Bharat Patel

Human rights and peoples rights in the post-colonial context

Introduction

The approach to human rights as a matter of international legal development has over the past four decades undergone radical reorientation requiring the formulation of new concepts and the adoption of new perspectives. As a significant part of that development, the notion of peoples rights figures prominently in the emergence of new nation-states and the formal accession of colonial peoples to international legal statehood. In this context, the relationship between human rights (as rights vested in the individual) and peoples rights (as rights attaching to recognised collectivities) assumes specific features which are peculiar to the post-colonial era. The purpose of this short paper is to delineate some of these features within the framework of the international system and, in so doing, to explore the potential tensions between human rights and peoples rights. It is also proposed to consider certain aspects of that relationship in the context of the domestic law of Zimbabwe.

It must be stated at the outset that this paper is not intended in any way to propound any definitive or fixed position. It is presented in the form of an impressionistic and somewhat cursory overview designed to provoke further discussion and consideration of the issues raised. Moreover, the argument that follows is to a large extent premised upon certain basic assumptions as to the legal status of peoples rights and does not purport to take on board the controversial nature of that status. In this respect, it is not proposed to enter into the definitional problems pertaining to the designation of "peoples" or to canvass the precise parameters and substance of peoples rights.

Theoretical justifications for colonial expansion and their impact upon peoples rights

The political ideology of self-determination and the attendant evolution of nationalism as a manifestation of that ideology are substantially attributable to

eurocentric conceptions originating in the late-eighteenth and early-nineteenth centuries. The discussion and application of these notions in subsequent political theory – although enunciated in universal terms – was largely confined to European developments. In this regard, non-European peoples, as a general rule, were regarded as not having attained a sufficient level of advancement to merit their inclusion within this paradigm. Thus, their supposedly untutored status indirectly provided moral and political justification for the imperial expansion of the "civilized" nations. The European powers and their subjects, wearing the mantle of civilization and fortified by paternalistic rhetoric, sallied forth in the name of a Christian god to subjugate the lands inhabited by their less fortunate brethren.

The period of colonial expansion also witnessed a complementary development of legitimation in the doctrine of customary international law. As an essential part of that development, the recognition of territorial acquisition by conquest and its corollary, the *terra nullius* concept, came to be formulated with greater legal precision. The crystallization of this normative process is particularly evident in its application to Africa: large tracts of that continent were characterized as *terra nullius*, belonging to no, one or no recognised sovereign or collectivity and therefore open to conquest and formal annexation. The alternative to naked conquest was the ascription of qualified sovereignty and the consequent creation of sattelite territories by resorting to the device of so-called "treaties of protection". The somewhat chaotic nature of the "scramble" for Africa in the latter half of the nineteenth century was regularised to a large extent through various bilateral and multilateral arrangements culminating in the formal carving up of the African cake between the European powers in order to minimize conflicts *inter se* and thereby to facilitate the exercise of colonial control.

Taking a broad view of these and other analogous developments in the sphere of international law, it may properly be argued that their undeclared effect, in functional terms, was to provide *ex post facto*, legitimation of the realities and ramifications of colonial expansion. However, the doctrine of international law tends to mask the objective nature of that expansion, viz. the inherent contradictions and exigencies of capital necessitating its consequent globalization. The inner logic of capitalist accumulation – given existing territorial constraints, finite material resources and limited labour markets – inexorably impels capital and its agents to expand into newer territories and hitherto unexploited labour reserves and to draw them into the capitalist arena. On this analysis of the underlying dynamic of colonial expansion and its juridical articulation, the possibility of asserting peoples rights on a universally applicable basis (however such rights might be conceived and formulated) can hardly be contemplated.

Peoples rights in contemporary international law

The argument that follows below is predicated on the general proposition that contemporary international law tends on the whole to mediate and reflect pre-existing political power realities and the international economic order which forms the basis of those power divisions[1].

[1] The Berlin Conference and Act of 1885 is an outstanding example.

Insofar as the colonial context is concerned, the right to political self-determination is more or less recognised and, with a few exceptions [2], is now almost fully resolved. The right of peoples to determine their own form of political organization finds expression in numerous international legal instruments [3]. Moreover, to the extent that state practice is the primary determinant of positive international law, the principle of political self-determination has found concrete fulfilment [4] in countless ex-colonial situations [5].

There is little doubt that this process of decolonization signifies the clearly progressive development of international law. Nevertheless, the affirmation of «the principle of equal rights and self-determination of peoples» is somewhat illusory in its application to the real world. The notion of the equality of all peoples [6] is, in effect, no more than a hollow assertion of formal equality which discounts *in toto* the substantive inequalities that pervade the interaction of legal subjects. What is postulated here is the fundamental contradiction between, on the one hand, the form of legal right and its false premise of equality and, on the other, the impossibility of the universal and uniform realization of that right as between given unequals.

Thus, the normative development of the principle of self-determination in the post-colonial era occludes the underlying economic, and therefore political, stranglehold which the metropolitan powers continue to exercise over their erstwhile colonial territories. Generally speaking, this control is perpatuated through a variety of systemic forms which mediate the existing world economic order, viz., *inter alia*, the conditions governing financial and technical aid arrangements [7], the operations of transnational corporations and private investment and the co-option of local ruling classes and power elites. Moreover, in the sphere of international conventional law, there are in force numerous wide-ranging agreements governing economic interaction between states – both bilateral and multilateral – which operate to formalize and legitimate the current economic and technological disequilibria between industrialized countries on the one hand and developing nations on the other. The cumulative effect of these inter-linked processes is to buttress a global system within which, to use a Marxist metaphor, surplus-value continues to be syphoned off from the underdeveloped periphery to the industrialised centre. In this context of disparate development, the rights of developing peoples to economic autonomy and real control over their material resources are effectively

[2] E.g. South Africa, Namibia, Northern ireland and the Palestinian and Sahrawi situations.

[3] Viz. the United Nations Charter, the International Covenants of 1966, and various General Assembly resolutions beginning with the pioneering Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) of 1960.

[4] Only, however, insofar as form of political organization can, if ever, be separated and divorced from socio-economic realities.

[5] Within the confines, at any rate, of colonially defined territorial boundaries. Apart from the exceptional case of Bangla Desh, the argument for any right of secession cutting across such boundaries is highly unlikely to merit international favour. See, in particular, the qualification against dismemberment embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 1625 (XXV) of 1970.

[6] Cf. the analogous affirmation of «the equality of all persons before the law».

[7] Either by way of direct agreement between states or through the machinery of international monetary institutions.

negated under the prevailing international order as recognized and upheld by contemporary international law.

Private property rights in relation to peoples rights under international law

Under international law, the protection of the individual rights of foreign nationals ordinarily falls within the ambit of the so-called right of diplomatic protection. The right of the national state to intervene in the domestic affairs of the host state is founded on the relation of nationality between the individual and the former state. In this regard, the protection of the private property rights of aliens constitutes a fundamental incident of protection by their national state. Under modern conditions, the operative rules in this area of international law are, needless to say, hardly uncontroversial. The traditional view upholds the international minimum standard governing the treatment of aliens in terms of which the property rights of the latter are accorded special protection within the territory of the host state [8]. In so far as the expropriation of property rights is concerned, the traditional approach demands the payment of «adequate, effective and prompt compensation» as a condition of the legality of any expropriatory measure [9]. The impact of this rule of compensation has specific implications in relation to developing states in their efforts to nationalize property belonging to individual aliens and foreign corporations originating or based in other – predominantly Western – countries. Given limited financial resources, there is little doubt that the application of the full compensation rule in all its rigour is intolerably onerous and may effectively preclude or stultify projected schemes of nationalization. Indeed, even in situations where the compensation rule is modified so as to reduce the amounts payable to less exorbitant proportions, the very existence of the right to compensation tends to militate against the viability of expropriatory action.

All in all, the rules of international law governing the protection of alien property rights provide a classic instance of the tension or contradiction between individual rights and the rights of peoples (through the agency of the state acting in their behalf [10] to control and freely dispose of their natural and material resources.

Property rights and peoples rights in the domestic law of Zimbabwe

The protection of the property rights of aliens is, as indicated above, more or less an established tenet of international law. The right to own and enjoy

[8] The opposite view, relying on the principle of national treatment, equates the position of aliens to that of the nationals of the host state.

[9] In the light of modern practice, however, it is arguable that the operation of the full compensation rule has to some extent been eroded.

[10] While it is true that the equation of the rights of the state with peoples rights implies a complete identity of respective interests – which more often than not may be a wholly spurious assumption – it may be proper in specific situations to assimilate certain rights where the state exists as the only viable mechanism or vehicle for the effective realization of peoples rights, e.g. in the case of development programmes or land resettlement schemes.

property without arbitrary state interference is also recognized in various international instruments [11] as a human right attaching to every individual, irrespective of national status.

The property norm in the law of Zimbabwe finds specific embodiment in section 16 of the Constitution which, in its detailed formulation, constitutes a pivoltal provision in the Declaration of Rights [12]. This enshrinement of private property impinges on virtually every aspect of state action and internal sovereignty. By virtue of section 52 [13] of the Constitution, the protective provisions of section 16 are entrenched for a period of ten years from the date of independence [14]. The gravamen of section 16 lies in its preclusion of the compulsory acquisition of property unless the law in terms of which the acquisition is sought complies with certain prerequisites [15]. More importantly, the acquisition by the state of any property right is made subject to the requirement «to pay promptly adequate compensation for the acquisition» [16]. Furthermore, any compensation payable in respect of the loss of ownership or enjoyment of any land is freely remittable to any country outside Zimbabwe [17].

The overall result of this constitutional protection of property rights is to impose severe restrictions on the powers of the state [18] to give effect to the right of the Zimbabwean people [19] to economic self-determination. To put it precisely, the state is placed in the invidious position of having to violate its own constitution if it were to embark on any programme of substantial socio-economic transformation involving the eradication of existing imbalances and the organisation of a new economic dispensation redistributing given material resources [20] on a wider and more equitable basis. Peoples rights, in this instance, are clearly subordinated to individual rights within the framework of a legal order which accords primacy to the prevailing property norm. The resolution of this contradiction is to a large extent dependent upon the radical reconstitution of that norm. Historically, in the context of the process of decolonization, it is explicable as an incident of the attainment of merely formal political indipendence without concomitant economic autonomy.

Conclusion

The preceding analysis of the relationship between law and reality should, in the writer's view, be seen as a necessary precondition to any meaningful discus-

[11] See, e.g. article 17 of the Universal Declaration of Human Rights.

[12] Chapter III of the Constitution. The various rights enumerated in the Declaration are, in terms of the enforcement provisions of section 24, justiciable before the Supreme Court.

[13] Subsection(4)(a).

[14] 18th April, 1980. Under the Lancaster House dispensation, the amendment of these provisions requires the affirmative votes of *all* the members of the House of Assembly – section 52(3)(b)(i).

[15] Subsection (1).

[16] Paragraph (c) of subsection (1).

[17] Subsection (5).

[18] See note 10, *supra*.

[19] The term being applied here to designate the vast majority of Zimbabweans who are either landless or otherwise economically deprived or disadvantaged.

[20] In particular, land.

sion of the relationship between peoples rights and human rights. The purely abstract and de-contextualized consideration of legal rights – although not to be eschewed *tout court* – cannot provide an adequate substitute for the proper appraisal of those rights in the historical and material milieu within which they are given political and juridical expression. There can, of course, be little argument against the position that the rights of the individual and those attaching to the collectivity should not be postulated as being inherently or necessarily antithetical but should instead be seen to dovetail in a complementary relationship of interdependence. However, in order to reconcile the potential conflict between these rights and thereby to achieve their effective harmonization and optimum realization, it is first necessary, among other things, to recognize and address the causes and realities of uneven development and material inequality. ■