After the Boipatong massacre

Legitimacy of violent resistance?

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The process of political reform in South Africa is frequently interrupted by the violence so horrifically epitomised by the Boipatong massacre of 17 June 1992. What distinguishes Boipatong from previous mass killings, notably Sharpeville and Soweto, is the display of militancy among the blacks. The aggression in their anger and passion at the funeral of the Boipatong victims signals a noticeable shift in the blacks' reform strategy from conciliation to confrontation. The rival black political and labour organisations such as the Pan African Conference, the Azanian Peoples Organisation and the Congress of South African Trade Unions pledged to co-operate and unite their 'liberation armies' to fight the de Klerk minority regime. The ANC, short of endorsing such a military solution, opted to boycott the talks on political reforms and called for mass action against the regime. Archbishop Tutu pleaded in vain for justice and reconciliation to defuse an explosive crowd chanting revolutionary slogans, songs and imitating the sound of gunfire.[1] With this state of hostility, South Africa seems destined to experience a proliferation of violence and widespread bloodshed.

Notwithstanding the successive recognition by the UN since 1952 of the equal rights and self-determination of the indigenous black majority with its speedy and unconditional implementation, such rights remain as uncertain and illusionary as ever. The human cost of the blacks' quest for the realisation of their rights continues to be staggering. Given this situation, can the blacks, being the holders of the right, resort to violent exercise of their right, a radical self-help remedy that flows across the mass to the leaderships following the Boipatong tragedy?

Violent exercise of self-determination

Article 2(4) of the UN Charter prohibits the use of force in international relations. It may be argued that force used within a state by peoples to enjoy their equal rights and self-determination is essentially an internal matter, beyond the scope of Article 2(4). During the colonial era, the struggle of colonial peoples for self-determination and independence against their colonial powers constituted internal conflict and was dealt with under domestic legislation of the latter. In most cases, colonial powers' resort to repressive measures to perpetuate their colonial possession was justified as police action necessary to maintain law and order. But the status of peoples' struggle for their equal rights and self-determination has undergone a profound change in contemporary UN practice. Equal rights and self-determination of peoples are recognised as basic human rights and a major purpose of the UN. Thus the relationship between a government and its peoples striving for equal rights and self-determination is no longer regarded by the UN as internal, but a legitimate international concern. South Africa affords an example for it has been thoroughly internationalised by a consistent flow of authoritative UN resolutions. This internationalisation implies that the relationship between the regime and its black peoples has ceased to be an internal matter and has outgrown the domestic jurisdiction of South Africa. This position has radically altered the legal status of violence by the blacks in support of their cause. It would constitute a force which may well be classified as a force employed in international relations within the terms of Article 2(4) and is, as such, subject to the principle of prohibition of use of force under international law rather than domestic law.

The UN Charter, though it recognises equal rights and self-determination of peoples, does not prescribe any specific procedure, in particular coercive means, for its enforcement. The UN Charter merely imposes a general obligation on states to comply with the UN purposes in good faith. It is the member states that have pledged themselves to take joint and separate action for the achievement of self-determination of their peoples, among other things (Article 56 of the UN Charter). This act of implementation may constructively be construed to require the adherence to peaceful means, not to authorise peoples to initiate the use of force in the event of a delay or a failure on the part of the government to enforce the right.

Violence in support of a self-determination claim, if waged with serious magnitude and desperation, may be costly to the world order. It transgresses

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international peace and security and is qualitatively indistinguishable from any other prohibited use of force. Hence such use of force appears to infringe, in the absence of any other legal basis to justify, the principle of non-use of force in international relations. The recognition by the UN of the equal rights and self-determination of the South African blacks does not by that very fact entitle them to use force for the realisation of this right. They are also subject to the principle of non-use of force and required to realise their right through peaceful means.

Is there a violent remedy?

The existing international legal order lacks a regimen for the compulsory settlement of disputes through peaceful means. Under this circumstance, it is difficult to pretend that the right to self-determination must always be exercised through peaceful means. If the beneficiary of self-determination is strictly required to comply with peaceful means under all circumstances while others settle their disputes through coercive means, it would imply a double standard. The UN system is obliged to protect all Charter rights and to prevent their denial. It is inconceivable that a right has been created without a remedy to redress its abrogation. In fact, where there is a right there is a remedy. The UN has conceded this and provided a conditional remedy to cases of denial, particularly forcible, of equal rights and self-determination in its subsequent resolutions.

The 1970 UN Declaration on Principles of International Law[2] deals, among other things, with the use of force in self-determination (Principle V, para. 5). This paragraph imposes an absolute injunction on the forcible denial by the incumbent government of equal rights and self-determination of its peoples. If this prohibited force is used against the beneficiary of the right, the latter acquires a right to resist the former with necessary counter-force. The scope of resort to counter-force is circumscribed by conditions. It may be permissible as a last resort only in situations where this choice becomes unavoidable due to the practical impossibility of enforcement of the right through peaceful means. In other words, armed resistance to the forcible denial of self-determination is permissible. This paragraph reaffirms that self-determination is a legal right to be exercised within the existing international legal system. The peoples whose right is being forcibly challenged have the right to use counter-force, a right which accrues only after all peaceful means are exhausted. The obvious inference is, if a government does not use force to deprive peoples of their right, the right of the peoples to use force does not arise. Viewed from this perspective, it may be asserted that the right to violent exercise of self-determination emanates from the forcible denial of that right. The former is a consequential right of the peoples and becomes operative following the failure of a government to perform its duty as mentioned in the paragraph.

South African Government forcibly denies the right

The South African regime owes a duty to respect and foster the peaceful enjoyment of equal rights and self-determination in the territory. It is under a definite duty not to use force to defeat the peaceful exercise of the right. In defiance of these distinct obligations, the regime has persistently resorted to violence against the blacks, either through its ally the Inkatha Party[3] or by its own security forces,[4] aimed at subverting the peaceful realisation of the right. These violent measures are totally proscribed under the 1960 Decolonisation Declaration (paras 1 and 4), the 1966 Declaration on Non-Intervention (para. I.b) and the 1970 Declaration on Principles of International Law (Principle I, para. 7; Principle III, para. 3 and Principle V, para. 5). Since violence has been perpetrated against equal rights and self-determination, it is, in effect, used against one of the cardinal purposes of the UN. Therefore it becomes a force used 'in any other manner inconsistent with the Purposes of the UN' within the meaning of, and is prohibited by, Article 2(4) of the UN Charter.

Given that the South African regime has been engaged in committing illegal force against the blacks, who are entitled not to have force used for the denial of their lawful right, such illegal actions of the regime confer a right on the blacks to resistance.

External assistance to self-determination

The 1970 Declaration (Principle V, para. 5) authorises the peoples whose right is being forcibly denied to seek and receive outside assistance in support of their resistance to, and actions against, such denial. The peoples are not states. They are either unarmed or lack sufficient arms to resist the forcible denial of their right by the organised and well-equipped government forces. The right to resistance conferred on them would be meaningless if they do not have adequate strength to counter the Government's use of force. Given this situation, the 1970 Declaration seems to furnish a solution by authorising the peoples to seek and receive international aid to augment their resistance power. The formulation may contextually be understood to embrace a wide range of assistance including arms.

Under this authorisation, the South African blacks may be entitled to an appeal to the world community for support and assistance including arms in their resistance to the Government's forcible denial of their right. However, this right is limited to merely seeking outside help. They cannot claim a right to external assistance. In response to their appeal, a third party is not under any duty to render such assistance. Any self-determination struggle in South Africa must be engineered, sought and fought by the 'self' concerned. Excessive external aid to them from the very beginning may, precisely as happened in Katanga,[5] dilute their right to self-determination which by nature must always be determined by its beneficiary. Similarly, the blacks cannot seek, and a third party cannot embark on, a direct armed intervention in support of the resistance movement. The 1970 Declaration simply does not grant such a right.

Conclusion

The resurgence of dormant militancy among the blacks following the Boipatong crisis represents a fundamental problem in South Africa — the antinomy between order and justice. Order cannot be restored if justice is denied and justice cannot be administered unless order is sustained. It is in the best interests of these two interdependent imperatives for peace and security that resort to force both by the Government to prescribe and by the peoples to enforce, equal rights and self-determination must be resisted. This objective cannot be attained by a blanket denial of peoples' right to use counter-force. Internal injustices and the ruthless suppression of a just cause in South Africa and world inaction may leave no other palatable option but recourse to counter-force, disruptive to both internal and international order. The legitimacy of violent exercise of self-determination as the ultimate remedy in extreme cases of the forcible denial of that right may be undeniable. The justified end of the peoples turns their otherwise illegitimate means into a legitimate one.

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altogether, or by following through the implications of the claim that their theories (including Hobbes') must be read exclusively as attempts to justify political and thereby legal obligation, and not in any sense as explanations (however interwoven and fortified by moral assertion) of how and why political systems might arise and survive? That quickly leads to questions about the logical status and source of the principles used to define prominent features of the social contract, as has been suggested, and we cannot easily ignore them in favour of the more accessible historical and psychological issues.

Some modern philosophers who have seen this priority, like John Rawls, find the defensible core of contract theories in the idea that social obligation arises from the fairness of a system of agreed reciprocal restraints. But there is also a much older philosophical tradition, part of an intellectual culture against which each of these theories, in their own way, has reacted, and against which they might also be viewed. This is the Catholic philosophy championed by Thomas Aquinas, who saw all political and legal authority as ultimately derived from God, and who put the issue of abuse of Sovereignty in more simple and direct terms: *Lex Iniusta non est Lex.*

That simplicity has not impressed positivist legal philosophers, such as Jeremy Bentham and H.L.A. Hart, who defend a conceptual scheme which describes such laws (assuming they do not violate legal or constitutional standards) as legally 'valid', but as too immoral to obey. If one believes, as Thomist philosophy argues, that a universal Natural Law of moral precepts is accessible to the rational mind, then Aquinas' theory for civil disobedience seems eminently sensible, since it neatly resolves our provisional moral duty to respect the law in a more profound morality of justice. Because Hart sees the background Natural Law claim as optimistic, he offers no basis stronger than personal conviction and conventional moral practice from which to impugn such laws, hence no warrant nor means to elevate such moral values into a concept of 'legal' validity. But he does not disagree with the central point that they impose no moral obligation; it is just that the values in question are (to a positivist) either too abstract in expression, or too individualistic in content, to make this issue amenable to any authoritative social judgment.

A modern Kantian approach, as exemplified by Ronald Dworkin, might nevertheless support the Angelic Doctor's proposition on non-theological grounds. For Dworkin, the moral values which shape the constitutional constraints of a bill of rights would lose neither their distinctively 'legal' relevance, nor their logical status as articulate if highly implicit standards, were they deleted from the constitutional documents. As is well known, Dworkin has defended for many years an original philosophical thesis about the nature of social moral standards. He argues that, given their contextual role in the critical legal and political life of a community, the controversy inherent in interpreting their necessarily abstract formulation provides no basis in logic for dismissing them as inarticulate standards for judgment. On the contrary, as his celebrated account of Hercules is meant to show, they are the only means language both offers and permits to do this job with precision (see *Taking Rights Seriously*, Ch. 4). Because Dworkin's political community exists on the basis of reciprocal moral commitment, obligations arise on all participants directly from the ideals of fairness implicit in this arrangement. Dworkin thus bypasses classical social contract theory, by treating the feature of consent as secondary to the core ideal of fairness which gives it moral bite.

Nevertheless, if we wish to defend a specifically contractual theory of social obligation, but also acknowledge that all citizens have fundamental civil rights, both as individuals and minorities, then we must in the end argue that these rights are a central part of the contract itself, so that they can be defended against any attack, and in any political crisis, however extreme. Further, we must hold this contract beyond negotiation, so that its principles of justice, freedom and welfare will govern all social disputes, including disputes over the abuse of power and the suspension of duties. John Rawls, with his famous blindfold interpreter, has described a way to identify and elucidate the kind of principles which might justify such rights, and it is arguable whether Dworkin's Hercules, with unlimited intellect and all-seeing eyes, would reach significantly different conclusions. Neither, however, supposes these principles hold good because we are pledged to them by contract.

However, if we try to follow in the path of the classic social contract theorists, and also insist that the social contract, as the basis of civil society, is itself dependent on the continued respect by authorities for such rights and principles, then (unless our argument is merely a statement of social or psychological fact), we will leave those who rely on such rights vulnerable to any claim that the contract is ended as Sandra Berns has, I think mistakenly, suggested. Hobbes' refusal to countenance withdrawal from the commonwealth, and Locke's notion that one could withdraw allegiance from civil authority but not from the social pact, may well have been prompted by this very realisation. On the other hand if, as I would argue, we truly believe that these principles and rights have such distinctive importance in our political and legal life, then why should we bother to postulate a 'contract' model in the first place?

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The principle of equal rights and self-determination of peoples has introduced new elements to the integrity of the principles of non-use of force and non-intervention. The efficacy and desirability of the latter principles may seriously be impaired in the case of South Africa as a result of the regime's persistent violent denial of equal rights and self-determination of the blacks. This denial serves to legitimate a violent exercise of self-determination. Were such to occur in South Africa, the international community and its forum, the UN, so committed to the eradication of apartheid, should regard it as not a violation of, but instead as being in compliance with, the purposes and principles of the UN.

References

1. See the *Australian*, 30.6.92, p.6; the *Guardian*, 5.7.92, p.7.
2. For the text see (1970) 9 *Int'l Leg Mat* 1296. The Declaration must be distinguished from the recommendatory functions of the General Assembly which, acting under the direct authority of the UN Charter Articles 13 and 14, has codified the Charter provisions on the seven selected principles of international law and created legal rights and duties deriving therefrom. These are binding on member states.
3. For this alliance see the *Guardian*, 5.7.92, pp.17-18; Islam, M. Rafiqul, 'South African "Inkathagate": A Hidden Agenda', (1991) 16 *LSB* 270-72.
4. The *Amnesty International Report* 1992 at 233-36; (1992) 8 *South African J on Human Rights* 144-48; *Time*, Aust., 6.7.92, at 20.
5. Katanga's violent attempt was supported by a Belgian mining company and Belgian troops right from the very beginning.