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Human Rights Law-Making in the United Nations, 1 Harv. Hum. Rts. Y.B. 335 (1988)

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In his book *Human Rights Law-Making in the United Nations*, Theodor Meron takes a constructive approach towards evaluating the quality and effectiveness of the UN human rights policy-making system. Meron first selects several policy instruments for analysis, identifying their technical weaknesses. He then evaluates structural problems inherent in the law-making institutions, proposing reforms for the institutions as well as for the human rights law-making process itself.

As an institution which protects human rights, the UN's legitimacy depends on its acceptance by the constituent States. A fundamental weakness in the UN's ability to promulgate and effectively implement human rights legislation is the reluctance of individual States to support legislation due to unacceptable provisions. For example, the mandate in Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women,¹ ("Discrimination Against Women Convention") which demands that States take "all appropriate measures . . . to modify . . . *customs and practices* which constitute discrimination against women" (p. 64) (emphasis added), potentially conflicts with the rights of ethnic and religious groups whose deeply-rooted traditions restrict women's freedom. Likewise, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention"), by mandating the imposition of criminal liability for the dissemination of ideas based on racial superiority or hatred,² infringes on freedoms of speech and association which democratic societies consider inviolable. The existence of such conflicts, while perhaps inevitable in an international forum as diverse as the UN, greatly impedes progress in the formulation of human rights instruments. But Meron believes that the political nature of this forum does not preclude the possibility nor the need for progressive change.

Although UN human rights instruments embrace admittedly ambitious and commendable goals, Meron contends that inadequacies in the drafting of these instruments have created conflicts of interest with other human rights instruments, gaps in the protection of certain rights and unrealistic policy objectives. Meron discusses some of the drafting errors he considers to be most blatant in three of these instruments: the International Covenant on Civil and Political Rights

1 *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) 193, U.N. Doc A/34/46 (1979) [hereinafter *Discrimination Against Women Convention*].

2. Article 4(a) declares "an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination . . . and also the provision of any assistance to racist activities, including the financing thereof." 660 U.N.T.S. 195, reprinted in 5 INT'L LEGAL MATERIALS 352 (1966); Meron at 318.

("Political Covenant"),³ the Discrimination Against Women Convention and the Racial Discrimination Convention.

The Racial Discrimination Convention drew its impetus from the UN's desire to end discrimination against blacks and other non-whites. The Convention drew widespread support, so that it was rapidly adopted and ratified by more States than almost any other human rights treaty. The Convention appears to embrace the purpose of achieving equality of result, not merely equality in the sense of equal treatment. For example, Article 2(2) of the Convention obliges State Parties to take affirmative action to achieve racial equality (p. 37), and Article 2(1)(c) requires that States review government policies and rescind any laws which have the effect of creating or *perpetuating* racial discrimination (p. 14) (emphasis added). However, the Convention's definition of discrimination does not explicitly call for equality of result.⁴ Furthermore, the affirmative action provision fails to define which "racial groups" should benefit from special measures or what political, economic or social circumstances warrant the implementation of such measures. To illustrate, Meron points out that by defining a group by its minority status, a State could avoid its duty towards that group by asserting that the group constitutes the largest percentage of the population. Here, Meron fails to cite any specific examples, e.g., the use of this tactic to perpetuate apartheid in South Africa. Strangely enough, Meron does not mention South Africa at all in his discussion of the Racial Discrimination Convention. Likewise, if a racial group is defined by physical or ethnic characteristics, it is unclear to what extent that group must differ from the rest of the population in order to benefit from the affirmative action provision. Thus, Meron suggests that a State's obligations should depend on a particular group's access to political and economic resources and not on a numerical or anthropological basis.

Article 2(1)(d) of the Convention requires that States "prohibit and bring to an end, by all appropriate means . . . racial discrimination by any persons, group or organization" (p. 18). But when applying policy as articulated in Article 2(1)(d), what area of private life remains beyond its reach? Meron argues that by failing to define the extent to which a State may act to enforce the prohibition of discriminatory practices, implementation of the Convention threatens to jeopardize freedoms of thought and expression. Thus, countries in which these

3. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter *Political Covenant*].

4. Meron writes: "The Committee . . . appears to regard equality of result as the principal object of the Convention. That goal is reflected in several provisions of the Convention, for instance Arts. 1(4) and 2(1)(c), but is not explicitly stated in the Convention's definition of racial discrimination" (p. 12).

values are protected have had to resort to reservations to the Covenant.⁵ According to Meron, proper balancing between protection of privacy and the elimination of discriminatory practices could be achieved by adopting an approach analogous to that embraced by the United States Supreme Court in the case of *Roberts v. United States Jaycees*,⁶ whereby activities of large private entities and primarily nonselective organizations would be deemed public, and thus subject to State restrictions.

The Discrimination Against Women Convention suffers from similar drafting problems. Meron describes the Convention as "the first universal instrument which focuses on the general prohibition of discrimination against women" (p. 53). Indeed, Meron agrees that the Convention's focus on equality of result is necessary in order to achieve systemic change.⁷ However, many provisions in the Convention are not sufficiently explicit. Article 4(2) exempts from the definition of discrimination measures which are aimed at protecting "maternity," thereby leaving open the danger that this provision may be used as a pretext to discriminate for "protective" purposes (p. 73). Article 11, which refers to the right to job promotion, does not protect against such discrimination during pregnancy or maternity leave (p. 75). In Meron's view, a provision such as that contained in Title VII of the Civil Rights Act,⁸ which requires that pregnancy be treated like other temporary disabilities for employment-related purposes, would fill this gap.

5. For example, Belgium has emphasized the need both to adopt the necessary legislation as embodied in the Convention and to respect freedoms of expression and association. Great Britain has limited the Convention's obligations to the extent to which they may be fulfilled with due regard to the right to freedoms of opinion and peaceful assembly. The United States has also made a declaration limiting the scope of obligations assumed under the Convention to those which would not restrict the right of free speech as guaranteed by the United States Constitution and laws of the United States (p. 31 n.90).

6. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the United States Jaycees imposed sanctions on two Minnesota local chapters for admitting women as regular Jaycee members in violation of the Jaycees' bylaws. Local chapter members filed discrimination charges against the organization under the Minnesota Human Rights Act, MINN. STAT. § 363.03, Subd. 3 (1982), which prohibits the denial to any person of the "full and equal enjoyment of goods, services, facilities . . . of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.* at 615. The Supreme Court held that application of the Act, by compelling the Jaycees to accept women members, would not abridge male members' freedom of association guaranteed by the First Amendment. In reaching this decision, the Court considered particular features of the organization, such as its large size, lack of criteria in judging applicants for membership and the degree to which outsiders participated in the organization's activities. The Court concluded that Minnesota's compelling interest in eradicating discrimination justified the Act's minor impact on the male members' freedom of association.

7. Discrimination against women is defined in Article 1 as follows: "any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms in the political, social, cultural, civil or any other field" (p. 59) (emphasis added).

8 Civil Rights Act of 1964. 42 U.S.C. § 2000e(k).

The Discrimination Against Women Convention resembles the Racial Discrimination Convention in that both instruments define discrimination so as to encompass private acts. In fact, to the extent that the Discrimination Against Women Convention seeks to abolish "customs and practices" which discriminate against women,⁹ Meron argues that it conflicts with the ideas embraced in the Racial Discrimination Convention as well as in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.¹⁰ Moreover, the Discrimination Against Women Convention contains a resolution of conflicts provision (Article 23) which gives interpreting bodies little guidance as to which policy should govern when selecting or balancing conflicting rights. The resolution states, "[n]othing in the present Convention shall affect any provisions that are *more conducive* to the achievement of equality between men and women . . ." (emphasis added).¹¹ According to Meron, this simplistic approach does little to clarify the relationship between conflicting priorities.

Meron refers to the Political Covenant as "the most important universal instrument on civil and political rights . . ." (p. 83). One of the main weaknesses of the Covenant, however, relates to the right given State Parties to restrict the application of certain articles of the Political Covenant in times of emergency (Meron refers to this as the right of derogation). Since it is in times of emergency that human rights abuses are most extreme, such derogation clauses deserve special attention. The potential for governments to abuse these clauses is considerable, particularly in view of the fact that certain countries have extended states of emergency indefinitely. Meron cites the example of Chile, where "since 1973 not one day had passed . . . without a state of emergency being in force" (p. 88). Meron concludes that the "real value of human rights instruments should therefore be tested by examining their derogation clauses" (p. 87). The Political Covenant falls short in this regard. Although the Covenant requires that a State notify other State Parties when it invokes its derogation right, the Covenant imposes no penalty for failure to notify. In effect, therefore, the Covenant has no real deterrent effect. The Covenant's weakness with regard to derogation rights is compounded by the fact that the list of non-derogable rights (those rights which must be absolutely

9. Article 2(f) demands "appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women" *Discrimination Against Women Convention*, *supra* note 1; Meron at 64 (emphasis added).

10. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G A Res. 36/55, 36 U.N. GAOR Supp. (No. 51) 171, U.N. Doc. A/36/51 (1981). Adopted by the General Assembly of the UN on November 25, 1981

11. *Discrimination Against Women Convention*, *supra* note 1. Meron at 77

respected by all States at all times) listed under the Covenant is extremely limited.¹² One provision protects persons from imprisonment for the failure to fulfill a contractual obligation (Meron calls this a non-essential provision whose inclusion amongst non-derogable rights is "bizarre"), but the Covenant fails to provide due process guarantees or to prohibit deportation. Some non-derogable rights, although included in the Covenant, are not clearly defined. For example, Article 7 fails to provide criteria with which to distinguish torture from lesser forms of cruel treatment.¹³ This lack of criteria creates ambiguities when attempting to apply the Article to concrete cases.

Although deficiencies in the instruments discussed above involve in part the inability of policy-makers to reach a political consensus, Meron claims that these deficiencies could have been resolved or at least alleviated through better drafting. Meron also suggests that, although human rights instruments should be more advanced than the mores of the community, at times the moral ideal should be relaxed in order to encourage greater acceptance of the instrument among the State Parties. On the other hand, Meron observes that the broad range and sensitive nature of the issues dealt with by the Political Covenant makes the possibility of obtaining a consensus on amendments to the Political Covenant unlikely; as an alternative, he points to gap-filling methods. For example, in the instance of torture, the UN has already adopted a separate instrument, the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴ The further adoption of specialized instruments in areas such as abolition of the death penalty or the elaboration of certain non-derogable due process rights would remedy other weaknesses inherent in the Political Covenant.

Meron's discussion of the Political Covenant illustrates how he acknowledges the practical difficulties involved in formulating an instrument which serves diverse needs, but he goes beyond a critique of the instruments. More importantly, Meron proposes that the con-

12. The list of non-derogable rights includes: Article 6 (right to life), Article 7 (prohibition against torture), Article 8(1) (prohibition against slavery), Article 8(2) (prohibition against involuntary servitude), Article 11 (prohibition against imprisonment for inability to fulfill a contractual duty), Article 15 (prohibition against holding one guilty of a criminal offense on account of an act or omission which did not constitute such an offense), Article 16 (right to recognition as a person before the law) and Article 18 (right to freedom of thought). See *Political Covenant*, *supra* note 3; Meron at 91.

13. Article 7 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Political Covenant*, *supra* note 3; Meron at 297.

14. *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR Supp (No. 51) 197, U.N. Doc. A/39/51 (1985).

flicts which exist between different human rights instruments (or within the same instrument) can be remedied through structural and procedural changes in the law-making process itself. In particular, Meron analyzes structural weaknesses in the hierarchy of international legal norms which underlie human rights policy. He then evaluates inconsistencies in the interpretation and legislation of legal instruments. Finally, Meron suggests ways in which the UN could integrate its law-making system, both through the adoption of novel legislating techniques and through the creation of specialized bodies which would deal exclusively with UN human rights law-making.

Formulating a given policy instrument involves a prior determination of values to be protected. When there is no consensus on those values (e.g., advancement of women's rights versus elimination of racial or religious discrimination), conflicts arise in the implementation of human rights policy. Thus, Meron argues that an underlying complicating factor in the field of human rights law-making is the lack of a defined hierarchy of international legal norms.

Unlike national legal systems where, as in the United States, constitutional provisions "trump" ordinary statutes, in international law such instances are rare. One exception to the absence of hierarchical ordering of rights is the concept of *jus cogens*. Although the legitimacy of this principle is not disputed, in practice the concept is still of limited applicability.¹⁵

But typical of this lack of hierarchical ordering of rights is the confusion surrounding the terms "fundamental human rights," "basic rights of the human person" and other rights. Although there has been much academic discourse over distinctions among these concepts, Meron contends that the various terms have been used interchangeably in the formulation of human rights instruments. The historical development of such terms has helped to establish the idea, essential to the advancement of human rights, that there is a certain class of "fundamental" rights, firmly rooted in international law, which all States have a legal interest in protecting. Nonetheless, at the present time there is no accepted system by which such higher rights can be determined. Indiscriminate use of such labels, Meron warns, may adversely affect the credibility of human rights as a legal discipline. The international community should rather direct its efforts towards defining the legal significance of a distinction between ordinary and

15. This principle is defined in the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at Art. 53, as a "norm from which no derogation is permitted," Meron at 190. Meron questions the practical relevance of this term to agreements implicating human rights: "States are not inclined to contest the absolute illegality of acts prohibited by the principle of *jus cogens*. When such acts do take place, States deny the factual allegations or justify violations by more subtle or ingenious arguments," Meron at 190.

higher rights, extending the internationally-recognized list of non-derogable rights and allowing the concept of *jus cogens* to develop gradually through general consensus.

With regard to the interpretation and implementation of existing human rights instruments, Meron advocates the development of an integrated system of implementation, ideally through the establishment of a UN human rights tribunal which would supervise the entire body of UN human rights law. A single supervisory organ would serve to reduce the conflicts which arise among diverse policy instruments by balancing differing policies against each other in much the same way that national courts conduct "balancing tests." Furthermore, in any particular adjudication, a co-ordinated system of interpretation would work to raise overall standards by evaluating norms developed in two different organs and applying the norm most favorable to the outcome of the particular case. The Court of Justice of the European Communities has taken this approach; however, most supervisory organs apply the norms articulated in their founding instruments. Meron warns that an organization's ability to achieve higher norms is limited by the willingness of the States to abide by these norms.

Meron also points out legislative techniques which would both integrate the law-making system and raise normative standards. He cites the example of the Council of Europe, which has succeeded in raising its regional standards to the level set by global bodies through the adoption of additional protocols to existing instruments via a legislative process. In recognition of the fact that the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶ had embraced a narrower scope of norms than those embraced by the Political Covenant, the Council of Europe incorporated an additional list of rights (including the abolition of the death penalty in peacetime), to the European Convention through the protocol adoption process. The Council of Europe's approach is particularly desirable in that it views law-making not as the creation of a particular instrument, but rather as a continuing, evolving process.

To reduce conflict between human rights instruments, Meron cites a number of specific techniques which the International Labor Organization ("ILO") proposed in 1973.¹⁷ An organization should, whenever possible, use legislative restraint if a matter has previously been left to another organization. If existing legislation is not satisfactory, it should undergo revision by the enacting organ. Cross-reference clauses, if formulated correctly, can clarify which of two norms should

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

17. Meron at 202-03.

govern, particularly where there are normative differences between separate instruments (such as the conflict between discrimination against women and religious freedom). Meron does concede that some conflicts are due to political differences rather than technical considerations, but he stresses that ambiguous clauses not only fail to prevent conflicts, but they present problems of interpretation. Meron advocates the establishment of an interorganizational committee to detect normative and jurisdictional conflicts at an early stage with an aim towards proposing solutions.

With regard to institutional structure, Meron suggests throughout his analysis that the UN create specialized bodies which would serve to integrate policy legislation and implementation. On a broader level, Meron proposes that the General Assembly establish a small body of experts, entrusted with the duty to continuously review human rights instruments in the entire UN system. Ultimately, Meron urges the creation of an organ that would devote itself exclusively to human rights law-making (the Human Rights Commission, which devotes much of its energies to investigating human rights abuses, cannot adequately fulfill this role). The success of such organizations as the ILO demonstrates that specialized bodies with a highly structured procedure and expert personnel have proven to be effective in the formulation of UN policy.¹⁸

Skeptics may argue that the political nature of human rights policy-making would make any substantial reforms unlikely, or that the UN is already overstaffed. But it is Meron's principal contention that, regardless of political considerations, the need for structural and procedural reforms does in fact exist: "[t]he subject of human rights law-making is crucial, the present system inadequate, and reform needed. The academic community therefore has both the moral and professional obligation to lead the way, to suggest reforms, and to work for their adoption" (p. 291).

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18. Meron describes the ILO's legislative procedures as being highly structured and known for their proven effectiveness. He observes, moreover, that "there is no reason why some of its features should not inspire appropriate reforms in UN human rights law-making" (p. 283).