory's Legislative Council. In essence it provided for the introduction of a ministerial system of government collectively responsible to the legislature which was henceforth to be known as the House of Assembly. The Executive Council was replaced by a Council of Ministers presided over by the Governor and consisting of three ex-officio members, 55/ the Chief Minister and not less than four and more than six ministers, appointed by the Governor on the advice of the Chief Minister from among the elected members of the House of Assembly. 56/ The Chief Minister was elected by the elected members of the House of Assembly from among their number 57/ and he and the other ministers were bound to resign if a motion of no confidence received in the House the affirmative votes of a majority of all elected members. 58/

50/ Ibid., section 53

51/ Ibid., section 54

52/ Ibid., section 56

53/ Ibid., section 57

54/ The Gilbert and Ellice Islands Order, 1974.

55/ The same ones as under the 1970 Constitution except that the post of Chief Secretary was abolished and replaced by that of Deputy Governor.

56/ The Gilbert and Ellice Islands Order, 1974, section 44.

57/ Ibid., section 32.

58/ Ibid., section 34.

Under the 1974 Constitution the Governor retained sole responsibility for defense, foreign affairs, internal security, the police and the public service. 59/ Though on other matters he was to act on the advice of the Council of Ministers, he retained the power under certain circumstances to act without consulting the Council 60/ or against its advice, though in the latter case he was to report the matter to the Secretary of State together with the reasons for his action. 61/

The composition of the House of Assembly and its powers with regard to legislation remained virtually unchanged from those enjoyed by the Legislative Council under the 1970 Constitution. However the role of the Governor in presiding over the legislature was taken over by a Speaker who was appointed by the Governor, acting after consultations with the Chief Minister, from among persons who were not members of the House and who held office during Her Majesty's pleasure. 62/

The House of Assembly had to be dissolved four years after its first meeting unless it had been dissolved earlier by the Governor acting in his own discretion. 63/

Concerning the judiciary, between 1961 and 1975 the Gilbert and Ellice Islands came within the jurisdiction of the High Court of the Western Pacific. 64/ The Court was presided over by a Chief Justice resident in Honiara in the Solomon Islands. A judge of the High Court visited the Territory about twice a year to deal with outstanding cases. Other cases were dealt with by the Senior Magistrate in the Territory. Appeals from the High Court lay to the Fiji Court of Appeal and from there, in certain circumstances, to the Judicial Committee of the Privy Council in London. 65/

59/ Ibid., section 26.

60/ Ibid., section 27.

61/ Ibid., section 28.

62/ Ibid., section 61.

63/ Ibid., section 70

64/ The Western Pacific (Courts) Order, 1961. The jurisdiction of the High Court extended also to the Solomon Islands and to the New Hebrides.

65/ The Judicial Committee of the Privy Council is the final court of appeal for all the remaining British dependent territories as well as for all those independent members of the Commonwealth which acknowledge Queen Elizabeth II as their head of State with the exception of Canada, Papua New Guinea and Solomon Islands. In addition certain Commonwealth countries which have severed their constitutional links with the British monarchy have maintained appeals to the Judicial Committee.

Following the separation of the Ellice Islands (Tuvalu) in October 1975 a new Constitution was brought into effect in the Gilbert Islands. 66/ Essentially it followed the lines of the 1974 Constitution with some modifications made necessary by the separation of the Ellice Islands and by the concurrent dissolution of the High Court of the Western Pacific. Thus the number of elected members of the House of Assembly was reduced from 28 to 21 as a result of the abolition of the eight seats representing Ellice Islands constituencies and the addition of one seat for a member representing the Line Islands. 67/

A new High Court for the Gilbert Islands was established to replace the High Court of the Western Pacific. Appeals continued to lay to the Court of Appeal in Fiji and from there, under certain conditions, to the Judicial Committee of the Privy Council. 68/

D. Internal Self-Government

The Gilbert Islands achieved self-government on 1st January 1977 following a series of amendments to the 1975 Constitution. 69/ As a result the Governor, in the exercise of his functions, was to obtain, and act in accordance with, the advice of the Council of Ministers, except on matters with respect to which he still retained sole responsibility namely defence, external affairs, internal security including the police, and any matter which in his judgement would affect the operation of the special provisions concerning the Banaban community. 70/ The Governor also ceased to preside over the Council of Ministers which henceforward was to be chaired by the Chief Minister. 71/ The office of Deputy Governor was abolished 72/ and that of Financial Secretary replaced by a Minister in charge of Finance, 73/ with the result that the Council of Ministers consisted of the Chief Minister, not less than five not more than seven Ministers and the Attorney-General who continued to sit as an ex-officio member. 74/

66/ The Gilbert Islands Order, 1975.

67/ Ibid., section 44.

68/ Ibid., Chapter VI, sections 71-83.

69/ The Gilbert Islands (Amendment) Order 1976.

70/ Ibid., section 8.

71/ Ibid., section 10, though the Governor retained the right to summon and preside over a special meeting of the Council of Ministers as he saw fit.

72/ Ibid., section 5.

73/ Ibid., section 3. This section came into operation on 1 November 1976.

74/ Ibid., section 9.

Concerning legislation the Governor's powers to veto Bills or to declare a Bill passed or a Motion adopted without the Assembly's consent were confined to Bills or motions affecting matters for which the Governor retained personal responsibility. 75/ Likewise the Royal Prerogative of disallowance was limited to legislation which in Her Majesty's view affected any matter within the Governor's sole competence or the responsibility of the United Kingdom government for defence and foreign affairs. 76/ The Amendment Order also provided that the Governor was to reserve "for the signification of Her Majesty's pleasure" any Bill which appeared to him, acting in his discretion, (a) to be inconsistent with any international obligation imposed on Her Majesty by treaty, (b) likely to prejudice the Royal Prerogative and (c) to be in any way repugnant to or inconsistent with the provisions of the Gilbert Islands Constitution. 77/

The composition of the House of Assembly was modified with the increase in the number of elected seats from 21 to 36 78/ and with the abolition of the posts of Deputy Governor and Financial Secretary both of which carried ex officio membership of the Assembly. Also the Speaker was henceforward to be elected by the elected members of the House of Assembly from outside their number prior to his formal appointment by the Governor. 79/

The 1976 Order also contained special provisions designed to protect the rights over or interests in land in Ocean Island possessed by members of the Banaban community residing in Rabi Island. 80/

75/ Ibid., sections 19 and 21.

76/ Ibid., section 20.

77/ Ibid., section 19.

78/ The increase in the number of seats was not contained in the Gilbert Islands (Amendment) Order 1976 but was decreed by the Election Ordinance 1977 passed by the Gilbert Islands House of Assembly.

79/ Ibid., section 22.

80/ Ibid., section 28.

E. The Independence Constitution 81/

At the end of 1978 a Constitutional Conference was held at Marlborough House, London, under the chairmanship of Lord Goronwy-Roberts, United Kingdom Minister of State for Foreign and Commonwealth Affairs. The Conference agreed on the basic provisions to be included in the Independence Constitution on the basis of proposals put forward at the Conference by the Gilbert Islands delegation. It also decided that the Territory would become independent under the name of Kiribati 82/ in early July 1979 and would seek to retain membership of the Commonwealth.

The Executive

The Independence Constitution provides for a republican form of government under a mixed presidential and parliamentary system. The executive authority in Kiribati is vested in a Cabinet which is collectively responsible to the legislature - to be known as Maneaba ni Maungatabu. The Cabinet is presided over by the President of Kiribati - known as Beretitenti 83/ - who is both Head of State and Head of Government. He is elected nationally following a general election to the Maneaba from not less than three and not more than four candidates nominated by the Maneaba from among its members. A person may assume office as Beretitenti after election on not more than three occasions. 84/ Provision is made for the person holding the office of Chief Minister at the time of independence to become the first Beretitenti.

Other than the Beretitenti, the Cabinet consists of the Kauoman-ni-Beretitenti (or Vice-President), not more than eight other ministers and the Attorney-General, all of whom hold office at the Beretitenti's pleasure. The Kauoman-ni-Beretitenti is appointed by the Beretitenti from among the Ministers, while the Ministers are appointed by the Beretitenti from among the members of the legislature. The Attorney-General, who is the Government's chief legal adviser, is also appointed by the Beretitenti. If he is not an elected member of the Maneaba, he becomes ex officio a member of the legislature.

The Beretitenti - and thereby the cabinet - must resign if a motion of no confidence in him or the Government is adopted by a majority of all members of the Maneaba or if in a vote in the Maneaba on a matter which the Beretitenti declares to be an issue of confidence he fails to gain a majority of all the members. In those cases the Maneaba is to be dissolved and the Council of State - consisting of the Chairman of the Public Service Commission, the Chief Justice and the Speaker - performs the functions of Beretitenti and of government until, following a general election, a Beretitenti assumes office.

The Beretitenti also ceases to hold office through death or incapacity, or if he ceases to be member of the Maneaba. In those cases the Kauoman-ni-Beretitenti assumes the office of Beretitenti subject to confirmation by the Maneaba until the Beretitenti assumes office following an election.

81/ The outline of the Independence Constitution is based on the Report of the Gilbert Islands Constitutional Conference, London, November/December 1978 (London H.M.S.O., Cmd 7445).

82/ pronounced Kíribass

83/ pronounced Beresiténce

84/ If the Kauoman-ni-Beretitenti (Vice-President) assumes the office of Beretitenti, he may assume office on election as Beretitenti on not more than two subsequent occasions