Denial of Justice in International Law

Jan Paulsson

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Table of Contents

office now required of judges was to the effect that they would defer to the legislature.

The arbitrators concluded that 'if this proceeding were directed against the South African Republic, we should have no difficulty awarding damages on behalf of the claimant'. They noted that there were a number of technical issues as to whether Brown ever held title to specific rights, and that it was correct that 'his legal remedies were not completely exhausted', but:

> Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions ... In the actual circumstances ... we feel that the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State: 'A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust'.[36]

Freeman concluded that the *Robert E. Brown* award 'assimilated to a denial of justice all the unlawful acts committed to the foreigner's prejudice'. He went on to write:

> It was the 'improper deprivation of rights of a substantial character' which, for the arbitrators, constituted the denial of justice. Exactly how or by what State organs that end was accomplished was apparently immaterial.
>
> An identical position was taken in the *El Triunfo Co* case.[37]

Freeman's failure to see the distinctions between the two cases is a matter of considerable importance. In *Robert E. Brown*, there was massive interference in a pending case, with the executive removal of the chief

[36] *Ibid.* at p. 129; the US Secretary of State in question was Hamilton Fish; his often-cited dictum appears *in* Moore, *Digest*, vol. VI, at p. 677.

[37] Freeman at pp. 100–101.

judge who had been instrumental in acknowledging Brown's rights and with the legislative reversal of a substantive rule which had already become *res judicata* in Brown's specific case. The implication of the two other branches of government in the administration of justice was direct; the difference with *El Triunfo* was manifest and fundamental.[38]

In sum, Fitzmaurice and Freeman's conclusions to the effect that denial of justice involves 'some misconduct either on the part of the judiciary or of organs acting in connection with the administration of justice to aliens'[39] appear irresistible. Indeed, Freeman quotes a Mexican scholar and diplomat, writing at a time when that country's experiences were not such as to make it enthusiastic about any expansion of the delict, that denial of justice may, in extreme cases, involve 'administrative authorities'.[40] Authors or precedents cited to the effect that denial of justice relates only to actions or omissions of courts on closer analysis appear to have been focused primarily on establishing the proposition that Hyde and Nielsen were wrong,[41] and that denial of justice must relate to some dysfunction of the administration of justice as opposed to any and all breaches of international law that might justify diplomatic intervention. In so doing, such authorities may, *obiter dictum*, have used loose expressions. Once it is established that the relevant act or omission is imputable to the state, it simply cannot matter whether the doors to justice were blocked by executive fiat, legislative overreaching, or judicial obstreperousness.

Extension of *locus standi*

The actors on the modern international stage are vastly more numerous than in Freeman's day. At the turn of the century, according to the 2001/2002

[38] See also the five awards (*Ruden*, *R. T. Johnson*, *Neptune*, *Ballistini*, and *Romberg*) cited by Eagleton, *Responsibility of States*, at p. 547, note 2828, involving such executive acts as orders forbidding the trial of suits against the treasury and irresistible interventions by a provincial governor to prevent the hearing of a suit.

[39] Freeman at p. 106, agreeing with Fitzmaurice, who referred, at p. 94, to 'actions *in or concerning the administration of justice*, whether on the part of the courts or of some other organ of the state' (emphasis in the original).

[40] '[A]ctos de autoridades administrativas, cuando éstas ejerzan funciones jurisdiccionales con carácter definitivo y sin ulteriores recursos ante los Tribunales de Justicia', Oscar Rabasa, *Responsabilidad Internacional del Estado con Referencia Especial a la Responsabilidad por Denegación de Justicia* ((Mexico: Imprenta de la Secretaria de Relaciones Exteriores, 1933), at p. 35, quoted in Freeman at p. 106, note 2).

[41] See Note 22 of this chapter above.