Kazuo v. ROP, 1 ROP Intrm. 154 (1984)

JULIO KAZUO,
Petitioner,

v.

REPUBLIC OF PALAU
Respondent;

YUKIE YANO,
Petitioner,

v.

REPUBLIC OF PALAU
Respondent.

SPECIAL PROCEEDING NO. 7-83
Criminal Appeal No. 184-83
and
SPECIAL PROCEEDING NO. 8-83
Criminal Case No. 248-83

Supreme Court, Appellate Division
Republic of Palau

Writ of prohibition
Decided: November 13, 1984

Counsel for Petitioner: Douglas F. Cushnie
Counsel for Respondent: Philip D. Isaac

BEFORE: MAMORU NAKAMURA, Chief Justice; ROBERT W. GIBSON, Associate Justice; HERBERT D. SOLL, Associate Justice.

NAKAMURA, Justice.

I.

Before the Court are two cases, consolidated for the purposes of deciding identical issues raised therein. Petitioners seek writs of prohibition to restrain the trial division of this Court from conducting further proceedings in criminal actions charging petitioners with violation of RPPL ⊥155 No. 1-25.[1] The law, mandated by Article XIII, Section 13(2) of the Palau

[1] Section 5 of RPPL 1-25 provides:

(a) Any person who knowingly shall import, possess, uses, manufacture or have in his custody or control, any firearm shall be guilty of a felony and upon

Constitution,[2] prohibits the importation, use, manufacture or possession of any firearm and sets forth a penalty of imprisonment for at least fifteen years. The proceedings in the trial division were stayed pending our determination on the merits of the petitions. The stay had the same effect as though an alternative writ of prohibition had issued. Respondent Republic of Palau (hereinafter "Government" or "Republic") was asked to appear to show cause why a permanent, or peremptory, writ should not issue. On March 3, 1984, the Republic made a return to the alternative writ by filing its opposition to the petitions. The arguments of counsel were heard on April 12, 1984.

The petition of Julio Kazuo alleges in substance the following facts. On June 20, 1983, an Information was filed against Kazuo charging him with the possession, use, custody or control of a firearm in violation of RPPL No. 1-25 is cruel and unusual in violation of the principles prohibiting such punishment embodied in the Trust Territory Bill of Rights[3] and in the Palau Constitution.

Petitioner Yukie Yano was charged by Information filed ⊥156 on September 23, 1983, with unlawful possession, use or custody and control of a firearm in violation of RPPL No. 1-25 and with aggravated assault under 11 TTC § 202. Yano also filed a motion to dismiss on the same grounds set forth in Kazuo's petition. The two cases were consolidated for the purposes of the motions. On December 1, 1983, the trial division denied the motions. The petitioners then filed the instant petitions for prohibition.[4]

II.

A writ of prohibition is a common law writ which issues to prevent a lower court from acting in excess of its jurisdiction. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943); *In Re Chicago Rock Island & Pacific Railway Co.*, 225 U.S. 273, 41 S.Ct. 288, 65 L.Ed. 631 (1921). The validity of the legislation which the trial court is asked to enforce goes to the essence of the court's jurisdiction. A court has no jurisdiction to enforce an invalid

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conviction thereof shall be fined not more than $5,000.00, receive no compensation for the firearm(s), and be imprisoned for not less than fifteen (15) years.

[2] Section 13 of Art. XIII provides:

> Section 13. Subject to Section 12, the Olbiil Era Kelulau shall enact laws within one hundred eighty (180) days after the effective date of this Constitution:
>
> (1) providing for the purchase, confiscation and disposal of all firearms in Palau;
>
> (2) establishing a mandatory minimum imprisonment of fifteen (15) years for violation of any law regarding importation, possession, use or manufacture of firearms.

[3] 1 TTC §§ 1-14.

[4] It should be noted here that while the Informations charging petitioners with violations of RPPL No. 1-25 both charge possession or use, the Republic has conceded that the basis of each action is possession only. *See* Memorandum of Points and Authorities in Opposition to Petition for Writ of Prohibition, at 1.

law. *Harden v. Superior Court*, 44 Cal.2d 630, 284 P.2d 9 (1944). While there exists a difference of opinion between the parties as to the appropriateness of prohibition where a law is alleged to be invalid, we have adopted the California rule which holds that a petition for a writ of prohibition is an appropriate method of seeking relief where a criminal statute sought to be enforced is alleged to be unconstitutional on its face. *See Akiwo v. Supreme Court of Republic of Palau*, Special Proceeding No. 5-83 (Palau Supreme Court (App. Div.) (1983). *See also Dulaney v. Municipal Court for San Francisco J.D.*, 11 Cal.3d 77, 520 P.2d 1, 112 Cal. Rptr. 777 (1974); *Dillon v. Municipal Court for Monterey-Carmel J.D.*, 4 Cal.3d 860, 484 P.2d 945, 94 Cal. Rptr. 777 (1971). We therefore proceed to the merits of the petitions.

III.

A.

Articles 73-91 of the United Nations Charter (hereinafter "Charter") provide for a trusteeship system for dependent non-self-governing areas. The Republic of Palau remains a part of the Trust Territory of the Pacific Islands, a ⊥157 United Nations mandated trusteeship under the administering authority of the United States.[5] The relationship between the United States and the peoples of the Trust Territory is "a fiduciary one . . . [in which] the interests of the inhabitants of the territory become paramount." *See Temengil v. Trust Territory of the Pacific Islands*, Civil No. 81-0006 (D.N.M.I. decision on summary judgment filed March 22, 1983) at 10 (quoting Liebowitz, *The Marianas Covenant Negotiations*, 4 Fordham Int'l J 19, 79 n.236 (1980).

Under 48 U.S.C. § 1681, the United States' administrative authority is vested in agencies designated by the President until Congress provides otherwise. The President delegated this authority to the Secretary of the Interior.[6] Pursuant to this delegation, the Secretary of the Interior initially vested executive and legislative power in a High Commissioner and judicial power in a High Court. In 1964, Interior Department Secretarial Order No. 2882 created a popularly elected Congress of Micronesia to exercise legislative authority, subject to final veto by the Secretary.

In the 1970's, the inhabitants of the Trust Territory began calling for meaningful self-determination resulting in the initiation of negotiations to define a new status relationship with the United States.[7] During the course of these negotiations, the Secretary of Interior began the transfer of legislative functions from the Congress of Micronesia to the emerging entities.[8] The

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[5] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 U.S. Stat. 3301. Although representatives of Palau and of the United States have negotiated a new political relationship known as the Compact of Free Association, the plebiscite failed to approve the Compact by the required margin. *Gibbons v. Remeliik*, Civ. No. 67-83 (Supreme Court of Palau Tr. Div. Aug. 6, 1983). An amended Compact has been negotiated, the status of which has not been finally determined.

[6] *Temengil, supra*, at 10, n.21, citing Executive Order No. 11021, 27 Fed. Reg. 4409 (1962).

[7] *Temengil, supra*, p. 5, at 11.

[8] Secretarial Order No. 3027, *reprinted in Trust Territory Code*, at 44-47 (1980 ed.).

legislative authority in Palau became vested in the Palau Legislature.[9] In 1979, the Secretary of Interior issued Secretarial Order No. 3039[10] which delegated executive, legislative and judicial ⊥158 authority in the Palau District to the Republic of Palau, to be exercised according to the locally ratified Constitution.[11] On January 1, 1981, the Constitution of the Republic of Palau took effect.

B.

The curious situation in which Palau now finds itself gives rise to the unusual issue before us. Palau is currently under the administration of two governments. The will and desire of the people is expressed in the popularly ratified Constitution. Yet Palau remains a part of the Trust Territory,[12] leaving the United States with obligations toward the inhabitants under the terms of the Trusteeship Agreement.[13] It is this dual system of authority which has created the problem which we now confront.

The drafters of the Palau Constitution recognized that the United States would have some continuing authority and obligations under the terms of the Trusteeship Agreement. In response to this concern, Art. XV, Section 10 was adopted which provides:

> Any provision of this Constitution or a law enacted pursuant to it which is in conflict with the Trusteeship Agreement between the United States of America and the United Nations Security Council shall not become effective until the date of termination of ⊥159 such Trusteeship Agreement.[14]

The inclusion of this transitional directive lightens our task to a certain degree. We are not called upon here to resolve any conflicts found to exist between the rights of the inhabitants

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[9] *Ibid*, at § 3.

[10] *Reprinted in Trust Territory Code, supra* note 8, at 47-50.

[11] Secretarial Order No. 3039 did however retain in the Trust Territory Government certain defined functions. *See* Section 3 of the Order.

[12] Throughout this opinion "Trust Territory" refers to the Trust Territory of the Pacific Islands, whereas "trust territory" refers generally to territories administered under the United Nations Trusteeship system.

[13] "Trusteeship Agreement" refers to the specific agreement between the United States and the United Nations regarding the Trust Territory, whereas "trusteeship agreement" is used generically to refer to a document which implements trusteeship principles.

[14] The language of Section 10 as originally proposed allowed for transitional legislation to be enacted by the government of Palau "in order to conform to the Trusteeship Agreement." This transitional language was designed so as to "allow for adjustments that might be necessary as a result of the continuing authority of the Administering Authority." It was intended that such legislation would terminate upon the termination of the Trusteeship Agreement. *See* Palau Constitutional Convention, Special Committee on Transition, Standing Committee Report No. 45, March 8, 1979. No further illumination is given the current language as it was proposed and adopted in the Committee of the Whole without comment or report. *See* Amendment to Section 10 of Proposal No. 495, Draft 4, March 29, 1979.

under the Trusteeship Agreement and the constitutional powers of the Palau Government. Art. XV, Sec. 10 contemplates the possibility of such conflicts and sets forth the remedy: the law of Palau shall not become effective until the termination of the Trusteeship Agreement. Our duty then is only to determine whether a conflict exists to which the provisions of Art. XV apply.

IV.

A.

The Republic raises an initial issue regarding the proper political body vested with the authority to review Olbiil Era Kelulau (O.E.K.) legislation for consistency with the Trusteeship Agreement. The Republic asserts that by the provisions of Secretarial Order No. 3039, the High Commissioner possesses the sole authority to make consistency determinations. Such action would then be subject to review only by the Secretary of Interior. The Government concludes that as the High Commissioner has undertaken such a review and has found no conflicts, any and all Art. XV consistency determinations are at an end.

The Government is correct in its assertion that the Secretary of Interior has retained in the office of the High Commissioner the authority to review O.E.K. legislation for ⊥160 consistency with the provisions of the Trusteeship Agreement. Secretarial Order No. 3039, Section 4(a). However, we find nothing in this order or in any other legal provision in force in Palau which makes the consistency review authority exclusive to the office of the High Commissioner; nor are we persuaded that this should be so. As stated above, this case presents us with a question of constitutional interpretation. That this Court, under our tripartite form of government, is the institution vested with the ultimate responsibility to interpret constitutional provisions and to declare those legislative acts which transgress the bounds of constitutional authority void is not subject to dispute. "It is emphatically the province and duty of the judicial department to say what the law is," *The Senate of the First O.E.K. v. Remeliik*, Civil Action No. 192-83 (Supreme Court of Palau (Tr. Div.) Nov. 29, 1983 at 2 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, 73 (1803)); *see also United States v. Nixon*, 418 U.S. 683, 703 94 S.Ct. 3090, 3105, 41 L. Ed.2d 1039, 1061 (1974). Often, when a court is undertaking its duty to determine the rights of the people or the limits of the governmental authority, it is called upon to interpret the laws of foreign nations or to give meaning to international agreements. Such is our task here which requires an examination of the Trusteeship Agreement between the United States and the United Nations to determine whether Art. XIII, Sec. 13(2) or RPPL No. 1-25 conflict with any provisions therein.

While we should of course consider the opinion of the Executive Branch of the United States Government regarding the meaning of Trusteeship Agreement provisions, we are not bound by such interpretation.[15] Any deference here is made exceedingly difficult by the

[15] *See, e.g.*, American Law Institute, Restatement of the Law 2d, Foreign Relations Law of the United States (1965) (hereinafter "Restatement of the Law-Foreign Relations"), § 148(2) which reads:

An interpretation of an international agreement made by a national authority,

conclusionary nature of the High Commissioner's statement of consistency.[16] While a position of absolute deference would be an expedient manner by which to ⊥161 avoid addressing an emotionally charge political issue, we will not so readily abdicate our constitutional duties. In an equally difficult case facing the California Supreme Court, Chief Justice Bird made the following comments:

> Have we forgotten that justice is not a matter of expediency? It is not a cloak in which we can wrap ourselves when we find its protection most convenient. It is, rather, a matter of principle, plain and simple. If we hope to maintain a legal system characterized by justice, we cannot defer its application as to even a single case that comes before us.

People v. Tanner, 24 Cal.3d 514, 569, 596, P.2d 328, 358, 156 Cal. Rptr. 450, 480 (1979) Bird, C.J., concurring and dissenting). Accordingly, we now turn to our major task of interpreting the Trusteeship Agreement.

B.

Article 6(3) of the Trusteeship Agreement imposes upon the United States, as administering authority, the obligation to the population. This obligation regarding rights and freedoms reflects an implementation of one of the basic purposes of the United Nations[17] and of the International Trusteeship System.[18] The Charter remains mute, however, as to further ⊥162 definition of these phrases. This fact has led one commentator to note that "the function of the United Nations with respect to human rights is not very consistently determined," as the Charter "does in no way specify the rights and freedoms to which it refers." H. Kelsen, *The Law of the United Nations*, 28-30 (1950).

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whether judicial or otherwise, is not binding under international law upon a party that has not agreed to accept it.

[16] That the opinion of the High Commissioner was communicated to the O.E.K. by telex is indicative of the summary nature of the opinion. *See* Telex from High Commissioner to President Remeliik, Dec., 22 1981 (electing not to suspend RPPL No. 1-25).

[17] Article 1 of the Charter reads in part:

The purposes of the United Nations are:

[. . .]

(3) To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . . [.]

[18] Article 76 of the Charter provides in part:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

[. . .]

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to encourage recognition of the interdependence of the peoples of the world[.]

The only clarifying document which our research has covered is the "Universal Declaration of Human Rights," adopted and proclaimed by General Assembly Resolution. 6A Res. 217 (111), Dec. 10, 1948, *reprinted in Human Rights Documents*, Comm. on For. Relations, U.S. House of Rep., (Sept. 1983). Article 5 of the Declaration states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[19] Again, however, any clearer statement regarding the limits of this right generally has eluded our search.

This paucity of direct evidence regarding United Nations' definitions of "human rights" need not deter us from our quest. We must remember that we are in effect interpreting an international agreement between the United States and the United Nations. The primary object of such a task is to ascertain the meaning intended by the parties, having regard to the context in which the terms are used and the circumstances under which the agreement was made. *See Restatement of the Law, Foreign Relations, supra* p. 10, note 15, § 146. Thus, we must attempt to understand the meaning accompanying the words "human rights" as used by the parties to the Trusteeship Agreement. Although little explicit guidance ⊥163 on the question is found in the Charter, there is evidence that reasonably leads to the conclusion that the interpretation of "human rights" under the domestic law of the administering authority represents a minimal quantum of protection which must be afforded to the inhabitants of a trust territory. Several factors considered together lead us to this conclusion.

The nature and history of the trusteeship system itself supports this interpretation. The predecessor of the current model was the "Mandatory" system under the League of Nations. Under the principles of the mandate administration, the development and well-being of peoples "not yet able to stand by themselves" formed a "sacred trust of civilization." Under this doctrine, the "tutelage of such peoples" was "entrusted to advanced nations who by reason of their resources, their experience or their geographical position [could] best undertake this responsibility." *Covenant of the League of Nations*, Art. 22 (emphasis added), *reprinted in* L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations*, 653, 660-661 (third and rev. ed. 1969). Trusteeship under the Charter is essentially the same institution as the mandates. H. Kelsen, *supra* p. 12, at 566. The trustee is a state or international organization which holds in trust the power of administering a territory; this authority must be exercised for the benefit of the population. In the exercise of this power then, the administering authority, due in large part to its experience in self-government, acts as a teacher and a role model, and holds the good of the dependent peoples in "sacred trust" for the peoples of the world. It is reasonable to conclude that

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[19] Art. IV, Sec. 10 of the Palau Constitution provides:

> Torture, cruel, inhumane or degrading treatment or punishment, and excessive fines are prohibited.

While we can assume that the punishment at issue does not contravene Art. IV, Sec. 10 as the penalty is specifically mandated in Art. XIII, Sec. 13, we are not of the opinion that the interpretation given this clause by the people of Palau governs regarding the meaning of parallel language in a declaration adopted 30 years earlier by other parties. Rather, we must interpret the Trusteeship Agreement in light of the intentions and understandings of the parties when it was signed.

the trustee was intended to respect and protect the human rights and fundamental freedoms of the territory's inhabitants at least to the same extent i[t] respects those rights as to its own people. Anything less could not be considered compatible with the terms of the trust and the principles of the trusteeship system. Moreover, any disparity between the rights afforded the trust territory inhabitants and those recognized within the trustee's own jurisdiction would arguably amount to unjust discrimination in violation of the principles of the United Nations. *See* Charter of the United Nations, at Art. 1(3) (rights respected "for all without distinction as to race, sex, language or religion").

The specific terms of the Trusteeship Agreement add weight to this conclusion. As a general matter, the Charter identifies purposes and principles[,] and the trusteeship agreement imposes duties and obligations implementing those goals. H. Kelsen, *supra* p. 12, at 573. Thus, a good amount of the United Nations' control over the implementation of the trusteeship system lies in its authority to approve or disapprove the proposed trusteeship agreement. The United ⊥164 Nations Security Council approved the Trusteeship Agreement, drafted by the United States, with only minor modifications none of which concerned the issue of human rights. J. Murray, *The United Nations Trusteeship System* at 75 (1957). During the Security Council sessions on the proposed Trusteeship Agreement, the United States Representative made the following comments regarding its proposed administration of the Trust Territory:

> My Government feels that it has a duty towards the peoples of the trust territory to govern them with no less consideration than it would govern any part of its sovereign territory. It feels that the laws, customs and institutions of the United States form the basis for the administration of the trust territory compatible with the spirit of the Charter.

U.N. Security Council Off. Rec., 116th Meeting, March 7, 1947, p. 473, quoted in *People of Enewetak v. Laird*, 353 F. Supp. 811, 819 (D. Haw. 1973).

Trusteeship Agreement gives the administering authority "full powers of administration, legislation, and jurisdiction over the territory" allowing the United States to apply to the Trust Territory "such laws of the United States as it may deem appropriate." Trusteeship Agreement, Art. 3. The exercise of this authority was conditioned upon its adherence to the terms of the United Nations Charter. *Id*. at Art. 4. Additionally, the United States specifically undertook to "protect the rights and fundamental freedoms of all elements of the population." *Id.* at Art. 6(3). This authority given the United States by the United Nations to install an American system of government along with the imposition of specific obligations regarding the protection of human rights, further supports our conclusion that the parties intended that the Trust Territory inhabitants be guaranteed, at a minimum, those human rights enjoyed by the peoples otherwise within the jurisdiction of the United States.

V.

The right to be free from "cruel and unusual" punishment is deeply ingrained in Anglo-American jurisprudence. The prohibition appeared in the Magna Carta (1257), where three

chapters were devoted to the rule. It was carried on through the First Statute of Westminster (1257), the English Bill of Rights, (1689) and imported to the New World and drafted into the American Bill of Rights. *See generally Solem v. Helm*, U.S.___,___, 103 S.Ct. 3001, 3006-7, 77 L.Ed.2d 637, 645-6 ⊥165 (1983). The prohibitions embodied in the Eighth Amendment are considered so fundamental today that they are applicable to the States through the due process clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

A.

It has long been recognized by the United States Supreme Court that a sentence which is grossly disproportionate to the gravity of the underlying crime violates the constitutional prohibition against cruel and unusual punishment. *See, e.g., Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1959) (it is a precept of justice that punishment for crime should be graduated and proportional to the offense); *Robinson v. California*, 82 S.Ct. at 1421 (while a term of imprisonment in the abstract may be neither cruel or unusual it may well be so when viewed against the offense for which it is imposed).[20]

In *Solem v. Helm*, U.S., 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the Court issued its most definitive and instructive statement to date on disproportionate sentencing. The defendant was convicted in a South Dakota trial court of offering a $100 no-account check. Taking into consideration the defendant's three prior burglary convictions as well as three other minor offenses, the trial court sentenced the defendant to life imprisonment without the possibility of parole. After exhausting his state court remedies, the defendant petitioned for habeas corpus in federal court which denied the petition. On appeal, the Eight Circuit reversed, granting habeas corpus relief, which the Supreme Court affirmed. Tracing the history of the concept of cruel and unusual punishment, the Supreme Court concluded that the principle that a punishment should be proportionate to the crime is "deeply rooted and frequently repeated in common law ⊥166 jurisprudence." 103 S.Ct. at 3007-8. The Court, tracing forward, noted that the principle was adopted by the framers of the Eighth Amendment and has been explicitly recognized by the Supreme Court for almost a century. "In sum," the Court concluded, "we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id*. at 3009.

In an effort to synthesize a test by which a specific sentence could be balanced against Eighth Amendment norms, the Court drew from previous cases objective factors which could be used to guide a trial court in its analysis. First, a court should compare the gravity of the offense with the harshness of the penalty. Second, it should examine the sentences imposed for other

[20] This principle of proportionality is recognized by many of the States of the Union as well. The constitutions of several States contain express provisions mandating that every penalty be proportional to the offense. *See* S. Kadish and M. Paulsen, *Criminal Law and its Processes*, 157 note (3d ed. 1975), citing Legislative Drafting research Fund of Columbia University, Index Digest of State Constitutions 342 (2d ed. 1959). Moreover, this principle is recognized by many other States as being implicitly incorporated in their constitutions. *See, e.g., In Re Lynch*, 8 Cal. 3d 410, 422-423, 503 P.2d 921, 929, 105 Cal. Rpt. 217, 225 (1972).

crimes in the same jurisdiction. Third, the court should compare the sentence imposed in other jurisdictions for the same crime. *Id.* at 3010-11. Examining the facts before it, the Supreme Court found that the sentence was "significantly disproportionate" to the crime and was therefore prohibited by the Eighth Amendment. *Id.* at 3016.

B.

We now turn to the facts of the cases before us and balance the potential sentences against Eighth Amendment norms as set forth in *Solem*. First, we must examine the gravity of the offense and the severity of the penalty. It is not, and we add, cannot be seriously argued that the intentions of the drafters of the firearm ban were not admirable. In apparent response to the increasing threat to society evidenced by the continuing rate of crime in which firearms were involved, the framers chose a course of total prohibition of firearms. So set were they as to the inherent dangers of firearms that they rejected suggestions that the firearms be put in storage or sold for revenue.[21] They would not stop short of the total destruction of confiscated civilian firearms, an intent now reflected in the Constitution.[22] The goal of the elimination of firearms is a legitimate legislative end and in and of itself is not challenged here. It is in light of these goals that we view the crime.

We address here the crime of possession of a firearm, ⊥167 not its use. While possession itself is not a violent crime, it is a serious offense. Possession cannot be considered innocuous. The potential for immediate violence inherent to the offense is arguably unsurpassed. Assuming the requisite mental state to be present, a simple possession offense may become an assault or a robbery upon the mere act of unveiling the weapon; a finer line is difficult to imagine. The offense assumes an added dimension of gravity in a society in which firearms are prohibited. The possession of weapons by a few who act outside the law, while the remainder of the population is defenseless, has serious implications. Also, the nature of the offense renders its commission easily concealed and increases its severity. Based on these considerations, we find that the offense of possession is quite serious and weighs heavily in the balance against the invalidity of imposed penalties.

Against the gravity of the offense must be compared the severity of the punishment. Of grave concern to us initially, is the broad range of culpability which can be associated with the commission of the offense. At one extreme may be an offender who uses a weapon resulting in a homicide, the commission of which displays evidence of premeditation and deliberation. At the other end of the spectrum may be placed an elderly defendant residing in a high crime area, perhaps the victim of previous assaults, who possesses an unloaded pistol only for its deterrence value. The enormous degree of difference between the two offenders is immediately apparent. Even if we limit our examination to mere possession violations, there is still included a very broad range of culpable mental states. Yet, under RPPL No. 1-25, there is vested in the sentencing court no discretion to consider mitigating circumstances presented by the particular

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[21] *See Journal of the Senate*, 1st O.E.K., 2nd Regular Session at 125-126 (Apr. 22, 1981).

[22] Section 13 to Article XIII requires that the O.E.K. set up a mechanism for the "purchase, confiscation and disposal of all firearms in Palau." (Emphasis added). *See* the debates cited in note 21, *supra*, for the interpretation of disposal.

facts of the case. Each offender would serve at least fifteen years if convicted. The potential injustice is readily evident. Faced with this broad range of culpable conduct inherent to the offense, we must determine whether the mandatory sentence is excessive as applied to those defendants whose conduct falls within the less severe ranges of culpability covered by the offense. *See In Re Grant*, 18 Cal.3d 1, 553 P.2d 590, 598, 132 Cal. Rptr. 430, 438 (1976).

Under RPPL No. 1-25, a person found in the possession of a weapon and who harbors no other criminal intent, would serve fifteen years in custody at a minimum. This term of confinement is substantial. It represents more than one-fifth of the average person's life.[23] Imposed upon a person in the ⊥168 upper middle ages, the penalty could represent a life sentence. The vocal opposition to the inclusion of the sentence in the Constitution and to the passage of RPPL No. 1-25 offers additional evidence of the penalty's severity.

The proposal before the Constitutional Convention was not without significant opposition. Several delegates spoke against the proposal as unjustly harsh.[24] The minority report similarly criticized the draft and proposed a graduated minimum sentencing scheme of one, three and five years depending on the circumstances of the possession.[25] Some delegates voted against the proposal on the third and final reading believing it to be "cruel and unusual."[26] Similarly, in the O.E.K. debate, some members expressed concern over the harshness of the penalty, quieting their opposition only in light of the realization that attacks in that forum would be futile as the action was constitutionally mandated.[27] Under the first part of the three-step analysis then, we are of the opinion that even against what we recognize as a grave and serious offense, the mandated punishment is extremely severe in the length of the minimum sentence and in the inflexibility regarding mitigating circumstances.

The second element of the test suggests that an examination be made of the potential sentences imposed in the same jurisdiction of other crimes which may be considered of a more serious nature than the one in question. If, in this search, more serious crimes are found which are punished less severely than the offense in question, the law at issue is considered suspect. *See In Re Lynch*, 8 Cal.3d 410, 426, 503 P.2d 921, 931-2, 105 Cal. Rpts 217, 227-8 (1972).

The only crimes which draw a term greater than fifteen years are first-degree murder (life sentence)[28] and attempted first-degree murder (thirty years).[29] The few criminal acts for which a defendant potentially could be sentenced to fifteen ⊥169 years, but for which the statute also

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[23] Based on statistics of United States residents, as of 1959 the average life expectancy of birth was 69.7 years. *See* Am. Jur. 2d Desk Book, Doc. No. 142. No similar statistics of residents of Palau were available to the Court.

[24] Constitutional Convention debated, Daily Journal, 41st day at p. 5.

[25] Minority Report 40-4, Committee on Civil Liberties and Fundamental Rights, Palau Constitutional Convention, March 8, 1979.

[26] Constitutional Convention debates, Daily Journal, 50th day at p. 8.

[27] Journal of the Senate, 1st O.E.K., 2nd Regular Session at 74, 77, 124 (April 21-22, 1981).

[28] 11 TTC § 751.

[29] 11 TTC § 4.

allows less severe penalties are all serious crimes which embody real or threatened violence to persons. Among these second category crimes are attempted second-degree murder (thirty months to thirty years),[30] arson, where the building burned is a dwelling or where the life of a person is placed in jeopardy (twenty year maximum),[31] second-degree murder (five years to life)[32] and rape (twenty-five year maximum).[33] Crimes for which a fifteen-year sentence would be in excess of that authorized by law also include acts which involve the use of weapons and acts which risk serious bodily injury. Perhaps the most significant of these crimes is that of assault. The penalty for simple assault and battery is a maximum of six months.[34] Assault and battery with a dangerous weapon brings a maximum five-year sentence.[35] Aggravated assault, defined as an assault with a dangerous weapon with the intent to kill, rape, rob, inflict grievous bodily harm, or to commit any other felony against the person of another would warrant only a maximum sentence of ten years.[36] Also included among the third category crimes, for which a defendant would be sentenced less severely than he or she would be for a firearm possession conviction, include mayhem (seven years),[37] voluntary manslaughter (ten-year maximum),[38] kidnaping (ten-year maximum),[39] and robbery (ten-year maximum).[40]

Within the jurisdiction of Palau, then, we find many statutes defining crimes the commission of which cause or threaten serious bodily harm or other violence to the person, and many of which involve the use of a firearm; yet conviction of these crimes would warrant or potentially warrant less severe sentences than would mere possession of a firearm under RPPL No. 1-25.

The last of the three factors to be considered is the punishment imposed in other jurisdictions for the same crime. If the challenged punishment is found to exceed that warranted by same or similar acts in other jurisdictions, such evidence is further measure of the infirmity of the law. *See In Re Lynch, supra*, 503 P.2d at 932. The only political units to which a comparison seems appropriate are the nations of Micronesia. In each of these jurisdictions, the Federated ⊥170 States of Micronesia, the Republic of the Marshall Islands and the Commonwealth of the Northern Mariana Islands, the "Trust Territory Weapons Control Act" has been carried over under transitional provisions. The Act [41] requires that all permitted firearms be registered and

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[30] 11 TTC § 4.
[31] 11 TTC § 151.
[32] 11 TTC § 752.
[33] 11 TTC § 1302.
[34] 11 TTC § 203.
[35] 11 TTC § 204.
[36] 11 TTC § 202.
[37] 11 TTC § 1001.
[38] 11 TTC§ 753.
[39] 11 TTC § 801.
[40] 11 TTC § 1251.
[41] The Firearms Control Act was originally codified as 63 TTC § 551 *et seq*. In the CNMI it is now codified as 6 CMC § 220, *et seq.*, and in the FSM it appears at 12 FSM § 1201 *et seq*. To our knowledge the Marshalls have not yet completed their law revision project.

that possessor obtain an identification card. Violations of any provisions of the Act[42] is punishable by imprisonment of up to five years. 63 TTC § 581.

In light of these objective factors which guide our review of the sentence under the law of the United States, the cases at bar cause us great concern. Of course, any interpretation of American law as applied to the facts here presented calls for some degree of speculation as we cannot be certain that the United States Supreme Court would decide the case with the same results as we reach today; however, courts rarely have this luxury. We have been called upon to apply the constitutional provisions of our Republic, which, in this case, has necessitated interpretation of the law of a foreign jurisdiction. Upon consideration of these factors, we are of the opinion that the provisions of RPPL No. 1-25 which impose a minimum term of imprisonment of fifteen years for the unlawful possession of a firearm mandate a sentence which is "significantly disproportionate" to the underlying crime, and as such, conflicts with the principle against infliction of cruel and unusual punishment embodied in the Trusteeship Agreement.

We are aware that the decisions of the United States courts over the past two decades have found longer, and arguably harsher, sentences to be within the norms of the Eighth Amendment. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 556 (1982). However, constitutional principles are not rigid and fast; rather, they are designed with a flexibility that can survive changes in human understanding. In the words of the late Chief Justice Warren of the United States Supreme Court, the prohibition against cruel and unusual punishment "must draw its meaning from the ⊥171 evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630, 642 (1958). Justice McKenna writing for the Court in *Weems v. United States, supra*, 30 S.Ct. at 551, spoke of this adaptability:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it.". . . In the application of a constitution, therefore, our contemplation cannot only be of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Justice McKenna concluded that the concept of cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 30 S.Ct. at 553. Accordingly, while precedents should be carefully considered, they must also be thoughtfully applied. In arriving at a decision on a new application of a

[42] The only exception being improper transportation of an otherwise legal firearm which is punishable by a maximum term of three months. 63 TTC § 581(1).

constitutional principle, such precedents must yield when modern, enlightened concepts of justice so require. We believe that just such a step is necessary here.

We reemphasize our earlier comments that we do not condemn the purpose behind the constitutional provision. The intentions of the drafters and the voters are admirable and to be commended as a humanitarian attempt to curb violence in the Republic. The destruction of firearms can itself be termed an evolutionary step and the result of progressive and enlightened thought. It is this very nature of the subject matter of these cases which causes us such great difficulty in reaching the decision that we do today. Nonetheless, after much thought and discussion, we feel that to decide otherwise would represent a failure on our part to perform our constitutional duty. When faced with a similar case, California Chief Justice Bird had the following comments which eloquently express our thoughts:

⊥172 As judges, we have taken an oath of office to uphold the Constitution of this state. Thus, when a legislative enactment contravenes the Constitution, this Court cannot defer to the Legislature and remain true to its constitutional mandate. However controversial the question, the court cannot avoid an issue which goes to "the very core of our judicial responsibility." [citations omitted].

. . .

> This Court must perform the difficult task of removing itself from the politics of the moment without isolating itself from the realities of the day. No one condones the use of a firearm to secure an illegal end. As judges, we share with all citizens the sense of outrage at those who would take the life or property of another at gunpoint. Justice and respect for human life demand nothing less from us. Such actions not only injure individuals, they inevitably tear at the fabric of our society. But just as every human life is irreplaceable, every human being is unique and each situation must be judged individually.

People v. Tanner, supra, 596 P.2d at 359.

VI.

The only remaining issue concerns the appropriate remedy. Petitioners contend that, the sentencing provisions of RPPL No. 1-25 being invalid, the criminal charges against them must be dismissed. Based on the doctrine of severability, we reject this position.

The general principle of severability is well developed in United States case law.[43] The United States ⊥173 Supreme Court has said:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Buckley v. Valeo, 424 U.S. 1 108, 96 S.Ct. 612, 677 46 L.Ed.2d 659, 739 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062, 1078 (1932)). In an earlier case, the Court stated:

> [I]t is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment.

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 396, 14 S.Ct. 1047, 1053-4, 38 L. Ed. 1014, 1023 (1984). The failure of the legislature to include in the legislation a severability clause does not "dictate the demise of the entire statute." *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790, 802 (1971); *see also Welsh v. United States*, 398 U.S. 333, 364 90 S.Ct. 1792, 1809, 26 L.Ed.2d 308, 333 (1970).

In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the United States Supreme Court addressed a fact situation similar to the one before us. The defendant was charged under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) of which provided:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The Court concluded that the death penalty provision imposed an impermissible burden on the exercise of the constitutional ⊥174 right to trial by jury. However, the Court determined that the invalid provision was severable from the Act:

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[43] We reiterate our earlier statements that we are not bound by the decisions of United States courts. However, as we are still in the early stages of our jurisdictional development, we will look to the doctrinal law of other jurisdictions for guidance on matters of first impression.

> The clause in question is a functionally independent part of the Federal Kidnaping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it would not include the death penalty clause now before us.

88 S.Ct. at 1218-1219. Justice Stewart concluded for the Court:

> Thus, the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose--that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act but they cannot be put to death under its authority.

88 S.Ct. at 1221.

We believe that the principle of severability as developed in the United States is sound. On the facts of the cases before us, we are of the opinion that the O.E.K. would have enacted the Firearms Act even if it were informed that the sentencing provisions would not be enforceable. We see no evidence that the O.E.K. would have chosen "to discard the entire statute" if the fifteen-year sentence would be omitted. Nor do we believe that Art. XIII, Sec. 13 would not have been drafted or approved but for the sentencing clause. The evidence before us convinces us that the people of the Republic were determined to ban firearms from their islands and adopted the harsh sentence as a mean to that end.

We hold, therefore, that the invalidation of the sentencing provisions for possession under RPPL No. 1-25 does not render the entire statute unenforceable. The remaining provisions are not challenged here and may properly provide the basis of a criminal charge. Accordingly, the petitioners may ⊥175 be charged, tried and fined under RPPL No. 1-25; however, they may not be subject to imprisonment for a possession violation.

VII.

In conclusion, we hold that the sentencing provision of RPPL No. 1-25 providing for a mandatory minimum term of imprisonment of fifteen years imposes upon a violator a punishment which is "significantly disproportionate" to the underlying crime of possession of a firearm. As such, the penalty constitutes a cruel and unusual punishment running afoul of the human rights protections of the Trusteeship Agreement. The mechanics of Art. XV, Sec. 10 operate to delay the effective date, until the termination of the Trusteeship Agreement, those provisions of the Constitution or public laws in conflict with the Trusteeship Agreement. Thus, the sentencing provisions of Art. XIII, Sec. 13(2) and of RPPL No. 1-25, § 5(a) relating to the

unlawful possession of firearms, which we have found to be in conflict with the Trusteeship Agreement, are not yet of force and effect. This is not to say that they are invalid; they will become effective upon the termination of the Trusteeship Agreement. Thus, the O.E.K. is free to amend RPPL No. 1-25 or pass new legislation to provide for the imprisonment of those who are found in unlawful possession of the firearm under RPPL No. 1-25 so long as such legislation is not in conflict with this opinion or with the Trusteeship Agreement.

We emphasize the limited nature of our holding. Art. XIII, Sec. 13(2) and RPPL No. 1-25, § 5(a) both prohibit the importation, possession, use or manufacture of firearms; these acts are still prohibited. Our decision effects only the proscribed punishment for possession. Thus, persons charged under RPPL No. 1-25 for possession are subject to the fine provision of § 5(a). Person charged with importation, use or manufacture are subject to the minimum fifteen years imprisonment penalty unless and until the constitutionality of the sentence as applied to importation, use or manufacture is challenged and found unenforceable by this Court.

Let the writ issue in accordance with the dictates of this opinion.

⊥176

GIBSON, Justice, dissenting:

The majority predicates its Decision on what it determines to be the co-extensive right of this Court, with the Trust Territory High Commissioner, to review, for consistency with the Trusteeship Agreement,[44] Article III, Section 13, and Article IV, Section 10, of the Constitution of the Republic of Palau.

Having concluded that this Court has the right to "interpret constitutional provisions" and to declare transgressions of the Constitution void, it passes on to a grant of authority to this Court to declare a section of the Palau Constitution suspended until Palau escapes from Trusteeship constraints via finalization of the Compact of Free Association and concurrent termination of the Trusteeship Agreement.

The authority for this they find in Article XV, Section 10 of the Palau Constitution.[45]

The basis is found in Article 6, section 3 of the Trusteeship Agreement.[46]

Having thus determined the Palau Constitution to be subordinate to the Trusteeship Agreement, the United States Courts' interpretations of the United States Constitution are examined to find disproportionality of sentencing and thus the presence of "Cruel and Unusual Punishments".

It is admitted that the "rights and fundamental freedoms" of Article 6, section 3 of the

[44]Trusteeship Agreement for the former Japanese Mandated Islands, July 18, 1947, 61 U.S. Stat. 3301.

[45]Article XV, Section 10.

[46]Section 6 of the Trusteeship Agreement.

Trusteeship Agreement is not defined.

> "This fact has led one commentator to note that the function of the United Nations with respect to human rights is not very consistently determined, "as the Charter" does in no way specify the rights and freedoms to which it refers." p. 12, Majority Opinion.

⊥177 Then follow four pages of collateral citations seeking to establish the fact that it was the intention of the United Nations to guarantee, "at a minimum those rights enjoyed by the people otherwise within the jurisdiction of the United States."

It is quite clear that the primary, if not the only source of "those rights" are the interpretations placed upon the United States Constitution, and in particular, Amendment Eight thereof, by the United States Courts which the majority use as the ballast against which to weigh potential sentence "norms."

Having reached this point the "norm" selected to compute proportionality is *Solem v. Helm*, 103 U.S. 3001, 77 L.Ed.2d. 637 (1983), perhaps the most exaggerated example of over-zealous sentencing to be found in any reported case in the last 50 years . . . one which admittedly shocks the American legal conscience. *Solem* is truly representative of the maxim that "hard cases make bad law."

From the examination of *Solem* it is then concluded that the Palau 15 year sentence is disproportionate to sentences which may be imposed for other crimes and therefore though not unconstitutional is unenforceable for so long as Palau remains within the Trust Territory sphere. "A distinction without a difference."

Two problems confront this writer in espousing this conclusion.

One, I cannot see why the majority in singling out the "rights and fundamental freedoms" of Article VI, Section 3 passed over, without comment, the preceding mandate of Article VI, Section 1 which reads in terms of "promote the development of the inhabitants--toward self-government or independence as may be appropriate to the particular circumstances of each territory and its people and the freely expressed wishes of the people concerned and give due recognition to the customs of the inhabitants in providing a system of law." (Emphasis supplied.)

These aims have been consistently carried out through the several Executive and Secretarial Orders until today Palau operates under its own Congressionally approved Constitution and some 70 unsuspended Legislative Acts each in contravention of the Trust Territory Code. A "best example"of what was intended by the terms "self-government" and "freely expressed wishes of the peoples concerned."

Second. The majority it seems starts from the Trusteeship Agreement and works forward to find it at fault ⊥178 with Article XIII, Section 13, Palau Constitution. This it seems to me

demands the *ab-initio* presumption that fifteen years is *per se*, "Cruel and Unusual Punishment". I, would reverse the process and work backward from the Constitution to determine whether or not a conflict with the Trusteeship Agreement exists to such an extent as to justify suspending the operative force and effect of this full section of the Palau Constitution, and its companion Act. The former approach it seems to this scrivener smacks of judicial legislation--the interposition of the Court's view of what it thinks should apply for that which now in fact does apply.

Again, the majority at page 11 speaks of not "abdicating our constitutional duty." I would ask to whom this constitutional duty owed if other than to the Republic of Palau and its Constitution?

The majority cites with favor Chief Justice Bird's statement in *People v. Tanner*, 596 P.2d, 156 Cal.Rptr. 450. To the writer the opening two sentences of this citation establish its dissimilar status as authority for the majority's position. In the first place the members of this Court have taken an Oath to uphold the Palau, not the United States or the United Nations Constitution, and in the second place, we are not examining the very Constitution itself to determine whether or not it comports with an outside definition of "rights and fundamental freedoms", a phrase so indefinite and vague as to necessitate resort to an admittedly non-controlling United States Constitution for meaning!

> "The United States Constitution and its full faith and credit clauses are not applicable to the Trust Territory." *Overby v. Olsen*, 7 TTR 49, at p. 61.

It would unduly prolong this dissent to give tongue and pen to the equally "humanitarian" reasons why the law should be upheld. Suffice it to say that the word "unusual" does not appear in the Palau Constitution. It's insinuation into that Constitution by the majority in an effort to give Palauan lawbreaker "equal protection" with that accorded the U.S. malefactor, ignores the basic right of the Palauan people to declare that the possession of firearms, with its concomittant ability to put the same to immediate and violent use, is equally if not more so, "inhumane" with respect to the prospective victim. Given the volatile nature and physiological make-up of many Palauan people, even 15 years may not be an adequate deterrent.

⊥179 I admit to being troubled by the answer to the question when is a Constitution, unconstitutional? The implication from a reading of the majority opinion is that it is only for so long as the United States Constitution and U.S. Courts' interpretation thereof apply. A self-righteous anomaly, for if the gauge be, as it should, the Trusteeship Agreement concept of "human rights and fundamental freedoms," and not the United States Constitution, the Trusteeship Agreement is as valid now in terms of the United Nations Charter and the Trusteeship Agreement itself, as it will ever be when unfettered by United States control.

The majority speaks of deference (p. 10). I too note that the United States pays much deference to Article XIII, Section 6, yet the majority now would pay none to Section 13 of the same Article, neither section being in accord with United States policy.

We note in passing the absence of any reference in the majority opinion to the possible

effect upon their decision of the Trust Territory so-called "Bill of Rights", 1 TTC Sections 1-12. Our examination of the evolution of the Palau Constitution through Executive and Secretarial Orders leads us to agree the same has no current effect on the controversy before this Court.

To borrow a line from Judge Bird (Tanner, *supra*) "each situation must be judged individually." This is what this writer feels the majority has not done. Rather has it judged Palau as Palau were a beholden State of the United States.

Fifteen years is a harsh penalty -- true -- but only when viewed with United States' eyes, ingrained with United States Courts' proportionality decisions.

We have all heard the warnings, no doubt equally disproportionate, of harsh penalties for drug use and possession imposed by Mexico, the South American countries and those of the Middle East -- yet they all remain members of the United Nations in good standing. What constitutes "human rights and fundamental freedoms" is ill-defined, chimerical, and like beauty, lies in the eyes of the beholder. To impose what we as North Americans see as being "rights and freedoms" upon those whose images differ is to fall into the easy trap of needlessly substituting our judgment for that of the people affected. The Soviet bloc has consistently violated these "rights and freedoms" and yet remains of equal authority and prestige with the United States in the United Nations hierarchy.

⊥180 I cannot, as does the majority, view Article XV, Section 10 as a dumping ground into which may be relegated all things which do not agree with the concept that "what is morally right for the United States is morally right for everybody," a proposition which has less than endeared the United States to the rest of the world.

Finding equally valid reasons to do so and recognizing the legal preference of declaring constitutionality, I would DENY THE WRIT.