

RIGHT TO SELF-DETERMINATION

The basic philosophy underlying the Declaration on the Granting of Independence to Colonial Countries and Peoples is that ‘the subjection of peoples to alien subjugation, Domination and exploitation constitutes a denial of fundamental Human Rights, is

Contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and co-operation’. All peoples, the Declaration maintains, have the right to Self-determination and all States are accordingly expected to abide by it faithfully. In Many resolutions the General Assembly has emphasized the inseparable link between Self-determination and human rights and called upon all States to recognize these rights And to offer all peoples striving for them “moral, material and other forms of assistance In their struggle to exercise fully their inalienable right to self-determination and Independence” **[P.18 Report on Racial Discrimination by Spl.Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study by Herman Shanta Cruz, Revised and updated Version 1976. SalesNo.E76.xiv.2.]**

The language of John Dickinson of Pennsylvania in his address to the Committee of Correspondence in Barbados is unequivocal:

“King or Parliaments could not give the rights essential to happiness as you confess, Those invaded by the Stamp Act to be. We claim them from a higher source from The king of kings and Lord of all the earth. They are created in us by the decree of Province, which establish the laws of nature. They are born with us and cannot be Taken away from us by any human power, without taking our lives. In short, they Are founded on the immutable maxims of reason and justice”

[Writings, Forde’s edition Vol.14, P.262] at P.129, International Law by Hersch Lauterpatch]

John Locke in his 2nd treatise on Government II said

“To understand political power aright and derive it from its original, we must Consider what estate all men are naturally in, and that is, a state of perfect freedom To order their actions within the bounds of the law of Nature, without asking leave Or depending upon the will of any other man. A State also of equality, wherein all The power and jurisdiction is reciprocal, no one having more than another, there Being nothing more evident then that creatures of the same species and rank Promiscuously born to all the same advantages of Nature and the use of the same Faculties, should also be equal one amongst another without subordination or Subjection.”

‘Men, being as have been said, by nature all free, equal and independent, no one Can be put out of this estate and subjected to the political power of another Without his own consent, which is done by agreeing with other men, to join and Unite into a community’.

[Reported at P.134, International Law & Human Rights by Hersch Lauterpatch]

The Preamble of the Draft of the International Bill of the Rights of Man, enshrined as:-

Whereas the right of man to freedom comprises the right of self-Government
Through persons chosen by and accountable to him;
Whereas the principle of equality of man demands an equal opportunity of
Self-government and cultural developments;

Article 13 of the International Bill of the Rights of Man further envisages as:

‘Wherever the political condition or the stage of development of communities
Which have not yet attained full political independence or which constitute a
Colony or a trust territory require the application of the principle of trusteeship
Or of political tutelage, such modification of the right of self-government shall
Be subject in accordance with the Charter of the United Nations to the effective
Recognition of the principle of the eventual independence of these communities
In accordance with their development and the wishes of their populations’.

The provisions of this article are very clear and imposes an obligation on the States that
The respect to the expressed wishes of the people in all the circumstances to be extended.
The Article 27 of the same Bill further explains the position of the States to the rights and
Obligations are binding under the International Bill of the Rights of Man, which
enshrines

As:-

“The International Bill of the Rights of Man shall enter into force, as an
Instrument operating within the framework of and guaranteed by the United
Nations as soon as it has received the assent of the two-thirds of the members
Of the United Nations. It shall become binding, without any necessity for
Ratification, upon Members of the United Nations whose duly accredited and
Authorised representatives present at this Special General Assembly cast their
Vote in favour of the Bill or who at any future session of the General Assembly
Make a declaration accepting its binding upon their State. Any State, which is
Not a Member of the United Nations may accede to this Bill of Rights by a
Declaration deposited with the Secretary-General.”

The Virginia Declaration of the Rights adopted on June 12, 1776, made by the Representatives of the good peoples of Virginia assembled in full and free convention; Which rights do pertain to them, and their posterity, as the basis and foundation of? Government. They proclaimed:-

1. That all men are by nature equally free and independent and have certain Inherent rights of which, when they enter into a state of society, they cannot, By any compact, deprive or divest their posterity; namely, the enjoyment of life And liberty with the means of acquiring and possessing property and pursuing And obtaining happiness and safety.
2. That all power is vested in and consequently derived from the peoples, the Magistrates are their trustees and servants and at all times amenable to them.

President Woodrow Wilson referred to that phrase in insisting that its principles should Incorporated in the Covenant – as in fact it was in Article 1 paragraph 2 of the Bill. He Said:

“We have said that this war was carried on for a vindication of democracy. The statement did not create the impulse but it was stated that the war was Being waged to make the world safe for democracy, a new spirit came into The world. People began to look at the substance rather than at the form. They knew that governments derived their just powers from the consent of The governed. I should like to point out that nowhere else in the draft is There any recognition of the principle of democracy. If we are ready for

This we should be ready to write it into the Covenant”.

American Representative on the Human Rights advocated in 1948 quoting from Lincoln’s speech as quoted by Holcombe, Human Rights in the Modern World (1948) at P.27 – Abraham Lincoln castigated in a bitter passage that perversion of argument:

“When we were the political slaves of King George and wanted to be free we called The maxim that all men are created equal ‘a self-evident truth; but now when we have Grown fat and have lost all dread of being slaves ourselves, we have become so greedy to Be masters that we call the same maxim a self-evident lie”. Yet, and this reveals the Complexities of the problem, Lincoln set [practical limits to what he considered the Proclamation of the self-evident truth in the matter of equality. He said: ‘I think that the Authors intended to include all men, but that they did not mean to say that all were equal In colour, size, intellect, moral development or social capacity. The defined with Tolerable distinctness in what respects they did consider all men created equal – equal in Certain inalienable rights, among which are life, liberty and the pursuit of happiness. This They said this they meant. They did not mean to assert the obvious untruth, that all men Were then actually enjoying that equality nor yet that they were about to confer such a Boon. They meant simply to declare the right so that the enforcement of it might follow As fast as circumstances should permit. They meant to set-up a standard maxim for free Society which should be familiar to all and revered by all – constantly looked to, Constantly laboured for and even though never perfectly attained, constantly Approximated; and thereby constantly spreading and deepening its influence and Augmenting happiness and value of life to all people, of all colours, everywhere.”

On June 17, 1789, the six hundred Common Representing over 95% of the population of France gathered in Versailles without the other two estates the nobility and the clergy and Declared them the national assembly. On June 20 the third estate met again and Took an oath to continue to press for a new constitution. When on July 14, a Pavilion Mob stormed the Bastille, symbol of the repressive old regime, the French Revolution Began. In August of the same year the National Assembly passed the declaration of the Rights of Man and of the Citizens which proclaimed among other things, popular Sovereignty and the right to resist oppression. By proclaiming the principle of popular Sovereignty the revolution altered the then prevailing conception of the State, the divine Right of kings was not only discredited as it had been in England but was also replaced by

The divine right of the people.

The principle of popular sovereignty expressed as the right of self-determination was Widely recognized by the end of World War-I. The principle of sovereignty of the people

Modified from the original idea born in the French Revolution and American Revolution of 1776 appearing now as self-determination. The American Declaration of Independence of 1776 declared:-

‘We hold these truths to be self-evident that all men are created equal, that They are endowed by their creator with certain inalienable rights that among these Are life, liberty and the pursuit of happiness? That to secure these rights Governments are instituted among men deriving their just powers from the Consent of the governed; that whenever any form of government becomes

Destructive of these ends, it is the right of the people to alter or abolish it and
Institute new governments.’

Thomas Burke of Carolina adumbrated in a famous speech of 1783:-

“All political power which is set over men and All privileges claimed or
Exercised in exclusion of them, being wholly artificial and for so much, in
Derogation from the natural equality of mankind at large, ought to be some
Way of other exercised ultimately for their benefit such rights or
Privileges or whatever else you choose to call them are all in the strictness
Sense a trust; and it is of the very essence of every trust to be rendered
Accountable”.

It was not until the twentieth century that the principle of self-determination
Developed beyond this stage of justifying the resort to self-help or unilateral action.
Although President Wilson championed the principle of self-determination originated in
The seventh century when the nation state system deeply rooted in the concept of
Nationality, the principle was then divorced from considerations of human rights. At
The end of World War I the principle of self-determination took new shape under the
Championship of President Woodrow Wilson who took the view and said that:

‘No peace can last or ought to last which does not recognise and accept the
Principle that government derive all their just powers from the consent of
The governed and that no right anywhere exists to hand people about from
Sovereignty to sovereignty as if they were property’.

As former colonial people and territories substantially disappear the focus of Attention has begun to shift from colonial and non-colonial context as far as claims Of self-determination is concerned. As long as making continue to give deference to Human dignity and human rights at least in rhetoric self-determination will continue to be Involved and re-invoked self-determination as conceived by Wilson was an imprecise Amalgam of several strands of thought, some associated in his mind with the notion of Self-government. Wilson had long held that every people had the right to select its own Form of government – an idea that might be termed ‘internal’ self-determination. Consent of the governed came to subsume ‘external’ self-determination as well; the right Of every people to choose the sovereignty under which they shall have to be free of alien Masters and not to be handed about from sovereignty to sovereignty as if they were Property. Self-determination has not only been transformed from political or moral Principle to a full legal right; it has become the pre-emptory norm of international law Capable of over-riding all other international legal norms and even such other possible Pre-emptory norms as the prohibition of the threat or use of force in international Relations.

The League of Nations Covenant did not specifically mention self-determination. Only Article 22(1) of the Covenant provided:-

“To those colonies and territories which as a consequence of the late have Ceased to be under the sovereignty of the States which formerly governed them And which are inhabited by peoples not yet able to stand by themselves under the Strenuous conditions of the modern world, there should be applied the principle That the well-being and development of such peoples from a sacred trust of Civilisation and those securities for the performance of this trust should be

Embodied in this covenant”

The Atlantic Charter of 14 August, 1941 as agreed by Roosevelt and Churchill and Ascribed to by 26 allied states on 1st January, 1942 contained two points relevant to the Principle of self-determination. First, their countries seek no aggrandisement, territorial Or other. Second, they desire to see no territorial changes that do not accord with the Freely expressed wishes of the peoples concerned. In September, 1941 in the House of Commons, Churchill said –

‘At the Atlantic meeting we had in mind primarily the extension of the Sovereignty, self-government and national life of the States and nations of Europe now under the Nazi yoke and the principles which should govern any Alterations in the territorial boundaries of countries which may6 have to be Made. That is quite a separate problem from the progressive evolution of self-Governing institutions in regions whose peoples owe allegiance to the British Crown. We have made declaration on these matters which are complete in Themselves free from ambiguity and related to the conditions and circumstances Of the territories and peoples affected. They will be found to be entirely in Harmony with the conception of freedom and justice which inspired the joint Declaration”.

The ancient and profound desire of mankind for the recognition and guarantee of Human Rights was intensified by the oppression of dictators, now finds, through the United Nations the opportunity of being placed under the guarantee of international law. At

Dumbarton Oaks where in 1944 the tentative proposals for the United Nations Charter were prepared, references were made to problems of a 'humanitarian' nature. United Nations met at San Francisco in 1945 to draw up their Charter it was clear that the opinion not only of Governments but also of the common people in favour of a more direct reference to Human Rights and fundamental freedoms ran strongly.

RIGHTS RECOGNISED: The Charter of the United Nations, the Covenants of the Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolutions 1514(XV) of 14 December, 1960), the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States of 24.10.1970 (General Assembly Resolution 2625[XXV] and many other Declarations and Resolutions recognise people's right to self-determination.

Article 1 of the International Covenant on Civil and Political Rights and Article 1 of the Economic and Social Council articulated in a very broad sense the principle of self-determination which runs:-

1. All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

3. The States, parties to the present covenant including those having the
Responsibility for the administration of non-self-governing and trust territories
Shall promote the realisation of the right of self-determination and shall respect
That right in conformity with the provisions of the Charter of the United
Nations.

The principle of self-determination is mentioned only twice in the Charter of the
United Nations both times in the context of developing ‘friendly relations among
Nations’ and in conjunction with the principle of equal rights of peoples. The right
is

Not mentioned in the Universal Declaration of Human Rights of 1948 even though
There is a preamble reference to developing relations among nations. It also did
Not have any mention in the International Bill of Rights.

The Universal Declaration of Human Rights adopted on 10th December, 1948 begin
With some important recitals:

‘Whereas recognition of the inherent dignity and of the equal and inalienable
Rights of all members of the human family is the foundation of freedom, justice and
Peace in the world.....

Whereas it is essential, if man is not to be compelled to have recourse as a last resort
To rebellion against tyranny and oppression, those human rights should be protected
By the rule of law.

Whereas Member States have pledged themselves to achieve in co-operation with
The United Nations the promotion of Universal respect for and observance of human

Rights and fundamental freedoms.....”

The Declaration lists in 30 Articles is an exhaustive catalogue of the ‘human rights And fundamental freedoms’ for which the United Nations member states are to Promote respect and whose ‘Universal recognition and observance they are to Secure. The Universal Declaration of Human Rights has now become part of Binding international law, whatever may have been the intention of the member? States of the United Nations when its’ General Assembly adopted it.

As a general principle, self-determination had been on the international political Agenda since at least the later part of the nineteenth century. It had lain at the Foundation of the earliest independence struggles by colonies – first of the British And later of the Spanish Empire. The earliest of these at the end of the 18th Century Was the United States of America – which is doubtless why the principle of self-Determination was one of the salient features of U.S. President Wilson’s 14 point Programme which underlay the peace treatise concluding the First World War.

From that time onwards, this principle continued to underlie the world-wide Movement for decolonisation to which the United Nations made such a signal Contribution. It has formed the foundation for the independence of the entire member

Of the Commonwealth and is therefore a central concept for all these nations.

However, a political principle is one thing, a legal right is another. Nonetheless, on The insistence of the United Nations General Assembly as long ago as 1952 an

Express right to self-determination of peoples together with an associated right of Their natural wealth and their natural resources was eventually included in both the Covenants and so now forms part of the international legal order.

PEOPLE/SELF:

The Human Rights Committee has identified five different uses of the term

‘People in the period to which the political principle of self-determination applied:

- a) A people living entirely within a state ruled by another people e.g. Poles in Russia before 1919;
- b) A people living as a minority group in a state but understanding themselves as forming part of the people of a neighbouring state;
- c) A people dispersed throughout many separate states (Germany in Racial European and Asian States);
- d) A people who constitute a majority in a territory under foreign domination (Colonial Regime).

Definition of ‘people’ was that of non-European inhabitants of former colonies, without further regard for ethnicity, religion or other objective characteristics of such colonized Peoples (apart from the fact of colonization itself). Territory, not ‘Nationhood’ was the determining factor. Despite the lack of cultural, political or other homogeneity, however,

In most colonies a subjective feeling of belonging to a people even if defined only by shared anti-colonialism did exist. From whichever angle the question of defining the self within the new United Nations law of self-determination is approached – the Wilsonian

Dilemma has persisted. Except for the most obvious cases of 'Decolonization', objective Criteria have not been developed or applied for preferring one claim over another or for Delimiting which population belongs to which territory.

The definition of the legitimate 'self' for the purposes of self-determination is perhaps a Difficult problem. The Charter of the United Nations establishes that peoples are the Selves to whom self-determination applies. Ivory Jennings says "It seems reasonable: let The people decide". It is strange at least to me that because the people cannot decide until

Somebody/someone decides on their behalf as to who are the people who can determine And fulfil the requirements of Statehood. Arguably, the territory may be resided by Many kinds of people of different backgrounds or denominations viz. cultural, racial and Religious groups but might not necessarily be of the same nationality or of the same stock

Of Indigenous. With this reason, the rights differ in this sense, as for example, the case of

Refugees in the world. Professor Rosalyn Higgins refers to the right of the majority Within a generally accepted political unit to the exercise of power. In other words, it is Necessary to start with stable boundaries and to permit political change within them'.

This limitation is a significant one as it rules out self-determination in law, by groups Whose basis of association lacks this territorial element?

However, to identify the people of particular race, Committee of Experts on race problems concerned in December, 1949 in Paris under the auspices of UNESCO agree that the term race designates:-

A group or population characterised by some concentrations, relative as to frequency and distribution of hereditary particles (Genes) or physical characters which appear, fluctuate and often disappear in the course of time by reason of geographic and or cultural isolation.

It further suggests about the group differences:-

- A) In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiology).
- B) Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.
- C) Some biological differences between human beings within a single race may be as great as or greater than the same biological differences between races.
- D) Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.
- E) There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture whether for good or ill, can generally be traced to social factors.

Imagine, for example, a group of immigrants engaged in commerce or in any employment of the host country, it seems unlikely that this group may qualify for the same rights as the general populace of the territory. Although such group has already settled down on the territory but may not necessarily qualify for the claim of the right to self-determination because of its status. The other class of people could be invaders who invaded the territory and settled down there does not seem likely that they may qualify for the same. Apparently, this conflicts with the rights of the indigenous people who

legitimately qualify for the same rights on the basis of their territorial ties that is the natural right.

The Indian Citizens in East Africa and Turkish workers in Germany may have much to complain about but despite their differentiation from this surrounding culture they cannot claim that this gives them a right to secede or self-determination. His is not to say that maltreatment is justified because these groups lack a territorial base.

An article written by Somendu Kumar Banerjee titled ‘The Concept of Permanent Socereignty over Natural Resources – An Analysis – reported in Indian Journal of International Law Vol.8(1968) at Page.516, which referred the quotation of Professor B.A.Wortley. . . .who in supporting the contention of the Western capital exporting States pointed out that:-

“Much confusion has arisen from the nineteenth century exaggerations of the powers of the territorial sovereign over persons and things in its territory. . . . It has been rightly said that everything actually in the territory of the State considered in itself and independently of the persons to whom it belongs must be deemed subject to the right of the imperium of the territorial sovereign’. Yet imperium, sovereignty and eminent domain is not ownership: Territorial sovereignty exists in the framework of international law; it is not superior to it. Because a sovereign state may control and expropriate property in its territory, this does not mean that it can, all will, disregard the claims made by virtue of public international law to restitution or to just compensation or that it may always on its own conception of private property”.

Self-determination begins with an attempt to break the concept into its component parts: what constitutes the relevant 'self' and in what manner should its face be determined?

The self includes the subjective and objective components in that it is necessary for members of the group concerned to think of themselves as a distinctive group as well as the group to have certain objectively determinable common characteristics for example ethnicity, language, history or religion and primitiveness of course, everyone belongs to different groups at the same time. The difficulty arises in determining the fact that which are the relevant groups for the purposes of principle of self-determination.

It was not only the mixture or intermingling of racial, linguistic or religious groups which presented obstacles to the solutions acceptable to all the elements involved (at the end of the first world war). Even more dangerous to peace than the conflicting 'national rights of the nationalities were their historical rights'. Each nationality claimed the frontiers as they existed at the time of its greatest historical expansion, frontiers which disregarded the ethnic and historical development of intervening centuries. The awakening of the people released collective passions which became in the century after 1848 the most potent factor in arousing hatreds and fomenting wars.

Who then is 'self' to whom the right to self-determination applies? A race, a territorial area, what are the boundaries of the area? Who are its inhabitants? Who are the members of the 'race' or the community? Which population belongs to which area or territory? An exercise which is particularly delicate where significant population movements, of recent or more ancient origin has occurred. Such movements tend to complicate the ethnographic map and to raise thorny questions regarding the identification and rights of

‘indigenous’ and ‘settler’ populations. ‘Self’ which is to exercise determination lies at the heart of what is probably the most basic dilemma in the matter of self-determination: recognition of the rights of one self entails a denial of the rights of a competing self. Is it to be only the indigenous populations and if so, which individuals and groups qualify for the appellation ‘indigenous’? In order to define the ‘self’ and to determine what it is that it may determine it is necessary to have recourse to the historic, economic and strategic considerations. Only thus is the abstract self-determination formula concretized.

Upon whom the right to self-determination conferred given recognition in identical terms in the Declaration on Colonialism (General Assembly Resolution 1514[XV] Granting of Independence to colonial countries and peoples. However, the whole context in which the universal goal is declared: demonstrates an intention to confine the right to the following peoples:

‘Those who are still ‘dependent’ because they inhabit trust territories, non-self-governing territories, of ‘all other territories which have not yet attained independence’ and those subjected to alien subjugation, domination and exploitation.’

However, the conquest followed by subjugation and control for many years gave title to land but since the Covenant of the League of Nations and Kellogg-Brind Pact, this is no longer considered valid. (International Law by Charles S.Rhyne, P.103).

When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be

by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties. This was made clear by Lord Atkinson when acting the Pondoland case of *Cook v Spring* (3), he said *Secretary of State for India v Kamachee Bai Rajboi* (4) at P.268:

“It was held that the annexation of territory made an act of state and that any obligation assumed under the treaty with the ceding state either to the sovereign or to the individual is not one which the municipal courts are authorised to enforce”. – P98, *HOANI V AOTEA LAND BOARD* [May, 10 1941] All E.R. (Annotated Vol.2).

A resolution was adopted by the Conference of Jurists of Afro-Asian Countries held in Conakry in October, 1964 claimed that:

‘All struggles undertaken by the peoples for their national independence or for the restitution of the territories or occupied parts thereof, including armed struggles are entirely legal’.

The non-aligned countries conference of 1964 held in Cairo declared that

‘The process of liberation is irresistible and irreversible. Colonized peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial powers persist in opposing their natural aspirations’.

The General Assembly passed the Resolution 2105[XX] which recognises the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all states to provide material and moral assistance to the national liberation movements in colonial territories. The Afro-Asian states in 1966 led by Algeria tried to gain acceptance of an interpretation of Article 2(4) of the United Nations Charter at the meetings of the Special Committee on Principles of International Law: Their interpretation was that:-

‘The prohibition of the use of force shall not affect. . . .the use of force pursuant to the right of peoples to self-determination because, according to their view, the right to self-defence applied only to states and any self-defence against colonial domination, in the exercise of their right to self-determination’.

In 1967, several third world states sponsored a resolution in the Special Committee on Principles of International Law which declared that:

‘Alien subjugation, domination and exploitation as well as any other forms of colonialism’ was a violation of international law. The draft went on to state that –
Consequently peoples who are deprived of their legitimate right of self-determination and complete freedom are entitled to exercise their inherent right of self-defence by virtue of which they may receive assistance from other states’.

DOCTRINE OF TERRA-NULLIUS

The doctrine terra-nullius, dictionary meaning of which is, the title to the territory. The people who have natural right or vested right to the territory qualify as the people belonging to the territory for the purposes of the exercising the right to self-

determination, which have fallen under the foreign or alien subjugation. Apparently, the indigenous population of the country seems to be likely to qualify for the right in terms of the title to the territory and constitutes the 'people' and terra-nullius to the territory.

The Nootka-Sound controversy in regard to the terra-nullius is most relevant here. With the opening of the Nootka Sound controversy between Spain and England in 1790, however, the element of occupation as a basis for the enjoyment of commercial privileges introduced confusion into diplomatic correspondence. In the contest over the north-western territory in which the United States, England and Russia were involved during the first quarter of the nineteenth century discovery with SYMBOLIC TAKING OF POSSESSION was considered insufficient to vest legal title in any of the claimants.

Confusion is sometimes caused by the varying meanings of the term 'Discovery'. If there is no indication to the contrary, the word discovery always includes a landing and such landing is accompanied by symbolic taking of possession. The actor is authorised by a government to make the discovery on behalf of the government'.

Several Russian vessels were upon the point of making commercial establishments upon the north-west coast near Nootka-Sound in the seventeen-eighties. Spain, however, immediately pointed out to Russia that a Spanish admiral had visited Nootka-Sound in 1774 that the harbour had been frequently visited both before and after that year "with the usual forms of taking possession and that the forms of taking possession had been repeated more particularly in 1755 and 1779 all along the coast as far as Prince Williams Sound. Because of these acts of possession by Spaniards, Russia ordered its subjects not

to make settlements in places which belonged to Spain? Lieutenant Mears, an Englishman

reached Nootka Sound in May, 1788 and after purchasing a spot of land from the local Indian Chief, he built a house and hoisted a British Flag on it. He soon departed. When other English ships appeared at Nootka Sound the following year the Spaniards seized them for encroaching upon Spanish territorial rights. English notes of protest to Spain against the seizures made no claim to English sovereignty over the disputed region, but merely sought to secure the consent of Spain to the right of British subjects to the enjoyment of a free and uninterrupted navigation commerce and fishery and to the possession of such establishments as they should form, WITH THE CONSENT OF THE NATIVES OF THE COUNTRY, not previously occupied by any of the European nations.

In the opinion of the Permanent Court of International Justice in the Eastern Greenland case decided April 5, 1933, when act in an early period of history as from the tenth to the sixteenth centuries is thinly populated or unsettled territory are considered a less rigid test would be necessary to establish legal title to terra-nullius than would be necessary were such acts attempted in a more recent period and in a heavily settled area. Similarly, although discovery with symbolic taking of possession has not been sufficient to establish legal title to terra-nullius since the beginning of the nineteenth century, it is clear from an examination of the diplomatic correspondence of the states here considered that such discovery with symbolic taking of possession constituted legal title to terra-nullius in North-America prior to 1700.

The other test to the territorial claim seems to be likely relevant i.e. nationality principle.

The nationality principle also and always seems to be subject to natural or genuine link to the territory. This confers and supports its legality of title to the indigenous population only, inhabiting the territory pre-invasion or colonization.

A state is free to establish nationality law and confer nationality as it sees fit. Laws that confer nationality on the grounds of birth in a State's territory (IUS SOLI) or birth to parents who are nationals (IUS SANGUINIS) are universally accepted as based on genuine links. What about the descent of the people who are settled on the territory and most probably from generations. Does it not defeat the claim of birth right on the territory?. It appears logical that if the descent of the population comes into examination or the decisive factor of nationality it is likely that the population may be termed as foreign and no claim to the territory whatsoever will succeed. Voluntary naturalization is generally recognised by other states but may be questioned where there are no other ties to the state e.g. a period of residence in the state.

On July 29, 1970, the United Nations Security Council decided by Resolution 284(1970) to request an advisory opinion of the Court in South-West-Africa case on the following question:-

What are the legal consequences for states of the continued presence of South-Africa in Namibia?. Notwithstanding Security Council Resolution 276(1970)?. The Court stressed that a binding determination made by a competent organ of the United Nations to the effect that a situation was illegal could not remain without consequence. South Africa being responsible for having created and maintained that situation had the obligation to put an end to it and withdraw its administration from the territory. By occupying the territory without title South Africa incurred international responsibility arising from a continuing violation of the rights of the people of Namibia or of its

obligations under international law towards other states in respect of the exercise of its powers in relation to the territory.

The Court stressed that all states should bear in mind that the entity injured by the illegal presence of South Africa in Namibia was a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted. Proposals by South Africa concerning the supply of further factual information and the holding of a Plebiscite. That government had expressed the desire to supply the Court with further factual information concerning the purposes and objectives of its policy of separate development in Namibia, contending that to establish a breach of its substantive international obligations under the mandate it would be necessary to prove that South Africa had failed to exercise its powers with a view to promoting the well-being and progress of determining whether policy of apartheid applied in Namibia was in conformity with the international obligations assumed by the South Africa. It was undisputed that the official governmental policy pursued by South Africa in Namibia was to achieve a complete physical separation of races and ethnic groups. This meant the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constituted a denial of fundamental human rights.

For these reasons the court was of opinion:

1] that the continued [presence of South Africa in Namibia being illegal South Africa was under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory.

2]that states members of the United Nations were under obligation to recognize the illegality of South Africa's presence in Namibia and the validity of its acts on behalf of or concerning Namibia and to refrain from any acts and in particular any dealings with the government of South Africa implying recognition of the illegality of or lending support or assistance to such presence and administration.

3] that it was incumbent upon states which were not members of the UN to give assistance within the scope of sub-paragraph(2) above in the action which had taken by the United Nations with regard to Namibia.

In Belize case prior to its independence the General Assembly continuously rejected Guatemala's argument. The resolutions on Belize consistently re-affirmed the inalienable right of the people of Belize to self-determination, independence and the preservation of the inviolability and territorial integrity of Belize.

The whole context of Article 73(e) proved beyond the slightest shadow of a doubt, that the Charter referred to the indigenous population to the indigenous inhabitants to those who had their roots in the territory. The Charter could not conceivably have provided for the possibility that an administering power might try to distort to obvious intent of its authors to mislead world public opinion by arguing that a few settlers, established in a territory from which the original inhabitants had been first expelled, could one day take over the territory and proclaim that, since it was in their interest to continue being the servants of a colonial power decolonization consisted in perpetuating a military colony – The territory of Belize was not terra-nullius when the first British subjects arrived. On

the contrary, in that territory there was an indigenous population which was forced to flee in order not to be wiped out or subjected to slavery. A considerable number of them decided to live on the periphery, but their presence as the legitimate inhabitants of the area cannot be erased merely by usurpation. In Western Sahara case, the Court concluded its decision:

‘The material and information presented to the court do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the court has not found legal ties of such a nature as might effect the application of resolution 1514[XV] in the decolonization of Western Sahara and in particular of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory’.

FALKLAND CASE:

Judge Dillard has rightly emphasized in Falklands case that from the perspective of Argentine the U.K. was making reference to self-determination in order to perpetuate a colonial situation by an artificial imported population.

There had never been indigenous Argentines living on the Falklands when a significant measure of local self-determination was already been exercised or when the claimant country had an undemocratic government and a strikingly bad human rights record.

Policy questions raised in Falkland’s case to self-determination were:

1. May self-determination ever be used to legitimize what may have been essentially illegal occupation of territory?.
2. That is, if it were determined that the British occupation of the Falklands Islands in 1833 was an illegal usurpation of Argentine territory, could the principle of

- self-determination is used 150 years later to legitimize that occupation?
3. At what point should historic claims of sovereignty be overridden by the right of the current inhabitants in a territory to self-determination?
 4. Should there is a specific time period after which claims of pre-existing sovereignty should be extinguished in favour of the right to self-determination. If so, will this encourage nations to settle occupied territories in the hope that the settlers will eventually declare their desire to retain links with the mother country?.

The Flatlanders are not entitled to self-determination because they are a small settler population that illegally replaced the legitimate Argentine inhabitants who were expelled by force in 1833. Argentine argues that in order to be entitled to self-determination, there must be a legitimate relationship of the population to the territory. There, apparently were no indigenous people on the islands, thus making it inevitable that any eventual inhabitants would be settlers. The Argentine who inhabited the islands between 1820 and 1833 were themselves settlers. Thus, if applying the principle of self-determination to the ~Falklands would not result in a partial or total disruption of the national unity and territorial integrity. Denying the right of self-determination to colonized settler population might by analogy undermine the sovereignty rights of long-established, independent settler populations. For example, in response to the Guatemalan claim that the population of Belize is non-indigenous and therefore barred from the right of self-determination, the Jamaican Representative in the fourth Committee recalled the statement of Guatemala that the population of Belize was made up of 40% Guatemalan Mayan Indians and

that the rest of the inhabitants had come from other Caribbean Countries in order to work in Belize.

In August 1984, the International Seminar on the Legal Status of the Apartheid Regime and other legal aspects of the struggle against apartheid, a meeting of more than 90 prominent international Jurists at Lagos organised by the United Nations Special Committee against Apartheid. The Jurists pointed out that:-

“The granting of independence to the union of South Africa preceded the modern principles of international law enshrined in the right of colonization and to the self-determination of peoples subject to alien domination and in the prohibition of racial discrimination. A regime which negates the legal personality of the great majority of its people on the ground that they are of indigeno0us origin which deprives them of elementary rights and leaves them without citizenship and subjects them to massive, persistent a cruel racial discrimination cannot claim to be an independent community based on self-determination.

The 1984 seminar defined the ‘elements of a definition of a people entitled to self-determination as formulated by the practice of the United Nations as:-

- A] The term ‘people’ denotes a social entity possessing a clear identity and its own characteristics;
- B] It implies a relationship withy a territory, even if the people in question has been wrongly expelled from it and artificially replaced by another population;
- C] A people should not be confused with ethnic, religious or linguistic minorities whose existence and rights are recognised in Article 27 of the International

Covenant on Civil and Political Rights.

CONCLUSION:

The precise meaning of the principle of self-determination, if consistently applied is bound to clash with what was then and still is the cardinal principle of international law, the sovereignty of states. If sovereignty is understood to imply a state's right to preserve its territorial integrity, then clearly everything that is likely to affect it adversely can hardly be accommodated with the framework of the same legal system. According to the dominant view, it implies the right of every people to political independence. Under Article 1(2) of the Charter it is one of the purposes of the United Nations to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States 1970 the General Assembly went even further by imposing on every state the duty to promote the realization of self-determination and the corresponding duty to refrain from any forcible action which deprives a people of this right.

Self-determination so conceived and so practised is accompanied by certain racial overtones which for obvious reasons are not explicitly articulated in the high sounding United Nations declarations on the matter. Professor Higgins said that The present political climate the right of self-determination is likely to continue to be presented in a racial context. Exercise or otherwise of the right of self-determination by any given people depends not on the existence of this right in abstracts but rather on the ability of such people to implement its right to self-determination. The people of Biafra

were unable to realize their right to self-determination: consequently, it was not given effective recognition by the international community. The people of Bangladesh were capable of realizing it albeit with the active aid of India and in violation of the principle of non-intervention in the internal affairs of another state, and international recognition of this right duly followed.

The growing support of the newly independent states for the right of peoples to self-determination was evident at the 1955 Bandung Conference of Afro-Asian Countries which affirmed that?

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. Consequent to the conflict in Algeria about their right to self-determination, the General Assembly did pass Resolution 1188[XII] which although it did not relate specifically to Algeria, did relate to self-determination. In it, member states agreed to give due respect to the right of self-determination and promote the realization and facilities the exercise of this right in non-self-governing territories”.

By 1958 the Afro-Asian States were demanding the right of the Algerian people to independence, not just self-determination. ‘The voting records show that not only was the cause of Algeria gaining supports but that so was the idea that there might be a legal right to self-determination in these circumstances even inspite of objections based on domestic jurisdictions. The 15th Session of the General Assembly was a milestone in the development of the right to self-determination. The Assembly recognized the right of

the Algerian people to self-determination in Resolution 1573(XV). Sixteenth session the resolution 1724(XVI) was passed by the General Assembly where Professor Rosalyn Higgins commented:-

‘The basis of the Assembly Resolution, which is addressed to two specific parties, lies squarely on an international legal right to self-determination and by implication, the inapplicability of article 2(7) to any situation concerning this right’.

Resolution 2160(XXI) affirmed that:

Any forcible action, direct or indirect which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations. Accordingly, the use of force to deprive peoples of their natural identity as prohibited by the Declaration on the Inadmissibility of Intervention in the domestic affairs of States and the Protection of their Independence and Sovereignty contained in G.A.Resolution 2131(XX) constitutes a violation of their inalienable rights and the principle of non-intervention. By resolution 2621(XXV) of the 1970 the General Assembly proclaimed that the continuation of colonialism in all its forms and manifestations was a ‘crime’.

In 1972 V.S.Mani(Indian) wrote:

‘Twenty-three years of rule by Pakistan had resulted in the worst type of suffering and tribulations to the Bengali population in the Eastern wing. The administration, except for a couple of fleeting glimpses of democracy and representative government, was consistently authorisation and under the control of by (sic) the west Pakistanis. The East

Pakistanis were discriminated against in all walks of life. In short, it was a pathetic story of political, economic, social and cultural domination and exploitation of the East by the west pertaining of the worst features of colonialism’.

The position of self-determination in international law the following points are of utmost relevance:

1. Self-determination is not a matter essentially within the domestic jurisdiction of a state.
2. It is now generally accepted criteria that there is a right to self-determination in international law.
3. This legal right is not enjoyed by any group desiring independence. In general, it applies to separate political units. In particular trust and mandated territories and non-self-governing territories under Chapter XI of the Charter have a right to self-determination. In addition, geographically distinct territories which are subordinate to the metropolitan state and are non-self-governing with respect to the remainder of the state may have a right to self-determination for a territory in this third category is usually highly controversial.
4. Self-determination may be achieved by the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by the people of the territory.
5. The territory inhabited by peoples enjoying a right of self-determination has a status in international law separate from that of the metropolitan state.

NOTES

By the start of the second century BC “No Greek could help being distressed by the Almost universal contempt shown at least in public utterances towards his nation. In Stark contrast to the identification of the Roman name with good-faith among the Greeks, the term ‘GRAECA FIDES’ among the Romans came to mean ‘UNCREDITWORTHINESS’

Romans developed a set of stereotypes about the Greeks which centred on what they Considered to be the six main failings of the Greek character:-

- (1) VALUBITAS: a tendency to prefer normal facility in speech to substance.
- (2) INEPTIA: a proclivity for inappropriate or excessive behaviour, a readiness to Elaborate on subjects of which they knew nothing.
- (3) ARROGANTIA AND IMPRUDENTIA: related according to ‘irresponsibility’ deceitfulness and an Aptitude of flattery.
- (4) DECEITFULNESS: single out as a particularly unpleasant trait.
- (5) A weakness for excessive luxury and ostentation. But it was the sixth quality that the Romans most despised: LEVITAS.
- (6) LEVITAS: Embracing “aspects of instability, rashness and irresponsibility” it Connotes absence of good-faith, honour and trustworthiness and was a prominent Element in the popular conception of Greek character Levitas here is that lack of Credibility which is the consequence of subordinating standards of honour and Duty to personal and unworthy motives and it is attributed by Cicero to the Greeks

As a people’.

The Romans made a point of contrasting the traditional Roman qualities of GRAVITAS AND DIGNITAS with the GREEK LEVITAS.

Finally, it was from the relationship between Roman master and Greek slave that the Diminutive GRAECULUS came especially from the household context in which the Greek slave performed the role of tutor. The term GRAECULUS seems to have Suggest GREEK MANLINESS and also GENERAL WORTHLESSNESS.

Petrochitos concludes: “Graeculus is thus a word of unique type a diminutive formed From an ethnic name; it reflects the special quality of the relationship of Rome and Greek; by nature of being a diminutive it can express a variety of attributes from the Mild patronising to the openly contemptuous’.

Like the American term ‘SAMBO’ and the Jamaican ‘QUASHES’ Graeculus come Sometimes is a term of endearment without losing its undertone of contempt.

The Romans were not a particularly chauvinistic people. In fact, with the possible Exception of the ancient Persians, they were among the least chauvinistic peoples of all Times. A good deal of the carping at the Greek way of life sprang from Roman Defensiveness about their own culture which in many areas had benefited from Greek Influence, thus the law of honour attributed to the Greeks in their midst have come From the m aster-slave relationship and the tendency to view all eastern slaves (man of Whom ended-up in the household) as Greeks.

Greeks as a group to be regarded as persons without honour because the great majority Of slaves in face-to-face contact with Roman masters were either ethnic Greeks or

Hellenized peoples.

The typical slave in the Roman view was a 'VOCAL INSTRUMENT' a non-person to

Be used sexually, disciplined with the whip and questioned in Court only under torture

Since his word was utterly without honour. Nothing more enhanced his sense of

Honour and his reputation in the eyes of his peers. And, as in all slave societies, even

The poor who may have owned no slaves felt a sense of honour in the presence of

Slaves. In this sense, the system was self-regulating it fed on itself as Keith Hopkins

Indicates:

“The presence of substantial numbers of slaves in Roman society defined free

Citizens, even if they were poor, as superior. At the same time, free citizens' sense of

Superiority probably limited their willingness to compete with slaves to work full time

As the overt dependants of other citizens. Yet rich men, by definition, needed

Dependants. Slavery permitted the ostentatious display of wealth in the palaces of the

Rich without involving the degradation of the free poor”.

The Roman master demanded more than mere obedience from his slave. Seneca no

Doubt spoke for his class when he drew the distinction between ministerium, which is

the performance by the slave of what he is obliged to do and beneficium which is what

was performed 'not by command but voluntarily'.

Having dependent followers had long been an important component of power a

prestige. The increasing economic importance of slaves was added to their social

value – whether the clove industry prospered or stagnated the slaves labour helped provide subsistence while their presence conveyed prestige’.

In East Africa as in the United States South their degradation meant that all the free persons regarded them as fit subjects for abuse. That slaves once outside the Protective power of their masters found themselves victims of mob violence.

Human Rights Work of B.P.S.GAUTAM
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