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# Human Rights as Comparative Constitutional Law

Jacob W.F. Sundberg

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# HUMAN RIGHTS AS COMPARATIVE CONSTITUTIONAL LAW

PROCEEDINGS AT THE SYMPOSIUM HELD AT THE UNIVERSITY OF AKRON  
SCHOOL OF LAW, NOVEMBER 13, 1986

by

JACOB W.F. SUNDBERG

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## PREFACE

by

JACOB W.F. SUNDBERG

### WHAT IS 'HUMAN RIGHTS': THE UNIVERSAL DECLARATION

The history of the English term 'human rights' is not very long. The term did not appear in any international instrument until the Second World War.<sup>1</sup> The fact that it ended up in something so prestigious as the Universal Declaration on Human Rights, 1948, has a great deal to do with historical accident. Mrs. Eleanor Roosevelt can certainly claim much of the credit. Being neither a lawyer nor a philosopher she was presumably not placed in the chair of the Human Rights Commission (1947) to achieve any legal miracles. Much to everybody's surprise her group completed successfully an agreed text<sup>2</sup> which subsequently, and very quickly, was accepted as a General Assembly Resolution on the night of December 10, 1948.<sup>3</sup>

To experienced lawyers it is, of course, evident that the idea of "human rights" is something very revolutionary in a generally positivist world. To put it in the briefest possible proposition: human rights means that the legal system no longer starts from above, with statute and the legislature, but starts from beneath, with the individual and his rights and what cannot legitimately be done to him. To use a phrase coined by Justice Arthur J. Goldberg, there is no sovereign right of any state to deny the fundamental rights of Man.<sup>4</sup>

The circumstances gave the Americans a very great say when the Universal Declaration was being prepared. No less could be expected, given that Mrs. Roosevelt was in charge, that the meeting was held in the United States, the enormous prestige of the war-winning Americans and the input into the preliminary works of all the non-governmental organizations around the United States. The Universal Declaration thus has come to reflect mostly American style legal thinking. Some have been very explicit about this. For example, Professor Louis Henkin says that "most of the Universal Declaration . . . is, in essence, American constitutional rights projected around the world."<sup>5</sup>

The world was taken by surprise. It is therefore interesting to look briefly at the reactions in some quarters. Let us start with Field Marshal Jan Smuts, the premier of South Africa. Smuts started out as a strong supporter of the

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<sup>1</sup>See, e.g., COBBETT, *LAW IN DIPLOMACY* 253 (1959).

<sup>2</sup>Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 39-58, 47; (E. Luard, ed.), cf. J. BURTON, *The Universal Declaration of Human Rights and Beyond*, 12 (2) *ESSAYS IN ARTS AND SCIENCES* 91-104, 94 (May 1983).

<sup>3</sup>Res. A/810, — U.N. GAOR at 71-77.

<sup>4</sup>Goldberg, *The Need for a World Court of Human Rights*, 11 *HOW. L.J.* 621 (1965).

<sup>5</sup>Henkin, *Constitutional Rights and Human Rights*, 13 *HARV. L.R.-C.L. REV.* 593-632, 609 (1978).

Universal Declaration.<sup>6</sup> He did this in the shadow of the Americans and in reliance upon the Americans. He was acutely aware of and concerned about the demographic problems that pestered his country, but he could take comfort in the 'separate-but-equal' doctrine which at that time prevailed in the United States Supreme Court,<sup>7</sup> as well as in the ban on interracial marriage which at that time was not uncommon in the laws of the various American states.<sup>8</sup> Moreover, the United States was notorious for using its immigration laws as a means of saving the nation from contact with the population explosions outside its borders.<sup>9</sup> Looking at corresponding phenomena in South Africa, Field Marshal Smuts could not reasonably have felt very threatened by the new American-style document that was taking shape. It testifies to his good judgment that in the end he realized what a revolutionary document it really was and saw to it that South Africa abstained in the voting on December 10, 1948.<sup>10</sup>

The Soviets were equally taken by surprise. They (unlike Jan Smuts) did not expect anything good from Capitalist America! It must be kept in mind that the enormous difference in philosophy that separated the Marxist World from the Western one was not a creation of the "Cold War." The Cold War simply made the difference visible. To the Soviets, like to most Socialists, American Constitutionalism was sheer superstition. In Marxist analysis, realism could not be arrived at by building on such foundations. Andrei Vyshinsky, one of the top Soviet lawyers, put in a mild reminder of the fundamental difference in legal philosophy in one of his interventions in the U.N. General Assembly's debate on the Declaration:

Human rights [cannot] be conceived of outside the state; the very concept of right and law [is] connected with that of the state. Human rights [mean] nothing unless they [are] guaranteed and protected by the state; otherwise they [become] a mere abstraction, an empty illusion easily created but just as easily dispelled.<sup>11</sup>

Overwhelmed by the American predominance in the General Assembly, the Soviets must have analyzed the situation in very much the same way as if the Declaration had concerned condemning witchcraft. To people believing in witchcraft, such a declaration might appear to have a useful purpose. To people who had come to realize that the natural laws of cause and effect did not allow 'witchcraft' to have any effect, much less making it possible thereby to

<sup>6</sup>Cf. G. EZEJIOFOR, PROTECTION OF HUMAN RIGHTS UNDER THE LAW (1964) p. 56 UNCIO, Docs. vol. I, p. 425.

<sup>7</sup>Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377 (1954).

<sup>8</sup>See, e.g., *Perez v. Lippold*, 32 Cal. 2d 711, 198 P.2d 17 (1948); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>9</sup>See, e.g., T. BENNETT, AMERICAN IMMIGRATION POLICIES, (1963); LOESCHER & SCANLAN, CALCULATED KINDNESS. REFUGEES AND AMERICA'S HALF-OPEN DOOR 1945 — PRESENT. (1986).

<sup>10</sup>Humphrey *supra* note 2, at 49; cf. Erik Rydbeck, (newsletter) Nr 3 — Series E 10-1985; 18/3 1985 (Johannesburg, S.A.A.).

<sup>11</sup>U.N. GAOR 924 U.N. Doc. A/119 (1948)  
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damage another, the matter was simply one of diplomacy: how to avoid antagonizing the believers without too much compromise of your own intellectual integrity. So the Soviets too abstained in the voting.<sup>12</sup>

Immediately thereafter they were reinforced in their belief that the human rights business was unmitigated American Capitalist evil, when early in 1949, on the proposal of a number of Western powers, the General Assembly adopted a resolution finding the Soviet Union guilty of violating human rights in the so-called *Russian Wives Case*.<sup>13</sup> At that time the Soviet Union practiced a ban on Soviet nationals who were in the Soviet Union to leave the union, even in the case when they were married to non-Soviet nationals and wanted to leave with them. The Assembly found, via the detour of the U.N. Charter, that this was contrary to Articles 13 and 16 of the Declaration.

As far as Orientals, such as the Chinese and the Japanese, were concerned, they hardly could reconcile American constitutionalism with its legalistic, adversarial approach with their traditional Confucian concepts.<sup>14</sup> The latter permeated not only the life of the individual and his family but also the whole structure of government between the Emperor and the individual. Since time immemorial, Chinese emperors had learned to "rule by exhorting filial piety" as a famous exhortation urged; both ruler and ruled were expected to find harmony, not conflict, within the Confucian code.<sup>15</sup> Certainly, this was irreconcilable with the American notion of standing up in court, claiming your "right." But the Orientals had no say. Japan was completely defeated and had indeed been forced by the *fiat* of General MacArthur to adopt an American-style Constitution, prepared during a week or so by the American headquarters. It took effect on May 3, 1947.<sup>16</sup> Kuomintang's China was a country militarily unimportant and far away. Its representative did not have reason to be troublesome to Mrs. Roosevelt and her aids.<sup>17</sup>

So the Universal Declaration was a great success.

#### THE BACKGROUND OF THE SUCCESS: THE NUREMBERG TRIALS

The Universal Declaration would never have been catapulted in this way to its fame, had it not been for the Nuremberg Trials. They made a very deep impact. The International Military Tribunal was established on August 8, 1945, and the trials ended with judgment on October 1, 1946, sentencing to

<sup>12</sup>See Humphrey, *supra* note 2, at 49.

<sup>13</sup>Reported in H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS. 203-05 (1950).

<sup>14</sup>See generally J. HSIUNG, HUMAN RIGHTS IN EAST ASIA. A CULTURAL PERSPECTIVE. (1985), in particular *The East Asia Humanist Legacy*, 6-12.

<sup>15</sup>Compare the popular Chinese saying: "If the Emperor wished his Prime Minister to die, the Prime Minister would not dare not to die, and if a father wished his son to pass away, his son would not dare not to pass away."

<sup>16</sup>BLAUSTEIN, THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD, 26-28 (1986).

<sup>17</sup>Mr. C.P. Chang was the representative of China.

death eleven of the defendants, giving prison terms for seven others, and ordering the release of the remaining three. Altogether the trial of the German generals, admirals, bureaucrats and Nazi party leaders had lasted 216 days. Out of this had come, this was the contention, new principles of international law. The lesson of Nuremberg was believed to be that individuals owe obligations under International Law, and not merely States. If man could individually be subject to penalties for infractions of International Law, it was unavoidable that he must also be able to claim rights under such Law.

In the view of Sir Hersch Lauterpacht, "the individual has been transformed from an object of international compassion into a subject of international right."<sup>18</sup> "The punishability of the individual under international law precipitated the demands for sanctions to protect the individual from violations of human rights" wrote Cherif Bassiouni.<sup>19</sup> "The Nuremberg Judgments had established a new concept of national sovereignty," was a prevailing opinion at the time.<sup>20</sup>

Even skeptics acknowledge the value of the Nuremberg Trials. "Their only value was an entirely unintended one" wrote Judithe Shklar perceptively. "The Trial, by forcing the defense lawyers to concentrate on the legality of both the entire Trial and its specific charges, induced the German legal profession to rediscover and publicly proclaim anew the value of the principle of legality in criminal law, which for so many years had been forgotten and openly disdained."<sup>21</sup>

#### REACTING TO THE SUCCESS: THE UNITED STATES STORY

For the American prosecution at the Nuremberg Trial, the real purpose of the exercise was to revolutionize International Law, to make an enormous contribution to its future development.<sup>22</sup> The success of the Universal Declaration tended to reinforce the conviction that such a contribution had been made. The expression: "There is no sovereign right of any state, large or small, to deny the fundamental Rights of Man — rights which belong to him because as a child of God, he is endowed with human dignity" was used by Justice Arthur J. Goldberg to convey this conviction.<sup>23</sup>

Many in the West tried to live up to these expectations. In France, the Universal Declaration was published in the *Journal Officiel* on January 9, 1949; the normal place for legislation and ratified treaties.<sup>24</sup> In the United

<sup>18</sup>H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS*, (1950).

<sup>19</sup>Bassiouni, *The 'Human Rights Program': The Veneer of Civilization Thickens*, 21 DEPAUL L. REV. 271, 273 (1971).

<sup>20</sup>Weil, *The Evolution of the European Convention on Human Rights*, 57 AM. J. INT'L L. 804, 805 (1963).

<sup>21</sup>J. SHKLAR, *LEGALISM*, 165 (1964).

<sup>22</sup>*Id.* at 170.

<sup>23</sup>Goldberg, *The Need for a World Court of Human Rights*, 11 HOW. L.J. 621 (1965).

<sup>24</sup>*Journal Officiel*, 1859 (9 January 1949).

States, in 1950, the California District Court of Appeal struck down a California statute as violative of the human rights provisions of the United Nations Charter.

This unanimous decision in *Sei Fujii v. State*<sup>25</sup> (later overruled on other grounds)<sup>26</sup> "sent shock waves across the American legal community."<sup>27</sup> It was "greatly relied on by the ABA Committee on Peace and Law Through United Nations and by Senator Bricker."<sup>28</sup> In 1951, Senator Bricker introduced a proposal to limit the effect of the new human rights provisions. He proposed to amend the United States Constitution so that all treaties would be executory only, thereby void of effect in relation to State and Federal legislation unless reproduced in such legislation.<sup>29</sup> The Bricker Amendment exercised considerable influence and did not die until in 1954, when one of its versions failed to receive the necessary two-thirds majority in the Senate.<sup>30</sup> Its spirit was fully reflected, however, in the address to the Judiciary Committee of the Senate which was delivered by Secretary of State, John Foster Dulles, on April 6, 1953. He said that:

the present administration intends to encourage the promotion everywhere of human rights and individual freedoms, but to favour methods of persuasion, education and example, rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community, which has different standards. . . . We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.<sup>31</sup>

The United States has since rather persistently stuck to this line. Most American presidents may have urged the ratification of various human rights treaties (Truman, Kennedy, Nixon, Carter) but the U.S. Senate has shown persistent opposition to any United States involvement in such multilateral agreements.<sup>32</sup>

### REACTING TO THE SUCCESS: THE SOVIET UNION STORY

When the Americans put in a flat refusal of any commitment beyond so

<sup>25</sup>217 P.2d 481 (Cal. Dist. Ct. App. 1950); *rehearing denied*, 218 P.2d 595 (1950). *But see* note 26 *infra*.

<sup>26</sup>242 P.2d 617, 38 C.2d 718 (1952).

<sup>27</sup>Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 900, 924 (1984).

<sup>28</sup>Chafee, *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 357 n. 29 (1952).

<sup>29</sup>On the Bricker Amendment, *see* L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 948-971 (1953).

<sup>30</sup>*Id.* at 963-64.

<sup>31</sup>Department of State Bulletin, 592 (April 20, 1953).

<sup>32</sup>With a single exception, none has been ratified by the United States. For a renewed attempt in the Bricker Amendment spirit, *see* Comment, *The International Covenant on Civil and Political Rights and United States Law: Department of State Proposals for Preserving the Status Quo*, 19 HARV. INT'L L.J. 845 (1978).

called Action Programmes,<sup>33</sup> the Soviets set in to remove the core constitutionalist element from the term human rights. They succeeded in doing so by introducing the term 'self-determination' with its specific Marxist meaning into the human rights area.<sup>34</sup> Self-determination being the new human right they secured for themselves the support of all the people who in the 1960s and 1970s extricated themselves from the European colonial empires and eventually came to make up the majority of the United Nations General Assembly. The Soviet premier, Mr. Nikita Khrushchchev was present at the U.N. General Assembly meeting in 1960, and at that meeting the Assembly adopted, in the same form as the Universal Declaration had been adopted, the Declaration on granting independence to colonial countries and peoples: the Anti-colonial Declaration of 1960.<sup>35</sup> In the following years the General Assembly by tremendous majorities established an entirely new machinery for the implementation and supervision of this Anti-colonial Declaration. This was a machine of great complexity consisting of numerous committees with the right to investigate situations, receive petitions and hear petitioners. In this area of human rights the United Nations as an organization was to show real interest and push.<sup>36</sup>

#### THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950

The development in Europe was very different. As a side effect of the Cold War, the West became culturally self-conscious. In Europe, where the frontlines ran and where the Berlin blockade, the fall of Czechoslovakia and the Greek civil war had an immediate impact, there materialized a search for an identity, for a positive and uniquely Western tradition. The core of that tradition was discovered to be the *rule of law*. "[The predisposition to discover, construct, and follow rules was . . . [believed to be] the distinguishing mark of European culture," in glaring contrast to the patrimonial justice of Russia and other Oriental despotisms, the kadi justice of Islam and the Confucianism of the Far East.<sup>37</sup> Attempting to reduce the Universal Declaration into a binding

<sup>33</sup>Cf. Schwelb, *Human Rights: Protection of the Individual Under International Law, Proceedings of the Fifth Summer Conference on International Law*, Cornell Law School. June 18-20, 1964, 54 (1970) (1970).

<sup>34</sup>The following definition is given in the authoritative textbook *International Law*, published by the Academy of Sciences of U.S.S.R. (1957 in Russian; two German translations in 1960 (East Berlin and Hamburg/Kiel respectively) and one English translation 1961 (Moscow)):

Every people and every nation has a right to self-determination. Self determination consists of a people or a nation throwing off the imperialist control of the bourgeois class. A people or nation that has thus exercised its right of self determination is then independent and equal with every other people. When equal, independent peoples or nations form a state, popular and national sovereignty merge with state sovereignty, and any subsequent attempt to induce a change of the social system or government in that state is an infringement of state sovereignty. However, any people or nation that has not exercised such self determination still has the right to do so and any attempt to induce such a change of the social system or government is not an infringement of the sovereignty of that state. (93-98, 112-118, 176-189).

<sup>35</sup>See generally the account by Schwelb, *supra* note 33, at 55.

<sup>36</sup>*Id.* at 53.

<sup>37</sup>See J. SHKLAR, LEGALISM, 20-24. Compare M. WEBER, LAW IN ECONOMY, 236-237, 304-305; and K. WITT, *http://www.oriental-despotism.com/For\_a\_discussion\_of\_Montesquieu's\_models\_in\_Spirit\_of\_the\_Laws\_(and\_Persian\_Letters)\_see\_J.\_SUNDBERG,\_HAEGERSTROEM\_AND\_FINLAND'S\_STRUGGLE\_FOR\_LAW\_15-29\_(1983).*

treaty, this European identity was then, in 1950, given its own legal monument in the European Convention on Human Rights,<sup>38</sup> a Convention that must be seen as a child of that American constitutionalism which assisted so much at both its conception and at the conception of its basic inspiration: the Universal Declaration.

### *The Rolin Controversy*

When the European Convention on Human Rights was being drafted, the wording of the opening Article was corrected better to convey the overriding character of human rights. A previous text had read that the High Contracting Parties “*s’engagent à reconnaître*” (in English: ‘agree to recognize’) the human rights set out in the Convention.<sup>39</sup> In the course of the final debates in the European Consultative Assembly on August 25, 1950, the issue was spotted by the Belgian delegate, M. Henri Rolin (later judge of the European Court). He proposed to replace the phrase with the word “*reconnaissent*” (‘recognize’) and the change was adopted.<sup>40</sup> After the Convention had entered into force (September 3, 1953) M. Rolin came back to the meaning of the changed wording and he explained the significance at the 5th session of the Assembly:

According to Art. 1 . . . the States did not ‘agree to recognize’ in their legislation, they ‘recognized’: there is all the difference. After this Convention is approved by our Parliaments and ratified, there follows that without the passing of further legislation our courts are fully empowered to enforce the provisions of the Convention.<sup>41</sup>

He could have pointed, furthermore, had he so wished, to Art. 7 of the Convention in which the legacy of the Nuremberg Trials had been directly codified by an explicit reference to “a criminal offence under . . . international law.”

### *The Defeated Nations*

With this as a background, the defeated nations: Germany, Austria and Italy, could see no reason to hesitate in the matter.

The *Bundestag* of the new Federal Republic of Germany approved the Convention in the form of an enactment under Art. 59 of the *Grundgesetz* so that it acquired the force in Germany of a Federal Law (*Bundesgesetz*),<sup>42</sup> and

<sup>38</sup>At the present time there is already an enormous literature on the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and the judicial or quasi-judicial system built around it. I will here limit myself to a reference to the extensive bibliography provided by Prof. Jochen Abr. Frowein *LAWS, RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 12-13 note 4 (J. Sundberg, ed., 1986).

<sup>39</sup>*Cf.* Collected edition of the *Travaux préparatoires*, vol. V, 26. See also H. Golsong, 33 *B.Y.I.L.* 317, 319 note 5 (1957).

<sup>40</sup>Consultative Assembly Reports, 2d Sess. 915 (1950): Collected edition of *The Travaux préparatoires*, vol. VI, 132.

<sup>41</sup>Consultative Assembly Reports, 5th Sess. 341 (1953).

<sup>42</sup>J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969) 10; A. LUINI DEL RUSSO, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 222 (1971).

the Convention was ratified by the Republic on December 5, 1952.<sup>43</sup> A few years later, in a case before the *Bundesverwaltungsgericht*,<sup>44</sup> it was implicitly acknowledged by the Court that the provisions of Section I of the Convention, granting substantive rights (the Bill of Rights), form part of German law and are therefore to be applied by German tribunals.

Italy too tried to jettison her belligerent past and the Italian Constitution of January 1, 1948, adopted international law as part of the national legal system. In Art. 80, the self-executing nature of treaties was affirmed.<sup>45</sup> When the bill for ratification and execution of the European Convention was on the floor of the Italian Senate, Senator Santero remarked in his report on behalf of the Third Permanent Committee on Foreign Affairs:

The most important point of the Convention is that it transfers into the domestic law of signatory states without need of any implementing legislation the rights recognized and protected by the Convention and the Protocol. In fact Title 1 is preceded by Article 1 in which it is stated not that the member states obligate themselves to recognize in their legislations the rights and freedoms defined in Title 1 but that the signatory states recognize to each individual such rights and freedoms. The consequence is therefore that after ratification of the Convention and Protocol the national courts can, without waiting for any additional implementing law, enforce the law of the Convention and of the Protocol.<sup>46</sup>

Italian Law 848/1955, Art. 1, authorized the ratification of the European Convention, and it took place on October 26, 1955.<sup>47</sup>

At the time when the Council of Europe was formed, Austria was still occupied territory. Not being a member of the Council she did not participate in the drafting of the European Convention, and absent membership she could not even ratify. This became possible first when the occupation had been terminated due to the Austrian State Treaty in 1955.<sup>48</sup> Austria ratified the Convention together with the First Additional Protocol on September 3, 1958, and published the instruments in the *Bundesgesetzblatt* No 210/1958, thereby giving the Convention legal effect.<sup>49</sup> Recognizing that the Convention dealt with those fundamental rights which in Austria traditionally had been regulated by the Constitution, the Austrian legislature adopted the Convention as a *Verfassungsgesetz* "thus conferring constitutional law rank upon it."<sup>50</sup>

<sup>43</sup>See J. FAWCETT, *supra* note 42, at 11.

<sup>44</sup>DEUTSCHES VERWALTUNGSBLATT, 57 (1957).

<sup>45</sup>A. LUINI DEL RUSSO, *supra* note 42, at 230.

<sup>46</sup>See *Id.* at 230-33.

<sup>47</sup>See J. FAWCETT, *supra* note 42, at 42.

<sup>48</sup>See generally S. ALLARD, RUSSIA AND THE AUSTRIAN STATE TREATY (1970).

<sup>49</sup>Kohl, *The Influence of the Human Rights Convention on Austrian Law*, 18 AM. J. COMP. L. 237, 238 (1970).

<sup>50</sup>*Id.* at 239.

In these three countries, Germany, Austria and Italy, all prototypes of the defeated Axis powers, Henri Rolin's principle had thus been taken to heart. German, Austrian and Italian courts were fully prepared to find that there was no sovereign right of the state to deny the human rights set out in the Convention.

### *The Battle of the Books*

In Strasbourg, at the center of Europe, the seat of the Council of Europe and the European Commission (and later the European Court) this understanding of human rights as an overriding notion was felt to be a line to press. In 1957, Dr. Heribert Golsong (at that time serving the Consultative Assembly in the capacity of first secretary in the Office of the Clerk, later the Director of Human Rights) published an article in the *British Year Book of International Law* in which he reiterated the familiar Rolin argumentation and asserted that ". . . each State acceding to the Convention would *ipso facto* give full effect thereto in its own legal system."<sup>51</sup> In 1958, in his book *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* (Karlsruhe), he went further. Readers found therein an implied reproach against the United Kingdom for having failed to give effect in their internal legislation to the Convention and he spoke of the view that the Convention forms part of the internal law of the signatory States as 'correct'.<sup>52</sup>

Mr. Norman S. Marsh took issue with the word 'correct'. Several interpretations could be read into this: Correct because of internal law or correct because of the Convention? Mr. Marsh refused to see anything but treaty law in the notion of human rights. He stressed the particularity of:

a State such as the United Kingdom, in which the Executive has full treaty-making power, but with the reasonable limitation, as a matter of internal law, that such treaties cannot, without specific legislation, detract from the rights of the subject (*Walker v. Baird*, [1892] A.C. 491).<sup>53</sup>

By this time the attitude of the United Kingdom to the European Convention attracted general interest in Europe. The United Kingdom had been the first country to ratify the Convention.<sup>54</sup> By declaration of October 23, 1953, she had extended the application of the Convention — only — to a great number (but not all) overseas territories. Due to the political disturbances of the 1950s, however, she very often invoked Article 15 in relation to some of these territories.<sup>55</sup> Having delayed making any declaration according to Article

<sup>51</sup>Golsong, *The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court*. 33 B.Y.I.L. 319 (1957).

<sup>52</sup>H. GOLSONG. DAS RECHTSSCHUTZSYSTEM DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION (1958).

<sup>53</sup>Marsh, Book Review, 34 B.Y.I.L. 459 (1960).

<sup>54</sup>On February 22, 1951, see J. FAWCETT, *supra* note 42, at 17.

<sup>55</sup>See Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*. 12 INT. & COMP. L.Q. 1206, 1210, 1213 (1963).

25, the United Kingdom came to experience, instead, a number of inter-state applications, introduced under Article 24, made by less than friendly other European states for the benefit of human rights victims under British rule. Greece brought applications in 1956<sup>56</sup> and 1957<sup>57</sup> and Iceland was rumored to plan bringing one on behalf of Dr. Banda, leader of the Nyasaland independence movement in Africa in 1960.<sup>58</sup>

Dissatisfaction with the British position was voiced in the British Parliament in 1958 and 1959; the exchange was mercilessly published in the Yearbook of the European Convention. Members of Parliament wondered "what in the world is the good of ratifying a Convention theoretically if one does not accept the application of that Convention?"<sup>59</sup> and how could such a British position be reconciled "with the action the British Government — and in the opinion of most of us rightly — took in regard to the Nuremberg trials? Can one really maintain a view of international law, international rights on the basis that a man may be individually subject to penalties for infractions of it, but not able to claim any rights under the same conception?"<sup>60</sup> The replies from the Ministry of Foreign Affairs were likely to make big echoes in Strasbourg: It was first maintained that "the procedure in the Nuremberg courts was entirely exceptional" (Mr. Ormsby-Gore),<sup>61</sup> and then "that the individuals were prosecuted under laws promulgated by the victors" (Mr. Allan).<sup>62</sup>

It is perhaps not unnatural to read some Strasbourg concern with this position into the formulas used by the European Commission in 1959 to state its reading of the Convention in the case *Szwabowicz v. Sweden*.<sup>63</sup> The Commission stated on June 30, 1959 that "a State which signs and ratifies the European Convention . . . must be understood as agreeing to restrict the free exercise of its rights under general international law . . . to the extent and within the limits of the obligations which it has accepted under the Convention."

Dr. Golsong who had reiterated his thinking in 1961<sup>64</sup> received reinforcement first from Professor Süsterhenn, a member of the European Commission who developed the self-executing nature of Article 1 in his paper "*L'applica-*

<sup>56</sup>Greece v. United Kingdom, Appl. 176/56 (1st Cyprus Case).

<sup>57</sup>Greece v. United Kingdom, Appl. 299/57 (2nd Cyprus Case).

<sup>58</sup>See LUINI DEL RUSSO, *supra* note 42, at 209; Vasak, *supra* note 55 at 1212.

<sup>59</sup>Mr. Brockway, House of Commons, November 26, 1958; see 2 ECHR YB 546 (1958-1959).

<sup>60</sup>Mr. S. Silverman, House of Commons, November 26, 1958; see 2 ECHR YB 547 (1958-1959).

<sup>61</sup>Mr. Ormsby-Gore, House of Commons, November 26, 1958; see 2 ECHR YB 547 (1958-1959).

<sup>62</sup>Mr. Allan, House of Commons, April 27, 1959, see 2 ECHR YB 556.

<sup>63</sup>*Szwabowicz v. Sweden*, Appl. 172/56, 434/58 and 911/60, 2 ECHR YB 354, at 372 (compare 1 ECHR YB 211 and 4 ECHR YB 198). For a discussion of the number of applications, see Weil, *The Evolution of the European Convention on Human Rights*, 57 AM. J. INT'L L. 804, 812 (1963).

<sup>64</sup>Golsong, *Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 123, 129 (1961).

*tion de la Convention sur le plan du droit interne*" (1961)<sup>65</sup> and thereupon, in 1964, from Professor Thomas Buergenthal who wrote that he could not:

but share the conclusion reached by Dr. Golsong and Professor Süsterhenn that Article 13 creates an obligation on the part of each adhering State to transform the Convention into directly applicable domestic law. These scholars both justly note that an individual cannot be said to have 'an effective remedy' to vindicate a violation of the rights and freedoms 'as set forth in this Convention', unless he can actually and effectively invoke the relevant Convention provision before the competent national authority.<sup>66</sup>

By this time the focus of the argument had shifted from human rights to treaty. Buergenthal looked mainly to the international law undertaking, to be determined from the treaty language and its history and the intent of the treaty-makers. He granted that ultimately it must be up to each state itself to determine its law. The result of the exercise could therefore not be to change such law, but possibly to find that the state was in violation of its treaty undertaking.<sup>67</sup>

When Mr. Ralph Beddard came back to the matter in 1967 he therefore could focus on the United Kingdom treaty-making intention never having been to make human rights the law of the land:

There is no evidence that at the time of the drafting of the Convention the United Kingdom foresaw any occasion when it might be called upon to implement the terms of the Convention in its domestic law . . . It must be apparent, therefore, that the United Kingdom did not intend that the Convention should be in a form capable of translation into municipal law.<sup>68</sup>

It may of course surprise many that the United Kingdom representatives of the time should have turned a blind eye to those matters which were evident to Continentals such as Henri Rolin. If it is true that the British Labour Government, in 1950, was unhappy with the rise of European institutions and the European Convention but preferred to be in something which they disliked, thereby being able to influence it, rather than to be out, unable to do anything but watch,<sup>69</sup> it does not seem self-evident that this blind eye should be converted into an intent *not* to follow the line shared by the Continentals. The waning

<sup>65</sup>Süsterhenn, *L'application de la Convention sur le plan du droit interne*, in LA PROTECTION INTERNATIONALE DES DROITS DE L'HOMME DANS LE CADRE EUROPEEN, 303, 305 (1961).

<sup>66</sup>Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, 1965 INT. & COMP. L.Q. 79, 82.

<sup>67</sup>*Id.*

<sup>68</sup>Beddard, *The Status of the European Convention of Human Rights in Domestic Law*, 16 INT. & COMP. L. O. 206, 209 (1967).

<sup>69</sup>The British Labour Government of the time was reportedly notorious in Strasbourg for its unenthusiastic attitude towards the Council of Europe: see T. BROWALDH, *GESÄLLVANDRING*, 107 (2nd ed. 1976).<sup>13</sup>

of the British enthusiasm for the Convention, whenever it occurred, was in the end offset however by the increasing realization that the British Empire was lost and that the British future lay in Europe. The end result came to be that in 1966 the United Kingdom, for the first time, made declarations according to Articles 25 and 46.<sup>70</sup> This indeed brought new life to the European Convention and infused new courage and vitality into the Convention institutions.

#### FRANCE

Publishing the Universal Declaration in the *Journal Officiel* was a success that did not last long. In the end the French courts refused to take notice of the Declaration.<sup>71</sup> France also stayed aloof from the European Convention in spite of the fact that it was one of the original members of the Council of Europe and indeed was the site of the Council and the European Commission and the Court. France did not ratify the European Convention until 1974<sup>72</sup> and it did not make any declaration under Article 25 until 1981.<sup>73</sup> What it did, however, was to assume some kind of responsibility for the European Court, once it was constituted (1959), by having M. Rene Cassin elected as one of the first panel of judges and in the end, indeed, as the President of the Court (1965).

Many of the reasons for this aloofness are to be found in France's turbulent history of the period. The 1950s were dominated by the Algerian war which did not allow paying much respect to the principles of Article 5; the 1960s saw Rene Cassin trying in vain to persuade General Charles De Gaulle to call for ratification, pointing to Cassin's embarrassment when he had to preside over proceedings in which he had to tell other countries that they were violating human rights while his own country had not even ratified.<sup>74</sup>

#### THE AMERICAN GRANDCHILD: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

By the European Convention the Europeans had succeeded to give the principles of the Universal Declaration treaty form, binding within the Council of Europe states. On the international level, the same was attempted by the United Nations General Assembly requesting that the Commission on Human Rights (a body set up by the Economic and Social Council (ECOSOC)) speedily draft a covenant on human rights that would implement the principles of the

<sup>70</sup>A. LUINI DEL RUSSO, *supra* note 42, at 208; Comment, *European Convention on Human Rights*, 1966 CAMBRIDGE L.J. 4-7. The declarations were made on January 15, 1966.

<sup>71</sup>Decisions of the Conseil d'Etat in the case *Elections de Nolay*, April 18, 1951, and in the case *Sieur Car*, May 11, 1960, see 1961 *Journal du Droit International*, 404.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>For this piece of information I am much indebted to Dr. June Burton, University of Akron, who has allowed me access to the paper on Rene Cassin (a manuscript signed September 15, 1981; unpublished) which she read at the 1981 meeting of the Southern Historical Association.

Universal Declaration in treaty form.<sup>75</sup> On December 16, 1966, ECOSOC submitted two draft covenants to the General Assembly for adoption. They were titled "The International Covenant on Civil and Political Rights" and "The International Covenant on Economic, Social, and Cultural Rights." Annexed was an Optional Protocol to the first Covenant permitting individual petitions alleging human rights violations to the U.N. Human Rights Committee.<sup>76</sup> It took ten years before the first Covenant and the Optional Protocol had collected enough ratifications, but on March 23, 1976 they both entered into force.<sup>77</sup>

Given this history and the success of the European system it was but natural that the new United Nations system for the protection of "civil and political rights" should in many ways reflect the European experience with a judicial protection of human rights, in particular in the adversarial aspects of the proceedings under the Optional Protocol.

But the U.N. system was more than the European one. It was global in its ambitions. By global representation on the 18 member Human Rights Committee, including members from the Soviet Union and the German Democratic Republic, and by globally dispersed ratifications of the Covenant on Civil and Political Rights, the U.N. system succeeded to bring in under its aegis as much greater diversity of legal philosophies than had ever been the ambition of the European system. The fact that the European Convention had exercised so much influence in the drafting of the U.N. Covenant meant that the European Convention now radiated also into areas of the world which previously had been completely closed to it. And at the heart of this radiation was American Constitutionalism. But the United States was not a party to the Covenant and did not intend to become one for reasons established already in the days of the Bricker Amendment.<sup>78</sup>

#### THE AKRON SYMPOSIUM

This was the background of the Akron symposium on human rights as comparative constitutional law. The purpose of the symposium was to expose U.S. constitutional and international law experts to the working of these human rights protection systems in which decisions under the U.N. Covenant for Civil and Political Rights and the European Convention on Human Rights have arrived at an independent and influential, if not even precedent-setting role in relation to the national courts. Decision making by the U.S. Supreme Court is the focus of the teaching of Constitutional Law in the United States.

<sup>75</sup>Cf. Hendrick, *An International Bill of Human Rights*, 18 DEPT. OF STATE BULL. 195 (1948).

<sup>76</sup>G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52-58, U.N. Doc. A/6546 (1966).

<sup>77</sup>Note, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511 (1976).

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<sup>78</sup>See *supra* note 29.

Having a number of European human rights cases, decided by the European Court on Human Rights, their structure and reasoning allows a useful comparison with corresponding U.S. Constitutional Law cases. The work of the Human Rights Committee set up under the U.N. Covenant which applies to Canada (but not yet to the United States) is in many ways parallel to the work of the European Court; and the examination of national reports under Article 40 of the Covenant allows the Human Rights Committee an insight and an influence which goes far beyond what has been possible for the European Convention organs. All this set the stage for an exchange of views between experts from Canada and Europe who had first hand knowledge of the working the U.N. and the European human rights protection systems, and American experts who could test their American experience by comparing it with the international one. As organizer of the symposium I hoped that this exchange would turn out to be a fruitful one. I think that the symposium has lived up to those expectations.

Akron, December 14, 1986.

## WELCOME

by

DONALD M. JENKINS\*

I want to bid our visitors welcome. I would like to give you just a little background, a little insight, into Dr. Sundberg's position here with reference to the Brennan Chair. We were very fortunate, some two years ago, to be blessed with the endowment of this Chair for whatever purposes the Law School could best serve our community. The inaugural holder of the Brennan Chair was the Honorable Arthur J. Goldberg, who served the United States as the United States Supreme Court Justice, as Ambassador to the United Nations, and as the U.S. Secretary of Labor. In his capacity as the Brennan Professor of Law in 1984, he not only taught constitutional law in our law school, but he also left a legacy — a legacy which I am happy to see the present holder of the Chair, Professor Jacob Sundberg, is continuing and has made the major theme of this Symposium. While ambassador to the United Nations in 1965-1968, Justice Goldberg urged his country to assume a leadership role and champion the adoption of what came to be called the International Covenant on Civil and Political Rights drafted by the United Nations to implement the Declaration of Human Rights; and he said, "and we should adopt such a treaty without reservation for none is needed or justified." He continued, "the time is overdue for the adoption of a binding treaty on human rights to implement the Declaration and for the establishment of an International Court of Human Rights to enforce the rights guaranteed by such a treaty."<sup>1</sup> He added, "some men of good will believe that world justice through the rule of law can only be achieved through the creation of a full-fledged super-state in which all nations are merged."<sup>2</sup> Justice Goldberg did not share this view. His belief, he said, "accepts the premise of the late Dean Roscoe Pound that: 'all states need not be merged in a great world state, in which their personality is lost in order that their conduct may be inquired into and ordered by the authority of a world legal order.'"<sup>3</sup>

Justice Goldberg continued:

others object to the signing of the proposed treaty guaranteeing international due process on the ground that this would tend to undermine the sovereignty and independence of the separate states. The simple answer to this states' rights contention is that there is no sovereign right of any state, large or small, to deny the fundamental rights of man — rights which belong to him because as a child of God, he is endowed with human dignity.

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<sup>1</sup>Arthur J. Goldberg, *The Need for a World Court of Human Rights*, 11 *How. L.J.* 621 (1965).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

Moreover, the experience, since the creation in 1953 by the fifteen countries of the Council of Europe of the European Court of Human Rights and the Commission on Human Rights, demonstrates that an international forum and procedure for their enforcement can operate practically and without infringing upon true national sovereignty.<sup>4</sup>

While serving on the Supreme Court of the United States in 1962-1965, Justice Goldberg at times practiced the principle outlined in his 1965 address, that there can be no sovereign right to disregard human rights, and the meaning of human rights must be ascertained with the help of a comparative study. It is a matter of considerable interest that in the years since World War II there has been, in many countries, growing interest in securing human rights by judicially enforceable constitution-like guarantees. This Symposium is intended to acquaint our American audience with some important manifestations of this interest.

This interest is manifested in the relatively recent International Covenant on Civil and Political Rights with its accompanying Optional Protocol, which we will discuss during the course of the Symposium, in their relationship, among others, to the Charter of Rights and Freedoms in the new Canadian Constitution; and the European protection that has emerged in Europe during the last three decades under the European Convention on Human Rights and to a lesser extent under the Common Market Treaty. The intrinsic interest of these developments is alone, of course, a sufficient reason for acquiring some familiarity with them; but there are also more pressing reasons. And I would note the United States has spoken out publicly countless times in support of the Charter, and specifically, in support of its human rights provisions. If we Americans are to remain true to our word, we must be astute to seize all opportunities to give these provisions real meaning and force. Only on a rather high level of abstraction can the issues and arguments confronted in Europe and Canada be said to be the same as those that the United States is confronted. What, then, are the differences — and why are these differences? The point is not that we can readily transfer to the United States conclusions reached in Canada or Europe, but that a consideration of the applicability of their experiences to the United States will deepen our understanding of the issues we face and open the way for a possible U.S. ratification of the International Covenant. The traditional insularity of American law, especially its constitutional law should not stand in the way of a use of foreign experience; and the constitutional lawyers will be the first to spot the difficulties and also suggest the way to master those difficulties. It was to them, the constitutional lawyers in the first place, that Justice Goldberg spoke in his 1965 address:

if we in the United States are faithful to our own Bill of Rights, we need no reservations in a treaty pledging adherence to an international bill of

rights which mirrors our own. If we are faithful as a people and through our national forums to our own constitutional commands, we will not be called upon to answer before an international forum.<sup>5</sup>

With that as the tone, let me welcome each and everyone of you with the hope that what we do here will be an important Symposium in the American legal history and its relationship to human rights.



# THE CANADIAN EXPERIENCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS SEEN FROM THE PERSPECTIVE OF A FORMER MEMBER OF THE HUMAN RIGHTS COMMITTEE

by

WALTER S. TARNOPOLSKY\*

THE UNITED NATIONS AND THE INTERNATIONAL BILL OF RIGHTS\*\*

## *Immediate Pre-Charter Influences*

A direct precursor of post-World War II actions in human rights was President Roosevelt's January, 1941, address to Congress in which he proclaimed the Four Freedoms: of speech, of religion, from want and from fear. In response, Prime Minister Churchill added that racial persecution must end. As a result, when they met in the mid-Atlantic, in August, 1941, they proclaimed the Atlantic Charter. When, on January 1, 1942, some 26 allied countries joined in a "Declaration by United Nations," the preamble subscribed to the purposes and principles of the Atlantic Charter and the Declaration affirmed that victory was "essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice."

## *The Charter*

Although many of the smaller powers at the San Francisco Conference tried to introduce amendments that would have added some form of a Bill of Rights, or at least a declaration of rights in the Charter, in the end this was not done. Nevertheless, references were made in the preamble and in some five or six articles:

- 1(3) — purposes of the U.N.
- 13(1)(b) — General Assembly studies and recommendations
- 55(c) and 56 — pledge for joint and separate action
- 62(2) — Ecosoc
- 68 — Ecosoc to set up Commissions
- 73 — Non-self-governing Territories
- 76(c) — Trusteeship system

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\*Mr. Justice Walter S. Tarnopolsky is Justice of the Court of Appeals of the Province of Ontario and was previously Canada's member of the Human Rights Committee (Geneva/New York) (1977-1983). He has pursued an academic career that started at the University of Saskatchewan in 1959 and carried him to several Canadian universities. His books include *THE CANADIAN BILL OF RIGHTS* (1966, 1975) and *DISCRIMINATION AND THE LAW IN CANADA* (1983).

\*\*I have lectured on this topic at the Universities of Calgary, Manitoba, Ottawa, Toronto and Saskatchewan in Canada and at the International (René Cassin) Human Rights Institute at Strasbourg. Therefore, it will surprise no one that this part of my paper is an update and revision of these earlier lectures.

*The International Bill of Rights*

Pursuant to a recommendation of the General Assembly in January, 1946, Ecosoc created the Commission on Human Rights, pursuant to Charter art. 68. The Commission, composed of representatives of states, was mandated to submit proposals, recommendations and reports to the Council on:

- (a) an International bill of Rights;
- (b) international declarations or conventions on civil liberties, status of women, freedom of information, etc.;
- (c) protection of minorities;
- (d) prevention of discrimination on grounds of race, sex, language or religion;
- (e) any other matter not covered.

At its Second Session, in 1947, the Commission decided to proceed to prepare:

- (1) a draft Declaration of Human Rights;
- (2) a draft Covenant of Human Rights;
- (3) measures of implementation;

together constituting the International Bill of Rights.

The draft Declaration came before the General Assembly's Third Committee early in 1948. Eighty-five meetings later the draft was approved by the General Assembly on December 10, 1948. In the Resolution proclaiming the Universal Declaration, the General Assembly asked Ecosoc to request the Commission to give priority to preparing a draft Covenant. This was started in 1949. (While that work proceeded, the Commission also drafted a series of declarations and conventions on specific human rights topics, e.g., Refugees, Forced Labour, Racial Discrimination, etc., for eventual submission to and adoption by the General Assembly.)

In 1952, the General Assembly decided that it was necessary to prepare two Covenants and, by 1954, the Commission approved the draft of two Covenants — one on Economic, Social and Cultural Rights (C.E.S.C.R.) and one on Civil and Political Rights (C.C.P.R.). It took another 12 years, until December 16, 1966, before the two Covenants and an Optional Protocol to the C.C.P.R. (providing for individual "communications" (complaints)) were adopted by the General Assembly.

Both Covenants required 35 ratifications in order to become effective three months thereafter. This took another nine years. In the case of the C.E.S.C.R., the 35th ratification came on October 3, 1975, and so that Covenant came into effect on January 3, 1976. The C.C.P.R. came into force on March 23, 1976, after the 35th ratification was deposited on December 23, 1975. The Optional Protocol came into effect on the same day since only ten ratifications were necessary, and by that time, there were already twelve. Arti-

cle 41 of the C.C.P.R. provides for an optional declaration to accept State party-to-State party complaints. This also required ten ratifications to come into force, but this did not occur until December 28, 1978, effective the usual three months later.

The situation to date is that, of the 155 plus members of the United Nations, over 84 have ratified the Covenant. Of these about 38 have ratified the Optional Protocol, and some 18 have made the requisite declaration under Article 41. Only the five Nordic countries, plus Ecuador, Italy, Luxembourg, Netherlands, Senegal, Spain, Peru and Canada have accepted all three forms of obligation. Of the 18 countries that have made the optional declaration under Article 41, 15 are from the group known as Western Europe and Others (WEO's); the other four are Ecuador, Senegal, Peru and Sri Lanka.

Among the major countries in the world which have not ratified the Covenant are: Brazil, China, Indonesia, Nigeria, Pakistan, and the United States. On the other hand, all East European countries have ratified the Covenant, but not the two optional obligations. It is not likely, in my opinion, that they will do so in the near future. Nevertheless, it is very important to recognize that East Europeans accept the view that, to the extent that they ratify an international treaty like the Covenant on Civil and Political rights, it is not an interference in domestic jurisdiction. It cannot be emphasized enough that the Human Rights Committee is the only international forum from which the Warsaw Pact countries have accepted questioning on their human rights record and to which they have responded. They cannot and have not rejected such questioning as an interference in domestic jurisdiction. Whether their responses to the questioning are sufficiently complete, and whether this has made any difference to their domestic human rights record, is another question. However, it must be recognized that their ratification of the Civil and Political Rights Covenant has given them some considerable ammunition for their response to the United States in the Helsinki Follow-up Conferences. They have adopted international human rights commitments, which are found in the International Bill of Rights, while the United States has not.

### *The Human Rights Committee*

#### The Committee

By art. 28 of the Covenant, the Human Rights Committee is to consist of eighteen members. The requirements set out for consideration for election to the Committee include:

- a) "high moral character"
- b) "recognized competence in the field of human rights"
- c) "legal experience"
- d) "equitable geographical distribution"
- e) "different forms of civilization"
- f) "representation of the principle legal systems."

Of all of these supposed requirements, one can state the following: all members have had legal training; despite art. 3 of the Covenant, there were no women members until 1983; and the most important factors appear to be geographical distribution and effectiveness of the lobbying of the nominee's country's representatives in New York.

A very important characteristic of a Committee member, according to art. 28(3) of the Covenant, is that he is to "serve in a personal capacity." This means that no member is representative of his government. Nevertheless, if one takes into account that the Human Rights Centre (which is the civil service of the United Nations in the human rights field), has added only one or two officers to its staff to work for the Committee, and if one keeps in mind that the United Nations Secretariat does absolutely nothing to make hotel or travel reservations, provides no secretarial services other than to type penultimate drafts, one can see why all members have had to fall back on their own missions for support facilities. As a result, although all "serve in a personal capacity," obviously, some members' "capacities" are more personal than others.

### Method of Work

Article 39 of the Covenant provides that officers of the Committee shall be elected for two years. In that election the most important rule is the unwritten one that the officers of any such organ must reflect the five geographical regions. Thus, at the first session, after each member took the solemn declaration to perform his functions "impartially and conscientiously" as required by Article 38. When reelection of the officers was called, the Committee adjourned immediately to caucus and negotiate as to who the officers would be. When it was decided, after some considerable negotiation, who would be Chairman (as it turned out, the choice of Andreas Mavrommatis from Cyprus was so fortunate that he has been Chairman ever since), the selection of the other officers was easy, with one from each of the other four geographical regions.

There is currently in international fora great pressure for the making of decisions by consensus. Art. 39(2)(b) of the Covenant provides that decisions of the Committee shall be taken by a majority vote of those present. Of the 15 days that were spent at the first session on the rules of procedure, fully one-third were spent on Rule 39(2)(b). The members from Eastern Europe were absolutely insistent that the Committee should take its decisions by consensus. The members from the West insisted on applying art. 39(2)(b). Most of the members from the Third World tended to agree with the West, but were not prepared to push for a vote. The end result is that Rule 51 of the Provisional Rules of Procedure makes reference to a footnote, which is a quotation from the records of the meeting, and reads as follows:

method of work normally should allow for attempts to reach decisions by consensus before voting, provided that the Covenant and the rules of procedure are observed and that such attempts do not unduly delay the work of the Committee.

. . . Bearing in mind paragraph 32, the Chairman may at any meeting and at the request of any member shall put the proposal to a vote.

In the ten years of the existence of the Committee no vote has ever been taken. All decisions have been achieved by consensus. The only possible exception is that in the "Final Views" (decisions) under the Optional Protocol a number of the Committee have appended dissenting views, which might be considered a form of dissenting vote.

As a result of proceeding by consensus in the taking of decisions, and because precedent is extremely important in international proceedings, the usual procedure with respect to taking a decision on some new matter is that all the contending views are stated for the record. It becomes very important to put on the record whatever one agrees or disagrees with, because whatever is on the record becomes the basis of negotiation for the consensus. At that point there is usually no further discussion on the record, but rather negotiations take place over meals, early in the mornings, late at nights, whenever and wherever, until a consensus is reached. At that point, the Chairman reads into the record what the consensus is. Two matters will be seen to arise from this. The first is that the role of the Chairman becomes extremely important. The second is that it is inordinately difficult for scholars, who have available to them only the written record, to know how the Committee got from the disparate views originally expressed, to the consensus which is read into the record.

#### Problems of Interpretation and Their Effect on Working Procedures

Article 40(1) requires each State Party to submit a report on its fulfillment of Covenant obligations: (a) within one year of ratification, and (b) thereafter whenever the Committee so requests. (These reports vary in length from 1 page to Canada's 468 pages, with the average being around 20 to 30 pages.) Then, para. 4 of art. 40 provides:

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

What faces the Committee is that the State Parties, in addition to attempting to meet conscientiously their obligations, inevitably avoid, prevaricate, exaggerate, and, yes, even lie. Many reports can be characterized as being "Stakhanovite," in the sense that the country claims not only to have fulfilled

its obligations under the Covenant, but to have overfulfilled them. Thus, for example, the report of Czechoslovakia in para. 2 thereof states:

The rights contained in . . . the Covenant are guaranteed in the Czechoslovak Socialist Republic by the constitution . . . and by other constitutional acts and laws which frequently protect the civil and political rights of citizens to a greater extent than that required by the Covenant . . . These laws are consistently observed in legal and political practice, which itself is in full conformity with the Covenant, and, in certain cases is more advantageous than as anticipated by the Covenant.

Further, in the same report there is the following claim:

As is obvious from the Report with regard to other articles of the Covenant, the legal system and the implementation of laws in the Czechoslovak Socialist Republic fully satisfy and, in a number of cases, surpass the requirements of the Covenant. Therefore, restrictions on any of the rights or any of the freedoms as recognized by the Covenants as a result of incorrect interpretation of The Covenant are impossible.

If one refers to para. 40(4) quoted earlier, there is nothing about questioning and yet, since many reports leave many unanswered questions, (while many others are too brief or inadequate to provide any useful information), the Committee has to submit questions to which it expects responses. In some cases these responses are given orally within a day or two, in others they come in writing, but in whichever way they are made, the crucial test of effectiveness will come when each State Party returns before the Committee for its next periodical report, which has been decided upon as being every five years.

A further difficulty of the work of the Committee is that the Covenant requires reports on "measures . . . adopted which give effect to the rights recognized . . . and on the progress made in the enjoyment of those rights." There is a further reference in para. 40(2) that "reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant." However, there is nothing in any part of art. 40 which refers to treatment of individuals, or, if one wishes, to individual cases. Therefore, one does not raise individual cases. Furthermore, para. (4) contemplates that the Committee shall "study" *the reports of the States Parties*. There is no recognition of a right to refer to any other sources, such as newspaper accounts or information received from non-governmental organizations (NGO's). And yet, without the information available from such groups (as e.g. Amnesty International, the International Commission of Jurists, the International League for Human Rights and various church groups and public interest groups) the Committee would have very little information. Some argued that there should be the right to the making of such references, but there has never been a Committee decision clearly affirming or negating this right. Until a consensus is reached, each side is cautious in its reference to such sources, although everyone at one

time or another has made such reference.

One of the major problems faced by members of the Committee is how to compare the performance of countries with very different standards of economic development, or very different political systems by the gauge of the same Covenant. How does one compare Sweden with East Germany or Czechoslovakia with the Malagasy Republic? This author takes the view that the same standard applies to everyone, but that a number of provisions, i.e., article 12, concerning freedom of movement, and articles 18, 19, 21 and 22, concerning the fundamental freedoms, have specific limitations clauses permitting restrictions. Therefore, where a State Party is honest enough to admit that its national security or public order or public health is in jeopardy because of economic or social conditions, one might recognize the validity of certain restrictions. Thus, i.e., the oral report of the Malagasy Republic included the following:

260. The representative pointed out that the promotion of civil and political rights in his country had been hampered by the *lack of judicial facilities*, the *sharp rise in crime* and the *worsening of the economic situation as a result of the world economic crisis*. The last two factors necessitated the adoption of measures restricting the enjoyment of certain rights and freedoms in order to protect society and the economic order. These measures included, according to ordinances issued in 1976 and 1977, the *suspension of the publication of newspapers and periodicals guilty of disturbing public order*, of *undermining national unity or of offenses against public morality*; the establishment of *six special economic courts* and special *criminal courts* aimed at controlling the crime wave. He also referred to *two ordinances* that had been enacted as exceptional measures to restrict the *movement*, or *fix the residence*, of persons regarded as a *threat to public order* or known to engage in *acts of banditry*. He pointed out, however, that these two measures had been resorted to very rarely.

In a case such as this, one can understand the need for restrictions. However, in the case of a "Stakhanovite" report there seems to be no justification for restrictions such as extended periods of imprisonment for non-violent dissent, or for peaceful advocacy of a change of governmental system or the right to assemble and associate to bring about such change by nonviolent means.

### Issues and Interpretation Concerning Article 40 Reports

A number of matters arise from the differences and backgrounds of the members of the Committee, especially those from the West and those from the East. The author recognizes the utmost good faith on the part of fellow members in the questions they pose and the views they expound. The following illustrates some very different approaches that result from such differences.

*Independence and Impartiality of the Judiciary* — Paragraph 14(1) requires a "fair and public hearing by a competent, independent and impar-

tial tribunal established by law.” It seems impossible to understand how a judge can be independent in the German Democratic Republic when art. 94 of the Constitution provides that only “persons *loyally devoted to the people and their socialist state*, and endowed with a high measure of knowledge and experience, human maturity and character may be judges,” and when art. 95 provides that all judges are elected “by popular representative bodies or directly by the citizens,” and that they “account to their electors on their work” and further, that “they may be recalled by their electors if they violate the Constitution or the laws or commit a serious breach of their duties.” In these circumstances it is difficult to see how judges can be independent.

On the other hand, when the United Kingdom and Canada presented their reports, several of the author’s Eastern colleagues asked such questions, concerning the judiciary, as: What is their social origin? From which economic and social class do most judges come? How many of them are children of workers? How many are women? These Committee members asked, “If judges are appointed mostly from amongst white, middle-class males, how can they be ‘impartial,’ either with respect to disputes concerning women or with respect to disputes concerning workers?”

*“Parasitism” or “Anti-social Behaviour?”* — Information came that, in Czechoslovakia, people who had signed *Charter 77* or refused to denounce those who had signed it, were not given jail sentences, but rather, were fired from their jobs. If one then was not prepared to work as a street cleaner or bottle washer, and one did not earn one’s livelihood, but had to rely upon gifts of food or clothing from friends or relatives, then one was charged under the Penal Code with “parasitism.”

On the other hand, when considering the report of Sweden, the members were informed that there was, on the statute books of that country, an Act called “An Act on Anti-Social Behaviour.” Under this statute a person who could not get along in society, and who could not be helped or induced to adopt a normal, productive life, could be dealt with in a program of special retraining. From one point of view this was a statute very similar to the one prohibiting “parasitism.” However, as the Swedish representative explained, no one had been dealt with under this statute since World War II. Nevertheless the difference was not that clear. The reader will be happy to learn that after this exchange in the Committee, the Swedish Parliament repealed the statute.

*Written and Unwritten Constitutions* — In comparing Constitutions, Western members have difficulties with provisions such as those in the Constitution of the German Democratic Republic, for example, art. 1 of which provides that “the German Democratic Republic is a socialist state of workers and farmers.” Similarly, art. 4 provides:

All power serves the welfare of the people. It insures a peaceful life,

*protects socialist society and guarantees a socialist way of life for the citizens . . .*

Particularly questionable is a provision like art. 6, para. (2) of which provides:

. . . The German Democratic Republic is an inseparable part of the community of socialist states.

On the other hand, the reader can imagine the difficulty that some of the East European members have with the situation of the United Kingdom, where there is *no* written constitution. One member asked: "You say that there is freedom of speech and of the press; but why can you not show me the constitutional provision, or any other law, which so provides? You tell us that one of the fundamental principles of your constitution is Parliamentary supremacy. This means that Parliament can do anything, including taking away any rights, and no court in the country can stop Parliament. Further, under your law, evidence is admissible even if illegally obtained. If so, how can you say that the legal rights required under the Covenant receive protection when your police can contravene these rights and the evidence will still be admissible?"

*"Property, Birth or Other Status"* — With respect to the Constitution of the United Kingdom, another point raised by many members was that The House of Lords was a contravention of art. 25 of the Covenant which provides equal access to legislative bodies without discrimination on, among other grounds, "social origin, property, birth or other status." Mr. Ivor Richard, who was the United Kingdom representative appearing before the Committee, protested that the House of Lords has no power and that he, for one, would not want to be a member of it. That may be true, of course, but the law concerning the role and status of the Upper Chamber gives it constitutional power, and a hereditary peerage would seem to be in contradiction with art. 25 of the Covenant.

A further example of the possible contravention of art. 25 arises out of the nationality rules for permanent appointments in the British civil service. Thus, for example, a candidate cannot be appointed to work in the Cabinet Office or the Ministry of Defense unless "(1) at all time since his birth he has been either a British subject or a citizen of the Irish Republic and (2) he was born in a country or a territory which is or then was within the Commonwealth or in the Irish Republic and (3) each of his parents was born in a country or territory which is within the Commonwealth and is or was at death a British subject or citizen of the Irish Republic and has or had been one or the other at all times from birth." For the diplomatic service the requirements are only slightly less stringent. It is difficult to see how these requirements can be reconciled with the prohibition of discrimination on the grounds of "national . . . origin, . . . birth or other status." The author raised this issue, but received no satisfactory answer.

### The Optional Protocol

Only four issues will be raised in the following subsection:

- (a) only half of the states ratifying the Optional Protocol have had communications against them;
- (b) the written procedures cause delays;
- (c) what is a fact?
- (d) no follow-up.

*Only half the ratifying states have had communications against them.*

Why is this so? One can only guess, but the author believes it is because no one in the countries concerned, perhaps not even a government law officer, knows that the country has ratified the Covenant, much less the Optional Protocol. It seems that the lawyers in these countries have not been informed and have not informed themselves sufficiently about international petition procedures. Members of the Committee have come to realize this and so more questions are being posed to State Party representatives about the kind and extent of publicity being given in their country concerning the ratification of the Covenant, the ratification, if any, of the Optional Protocol, and even the fact of the consideration of the State Party's report under art. 40 of the Covenant. Here is a great service that NGO's could provide, in helping such publicity.

*The Delays of Written Procedures.* Articles 2, 4(2) and 5 of the Optional Protocol make clear reference to "written" procedures. Some members have urged that this does not preclude oral hearings, but no consensus has emerged on this issue and so none have been held. The written procedure, however, results in delays because (i) the Committee meets only three times a year and only a few interim mechanical procedures can be carried out by the Secretariat; (ii) responses to observations, passing by mail, take a long time; and (iii) frequently, only after several exchanges of observations, does some vital fact come out which then requires further questions and responses.

*What is a fact?* If there is free communication on the part of the victim, and if the State Party replies fully and specifically, then one has a fairly complete case for the Committee to consider. However, if either is not the case, then how does the Committee decide what the facts are? Some members have insisted upon corroboration of allegations. This is frequently difficult to obtain, particularly if the author of the communication is not the victim and is even abroad. Some members (of which the author was one) have urged that an allegation not specifically investigated by some impartial agency and not specifically repudiated, has to be taken as fact, particularly in the absence of oral procedures.

*No follow-up.* Article 5(4) of the Optional Protocol provides: "The Committee shall forward its views to the State Party concerned and to the individual. There is nothing about responses or a follow-up review. By an evolutionary process the Final Views have started to include some requests for in-

formation on what the State Party will do. However, the Committee has felt it has no power to apply further pressure for compliance. Some representatives on the Third Committee of the General Assembly have raised compliance questions. This should be expanded. It appears, further, that States Parties concerned should be questioned about compliance during consideration of their art. 40 reports. In the end, it is the publicity referred to in the next topic that may be most influential.

### Effectiveness

It has to be recognized that the Human Rights Committee has no enforcement powers for its supervising mandate, except the pressure of world public opinion. In that line the greatest problem is that the work of the Committee receives very little publicity, especially in the United States media. Without such publicity there is not much pressure of world public opinion. Probably the reason for the absence of United States media coverage is that to them, anything that the United States is not involved in cannot be important.

The greatest amount of publicity given to the work of the Committee is by such international NGO's as Amnesty International, the International Commission of Jurists, the International League for Human Rights, and various church groups. Not only are they extremely important in terms of supplying information to the Committee, but also, at the other end of the process, they are invaluable in alerting public opinion to the work of the Committee.

In fact, in terms of actual individuals who have been protected and aided and released, there is no doubt that the NGO's could probably claim greater success than official United Nations bodies. On the other hand, these NGO's operate on the basis of urging the application of certain standards. The NGO's have no authority to lay down these standards. That can only be done by governments themselves and so, clearly, both governmental and non-governmental institutions must work together for greatest effectiveness.

If this survey of the work of the Human Rights Committee has sounded too cynical or too critical, remember how recently international supervision of domestic implementation of human rights has been accepted. In other words, it is unfair to gauge progress in this field by measuring from one hundred per cent. Rather, one has to measure from zero. And from that point of view there has been progress.

## CANADA AND THE UNITED NATIONS ACTIVITIES IN HUMAN RIGHTS

### *The Influence of the United Nations on Canadian Human Rights Instruments*

If one considers that for the first twenty years of the Human Rights Division of the United Nations (1946-66) a Canadian, Dr. John Humphrey, was the Director, if one considers the conscientious involvement of Canada in

United Nations human rights activities during the past twenty years; and if one considers the impact of United Nations human rights instruments on domestic implementation in Canada since the Universal Declaration of Human Rights (U.D.H.R.) on December 10, 1948, it is surprising that Canada very nearly abstained from voting for its adoption. When, four days earlier, the Third Committee recommended the U.D.H.R. for adoption, Canada abstained, along with Byelorussia, Czechoslovakia, Poland, Ukraine, the U.S.S.R. and Yugoslavia — Saudi Arabia and South Africa did not vote. The main reason given was that most rights were within the jurisdiction of the provinces.<sup>1</sup> In fact, within a few years the legislative jurisdiction of Parliament was shown to be greater than believed up to the end of the World War II.<sup>2</sup> Interestingly enough, one of the factors in Canada's lukewarm interest was the strong opposition of both the Canadian and American Bar Presidents who considered the Universal Declaration to be "pink" and too "revolutionary."<sup>3</sup> In any case, probably because of the company in which Canada would have found itself, new instructions were sent out and, on December 10, 1948, Canada voted in favor of the U.D.H.R.

Even before then there was action in Parliament, at the 1947 and 1948 sessions, with reference to implementation in Canada of our obligations under the United Nations Charter.<sup>4</sup> In May and June of 1947 a joint special committee of the Senate and House of Commons on human rights and fundamental freedoms was appointed. Its terms of reference were:

1. To consider the question of human rights and fundamental freedoms and the manner in which these obligations accepted by all members of the United Nations may best be implemented;
2. What is the legal and constitutional situation in Canada with respect to such rights;
3. What steps, if any, would be advisable to take or to recommend for the purpose of preserving in Canada respect for and observance of human rights and fundamental freedoms.<sup>5</sup>

The session was ending and only two witnesses were heard. In the 1947-48 session the committee was reconstituted but, after considering replies from the provincial attorneys-general and law deans, the Committee reported: "Your Committee is of opinion that to enact a Bill of Rights for Canada as a federal statute would be unwise for the following among other reasons: The power of

<sup>1</sup>J. Humphrey, *Human Rights and the United Nations: A Great Adventure* 71-72 (1984).

<sup>2</sup>See, e.g., Scott, *Dominion Jurisdiction Over Human Rights and Fundamental Freedoms*, 27 Canadian Bar Review 497 (1949). For the background to these events see W.S. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS*, 3-14 (2d ed. 1975).

<sup>3</sup>J. HUMPHREY, *supra* note 1, at 79.

<sup>4</sup>For the debates, See Can. H.C., *Debates* 3139-83, 3199-236, 3422-26; (1947), 2842-3035 (1948).

<sup>5</sup>Can. H.C. & SEN. JOINT COMMITTEE ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *Minutes of Proceedings and Evidence*, 1 (1947).

the Dominion Parliament to enact a comprehensive Bill of Rights is disputed."<sup>6</sup>

Within two years, however, in 1950, the Senate appointed a special committee on human rights and fundamental freedoms. The terms of reference required the committee to consider a number of draft articles. These were clearly based in large part on the Universal Declaration of Human Rights.<sup>7</sup> After hearing from a large number of individuals and groups who presented arguments in favor of a role at the national level,<sup>8</sup> the Committee recommended the adoption of a Declaration of Human Rights limited to its own jurisdiction.<sup>9</sup>

In any event, the government did not submit a bill of rights for the consideration and adoption of Parliament. Another ten years passed (August 10, 1960) before the Canadian Bill of Rights became law. Nevertheless, the deliberations of the two parliamentary committees, directly inspired by the United Nations Charter and the Universal Declaration of Human Rights, probably did forward the adoption of the Canadian Bill of Rights. The international experience provided a further argument favoring the need in Canada for a written charter or declaration rather than continually relying only upon the British constitutional principles of parliamentary sovereignty and the rule of law as found in regular court decisions and ordinary statutes.

It is with respect to egalitarian human rights that the influence of the United Nations had the earliest impact on Canadian laws. The evolution through fair practices legislation, on the New York model, to comprehensive human rights (anti-discrimination) codes administered by Human Rights Commissions (comparable to the United States Civil Rights Commissions) has been led by Ontario. In 1951, when introducing *An Act to Promote Fair Employment Practices* in Ontario, Premier Leslie M. Frost stated that it was in accordance with a line of policy followed since 1944 with enactment of specific criminal prohibitions of racial discrimination. He went on to state that there was a second reason for the introduction of this legislation: "... we are taking a further step which is in accordance with the universal declaration of human rights as proclaimed by the United Nations, under whose banner we are."<sup>10</sup> With every succeeding enactment, through equal pay and fair accommodation practices legislation, up to the enactment of the Ontario Human Rights Code

<sup>6</sup>*Id.* at 211 (1947-48).

<sup>7</sup>CAN. SEN., SPECIAL COMMITTEE ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *Minutes of Proceedings and Evidence*, i-iii (1950).

<sup>8</sup>*Id.*, Scott, *supra* note 2 at 16-31; (Association for Civil Liberties) 40-47; (the Canadian Jewish Congress) 69-73; (Canadian Congress of Labour) 78-80; (Canadian Association for Adult Education) 138-41; (Canadian Civil Liberties Union) 151-64; (Canadian Committee for a Bill of Rights) 205-12.

<sup>9</sup>*Id.* at 306.

<sup>10</sup>ONT. LEG., *Debates* vol. 11, A-4 (1951). When the federal government introduced the Canada Fair Employment Practices Act in 1953, the Minister of Labour indicated that this legislation was in accord with Canada's participation in the International Labour Organization and the United Nations. For the detailed provisions of the Act, he indicated that the federal government had looked to similar statutes in Ontario and New York. CAN. H.C. *Debates* 3762-3 (1952-53).

in 1961, references were made to the U.D.H.R. Thus, the preamble to the Code, through all subsequent revisions, affirmed the influence of the United Nations: “. . . [R]ecognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations.”<sup>11</sup>

While this evolution in Canada's anti-discrimination laws was taking place, the issue of extending the Bill of Rights to the provinces and of entrenching it in the Constitution arose again. In February, 1968, at the opening of a new round of Federal-Provincial conferences seeking agreement to an amending formula and other constitutional changes, the federal Minister of Justice (a few months later Prime Minister) Pierre Elliott Trudeau, tabled a proposal for “A Canadian Charter of Human Rights,”<sup>12</sup> which would be entrenched and applicable to the provinces. Appended thereto were, *inter alia*, the U.D.H.R., the two Covenants, the Racial Convention and the European Convention. In the “Introduction” Prime Minister Pearson pointed out that 1968 was a “particularly appropriate year” for such a proposal because it had been “named Human Rights year by the United Nations General Assembly.” In the text itself reference was made to: the International Human Rights Year; the reference in the preamble of the U.N. Charter to “fundamental human rights”; the U.D.H.R.; the some fifteen conventions on rights of a specialized character; and the two Covenants adopted just a short while before.<sup>13</sup> This was followed with this challenge: “It is the hopeful expectation of the General Assembly that in 1968 an aroused awareness by all peoples will result in government action everywhere. Canada has the opportunity to take a lead in this respect.”<sup>14</sup>

Three years later that particular initiative came to nought and was not taken up again until the end of the 1970's. After a series of meetings of Attorneys-General to consider a renewed proposal for constitutional change, which seemed to be getting nowhere, in October, 1980, the federal government submitted to Parliament a “Proposed Resolution Respecting the Constitution of Canada.”<sup>15</sup> including a Canadian Charter of Rights and Freedoms. This is the draft which, after a year and a half of further discussions, of constitutional references to the Supreme Court of Canada, of federal-provincial meetings and more amendments, became our present *Charter* on April 17, 1982.

A quick perusal of this Proposal will show, in S. 1, the presence of a

<sup>11</sup>ONT. STAT., 1961-62, c.93, now ONT. STAT. 1981, c. 53. Other provincial codes making the special reference to the U.D.H.R. include Newfoundland, Nova Scotia and Prince Edward Island. Other codes which contain preambles incorporate terms taken from the U.D.H.R.: e.g. New Brunswick.

<sup>12</sup>P.E. TRUDEAU, A CANADIAN CHARTER OF HUMAN RIGHTS (1968).

<sup>13</sup>*Id.* at 12.

<sup>14</sup>*Id.*

<sup>15</sup>OTTAWA: PUBLICATIONS CANADA (1980).

limitations clause somewhat similar to art. 29 of the U.D.H.R. and the more specific limitations clauses of the Covenant on Civil and Political Rights (C.C.P.R.). Section 2 included the fundamental freedoms, drafted more in accordance with the freedoms set out in arts. 18, 19, 21 and 22 of the C.C.P.R. than in accordance with the 1960 Canadian Bill of Rights. In addition, the Proposal specifically acknowledged that some of the "Legal Rights" in ss. 7-14 were adapted from the C.C.P.R., in particular certain s. 11 rights.<sup>16</sup>

As the Proposal was being considered by a Special Joint Committee of the Senate and House of Commons, several of those making presentations asking for amendments,<sup>17</sup> based their submissions on Canada's obligations under the C.C.P.R. As a result, when the Minister of Justice submitted a series of amendments to the proposed *Charter* he indicated, in a press release of January 12, 1981 and in a published consideration of amendments, that the French version of s. 2, the French version of and the retroactive punishment clause in what is now s.11(g) (in order to exempt offences under international law), would be brought into close conformity with the C.C.P.R.

To conclude this discussion about the influence of the C.C.P.R. on Canada's new *Charter*, it is interesting to note that when Canada's supplementary report under art. 40 of the C.C.P.R. was being considered by the Human Rights Committee on October 31, 1984, Canada's representative introduced it by noting:

Although it was true that the Charter and the Covenant were not identical in every respect, there was a high degree of similarity and complementarity between them. The Charter gave effect to many of Canada's obligations under the Covenant. Further, the Covenant and the comments made by members of the Committee during the review of Canada's initial report had contributed to many of the changes to the original draft of the Charter.<sup>18</sup>

### *The Influence of International Law Concerning Human Rights on Interpretations of the Canadian Charter of Rights and Freedoms*

One should commence this discussion by pointing out that in interpretations of the Canadian *Charter* the jurisprudence developed in Europe concerning the European Convention on Human Rights is resorted to equally with that under the C.C.P.R. There are a number of reasons for this. For one thing, as is well known,<sup>19</sup> the European Convention was based on the U.D.H.R. and

<sup>16</sup>Section 11 (a) to be informed promptly [now "without unreasonable delay"] of the offence; (b) to be tried within a reasonable time; (c) to be protected against retroactive laws; (d) to be protected against double jeopardy; (e) to the benefit of a lesser punishment in case of increased severity.

<sup>17</sup>For example, the oral presentations by the President of the Canadian Civil Liberties Association, the Chief Commissioner of the Canadian Human Rights Commission, the Canadian Jewish Congress.

<sup>18</sup>REPORT OF THE HUMAN RIGHTS COMMITTEE, ¶ 183 G.A. Official Records: Fortieth Session, Supplement No. 40, at 32 (A/40/40).

<sup>19</sup>See, e.g., A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE, 8-9 (1963).

early versions of the C.C.P.R. So, other things being equal, similar provisions should probably receive somewhat comparable definitions. Second, the European Court and Commission have been in place for much longer than the Human Rights Committee and so there is more relevant jurisprudence. Third, Canadian laws and legal traditions are based upon those of the United Kingdom and, in Quebec, upon those of France as well. Therefore, two of the important influences on European jurisprudence also influence Canadian jurisprudence.

The last point mentioned also leads to another observation that could be made concerning Canadian judicial reference to European human rights jurisprudence. Until 1949, Canada's ultimate court on constitutional and civil law issues was the Judicial Committee of the Privy Council.<sup>20</sup> (The last case heard was decided in 1959.)<sup>21</sup> Not only were decisions of the Judicial Committee binding on Canadian courts, but the same was true of the House of Lords. Some would say that even today this deference has not ceased. So, one might hazard this observation, many Canadian judges could be more readily apt to adopt an interpretation by the House of Lords of a comparable provision under the European Convention than one in the C.C.P.R. as interpreted by the Human Rights Committee, composed of members from all over the world. In any case, it is interesting that whatever doubts may have existed amongst judges raised in the tradition of parliamentary supremacy concerning the overriding nature of a constitutionally entrenched Charter of Rights, was probably laid to rest most convincingly when a number of lower courts<sup>22</sup> and then the Supreme Court of Canada<sup>23</sup> commenced *Charter* jurisprudence by quoting from the decision of the Judicial Committee in the Bermuda case of *Minister of Home Affairs v. Fisher*,<sup>24</sup> where Lord Wilberforce made the following observation:

It is known that this chapter, [of the Bermuda Constitution dealing with "Protection of Fundamental Rights and Freedoms"] as similar portions of other constitutional instruments drafted in the post-colonial period . . . was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to . . .<sup>25</sup>

<sup>20</sup>For the history of the abolition of criminal appeals to the Judicial Committee see *British Coal Corporation v. The King*, [1935] A.C. 500. For the authority to abolish all other appeals see *A.G. Ontario v. A.G. Canada (Privy Council Appeals)*, [1947] A.C. 127. The abolition came in *STATS. CAN. 1949 (2d Sess.)*, c. 37, s. 3.

<sup>21</sup>*Ponoka-Calman Oils v. Wakefield*, [1960] A.C. 18.

<sup>22</sup>*See, e.g., R. v. Therens*, 148 D.L.R.(3d) 672, 686 (Sask. C.A. 1983).

<sup>23</sup>*See Hunter et al. v. Southam Inc.* 11 D.L.R. (4th) 641, 650 (1984).

<sup>24</sup>[1980] A.C. 319.

Nevertheless, one should not over-estimate the extent of the influence of international law concerning human rights on judicial interpretations of the Canadian *Charter*. At the trial level, one of the highest tributes has been paid by Linden J. of the Ontario High Court, when he asserted that the C.C.P.R. "can be used to help construe ambiguous provisions of a domestic statute if there are no provisions of the domestic statute contrary to the portions of the Covenant being relied upon."<sup>26</sup> He proceeded to consider the more extensive C.C.P.R. art. 14(3)(a) right to be informed of the charge,<sup>27</sup> in construing the *Charter* s.11(a) right "to be informed without reasonable delay of the specific offence." However, in another case,<sup>28</sup> although making the same assertion, he did not find the Covenant helpful. Mr. Justice O'Leary, also of the Ontario High Court,<sup>29</sup> and Madame Justice Reed of the Federal Court, Trial Division,<sup>30</sup> made extensive references to international instruments in considering whether freedom of association applied to trade union purposes. Mr. Justice D.C. McDonald, in defining the reasonable limits clause in S. 1 of the *Charter*, compared it with the Covenant and the European Convention and concluded that the onus on the person relying on s.1 was less because there was no reference, as in the international instruments, to the limit being "necessary" in the interests of a free and democratic society."<sup>31</sup>

Several courts of appeal have made reference to international standards in *Charter* decisions. The Ontario Court of Appeal has done so on a number of occasions. Thus, for example, in the early case of *Rauca*,<sup>32</sup> the Court referred both to the Covenant and the European Convention in deciding that the *Charter's* s.6(1) "right to remain in Canada" did not prevent extradition. In a case concerning provincial laws requiring closing retail establishments on Sundays,<sup>33</sup> the Court referred to the Covenant's "freedom of thought, conscience and religion" provision (art. 18) as an aid in construing *Charter* S. 2(a) to include not just the right to profess one's religion, but also to manifest it by closing a retail outlet on one's Sabbath and staying open on a Sunday.

Several other appellate courts have made brief reference to Covenant pro-

<sup>26</sup>*Re Warren et al.*, 35 C.R. 3d 173, 177 (1983).

<sup>27</sup>Art. 14-3. "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: "(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

<sup>28</sup>*Re Mitchell and the Queen*, 6 C.C.C. (3d) 193 (1983).

<sup>29</sup>*In re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home*, 4 D.L.R. (4th) 231, 280-81 (1984).

<sup>30</sup>*In re Public Service Alliance v. The Queen*, 11 D.L.R. (4th) 337, 354-55 (1984).

<sup>31</sup>*Re Reich and College of Physicians and Surgeons (No. 2)*, 8 D.L.R. (4th) 696, 711-12 (1984).

<sup>32</sup>*Re Federal Republic of Germany and Rauca*, 145 D.L.R. (3d) 638, 655-57 (1983).

<sup>33</sup>*R. v. Videoflicks and others*, 14 D.L.R. (4th) 10, 35-6 (1984). At 43 and 46 reference was made to Covenant articles 19 on "freedom of expression" and 27 on minority rights as an aid in construing the comparable sections 2(b) and 27 in the *Charter*.

visions,<sup>34</sup> to provisions in other international instruments,<sup>35</sup> or to the Covenant and other international or foreign domestic documents.<sup>36</sup> One can find several references to international standards by members of the Supreme Court of Canada<sup>37</sup> even if in only two so far have the references been made in a majority decision. The older of these is *Reference Re Section 94(2) of the Motor Vehicles Act (B.C.)*.<sup>38</sup> In the majority decision, Lamer J. made general references to "the international conventions on human rights" as one of the sources of expression of the principles of fundamental justice in s.7 of the *Charter*.

The most detailed and important reference to the Covenant has been that of Chief Justice Dickson, on behalf of the majority of the Court, in *R. v. Oakes*<sup>39</sup> when he cited art. 14(2) of the Covenant, and art. 11(1) of the U.D.H.R., as "further evidence of the widespread acceptance of the principle of the presumption of innocence," in considering the general meaning of that principle in s.11(d) of the *Charter*. In this he noted that Canada has acceded to the Covenant and the Optional Protocol. He also referred to art. 6(2) of the European Convention on this provision. These references were part of his review of the authorities on reverse onus clauses in Canada and other jurisdictions from which he concluded, at p. 343: "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s.11(d)." <sup>40</sup>

In conclusion, it is clear that courts in Canada have recognized that Canada has bound itself in international law to achieve and maintain human rights standards accepted by the world community. It cannot be said, however, that these international standards determined the resulting interpretation on a particular issue. On the other hand, in line with Canadian judicial practice to refer to *any* relevant comparative jurisprudence, Canada's international obligations under U.N. human rights instruments have expanded the scope of pertinent reference material.

<sup>34</sup>See e.g. *Re Scowby et al. and Glendinning*, 148 D.L.R. (3d) 55, 63 (Sask. 1983).

<sup>35</sup>*R. v. Sophonow* (No. 2), 150 D.L.R. (3d) 550, 600 (Man. 1983). *R. v. Dubois*, 8 D.L.R. 4th 589 at 595 (Alta. 1984).

<sup>36</sup>See, e.g. *Re Allman and Commissioner of the Northwest Territories*, 9 D.L.R. (4th) 230, 233-34 (N.W.T. 1985); *Re Department Store Union and Government of Saskatchewan*, 19 D.L.R. (4th) 609, 646-47 (Sask., per Cameron J.A. concurring 1985); *Re Luscher and Deputy Minister, Revenue Canada*, 17 D.L.R. (4th) 503, 506-07 (Fed. 1985).

<sup>37</sup>See, e.g., *Singh v. Minister of Employment and Immigration*, 17 D.L.R. (4th) 422, 449 (per Wilson J. for 3 of the 6 justices on this case 1985); *Mills v. The Queen*, (unreported) (per Lamer J. at p. 14-15, 72-3 and 94 in dissent, but not on the issue of what is "a reasonable time within which to be tried") (1986).

<sup>38</sup>[1985] 2 S.C.R. 486.

<sup>39</sup>[1986] 24 C.T.R. (3d) 24, 34.

<sup>40</sup>*Id.* at 343.

# THE EUROPEAN EXPERIENCE OF HUMAN RIGHTS PROCEEDINGS: THE PRECEDENT VALUE OF THE EUROPEAN COURT'S DECISIONS

by

FREDRIK G.E. SUNDBERG\*

## INTRODUCTION

I am here instead of Professor Ronald MacDonald from Dalhousie University, Liechtenstein's Judge at the European Court of Human Rights, who unfortunately was prevented from participating as a result of the very tight schedule of the European Court of Human Rights (the European Court). Of course, I will in no way be able to fill his place, but I will do my best to share with you my own knowledge and my own experience from my service under Dr. Marc-Andre Eissen, the Registrar of the Court.

I wish to point out that I address you in my personal capacity. What I will say does accordingly not necessarily represent the view or the opinion of the Court or its registry.

My speech will deal with the precedent value of the judgments of the European Court, i.e. the normative effects of the judgments in subsequent cases, either before a Convention organ or before an authority, primarily a court, in one of the Contracting States.

The first effect I will call *internal* precedent value and the second *external* precedent value.

However, under the European system the Court is not the ultimate interpreter of the Convention in all questions. The European system is based on a division of powers and the authority of the Court's judgments will have to be examined against this background. In consequence, I shall first remind my audience of the basic structure of this division of powers.

I shall first turn to the decision-making power of the European Commission on Human Rights. According to Article 25 of the Convention, the Commission may receive petitions from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention. However, according to Articles 26 and 27 the Commission may not deal with all petitions: for example, it may not deal with any petition unless all domestic remedies have been exhausted, and shall declare inadmissible any petition which it considers incompatible with the pro-

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visions of the Convention, manifestly ill-founded or an abuse of the right of petition. According to Article 24, the Commission shall also examine applications from Contracting States. The Commission also examines the admissibility this aspect of inter-state complaints.<sup>1</sup> Unless the case is referred to the Court, the Commission's decision on the admissibility will be final.<sup>2</sup>

A case may end before the Commission also in another way. According to Article 28 the Commission shall, if it accepts a petition referred to it, place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention. If a friendly settlement is reached, and if the Commission finds that it is based on such respect, then the Commission will strike the case from its list. This decision is taken by the Commission in first and last instance.<sup>3</sup>

If the Commission fails to secure a friendly settlement, it shall according to Article 31 draw up a report on the facts and state its opinion, which is not binding as to whether or not the facts found disclose a breach of the Convention or not. This report shall then be transmitted to the Committee of Ministers.

If neither the Commission nor the State or States concerned have chosen to refer the case to the European Court within 3 months from the date of transmission, the Committee of Ministers (i.e. the Ministers of Foreign Affairs of the 21 Member States) shall, in accordance with Article 32, decide whether there has been a violation or not.

Only if the respondent State has accepted the jurisdiction of the Court either in general or the specific case and if either the Commission or State concerned bring the case before the Court (Article 48)<sup>4</sup>, does the Court have power

<sup>1</sup>E.g. the decision on admissibility in the case *Ireland v. United Kingdom*, referred to in the judgment of the case, 2 EHRR 25, 76-77 paras. 156-157.

<sup>2</sup>The Court has however declared that once a case is duly referred to it, the Court is endowed with full jurisdiction and may thus take cognizance of all questions of fact and law which may arise in the course of the consideration of the case — i.a. questions of admissibility; see *Vagrancy Cases*, 1 EHRR 373, 396 judgment paras. 49-50; recently compare *James v. United Kingdom*, 8 EHRR 123, 157 para. 80. See also Eissen, *La Cour européenne des Droits de l'Homme* in *Bulletin de l'Association pour la fidélité à la pensée du président René Cassin* No. 5 (Oct. 1983).

<sup>3</sup>It may be discussed whether as a matter of principle a friendly settlement is to be considered as an ordinary contract between the State and an individual or whether it is to be considered an international obligation imposed on the State by the Commission by virtue of its powers under Art. 28 and containing an element of judicial decision. In the latter case it would seem possible that the decision also be endowed with some precedent value beside the binding force *inter partes*. This aspect of a friendly settlement before the Commission has however not, to my knowledge, received much attention and as the Commission will in most cases accept the judgment of the Court as authoritative statements of the Law of the Convention, I have not considered it necessary to expand further here.

<sup>4</sup>Article 48 reads:

The following may bring a case before the Court, provided that the High Contracting Party concerned. If there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is

to examine the case and render a judgment.<sup>5</sup>

### INTERNAL PRECEDENT VALUE

The Convention does not contain any explicit provisions dealing with the internal precedent value of the different, above-mentioned, forms of decisions for terminating a case.

With regard to the precedent value of the judgments in later cases before the Court itself, it is clear from the reasons advanced by the Court and the frequent references therein to previous judgments that the Court in its practice adheres to a limited doctrine of *stare decisis*<sup>6</sup>, even though it is not an absolute doctrine; as appears from, e.g., Rule 50 of the new Rules of Court, the Court does not exclude the possibility of deviating from an earlier case-law. However, according to this Rule, a reversal of an earlier case-law should be made by the Plenary Court and not by a Chamber.<sup>7</sup>

This limited doctrine of *stare decisis* is applied not only in respect of each individual State separately, but also on the Convention, or European, level, i.e. irrespective of the nationality of the respondent Government.<sup>8</sup> On this European level, national law is to a large extent treated as a question of fact. This appears already from the Court's invariable practice of inserting the account of the domestic legal situation under the heading "As to the Facts" in the judgments. This does not, of course, mean that national legal practices lack relevance when the Court is determining the requirements of the Convention. Many of these are construed on the basis of common practices among the

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more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

<sup>5</sup>The Convention contains no provisions indicating when the Commission should send the case to the Court and when it should send the case to the Committee of Ministers. If a case will go to the Court or not seems, according to the present practice of the Commission, to depend mainly on whether or not a violation has been found. If no violation is found, the case will be sent to the Court only if it raises important questions of principle. If a violation is found, the case will be sent to the Court if it raises important questions of principle or if a decision by the Committee of Ministers would seem insufficient to secure the applicant's rights (Op-sahl, *Menneskerettsdomstolen — saerlig sett fra hommisjonen*, in Reg og Rettsal 638-639 (Michelsen, Rostad and Aasland, eds., 1984).

<sup>6</sup>Marc-André Eissen states on this point that the Court has shown "a manifest will not to depart lightly from its previous judgment to which the Court frequently refers": Eissen, *supra* note 2, at 38.

<sup>7</sup>Rule 50 reads:

1. Where a case pending before a Chamber raises one or more serious questions affecting the interpretation of the Convention, the Chamber may, at any time during the proceedings, relinquish jurisdiction in favour of the plenary Court. The relinquishment of jurisdiction shall be obligatory where the resolution of such question or questions might have a result inconsistent with a judgment previously delivered by a Chamber or the plenary Court. Reasons need not be given for the decision to relinquish jurisdiction. . . .

<sup>8</sup>See, e.g., recently the almost identical judgments in the *Deumeland* and *Feldbruegge* of 29 May 1986 (Sencs A Nos. 99 and 100, respectively) which concerned similar issues under Art. 6 in respect of the Federal Republic of Germany and the Netherlands, respectively. See also judgment in *Ireland v. United Kingdom*, 2 EHRR 25, 75-76, para. 154.

member States of the Council of Europe (e.g. 'necessary in a democratic society' — the comparative law-method), or refer in varying degrees to the domestic legal situation in the respondent State (e.g. the notion of 'law').

It would also seem that it is this supra-national, European scope of the Court's doctrine of *stare decisis* which has been, to some extent, at the basis of the recognition of a limited right of intervention for other Contracting States and other third parties in the new Rule 37 (as of 1983), paragraph 2, of the Rules of Court.<sup>9</sup>

Turning to the precedent value of the Court's judgments accorded by the Commission, the Commission does not feel bound by the judgments,<sup>10</sup> although it does consider the judgments to have a high degree of persuasive authority; references to the Court's case-law are frequent and in several cases the Commission has reversed its own previous practice, which as a result of its responsibilities regarding the admissibility of complaints may be quite well-established, to follow the developments of the Court's case-law.<sup>11</sup>

It is noteworthy that the Commission is by far the main purveyor of cases to the Court.<sup>12</sup> Should the Commission not agree with the developments of the Court's case-law, it could accordingly to some extent prevent the Court from taking the ultimate decision in a certain case by refraining from using its power to send the case to the Court — thus leaving the decision to the Committee of Ministers. However, the Commission does not seem to have used its powers in this way; as was noted above, it has as a rule accepted the developments of the Court's case-law.

The Committee of Ministers does not develop its reasons for its decisions; instead the Committee tends to simply state that it adopts the opinion expressed by the Commission in its report in those cases where the Commission has concluded that there is no violation of the Convention,<sup>13</sup> and that the Com-

<sup>9</sup>Rule 37 para. 2 reads:

The President may in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant.

See Mahoney, *Developments in the Procedure of the European Court of Human Rights: The Revised Rules of Court*, 3 YEARBOOK OF EUROPEAN LAW 127, 141-154 (1983); see also Symmons, *The Effect of the European Convention on Human Rights on the Preparation and Amendment of Legislation, Delegated Legislation and Administrative Rules in the United Kingdom*, in THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND OF RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 387, 397 (1983).

<sup>10</sup>E.g., the Commission's report in the *Albert and Le Compte case* (Appl. 7299/75 and 7496/76) adopted December 14, 1981, where the Commission expressly stated that it could not subscribe to the view of the Court in a previous judgment in an identical matter (para 78 of the report).

<sup>11</sup>E.g., the separate opinion of Mr. Danelius, joined by others, in the Commission's report in the *Pudas v. Sweden* (Appl. 10 426/83) which was adopted on December 4, 1985.

<sup>12</sup>As of April 1986, 79 cases had been brought before the Court by the Commission, 24 by the Commission and then by a Government, 5 by a Government and then by the Commission and 4 by a Government only.

<sup>13</sup>E.g., The Committee of Minister's decision in *Gordan v. United Kingdom* DH (86) 9.

mittee agrees with the opinion in many of the cases in which such a violation has been found.<sup>14</sup> The Committee of Ministers will thus on most occasions also have supported the Court's case-law, at least for practical purposes. There have however been exceptions. In some cases the Committee of Ministers has been unable to reach the necessary two thirds majority to take a decision,<sup>15</sup> and in some cases it has either expressly reversed or at least avoided to agree with the Commission's conclusion of a violation.<sup>16</sup>

To conclude, it would seem that the practice of the Committee of Ministers, in combination with the Commission's acceptance of the authority of the judgments of the Court, creates a certain, albeit fragile, harmony in the system allowing the judgment of the Court to stand out as the "Law of the Convention" for most practical purposes.<sup>17</sup>

### EXECUTION OF THE JUDGMENT

Before going into the precedent value of the Court's judgments in subsequent cases before domestic courts, I will make some observations on the effects of the judgments with regard to the respondent State in the individual case, i.e. what is normally referred to as the execution of the judgment. It may be assumed that absent effective execution of the judgments individuals will be less inclined to invoke the Convention in domestic proceedings; in addition the domestic authorities will not have the same motivation to pay attention to these judgments within their sources of law framework.

How effective is then the execution of the judgments of the European Court?

The basic Article in this context is Article 53 whereby the respondent State has undertaken to *abide by the decision* of the European Court. There can be no doubt that this undertaking includes to give effect to the Court's judgments<sup>18</sup> on the domestic level, but one may ask what effects. Neither the Convention nor any of the Additional Protocols contain any specific provision

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<sup>14</sup>E.g., the Committee of Minister's decision in *Bramelid and Malmström v. Sweden*, Res. DH (84) 4 (in 8 EHRR 116); see also Sundberg, *Human Rights in Sweden: The Annual Reports 1982-84*, 60-64 (Institutet för Offentlig och Internationell Rätt No 60, Stockholm 1985).

<sup>15</sup>The Committee of Minister has expressly stated this reason in Resolutions DH (75) 2 *Huber v. Austria*, DH (77) 2 *East Africans Asians v. United Kingdom*, and (85) 7 *Dores and Silveira v. Portugal*; the denial of justice aspects of these non-decisions have been dealt with by, e.g., J. Velu in his report to the sixth international colloquy about the European Convention on Human Rights in Sevilla, 13-16 November 1985, "Responsibilities for States Parties to the European Convention," Council of Europe document H/Coll (85) 3, pp. 60-63.

<sup>16</sup>Resolutions (65) DH 1 in the case *Grandrath v. Federal Republic of Germany*; DH (74) 1 in the *Le Fourons v. Belgium* and DH (79) 7 in the case *Eggs v. Switzerland*.

<sup>17</sup>The main exception relating to the outer boundaries of the protection. Here the Commission's decision on the admissibility would seem to be the prime authority; a decision that a case is manifestly ill-founded will usually not come before the Court; Cf. however, *supra* note 2.

<sup>18</sup>Thus, e.g., Rule 2 of the Committee of Minister's Rules concerning the application of Article 54 states that "the Committee shall invite the State concerned to inform it of the measures which it has taken in consequence of the judgment, having regard to its obligation under Article 53 to abide by the judgment."

dealing with this question. The Court interprets the European Convention system as meaning that it is left to the respondent State to choose what means should be utilized in its domestic legal system for the performance of its obligations under Article 53.<sup>19</sup> In exercising this option the State will naturally take guidance from the principle of general international law that:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed<sup>20</sup>

Thus, the effect of the respondent State's action should as far as possible be *restitutio in integrum*.

What action is called for in a given case in order to meet this requirement will of course depend on the facts of the case. Nevertheless, it would seem possible to sort out the following main possibilities:

- (1) a change of the law by Parliament or by the Government;
- (2) a reopening of the case by the domestic courts or authorities;
- (3) acceptance by courts and administrative authorities of the precedent value of the Court's judgment, or perhaps even of their status as "Law of the Convention;
- (4) pardon, amnesty or abolition.

Of course, there is nothing to prevent that two or more of these solutions are resorted to in one and same case. Nevertheless, it may for a number of reasons be impossible to achieve *restitutio in integrum*.

In certain cases of violations there is an inherent factual impossibility to achieve *restitutio in integrum*. Thus, as the Court stated in the "*Vagrancy case*":

Neither the Belgian law, nor indeed any other conceivable system of law, can wipe out the consequences of the fact that the three applicants did not have available to them the right, guaranteed by Article 5(4), to take proceedings before a court in order to have the lawfulness of their detention

<sup>19</sup>See recently the *McGoff* judgment against Sweden 8 EHHR 246 at 251 § 31. See also Rule 5 of the Committee of Minister's Rules for the application of Article 32 which states: "The provisions of paragraph 2 of Article 32 enable the Committee of Ministers, in cases where it has decided that there has been a violation, to give advice or make suggestions or recommendations to the state concerned, provided that they are closely related to the violation. Such advice, suggestions or recommendations, whether based on proposals made by the Commission, or not, would not be binding on the government to which they are addressed because they would not constitute decisions within the meaning of paragraph 4 of Article 32."

<sup>20</sup>*Chorzow Factory case* (1928) P.C.I.J. ser. A, No. 17, p. 47; see recently the arbitration award in *Texaco/Calasiatic v. Libya*, I.L.M. 17, 1978, S 36 § 109; cf. also Eduardo Jimenez de Arechaga *International Responsibility* in *MANUAL OF PUBLIC INTERNATIONAL LAW* 564 (Max Sorensen ed., 1968).

decided.<sup>21</sup>

It may also be difficult to achieve *restitutio* because of the internal legal organization of the respondent State. This will be illustrated below.

(1) The required legislative changes may at times be difficult to bring about because of the parliamentary law-making process. If the respondent Government cannot obtain the necessary parliamentary majority, it may happen that it is unable to get the required legislation passed, at least for the time being.<sup>22</sup> Constitutional problems pertaining to a State's federal nature may be another obstacle. Both these problems became particularly visible in the *Tyrer case*. In this case the European Court found that the practice of birching for certain offences on the Isle of Man constituted degrading treatment in violation of Article 3 of the Convention. First, the special status of the Isle of Man seems, as a matter of constitutional convention, only to have allowed the United Kingdom Government to inform the local Government of their view that judicial corporal punishment was to be held to be in breach of the Convention.<sup>23</sup> In addition, the prevailing opinion in the Isle of Man Parliament seems to have made any change of the pertinent legislation impossible.<sup>24</sup>

<sup>21</sup>1 EHRR 438 at 443, 444 § 20; similarly in the *Ringeisen case* the Court stated: "The fact of deducting the time spent in detention on remand from the prison sentence imposed on a person must no doubt be taken in consideration in assessing the extent of the damage flowing from the excessive duration of that *detention*; but it does not in any way thus acquire the character of *restitutio in integrum*, for no freedom is given in the place of the freedom unlawfully taken away." 1 EHRR 504, 509 § 21; Christoph Schreuer remarked on this point that "the Court thus made it plain that it was quite aware of the fact that courts are often influenced by the duration of detention on remand when passing sentence" in *The Impact of International Institutions on the Protection of Human Rights in Domestic Courts* 4 ISRAEL YEARBOOK ON HUMAN RIGHTS 60, 70 (1974).

<sup>22</sup>Thus Professor E. Alkema remarks in his written communication on *Responsibilities deriving from the implementation of the European Convention on Human Rights: Responsibilities for States parties to the Convention* presented at the Council of Europe's colloquy in Sevilla 13-16 November 1985 that the legislative amendments proposed by the Dutch Government in consequence of the *Winterwerp judgment* of 24 October 1979 (2 EHRR 387) still had not come into force at the time of the colloquy.

<sup>23</sup>Information appended to the Committee of Ministers Resolution (78) 39; see also Rosalyn Higgins *The Execution of the Decisions of Organs under the European Convention on Human Rights*, 31 REVUE HELLENIQUE DE DROIT INTERNATIONAL 1, 39; cf. the Committee's Resolution DH (83) 10 in the *Minelli case*; cf. also Villiger *Die Wirkungen der Entscheide der EMRK-Organe im innerstaatlichen Recht, namentlichen in der Schweiz* 4 REVUE DE DROIT SUISSE 469, 498 (1985).

<sup>24</sup>Leon Hurwitz stated that "birching might not have "outraged" Manx public opinion, but the court's decision most certainly did, and the island had a strong initial reaction. Howard Simmonds, a Tynwald member, accused Great Britain of ignoring article 63 (3) and the special Manx "local conditions" at the court hearing; Peter Craine, the only Manx Nationalist in the House of Keys, Tynwald's lower House, said that the island "should tell the court to go to hell and mind their own business"; the chairperson of the Manx nationalists, Audrey Ainsworth, said, "if the Isle of Man is a nation, let us act like one." (*The State as Defendant: Governmental Accountability and redress of individual Grievancies*, 158 et seq.) (1981). The Isle of Man legislation on birching was still unamended when on 6 October 1981 the High Court of Justice of the Island was faced with an appeal from a sentence of birching in the *O'Callaghan case*. The High Court stated: "In our view, a decision of the European Court . . . is binding on us in respect of the question as to whether or not a particular act is breach of the Convention or not. Consequently, in our view, further sentences of birching, if carried out, would render the United Kingdom and the Isle of Man in breach of an International Treaty obligation' . . . The judge went on to saying that however, there being no Implementing Act, the European Convention on Human Rights was "not part of the law of England," sentences of birching were lawful now as before; that the political consequences of this 'most unsatisfactory state of affairs', such as 'the possibility of the United Kingdom being expelled from the Council of Europe', would have to be borne by the Governments of the United Kingdom and the Isle of Man themselves; that he could not consider the

(2) With regard to the reopening of a case, it is noteworthy that difficult problems may arise when *restitutio in integrum* requires domestic courts to alter or otherwise set aside previous decisions. In the case *Ireland v. United Kingdom*<sup>25</sup> (1978) the European Court found reason to declare "that the sanctions available to it do not include the power to direct one of those (Contracting States) to institute criminal or disciplinary proceedings in accordance with its domestic law." It is submitted that the Court does not consider itself empowered to reverse or annul the determination of domestic authorities.<sup>26</sup> Any power to reopen a case would thus have to emanate from the internal legal system.

At times the remedy of reopening the case may run into difficulties due to the doctrine of *res judicata* and a petition for reopening would be dismissed because the matter has been settled once and for all by the highest national instance.<sup>27</sup> However, over the years, various attempts have been made to overcome this difficulty.

In Austria, as a result of the Commission reports in the cases of *Pataki* and *Dunshirn* which declared certain procedural practices before the Austrian courts contrary to Article 6(1), a *lex specialis* was enacted granting a right to reopening to all applicants whose applications had been declared admissible by the Commission at that time.<sup>28</sup>

In Belgium the chosen solution is of more general scope. According to Article 441 of the *Code d'Instruction Criminelle* the Minister of Justice may order the *Procureur Général* at the Court of Cassation to request the Court to annul an otherwise final judgment.<sup>29</sup> While the Court of Cassation is not bound to grant such a request it has done so, notably as a result of the European Court's judgment in the *Piersack case*.<sup>30</sup> In this case, the Court of Cassation itself had found that the presence of a certain judge on the bench of the

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courts to be obliged never again to impose birching by exercising their discretion regarding the choice of sentence. "We believe that to adopt (that approach) would in effect put us in the position of legislators. We would as judges be seen to be repealing a valid Isle of Man statute." (as rendered by Prof. Dr. G. Ress' report *European Convention on Human Rights and States Parties: The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States* PROTECTION OF HUMAN RIGHTS IN EUROPE: LIMITS AND EFFECTS, 246-247, note 150 A (Irene Maier, ed., 1982) It should be noted that the United Kingdom Government at an early stage in the Tyrer proceedings saw the difficulties coupled with individual applications from "sovereign" territories; when the Government renewed its acceptance of the right of individual petition on 13 January 1976, it did not renew it with regard to the Isle of Man (see Eissen, *supra* note 2, at 67, note 227).

<sup>25</sup>2 EHRR 25, at 85 (§§ 186-187).

<sup>26</sup>*Cf.* the Albert and Le Compte v. Belgium judgment (Article 50) 24 October 1983, Series A No 68, § 9; see also Eissen, *supra* note 2, at 48.

<sup>27</sup>The requirement of exhaustion of domestic remedies will usually prevent any decision from a lower tribunal from coming before the European Court.

<sup>28</sup>Robertson *Applying, and Effecting Compliance with Decisions (With Reference to the European Convention on Human Rights)* THE EFFECTIVENESS OF INTERNATIONAL DECISIONS, 349-350 (Stephen M. Schwebel, ed. 1971); also Schreuer, *supra* note 21, at 65-66.

<sup>29</sup>Eissen, *supra* note 2, at 65-66; see also Villiger, *supra* note 23, at 504.

<sup>30</sup>5 EHRR 169.

*Cour d'Assises*, who had been challenged for bias, had not violated Article 6 of the Convention, but the European Court arrived at the opposite conclusion when the case came before it.<sup>31</sup>

In Norway, there is a general right for an injured party to obtain the reopening of proceedings in civil and criminal cases. The requirements are that when the domestic judgment may be presumed to base itself upon an interpretation of a treaty which deviates from the interpretation an international court has given the same set of circumstances in a case binding upon Norway, and that this interpretation would seem to require another outcome of the domestic case.<sup>32</sup>

In Switzerland, the solution proposed has been an enactment permitting the reopening of criminal proceedings in cases where the final Swiss judgment has subsequently been found to be incompatible with the Convention by the European Court or by the Committee of Ministers. It would seem that this proposed law has not yet been passed by the legislature.<sup>33</sup>

The discussion of the matter which has taken place in Sweden was originally released by the case of the *Netherlands v. Sweden* (the *Boll Case*) before the International Court of Justice and was purely hypothetical in nature.<sup>34</sup> However, with the passing of time it found application also to cases arising under the European Convention. Considering that the Government, which had lost the case before the international instance, could not constitutionally order the courts to change their decisions, the basic question was whether the Swedish courts could *proprio motu*, under the Rules of the Code of Judicial Procedure, or upon petition from the successful applicant, reopen the case. It is noteworthy that Professor Hilding Eek argued the existence of unwritten rules of national law saying that that very organ which according to the Constitution exercises independently and as the highest instance a certain governmental function, in this connection the highest domestic court, must itself implement the obligation that binds the State and which the Government itself cannot implement unless it has its cooperation.<sup>35</sup> It would seem that, under the added burden of cases lost before the Convention organs, these arguments have impressed Justice Gustaf Petrén, a member of the Swedish Supreme Administrative Court, sufficiently to make him follow Eek part of the way. Assuming that the Swedish interpretation of the international con-

<sup>31</sup>See also *supra* note 22.

<sup>32</sup>"Lov om rettergangsmåten for tvistemaal" § 407 (13 August 1915, No. 6, as amended by law 14 February 1969 No. 9) and "Lov om rettergangsmåten i straffesaker" § 391 (22 May 1981, No. 25).

<sup>33</sup>Krafft *Consequences of the Ratification of the European Convention on Human Rights in Domestic Swiss Law: International and Constitutional Law Aspects*, in J. SUNDBERG, LAWS, RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 29, 33 (1986); see also Villiger, *op. cit.*, *supra* note 23, at 505-509.

<sup>34</sup>J. SUNDBERG, *supra* note 33, at 75-81.

<sup>35</sup>Eek, *Die Erfüllung von Verpflichtungen aus zwischenstaatlichen Konventionen im Bereiche des internationalen Privatrechts*, in *Internationales Rechtliche und Staatsrechtliche Abhandlungen*, in Festschrift für Walter Schätzel zu seinem 70. Geburtstag, 117 (1960).

vention was wrong, "then this would today be a reason for the Supreme Administrative Court to decide to allow a reopening of the case."<sup>36</sup>

Thomas Buergenthal has pointed out also other ways to avoid the problems which may be posed by the doctrine of *res judicata*. Thus, under an estoppel theory States accepting the compulsory jurisdiction of the Court and admitting that the defense of *res judicata* is waivable by the parties, would be estopped from raising that defense in respect of cases dealt with by the Court; the undertaking to abide by the decision of the Court (Article 53) would be inconsistent with reliance on the *res judicata* effect of any prior domestic adjudication. Under another theory, the judgment of the European Court could be seen as a new fact or element that would have resulted in a different decision had it been considered in the initial proceeding.<sup>37</sup>

The reopening of proceedings in cases concerning administrative authorities do not cause the same problems of principle as these decisions do not have the force of *res judicata*.

(3) The question whether the reopening of proceedings will really serve any purpose, depends to a large degree on if the domestic court or authority may under domestic law adopt an interpretation of the relevant provisions that is in conformity with the judgment of the European Court. Thus, a petition for a reopening of the expropriation permit proceedings before the Swedish Government in the *Sporrong and Lönnroth case* would not have been effective. Here the Swedish legal system as such in the case of zone expropriations implied a violation of Article 6, something which a Swedish Governmental authority or court could do nothing about; legislation by Parliament would have been the only solution.<sup>38</sup>

(4) Administrative pardon, amnesty and abolition are measures which, although often unable to remove all the consequences of a conviction, may still be of considerable importance from the point of view of the individual. An example of the possibilities offered by these measures is presented by the *Neumeister case*. In this case the European Court found a violation of the Convention in the lengthy detention on remand of Fritz Neumeister (more than 2 years and 4 months in total) in the conduct of complicated fraud proceedings before the Austrian courts at the end of which Neumeister was sentenced to 5 years imprisonment. After the judgment of the European

<sup>36</sup>Petren, *Comments* in J. SUNDBERG, *supra* note 33, at 83; it may be worth noticing that, at a colloquy organized by the Council of Europe a few years earlier, in April 1981, he stated the contrary view: "if we had lost it (the Boll case) there would have been no possibility whatsoever to enforce the decision of the International Court in Sweden."

<sup>37</sup>Buergenthal *The Effect of the European Convention on Human Rights on the Internal Law of the Member States*, I.C.L.Q. SUPPL. 1965, 98-99.

<sup>38</sup>Petren, *supra* note 33, at 83-84; such legislation also seems to be on its way after the Boden and Pudas cases have now been referred to the Court, see the Swedish Government's legislative memorandum DsJu 1986:3; *cf.* also the *Pataki and Dunshirn cases* above, see *supra* note 28, in which the Austrian Government changed the relevant legislation before enacting the *lex specialis* which allowed the reopening of the proceedings.

Court, Neumeister received, by way of a pardon granted by the Austrian President, remission of his remaining sentence (2 years, 7 months and 10 days). On the question of *restitutio* the Court observed:

The applicant was convicted and sentenced to a term of imprisonment considerably longer than his detention on remand and that detention was reckoned in full as part of the sentence. Moreover . . . he was granted a pardon on February 14, 1973 which he himself had requested as being the best form of reparation and which was far more advantageous to him than payment of a sum of money . . . These various circumstances outweigh the moral wrong of which he complains; the Court thus reaches the conclusion that in this regard it is not necessary to afford him any further satisfaction.<sup>39</sup>

The fact *restitutio in integrum* may not always be possible is however also recognized by the Convention which has provided for further remedies on the international level. Article 50 states:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.<sup>40</sup>

The possibility offered the member States by Article 50 to escape that the European Court imposes further international sanctions was in the beginning perceived as an opportunity for,<sup>41</sup> and by some also as an obligation for,<sup>42</sup> the States to utilize and provide for effective domestic remedies capable of implementing (executing) the judgments of the Court.

The question whether the Court's interpretation of Article 50 has really served to promote the creation of such procedures on the domestic level seems open to discussion. In the Court's second case on Article 50, the *Ringeisen case* (1972), the Austrian Government argued that the conditions for the application of Article 50 were not fulfilled when the applicant could exercise domestic

<sup>39</sup> 1 EHRR 136, 151-152.

<sup>40</sup> "It is a well-known fact that this Article is modelled on clauses found in a number of arbitration treaties, e.g. the German-Swiss Treaty of Arbitration and Conciliation, 1921, Article 10, and the Geneva General Act for the Pacific Settlement of International Disputes, 1928, Article 32 (see, for example H. GOLSONG, *DAS RECHTSSCHUTZSYSTEM DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION*), 106 (1968). These clauses were inserted to deal with the situation that a State, although willing enough to fulfill its international obligations, for constitutional reasons is unable to do so without changing its constitution. They confer on the arbitral tribunal the power to transform this obligation into an obligation to pay to the injured party an equitable satisfaction of another kind." — from the joint separate opinion of judges Holmbäck, Ross and Wold in the "Vagrancy cases," 1 EHRR 438, at 445; also Buergenthal, *supra* note 37, at 96; cf. also Gainen, *The Application of Article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: The Vagrancy Cases and the Ringeisen Case*, 7 N.Y.U. J. INT'L L. & POLITICS. 177 (1974).

<sup>41</sup> Buergenthal, *supra* note 37, at 97.

<sup>42</sup> See J. FAWCETT APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 336 (O 1969).  
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remedies to obtain reparation. The Court did however not accept this view. It stated instead that it will afford just satisfaction in all cases where the exercise of domestic remedies to obtain redress "would lead to the . . . result of preventing the Court from speedily affording reparation for the damage caused by the violation."<sup>43</sup> The subsequent case-law also shows a tendency on the part of the Court to avoid using Article 50 as a means for controlling that its judgments on the merits are executed, as far as possible by the respondent State.<sup>44</sup>

The control of the proper execution of the European Court's judgments is instead mainly performed by the Committee of Ministers under Article 54 of the Convention. Under this Article the Committee also controls the execution of any award of just satisfaction given by the Court.<sup>45</sup>

According to the Rules of Procedure adopted by the Committee of Ministers, the first step in the control is to invite the respondent State to inform the Committee of the measures it has taken in consequence of the judgment.<sup>46</sup> After having received this information, the second step is to decide whether, in the light of the information submitted, further action is called for in the case or not.<sup>47</sup> Neither the Convention, nor the Rules adopted by the Committee of Ministers contain any time limits for the execution of the judgment.<sup>48</sup>

<sup>43</sup>1 EHRR 504, at 510 para 22.

<sup>44</sup>See also Villiger, *supra* note 23, at 481-187; but cf. the *Piersack case*, 5 EHRR 169, and what the Registrar of the Court, Eissen, explains in his article on the Court, *supra* note 2, at 65-66 (translation from French by the author): "There remained the question of just satisfaction . . . On instructions from the President of the Court, the Registrar wrote, on 23 March 1983, to the Agent of the Respondent State in order to ascertain whether 'in the opinion of his Government, and without prejudice to the Court's power of appreciation, the Belgian legislation provided a means to wipe out entirely the consequences of the violation which had been found' on 1 October 1982; he referred to Article 50 of the Convention and to the relevant case-law. The Agent replied on 29 April that the Minister of Justice had, in accordance with Article 441 of the Code of Criminal Procedure, requested that the public prosecutor at the Court of Cassation should ask for a reopening of the procedure . . . On 18 May 1983, the Court of Cassation censured (its earlier) judgment in the case in the light of the decision taken in Strasbourg. A new process will accordingly take place.

<sup>45</sup>Rule 3 of the Committee of Minister's Rules concerning the application of Article 54 of the Convention states explicitly that "the Committee shall not regard its functions under Article 54 of the Convention as having been exercised until it has taken note of the information supplied in accordance with Rule 2 (measures in consequence of the judgment) and, when just satisfaction has been afforded, until it has satisfied itself that the State concerned has awarded this just satisfaction to the injured party."

<sup>46</sup>Rule 2 (a)

<sup>47</sup>Rule 4 compared with the usual wording of the Resolutions, see e.g. Resolution DH (85) 17 of 25 October 1985 in the *Sporrong and Lönnroth case*:

Having regard to the 'Rules concerning the application of Article 54 of the convention';

Having invited the Government of Sweden to inform it of the measures which had been taken in consequence of the judgments, having regard to its obligations under Article 53 of the Convention to abide by the judgments;

Whereas, during the examination of this case by the Committee of Ministers, The Government of Sweden informed the Committee of Ministers of the measures taken in consequence of the judgments . . . ;

Having satisfied itself that the Government of Sweden has awarded the just satisfaction provided for in the judgment of the Court of 18 December 1984,

Declares, after taking note of the information supplied by the Government of Sweden, that it has exercised its functions under Article 54 of the Convention in this case.

<sup>48</sup>Rule 2 (b) states however "If the State concerned informs the Committee of Ministers that it is not yet in a position to inform it of the measures taken the case shall be automatically inscribed on the agenda of a meeting of the Committee taking place not more than six months later, unless the Committee of Ministers

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The efficiency of the Committee of Minister's control has been subject to certain criticism. Thus Professor Rosalyn Higgins has some critical remarks to the performance of the Committee in some cases: "In certain cases, no action at all under Article 54 appears to have been taken by the Committee of Ministers. There is thus no authoritative pronouncement by an organ of the Convention as to whether the Court's judgments have or have not been executed."<sup>49</sup>

Further criticism has been directed at the Committee's practice of relying on mere legislative proposals when taking its decision that no further action is called for in the case; on occasion such proposals have not resulted in legislation.<sup>50</sup> There is also difference of opinion regarding the extent to which the Committee should evaluate if the proposed measures are really capable of remedying the situation which the Court has found to be in violation of the Convention.<sup>51</sup> Another area of dispute concerns the extent to which the State should be under obligation to provide the Committee with information relating to measures of a general nature going beyond the particular case.<sup>52</sup>

Despite these problems relating to both the actual execution of the judgment and the supervision thereof, the practical experience of the system shows that the execution of the judgments (and of other decisions taken by the Convention organs<sup>53</sup>) by the respondent State is sufficiently effective to motivate an ever increasing number of individuals to use the European protection machinery in order to challenge national decisions.<sup>54</sup> In this context it also may

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decide otherwise; the same rule will be applied on expiration of this and any subsequent period."

<sup>49</sup>Higgins, *supra* note 23, at 38-39.

<sup>50</sup>See, e.g., the *Winterwerp case*, *supra* note 22 above.

<sup>51</sup>E.g. Villiger *supra* note 23, at 490-492; also Velu's report, *supra* note 15, at 73; Higgins, *supra* note 23, at 37-38; Eissen refers on this point to the "faible propension du Comité des Ministres, organe politique de coopération intergouvernementale, à se montrer pointilleux en contrôlant l'exécution, lato sensu, des arrêts de la Cour," *supra* note 2, at 68. The practice of the Committee of Ministers does contain a few examples of cases in which certain measures in consequence of a judgment of the Court were approved by the Committee of Ministers, but were later found by the Court to be in violation of the Convention, at least as applied in a subsequent case — e.g. the Committee of Ministers accepted in the *Goldor case* (1 EHRR 524) that certain amendments to the British Prison Rules on correspondence were sufficient for the purposes of Article 54, but when the amended Rules were subsequently brought before the Court in the *case of Silver and Others* (5 EHRR 347) their application was anew found to be in violation of the Convention, Symmons *supra* note 9, at 387, 416; cf. also, with regard to Sweden, the Committee of Ministers Resolution DH (85) 17 in the *Sporrong and Lönnroth case* and the subsequent *Boden case* (application 10 930/84, report adopted by the Commission on 15 May 1986) which is presently pending before the Court — both cases concerning the right to a fair trial before a court with regard to decisions by the Government granting expropriation permits concerning the applicants' properties.

<sup>52</sup>Velu *supra* note 15, at 73-82; cf. Villiger *supra* note 23, at 495-499.

<sup>53</sup>"Operative effects" on the national level have in many cases been achieved also informally in the course of the proceedings before the Commission (see e.g. the *case of Karnell and Hardt v. Sweden*, application no. 4733/71) or formally by way of a friendly settlement approved by the Commission or the Court, Higgins, *supra* note 24, also Opsahl & Dolle, *Settlement based on Respect for Human Rights under the European Convention on Human Rights*, written communication presented at the sixth international colloquy about the European Convention on Human Rights in Sevilla 13-16 November 1985, Council of Europe document H/Coll (85) 15.

<sup>54</sup>Thus the total number of registered complaints were 1,926 in 1975, 2,225 in 1980 and 2,831 in 1985.

be worth mentioning that, although the scope of the measures taken by the States with regard to legislative or other changes in the domestic legal situation have on occasions been *de minimis*, there has never been any refusal to pay promptly to the applicant any sum afforded under Article 50.<sup>55</sup>

#### PRECEDENT VALUE IN SUBSEQUENT CASES ON THE DOMESTIC LEVEL

To what extent do the judgments of the European Court have any effect on national decisions in subsequent cases? This is not only the question whether, once the judgment of the Court has been executed in the respondent State, it will be respected as precedent by the courts and authorities in that state in subsequent cases, but also whether the judgment will be respected in other Convention States in their administration of justice. Will, e.g., a judgment against Netherlands be respected by the courts in Sweden?

Article 53 only prescribes that the judgments of the European Court shall be considered binding in respect to the respondent State and only with regard to the specific factual situation at issue in the case in question.

Evidently it is a basic premise for any discussion of the effects in subsequent cases that the national courts and authorities have knowledge of the Strasbourg case law.<sup>56</sup> A first question is therefor whether this premise holds true.

If we first look at the efforts in Strasbourg to provide information on this case law, these efforts are limited. Of course, these publications cover the judgments of the Court,<sup>57</sup> most of the reports of the Commission<sup>58</sup> and the various decisions of the Committee of Ministers,<sup>59</sup> as well as a wealth of other materials concerning the Convention,<sup>60</sup> including, more recently (since 1975) the *travaux préparatoires* pertinent to the Convention and the Additional Pro-

<sup>55</sup>Eissen, *supra* note 2, at 65.

<sup>56</sup>E.g. Schreuer, *supra* note 21, at 75: "It is difficult to explain, in a satisfactory way, why courts are so reluctant to rely on the available international practice relating to the Convention. Part of this reluctance may be attributable to a theoretical uncertainty about the relevance of acts of international organs in the court's framework of "source of law," or a rigid adherence to the fiction that treaties become domestic law once they have been incorporated and must consequently not be treated differently from statutes. The most important reason is, however, probably still to be found in a lack of adequate information on the part of bench and counsel and an unfamiliarity with the published material."

<sup>57</sup>These are first published in a roneotyped version by the Court itself (obtainable upon request to the Registrar) and later in a printed version, the Series A, by Carl Heymanns Verlag K.G., Köln, Federal Republic of Germany. The same publisher also publishes the pleadings and other relevant material from the proceedings in the case in a Series B. Extracts from the judgments also appear in the European Yearbook on Human Rights published by Martinus Nijhoff Publishers, Dordrecht, The Netherlands.

<sup>58</sup>These appear in the series *Decisions and Reports* published by the Council of Europe in Strasbourg, France, and also, since 1986, after the Court's judgments in the Series A, see *supra* note 53. Extracts of certain reports also appear in the European Yearbook, see *supra* note 57.

<sup>59</sup>These are published in a roneotyped version by the Council of Europe itself and they also appear in the European Yearbook, see note *supra* 57.

<sup>60</sup>See Leuprecht *Making Human Rights and Human Rights Information More Accessible: The Documentation Center for Human Rights in Strasbourg*, J. Sundberg, *supra* note 33, at 57-68.

tocols, in a collected edition,<sup>61</sup> and (beginning in 1970, renewed 1984) comprehensive digests of the case law.<sup>62</sup> However, the resources for publication and distribution remain small and a need for additional publications on the case law of the Convention organs has certainly existed, in particular in those countries where the language is not any of the official languages of the Council of Europe, i.e. French or English. Only on rare occasions is a translation into these other languages provided.<sup>63</sup>

Moving next to the national level I will restrict myself to describing in a rather fragmentary way the situation in a few but important countries.

In the Federal Republic of Germany, beginning in October 1974, Mr. Norbert Paul Engel undertook the publication of the *Europäische Grundrechte-Zeitschrift* (EuGRZ), renowned for, among other things, its excellent registers. This series provides translations into the German language of a selection of the decisions of the European Court and Commission.

In the United Kingdom, the European Law Centre which first devoted itself mostly to Common Market law, expanded in 1979 into the field of European human rights by beginning the publication of the series European Human Rights Reports (EHRR). This renders in easily accessible form the text of the English version of the judgments of the European Court and the decisions of the Committee of Ministers and lately also of a selection of the reports of the Commission.

In Switzerland, reports (excerpts and digests) on the Strasbourg case law are found in the trilingual series *Jurisprudence des autorités administratives de la Confédération*: prepared and published by the Federal Justice and Police Department on order from the Federal Council.

The basic premise would thus appear satisfied, at least to the extent that the case law of the Convention organs is available, although to various degrees, in local publications in English, French, Spanish, Portuguese and German.

To what extent then has the question of external precedent value been addressed in legal scholarship? I shall not try to provide the reader with any study of my own of the precedent value which has been accorded to the European Court's judgments by national courts and authorities in subsequent cases. That would be much beyond the scope of this article.

I shall however briefly discuss some of the more interesting studies concerning the problem of precedent and the methods used by their authors when

<sup>61</sup>Published by Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1985.

<sup>62</sup>Published by Carl Heymanns Verlag KG, Köln, Federal Republic of Germany, 1984.

<sup>63</sup>Thus, the Court will usually provide a translation to the language of the respondent state of its judgments and will also provide translations of summaries of its case-law to other European languages (German, Spanish, Italian and Icelandic).

approaching this problem.<sup>64</sup>

These studies have mainly approached the problem of precedent by looking at the domestic legal situation in one or more of the following ways:

(a) analyzing cases from domestic authorities, primarily, courts making open references to the case-law of the Court (or the Commission) in order to ascertain the extent to which the domestic decisions have been openly influenced by this case-law;

(b) analyzing the status of the Convention and the judgments of the European Court within the national legal system in order to ascertain the extent to which it seems possible to take account of them in domestic decisions;

(c) analyzing the possible motives, both on the legal and the practical level, for domestic authorities to take the European Court's case-law into account.

Theoretically, these studies have demonstrated, on the one hand, that the domestic decision-maker may not always be able to give effect to a judgment of the European Court in a subsequent domestic case as a result of the particular domestic legal situation, in particular with regard to the Convention's status within the domestic hierarchy of laws. At one end of the scale we have Austria which has incorporated the Convention into domestic law with Constitutional rank, on the other we have the United Kingdom, the Scandinavian countries and some other nations in which the Convention is not looked upon as a domestic law for the reason that it has not been incorporated by Parliament. On the other hand they have also demonstrated that the national decision maker may have good reasons for looking at the European Court's case law despite these problems.<sup>65</sup> Christoph Schreuer thus stated in his survey in 1974:

In the case of the international organs under the Human Rights Convention, their function as effective organs of supervision, the continuity and consistency of their practice and their specialization in matters of the Human Rights Convention should endow their pronouncements with a very high degree of authority, deserving careful examination and observation by domestic courts.<sup>66</sup>

<sup>64</sup>Buergenthal, *supra* note 37 and *Comparison of the Jurisprudence of national courts with that of the organs of the Convention as regards the rights of the individual in court proceedings*, HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW, 151-200 (A.H. Robertson ed, 1968); *cf also* the similar analysis made by Scheuner. COMPARISON OF THE JURISPRUDENCE OF NATIONAL COURTS WITH THAT OF THE ORGANS OF THE CONVENTION AS REGARDS OTHER RIGHTS. *Id.*, 214-266; Schreuer, *supra* note 21 (Schreuer has also published the volume DIE BEHANDLUNG INTERNATIONALER ORGANAKTE DURCH STAATLICHE GERICHTE (1977), this work has however not been at the author's disposal); Ress, *supra* note 24, at 269, in particular 238-269; Eissen, *Le statut juridique interne de la Convention devant les juridictions penales francaises*. DROITS DE L'HOMME EN FRANCE — DIX ANS D'APPLICATION DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME DE VANT LES JURIDICTIONS JUDICIAIRE FRANCAISES, 1-30 (1985); Villiger, *supra* note 23.

<sup>65</sup>Buergenthal, *supra* note 37 at 100-101; Schreuer, *supra* note 21 at 72; Ress, *supra* note 24 at 238-239; Villiger, *supra* note 23 at 512-514; *cf.* Eissen, *supra* note 2 at 68.

<sup>66</sup>Schreuer, *supra* note 21 at 72.

Practically, these studies have also demonstrated that the judgments of the European Court have openly been admitted to have influenced the national decision-maker in a number of cases. Thus, both the Austrian Constitutional Court and the Belgian Court of Cassation seem to have openly reversed their previous practice in some cases because of the authority accorded to the European Court's judgments.<sup>67</sup>

It is however to be noted that the studies performed have or appear to have been based on a relatively small number of domestic decisions, primarily court judgments, which have been, one way or another, informally brought to the attention of the author because of their open reference to the European Court's case-law.

Leaving aside the questions pertaining to the representativeness of the materials studied, it would appear that the method of looking only at open references suffers from certain shortcomings. As Schreuer observed with regard to court judgments:

A thorough study . . . would have to examine in detail and by chronological comparison in what cases before domestic courts relevant international practice would have been available, [i.e. through the pleadings or through the court's own knowledge — my remark] whether the domestic court's decision shows any indication that it has been influenced by pertinent international practice and whether such practice has caused a departure from solutions adopted in previous decisions.<sup>68</sup>

As Schreuer and several other authors hint,<sup>69</sup> the problem of precedent cannot be solved by a mere analysis of open references to the European Court's case law in the judgment. There may be instances where, e.g. a judgment of the European Court was cited by counsel to support his arguments and also taken into account by the domestic court without this, for one reason or another, appearing in the published judgment.<sup>70</sup>

A more comprehensive study of the precedent authority of the judgments of the European Court would therefore require also an analysis of the pleadings by counsel. However, as has been demonstrated by Professor Lockwood's study on the effect of the Universal Declaration in American courts, this type of study involves a big and difficult effort, and it would be even bigger and more complicated if it were to be performed on the European scale. On the more modest national scale, however, this type of analysis appears feasible,

<sup>67</sup>See with regard to the Austrian practice, the comments made on Prof. Ress' report, *supra* note 24, by the Austrian professor Theodor Öhlinger at 297 and with regard to the Belgian situation Ress at 268; cf. Eissen, *supra* note 2 at 68.

<sup>68</sup>Schreuer, *supra* note 21 at 72-73.

<sup>69</sup>*Id.* at 73; cf. Eissen *supra* note 64 at 25-26.

<sup>70</sup>See Laakso *Prejudikatverkan över Bottniska viken* SKRIFTER TILL MINNET AV HALVAR G.F. SUNDBERG, 93, Published by J. Leif Ekström at Åkron, 1987.  
 96 Institut för Offentlig och Internationell Rätt No. 40, 1978).

and in relation to e.g., Swedish judgments, such an analysis is provided by the annual reports published by *Institutet för offentlig och internationell rätt*.

Let me finally make some suggestions as to how to increase the precedent value of the decisions of the Strasbourg Convention organs at the national level. In essence, this boils down to some advice to attorneys.

I will begin this part with an illustration of the problem.

In a recent case, the Swedish Supreme Court was confronted with an Italian request for the extradition of Mr. Sami Skaff, based on an Italian judgment *in absentia* by which he had been convicted for a drug offense and sentenced to 5 years in jail.<sup>71</sup>

When the case came before the Swedish Supreme Court, the matter of allowing extradition on the basis of this Italian judgment had already been before the German *Bundesverfassungsgericht* and been found to be contrary to, *inter alia*, Article 6 of the European Convention on Human Rights. The German Court had interpreted this Article, as applicable in the case, to represent an international law minimum standard. Before the Swedish Supreme Court, counsel for Mr. Skaff argued that there was no need for the Swedish Court to go into the issue of the admissibility of the extradition since this question had already been decided by the German Court. Unfortunately, however, counsel was not successful in bringing this argument to the attention of the Court. The understanding of the Swedish Supreme Court is reflected in the following quote from the judgment:

Sami Skaff seems to maintain that since the Federal Republic of Germany, Sweden and Italy have all adhered to the European Convention on Extradition of 1957, the German court decision should be a bar to extradition being granted in the extradition case pending in Sweden.

The question of extradition is in each separate case a matter between the states concerned by the request. The German court decision is, under Swedish law, no bar against the extradition of Samir Skaff from Sweden. Consequently, the objection based on the effect of the German decision in the Swedish extradition case may be summarily dismissed by the Supreme Court.

The Supreme Court thus never found occasion to take a stand on the issue whether or not the Swedish Supreme Court ought to arrive at the same result concerning the effect of Art. 6, as had the German *Bundesverfassungsgericht*. If the Article 6 issue had been clearly brought to the attention of the Court, one may wonder if the justices really would have felt entitled to dismiss the argument summarily. There does not seem to be any valid reason why the judicial organs in any one Convention state should withhold its participation

<sup>71</sup>Nytt Juridiskt Arkiv (NJA) 1984 p. 903; see also Jacob Sundberg HUMAN RIGHTS IN SWEDEN: THE ANNUAL REPORT 1985, 119-124 (1987).  
<http://id.eexchange.us/akron.edu/akronlawreview/vol20/iss4/1>

in the development of what Alessandra Luini del Russo has called "a European common law of fundamental freedoms."<sup>72</sup>

Attorneys would seem to be well-advised to develop their arguments under the convention, in particular by means of references to cases from the European Court, because doing so tends to bring the risk of reversal more readily to the consideration of the national court. Judges generally do not wish to have their judgments reversed and the reversal risked by the case ending up before the Convention organs in Strasbourg seems from this point of view no more attractive than other reversals.

Counsel developing their arguments in this direction also serves the purpose of meeting a requirement established by the Commission as a matter of exhausting domestic remedies. Such exhaustion of remedies requires in the opinion of the Commission that the applicant has been able to put the same questions before the national court as he places before the Commission.<sup>73</sup>

This case-centered pleading technique has been a forceful instrument among the American jurisdictions to keep the American states within one American legal system, eventually crowned by the American Restatements. Using it in Europe may well help towards achieving the European common law of fundamental freedoms.

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<sup>72</sup>Luini del Russo *Prisoners' Right of Access to the Courts: A comparative Analysis of Human Rights Jurisprudence in Europe and the United States*, 13 J. INT'L L. & ECON. 1, 4 (1978); cf Drzemczewski, *The Sui Generis Nature of the European Convention on Human Rights*, 29 I.C.L.Q. 54 (1980).

<sup>73</sup>Frowein *Recent Developments Concerning the European Convention on Human Rights*, J. SUNDBERG, *supra* note 33, at 15.



## THE SWEDISH EXPERIENCE OF THE EUROPEAN CONVENTION: THE VIEW FROM BENEATH

by

JACOB W.F. SUNDBERG

FROM NOTHING TO SOMETHING

### *The Period of No Complaints*

Sweden was one of the signatories to the European Convention and ratified it quickly.<sup>1</sup> It was indeed the third country to ratify and it accepted the right of individual complaint for an indeterminate period at the same time. Nevertheless, for decades the Convention was hardly taken seriously by the Swedish people. Our most durable Foreign Minister, Professor Osten Unden, probably voiced the opinion of most Swedes at that time when he wrote after his retirement as Foreign Minister in 1963: "What Government would ever hit upon the idea of e.g. summoning Sweden before the Council of Europe's Court for an alleged violation of the fundamental rights and freedoms set out in the Convention?"<sup>2</sup> At times, the Swedish political and bureaucratic leadership did not seem to be even aware of the Convention. At an international gathering devoted to the subject of human rights all others lectured on human rights in general and the European Convention in particular; but the Swedish participant, Dr. Hans Blix (later the Foreign Minister of Sweden) did not touch on human rights, a single time. He exclusively spoke about the Ombudsman.<sup>3</sup> "Not a single time could I find a question in which the Swedish legal standard was less, or less secure than in the other countries" is a famous statement by a Swedish member of the Committee of Experts on Human Rights (Council of Europe) in the early 1970s.<sup>4</sup>

Indeed, up to 1981, there were very few complaints of Swedish origin brought to Strasbourg. The annual number remained between five and ten. The ones there were, were furthermore very minor ones. A perfect bliss seemed to reign in Sweden.

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<sup>1</sup>Sweden ratified the European Convention on January 11, 1952. See *Sveriges Överenskommelser med Främmande Makter* (SÖF) 1952:35.

<sup>2</sup>Unden, *Om FN:s och Europarådets domstolar*, Svensk Juristtidning, 659 (1963).

<sup>3</sup>Blix, *A Pattern of Effective Protection: The Ombudsman*, 11 How. L.J. 386 (1965).

<sup>4</sup>Strömholm, *Svenska Dagbladet* (January 22, 1984).

### *The Period of Massive Complaints*

Then suddenly, out of nothing, so it seemed, came a flood of Swedish complaints. The numbers rose dramatically in the early 1980s. The so-called provisional files show the number of individuals feeling sufficiently aggrieved to bring complaints. In 1981 their number was 42, in 1982 72, in 1983 240, in 1984 192 and in 1985 168. The number of registered complaints shows the ones that were legally sufficiently well-drafted to serve as the basis of proceedings in Strasbourg. They were 8 in 1981, 18 in 1982, 46 in 1983, 51 in 1984 and 64 in 1985.<sup>5</sup> This means that today Sweden has some 60 or so cases pending at different stages before the Convention organs in Strasbourg. Proportionately speaking, considering population, that is more than any other country belonging to the Convention.

Thus, it would seem that the European human rights idea enjoyed a kind of breakthrough in Swedish thinking around 1983. Even in an international perspective this is remarkable. What happened, how was it done and how was such a breakthrough achieved?

#### HOW WAS IT DONE?

##### *Grievances Accumulated*

Of course it takes some kind of grievance to generate a complaint and one should not think that there can be no grievances in a welfare society. The greater the area of governmental intervention, the more numerous are the chances of conflict between individual and government. Social welfare means interventionism and the expansion of social welfare which consequently means greater opportunities for individual grievances, whatever other blessings it may bring with it. The ruling Social Democratic party in Sweden always viewed that expansion with committed sympathy. The expansion was given high priority with the change of generations in the party leadership in the late 1960s and that came to colour in many ways in the decade to come.

In my inaugural lecture as Professor of Jurisprudence, 1970, I saw reason to express it as follows: "In the Swedish public debate of today, it is not difficult to discern those elements that predict the transition to a system parallel in essential points to the one prevailing in the people's republics of Eastern Europe."<sup>6</sup>

Indeed, in the eyes of the new party leadership, the time had come to carry out the Socialist ideas. Room must be made for a great leap forward. The obstacles were spotted; private ownership of land: a means of production;

<sup>5</sup>Stefan Trechsel provided slightly different figures when reporting to the Second Seminar on International Law and European Law, devoted to the topic of *Merger of the European Commission and European Court of Human Rights*, and held at Neuchâtel (Switzerland) March 14-15, 1986.

<sup>6</sup>J. Sundberg, *Teleologisk metod och fair play* (Institutet för offentlig och internationell rätt No 34) 1, (1970).  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss4/1> 60

courts being too independent of the 'popular will'; the family as a reactionary backwards-looking unit in a 'progressive' society; and private schools, subversive if they spread another message than the one approved by the state school authorities and unnecessary if they taught the same. In Mr. Palme's new Cabinet, removing the obstacles was assigned between the new leaders. Mr. Carl Lidbom — besides being assigned human rights as a field — devoted himself to thorough revisions of expropriation law and family law.<sup>7</sup> Dr. Lennart Geijer took care of the courts,<sup>8</sup> and Mr. Ingvar Carlsson (later Prime Minister) assumed responsibility for what needed to be done in the field of private schools.<sup>9</sup>

Mr. Lidbom was a dynamic person with original ideas. The new directives of 1969 for the revision of family law was held to express well the views of Mr. Lidbom, and they included the statement that there was no reason "to relinquish the use of statutory regulation of marriage and family relations as one of several tools available" in the endeavours to create the new society.<sup>10</sup> Indeed, as put by Professor Folke Schmidt, these directives presented "basic evaluations with an openness seldom met with in political life."<sup>11</sup> Dr. Geijer took on the courts. He warned them that "the courts do not exist outside of society, but are societal agencies that offer a service to society."<sup>12</sup> Courts were supposed to be implementing societal policy rather than organs set up to protect the individual against the interventions in the state.<sup>13</sup> Indeed, lectured Dr. Geijer, the Minister of Justice, to the law students at the University of Lund, in 1973: "Behind the saying that the courts are there to protect the individual against the 'authorities' there lurks an anti-democratic criticism of the parliamentary system of government . . . It is, therefore, a dangerous saying."<sup>14</sup> The lay assessors in Swedish courts, politically appointed, offered opportunities to bridle judges too independent of the prevailing political climate. The Social Democratic party attracted general attention by instructing their appointees in

<sup>7</sup>See generally R. HUNTFORD, *THE NEW TOTALITARIANS*, (1971). Mr. Lidbom is believed to be the *spiritus rector* of the language in the Protocol on Justice Department Matters of August 15, 1969: cf. J. Sundberg, *Marriage or No Marriage, The Directives for the Revision of Swedish Family Law*, 20 INT. & COMP. L.Q. 223, 224, 236 (1971); and J. Sundberg, *Experiment Repeated*, 23 AM. J. COMP. L. 34, 40 (1975). The Directives are published in Swedish in *Riksdagsberättelsen* 1970 Ju 52. — On the expropriation side, see *Statens Offentliga Utredningar* 1969:50 Expropriationsutredningen; and B. BENGSSON, *EXPROPRIATION OCH RIKSPLANERING* (2nd ed. 1973).

<sup>8</sup>Cf. J. Sundberg, *Rättskällorna på 1970-talet*, in *SVENSK RÄTT I OMVANDLING. STUDIER TILLÄGNAD HILDING EEK, SEVE LJUNGMAN, FOLKE SCHMIDT*, 506 (1976).

<sup>9</sup>J. Sundberg, *Human Rights in Sweden. The Annual Report 1985*, Institutet för offentlig och internationell rätt No 67 (1987).

<sup>10</sup>For English language comments on the 1969 Directives, see J. Sundberg, *Marriage or No Marriage*, *supra* note 7 and J. Sundberg, *Experiment Repeated*, *supra* note 7.

<sup>11</sup>Schmidt, *The Prospective Law of Marriage*, 15 SCANDINAVIAN STUDIES IN LAW 193, 213 (1971).

<sup>12</sup>Lennart Geijer, *Domstolarna i dagens samhälle* (tr. The Courts in Today's Society), public lecture in Lund, February 22, 1973. Dr Geijer has graciously provided the author with a copy of the original manuscript (on file at Institutet för offentlig och internationell rätt in Stockholm, Sweden).

<sup>13</sup>G. Elwin, *FESTSKRIFT TILLÄGNAD PER OLOF EKELÖF*, 244 (1972).

closed party sessions, attempts from the side of the professional judiciary to observe such sessions being cold-shouldered with the remarks that those judges were unduly busying themselves with the affairs of the Social Democrats.<sup>15</sup> A few years later, it was expressly said in the parliamentary debate that "to us, Social Democrats, it can never be a question of the responsibility for the political ideology disappearing if we are elected lay assessors."<sup>16</sup> The new Swedish Constitution of 1974 assigned to the judiciary a much more subordinate position than previously, by doing away with the separation-of-powers principle<sup>17</sup> (replacing Montesquieu with Rousseau, as it has been put).<sup>18</sup> Finally, in the educational system the new attitude was voiced by Mr. Carlsson, and in 1971,<sup>19</sup> the National Board of Education received orders to plan for the discontinuation of the private schools.<sup>20</sup> Indeed, in Stockholm some 30 of them disappeared during the years to follow.

The long and deceiving calm that followed upon these changes is believed to have reflected, mostly, the efficient muzzling of dissenting voices. Dissenters were faced with the massive hostility of the media, controlled mostly by the unions which in turn mostly belonged to the Socialist 'machine.' Critical voices were hard to find except in *samizdat* literature.<sup>21</sup> Nevertheless, it would seem that indignation was building up at the grassroot level. A cursory look at the character of the complaints of the 1980s suggests that very often they are directed against phenomena going with the expansion of the social welfare society; in particular they seem to challenge the powers of the social welfare board and tax boards over the citizenry.<sup>22</sup> Parents often experienced a negative reaction to the excessive control of family life to which they felt they were being subjected. Being Swedes, they were seldom mindful of 'human rights' as such, but they were mindful of social welfare payments. Their position was compromised by neo-poverty taking too much away in taxes and redistributing it in the form of social welfare. That made them dependent on the social welfare machine and this in turn forced them to insist on their believed rights against it.<sup>23</sup> Feeling that they were abused in a high tax society, paying the way for myriads of social workers, people increasingly focused their fears on the agen-

<sup>15</sup>J. SUNDBERG, HIGH TAX IMPERIALISM, Institutet för offentlig och internationell rätt No 51, Stockholm 1981, at 7 with further references. Compare *Soderlund v. Sweden*, Appl. No. 5258/71, 43 ECHR CD 73; and J. Sundberg, *The Media and the Formation of Law*, in *Festschrift für Dietrich Oehler* (hrsgb. Rolf Dietrich Herzberg) (Carl Heymanns Verlag) Cologne etc. 447, 467 (1985).

<sup>16</sup>*Snabbprotokoll från riksdagsdebatterna* 1975/76 No 45, at 13.

<sup>17</sup>*Kunglig Proposition* 1973:90, 91, 155.

<sup>18</sup>S. Jägerskiöld, *Statsrättslig forskning kring dem nya grundlagen*, *Statsvetenskaplig tidskrift* 50 (1976).

<sup>19</sup>Ingvar Carlsson, interview in *Svenska Dagbladet*, December 15, 1971; J. Sundberg, *supra* note 9, at 36.

<sup>20</sup>J. Orring, interview in *Göteborgs Handels och Sjöfartstidning*, July 21, 1972, at 4.

<sup>21</sup>J. SUNDBERG, *supra* note 15, at 21.

<sup>22</sup>See, e.g., the complaints to the European Commission in the following two cases, both stricken from the list after 'friendly settlement' with sizeable indemnities to the applicants (200,000 Sw. crowns each): *Aminoff v. Sweden*, Appl. 10 554/83, 8 E.H.R.R. 75, and *Widen v. Sweden*, Appl. 10 723/83, 8 E.H.R.R. 79.

<sup>23</sup>*Andersson and Kullman v. Sweden*, Appl. 11 776/85, reported in J. Sundberg, *supra* note 9, at 126-138. 62

cies that meant most to their lives and which seemed to hold unchecked power.

Registered complaints, tended however, to focus not only on the practice of the social welfare boards (reflecting an overwhelming Marxist input in the training of social workers during the 1970s) but also on the vagueness of the Swedish legislation and the uselessness of the administrative court proceedings.<sup>24</sup>

During the 1970s in Sweden, 'human rights' was mostly — and easily — dismissed as a matter of foreign affairs. Nevertheless, the term had a life of its own because it is so highly charged and so easy to keep in mind, not the least due to the high scrutiny to which the Swedish media subjected the rest of the world. Among the educated it did not need much insight to understand that in many sectors of Swedish life a major conflict with the European Convention was alive. After all, the Convention guaranteed the right of property (Art. 1 of the First Additional Protocol), which is the essence of the European legal tradition in the right to a fair hearing before an independent and impartial court (Art. 6); it saw and guaranteed the right to respect for family life (Art. 8), as well as the respect for the parents' religious and philosophical convictions in the education of their children (Art. 2 of the First Additional Protocol).

### *Breaking the Bureaucratic Wall*

#### The Bureaucratic Wall

Few people have an interest in making the situation under the Convention better known, it was said in governmental circles after *Sporrong Lonnroth*. "Most people hope to prevent any further complaints being brought before the Commission based on the rule in Article 6 by remaining silent."<sup>25</sup> And indeed, among the bureaucrats the appearance of perfect bliss was strongly supported by their massive silence.

Relevant to this situation was, firstly, that within the Swedish Ministry of Foreign Affairs, human rights questions were considered to be, by their nature, foreign policy questions. A convincing piece of testimony to this came to light when Carl Lidbom was made Minister *de facto* for human rights questions in 1969. The Permanent Undersecretary in the Foreign Ministry, Mr. Sverker A ström felt forced to protest this assignment to a Foreign Ministry outsider. "It is not possible to take human rights questions out of their political environment." Later, Carl Lidbom acknowledged the merits of the protest: "The legal aspects are difficult to isolate. Furthermore, when things are getting serious, they have to be subordinated to things political."<sup>26</sup>

<sup>24</sup>Cf. note 22.

<sup>25</sup>J. SUNDBERG, *LAW, RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 50 (1986).  
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<sup>26</sup>C. Lidbom, *REFORMIST*, 37 (1984).

What this meant to the bureaucracy surfaced in a recent public discussion. It was carried on between high bureaucrats and concerned the extent to which the functionaries in the Ministries must refrain from criticizing publicly decisions taken by the Government and their effects. Mr. Peter Löfmarck (an insider) put it like this:

Even if the functionary should consider the decision wrong and feels unable to say something positive about it (which anyway is seldom or never requested), he or she must in any case outwards refrain from criticizing the decision publicly. If the political leadership cannot have complete confidence in this respect in the functionary, it perhaps will not dare to rely fully in day to day work on the competence and judgment of the functionary.<sup>27</sup>

He received a reply from an ex-insider, Mr. Clas Nordström, distinguishing between the Government function and the Government interest:

It is being expected, and justly so, from those who are assisting the Government in the drafting of legislation in their capacity of experts that they will put their competence at disposal when it comes to structuring the law as an instrument of the political will of the Government, and that they will do so without any consideration of interests, values and commitments of a private nature. The only legitimation they then need is the legality of the Government. They assume no responsibility for the will of the Government or its political motivation.

The loyalty of Mr. Löfmarck is of a different kind. With him the loyalty in question does not primarily cover the task and the Constitutional function superior to the task that is exercised by the Government. Rather it covers the Government in the meaning of the holders of Government power as the representatives of a political group. In this perspective, loyalty comes out as a call for holding back criticism that could disturb the endeavours of the power-holders in this capacity to lay the foundations for and to fortify a continuing hold onto power.

People in the Foreign Ministry, however, were subject to stricter rules. Even Mr. Nordström found this unavoidable: "Holders of important posts in the Foreign Ministry ought/ not . . . make public statements indicating views that deviate from the Government's dispositions in matters of foreign policy and general security. . . . There the Government function is in issue, not the Government interest (at least, this must be presumed)."<sup>28</sup>

From this, one may at least conclude that to the extent that human rights issues are seen as foreign policy matters, the high bureaucracy will feel discouraged from making itself visible once it senses that the Government has

<sup>27</sup>P. Löfmarck, *Tjänstemän måste visa lojalitet* (tr. Civil servants must display loyalty), *Svenska Dagbladet* (April 19, 1985).

<sup>28</sup>Clas Nordström, *Det skiljer oss från dem: lojalitet* (tr. The in camera loyalty), *Svenska Dagbladet* (April 24, 1985).

taken a position.

This approach was indeed driven home when the Svea Court of Appeals had made some references to the European Convention when consulted for its opinion relating to the proposed (Lidbom) revision of the expropriation law.<sup>29</sup> This brought the human rights Minister to express his displeasure in no uncertain terms in the parliamentary debate on December 9, 1971. The opinion of the Court was referred to as "a mistake on the part of the Court of Appeals," a "stupidity," and "an opinion that the Svea Court of Appeals will prefer to forget."<sup>30</sup> The impact was such that every reference to the Convention was dropped in the university textbook commenting upon the new legislation.<sup>31</sup>

Ever since the advent of the so-called 'new teaching' in the late 1960s,<sup>32</sup> the bureaucracy had been made aware that when a matter was called 'political' in nature, it was not for them to deal with; it awaited 'political' decision. Mr. Lidbom pushed the matter one step further. In 1974, capitalizing on those bureaucratic tendencies, he gave form to a new philosophy of 'social engineering': We have to "get rid of and consistently so, the views of times gone by that laws are written to last for decades as expressions of some kind of immutable objective justice. Laws should not be looked upon with submissive respect. For us [Social Democrats] they are working tools to be used to achieve political goals. . . . We are pushing our positions in the direction of our own values . . . pushing the positions all the time in all fields is the only possibility to get rid of, eventually, class society."<sup>33</sup> One discovers easily here the basic Marxist philosophy that the Law is not to protect the inherited values but rather to go ahead and operate as the motor in society's progression towards the ultimate end station of history: Communist society.

The term 'bureaucracy,' as used in the present context, is chosen to convey a nondistinction between the professional judiciary and the administration proper. Like in the Socialist Camp, the judge is part of the unitary administration. Indeed, this is a feature much appreciated from the top. The former Minister of Justice, Mr. Ove Rainer says in his book, *The Powers*:

Work for the Government to a great extent being based on using judges for various tasks is something unique. Excepting that the system to some extent is used in Denmark and Finland, it is practically unknown abroad.

In many other European countries, it is customary instead that lawyers are employed and recruited from the law faculties or the academies to do legislative and treaty work. Theirs is a more theoretical and formal view of the law than the one we have. This difference in outlook is a not unim-

<sup>29</sup>Statens Offentliga Utredningar 1969:50 Expropriationsutredningen.

<sup>30</sup>Snabbprotokoll från riksdagsdebatterna 1971 No 162, at 36.

<sup>31</sup>B. BENGSSON, EXPROPRIATION OCH RIKSPLANERING, Uppsala (2nd ed. 1973).

<sup>32</sup>N. BECKMAN, FESTSKRIFT TILLÄGNAD IVAR AGGE, 44 (1970); Cf. J. Sundberg, *supra* note 8, at 509.

<sup>33</sup>C. Lidbom, PAPPERSINDUSTRIARBETAREFÖRBUNDETS KONGRESSHANDLINGAR, 191 (1974).

portant reason why we are in difficulties, e.g., in the application of the European Convention on Human Rights.<sup>34</sup>

To the extent that the judiciary, in spite of the human rights Minister's blasting of the Svea Court of Appeals in Parliament, 1971, would feel inclined to look to the European Convention, the matter was seemingly put to rest in 1974 when the Supreme Administrative Court in no uncertain terms declared that they could not do so. In the *Ranea Case*, the fact that the ratification of the European Convention had not been accompanied by Swedish legislation was capitalized upon.

An international agreement to which Sweden has adhered is not directly applicable in the domestic administration of justice: instead, those legal provisions that are to be found in the treaty must be included in a Swedish statute in order to be valid law in our country (*transformation*). There has been enacted no such statute of transformation with regard to Article 2 of the Additional Protocol of March 20, 1952, to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, no duty has arisen for the School Board to comply with the rules of the Additional Protocol in its activities.<sup>35</sup>

Having this for a background, it is not surprising that on March 28, 1983, the Faculty of Law at the University of Stockholm, advising the Rector, felt entitled to state publicly and for the record that human rights was not a matter for scholarly research.<sup>36</sup>

To sum up, faced with the combined might of political resolution, the bureaucracy at large lost interest in the European Convention. It was seen as a matter for a couple of experts in the Foreign Ministry and perhaps one or two Professors. Being a foreign affairs matter, it was of absolutely no interest in the Swedish administration of justice. The bureaucracy functioned as a Wall against any intrusion of the human rights idea.

### The Break-In Tools

If you compare, at the European level, the amount of literature that has been devoted to the European Convention, it strikes you immediately how little there has been in Sweden. In Germany, Switzerland and Austria, e.g. the early 1970s saw a rich crop of contributions, focusing on matters of criminal procedure, covered by the Convention,<sup>37</sup> but one more decade was to pass

<sup>34</sup>O. RAINER, MAKTERNA, 19 (1984).

<sup>35</sup>*Regeringsträttens Arsbok*, 121 (1974).

<sup>36</sup>Faculty resolution of March 28, 1983, upon application from the National Correspondent for Sweden to the Documentation Centre for Human Rights (Council of Europe) for research assistance.

<sup>37</sup>A look at the extensive footnote supplied by Prof. Jochen Abr. Frowein to his chapter in J. Sundberg, *supra* note 25, at 12-13, conveys a general impression. Lindgren, *Europakonventionen och det svenska rättegångsförfarandet* (tr. The European Convention and Swedish procedure), 394 (1985), is the first attempt to publish in Sweden something which at least in its focus corresponds to Vogler, *Straf- und strafverfahren-*

before a single article on the subject was published in Sweden.<sup>38</sup> Thus, the first step towards taking human rights seriously in Sweden was to create a literature about them.

Looking at the legal system from the point of view of the citizen's rights has no long history in modern Sweden. It goes back to the publication in 1947 of the book "Medborgarrätt" (Citizen Rights or Citizen Law, there is some ambiguity in the term): "What today may look self-evident to us was only 30 years ago something almost surprisingly new" writes a recent commentator on the book.<sup>39</sup> The *spiritus rector* and co-author, Professor Halvar G.F. Sundberg, also published in 1957 the first, primitive Swedish commentary to the European Convention,<sup>40</sup> and it remained at hand until Halvar Sundberg had published his 11th and last edition of that book (1971), the commentary remaining largely unchanged throughout the various editions. The publications that followed were not overly helpful to aggrieved parties. Hans Danelius wrote a book<sup>41</sup> on the basis of a report that he had prepared on the European Convention in connection with the drafting of the new Constitution of 1974.<sup>42</sup> The report convinced the legislature that no special consideration was due to the Convention in the Constitution. Danelius' book is instructive, but, little related to Swedish things; nevertheless, in three editions (1975, 1981 and 1985) it sold some 6,000 copies.

Of greater importance was the conference that was organized in Abo (Turku), Finland, by Professor Tor Modeen in 1974.<sup>43</sup> It inspired some of the participants, connected with *Institutet för offentlig och internationell rätt* in Stockholm to start the development of a course on European human rights for advocates and the idea came to its first realization in December 1978, followed by two more courses in 1979 and 1980. In the meantime, others organized a teach-in for the general public at the old parliamentary building in 1979,<sup>44</sup> two years later followed by a half-day Council of Europe human rights seminar for advocates at the restaurant *Operakällaren* in Stockholm.<sup>45</sup> In 1980, the

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*srechtliche Fragen in der Spruchpraxis der Europäischen Kommission und des Europäischen Gerichtshof für Menschenrechte.*" published in the Federal Republic of Germany some ten years earlier (89 Zeitschrift für das gesamte Strafrechtswissenschaft 761-795; cf 82 Zeitschrift für das gesamte Strafrechtswissenschaft 743-781). In Switzerland, the Strasbourg case law is digested in the Swiss yearbook for Administrative Law (Annuaire de jurisprudence administrative); in Austria it is extensively discussed in Ermacora's and Others' manual.

<sup>38</sup>Lindgren, *supra* note 37.

<sup>39</sup>G. PETRÉN, SKRIFTER TILL MINNET AV HALVAR G.F. SUNDBERG. (Institutet för offentlig och internationell rätt No 40) 17 (1978).

<sup>40</sup>R. MALMGREN, SVERIGES GRUNDLAGAR OCH TILLHÄRANDE FÖRFATTNINGAR MED FÖRKLARINGAR. (7th ed. 1957).

<sup>41</sup>H. DANFLIUS, MÄNSKLIGA RÄTTIGHETER (consecutive editions 1975, 1981, and 1984).

<sup>42</sup>*Statens Offentliga Utredningar*, 1974:88. Europakonventionen och europeiska sociala stadgan.

<sup>43</sup>The proceedings were published in 8 REVUE DES DROITS D L'HOMME. HUMAN RIGHTS JOURNAL (1975).

<sup>44</sup>Part of the proceedings were reported in *Svensk Juristtidning*, 1-00 (1979).

<sup>45</sup>A number of the Advocates who were present at *Operakällaren* have later taken various cases to Strasbourg, e.g. Hans Michélsen, Hans Liljesson, and Kjell Jönsson).

Institute-developed course was transferred to the Faculty of Law in Stockholm and was subsequently given as part of the regular law student programme under the auspices of the Chair in Jurisprudence, the switch being all the easier since the holder of the Chair had developed the course as Director of Studies at the Institute.

In 1982, the Institute was appointed National Correspondent for Sweden to the Council of Europe's Documentation Center for Human Rights.<sup>46</sup> This appointment by the Director of Human Rights in Strasbourg meant the beginning of an energetic effort on the part of the Institute to make the Convention better known among the Swedes. Having already published at that time the volume, *Studier kring Europakonventionen* (translation: Studies on the European Convention), 1982, the Institute planned for a major breakthrough for the Convention. Achieving it however, was held to be impossible without, firstly, the publication and distribution of a pocket edition with the Swedish version of the Convention text<sup>47</sup> and a pocket instruction about the European system and how to use it; secondly, making the Swedish bureaucracy read the Convention and take it seriously. In both matters, 1983 became the decisive year.

On March 29, 1983, a Colloquy on Laws, Rights and the European Convention on Human Rights took place at the Svea Court of Appeals in Stockholm. With a panel including representatives of Strasbourg and Switzerland it assembled some 70 participants, mostly from the high bureaucracy in Stockholm. It was organized by the Institute on the principle of making representatives of the Convention organs in Strasbourg meet representatives of the high Swedish bureaucracy. The informal exchange of views would, it was hoped, demonstrate to the Swedish bureaucracy how it was seen by the Convention organs in Strasbourg, and show the latter how they were seen by the Swedish bureaucracy. The participation of representatives of the Swiss government simultaneously provided a sidelight on another member of the Council of Europe than Sweden. That made human rights assume a new European dimension at the colloquy. It was no longer a matter only of a relationship between the Swedish bureaucracy and the Convention organs. It was equally a matter for all governments in the Convention states and for all their bureaucracy.<sup>48</sup>

The pocket editions followed. During 1983-84 some 10,000 copies of the instruction about the Convention machinery<sup>49</sup> were released among the general public, followed by an edition of the Swedish text of the Convention.<sup>50</sup>

<sup>46</sup>J. Sundberg, *supra* note 25 at 68.

<sup>47</sup>J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 (Institutet för offentlig och internationell rätt No 60) 56 (1985).

<sup>48</sup>J. SUNDBERG, *supra* note 25 at 8, 102.

<sup>49</sup>No 52 in the publication series of Institutet för offentlig och internationell rätt.

<sup>50</sup>*Supra* note 49 at No 53.

Some 2,600 copies went to the Swedish Advocates in March 1984; in June of the same year, 800 copies were distributed (thanks to a third-party generosity) to the prosecutors in the realm.

The efforts continued. In fact, during the three years that passed since the appointment as National Correspondent, the Institute published 8 numbers in its publications series devoted to the European human rights theme.<sup>51</sup> A major effort went into the publication in Swedish of the text of the decisions in the *Sporrong Lönnroth Case* — some 170 pages with the Report of the Commission and the two judgments of the European Court, with the addition of one article on the history of the case as seen by the applicants, one article on the importance of the judgments in the Swedish legal context, and one article on the place of the case in the Swedish history of legal ideas. It was published in 1985.<sup>52</sup>

Certainly, during the decade that followed Professor Modeen's conference in Abo, the need for literature had been met, not as richly as elsewhere but still to a remarkable degree, considering that this was Sweden. But was it read?

### Citation Cartels

Publication is certainly not enough: the writings must also be read. What happened at the Colloquy at Svea hovrätt of course was 'read' in the sense that those who participated also listened to what was being said and recognized it when they perused the volume with the proceedings of the colloquy. The rich supply of pictures from the Colloquy which accompanied the Swedish edition of the proceedings<sup>53</sup> also allowed the participants to recall who else could be counted on to have 'read' the book in this sense. Finding the photos of Ambassadors Danelius and Corell in this group certainly made an impression.

It would of course be surprising if those interests who had succeeded so well with the bureaucratic "Wall" would have been happy with the new development. However, nothing more seemed to be called for than the setting up of a *citation cartel* (a term for which I acknowledge my indebtedness to Professor Leo Gross) to cordon off the disturbing new literature. Since any

<sup>51</sup>J. SUNDBERG, B. MALMLÖF, M MELLQVIST & F. SUNDBERG, STUDIER KRING EUROPAKONVENTIONEN (No 47) 1982; J. SUNDBERG, red., LAGAR, RÄTTIGHETER OCH EUROPAKONVENTIONEN OM DE MÄNSKLIGA RÄTTIGHETERNA (No 50) (1984); SKYDDET FÖR MÄNSKLIGA RÄTTIGHETER I EUROPA (No 52) (1983); DEN EUROPEISKA KONVENTIONEN OM DE MÄNSKLIGA RÄTTIGHETERNA (No 53) (1983); VIKTIGARE TILLDRAGELSER PA OMRÅDET FÖR MÄNSKLIGA RÄTTIGHETER I SVERIGE. ARSRAPPORT FÖR 1983 AVGIVEN AV INSTITUTET FÖR OFFENTLIG OCH INTERNATIONELL RÄTT (No 58) 1985; EUROPEISK TÄVLAN I FINGERAD RÄTTEGANG INOM OMRÅDET FÖR MÄNSKLIGA RÄTTIGHETER (No 59) [1985]; J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 (No 60) (1985); VIKTIGARE TILLDRAGELSER PA OMRÅDET FÖR MÄNSKLIGA RÄTTIGHETER I SVERIGE. ARSRAPPORT FÖR 1984, AVGIVEN AV INSTITUTET FÖR OFFENTLIG OCH INTERNATIONELL RÄTT (No 62) (1986).

<sup>52</sup>J. SUNDBERG, RED., SPORRONG LÖNNROTH. EN HANDBOK (tr. The *Sporrong Lönnroth Case. A Manual*) (No 63) (1985).

<sup>53</sup>J. SUNDBERG, RED., LAGAR, RÄTTIGHETER OCH EUROPAKONVENTIONEN OM DE MÄNSKLIGA RÄTTIGHETERNA (No 50) (1984). Exchange@UAKron, 1987

essayistic literature is by definition incomplete in setting out the whole picture, a citation cartel is not that easy to prove. In this case, however, the presence at the 1983 colloquy of Professor Jochen Abr. Frowein, Vice President of the European Commission, greatly facilitates the task. The organizers of the colloquy had asked him to give a lecture especially designed to be informative and useful to a Swedish bureaucratic audience. He obliged and even went to great pains to supply an extensive footnote apparatus to his paper in the printed edition of the proceedings.<sup>54</sup>

The presence and the extent of the citation cartel is then easy to study by looking at the literature on the Convention that was published in Sweden after the Colloquy. It is all the easier since it is not a big one. It is then interesting to note that in every piece written by somebody connected with the Foreign Ministry environment, directly addressing the Convention issues, the reference to Professor Frowein's contribution is missing. Not only such Colloquy participants as Ambassadors Danelius and Corell omit any mention, whatever footnotes they otherwise add to their texts,<sup>55</sup> but also papers written for the enlightenment of the Swedish legal public by their subordinates or *protegees* all show the same.<sup>56</sup>

The citation cartel of course also hit the other publications put out by the Institute during these years. At times one may say that its instigators went too far. In 1986 the Department of Justice published a Report proposing the introduction into Swedish law of a special procedural remedy, designed to meet the requirements of Art. 6 in the Convention and held to be necessary in view of the judgment (1982) in *Sporrong Lönnroth* and the subsequent European case law (Ds Ju 1986:3. *Europaradskonventionen och rätten till domstolsprövning*). In this Report it is being stated flatly that the Commission Report in *Sporrong Lönnroth* remains 'unpublished' (*opublicerad*)<sup>57</sup> in spite of the fact that, at the preparatory stage, it was directly brought to the attention of the drafters of the Report that the statement was untrue, since the Commission Report was published *in extenso* in translation to Swedish in vol. 63 of the Institute series.<sup>58</sup>

## The Media Wall

To this should perhaps be added a few words about the strange media

<sup>54</sup>Jochen Abr. Frowein, "Recent Developments Concerning the European Convention on Human Rights," in J. Sundberg, *supra* note 25 at 11-27.

<sup>55</sup>H. DANELIUS, MÄNSKLIGA RÄTTIGHETER, (3rd ed. 1984); Corell & Holtz, *Mänskliga rättigheter. Förfarandet enligt den europeiska konventionen*, UD informerar (1985).

<sup>56</sup>C. Holtz, *Den långa vägen till dom i Strasbourg — något om förfarandet inför Europarådets organ för de mänskliga rättigheterna*, *Svensk Juristtidning* 621-3 (1985); R. Lindholm, *Om mänskliga rättigheter i Sverige*, *Svensk Juristtidning* (1986), E. Fribergh, *Europakonventionens krav på domstolsprövning av förvaltningsbeslut*, *SVENSK JURISTTIDNING* 325 (1986); G. Melander, *The Effect of Treaty Provisions in Swedish Law*, 53 *Nordisk Tidsskrift for International Ret* 63-70 (1984).

<sup>57</sup>Ds Ju 1986:3. *Europaradskonventionen och rätten till domstolsprövning*, at 47.

<sup>58</sup>J. SUNDBERG, *supra* note 52, at 17-118.

situation in Sweden. From the general attention that the Swedish media have given human rights violations and human rights at large, abroad, one might perhaps have concluded that even the matter 'European human rights' had considerable news value. Many of the judgments of the European Court would seem to have had much to offer a reasonably gifted Swedish journalist. But it has reflected a Swedish *zeitgeist* not to report anything apart from the most rudimentary facts about what was happening in Strasbourg. The Convention has in fact been a non-issue to most of the Swedish media during most of the time. This was so because it was deemed a legal matter, with much of the thinking taking place on the abstract European level, totally beyond the reach of the, almost without exception, legally untrained modern Swedish journalists.<sup>59</sup> Time and again the attentive observer would discover that the media had deliberately suppressed news forthcoming from Strasbourg.<sup>60</sup> An almost sensational incident of this kind occurred when the Swedish media had nothing to say about the friendly settlement of December 9, 1985, between Sweden and four other countries on the one side, and Turkey on the other, while this news was reported the day after by most other European media.<sup>61</sup> To the Swedish media, it would seem, it was not news fit for print.

Having this for a background it was something of a surprise that the media, on September 29, 1983, should provide the European Convention with a totally unplanned marketing device. This was the careless remark of the Prime Minister, Mr. Olof Palme, mercilessly published by a major Swedish daily, *Svenska Dagbladet*, in which the Prime Minister referred to the European Court as the 'Kindergarten' of Mr. Justice Gustaf Petren (one of Mr. Palme's chosen adversaries).<sup>62</sup> At the media level of thinking, this type of childish comment is important. The 'Petren's Kindergarten' image spread like wildfire and reappeared in numerous references in the press and elsewhere. It is thought-provoking to find it mirrored, a year later, in an editorial in *Svenska Dagbladet* titled: "What the Kindergarten Can Do," an editorial which fancy enough is in fact reviewing an article by Professor Frowein in an American legal periodical.<sup>63</sup>

### The Human Rights Law Moot Court Competition

Neither the citation cartel, nor the massive hostility on the part of the media were without effect. The effects in Sweden were similar in kind to the

<sup>59</sup>J. Sundberg, *The Media and the Formation of Law*, *supra* note 15, at 452-53; J. SUNDBERG, RED., OM MASSMEDIAS RÄTTSSYN. STUDIER OCH FÖRHANDLINGAR UTGIVNA AV INSTITUTET FÖR OFFENTLIG OCH INTERNATIONELL RÄTT. (Institutet för offentlig och internationell rätt No 55) Stockholm 1984.

<sup>60</sup>One such incident concerning a derogatory mistranslation from Swedish in the case *Olsson v. Sweden*, Appl. 10 465/83, 8 E.H.R.R. 71, labeling one of the applicants "degenerate," surprised the Swedish public in 1986 when the cable to the Swedish press agency TT setting out the story was intercepted and brought to public knowledge in spite of the decision to suppress the story taken by the Swedish print media.

<sup>61</sup>For more detail, see J. Sundberg, *supra* note 9, at 88-97.

<sup>62</sup>J. SUNDBERG, *supra* note 47, at 36-38.

<sup>63</sup>Frowein, *European Integration Through Fundamental Rights*, 18 UNIV. MICH. J.L. REFORM, 5-27 (1984).

syndrome known internationally as 'Finlandization.' Public display of support for the Institute became so unfashionable that in the end the mandate as National Correspondent was not renewed — no grounds given — but moved to another institute at the University of Lund, i.e., a place as far removed from the capital of the country as you could get.<sup>64</sup> Increasingly it was realized at the Institute that renewed efforts were called for.

By this time the *Jessup International Moot Court Competition* happened to intervene in the picture. A moot court competition is essentially an American pedagogical tool, and it enjoys an established place in the curriculum of the American law school<sup>65</sup> but it has also been utilized in other places.<sup>66</sup> At the Institute in Stockholm, the idea was developed to use the proceedings in Strasbourg as a model for a moot court competition between law students in the Scandinavian countries adhering to the European Convention. Since the Director of Studies had rather extensive experience of teaching in the United States and kept a voluminous file covering moot court competitions, the necessary ingredients were at hand. The rules for the new competition were patterned along the Jessup lines.<sup>67</sup> In September 1983, proposals for a discussion of the setting up of such a competition were sent out to various law faculty dignitaries and the students' Law Association.<sup>68</sup> They received little or no response. During the Spring of 1984, however, by accident, the matter was joined with another.

As a side effect of the 'ideas of 1968' (i.e. the students' revolt in Paris) Swedish students participate in faculty-level decisions determining mandatory reading assignments. Under this system first year students may have a say in what the last year students should read. That spring, the students exercised this privilege to destroy a proposal concerning readings towards the end of the law study curriculum. In mild criticism of this exercise (the youngest of the responsible students was only six months in law school) the students received professorial letters, written in Socratic irony, complimenting them for their interest in such a far-away subject as this and adding that the Professor hoped to soon be able to come back with an offer keeping in mind their interest. The students then riposted, perhaps with some help from other interested people, by turning to the Rector, the Ombudsman and the Chancellor of Justice, complaining that the Professor was "threatening" them by his letters. The matter

<sup>64</sup>Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Univ. of Lund.

<sup>65</sup>See e.g., Walsh, *The Moot System*, 60 L. Q. REV. 416, 421 (1899).

<sup>66</sup>D. Flint, *Luxembourg Moot*, 31 J.L. SOC'Y SCOTLAND 79 (1986); Baker, *Ten Days in Hong Kong*, NEW ZEALAND L.J. 334 (1983); Gormley, *International Moot Court Competition*, 17 J.LEG. ED. 333; Fleming, *The Canadian Round of the Philip C. Jessup International Moot Court Competition*, 30 UNIV. NEW BRUNSWICK L.J. 187; Brown, *The Jessup Mooting Competition as a Vehicle for Teaching Public International Law*, 1978 CANADIAN YEARBOOK INT'L L. 332.

<sup>67</sup>*Europeisk tävlan i fingerad rättegång inom området för mänskliga rättigheter*, supra note 51.

<sup>68</sup>AFFÄREN FR. EDDAN T. EKELOF, EN VITBOK. DOKUMENTSAMLING UTGIVEN AV INSTITUTET FÖR OFFENTLIG OCH INTERNATIONELL RÄTT (Institutet för offentlig och internationell rätt No 61, 1985).

was taken deadly seriously in the bureaucracy, explanations that the offers to be expected which were referred to in the letters, concerned a planned moot court competition (a novelty in Swedish legal education) were dismissed as completely untrustworthy and the Board of Trustees of the University of Stockholm (*Universitetsstyrelsen*) called for a criminal prosecution. The Chancellor of Justice did not go that far but reprimanded sternly the "writing and despatching" of these letters.<sup>69</sup>

In a way the outcome was a blessing. The moot court competition started at about the same time as the Chancellor let his decision be published in the media.<sup>70</sup> Not everybody in the high bureaucracy thought that the Chancellor of Justice or the University Board of Trustees really believed that a Law Professor, offering his students to learn something, thereby was threatening them. In this way a rather favorable atmosphere built up in high bureaucracy which greatly facilitated the setting up of the moot court competition. The competition turned out to be a great success. Parties involved in the *Sporrong Lönnroth Case* set up a money prize and renewed it, dipping into the damage award.<sup>71</sup> After two years, all the four Scandinavian countries had been sending teams to participate; six universities were represented and a dozen teams took part in finals and semi-finals. All in all some one hundred law students took part in the finals held in June 1986 at the Palace of the Supreme Court in Stockholm. The President of the European Court of Human Rights sat on the panel of judges with two of his colleagues from Strasbourg, assisted by justices from the supreme courts of Denmark, Iceland, Norway and Sweden.<sup>72</sup> It was a great event, something that never had happened before.

When those representatives of the high Swedish judiciary, presidents of various supreme and appellate Swedish courts, in the course of this competition, listened to the many hours of student pleadings based on the European Convention, they also familiarized themselves with the Convention in a way that no cursory reading ever could match. Not only did they consider the rules of the Convention in the light of the case law that the students were pleading, but also, by the participation of non-Swedish students and judges, they got the full sense of the European dimension in the matter.

Needless to say, the event was tabooed by the Swedish media.<sup>73</sup> But this of course in no way prevented the deep-going effects of what had taken place and not the least the example that had been set by these presidents to their subordinates in the Swedish judicial career. The Walls set up by the bureaucracy and the media had been broken; the European message was coming through.

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<sup>69</sup>J. SUNDBERG, *supra* note 47, at 102-103.

<sup>70</sup>*Svenska Dagbladet*, September 20, 1984.

<sup>71</sup>J. SUNDBERG, *supra* note 47, at 103.

<sup>72</sup>J. Sundberg, *supra* note 9, at 108.

<sup>73</sup>J. Sundberg, *supra* note 9, at 109.

## THE EFFECTS

*Friendly settlements*

The first signs of a new attitude towards the European Convention in Swedish officialdom was a reflection of a friendly settlement that was entered into in the *Skoogström Case* on March 19, 1984.<sup>74</sup> Sweden had made friendly settlements in particular cases before but this was different. Until then, friendly settlements had resulted mainly from the fact that the Swedish Government had found it possible to agree that some sort of exceptional development had taken place to the detriment of the individual applicant, but that the Swedish legal system as such was beyond reproach. The Skoogstrom settlement concerned legislation itself; it was a more or less thinly veiled undertaking on the part of Sweden to amend Ch. 24 of the Code of Judicial Procedure so that the periods of detention were brought into conformity with the requirements of the Convention of Europe. A kind of undertaking also was hiding behind the passage in the settlement that:

the Government has seen to it that the National Board of the Judiciary and the Chief [State] Prosecutor will publish a summary of the [European] Commission's report so as to enable the judiciary and the prosecutors to avoid creating in the daily performance of their duties situations which have been found by the Commission to constitute a violation of the said Article [5 (3)].

In order to satisfy this undertaking an official article was authored by Mr. Peter Löfmarck, a high dignitary in the Department of Justice, and published in a number of official periodicals for judges, prosecutors the police and advocates. In this article, Mr. Löfmarck concluded from the case law of the European Court, "that the Swedish rules, at least in the way they are often applied in practice, cannot be reconciled with the Convention. Consequently the rules will have to be changed."

In the meantime it is desirable that the authorities will apply the present rules, as far as possible, in such a way that there will be no conflict with the Convention of Europe. . . . It is important . . . that the authorities charged with the application make themselves familiar, as soon as possible, with what the decision of the Commission of Europe means in their case.

By internal news letters in the courts and briefings of personnel in the office of prosecutions the contents of this article were brought to attention in June, 1984. The effect was enhanced considerably by the almost simultaneous distribution of the Institute pocket edition of the Convention text and the instruction about the Strasbourg proceedings.

<sup>74</sup> Appl. 8582/79; for detail, see J. Sundberg, *supra* note 47, at 66-69.  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss4/1>

### *Sporrong Lönnroth*

The case *Sporrong Lönnroth v. Sweden* came to an end, in its judicial aspects, by the judgment of December 18, 1984 in which the European Court awarded the applicants damages in the amount of 1 million Swedish crowns plus costs. They were paid out to the applicants pursuant to a Government decision of May 2, 1985.<sup>75</sup>

However, by letter of December 23, 1984, a new victim made his appearance before the Government. Mrs. Inga Mari Lönnroth had challenged the expropriation proceedings before the European Court, but, she was only the owner of three fourths of the real property hit. Now the owner of the remaining quarter claimed damages on the force of the argument that his fourth had suffered just as much as the other fourths from the expropriation proceedings. By decision of July 11, 1985, the Government accepted the claim and ordered the payment of 66.666 crowns.

Had Arne F. Andersson been a party to the case before the Court, he would have, in view of his co-ownership to the piece of real property, been awarded damages on the corresponding grounds and to the same extent as Inga Mari Lönnroth. With this as a background, the Government finds that the claim presented by Arne F. Andersson should be assented to.

This being done, all the owners of land in Stockholm, who had been hit by these major zone expropriations which had come to European attention through the *Sporrong Lönnroth Case*, scrambled to press similar claims. A drive was started by their professional real property owner association by circular letters of October 4, 1985; by December 17, a group of 64 owners had been organized representing claims totalling more than 86 million crowns.<sup>76</sup>

On the other hand, the lawyer reputed to be the man behind the two applications in the *Sporrong Lönnroth Case* found his office dismantled by some major banks withdrawing their support of it.<sup>77</sup> He survived professionally only by other private interests coming to the rescue.

### *The European Limelight*

Europe has rarely experienced the immediate intellectual community that goes with a common language and which to the peoples of the American continents is something selfevident, since English is the common language (with all respect for French-speaking Quebec) in North America, and Spanish (with all respect for Portuguese-speaking Brazil) in South America.

Swedish administration of justice being based on the Swedish language ex-

<sup>75</sup>J. Sundberg, *supra* note 9, at 56.

<sup>76</sup>J. Sundberg, *supra* note 9, at 57.

<sup>77</sup>J. Sundberg, *supra* note 9, at 142  
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clusively has meant a kind of comfortable relative European anonymity for Swedish bureaucracy. For Continentals and the British, observing what was taking place in Sweden meant a real effort. Most would go unnoticed.

This has been changed to no little degree by the European Convention. In Strasbourg, legal opinions and arguments are made available in English or French, the official languages of the Council of Europe. Thereby they become open for everybody commanding one of these world languages. Such people are a great deal more numerous than the ones commanding Swedish. The language barrier protection is gone.

Cases being taken to Strasbourg thus came to mean that the civil servants in Sweden suddenly found themselves exposed to the European limelight. The comfortable relative darkness gone, this was quite a traumatic experience for many. It made them look with a great deal more apprehension to what could be expected from Strasbourg, and to create among them an awareness of the European dimension in what they were doing. A recent cartoon in a Swedish daily makes the point. It shows a bureaucrat at his desk. An unknown opens the door and whispers: "God sees you, and so does the Court of Europe."<sup>78</sup>

### *Advocate Pleading*

Many are curious about how relevant the Strasbourg case law is in the national practice of the Convention states. A number of attempts have been made to find the extent to which national courts have referred to and relied on that case law. Such attempts have met with rather limited success, however. Some of them were undertaken rather long ago when there was less to find. Most of them seem to use an unsatisfactory method only focusing on what was set out in the order and the opinion of the judgment. It is possible to do better than that.

Mr. Löfmarck's article is of course a strongly worded advice that Swedish authorities should "make themselves familiar" with the Strasbourg case law in issue and that "the police, the prosecutors and the courts take into consideration the standards insisted upon by the Convention." This may well happen without it being reflected in any way in the opinion or the order of a judgment. A better way to find out the relevance of the Strasbourg case law would then seem to be to explore to what extent counsel includes the Convention element in his argument. In its simplest form, this means to ask counsel whether he thinks it pays to argue the Convention before the Swedish authorities. Based on personal contacts with experienced practitioners in Sweden, I believe that many today would answer yes to that question although simultaneously cautioning about imperatives set by the diplomacy of the art. It is certainly not unusual today to find the Convention or Strasbourg cases referred to in written

<sup>78</sup>Staffens Stollar, *Expressen* (July 29, 1986).  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss4/1>

argument;<sup>79</sup> and the judgment, while seldom mentioning this argument, will often be so drafted as to align itself with the position which seems desirable in view of the Convention arguments.

### *The Law Council*

The best place to look for the effects of the European Convention's breakthrough in Swedish legal thinking is however in the opinions of the so called Law Council (*lagrådet*). This is a body recruited from the high judiciary and supposed to offer its opinion as to the lawfulness and advisability of proposed new legislation. It had been around for a long time<sup>80</sup> but in the new Constitution of 1974, it received a kind of charter of its own. In Ch. 8, sec. 18, para. 3, No. 1, it was provided that the Law Council should consider "how the proposed law harmonizes with the fundamental laws and the rest of the legal system" a sweeping reference that may or may not include the European Convention. The year 1974 was a kind of low-water mark for the European Convention in Sweden. This was the year when the Supreme Administrative Court advised that nobody need pay any attention to it whatsoever, since there was no 'transformation law,'<sup>81</sup> Lidbom had recently blasted the Svea Court of Appeals for having paid attention to it,<sup>82</sup> and the Minister of Justice had warned the courts against unduly protecting the individual.<sup>83</sup> Consequently, it is not surprising that in the case of the *Act on Securing Evidence in Tax Matters*, enacted on November 27, 1975, the Law Council felt relieved of having to pay any attention to the European Convention in spite of the fact that the leading idea of the Act was to allow intrusion into private and family life without any suspicion of any offence whatsoever having been committed, simply to allow a fishing expedition for documents of interest to the tax authorities.<sup>84</sup>

Some five years later, summarizing his experiences of serving with the Council, Justice Gustaf Petrén felt forced to raise the question whether the Council was even constitutionally competent to express an opinion as to such a treaty as the European Convention if that opinion were to deviate from the one held by the Swedish Government as being the legal representative of Sweden in treaty matters.<sup>85</sup> It would seem to follow that the Law Council would not feel free to consider the requirements of the Convention until the Government Agent had conceded in Strasbourg that a violation had taken place.

*The Profit Sharing Tax Act* was issued on December 22, 1983. It was an

<sup>79</sup> Cf. e.g., J. SUNDBERG, *supra* note 47, at 42, 44, 48, 52, 84, 88, 92, 95, 97, 100.

<sup>80</sup> See F. Schultz, *Om lagrådet som rättssäkerhetsgaranti*, (Institutet för offentlig och internationell rätt No 54) 1984.

<sup>81</sup> *Regeringsrättens Årsbok* 1974, at 121.

<sup>82</sup> Cf. *supra* note 30.

<sup>83</sup> Cf. *supra* note 14, at 15.

<sup>84</sup> For further detail, see J. SUNDBERG, *High Tax Imperialism* *supra* note 15, at 45.

<sup>85</sup> Gustaf Petrén, *Lagrådsintryck*, 133, 136 (1980).

Act with some of the most sweeping effects ever experienced in modern Sweden. It levied a tax on the profits of private Swedish companies, and sent the tax moneys via some special funds to the unions for the purpose of allowing the unions to buy up the shares of the companies, thereby making private enterprise pay for its own socialization.<sup>86</sup> The Law Council was given three weeks to consider the proposed legislation.<sup>87</sup> In the opinion that was handed to the Government, the Council addressed the issue of the European Convention which had been raised by others, but found that the proposal did not contravene Sweden's international obligations.

Similarly, the Law Council finds that the proposal does not contravene our international obligations. The requirement in Art. 1 of the said Additional Protocol that such an intervention as is referred to in the Article must be "in the public interest" may be considered to be satisfied inasmuch as the monies go to the general pension fund and are administered by organs subject to public regulation. The fact that the Bills also serve other purposes such as strengthening the influence of employees in business life does not seem to call for any other view.

Whatever the merits of the opinion of the Law Council — it was indeed challenged in the case *Svenska Managementgrup v. Sweden*<sup>88</sup> — it certainly overruled the objections raised by Petren why resort to the Convention should mostly be impermissible.

On November 14, 1984 the new activist interpretation was made explicit in the Addendum to Sweden's Report to the Human Rights Committee, submitted under Art. 40 of the International Covenant on Civil and Political Rights. It is there said that the duties of the Law Council include that it "has to consider the proposal [of a new law] to verify its conformity with international agreements into which Sweden has entered."<sup>89</sup>

During the Spring of 1985, the Law Council again was faced with proposed laws raising a number of questions under the European Convention.

The first in the row was the *Act on the Right to Fish (Amendment)*, which was issued on March 28, 1985.<sup>90</sup> The basic issue was if it could be said to be in the 'public interest' to deprive fishermen of their exclusive fishing rights in order to allow town people to go fishing in the same waters for their pleasure. The Law Council was briefed on the matter on January 3, 1985.<sup>91</sup> The Council had doubts whether any justified objections could be raised.

What may come close to being an issue in this connection concerns

<sup>86</sup>*Svenska Managementgruppen v. Sweden*, Appl. 11 036/84.

<sup>87</sup>J. SUNDBERG, *supra* note 47, at 17.

<sup>88</sup>Appl. 11 036/84.

<sup>89</sup>*Cf.* J. Sundberg, *supra* note 9, at 83.

<sup>90</sup>J. Sundberg, *supra* note 9, at 1.  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss4/1>

<sup>91</sup>J. Sundberg, *supra* note 9, at 5-8.

whether the proposed legislation is in violation of the contents of the first paragraph of Article 1 of the First Additional Protocol to the Convention of Europe. It seems possible to say on this point, however, that there is much room for the Convention States to determine what should be such a general interest which allows an interference with the right of ownership (see e.g. SOU 1974:88 p. 111). There does not seem to be any reason to disapprove of the proposal remitted from the points of view here mentioned.

Another aspect of the question of being reconcilable with the Convention concerns compensation questions. The Convention text includes no explicit provisions on the right to compensation because of interference with ownership. However, such a requirement is held to be included in the second sentence of the first paragraph of Article 1. Provided that respect is paid to what the Law Council has said in the past concerning the compensation questions, no problems should arise in any case in relation to the Convention matters now discussed.

Finally, on March 12, 1985, the Law Council discussed the proposed Planning and Building Act.<sup>92</sup> This was a major piece of new legislation and it touched the areas where the *Sporrong Lönnroth Case* had made its impact. Both the Convention and the Case received extensive discussion.

The Council first considered the case where the building rights on land once given to the owner in the original Plan were taken away by the cancellation or the revision of the Plan. The Council discussed the compensation rules of the Bill and said:

Against the background now sketched and in consideration of the uncertainty how the practice of the European Court will develop, it is doubtful, in the opinion of the Law Council, if the rule will be considered to be in conformity with the European Convention to the extent that the rule means that a plan is revised or cancelled without any compensation to the land owner.

The Law Council also addressed the issues arising under Art. 6 of the Convention.

The reach of this Article is contested. The Bill sent to the Law Council does not show whether it has been taken into consideration when the legislation was being prepared, if the appeals system in PBL was in all respects reconcilable with the Article. The decision in the *Sporrong and Lönnroth Case*, referred to above, does however call for a closer look.<sup>93</sup>

Thereupon the Law Council discussed rather extensively what the rules set out in Art. 6 would mean when applied to the PBL-Bill. The Council concluded:

The Law Council has wanted to draw attention to the problem now

<sup>92</sup>J. Sundberg, *supra* note 9 at 60  
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<sup>93</sup>J. Sundberg, *supra* note 9, at 61.

touched upon. The Law Council does not propose any change of the appeal rules in the PBL-Bill in order to adapt them to Art. 6 (1). The rules harmonize in their main features with the Swedish legal tradition and with the basic features of our Constitutional and Administrative Law. What changes in the rules that may be prompted by the fact that our country has adhered to the European Convention is a question connected with the broader issue of subjecting the administration generally to judicial control.<sup>94</sup>

Thus the Law Council has come a long way from its position when the Act on Securing Evidence in Tax Matters was before it. Certainly, the Council has gone from nothing to something. It may well be that further advance along this road will in the end tend to reduce the number of Swedish complaints to Strasbourg.

## THE SPORRONG LONNROTH MEDAL

by

DONALD M. JENKINS

Any legal system developing by cases must have people carrying the burden of the cases. Plaintiffs and defendants in these cases like their counsel are indeed when the moment is ripe vicariously cultivating the issues of mankind. To any American audience of lawyers, *Gideon's Trumpet* (Anthony Lewis' famous book about a trial) recalls this issue.<sup>1</sup> Thus, those who convert their personal grievances into a Leading Case have some right to be commemorated and so have those assisting them in their endeavours to win the seminal judgment. In the United States, a journalist wrote a best-selling book about *Gideon*; in Europe, they make medals. At this occasion I would like to present to our panelists the medal that was cast to commemorate one of the most important cases in the history of the European Convention on Human Rights: the SPORRONG LONNROTH CASE.<sup>2</sup> The maxim going with the medal is most appropriate to those who now will receive it. It is written in very concise Latin: *fulcrum infelicibus*. (i.e. the fulcrum of the unlucky).<sup>3</sup>

Please, gentlemen, come forward to receive it.

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<sup>1</sup>A. LEWIS, *GIDEON'S TRUMPET* (1964); cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup>*Sporrong and Lonroth v. Sweden*, 5 E.H.R.R. 35 (1982); 7 E.H.R.R. 251.

<sup>3</sup>The first medal using this motto was cast in Sweden by the House of Nobility in 1764 to celebrate Countess Charlotta Taube, whose untiring efforts and at great expense had finally succeeded to win a rehearing and an acquittal of twelve women from Dalecarlia, prosecuted and sentenced for witchcraft.



## PANEL DISCUSSION

*MODERATOR WILLIAM D. RICH, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF AKRON SCHOOL OF LAW*

What we have planned for this evening is a discussion of various issues pertaining to the International Covenant on Civil and Political Rights and the question of its possible ratification by the United States. More specifically, we will address constitutional issues arising from the possible U.S. ratification of the Covenant. In doing so, we will draw on the expertise of our distinguished panelists who bring to bear their knowledge of the International Covenant and their experience with its administration and with the administration of similar international human rights agreements. They will give us accounts of the experiences of other nations which should provide us with an indication of what might be anticipated in our own nation.

Our intention and our hope is for discussion to address questions from the floor, as our audience includes a number of scholars of American constitutional law, as well as international and comparative law. Their contributions in the form of questions and comments will be essential to a successful discussion. As you may be aware, the proceedings of this Symposium are to be published and disseminated, not only in this country but also abroad. In order to provide some structure for this evening's discussion, I will exercise my prerogative as moderator to sketch out a framework within which we can examine the constitutional issues pertaining to ratification of the Covenant. I hope that this framework then will serve as the agenda for the ensuing discussion, and I ask your assistance in raising questions or making comments at appropriate times.

By defining the topic in constitutional terms, I do not intend to limit discussion to the relatively narrow and technical questions concerning the current state of American constitutional law in relation to the International Covenant. To the contrary, I hope that the discussion will encompass both constitutional law and what might be termed constitutional policy. In the United States the debate over ratification of the International Covenant has often been couched in terms of whether ratification would violate the U.S. Constitution. Although the possibility of such violations is undeniably important, it should not, monopolize the debate. Regardless of whether one thinks that ratification or fulfillment of the obligations of the International Covenant would be unconstitutional, there are further constitutional questions that must be addressed. If, on the one hand, it is concluded that ratification or fulfillment of the obligations of the Covenant would violate the Constitution, it remains to be determined whether the Constitution should be amended to permit such ratification or fulfillment. If, on the other hand, it is concluded that ratification of the Covenant would not violate the Constitution, it remains to be determined whether the structural or substantive changes that would be effected by ratification are desirable as a matter of constitutional policy. So the constitu-

tional issues arise at two levels: law and policy.

In identifying the issues to be discussed, I will begin with the more general or theoretical concerns and work toward those that are more specific or practical.

First, the possible ratification of the International Covenant poses some important jurisprudential and institutional questions. It is ironic but, I think, not wholly inexplicable that the United States has thus far failed to ratify a treaty for the protection of human rights that is patterned to a significant degree after its own Constitution and Bill of Rights. Perhaps one reason for this failure or refusal is that the theory of natural rights, in which both documents are grounded, has been seriously challenged in the interim between the framing of the Constitution and the present day. At one time it was generally thought, or at least professed, that judges decide cases by making deductive inferences from basic principles of natural law that are non-political and beyond serious controversy. Owing partly to the scholarly work of the American legal realism movement and its intellectual successor, the critical legal studies movement, large numbers of American legal theorists and lawyers now understand judicial decisions, especially constitutional decisions, as the result of a process that entails significant discretion and rests inherently on ideological and therefore controvertible premises. Rights are seen not as God-given or natural, but as human creations, legal constructs, that implement a particular set of political, economic and social relations and that generally serve the interests of the dominant or powerful groups in the society of which the rights are constitutive. In short, the theoretical grounding of American Constitutionalism has been called seriously into question, if not undermined. There is reason to suspect that if Americans were to frame a Constitution in 1986, it would be very different from the one we have inherited. Specifically, it is not at all clear that a new constitution would define human rights in the vague terms of our current constitution or indeed in the relatively vague terms of the International Covenant, delegating to politically unaccountable judges the power to interpret those provisions in ways that profoundly affect political and economic relationships in the society.

These observations lead to the following questions: First, must one accept the natural law theory in which the International Covenant seems to be grounded in order to favor its ratification? If so, can natural law theory be defended against the serious criticisms that have been leveled against it?

If one remains unconvinced that human rights cases can be decided by making logical inferences from objective ideologically neutral principles of natural law, then the crucial questions have to do with who should be empowered to make authoritative interpretations of the human rights principles embodied in the Covenant. It must be determined what the appropriate distribution of authority is between politically unaccountable judges on the

one hand and politically accountable legislators or executives on the other, between domestic and international authorities; and, within the United States, between national and state governments. Thus, the question of who should make authoritative interpretations subdivides into three categories.

With respect to the first category, to what extent would the substantive guarantees of the Covenant be self-executing? Would the ratification of the Covenant by the United States entail a significant delegation of authority to its own judiciary to interpret the general language of the Covenant in ways that necessarily have important ideological implications and social consequences. If so, would this be an acceptable arrangement?

With respect to the second category of questions concerning who should interpret the guarantees of the Covenant, what domestic effect would the decisions of the Human Rights Committee have? Would the ratification of the Covenant by the United States entail a significant delegation of authority to an international quasi-judicial body — the Human Rights Committee — to interpret the general language of the Covenant in ways that necessarily have important ideological implications and social consequences?

If so, would such a delegation be acceptable and would it violate our Constitution? The third category of questions concerning who decides — who interprets the language of the Covenant — arises from the federalistic nature of the American constitution. Although the federalistic nature of American government has declined considerably in this century, the United States continues to divide governmental powers between levels of government in a manner and to a degree that is relatively unusual among the nations of the world. One question that Americans must consider is whether ratification of the Covenant would significantly expand national legislative, judicial and executive powers into what heretofore has been the realm of state government. If so, would this further dilution of federalism be acceptable?

Beyond the question of who should make authoritative interpretations of the human rights principles embodied in the International Covenant, a final set of questions concerns the definitions of particular rights under the Covenant and the extent to which ratification of the Covenant will predictably alter the rights that now exist in the United States. To what extent does the Covenant provide lesser protection of human rights than does the U.S. Constitution? Notwithstanding the second section of Article 5 of the Covenant, which negates the inference that rights protected under the existing domestic law are diminished by their omission from, or lesser protection by, the Covenant, might American courts tend to interpret the U.S. Constitution to be consistent with the Covenant and thereby lessen the protection of human rights in the United States? To what extent would the Covenant guarantee rights that are not protected by the U.S. Constitution? To what extent would it broaden or strengthen the rights already protected by the U.S. Constitution? By confer-

ring new rights or broadening or strengthening those already afforded constitutional protection, would the Covenant narrow or weaken other conflicting constitutional rights? In this regard, three examples might be considered.

First, Article 6 of the Covenant declares that every human being has the inherent right to life and requires the protection of that right by law. Other rights guaranteed by the Covenant are vested in persons rather than human beings. Moreover, although Article 17 prohibits arbitrary or unlawful interferences with one's privacy and family, nowhere does the Covenant expressly guarantee a woman's right to make decisions concerning contraception and abortion free from unwarranted governmental interference. Thus, the language of the Covenant might well be construed to confer a right to life from the moment of conception or at least some time before birth and thereby prohibit or to require the prohibition of abortion. So construed, Article 6 would conflict with the United States Constitution as it has been interpreted by the U.S. Supreme Court.

The second example is found in Article 17 of the International Covenant which prohibits arbitrary or unlawful attacks on one's honor or reputation and mandates legal protection against such attacks. No similar guarantee is contained in the U.S. Constitution. Moreover, our constitutional guarantee of freedom of speech has been interpreted to preclude the imposition of legal sanctions for defamation of public officials or public figures except under very limited circumstances. Thus, Article 17 may be understood to require something that the U.S. Constitution prohibits.

A third example is found in the first section of Article 14 of the Covenant which affords criminal defendants and civil litigants a privacy interest that under unspecified circumstances is sufficient to justify exclusion of the press and the public from a trial. If this provision were interpreted to confer a right to a trial from which the press and public are excluded, it might well conflict with our constitutional guarantees of public trials and freedom of press.

There are, then, as I have sketched out this framework, three large questions, or sets of questions. One has to do with natural law and the International Covenant on Civil and Political Rights. The second has to do with, who should make authoritative interpretations of the guarantees contained in the Covenant. And the third has to do with differences between rights under the Covenant and those under the United States Constitution. What I would like to do is to divide the time we have this evening for discussion among those three categories, and to begin with the first. Must one accept the natural law theory in which the Covenant seems to be grounded in order to be in favor of its adoption and, if so, can natural law theory be defended against the serious criticisms that have been leveled against it? What I would like to do is to begin by simply inviting responses by the panelists and then open it up to questions<sup>86</sup>

from the floor.

*JUSTICE WALTER S. TARNOPOLSKY, JUSTICE OF THE COURT OF APPEALS OF THE PROVINCE OF ONTARIO*

The question is: must one accept natural law theory to satisfy the requirements of the Covenant? I do not think so. Just as I do not think that one has to accept natural law theory when facing these issues within a domestic situation, but I will not go into that. Let me deal with the Covenant. If I can just take you for a moment to the Universal Declaration as a justification for implementation of human rights standards — the first paragraph of the Preamble is, I would agree with you, a natural law justification, but the second paragraph (and for those of you who have been involved in any international seminar or conference with participants from other parts of the world, particularly eastern Europe), you will find the last part of paragraph 1 emphasized; but paragraph 2 provides that “whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech, etc., has been proclaimed as the highest inspiration of the common people.” There, I think, you have the explanation or justification for United Nations action in the post-World War II period. It was a reaction to what the United Nations saw happening in Nazi Germany. People were not being recognized as people. And I think the third paragraph is also important. It says, “whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” I think you have there another (and very closely related to the one that I have mentioned) justification for human rights promotion.

Within the traditional international law context, the most important requirement was maintenance or preservation of international peace and security. Now what you have — and this is in some ways the revolutionary, but I would say not necessarily, natural law version of post-World War II human rights justification — is that without promotion of human rights, international peace and security is challenged. So I would say that this is not necessarily a natural law justification. It is one within the context of the fundamental requirement of international law — international co-existence. That is, that without human rights protection, international peace and security is challenged. I would put it on that basis, rather than on natural law; but my colleague to the left, I think, will give you a natural law basis.

*MODERATOR RICH*

Let me interject what may be a clarification of the question. I am not so much asking whether there is justification for imposing sanctions against certain kinds of acts; but whether the document, as a whole, or in large part for

that matter, can be justified — can be accepted — without acceptance of the natural law theory in which it seems to be at least partly grounded.

*JUSTICE TARNOPOLSKY*

I won't add anything to what I said except that your second question does not change my response.

*DR. NOEL A. KINSELLA, SENIOR HUMAN RIGHTS COMMISSIONER IN CANADA*

Let me just pick up the point on natural law, Mr. Moderator. Jacques Maritain, I suppose is as well-known a natural law philosopher as you are going to find. In his book, which I believe he wrote while working in the United States, entitled *The Rights of Man and Natural Law*, he pointed out very clearly that the marvel of the Universal Declaration of Human Rights and by extension the Covenants consisted in the fact that the document did not rest at all on any particular political philosophy. Indeed, the Declaration is a universal standard of human rights precisely because the world community was able to proclaim it notwithstanding the wide array of political philosophies, political theologies and political systems. The universal standard that is articulated in the Universal Declaration is simply a standard that has been articulated by the world community notwithstanding differences in terms of political philosophy. So I would argue that one does not at all need to accept a natural law theory in order to recognize and subscribe to the rights that the world community has achieved with the Declaration and the Covenants on Human Rights. That's my first point. My second point is made vis-a-vis the concern of our colleagues here in the United States as to the meaning of the various provisions of the Covenant, or for that matter the Universal Declaration. I think it would be very interesting to conduct research on the position of the United States during the preparatory work at the United Nations on the Declaration and the Covenants. What, I ask, was the position of the U.S. delegation at the time vis-a-vis some of these provisions to which you have alluded a few moments ago as possibly being in conflict with your constitution?

*FREDRIK G.E. SUNDBERG, ADMINISTRATIVE OFFICER, EUROPEAN COURT OF HUMAN RIGHTS*

I would just like to add that from the European perspective, what Justice Tarnopolsky said is reflected also in the European Convention. It is said there that the European Convention is taken partly because the contracting states reaffirm their profound belief in those fundamental freedoms which are the foundation of justice and peace, which I think is roughly equivalent to preservation of international law and security. But besides that, from the European perspective, these fundamental rights and freedoms are subject of collective enforcement, also, because the European states wanted to achieve a greater unity between its members. It was a means of creating a common Europe.

*MODERATOR RICH*

Any further comments from the panel?

*JOHN FINAN, PROFESSOR OF LAW, UNIVERSITY OF AKRON SCHOOL OF LAW*

As I hear at least the last speaker, we seem to be talking about an instrumental rather than a natural law approach; and that is rather interesting. About two years ago the holder of the Brennan Chair, Justice Goldberg, was asked whether judges make law; he said, "what do you think we do all day?" Jacob suggested that law is an artifact. There is nothing really wrong with the notion that this human rights convention, whether we indulge in the fiction of a codification of natural law, is basically positive law intended to create rights which heretofore have not been created. You know, we get into that problem in *Swift v. Tyson*, where the courts thought that a federal judge could say: well, the opinion of the Ohio Supreme Court about Ohio law is wrong because we checked independently; and we found out they made a mistake. *Erie v. Tompkins*, if nothing else, was a repudiation of that view. It seems to me that for some reason which seems embedded in the human psyche, we seem to feel some sort of an atavistic need to ground positive law on some sort of a tadpole and fish analogy or whatever and put new wine in old bottles. If we take the notion that we have to codify our sense of injustice and our widely shared revulsion against some of the violations of human rights, there is really nothing wrong with creating positive law and couching it in the garb of natural laws because of its psychological import. But that's entirely different from the suggestion that if there is no natural law, there are no human rights.

*JACOB W.F. SUNDBERG, PROFESSOR OF LAW, UNIVERSITY OF STOCKHOLM*

Let me say this, that there is a certain cultural diversity; and what you have in particular in the United States but also in Western Europe, perhaps in Europe, as a whole, is a belief in law conceived of as *legal procedures*. You can really end up in almost any type of disastrous consequences as long as you do it in the right way. And this is a way of thinking that does have its merits, because it certainly does entail that power doesn't always win. There is a certain element of fair play in viewing conflicts this way, but it certainly is not the only way you can approach the resolution of conflicts. It certainly is not the one that is perhaps the most prevalent in the world considering the distribution of populations, but it is one that has been historically triumphant, much due to what happened during the 19th century. We have pinned our identity to a considerable extent to this view of looking at conflicts and resolving them. I think it's a great triumph as such that this thinking has gone into a global instrument of the type of the Covenant, and indeed into the document, the Universal Declaration. For that reason, in case we want to remain paramount, in case we want to triumph, there is a battle that we have to take upon ourselves. In particular, we have to identify and cut down those forces that do not accept these

premises, that do not accept this view of life, and would rather have it some other way. This is what I call the European artifact, at least that is what I call it in Europe. In the United States, I might perhaps prefer to call it a Western artifact. But certainly it is not a law of nature in the sense that it was always so, it will always be so, and will be so whatever the type of society that is around us. I think it is reasonably good society as societies go, and I think it is worthwhile fighting for.

*MODERATOR RICH*

If I may interject a comment for a moment here, I think that Professor Sundberg's last remarks and his earlier remarks this afternoon go part of the way toward illustrating the point of the question; and that is that what is presented by the consideration of the International Covenant is a particular vision of society or at least a range of possible societies. The question would seem to be: does that match the kind of society that we want to have here, and we want to promote elsewhere in the world. I think Professor Sundberg's earlier remarks this afternoon make clear that at least for some people the content of the Covenant is clearly ideological in that it has to do with basic choices concerning who should own the means of production. If that is what underlies the Covenant, and perhaps it's not, we should certainly be clear about it.

*JOHN K. EBIAH, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW*

I think I cannot direct my answer to the three questions you posed; I'd rather like to speak in general terms. Now when it comes to questions of human rights, normally with respect to the enforcement of international law, United States has a tendency to put certain issues on academic level by interposing all sorts of fanciful or unrealistic issues to merely cloud the real issues at stake. Now this makes it rather suspicious. When we take the Universal Declaration of Human Rights, it was essentially an American declaration; and the United Nations Charter makes it specific that member nations would take the necessary measures in order to implement human rights and protect fundamental freedoms of their people. I think that when the United States was instrumental in bringing about the Universal Declaration on Human Rights, the intention was that the declaration would be given effect to in the future. Again, when we take the inter-American Convention on Human Rights, the United States was also instrumental in its formulation, yet, The United States has refused to ratify that Convention. I think we have to face the reality. The Constitution underscores the fact that treaties are supreme law of the land. And yet when it comes to implementation of treaties, the courts have a way of getting around it by using arguments like the equality in rank, or first in point of time, self-executing and non-self-executing clauses, to undermine the effectiveness of such international treaties vis-a-vis the Constitution. This country

has not come to grips with the fact that there are certain groups which have to be protected by the Constitution or by the national policy as a whole. We have the question of race, based upon color, or ethnic origin, the question of discrimination against women, blacks, and other minorities. Now I submit to you that if the Covenant on Civil and Political Rights were to be ratified, these issues would not have arisen. There would be no need for constitutional amendment in order for the ERA to be implemented. There would be no need for such a constitutional amendment if America ratified the inter-American Convention on Human Rights. The European nations have ratified the Covenant on Civil and Political Rights. They also faced the same problems as the United States but chose to come to grips with the reality. Could America be the leader among nations? Like the motto, "out of many, one" — therefore, what I am saying is that if the United States wants to be perceived by the world as a leader among the community of nations, then it must not pay lip service to its international obligations or put important issues on mere academic exercise but must express its sincerity by ratifying international human rights treaties, not only the one on Civil and Political but the rest of the human rights treaties of the United Nations. Otherwise, this nation does not project a very good image in the eyes of the rest of the world.

*PROFFESOR FINAN*

In some of the discussion at dinner, it wasn't altogether clear whether a treaty which varies, contradicts, or modifies the Constitution is the supreme law of the land; but there is nothing wrong with a treaty that supplements the Constitution. And I take it, if some treaty supplemented it by enacting, for example, the substance of ERA (Equal Rights Amendment) or some other constitutional proposals by say, the American Civil Liberties Union, (I understand — and I know nothing about constitutional law and am terribly unsophisticated —) I'm not sure that there is any problem with supplementing the Constitution in such a manner but some of the constitutional lawyers at dinner seemed to think there might be a problem.

*ALLEN SULTAN, PROFESSOR OF LAW, UNIVERSITY OF DAYTON SCHOOL OF LAW*

I have a few remarks in defense of natural law — looking at it from a thoroughly constitutional, rather than an international vantage point; and without at all contradicting the statements that have been made as to the fact that both regional and universal declarations do embrace standard and, pretty much, parallel norms. However, before I get into that, Professor Ebiasah's statement requires that I make a short response; not disagreeing with anything he said; but perhaps putting it in a different perspective, while at the same time understanding thoroughly the vantage point of somebody from the Third World.

When Abraham Lincoln was elected as our 16th president, he stopped off on his way to Washington and made a speech at Independence Hall on the true

implications of the then obviously pending Civil War: our commitment to human dignity. In many ways it harkened back to his Dred Scott speech following that fateful decision four years earlier where he pointed out that the statement that "all men are created equal" was not necessary for our separation from Great Britain. It didn't have to be put in the Declaration of Independence for that purpose; that there certainly was a sufficient delineation of grievances to justify breaching their oath of allegiance to the English crown. Rather, it was put in there for another reason. Lincoln said it was put in there as a standard, a standard or a norm that will never be perfectly achieved; but nonetheless, it will provide us with the proper direction. Always trying, he said, to accomplish it; always working towards its realization, although we understand that it will never be fully achieved. So what I have to say, I guess, in response to Professor Ebiasah, is that our norms can never be perfectly realized. But that doesn't change the fact that they are norms that we're committed to. Within the vicissitudes of human personality and given the limitations of the human psyche, we will work toward them. If there is a gap in our country, it is a gap of a political nature and not a gap of philosophical commitment. Very often, sadly, human nature has indicated that our philosophical commitment is far from realized, indeed often contradicted; but it remains our philosophical commitment.

That is why I think that somebody has to speak in defense of natural law. I don't want to take too much time, but I feel very strongly about it. I think the problem with natural law is one of labels, one of definition. One of the major areas of debate over natural law was, who was to define it. So we have to ask questions. First, were the Framers committed to natural law, or to the precepts that grow out of natural law, precepts that are now realized, universally and regionally, in the human rights documents? And if they were so committed, how did they intend to have these norms or precepts implemented — never being fully realized, but always working towards them?

My personal view is that, yes, they were so committed. I think we have a host of political documents proclaimed at the outset of our nationhood that clearly proves that commitment. Remember, I am trying to express it from a constitutional rather than an international vantage point. What makes up this host of political documents from our latter 18th and early 19th century? Well, we have the Declaration on the Causes of Taking Up Arms written by Dickinson and Jefferson. If you read that Declaration, you see clearly that they felt very strongly about the rights of individuals vis-a-vis the arbitrary use of official power. Then, of course, we have our Declaration of Independence which speaks in so many words of "the Laws of Nature and of Nature's God." Now, that may be a label; again, the question remained, who is going to define it? Well, I think that the Framers also answered that question. Also, we have the Preamble to the Constitution. And we have the Bill of Rights, which in their time was not a new thing, but rather an old thing. Remember the sequence of

events: when Virginia's House of Burgesses instructed their delegation in Philadelphia to call for independence, they set up a committee, under George Mason, that drafted the Virginia Declaration of Rights. And they took their direction and justification from the Glorious Revolution of 1688; and by the time we drafted our Constitution, every state had guaranteed individual rights. Now if you want to call it natural law or you want to call it something else, I think the message of their intention was rather clear. And that intention, that there *are* basic norms, was articulated by Mr. Justice Chase early in the history of this country, in 1798 (*Calder v. Bull*). He said that there are things that government cannot invade.

The problem we have in this country is, we sort of got off on a tangent; we didn't follow through. In the nineteenth century we became entangled in the morass of materialism. That is why many foreigners look to America since that period and say: you know you are very hypocritical. You haven't lived up to your noble birth. But that doesn't erase the history, the intention of the Framers, what they had in mind: that there will be individuals who will implement these precepts. They are the federal judges; Hamilton clearly writes about this in his 78th and 81st Federalist Papers, papers that fully support both *Marbury v. Madison* and *Martin v. Hunter's Lessee*. They, the judges, will apply the norms or precepts. Among humans they are the best because, to a substantial degree, they are insulated from the political imperatives of government.

Now the question has been raised regarding the International Covenant, as to whether it will be self-executing or non-self-executing. To me that is only half of the argument favoring ratification. Sure, it may not be self-executing with respect to its implementation on our municipal level. But the norms that have been adhered to by way of an international commitment cannot help but have an impact on the everyday judicial decision making in this country — maybe not as much as they should, as quickly as they should, and if not self-executing, not cited as direct authority; but nonetheless, that effect will exist. As far as the federalism question is concerned, I look to the very recent case of *Wallace v. Jaffree* and I say, well, that the states must abide by national norms, articulated by the Supreme Court. These are *national* values. In *Wallace v. Jaffree* the majority made it very clear that the states don't have any right to violate these basic precepts. There the specific principle was freedom of conscience. But what's sauce for the freedom of conscience goose, is sauce for the gander, of the other norms as well.

I guess what I am saying is that if we have to look to humans to maintain our human dignity, which we do, I think that the Framers were clear that there were norms that they wanted to increasingly and persuasively implement. This is the most important half of the argument favoring ratification. Thankfully, international law is now beginning to realize the wisdom of the Framers. Just look at the expanding definition of international personality.

*Western Sahara* case. Clearly, concepts of sovereignty are moving away from absolute dominion over a nation's subjects. Clearly, sovereignty may be embracing an agency concept, or one focusing upon administration of the peoples' business. Officials are given a certain amount of authority, yes, but they cannot invade the rights of the individual whom they serve. And if that is becoming an emerging international concept of sovereignty, and I believe that it is, our Framers embraced it two hundred years ago. They knew that if we have to have anybody to implement this on a chapter and verse basis, leave it to the federal judges. We have far more checks on that least dangerous branch than we have on those who hold political power with their weapons of the purse and of the sword.

*MR. MICHAEL PARTLOW, LAW CLERK, NINTH DISTRICT COURT OF APPEALS OF OHIO*

I think the last speaker really identified the issue when he addressed the question of sovereignty. I got the impression from various panelists today that there is not really very much in the main body of the Covenant that is not already in the United States Constitution and that the items that may be in the main body of the Covenant, that are not in the Constitution, are sufficiently vague that our case law can probably be interpreted to encompass them. I think the real controversy here is with the Optional Protocol. The question that I have for any panelist who cares to comment on it is: why do you insist that the Optional Protocol is part and parcel of the entire package? Why do you feel that if we do not adopt the Protocol, we have not really accomplished anything? I agree that the Optional Protocol certainly gives individuals greater rights than the Covenant by itself. However, Article 41 of the Covenant can really accomplish what needs to be accomplished in the manner that international law usually works: states dealing with states. Some commentators contend that the Optional Protocol is necessary because there are so few states who have ratified the Covenant at this time, that they do not normally bring actions against one another. I agree that this is currently the case. However, this seems to be a fairly short-sighted analysis. If, for example, forty to seventy states ratify the main body of the Covenant, won't Article 41 of the Covenant become very effective, without the extreme intrusion that the Protocol would make upon sovereignty? Consequently, is the Optional Protocol really necessary? Anybody care to address that?

*DR. BERT P. LOCKWOOD, JR., PROFESSOR OF LAW, UNIVERSITY OF CINCINNATI SCHOOL OF LAW*

The thrust of your comment is, I think, a correct interpretation of international law prior to its entering into the human rights phase. Human rights by definition are restrictions upon a government. To think that governments are going to be the primary protector or promoters of those restrictions upon them<sup>94</sup>

selves is probably not an assertion that you would want to place too much emphasis or reliance upon. It is clear, at least from my vantage point, that the primary promoters and protectors in this post-World War II era of human rights have been the non-governmental organizations, Amnesty International, the International Commission of Jurists, the lawyers that are bringing the private complaint; and that's not surprising. I mean governments, as I say, are not likely to be the ones that are going to be in the forefront on these issues. I think, and that's why in my remarks I characterized this as entering a revolutionary phase in terms of law and the international area. Practice would not make one sanguine that states are likely to bring actions over the human rights practices of another state. There are a few exceptions — you had some in the Council of Europe against Turkey and its human rights and their Greek generals — but as a general matter, your state-to-state complaints are not a workable phenomena. Therefore, and certainly we are very comfortable with this in the United States, that the actions by private parties are the most likely to be effective remedies. I give you an illustration. Right now in the U.S., you have a case that was argued about three weeks ago before the inter-American Human Rights Commission an appeal brought from the U.S. Supreme Court in a case (the *Roach* case involving either Georgia or South Carolina) where you had a minor that was a minor at the time he committed the crime, the individual was given the death penalty, executed; Supreme Court permitted the execution to go through. The argument is, and the one that was presented and argued before the inter-American Commission on Human Rights is that as a matter of customary international law, there are two categories of individuals that you can't execute. Pregnant women while pregnant and individuals who were minors at the time of the commission of the crime. I think that is a correct interpretation of customary international law. Those are the types of cases — I mean presumably our court can make mistakes or not be as far in the forefront in these human rights matters, and we should not — I'd like to make two comments — we should not be reluctant to utilize these international procedures and to participate in them. Secondly, to think that the United States — and this is particularly useful in terms of the bicentennial — Supreme Court decides cases simply for the United States is also an aspect of our provincialism. The United States Supreme Court is probably the most respected institution in the world. Its importance in terms of the practice of other countries is very significant. I can remember one of my Irish colleagues indicating that it would almost be grounds for malpractice for an Irish attorney to go before the Irish Supreme Court and argue a case involving individual rights without being conversant with the United States Supreme Court decisions on point. How much richer would it be for us if the United States were participating in this process of developing an international jurisprudence that was enriched both with a comparative, as well as the international human rights treaties.

*JUSTICE TARNOPOLSKY*

Just to start off with Bert's last point, which is not directly relevant to the question; but I do want to emphasize it! The fact is that there is now a Human Rights Committee which is developing the jurisprudence of the Covenant and which it is going to be very difficult to undo. It is doing so without the participation of the United States. Now to some extent, there are other Western countries which have an input; but the fact is that if some day the United States were to ratify the Covenant, it is going to be bound by an international view of human rights that it had no participation in developing. And so the sooner you get in, the sooner you will have something closer to what you want to see.

To go back to your first question, and that is concerning the state party to state party complaints. I think that again Professor Lockwood hit the main point, which is that governments are reluctant to apply a stringency of standard to another government that they would be afraid to have applied to themselves and so obviously, they are going to be reluctant to use it unless in certain circumstances such as, within the European Convention system, with the Nordic and Scandinavian countries against Turkey, or earlier against the Greek colonels, but in other circumstances it will not be raised easily. But there is the positive side to it, and that is that the state party to state party complaints procedure gives a country ratifying such a procedure the opportunity to attack the other side legitimately. Just consider the Helsinki process, where each side is trying to get at the other side with what may or what may not be a legitimate complaint procedure. But I think that the state party to state party complaints procedure really overlooks two things which I think are fundamental. One is that it is very difficult in an international context wider than the West European system. Within the West European context, you have enough jurists, either on the Commission or the Court, that know enough about other systems to make authoritative statements about them. But in a wider international context, let us say, when there were the 18 of us on the Human Rights Committee covering 80 countries, who has sufficient knowledge of the internal domestic law of the country complained against to make an authoritative statement about it? And, if you do, you are in the kind of difficult situation I found myself in as a Canadian when a quarter of all complaints made, were against Canada. Why should I give the Committee the internal reasons why Canada was wrong if no other country has that internal knowledge brought against it? Now, I tried to be as fair as I could and, therefore, if I knew there was a weakness in Canadian law, I would try to raise it in the Committee. But it is unfair to Canada that there was someone on the Committee, who also happened to be President of the Canadian Civil Liberties Association. And so, I had my criticisms against Canadian laws, but could I bring these to the Committee? Is that fair to Canada when against most other countries there was nobody on the Committee who could do the same thing?

You face this kind of a problem with state party to state party complaints or with international supervision. How much knowledge do you have to have of what is really going on? We all know that regardless of what your constitution says, there are all kinds of things that police can do and administrators can do and government agents can do which stay on the right side of a bill of rights or a constitution, but which can still be oppressive. That kind of internal knowledge is difficult to have in the state party to state party complaint. It is, however, available in the individual complaints procedure. That is the big advantage, in terms of real promotion of human rights — realistic promotion of human rights, of the individual complaints procedure. You then have information provided to the Committee by someone from within the country with knowledge of the domestic situation. That, I think, is the big advantage of the individual complaints procedure.

That brings me to the final point on this. We have to remember that regardless of the effectiveness of the individual complaints procedure, the state party to state party complaints procedure, and the Article 40 reporting procedure, implementation of human rights is going to be a domestic matter in the end, whether it is the Soviet Union, Czechoslovakia, United States, or Canada. All we can do internationally is to try to protect and make easier for those people within a particular country who want to promote human rights in that country. This is why, if I could switch from the Covenant to the Helsinki process for a moment, this is why it was so important for all of us to protect the various Helsinki watch groups. Those are the people who are going to implement any human rights standards and not us from the outside, from whichever country and however much we think we know about someone else. It is the internal forces which will determine what human rights standard will be achieved. Let us turn to Argentina as an example. In the end all we could do internationally was try to make the climate right for Alphonso to come into power and then accomplish whatever he can. Let us hope our help can keep him in power, at least for awhile. But it is not the United States or Canada or the Inter-American Commission that will impose a human rights standard from abroad. All we can do is try to create the conditions that will permit internal or domestic groups to achieve what we think they should achieve.

*DR. LOCKWOOD*

One of the things that I was particularly struck with when I was in Chile last year is that the document that the human rights lawyers posted all over their offices and that they use and that they cite is the Universal Declaration of Human Rights; and when you are in a country that is going through or experiencing severe human rights deprivations that is referenced to those international instruments that is sort of their fetchmark, if you will, to bring to the attention the shortcomings of the current regimes that are in power and perhaps that's when these instruments take on their greatest importance.

*PROFESSOR RICHARD SEEBURGER, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH LAW SCHOOL*

It seems to me we are really talking about two different issues. One is the source of law, and the other is the mechanism for enforcement. Your first question dealing with natural law deals with the question of source of law. I happen to believe in natural law. But I am not sure that anyone else shares my vision of natural law. I think it's like obscenity; I'll know it when I see it. And the fact that Western civilization shares certain norms does not necessarily mean that those norms are natural law. That, I think, is a relatively unimportant point. The more important point, is the means of enforcement; which brings me to the second question you ask — the effect of American ratification of the International Covenant on Civil and Political Rights. The United States, criticized by my brother from George Mason here, is misunderstood in the world. Our Constitution is a political document; it is not a social document. Our American Constitution does two things. It divides powers at the federal level, separation of powers; and it also creates federalism. While our Supreme Court is an activist court, insisting that it enforce these international norms, gives to that court something that the Constitution does not give it the power to do. These international civil and political rights are largely political and social rights that must be enforced by positive legislation. The Court does not have that authority under our Constitution; and if it does not have that authority, it would be operating beyond its Article III jurisdiction. It seems to me the adoption of the International Covenant creates two constitutional problems. One is federalism, suggested in *Missouri v. Holland*. We would have to amend the Tenth Amendment to give the federal government the power to enforce these individual rights that by the constitution are now committed to the states, which unlike Canada, have no role in the ratification of treaties. Secondly, Article III would have to be amended to give to the Court the authority to mandate legislative action which it currently does not have. Our Court has the authority to stop governmental action, to prevent governmental interference in human rights. It does not have the authority to mandate preferences for those rights by providing support. What we are asking for here is a profound realignment of American political power, an alignment of political power which was made years ago to protect human rights through the diffusion and allocation of power. My brother from George Mason says we ought to concentrate that power — that might be right, but it's not the constitutional scheme now.

*PROFESSOR ROBERT A. SEDLER, PROFESSOR OF LAW, WAYNE STATE UNIVERSITY*

I have been thinking about this matter for some time, since I come to this conference from a very different perspective than most of the participants. While I am an academic constitutional law commentator, I am also a civil rights and civil liberties lawyer, who has done a lot of litigation over the years.

Likewise, I have become very interested in the Canadian Charter of Rights, and I think that the United States Constitution was the primary source and model for many of the provisions of the Charter. So, I am looking at international human rights treaties, not as a global matter, not from the standpoint of foreign policy, but from the standpoint of protection of individual rights in this country. I ask the question: would it make any difference to the protection of individual rights in the United States if we adopted the International Covenant on Civil and Political Rights? If we are going to ratify this treaty, we ought to do it for the right reasons. There may be very valid foreign policy considerations for ratifying the treaty, but I do not see in the provisions of the International Covenant, which I have been reading, any basis for expanding to any significant degree the protection afforded to individual rights under the Supreme Court's current and in many instances long-standing interpretation of the individual rights provisions of our Constitution.

The International Covenant was drafted some 20 years ago and reflects a compromise among sovereign nations. This was in the midst of the real revolution in constitutional protection of individual rights that was being wrought by the Warren Court. As a litigating civil rights/civil liberties lawyer, I ask the question: if I have a choice, do I want to go into court with this document, or do I want to go into court with current constitutional doctrine under our Constitution? I would much rather take my chances with current constitutional doctrine under our Constitution. In addition, because our states are sovereign, we have state constitutions, which not infrequently are interpreted as placing greater limitations on governmental power in order to protect individual rights than those imposed by the federal Constitution.

There are some provisions in the International Covenant that would clearly change the protection now provided under our Constitution. There is more emphasis in the International Covenant on dignitary rights and less on freedom of expression. For better or worse, under our Constitution, we have come down on the side of freedom of expression. Article 20 says, "any propaganda for war shall be prohibited by law," which is in flat violation of the first amendment. Article 20 says, "any advocacy of national, racial or religious hatred . . . shall be prohibited by law." Maybe that's a good idea, but it is contrary to the way that the first amendment has developed. We could go on to a number of other examples. Professor Rich has raised the question of the meaning of human life under the International Covenant: perhaps that provision could be relied on to invalidate abortion. Professor Lockwood's examples of possible greater protection under the International Covenant were indeed very tentative.

My point is that whatever criticisms may be directed against the United States for failing to ratify the international human rights treaties at an earlier time (I think that we failed to ratify them for the wrong reasons), the fact remains that under our own Constitution we have done a very good job of pro-

protecting individual rights against governmental action. It may also be asked whether, if the International Covenant were ratified, it would be an independent source of protection of individual rights in the United States. That is, would the courts use the provisions of the Covenant as norms to invalidate governmental action, or would they say that because the Covenant provides for human rights committees, the Covenant should be developed independently by the human rights committees, it would not be applied by the courts?

There may be valid reasons for ratifying the Covenant, but I find it very difficult as a lawyer involved in civil rights/civil liberties litigation to see in the actual provisions of the Covenant any basis for expanding to any significant degree the protection afforded to individual rights under our Constitution. When you look to the substantive provisions of the Covenant, I would submit that on the whole, interpreting the language according to its ordinary meaning, a number of them might provide less protection for some individual rights, such as freedom of expression, than is currently provided under our constitutional doctrine.

*PROFESSOR DOREAN M. KOENIG, PROFESSOR OF LAW, THOMAS M. COOLEY LAW SCHOOL*

I find this a very tantalizing document, but I share many of Professor Sedler's concerns with it. I think the issue is very well put to say, is it founded upon a theory of natural law, but that's not really the issue. Is this idea of natural law embodied in this document? In courses on learning persuasion, there is something called appeal to power, and I think when we say that we are basing a document on natural law, there is some appeal to power saying that it is not us who are putting this document together, but rather some higher source so that we can rest assured that this is the finest document there is.

What we are really talking about here, I think, is a conflict of rights. There are certain rights, as Professor Sedler indicated, that are set forth in this document which are in conflict with other rights which have been recognized by Supreme Court decision as being guaranteed by the American Constitution. It also conflicts with certain rights guaranteed by federal law. It likewise conflicts with some rights enumerated in various state constitutions. By presuming to base this document on natural law, development is also hindered, so that if, in the future, there is a desire to change some of the items which are enumerated in this document, it will be impossible. So I think we should all be very concerned.

*DR. NOEL KINSELLA*

There are a number of standpoints from which it might be helpful to take a second look at this question of the relationship of the Covenant and the U.S. Constitution. For example, Article 2 subsection 2 of the Covenant clearly

points out in regard to the Covenant and the rights that are contained therein that state parties are to take steps to give effect to the rights recognized in the Covenant but “to take the necessary steps, in accordance with its constitutional processes . . .”. If the concern is that things are not congruent with your constitution, in what sense would they not be congruent? I just want to come back to what I considered to be the point that Mr. Partlow raised, would it be advantageous to ratify the Covenant if you are not going to ratify also the Optional Protocol? The point here is the individual complaint procedure and really we are not much interested in the procedure under Article 41 of the Covenant. It seems to me from a domestic standpoint that the reporting procedure is so terribly important because there you show the kinds of ways in which you achieve the types of rights that are articulated in the Covenant according to the system of law you have within a given State Party. You show within that context and also in the context of how your constitution provides for rights above and beyond the covenant rights you could report. It would be only in those areas that there seems to be some gaps in protecting human rights domestically that the protocol would come into play. Maybe its only the legislative process that has to be called into play and not a constitutional amendment kind of process at all.

*MODERATOR RICH*

To just interject a question, I think that’s exactly why I raised the question of the extent to which the Covenant would be self-executing within the United States to the extent that it says persons or human beings shall have a particular right, does that give rise to a judicially enforceable right, something that can be enforced by the judiciary without further legislative action.

*DR. LOCKWOOD*

I don’t know where to start. First, the *Missouri v. Holland* concern — we have never had a treaty that has been determined to be outside the treaty power. I think it’s clear, I suspect this panel would evidence that, that one of the most important subjects on the international agenda these days is human rights. As we know, our own president indicated that they were linked to the disarmament discussions in the Soviet Union, so I do not think that there is a serious problem that is posed by the conclusion of treaties bearing upon human rights as a matter of U.S. constitutional law as to what is within the purview of the treating making power. I think the federalism concerns is a smokescreen for concerns over racial discrimination, as I mentioned in the past, and that they have had a serious retardant effect on the attitude of the U.S. Senate toward the ratification of these international instruments. To a certain extent, it’s a wonderful luxury today to actually be raising these questions as to whether or not this document would be a better document than the U.S. Constitution because we have never really reached that stage of serious discussion.

I am also reacting by flipping through these pages, as Professor Sedler has today, to try to address those. It seems to me that there are probably pro's and con's. I notice in here there are proscriptions on discrimination on the basis of language; perhaps that's interesting after November 4th's constitutional amendment in California declaring English as the official language of the state. We don't know where that's going to go; presumably, this treaty might have something to say as a protection for the Asian and Hispanic communities in the state of California. There are questions that are also raised with respect to capital punishment; flipping through I notice in here a provision that says the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be the reformation and social rehabilitation — I think we gave up on that, on our prison system — quite a while ago. That, I think, at least from prisoners' point of view would in the minds of some, be an improvement if in fact those were required to be the aims of our prison system. My concerns are less on the first amendment; we must also remember that it's always possible to frame reservations to treaties. It's done all the time. If you are concerned over the question as to the first amendment concerns certainly a reservation to that particular provision would be acceptable if you do deem more propaganda particularly worthwhile to protect. I would note on the concern over the racial hatred stuff that it does talk about incitement there which sounds a little more like our first amendment standard than it is simply the prescription. I must confess I have agonized over that having seen the Canadian experience as well. I still feel that the greatest unresolved problem in our society today is race. I don't think we have done a particularly good job about it. Perhaps one would be able to find in international treaties reason for us to take a more concerted effort toward education and banning the Ku Klux Klan. This is certainly not something that I am going to simply dismiss out of hand. It may well be that we are correct, that protecting the greatest freedom of speech is the preferable way to go even if your goal is the elimination of racial discrimination. I just think it's a more honest question, and we shouldn't dismiss it out of hand, given our lackluster experience with reformation in that area. I think one simply can go to the privacy area — after *Hardwick*, are you going to tell me that this treaty is a step backward? Certainly a homosexual that wants to have free choice is going to feel greater protection by this treaty than he is under the U.S. Supreme Court. I think it's also interesting to note that what Professor Sedler is talking about, I think, is the Warren Court. It's still that same document that's been around here for close to 200 years. He's talking about the Warren Court's interpretation, I mean, suddenly they find that you've got a right to counsel in your *Gideon* case. The language didn't change in the constitution; it's been there for 150 years. I'm not sure that 15 years into the Rehnquist Court, that Professor Sedler is going to feel as comfortable about that constitutional document. In fact, you might want to bank on some of our international treaties.

*FREDRIK SUNDBERG*

I have a comment in the form of a question, perhaps because of my lack of experience in the U.S. constitutional law. But I was a bit astonished by the argument presented by Professor Seeburger and Sedler about the reason why this problem could not be introduced into American law. It concerned the limitations on the jurisdiction of the U.S. Supreme Court. That is a very common problem in the European context, and the remedy to those kinds of things is, of course, that the Parliament takes the necessary legislative actions to enable the Court to fulfill its duties. The European countries have accepted to take these measures on a number of occasions without any special problems. And I wonder what are the specific problems on the U.S. Constitutional law that would prevent Congress from enabling the Court to fulfill its obligations under the Covenant?

*JOHN QUIGLEY, PROFESSOR OF LAW, OHIO STATE UNIVERSITY*

I'm not troubled by the fact that there may be different levels of protection in the international documents as opposed to the U.S. Constitution. As Professor Sedler himself pointed out, we have the state constitutions and the U.S. Constitution; they have different levels of protection. In California the cruel and unusual punishment clause may mean something different than in the U.S., so it seems to me it is additional protection. If there is a conflict, then, yes, that is a problem, and perhaps a reservation, as Professor Lockwood says, may be appropriate. But I think the U.S. Constitution would take precedence under Article 6 of the Constitution. A treaty is equivalent to an Act of Congress under our Constitution, so that the Constitution would prevail.

There are important reasons for participating in these conventions apart from the impact on domestic law. One of them is the U.S. posture in the world, the embarrassing situation we are continually in for not ratifying. The other is what Justice Tarnopolsky mentioned, the fact that we are not involved in the shaping of the norms by the fact of our non-participation. And third, the fact that we are not participating means that we are not participating in promoting human rights everywhere in the world, which is one of the things one does when one is a party to the International Covenant on Civil and Political Rights. We are not participating in the Human Rights Committee that functions to implement the Covenant.

The basis for human rights may well have a natural law element, but in the international context there is an additional feature and that is the preservation of world peace, as was mentioned by Mr. Sundberg in referring to the European Convention. There is justice and peace language in the preamble, and similar language in the International Covenant on Civil and Political Rights. In fact, if one goes back to the first major international human rights document, the Constitution of the International Labor Organization, one will find

in the preamble as a reason for setting up international labor protection the fact that, as it stated there, international peace is imperiled. This was 1919. There was a revolution in Hungary, a revolution in Germany, a revolution in Russia; and they were worried about world peace. I think that provides a sound basis, maybe a basis instead of natural law or maybe a basis in addition to natural law, for protection of human rights in the international arena. It promotes enforcement of human rights norms if they are viewed as necessary for protection of world peace. Rather than just going after their neighboring state and worrying about whether they are going to have it thrown back at them some day, states may see a need relating to promotion of world peace. Take major violations of human rights, such as UDI (the Unilateral Declaration of Independence) in Southern Rhodesia in the 1960's. The Security Council viewed that as a threat to the peace. The Security Council made a determination that the violation of human rights on a massive scale constituted a threat to the peace; and on that basis, it instituted an economic boycott against Southern Rhodesia. Had it not viewed the matter as involving a threat to the peace, it would not have been able, under Chapter 7 of the U.N. Charter, to do that.

*DR. LOCKWOOD*

That was Justice Goldberg's rationale that provided that theory.

*PROFESSOR ALLEN SULTAN*

I would just like to take a minute to take issue with something that has been said. The Constitution is more than just a distribution of power to federal organs and to the states vis-a-vis the federal government. First, and least importantly, it is a body of rules. It tells you how many witnesses you need for a federal crime of treason; how old you have to be to run for the House of Representatives, etc., etc. Secondly, it creates the three branches of the national government and distributes power to them and to the states — distributes it both on a vertical and on a horizontal level. But it is a third thing; and I think that this is its most important characteristic: it is a body of principles. One doesn't have to go very far in the Constitution to reach Article 1, Section 9, and Article 1, Section 10. The substance of those provisions are purely principles. Principles of natural law, political norms or values, whatever you want to label them. And if you go to Article 3, Section 2, you'll find additional principles, norms or values. Lastly of course, there is the Bill of Rights, part of the original package.

Also, we have to not only look to the Constitution. After all, equality was not in the Constitution at the time of the Civil War; quite the contrary. But it was in the Declaration of Independence. So we have to look to more than the script of the Constitution to find a commitment to political equality, but to all

the values of constitutionalism in the United States. That was the point that I was trying to make earlier; that's why we fought the Civil War. There was nothing in the Constitution requiring it, but it was part of our constitutional tradition. So what I guess I am trying to say is that, sure, the Warren Court recognized the process of pervasive implementation of norms. If Chief Justice Rehnquist obtains enough colleagues with his outlook, they may hold the process back awhile. But the principles are there. And if there is anything in the international norms that will enhance the process, then I think that the international norms are great. They'll supplement and enrich what we have.

With respect to any problem regarding conflict of norms in the United States, the first amendment is our national triumph. It protects our freedom of expression, of petition, of assembly, and of association. So, if our standards are beyond those of the international community, well, that's fine. We are twice blessed. We have our norms and the international norms as well. I don't see any great problem. Surely, international peace is a good argument. It's not, however, the sole justification. The *main* argument is that they are *our* principles. We were the ones who proclaimed them the first time as a matter of political reality. Indeed, we legitimated the creation of our nation upon them! Some may like to forget it, but that's the truth. So we have our independent, indigenous justifications that impel us to embrace expanded versions of human rights.

Clearly there is a problem with implementation by means of legislation, as some nations in Europe have found out. Parliaments do not usually like to restrict their power, to give it to a higher authority. After all, they are in the business of power. That's why the Framers chose to have state conventions rather than state legislative bodies ratify the Constitution. Indeed we continue to have that same problem here in the U.S. But we do have the separation of powers, we do have independent judicial authority, including the most highly respected tribunal in the world. Central to it all, we have judicial review and the Supremacy Clause. Thus, I say, let's get as much as we can now, and look for the rest by way of legislation later. And let's say first and foremost, it's a national commitment; and then in addition, it's an enriching international opportunity.

#### PROFESSOR SEDLER

I just want to say very briefly in response to Mr. Sundberg's point, that I was not saying that the United States should not ratify the International Covenant, but it does seem that any suggestion that the Covenant is less than the be-all or end-all, or that there are any problems in ratification, is construed as an argument against ratification. I did say that if we are going to ratify it as a nation, we should do so for the right reasons. And there may be very valid foreign policy concerns that would justify ratification. I am suggesting, and I will stick to this point, that the substantive provisions of the Covenant, which

are now 20 years old and which were drafted as a compromise among sovereign nations, will not, in my opinion, add to any significant degree to the protection of individual rights that we now have in the United States under current constitutional doctrine. This doctrine is in part a product of the Warren Court, but it is also in part a product of evolution over a long period of time. I'm simply trying to counter the impression that the United States, whatever else it may have to be ashamed of in the international community — and I think there is much — does not have to be ashamed of its ability to recognize individual rights and extend constitutional protection to them. And finally, when it comes to ratifying a particular treaty, I do think it is legitimate to look to the substance of the provisions, and above all, the fact that it is called the International Covenant on Civil and Political Rights does not alter the fact that the particular provisions should be subject to critical analysis to see how they square at least with our conception of what are constitutionally protected rights, as that conception has developed in our own experience.

*PROFESSOR JOHN EBIASAH*

I just want to make something clear. I want to let you understand that I am a naturalized American and therefore, I feel I have a right to speak to matters which affect the position of this country on the international scene. If I were not a citizen, perhaps, I wouldn't have said that. And that is a problem for this country. People take criticisms too personal; and therefore, we have foreigners who come into this country and, no matter what they feel, they keep it to themselves; and then that creates problems for this country overseas. If I were not a citizen, I wouldn't say this; but I am a citizen, and that is why I feel that I have a right even to criticize the United States. Now if we are going to make this a personal sort of vendetta or some kind of an attack on the United States, that is very unfortunate because I came here with an open mind. I feel that I have the right to speak on certain issues on an intellectual level, and I don't think that we always have to, you know, get praise in order to see that we are right in the world. Each one of us knows that human rights are matters which are of international concern. You have always pointed an accusing finger upon repression in the Soviet Union, in Poland, in Africa and in many other countries. I happen to come from a country which is ruled by a military autocracy. America is a great country, but it is not a perfect country. It must accept criticism with equanimity and grace befitting its leadership role in the world.

*PROFESSOR JACOB SUNDBERG*

Let me provide you with something from another area: Aviation law, aviation law is dominated by American civil aviation since it is so great. It is in fact bigger than the civil aviation you find in the rest of the world. This does give the Americans a great say when treaties concerning civil aviation are be-

ing concluded. Now, the way this works in practice is that other countries are pretty considerate towards the Americans because they feel that no treaty is really worth that much unless the Americans are being persuaded to go with it, to sign the treaty. And this means that the normal pattern, or rather a normal pattern, is that all the other countries in the world are so considerate that they make any number of concessions just because the American delegates say that they are absolutely necessary. And a great compromise is being created. Everybody goes back home, and so do the American delegates. When they go back home, it turns out they have no say whatsoever in their own domestic setting. So nothing comes out of this great compromise, as far as the Americans are concerned. The rest of the world will take it, and they consider that they made a great compromise just for the sake of global uniformity. And they are somehow deceived by the Americans who have spoken so much and have too little say. Now, in the second stage, then the rest of the world feels deceived. Then they pick fault with the Americans. And they pick a great deal of fault with the Americans which *you* do not see but which is more easily seen from the outside. Then the world is coming, to a certain extent, apart; so some of the great things in contemporary aviation law concern some of the American institutions, such as the contingent fee situation and the fact that most of the insurance costs in the world, in fact, are costs that are being paid out directly to American lawyers (which is not a very great way to run an insurance system anyway). Consequently, it ends up with the rest of the world ganging up on the Americans. Now, if you transfer this to a human rights setting, you see something of the same thing. I think it's dangerous for the Americans to stay out. I don't think that your arguments are that persuasive that the system here is so much greater than the one you find in the rest of the world, that it is really worthwhile if you could achieve some kind of uniformity globally and make the world unite on some kind of common denominator. The very fact that the Soviets are in certainly weakens enormously the American position. The Soviets may be cheating, but at least they have formally accepted the system. The Americans have not; they're hiding somewhere. Nobody knows really where, but not too many outside the United States are convinced that this is the better system.

*LEE ALBERT, PROFESSOR OF LAW, SUNY AT BUFFALO LAW SCHOOL*

Let me say at first that there are a lot of very powerful arguments for why the U.S. should join human rights covenants and conventions. I agree that the perception of the world of the United States and its treatment of its citizens is important. But I want to shift the discussion from the realm of how we look to the rest of the world to a theme that Bob Sedler stated before. He did it from the point of view of, as he put it, a civil rights litigator concerned with the possible changes that U.S. ratification might work in American constitutional law. I want to talk about the issue of possible change as a student of constitu-

tional law, rather than somebody caring about whether we do have constitutional protection for advocacy of race hatred, or whether we don't have protection against that. I don't think we would be a worse society if we didn't have that protection. But there is a more general issue, which is the extent to which there are, or should be, universal norms of human rights that are applicable to all societies, regardless of the particular historical and cultural configuration of that society. I happen to be a skeptic on that proposition. I think that societies differ enormously in a whole variety of ways. Once you get beyond highly abstract declarations of the good and the wise, when you get down to the particulars of human rights, for example speeches about war, propaganda about race hatred, and a variety of things like that — I think nations can legitimately establish very different responses to those kinds of questions while seriously embracing and respecting human rights. I don't believe there are universal norms of decency divorced from time, place and culture. That has implications for what seems to me is a central question in adopting international conventions. A related question concerns what institutions, national or transnational, are to interpret and elaborate the skeletal language protective of human dignity and human decency, that one finds in most constitutions or human rights declarations. Since the American Constitution is two centuries old, it employs archaic phrases: due process, cruel and inhuman punishment, search and seizure and equal protection. But the appeals to concepts of human dignity don't differ. It's the implementation, the elaboration of those concepts, that strike me as different for different societies at different times.

One argument that I heard earlier endorses multiple voices: let a thousand flowers bloom; there can be different norms for different societies; but let's have as many voices as we can. After all, in the United States we have fifty state courts providing constitutional responses and we have the United States Supreme Court making constitutional noises, as well as federal circuit courts and district courts. But the result would be babble in the United States if we didn't have an authoritative structure by which one of those voices is going to stick at some point. We do have that authoritative structure. Some voice counts; either it is the state court if it is a state constitution question or it's the U.S. Supreme Court if it is a federal constitutional question. If we didn't have that, and we had many voices without authoritative norm resolution of which voice counts, constitutional norms would be pious declarations by judges without coercive force behind them. That's a conception of constitutional law, but one that is very different from the American conception. It's a conception of norm exhortation by judges, which is different from our experience. But that conception is indigenous to the international arena. The enforcement machinery, the sanctional mechanisms behind international conventions, are vastly different from the sanctional mechanisms behind American constitutional review. We take prompt compliance for granted. There rarely is any doubt about conformity to the judicial decree. Compliance by reflex or coercion is not

typical in international tribunals. It would not be a positive contribution to American jurisprudence to view domestic constitutional adjudication as norm declaring rather than mandatory law. What I am really trying to say, in this very rambling manner, is that there are a lot of concerns, institutional concerns and concerns about our conception of civil rights as enforced by judges, that differ considerably between domestic law and international law. The American legal conception of civil rights is not the same as the transnational understanding of human rights. The differences should not be ignored.

*PROFESSOR FINAN*

It seems to me when I read *Trinity* by somebody or other, I thought it was written by my mother. I suppose a lot has to do with where you come from; but the only thing I get out of this discussion today is that I think of myself as a potential victim. And I say to myself, what remedies do I have? Because there is an old expression, *ubi res ubi remedium*, and I don't believe in that. I believe that where there is a remedy, there is justice. It seems to me that we who are committed to civil rights have an important mission in creating positive law throughout the world that will ensure it. I have no quarrel with my brothers; I spent ten years with the Jesuits and am, therefore, tarnished. But I have no quarrel with my brothers who feel that there is a natural law, but what bothers me about natural law is a statement such as, if it weren't for natural law, we couldn't condemn Hitler. I think I could make a pretty good case that we can hang the son-of-a-bitch whether there is natural law or not. I think to the extent that we create this edifice on the assumption of natural law which assumes that law in ontological as opposed to deontological, we create our edifice on sand; and I think we have a much more credible edifice if we take the realist's if not the critical legal studies, point of view. I like the "crits." Natural law is a wonderful artifact, as Jacob likes to say; and I think maybe psychologically it is so that these human rights will go down the drain unless natural law is a fact.

*DR. LOCKWOOD*

I'm afraid I've been provoked into a couple of different directions. Let me respond first to Professor Albert and then to Professor Sedler. On the enforcement, I think last week in the *New York Times*, there was a rather interesting juxtaposition, intentional or unintentional, the one article — both on the front page — the one article indicated that United States had made its contribution of a hundred million dollars to the U.N. budget; it had been assessed what we were required by charter law was 175 million, but we couldn't afford to pay that so we are only paying 100 million. Next to that was that the Reagan Administration had to be satisfied with giving the Contras 100 million dollars for its covert war in Nicaragua. The point that I want to make is that the monetary level of commitment to these human rights apparatus that have

been set up within the United Nations has been minimal. We've seen just from what Judge Tarnopolsky indicated this Summer that the human rights committee has even had to cut back its work. For a modest amount of money, real modest amount of money, it would be very easy to put more teeth into the human rights apparatus within the U.N. The few times that the U.N. has attempted to do something, (Professor Quigley talked about the Rhodesian sanction), such as in 1966 and 1968 when the Security Council for the first time in its 35 year history passed economic sanctions under Chapter 7, an enforcement procedure attempting to address a human rights situation, the renegade regime of Ian Smith. The sanctions were beginning to have some effect when what happens? Senator Byrd from Virginia introduces the Byrd Amendment into the U.S. Senate dealing with the question. At the time, Southern Rhodesia had two huge stockpiles of items, one was tobacco, the other was metallurgical chromite mined by Union Carbide. The senator from Virginia obviously didn't want to effect bringing in Rhodesian tobacco; he wanted to help out Rhodesia. He put an amendment to the Strategic and Critical Materials Stockpiling Act, which permitted the importation into this country of metallurgical chromite. We brought litigation against Union Carbide and the U.S. (the *Digbee-Schultz* case) in the district court in The District of Columbia, arguing that that was a violation of our treaty obligation under the U.N. Charter, Security Council resolution. The upshot of which is, we got standing, but under the judge-made law in the U.S., the court said Congress wanted and intended to violate our solemn treaty obligation; and it did so under U.S. constitutional jurisprudence that if a congressional statute comes later than the treaty obligation, the congressional statute takes precedence. The first time the U.N. tried to do that, that was the U.S. reaction. During the Iranian hostage crisis the U.S. goes into the World Court and argues that there are basic minimum rights, diplomatic immunity; minimum rights for the hostages wins a unanimous verdict in the World Court. The U.S. later gets taken to the World Court by Nicaragua; the World Court finds it has jurisdiction, the U.S., the Reagan Administration says I'm sorry, we don't like that decision. We're not going to abide by it. You can't have that kind of commitment by this government toward international law and expect to create a viable human rights instance. Switching to Professor Sedler, I remember the Arlington Heights Property Association's amicus brief in the 1948 case of *Shelley v. Kraemer* where the plaintiffs were arguing that the U.N. charter's prescriptions on racial discrimination prevented the implementation of these racially restricted covenants. The Arlington Heights amicus brief on the other side said that is absolutely absurd. One can imagine if you followed the charter's prescriptions on racial discrimination, that would mean that you couldn't ban sexual discrimination as well, because the Charter has prescriptions on sexual discrimination — how absurd. 1948 — my experience in teaching constitutional law for the first time last year was that my students at Cincinnati were embarrassed to talk about racial discrimination cases. They seemed so far distant, and how could we ever have interpreted

separate but equal as complying with the fourteenth amendment. We have experienced this transformation currently in the last twenty years toward sexual discrimination. I submit to you today that forty years from now that we will look back on the fact that people can die from hunger, that they can go homeless, that they can't have minimum medical care in this country and not be protected by the federal constitution as being as distant as our attitude is toward those racial discrimination and currently sexual discrimination. It is absolutely scandalous in this country that those kinds of situations can take place. Let's not just talk about the Civil and Political Covenant, let's talk about the Economic, Social and Cultural Covenant, its complementary international instrument that is also reflected in that 1948 universal declaration of human rights and for which President Roosevelt included in one of his four freedoms the freedom from want.

*PROFESSOR SEEBURGER*

I don't want to miss my chance to engage in America-bashing. There is much to be criticized in United States policy. I do it all the time, but I think we're confusing the issue. The issue is the proper function of the judiciary. We are talking about adopting the Covenant and having it judicially enforceable rather than something that ought to be the result of an informed political will. We are prisoners, we in the United States, of having the original constitutional court, which does all kinds of wonderful things. Now we are asked to take that precedent of an independent court and exponentialize it and tell it to interfere with political processes even more. The fact that our Constitution does not give the courts the power to make people do the right thing is not necessarily a failing. Our failing is the lack of political will. It is not the nature of our constitutional structure. I think I resent criticisms directed toward our judicial system based on political values.

*DR. LOCKWOOD*

Yes, there may be a common ground; I take your point. The fact is, however, that if you ratify the treaty, one's method of good faith implementation isn't simply through the judiciary. I mean it may require legislative enactment, and it would certainly give the power to Congress and to the states to implement it through the legislative thing. One may have different views on what the proper role of the judiciary is; I agree with that.

*JUSTICE TARNOPOLSKY*

Well it is a bit difficult for the non-Americans here this evening to make comments in the light of Professor Seeburger's comments about America-bashing. The only thing is that — that is why we are here! I assure you that as president of the Canadian Civil Liberties Association for four years, I did a lot of Canada-bashing. Part of the reason is that we live in the 25-30 happiest,

freest, wealthiest countries in the world. Everybody else envies us. It doesn't mean that we're perfect in every way. It doesn't mean that there aren't ways in which we can all be improved. It doesn't mean that the Covenant doesn't give problems to every country that ratifies it, because in some ways some parts of the Covenant provide some difficulties for some countries — east, west, Third World, whichever. There are things that we do better, and to the extent we do it better, sub-paragraph 2 of Article 5, permits us to do it. It says that the Covenant is not intended to be a basis for arguing for any less protection than any constitution has.

So, there is no problem with ratification of the Covenant if one's constitution is better than that standard. But, on the other hand, one has to remember that one cannot put down the Covenant merely because it is twenty years old, as Professor Sedler says. After all, the American Constitution is much more than twenty years old; I understood it is almost 200 years old. Some aspects of it are only 100 years old; is that out-of-date? The fact is that all of these documents, whether domestic or international, are expressed in general terms. Some people like to put them in natural law terms; as a person who has never accepted natural law as the basis of justification, I think, as was stated, that it does not matter whether anyone believes in natural law or not, Hitler would have been hanged for what he did under our domestic laws. But those are not the criteria by which one judges.

The fact is that there are a number of provisions in the Covenant which, I think as an outsider, would be beyond the protections in the United States Bill of Rights. Let me invite you to take a look at Article 6, Right to Life, paragraphs 5 and 6, "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age" — is there something in the American Constitution preventing that? If it is, great. How about the next one — "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment" — as I understand the American situation, during the last ten years you have gone the other way. You have reintroduced capital punishment. For awhile it seemed like the American Supreme Court had struck it down. Is retention of capital punishment contrary to paragraph 6? I am not sure that any court would hold it so. But as has been mentioned, it could be the basis of a political argument. Let us take a look at Covenant's Article 9, paragraph 5, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Do you have that in the United States? We do not in Canada. Maybe we should think about it. Is that something you would like your country to consider; should there be such a right? I think that I would like to see my country consider that. Article 10, it was already mentioned earlier, Professor Lockwood mentioned paragraph 3. Take a look at paragraph 2 — are all your accused persons segregated from convicted persons? If you can enforce that, that's great. Then you will have no problem with an Article 40 examination; but if you cannot, maybe there is

something that can be raised. How about the next one in Article 10? Are all your juvenile persons separated from adults? Well, if you can be happy with that requirement in every state, then you have no difficulty. I do not think that my country can quite claim that all the way. How about Article 14, paragraph 6, do you have provisions ensuring that any conviction which is subsequently reversed shall be compensated according to law? Is it just an *ex gratia* payment, or can one go to court and get compensation in law for being imprisoned when the decision has been reversed? How about Article 25? Article 25 speaks about every citizen having the right and opportunity without any of the distinctions mentioned in Article 2 to take part in political life. Well, if you look at Article 2, you will not find a requirement of education. What are the various kinds of literacy tests that your people have to go through and that some of the blacks in southern United States have gone through? Can you meet all the requirements of Article 2 and Article 25? If you feel happy that you can, great; but I would have thought that some of the bases upon which your voter registration went through in the past might have given you an opportunity earlier to strike down some of the voter tests that had been required.

There is nothing in the Covenant, however, which can be used, in my opinion, to strike down those provisions or protections in your Bill of Rights which go beyond the Covenant. It does, on the other hand, provide a number of ways in which one can consider one's internal domestic situation, in ways that perhaps we hadn't thought of. And, to finish on this point, which is the Moderator's second question: who is going to interpret the Covenant? Whether we like it or not, regardless of what we say, it is going to be the Human Rights Committee. Now, are you going to be on that Human Rights Committee, or are you not? You are going to be bound by what they say as far as the Covenant is concerned; and the less you like it, the more difficult will be participation in the international bill of rights. Your jurisprudence is not going to affect the jurisprudence of the Committee, unless you are a part of the Committee.

### *PROFESSOR SULTAN*

Yes, I've spoken in generalities, and I think that perhaps there's an improper impression that I'm not concerned with implementation. Implementation is, of course, the bottom line. I would like to suggest two distinctions regarding implementation that have not been fully expressed this afternoon. The first is the distinction between a remedy and enforcement of a judgement. To have a remedy there has to be legislative jurisdiction granting judicial jurisdiction. That's by means of a statute; and, of course, courts interpret statutes. With respect to these types of statutes, courts have proven not to be too restrictive unless there are compelling political reasons to limit their own power. So we have to assume that usually a remedy exists or the court wouldn't take the case in the first place. Thus, I think the real question is whether or not there

will be enforcements of judgments, that aspect of implementation.

The other distinction is that we should not assume that the political branches must always take the lead with respect to implementation. They can at times be the followers. I'd like to cite the case that our attorney general, Mr. Meese, looks down upon, *Cooper v. Aaron*. In many respects it represents the moment of truth with respect to our commitment to the principle of equality in this country. Every single justice on the Supreme Court personally signed that opinion. Then President Eisenhower had to live up to his oath that he "shall take care that the Laws be faithfully executed." And when it came down to "fish or cut bait," he had to use federal troops. Later, at "Ole Miss" (the University of Mississippi) it was the 82nd Airborne Division.

Now, I'm not saying that we should look at the 82nd Airborne Division to enforce the law. That's a pretty primitive way to execute judgments. What I am saying is that the political branches don't always have to take the lead; that in our system, when they are paralyzed and action in the public interest is compelling, the lead has been taken by the judicial branch. Now if these universal human rights provisions are in effect in the United States and they say you can't execute a child under eighteen, then once again we will face a political moment of truth, as well as an obvious international responsibility to see to it that authority conforms to the law. Whoever may suggest otherwise challenges the law. That's not new. Rather that is exactly what goes on every time there is a case challenging federal judicial supremacy, whether the challenge comes from one of the states or from a political branch of the national government. Moreover, it's the responsibility of the political branches to support the rule of law: of the legislature to vote money, for example. Many times they say they don't have the money, but somehow they come up with it when they have a legal obligation to do so. And, as with Little Rock and "Ole Miss," it's the responsibility of the other political branch, of the executive, to execute such judgment, and they are almost always given the resources to do so.

So I think we should keep those distinctions in mind when we discuss "implementation," particularly regarding a very viable norm, like our commitment to political equality. Sure, the political branches are at times all bound up, like they were in the areas of racial discrimination or reapportionment — two provisions based upon that precept of equality. Yet remedies proved to be available, and judgments were enforced. This is part of the elasticity built into our separation of powers. The judicial branches took the lead and the political branches, when faced with their responsibility under the rule of law, lived up to their constitutional obligations.

*PROFESSOR SEDLER*

There are a number of points that sort of come together very quickly.

Justice Tarnopolsky suggested that if we don't ratify the treaty, we won't par-

participate in the work of the Human Rights Committee, but we will be bound by it. If the treaty is going to be self-executing, which it can be, and if it can be used as a source of protection in individual rights, then the courts in this country will have the responsibility to enforce it. So I think that the point that I raised earlier, that either the courts are going to defer to the Human Rights Committee for the treaty which means it's really not going to be important, and that the only way it's going to be important within the United States itself is if the courts enforce the provisions; and that really brings me to the point made about the nature of a right. I will use the Canadian concept of entrenchment. While it is indeed true that Canada ratified the International Covenant in 1976, Canadian civil rights leaders, including Justice Tarnopolsky, did not say, "well we've solved our problems in Canada." Rather they said, we need an entrenchment in the Constitution of individual rights. And I think the reason is textually given in Article 24, paragraph 1, where it says that anyone whose rights or freedoms as guaranteed by this charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. I think that reflects not only a Canadian traditional notion of rights but also an American view of protection of individual rights, and maybe the reason why American constitutional lawyers don't get excited about the International Covenant is that our view of constitutional rights does relate to the concept of entrenchment. That means that you don't go before a committee and the committee gives you advice. If the government is doing something that violates your rights, you want to go into court — you want a declaration that such action is unconstitutional, and you want an injunction to stop them from doing it. And if it seems that we are parochial, I would only suggest that maybe this system has worked very well for us. Canada has also decided that a similar system will work well for it. There are various European nations that have established a constitutional court, and maybe one might suggest with all due deference that if there is going to be universal protection of individual rights picking up on Professor Albert's point about adapting it to the context of each nation, that may be the way to go. It's not relying on international human rights treaties, but for nations entrenching individual rights in their own constitutions and making these rights enforceable by the national judiciary.

#### *MR. PARTLOW*

Sitting here with a number of fine constitutional lawyers, we have heard a lot of arguments concerning differences between the Covenant and our own Constitution. This is all very interesting. However, something which the Symposium has not focused upon, although I feel we cannot ignore it, is the fact that this is an international agreement. I think whenever one contemplates an international agreement, one needs to take certain things into consideration. First of all, enforcement is very different and very difficult. However, as more agreements of this sort develop and more nations around the world ratify

them, the better argument one has that human rights exist as customary international law. Down the road, one has a better chance of influencing some renegade nation that does not give its people these sorts of rights. I think that this is the real intent behind the Covenant, as well as its true value. Today, we can discuss the direct effects that the Covenant could have in Canada or the United States. This is all very interesting and very valid. However, I do not think we should ignore the overall objective.

*PROFESSOR JACOB SUNDBERG*

Well, I think I would like to respond to that by pointing to the fact that once you have an agreement of this type that is supposed to be a guarantee for individual rights, the treaty, the document takes on another character than most international documents. You see this very clearly in the European context. Because what the states agree upon is not to provide each other reciprocally rights, but rather to establish a standard throughout the whole area. In European terms this is called the European public order. And those who don't like it will call it the autonomous interpretation of the treaty. But it comes down to the same thing. Well, the European Convention covers an important area; after all, over 350 million people in it so it's not *quantité négligable*; but when you go out world-wide, as you do with the Covenant, these things do take on another dimension. I would like at this point to invite Justice Tarnopolsky to comment upon the world public order, if there is such a thing, at least present in the thinking or was present in the thinking of the Human Rights Committee. Because I would say that this would take away something of this argument that after all, this is only a treaty. It is something more.

*JUSTICE TARNOPOLSKY*

Well, I really find it difficult to add anything to that. I agree as I do with the previous speaker from the University of Akron, which is that it is part of the post-World War II evolution in human rights, and we all have a role to play. This is one of the matters that I use to argue with some of my friends in the Canadian government: It does not matter if the Committee condemns us on situation X; the fact is that eighteen intelligent people see that our record is pretty good on other things. In other words, we have a general responsibility between ourselves, in terms of these standards, to try to raise the level of human rights protection in the whole world. But one loses any kind of moral authority, in condemning Chile or Czechoslovakia, if one says that we are just too good for this international standard. One has to be part of that, or no one will listen. And the fact is, I am sorry to say, that no one wants to listen to Americans, even though this is the center of the most of the research, most of the solid writing. Just between you and me, what I have heard from other members of the Human Rights Committee is: Who are these Americans to write books telling us what to do when the United States has not accepted the

Covenant? The fact is that the best book available on the Covenant may not have that moral weight needed with Committee members; and that is what you are losing.

You are the people who have had the greatest and longest experience in protection of civil liberties and you, with the rest of us — Sweden, Canada, Western Europe — are amongst the happiest countries in the world in terms of balancing the two great branches of human rights — liberty and equality. But we are not without fault in various ways. One of the great surprises to Canadians has been that despite the fact that we think our record is so good, when we go to the Human Rights Committee and, despite our 468 page report, members of the Committee find fault with our record. We, — where everybody is free, — where we talk about multi-culturalism — we encourage people, to keep their ethnicity and their religion, their cultural rights, and we say to them, you are equal Canadians; and yet, when we go before the Human Rights Committee, members ask our representatives about how our native peoples are treated. How many of them are dying? What are you doing for them? Can one really say that the rights of men and women are equal when you have one female judge on the Supreme Court of Canada and maybe ten members of Parliament out of some 285. There are ways in which we too have an Achilles heel. But, on the other hand, I always felt perfectly confident as a Canadian to make comments about Canada or Sweden or the Soviet Union because we were part of the process. But if you are not part of the process, those people just are not going to pay the same amount of attention to your position.

So, I agree with the last two speakers — we are not just looking at what each of us can do for our own countries domestically. That is very important. There is also the factor of what we can do abroad. Can we really criticize Chile or Poland or Bulgaria if we ourselves are not part of what they have joined by way of an international obligation.

#### *MODERATOR RICH*

Perhaps our lack of reliance on moral authority has something to do with our tendency to rely on economic and military power.

#### *FREDRIK SUNDBERG*

I would like to address this question once again, perhaps this time to Justice Tarnopolsky. This afternoon you mentioned, or you told us about all the different interpretations that were possible under the Covenant; and all the arguments presented by the East and West as to what was the correct judiciary. I have noted reading the Covenant that there does not seem to be any specific definition of what is a democratic society. In the European context that is the key almost to the whole Convention. Almost all interferences have to be "lawful." That says that they are decided by Parliament, in free elections;

and I can read to you what the European Convention says on this issue. It says that the high contracting parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. That is really totally essential as to the interpretation of the whole document. If that would not be there, freedom of expression could have most different meanings, the judiciary, the judiciary review of governmental actions could mean many different things than it means today in both the United States and in Europe. Now, to me that lack, as I understand it, in the Covenant opens up a whole panoply of different interpretations and to solve that perhaps the only source that there might be would be to look at what is the common practice among the contracting states. Now, not all states adhering to this consist of democracies and perhaps the standards kept by the Covenant could be considered to be without terms, non-democratic. Is there anything that one could add in that perspective?

#### *JUSTICE TARNOPOLSKY*

I tried very briefly this afternoon to indicate some of the difficulties with a world-wide standard, unlike the regional situation with the European states, the twenty-one states in the Council of Europe, who really have today very little differences between them on what is the essence of a "free and democratic" society. Our big problem was that the Covenant covers the world. And one of the big problems, let me give you just one illustration, is how do you reconcile one-party states? There are the one-party states of eastern Europe and there are one-party states like Tunisia and Tanzania. One-party states are not the kinds of systems that we would choose to have in North America. But, one has to recognize that there is a big difference between Tanzania or Tunisia, or other one-party states in Africa, and those in eastern Europe. The difference between a totalitarian state that does not countenance any kind of different views in eastern Europe, and the one-party states where, as long as, for example, in Tunisia you pay obedience to Bourguiba, you could criticize anything else you want. And in Tanzania you have a system similar to the "ombud's" function, in which criticism can be brought against any organ of the state. So how does one compare? Well, it is a very difficult thing.

How does one apply the Covenant to three very different states: Sweden or Canada or the United States on the one hand, East Germany on the other, and the Malagasy Republic on the third? How can you gauge the measures taken in three countries with very different economic and historical and political situations. Well, one of the ways you can is in considering the limitations clauses. If you look at Article 12 on freedom of movement within the country, Article 18 on freedom of religion, 19 on expression, 21 on assembly, 22 on association, 14(1) on public trials, you will find permissible limitations. So, if you have, as we did, an honest report from the Malagasy Republic which

said that there were economic and public order difficulties that they had been facing and, therefore, for reasons of public order under Article 19, freedom of expression is limited, one can understand the need for limitations. On the other hand, if you have a Stakhonovite report, as we had from Czechoslovakia, then you say well, all right, if things are so marvelous, then why do you have to suppress peaceful dissent. So, an international committee can take account of these kinds of limitations; but it has to operate within the context of an international standard.

Perhaps I could finish off in this fashion. I came to the Human Rights Committee, unlike all the other members on the committee who had an international law or a diplomatic background, without either. My whole experience was in human rights and civil liberties issues in Canada: no real international experience. Therefore, I started to gauge the actions of different countries by my own standards in Canada. But my friend from Mauritius, Ravsoomer Lallah said: "Look, all we can hope to do is push these governments a little bit. We are not going to transform them into another Canada overnight; we just want to push them forward a little bit." And that is all we can hope for on an international level, it seems to me — bit by bit, but we cannot stop. If we don't push at all, we won't get anything.

### *PROFESSOR QUIGLEY*

Looking at different systems and deciding what the standards are calls to mind what Justice Tarnopolsky said this afternoon. He suggested that an article saying that a person must be devoted to the state in order to be a judge is a violation of the concept of independence in the judiciary. I do not think there are too many states in the world where you would find people who are not devoted to the state becoming judges. To some extent, it is inherent in the judicial function — you are enforcing the laws of the state; if you are not devoted to the state, it is to some extent inconsistent to be a judge. There are political processes in the United States — in the federal bench, it is appointment by the President. And at present you must not only be devoted to the state but to a very particular concept of the state as conceived by the executive. But even apart from that, you do not ever find in the United States too many judges who are anarchists, for example. They do not happen to get appointed. You have to be devoted to the state to a certain extent.

I also wanted to comment on Professor Sundberg's question about world public order, the question that he posed to Justice Tarnopolsky in the human rights context. This has come up in one other context. Now the International Law Commission of the United Nations in its drafting of articles on the law of state responsibility has introduced a concept of international crime. It is making a distinction in terms of international responsibility among different kinds of internationally wrongful acts, some being considered crimes, and others being considered delicts only. The idea behind the international crime is that an

international crime is an act that is not simply a violation of the rights of some other state but a violation as well of world public order. If, for example, state A commits a wrongful act against state B, it means that states C, D, E, and F have some role in insuring compliance by state A. This comes out, for example, in chapter 7 of the U.N. Charter with a crime against the peace. Peace is considered something in which all states have an interest. The International Law Commission is pushing that a bit to apply it to such wrongs as denial of self-determination. The Commission says that that is an international crime — if a state denies self-determination to a people, that is something of concern to the entire international community. The Commission also includes certain major human rights violations in that regard. It has a formulation that serious violations of human rights constitute an international crime. It gives by way of example, genocide, slavery, and apartheid as examples of serious violations of human rights. That means that if apartheid is committed by a state, that infringes interests of the entire international community based on the concept of world public order.

*DR. LOCKWOOD*

A concrete example of where that might come into play in terms of a lawyer's practices were involved in this litigation in Hawaii now against Marcos, class action on behalf of victims of torture, one of the (it has been dismissed at the district court level) but in good part on an active state invocation. It would seem to me that you could use those principles to be able to suggest that the U.S. courts should not invoke an act of state doctrine when you've got involved an international crime of that order. That would preclude a judicial restraint kind of argument in that instance.

*FREDRIK SUNDBERG*

I could follow up on my first question a little bit. And since as this world public order would necessarily, because of these shortcomings as to common denominator between the nations, be on a very abstract level, is it the acceptance of the Convention, or the Covenant and its Protocol, something that can really add something on the internal, internally, in the state that one should accept them as valid domestic law; or should it perhaps serve a better purpose as an international moral setting standard, as the universal declaration?

*JUSTICE TARNOPOLSKY*

One of the problems with the limitations clauses in Articles 18, 19, 21, 22, is that you will see the reference to one of the grounds upon which there may be a limitation as being "public order." Not all of them, but most of them, have in brackets the French italicized "*ordre public*." The problem is that that has created difficulties in interpretation, because those French words were probably introduced specifically to give the French interpretation of "public order"<sup>20</sup>

which is much narrower, if you wish, much less restricted than our North American, or English interpretation. All it means in French is "public policy." Well, heck, if on the basis of public policy you can restrict any of these freedoms, then anything the government wants to do is public policy. Who can question the legitimacy of a government elected by a majority as having valid public policy reasons for restricting the fundamental freedoms. You can see some of this in the book edited by Louis Henkin, because the chapter concerning these limitations was written by Alexandre Kiss; and Alexandre Kiss, as many of you may know, is a distinguished French professor, who runs the Rene Cassin International Human Rights Institute in Strasbourg. I was at the session at which these papers were presented before being published; and you saw this kind of thing, which is very revealing. Alexandre Kiss took the typical French view of what "ordre public" means. And all the Americans who were there, and you can read the list in Louis Henkin's book, and a couple of us from the Human Rights Committee were there; Christian Tomuschat from West Germany, Torkel Opsahl from Norway and I. Everybody argued that one could not possibly put forth that kind of an interpretation of public order because if we do, it makes the limitations clause wide open. So the version you read in that book is a little more toned down than what was the original; but this is part of the problem one faces. There is no question, and your Supreme Court was the first to say, that you mustn't shout fire in a crowded theatre, there are limits. But how do you define them? And if they are defined too loosely as they would be with the French version in "*ordre public*," then one really provides a path big enough for tanks to drive through.

In response to Professor Quigley and his criticism of my criticism or my making light of the East German constitution, one has to remember that it doesn't just speak of people loyally devoted, that is judges being loyally devoted to the people, which I hope I am to Canada despite being a judge, it goes on to say, "*and to their socialist state*" and *that they are accountable to and may be removed by the people who elect them*. It is this combination, the whole thing, the context of the Constitution which makes a difference: where a judge in eastern Europe cannot make a ruling which goes against whatever the government decides; where obviously someone appointed by the Republican administration here can overrule a decision of the Reagan government; and where I, as an appointee of the Liberal government in Canada, would not have hesitated, and did not, to hold invalid pieces of legislation enacted by that government. It's that combination of situations which becomes crucial.

#### *PROFESSOR LOCKWOOD*

I would like to mention that on the principles of interpretation as well as the meaning of the International Covenant on Civil and Political Rights my institute had a meeting of experts a few years ago in Sicily that had background papers that developed these principles and commentaries that are published as

volume 71, No. 1 of the *Human Rights Quarterly*. We have done a similar exercise with the International Covenant on Economic, Social and Cultural Rights which will be out in the May, 1987 issue of the Quarterly.

*MODERATOR RICH*

We could probably go on indefinitely if we weren't all getting tired, but we've covered quite a bit of ground, discussed quite a number of the issues that were up for discussion — even if we didn't resolve them — and we have a final comment from someone who hasn't spoken yet.

*BRIGADIER GENERAL NORMAN THORPE, UNITED STATES AIR FORCE*

We were told to wait until we got to the proper part of the program, and I understood that we were going to get to the practical before we stopped. I would just like to say that I think the foreign policy-domestic policy distinction is the key one that we've discussed at some length tonight. The point is, as I told Professor Lockwood earlier in the evening, I don't think he's going to be successful establishing a rule of customary international law, or of, natural law or anything else, to the effect that there is an international standard against cutting off unemployment compensation after 90 days or such detailed domestic issues as that. The real key is, where do we stand in the leadership position in this important issue in world affairs, and that's the foreign policy issue. Now I certainly have to yield to Mr. Justice Tarnopolsky's view that the other members of the commission and the people that he discusses these issues with are disappointed that the United States has not joined this Covenant, and I am sure they are serious in that. I think, however, that they feel that way because they would like the United States to lend the strength of its opinion to the subject matter, not because they think there is something wrong with civil and political rights in the United States; on the contrary, if this is a document which can be easily signed by the Soviet Union and Bulgaria, signing it obviously does not establish the existence of civil and political rights in the homeland. And therefore, I think we have a practical problem in pushing this through the Senate of the United States. You know, Professor McDougal led all of us American international lawyers some years ago away from normative, ambiguous concepts that we can all agree to, so now we have detailed conventions that are like the revision of the United States Criminal Code. No one can agree to it because we don't think eighteen is the right age to define juvenile or for whatever reason. As long as you have that much stuff in there, we can never agree to it. And as a practical matter, if we want to advance human rights, I think we're pushing on the wrong button.

*PROFESSOR LOCKWOOD*

I would like to thank Professor Sundberg and the University of Akron School of Law for a most stimulating experience. This really has been for me a

good deal of thoughtful discussion, and I know I am coming away from this experience with a number of new ideas; and I think the University of Akron School of Law is to be commended for bringing this group together. Thank you.

*MODERATOR RICH*

On behalf of the University of Akron School of Law and myself, I would like to thank the panelists, our invited guests, and members of our audience for their contributions to these proceedings. I think that the discussion that we've had tonight well justifies the effort that was put into creating this event, and we're grateful. On that note, I'll say good night.

