RECONSIDERING THE INSULAR CASES

Panel III: The Future Status of Puerto Rico

Harvard Law School

February 19, 2014

PUERTO RICO AND THE UNITED STATES AT THE CROSSROADS

Carlos Iván Gorrín Peralta

Professor of Law

Inter-American University of Puerto Rico School of Law

I thank the organizers for the invitation to this conference.

I am glad that Harvard Law School has decided to address issues that for too long have been kept "in the closet." Judge Torruella wrote many years ago that the Insular Cases "have been relegated to the backburner of judicial concern" and that their doctrine "floats in the penumbra of legal priorities considerably below the rule against perpetuities." Reconsidering the insular cases is a welcome and necessary development.

I have entitled my presentation, *Puerto Rico and the United States at the Crossroads*. In the singular, crossroad is "a junction where one street or road crosses another". In the plural, it is "a crisis situation or point in time when a critical decision must be made."

The relation between Puerto Rico and the United States stands at the crossroad of constitutional law and international law, particularly the international law of human rights, and more specifically the collective right of all peoples to self-determination. I share the view that he constitutional doctrine of territorial non incorporation is a constitutional anomaly, forged out of imperialism and racism, and a mutation of the values upon which this republic was erected. But I will focus on the international law that evolved during the second half of the past century, in direct contradiction with the constitutional doctrine of the insular cases.

The term self-determination –coined almost a hundred years ago by Woodrow Wilson and Vladimir Lenin,– acquired the status of a legal right after World War II with its bases in the U.N. Charter and the International Bill of Human Rights, that is, the Universal Declaration and the two International Covenants on Human Rights. Article 1 of both Covenants recognizes the right of all peoples to self-determination, and imposes on signatory states the duty to promote and respect it. Several U.N. resolutions and decisions of the International Court of Justice evidence the formation of an international consensus regarding that right, increasingly considered as an inalienable right of all peoples, part of *jus* cogens, a peremptory norm of customary law,.

The United States signed and ratified the International Covenant of Civil and Political Rights. It should, then, be part of the "supreme law of the land", as ordained by the supremacy clause. But the "declaration" made by the Senate upon its approval of the treaty, states that articles 1 through 27 of the Covenant are not self-executing. Since the 19th century, the doctrine of not self-executing treaties has been enthroned in the jurisprudence of this country. It has been strongly questioned with solid arguments by several authors, including Judge Torruella, in his scholarship as well as from the bench.

Originally, international law developed as the "law of nations"; it defined the rights and obligations of a nation *vis à vis* other nations. But now, the international law of human rights has evolved to recognize rights of individuals, groups and peoples *vis à vis* their own governments. It should no longer be maintained that a nation may represent before the international community a commitment to recognize, respect, protect, ensure and promote human rights, and yet refuse to recognize and respect them because the treaty is not self-executing. That argument makes a travesty of international obligations.

Still regardless of whether the judicial power of the United States abandons the doctrine or not, the right to self-determination is recognized by everyone in the international community, thus becoming a peremptory norm of customary law, binding even for states that have not recognized the right by treaty. It is part of the law of this land.

Be that as it may, will Congress – should Congress – act to fulfill its legal, moral and political obligations regarding the exercise of self-determination by the people of Puerto Rico? … I think it should…. I think it must…. The relation between Puerto Rico and the United States stands at the crossroads. We are in "a crisis situation or point in time when a critical decision must be made."

First of all, the territory is in an untenable position. After 116 years under the plenary powers of Congress, colonialism has failed. The territory is broke. The crisis which can be traced to more than forty years ago, now, after seven or eight years of recession or depression, taints the prestige of the United States, menaces the stability of its bond market, and looms over the Treasury, as some are talking of a "federal bailout" to save the day.

Secondly, the people of Puerto Rico have rejected the territorial relationship. For sixty years, the United States and the supporters of the regime defended the legitimacy of the relationship with the consent of the people supposedly expressed in 1952 upon the creation of the *Estado Libre Asociado*. … Well, no more.… In the 2012 plebiscite, a clear majority of 54% of the electorate rejected the current territorial status. Consent to a colonial regime is never legally valid, but now –in the case of Puerto Rico– it has simply ceased to exist.

The third reason for urgent action is that the international community is observing and beginning to act. In the world stage, the U. N. Special Committee on Decolonization

has maintained the case of Puerto Rico in its permanent agenda through a long series of resolutions. The one adopted last year, for the first time ever, characterized the relation as one of “political subordination,” rejected by the people on November 6, 2012. Accordingly, the resolution again calls upon the Government of the United States to expedite a process that will allow the people to fully exercise their inalienable right.

In the Latin American region, CELAC (in English, the Community of Latin American and Caribbean States) groups all independent nations of the region. In its most recent summit, held in Havana a couple of weeks ago, the member states adopted a unanimous declaration which takes note of the resolutions adopted by the U. N. Committee, commits member states to work towards the eradication of colonialism from the region, and creates a working group of four states to elaborate proposals for the advancement of the objectives of the U. N. resolutions on Puerto Rico.

Given this panorama, two questions arise. First, what are the substantive options for the future status of Puerto Rico? Secondly, what process ought to be put in place to reach a decision?

There are three options to the colonial regime. The so called Estado Libre Asociado Soberano or Sovereign Free Associated State, would require that Congress dispose of the territory, and that a compact of free association be adopted, following the example of several insular communities of the Pacific associated with New Zealand and with the U.S. None of these communities is viable as an independent nation. Their populations range from 1,400 people to slightly over 100,000. Their combined population is similar to that of the city of Ponce, on the southern coast of Puerto Rico.

Of course, the option of free association, as a transitional status towards independence, cannot be summarily dismissed.

There is also the option admitting Puerto Rico as a state of the union. Proponents of statehood insist that in 2012, their option obtained a 61% majority, when in fact only 45% of those who participated voted for it. That percentage was lower than the one obtained in the 1993 and the 1998 plebiscites, which was 46%. Statehooders insist on a claim of equality for U. S. citizens residing in Puerto Rico, and try to evoke the struggle for civil rights and racial equality to appeal to liberals and moderates in the U. S. However, the status of Puerto Rico is not an issue of individual civil rights but of the collective right of the people of Puerto Rico to self-determination, an inalienable right which as a matter of law cannot be renounced. Statehood is irrevocable. Can the people of a territory or colony exercise their right to self-determination and permanently renounce their inalienable right to self-determination?

For Congress to make a satehood offer, it must consider if a majority of 51%, or even higher would suffice, if one fourth, or one third, or close to half of the people would rather opt for separate sovereignty under independence or free association. It should understand that nationalities cannot be suppressed and they reappear. Remember the Soviet Union, Yugoslavia, more recently Scotland, Catalunya, the Basque Country, and closer to home, Québec.

Finally, there is the option of independence, supported by the majority of the people seventy years ago, but has dwindled over the last decades as a result of repression and dependence. And yet that is the natural destiny of all peoples. Sometimes, critical events produce unexpected results. For example, in 1774 George

Washington said: “I am satisfied that independence is not desired by any thinking man in America.” And according to the Journals of the Continental Congress, some months prior to July 1776, none other that Thomas Jefferson said that a happy and permanent relation with England was desirable, and that no one was interested in separating from it. Fortunately, those were not his last words.

An independent Puerto Rico would be free to pursue its economic development unhindered by federal limitations. It would be free to establish productive relations with other nations, including the United States, which would benefit much more from a free Puerto Rico than from a bankrupt colony. Transition to independence would require a careful but very viable economic transition, such as that already negotiated by the Independence Party with Congressional leaders in 1989 to 1991.

In fact, now it turns out that all three substantive options for the future status of Puerto Rico will require an economic transition from the current economic crisis to conditions of self-sufficiency and sustained economic development. In compliance with the legal obligation to promote self-determination, transitional aid under independence for instance, must be viewed not as a federal bailout, but as reparations for 116 years of colonialism –and still running.

With regards to the process to solve the problem, Washington must “dispose of the territory” to facilitate and promote self-determination. In San Juan, legislation should be enacted to allow the people to exercise their constituent power, in order to determine their future.

Currently, there are several proposals. The New Progressive Party is proposing a bill in Congress to authorize a yes or no vote on statehood all by itself. The proposal

does not solve the problem. First, its political possibilities are as big as the abolition of the papacy by the Catholic Church. But even if it were approved, what would happen if there is no majority, or if there is one by a slim margin? The territorial status would prevail.

There's also President Obama's 2.5 solution, the miserly appropriation of two and a half million dollars to educate the people of Puerto Rico for some kind of plebiscite among options approved as constitutionally viable by the Attorney General. That, of course, could include the current territorial status, which has been constitutionally viable since the insular cases. It's a non proposal, and it does not comply, even remotely, with the international obligation to promote self-determination.

Some members of the legislative majority of the Popular Democratic Party have proposed legislation for a constitutional status assembly whose elected majority would negotiate with the United States the terms of a new relationship not subject to the territory clause.

And the Puerto Rican Independence Party has proposed legislation to call for a status assembly based on the constituent power which resides in the people. It would be inclusive of all non territorial options –independence, statehood and sovereign commonwealth– and would demand from Congress a response to all three proposals through a process of negotiation. The end result would be a plebiscite so that the people may vote on options acceptable to the U. S., with full knowledge of what each proposal really entails. What kind of free association? What conditions and concessions for statehood, if it were plausible? What would be the terms for the new relationship between the U.S. and an independent Republic of Puerto Rico?

In the next few weeks and months, these procedural proposals will be discussed and hopefully, there will be a decision to initiate the process of self-determination of the people of Puerto Rico. I hope that the forces of inertia and immobility do not stall the process, because, as I said before, Puerto Rico and the United States are truly at the crossroads, in a situation of crisis, at a time when a critical decision must be made.

In closing, may Harvard contribute to the solution to this complex problem? Of course. This conference has been a good start to "reconsider the insular cases." But this cannot end today. It must be a new beginning with an ample agenda.

For example, the Human Rights Program should dedicate efforts to debunk the theory of not self-executing treaties in the area of human rights.

And even 115 years after the fact, Harvard should expunge an embarrassing page of its faculty scholarship. After reconsidering the insular cases, it should repudiate the imperialist theories articulated in the pages of the Harvard Law Review of 1899. Those articles by Langdell, Baldwin, Randolph, Lowell and Thayer set the stage for congressional exercise of imperial power and paved the way for the constitutionalization of colonialism by the Supreme Court. Harvard can now point in the opposite direction.

Colonialism demeans both the colonized and the colonizer. The time has come to agree with Justice Harlan when he dissented in *Downes v. Bidwell*, in 1901:

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces … is wholly inconsistent with the spirit and genius, as well as with the words of the constitution.

May I add that it is also inconsistent with the international law of human rights and an outrageous insult to human dignity in this day and age.

Thank you.