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Understanding "Rights" and Bills of Rights

Albert P. Blaustein

Carol Tenney
University of Richmond

ARTICLES

UNDERSTANDING "RIGHTS" AND BILLS OF RIGHTS

*Albert P. Blaustein**
with Carol Tenney

I. INTRODUCTION

Scholars hold that there are forty to fifty distinct human rights.[1] History teaches that they should be constitutionally enshrined. In this modern era when constitution-making is multiplying, drafters of bills of rights must now determine questions of formulation and location. How should these forty to fifty distinct human rights be classified; where in these constitutions should these rights be recited?

This is no idle academic exercise. The modern bill of rights bears little resemblance to the original American renditions, either in their genesis in the Virginia Constitution of 1776 or their promulgation in the first ten amendments to the United States Constitution in 1791. There is universal concurrence that the concept of human rights evolved during the subsequent two centuries. There is also universal agreement that America's founding fathers erred in omitting the guarantee of such rights from the 1787 Philadelphia Constitution.

Given the requirement of a constitutional listing of human

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* Albert P. Blaustein is Professor of Law, Emeritus, at the Rutgers University School of Law-Camden, and counsel to the Philadelphia-based firm of Dilworth, Paxson, Kalish and Kauffman. A.B., 1941, Michigan University; LL.B., 1948, Columbia University School of Law. As president of the Philadelphia Constitution Foundation, he has been counsel, consultant and sometime drafter of more than twenty national constitutions. The author wishes to thank Carol Tenney, Class of 1992, for her invaluable research assistance.

All constitutional references are taken from the constitutional texts published in A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, 1971-1991 (1976).

1. P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 125 (1983).

rights, drafters of today must grapple with the problem of where in constitutions such rights should be included. As a prelude to the exercise of such judgment, they must first categorize and classify the human rights to be enumerated and guaranteed.

II. An Excursion Into History

While the human rights enumeration is a characteristic of all modern constitutions, it was expressly excluded from the 1787 Philadelphia Constitution. Significantly, this exclusion was engineered by the father of the United States Constitution, James Madison. Madison and fellow founding father Alexander Hamilton explained the exclusion in *The Federalist Papers*[2] which they coauthored with John Jay, who was later named as the nation's first Chief Justice. Hamilton explained the exclusion best:

> [A] minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. . . .
>
> . . . .
>
> I go further and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . .
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> . . . The truth is . . . that the Constitution is itself A Bill of Rights.[3]

That conclusion was not easily nor unanimously reached. One of the other founding fathers who participated in the writing of the United States Constitution in that long, hot summer of 1787 was George Mason of Virginia, author of the Virginia Declaration of Rights in the Virginia Constitution of 1776. As the constitutional

2. The Federalist No. 84, at 513-515 (A. Hamilton, J. Madison & J. Jay) (C. Rossiter ed. 1961).

3. *Id.*

convention was coming to a close without the acceptance of a Bill of Rights, he argued for a second convention to be held after the views of the citizenry on this issue were ascertained. Mason rightly surmised that the American public wanted such inclusion. When that proposal met with defeat, he refused to add his name to the signers of the new constitution.

It was Mason and not Madison and Hamilton who eventually prevailed—not only as to the United States Constitution but as to the future of constitutional history. When the electorate in state after state indicated that their ratification votes were conditioned upon a pledge to add a bill of rights, James Madison was in the forefront of those willing to make the pledge. In 1789 it was Madison who authored the American Bill of Rights, formally added to the Constitution as its first ten amendments on December 15, 1791.[4]

Mason's Virginia Declaration was not only the first human rights document but became the model and precedent for all subsequent human rights declarations.[5] By the time America's founding fathers met in Philadelphia, eight of the thirteen states had composed similar bills of rights for their own constitutions. Even more important, the Virginia Declaration was the model for the French Declaration of the Rights of Man and the Citizen, which in turn spread the Virginia message throughout Europe.[6]

In the era following World War II, the Virginia Declaration was of great significance in the deliberations on the Charter of the United Nations and the three documents comprising the United

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4. Madison had originally announced the intention to incorporate the various rights declarations within the body of the Constitution itself but was later persuaded to formulate them as constitutional amendments.

Only two national constitutions were promulgated before that date: the Polish Constitution of May 3, 1791 and the French Constitution of September 3, 1791. While there was no bill of rights in the Polish charter, the French Constitution incorporated the Declaration of the Rights of Man and the Citizen of August 26, 1789.

5. Clinton Rossiter has termed the Virginia Declaration of Rights and the Massachusetts Constitution (written mainly by John Adams) as "among the world's most memorable triumphs in applied political theory." C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 231 (1963).

6. "The French intellectual, Brissot, was soon hailing 'l'immortelle declaration de l'Etat de Virginie sur la liberte des cultes,' and his countryman Condorcet asserted that the author of the Virginia declaration had earned 'the eternal gratitude of mankind.'" L. GIDNEY, L'INFLUENCE DES ETATS-UNIS D'AMERIQUE SUR BRISSOT, CONDORCET ET MME. ROLAND 42 (1930); J. SCHAPIRO, CONDORCET AND THE RISE OF LIBERALISM 221 (1934) (quoted in I. RUTLAND, THE PAPERS OF GEORGE MASON 1725 - 1792 276 (R. Rutland ed. 1970)).

Nations International Bill of Rights: the Universal Declaration of Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.[7] These documents in turn have become the human rights chapters of several modern constitutions.

Senegal in 1963, Mali in 1974, and Mauritania in 1985 provide good illustrations. The Preamble to the Senegal Constitution, for example, contains these words: "The people of Senegal solemnly proclaim their independence and their attachment to fundamental rights as they are defined in the Declaration of the Rights of Man and the Citizen of 1789 and the Universal Declaration of December 10, 1948."[8]

III. Traditional Human Rights Formulations

A. *The Generational Classification*

Human rights were not all created equal. They differ in kind as well as degree. They can and should be classified and categorized by subject, by type, by priority, by effect. This classification and categorization should direct their constitutional status.

Popular today is the classification of human rights by "generation." The human rights proclaimed and protected by the United States Bill of Rights and the French Declaration of the Rights of Man and the Citizen (and their progeny) have been described as "civil and political rights" and have been delineated as the first generation of human rights.

The second generation of human rights, according to the experts, are the "economic, social and cultural rights." These rights were the subject matter of European constitutionalism after their inclusion in Germany's Weimar Constitution of 1919, and Hans Kelsen's 1920 Austrian Constitution, both of which proclaimed their "social" (not "socialist") character. These rights were also emphasized in the Mexican Constitution of 1917, which is not as well known to European and American constitutionalists, but which has

7. Of all the draft recommendations submitted to the United Nations for the preparation of the two International Covenants, the most influential was the *Statement of Essential Human Rights*, drafted by a Committee Representing the Principal Cultures of the World, appointed by the American Law Institute, headquartered in Philadelphia. *See* Blaustein, *Human Rights in the World's Constitutions*, in Progress in the Spirit of Human Rights, Festschrift fur Felix Ermacora 599 (1988).

8. Senegal Const. preamble.

strongly influenced Latin American constitutions for three-quarters of a century. Such rights were also proclaimed, with qualifications, in the first Soviet Constitution of 1918.

The third generation of human rights, fashionable in United Nations and Third World thinking, encompasses the right to peace, the right to disarmament, the right to a clean environment, and the right of development. Karel Vasak, long a leader in the human rights field, described these as "solidarity" rights.[9]

Newly-coined, the fourth generation of human rights encompasses people's rights or group rights—rights based on status and ascription. This includes the special rights of indigenous peoples—rights based on race, language and ethnicity, and rights that flow from membership in a particular tribe or caste.[10] This is well illustrated by Article 27 of the International Covenant on Civil and Political Rights which states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[11]

It is perhaps better illustrated by the aptly named African [Banjul] Charter on Human and Peoples' Rights.[12] Article 12 of that document sets the stage: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." This was in effect augmented and supplemented by the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted in 1989 by the General Conference of the International Labor Organization.[13] Better known as Convention 169, its Article 1 declares its applicability to:

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9. K. Vasak, *A 30-year Struggle*, UNESCO COURIER 29 (1977). *See also* Clark, *International Human Rights Law*, in ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM (1987). The most detailed treatment is found in D. VARGAS, LA TERCERA GENERACION DE DERECHOS HUMANOS Y LA PAZ (1983).

10. *See* Blaustein, *The New Nationalism*, 30 AM. J. COMP. L. 377, 377 (1982), *reprinted in* 129 CONG. REC. S5124 (1983). *See also* Blaustein, *Confederation, Condominium Consociation, Confiliation*, in GUIDE TO AMERICAN LAW 138 (1982-83).

11. *See* Blaustein, *supra* note 7 (discussing the International Covenant on Civil and Political Rights (1966) (entered into force, March 23, 1976)).

12. African [Banju] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 58 (1982).

13. 28 INTERNATIONAL LEGAL MATERIALS 1384 (1989).

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

The generational classification system is far from precise. There is much overlapping. For example, while the distinctions between the first and second generations of human rights provided the basis for the duality in the United Nations Covenants on (1) Economic, Social and Cultural Rights, and (2) Civil and Political Rights, duplication (intentional or otherwise) was inevitable and certain rights might just as well have been in one document as well as the other.

Article 1, dealing with self-determination, is identical in both Covenants. Article 3 of both Covenants stresses "the equal right of men and women." Education in "human rights and fundamental freedoms" in Article 13 of the Covenant on Economic, Social and Cultural Rights could well be a part of the Covenant on Civil and Political Rights. Provisions of the Civil and Political Rights Covenant on "forced or compulsory labour" in Article 8 and the prohibition against imprisonment for "inability to fulfill a contractual obligation" in Article 11 could both be considered economic or social matters. Examples of such duplication are many.

This inconsistency was always present in human rights analysis. The so-called "first generation" United States Constitution made provision against laws "impairing the obligation of contracts"[14] and set forth that private property should not "be taken for public use, without just compensation."[15] Surely these are within the sphere of economics. The United States Constitution also provided for economic social and cultural rights in its authorization to the Congress to pass laws "to promote the Progress of Science and useful

14. U.S. CONST. art. I, § 10, cl. 1.
15. U.S. CONST. amend. V.

Arts" through copyrights and patents.[16] It can also be argued that the economic right to property is subsumed by the concepts of freedom and liberty which underlie civil and political rights.[17]

Inconsistency is also found in the first generation French Declaration of the Rights of Man in 1789 and the first French Constitution of 1791. The seventeenth and final provision of the 1789 Declaration addresses the area of economics by describing property as a "sacred and inviolable right." The 1791 Constitution goes even further into what are today more commonly labelled as economic rights: "There shall be created and organized a general establishment of public relief in order to bring up abandoned children, relieve infirm paupers, and provide work for the able-bodied poor who may not have been able to obtain it for themselves."[18]

B. *Rights and the State*

Rights can and must be categorized in terms of their relationship to the state. Such classification requires cataloging under three subheadings:

1) Rights *against* the state versus rights *from* the state;

2) State *forbearance* versus state *action*;

3) Rights which *require* versus rights which *do not require* financial contributions from fellow members of the state.

The American ideal, as expressed in the Declaration of Independence, is that all men "are endowed by their Creator with certain unalienable Rights"[19] and "[t]hat to secure these rights, Governments are instituted among Men."[20] Thus the rights of Americans—and other first generational rights—are generally classified as rights *against* the state, demanding state *forbearance*, and requiring no financial contributions from fellow Americans.

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16. U.S. CONST. art. I, § 8, cl. 8.

17. United States Supreme Court Justice George Sutherland declared in a 1921 speech: "To give a man his life but deny him his liberty, is to take from him all that makes his life worth living. To give him his liberty but take from him the property which is the fruit and badge of his liberty, is to still leave him a slave." W. SKOUSEN, *Property Rights—Essential to Liberty*, THE CONSTITUTION 23-24 (1987).

It was also the view of John Locke, whose writings so influenced America's founding fathers, that the right to property was *the* fundamental human right.

18. LA CONSTITUTION title I, § 3 (1791) (France).

19. The Declaration of Independence (U.S. 1776).

20. *Id.*

The First Amendment to the United States Constitution provides the perfect example:

> Congress shall make no law [rights against the state requiring forbearance] respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances [and thus at no cost to the citizenry].[21]

This can also be said about the other amendments making up the United States Bill of Rights—almost. For example, the right to a "speedy and public trial, by an impartial jury,"[22] as provided in the sixth amendment, demands that the state create a criminal justice system and that the population is taxed to support that system.

This American ideal is, of course, contrary to the rights philosophy expressed by the communist states. Article 39 of the 1977 Constitution of the Soviet Union begins its human rights chapter this way: "Citizens of the USSR enjoy in full the social, economic, political and personal rights and freedoms proclaimed and guaranteed by the Constitution of the USSR and by Soviet laws. The socialist system ensures enlargement of the rights and freedoms of citizens. . . ."[23] Article 50 of the Soviet Union's Constitution states:

> In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assemble, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets and squares at the disposal of the working people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio."[24]

Soviet style freedoms of speech and press, thus fall into the category of rights granted by the state, demanding state action and requiring subsidization by other elements of the population,

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21. U.S. CONST. amend. I.
22. *Id.* amend VI.
23. KONSTITUTSIYA SSSR art. 29 (U.S.S.R.).
24. *Id.* at art. 50.

whether or not they engaged in such activities.

Soviet thinking is an anachronism—at least according to United Nations formulations. Article 19 of the International Covenant on Civil and Political Rights, conforming to inaction, forbearance and the absence of subsidization states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[25]

Even if the Soviet approach is an anachronism, this does not mean that *all* constitutional pronouncements on freedom of speech necessarily combine inaction, forbearance and the absence of subsidization. This is especially true in the Third World. The most important manifestation of freedom of speech today is the telecast. Where a nation has only one television station and the station is government owned, there can be no freedom of speech without government action and tax monies being allocated to keep the television station in operation.[26]

It is subject matter which provides the real distinctions. Certainly, there is a human right to education. But such a right means that the state must act to build schools and hire teachers, and that in turn means that members of the public must pay taxes to compensate the construction workers and the teachers to make this possible. Such a duty is placed upon the state and the taxpayer even though the government might prefer to spend its resources on more military equipment and even though the taxpayer might de-

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25. International Covenant on Civil & Political Rights, art. 19 (1966) (entered into force, March 23, 1976).

26. As draftsman of the 1984 Constitution of Liberia, I incorporated these words into Article 15 dealing with freedom of expression: "Access to state owned media shall not be denied because of any disagreement with or dislike of the ideas expressed. Denial of such access may be challenged in a court of competent jurisdiction." CONSTITUTION OF THE FEDERAL REPUBLIC OF LIBERIA, art. 15. I strengthened this point in my role as draftsman of the Fiji Constitution of 1990:

> Access to state owned media shall be granted to all legitimate, registered political parties during a reasonable period and for a reasonable time prior to all elections. Denial of access may be directed to the Supervisor of Elections for administrative correction and, if necessary, appealed to the Constitutional Court which is empowered to grant appropriate relief, including a mandamus order requiring television time.

CONSTITUTION OF THE REPUBLIC OF FIJI (Blaustein draft, March 7, 1990). Regrettably, this provision was not included in the final draft. Despite these exceptions, free speech and the other American rights are rights against the state, calling for state forbearance and demanding no subsidization.

sire to send his children to private schools or has no children in the schools at all. The same kind of analysis can also be employed in contrasting the American rights with the right to health care, the right to a fair wage, the right to social security, and the right to protection of the family unit, which require state action and state revenues.

C. *Technical Distinctions*

Bills of rights and their enumerated individual human rights can also be classified on the basis of the following distinctions:

1) Rights complete within the constitutional text versus incomplete formulation requiring further legislation;

2) Rights which are self-executing versus rights requiring implementation;

3) Rights which are operational versus rights which are programmatic;

4) Rights which are immediate versus rights which are programmatic;

5) Rights which are absolute versus rights which are qualified. Constitutional provisions taken from various bills of rights illustrate one or more of these overlapping and often inconsistent distinctions.

The human rights provisions of the United States Constitution, including the Bill of Rights,[27] the "privilege of the Writ of Habeas Corpus"[28] and the limitation that "[n]o Bill of Attainder or ex post facto Law shall be passed,"[29] can be classified as complete within the text, self-executing, operational, immediate and absolute. At least that is the way they appear when contrasted with the human rights provisions in other constitutions. Yet the habeas corpus clause includes the qualification that it may not "be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[30] Nor have the words "no law" in the first amendment been applied literally; the law reports are replete with decisions limiting the right to both freedom of speech and freedom of religion.

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27. U.S. CONST. amend. I-X.
28. *Id.* at art. I, § 9, cl. 2.
29. *Id.* at art. I, § 9, cl. 2 and 3.
30. *Id.* at art. I, § 9, cl. 3.

But the essential distinction is still there. By contrast, examine some of the human rights clauses of the 1978 Spanish Constitution. *Incomplete and progressive*: Education: "Teachers, parents, and in some cases, the students, shall participate in the control and management of all centers maintained by the Administration with public funds, under the terms established by law. The public authorities shall inspect and standardize the educational system so as to guarantee compliance with the laws."[31] *Non-self-executing and programmatic*: Economy: "The law shall establish the forms of participation of those interested in Social Security and in the activities of the public agencies whose function directly affects the quality of life or general welfare."[32] *Qualified*: Religion: "Freedom of ideology, religion and cult of individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law."[33]

For good examples of the incomplete, progressive, programmatic, qualified, and requiring implementation, consider the following—promulgated on three separate continents, in countries with very different cultures. From the Mexican Constitution of 1917: "It is the duty of parents to preserve the right of minors to satisfy their needs as to physical and mental health. The law shall determine the support for the protection of minors to be given by public institutions."[34] In addition:

> Every person is entitled to suitable work that is socially useful. Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law. The Congress of the Union, . . . shall enact labor laws which shall apply to: . . . [w]orkers, day laborers, domestic servants, artisans, and in a general way to all labor contracts.[35]

From the 1989 amended Constitution of Algeria: "The institutions seek to assure the equality of rights and duties of all citizens in suppressing the obstacles, which obstruct the development of the human personality and impede the effective participation of all

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31. CONSTITUTION ESPANOLA art. 27, cl. 7 and 8 (Spain).
32. *Id.* at art. 129, cl. 1.
33. *Id.* at art. 16, cl. 1.
34. CONSTITUTION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 4. (Mexico).
35. *Id.* at art. 123.

in the political, economic, social and cultural life."[36] And: "All citizens have the right to work. The right to protection, security and hygiene at work is [to be] guaranteed by law. The right to rest is [to be] guaranteed. The law [is to] determine the modalities of its exercise."[37]

Finally, provisions from the 1983 Constitution of the Netherlands, as amended in 1989: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."[38] Further: "(1) The authorities shall take steps to promote the health of the population. (2) It shall be the concern of the authorities to provide sufficient living accommodation. (3) The authorities shall promote social and cultural development and leisure activities."[39]

Ethiopia's Constitution of 1987 even identifies its education clause as "progressive," noting: "The state shall progressively ensure compulsory education for school-age children and expand schools and vocational institutions of various types and levels."[40] At the other extreme is the freedom of expression provision of the Zimbabwe Constitution of 1979.[41]

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36. ALGERIA CONST. art. 30.
37. *Id.* at art. 52.
38. THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS art. 21.
39. *Id.* at art. 22.
40. ETHIOPIA CONST. art. 40, cl. 2.
41. CONSTITUTION OF ZIMBABWE art. 2, cl. 20 states:

> Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
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> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision- (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; (b) for the purpose of- (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings; (ii) preventing the disclosure of information received in confidence; (iii) maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly; (iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields; (v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or (c) that imposes restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
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> (3) No religious denomination and no person or group of persons shall be prevented from establishing and maintaining schools, whether or not that denomination, person or group in receipt of any subsidy, grant or other form of financial assistance from the

These classification exercises are useful in understanding the scope of human rights, the varied approaches to human rights and the language in which human rights are expressed. But this is not enough. What is lacking—and needed—is a classification which will dictate constitutional formulations of the different human rights and govern, or at least guide, enforcement procedures.

IV. JUSTICIABILITY

Human rights can best be—and should be—classified according to their justiciability. Distinctions must be drawn between those rights which are judicially enforceable and those which are not. President Franklin D. Roosevelt's Four Freedoms[42] provided the world with two of each: justiciable freedom of speech and freedom of religion and non-justiciable freedom from want and freedom from fear. The human rights classified in this manner should be placed in different chapters of all constitutions. Further, all constitutions should contain specific language as to the enforceability or non-enforceability of these rights.

The division between the enumeration of human rights in the United Nations Covenant on Economic, Social and Cultural Rights and the enumeration in the International Covenant on Civil and Political Rights is largely grounded on the justiciability distinction. The reasoning behind the division, as Roger S. Clark has explained, is that the supervisory mechanisms and complaint procedures applicable to civil and political rights would not be appropriate for economic and social rights.[43] While the principle is valid,

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State.

(4) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (3) to the extent that the law in question makes provision- (a) in the interest of defence, public safety, public order, public morality, public health or town and country planning; or (b) for regulating such schools in the interests of persons receiving instruction therein; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(5) No person shall be prevented from sending to any school a child of whom that person is parent or guardian by reason only that the school is not a school established or maintained by the State.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

42. F.D. ROOSEVELT, STATE OF THE UNION ADDRESS, 87 CONG. REC. 44, 46 (1941).

43. Clark, *supra* note 9, at 336.

there are economic and social rights set forth in the International Covenant on Civil and Political Rights. Further, certain provisions of the International Covenant of Economic, Social and Cultural Rights are in fact justiciable, while certain rights listed in the International Covenant on Civil and Political Rights are not.

To give a few illustrations: Article 3 of the International Covenant on Economic, Social and Cultural rights is designed "to ensure the equal rights of men and women" in the enjoyment of such rights. Article 13(2)(b) provides that "[h]igher education shall be made equally accessible to all, on the basis of capacity." Certainly, these are justiciable. On the other hand, the International Covenant on Civil and Political Rights provides in Article 22 for the economic "right to form and join trade unions." Article 23 states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 27 sets forth group rights to culture, religion and language. These are topically more appropriate to the International Covenant on Economic, Social and Cultural Rights, and certainly the last two are not justiciable.

Nor does the four generation classification system of human rights divide in accordance with justiciability. Most political rights are justiciable and most economic rights are not. Most of the third generation of human rights are likewise non-justiciable. Yet property rights and the right to enter into contract are both economic and justiciable, and environmental rights and most group rights can also be judicially determined.

Again, what is proposed for all future constitutions are separate chapters for justiciable and non-justiciable rights, with appropriate explanations to the effect that the justiciable human rights are enforceable by the judiciary and a statement that the non-justiciable rights are directives and guidelines addressed to the legislative and executive branches.

Regrettably, this proposition has yet to be accepted by the drafters at work on the new constitutions of Eastern Europe and Latin America. Polish, Romanian, Russian and Yugoslavian (both Slovenian and Croatian) constitutionalists endlessly look to and for European and American approaches and hesitate to adopt ideas which deviate from these constitutional backgrounds.[44] The same

44. I have been consulting with these constitutionalists.

can be said for the constitutionalists of Brazil and Peru.[45] Persuading the new drafters to deviate from the European and American approaches is the principal reason for writing this article.

V. The Justiciability Precedent

The earliest constitutional precedent for the division between justiciable and non-justiciable human rights *is* European. It is a feature of the 1937 Constitution of Ireland. Articles 40 to 44 are in the chapter headed "Fundamental Rights." Included in this chapter are provisions on liberty, equality, freedom of speech, and property. Another chapter bears the heading, "Directive Principles of Social Policy." Article 45 is the sole provision under this chapter and includes the "right to an adequate means of livelihood" and a pledge to "safeguard with especial care the economic interests of the weaker sections of the community."[46] The first paragraph of article 45 is instructive:

> The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [Parliament]. The application of those Principles in the making of law shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.[47]

While the Irish example remained largely unknown and unheralded in constitutional circles, it became important in 1949 when India followed this precedent for its Independence Constitution. The chapter designated as Part III is entitled "Fundamental Rights." This includes the justiciable rights. The chapter labeled Part IV is entitled "Directive Principles of State Policy." This includes the non-justiciable rights, the guidelines for the executive and legislature. The sole caveat as to the division of justiciable and non-justiciable rights is found in Article 37 of Part IV: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[48]

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45. I was unable to convince these constitutionalists to deviate from the European and American approaches.

46. Ireland Const. art. 45.

47. *Id.*

48. India Const. art. 37.

The approach used by India was copied in the framing of the Bangladesh Constitution of 1972, with Part II designated as "Fundamental Principles of State Policy" and Part III entitled "Fundamental Rights." There was, however, no explanation of the division or provisions on enforcement.[49] The 1989 Constitution of the Federal Republic of Nigeria, scheduled to go into effect in 1992, also follows this approach, and does it better. Chapter II is labelled "Fundamental Objectives and Directive Principles of State Policy" and Chapter IV is entitled "Fundamental Rights." Chapter III on "Citizenship" is between the two chapters. The division is well planned. Chapter II subheadings are characterized by objectives: political objectives, economic objectives, social objectives, educational objectives, and foreign policy objectives, with additional topics included such as the "Directive on Nigerian culture." The "Fundamental Rights" chapter includes the right to life, the right to dignity, the right to liberty, the right to a fair hearing, the right to freedom of thought, conscience and religion, the right to freedom of expression and the press, the right to freedom of movement, and the right to freedom from discrimination. This chapter ends with a lengthy section on enforcement procedures to preserve such rights.[50]

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49. I had the privilege of working on this constitution with the principal drafter, Kamal Hossain, then designated as Minister of Law, and with the late Abu Sayeed Chowdhury, the first president of Bangladesh. Unfortunately, neither could be convinced of the need for such explanation or for enforcement specifications.

50. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (Draft) § 44 states:

> (1) Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State or in the Federal Capital Territory, Abuja, in relation to him may apply to a High Court having jurisdiction in that area for redress.
>
> (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State or in the Federal Capital Territory, Abuja, of any rights to which the person who makes the application may be entitled under this Chapter.
>
> (3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.
>
> (4) The National Assembly—
>
> (a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and
>
> (b) shall make provisions-
>
> (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling

This article recommends the bill of rights format which was developed for the 1984 Constitution of Liberia, and further refined for the 1990 Constitution of Fiji.[51] Chapter II of the Fijian Constitution, labelled "Principles of National Policy," deals with cultural preservation, promotion of family unity, and safeguards for maternity, infancy and youth. It also includes provisions such as Article 11: "The Republic shall take all necessary and proper steps to protect the safety, health and welfare of all of its citizens and of aliens legally residing within its borders."[52] Chapter III, "Fundamental Rights and Freedoms," lists the justiciable rights: rights to life, liberty and property, the requirement of equality, freedom of religion, freedom of political expression, and freedom of movement. There is nothing new about such delineation. What is new are the constitutional explanations and provisions on enforcement.

Article 6, entitled "Principles of National Policy," introduces Chapter II. Article 6 states:

> The principles set forth in this Chapter, except as otherwise provided for in this Constitution, are not justiciable and thus shall not be enforceable by any court. They shall nonetheless be fundamental in the governance of the Republic of Fiji and shall serve as guidelines in governmental policy-making and in the formulation of executive, legislative and administrative enactments and directives.[53]

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him to engage the services of a legal practitioner to prosecute his claim, and ensure that opportunities for securing justice are not denied, and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

(5) In this section, reference to a High Court includes a reference to the Federal High in the Federal Capital Territory, Abuja.

51. CONSTITUTION OF THE REPUBLIC OF LIBERIA, chapter II, (General Principles of National Policy), art. 4 has the following introduction: "The principles contained in this Chapter, except as otherwise provided for in this Constitution, shall not be enforceable by any court, but shall nevertheless be fundamental in the governance of the Republic and shall serve as guidelines in the formation of legislative, executive and administrative directives and policymaking and their execution."

Chapter III, (Fundamental Rights), art. 26, has the following introduction: "Where any person or association alleges that any of the rights granted under this Constitution or any legislation or directives are constitutionally contravened, that person or association may invoke the privilege and benefit of court direction or order or writ, including a judgment of unconstitutionality."

I developed the format as framer of the 1984 Constitution of Liberia and further refined it as counsel and draftsman for the 1990 Constitution of Fiji.

52. CONSTITUTION OF THE REPUBLIC OF FIJI art. 11 (Blaustein draft, Mar. 7, 1990).

53. *Id.* art. 6.

In contrast, Article 14, entitled "Fundamental Rights and Freedoms," explains Chapter III. Article 14 states:

> All of the rights and freedoms set forth in this Chapter are justiciable; and every person and association that contends that any of them shall have been contravened, whether or not claimant is aggrieved, may invoke the privilege and benefit of appropriate court order, writ or ruling, including a judgment of unconstitutionality.[54]

This statement of justiciability is further strengthened by Article 56 in the judiciary chapter, establishing a constitutional court with jurisdiction to hear human rights issues. This provision gives selected government officials, Fijian religious and ethnic groups, human rights organizations, and other non-governmental organizations alleging human rights violations the right to bring their complaints directly to the constitutional court.[55]

Unfortunately, the Fijian Cabinet changed this enforcement provision in Section 19 of the final draft of the 1990 Constitution.[56] It

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54. *Id.* at art. 14.

55. *Id.* at art. 56 states:

> (a) The Constitutional Court shall have original jurisdiction to hear and determine all constitutional issues brought by any individual who alleges that any provision in this Constitution has been or is likely to be contravened and that his interests are being or are likely to be affected by such contravention, or, in the case of a person who is detained, by any person or group alleging such a contravention in relation to him.
>
> (b) The Constitutional Court shall have original jurisdiction to hear and determine all constitutional issues brought by (1) the President, the Prime Minister, the Ombudsman, the Minister for Fijian Affairs, the Minister for Indian Affairs, the Attorney-General, the Solicitor-General and the Director of Public Prosecutions, and (2) Fijian political parties, religious groups, ethnic groups, human rights organizations, environmental protection organizations and any other Fijian groups alleging human rights violations.
>
> (c) The Constitutional Court shall have jurisdiction to hear and determine constitutional issues on its own motion, with power to appoint solicitors or barristers to argue such issues before it. The Court shall also be empowered, in open court, to grant advisory opinions in response to constitutional questions referred to it by the President.
>
> (d) The Constitutional Court shall have jurisdiction to hear and determine constitutional issues referred to it by the High Court and to hear or deny appeals on constitutional issues from final decisions of the High Court.
>
> (e) The Constitutional Court may decline to exercise its jurisdiction and powers if it adjudges that the constitutional issues raised are without merit or is satisfied that adequate means of redress are available for the person or persons concerned in proceedings before the High Court.

56. *Id.* at art. 19, cl. 1 states:

> If any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is

now limits the initiation of human rights charges and claims for redress to persons alleging that their own human rights had been contravened or "in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person."[57]

VI. The Constitutions of Tomorrow

The last decade of the twentieth century will go down in history as the decade of constitutionalism. Never before have there been in operation so many constituent assemblies and constitutional commissions, as well as committees, councils, caucuses and conventions (both governmental and non-governmental) employed in constitutional planning. And there are more to come. While American attention today is primarily focused on constitutional change in the eastern European countries so recently freed from communism, such developments merely scratch the surface. Far more important is the new constitution being framed for the reunited Germany and the new constitution for the Soviet Union. Then there are constitutions recently promulgated and planned for the fifteen republics of the Soviet Union and the six republics of Yugoslavia. There is also constitutional planning in Belgium, whose 1831 constitution is the third oldest in continuous existence, behind the United States Constitution, ratified in 1788, and the Norway Constitution, ratified in 1814.

In this hemisphere, there is constitutional debate in Canada, and activity in Grenada and Panama, plus a planned meeting on the revision of the undemocratic Sandinista Constitution of Nicaragua. As a result of the 1990 election, a commission has now been established to begin planning a new constitution for Colombia, whose 1886 charter is the world's seventh oldest in continuous existence. Efforts have been renewed to reestablish the aborted attempt to revise the 1853 Constitution of Argentina, the fourth oldest in continuous existence. Constitutional changes in Chile and Peru are imminent and there are constitutional blueprints being devised for Surinam.

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detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

57. *Id.* at art. 19.

Soon to be high on the constitutional agenda is a new charter for Iraq, and the constitutional changes in all of the Persian Gulf states which will certainly follow from the events of the war in the Persian Gulf. Then there must be a new constitution for Afghanistan. Israel, one of the three countries in the world which does not have a single-document constitution (the United Kingdom and New Zealand are the other two) is in the midst of constitutional discussions. On the other side of the Asian continent, the decade should see a unification constitution for the two Koreas, a revised constitution for the hastily-drawn 1987 Philippine Constitution, and new constitutions for Laos, Cambodia and Vietnam.

Africa will have the largest number of new constitutions. Of great international importance is a new constitution for South Africa, for which there have been more proposals, more discussions and more conflict than with any constitution in history. Ghana expects to have a new constitution this year and so does Guinea. Work is also being undertaken on new constitutions for Angola, Chad, Ethiopia, Gabon, Madagascar, Mozambique, Somalia and Sudan.

In the Pacific, New Zealand issued its first human rights charter in 1990 and there are discussions underway, as in Israel, for a one-document constitution. New Caledonia's forthcoming independence will also result in a new constitution.

Each constitution will have a bill of rights or, more properly, a chapter or chapters on human rights. Each will be more influenced by the German Basic Law of 1949 than the United States Constitution. This is because the "official" introduction to the German document which is distributed throughout the world speaks of one of its foundations as the "social-state" principle: "The social-state principle was established mainly to protect the weaker members of society. The state is required to ensure that every member of the community is free from want, can live in circumstances worthy of human dignity, and has a fair share of the nations's general prosperity."[58] But Chapter I of Germany's constitution, entitled "Basic Rights," lists all of the human rights, both justiciable and non-justiciable. This pattern should not be followed. Furthermore, Germany's constitution does not furnish a strong enough provision on

58. The Basic Law of the Federal Republic of Germany, Public Document, *Introduction* (which is not part of the Basic Law), Federal Republic of Germany (1987).

human rights enforcement.[59]

It is proposed that the constitution for the new, united Germany, as well as all of the other new constitutions to come, adopt the two-chapter formula—European (Irish) in origin, developed in Asia by the world's largest democracy (India), copied by the biggest and most important nation in Africa (Nigeria), followed in the American-style Constitution of Liberia, and developed (though finally not adopted) for the Pacific nation of Fiji.

Disregarding the generational and technical classifications between and among the various listings of human rights, these constitutions should distinguish between the justiciable and non-justiciable human rights. Such rights should be set forth in two distinct chapters with adequate explanations for the division, together with a clear statement as to which are subject to judicial enforcement and which are directives or guidelines for the other branches of government. And, the framers should dictate strong and detailed procedures for the enforcement of those rights which are in the province of the courts.

59. GERMAN CONST. art. 19(4) states: "Should any person's right be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be to the ordinary courts . . . ."