Judicial Interpretation of the Mandate for Palestine.

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The Mandate for Palestine was granted by the Principal Allied Powers to Great Britain at the conference of San Remo in 1920. The terms of the Mandate were subsequently formulated by the Principal Allied Powers, and were submitted to the Council and to the Assembly of the League of Nations. There was some delay in the confirmation of the Mandate consequent on outstanding questions with regard to the Syrian Mandate which had been accorded at the same time to France. It was desired that the Mandates for the two neighbouring countries should come into operation at the same time, and it was not till 1923 that an agreement was reached on all the disputed points. During the five years that have passed the provisions of the international instrument have come up for consideration, both before the Permanent Court of International Justice and before the Courts of Palestine. Not less than three out of the ten cases in which the Court of International Justice was called upon to give a judicial decision, as distinct from an advisory opinion, have been concerned with the interpretation of the Mandate in Palestine.

The decisions of the Local Courts on the interpretation of the instrument under which the Government of Palestine exercises authority, if of less far-reaching importance than those of the World-Court, merit nevertheless the attention of jurists.

The Mandate contemplates that questions of the application or interpretation of its articles which may arise between the Mandatory and a member of the League of Nations shall be deferred for settlement to the International Court. Article 26 lays down in broad terms, "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Ar-

ticle 14 of the Covenant of the League of Nations". The three cases which have been judged by the International Court under this power have been concerned with the different aspects of a single question, namely, the validity and scope of certain concessions granted by the Ottoman Government in Palestine prior to the outbreak of the war.

The concessions concerned the supply of water and electric power for Jerusalem and they were granted to an Ottoman Greek by the name of Mavrommatis in the year 1914. No work had been done on the concessions prior to the British occupation, save that the concessionaire had submitted plans for the works to the Turkish authorities and had received permission to extend the period under the concession within which the work was to be done. During the military operations in Palestine, the British Army had installed a water supply for the city of Jerusalem which was subsequently transferred to the Municipality. And shortly after the Civil Administration of Palestine was established, before indeed the Mandate of Palestine had been granted, the High Commissioner had granted a concession for the generation of electric power from the Jordan, and the exclusive right to distribute electricity throughout the country, to a Russian-Jewish engineer Mr. Rutenberg. There was a provision in the concession that the Government should expropriate any existing rights for the supply of electricity within any part of Palestine. When therefore the Ottoman concessionaire Mr. Mavrommatis applied for the ratification of his Ottoman concessions, he was informed that the Government did not propose to maintain them, but was prepared to compensate him for the expenditure which he had incurred in obtaining his rights and preparing the plans. He however claimed in virtue of a clause in the abortive Treaty of Sèvres, which was afterward reproduced in the Special Protocol concerning concessions attached to the Treaty of Lausanne between the Allied Powers and Turkey, that he was entitled to have his concession readapted to the new economic circumstances of the country and that, as the Government of Palestine had made it impossible for him to carry out his enterprise, he should receive compensation which he placed at a generous figure. When the British Government refused his terms, he laid his case before the Greek Government claiming that he was a Greek subject, and asked that his State should submit the dispute to the Court of International Justice. After very scant discussion with the British Foreign Office, the Greek Government referred the case accordingly to the Court at the Hague, maintaining that there was a disagreement as to the interpretation of the Mandate that fell within the submission to the international jurisdiction under Article 26. The British Government demurred to the jurisdiction on three grounds.

(a) that there was no dispute between the two Governments, but only a dispute between a Greek subject and the Government of Palestine

(b) that there was no prelimina y attempt to settle the difference by negotiation

(c) that in any case the dispute was not with regard to the interpretation or application of the Mandate for Palestine.

The preliminary question was decided by the International Court in 1924; and by a majority of six votes to five (which included the National Judge appointed for the special case by Greece) the Court decided that it had jurisdiction. The article of the Mandate of which the application was alleged to be in dispute was No. 11, which provides as follows: —

> "The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country; and subject to any international obligations accepted by the Mandatory, shall have full power to provide public ownership or control of any of the natural resources of the country or the public works, services and utilities established therein. ..... The Administration may arrange with the Jewish Agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration."

It was contended by the Greek Government that the Mandatory had violated this provision, because in giving Mr. Rutenberg the exclusive right to generate and distribute electrical power, it had disregarded the international obligations accepted by the Mandatory in the Concessions Protocol attached to the Treaty of Lausanne. That contention was adopted by a majority of the International Court, which considered the clause in the Rutenberg concession by which the Government was empowered to expropriate any existing rights concerning electric supply to be in conflict with the article of the Convention attached to the Treaty of Lausanne, under which concessions of Allied subjects in Turkey granted before the outbreak of war must be ratified and be readapted to the new conditions.

The question of jurisdiction having thus been vindicated, the Court proceeded to consider, on the merits of the case, whether Mr. Mavrommatis had been wronged and whether he was entitled to damages. The British Government voluntarily agreed that the Court should pronounce upon the question of the application of particular articles of the Lausanne Con essions Convention as to which there was a difference between the Greek and British case. The Greek Government maintained that there was the beginning of the execution of a concession as soon as the concessionaire has submitted his plans; and therefore there was the right

in this case for their subject to have the contract readapted to the new conditions; whereas the British Government maintained that that condition had not been fulfilled, and therefore compensation was payable on the basis of actual loss incurred. The International Court finally held in 1925 that the provisions of the Rutenberg concession in its original form did derogate from the rights of the Allied concessionaire which were protected by Article 11 of the Mandate; but that, as the holder of the concession granted by the Mandatory had expressly declared his willingness to exclude any area covered by a pre-war concession, it was quite possible for Mr. Mavrommatis to carry out his undertakings, and he was bound to do so and was not entitled to damages.

It became necessary then for the Concession to be readapted to meet the new conditions in Palestine, and for this purpose the Greek and the British Governments appointed experts who arrived at an agreement. It might have been expected that an end had been reached of the international litigation. But further trouble arose, and the Greek Government once more was called in to assist the Greek subject. Mr. Mavrommatis put forward certain plans for carrying ou the water supply of Jerusalem which involved the use of the waters of the River Auja near Jaffa. Those waters were already affected by one of the concessions granted by the Government of Palestine to Mr. Rutenberg, which included the right of using the River Auja for the purpose of irrigation. It became necessary therefore for the Government, in considering the plans of Mr. Mavrommatis, to adjust his proposals with the rights of Mr. Rutenberg; and this required some time. The Greek concessionaire complained that the delay of the Government in accepting his plans had once again deprived him of the benefits of his concession, and reasserted a demand for damages. When the British Government refused his demand, he represented once more to his Government that the Mandatory had again violated the article of the Mandate; and a fresh suit was launched in the International Court. Once again the British Government demurred to the jurisdiction. This time their objection met with more success: for the International Court upheld the objection that there was no genuine difference as to the interpretation or application of the Mandate, but only a claim for breach of contract, and therefore the Court of International Justice had no jurisdiction. It was open to the concessionaire, if he complained of breach of contract by the Government of Palestine, to sue in the courts of that country for damages. But it was not open on these grounds to invoke the intervention of his country or the jurisdiction of the International Court on the plea that there had been a violation of the articles of the Mandate.

Turning now to the decisions of Palestine Courts on the interpretation of the Mandate, it is notable that the principal point which has

been in issue is the question of discrimination between the different communities. One of the fundamental duties of the Mandatory of Palestine is to take steps to secure the establishment of the Jewish National Home in accordance with the Declaration of the British Government made in November 1917; but that function is qualified by the duty of carrying out the other part of the Declaration, that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish Communities in Palestine. The Administration of Palestine therefore in its executive and legislative actions is obliged to hold the balance fairly between the Jews and Arabs, and may not use discrimination against one section or the other.

The question of the power of the Courts in Palestine to pronounce upon the validity of acts of the Government in Palestine with reference to the provisions of the Mandate was first raised in the year 1925, and arose over legislation passed by the Government to meet a crisis caused by drought in the water supply of Jerusalem. That water supply has been a matter of contention on several historical occasions, notably when Pontius Pilate raided the Temple treasury to provide the means of building an aqueduct. On the present occasion the question in issue was again the right of the Government to bring water into the city from an outlying village, the reputed site of King Solomon's Gardens and bearing the name of Urtas, which is the Arabic corruption of the Latin Hortus. That village lies by the side of the Pools of Solomon which are not indeed of the biblical King but the Turkish conqueror Suleiman. When the water supply of Jerusalem altogether failed, Government proposed to conduct the superfluity of the waters of the village from the Pools by a pipe-line to the city. No agreement was come to with the villagers as to the terms of taking water; and an Ordinance therefore was passed by the High Commissioner acting under the Palestine Constitution, which empowered him to authorize the Municipality of Jerusalem to take water which was the private property of the inhabitants of the village, subject to payment of compensation to the villagers for loss of cultivation which was to be fixed by an arbitrator. Representatives of the villagers challenged the action of the High Commissioner in the High Court of Jerusalem, asking for an injunction to restrict the Government from acting under the law, on the ground that the Ordinance was contrary to Article 2 of the Mandate of Palestine. That article prescribes that the Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish National Home: ..... and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion. The High Court in Palestine granted the injunction, holding that the provisions of the Ordinance

with regard to compensation to be paid to the villagers for the use of their water were contrary to this Article of the Mandate, because they did not safeguard the civil rights of the villagers, and therefore the Ordinance was null and void. The Court founded its jurisdiction in the case on an article of the Palestine Order-in-Council, 1922, which is the instrument by which the powers of the Government of Palestine were laid down by the Mandatory. The Article is to the effect that no Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate; and the Court maintained that as the legislature of Palestine, which is composed of the High Commissioner in Council, was a subordinate legislative authority and subject to the conditions prescribed in the charter of the Government, it was the function of the Court to examine legislation which was alleged to transgress conditions binding on the legislative authority.

The Court had then to examine whether the Ordinance of the Government was in conflict with Article 2 of the Mandate. They found that there was a conflict, and that the law did not safeguard the civil rights of the inhabitants, in three particulars.

(a) because the question as to the sufficiency of the supply of water for the inhabitants was to be determined by an arbitrator and not by the Courts;

(b) because no compensation was provided for a failure to give a sufficient supply of water for the villagers;

(c) because the compensation to be paid for damage or loss of crops was to be assessed by an arbitrator and not by a Court of law.

The Government of Palestine appealed from the judgment of the Supreme Court to the Judicial Committee of the Privy Council in England, which is the Supreme Court of Appeal from all courts established under British Administration. The Privy Council gave judgment in the Appeal on February 3, 1926, and their decision is reported in the English Law Reports (1926, Appeal Cases, p. 321), under the title, "Jerusalem-Jaffa District-Governor v. Suleiman Murra". The Court had in the first place to consider whether the appeal would lie from Palestine to His Majesty's Council. The jurisdiction of His Britannic Majesty under the Mandate of Palestine is, in its English constitutional aspect, jurisdiction in a foreign country and exercised in accordance with the powers granted by the Foreign Jurisdiction Act 1890, which provides that His Majesty shall exercise any such jurisdiction in as ample a way as if he had acquired the territory by cession or conquest. Wherever Courts are established under that Act of the British Parliament, ultimate appeal lies to the Privy Council. Having then established their right to entertain the appeal, the Judicial Committee went on to reverse the judgment of the Supreme Court of Palestine. They were of the

opinion that the Palestinian Court had put a wrong construction on Article 2 of the Mandate. The words at the end of that clause were intended to secure simply that the Mandatory shall not discriminate in favour of persons of any one religion or race in safeguarding the rights of the inhabitants of Palestine. It was not the business of the Courts to consider whether legislation of the Government which modified the antecedent rights of any inhabitants of Palestine was in accordance with what the Court might consider to be principles of sound legislation. It cannot be the duty of the Court to examine, at the instance of any litigant the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of "natural justice". The judgment found moreover that there was no discrimination against any class in the Ordinance about the use of the Urtas Springs, and further that the Ordinance had provided for adequate compensation to the villagers for the use of their property, and that the provision made for assessment and compensation by arbitration and not by a Court of Law was fair and proper.

A few months after the decision of the High Court was given in the Case of the Urtas-Jerusalem water supply, another application was made to the same Court, in which the question concerned an administrative action of the Government, relating to postage stamps of the country, which was said to be in conflict with the article of the Mandate. The action in this case took the form of an application for a writ of *Mandamus*, a form of procedure introduced into Palestine from the English practice, by which any individual may challenge the acts of the Executive and apply to the Courts to issue an order to an officer of the Government to act in accordance with the law. The Order applied for in this case was directed against the Postmaster General and asked that he should issue stamps without a certain inscription which, it was alleged, was not in conformity with the principles of equality of the Arabic and Hebrew languages prescribed in the Mandate. The article in question states: — "English, Arabic and Hebrew shall be the official languages in Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew, and any statement or inscription in Hebrew shall be repeated in Arabic." At the time of the application the postage stamps in use in Palestine were war-stamps issued by the Egyptian Expeditionary Force, bearing a surcharge with the name Palestine in the three languages. But following the Hebrew word transliterating Palestine were two initial letters standing for the Hebrew words which, translated, mean "the land of Israel". The addition had been made on the representation of the Jewish people that the word Palestine transliterated into Hebrew was not the

correct name of the country, and that the name 'Eretz Israel' was the historical name consecrated by the Bible and by later Hebrew literature. The administration of Palestine was not prepared to adopt the traditional Hebrew name, but, in deference to Jewish sentiment, it placed the initials of the Hebrew name after the transliteration of Palestine to serve as it were, as an explanation.

The Arab Committee, which represented the nationalistic ideas of the Palestinian Arabs, protested against the consequent requirement by the Post Office to use stamps on which Palestine was described as the land of Israel, and urged that this was a moral injury for which the High Court was bound to find a remedy. It was alleged further that the inscription on the stamps contravened Article 82 of the Palestine Order-in-Council which prescribed that all official notices and official forms should be published in English, Arabic and Hebrew.

The Court in this case rejected the application, holding that they had no power to enforce the terms of the Mandate on the Administration, save in so far as they were incorporated in the Palestine Order-in-Council. As regards legislation by the Government, the Article of the Order-in-Council, which was invoked in the case of the Urtas Water Ordinance, was adequate to justify the intervention of the Courts. There was no similar condition however in regard to the executive acts of the Government; and therefore the provisions of the Mandate, save in so far as they were affected by legislation, could not be enforced or vindicated by the Courts of Palestine. It was therefore unnecessary to consider whether the Hebrew lettering used on the postage stamps in Palestine was in accordance with the article of the Mandate or not. The Chief Justice, Sir Thomas Haycraft, went on to point out that matters of sentiment or politics could not come within the scope of the authority of the High Court, unless expressly included by some instrument of law. Had the Postmaster refused without reasonable grounds to convey a letter or to issue a postage stamp demanded in accordance with the regulations of his department, there would have been an infringement of a right for which a legal remedy would lie; but a court could not give orders to a department in a matter in which sentiment alone was concerned and there was no breach or inobservance of the regulations [1]).

A recent case concerning the Mandate, which came under judicial consideration, raises the question of conformity of legislation passed by a subordinate legislative authority in Palestine with certain articles of the Mandate. Paradoxically enough, the action was taken by a Jew

[1]) The Decision of the High Court which has not been reported in the Palestine Law Reports, is dated the 24th of October, 1925.

on the ground that local legislation was discriminating against Jews, while the specific aim of the legislation was to satisfy Jews with regard to the observance of the Sabbath day. The legislation was enacted by the Local Council of the Town of Tel-Aviv which is one of the most remarkable creations of the Jewish population of Palestine since the British Occupation. Before the war, Tel-Aviv was a small suburb of Jaffa with a population of a few thousand, and it has grown in the last seven years to a township with a population of 40 000 of which over 95% are Jews. An Ordinance of the Palestine Government provided for the establishment of Local Councils in certain areas which were not municipalities; and in accordance with that law, a Local Council was established in Tel-Aviv which had powers of issuing bye-laws for the good order of the area. Under this power, the Council, with the approval of the Government, enacted an Order requiring all shops and factories to be closed on the Sabbath Day, subject to certain exceptions in favour of restaurants which might be open at certain hours, and in favour of Moslem and Christian shops which were not required to be closed on the Jewish Sabbath. The Jewish keeper of a restaurant was prosecuted for breach of the bye-law and convicted by the Local Court sitting in Tel-Aviv. On Appeal to the District Court (which is a superior tribunal presided over by a British Judge and composed of three members) it was held that the conviction should be quashed because the bye-law was ultra vires as in conflict with the provisions of Article 15 of the Mandate. That article prescribes as follows: —

"The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief."

There is another article of the Mandate which provides that the Administration of Palestine shall recognize the Holy Days of the respective communities in Palestine as legal days of rest for the members of such communities; and it was urged that, in view of that obligation, the Council of Tel-Aviv was acting in full accord with the terms of the Mandate in legislating for observance of the Jewish Sabbath in the Jewish Township. The District Court however maintained that, while a general bye-law requiring all shops and similar establishments to be closed on Sabbath days would have been unobjectionable, a bye-law which required Jews to close their establishments while leaving Moslems and Christians free to keep their places open involved a discrimination against the Jewish inhabitants on the ground of their religion, which was against the terms of Article 15 of the Mandate. An appeal was then

brought from the decision of the District Court to the Supreme Court of Palestine, in which the construction of the Mandate was directly put in issue. That Court has given judgment upholding the decision and reasons of the District Court.

One other case decided by the Courts in Palestine contains certain findings of interest on the position of the Mandatory State in relation to the nationality of the inhabitants of Palestine. Although it has not directly involved the judicial interpretation of an article of the Mandate, it may be of interest to refer to the dicta which touched upon the international status. The case arose out of an application made by the Italian Government to the Government of Palestine for the extradition to Italy of two persons resident in Jerusalem who were charged with participating in the fraudulent bankruptcy of certain persons in Italy. In accordance with Article 10 of the Mandate (which is applied by an Extradition Ordinance enacted in Palestine in 1924), the Extradition Treaties in force between the Mandatory, i. e. His Britannic Majesty and other foreign powers shall apply to Palestine. The Anglo-Italian Extradition Treaty of 1873 was therefore applicable: and the question arose about the effect of the clause in that Treaty providing that British subjects shall not be surrendered to Italy and Italian subjects shall not be surrendered to England. There was some doubt as to the nationality of the accused persons in Palestine, because at the time at which prosecution was brought, no law of Palestinian nationality had been enacted. The persons however had obtained documents known as provisional certificates of Palestinian citizenship which were issued by the Government as travel documents to permanent residents of the country who made a declaration opting for Palestinian nationality. It was contended before the High Court in Palestine, in a Habeas Corpus application after an order for extradition had been made, that the accused persons ought to be treated as British subjects and therefore should not be surrendered, because, in the absence of a Palestinian citizenship, the subjects of the mandated territory obtained the nationality of the mandatory state. In other words, it was contended that there was no such thing in international law as Palestinian nationality, and that Palestinians, including persons who had opted to be Palestinians, had become British subjects in virtue of the operation of the Mandate. The High Court rejected this plea. It held that, assuming that the accused persons were ex-Ottoman subjects permanently resident in Palestine, they had not become subjects of the Crown, because, in accepting the Mandate for Palestine, His Majesty had not acquired full sovereignty over the territory, but a more qualified authority which left the mandated territory separate from the British dominions and the nationality of its inhabitants something distinct from British nationality. The

finding about nationality was in accord with the decision reached by the Council of the League of Nations about the nationality of persons in any territory subject to a Mandate; and although the status of Palestinians in Palestine in the international aspect may be still somewhat indefinite, it may be stated with some certainty that Palestinians are not British subjects.

It will be seen, then, that the Mandate for Palestine has been elucidated in several notable particulars by the wisdom of the Bench. The solutions of other problems that will arise out of the attempt to carry out the trust for civilisation are, no doubt, buried in the breasts of the judges.