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Post-Lecture Discussion

SPEAKER: LUNG-CHU CHEN
MODERATOR: REV. TIMOTHY R. SCULLY, C.S.C.
SPEECH: "SELF-DETERMINATION AND WORLD
PUBLIC ORDER"
DATE: MARCH 1, 1991

Rev. Scully: Professor Chen, you did not disappoint us. Thank you very much for a stimulating lecture and a fine beginning to our conference.

Let me, if I may, from my very limited perspective as a political scientist, and even more limited perspective as a student of Latin American politics, respond briefly to some of the points you raised. While I am not an expert in the area of international law, the key protagonist in your talk seemed to me to be the nation state, and it would not be appropriate to have our guests come to a Catholic university without some reflection on our ambiguous, historic relationship with this invention of Northwest European countries in the 17th Century. The development of the nation state as a political entity is, of course, tightly linked to socio-economic processes occurring in that part of the world, and really only in that part of the world, for the period of several centuries.

The nation state as a political entity in the northwest corner of Europe during those centuries was a distinctive form of political domination—or set of dominations—that was linked to a process of modernization. It was also linked to cultural and economic changes that I think need to be included when we consider the goal of nation state builders to suppress subnational loyalties. As you noted in your lecture, the nation state as a political entity really did not crystallize in the so-called Third World until after the Second World War in 1945. The nation state having been, in a sense, invented by the *bourgeoisie* in Northwest Europe, did not become a reality in the Third World and to those developing countries until much later.

Nation state builders are faced with a set of dilemmas when building a nation. There are obvious normative claims as to the desirability of building a nation. You pointed out several of the problem areas. First of all, and perhaps foremost, is the problem of forging *identity*—forging a set of identities that is coherent.

Next, is the problem of *legitimacy*—making the nation and the form of domination which the nation state implies a legitimate form of domination. There is also the problem of *penetration*, namely, penetrating that national territory with state agencies that effectively carry out policy.

The second part of that tension, however, is that another set of tasks, not so much *support-generating* tasks for nation state builders, but *demand-generating* tasks, appear. And those are, as you pointed out towards the end of your talk, *participation* and *distribution*—very different tasks with very different implications.

Let us focus on this particular concept, the nation, *la nación*—what O'Donnell calls "the network of solidarities imposed upon the diversity and antagonisms of society." Note that there is a presumption that society is basically antagonistic and diverse and that a network of solidarity is imposed upon that essential diversity in order to build a nation.

The extension of the nation, that network of solidarities in the nation state as we conceive it and as your normative focus implies, also implies extending *citizenship*—that is formal or procedural equality together with what we call, at least in Latin American Politics, *lo popular*, not just procedural, formal equality, but real claims to substantive equality.

These elements are mediating mechanisms. They are mediating mechanisms (the nation, citizenship, *lo popular*) with the nation state at the center. They are, however, absolutely essential if the nation state and the political regime that is at its center are to be able to claim legitimacy.

When identity is not established, or in an authoritarian situation, as in Latin America in the last decade, in which the network of solidarity called *la nación* is subverted, the flag becomes the sign of the anti-nation (as we see in the Baltic republics today). Until recently, to sing the National Anthem in a poor area of Chile was a reason to be stoned—literally stoned! This occurs because coercion becomes the predominant force binding the nation when those fundamental solidarities are not present. So, the tension is very common in developing countries and parts of the developed world. In larger, multi-national states in which citizens do not hold the nation as the primary source, or focus, or locus of loyalties, but rather sub-national claims hold those loyalties, the result is the disintegration of the ability to govern—witness Liberia, the most recent dramatic example of this phenomenon.

On the other hand, while those larger states may be economically viable, at the other extreme we face the possibility of a proliferation of mini-states that may enjoy this solidaristic cohesiveness called the nation, but are simply not viable economically.

Perhaps the set of solutions lies in what Arend Lijphart has called consociational formulas, in which national groups are living side by side, but have certain minimal guarantees to ensure their autonomy and cultural viability.

In any case, it seems to me that "who gets what, when, and how" continues to be a helpful heuristic device for answering these questions.

Professor Chen: I think what you just said certainly points to the real complexities and the real heart of the problem. I did not have time to elaborate on the role of the nation state. When I speak in terms of the first category of national claims, that, in a sense, has to do with the establishment of the nation state. Other speakers, of course, will address arrangements falling short of that.

I think one of the most remarkable developments in international law is the notion that international law is not centered on the nation state. The nation state remains the primary participant, but there are other actors, many other participants. My book, *An Introduction to Contemporary International Law*, really tries to emphasize throughout that nation states remain the most important participants, but that other non-state entities, and even individuals, become very important.

International governmental organizations, sometimes called super-national organizations, play increasingly important functions. And international private associations, pressure groups, business associations, and multinational corporations are all performing roles, possessing assets that exceed the sum of the states. And most especially, the role of the individual is increasing. The individual human being is considered to be at the very heart of this whole process; that is what our international law is all about.

At one time in the past, international law was discussed in terms of the nation state as the only and exclusive subject of international law. Other entities or individuals were simply objects. The New Haven School really tried to get away from this dichotomy of a subject/object to see who the actual actors and participants are in the global functions of decision making.

In that sense, one can see that the nation state would continue to be very important to the extent that it continues to fulfill

the aspirations of legitimacy—in the sense that people in the past assumed nation states would be the framework that would give that fulfillment to the individual. When the state itself becomes oppressive, however, it is contrary, counterproductive, to what people demand. So, I think one can look to a future in which the nation state will continue to play an important role, but other non-state participants, including individuals, will also play important roles.

I do not think it is sound to focus only on the nation state when speaking about certain ethnic minority groups. They demand more protection, more fulfillment of different values. What sort of arrangement can they find? If the nation state happens to be the framework through which they can find that kind of satisfaction, then fine; but often it is not.

In that sense, one can see a wide range of actors performing various functions in global decision making.

Participant: Do you foresee a subunit of nation states becoming more important players in the development of world public order? In your talk you spoke of some sort of halfway house between complete independence and some lesser kind of autonomy that groups could have within nation states. Could those groups potentially become international players? And if they do, will they compete with the nation state? In addition, how will they become players? Can they become players in international organizations and such?

Professor Chen: I think they will become important players. Actually, they have more demands, and this is what we call “the new era of democracy.” People are saying they want to participate in the shaping and sharing of power and want to manage affairs that directly affect their own destiny—take for example, Quebec and Puerto Rico. They asked whether there would be alternatives short of the present arrangement, and short of a full fledged of independence. Quebec wants to have many of the functions performed by the federal government moved to the individual provinces. Obviously, our neighbor will have to work that out. It is not going to be an easy process, but there is such a demand.

In the case of Puerto Rico, there was, at first, every expectation that Congress would pass a resolution to enable Puerto Rico to have a referendum this year. The House and Senate obviously disagree on whether the referendum should have binding effect

on Congress or simply serve as some sort of indication of whether the people there would choose to maintain the status quo, the present commonwealth status, or seek statehood or independence.

Even those who subscribe to this notion of the present commonwealth status—which, everything considered, seems to have very considerable benefits—feel that it may be best to have greater participation within the framework of the United States by being part of the United States—a free, associated state, but with greater participation in the external arenas.

Actually, Michael Reisman undertook a study for the American Society sometime ago, which he examined what sort of external participation could be allowed for certain representations in the United Nations—different governments or organizations, especially OAS, or other comparable arenas—so that they could be part of the United States, but also participate and contribute more effectively externally. Consider also the situation in Yugoslavia, or the talk of loose confederations of the Soviet Union.

I think all of these examples very strongly indicate that people would participate. They want to make certain that their participation in the processes that affect their future can be established, both in terms of what is going on within their own borders and beyond.

Participant: Can you foresee independent consulates being sent by subdivisions of states for trade purposes or something of that kind? For example, in Quebec, a Quebec consulate for trade in addition to a Canadian one?

Professor Chen: This is why I think an arrangement falling short of independence would require a great deal of creativity and ingenuity. Professor Hannum addresses this issue quite a bit in his book. Short of independent status, what kind of arrangements can be made? I think that an independent consulate created for the purpose of allowing a city to economically participate in external trade and investment relationships certainly would be feasible. But this depends, of course, upon the actual situation. The situation in Quebec will be different from some others. I think, however, it is very important for all of the parties involved to see that there is a common interest: they have common stakes, and they can work within an open, peaceful process. Then, they can work out what their common interests are, and so on.

I think this is what is remarkable about a democracy. When you have that kind of open, democratic process, even though it may be a very painful and protracted process, different interests' demands can be worked out within the framework of realizing the common interest.

Participant: I would like to make a very short remark about the nation state. I think it would be interesting to discuss whether the nation state as developed in the 19th Century with the influence of German romanticism was not really a sort of distortion of the original nation state subject. That is something a bit out of the context here.

As to Professor Chen's lecture, I was very glad that at the end you said that self-determination was not limited to the colonial context. I think that was one of the major shortcomings of the self-determination discussion of up to ten years ago. Coming from a place [Germany] which is much more legalistic or positive than your New Haven, I would rather have the problem lean not so much to a value system, but to the antagonism between self-determination and territorial integrity.

There again, I think we have one of the problems of the present international law: that is, the subjects of international law are states, not people. I think that is something we ought to change. I do not think that we can say, with the actual state of the law, that nations, as such, are already subjects of international law. I think we have to change that.

And now I get into something which is closer to more internal stability. I think the stability of frontiers and state borders has become something like the holy cow of international law, starting from the decommunization process in Latin America. This doctrine was then taken over to Africa, where, in my opinion, it simply does not work. And we now have such a situation in central Eastern Europe and Southeastern Europe. You might call the Soviet Union one of the last lonely empires.

Anyway, we will be back in the colonial context, and that does not work. I think we have to come to a position where we can say that the right to self-determination will prevail over the interest of the state as to territorial integrity. I think that, in the end, would lead to much more stability. On the flight from Bangkok to Chicago, I read in the paper that the Luxembourg Foreign Secretary just said the EEC was not welcoming the secession of Slovenia

because they were afraid of destabilization. That, I think, is completely wrong.

We will have much more destabilization in the Baltics in Southeastern Europe if we do not respond to these demands for self-determination. There again I think we do meet the value system. And my approach is that we should turn the balance more, or very differently, in order to give the right of self-determination more importance than the interest of the state as to stability, and territorial integrity, which, obviously, is not as well principled in international law. Thank you.

Professor Chen: I think this is really at the very heart of the matter. For instance, in terms of the basic policy of how territorial integrity and freedom of choice or self-determination can be reconciled, the Declaration on Decolonization expresses the basic right to self-determination, among other things, but also discourages disintegration of the particular state. In other words, the territory is inviolable. So we have this question of stability and change—stability and freedom of choice. How can they be reconciled? My basic recommendation suggests that it does require a contextual analysis of the different factors involved, especially in terms of the probable consequences. When Slovenia or other Baltic states make a choice, for instance, the considerations as to what might be the probable consequences for the Baltic states or the rest of the Soviet Union, and what might be the implications for the regional community and even world public order as a whole should be addressed.

It is a difficult task. It is no mean task, but it is very important to realize that when a choice of that magnitude is made, it does generate effects far beyond the borders of one state or one particular group or territory involved. And in that sense, many different factors need to be taken into account.

One of the most significant changes in the decades after the creation of the United Nations certainly has been the notion that people are fundamental—people are paramount, not territory. I remember the very eloquent words used by Judge Dillard in the Western Sahara case. He said that in the ultimate sense, people are paramount as sovereign, not the territory. This is really the essence of what we mean when we talk about a piece of territory or the status of a particular piece of territory. Even border matters have to be viewed in light of what the implications may be for the people directly involved. What effect? What will the consequences

be in terms of their basic decision-making processes, internally and externally? How will it affect the aggregate of patterns, or the value distribution, and so on?

And so, that certainly is a very critical point.

Rev. Scully: We have five minutes remaining in the session. So, I would ask our questioners to be as brief as possible please.

Participant: Let me first say that I like the word "self-determination." However, the way international lawyers use it, sometimes I feel that its clarity is inversely proportionate to its popularity. And this is partly because there is no normative theory of self-determination. I detected that Professor Chen had a normative theory, at the beginning at least: that of consent. That people who do not consent can live with the obligation is a matter of consent. And then you want them to have a balancing act which says that of course there are other factors one has to weigh—is it viable, does it create problems for its neighbors? But that does not seem to be a normative theory; that is a balancing act. And the concept of consent is gone. Once you say that you have to balance those factors, then consent does not carry much weight. It seems to me that once one is engaged in balancing, one has to ask who does the balancing. And it matters who determines whether something is viable or not.

Rev. Scully: Could I ask you to take a few questions and then to respond?

Professor Chen: All right.

Participant: Thank you. I would like to follow up on a point just made. I am a legal anthropologist who is turning into an anthropological lawyer, and my comment and question follow from that prospective.

When you mentioned viability and responsibility, I think I could suggest that under that criteria the United States itself might be the least viable, the least responsible. After all, it is more economically dependent on resources outside its borders than any other union in the world system. As for responsibility, I would point to the last two major wars, in Vietnam and the Gulf, and question whether the U.S.'s role was particularly responsible. I am saying that the application of those criteria is problematic.

The other comment relates to your enumeration of self-determination issues on the table right now. In talking about the Americas, I was surprised that you picked out Quebec and Puerto Rico and totally passed over the entire Aboriginal nations' claims. That, in turn, illustrates the problem with this so-called universalistic set of criteria you set up, which is not at all universalistic, but liberal-western in tradition, because that was at play in Canada when the claims of hundreds of Aboriginal nations were not attended to, but the western-liberal claim put out by Quebec totally dominated the Mechlin courts.

So, I would like to have you comment on this very difficult tension that Mr. Addis first brought up.

Rev. Scully: I may ask you to endure one more question.

Participant: I have a very short question related to who has and who has not the right to self-determination. If the right to self-determination is *jus cogens*, it seems to me the question is not really a question because every ethnic group who has a declared right to self-determination has, at least in this interpretation, a right to self-determination.

The second short question: If there is in some way inherent tension between the right to self-determination of individuals and the right to self-determination of the group, how can you articulate who has which kind of right?

Professor Chen: Alright. (Laughter). It will require several hours. My initial presentation obviously did not clarify the matter.

First of all, this notion about a balancing act: I try to shy away from balancing in the sense that you try to balance one end of the scale and the other end. But when somebody is trained in a policy oriented approach, a configurated policy science approach, the emphasis is that in a particular situation, all the factors relevant in the context need to be taken into account. And the significance of one factor is a function of the context involved. So when you talk about self-determination, yes, I emphasize throughout, it is deeply rooted in the notion of human dignity, human rights, human freedom, aspiration for association with groups, identification with groups that can fulfill their demands for protection of values, and fulfillment of their values.

And so, in terms of basic preference, there is a presumptive weight in favor of a group demanding to self-determine, to man-

age its own affairs, to become master of its own destiny. But, to be very realistic, in the real world, if we begin to say that every group that wants self-determination can have it, then we are going to have real fragmentation. I remember days ago, when I had a chance to lunch together with Professor Myres McDougal, we talked about self-determination in the Baltic states, and he did not feel the way I feel. I strongly feel that they should be given support, and he said, "Well, self-determination for Mississippi, I'm all for it!" I said, "That's a very different situation." He asked "Why are they different?" I said, "People in Mississippi are very happy and content to live within the framework of the United States, even though the scars of the war among the states continue to linger on for some people." In terms of the intensity of the land separation, for independent identity I think one is really a far cry from the other.

So, I think this is a very real consideration in the sense of what I meant by complementality. On the one hand, aggression is impermissible under international law, but, on the other, self defense is permissible. Not every use of force is the same, as was very clearly demonstrated in the Persian Gulf situation. Not every use of a force is to be viewed with the same degree of value and justification. And this is why, when we talk about use of force in international law, there is permissible use of force, impermissible use of force, and the question of how they are to be distinguished to fulfill the common interest. I think the common interest is the ultimate guide. Common interest, as I identified on the global level, refers to world order. It is very different from President Bush's emphasis, but it is an order. The notion of a world public order certainly has been a trademark of McDougal's and Lasswell's books, in collaboration with their associates. *Human Rights and World Public Order* and *The World Public Order and the Space* have two distinctive dimensions, one of which is minimum world order, in the sense of minimization of unauthorized coercion and violence. The other is optimum world order, in the sense of the widest possible shaping and sharing values. Coercion that is authorized for the purposes of vindicating justice or repelling aggression is a far cry from force used for the purposes of naked aggression and conquest. Thus, I suggest that we have a contextual framework of analysis which allows one to increase the degree of rationality in decision making, instead of saying "Oh, yes, decisions about self-determination are just political decisions," and then forget about it.

We try to say, "Yes, common interests are at stake." And we try to determine how that common interest can be phrased in terms of minimal world order and optimum world order, creating conditions that would allow development, justice, and human rights to prevail. So, it is not only in the negative sense of absence of aggression, absence of the use of armed force, but also in terms of creating conditions that will enable every group, every people to find real fulfillment. In today's world, that fulfillment would not necessarily be in the form of independence only. There are other arrangements. And you say that international lawyers are confused about self-determination. Well, self-determination has been used by so many people for different purposes.

Self-determination is extremely attractive in its popular use, but people use it to refer to very different situations, different demands. That is why I took the trouble at the very outset to say, self-determination, as I focus upon it in my presentation, is the claim relating to the establishment of a new state.

And when I listed some of the notable examples of the people demanding self-determination, I thought Puerto Rico and Quebec would be very interesting in this context. I said the list can really go on and on. Those are not exhaustive.

The question about indigenous populations definitely has been discussed very much under this doctrine label of "self-determination." But what those rights should be has certainly been a subject of concern on the part of the United Nations Human Rights Commission and the United Nations as a whole. I believe some speakers will be addressing that. And I think that is an important part: to an extent, they do demand to establish a new state. They do present very peculiar situations. And here I think it underscores one fundamental dilemma in the area of international protection of human rights. International human rights law after World War II emphasized that as long as we protect the rights of the individual, then there should be no complaining. But now, what emerges is the idea that those human rights that are collectively demanded by groups, indigenous populations, are one type of demand. There are others, and we must determine how those particular demands can be given expression, either in the form of independence or far short of that. What kind of a special autonomous protection will be given? The kind of cultural right or special protection that is to be accorded really is something I think experts can work out, making certain that whatever arrangements

are made would enhance human dignities for the people most directly involved and for others.

Finally, I will address the question of the principle of self-determination as *jus cogens*. Some international lawyers take that position. *Jus cogens* means that these are norms that are so fundamentally, so intensely demanded that they cannot be derogated. Some people call it "peremptory norms." And yes, this particular view has gained a good deal of support in terms of the general principle, the general doctrine of self-determination. But the real difficulty again comes at the time of application. How can this general, abstract principle be related to a concrete case in which a particular group invoked the name of self-determination?

Well, the answer is not "yes and no," "your request granted or not granted." It involves more, and it also underscores the very fact that the world community remains decentralized. That is to say, individual states make decisions whether to support peoples or not. For instance, as to the Baltic states, only Iceland has stuck its neck out to extend recognition. Other countries are sympathetic, but not quite willing to go that far, showing that when a particular group is struggling to achieve independence, struggling to achieve freedom, it requires lots of international support, and whether that support would be forthcoming or not often is a matter of very critical decisions.

The nation state power elites consider what the implication will be in their own backyards. There is this notion that the nation state borders, even though inherited from the colonial past, are fundamentally very sacred. And territorial integrity, in terms of maintaining the new borders established after World War II, in general, certainly has gained very wide acceptance. But the question is: How should this actual application be effected? If you use particular case studies, then it would be even more difficult. But I would simply emphasize that when we talk about a new world order to come, that doctrine, the principle of self-determination, will have an important role to play.

If we can clarify what may be a state and, in a particular context, take into account the common interest of all the different parties and all the different communities that may be affected, we would most likely enhance the degree of rationality and optimize the common interest of all.