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The Land Law of Palestine

AN ANALYSIS OF THE DEFINITION OF STATE LANDS

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INTRODUCTION

I was prompted to write this article by the official announcements, published in the Israeli and the Arab press in Jerusalem on May 22 1979, of the Israeli decision to take control of all *miri* lands in the West Bank on the presumption that this land is state-owned.[1] The latest of these came on May 4, 1980, when it was announced by the Israeli cabinet that the survey of the West Bank carried out to determine the size of state lands had been completed. Judging from previous statements, the official government definition of state lands includes all *miri, mawat,* and *matrouk* lands. The falsification of the real definition of the categories of land that exist under the prevailing law, and the exploitation of the scarcity of literature on the subject have prompted me to attempt here to shed some light on this sensitive and highly controversial area of West Bank law. In this article I hope to clarify the categories under which land in the West Bank is classed, focusing on the definition of *miri* land, and to analyse whether or not it is distinguishable from land used for public purposes and commonly known in most countries of the world as state land. I also hope to explain here the origins and evolution of the land law of Palestine, surveying the changes that have affected it under Ottoman, British, Jordanian and Israeli rule.

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[1] *Al-Fajr* (Jerusalem), May 22, 1979, p. 1.

especially true in the case of *kharaji* lands when, because of the multiplicity of claims to the right to inherit from the deceased, collection of the tribute became difficult. The Sultan also granted *iqtaa* lands to private individuals for cultivation under the second principle. The grantees would hold the land subject to the liability of being dispossessed if it was not cultivated for three successive years. The grantee of *iqtaa* lands would be given either a right of *mulk* ownership, or a more restricted right to hold the land while the Sultan or Emir retained the ultimate true ownership (or *rakaba* as it was called) of the land.[4]

As a result of the application of the above two principles, most of the lands of Palestine were lands whose ownership (or *rakaba*) was in the hand of the Emir, and hence they were of the class which came to be know as *emirieh* or *miri* lands.

1. *The Kinds of Tenure Which Existed in Palestine*

Under the Ottomans, grants of land were made to military leaders (*sipahis*), as a reward for their services. This military tenure was of two kinds: *ziamet* and *timar*. The holder of a *timar* tenure had to provide in times of war a certain number of armed horsemen proportionate to the amount of revenue. The *ziamet* was the larger fief and had to bring in a revenue five to ten times as high as the *timar*. Both of these tenures were heritable and devolved upon the elder son on the death of the *sipahi*. The *sipahis* had to reside on the land; they farmed part of the fief directly and raised taxes from the peasants who worked the rest.

But this system began to fail; the *sipahis* shirked their military duties and sought to transfer their fiefs into private property. This led the Ottoman government in 1839 to abolish the system of *ziamets* and *timars*. These feudatories were replaced by tax farmers (*multazimeen*) who were supposed to raise from the peasants only a stipulated amount, but in fact enjoyed great power. Their extortionist practices and the abuse of their powers were assisted by the lack of a strong government administration and the non-availability to the peasants of legal redress.[5]

In an attempt to curb their strength, the government replaced the tax farmers (*multazimeen*) by the tax collectors (*muhasileen*). However, when they failed to serve the interest of the state in collecting revenue from the land, the Ottoman government became anxious to devise a system of land tenure which would achieve better results.

[4] *Ibid.*, p. 3.

[5] Charles Issawi, *The Economic History of the Middle East* (Illinois: University of Chicago Press, 1966), pp. 71, 72.

land as falling into one or the other of the following three main classes:[9]

a. *Waqf* lands. These are lands which have been dedicated to some pious purpose. Several classes of *waqf* land exist. Where a *waqf* is created, the proprietary right of the grantor is divested and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings, and the subject of the dedication becomes inalienable and non-heritable in perpetuity. Dedicating land to a family *waqf* (*waqf dhurri*) insured for the owner all its benefits to himself and his descendants, while his property was protected by the strongest legal and religious sanctions known to Muslim law from seizure by the state or its officers.[10]

The closest equivalent in English law to *waqf* is the "trust," but the two are not by any means identical, the principle of the English trust being that the trustee is the owner of the property entrusted to him while the enjoyment of the property is for beneficiaries designated to enjoy the property according to the terms of the trust. The obvious advantages derived from turning the land into a *waqf* induced many landowners to take this step and consequently a large proportion of land in Palestine was so dedicated. However, later legislation and the distinctions created between different classes of *waqf* affected the strictness of the principle that no tampering with *waqf* land should be allowed, which lay behind the meaning of *waqf* as explained above.

b. The second class of land was *mulk* land. The origin of this class of land was the *usburi* and *kharaji* lands given respectively to the Muslim and non-Muslim inhabitants of the conquered areas. By 1858, the date of the compilation of the Land Code, *mulk* land had been enlarged to include four kinds which were enumerated in Article 2 of the Code. These were, besides the above two kinds, land which comprises "sites for houses within towns or villages, and pieces of land of an extent not exceeding half a dunum situated on the confines of towns and villages which can be considered as appurtenant to dwelling houses," and "land separated from *miri* land and made *mulk* in a valid way...."

c. The third class comprises the second, fourth and fifth categories of land described by the Code, namely *miri, matrouk* and *mawat* land. The common element in these three categories is the fact that the ultimate ownership (or *rakaba*) of all three lies with the state.

To understand the division of land into these categories, it must first be borne in mind that the theory underlying land law was that all land was

[9] Tute, p. 1.
[10] Goadby and Doukhan, p. 69.

deprive the state of very valuable benefits. The Land Code was intended to put a stop to this, and at the same time to bring the cultivators of the lands into direct relation with the state without any intermediaries.[13]

4. *British Mandate Period*

The above were the legal categories of land in existence when the British Mandate was established in Palestine in 1921. According to Article 46 of the Order-in-Council of 1922,[14] "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman law in force in Palestine on Nov. 1, 1914... or any ordinances or regulations as may hereafter be applied or enacted...." A review of the ordinances enacted during the British Mandate and of the policy with regard to land reveals that, in general terms, the mandatory power, in order to implement the terms of the Mandate which provided for the establishment of a Jewish state in Palestine and hence the division of the land between Arabs and Jews, attempted to establish a clearer division of the land in order to facilitate the exercise of greater control. Hence, it very early began land survey and settlement of dispute operations. A Land Transfer Ordinance[15] was passed which required a permit to be obtained before land could be transferred. It will be noticed that settlement of dispute operations were begun in areas where Jews were interested in purchasing land, in order that purchasers would have a clear and undisputable title over land. In pursuance of this intention, the *Mawat* Land Ordinance enacted in 1921[16] required anyone who had taken possession of what at any time previous to the issue of this Ordinance had become *mahlul*[17] (or vacant), owing to failure of heirs or non-cultivation, in accordance with the provisions of the Ottoman Land Code, to inform the government within three months of the date of the Ordinance. Also, under the *Mawat* Land Ordinance, Article 103 of the Land Code was amended to the effect that anyone who, without obtaining the consent of the Director of Lands, broke up or cultivated any waste land should, contrary to the situation as it existed before the amendments, obtain no right to a title deed for such land and should be liable to be prosecuted for trespass.

The Order-in-Council also introduced a new and hitherto unknown category of land which is, strictly speaking, state or public lands. These were

[13] Tute, p. 2.

[14] Norman Bentwich, compiler, *Legislation of Palestine, 1918-1925*, Vol. 1 (Alexandria: Printed for the Government of Palestine by W. Morris, Ltd., 1926), p. 1.

[15] *Ibid.*, p. 62.

[16] *Ibid.*, p. 135.

[17] See the definition in the next section, below.

most notably suspended all operations of the settlement of disputes over land,[27] which had been continued by Jordan from the point they had reached during the period of the Mandate. The obvious reason for the suspension of settlement operations is to prevent owners from obtaining the chance to prove their title to the land. Furthermore, both locally and internationally, Israel has misrepresented the basic principles of the land law to suit the purposes of the occupation, and has popularized false interpretations of the classes of land. The most widespread of such interpretations is to misrepresent *miri* land as state land, so that when the military authorities expropriate these lands they can claim they are not expropriating land in private ownership.

THE LEGAL ANALYSIS

1. *Is* Miri *Land State Land?*

A good model to use for comparative purposes is the theory of English land law.

The theoretical basis of English land law is that all land in England is owned by the Crown. A small part is in the Crown's actual occupation, called crownhold. The rest is occupied by tenants holding either directly or indirectly from the Crown. This position can be traced from the Norman conquest. William I regarded the whole of England as his by conquest. To reward his followers and those of the English who submitted to him, he granted and confirmed certain lands to be held of him as overlord. These lands were granted not by way of an out-and-out transfer, but to be held from the Crown upon certain conditions, such as the provision of five armed horsemen to fight for the Crown for forty days in each year, and the like. The maxim, *nulle terre sans seigneur* (no land without a lord) applied. There is no allodial land in England.[28]

The same principle holds in Palestine. The basis of land law in Palestine is almost identical to the English land law. As explained above, the Sultan considered himself the true and only owner of all conquered land, with the exception of land which became *waqf* whose ultimate owner became the Almighty. It was explained above that even *mulk* land could, under certain circumstances, be claimed back by the Sultan. The terminology used to explain this is to say that the *rakaba* (ultimate ownership) lies in the hands of the Sultan while the *tessaruf* (use) is granted to private persons. The

[27] M.G.O. 291.

[28] P.V. Baker, *A Manual of the Law of Real Property* (London: Megarry, Stevens and Sons, Ltd., 4th ed., 1969), pp. 9-11.

it (see articles 20, 24 and 30).[31] Provisions were also made for cases where buildings were erected on the land and trees planted. When this happened, the legal situation resulting was that two kinds of ownership became physically fused into one. The land was theoretically the property of the Sultan, but the accretions were legally the *mulk* property of their possessor The category of quasi-*mulk* was thus created.[32]

However, these changes left intact the original principle that if land was left uncultivated without legal excuse for more than three years, then it escheated to the Sultan. Such land became *mahlul* land.[33] This category can be explained linguistically in the following manner: when the land was still under cultivation and therefore *miri*, a certain tie or nexus existed between the Sultan and the *mutassarif*. This tie was loosened and severed (in Turkish, *mahlul*) when the *mutassarif* failed to cultivate it. The land therefore became known as *mahlul* land. Such lands, according to the Code, were subject to the right of *tapu* (*mustakeki tapu*), which meant that the Sultan was not entirely free to grant them to any person he chose, but was restricted by the provisions of the Code which specified that certain persons had preferential rights to obtain a grant by *tapu* of the land.

In Book one, chapter two of the Code, the transfer of *miri* land is dealt with. Before the Code, the principle that *miri* holding was personal and could not therefore be transferred was observed.[34] The Code now conferred upon *miri* holders a legal right of disposition *inter vivos* with leave of the land registry (*dafter khani*), which was given in pursuance of a special formality known as *takhrir*. This was a declaration made before the official by both parties to the transaction.[35] Any disposition of *miri* interest was, of course, limited to the *tessaruf* (use) of the land; it could not affect the *rakaba*, which remained in the Sultan. The right transferred was only the limited right of the holder. Indicative of this basis of disposition is the word used to describe it. The transaction is not called a sale (*bey*), but *feragh* (transfer), and continues to be so called to this day. Dispositions of *mulk* properties, however, are called sale (*bey*).[36]

These are some of the changes that were brought about by the Land Code. The pattern is clear. While the theoretical basis was preserved, more rights over the land were conferred and others were defined. This trend was continued by the mandatory and the Jordanian legislation. However, the

31 Ottoman Land Code.
32 See Tute, *op. cit.*, commentary on Article 25.
33 See generally Book One, Chapter IV, Ottoman Land Code.
34 Goadby and Doukhan, *op. cit.*, p. 137.
35 Article 40, Ottoman Land Code.
36 Goadby and Doukhan, *op. cit.*, p. 138.

In the same sense and to the extent that crownholds are those lands owned and held by the Crown, or the state, a category of land has come into being as a result of British legislation which is the category of state land

It is perhaps more accurate to assume that such lands were always in existence long before the Mandate, being lands in the actual possession of the Sultan or his government and which were not the subject of any grant. However, the British, in their attempt to establish greater order and control over the system of land tenure, spelled them out in the legislation and called them "public lands" in the 1922 Order-in-Council. To this extent they created a new category of land. Article 2 of the Order-in-Council defined public lands as "all lands in Palestine which are subject to the control of the government of Palestine by virtue of Treaty, Convention, Agreement or Succession and all lands which are or shall be acquired for the public service or otherwise."

It is apparent from the definition that public lands are restricted to lands which are subject to the control of the government and used in execution of its purposes, such as the erection of government houses, etc. They do not include all land which is not the subject of a grant to the public, and therefore exclude *miri, mawat,* and *matrouk* lands whose *rakaba* are in the Sultan, but upon which no actual control is exercised by the Sultan. The definition includes lands which are to be acquired for the public service, by expropriation, for example. The High Commissioner was vested with all rights in or in relation to such public lands in trust for the government of Palestine.[40] The place of the Sultan as the ultimate owner of the land (the holder of the *rakaba*) was necessarily transferred to the High Commissioner who came to replace him and who inherited the Sultan's ultimate theoretical ownership of all the lands of Palestine.

3. *The Changes Made to* Miri *Holdings during the Period of Hashemite Rule*

Although several laws were passed during the Jordanian period amending the land laws that existed prior to Jordanian control of the West Bank, no changes were made affecting the fundamental theory upon which the land law was based. In Israel, on the other hand, a land law was passed in 1969 which put everything on a different basis.

Among the laws passed during the Jordanian regime was law No. 41 of 1953,[41] which permitted the change of the category of land from *miri* to *mulk*. The effect of this law was to change all *miri* lands falling within

[40] *Ibid.*, p. 7.

[41] Law Changing *Miri* Land to *Mulk*, *Official Gazette*, Vol. 3, Law No. 41 (Amman, 1953), p. 234.

similar terms. This, however, is not the case. Indeed, the preamble to the 1961 law states that, "for the purpose of this law, the definition of state land is as follows...."

It is, therefore, safe to assume that *mawat* and *mahlul* lands are not generally to be considered as state lands, and that their inclusion in one instance in the definition of state land was to achieve the special purposes for which the law was passed.

It is important also to note that, consistent with the theoretical basis by virtue of which ownership of all lands always exists with the state, the law of 1965 does not say that the minister may sell state land, but only that he may lease or grant it. The idea is that since the ownership of all lands, including state land, is in the hands of the state, they cannot be sold. If the law had provided that they could be sold, this would have been a violation of its theoretical basis.

5. *Developments during the Period of the Israeli Occupation*

The Israeli military government has promulgated several military orders affecting the sale of immovable property.[46] Although none of these orders affects the theoretical basis or the classification of lands according to the law existing before the occupation, they have been designed to facilitate purchase of land by Israelis, to reduce public scrutiny of the expropriation of lands by the state for public purposes, and to deprive the courts and civil tribunals of their role in the process of expropriation. The Israeli authorities also passed military proclamation No. 811 which has the sole purpose of validating land purchases made by virtue of irrevocable powers of attorney which, except for this order (which extended the validity of these powers of attorney to ten years), would have become void because the period of validity under Jordanian law is only five years.

However, perhaps the most important proclamation was order No. 291 which put an end to the process of settlement of land claims. Despite requests by some local inhabitants that the process be continued, at least in cases where it was at the last stage, with all the work completed except publication of the final schedule of rights (e.g., the case of the lands of the village near Ramallah called Batunia), the military authorities have refused to respond. The obvious reason for this is that after the settlement of claims, when people are given the chance to declare the land in their possession and prove their title to it, the land becomes registered in their names and their

[46] The total number of Israeli military proclamations, on all subjects, issued by the date of writing this article was 835.

title is indisputable. This state of affairs does not suit the purposes of the occupation which would prefer ambiguity of registration of title and vagueness in the law in order to be able to minimize the criticism made of its expansionist policies. It is more palatable, the Israeli government seems to believe, for the people outside to be told that private land is not being interfered with, and that only "state" land is used for building settlements.

CONCLUSION

I have attempted to show how the first main legislation on land in Palestine, the Ottoman Land Code, conceived of all land in Palestine as falling into one of five categories. If the land was neither *mulk* nor *waqf*, but cultivable lands and pastures close to the village, then it was *miri* land. Land left for public use (for building roads, etc.,) was *matrouk* land, and all other land falling about a mile and a half away from the village (as Article 103 of the Land Code puts it)[47] was *mawat* land. In this class were included all the lands that were not cultivated, and all mountainous areas far from inhabited areas and which were not in use. All land in Palestine fell into one or the other of these five categories. I have tried to show that none of these categories qualifies to be defined as state land in the sense commonly understood today.

As explained, the new class of land — state land — was created by the Order-in-Council of 1922. Subsequent Jordanian legislation on this subject was surveyed above. I analysed how this class only included the very restricted amount of land in the actual occupation or use of the state and its organs, and that it did not include the residue of all unused lands.

The unused land which is neither *waqf* nor *mulk* land is either *miri*, or if left for public use, *matrouk*. If it falls under none of these categories (the land in uninhabited rocky, mountainous areas, forests or deserted places, etc.), it is *mawat* land which, though not in any private ownership, is not state land.

The situation of the West Bank is that of occupation by one country of the lands of another. The interests of the occupying state are diametrically opposed to the interests of the occupied. International law protects the land of occupied territories from confiscation by the occupier, and prevents the occupying state from transferring its population into the occupied lands. Israel is, however, contravening international law, making the claim, which

[47] *Mawat* land is also defined in Article 6, Ottoman Land Code; and Article 1270, Civil Code (*Mejelle*) found in C.A. Hooper, *op. cit.*, Vol. 1, p. 328.