REVOLUTION IN DOMESTIC AND INTERNATIONAL LEGAL ORDERS : SOME REFLEXIONS ON THE STABILITY OF LEGAL ORDERS

Ruşen ERGEÇ (*)

In this brief study we would like to deal with one of the fundamental aspects of legal theory' Much has been written about the nature and legal implications of revolution in domestic law. Our intention is surely not to sum up those theories, or even less to make a critical appraisal. None the less, short developments of the topic are needed in order to pave the way for a comparaison with the revolutionary process in international legal order. Contrary to revolution in domestic law, to our knowledge, there is hardly a study dedicated to the concept of revolution in international law. The reason of this paucity lies perhaps in the very nature of the international legal order, the structures of which do not seem, at first sight, to square with the concept of revolution. However, revolution is inherent to any legal order and there is no reason to ignore it with respect to the law of nations.

By comparing the revolutionary process in domestic and in international law, one cannot but ascertain some obviousnesses stemming from differences of structure between the two legal orders. But, the comparison may reveal some other interesting points as to the respective stability and effectiveness of the municipal law and the law of nations. That is the purpose of our study.

It is not easy to give an accurate definition of revolution. It has various meanings which may diverge or overlap according as it is apprehended in the sociological, political, philosophical or the legal sense. In the latter sense we may venture to define revolution as an unlawful act which consists in imposing, either by threat or the use of force, radical changes in the legal order.

That the revolution is an unlawful act may give rise to doubts. When we talk of unlawfulness we naturally refer to the very legal order that the revolution purports to alter or to destroy. Revolutionists are, of course,

(*) Assistant at the Faculty of Law of the Free University of Brussels

loath to concede that have committed an unlawful act. However, they have no alternative, but to refer to extra-legal values which they intend to transform into new law. Pending that their existence rests solely upon the effectiveness and the legitimacy of their power. These two factors depend on their turn mainly on the social consensus, i.e. the propensity of the subjects to yield by forcer or voluntarily to the new order. Once these two prequisites are realized, revolutionary power is able to legalise itself by posing, formally, the legal foundations of its existence.

Now let us consider this first feature of revolution in the municipal order and international order respectively. At national level, the revolutionary power reaches its stability as soon as it eliminates all serious resistance. This may be very quick if there is a nationwide uprising against an abhorred political regime. If the revolution is carried out by a minority, it may take longer time to overcome the oppositional forces, especially when those are enjoying the active support of the majority of the population. Anyhow, sooner or later one of the contending parties will topple the other. In national order the lawfulness of a revolutionary process is an issue which hardly endures. The same may not be said of the revolution in the international sphere. The international society lacks the homogeneity of the state community. It is formed by a juxtaposition of sovereign entities split among various political, religious and economic régimes. The extreme homogeneity of the world community is not germane to brutal changes. Therefore, an act whatever violent, shall remain unlawful, for lack of consensus. If other states do not respond in order to suppress this illegality, there arises a situation which, by lapsing of time, may gain in effectiveness. However contrary to domestic order where the effectiveness of the political power begets its own legality, in international law effectiveness does not necessarily entail legality.

Suffice it to mention here, the doctrine Stimson according to which situations which are the result of the use of force ought not to be recognized by the international community. Lawfulness of Southern Rhodesia under the rule of Ian Smith or the presence of South Africa in Namibia, however effective they might have been, have constantly been challenged by UN bodies and other international organizations. In sum, facts may change, but the law remains, or at least its adequation to facts may be much slower than in domestic law.

The second feature of the revolution is the use of force. It is, of course, conceivable that radical changes in the legal order may be achieved by peaceful and legal means. But as the revolution aims at destroying the very values on which a legal order rests, this may hardly

be performed through the means offered by this legal order. Thus, national constitutions contain intangible provisions, i.e. provisions which may not be submitted to revision. These relate to the form of the state, to its basic philosophy, or to other principles which are deemed to be crucial enough to be rendered immune from the constituent power. Even other fundamental rules, though subject to revision, may involve so delicate and divisive issues that it hardly will be possible to muster up the broad consensus necessary for amendment. In the international legal order circumstances do not diverge very much. The broad diversity of the international community and its highly decentralized structure are particularly auspicious to the use of force. The war, most patent form of the use of force, has been, unfortunately, a frequent phenomenon through the centuries despite numerous legal instruments which purport to outlaw it. But here too the structure of the international community makes it difficult to have recourse to force to such a degree to impose its will on the majority of its members. International society rests on a balance of power which is the product of the desire for survival of its members. No state should accumulate enough power to absorb the others or dictate its will to them. The components of this balance may vary according to fluctutating interests of states; yet, there shall be always a minimum equilibrium to preclude the triumph of violence on a global scale.

The last element of revolution is the introduction of radical changes in the legal order. Revolution provokes abrupt and fundamental changes. It has been contended to this respect that revolution does not affect legal norms of lower level (1). This view cannot be shared without reservation. Revolution has an essentially ideological content. This characteristic distinguishes it from "coups" or "palace revolutions" which only bring changes in the holders of the power without altering the basic philosophy of the political régime. Given this ideological factor, legal norms exposed to revolutionary transmutations are naturally those with an ideological content too. These norms are hardly limited to the upper stages of the hierarchy. Law is a highly ideological instrument. Inferior rules are mostly the implementation to concrete cases of superior norms themselves or of the system of values they embodie. Examples abound: regulation of marriage, of property, of contracts (rules favouring the freedom of contract or restricting it in the general interest by protecting weak categories), etc. Revolution may, therefore, have wide-range repercussions on all norms whatever their source or rank may be.

As it lacks the "sophistication" of domestic legal orders, the international legal order does not contain properly speaking a hierarchy of norms. One may, however, suggest in the decreasing order, treaty,

custom and international judicial decisions. In this perspective the existence of a highly controversial category of norms, known as **jus cogens,** should not be forgotten. Even though its precise content is hardly discernible, the most cited examples concern rules prohibiting the violations of some fundamental human rights, such as right to life (genocide), human dignity and corporal integrity (torture racial discrimination), or the prohibition of the use of force. Moreover, some hierarchisation is perceptible through the article 103 of the UN Charter which proclaims the primacy of the Charter on agreements concluded by the member states of the organization.

It is highly inconceivable, in domestic order as well as at international level, that these basic rules should be challenged. They are so solidly anchored in the universial legal conscience that they transcend any ideological consideration. But in their universal acceptance lies their reduced number. The rest of international rules are deeply vulnerable to ideological trends. Suffice it to mention here rules governing economic and trade relations between developing and developed states, the nascent concept of common heritage of mankind relating to exploration or exploitation of areas outside state jurisdiction (deep-sea, space, more and more controversial status of Antarctica), and the developing international human rights law. The stance of states towards such tricky questions is not necessarily the reflect of the ideology inherent to their political régime. Except perhaps for the field of human rights, not infrequently states act according to the dictates of their egoistic interests favouring thereby the formation of rather odd coalitions as within the recent conference of the UN on the law of the sea. Yet the motives underlying those groupings do not matter much for our subjet. The salient fact is that most issues of international law are giving rise to deep oppositions among states which hinder the rapid formation of that broad consensus required for any rule of universal value. To have this virtue, a rule necessitates not only the consent of the vast majority of states, but also the accord of those which enjoy some degree of representation. This system falls far short of the absolute majorities of national parliaments or of the dictorial governments which can impose profound changes in the legal order. The reference to the "automatic majorities" in various international institutions to reject this line of reasoning is irrelevant. The principle has always been, and remains that a state is not bound, save with its express consent. So, unless they are purely declaratory of pre-existing rules, resolutions of these institutions may at most have exhortatory character.

Thus international legal order is, compared to domestic law, much more conservative, much less prone to radical changes. Codification ef-

forts take in average decades to be materialized in the form of a treaty which in turn may await decades to enter into force. In this context, revolutionary process can only materialize on a purely local level in the form of a war fought in order to establish a more suitable legal régime to the interests of the aggressor. It is noteworthy in this respect that in the contemporary world, the use of force at the interstate level has acquired much more subtle configurations with the growing risks of a direct aggression in a nuclear age. As the example of Afghanistan illustrates it, an aggression may be carried out by fomenting previously a revolution in the victim state. Thus at the last resort, the stability of the international legal order may be a function of the stability of the domestic legal orders. This is not so much an old idea for it has already found an echo in article 55 of the Charter of the U.N. But even those destabilisation efforts are highly dangerous for the aggressor in a world mainly divided in spheres of influences which may in case of extreme necessity be enforced by nuclear retaliation.

This limited perspective for fundamental changes contrasts sharply with radical changes in domestic legal orders that history has witnessed. One could only mention the French Revolution, or the deep mutations introduced by Ataturk in a Turkish society profoundly marked by centuries of retrograde Ottoman government.

From the preceding lines emerges a rather paradoxical conclusion : international legal order, is by nature much more stable than domestic legal order. The conclusion seems paradoxical for international law has often been depicted a sa pseudo-law in that it suffers from a lack of centralized enforcement mechanism. But its stability is precisely favoured by this lack of concentration of power which is repugnant to violent changes on a global scale.