

APPENDIX

Thurgood Marshall's Draft Bill of Rights for Kenya, 1960

THURGOOD MARSHALL'S DRAFT BILL OF RIGHTS FOR KENYA, which he wrote in January and early February 1960, was based on three documents: the Universal Declaration of Human Rights (1948), the Malaysian Independence Constitution (1957), and the Nigerian Independence Constitution (1960). The Nigerian Constitution in turn drew on the European Convention of Human Rights (1950). Some sections of the Draft Bill of Rights have no parallels in these documents. As discussed in *Exporting American Dreams*, much of Marshall's draft was not retained in the final Kenya Independence Constitution (1963).¹

This copy of the Draft Bill of Rights is annotated to provide citations to the sources Marshall borrowed from.

1. Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Nigerian (Constitution) Order in Council (1960) (Nigerian Independence Constitution); Proposed Constitution of Federation of Malaya (Malayan Independence Constitution) (Kuala Lumpur, 1957). See also *Malaya and Singapore, The Borneo Territories: The Development of their Laws and Constitutions*, ed. L. A. Sheridan (London: Stevens & Sons, 1961).

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KENYA CONSTITUTIONAL CONFERENCE, 1960
COMMITTEE ON SAFEGUARDS

Note by the Secretaries

The attached paper by Dr. Thurgood Marshall is circulated for the consideration of the Committee.

(Signed)

J. A. SANKEY
T. M. HEISER

PROPOSED DRAFT OF BILL OF RIGHTS

PRELIMINARY STATEMENT

BY DR. THURGOOD MARSHALL

Here is a rough draft of a Proposed Bill of Rights for Kenya. This proposal is solely mine and has neither been discussed with nor approved or rejected by the African Elected Members or any other group. It is, therefore, submitted for use by all members of the Conference.

All persons are equal before the law and are entitled without any discrimination or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law.

1

FREEDOM OF RELIGION, SPEECH, PRESS
AND ASSOCIATION

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²
2. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;³ and the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.⁴

2. Universal Declaration of Human Rights (UDHR), Article 18, is identical to this section. The Nigerian Independence Constitution, Chapter III, Section 23 (1), is similar.

3. UDHR Article 19 is identical to this passage. There are some similarities with the Nigerian Independence Constitution, Chapter III, Section 24 (1).

4. UDHR Article 20 is identical to this passage.

3. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁵
4. Neither the legislature, the executive nor the judicial branch of government may interfere with any of the aforementioned rights and shall take all necessary steps to protect said rights from interference by individuals.

II

PERSONAL SECURITY

Everyone has the right to life, liberty and the security of person:

1. (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- (2) Where complaint is made to the Supreme Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
- (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
- (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.
- (5) Clauses (3) and (4) do not apply to an enemy alien.⁶

5. UDHR Article 12 is identical to this section.

6. Sections 1-5 of Part II are identical to the Malaysian Independence Constitution (1957), Part II, Sections 5 (1) to (5).

2. (1) No persons shall be held in slavery.
- (2) All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes.
- (3) Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labour within the meaning of this Article.⁷
3. (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
- (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.⁸
4. (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office of employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.⁹

7. The Malaysian Independence Constitution, Part II, Sections 6 (1) to (3), is virtually identical to this section. UDHR Article 2 and the Nigerian Independence Constitution, Chapter III, Section 19, also prohibit slavery and involuntary servitude, but their provisions are different.

8. The Malaysian Independence Constitution, Part II, Sections 7 (1) and (2), is identical to this section. UDHR Article 2 and Article 11, Section 2, and the Nigerian Independence Constitution, Chapter III, Sections 21 (7) and (8), cover similar issues but use different language.

9. The Malaysian Independence Constitution, Part II, Sections 8 (1) and (2), is identical. The first sentence of UDHR Article 7 is similar to this subsection.

5. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
6. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.¹⁰

III

EDUCATION, HEALTH AND WELFARE

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.¹¹
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups.¹²
3. Parents have a prior right to choose the kind of education that shall be given to their children.¹³
4. Everyone has the right freely to participate in the cultural life of the community; to enjoy the arts and to share in scientific advancement and its benefits.¹⁴

10. Sections 5 and 6 of Part II do not appear to be borrowed directly from Marshall's non-U.S. sources and instead are similar to American law. See Lawrence Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993).

11. UDHR Article 26, Section 1, is identical.

12. UDHR Article 26, Section 2, is identical, except that there is additional language in the UDHR indicating that education "shall further the activities of the United Nations for the maintenance of peace."

13. UDHR Article 26, Section 3, is identical.

14. UDHR Article 27, Section 1, is identical.

5. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹⁵
6. Everyone has the right to adequate health and welfare facilities.¹⁶
7. All educational facilities, hospitals and other health facilities and all provisions for the general welfare shall be open to all without regard to race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other status.¹⁷

IV

RIGHT TO WORK

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.¹⁸
2. Everyone, without any discrimination, has the right to equal pay for equal work.¹⁹
3. Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.²⁰
4. Everyone has the right to form and to join trade unions for the protection of his interests.²¹

15. UDHR Article 27, Section 2, is identical.

16. UDHR Article 25 has much broader protection for health and welfare. While Marshall's text focuses on facilities, the Declaration relates to a "standard of living adequate for health and well being." Marshall's Bill of Rights includes a right to what we might now call a "living wage" and to public assistance if needed in Part IV, Section 3, on the "Right to Work." A narrower right to nondiscrimination in education is protected in the Malaysian Independence Constitution, Part II, Section 12 (1).

18. UDHR Article 23, Section 1, is identical.

19. UDHR Article 23, Section 2, is identical.

20. UDHR Article 23, Section 3, is identical.

21. UDHR Article 23, Section 4, is identical.

V

RIGHT TO VOTE

1. Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives.²²
2. Everyone has the right of equal access to public service in his country.²³
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal, and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²⁴

VI

PROPERTY RIGHTS²⁵

Here I suggest we use the following language from the Nigerian Constitution. If it is agreeable the language may be changed to conform to Kenya. The Nigerian Constitution provides:

- (1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force—
 - (a) requires the payment at adequate compensation therefor;

22. UDHR Article 21, Section 1, is identical.
 23. UDHR Article 21, Section 2, is identical.
 24. UDHR Article 21, Section 3, is identical.
 25. The Property Rights section is taken from the Nigerian Independence Constitution, Chapter III, Section 30. The UDHR has a property rights clause, but it is much less detailed. Article 17 of the Declaration states: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of property."

- (b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the Courts;
- (c) gives to any party to proceedings in the Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.
- (2) (a) Nothing in this section shall affect the operation of any existing law.
- (b) In this subsection the expression "existing law" means a law in force on the thirty-first day of March, 1958, and includes a law made after that date which amends or replaces any such law as aforesaid (or such a law as from time to time amended or replaced in the manner described in this paragraph) and which does not,
 - (i) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired; or
 - (ii) add to the purposes for which or circumstances in which such property may be taken possession of or acquired; or
 - (iii) make the conditions governing entitlement to any compensation or the amount thereof less favourable to any person owning or interested in the property; or
 - (iv) deprive any person of any right such as is mentioned in paragraph (b) or paragraph (c) of sub-section (1) of this section.
- (3) Nothing in this section shall be construed as affecting any general law—
 - (a) for the imposition or enforcement of any tax, rate or duty; or

- (b) for the imposition of penalties or forfeitures for breach of the law whether under civil process or after conviction of an offence; or
 - (c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts; or
 - (d) relating to the vesting and administration of the property of persons adjudged bankrupt or otherwise declared insolvent, of persons of unsound mind, of deceased persons, and of companies, other corporate bodies and unincorporate societies in the course of being wound up; or
 - (e) relating to the execution of judgments or orders of courts; or
 - (f) providing for the taking of possession of property which is in a dangerous state or is injurious to the health of human beings, plants or animals; or
 - (g) relating to enemy property; or
 - (h) relating to trusts and trustees; or
 - (i) relating to the limitation of actions; or
 - (j) relating to property vested in statutory corporations; or
 - (k) relating to the temporary taking of possession of property for the purposes of any examination, investigation or inquiry; or
 - (l) providing for the carrying out of work on land for the purpose of soil conservation.
- (4) The provisions of this section shall apply to the compulsory taking of possession of property, movable or immovable, and the compulsory acquisition of rights over and interests in such property by or on behalf of the Crown.
- (5) The provisions of this section shall apply in relation to the Southern Cameroons and Lagos as they apply in relation to

a Region and for that purpose references in subsection (1) to a Region shall be construed as if they were references to the Southern Cameroons or to Lagos, as the case may be. Lancaster House, London, S.W.1
2nd February, 1960.

Source: Proposed Draft Bill of Rights, attachment to J. A. Sankey and T. M. Heiser, Note by the Secretaries, February 2, 1960, Folder: Kenya Constitutional Conference, 1960 Committee on Safeguards, Memoranda, CO 822/2362, Public Records Office, National Archives of the United Kingdom, Kew, England.

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