

United States Attitudes Toward Ratification of Human Rights Instruments

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I am delighted to be the first speaker here at this very important symposium. I have felt for a long time that human rights are not taught enough. For that reason, I was not surprised that my publisher in Virginia decided at some point that there was no need to have a new edition of my book so it went out of print. Therefore, Mr. Lillich's book is now the leading book in international human rights law. Professors Buergenthal and Meron and I are trying, with the help of the West Publishing Company, to release a new casebook next year to illustrate the fact that over the last few years the international law of human rights has developed beyond anybody's dreams. This is a point that I would like to emphasize, and we shall hear also from the other speakers that the international law of human rights is a very young law, but is growing fast. It started only fifty years ago, and by now there are at least sixty important instruments of the United Nations that Mr. Johnson will talk about tomorrow. There are regional organizations, such as the European one that our guest from Brussels will tell us about. We also have present an important expert on the Inter-American system. So we will have a broad view of what has developed over this short period of time.

How did we get to this point? For many years international law was interested merely in the protection of aliens. Somehow we developed very early the idea that if a citizen of one country enters another and suffers some injury his home state is entitled to protect him. In that connection various rules of international law developed which later became the basis of human rights law. Starting in the seventeenth century, as a result of the religious wars of that period, we began protecting religious freedom in various countries, even citizens against their own government. In the nineteenth century, because of the Balkan Wars, people started to protect minorities in those countries by international treaties in order to prevent future

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wars in that part of the world. The League of Nations went one step further and drafted treaties protecting minorities which were then ratified by most countries in Eastern Europe. The League also initiated the protection of peoples in non-selfgoverning territories in Africa, Asia, and the Pacific. This was accomplished first through a system of mandates and the United Nations extended it to other areas. Only during the Second World War, because of tremendous suffering and death of millions of people due to war and persecution, did people of my generation realize for the first time how inhuman humanity is and that something should be done about it.

One person who was very impressed by these events was President Roosevelt. Starting in 1941 in one speech after another, he spoke of the protection of human rights. He made a well known speech about the Four Freedoms¹ which people think dealt only with the specified freedoms; freedom of speech and expression everywhere in the world; freedom of every person to worship God in his own way; freedom from want which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants; and freedom from fear, especially freedom from war everywhere in the world. Somehow, because of the great emphasis on this part of his speech, people did not realize that he also had decided that the old political freedoms were not enough. He said in another part of the speech that we had to find a new foundation for a healthy and strong democracy, namely, equality of opportunity for youth and for others, jobs for those who can work, security for those who need it, ending of special privilege for the few, preservation of civil liberties for all, a wider enjoyment of the fruits of scientific progress, and a wider constantly rising standard of living.

In case that message did not come through, three years later President Roosevelt decided to devote a whole speech, again one of his annual messages to Congress, to the question of what we now call economic, social, and cultural rights.² He declared that what was essential to peace is a decent standard of living for all individuals, men, women, and children, in all nations. He went on to say that

¹ Annual Message of President Franklin D. Roosevelt to the United States Congress (Jan. 6, 1941), *reprinted at* 3 DOCUMENTS ON AMERICAN FOREIGN POLICY 26-41 (1940-41).

² Annual Message of President Franklin D. Roosevelt to the United States Congress (Jan. 11, 1944), *printed at* 90 CONG. REC. 55-56 (1944).

we must lay plans for a better future for all because we cannot contend that a high general standard of living is good enough if some fraction of our people, whether it be one-third or one-tenth, is ill-fed, ill-clothed, ill-housed and insecure. This point hit home more recently because one percent of the United States population is now homeless, ill-fed and ill-clothed. It is again an issue about which there is still a great deal of concern. Consequently, several of the rights listed by President Roosevelt in 1944 are being discussed anew. They include the right to a useful and remunerative job, to provide adequate food, clothing and recreation; the right of the farmer to sell his product at a return that would give him and his family a decent living; the right of every businessman to trade in an atmosphere free from unfair competition and domination by monopolies at home and abroad; and the right of every family to have a decent home. I could list at least ten more. President Roosevelt said he wanted a second Bill of Rights. He pointed out that Americans possess political and civil rights which are well observed in the United States, but that is not enough. They need to have economic rights as well.

I would like to call attention to the fact that as a result of his efforts and, of course, I have to admit, also a strong push by the Australian government at the San Francisco Conference which established the United Nations, Article 55 of the United Nations Charter was added. People always cite the last paragraph of Article 55 relating to "universal respect for and observance of human rights and fundamental freedoms," but we must not forget the remaining portions of that article. The introduction, or "chapeau," and the first two paragraphs provide:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.³

I always felt that those things were closely connected. In the view of the President and then in the later fulfillment by his successors, they were clearly united. One cannot possess civil and political rights

³ U.N. CHARTER art. 55, paras a-b.

unless economic, social, and cultural rights are respected. I am quite sorry to see that our government continues to say that civil and political rights are fine, but that economic, social, and cultural rights are not important. I disagree. Those things go together, one requires the other.

After World War II, the United States Government remained at first very devoted to international human rights. Mrs. Roosevelt, like her husband, felt very strongly about the necessity of promoting human rights. She became the first Chairperson of the Commission of Human Rights of the United Nations. The first task she put before the members of the Commission was to draft the Universal Declaration of Human Rights. Work also began on the Covenants. It was a successful venture. The Universal Declaration of Human Rights was adopted by 1948, one of the shortest drafting times for a document of that kind of importance.⁴ Of course, the Covenants required more time and were only completed in 1966.⁵

In the meantime, other things began to happen. The famous *Sei Fujii* case⁶ was decided in California. It held that a person of Japanese descent was not entitled to own real property in the State of California because of the traditional provisions that Asians were not permitted to own that kind of property. The appeals court found that this was an obsolete provision and that the Charter of the United Nations provided for international protection of fundamental human rights, including the right to own property.⁷ The case went to the Supreme Court of California which asked whether such an international document should be binding in the United States. The answer was no. The court found that this was not a self-executing document⁸ and, using Chief Justice Marshall's idea about self-executing documents, the document had to provide clearly for rights, and their enforcement. These provisions were too general and, therefore, could not be applied. The court recognized that this was an important moral commitment to protect human rights, but stated that its duty was only to interpret the Constitution. A nice little shift in the judgment provided that, of course, the Constitution had to be interpreted according to modern standards and modern standards, required that

⁴ G.A. Res. 217-A, 3 U.N. GAOR, U.N. Doc. A/180 (1948).

⁵ G.A. Res. 2200-A, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171 (1966); 6 I.L.M. 360 (1967).

⁶ *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

⁷ 217 P.2d 481, *reh'g denied*, 218 P.2d 595 (Cal. Dist. Ct. App. 1950).

⁸ 38 Cal. 2d at 724, 242 P.2d at 621-22.

the court declare the alien land law of California invalid as in violation of the Fourteenth Amendment to the United States Constitution. In fact, the farmer received his land, but the court could not accept the idea that the Charter should be directly applicable.

Writings about the *Sei Fujii* case provoked a very strong reaction among conservative Senators, in particular, Republicans from the North and Democrats from the South. As a result, a coalition formed in Congress, especially in the Senate, to try to fight the idea that these international instruments could change the law of the United States or at least affect the rights of States of the United States to do what they please. A leader was found in Senator Bricker who proposed several constitutional amendments. His first idea was that a provision of a treaty that conflicts with the Constitution shall not have any force or effect.⁹ Everybody in the United States agrees that the Constitution is the supreme law of the land and that treaties and other laws are only on a lower level. Internationally, of course, this is not true. Even the constitution of a state can be violative of international law and in more recent days people seem to realize this. We see what is happening in Eastern Europe—they are changing their constitutions to make them more acceptable to the rest of the world and to fulfill fundamental international standards.

Senator Bricker's second idea was directed especially to the human rights law. "A treaty shall become effective as internal law of the United States only through legislation which would be valid in the absence of the treaty."¹⁰ A treaty by itself should not become the law of the United States. The treaty should require supplementary legislation that would be valid under the Constitution, and would not conflict, in particular, with the rule that the federal government is not entitled to interfere with the affairs of States of the United States on issues of human rights. These two amendments caused a big fight, but what really killed the Bricker proposals was the third amendment that angered the Eisenhower Administration by apparently limiting the power of the President. According to that proposal, "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such

⁹ See W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 110 (3rd ed., 1971).

¹⁰ S.J. Res. 1, 83d Cong., 1st Sess., 99 CONG. REC. 6777 (1953); Treaties and Executive Agreement, Hearings Before a Subcomm. on S.J. Res. 1 and S.J. Res. 43, 83d Cong., 1st Sess. (1953); S. Rep. No. 412, 83d Cong., 1st Sess. (1953).

agreements shall be subject to the limitation imposed on treaties by this article."¹¹ The power of the President under the Constitution to conclude executive agreements would have been endangered and, as a result, the opposition to the amendments slightly increased.

The fight continued in Congress for three years. Senator Bricker wanted a Constitutional amendment to put those proposals into the Constitution so that no court could dare to disregard these principles. Finally, the crucial vote came. The first vote was sixty-one to thirty on one of the amendments to the crucial amendment to the resolution proposed by Senators Knowland and George. I was afraid that if it got that far the amendment might go through, as the Constitution requires exactly a two-thirds vote of the Senate. Luckily, on the last vote on the document as a whole, one Senator shifted. Possibly Mr. Baab knows who it was. As a result, the amendment lost by just one vote, sixty to thirty-one. We were that close to losing even the little freedom our government pretended to have in the field of international human rights instruments. The right to conclude a treaty and to be bound by it would have been forever at the mercy of not only two-thirds of the Senate but also the House of Representatives. I think that if it had not been for the fact that there was this provision concerning the executive agreements which both offended the Administration and concerned some Senators, the amendment would have gone through the Senate and probably through the House by an even larger majority. That is how close we came to a great disaster.

While that might have been the first step in the wrong direction, it was not the last. As part of the fight, in order to persuade a few Senators to vote against Bricker, President Eisenhower promised that the United States would go much slower on human rights agreements in the United Nations. Consequently, his first human rights representative to the United Nations, Mrs. Lord, who replaced Mrs. Roosevelt, went there with a great denunciation of human rights agreements because they interfere with the domestic rights of states. Three years later in the Third Committee of the General Assembly, Mr. Edward Meany, the great labor leader at that time, was authorized to say that, as the United States Government did not intend to ratify the Covenants, the United States delegation would abstain from voting on, and refuse to participate in the discussion of these instruments.¹² Everybody was so angry that they failed to notice that Mrs. Lord,

¹¹ BISHOP, *supra* note 9, at 111.

¹² See 12 U.N. GAOR, C.3 (812th mtg.), at 250 (1957).

as part of the quid pro quo, was able to extract from the Administration a proposal that all members of the United Nations which did not accept the Covenants should, nevertheless, observe the Universal Declaration. The proposal also required the United States to report every year its performance in enforcing the Declaration domestically. This proposal passed and, in fact, one can find in the records of the United Nations long reports presented by the United States about its observance of the Declaration. The system of reporting lasted until a few years ago when the Covenants actually came into effect. I never knew how the system was abolished because it was not announced for a long time in the records of the United Nations. I finally discovered that it was not abolished by a resolution of ECOSOC, after a proper debate, but rather through a decision somewhere in the back of a book hidden amongst all the administrative matters. In view of the coming of the Covenants, the system of reporting under the Declaration was deemed unnecessary.¹³ The United States Department of State breathed a sigh of relief because they would no longer be required to prepare a report every year for the United Nations.

That was the end of our support for the major human rights instruments. Messrs. Baab and Johnson will tell you about the many other documents of the United Nations that have been since adopted. The two Covenants are very good and important instruments adopted by nearly 100 states, including a number of the Soviet bloc states. For a while they did not in fact apply the Covenants, using a variety of excuses, but now they might be delighted to apply them. So, it is a vastly changing situation. The United States should, I think, take into account that our prior excuse that it is no use to ratify the Covenants because many countries only pretend to observe them may no longer be valid.

At this point a troublesome issue arose in the United States. Constitutional theory held that a later treaty prevails over legislation and that later legislation prevails over a treaty. A number of cases decided by the Court affirmed this stance, holding that while treaty provisions may have existed newly enacted legislation prevails over them.¹⁴ For

¹³ See Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 369, at 374-77 (T. Meron ed. 1984).

¹⁴ See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 1 (1987).

instance, we ratified the Law of the Sea Convention of 1958 which provided, among other things, that a country shall not stop ships of another state on the high seas except with prior permission by a treaty to visit, investigate, and perhaps seize the ship.¹⁵ Of course, when we got into the drug problems recently, the Coast Guard decided that they can seize suspected ships on the basis of United States laws even in the absence of a treaty with the national state. After some protests they altered the practice slightly and said they would always obtain permission from an official of the ship's government first. If one calls a Colombian or Panamanian official to ask for permission to seize a ship suspected of drug trafficking, and the official should refuse, the government might be accused of conspiring with the drug traffickers. It would then become known that such an official would quickly be dismissed by his government. After this happened to a few persons, nations began to back down and, when the Coast Guard calls, officials are eager to grant permission over the telephone.

Several courts in the United States, including some federal judges in Florida, felt that something was wrong with this practice.¹⁶ In response, the Coast Guard turned to Congress and received a new piece of legislation in the form of the Maritime Drug Law Enforcement Act of 1986.¹⁷ It states that the United States is permitted to seize vessels on the high seas, if necessary, on the basis of telephonic or telegraphic communications.¹⁸ This is considered by the statute an international agreement and, therefore, is supposedly a valid "treaty." If the defendant insists that regardless of this provision seizure without permission of the foreign government is unlawful, the statute makes it clear that he is not permitted to invoke international law before the court in his defense. Several earlier instances exist in which the courts of the United States violated international law in a similar fashion. One example is the Ker-Frisbie doctrine.¹⁹ This doctrine provides that once somebody is under our jurisdiction we can do with him as we please. Moreover, it does not matter how we got

¹⁵ See *The Law of the Sea: United Nations Convention on the Law of the Sea*, Art. 110 (U.N. Pub. Sales No. E.83.V.5), at 35.

¹⁶ See, e.g., *U.S. v. Gonzalez*, 776 F.2d 931, 942 (11th Cir. 1985).

¹⁷ Pub. L. No. 99-570, 100 Stat. 3207, 3207-96 (1986) (codified at 46 U.S.C. app. §§ 1901-1904); Pub. No. 99-640, 100 Stat. 2545, 3553 (1986) (codified at 46 U.S.C. app. §§ 1901-1904).

¹⁸ See 46 U.S.C. app. § 1903(c)(1).

¹⁹ See HENKIN, PUGH, SCHACHTER, SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 885 (2d ed., 1987).

him here. This is not a very proper doctrine, but it shows what can happen when, by later legislation, one bypasses the safeguards provided for in a treaty. We must consider, among other things, the need to establish a principle that, at least as far as multilateral treaties are concerned, provisions cannot be changed simply by legislation.

The other way that some courts have tried to approach the problem has been by treating international law as a part of customary law, and domestically, as part of common law. In *The Paquete Habana* case,²⁰ Justice Gray clearly stated that international law, especially customary international law, is part of the law of the United States and has been since the birth of the republic. As such it should be applied whenever an issue involving international law appears before the court. Later, there was an attempt to apply this theory to human rights. Proponents argued that customary international law is created even by treaties which we have not ratified, and that they have become a part of the law of the United States. In *Thompson v. Oklahoma*,²¹ the Supreme Court, at least in a footnote, stated that in interpreting the United States Constitution courts can take into account even unratified treaties that seem to support the findings.²²

This brings me to my last point. The *Sei Fujii* case, which was supposedly the beginning of the end for international human rights law in the United States, has been disclaimed. International norms may now be used in the interpretation of our Constitution. This is a very important issue. Of course, if a treaty is ratified, then it is part of the law of the land and, unless changed by another law or some court decides that it is not self-executing, I think it would be applied. A second point, however, is equally important. In recent treaties, which Mr. Baab will discuss in more detail, the government inserts a reservation declaring the treaty is non-self-executing unless our domestic law already provides for it or a new law is enacted.

That is the status of our treaties. As for international customary law, it might be applicable to States of the United States as federal common law. There have been several cases lately in which this has been argued. For instance, the United Nations has been enacting and revising every few years something called the "minimum rules for the treatment of prisoners." To my pleasant surprise, I found that

²⁰ 175 U.S. 677 (1900).

²¹ 487 U.S. 815 (1988).

²² *Id.* at 831, n.34. *But see* *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975, n.1 (1989).

quite a number of both federal and state courts apply those rules, saying, for instance, that a prisoner, even in a crowded prison, should be entitled to a cell, however small, to sleep in by himself. The courts have generally held this to be a very good rule. However, a recent decision found that until we have more prisons, we cannot comply.²³

I think the most important point is that international instruments can be used, and are being used, if not as part of the federal common law then for the purpose of interpreting the meaning of statutes and the Constitution. Several cases have referred to international treaties for interpretation. The *Thompson* case found that a juvenile under the age of sixteen may not be punished by death. The case considered several important treaties, including one to which the United States is a party, that prohibit the death penalty for juveniles. These treaties included the Covenant for Civil and Political Rights, the American Convention on Human Rights, and the Humanitarian Convention of Geneva on Treatment of Civilian Populations in Occupied Territories. The last one states that a person under the age of eighteen should not be punished by death by an occupying power. The lawyer who discovered this document said that since a juvenile located in territory occupied by the United States is protected under this provision, are not the people of the United States entitled to the same protection? This is a very interesting idea.

Thus, in these very different ways, international law has become influential in the domestic law of the United States. We will hear of some of the problems raised by these developments from other speakers today. Difficulties may arise with respect to every attempt to improve existing procedures—the ratification of treaties; application of international law as part of the common law of the United States; the use of international law for interpreting the Constitution; or the use of international standards to interpret the Due Process Clause provision against cruel or unusual punishment; and so on. Of course, those ideas appear in many guises in many places and perhaps I might have a chance later to talk about them as well. Thank you.

²³ See *Lareau v. Manson*, 651 F.2d 96, 106-07, 109-11 (2d. Cir. 1981).