The Legal Status of the Arabian Gulf States: A Study of their Treaty Relations and their International Problems

By Husain M. Al-Baharna [Manchester University Press, Manchester and New York, 1968, pp. xv, 351]

The piecemeal and often reluctant expansion of the British Empire in the late nineteenth century, if it is to be called imperialism at all, was the imperialism of a nation of shopkeepers, to whom the adding of another penny to the income tax, whether to pay for a colony or anything else, was a sin. And so they practised imperialism on the cheap, while the Protectorate became the legal institutionalization of this policy of inexpensive expansion. From the British point of view, the establishment of a protectorate preserved the territory concerned from foreign intervention, allowing the imperial government to decide its constitutional future in its own time. In particular, it was felt that an elaborate and costly paraphernalia of administration was not normally required in a Protectorate, so that the establishment of a protectorate might well be approved by the Treasury when a colony might not. The Protectorate was a desirably cheap form of imperial expansion.

When the scramble for empire began, the device of the protectorate was best suited to serve a policy of inexpensive imperialism. But the rules of law relating to Protectorates were nevertheless modified greatly over the years to ensure that the interests protected were primarily those of the imperial power, rather than those of the inhabitants of the Protectorates.

The corpus of British public law doctrine dealing with protectorates, inherited by the later Victorians, was not entirely suited to their imperial needs. It stressed the importance of the treaty as the source of jurisdiction in and over Protectorates; yet treaty making was particularly difficult with tribal chiefs, not only in the reaching of a genuine consensus, but also because it seems to have involved their recognition as rulers of "states", their possession of "sovereignty", and their capacity to cede or delegate part of it to the protecting power. So shaky were thought to be these fictions and assumptions that the jurisdiction of the protecting power which was ultimately based upon them, seemed at times itself unstable.

In practice, jurisdictional disputes between European protecting powers arose more about the extent of their control over each other's nationals in their protectorates. The original British position here was inherently contradictory: that though African and Oriental rulers and chiefs could grant part of their "sovereignty" to a European protecting power, they could not grant jurisdiction over foreign Europeans in

their territories, as such a grant must come from the European power concerned.

The German and French positions however, was that once a Protectorate had been established, the protecting power could assert jurisdiction over all persons, irrespective of nationality, within its territorial limits. By 1895, the British position became assimilated to that of the Germans and French, involving a change of legal theory in response to the realities of imperial expansion.[1] This eventual consensus, however, was only partly based on formal international conventions and agreements.

Thus, by 1895 the long standing belief of British lawyers that the powers of the protecting state were limited by the terms of the treaty or agreement granting jurisdiction in each particular Protectorate was abandoned in favour of the continental doctrine that the powers of the protecting state flow not from such treaties or agreements at all, but from the fact of the assumption of the Protectorate; so that any limitations in the original treaty or agreement could be ignored altogether by the protecting power.

In British courts, this belief ultimately became enshrined in a pious corollary to the doctrine of the separation of the powers, when Denning, L.J., as he then was, said in *Nyalis' Case* that:—

> "Although the jurisdiction of the Crown in the protectorate 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 has 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. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage of sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged."[2]

In other words, in the municipal courts of Great Britain questions relating to the breach of treaties and agreements limiting the jurisdiction of the protecting power were just not justiciable.

And the peoples of colonial protectorates were little better off in the realms of international jurisprudence, for:—

> "As regards *contracts between a State* or a company such as the *Dutch East India Company* and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights such as may, in international law, arise out of treaties."[3]

But Dr. Al-Baharna argues that the recognition given by Great Britain to the Arabian Gulf States took place well before the estab-

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1 Lord McNair, *International Law Opinions*, vol. I, pp. 39-55.

2 *Nyali Ltd. v. Attorney-General*, [1956] 1 Q.B. 1, at p. 15.

3 *The Island of Palmas Case* (1928), further reported in R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963, pp. 88 et seq., at pp. 112-3.

lishment by treaties, of British foreign jurisdiction in the Gulf. He accordingly feels able to place them in the category of protected states, rather than of colonial Protectorates, and is not confronted with the difficulties posed by the type of treaty recognizing the sovereignty of a particular chief or ruler, and at the same time wholly or partially extinguishing it.

Dr. Al-Baharna does not deal with the complexities of English municipal law, notably the Foreign Jurisdiction Acts, relating to the Arabian Gulf States nor the relationship between municipal and international law rules relating to the States. Despite the intrinsic interest of these problems to British lawyers, it would be unkind to blame Dr. Al-Baharna for avoiding a discussion of what are essentially historical issues, now that the imperial fires are sinking on the dunes and headlands of the Gulf, and the far called Navy prepares to steal away.

At the same time, one may perhaps be permitted to ask whether the fine distinction often drawn between protected States and colonial protectorates, based essentially on recognition, is of any practical utility, while the Protectorate relationship continues. For during this time the protecting power controls and conducts their international relations. It is only in respect of internal affairs that they exercise rights of sovereignty.

But if a dispute arises as to the extent or exercise of British jurisdiction within a protected state, British municipal courts will not inquire into the right of the protecting power to exercise jurisdiction, the assumption of jurisdiction being treated as an act of state, and not cognizable by the courts. And so there is normally no effective municipal forum in which the inhabitant of a protected state may raise an issue relating to the extent of British jurisdiction in his country. In this regard, surely he has the same disabilities as the inhabitant of a colonial protectorate?[4]

On the question of the international status of the Arabian Gulf States Dr. Al-Baharna's standpoint is essentially British, or to be more precise, that of a member of the original Family of Nations, looking as as does for the most part at the transactions of Oriental sovereigns and rulers in the light of the rules of the old international club, at a time when its membership was very much restricted.

However, while it is interesting to see how the doctrines of late Nineteenth Century international law applied to the Arabian Gulf States, one may perhaps ask what were the applicable local rules governing the relationships of the Arabian Gulf countries and rulers *inter se*, and with the empires of Turkey and Persia in particular. Presumably Muslim law applied to the relationships of the Arabian Gulf States, Turkey and Persia then, as now. What rules did it pre-

4 As recently as 1966 Qatar was treated as if it were British possession for the purposes of s. 5(2) of the Foreign Jurisdiction Act, 1890: *R. v. Secretary of State for Home Affairs, Ex Parte Demetrious*, [1966] 2 Q.B. 194; [1966] 2 All E.R. 998, D.C. Of course, one must normally exclude the rulers of protected states from this generalization: *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

scribe? Did these conflict with the rules of international law as recognized by European Christian States? To my mind, these are fascinating questions suggested by Dr. Al-Baharna's study, which could well be explored, if indeed, this has not already been done.

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