THE WORLD COURT INTERPRETS ANOTHER INTERNATIONAL AGREEMENT

The Permanent Court of International Justice in its Advisory Opinion of April 6, 1935,[1] concerning Minority Schools in Albania, proceeded along lines which, according to the dissenting opinion of Sir Cecil Hurst, Count Rostworowski and M. Negulesco, involve a departure from principles previously adopted by the court in the interpretation of treaties.[2] Such impressive testimony inspires inquiry as to the character of that departure.

The precise question before the court was whether, regard being had to the Albanian Declaration made before the Council of the League of Nations on October 2, 1921, as a whole, the Albanian Government was justified in its plea that, as the abolition of the private schools in Albania constituted a general measure applicable to the majority as well as to the minority, it was in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration.[3] The Declaration was an international instrument of which the stipulations were recognized as fundamental laws of Albania, and contained stipulations in relation to minorities which were declared to constitute obligations of international concern to be placed under the guarantee of the League of Nations.[4] Articles 206–207 of the Albanian Constitution of 1933 announced that "Private schools of all categories at present in operation will be closed."[5]

The court concluded, by eight votes to three, that the plea of the Albanian Government was not well founded. It reached that conclusion after examining the text of the Declaration, the circumstances leading up to its acceptance embracing a memorandum of the Greek Government of May 17, 1921, a report of Mr. Fisher, a British representative on the Secretariat of the League of Nations concerning the responsiveness of the Albanian Declaration

[1] Publications, Permanent Court of International Justice, Series A/B, No. 64.

[2] The opinion, according to the dissenting judges, "involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory." (*Id.*, 25–26.)

[3] According to Article 5 of the Declaration: "Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

"Within six months from the date of the present Declaration, detailed information will be presented to the Council of the League of Nations with regard to the legal status of the religious communities, Churches, Convents, schools, voluntary establishments, and associations of racial, religious and linguistic minorities. The Albanian Government will take into consideration any advice it might receive from the League of Nations with regard to this question." (*Id.*, 5.)

[4] The complete text of the Declaration is contained in Annex III, *id.*, 35–36.

[5] *Id.*, 5.

to the suggestions in the Greek memorandum, a letter of February 9, 1921, from the President of the Albanian Council of Ministers, and other relevant data extrinsic to the document. It considered also the contention of the Albanian Government that no obligation was imposed upon it in educational matters other than to grant to minorities a right equal to that possessed by other Albanian nationals—a conclusion which it was alleged followed "quite naturally from the wording of paragraph one of article 5," as well as the contention that as the minority régime constituted a derogation from the ordinary law, the text in question should, in case of doubt, be construed in the manner most favorable to the sovereignty of the Albanian State.[6] The court adverted to the opposing Greek view that the equality of treatment referred to in the treaty was merely an adjunct to the right granted to minorities to retain existing schools.[7]

The court concluded that what the Council of the League of Nations asked Albania to accept, and what Albania did accept, was a régime of minority protection substantially the same as that which had been already agreed upon with other states in which there were no "communities." [8] Discussing the idea underlying the treaties for the protection of minorities, the court declared that two things had been regarded as particularly necessary and had formed the subject of treaty provisions. The first was to ensure that nationals belonging to minorities should enjoy perfect equality with the other nationals of the state; and the second was to ensure for the minority "suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics." [9] The court then adverted to the close similarity between the Polish treaty of June 28, 1919, for the protection of minorities, and the Albanian Declaration of October 2, 1921. It then proceeded to examine textually Articles 4 and 5, as well as 6, of the Declaration, and derived therefrom the conclusion that the members of the minority in Albania were always to enjoy the rights stipulated in the Declaration, and, in addition, any more extensive rights which the state might accord to other nationals.[10] In a word, the court appeared to conclude that the "intention was to grant to the minority an unconditional right to maintain and create their own charitable institutions and schools," [11] and that any lesser grant would result in "inequality in fact." [12]

It is not here sought to discuss the soundness of this conclusion, but rather

[6] Publications, Permanent Court of International Justice, Series A/B, No. 64, 15.

[7] *Id.*

[8] *Id.*, 16. Compare the Greek contentions concerning this point. *Id.*

[9] *Id.*, 17. The French text assumes a happier form than the English translation. The former makes reference to "*des moyens appropriés pour la conservation des caractères ethniques, des traditions et de la physionomie nationales.*"

[10] The court said in this connection: "The right provided by the Declaration is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority." (*Id.*, 20.)

[11] The language quoted is taken from the minority opinion, *id.*, 25. [12] *Id.*, 19.

to emphasize the fact that the court undertook to interpret a paragraph that was in the estimation of the minority "clear and simple" by reference to extrinsic data and to find therein evidence of a design that ran "counter to the natural sense of the words." [13] There was no primary deference for or reference to linguistic clearness, and no intimation that from the form of the text there was to be deduced an authoritative and uncontradictable standard of interpretation. This circumstance drew from the minority criticism of the method employed.[14] Instead, however, of relying solely on this ground of objection, the minority declared that the conclusion of the court interpreting the Albanian Declaration as conferring "an unconditional right" not only ran counter to the natural sense of the words, but also disregarded the explanation of the corresponding provision of the Polish treaty as given in the letter from M. Clemenceau in 1919, addressed to M. Paderewski, the leader of the Polish delegation, to the effect that the grant was a mere prohibition of discrimination; and it was added that the opinion of the court took no sufficient account of the events leading up to the preparation of the text of the Declaration.[15] It is not necessary here to pass upon the value or soundness of this stricture.

What stands out in the case is the fact that the eleven judges before whom the adjudication was had made use of data leading up to the preparation of the text of the Declaration as an aid to interpretation, the minority by way of confirming what they deemed the natural sense of the words employed in the text to demand, the majority as a primary means of establishing the design of the parties, regardless of the form of the text. The latter, in so doing, inspired the statement referred to above that the court was departing from principles which it had previously adopted. This statement as to the adoption of principles of interpretation deserves elucidation. In its work of interpreting treaties since 1923, when it rendered its first judgment in the case of the *S.S. Wimbledon*,[16] the court has not been confronted with a situation where conclusions which it deduced from the natural sense or the linguistic clearness of a text were, in its opinion, contradicted by extrinsic evidence from any source. Moreover, in cases where it has expressed the view that it did "not intend to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself,"

[13] The language quoted is taken from the minority opinion, *id.*, 24 and 32.

[14] *Id.*, 25–26, and 32.

[15] The minority said, in this connection: "This interpretation takes no sufficient account of the events leading up to the preparation of the text of the Declaration, in particular of the fact that the Greek Government asked for the insertion of a provision which would have conferred an unconditional right and made this request upon the ground that it was necessary in the case of Albania to go beyond the usual provisions of a minority treaty, and of the fact that the Council, instead of inserting the Greek proposal, used a wording on the same lines as that adopted in other minority treaties." (*Id.*, 32.)

[16] Publications, Permanent Court of International Justice, Series A, No. 1.

the court has been scrupulous to examine the preparatory work and seek therein confirmation of its views.[17] It is still a significant fact that the cases have thus far manifested a striking absence of conflict between extrinsic evidence and what the plain or natural meaning of a text seemed to demand. On the other hand, the court appears to be increasingly aware of the danger of concluding that textual or linguistic clarity is necessarily indicative of clearness of design of the parties to an international instrument, and perhaps, under the salutory influence of Judge Anzilotti's dissenting opinion in the case concerning the Interpretation of the Convention of 1919 concerning Employment of Women during the Night,[18] is reluctant to acknowledge that a text is verbally clear even when there is room for such a conclusion.[19]

In a word, the instant case reveals a departure in the method of approach which the court applies to the cases confronting it and justifies, in that regard, the testimony to that effect that is borne by the minority. An experience of twelve years has brought home to a great tribunal a sense of the importance of approaching a text concerning the construction of which there is divergence of opinion in such a way as to minimize the danger of misconceiving the actual design of the contracting parties, as well as a realization of the fact that that danger is not diminished and may even be enhanced if there is sought to be imputed to those parties, as by an applicable rule, an obligation to employ terms in a sense that was not in fact responsive to their actual design. The opinion concerning the Minority Schools in Albania, apart from the character of the conclusions reached, shows that the court is making progress in the performance of its interpretative tasks by breaking away from conventional statements calculated to impair both its freedom and success in getting at the truth.

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ACTS AND JOINT RESOLUTIONS OF CONGRESS AS SUBSTITUTES FOR TREATIES

The failure of all efforts during the past twelve years to make the United States a member of the Permanent Court of International Justice, due to the opposition of a relatively small minority of the Senate (the vote on January 29, 1935, in favor of adherence to the protocols was 52; that against adherence was

[17] See Advisory Opinion of Nov. 15, 1932, concerning the interpretation of the Convention of 1919 concerning the Employment of Women during the Night, Publications, Permanent Court of International Justice, Series A/B, No. 50, 365, 378. See, also, the Advisory Opinion No. 2 concerning the question whether agricultural labor was embraced within the competence of the International Labor Organization, *id.*, Series B, No. 2, p. 41; Case of the *S.S.Lotus*, *id.*, Series A, No. 10, pp. 16–17; Advisory Opinion No. 14 concerning the jurisdiction of the European Commission of the Danube between Galatz and Braïla, *id.*, Series B, No. 14, pp. 28 and 31; Advisory Opinion interpretative of the Statute of the Memel Territory (Preliminary Objection), June 24, 1932, *id.*, Series A/B, No. 47, p. 249.

[18] Publications, Permanent Court of International Justice, Series A/B, No. 50, 383.

[19] See Judgment in the Lighthouses Case between France and Greece, March 17, 1934, Publications, Permanent Court of International Justice, Series A/B, No. 62, 13.