

CONSTITUTIONAL REFORM

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PART 5

FUNDAMENTAL RIGHTS

For the average person in The Bahamas, the most important part of the Constitution is Chapter III, which deals with the protection of fundamental rights and freedoms of “every person in The Bahamas”. The Constitution makes no distinction between citizens and aliens in relation to fundamental rights. The fundamental rights, under Article 15, are summarised as right to:

- (a) life, liberty, security of the person and protection of the law;**
- (b) freedom of conscience, of expression and of assembly and association and;**
- (c) protection for the privacy of his home and other property without compensation.**

The rights, through Articles 15 through 28, are stated broadly followed by varying degrees of exceptions or derogation clauses. These provisions are known as the Bill of Rights. The guarantees provided under the Bill of Rights are not static, but represent a continuing process of judicial decisions from the past to the present, in protecting our fundamental values of human dignity. These guarantees are so highly cherished that they are deeply entrenched in our Constitution; they can only be changed, pursuant to Article 54 (3), through three quarters of all members of each House of Parliament and by a majority vote in a referendum of the Bahamian electorate. The Bahamian Bill of Rights is part of the global development of international human rights law.

The Constitution of The Bahamas, like the constitutions of other Commonwealth Caribbean countries, was patterned after the Nigerian Independence Constitution and Bill of Rights of 1957, which itself was patterned after the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1953.

EMERGENCE OF INTERNATIONAL HUMAN RIGHTS LAW

Before World War II how a government treated its own citizens was a matter of purely national concern. The individual citizen was not considered a proper subject of international law. However, the treaties concluded by the Allied countries with Germany, Italy, Japan and the Central European countries following World War II imposed obligations to respect human rights.

In the Nuremberg Trials, political and military leaders who had acted in the name of the state were held personally responsible and punished for crimes against humanity. For the first time national leaders were held accountable to an international tribunal for how they had treated their own citizens.

International human rights law was further strengthened by the international human rights conventions ratified after World War II. For example, the preamble of the United Nations Charter states:

“We the peoples of the United Nations determine to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international

law can be maintained, and to promote social progress and better standards of life in larger freedom ...”

The Charter, in Article 1, Sections 2 and 3, state the purposes and principles of the United Nations are:

- “2. To develop friendly relations among nations based on respect for the principles of equal rights, self-determination of peoples, and to take other appropriate measures to strengthen universal peace.**
- 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 the fundamental freedoms for all without distinction as to race, sex, language, or religion.”**

Furthermore, Article 55 states:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ...c. universal respect for, and observance for, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Article 56 posits a general obligation for member states to enforce human rights:

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”

The term “**pledge**” in Article 56 has been interpreted by the International Court of Justice, in its 1971 **Namibia Judgment (1971 I.C.J 16)**, to mean that member states of the United Nations have accepted an international obligation to observe the Global Bill of Human Rights and that the provisions of the Charter of the United Nations Charter are directly binding on member states.

This international observance of and respect for human rights is assumed as a necessary condition for international peace and security. This assumption is also reflected in the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. Professors McDougal and Riesman have argued that the Universal Declaration, in particular, is now **jus cogens**, or part of customary international law. The Bahamas, since its independence on July 10th, 1973, has ratified all of these instruments and, therefore, has an obligation under international law to observe the human rights standards established by these international instruments.

Professors McDougal, Lasswell and Chen in the book **Human Rights and World Public Order** have posited that these instruments constitute a **global bill of human rights** that are now part of customary international law and reflect basic international community policies of the world constitutive process, crystallized in a **norm of non-discrimination**.

ENFORCEMENT OF THE BILL OF RIGHTS

Under the Bahamian Constitution, the Supreme Court is given plenary powers to issue orders, writs and directions it may consider appropriate for the enforcement of the Bill of Rights. Article 28(1) provides:

“If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of the of the Constitution has been, or is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.”

Therefore, the Supreme Court, through the power of judicial review, is the ultimate guardian of the freedoms and rights of the individual in The Bahamas and the arbiter of the meaning of the Constitution as the supreme law of the land.

The Court, informed by this evolving international human rights law, has to give vitality and meaning to constitutional provisions, which are framed, in a high level of generality. Through judicial interpretation, therefore, that the Constitution becomes a living document, constantly evolving in response to the changing circumstances, needs and demands of the Bahamian society. The Privy Council has constantly held that our courts should take a contextual, rather than a textualist, approach in interpreting and applying constitutional provisions to concrete cases.

The Privy Council in the case **Ministry of Home Affairs v. Fisher** (1980) AC 319 held that our Courts should have full regard for this evolving international human rights law when interpreting our Bill of Rights. In this case, a Bermudian man had married a Jamaican woman who brought her children, who had been born out of wedlock, to Bermuda. Under the Bermudian Constitution, a stepchild of a citizen was entitled to Belonger status. The Crown contended that an illegitimate person could not benefit under the stepchild provision because there was a legal presumption that the word “child” in legislative and other formal documents connotes “legitimate child”. Lord Wilberforce, writing for the majority of the Privy Council, reasoned that since the Constitution of Bermuda was influenced by the human rights norms in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Declaration of Human Rights and the fact that the Bermudian Constitution uses the phrase “every person” in its Bill of Rights enabled the conclusion that the term

“child” meant any child and was not restricted to legitimate child. Specifically, Lord Wilberforce held that:

“...Chapter I is headed ‘Protection of Fundamental Rights and Freedoms of the individual’. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”

In interpreting the Constitution of The Bahamas, the Court should give a generous interpretation to the constitutional provisions and avoid “the austerity of tabulated legalism”. In an open democratic society, the protection of human rights is not just the business of judges and lawyers. It is everyone’s business. As noted by Professor Lung-Chu-Chan, human rights can flourish, only when every member and every sector of the community are vigilant in defending and protecting them.

Over the course of the next several articles of this series, I will examine and critically appraise the individual rights and freedoms of our Bill of Rights and make certain recommendations for reform for the expansion and the more effective protection of our fundamental rights, consistent with the evolving global Bill of Rights.