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Roundtable: The United States Constitution and the Adoption of International Human Rights Instruments: Freeing the Political Logjam: Keynote Address: Proposals for the Future

Louis B. Sohn
University of Georgia School of Law

KEYNOTE ADDRESS: PROPOSALS FOR THE FUTURE

Louis B. Sohn*

As it has already been mentioned today, we are living in a rather exciting time as far as human rights are concerned. Since 1917, we have lived under both the shadow of the Soviet Revolution and the threat of Communism becoming the great idea of the future. We know now that this did not come to pass, and that communism has proved to be unable to assert its superiority over other existing political systems. A chance and opportunity now exists for the United States to show that it can do better, that its goal is not to take over the world, and that its system is working better than that of the Soviet Union.

Internationally, the two revolutions currently underway are a result of United States action. As I mentioned this morning, one of the first great ideas of the post-world war era was human rights. This idea came from the United States. I remember helping to draft the Declaration of Human Rights in 1943 for the American Law Institute. Several European refugees, including Professor Rabel from Germany, helped with that project. The report was published in some obscure magazine that same year. I later discovered that it was one of the documents the Secretariat of the United Nations collected to serve as a source for drafting the International Bill of Human Rights. What was important for me at that early time of international human rights was the clear understanding in Washington that human rights was the great idea of the future.

Another idea underestimated by people at that time was behind the direct pressure by the United States for self-determination of all the peoples. It began at Yalta with the simple theme that the great empires had to go, and that all the countries of the world held under colonial domination were entitled to self-determination. No one believed that this would happen. Winston Churchill immediately responded to this view of Mr. Roosevelt by stating, "I have not become

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* Woodruff Professor of International Law, School of Law, University of Georgia, Athens, Georgia.

the Prime Minister of Great Britain to preside over the dissolution of the British Empire!" But soon thereafter he lost the election to Atlee whose first act was to free India, because Great Britain, weakened by the war, could no longer govern that ungovernable country. Lord Mountbatten went to India and liberated 400 million people. Once the drive towards self-determination was completed, the majority of the world's population had been liberated. The United Nations took advantage of this by admitting over 100 new members. The United States was more successful in its effort than it had ever expected. As a result, we have a completely different world today. Never in the history of mankind have so many nations received their freedom from foreign domination.

We are now living in the second part of this revolution. It concerns the self-determination of people against whoever oppresses them. We see this happening in Eastern Europe today, something that was inconceivable only a year ago. Albania seems immune for the moment, but I think it will not last much longer either.

So, the United States started two international revolutions but became frightened by both of them. Thereafter, it adopted attitudes counter to both the demands of the developing world and the numerous international instruments on human rights that it helped to draft. As I explained this morning, by the 1950's, the United States had begun to shy away from them. Once into the 1980's, the United States had moved even further away from these instruments. We are now facing the delayed consequences of our original successes; somehow we must find a way to live with them. I hope our friends who came here from Washington will find a solution for us.

We are now confronting a completely different world. Therefore, we must approach international and domestic problems of human rights with some new wisdom. Professor Lillich reminded me this morning of some notes I collected some time ago on the approach of the Supreme Court and lower courts over the last 20 or so years to international rules in the field of human rights. As it was pointed out earlier, *Trop v. Dulles*,[1] was one of the relatively recent cases that seemed to talk in international terms. Professor Lillich also mentioned a case I had never heard of, *Weems v. United States*.[2]

Historically minded as I am, I went to look at the *Weems* case. It is an international case involving the United States' occupation of

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[1] 356 U.S. 86 (1958).
[2] 217 U.S. 349 (1910).

the Philippines after the 1898 war. In the treaty with Spain, we promised that we would recognize the Spanish laws of the Philippines. As you know, we had to fight a guerilla war after defeating the Spanish. Again, an agreement was reached and we promised the Philippine guerrillas, as part of the agreement for their surrender, that we would respect the principles of their laws and customs. It was after this that trouble began for Mr. Weems.

He worked as an official of the Coast Guard which at that time was in charge of collecting customs. He discovered that, when paying salaries to people, he could make a nice deal with them. He would give them a check for more than they had actually earned. They would keep a little extra beyond their real salary and he would keep the rest. Over some time, he collected the great sum of 610 pesos. At that point he was caught. He went before a local Philippine court and they applied the Spanish Criminal Code, by that time called the Philippine Criminal Code. He was sentenced to fifteen years imprisonment in chains and "at hard labor."

Fortunately, an American lawyer who happened to be in the Philippines pointed out that this was "a gross violation of the Philippine Constitution." This modern Constitution had its own Bill of Rights, copied from the United States Bill of Rights, that Mr. Root and the Philippine Commission gave them, containing a clause prohibiting cruel and unusual punishment. Weems appealed to the Philippine Supreme Court which affirmed the lower court's ruling. This decision was then appealed to the United States Supreme Court. It had never had a case like this before. However, it had to decide whether to follow the peace treaty and accept the Philippine law, whatever it may be, or whether to apply the Bill of Rights given to them out of the goodness of our heart. The Court decided upon the latter.

The Court looked up a great number of American precedents. In the case's sixty-four pages, the Court recited the precedents of the United States about what constitutes "cruel and unusual punishment." However, much of this did not really apply to this kind of case. Therefore, it had to apply by analogy some of the other state and federal cases it collected. The lawyers for the United States, who were arguing that Weems' sentence was proper, insisted that the Court could not use modern cases and that it must interpret the Constitution as it was written in the 1780's.[3] Everybody knows that

[3] *Id.* at 375 ("we may rely on the conditions which existed when the Constitution was adopted").

at that time such a punishment was permitted in the United States. Therefore, since we could do that at that time and the fathers of the Revolution knew about it, we cannot say that our new standards should be accepted for the Philippine standards, as the Philippines were only then starting on the road which we have by then travelled over 100 years.

The United States Supreme Court rejected this view, and by a six to three majority, said something quite different. I believe it is a beautiful statement by Justice McKenna, in which Chief Justice Fuller concurred.

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.[4] . . . The [cruel and unusual punishment] clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.[5]

This is what happened in 1910. As a result, the Court set Mr. Weems free.

Some fifty years later, in *Trop v. Dulles*,[6] the Court declared unconstitutional a statute under which a native-born citizen was stripped of citizenship in a case of desertion from military forces. The Court held that this was "cruel and unusual" punishment proscribed by the Eighth Amendment. Invoking the *Weems* case, the Court noted that the words of that Amendment were not precise, and that their scope was not static. It added that the "Amendment must draw its

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[4] *Id.* at 373.
[5] *Id.* at 378.
[6] 356 U.S. 86 (1958).

meaning from the evolving standards of decency that mark the progress of a maturing society."[7] The Court pointed out that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime,"[8] and that a "United Nations' survey . . . reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion."[9] It also stated that "[t]he provisions of the Constitution are not time-worn adages or hollow shibboleth. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government, . . . we must apply the[m]."[10] These ringing phrases of Chief Justice Warren have been echoed in several later opinions of the Court, especially those relating to "evolving standards of decency." Following this opinion, several later decisions also looked abroad to help define these standards.

Thus, in *Coker v. Georgia*,[11] the Court held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[12] It noted that "the climate of international opinion," as evidenced by a United Nations survey, did not condone such punishment, as only three countries retained the death penalty for rape where death did not ensue.[13]

Similarly, in *Enmund v. Florida*,[14] the Court held unconstitutional a Florida decision imposing a death sentence on a defendant who participated in a robbery as the driver of the get-away car[15] and was not present when a murder was committed by the robbers. The Court noted again that the "climate of international opinion"[16] was opposed to the death penalty in cases of felony murder such as this one.

Building on these cases, the Court concluded in *Thompson v. Oklahoma*[17] that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his

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[7] *Id.* at 101.
[8] *Id.* at 102.
[9] *Id.* at 103.
[10] *Id.*
[11] 433 U.S. 584 (1977).
[12] *Id.* at 592.
[13] *Id.* at 596, n. 10.
[14] 458 U.S. 782 (1982).
[15] *Id.* at 788.
[16] *Id.* at 796, n. 22.
[17] 487 U.S. 815 (1987).

or her offense,"[18] and cited in support that "three major human rights treaties explicitly prohibit juvenile death penalties." They were:

> Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N. GAOR, Res.Supp. (No. 16) 53, U.N. Doc. A/6316 (1966) (signed but not ratified by the United States), reprinted in 6 International Legal Material[s] 368, 370 (1970); Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev.1, Corr.2 (1970) (signed but not ratified by the United States), reprinted in 9 International Legal Material[s] 673, 676 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (ratified by the United States).[19]

The swing vote in this case was that of Justice O'Connor,[20] who in her separate opinion emphasized the importance of the United States ratification in 1955 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. By doing so, the United States agreed to set a minimum age of eighteen for capital punishment in certain cases arising during military occupation of a foreign territory.[21]

On the other hand, Justice Scalia pointed out that

> [w]e must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under sixteen

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[18] *Id.*

[19] *Id.* at 831, n. 34.

[20] *Id.* at 848.

[21] *Id.* at 851. It may be noted that in this instance the United States agreed to treat inhabitants of occupied territories better than some States of the United States were treating their own citizens. The majority of the Court agreed to grant the same rights to all United States citizens.

> at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.[22]

In a later case, *Stanford v. Kentucky*,[23] involving juveniles who committed a crime at the age of sixteen and seventeen, Justice Scalia delivered the opinion of a majority of the Court on some aspects of the case, while Justice O'Connor concurred only in part without specifying her view on the international law reference.[24] The four dissenters pointed out, however, that the majority of nations would not impose death sentences on such teenagers and that three treaties and several declarations of the United Nations would not permit a person under eighteen years old to be punished like that.[25] Scalia rejected the minority's reference to the practice of other nations and international agreements by merely referring to a footnote in his dissenting opinion in the *Thompson* case.[26] He did this so as not to call too much attention to the minority views on this subject. The situation is thus uncertain, depending in what direction Justice O'Connor will move in the future. Those of you who would like to influence courts may have a chance if you could develop arguments that might sway Justice O'Connor's vote in the right direction.

For the moment, the issue shifted to the lower courts which continued to apply the "evolving standards of decency." However, the courts either do not mention international law at all or fail to connect their mention of international law to their decision.[27] Some of them simply state that other courts have mentioned international law as being relevant. I would cite one of these cases that you may find interesting, especially in the light of the new regulations prohibiting smoking on the airplanes. *Avery v. Powell*,[28] is a case involving a nonsmoking prisoner confined in an area where a common air flow system exposed him to constant and involuntary inhalation of smoke. The district court invoked *Rhodes v. Chapman*,[29] which applied the "evolving standards of decency" rule of *Trop* to conditions of imprisonment which "involve the 'unnecessary and wanton' infliction

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[22] *Id.* 868-69, n. 4.
[23] 109 S.Ct. 2969 (1989).
[24] *Id.* at 2980-82.
[25] *Id.* at 2985-86, n. 10.
[26] *Id.* at 2975, n. 1.
[27] *See, e.g.*, Franz v. Lockhart, 700 F. Supp. 1005, 1020-21 (E.D. Ark. 1988).
[28] 695 F. Supp. 632 (D. N.H. 1988).
[29] 452 U.S. 337 (1981).

of pain," and considered them to be prohibited by the Eighth Amendment clause proscribing punishment that is cruel and unusual.[30] The *Avery* court held that "exposure to ETS [environmental tobacco smoke] is not merely discomforting and that conditions of the plaintiff's confinement may constitute punishment cognizable under the Eighth Amendment."[31] It also relied on *Thompson*, but limited itself to reviewing the work product of the state legislatures. It concluded that the plaintiff established that ETS is harmful to his health and thus "has stated a claim for cruel and unusual punishment under the Eighth Amendment."[32] As you see, I have been able to draw a line from 1910 to 1990, pointing out how a little term in the *Weems* opinion has expanded into an influential principle, bolstered by references—at least in some cases—to international rules.

Rumaging through my stacks of papers, well known to the visitors to my office, I also discovered an article by Joan Hartman[33] anticipating such a development. She did not like this approach very much and argued that it would be better to apply international law as a part of the supreme federal common law. I am less dogmatic, as I believe that we can apply several methods, depending on circumstances.

First, and we discussed some of this earlier today, contrary later legislation should not be allowed to abrogate a multilateral treaty ratified by the United States. The main thing we are doing wrong today is treating multilateral treaties the same way as we treated ordinary bilateral treaties at the beginning of the 19th century. As you remember, that was the only type of treaty Justice Marshall knew when he wrote the principle that a law and a treaty are equal and the later law can prevail over an earlier treaty. Now that we have the multilateral treaty system, that rule should be changed. As the original rule was established by jurisprudence, I hope that we may have an enlighted Court soon that will establish a new rule.

Second, customary international law, which has a very dignified place in United States practice because of the *Paquete Habana* case,[34] also includes international agreements which crystallize the practice

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[30] *Id.* at 635.

[31] *Id.* at 639.

[32] *Id.* at 640.

[33] Hartman, *'Universal Punishment': The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 687-99 (1983).

[34] 175 U.S. 677 (1900).

of states, even if they have not been ratified by the United States. These international instruments are becoming generally accepted as customary international law, thereby becoming part of the common law of the United States. As part of the common federal law, these instruments can supersede the contrary laws of the states. In the area of criminal law, this might be a very important development for human rights. Third, application of international human rights agreements as a part of the process of the evolving "standards of decency" can assist us to interpret the human rights provisions of our constantly changing Constitution.

In addition to suggesting changes in the law, we have been asked what can be done right now on a practical level. It does not mean that it is not practical to hope for a change in the law, as I have suggested. This is the purpose of meetings like this. Ideas are presented that make one think and work. However, I have two ideas that may appear simple on first sight, but could be quite complicated.

I mentioned this morning that in a moment of desperation, while trying to pacify Senator Bricker, Mrs. Lord was asked to say that while the United States would not ratify the treaties, it would be willing to present reports to the United Nations showing how well it applies these non-ratified documents. Senator Bricker thought it would be a good idea, provided that the United Nations would adopt a rule saying that *all* States should present such reports. The General Assembly almost unanimously adopted the proposal. A negative vote came from the Soviet Union who did not like the idea, at least in the beginning; eventually, it began to present reports, boasting about its "progressive" human rights legislation. The United States fulfilled its promise, and presented comprehensive reports from 1953 until 1981. When a new enlightened administration entered the White House at that time, it said that since the Covenant on Civil and Political Rights established a Human Rights Committee, it was no longer necessary to have this old system of reports under the Universal Declaration of Human Rights. As I mentioned this morning, by a sleight of hand, with almost no one noticing it until suddenly there was no demand for the reports coming from the United Nations, the whole business ceased. Since the State Department no longer had to present reports on the United States, the Congress quickly imposed on it an even bigger task, to present human rights reports on the rest of the world. That is precisely what the State Department has been doing for the past nine years.

What I would suggest is that the United States propose a second time to the United Nations that human rights reports should be

presented to the United Nations by States which do not report under the Covenants. While about 100 States present reports under the Covenants, some sixty do not. With the United States among the sixty, it could again pioneer the presentation of reports. As we have done it in the past, we can do it again; we have nothing to hide. Presenting the reports will show how well we are doing. We could also make arrangements with the United Nations and the states parties to the Covenant on Civil and Political Rights to authorize the Human Rights Committee functioning under that Covenant to hold an additional meeting during the year to look at the reports of the remaining sixty countries. After holding appropriate discussions with special representatives of the countries presenting these reports the Committee would present some general comments on the developments in the protection of human rights around the world.

Perhaps the United States could start with a trial period of three to five years. If it works, then we would do it for another five years. If it does not work, at that point we would simply say thank you and stop sending any additional reports.

The second idea I have is a result of something I had to do recently at the University of Georgia. At one point the enlightened previous administration said we should have an ombudsman to decide disputes between members of the faculty, the faculty and the university, students and the faculty, students and the university, etc. A committee of five was established of which I became Chairman. We discovered that about 100 universities in the United States, and all universities in Canada, have an ombudsman to deal with these kind of problems. We drafted a proposal to establish such an office at the University. This proposal was presented to the incoming new administration which quickly decided that it could do it better than its predecessor and that no ombudsman was necessary. While that was a wasted effort to some extent, all my documents about an ombudsman remained, and it seems to me that they can be put to a good use.

I would like to suggest that the United States should show its good faith concerning human rights by establishing the office of a national ombudsman, an Advocate General for Human Rights. His principal duty would be to report to Congress annually on any complaints alleging violations by the Government of the United States of generally accepted rules of international human rights law. Of course, there are only a few such violations per year, but it might be interesting to have them discussed, and to have clarified whether there was a violation. At the same time, the Congress should establish a joint House-Senate Committee to review his report and to comment on it.

The Advocate General would also be entitled to submit to Congress opinions on the conformity of any proposed legislation with these rules of international law. It might be very useful to Congress since it sometimes does not receive the right advice.

The Advocate General would also be able to present amicus curiae briefs before federal and state courts in cases that involve issues of international human rights law. State courts, as well as federal courts, have to deal with these kinds of questions. In the light of the many complicated cases of Cuban and Haitian refugees, it would be useful for them to get some help.

Finally, the Advocate General might be further authorized to investigate claims by individuals alleging that they have been victims of a violation by United States officials of international human rights law. He would present a special report to Congress on the results of these investigations, with suggestions on how to resolve the problem, should Congressional or administrative action be required. These are my great radical suggestions which I present to you to commemorate this meeting. Thank you.