SOME ASPECTS OF JUDICIAL REASONING IN THE SOUTH-WEST AFRICA CASE OF 1962

by

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INTRODUCTION

« The magistrate is a speaking law, the law is a silent magistrate » [1]. The South-West Africa Cases (Preliminary Objections) of 1962 resulted in a judgment pregnant with judicial perplexity both for those participating in the case and for those who seek to use it as guidance. For international law the case is a Rubicon, not only because of the uncommon nature and of the importance of the issues involved, but also because the most fundamental matters of function and method were wrestled with. It is with these problems of judicial activity that this article is concerned, although their significance is magnified by the enormity of the issues at stake. This judgment was the fourth [2] in a series of litigation between the Union of South Africa, the mandatory of the territory of South-West Africa, and Liberia and Ethiopia who accuse her of breaking the Mandate agreement of 1919 by which the Union of South Africa agreed with the Allied and Associated Powers to exercise authority over the territory of the former German West Africa on behalf of the League of Nations « as a sacred trust of civilization » [3] and

* *N.D.L.R.* The following abbreviations have hereunder been used :

C.L.R.	: *Commonwealth Law Reports (Australia)*. These are the reports of the High Court of Australia, the highest jurisdiction in the Commonwealth.
A.C.	: *Appeal Cases* (Reports of Appeals to the House of Lords).
Aust. L.J.	: *Australian Law Journal*. Reports of Australian Cases in all Jurisdictions.
K.B.	: *King's Bench*.
CMD, H.M.S.O.	: *Command Paper* (United Kingdom) Her Majesty's Stationary Office.
L.J.	: Lord Justice.

[1] CICERO, *On the Laws*, Book III, 1.

[2] *South-West Africa Case (Preliminary Objections)*, *I.C.J. Reports*, 1962, p. 339.

[3] *Covenant of the League of Nations*, 1919, Article 22.

« to promote to the utmost the material and moral well-being and the social progress of the inhabitants » [4]. After the dissolution of the League of Nations in 1946, South Africa did not, as the other mandatories, conclude a trusteeship agreement with the new United Nations, and by 1949, after criticism of her administration, refused any authority of its new Trusteeship Council to supervise the mandate's operation.

An advisory opinion of the court in 1950 (at the request of the United Nations General Assembly)[5] stated the mandate and all its obligations survived the dissolution of the League and continued, and that the supervisory functions of the League had devolved upon the United Nations, but that there was no obligation to convert the mandate agreement into a trusteeship agreement although South Africa could not, without the consent of the United Nations, alter the status of the territory in any other way. The Union of South Africa refusing any co-operation with committees of the United Nations, two more advisory opinions were sought in 1955 and 1956 approving certain rules to be adopted by the General Assembly for voting on matters concerning the territory and for the hearing of petitions by its inhabitants. In 1960, following a Resolution of the African states [6], Liberia and Ethiopia introduced a petition to the International Court of Justice alleging breach of mandate and relying on an adjudication clause in the mandate agreement, in reply to which the Union of South Africa raised four objections to jurisdiction. This is the case being studied in this article. The judgment, by a narrow majority [7] rejected the Union's argument, and the case on the merits continued.

A judgment just handed down has rejected the petitions on the grounds that the petitioners had no legal interest in enforcing the « welfare and progress » clauses [8].

The mandate agreement was a brief document of only seven clauses which dealt with mandatory's duties and rights in the most general way, and circumstances had changed dramatically since it was signed: in particular by the dissolution of the League of Nations to which the mandatory was responsible, but also by reason of the rapid political evolution of Africa, the development of a certain political philosophy of the South African government [9], and by the

[4] *Mandate for South-West Africa,* 1919, Article 2 quoted by FITZMAURICE and SPENDER in their *Joint Dissenting Opinion, I.C.J. Reports,* 1962, p. 465.

[5] *Advisory Opinion on the International Status of South-West Africa,* Advisory Opinion, *I.C.J. Reports,* 1950, p. 128.

[6] *Resolution of the Conference of Independent African States* (Addis Ababa), 1960, quoted in M^me^ P. PIERSON-MATHY, « La politique raciale de la République d'Afrique du Sud », *C.P.E.,* vol. XVII, p. 628.

[7] The margin was eight votes to seven.

[8] Judgment, delivered on 18 July 1966, *South-West Africa, Second Phase, I.C.J. Reports,* 1966, p. 6.

[9] The doctrine of *apartheid,* which has especially aroused accusations of breach of article 2 of the Mandate, was introduced by the Nationalist Party in 1948.

change in relationships both political and constitutional, between it and the British government from whom it has throughout the dispute received none of the support which it had for its aspirations in 1919. It was obvious therefore from the very beginning that a case concerning South Africa's administration of this territory would present some formidable problems not only of legal complexity and interpretation, but of method of judicial approach in a case in which the legal aspects before the court were only a small element (and that by no means an easy one to settle) of the dispute between the parties.

A complex case came before a complex court : on the bench were judges of fifteen nationalities strange to the dispute and one judge nominated by each side. There were three representatives of Common Law, of European (Roman) and of South American systems, two of Soviet, and one each of Muslim and Asian law [10]. It is not surprising therefore that the opinions revealed a deep cleavage in beliefs about the very fundamentals of international judicial settlement. What may be wondered at is that after nearly sixty years of operation there is expressed so clearly in the international forum a basic disparity of methods between those used by Common Law and Civil Law [11] judges in an international case, a disparity which nonetheless can be traced back through the cases to the Court's early days [12], and behind which lies a whole philosophy of law.

The Joint Dissenting Opinion of their Honours Sir Gerald Fitzmaurice and Sir Percy Spender (English and Australian respectively) is twice as long as the principal judgment with whose primary assumptions these Common Law Justices are at odds. To summarize briefly here a long and exhaustive opinion they take a much stricter and narrower view of their duties as judge and interpreter of law than do the majority. This is not surprizing to very many Common Lawyers with whom the legal preconceptions of the judgment would certainly find accord. But it may seem surprising to Civil Lawyers to whom the English legal system has seemed freer, unCodebound and more open for development than the Code systems. Many younger Common Lawyers also do not find the philosophy behind these views *necessarily* entailed by the nature of the legal system. They are particularly attracted by the newer theories of

[10] The Court was presided over by Winiarski J.; the other justices were Koretsky, Badawi Pasha, Alfaro, Quintana, Bustamente, Wellington Koo, Jessup, Spender, Fitzmaurice, Spiropolous, Basdevant and Morelli.

[11] This term here meaning those systems based on Roman Law.

[12] *Cf. The Free Zones Case, P.C.I.J. Reports,* 1932, p. 96, where Sir Cecil Hurst's Joint Dissenting Opinion with Altamira J. stressed that the intention of an article was to be determined by « the terms and tenour of the article itself » (p. 176) as opposed to the Court's consideration of factors external to it; *Cf.* also the Dissenting Opinion of Lord Finlay in the *Chorzòw Factory Case, P.C.I.J. Reports,* 1928, p. 1 at p. 72, refusing the Court's « equitable » interpretation of the parties' rights in favour of a strict definition of the juridical relationship between the litigants.

argumentation and reasoning of the didactic sciences [13] as opposed to the stricter « logical necessity » theory which permeates the older English law [14].

But if these theories are only now influencing lawyers in English-speaking countries, it may be many years before a Common Law magistrate in the World Court will find himself able to take a view of his duties other than that of their Honours Fitzmaurice and Spender. I propose therefore to examine the main problems raised in this dissenting opinion which touch the theoretical basis of international adjudication.

A MODEL *MODUS OPERANDI*

One of the main criticisms levelled at the majority judgment is of the method of reasoning, which the dissenting justices characterize thus :

> The general approach adopted by the majority of the Court in the present case can, we think, reasonably, be described as follows — namely that it is desirable and right that a provision for the compulsory adjudication of certain disputes, which figures (or did figure) as part of an institution — the Mandate for South-West Africa — which is still in existence as an institution, should not be held to have become inoperative merely on account of a change in circumstances — provided that this change has not affected the *physical* possibility of continued performance. The present Court exists, and is of the same general character and carries out the same kind of functions as the tribunal (the former Permanent Court) which originally had jurisdiction under this provision (i.e. Article 7 of the Mandate for South-West Africa). Since there still exist States (and amongst them the Applicant States) who would have been entitled to invoke Article 7 *before* the changed circumstances came about, this Article must now be interpreted as still giving them this right, notwithstanding anything to the contrary in its actual terms, or resulting from any other relevant factor.
>
> It is evident that once a tribunal has adopted an approach of this nature, its main task will be to discover reasons for rejecting the various objections or contra-indications that may exist, or arise [15].

[13] *Cf.* PERELMAN, C. et OLBRECHTS-TYTECA, L., *La théorie de l'argumentation,* 2 vols., Collection Logos, Paris, Presses universitaires de France, 1958. For a survey of recent thought on this question see STONE, J., *Legal Systems and Lawyer's Reasonings,* London, 1st ed., 1964, ch. II, pp. 47 ff.

[14] An example of logical operations arriving at opposite conclusions is provided by *Victoria Park Racing and Recretation Gounds Co. Ltd. v. Taylor & Ors.* (1937), 58, *C.L.R.,* 479, an action in tort against the use of a property adjoining a race-course for broadcasting purposes. RICH, J. (dissenting) decided for the plaintiffs, saying, « In the absence of any authority to the contrary, I hold that there is a limit to the right of overlooking... », while DIXON J. declared « In my opinion, the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected at law or in equity ». The choice of premises here depended on whether the judge preferred the positive (what is not expressly forbidden is permitted) or the negative view (what is not expressly permitted is forbidden).

[15] *Op. cit. supra* n. 2, pp. 462-466.

This criticism faces squarely the problem of judicial reasoning (as one branch of legal reasoning in general). Where legal reasoning is concerned an early theory held that logical operations on given legal materials produced the right solution [16] and some cases occurred where the judge has felt himself (and sometimes reluctantly) compelled to a certain conclusion by logical or legal necessity [17]. Other thinkers would stress rather that there is a range of judicial choice between alternative conclusions, each justifiable [18].

What methods are open to a judge of the *international* court, and of international tribunals in general ? This criticism of their Honours Fitzmaurice and Spender is based on the old legal traditions of the Common Law where legal tenets have long been considered the only possible basis of decisions of Her Majesty's judges. Careful study of the Common Law system however reveals the usual English distinction between theory and practice. The origin and principle of the Equity jurisdiction for example was to take into account other factors, and as this branch of law has now ceased to be autonomous and is incorporated into the general body of the Common Law system, traces of this flexibility are inherent in it. Again it is more than clear that the law has taken account of social factors by the very adaptability of the Common Law — it has progressed. Quite apart from legislative tinkering the judges have extended certain legal concepts, once quite limited, to cover whole new areas of social facts unknown in 1066 or for several centuries thereafter [19]. The motivation may be well concealed, even from the author of such a new development, but a serious consideration of the cases will show how these factors have influenced the growth of the law.

Yet in a municipal system of law so highly developed, there is always some legal principle, however vague and however remote, which the judge can invoke as a purely legal argument, however tenuous connection such argument may have with the case in hand. The situation is quite different in International Law where there are very few established principles and where even the most general principles, for example *pacta sunt servanda,* are likely to be the object of controversy as to scope and exceptions and even existence. It is not surprizing, therefore, that Common Law judges move most uneasily where corresponding developments or precisations are called for in International Law.

[16] For example, the theory of John AUSTIN (1790-1859). See the assessment and criticism in STONE, J., *op. cit.*, n. 13, pp. 64-66.

[17] *Cf.* the regrets of Evershed L.J. in his concurring judgment in *Ball v. London County Council* (1949), 2, *K.B.*, 159.

[18] STONE, J., *op. cit. supra* n. 13, pp. 274 ff.

[19] The adaptation of the action on the case is but too well-known. Developments which have deduced legal principles to deal with motor accident injury and the modern insurance system have required a good deal of judicial originality; as did the first cases on the development of the limited company (Salomon's Case, 1897, *A.C.*, 22).

Civil law judges may act more confidently in this area because the « extra-legal » bases of their judicial reasonings are less hidden from them [20]. The necessary developments of the Code systems, which in some cases have had a merely mythical relationship to the text, allow one to see more clearly that judicial reasoning sometimes requires a clear derogation from the principle of sufficiency of the law. This judicial liberty is now admitted tacitly if not conferred explicitly [21] in modern Civil Law systems, and Civil Law judges therefore feel more at home with the additional authority granted by the incompleteness of the international order.

A reply to the criticisms of the dissenting Justices might in the first place take issue with their description of the Court's method of work as put a little strongly : it is not so much an object « to discover reasons for rejecting the various objections or contra-indications that may exist » as to use this approach as a means for choosing between them. Where the Court considers that the indications are ranged in fairly equal order on either side of the question, is it not entitled to consider the *desirable* end as the one that was in fact desired ? The difference of opinion may therefore not be as simple as characterised; there is a difference of opinion as to the relative weight of the legal factors and indications themselves — the majority considered that they created an ambiguity or dilemma of interpretation, whereas the dissenting justices felt that this discrepancy was already sufficiently clear to settle the legal question. It is rather, therefore, not a case of taking a decision « notwithstanding anything to the contrary » in the document, but of considering the incidences and essential features of the institution as the more important factor in the interpretation of it.

There are some cases where domestic law interprets in the spirit and purpose of a document rather than the strict letter — the construction of testamentary instruments is an example found in every jurisdiction. More closely analogous to the case in hand is the supervision of the administration of trusts [22] — the trust will not be allowed to fail for want of a trustee; and the charitable trust receives in several respects the advantage of a beneficial interpretation (it will not fail for want of a beneficiary either). It would certainly be justifiable for the court to consider that this form of legal reasoning more appropriate to the novel institution of the mandate than that more commonly employed of strict interpretation. This latitude is expressed in and confined by rules of inter-

[20] On the general question of justification in law see TAMMELO, I. & PROTT, L., Legal and Extra-Legal Justification, *Journal of Legal Education*, vol. 17, 1965, No. 4, p. 412.

[21] Tacitly in France for example, explicitly in the Swiss Code, Article 4.

[22] This analogy, though with a warning against too facile a transposition from domestic to international law, was extensively used by Mc NAIR, J., in his Separate Opinion, *Advisory Opinion on the International Status of South-West Africa, I.C.J. Reports*, 1950, pp. 146 ff.

pretation proper to these instruments; there is room for the enunciation of similar rules in international law.

With the suggested method of their Honours all lawyers would surely agree that the « only method of procedure is to begin by the examination of the legal elements, with especial reference, where questions of interpretation are concerned, to the actual language employed, and then, on the basis of this examination, to consider what are the correct conclusions which as a matter of law, should be drawn from them » [23].

The difficulty is to apply this general statement to the realities of litigation. What exactly are « legal elements » ? Certainly a legally valid document is. But are « surrounding circumstances », not binding documents and expressions of opinion ? They are taken account of in their Honours' Opinion [24]. The element of intention is often the vital one in the problem of interpretation — but is this strictly a legal element ? The obligation is binding whatever the intention — in this sense it is not a legal element; but when recourse is had to intention to determine the *extent* of such an obligation, it would seem that it is. Their Honours also speak of drawing the correct conclusions, which as a matter of law, should be drawn from them ». What conclusion, as a *matter of law,* is drawn from a consideration of the elements ? The very terms « law » and « legal » are in themselves so hedged around with uncertainty, and more especially in the international field. Is a conclusion of law one which is logically dictated ? dictated by factors internal to the legal system (such as the force of a precedent that is absolutely binding — and can such a compulsion exist in the infant international legal system ?) ? To most problems of law it would seem that, unlike arithmetic, there can be more than one right answer.

In agreeing with their Honours Fitzmaurice and Spender that the Court was not obliged to take the approach it did, one can surely argue that it was a reasonable and *justifiable* [25] mode of argument. Very few are the cases where logic would dictate the result (and if it could why would the parties come to court ? since they could themselves foretell the result). The importance of a submission to a legal body dwells in the fact that it deals in something more than that logic — rights and duties, of « ought » (or « ought not ») rather than « is » — for which a perfect system of logic has not up to now been conspicuous in any province, morals, theology, or philosophy itself. Indeed a good deal of the advantage of law has subsisted in the fact that it can, and when required, does, reject an expected result by the use of some distinction or reliance on some factor hitherto considered not relevant.

[23] *Opinion* cited n. 4, p. 466.

[24] *Cf.* Opinion cited n. 4, pp. 483-486, on the framing of the mandate agreement, and pp. 543-545 on the events in 1946 concerning the survival of mandate obligations and elsewhere.

[25] On justification as a legal method, see article cited n. 20.

« Looking at the matter as a whole and in the light of its history since the dissolution of the League, it seems to us quite clear that the applicants (and we think the Court also) are seeking to apply a sort of ' hindsight '... and some doctrine of ' subsequent necessity ' quite unknown in international law » [26]. In considering whether a decision is « desirable » or not the majority of the International Court of Justice is exercising hindsight and foresight in a way perfectly common to municipal judges. Cases which have reversed a long line of precedents [27] have justifiably paid regard to the « desirability » of a result; and so have those which have considered the possible effect of one such decision on cases not yet come to pass for which the instant case would be authority [28]. Considering the long-term effects of a decision is surely as much a consideration of desirability (in advance or in retrospect) as the majority of the Court indulged in the South-West Africa case on the jurisdiction question. An analogy could be drawn from domestic cases such as *Donoghue v. Stephenson* [29] where Lord Atkin justifies the addition of a general negligence category to the English law or tort.

LEGALISM AND THE JUDICIAL FUNCTION

Having expressed their disapproval of considering the ends before the means, the two judges then turn to the political and other factors, not strictly legal, introduced in the arguments before the court. Their Honours hold a view at the opposite end of the spectrum from that held by South American judges at the court since its inception, expressed in this case most strongly by Bustamante J. in his Separate Opinion where he considers at length the historical, sociological and political factors;

> In my view, consideration of the sociological factors which operated from the beginning of the 1919 system of tutelage must be of prime importance for the interpretation of the nature and significance of that system. Since the law is a living phenomenon which reflects the collective demands and needs of each stage of history, and the application of which is designed to achieve a social purpose, it is clear that the social developments of the period constitute one of the outstanding sources for the interpretation of law, alongside examination of the preparatory work of the technicians and research into judicial precedents. The law is not just a mental abstraction, nor the result of repeated applications

[26] *Opinion* cited n. 4, pp. 521 ff.

[27] *Cf.* the hypothetical examples suggested by the Lord Chancellor in *Smith v. Charles Baker & Sons,* 1891, *A.C.,* 325, which restricted the extent of one wider doctrine of common employment.

[28] *Cf. Haseldine v. Daw* (1941), 2, *K.B.,* 343 (assimilating responsibility for lifts to that of the common carrier rather than to the lesser standards of occupier's liability); and *Donoghue v. Stephenson,* 1932, *A.C.,* 562, on the general duty of care necessarily owed by modern manufacturers to the customer.

[29] Cited n. 28, esp. pp. 580, 582-593.

> of judicial decisions, but is first and foremost a rule of conduct which has its roots in the deepest layers of society [30].

The answer to this view is brief : « We are not unmindful of, nor are we insensible to the various considerations of a non-juridical character, social, humanitarian and other, which underlie, this case; but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on this basis of what we believe to be the correct legal view » [31].

The majority is reticent in its judgment — it prefers to decide the jurisdiction issue on factors which it would call legal, but which would not be legal in the stricter sense of the Joint Dissent.

The preferences of many lawyers would lie on the side of the Common Law dissenters. Unfortunately, as pointed out before, few are the cases where purely legal considerations could be taken into account — at best a high proportion would be mixed, especially as there is rather less international law than situations which call for its application. Moreover « social, humanitarian and other » considerations have intruded in other cases before the international court, especially in those areas where the law is rather undeveloped [32].

Another problem addressed in their Honours' judgment was the nature of the judicial function. They speak of the obligation of the Mandatory as expressed in the mandate document to « promote to its utmost the material and moral well-being and the social progress of the inhabitants of the territory... » saying

> There is hardly a word in this sentence which has not now become loaded with a variety of overtones and associations. There is hardly a term which would not require proper objective definition, before it could justifiably be applied to the determination of a concrete legal issue. There is hardly a term which could not be applied in widely different ways to the same situation or set of facts, according to different subjective views as to what it meant, or ought to mean in the context; and it is a foregone conclusion that in the absence of objective criteria, a large element of subjectivity must enter into any attempt to apply these terms to the facts of a given case. They involve questions of appreciation rather than of objective determination. As at present advised we have serious misgivings as to the legal basis on which the necessary objective criteria can be founded.
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> The proper forum for the appreciation and application of a provision of this kind is unquestionably a technical or political one, such as (formerly) the Permanent Mandates Commission, or the Council of the League of Nations — or today (as regards Trusteeships), the Trusteeship Council and the Assembly of the United Nations. But the fact that, in the present circumstances, such

[30] BUSTAMANTE, J., in his Separate Opinion, cited n. 2, p. 351.

[31] *Opinion* cited n. 4, p. 466.

[32] *Cf. the Judgment of the International Military Tribunal (Nuremberg Trials)*, (1946), *CMD.*, 6964 (1946), H.M.S.O., p. 411, section on The Law relating to War Crimes and Crimes Against Humanity : *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports*, 1951, p. 15 ff.

> technical or political control cannot in practice be exercised in respect of the Mandate for South-West Africa, is not ground for asking a Court of law to discharge a task which, in the final analysis, hardly appears to be a judicial one [33].

First of all one might take issue with the view that only objective determination and not appreciation is a judicial function. There are many categories where the words to be applied have not been of the sort to supply objective criteria, and yet courts of law have applied them and supplied these criteria by so doing. One has only to think of the definition of « political » in extradition — surely a government would have a better understanding of what is politics ? Yet judges have been quite prepared to define this word and defend their view against government opposition. What about cases where the welfare of a child has to be appreciated for a custody decision — no harder field could be imagined in the search for objective criteria. Likewise the « peace, order and good government » clauses of constitutions — just what these very general words included had to be determined by the first court called upon to apply them. In the international world the Court itself has to appreciate whether the police laws of a state are justifiable and have been justifiably used against the national of another state [34]; a matter in which the objective criteria may well be hard to find.

The fact is that terms like « welfare », « good government » and « politics » [35] are words with a highly subjective content, which arouse sentiments rather than connote a determinable range of meanings, and whose application is also subject to controversy. Yet they have all been applied in courts of law. The task of the first court which had to apply them was difficult, and very much like the task which faced the International Court of Justice with the inclusion of these words in the mandate for South-West Africa; but the domestic courts have nonetheless delimited a clear content of such terms which is then applied. They have in that area created, and to refuse to do so in the international forum *in principle* and *ab initio* is to deny to the international judiciary the creative function which the Bench enjoys within the State.

Secondly, it seems difficult to argue that there are *no* objective criteria for the application of these words. There is surely a certain minimum content of « welfare » [36] in this context which could be asserted, (just as has been determined for terms such as « cruelty » or « negligence ») to put it its lowest, in the negation of practices or laws; to put it at its highest, in the category of rights

[33] *Opinion* cited n. 4, p. 466.

[34] *Cf.* the allegation of Great Britain against Belgium in 1896 and the decision thereon in the *Ben Tillet* case, *R.G.D.I.P.*, 1899, p. 46.

[35] And many others used as legal terms, such as slander, treason, conspiracy, etc.

[36] On the « minimum content » or « core » meaning see HART, H.L.A., *The Concept of Law*, London, 1960.

and duties of the mandatory exposed by the petitioners in their argument on the merits (in their effort to supply the lack of objective criteria so deplored by Spender and Fitzmaurice JJ. They would certainly seem to have studied well the dissent on this point) [37]. One would say, merely as a matter of semantics, that some core of meaning must have been understood by all parties to have been included in this term; and the parties in allowing the court the function of adjudication had surely some basis for considering the determination of this content to be in fact a judicial activity.

There is no reason to believe, of course, that a judicial determination of the core- or minimum-obligation would settle the dispute, since the matter may well be one which would fall within the shadowy area of meaning, or be a dispute as to the permissible means of achieving this obligation (as was in fact later argued by the Union of South Africa on the merits of the case). But it does suggest that the grave doubts of their Honours as to whether this could be a judicial function at all may not necessarily prove justified.

But whatever criticism one might make of the inclusion of such terms in the mandate document, the fact is that they were included and that the mandate was meant to be a legally binding document (nor has anyone ever argued that it was void for vagueness — a question which in any case only a court of law could decide). If this accord then entailed legal responsibility, that responsibility has a certain content, and however difficult this may be to define, this is the task of the court. The very factors their Honours consider foreign to the judicial function and as « unquestionably a technical or political one » belong to it by that incorporation, just as the most technical details of otherwise quite separate fields may call for judicial interpretation in a contract in an internal system. Is a judge to refuse to adjudicate an action based on the contract for the use of an industrial design; or for breach of certain conditions of shipbuilding [38] because that refers to matter outside the usual field of judicial activity ? However unwise or unfortunate it may be thought to have judges delve into these « technical » realms, they can and frequently do so, usually with satisfactory results.

Their Honours base their Dissent on four basic principles which they hold to determine the instant case. Unfortunately, as pointed out before [39], for every principle of interpretation found to hold good, there seems to be another equally valid dictating the opposite. Fitzmaurice and Spender JJ. for example rely on

[37] See the eight categories of duties or rights suggested in the Petition of Liberia, *I.C.J. Reports*, 1966.

[38] *Cammell Laird & Co. Ltd. v. Manganese Bronze nad Brass Company Ltd.*, 1934, *A.C.*, 401. *Cf.* also *George Wills & Co. Ltd. v. Davids Pty. Ltd.*, 31, *Aust. L.J.*, 31 (on the pickling of beetroot).

[39] *Supra*, p. 41.

> « ... the principle that provisions are *prima facie* to be interpreted and applied according to their terms, where these are clear and unambiguous, and that such terms can only be ignored or overridden (if at all) on the basis of some demonstrably applicable legal principle of superior authority. The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions » [40].

The Court majority, on the other hand, speaks of the words of such a provision as not to be strictly applied where « the natural meaning is contrary to the spirit, purpose and context of the clause » [41]. A similar opposition of principles has occurred in the International Court before : in the *Anglo-Iranian Oil Case (Jurisdiction)* it was stated that

> « ... the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intentions ... at the time ».

and in the *Advisory Opinion on the Interpretation of Peace Treaties* the majority declared

> « The principle of interpretation expressed in the maxim : *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit » [42].

The problem is therefore, not to decide the issue of the case on the basis of the principle, but to choose the principle to apply to it.

The answer to much of this article will naturally be that analogies cannot be drawn in too facile a manner between internal legal systems and the international legal order which in respect of many factors, such as the sources of law, the sanctions possible (or rather impossible) and the consensual basis of jurisdiction, cannot be considered similar to *any* other legal order. While this is perfectly true it should be noticed that the very questions involved here do involve not only international law but law in general. What is the judicial function ? Can a court be required to appreciate circumstances rather than determine objectively ? What are justifiable methods of legal reasoning ? May judges have recourse to extra-legal considerations ? These are questions which enter into legal theorising in general. Even considering these questions entirely in the international context will lead theoreticians of law to compare the answers with those that would apply in the internal systems of law and invite again the questions, Is international law, law ? Is it, in that these questions are not already settled, only emerging law ? Is it the same discipline as law in general

[40] Opinion cited *supra* n. 4, p. 467.

[41] Case cited n. 2.

[42] *Anglo-Iranian Oil Case (Jurisdiction), I.C.J. Reports,* 1952, p. 93; *Advisory Opinion on the Interpretation of Peace Treaties, I.C.J., Reports,* 1950, p. 65.

or is it distinguished by the fact that its judges have no creative function ? This type of question, to which theorists are often devoted, has not so frequently loomed large in the actual pronouncements of the court or of individual justices[43] — yet it is clear from the South-West Africa cases that they can and will in the coming years determine the form and development of this method of international settlement.

CONCLUSIONS

If the *South-West Africa (Jurisdiction) Case* raised some of the most vital questions of international law in 1962 [44], it also suggested some of the answers. As opposed to the enounced view of strict legalism, the court would seem to have tacitly adopted a more flexible approach. The judgment on the merits, however, espoused rather the views of the dissenting judges;

> « It may be urged that the Court is entitled to engage in a process of « filling in the gaps », in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effects in order to ensure the achievement of their underlying purposes. The Court need not here inquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision » [45].

But the unusual circumstances which led to this change of opinion may not occur again and it is by no means certain that the 1966 majority opinion will be the precedent rather than that of 1962 [46].

The defenders of « strict legalism » are convinced that the certainty and predictability of law are best served by this attitude. A strict insistence on legal methods and legal sources would, they say, guarantee an impartial and constant application of law : one such defence of this view has been provided for example by a national judge : « It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide in great conflicts than a strict and complete legalism » [47]. But the virtues of an impartial and constant application of law vanish when the legal

[43] Two cases where these factors were discussed were the *Haya de la Torre Case, I.C.J. Reports,* 1951, p. 71, and the *Right of Passage Case, I.C.J. Reports,* 1960, p. 39.

[44] Other important questions were also dealt with in this case — the problem of « interest » for example, which was the determining factor in the final rejection of the petitions on the merits of the case, *South-West Africa Case* (*Merits*), *I.C.J. Reports,* 1966.

[45] *Idem,* p. 23.

[46] It should be noted that the changed result was in effect due to the absence of one judge from the final count, and the deciding vote of the President (Sir Percy Spender).

[47] Speech of Sir Owen DIXON on his swearing in as Chief Justice of the High Court of Australia, 85, *C.L.R.* (1952), p. XI.

sources are not immediately sufficient to determine the question. In the most detailed and elaborate system of legal regulation, there will always appear cases which have not been foreseen. Sometimes it needs only a small adaptation but adaptation it is. The fictions of law, not only of the John Doe variety [48], are proof of this : at some stage a judge has to decide whether or not to include a new circumstance in an ancient class or not (the tort of negligence for example in the general law of tort; or not to classify a motor car as an inherently dangerous object), and in this decision the parties have the guarantee that the judge shall make his decision on a way *approved* by the law; there can be no « strict legalism » where there is no law directly applicable.

This would seem to be the vice of a « strict legalism » theory — that it hides from the judge his function as a law creator. Especially in international law which is in dire need of the best judicial minds to adapt and extend it, this would be a pity. It would be a loss to exclude from it entirely cases which require appreciation rather than objective determination, since it would seem that to unduly limit the function of the international judge in comparison with his municipal brothers, would be to that extent to limit the submission of many cases where wider judicial powers are needed.

The vice of the more flexible approach would be named as uncertainty. This uncertainty should be tempered by the fact that the judges will only reach their conclusions in a manner consecrated by centuries of judicial practice; that it will be a *justifiable* decision; a conclusion which can be reasonably justified by traditional methods as a choice between sources, no one of which was in itself necessarily compelling for the solution of the case in hand [49].

Whatever view one might hold of the justifiability or no of the conclusions on the four objections to jurisdiction presented in this case (and some of the other dissenting justices have arrived at a rejection of jurisdiction by quite different methods) one cannot but feel that the court majority had accepted the power to delve when called upon into the murkier corners of international law and to state thenceforward the rules that had not until then been in evidence. By the accepted methods of classification, extension, analogy and adaptation, she might gradually have filled in the gaps and stood as a major source of law creation.

[48] John Doe is a fictional legal character very well known in the Common Law. To enable the old English action of ejectment (applicable originally to a leaseholder wrongfully ejected) to be open to a person claiming the freehold, the latter claimed a lease to the imaginary « John Doe » who was assumed to have been ejected by an imaginary « Richard Roe ». These fictions were admitted and the freehold title thus put in issue. The practice was abolished in 1852; OSBORN, P.G., *A Concise Law Dictionary,* 4th ed., London, 1954.

[49] The whole problem of the Mandate was without precedent and will be without successor owing to the dissolution of the League of Nations and the introduction of the trusteeship system.

But if « the magistrate is a speaking law », a repeal has just taken place [50]. The conservative and progressive elements are evenly balanced and the score now stands one all. It rests to the future to determine which will succeed in shaping the content of the international legal system.

[50] Such judicial self-limitation is not altogether unusual in the Common Law; *cf.* the restrictive interpretation of powers given to Equity and Common Law judges after 1834 and 1845.