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Steps Towards the Advancement of Human Rights

Edward M. Wise

IN THE MEMOIRS of people who grew up before the First World War, the theme recurs that the period between 1892 and 1914 or 1917 was unusually pleasant for a large privileged class. There is no doubt that during this time a thick crust of

society was extraordinarily comfortable and secure. Nor is there much doubt that the First World War, unlike the Second, unexpectedly "burst like a bombshell upon ordinary people."¹ What may be less authentic, however, is the concomitant recollection that the prewar age was one of solid calm and prosperity, of unre-

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lieved confidence in values and standards, and even of innocence.

The lamps which Sir Edward Grey imagined "going out all over Europe"² on August 4, 1914, "never had been quite so bright as men remembered them."³ The prosperity which had largely been taken as a matter of course in the decades before the war was, it seems, extremely precarious. An upheaval of social standards, although as yet without the advantage of disillusionment, was already in progress. Leonard Woolf and his friends found themselves at the turn of the century "in the springtime of a conscious revolt against . . . what for short one may call Victorianism."⁴ By 1892 the confidence of the mid-Victorian era had been profoundly shaken. "The nineteenth century," said Whitehead, "was dead by the 1880's; the 1870's was its last lush decade; 1914 was only the mace-blow which confirmed the fact of its previous demise."⁵

¹ MACMILLAN, *WINDS OF CHANGE 1914-1939*, at 59 (1966).

² GREY, *TWENTY-FIVE YEARS 1892-1916*, at 20 (1925).

³ THOMSON, *ENGLAND IN THE TWENTIETH CENTURY* 16 (1965).

⁴ WOOLF, *SOWING: AN AUTOBIOGRAPHY OF THE YEARS 1880 TO 1904*, at 175 (1960).

⁵ PRICE, *DIALOGUES OF ALFRED NORTH WHITEHEAD* 363 (1954).

I. THE BEGINNINGS OF PROGRESS (1892-1917)

One of the greatest of social changes at the end of the nineteenth century was in attitudes toward poverty and misfortune, a change which bears directly on the current effort to advance human rights, since a considerable part of this effort is concerned with matters of economic, social, and cultural entitlement. It is true that all aspects of contemporary work for human rights have a long history and must, for a full view, be seen from the "perspective of centuries."⁶ Nonetheless, there was prevalent for a great interval in much of the Western world a "resolute refusal to admit that society had any responsibility for the causes of distress."⁷

This harsh approach to social problems was largely overthrown on the threshold of the twentieth century. In 1902 Woodrow Wilson concluded his *A History of the American People* by saying that statesmen then knew it was to be their task to "make law the instrument, not of justice merely, but also of social progress."⁸ New policies of social reform aimed at "the idea of greater equality in the diffusion of welfare,"⁹ and new modes of thought, were taking shape. Almost everywhere men felt themselves to be passing through a turning point in national development.¹⁰ If Tsarist Russia was partly an exception, that particular "blot on European civilization"¹¹ was eradicated with a vengeance in 1917.

Along with changes in social attitudes, the late nineteenth century sowed the seeds of that "international functionalism" which now holds a marked place in the United Nations Charter.¹² These developments are not unconnected. Radical thinking was, at the time, largely cosmopolitan. The far-reaching economic and technical innovations which have given impetus to demands for social reform have also compelled international cooperation and control. Surely "one of the most interesting phenomena in the history of the protection of human rights is the interconnection between na-

⁶ McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 LAW & CONTEMP. PROBS. 490 (1949).

⁷ TAWNEY, RELIGION AND THE RISE OF CAPITALISM 224 (1947).

⁸ See FREIDEL, THE GOLDEN AGE OF AMERICAN HISTORY 534 (1959).

⁹ BARKER, AGE AND YOUTH 224 (1953).

¹⁰ See MARSHALL, SOCIAL POLICY 9-32 (1965).

¹¹ WOOLF, BEGINNING AGAIN: AN AUTOBIOGRAPHY OF THE YEARS 1911-1918, at 210 (1964).

¹² See NICHOLAS, THE UNITED NATIONS AS A POLITICAL INSTITUTION 20-22 (2d ed. 1962).

tional and international activity."¹³ An early example is the movement for protective labor legislation at the end of the nineteenth century which was international in character almost from the outset and which in the Berne Conference of 1906 secured what may be "the first multi-lateral international conventions in the wider field of the protection of the human person in history."¹⁴ It is true that before 1914 there were no more than intimations of what later was to become the functional approach to international organization — and very little of any other approach.

To an extent, this parallels national development. While government regulation was growing before World War I, it was only during and after the war that the mass of people believed for the first time that their lives were "shaped by orders from above."¹⁵ International coordination has increased hand in hand with the intensive organization of national life. Nonetheless, nearly all areas which are presently within the province of United Nations specialized agencies were subjected to some kind of international action before 1914. Leonard Woolf concluded in 1916 that the degree of international action was then great enough to bear quite hopefully on the prospects of international government.¹⁶ Mr. Jenks traces to Woolf's report the beginnings of the idea that concern with human rights and welfare should be the mainspring of international organization.¹⁷

International concern with human rights is, of course, quite old. It is indeed tempting to think of the historical measures that have been taken to protect the oppressed as an embodiment in "successive waves of specialization" of some not yet perfectly apprehended "great idea beating in the background of dim consciousness."¹⁸ Perhaps this is an over-simplification of the evolution of internationalism. Yet attempts at international protection of what are now recognized as human rights may be found at least as early as the Treaty of Westphalia.¹⁹ There were other instances which recurred throughout the nineteenth century, and if their incidence was not entirely regular, neither was it random.

¹³ Lauterpacht, *Some Concepts of Human Rights*, 11 *How. L.J.* 264 (1965). Cf. EZEJIOFOR, *PROTECTION OF HUMAN RIGHTS UNDER THE LAW* (1964); KONVITZ, *EXPANDING LIBERTIES: FREEDOM'S GAINS IN POST-WAR AMERICA* 368-86 (1966).

¹⁴ SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 18 (1964).

¹⁵ TAYLOR, *ENGLISH HISTORY 1914-1945*, at 2 (1965).

¹⁶ WOOLF, *INTERNATIONAL GOVERNMENT* (1916).

¹⁷ JENKS, *LAW, FREEDOM AND WELFARE* 2-8 (1963).

¹⁸ WHITEHEAD, *ADVENTURES OF IDEAS* 23 (1933).

¹⁹ JENKS, *LAW, FREEDOM AND WELFARE* (1963).

In liberal statesmanship of the last century it may even be possible to discern a cautious but conscious programme of reform.²⁰ The practical efforts of the period cluster, for the most part, under three headings: Treaty Guarantees, Diplomatic Protection, and Humanitarian Intervention. Under the first heading, a guarantee of toleration for religious minorities became in the nineteenth century "a common feature of every major peace treaty,"²¹ although, to be sure, these stipulations, like the minorities treaties of the League of Nations, were always a peculiar regime imposed mostly on marginal powers. It is undoubtedly in the abolition of the slave trade that the treaty technique had its most happy issue. By 1906 or so, there was certainly some expectation that treaty law might be of use as an instrument not of civilization merely, but also of human welfare.

The ordinary standards of civilization were, of course, the metewand of diplomatic protection. A state professing to be subject to international law was expected to come up to those standards. No doubt something of this idea also underlay the fitful doctrine of humanitarian intervention which, for all its weakness, did help "to implant the idea of limitations upon sovereignty imposed by respect for man."²² Edwin Borchard in 1915 was not unique in thinking that there is a set of basic rights which are enjoyed by the citizens of civilized nations and to which men everywhere are entitled. Diplomatic protection was in good part, he said, a special expression of those rights. Protection of citizens within their own country might also be secured in exceptional cases through humanitarian intervention.²³

From this idea of the "rights of mankind,"²⁴ it is, perhaps, no great distance to the sort of Declaration of the International Rights of Man which the *Institut de Droit International* adopted in 1929.²⁵ If the six short articles of that declaration seem a little thin and obvious to contemporary taste, so, too, do the notions of "due process" and "equal protection" which the American draftsmen of that

²⁰ Cf. Schwarzenberger, *The Protection of Human Rights in British State Practice*, 1 CURRENT LEGAL PROBLEMS 152 (1948).

²¹ CHAKRAVARTI, HUMAN RIGHTS AND THE UNITED NATIONS 11 (1958).

²² DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 172 (Corbett transl. 1957).

²³ BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 11-15 (1915).

²⁴ See 1 OPPENHEIM, INTERNATIONAL LAW 640-42 (8th ed. 1955).

²⁵ 35 (pt. 2) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 298-300 (1929). See MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 115-18 (1943).

declaration²⁶ must surely have had in mind. Even so, Hyde was to say that the declaration must be "regarded as an expression of faith — 'the substance of things hoped for, the evidence of things not seen' — rather than as a statement of what the family of nations acknowledges to be the law to which its several members are obliged to conform."²⁷

Yet in what was said sometime afterwards of the Universal Declaration of Human Rights, matters had not been much advanced. Besides, is there no middle ground between faith and positive promise?²⁸ In the early part of this century, if the family of nations was not completely civilized, at least the standard of its achievement was by no means negligible and, perhaps, was even higher than it has been ever since. It was at that time not uncommonly believed, rightly or wrongly, that there were certain elementary human rights which were important ingredients of a civilized way of life. International law had adopted these rights as a standard of value, giving them practical expression in a number of specific rules. It is true that these rights were enforceable at the discretion of governments which might set great store by prudence and incapacity. But to the extent that their infringement provided a ground of action, these rights were not merely moral. They had, as Borchard put it, been "positivized."²⁹

Along with the idea of the rights of mankind, there was talk, then as now, of whether individuals are "subjects" of international law. The dogma that they are not had taken firm hold in the nineteenth century. Borchard stated in 1915 that the weight of authority correctly supported this conclusion.³⁰ Towards the end of the last century, however, dissent from this doctrine began to appear with some frequency.³¹ For a brief period the dissent could point to two projects of 1907 under which individuals were granted standing before an international tribunal: the Hague Convention XII and the Central American Court of Justice.³² This nineteenth century dogma is said to have finally died at some uncertain time be-

²⁶ See Brown, *Editorial Comment*, 24 AM. J. INT'L L. 126, 127 (1930).

²⁷ I HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 46 (2d ed. 1947).

²⁸ Cf. *Hebrews* 11:39.

²⁹ BORCHARD, *op. cit. supra* note 23, at 13.

³⁰ *Id.* at 16-18.

³¹ See, e.g., POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW 19 (1928); cf. Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

³² See KELSEN, PRINCIPLES OF INTERNATIONAL LAW 222-23 (2d ed. 1966).

tween 1948 and 1956,³³ although there are some who feel that this report is still premature.

It has been thought that the question is one of great moment for the advancement of human rights.³⁴ Yet, all in all, perhaps its importance has been exaggerated. International law has not really been prevented by dogma from dealing with matters of concern to individuals or from applying directly to them by virtue of international agreement. On the other hand, the most enthusiastic claims about the position of the individual in international law have been put forward only "within very definite limits and for special purposes."³⁵

The real problem is rather one of the position which human rights occupy in the scale of international values. It is a matter of how they fare against the opposition of countervailing aims and of how adequate are the means to their realization in rules of positive obligation. The question of whether or not it makes sense to say that individuals are "subjects" of international law is a peripheral, if not an indifferent, matter.³⁶

The concept of domestic jurisdiction has been thought to be a second doctrinal obstacle. The concept had not, of course, appeared in clear form before 1919, when it found expression in Article 15, paragraph 8, of the League of Nations Covenant.³⁷ Before that, there were, instead, "the somewhat battered idols of sovereignty, state equality, and the like"³⁸ which held a lofty place in the political theory of the nineteenth century. Yet, these "idols" have turned out, on analysis, to be of somewhat limited importance. It is simply mischievous to suppose that there are purely internal affairs of states with which international law is incapable of dealing.

Whether international law should undertake to deal with some particular matter is, on the other hand, a very different question.³⁹ It may be undesirable or impracticable to regulate a certain field, although it is, in theory, capable of regulation. This sort of judg-

³³ JESSUP, *TRANSNATIONAL LAW* 3 n.6 (1956).

³⁴ LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 3-5 (1950); MUELLER & WISE, *INTERNATIONAL CRIMINAL LAW* 143 (1965).

³⁵ FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 234 (1964).

³⁶ Cf. DE VISSCHER, *op. cit. supra* note 22, at 125.

³⁷ The covenant is reprinted in SOHN, *BASIC DOCUMENTS OF THE UNITED NATIONS* 277, 282 (1956).

³⁸ BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS* 81 (1958).

³⁹ Cf. Hula, *International Law and the Protection of Human Rights*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 162, 163-64 (Lipsky ed. 1953).

ment turns ultimately on communal standards of value and also, one would hope, on that sense of the distinction between ends and means which is one of the characteristics of high civilization.⁴⁰

It is in this connection that notions of sovereignty, independence, and domestic jurisdiction may prove decisive. Those wretched phrases have emotional attachments which carry a weight as values which it would not be sensible to ignore, and, indeed the nineteenth century put powerful backing behind these sentiments. While the boundaries of the world were physically drawing closer together, whatever there had been of oecumenicity in the outlook of the eighteenth century was largely lost from view.⁴¹

Nationalism is not, of course, a barrier to the realization of all human rights. In so far as it favors self-government, for instance, it would commonly be reckoned to be doing a good work. And there is, indeed, a variety of nationalism which is simply "a decent Confucian respect for the manner and customs in which, in one's country, one has been brought up."⁴² It is the refusal to admit of external standards of value which is ripe with dangerous consequences. A Swedish saying has it that "in the last analysis all culture comes from without: barbarism alone is indigenous."

The prevailing winds of nineteenth century legal thinking were particularly favorable to a dangerously narrow outlook. One current was the positivistic tradition, but although it can be turned to evil, it is not wholly the aberration it is sometimes made out to be. In the organic idea of law, there is more clearly a deep influence on the totalitarian ideologies of the present day. There is also the idea of law as unprincipled fiat. Fascism at least differs from, for example, Hegelianism, in having gathered into itself "those forces of irrationalism or anti-reason which came to the fore as the nineteenth century waned and passed over into the tumults of our own age."⁴³

It is, more than anything else, the tumults of our own age which explain contemporary preoccupation with human rights. The human rights clauses of the United Nations Charter are undoubtedly a consequence of the extraordinary barbarism of the immediate past. In a sense, "circumstances forced on the United Nations the prob-

⁴⁰ Cf. BELL, *CIVILIZATION* 8-22, 61, 66-67, 129-30, 147-57 (1928).

⁴¹ See McDougal & Bebr, *Human Rights in the United Nations*, 58 *AM. J. INT'L L.* 603, 606 (1964).

⁴² CATLIN, *THE STRONGER COMMUNITY* 117 (1966).

⁴³ LLOYD, *THE IDEA OF LAW* 204 (1964).

lem of human rights."⁴⁴ The Second World War had become, on the part of the Grand Alliance,⁴⁵ a war for their enthronement. Even so, the Dumbarton Oaks draft referred to human rights only in a single sentence as one among many aims of economic and social cooperation.⁴⁶ There is an important lesson in the hand played by unofficial groups and smaller powers in moving concern with human rights to the heart of the charter.

There has been a tendency to justify this concern by saying that questions of human rights are closely related to questions of peace. In fact, the correlation is not always quite exact.⁴⁷ Too much meddling with other countries' domestic concerns may, as an interim matter, lead to the very violence that it is supposed to exclude. War, on the other hand, is often a promoter of social welfare. Still, there is some wisdom in the midrash of Simeon Ben-Gamaliel who said that the world rests on three basic things, justice, truth, and peace, and in the talmudic comment which adds that the three are really one: where justice is wrought, peace and truth are wrought also.⁴⁸

It is, perhaps, in its attitudes towards truth that the twentieth century differs most from the nineteenth. This change is not without sinister implications. In 1943 George Orwell spoke of his "feeling that the very concept of objective truth is fading out of the world."⁴⁹ And in 1933 Paul Valéry wrote:

"Only a few years ago . . . we still thought that in the world of the mind there were definite values, that a certain way of thinking, a certain general freedom of thought, a will to intellectual sincerity, intellectual precision had somehow gained, once and for all, the confidence of all humanity."⁵⁰

These statements may simply express disquiet with the systematic lying which seems to pervade modern political life. But there are deeper discouragements sounding under the surface, and these may be traced to the twenty-five years between 1892 and 1917. First, there was the revolution in the physical sciences. Whitehead

⁴⁴ Hammarskjöld, *The International Significance of the Bill of Rights*, in *SERVANT OF PEACE* 105 (Foote ed. 1962).

⁴⁵ 3 CHURCHILL, *THE SECOND WORLD WAR: THE GRAND ALLIANCE* (1950).

⁴⁶ See GREEN, *THE UNITED NATIONS AND HUMAN RIGHTS* 15-16 (1956).

⁴⁷ Wright, *Freedom and Human Rights Under International Law*, in *ASPECTS OF LIBERTY* 181, 195-97 (Konvitz & Rossiter ed. 1958).

⁴⁸ MONTFIORE & LOEWE, *A RABBINIC ANTHOLOGY* 382 (1960).

⁴⁹ ORWELL, *A COLLECTION OF ESSAYS* 203 (1954).

⁵⁰ Quoted in Reston, *Moscow: 'A Monstrous Distortion,'* N.Y. Times, Dec. 8, 1965, at 46, col. 8.

has told of how in the 1880's it was thought that nearly everything was known that could be known about physics.⁵¹ By the middle of the 1890's, there were a few tremors and by 1900, the Newtonian view of the world had been demolished.⁵² The understanding of physics which has come out of this crisis is rather elusive. It is not uncommonly supposed that it all proves that the natural world is untidy and intemperate and that there are insuperable limits to the possibilities of human knowledge. Perhaps this view is not quite accurate, as Robert Oppenheimer took pains to point out. But what does at least seem to be impossible nowadays is "a basis of common knowledge."⁵³ The problem is thus one of the impoverishment of general culture.

The notion of limits to objective knowledge may be more accurately traced to a separate revolution of social thought in the 1890's.⁵⁴ Here are the beginnings of the fashionable idea that everything depends on one's point of view, which Screwtape might well claim to be an invention of the devil.⁵⁵ Perhaps the dangers of such prejudice in dealing with historical fact have been somewhat exaggerated. Certainly less has been heard of this theory since some people began to make a conscious practice of it; nonetheless, its influence on general culture has been profound.

What is even more lively is the concomitant view that standards of value are purely subjective and can be neither true nor false. "Deep-seated preferences," as Holmes put it, "cannot be argued about."⁵⁶ Despite the ancient history of ethical relativism, for present-day purposes the seminal statement seems to be that of Max Weber in 1917.⁵⁷ The consequences of this doctrine have created difficulties for the advancement of human rights. If not precisely an age of unbelief, this is surely a period sceptical of the foundations of belief. There would, indeed, seem to be a paradox in an age which is so uncertain of universals proclaiming a Universal Declaration of Human Rights.

⁵¹ PRICE, *op. cit. supra* note 5, at 345.

⁵² *Id.* at 302, 345.

⁵³ ROUZÉ, ROBERT OPPENHEIMER 147 (1965).

⁵⁴ HUGHES, CONSCIOUSNESS AND SOCIETY 66 (1958).

⁵⁵ See LEWIS, THE SCREWTAPE LETTERS 139-40 (1943).

⁵⁶ HOLMES, COLLECTED LEGAL PAPERS 312 (1920).

⁵⁷ See FRIEDMANN, LEGAL THEORY 143 (4th ed. 1960); STONE, HUMAN LAW AND HUMAN JUSTICE 227 (1965).

II. THE ERA OF UNIVERSAL DECLARATION —
THE PARADOX OF COMMON GROUND AND
UNCOMMON ENFORCEMENT (1967)

In his Walgreen Lectures of 1949, Jacques Maritain spoke of a distinction between practical conclusions about human rights and the rational justification of those conclusions. It is possible, he said, for people who begin from different theoretical positions to come to "a merely practical agreement regarding a list of human rights."⁵⁸ An obvious proof of this possibility is the Universal Declaration of Human Rights.⁵⁹ Although not unaware of the importance of arriving at some common ground of action,⁶⁰ Maritain did think it somewhat unsatisfactory that belief in human rights was not universally founded on a true philosophy, since what matters most in the end is the way in which men justify their beliefs.

Along the same line, it has been pointed out that the problem of advancing human rights is really twofold. It not only is a matter of preventing and repairing specific deprivations but is, more importantly, a matter of defending human rights in general against wholesale assaults on their validity.⁶¹ While no one will doubt the prudence of this counsel, it does, however, seem useless to ask that defenses be made stronger than they actually can be made. To people who are unsure that their most deep-seated convictions can have objective validity, the thought of trying to protect human rights by erecting a hedge of true philosophy is either a stumbling block or else foolishness.

It may be, however, that part of the difficulty lies in shadow-boxing about what is meant by true philosophy.⁶² There is surely some similarity between the true believer who nonetheless admits that practical judgments are necessarily contingent and the passionate sceptic who nonetheless aims at avoiding, so far as possible, personal idiosyncracies. Human rights will in some degree in either case depend for their content on the considered assumptions of a particular culture or period. There is a fairly high premium on common understanding, at least among civilized nations, as Sir

⁵⁸ MARITAIN, *MAN AND THE STATE* 76 (1951).

⁵⁹ G.A. Res. 217A, 3 U.N. GAOR Supp. 13, at 71-77, U.N. Doc. A/810 (1948).

⁶⁰ Cf. POPE JOHN XXIII, *ENCYCLICAL LETTER "PACEM IN TERRIS,"* Part IV, § 143 (1963). The encyclical is reprinted in RIGA, *PEACE ON EARTH* 195, 240 (1964).

⁶¹ See MURRAY, *WE HOLD THESE TRUTHS* 301-02 (1960).

⁶² Cf. Cowen, *An Agenda for Jurisprudence*, 49 *CORNELL L.Q.* 609, 629-30 (1964).

Frederick Pollock emphasized in his essay on the law of nature.⁶³ The discovery of common ground is not merely practical agreement. It raises what would otherwise be a weak private opinion to a power "which can be hoped, on thought, to look reasonable to any thinking man"⁶⁴ and in that sense may be, as it seemed to Felix Cohen, "one of the great significant facts of our age."⁶⁵

A. *Objections to the Declaration*

The expression of rights in a definite text not only cumulates the probabilities in their favor, but it also heightens the quality of thought about them and fixes, as it were, a new starting point. This has been, for the most part, the experience of the Universal Declaration of Human Rights which, during the past nineteen years, has been treated as a compact statement of communal standards of value. It may be just as well, therefore, that the groundwork in 1948 was rather spaciouly laid down. There have been, it is true, objections to trying to cover too much ground, although they are not entirely persuasive.

(1) *Lack of Common Understanding.*—A first objection is that the Declaration has no firm basis in common understanding. Not only, it is said, cannot the Communists agree to much of it, which is sad, though not in itself of account for the rest of mankind, but also the economic and social ideals included in the Declaration are alien to the liberal Western tradition. Obviously, if all that is meant by this tradition is the negative notion of keeping authority at bay, the contention is true by definition. But argument in these terms presumes that classical political theory is so singularly flat that it allows no toe hold for other human values. The negative idea of liberty is perfectly consistent with the absence of self-government, and, indeed, there may have been a time not long ago when liberal-minded people did regard democracy as "fatal to individual freedom and to all the graces of civilized living."⁶⁶ It may be that there is only a very tenuous connection between personal liberty and democratic rule and that the two, beyond a certain point, are incompatible. Yet surely it is a perilously shortsighted view of classical liberalism which supposes that it has been completely unconcerned with positive rights of participation in government.

⁶³ Pollock, *The History of the Law of Nature*, in JURISPRUDENCE AND LEGAL ESSAYS 124-56 (Goodhart ed. 1961).

⁶⁴ LLEWELLYN, *THE COMMON LAW TRADITION* 277 (1960).

⁶⁵ COHEN, *THE LEGAL CONSCIENCE* 176 (1960).

⁶⁶ MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 1 (1966).

Perhaps there is even a natural progression of thought from civil to political and then to economic and social rights.⁶⁷ Exemplary liberals like E. M. Forster⁶⁸ have shown radical sympathies, so long as planning is "for the body and not for the spirit,"⁶⁹ and this may be true to an extent even of John Stuart Mill. It would, at any rate, be a mistake to suggest that the Western democracies had never until twenty years ago been concerned with economic and social inequities. At all events, the inclusion of economic and social rights in the Universal Declaration was not, as has been said, "a considerable diplomatic victory for the Communist members of the United Nations."⁷⁰ It would at least be a half-truth to call the Declaration a chiefly Western contrivance.⁷¹ Its social welfare provisions are shot through with much of the spirit of what President Roosevelt had said about "a second Bill of Rights"⁷² and with much of the substance of the American Declaration of the Rights and Duties of Man.⁷³

(2) *Lack of Common Enforcement.*—A second and more serious objection, perhaps, concerns the practical issue of enforcement. Not all of the provisions of the Declaration are everywhere susceptible of implementation to the same degree or by the same methods. Obviously, these are crucial considerations if the question is one of devising specific guarantees. It is now widely assumed that it would be futile to put all human rights under the protection of the same legal processes. The approach to economic and social rights, in particular, has to be somewhat different since there are, for the most part, greater difficulties in superintending the adequacy of steps taken towards their realization. Hence, the splitting of the United Nations covenant into two separate parts and the distinctive construction of the European Social Charter.⁷⁴

The difference, however, should not be exaggerated. There are simple social rights which it may be inexcusable not to enforce by

⁶⁷ See Raphael, *The Liberal Western Tradition of Human Rights*, 18 INT'L SOCIAL SCI. J. 22 (1966).

⁶⁸ Cf. CRANSTON, FREEDOM: A NEW ANALYSIS 107 (1953).

⁶⁹ FORSTER, TWO CHEERS FOR DEMOCRACY 57, 69 (1951).

⁷⁰ CRANSTON, WHAT ARE HUMAN RIGHTS? 34 (1962).

⁷¹ Neal, *The United Nations and Human Rights*, INT'L CONC. No. 489, at 123 (March 1953).

⁷² See GREEN, *op. cit. supra* note 46, at 14-15; HOLCOMBE, HUMAN RIGHTS IN THE MODERN WORLD 5-7 (1948).

⁷³ See 43 AM. J. INT'L L. 133 (Supp. 1949); 40 AM. J. INT'L L. 93 (Supp. 1946). Cf. Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT'L L. 553, 562-63 (1948).

⁷⁴ See ROBERTSON, HUMAN RIGHTS IN EUROPE 140-50 (1963).

law with all deliberate speed. Conversely, there are positive political rights which depend for their full realization on circumstances against which no writ can run, and it may be unhelpful to have these in a single treaty with the classical civil rights.⁷⁵ Still, none of these considerations is inconsistent with saying that in order to assess the position of human rights "one must think of the economic, social and cultural, as well as of the political, rights."⁷⁶

It has, however, been argued that the differences of practicality and priority are so great that economic and social rights should have been excluded entirely from the Universal Declaration. This is the conclusion of Maurice Cranston in a book which is otherwise a signal contribution to the understanding of human rights.⁷⁷ Cranston argues that a human right must, by definition, be morally compelling⁷⁸ and that the authenticity of a human right is, therefore, to be tested by the two conditions of practicality and paramount importance.⁷⁹ These criteria, he says, rule out the title of economic and social rights to inclusion in a list of human rights. No more appropriate criteria could, I expect, be devised by anyone who recognizes the relative validity of his convictions, yet I think Professor Raphael is correct in saying that Cranston's conclusion by no means follows from these premises.⁸⁰ Too sharp a division between civil and social rights somewhat falsifies reality;⁸¹ the familiar typology is not necessarily a hierarchy of values.

B. *Exclusion of the Basic Rights of Self-Determination*

The Universal Declaration does not include at least one right of which a good deal has been heard and which is now given pride of place in the United Nations covenants. This is the right of peoples to self-determination. It is a collective right, which gives rise to obvious difficulties of deciding who are the people who are entitled to it, and in this sense it is manifestly different from the classical rights of liberty.

Yet even here it is possible to exaggerate the difference. The explosive force of national self-assertion derives from the desire

⁷⁵ Cf. CHAFEE, *THE BLESSINGS OF LIBERTY* 274 (1956).

⁷⁶ Lauterpacht, *Some Concepts of Human Rights*, 11 *HOW. L.J.* 264, 265 (1965).

⁷⁷ CRANSTON, *WHAT ARE HUMAN RIGHTS?* *passim* (1962).

⁷⁸ *Id.* at 10.

⁷⁹ *Id.* at 36-38.

⁸⁰ Raphael, *supra* note 67.

⁸¹ Cf. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 74 (2d ed. 1961).

of each member of a community which has suffered severe humiliation for "the comfort of his own self-respect."⁸² It is true that this craving for equality of status is not entirely free from self-contradiction. It would certainly be wrong to claim a necessary connection between personal liberty and collective self-direction. Nonetheless, the deep-seated demands which have had their issue in self-determination are, in some respects, very much akin to the reasons for requiring liberty.⁸³

It becomes necessary, at any rate, to deal with "an ideal which is perhaps more prominent than any other in the world today,"⁸⁴ one which has drastically altered the whole order of priorities for the advancement of human rights. This change is quite uncomfortable for those whose emotions are not pitched to the values presently at the top of the scale. If one cannot agree with the mode in which priorities are graded, the result is likely to seem intolerably confused and lacking in discrimination. It is a disagreement about priorities which underlies much dissatisfaction with the very great emphasis placed in the United Nations today on questions of colonialism and white race-prejudice. The argument is not so much that these questions are unimportant. It is rather that issues which are felt to be no less paramount have been downgraded.⁸⁵

(1) *Racial Inequality and the Problems of Dependent People.*—The current preoccupation with the problems of dependent peoples and of racial inequality has at least managed to keep what are commonly regarded as questions of human rights at a position towards the center of the political stage. Not only has the ability of a majority in the United Nations to compel discussion of these questions been settled but also under the Declaration on Colonialism,⁸⁶ an incomparably elaborate system of superintendence has been set up. It is true that in article XI of the U.N. Charter, there is a somewhat singular basis for concern with non-self-governing territories. But the human rights clauses of the Charter are hardly less imposing.⁸⁷

⁸² Nyerere, *Rhodesia in the Context of Southern Africa*, 44 FOREIGN AFFAIRS 373, 374 (1966).

⁸³ BERLIN, TWO CONCEPTS OF LIBERTY 39-47 (1958).

⁸⁴ *Id.* at 45.

⁸⁵ See Carey, *The United Nations Double Standard in Human Rights Complaints*, 60 AM. J. INT'L L. 792 (1966).

⁸⁶ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 28, U.N. Doc. A/4684 (1960).

⁸⁷ See Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in INT'L & COMP. L.Q. 1, 9-10 (Supp. No. 11 1965).

Two general conclusions would seem to follow: one is that any issue of human rights may fitly be taken up in the United Nations, and the other is that the power to hear and rebuke which has been claimed by the Committee of Twenty-Four is also a prerogative of the Commission on Human Rights. This second conclusion, however, is not likely to be acted upon. The Commission has long persisted in a profession of impotence⁸⁸ which it would now be embarrassing to recant. The first conclusion, on the other hand, has become a commonplace.⁸⁹ It is widely assumed that in a case of human rights, Article 2, Paragraph 7, of the Charter, concerning matters of domestic jurisdiction, may be practically disregarded.

(2) *Abandonment of the Reservation Clause.*—There are, however, differing opinions about precisely what principle justifies this result. One argument supposes that discussion, inquiry, or even perhaps some more resolute measure, is not "intervention" as such and is therefore not prohibited. A second emphasizes that the members of the organization have assumed, under articles 55 and 56, some obligation in respect of human rights and cannot therefore claim that the matter is, in essence, one of domestic jurisdiction.⁹⁰

The first line of argument is open to the objection that it renders article 2, paragraph 7 meaningless. None of the organs of the United Nations, except the Security Council in special circumstances, is constitutionally competent to undertake enforcement measures. If the only point of article 2, paragraph 7 is to forbid coercive intervention, it really has no particular significance. But the second line of approach comes to a similar impasse. The provisions of articles 55 and 56 do not deal solely with human rights. They place the organization and its members under some obligation with respect to a wide range of governmental concerns and cover generally almost any question which might conceivably be claimed to be a matter of domestic jurisdiction. If the effect of articles 55 and 56 is to bar this claim, article 2, paragraph 7 is again virtually bereft of meaning.

It may be possible to reply to this criticism by saying that, far

⁸⁸ See Communications Concerning Human Rights, U.N. ECOSOC Res. 75 (V), 5 U.N. ECOSOC 20, U.N. Doc. E/1573 (Aug. 5, 1947); Communications Concerning Human Rights, U.N. ECOSOC Res. 728F (XXVIII), 28 U.N. ECOSOC, Supp. 1, at 19, U.N. Doc. E/3290 (1959).

⁸⁹ See, e.g., Issues Before the 21st General Assembly, INT'L CONC. No. 559, at 91 (Sept. 1966).

⁹⁰ See Waldock, *General Course in Public International Law*, (pt. 2), ACADÉMIE DE DROIT INTERNATIONAL RECUEIL DES COURS 182-91 (1963).

from being imperfectly open-ended, articles 55 and 56 merely set out some precise and narrowly defined obligations; but this is a statement about which it would be hazardous to be too confident. The answer to these objections is rather that an argument at the level of generality at which we have been speaking is seldom permitted in practice, however sound its construction, "to expand itself to the limit of its logic."⁹¹ In this regard, the value of article 2, paragraph 7 lies in its allowance for compromise⁹² and its counsel of caution in the exercise of powers which had to be cast in general terms.

Furthermore, the fact is that nearly all violations of human rights which have been acted upon in the United Nations have involved some form of large-scale and systematic discrimination on grounds of race, language, or religion. This state of affairs has prompted the suggestion that current practice only proves, at most, that the organization may take an interest in specific instances of *widely* cultivated inequality. There is no unequivocal precedent for any broader interpretation than that.⁹³

However, it would be unwarranted to insist that contemporary practice has thereby defined once and for all the exact authority of the United Nations. What it does show is simply that, with some significant exceptions, countervailing aims have so far been strong enough to hold their own against the advance of human rights.

The task of realizing human rights would be formidable even if the only ends to be considered were those penultimate values which are drawn into the Universal Declaration. There would not only be the mechanical problem of constructing commensurate means. The ends themselves are in disarray and in rivalry with one another. The ranking of these values according to some general principle of preference is, I should think, what modern ideologies are all about.

In addition to these difficulties, there is the opposition of imperial and inward values, which are most keenly felt and which, too, have a tendency "to declare themselves absolute to their logical extreme."⁹⁴ An extraordinary enthusiasm is required to set a limit to these countervailing aims; as a result, human rights have been taken up in the United Nations mainly on occasional gusts of emotion.

⁹¹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

⁹² LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 180 (1950).

⁹³ Buergerthal, *The United Nations and the Development of Rules Relating to Human Rights*, 1959 Proceedings of the AM. SOC'Y OF INT'L L. 132 (1965).

⁹⁴ *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

The process by which they are considered is quite haphazard and largely factious. Moreover, political assemblies are poorly equipped to base their judgment on principles that have a general applicability outside of the particular result involved.⁹⁵ It is awkward that human rights should be obliged for protection to such inconstant methods, especially since at least some of these rights are concerned with bridling the unruly exercise of power.

(3) *Alternative to Political Protection.*—The special provision in Article 68 of the Charter for a commission on human rights suggests, perhaps, that an alternative to political protection was considered from the outset. Whether the commission itself is competent to act as that alternative is arguable. But clearly its first term of reference was the drafting of an international bill of rights which, in turn, suggests some regular means of enforcement. The Universal Declaration was put forward as a first step towards executing the plan for a bill of rights. The rest of the scheme fell for a while into a number of vagaries, but the undertaking has now been concluded with the two covenants — one on economic, social, and cultural aspects, the other on civil and political rights — which the General Assembly adopted and opened to signature at the end of 1966.⁹⁶ The future vitality of these covenants is as yet uncertain.

C. *Practical Problems of Agreement — Suggested Reforms*

There are obviously great difficulties in getting governments to agree at once to observe a comprehensive list of rights. In view of these difficulties, it has sometimes been suggested that a more modest approach might meet with more favor. One such approach would break down the Universal Declaration into a series of problems of limited scope, each to be tackled in a separate treaty as soon as the opportunity for doing so successfully can be seized, somewhat like fitting together the pieces of a jigsaw puzzle.⁹⁷ The International Labor Organization has long taken this tack, although there are differences of opinion as to what its experience proves. Likewise, apart from the covenants, a number of conventions dealing

⁹⁵ See Henkin, *The United Nations and Human Rights*, 19 INT'L ORGANIZATION 505, 516 (1965); Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12-14 (1959).

⁹⁶ G.A. Res. 2200, 21 U.N. GAOR Supp. 16, U.N. Doc. A/5250 (1966).

⁹⁷ JENKS, *LAW, FREEDOM AND WELFARE* 14-15, 58-60 (1963); JENKS, *HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS* 139-41 (1960).

with human rights have so far issued from the United Nations,⁹⁸ but their lesson is still highly conjectural.

It is certain that, beginning next year, considerable attention will be paid in the United Nations to the ways and means of implementing obligations formerly agreed upon. This will also be a capital concern of the intergovernmental conference which is scheduled to meet at Tehran in the spring of 1968 to mark the observance of the International Human Rights Year. On the other hand, the suspicion may prove well founded that appreciable results can be expected only from regional arrangements along the lines of the European Convention of Human Rights,⁹⁹ which has been, by and large, remarkably effective.¹⁰⁰ There may be some confirmation of this view in the admirable, though less imposing, work of the Inter-American Commission on Human Rights.¹⁰¹

An even sterner school of modesty fastened the so-called "action programme" on the United Nations in 1953. This has "three main parts, namely triennial reports on human rights, studies of specific rights or groups of rights, and advisory services in the field of human rights."¹⁰² The United States Government of the day proposed this programme as a complete substitute for covenants and conventions from which it had disassociated itself, more or less on the ground that morality cannot be legislated.¹⁰³

If official statements may be believed, present American policy is at least somewhat more enthusiastic.¹⁰⁴ In any event, the "action programme" was set in motion, although supposedly without prejudice to other United Nations efforts. It has, of course, some unattractive features. For instance, the periodic reports of governments, when rendered, have not always, it seems, been models of intellectual sincerity. Nonetheless, the surveys and seminars carried out

⁹⁸ G.A. Res. 2081, 20 U.N. GAOR Supp. 14, U.N. Doc. A/6014 (1965).

⁹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁰⁰ See generally ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1963); WEIL, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1963).

¹⁰¹ See Sandifer, *Human Rights in the Inter-American System*, 11 HOW. L.J. 508 (1965); Scheman, *The Inter-American Commission on Human Rights*, 59 AM. J. INT'L L. 335 (1965). See generally SANDIFER & SCHEMAN, *FOUNDATIONS OF FREEDOM* (1966).

¹⁰² UNITED NATIONS WORK FOR HUMAN RIGHTS 27 (U.N. Pub. Sales No. 1965. I. 19).

¹⁰³ Cf. GOLDEN, *MR. KENNEDY AND THE NEGROES* 73 (1964).

¹⁰⁴ See GARDNER, *IN PURSUIT OF WORLD ORDER* 238-63 (1964); KONVITZ, *EXPANDING LIBERTIES: FREEDOM'S GAINS IN POST-WAR AMERICA* 353-63 (1966); cf. Kovey, *Human Rights Treaties: Why Is the U.S. Stalling?*, 45 FOREIGN AFFAIRS 414 (1967).

under this programme have probably had some subtle educative effect, which is all to the good; surely "what John Stuart Mill called the 'centralizing of knowledge' is one of the major civilizing influences of government at both the international and national level."¹⁰⁵

III. THE FUTURE ADVANCEMENT OF HUMAN RIGHTS (1968-1992)

In the long run, the advancement of human rights must depend on the character and spirit of the people who are to enjoy them.¹⁰⁶ This, although an old truth, is only a half-truth. It is no less important to have political values asserted in the form of obligatory rules. It gives them fixity and force. It may also so educate men "that the spirit of the laws can in time suffuse the laws of the spirit."¹⁰⁷ At the least, it leaves for those who would turn a people into hateful paths "one hard nut to crack."¹⁰⁸ These last are Lincoln's words about the Declaration of American Independence. In the same speech, there are also some lines which aptly sum up the intendment of the authors of the Universal Declaration of Human Rights:

They meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence¹⁰⁹

How much influence the Universal Declaration has actually had upon ordinary people is difficult to say. I am wary of claiming too much for it. Nonetheless, the Declaration has surely left an appreciable imprint on a number of official acts of the United Nations and individual governments.¹¹⁰ It has occasionally been in-

¹⁰⁵ NICHOLAS, *THE UNITED NATIONS AS A POLITICAL INSTITUTION* 132 (2d ed. 1962).

¹⁰⁶ Cf. McKeon, *The Funeral Oration of Pericles*, in *GREAT EXPRESSIONS OF HUMAN RIGHTS* 27-41 (MacIver ed. 1950).

¹⁰⁷ CAHN, *THE SENSE OF INJUSTICE* 109 (1949).

¹⁰⁸ 3 *THE WORKS OF ABRAHAM LINCOLN* 25 (Clifford & Miller ed. 1908) (Speech at Springfield, June 26, 1857).

¹⁰⁹ *Id.* at 24.

¹¹⁰ See SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 34-74 (1964); *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A STANDARD OF ACHIEVEMENT* (U.N. Pub. Sales No. 1963. I. 13).

voked as an index of the content of those rights which the members of the United Nations have pledged themselves to promote and has been mentioned in a large body of resolutions, exemplifying its particular provisions, in which there has been a tendency to speak of the Declaration as standing on a footing with the Charter.

It has also had a clear impact on regional efforts, particularly in Europe, and on national law.¹¹¹ These tendencies provide some support for those who would conclude that the Declaration has become a statement of positive obligation, "a kind of authentic interpretation of the Charter"¹¹² in the matter of human rights. However, this conclusion is somewhat at odds with the abundant and emphatic assertions of its authors that the Declaration was not to be legally binding. For the most part, they supposed that it was entitled only to respect by virtue of its great moral force, although as Professor Lauterpacht showed, there are crucial provisions of the Declaration which are so drafted as to verge on moral imbecility.¹¹³

On the whole, I think, the Declaration, while not positive law, is something more compelling than a simple expression of faith. The issue is, of course, bound up with the broader question of the legal effect of resolutions of the General Assembly. In this regard, compiling a list of sources of international law may be somewhat useless. It would, perhaps, be more satisfactory to approach the problem by asking what rule a candid mind would choose as "most in conformity with reason and justice for the solution of any particular controversy."¹¹⁴ The sources of law are hardly more than limitations on choice. They are matters which it would be unreasonable or inconvenient not to consult. This is, I suggest, the position of the provisions of the Universal Declaration, namely, the expression of the collective opinion of a large community which, in a case where choice is open, it would be unreasonable not to consider. They are not necessarily rules of decision but are surely the stuff of which decisions are made.

There is a further ground for not taking the Declaration to be binding in too strict a sense. The rights it sets out are cast in ostensibly absolute terms. Yet, plainly, they cannot be left unqualified. People who differ about what warrants asserting human

¹¹¹ See, e.g., Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*, 12 INT'L & COMP. L.Q. 1206 (1963).

¹¹² Schwelb, *The United Nations and Human Rights*, 11 HOW. L.J. 356, 362 (1965).

¹¹³ See LAUTERPACHT, *op. cit. supra* note 92, at 417-24.

¹¹⁴ JESSUP, *TRANSNATIONAL LAW* 106 (1956).

rights can agree to a list of the rights only if it is conceded that they are subject to limitation. But, to conserve agreement, the limitations must not be stated with conspicuous clarity. This is not to say, however, that declarations of rights are a hollow exercise. Once a human right is agreed upon, government is under some obligation to justify any prima facie infringement of it.¹¹⁵ To assert a human right is, in effect, to claim that the destruction of a particular value requires justification. The type of justification required will depend upon how a given right is qualified. The Universal Declaration itself contains in article 29, paragraph 2 the germ of a scheme of qualification which recognizes that the law may impose limitations on the exercise of human rights, "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹¹⁶

The translation of human rights into covenants, conventions, and national constitutions is as much a matter of defining "the range of permissible restrictions with greater particularity"¹¹⁷ as it is a matter of setting out enforceable guarantees. This is not always appreciated by those of us who are used to the United States Constitution which lays down basic human rights in terms of high generality and puts the whole process of qualification into the hands of the judiciary. The American Bill of Rights permits considerable flexibility over a period of time, but much depends upon the outlook of the judges. It is widely thought that this is not a very desirable approach to the drafting either of international instruments or of new national constitutions, at least not if these are meant to be legally enforceable.

In any event, a textual scheme of qualification is hardly the end of the matter. Such a scheme has also to be drawn in highly general terms. The result, for the most part, is not to set precise limits but rather to indicate the countervailing values according to which the propriety of a particular instance of repression should be tested. The qualification of a guarantee is essentially a determination of those values which are entitled to serious consideration by whomsoever has charge of interpreting the text. Differing types of defeasibility within a single document reflect a preliminary ranking of

¹¹⁵ Cf. Cowen, *Human Rights in Contemporary Africa*, 9 NATURAL L.F. 1, 12 (1964).

¹¹⁶ Cf. de Smith, *Fundamental Rights in the New Commonwealth* (pt. 2), 10 INT'L & COMP. L.Q. 219 (1961).

¹¹⁷ *Id.* at 215, 219-20.

rights amongst themselves. It is likewise an exercise in grading when certain rights are made legally enforceable, and others are made subject to only "a general affirmation of devotion"¹¹⁸ or to any of the possibilities which lie between these two extremes. In short, the design of an effective human rights instrument is very largely a matter of the grading of relative rights, the recognition of differentials of practicality and importance, and the positivisation of a hierarchy of values.

A textual statement can point, in more or less general terms, to acceptable modes of justification for restricting human rights. It cannot, however, substitute for the patient dissection of the justifiability of what is done or undone in a specific case. Yet such analysis is crucial.¹¹⁹ The reality of a right is imperiled with every available limitation, but, of course, there must be limits. The difficulty is that these limits may be drawn more tightly than the circumstances warrant. As things stand, nearly every government is a judge in its own cause. The danger is not only that evil men who care nothing for human rights may drive them out with counterfeit restrictions but there is also the risk of serious misjudgment by people who are simply deaf to the pitch of some peculiar value.

This deafness may be a national trait. In certain respects, the problem is one which confronts much of modern international law. The general inclination is, I think, to refer rules of law to the ends which they are supposed to subserve.¹²⁰ But these ends are not always consistent with one another. This results in rules of a very "open texture"¹²¹ which provide a large space for discretion in the solution of any particular case. This approach almost invites misuse so long as each government allows no other judge of its powers than itself. Impartial oversight is as much required in striking a respectable balance between the rival aims embodied in law as it is in settling the question of what the facts in controversy really are.

It may not be necessary for external scrutiny to take the form of judicial review. There are, besides human rights that cannot be enforced practically through adjudication, examples in national experience of checks on government other than the ordinary courts which have worked out quite well. These may not, however, be

¹¹⁸ de Smith, *Federalism, Human Rights, and the Protection of Minorities*, in *FEDERALISM AND THE NEW NATIONS OF AFRICA* 306 (Currie ed. 1964).

¹¹⁹ Cf. Marsh, *The Rule of Law as a Supra-National Concept*, in *OXFORD ESSAYS IN JURISPRUDENCE* 223, 245 (Guest ed. 1961).

¹²⁰ Cf. HOLMES, *COLLECTED LEGAL PAPERS* 186 (1921).

¹²¹ See HART, *THE CONCEPT OF LAW* 124 (1961).

engraftable elsewhere, least of all on an international body. One of the best-known examples is the Scandinavian ombudsman. What might have amounted to a roughly comparable institution¹²² is the proposal for a commissioner for human rights which is presently being seriously considered in the United Nations, although it is probable that the commissioner's office will be quite constricted — a mere adjutantcy allowing of no particular initiative.¹²³

So far as concerns the classical rights of liberty, "it is difficult to think of any alternative to judicial review which does not have graver defects of its own."¹²⁴ This is true, I think, on the international as on the national level. But the design of legal institutions must account, in part, for conflicting communal aims. Judicial review has not on the whole met with great favor in national constitutions, nor is regular international adjudication of human rights issues a very likely prospect for the immediate future. The primary reliance has to be extracurial. No doubt the United Nations will, in any event, continue adding to the mixed lot of committees and commissioners which are more or less concerned with advancing human rights. The problem of coordinating their efforts will, no doubt, assume increasing importance.

The crucial question, however, is whether any of these institutions can be aptly designed¹²⁵ to protect human rights effectively. For instance, in authenticating restrictions on a human right, neutral judgment is essential. That much of judicial method cannot be excluded. However, this limits the kind of institution to which cases involving human rights can be usefully referred. It may also limit the tasks which any one body can usefully undertake. There is, for example, a degree of incompatibility between judicial and conciliatory functions.¹²⁶ It is a fault, perhaps, of the covenant on civil and political rights¹²⁷ and of the convention on racial discrimination¹²⁸ that both seriously rely on methods of conciliation. These methods are said, however, to have some use in resolving questions of fact. Perhaps no more should be expected. In any event,

¹²² Cf. MOSKOWITZ, *HUMAN RIGHTS AND WORLD ORDER* 137-68 (1958).

¹²³ Cf. Blaustein, *Human Rights: A Challenge to the United Nations*, in *THE QUEST FOR PEACE* 315, 328-29 (Cordier & Foote ed. 1965).

¹²⁴ COWEN, *THE FOUNDATIONS OF FREEDOM* 155 (1961).

¹²⁵ Cf. FULLER, *THE MORALITY OF LAW* 170-81 (1964).

¹²⁶ Cf. Rolin, *Has the European Court of Human Rights a Future?*, 11 *HOW. L.J.* 442 (1965).

¹²⁷ G.A. Res. 2200, 21 U.N. GAOR Supp. 16, U.N. Doc. A/5250 (1966).

¹²⁸ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6014 (1965).

whether these treaties can even begin to work probably hinges on the extent to which the parties opt, as they may, to give the right of petition to their individual victims. Any institution to which only governments have access is of dubious utility.

"[T]he problem of judicial interpretation" said Pollock, "is to hold a just middle way between excess of valour and excess of caution."¹²⁹ No tribunal, I suppose, ever holds a straight course. The European Commission on Human Rights has so far been remarkably cautious.¹³⁰ No doubt the provisions of any instrument dealing with human rights must go through cycles of interpretation. These reflect, of course, the political and social conditions of the period. They are also related to the currents of intellectual history. Perhaps the next quarter-century will prove that moral ideals are susceptible of objective verification. I am inclined to think not. "It is a singular anxiety which some people have that we should all think alike."¹³¹ But technical oecumenicity will surely mean a wider sharing of those experiences, including education, which cumulate in convictions of value. This is hopeful for it may somewhat enhance "the degree to which men are sensitive as to wrongdoing and desirous to right it."¹³² It is not necessary that scepticism should imperil common decency. "To realize the relative validity of one's convictions," said Schumpeter, "and yet stand for them unflinchingly is what distinguishes a civilized man from a barbarian."¹³³

¹²⁹ Pollock, *Judicial Caution and Valour*, 45 L.Q. REV. 293, 296 (1929).

¹³⁰ See Buergenthal, *Comparative Study of Certain Due Process Requirements of the European Human Rights Convention*, 16 BUFFALO L. REV. 18, 52-53 (1966).

¹³¹ Letter from Thomas Jefferson to Charles Thompson, Jan. 29, 1817, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 679 (Koch & Peden ed. 1944).

¹³² MACDONNEL, *HISTORICAL TRIALS* 148 (1927).

¹³³ SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 243 (3d ed. 1950).