

# THE COVENANT ON HUMAN RIGHTS

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The Covenant on Human Rights is designed to form the second part of an International Bill of Rights, of which the first part is the Universal Declaration of Human Rights. The Covenant is a document of a fundamentally different character from the Declaration. It is more than a common standard of achievement for all peoples and all nations, a formulation of an ideal, to which the laws of the nations will be approximated as fast and as far as circumstances permit. It is a statement of law and imposes a legal as well as a moral obligation upon those peoples who accept it to act in accordance with its precepts. The articles of the Covenant will be embodied in a treaty, which, when duly ratified and made effective by such enabling acts as may be necessary in different countries, becomes a part of the law of the land in each of them. It is a project for a piece of international legislation, more ambitious and perhaps more important than any other in the history of international law. If supported by suitable measures of implementation, it could be a great triumph of reason over force and violence in the development of human relations.

The framing of the Covenant on Human Rights has been closely connected with that of the Universal Declaration of Human Rights. The United Nations Commission on Human Rights at its first session in January, 1947, resolved to prepare a Declaration and a Covenant simultaneously and at its second session in December of the same year proceeded to consider the substance of both documents. The majority of the Commission were quickly convinced that the drafting of a Covenant, suitable for incorporation in the laws of the nations, was a more difficult undertaking than that of a Declaration, designed primarily to express the aspirations of the peoples for whom they were authorized to speak. The Commission decided therefore to put the completion of the Declaration first and to continue with the framing of the Covenant thereafter. The adoption of the Declaration by the General Assembly of the United Nations, December 10, 1948, cleared the way for further work on the Covenant. It also imposed upon the Commission the obligation, in framing a Covenant, to give legal form, as far as may be practicable, to the moral principles proclaimed in the Declaration.

The Draft Covenant is based upon materials provided by the Secretariat of the United Nations and by a drafting committee appointed by the Commission itself. These materials were carefully considered by the Commission at its fifth session, ending June 20, 1949. The result was a document, consisting of twenty-six articles, which were put in shape for reference to the Member Nations with a view to further revision in the light of their criticisms and suggestions. The Member Nations were

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requested to return their replies to the Commission by January, 1950. The Commission will then try to complete the Draft Covenant, in order to submit it to the Economic and Social Council, which in turn, after due deliberation, may send it to the General Assembly for consideration at the session beginning in September, 1950.

The Draft Covenant is divided into three parts. Part II, consisting of eighteen articles, contains the main body of the Covenant. These articles set forth rights and freedoms corresponding to those proclaimed in the Universal Declaration of Human Rights, as far as the Commission on Human Rights deems them practicable at the present time in the existing state of the world. The Commission postponed the proposal of a definite text for three of the articles, pending further advice from other United Nations agencies and the receipt of the views of the Member Nations themselves. For the other fifteen articles definite texts were proposed. The first and third parts of the Draft Covenant, each consisting of four articles, contain propositions, both general and specific, relating to the enforcement of the Covenant. These articles proved extraordinarily troublesome and were left unfinished by the Commission at its fifth session. It is evident that the drafting of the Covenant is still in a preliminary stage and that difficult problems remain to be solved before it will be ready for submission to the General Assembly.

The nature of the Draft Covenant, and the problems with which its framers have to deal, are revealed most clearly by a comparison of its text with that of the Declaration. The latter begins with a general declaration of faith in the natural dignity and reasonableness of mankind and of hope for the eventual realization of human brotherhood. The second article of the Declaration, following the spirit and in part the letter of the Charter itself, proclaims the right of all men everywhere, regardless of the status of the country or territory to which a man may belong, to fundamental freedoms without distinctions of any kind. To the list of forbidden distinctions, contained in the Charter, the Declaration specifically adds others, notably distinctions on account of the ownership of property. There is of course nothing corresponding to these broad general observations in the Draft Covenant. Whatever generalizations of this kind may be deemed desirable will presumably be inserted in the preamble to the Covenant, where they can illuminate its purpose and spirit and thereby aid in its interpretation and enforcement. The Commission has not yet drafted the preamble.

The next eighteen articles of the Declaration deal with civil rights, both substantive and procedural. The first of these, Article 3, proclaims simply that everyone has the right to life, liberty, and personal security. The Covenant cannot dispose of these fundamental freedoms so easily. Consider the most fundamental of all rights—the right to live. We Americans deal with this fundamental right by providing that neither the federal nor the state governments shall deprive any person of his life without due process of law. These provisions do not exclude the possibility of lawfully depriving a person of his life in various ways as well as by con-

viction in court for a capital crime. Americans may be lawfully killed in the process of suppressing a rebellion or putting down a riot, or in self-defense or in defense of the life of another person, or by accident, or by a surgical operation, or for resisting arrest under certain circumstances, or to prevent the commission of a serious crime, or by the military in time of war.

The Commission recognized the difference between writing an article, designed to discountenance the taking of life, as in the Declaration, and one designed to penalize it, as in the Covenant. It began by considering a proposal that no one should be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty was provided by law. Then it proceeded to consider the various exceptional cases in which the taking of life should not be held a criminal act. It ended by providing simply that no one shall be deprived of his life. This provision obviously did not dispose of the Commission's problem, but general agreement could not be obtained for any list of exceptions. Members of the Commission doubtless came to realize that procedural rights for persons accused of depriving others of their lives without due cause would be more important than a substantive right to live which nobody could define. They added therefore provisions designed to restrict capital punishment to the most serious crimes, whatever that may mean in different parts of the world, to prevent summary executions without at least a formal trial, and to encourage mercy in the administration of criminal justice. Other articles were designed to put an end to the use of torture or cruel and inhuman punishments of any kind, and to afford protection against unauthorized medical or scientific experimentation involving bodily mutilation. Questions arose whether the performance of certain surgical operations without the consent of the individual directly concerned for the protection of society against the spread of imbecility was to be permissible, and this part of the subject was referred to the World Health Organization for an advisory opinion. The Commission certainly made progress toward a rational definition of the right to life, but confessed its inability to finish this part of its task without further help.

The problem of defining the right to liberty proved even more difficult. Liberty may be defined narrowly as a right to move about in a country from one place to another without physical restraint of the person. Such liberty is secured for Americans by habeas corpus acts and by the decision of the Supreme Court in the *Okie* case<sup>1</sup> that a state government may not obstruct the movement of citizens across state lines. It does not prevent the government from taking action in the public interest which may greatly restrict the freedom of the individual to do as he pleases. Liberty may be defined more broadly so as to include freedom to do many things that a man might like to do or even to do as he pleases in all things, provided he does not interfere with a like liberty of others. But such liberty for all would greatly impede the practical capacity of the government to protect the interests of the whole

<sup>1</sup> *Edwards v. California*, 314 U. S. 160 (1941).

body of people by imposing salutary restraints on the behavior of the individual. The problem of drawing a line wisely between the liberty of the individual to do as he pleases and the authority of the government to do what may seem to be necessary and proper in the public interest is the basic problem of constitutional government.

The Commission on Human Rights was well advised not to try to solve this problem, certainly not in a uniform manner, for all peoples everywhere regardless of differences in their traditions and circumstances. It framed articles designed to put an end to slavery and to involuntary servitude except as a punishment for crime, but found the problem of forced labor, particularly as punishment for political offenses, excessively difficult and postponed action on this part of the provisions dealing with personal liberty. Other articles were designed to prohibit imprisonment for debt, to guarantee freedom to depart from and return to one's own country, and to protect aliens lawfully admitted to a country from arbitrary expulsion. The universal adoption of these articles would certainly mean substantial progress toward a rational state of personal liberty throughout the world. But there was no attempt here to reduce to practice a philosophical conception of liberty regarded as a state in which human personality can fully express itself.

The Universal Declaration of Human Rights devotes three articles to the rights which Americans associate with Article I of their federal Bill of Rights. These are the rights to freedom of thought, conscience, and religion; to freedom of speech and expression; and to freedom of peaceful assembly and association. They are contained in Articles 18, 19, and 20, and are stated more elaborately and more adequately than in the American Bill of Rights. The Draft Covenant deals with these fundamental freedoms in Articles 16, 17, 18, and 19. In drafting these Articles the Commission on Human Rights was bound to consider how far it is expedient in the present state of the world to attempt to establish by law a uniform practice in matters touching the relations between the government and the individual which politicians deem of great importance and concerning which individuals in various countries are deeply divided against themselves.

The decisions which the Commission took are creditable to its sense of expediency. Freedom of thought, conscience, and religion was construed to include freedom to worship in public regardless of non-conformity to the official forms of public worship in countries with established churches and regardless also of public opinion in countries where a peculiar creed is particularly unpopular. It is only necessary to recall the trials and tribulations of Quakers and Mormons in our own country in former times and of Jehovah's Witnesses and communistic Atheists in our own time, to recognize the difficulty of the task assumed by the Commission on Human Rights in trying to realize in enforceable rules of law man's perennial dream of religious freedom. Freedom to manifest one's religion or beliefs, the Commission proposes, shall be subject only to such limitations as are pursuant to law and are reasonable

and necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. But who shall say what is reasonable and necessary for these purposes? The true believer may insist on giving the answer dictated by his own conscience, when those responsible for protecting public interests impose limitations in the name of the law. The problem of finding a rational definition gives way to the problem of finding suitable measures of implementation.

The same sequence of problems reappears in the articles dealing with freedom of speech and of the press and with the right to assemble and join associations. Article 19, dealing with the right of peaceful assembly, and Article 20, dealing with the right of association, contain the same provision for the imposition by law of limitations necessary for the protection of public interests. The practical significance of these articles would depend upon the character of the limitations which Member Nations might see fit to impose by their established lawmaking processes. Article 17, dealing with freedom of speech and information, presented special difficulties, since various aspects of these freedoms were the subject of deliberations by the United Nations Conference on Freedom of Information and other United Nations agencies. The Commission on Human Rights was unable to reach any conclusion on the form of this article and decided to postpone its consideration until the Commission's sixth session.

This uncertain treatment of important fundamental freedoms may well have caused the members of the Commission to reflect upon the relations between substantive and procedural rights, and to give greater weight to the latter in determining the content of the Covenant. Be that as it may, the Commission failed to include in the Draft Covenant provisions corresponding to several important articles in that part of the Declaration dealing with substantive civil rights. The Declaration asserts a right of privacy, a right to seek asylum from persecution, a right to a nationality and to change one's nationality, a right to marry and to found a family, and a right to own property, either alone or in association with others. The Draft Covenant does not attempt to secure any of these rights by law. They are regarded presumably as not suitable for legalistic formulation and implementation in the present state of the world, or at least as presenting such great difficulties that they ought not to be included in the first draft of a Covenant which at best will provoke grave controversies and may not prove acceptable to many of the Member Nations.

The framers of the Draft Covenant encountered even greater difficulties in dealing with the procedural rights proclaimed in the Declaration. Article 7 of the Declaration asserts that all persons are equal before the law and are entitled without discrimination to its equal protection. Article 8 declares that everyone has the right to an effective remedy by competent national tribunals for acts violating his fundamental constitutional or legal rights. Article 9 contains a guarantee against arbitrary arrest, imprisonment, or exile. Article 10 asserts the right of every person to a fair public hearing, when accused of crime or seeking to secure his rights, and Article 11

asserts the right of persons accused of crime to a presumption of innocence until proved guilty and to immunity against punishment for acts which were not crimes when committed.

All these provisions of the Declaration are covered by corresponding provisions of the Draft Covenant. The Commission, however, found several of them very troublesome. The declaration against arbitrary arrests and imprisonment raised the question of determining what is arbitrary. There seemed no better answer than to guarantee trials by due process of law and to ensure by the procedure of habeas corpus that they be held promptly. Article 9 of the Draft Covenant, which contains these provisions, includes also a provision that every person who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation. This Article, if approved, would carry the protection of the individual against arbitrary arrest and imprisonment further than has been the practice in the United States, but at the request of the member of the Commission representing the Soviet Union final action was postponed pending further consideration of the articles dealing with measures of implementation.

Consideration of measures of implementation was necessary also in order to dispose of Article 8 of the Declaration which proclaims the right to an effective remedy in a competent court for every violation of these fundamental freedoms to which a person may be entitled by law. This brought the Commission back to Part I of the Draft Covenant. The representative of the Soviet Union was particularly interested in Article 4, the last article in this Part, which provides that "in time of war or other public emergency threatening the interests of the people, a State may take measures derogating from its obligations under Part II of the Covenant to the extent strictly limited by the exigencies of the situation." Such a provision would leave each state, which might ratify the Covenant, free to determine for itself how far it might go in abridging the rights, to be secured under Part II of the Covenant, whenever it might deem such action necessary and proper on account of the existence of a war or other public emergency. There was no attempt to define public emergencies other than war. Instead of a clear guarantee of every person's right to a day in court, when his fundamental freedoms, so far as they might be guaranteed by law, seemed to be threatened, there seems to be here a guarantee of the right of the government of the country to disregard these freedoms under conditions of which the government would be the judge. It is evident that, unless the basic civil rights are excluded from the scope of this proposed Article 4, the provisions of Part II of the Covenant are liable to be seriously abridged or even nullified by the provisions of Part I. It is evident also that the attitude of the Soviet Union toward the practical problem of securing the blessings of liberty is utterly alien from, and hostile to, the attitudes of the non-communist countries.

This irrepressible conflict between the communist and non-communist attitudes toward the problem of securing the blessings of liberty was revealed again in the

treatment of the Article of the Declaration relating to the equal protection of the laws. The Draft Covenant deals with this subject in Article 20, which declares that all persons are equal before the law and guarantees to all the equal protection of the laws. This Article not only prohibits discrimination on account of race, sex, language, religion, etc., but also calls for protection against incitement to such discrimination. This, however, it is not easy to provide without exposing innocent persons to dangerous abridgments of their freedom of speech and communication. Apparently this fundamental freedom will have to be more precisely defined than has been customary in the United States in order not to jeopardize a proper liberty of public discussion under the guise of protecting exposed classes of people against discrimination.

The Commission recognized that this liberty was not adequately protected by Article 20 of the Draft Covenant and proposed two further articles for its further security. Article 21 was to deal more particularly with incitement to violence through advocacy of provocative national, racial, or religious doctrines, but the Commission postponed its discussion, wishing to enjoy the benefit of advice from other United Nations agencies concerned with the abuse of fundamental freedoms by reckless or malevolent propagandists. The Commission seemed to be well aware of the difficulties in treating this subject. The Declaration spoke of racial and other distinctions, but the Draft Covenant speaks only of discriminations. As Americans have learned by painful experience in the application of comparable provisions of the Fourteenth Amendment, there is a wide difference between distinctions and discriminations.

Finally, Article 22 of the Draft Covenant deals with the problems arising out of the abuse of fundamental freedoms by persons who, without believing in the equal enjoyment of the blessings of liberty by all, would exploit these freedoms, when extended to themselves, in order to gain the power to deny them to others. The Declaration tried to save the rights of honest men by a final Article, number 30, which states that "nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." Article 22 of the Draft Covenant follows closely the text of the corresponding Article of the Declaration. Recognizing, however, that the problem is too complex to be disposed of so easily, the Commission added a further provision in the Draft Covenant designed to prevent not only the destruction of these rights and freedoms, but also their limitation "to greater extent than is already provided for in this Covenant." What this might mean in practice is not clear. The interest of the communists, for example, in freedom to exploit opportunities for subversive propaganda in capitalistic countries conflicts with their interest in freedom to suppress subversive propaganda in communistic countries. The latter interest might be protected by the provisions of Article 4 in Part I of the Draft Covenant. The former

interest must look for protection to the relevant provisions of Part II. Apparently the representative of the Soviet Union on the Commission was more concerned about the power to suppress subversive propaganda at home than about the power to conduct it abroad. As long as he could have Article 4 drafted to his satisfaction, he need not care greatly how the representatives of the capitalistic countries on the Commission dealt with Article 22.

Besides the civil rights, both substantive and procedural, contained in the Declaration, there are others which are political, economic, or social in character. Several political rights appear in Article 21. They include a right to participate in the government of one's country, either directly or through freely chosen representatives, a right of equal access to the public service, and a right to periodic and genuine elections by universal and equal suffrage with a secret ballot. Article 28 adds a right to an international order in which the rights and freedoms set forth in the Declaration can be fully realized. In short, the Declaration commits the Members of the United Nations to democratic political ideals, including that of national states in which governmental authority rests upon the consent of the governed and that of a world order in which the rights of persons are sustained by the organized opinion of mankind.

The Commission made no provision for political rights in the Draft Covenant. Its own deliberations, if there had been no other available evidence, would have convinced its members of the impracticability in the present state of the world of standardizing the electoral and administrative systems of countries as different as the United States and the Soviet Union, to say nothing of lesser powers. As for an international order capable of fully realizing the rights and freedoms set forth in the Declaration, there was little the Commission could do beyond formulating and proclaiming the ideal. The Commission was not authorized to propose amendments to the Charter of the United Nations and without such amendments the Commission was restricted to the consideration of measures for the implementation of Part II of the Covenant consistent with the existing provisions of the Charter. The Commission's function was to improve the world order by proposing legal sanctions for the provisions of the Declaration, as far as it might be deemed practicable to do so under the strenuous conditions of the modern world. Under the existing conditions legal sanctions for changes in the political processes of countries which might reject the American or Russian or other models seemed obviously impracticable.

The economic and social rights deemed suitable for inclusion in a Universal Declaration of Human Rights are set forth in Articles 22 to 27. They include a right to social security, a right to work, a right to a just wage, a right to join trade unions, a right to rest and leisure, a right to an adequate standard of living, a right to education, and a right to participate in the cultural life of the community. Finally, in Article 28, a right is included to a social order in which the other rights and freedoms

can be fully realized. The nature of such a social order, whether individualistic or socialistic, is not specified, and the statement of this ideal for modern society is presumably directed to the teachers of mankind rather than to its legislators and administrators. The more specific provisions of the preceding Articles may well be addressed to the world's legislators, but there is a manifest and important difference between rights which require for their enjoyment affirmative action by legislative bodies and rights which require for their enjoyment merely that public officers refrain from forbidden action. The specific economic and social rights fall in the former category, unlike the substantive civil rights most of which fall in the latter category. The problem of devising suitable measures of implementation for the economic and social rights is therefore more difficult than that involved in the implementation of the substantive civil rights.

The Commission decided to omit entirely from the Draft Covenant provisions corresponding to the Articles of the Declaration dealing with economic and social rights. This decision was not reached without spirited and lengthy controversy among its members. The declarations of rights which have been adopted by national states since the second World War have generally included rights of this kind. If a principal purpose of a modern democratic state is to promote the welfare of its people, economic and social rights might seem to be the logical concomitant of civil and political rights. The opinion of mankind appears to be moving vigorously in that direction. The articles dealing with economic and social rights were no less popular than the others among the members of the General Assembly which adopted the Declaration. The obligation to provide such legal sanctions for them as may be practicable is the same as that to provide legal sanctions for the other provisions of the Declaration. But the majority of the Commission did not deem the implementation of such rights immediately practicable. That part of their task was indefinitely postponed.

The nature of the Draft Covenant may be further tested by comparison with President Roosevelt's Four Freedoms, which indeed furnished much of the inspiration for its development. The First and Second Freedoms are duly covered in the pending Draft. There are numerous provisions, definitive or prospective, for the freedom of speech and expression and for the freedom of worship. But there is nothing that deals directly with the Third Freedom, freedom from want. Though there is much that deals with freedom from fear, as far as the fear of domestic tyranny is concerned, there is nothing added to what was already contained in the Declaration dealing with the fear of war. Better protection of civil rights for all men everywhere may help greatly to remove one of the serious causes of war. Many thoughtful men believe this. But the impact of the Covenant on the causes of war would be implicit rather than explicit. The provisions of the Draft Covenant dealing with the Fourth Freedom are therefore very imperfect.

The determination of the scope of the Covenant on Human Rights was the first

of the major problems with which the Commission had to deal. President Roosevelt recognized that the Third Freedom was a recent accession to the list of fundamental freedoms, but there is no evidence that he regarded it as less basic or urgent than the First and Second Freedoms. He encouraged the National Resources Planning Board to prepare a draft of an Economic Bill of Rights of which a simplified version was recommended by him to the consideration of Congress. He himself at the close of his life was absorbed in his plans for the realization of the Fourth Freedom, or that part of it relating to the fear of war. He hoped to prevent resort to war as an instrument of national policy both by the enforcement of peace through the employment of military contingents under international control and through the improvement of the processes for the adjustment of disputes between nations by international agencies. He regarded the lightening of the burden of national armaments as an important index of the decline of the fear of war and hoped that the measures for implementing the Fourth Freedom which he helped to devise would bring about a reduction of military budgets among the powers. Nothing would have shocked him more than the unparalleled growth of national armaments since the destruction of the German, Italian, and Japanese armies by the forces of the coalition of powers which he did so much to organize.

The Commission on Human Rights began its work with the conviction that something more comprehensive and specific than the Four Freedoms would be expected from its deliberations. But how much more comprehensive and specific was a question on which the opinions of its members differed widely. The American influence in the Commission was thrown in favor of a relatively short and simple International Bill of Rights. Both at first in drafting the Declaration and later in drafting the Covenant, Mrs. Roosevelt urged concentration on first principles and the avoidance of unripe topics and controversial details. But members representing other countries wished to utilize the opportunity to give the peoples of the world as much good advice and guidance as possible.

The representative of the Soviet Union was foremost in urging the inclusion of an elaborate economic and social bill of rights. He followed the lead set by the framers of the bill of rights contained in the Soviet Union Constitution of 1936. Economic and social rights came first, and even in the articles dealing with civil rights the emphasis was shifted away from the protection of the individual against objectionable interference by government officials. The stress in the article dealing with the freedom of the press, for example, was laid upon the supply of paper, ink, and printing machinery rather than upon the absence of a censorship. But the supply of these essentials was controlled by the official bureaucracy and there was nothing to prevent official discrimination against those who failed to follow the party line. Even in the United States official control of the distribution of printing supplies was found to be necessary in time of war, when there was a shortage of essential materials and facilities, but the spirit of a free press was sedulously pre-

served by insuring the distribution of scarce materials and equipment without regard to the politics of publishers. Under such circumstances there is merit in the Russian insistence that access to supplies is indispensable for a free press, but the American idea that distribution must be arranged equitably regardless of political considerations is also indispensable.

It is not surprising that among the representatives of countries with undeveloped resources and inadequate free capital there should have been sympathy for the view that freedom means more than the absence of governmental restraints upon the acts of ordinary persons. Freedom may be an illusion without public aid to supply the deficiency of private means. Representatives of backward countries or countries temporarily impoverished by war could join in the demand for the inclusion in the International Bill of Rights of guarantees of positive action by public officers to promote the general welfare as well as of safeguards against the abuse of power by government officials. The French member of the Commission was perhaps most influential in asserting the need for economic and social rights in addition to the civil rights traditionally associated in the West with declarations and bills of rights, but there was strong support for this view among members representing other countries with governments in which social democratic and labor parties took an influential part. Thus three important points of view developed within the Commission. The American was most favorable to the essentials of what has been called the free enterprise system. The Russian was most antipathetic to the American. An intermediate position was held by the representatives of the West European democracies. The representatives of other countries on the Commission could choose among the three leading attitudes in accordance with their personal preferences or the interests of the governments which they represented. It was a situation which insured that such action as the Commission might be able to take would be based upon compromise and would reflect a spirit of moderation and mutual adjustment.

The problem of the content of the International Bill of Rights was disposed of in the first instance within the Commission by the inclusion of economic and social rights in the Declaration and their exclusion from the Covenant. But it was not finally settled. Out of deference for the French representative, who pressed for agreement that a second Covenant should be drafted to deal with the economic and social rights omitted from the first, a final decision on the content of the Covenant was postponed until the Commission could obtain the advice of other United Nations agencies concerning the treatment in the Covenant of rights of this kind embodied in the Declaration.

The problem of content was not even tentatively disposed of without an important controversy over the form in which the substance of civil rights should be stated. The United States, influenced doubtless by the successful use of the due-process clauses of the Fifth and Fourteenth Amendments for the purpose of adapt-

ing an eighteenth-century bill of rights to the needs of a twentieth-century world and mindful of the likelihood that there would be need for flexibility in the adaptation of the Covenant to a world which presumably will continue to change, wished to state the civil rights and freedoms of mankind concisely and in general terms, leaving their possible limitation in particular cases to a single article, phrased like the due-process clauses in correspondingly concise and general terms. Such a treatment of exceptions to general principles would throw the accent upon procedural rights and emphasize the importance of judicial processes and of the judiciary in the implementation of the Covenant. The English, mindful of the working of their party system and of the practical capacity of the Loyal Opposition in the House of Commons to expose the abuse of power by Governmental officials, preferred to elaborate these rights and freedoms in as definite and, where necessary, detailed a fashion as possible, cataloguing under each article of the Covenant all the limitations and exceptions which might be applicable. An illustration of the problem has already been furnished from the discussion of the right to life.

Neither the American nor the English view wholly prevailed in the Commission. The Americans secured the adoption of some general terms, such as "arbitrary" and "emergency," but it was clear to all that the use of these expressions weakens the Covenant by opening the door for various interpretations of its provisions by interested governments. The English convinced the members of the Commission that it was possible to list the exceptions to the general rules set forth in the Covenant, which experience has shown to be expedient, and that it was necessary to list at least the important exceptions in order that each signatory state may know precisely what are its international obligations under the instrument. The result again is a compromise. The lists of exceptions, contained in the Covenant, are not as long as those originally proposed by the English and reliance upon general limitations is not as great as originally advocated by the Americans. This result prepares the way for the use of political as well as judicial measures of implementation. It permits countries in various stages of constitutional development to borrow English political processes as well as American judicial processes for the purpose of giving effect to their eventual international obligations under the Covenant.

This technical problem of the form in which the fundamental freedoms of mankind should be stated led directly to the major problem in the drafting of the Covenant, that of measures of implementation. American experience with the enforcement of the Fourteenth Amendment<sup>2</sup> discloses the limitations of the judicial process as a method of implementing the civil rights of Negroes, even when there is a powerful federal judiciary with jurisdiction over cases which originate in the state courts. The United Nations, possessing no powerful judiciary with jurisdiction over cases originating in the Member Nations, could not expect satisfactory results from

<sup>2</sup> See A. N. HOLCOMBE, *HUMAN RIGHTS IN THE MODERN WORLD*, c. III, *The Constitutional Privileges and Immunities of Americans* (1948).

judicial proceedings in the individual Nations, particularly in those in which protection for the civil rights of mankind would be most needed. No American, however, judging by efforts to secure protection for civil rights by congressional action, would expect better results here from the English practice of public questions to Ministers in the House of Commons. The Russian members of the Commission took the position from the beginning of its deliberations that the importance of the problem of implementation was so great that it was untimely to discuss the content of the Covenant until the problem of implementation had been fully considered and suitable measures devised and agreed upon. Whether Russian concern over measures of implementation was genuine or its representatives took their position solely for the purpose of obstruction and delay is perhaps immaterial. An International Covenant on Human Rights adds little or nothing to a Universal Declaration of Human Rights unless provision of some sort is made for measures of implementation. Without such measures the Covenant, like the Declaration, would possess such force as opinion in each Member Nation might give it. In the present state of education and facilities for propaganda throughout the world there could be no prospect of universal respect for the fundamental freedoms and observance of them in a uniform manner within any foreseeable time.

The problem of implementation raised fundamental issues over which the Commission on Human Rights was divided against itself. The representatives of the Soviet Union held the opinion that implementation means the realization by each state in its own way of the rights and freedoms embodied in the Covenant. They rejected the possibility of setting up any international machinery for the purpose of ensuring that these rights and freedoms are in fact observed in the states which adhere to the Covenant. The enforcement of respect for human rights and fundamental freedoms, they contended, falls under the domestic jurisdiction clause of Article 2 of the United Nations Charter and is consequently reserved for such action as sovereign states may choose to take through their own governmental authorities. Any international machinery of implementation, they concluded, would be a violation of the Charter.

This Russian attitude threatened to destroy the practical usefulness of a Covenant. To be sure, if basic human rights and fundamental freedoms were embodied in a Covenant having the force of an international treaty, any abridgment of these rights and freedoms would be a treaty violation and might give rise to such dissatisfaction by other parties to the treaty as to cause a threat to the peace. The Security Council could then take cognizance of the matter, but its capacity for effective action would be slight, if the offending party were one of the privileged powers possessing a veto in the Council. For practical purposes under this theory of implementation a Covenant would add so little to what might be accomplished by means of the Declaration as hardly to justify the effort to agree upon a Draft and procure its ratification. It is not surprising that the Russian attitude found

no favor within the Commission except among the representatives of communist states.

The other members of the Commission conceived implementation differently. They wanted some machinery which would enable the United Nations to exercise some kind of supervision over the observance of human rights in the covenanting states. They could not admit that respect for human rights was an exclusively domestic concern of particular states. The Charter, as they understood its language, clearly removed respect for, and observance of, human rights from the national to the international field of action. An acceptable Covenant would be a part of an International Bill of Rights which could furnish a basis for effective international action. Measures of implementation should be devised whereby the United Nations would be in a position to do something about the observance of human rights, when and where they might be violated. Enforcement should not be contingent on the good faith or the practical efficiency of national governments, which might fall under the control of men without respect for the fundamental freedoms of mankind.

Among the advocates of positive measures of implementation, however, there were substantial differences of opinion concerning the kind of measures to be employed. Americans favored judicial processes in accord with American experience in the enforcement of civil rights. Englishmen favored the political processes which enabled His Majesty's Loyal Opposition, taking advantage of the opportunities afforded by the English parliamentary system, to become a veritable symbol of liberty. Others recommended administrative expedients, such as a permanent Commission on Human Rights to watch over the observance of human rights in the covenanting states, report infractions to the General Assembly of the United Nations, and appeal to the opinion of mankind for such action as might be necessary and proper. The Australians were ready for such advanced measures as the establishment of an international court of human rights or the grant of jurisdiction over cases of violation to the International Court of Justice.

The difficulty of agreement upon effective measures of implementation was most clearly disclosed by the discussion of the right of petition. Should a right to bring infractions of the Covenant in any covenanting state to the attention of the appropriate organ of the United Nations be recognized? If so, by whom should it be exercised? There was general agreement that signatory states should possess such a right, but sharp differences of opinion emerged over the proposal to recognize a right on the part of private individuals, groups, or organizations to initiate proceedings of any kind against violations of human rights. A general right of petition would give private individuals and organizations a new status as members of the international community and bring about a profound change in the relationship between the individual and the particular state to which he might be subject.

There were three different attitudes toward the right of petition. The Russians were opposed in principle to the recognition of any such right, contending that

such recognition would tend to subvert the natural relationship between a state and its own citizens. The Americans and English were not opposed in principle to the recognition of such a right, but favored a cautious approach to the problem in the existing state of the world, lest false hopes of efficient enforcement be aroused, leading only to bitter disappointment when the weakness of the United Nations should eventually be discovered by victims of oppression at the hands of one of the powers. They preferred to postpone the grant of a right of petition to private individuals until after the establishment of machinery of implementation and the gaining of experience in its use. Others, however, advocated the immediate recognition of such a right regardless of the arrangements that might be made for handling petitions from private persons at the offices of the United Nations. They contended that the denial of a right of petition to the humble and oppressed would be a mockery of human rights. The United Nations, they declared, cannot proclaim in the Charter its devotion to fundamental freedoms for all, and then refuse to listen when any one wishes to complain of their violation.

The Commission was forced to postpone action on this fundamental issue. The Russians modified their original position, conceding that the right of petition might be extended to organizations established on a "wide democratic basis," that is, presumably, to communist parties and other approved organizations, but not to other groups or to individuals. This concession did not make the Russian position more acceptable to the non-communist world. Most of the non-communist states, however, did not share the American and English reluctance to take action which would put the United Nations in a position where it might not be able to fulfill the expectations of oppressed peoples. They contended that the United Nations must try without undue delay to perform the obligations implied in the Charter and trust that efforts to ensure respect for human rights made in good faith, even if unsuccessful, will serve to strengthen rather than weaken the general international organization. A proposal that a universal right of petition be included in the Draft Covenant divided the Commission equally. Favoring the proposal were the representatives of France, Denmark, Lebanon, India, the Philippines, Australia, Uruguay, and Guatemala. Opposed to it were the Soviet Union, the Ukraine, Yugoslavia, the United Kingdom, Egypt, Iran, China, and the United States. The alignment of states is not without significance. The deadlock was broken by the adoption of a resolution referring the problem to the Economic and Social Council with a request that the Secretary General be instructed to study it and report his findings for consideration by the Commission at the next session.

Examination of the record suggests that the Commission on Human Rights is unlikely to finish its work on the Draft Covenant as quickly and as successfully as that on the Declaration. The difficulties to be overcome are manifestly much greater. At the close of its fifth session the communist members of the Commission expressed great disappointment at the exclusion of the economic and social rights, and abstained

from voting on the simple proposition to accept the Commission's progress report. Other members must be equally, and perhaps more sincerely, disappointed at the unwillingness of the Americans and English to support vigorous measures of implementation. The Draft Covenant, if completed in 1950 as planned, might be approved by two-thirds of the General Assembly, but it cannot be completed, to say nothing of receiving the approval of the necessary majority in the General Assembly, without some great compromises between the conservative members of the Commission, led by the Americans and English, and the more liberal members, led by the French and Australians. Mrs. Roosevelt, the purposeful and experienced chairman, was sanguine enough at the close of the Commission's fifth session to report<sup>3</sup> that its non-communist members "seemed to feel a good beginning had been made towards our ultimate goal." It is possible—but by no means certain—that they were justified in so feeling.

The root of the difficulties that stand in the way of the completion of the Draft Covenant lies in the nature of the problem of implementation.<sup>4</sup> Effective measures of implementation mean the readjustment of the relations between private persons and the states to which they belong. If such readjustments are accomplished through the intervention of United Nations agencies, the relationship between the United Nations and its Members will also be changed. Effective implementation cannot be imagined except by measures which will put the United Nations well on the road towards transformation into a genuine World Federation. In the United States the original federal Bill of Rights did not apply to the relations between private persons and the governments of the states in which they resided. It applied only to the relations between the individual and the United States. It was not until the adoption of the Fourteenth Amendment that the federal Bill of Rights began to cause the readjustment of the relations between the individual and his own state. If the United Nations should follow the example of the United States, a Covenant such as the Commission on Human Rights is trying to draft would not be adopted for a long time. The readjustment of the relations between Americans, Englishmen, Frenchmen, Russians, etc., and their respective states would be left to the lawmakers of the states themselves, acting under the inspiration of the Universal Declaration of Human Rights to approximate the standards established by the Universal Declaration of Human Rights as rapidly as circumstances should permit.

The task remaining for the present Commission on Human Rights would not be to draft a Covenant designed to put the United Nations at one stroke in the position reached by the United States after the adoption of the Fourteenth Amendment. Instead of trying to reform immediately the legal relationships between individuals throughout the world and the particular states in which they reside, the efforts of those who desire to promote greater respect for human rights throughout the world by law would be directed toward promoting greater respect for the

<sup>3</sup> 6 U. N. BULL. 3 (July 1, 1949).

<sup>4</sup> See HOLCOMBE, *op. cit. supra* note 2, c. V, The Problem of Enforcement.

rights of persons regarded as citizens of the world. This means, among other things, insuring the right of persons everywhere to travel to the seat of government of the United Nations, to be informed concerning what is being done there, to report these proceedings to their countrymen without interference by the government of their own state, to criticize the attitude of their own government toward the questions under consideration by the organs of the United Nations, and to urge the adoption by their own government of such policies in international affairs as meet with their approval. A Covenant directed toward this end would mark a great advance over the present state of observance of human rights. It would greatly aid the United Nations in performing its duties under the Charter without interfering with the relations between the governments of Member Nations and their own subjects more than would be necessary to protect the rights of the latter as citizens of the organized world.

The United Nations has already made substantial progress toward the implementation of the rights of mankind regarded as members of an international community. The first General Assembly recognized the freedom of information as "the touchstone of all the freedoms to which the United Nations is consecrated." It issued a call for an international conference on freedom of information, which was eventually held in Geneva in the Spring of 1948 and attended by the representatives of more than half a hundred nations. This United Nations Conference<sup>5</sup> drafted three conventions, relating to freedom of information about affairs of international interest, designed to be the basis of international covenants when approved by the proper organs of the United Nations. Favorable action was taken by the third General Assembly on part of the program drafted by this Conference. Such conventions, when duly ratified, will provide a body of international law promising better protection than heretofore for the fundamental freedoms which are most important to the peoples of the nations regarded as citizens of the world. The problem of devising suitable measures of implementation for such a body of international law should be more manageable than that of implementing a Covenant such as the Commission on Human Rights is trying to draft. The Commission might well consider the wisdom of drafting a Covenant limited to the protection of those fundamental freedoms which are essential to a proper functioning of the United Nations itself before trying to complete the more ambitious and difficult task of enforcing all the rights which may be deemed necessary for the complete establishment of modern democracy in each of the various countries of the world. The best should not be permitted to become the enemy of the good.

<sup>5</sup> *Id.* at 141-151.