justify this practice from the discretionary nature of the Mandatory's power. The Respondent emphasizes that the practice of *aparthied* is only impermissible when it is carried out in bad faith".[6]

And

"One of the contentions concerning the application of the said legal norm is that, if such a legal norm exists for judging the Respondents' obligations under Article 2, paragraph 2 of the Mandate, it would be the one in existence at the time the Mandate was entrusted to the Respondent. This is evidently a question of inter-temporal law.

"The Respondent's position is that of denying the application of a new law to a matter which arose under an old law, namely the negation of retroactivity of a new customary law. The Applicants' argument is based on "the relevance of the evolving practice and views of States, growth of experience and increasing knowledge in political and social science to the determination of obligations bearing on the nature and purpose of the Mandate in general, and Article 2, paragraph 2" ; briefly, it rests on the assertion of the concept of the continuous, dynamic and ascending growth of the obligation of the Mandatory".[7]

And

".....although the Court is bound by the submissions of the Parties, it is entirely free to choose the reasons for its decision. The parties may present and develop their own argument as to the interpretation of the provisions of the Mandate, the Covenant, the Charter, etc.,

6 *Ibid*., at pp. 286 and 287.

7 *Ibid.*, at p. 293.

but the Court, so far as legal questions are concerned, quite unfettered by what has been put forward by the Parties, can exercise its power of interpretation in approving or rejecting the submissions of the Parties".[8]

JUDGE MBANEFO

"The facts relied upon by the Applicants in support of their Submissions 2 and 4 are certain laws, regulations and official measures introduced in the territory by the Respondent which are listed in the Applications and amplified in the Memorials....."[9]

"These facts and their sources are not in dispute between the Parties. The Applicants by amendments say that as a matter of governmental policy they are judged by acceptable international norm and or standards, in violation of the Respondent's Mandate obligations. By doing so the Applicants were introducing a measure by which the conduct of the Respondent should be judged. What the amendments have done is to bring out the essentially legal character of the dispute as one relating to the interpretation and application of the provisions of the Mandate. They have not in any material sense altered the basic complaint of the Applicants which is that the practice of *aparthied* is discriminatory, unwarranted, inhuman and, therefore, inherently and *per se* incompatible with, and in violation of, Article 2, paragraph 2, of the Mandate....."[10]

Comments

For the purpose of discussions under this chapter, we must refer to the Applicants' Submission Nos. E, F, G, and

8 *Ibid.*, at p. 316.

9 *Ibid.*, at pp. 486 and 487.

10 *Ibid.*, at p. 489.

H of their Applications, Submission Nos. 3 to 9 of their Memorials and page 274 of their Reply, as also Respondent's Submissions in its Counter-Memorials. These submissions have been set out in Chapter I of this Study.

In respect of the Applicants' submissions, Judge van Wyk in his separate opinion, and Judge Tanaka and Judge Mbanefo in their dissenting opinions, to the 1966 Judgment pointed out that the original claim of the Applicants, as contained in Submissions Nos. 3 and 4 of the Memorials, related to violations by the Respondent of its obligation under Article 2(2) of the Mandate and Article 22 of the Covenant by its "arbitrary, unreasonable, and unjust actions, and... conduct detrimental to human dignity". These claims, according to Judge van Wyk, were "based on allegations that the Respondent had in fact failed to achieve the results contemplated by Article 2(2) of the Mandate". (See Annexures I and II to this Study). It may be noted, in this connection, that Mandatory's obligation under Article 22 of the Covenant and Article 2(2) of the Mandate is "to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory". Judge Tanaka points out that the Applicants' cause was originally based "directly on a violation of the well-being and progress by the practice of *aparthied*". According to Judge Mbanefo, the original complaint, which remained to be their basic complaint even after the amendments later made by them, was "that the practice of *aparthied* is discriminatory, unwarranted, inhuman and, therefore, inherently and *per se* incompatible with, and in violation of, Article 2, paragraph 2 of the Mandate".

In their Final Submissions, the Applicants amended their Submission No. 4 in the Memorials and inserted therein a phrase "in the light of applicable international standards or international legal norm". The effect of the aforesaid amendment, according to Judge van Wyk, was "that the allegation of failure on the part of the Respondent to perform its duties

has been narrowed down to breaches of an alleged international norm and or standards as defined at page 274 of the Reply" and the issue before the Court turned "only on whether Respondent is bound to conform to the alleged norm or standards in the administration of the Territory". The said norm is defined by the Applicants at page 274 of their Reply in the following terms :

> "In the following analysis of the relevant legal norms, the terms 'non-discrimination' or 'non-separation' are used in their prevalent and customary sense; stated negatively, the terms refer to the absence of governmental policies or actions which allot status, rights, duties, privileges or burdens on the basis of membership in a group, class or race rather than on the basis of individual merit, capacity or potential; stated affirmatively, the terms refer to governmental policies and actions the objective of which is to protect equality of opportunity and equal protection of laws to individual persons as such".

According to Judge Tanaka, claims made in Submission Nos. 3 and 4 of the Applicants, after the aforesaid amendment, came "to possess a special meaning; namely of a juridical character", inasmuch as they were, after the amendment, based on a violation by the Respondent of the said international legal norm and/or standards, and not directly on a violation of its obligation to promote the well-being and social progress of the inhabitants. Judge Mbanefo expressed the view that the aforesaid amendment provided a norm or standard, which can be used as "a measure by which the conduct of the Respondent should be judged".

The legal effect of the Applicants' amended submission, read together with the formal definitions and explanations, according to Judge van Wyk, was that the aforesaid international legal norm and or standards provided absolute rules of law, to which, the Applicants contend the Respondent was bound to

conform, irrespective of whether or not the policies in question in fact promote the progress and well-being of the population as a whole. For this reason the (Applicants' Agent) contended that no evidence relative to purpose, motive, effect, etc., would be relevant or admissible". On the other hand, Judge Tanaka regarded an obligation to observe the aforesaid norm and/or standards, in case they exist, to be a part of the Mandatory's general obligation to promote the well-being and progress. According to him, the Applicants' contention was to the effect that the aforesaid norm or standard constitutes a legal limitation of the Respondent's discretionary power and makes the practice of *aparthied* illegal".

Judge Mbanefo pointed out that the facts relied upon by the Applicants in support of their aforesaid claims are listed in the Applications and amplified in the Memorials, and that they and their sources are not in dispute between the Parties. The Respondent, according to Judge van Wyk, did not deny its policies of differential treatment on a racial basis, but asserted that "the circumstances in the Territory are such as to render such policies desirable, if not inevitable". Further, according to Judge Tanaka, the Respondent denied the existence of the said norm or standards, which it is bound to observe in its administration of Territory, and asserted the discretionary nature of its powers. "The Respondent emphasized that the practice of *aparthied* is only impermissible when it is carried out in bad faith".

So we discover that the issues before the Court were (i) whether an international legal norm and/or standards of non-discrimination existed; (ii) whether in his administration of the Territory, the Respondent was bound to conform to such norm or standards or whether Respondent's policies could be questioned only when they were carried out in bad faith.

One more issue, upon which the parties differed, is important for the present discussions. The Applicants contended that the scope, content and nature of the Respondent's

obligation under the Mandate, has undergone considerable change with the passage of time and that in assessing facts at a given time the norms and standards recognized by law, at the time in question, have to be taken into consideration. The Applicants' argument was based on "the relevance of the evolving practice and views of States, growth of experience and increasing knowledge in political and social science to the determination of obligations bearing on the nature and purpose of the Mandate in general, and Article 2, paragraph 2", and the concept of the continuous, dynamic and ascending growth of the obligation of the Mandatory". The Respondent denied "the application of a new law to a matter which arose under an old law, namely the negation of retroactivity of new customary law" and claimed to be bound by only such norms, as existed at the time of creation of the Mandate.

As regards ascertaining the nature of the case, Judge van Wyk expressed the view that the Court must *prima facie* refer to the Submissions of the Parties, and that the Court could depart from the Submissions only where the same are found not to reflect the Applicants' intention accurately, provided the Respondent had adequate knowledge or notice of the actual case sought to be made by the Applicants". On the other hand, Judge Tanaka regarded the Court to be "entirely free to choose the reasons for its decision" and to "exercise its power of interpretation in approving or rejecting the Submissions of the Parties".

2. Mandatory's obligation to promote well-being and social progress of inhabitants under Article 2 (2) of the Mandate

1966 Judgment

Dissenting opinions

JUDGE TANAKA

....."What is meant by well-being or progress? Which one has priority in case of conflict between

material and moral well-being? Is there any difference between "progress" and "development"? Concerning the latter two concepts there may be great divergence of standpoints between evolutionists or pragmatists and conservatives. Concerning the appreciation of the moral well-being and what it consists of idealists and materialists may differ one from the other.

"The creators of Article 22 and the drafters of the Mandate Agreement, however, do not appear to have scrutinized these matters from the above-mentioned point of view. They wanted to indicate by this simple formula the goal of good government as it should be applied to the administration of mandated territories. They wanted to find some idea or principle which could be considered a common denominator among divergent political ideas and thoughts on good government just as it is inevitable in the case of indicating a constitutional aim of a democratic State or, in an analogous case, of an international organization whose purposes are as general as those of the League of Nations or the United Nations".[11]

JUDGE JESSUP

"...If the "sacred trust" obligated the Mandatory to "promote to the utmost the material and moral well-being and the social progress" of all the inhabitants of the territory, that is, of the European Whites as well as of the non-Whites, the Mandatory might justify certain policies which were especially directed to the welfare of the white segment of the population. But if it was the non-white segment of the population whose well-being and progress were to be promoted, then other criteria would be applicable.

"The sound conclusion would seem to be that in the 'C' mandates, the protective provisions were intended to

11 *Ibid.*, at p. 280.

apply to the indigenous peoples and not to the White settlers...It is paragraph 6 of Article 22 which applies to the 'C' mandates and this paragraph explicitly mentions "the indigenous population".[12]

JUDGE PADILLA NERVO

"The Mandatories have the duty, not only to "promote to the utmost the well-being and development" of such peoples entrusted to their care, but to do it by means and methods most likely to achieve that end, and which do not by their very nature run contrary to the intended goal. The Charter prescribes the roads which will lead to it; those of non-discrimination and respect for human rights and fundamental freedoms, among other ways and means will help the peoples to overcome the hardships and strains of our time."[13]

And

"Paragraph 3 of Article 22 of the Covenant did not presuppose a static condition of the peoples of the territories. Their stage of development had to be transitory, and therefore the character of the Mandate, even of a given Mandate, could not be conceived as a static and frozen one; it had to differ as the development of the people changed or passed from one stage to another. Are the people of South West Africa in the same stage of development as 50 years ago?"[14]

Comments

For purposes of consideration of this item, discussions contained in Chapter II of this Study may also be referred to.

12 *Ibid.*, at p. 426.

13 *Ibid.*, at p. 465.

14 *Ibid.*, at p. 467.

According to Judge Jessup, the proper beneficiaries of the Mandatories' obligation to promote the material and moral well-being and social progress were the non-Whites or indigenous peoples of the Territory, and not the Whites. He also referred to paragraph 6 of Article 22 of the Covenant "which applies to 'C' mandates and this paragraph explicitly mentions "the indigenous population". (See Annexure I to this Study).

Judge Tanaka was of the view that the Mandatory's obligation to promote well-being and progress, as provided in the Covenant and the Mandate, was merely a formula for good government of the territory... "a common denomination among divergent political ideas and thoughts on good government". In this regard, Judge Padilla Nervo expressed the view that the Mandatory's obligation was to promote the well-being and development of indigenous peoples by "means and methods most likely to achieve that end, and which do not-by their very nature-run contrary to the intended goal". According to him, such means and methods can be found in the Charter and "those of non-discrimination and respect for human rights and fundamental freedoms, among other means will help the peoples to overcome the hardships and strains of our time". Further, he favoured a dynamic concept of well-being and progress, inasmuch as each stage of development was transitory. As such, the character of the Mandate "had to differ as the development of the people changed or passed from one stage to another". According to the said concept, it becomes necessary to take into consideration the changing legal norms coming into being and prevailing during the stage of development concerned.

3. Extent and scope of Mandatory's discretionary powers in regard to administration of the mandated territory

1966 Judgment

Separate opinion

JUDGE VAN WYK

"The essence of a discretionary power is that the

holder of the power is entitled by law to choose between two or more alternative courses of conduct. When he so chooses, he does no more than he is entitled to, and a Court of law, unless specifically granted powers of appeal, cannot interfere merely because it does not agree with the decision of ths person exercising the discretion. In the absence of special provision, a Court of law is not an appellate authority over the holder of such a power, and the Court cannot substitute its own decision for his. The most a Court of law could do by virtue of its normal powers is to enquire whether the acts in question were illegal; and it follows from the very nature of a discretionary power that an act is not illegal merely because a Court considers that, had it been the holder of the power, it would have acted differently". [15]

Dissenting opinion :

JUDGE WELLINGTON KOO

"Whatever power and authority the Mandatory possesses under the Mandate are clearly not conferred to serve its own ends or to enure to its own benefit or advantage, but solely for the purpose of enabling it to fulfil its obligations. Any policy it adopts to administer the mandated Territory is subject, among others, to this overriding obligation. Thus the policy of *aparthied* or separate development (here I refer, not to such policy as is in operation in South Africa, with which the Court is not called upon to deal, but only to that which has been and is pursued in South West Africa) should be examined in the light of this primary obligation. The laws, regulations and measures of the Union (now republic) of South Africa are relevant to the instant cases only in so far as they, by official proclamations have been

15 *Ibid.*, at p. 151.

and are applied or made applicable to the mandated territory". [16]

JUDGE TANAKA

"Investigation of the degree of expediency is not a matter for Courts of law to deal with. The appropriateness of the exercise of a discretionary power by the Mandatory does not belong to matters subject to the jurisdiction of a Court of law. Therefore the contention of the Respondent that the exercise of the Mandatory's power is discretionary, and that it is not justiciable unless the power has been exercised in bad faith, can be recognized as being fundamentally right. The political obligations are in themselves incompatible with judicial review". [17]

And

"The discretionary power of the Mandatory, however, is not unlimited. Besides the general rules which prohibit the Mandatory from abusing its power and mala fides in performing its obligations, and besides the individual provisions of the Mandate and the Covenant, the Mandatory is subject to the Charter of the United Nations as a member State, the customary international law, general principles of law and other sources of international law enumerated in Article 38, paragraph 1. According to the contention of the Applicants, the norm and/or standards which prohibit the practice of *aparthied*, are either immediately or by way of interpretation of the Mandate binding upon the discretionary power of the Mandatory. The Respondent denies the existence of such norm and/or standards". [18]

16 *Ibid.*, at p. 233.

17 *Ibid.*, at p. 283.

18 *Ibid.*, at pp. 301 and 302.

JUDGE JESSUP

"There is no need and there is no intention here to impugn South Africa's motives ; they have not been put in issue. It may be assumed for purposes of this particular part of the analysis that the motives are immaterial. The difficulties of reaching the objectives of the sacred trust were and are enormous ; they must not be underestimated ; the routes which might be followed towards the goal are multiple. Various mandatories utilized various methods. But the choices of policies followed by a mandatory are subject to review and it does not follow that each member of the Court has to decide subjectively whether he believes the mandatory has chosen wisely and correctly. The law abounds in examples of standards or criteria which are applied by Courts as tests of human conduct ....." [19]

JUDGE PADILLA NERVO

"Obviousiy the power of administration and legislation could not be legtimately exercised by methods which run contrary to the aims, principles and obligations stated in Article 22 of the Covenant, especially in paragraphs 1, 2 and 6. Nor could be exercised today in violation of the United Nations Charter's provisions - among others-those regarding respect for human rights and fundamental freedoms, or the prohibtion to discriminate on account of race or colour". [20]

Comments

In connection with the discussions under the present item, those contained in item 3, sub-items (ii) and (iii) of Chapter II may also be referred to.

19 *Ibid.*, at p. 434.

20 *Ibid.*, at p. 467.

Judge Wellington Koo emphasized that the authority and power with respect to the Territory were vested in the Mandatory, not to enable it "to serve its own benefit or advantage, but solely for the purpose of enabling it to fulfil its obligations". Judge van Wyk and Judge Tanaka expressed the view that the Mandatory, in exercise of discretion vested in him, was free to choose between two or more courses of conduct and that the Court could not question such choice, except where the same "has been exercised in bad faith" or "the acts in question were illegal". Judge Jessup recognized that the routes "of reaching the objectives of the sacred trust were and are enormous", but he asserted that "the choice of policies followed by a Mandatory are subject to review". According to him, motive or intention of the Mandatory were immaterial and not in issue, and what was material for the Court were certain legal "standards or criteria which are applied by Courts as tests of human conduct". Thus, he favoured the test of such standards or criteria to be applied by the Court, instead of the test of *bona fides* in respect of the choice of policies made by the Mandatory. It is obvious that, in case any such legal standards or criteria, which are binding on the Mandatory, exist, the Court is bound to take them into consideration in reviewing the choice of policies made by the Mandatory.

Various legal standards and criteria binding upon the Mandatory were pointed out by Judge Wellington Koo, Judge Tanaka and Judge Padilla Nervo in their dissenting opinions to the 1966 Judgment. Judge Wellington Koo emphasized that any choice of policies by the Mandatory should fulfil its obligations, and that the *aparthied* policy and the laws, regulations and measures, as applied to the Territory, should be examined by the Court in the light of the Mandatory's primary obligation. According to Judge Tanaka, the discretionary power of the Mandatory was subject to "the general rules which prohibit the Mandatory from abus-

ing its power and *mala fides* in performing its obligations", the Charter of the United Nations, the "customary international law, general principles of law and other sources of international law enumerated in Article 38, paragraph 1" of the Court's Statute. He also referred to the Applicants' contention in regard to the existence of an international norm and/or standards which prohibit the practice of *aparthied* and which "are either immediately or by way of interpretation of the Mandate binding upon the discretionary power of the Mandatory", and to the Respondent's denial of "the existence of such norm and/or standards". Judge Padilla Nervo expressed the view that Mandatory's power of administration and legislation and other acts and policies were subject to the principles and obligations stated in paragraphs 1, 2 and 6 of Article 22 of the Covenant, the provisions of the United Nations Charter, and to "human rights and fundamental freedoms, or the prohibition to discriminate on account of race or colour".

4. Legal norm and standards of non-discrimination

1966 Judgment

Separate Opinion

JUDGE VAN WYK

> "It has not been, and in my view could not be, suggested that the Mandate has been amended to include the norm or standards relied upon by Applicants. It is clear that no amendment could have been effected without the consent of the Respondent, and it is common cause that Respondent has always rigorously resisted the imposition upon it of any rule of the sort relied upon by Applicants. It follows, therefore, that even if the alleged norm or standards were to exist, this Court would have no jurisdiction to consider alleged

violations thereof, inasmuch as they do not constitute provisions of the Mandate.

"In attempting to establish jurisdiction, Applicants contended, firstly, that the alleged standards were binding on Respondent by reason of an implied agreement in the Mandate itself, in terms of which the Mandatory was bound to submit to standards laid down by the supervisory authoriry. This contention, if accepted, would partly solve Applicants' jurisdictional problems, but.....it is in my view completely unsound".[21]

And

".....in Applicants' usage of the terms, the norm and the standards were legally enforceable rules both possessing identical content, i.e., as defined at page 274 of the Reply. The sole difference between the two concepts was that standards were said to be binding only on Respondent as Mandatory, whereas the norm was said to be binding on all States, including Respondent in its capacity as a sovereign State....."[22]

And

"The contention is that this paragraph (Article 38(1)(a) of the Court's Statute), which authorizes this Court to apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting States, has relevance, inasmuch as 'the provisions of the United Nations Charter and the Constitution of the International Labour Organization as interpreted by these organisations respectively bind the Respondent.

21 *Ibid.*, at p. 157.

22 *Ibid.*, at pp. 157 and 158.

'.....the instruments concerned cannot be interpreted to lay down the rule relied upon by Applicants, the organs of the organizations do not have the power to lay down such a rule by way of "interpretation", and.....in any event, this Court has no jurisdiction to determine disputes arising from alleged violations of these instruments".[23]

And

"The next contention relies on the provisions of Article 38(1)(b) and is to the effect that through the collective processes of the organized international community, including mainly the resolutions of the United Nations relative to discrimination, and particularly those condemning the policies pursued by the Respondent in South West Africa and in the Republic of South Africa, there has arisen a norm of customary international law of the content contended for by Applicants. In this connection the Applicants did not contend that they could satisfy the traditional tests applied by this Court in determining the existence or otherwise of "international custom" as evidence of a general practice accepted as law"; and indeed, it is clear that they could not. Applicants did not even attempt to show any practice by States in accordance with the alleged norm, but relied on statements of States relating, not to the practice of those or other States, but to criticism of the Respondent's policies. .....Applicants did not even seek to show that such criticism was in some way related to the creation, or existence, of a norm with a content as relied upon by them".[24]

And

"The Applicants next invoked the provisions of Article 38(1)(c) to justify their alleged norm, which

23 *Ibid.*, at pp. 168 and 169.

24 *Ibid.*, at p. 169.