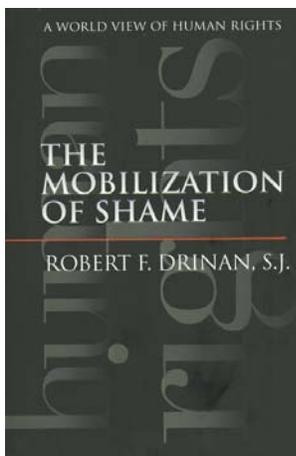


## Internationally Protected Human Rights: Fact or Fiction?

By Paul J. Magnarella

**Theory and Reality in the International Protection of Human Rights** by J. Shand Watson. Ardsley, New York: Transnational Publishers, 1999. 340pp.



**The Mobilization of Shame: A World View of Human Rights** by Robert F. Drinan, S.J. New Haven: Yale University Press, 2001. 256pp.

*From real laws come real rights; from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights...*

— Jeremy Bentham, Critique of the French Declaration of the Rights of Man and of the Citizen.

Many persons concerned with the issue of human rights fall into either the natural law or positive law camps. Natural law theorists believe humans share a universal dignity that rests on a universal moral foundation. This universal dignity is expressed by universal respect for human rights. Each person is entitled to this respect simply because he or she is human. For natural law theorists, law and morality ought to be congruent. When law is not congruent with the morality of universal human dignity, natural law theorists regard it as temporarily deficient. The optimistic among them believe that law ought to and will eventually evolve towards congruence with morality. Many maintain that immoral laws issued by sovereign authorities are not deserving of the “law” label. In addition, natural law theorists often make morality-based claims for human rights that are not supported by current law.

By contrast, positive law theorists focus on what law is and do not necessarily believe in the requirement of a law-morality congruence, nor in the inevitable achievement of universal respect for human dignity. For them, “rights” that are based on the morality of human dignity—but unsupported by sovereign legislative authority—are “imaginary rights,” not law. Authors J. Shand Watson and Robert F. Drinan clash over the same issue that Bentham, John Locke, and others have debated since the seventeenth century: are internationally protected human rights real or imaginary? Watson says imaginary; Drinan, real.

### **Gap between Theory and Reality**

J. Shand Watson of Mercer University Law School refutes claims that human rights law creates legally binding international norms. He maintains there is the gap between the theory of human rights and the reality of human rights abuses as evidenced by appalling violations by states within their own borders. During the 1917-1990 period, for example, the number of people killed by their own governments reportedly was approximately 119,400,000—four times as many as those killed in all foreign and domestic wars! (Watson: 3). Human history has witnessed “a continuum leading ineluctably to the massive slaughters in Russia and Cambodia, the genocide of the Indian populations in North and South America, the starvation of Ethiopian citizens by their government, and the tribal excesses in Rwanda and Burundi” (Watson: 1). Watson attributes these mass killings, in large part, to the ineffectiveness of international law to protect human rights and to universal human nature. “There is in human history,” he writes, “a thread of violence and inhumanity which seems, regrettably, to remain fairly constant” (Watson: 1).

Watson argues, in the classic positivist sense, that the essence of a legal right is enforceability: a “legal right” which is commonly violated with impunity is not a legal right at all. Because, he maintains, the international system has no legislative and enforcement mechanism, human rights are and have been repeatedly violated on a large scale, despite the existence of many human rights conventions. Consequently, Watson insists that human rights are not *real* international legal rights. Thus, either the brutalization of civilians by state police and militaries is not subject to any prohibitive rule of international law, “or else the strictures of that system are so insignificant and so ineffective as to be of little practical worth” (Watson 14).

Almost in exasperation, Watson writes that “despite the vast amount of information available... on the steady worldwide juggernaut of torture, starvation and mass slaughter, a veritable growth industry has sprung up in the academic world dedicated to the business of endlessly stating and restating that human rights are currently protected by international law” (Watson: 13). He goes on to chide those academics who make such “anodyne statements to the effect that the Universal Declaration of Human Rights ‘is now part of the customary law of nations and therefore is binding on all States’” (Watson: 13). Watson sees starry-eyed academics making these *imaginary* claims despite the appalling record of human rights abuses and lack of enforcement since World War II in places as disparate as Ethiopia, China, Uganda, the former USSR, Cambodia, Palestine, Liberia, Bangladesh, The Sudan, Chile, East Timor, Rwanda, and Chechnya.

### **Centralized vs. Decentralized Law Regimes**

Watson also faults proponents of human rights law for allegedly misrepresenting the international legal regime by subjecting what is basically a decentralized customary system to a series

of hierarchic assumptions that are alien to it. The result, he claims, is a gap between actual state behavior and posited human rights law. Again, he faults academics: “Unfortunately, those engaged in the burgeoning business of academic human rights seem to be more preoccupied with the finer points of their work, and tend to ignore the substantial, and painfully obvious, evidence to the effect that states and governments are only paying ‘lip-service’ to the rules” (Watson: 19).

Following the line of reasoning offered by H.L.A. Hart in *The Concept of Law* (1961), Watson argues that international law lacks a legislature, courts with compulsory jurisdiction and a centralized coercive enforcement structure. International law, he maintains, is a primitive horizontal system, comprising only primary rules, without secondary rules of legislative, adjudicative and enforcement procedures. On the international plain there is a growing body of human rights rules and a parallel body of thoroughly inconsistent state practice evidenced by worldwide torture, starvation and mass slaughter.

### **Imagined Reality?**

The Rev. Robert F. Drinan, S.J., professor at Georgetown University Law School and former member of Congress from Massachusetts (1971 to 1981), makes just the kinds of statements and claims that Watson condemns as inaccurate, academic wishful thinking. In his broad overview of human rights developments in the last half of the twentieth century, Drinan is hopeful, but not without disappointment.

Drinan participated in the 1993 UN World Conference on Human Rights in Vienna as a delegate of the American Bar Association. He maintains that the Vienna Declaration “constitutes customary international law” [and] “will continue to be accepted as binding on governments everywhere” (Drinan: x). Yet he offers no evidence that any court has ever invoked the Vienna Declaration as its rule of decision or guiding authority in any case. He acknowledges that the Declaration “contains some visionary and idealistic conclusions which have not yet entered into the public consciousness of the world—or even into the consciousness of some of its human rights activists,” however, he insists, its “conclusions can still be regarded as customary international law” (Drinan: x). I am sure Watson will consider using these statements in the next edition of his book as an example of academic double talk. Drinan’s statement that the right to food is “bestowed by customary international law on every person on the planet” is certainly idealistic (Drinan: 122). Watson might ask who has the legal obligation to feed the starving peoples of Africa? How can these peoples enforce their right to food?

### **The United States and International Human Rights**

Drinan devotes a good portion of the book to the US treatment of human rights conventions. He erroneously states that the US ratified the Covenant on Civil and Political Rights in 1994 (Drinan: 7); the year was 1992. He correctly points out, however, that the US reservations that conditioned its ratification mean that the US has not committed itself to anything beyond what US courts had already deemed necessary under US domestic law. Drinan notes that generally when the US ratifies a human rights convention, it does so with limiting or even “crippling” reservations and refuses to do more than what US courts have ruled is constitutionally required. Drinan relates the interesting historic fact that during the Eisenhower administration in 1953, Senator John Bricker,

Republican of Ohio, proposed an amendment to the Constitution that would have prevented any UN human rights convention from becoming the supreme law of the land as do other US treaties.

Drinan believes that “America’s reluctance to enter into treaties and to be judged by commissions and tribunals is deep-seated among Americans” (Drinan: 31). The US is one of a few countries that refuse to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). President Jimmy Carter signed that Convention in 1980 and submitted it to the Senate for its advice and consent. The subsequent Republican administration offered it no support, but Democratic President Bill Clinton did. Even though the State Department, on behalf of the Clinton administration, offered four reservations, four understandings and two declarations, addressing many of the concerns of recalcitrant senators, the Senate still failed to take positive action on the Convention.

The story of the Convention on the Rights of the Child (CRC) is similar. Drinan explains that “the failure of the United States to ratify the convention is due to the existence of a handful of individuals and a few radically conservative groups that somehow think that the Convention on the Rights of the Child is anti-family” (Drinan: 46). Yet, he notes that the US leads the developed world in child poverty.

### **Can Foreign Assistance Make Human Rights Real?**

Drinan describes the background to the US Congress’ creation of Section 502b of the Foreign Assistance Act (promoted by Congressman Don Fraser, Democratic Representative from Minnesota). The Act provides that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights” (Drinan: 61). The section allows the president the discretion to certify that extraordinary circumstances exist that warrant exceptions. The rationale for the section was that the US should avoid identifying with governments that deny their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of US policy. Drinan laments that “these laws have led to a cutoff of aid in fewer than ten instances—mostly in Latin America” (Drinan: 62).

Jimmy Carter, promising to make human rights the soul of his foreign policy, established the Bureau of Human Rights and Humanitarian Affairs (later renamed the Bureau on Democracy, Human Rights, and Labor) within the State Department to fulfill the requirements of Section 502b. The State Department reports on the human rights practices of practically every country—except the US. Drinan claims the US State Department human rights reports are a resort to the “mobilization of shame”: “the moral power which, more than laws or economic sanctions, will induce nations to follow the less traveled road that leads to democracy and equality” (Drinan: 94). With this statement Drinan appears to be in agreement with Watson’s claim that the international human rights regime has no formal enforcement power. Is the discretionary application of shaming tactics enough?

After Carter, Drinan writes, Republican President Ronald Reagan converted the Bureau into an anti-Communist propaganda machine, and human rights went on the back burner, if not off the stove completely. Congress had to override a Reagan veto in order to implement economic sanctions against the apartheid South African regime. Apparently, shame alone would not have done the job.

Drinan is especially critical of the State Department's human rights reports on certain Latin and Central American countries that the US has been involved with. "There is something artificial, pretentious, and hypocritical about the way in which the US government through the State Department sits in judgment every year on the state of human rights in El Salvador. The same could be said about Nicaragua" (Drinan: 89). He notes that the Nicaraguan report did not refer to the massive US intervention and support for the Contras. Drinan maintains that a conflict of interest between accurately reporting on a country's human rights practices and US foreign policy concerns prevents the State Department from accurately assessing human rights practices abroad. Consequently, independent NGO critiques of the reports are valuable.

US foreign policy concerns partially stem from economic and constituent pressures. Despite China's deplorable human rights record, the US continues to grant it Most-Favored-Nation trading status. In part, Drinan explains, this is because American farmers want the opportunity to sell massive amounts of grain to China. There are also American middlemen and retailers who profit from the import and sale of inexpensive Chinese products of all kinds.

Drinan's claims that "the fact that nations do not openly criticize the US for its involvement in the human rights conditions of other nations is a silent concession that the US is deemed the world's principal leader in advancing human rights" (Drinan: 63). In fact, cries of American hypocrisy are issued frequently by China, Iran, and other countries that the US criticizes. China now puts out its own annual human rights report on the U.S., charging it with racism, genocide and other human rights breaches.

### **Can US Courts Make Human Rights *Real*?**

Drinan idealistically believes that US courts can deliver justice to the world's torturers and thereby make some international human rights *real* rights. He discusses the importance of *Filartiga v Pena Irala* (1980), a civil case in which Paraguayan citizens residing in the US were able under the Alien Tort Statute (ATS) to successfully sue Pena, a former Paraguayan police official, in a US court, for torturing a family member in Paraguay. He doesn't mention, however, that US officials allowed the defendant to leave the US before the court dealt with the merits of the case. Consequently, Pena never had to face an American court to answer for his torture nor pay a penny in compensation. Rarely in these types of cases, whether brought under the ATS or the Torture Victim Protection Act, have plaintiffs been able to collect their judgment awards. Also, because the defendants must be in the US subject to Service of Process, Drinan's claim that "the US puts the world's torturers on trial" is an exaggeration (Drinan: 95). These Acts provide for civil, not criminal trials, and thus far they have not proven to be either effective deterrents or punishments for torture.

Drinan speaks highly of the independence of the US judiciary. He is mostly correct. One wonders, however, how a fair-minded, independent judiciary could have ruled that a valid extradition treaty with Mexico does not preclude US agents from conspiring to violate a Mexican national's human rights by kidnapping (rather than extraditing) him to stand trial in a US court (*United States v. Alvarez-Machain*, US Supreme Ct. 1992).

The creation of a United Nations-based international criminal court would certainly help satisfy Watson's criteria for real international enforcement of human rights law. Drinan laments, however, that the US will not ratify the Statute of the International Criminal Court (ICC). He explains that the Clinton Administration was inhibited by Senator Jesse Helms, who proclaimed that the ICC would

be dead on arrival at the US Senate, and the Pentagon, which did not want to expose American military personnel to a foreign court, even if they had been indicted for the world's most serious offenses: genocide and crimes against humanity. Drinan carefully spells out the safeguards in the ICC statute that would prevent the kinds of politically motivated indictments that the Pentagon and State Department fear. The safeguards have not, however, persuaded the ruling Republicans. It is, of course, ironic that the U.S.—which created the Nuremberg Tribunal and has strongly supported the Criminal Tribunals for the former Yugoslavia and Rwanda—opposes an international tribunal that could have jurisdiction over Americans. Apparently, international justice should apply only to others.

### **An Exception to Watson's Rule: The Council of Europe**

Although Watson's critique of international human rights presents an intellectual challenge to human rights advocates and like-minded academics—such as Drinan—the picture he paints is in black and white only, whereas shades of gray are needed. His analysis has limited predictive value; it fails to accommodate evolutionary change in the international human rights regime.

For example, Watson acknowledges that to many observers, the European human rights regime, with its Convention for the Protection of Human Rights and Fundamental Freedoms and its Human Rights Court, appears to be successful. Council of Europe states have ratified the Convention and recognize the Court's jurisdiction both for interstate and individual complaints. Consequently, many individuals living in Europe have been able to file complaints against their countries of residence with the Court, and states party to the European Convention have generally respected the Court's decisions. The Council of Europe also has an enforcement mechanism in the Council of Ministers. Watson, however, discounts this example as an anomaly. "Clearly," he writes, "the European experience is due to the fact that the states involved share the same culture, standard of living, and high regard for the individual" (Watson: 162). "One cannot argue," he continues, "that because there is a more effective system of secondary norms in Europe there is some likelihood of the same occurring in broader treaties" (Ibid.).

Watson's statement is not only factually incorrect, it is not predictive of change, when, in fact, change has been progressive. For example, the Council of Europe was founded in 1949 after centuries of war in Europe to defend human rights, parliamentary democracy and the rule of law. By 1990, it had 34 member states. By December of 2003, its membership had expanded to 45 states, including practically all West European ones as well as such diverse countries as Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Cyprus, Georgia, Estonia, Malta, Macedonia, Moldova, the Russian Federation, Serbia and Montenegro, and Turkey. Its membership has become Euro-asiatic.

Even at the time of Watson's writing, Turkey (a country whose population is over 90 percent Muslim) was a member of the Council of Europe and had recognized the Court's jurisdiction for both interstate and individual complaints. Wide variations exist among the constitutions, legal histories and legal systems of the 45 states comprising the Council of Europe. Some have constitutions that are over 100 years old; others, such as the newly freed countries of Eastern and Central Europe, have new constitutions. Great Britain has no written constitution. European constitutions differ markedly as to their lists and definitions of protected rights and freedoms and the procedures for enforcing them (Janis *et al.*, 2000: 467-68). The European Convention grants the European Court of Human Rights authority to exercise quasi-constitutional supervision over the

exercise of power by those state parties to the Convention. Still, the Court's application of the Convention to states has not resulted in a totally homogenizing effect.

For instance, in a 1986 case (*Johnson v. Ireland*)<sup>1</sup> involving the right to respect for private and family life, the European Court of Human Rights reasoned that "The notion of 'respect' is not clear-cut: having regard for the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

Consequently, the European Court judges do not agree with Watson's claim concerning the homogeneous culture of Council of Europe member countries, nor do they require or expect total uniformity of application of the European Convention. They often employ the margin of appreciation in recognition of cultural variation.

### **Another Exception: The European Union**

The European Union (EU) constitutes another important example of positive evolutionary development both for international law and human rights law. The EU is a family of democratic European countries, committed to working together for peace and prosperity. Its member states have established common institutions to which they delegate some of their sovereignty. These include the European Parliament (elected by the peoples of the member states); the Council of the European Union (representing the governments of member states); the European Commission (executive body); and the Court of Justice (with jurisdiction over EU matters and states).

Initially, the EU consisted of only six countries: Belgium, (West) Germany, France, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined in 1973, followed by Greece in 1981, Spain and Portugal in 1986 and Austria, Finland and Sweden in 1995. In May 2004 the following ten Eastern and Southern European states also joined: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Bulgaria and Romania expect to follow a few years later and Turkey is also a candidate country.

In the early years, EU countries cooperated mainly on trade and the economy, but now the EU also deals with citizens' rights; security and justice; job creation; regional development; and environmental protection. "A strong commitment to human rights is one of the principal characteristics of the European Union....the Community has taken notable initiatives in a wide range fields from gender equality to racism and xenophobia." (Alston and Weiler 1999: 6). The EU's 1999 Amsterdam Treaty reaffirms that the Union was "founded on the principles of liberty, democracy, respect for human rights and fundamental human rights, and the rule of law" (Pinder 2001: 58). "The European Court of Justice has long required the Community to respect fundamental rights and the European Council [i.e., the Council of the European Union] has issued several major statements emphasizing the importance of respect for human rights" (Alston and Weiler 1999: 6).

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<sup>1</sup> 112 Eur. Ct. H.R. (ser A) 1986.

The EU, like the Council of Europe, has an effective vertical structure consisting of legislative, executive and judicial organs. Both of these originally purely West European institutions have expanded their memberships to include more distant and disparate states. Both are models that countries in other regions of the world are trying, with varying degrees of success, to emulate.

### **Other Regional and International Developments**

The Organization of American States has a human rights convention and court and the Organization of African Unity is in the process of creating a human rights court to support its human rights convention. The UN Security Council has created war crimes tribunals for the former Yugoslavia and Rwanda. And, the UN has established an International Criminal Court designed to try individuals responsible for the most heinous violations of human rights: crimes against humanity, genocide and war crimes. These are some important examples of progressive or evolutionary legal change in the international protection and enforcement of human rights. Watson's Theory and Reality in the International Protection of Human Rights provides an important critique, but it fails to deal effectively with current and possible future developments.

### **Conclusion**

Drinan maintains that human rights are real; they can be supported by all kinds of religions and cultures and by mobilizing shame against those state and military leaders who violate them. Watson would agree with Bentham's contention that internationally protected human rights are the creations of "poets, rhetoricians, and dealers in moral and intellectual poisons," or for short: academics. Drinan, the academic and former politician, has written the kind of book that Watson berates. It is full of claims about the existence of customary international human rights norms in the face of widespread, almost unchecked abuses. Despite this, Drinan's book is an interesting read, not for its accuracy, but for the views that the former congressman and supporter of international human rights has to offer. Watson's argument is too one-sided and dated. It fails to offer a construct for dealing with or predicting the kinds of changes that have occurred and are occurring in the international human rights arena. Unfortunately, Drinan's sympathetic "world view of human rights" contains a major gap: Israel's and the US' roles in the plight of the Palestinians.

During Drinan's tenure in the US Congress, the US vetoed over a dozen UN Security Council Resolutions criticizing Israel for its abuse of Palestinian human rights (Bennis 1996: 27). By use of its veto power, the US alone crippled the Security Council's ability to take any action against Israel to stop its human rights violations. Shaming by other countries has done little to deter Israel or help the Palestinians. During that same period, the US Congress repeatedly endorsed the policy of empowering Israel's occupation of the West Bank and Gaza [in defiance of UN Resolutions] and Israel's illegal expropriations of Palestinian territories with huge amounts of financial support. All the while, reputable human rights NGOs, such as Amnesty International, Human Rights Watch and B'TSELEM (the Israeli Center for Human Rights in the Occupied Territories established in 1989 by a group of prominent academics, attorneys, journalists, and Knesset members to "combat the phenomenon of denial prevalent among the Israeli public, and help create a human rights culture in Israel" (<http://www.btselem.org/>)) issued numerous reports documenting Israel's widespread and systematic violations of the Palestinians' human rights. Shamefully, none of this gets into Drinan's book.

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