



ARTICLES

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CONSTITUTIONS AND BILLS OF RIGHTS IN THIRD WORLD NATIONS: ISSUES OF FORM AND CONTENT

'From now on, every idea has to live dangerously'

Paul Valery

1 Introduction

No useful purpose will be served by showing here that traditional human rights concepts were the product of a capitalist oriented economic system. This has been amply demonstrated by Adam Smith.¹ The revolt, which occurred at Runnymede which led to the signing of the Great Charter, was a revolt by the gentry, those who owned land, the wealthy and the lords, and although the common people benefitted from some of the provisions of the Charter, it was originally initiated to secure rights for the aristocracy. Matters such as reliefs, rights of wards, escheats, guardianship, marriage of heirs, rights of widows, and knight service were the concern of the upper class.² It is even doubtful whether the most important article which guaranteed 'free men' the protection of the law or what is today called 'due process' extended to all people; some commentators say the word 'peers' is a corruption of the Latin word 'pares' meaning 'equal',³ and should not be taken literally. Similarly, the Petition of Rights (1628) was a demand on the King by his nobles, and so also was the Declaration of the Bill of Rights (1689).

What is often overlooked by commentators is the fact that these demands were made to ameliorate the social conditions of the people concerned, but since the demands were politicized they became political

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1 See generally Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* Vol 1, RH Campbell at al ed (1976) p400; also FA Hayek, *The Road to Serfdom*, (1944) p36ff; H Laski, *Liberty in the Modern State*, (1938) p51; and M Friedman, *Capitalism and Freedom* (1962) passim.

2 E Howard, *Magna Carter: Text and Commentary*, University of Virginia Press, (1964) 32. See also Articles 3, 4, 5, 6, 16, 43 of the Charter (1215).

3 Article 39 reads:

'We [will not] proceed against or prosecute [a free man] except by lawful judgment of his peers.'

See also Howard, *ibid*.

rights when the rights were granted. Viewed in this way, political and civil rights are at once social rights. If this generally was the background of the traditional Bill of Rights, is it wrong to require the peoples (albeit the elite) of developing nations to exert pressure for the grant of rights which the exigencies of their situation and circumstances make mandatory for survival? The problem of poverty is well known. The question is: will a Bill of Rights resolve problems of food, clothing, housing, education and medical care? That these are fundamental problems which must be solved by the polity cannot be denied. But the question has been asked: how?

Professor Richard McKean remarked:

‘Most of the fundamental opposition in the discussion of human rights is between those who hold that the preservation of civil and political rights is basic even before the establishment of economic and social rights and those who hold that unless economic and social rights are first secured, civil and political rights are an empty sham and pretence.’⁴

Supporters of the view that without economic and social security, civil and political rights are empty include Professor H J Laski, and the Indian sage and philosopher Humayun Kabir who asserted that the problem of the twentieth century is to reconcile the conflicting claims of liberty and economic security, and that a charter of human rights must aim at securing the minimum requirements of bare existence - food, clothing, shelter, education and medical care.⁵

The relationship between the evolution of a constitutional democracy and economic and social well-being has long been recognised, as the example of the industrial Western democracies palpably demonstrates, and to some extent the socialist countries also. Professor Harold Laski wrote in 1925:

‘By economic liberty I mean security and the opportunity to find reasonable significance in the earning of one’s daily bread. I must, that is, be free from the constant fear of unemployment and insufficiency which, perhaps more than any other inadequacies, sap the whole strength of personality. I must be safeguarded against the wants of to-morrow. I must know that I can build a home, and make that home a means of self-expression. I must be able to make my personality flow through my effort as a producer of services, and find in that effort the capacity of enrichment. For, otherwise, I become a stunted and shrunken being in that aspect of myself which lends colour and texture to all that I am. Either I must, in this sense, be free, or I become one of those halfsouls who are found in the slums and prisons as the casualties of civilisation. Nor is this all. I must be more than the recipient of orders which I must obey unthinkingly because my labour is only a commodity bought and sold in the market, like coal and boots and chairs. *Without these freedoms, or, at least, an access to*

4 *UNESCO Symposium on Human Rights*, New York: Columbia University Press (1949) pp78-89.

5 *Ibid* 90.

*them, men are hardly less truly slaves than when they were exposed for purchase and sale.*⁶ (emphasis added)

Dr F K Drah expands Professor Laski's view when he said:

'An interest in liberty begins when men have ceased to be overwhelmed by the problem of share existence; it is when they have a chance for leisure, the opportunity to reflect over their situation, in a degree in which if small is nevertheless real, to recognise that they need not helplessly accept the routine in which before, they seemed helplessly immersed. Economic sufficiency, and leisure for thought - these are the primary conditions of the free man.'⁷

What was then true of the ordinary peoples in the past is unfortunately true today of the vast masses of the Third World nations who occupy the subsistent sector. An attempt to awaken them to the great issues of human freedom without radically transforming their economic and social lot is an experiment in futility.

Dr Drah again stated the case cogently when he said:

'The idea of liberty as it is debated by social philosophers, involves discussions of experience and concepts too complex to have entered into their lives. The observer can easily be led to report that they are wholly indifferent to it; and that an attempt to arouse them from their present inertia would involve an effort not worth the labour that would have to be expended upon it.'⁸

In this paper, the thesis is that the traditional freedoms will be taken seriously by the government when the people's economic and social expectations have been reasonably met; that the constitution as the organic and fundamental law can identify and define regimes of economic and social interests of the people which then become 'jural postulates' to use the expression of Dean Pound;⁹ that the constitution should next define the limits within which these interests, rights, claims, needs and wants shall be recognised legally and given effect through legal precepts and endeavour to secure them within the limits so defined. The constitution is not to be regarded as value-free. It can espouse a philosophy of national life which the polity should try to accomplish by deeds. The constitution should be flexible and amenable to change as an instrument for effecting social policy.

2 The Traditional and Economic and Social Rights Controversy

The fundamental problems of the developing nations today are food, shelter, education, medical care etc; and a Bill of Rights which does not contain provisions addressed specifically to these problems is a sham, for in order that the people should exercise civil and political rights they must live, not merely exist. To the question: why embody such matters in a constitution? Our answer is that for the same reason the traditional

6 JH Laski, *A Grammar of Politics*, (5th ed 1967) p148.

7 FK Drah, 'Some Thoughts on Freedom in a Post-Colonial Setting' *Econ Bull Ghana* vol 12 (1968) 34, at p40.

8 *Ibid* 41.

9 VR Pound, *Social Control Through Law*, (1942) *passim*.

rights are embodied in a constitution, viz; it makes the path of the transgressor more difficult; in our case because if they are embodied in the constitution they cannot easily be ignored by the powers that be.

Critics of the view that civil and political rights are empty without economic and social rights include Professors Cowen and de Smith. Professor Cowen said:

‘While I do not for one moment deny the great importance of providing social and economic security, I would suggest that there is an area of individual liberty which should necessarily, and in all circumstances, be safeguarded...I utterly repudiate the notion that the provision of social and economic security should be given pride of place above all other freedoms.’¹⁰

He went on to illustrate his point by pointing out that socio-economic rights are deep issues between the USSR, her allies and the West, and that in fact some guaranteed rights in the constitution of the USSR were not fundamental rights in the true sense by which, he meant, they were not fundamental rights as they are understood in the West. He lamented the fact that in the USSR where the State is a universal provider, ‘the individual ceases to count’.¹¹ He concluded however on a note of compromise:

‘In any event the safeguarding of individual liberty and the provision of social and economic security are not mutually exclusive ideals. They are in fact complementary; without some amenities the traditional freedoms are small comfort, and without freedom the amenities are not worth having. The question - and I do not deny its difficulty - is how to strike a wise balance; where to draw the line?’¹²

Recognising that the drawing of the line depends upon ‘the practical virtue of prudence’,¹³ he agreed there could be no hard and fast rule. ‘Much’, he said, ‘no doubt depends upon the needs of time and place, and this is particularly the case in underdeveloped countries like Africa.’¹⁴ He said he had little sympathy for the view of those who would attempt to force ‘African realities Procrustes - fashion into Western political moulds’ and who criticise newly independent African states on the ground that their polities are not exact replicas of British Parliamentary democracy. He repeated again that there is no real conflict between the interests of civil and political liberties and economic and social security.¹⁵ ‘The provision of social and economic services’, he said:

‘is not incompatible with most of the really basic, rights and freedoms. I have, for example yet to learn how the right to personal freedom and a fair trial, freedom of worship, stand in the way of economic and social security in a given state.’¹⁶

Professor Cowen’s views are moderate and there is in fact no divergence of view between him and this writer. This writer argues that civil and

10 D Cowen, *Foundations of Freedom*, OUP (1961) p121.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.

political rights and economic and social rights must form a package under fundamental rights provisions of a constitution. However, Professor Cowen in his preoccupation to prove absence of conflict between the goals of political liberty and economic security glossed over the problem that some political rights cannot be exercised or enjoyed unless there is a minimum of economic and social security; we shall presently see how this happens.

Professor de Smith is a more aggressive critic of the inclusion of economic and social rights in a constitution. The thrust of his argument is that such rights are generally speaking difficult to enforce. He said:

'To fail to guarantee the right to work or to enjoy social security may be bad politics, but it is not thought to be bad law; for a constitution is primarily a legal document; rights ought not to be guaranteed in it unless they can be judicially enforced and a "right" to social security manifestly cannot.'¹⁷

Although we shall be taking up the question of enforcement of economic and social rights later, we wish to comment in passing, first, that the argument that a right should not be guaranteed in a constitution unless there is the means to enforce it ignores the fact that even in English law, statutes confer rights which no one can enforce and that it is not enforceability which gives a piece of law its legality. Enforcement affects only the remedial aspect of a legal norm. It does not affect the question of its legality in the sense that when ignored, the courts cannot be seized or take cognizance of its breach. Such provisions serve a certain purpose even if not enforceable ie they affect people's attitude to the subject matter of the rights.¹⁸ Secondly, as Professor Wheare indicates, there is no limit on what a constitution may contain; what a people decide to put in the provisions of a constitution is a matter of choice. Observing that a broad classification is discernible he said,

'A principal line of division is found between those who regard a Constitution as primarily and almost exclusively a legal document in which, therefore, there is a place for rules of law but for practically nothing else, and those who think of a constitution as a sort of manifesto, a confession of faith, a statement of ideas.'¹⁹

Professor Richard B Bilder criticises the UN Declaration of Human Rights for the vagueness of some of the rights which it confers. But few legal concepts, if ever, are free from ambiguity; when the 'due process'

17 de Smith, *The New Commonwealth and its Constitutions*, (1964) p151.

18 See KN Rao, 'The Indian Directive Principles - A case for New Interpretation' *Indian Yb IA Vol 8 (1959)* 110 for an elaboration of this argument.

19 CK Wheare, *Modern Constitutions*, (1966) p46. In *McCulloch v Maryland*, Wheaton 316 (1803) Marshall, (CJ) enunciated the following principle:

'A Constitution to contain an accurate detail of all the subdivision of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore, requires that only its broad outlines should be marked, its important objects designated, and the minor ingredients which compose those ingredients be deduced from the nature of the objects themselves.'

See further, M Anantanarayan, 'Some Juristic Norms and the Indian Constitution' *Indian Yb IA Vol 8 (1959)* p104. The *Indian Constitution* covers some 250 pages while the *Constitution of Norway* is compressed into 25 pages.

and 'equal protection' clauses in the Amendments to the US Constitution were enacted, they were at first very vague, but the courts, guided by policy considerations, have over the years so interpreted these provisions that with time their meaning seems quite clear now.²⁰

There would thus, appear to be no valid reason, or so it seems at least to this writer, for excluding social and economic rights from the provisions of a constitution. They may simply be declaratory of goals or they may be absolute rights.

Some new nations avoid the 'justiciable non-justiciable' dilemma by couching the rights in seemingly absolute terms, although they are in fact very abridged and their enjoyment made dependent upon some contingency. For example, the 1976 constitution of Ethiopia having provided for the right to work in Article 39(1) then proceeds to provide thus in Article 39(2): 'The state shall, as the development of the national economy permits, progressively ensure that employment opportunities are created and working conditions improved.'²¹

The necessity arises from the fact that once embodied in a constitution, they become a constant reminder to those in power that they owe the duty to improve the social conditions of the electorate and that they would be voted out if at the end of their term, ordinary people do not see noticeable change in their living condition. Those in power cannot easily ignore the threat of losing power on this account. Even strong rulers would want their actions seen as legal hence the late Dr Nkrumah's obsession with constitutional amendments.²² On the need for embodying traditional rights in a constitution, Professor Cowen said:

'No knowledgeable person has ever suggested that constitutional safeguards provide in themselves complete and infeasible security. But they do make the way of the transgressor, or the tyrant, more difficult. They are, so to speak, the outer bulwark of defence.'²³

We make the same claim for the need to embody socio-economic rights in a constitution. It is obvious that we cannot discuss adequately all the ramifications of the controversy in a paper such as this. For our purposes, therefore, we are adopting the position that for developing nations it may perhaps be more advantageous to the body politic to include socio-economic rights in a Bill of Rights provision of a constitution than to exclude them.

We shall next look at some effects of the absence of economic and social rights on the prospect of democracy.

3 The Relevance of Economic and Social Rights to Democracy

Social rights and social justice are indispensable to freedom and equality in a democracy. Their absence results in the deprivation of individual rights in the underprivileged sections of the society. Justice Thurgood Marshall remarked:

20 B Bilder, 'Re-thinking Human Rights' 1969 Wisc LR p170.

21 See also Arts 66 and 67 of the Constitution of Algeria, 1972.

22 On the frequent change of constitution in Africa see GY Ghai, 'Constitutions and the Political Order in East Africa' ICLQ Vol 21 (1972) p403.

23 Cowen, *Foundations of Freedom* supra n 10 at 119.

'A property right is not a right to possess property but a right to acquire it, if you can get it. But if you use these arguments to explain to a pauper that his property rights are the same as those of a millionaire he will probably accuse you of quibbling. Similarly, the right to freedom of speech has little real substance if, from lack of education, you have nothing to say, and no means of making yourself heard if you say it. But these blatant inequalities are not due to defects in civil rights, but lack of social rights.'²⁴

It is no exaggeration to assert that poverty makes a man vulnerable and likely to succumb to the temptations of money eg bribery, corruption and naked thievery of state property. Of course greed and avarice may also make a person susceptible to money's temptations. Crime and violence, resort to intimidation or exertion of undue influence are no doubt sometimes the byproduct of poverty. The vast majority of Third World nationals, as is universally known, still live below the poverty line and their situation can be improved not through half-hearted or piece-meal legislative action but through a massive and radical transformation of the social-economic system. The Constitution can be used for this.

Added to the problems of forging a united, strong nation and raising the standard of living of the masses is the problem of population explosion. It is argued by some that population explosion can be controlled only by economic development. Though this may be the answer yet we cannot get out of the current vicious circle inherent in the statement: without economic development, population explosion cannot be contained, and population explosion is nullifying the effect of economic development. The great strides made in contraceptive technology have no noticeable effect on rural life in developing nations because of deprivation of basic education and medical care.

The socio economic conditions of a people affects democracy adversely in a number of ways. A tradition of democratic process is maintained through the ballot box which ensures participation of the people in government. Voting is based on the principle of universal adult suffrage subject to such limitations as age, citizenship and the like.²⁵ In the USA, the Commission on Civil Rights recommended that the rights to vote ought not be abridged or interfered with -

'Except for inability to meet reasonable age or length of residence requirements uniformly applied to all persons within a state, failure to complete six grades of formal education or its equivalent, legal confinement at the time of registration or election, judicially determined mental disability, or conviction of a felony.'²⁶

The requirement of six grades of education in the USA is no doubt intended to insure intelligent participation in democracy. But will this not

24 T Marshall, *Sociology at Cross-road and other Essays* (1st ed 1963) p91. In this work, Marshall perceives civil rights as rights necessary for individual freedom - freedom of the person, freedom of speech, etc. Social rights he regards as embracing the whole range of rights from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of the civilised being according to the standard prevailing in the society.

25 Representation of People Act, 1951.

26 *Report of the US Commission on Civil Rights*, Washington (1963) p26.

deprive a vast group, particular the disadvantaged minorities, from participation in government? In any case in the developing nations, where illiteracy is the rule rather than the exception, such a limitation on the exercise of the franchise would certainly not work, for it would effectively undermine the very concept of democracy since the majority will lack the capacity to vote.

At the risk of stating the obvious, economic deprivation implies the economic dependence of one person on another. The weaker of the society are dependent on the powerful, the influential and the wealthy. The adverse effect of this on the democratic tradition has been summed up in the words of the US Commission on Civil Rights. It states:

‘To be sure the Voting Rights Act has not resulted in full use of the franchise. Means other than disqualification, such as exploitation of continuing economic dependence of rural negroes in the South, still constitute deterrents to the exercise of the right to vote.’²⁷

In India, lack of land and education have deprived the Harijans of the advantage of their political strength. In Ghana, the tribes of the North who work on the cocoa farms in Ashanti and the South have been disenfranchised de facto by virtue of their dependence on their Southern landlords for survival. In this can be seen the force of the argument that legal equality will not and does not by itself achieve social equality. But if it is implied in this that an attempt at achieving legal equality is unnecessary, we must remind ourselves that under every constitution legal equality is an imperative for the enforcement of social equality. Social rights may be difficult to enforce, yet their existence helps to change people’s attitudes. Again, to quote the US Commission on Civil Rights: ‘Civil rights laws and policies by the Federal Government can be of value even when they do not contain strong enforcement mechanisms. [The law] brings about substantial changes in attitudes and behaviours.’²⁸

A side-effect of poverty is apathy and cynical unconcern for the governmental process. This is the inertia and stupor out of which, as Professor Laski pointed out, it is difficult to arouse the people. In Australia, the Government of the country sought to prevent apathy by making voting compulsory.²⁹ This step has been criticised as being undemocratic. Certainly in populous and nascent democracies, this will impose onerous administrative burdens on the government. Without popular participation in government, it is easy for a government to become autocratic since the silence of the people, which is the consequence of apathy, is taken to indicate approval of government policies. In the long run, the people are their own executioners.

Population explosion affects democracy qualitatively. For functional reasons, the strength of a legislative body cannot be increased beyond a predetermined optimum number. Thus with the rise in population, the number of voters in a constituency becomes too great and consequently unwieldy and contact with constituents becomes very difficult, hence the sensitivity of the elected representative becomes callous or dim; it also

²⁷ *Federal Civil Rights Enforcement Effort: A Report of the US Commission on Civil Rights*. Washington (1970) p13.

²⁸ *Ibid* 29.

²⁹ A Sawyer, *Australian Government Today* (Rev ed 1962) p52.

means increased expense in electoral contests, making it more difficult for the not-so-well off (of the society) to seek election at all.

4 Socio-Economic Rights and Constitutions of Developing Nations

The International Congress of Jurists which met in New Delhi, India in January 1959 gave some indication as to the mood of the developing nations on the crucial legal principle of the Rule of Law; the Congress expressed the view that the Rule of Law was compatible with a strong government.³⁰

'The Rule of Law depends not only on the provision of adequate safeguards against abuse of power by the Executive, but also on the existence of effective government, capable of maintaining law and order and of ensuring *adequate social and economic condition* of life for the society.'³¹ (emphasis added)

On the Judiciary, the Congress affirmed its recognition of the fact that an independent judiciary is an indispensable requisite of a free society and that such independence implies freedom from executive and legislative interference with the exercise of judicial function. It noted however, that the independence of the judiciary does not imply that 'the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it'.³²

On the relationship between the legislature and the principle of the rule of law, it stated:

'*This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.*'³³ (emphasis added)

It is important to note that traditionally social, economic, educational and cultural rights did not sound in any exposition of the principle of the Rule of Law. Introducing into the reach of the principle for the first time are social and economic matters. Lord Denning was said to have remarked *ex cathedra* that he had been made to change his view on the doctrine as a consequence of the New Delhi Declaration. This could be due to the influence of socialism in Europe.

On the all-important matter of ensuring fundamental rights through legislative activism, the congress said that every legislature in a free society should give effect to the principles enunciated in the Universal Declaration of Human Rights. It laid special emphasis on the traditional rights, but admonished: 'the failure to refer specifically to other limitations or to enumerate particular rights is not to be construed as in any sense minimizing their importance'.³⁴

Since fundamental rights have traditionally been the preserve of national constitutions, one would have expected that the admonition of the Congress would find expression in constitutional provisions in the new nations. What

30 *Declaration of the International Congress of Jurists on the Rule of Law*, Delhi (1959), reproduced in Jn ICJ Vol 2 (1959) p7.

31 *Ibid* 10.

32 *Ibid* 16.

33 *Ibid* 8.

34 *Ibid*.

we find is rather ambivalence and apathy to the entire idea. The new nations are not wholly blamable for their attitude since most of them had just then been granted independence and needed time to experiment with new constitutions. Those which became independent soon after the Delhi Conference in fact had to negotiate their constitutions - a negotiation over which they did not have complete control.

The idea of embodying socio-economic rights in a constitution was not first initiated at the Delhi Conference. It had been tried in the USSR, Japan, Indonesia, India and Ireland and most recently in Nigeria and it will be helpful for our purposes to review the area which the concept encompasses under the constitutions of some of these countries. In the constitutions of the USSR, Japan, Indonesia and Nigeria the rights would appear to be justiciable. In the Constitutions of Ireland and India, they are not justiciable.

(a) *USSR*

Although the practice of including economic and social rights as fundamental rights in the organic law or constitution of a nation may be said to have socialist origin, it is important for us to bear in mind the fact that even the USSR is not immune to ideas prevailing in other parts of the world, and that the revised 1977 Constitution of the USSR has incorporated in the human rights provisions of the Constitution similar provisions of the UN International Covenants.³⁵ Thus the provisions today are fundamentally different from what they were when they were first promulgated in 1936. It may therefore be argued that the USSR is not necessarily the leader in these matters.³⁶ Again, the fact that the Soviet Bill of Rights has not only been revised but has been repositioned to place it ahead of the Chapter on state structure rather than behind it as was the situation under the Constitution of 1936 is indicative of the importance that the USSR now attaches to its prestige in the scheme of constitutional developments. This increase in the importance and prestige of the Soviet Bill of Rights may have been occasioned by the realisation on the part of the Russians of the increasing emphasis other nations throughout the world have been placing on fundamental rights.

The provisions of the USSR constitution which are based on UN International Covenants are: (1) the right to health protection which in the USSR is ensured by the state's provision of free medical care, hygienic environment and the prohibition of child labour;³⁷ (2) the right to housing which is guaranteed by the development and upkeep of state-owned housing and the provision of government assistance for individual and co-operative house building, low rent and low charges for utilities;³⁸ (3) the right to

35 J Hazard, 'Explanatory Note on the 1977 USSR Constitution', in *Constitutions of Countries of the World*, Vol XVII *The Constitution of the USSR*, AP Blaustein and GH Flanz, eds Dodds Ferry, New York: Oceana Publications Inc (1978) p1. According to Hazard, the delay in the work of the Constitution Drafting Committee set up in 1962 to revise the 1936 Constitution was occasioned partly by the fact that the Bill of Rights required redrafting to conform to obligations assumed by the USSR when it ratified the UN International conventions on Civil and Political Rights and Economic, Social and Cultural Rights. See also, V Chirkin, *Constitutional Law and Political Institutions*, Moscow: Progress Publishers (1985) p255.

36 State medical service and social security have been in existence in the UK since 1947.

37 Art 42.

38 Art 44.

enjoy cultural benefits ensured by the preservation of state and world treasures and other collections, fair distribution of educational and cultural institutions throughout the nation and the provision of television and literary information;³⁹ and (4) the right to family life which is ensured by state provision of child care institutions.⁴⁰

Other important human rights provisions of the constitution include: the right to work, guaranteed by state ownership of the means of production and pay in accordance with the quantity and quality of work performed;⁴¹ indeed every able-bodied citizen is under an obligation to work conscientiously⁴² and 'evasion of socially useful work is incompatible with the principles of socialist society'.⁴³ There is the right to leisure,⁴⁴ the right to education,⁴⁵ which is ensured by the free provision of all forms of education, the institution of universal and compulsory secondary and technical education, free text books and the provision of scholarships for tertiary education. Of particular interest is the 'right to maintenance in old age, in sickness and in the event of the complete or partial disability of the bread winner'.⁴⁶ This right is guaranteed through social insurance of workers and the provision of retirement and disability pensions for all workers.⁴⁷ It is to be observed that there is no blanket provision for the maintenance of the poor.

There are, of course, the traditional rights: freedom of the person,⁴⁸ speech,⁴⁹ conscience,⁵⁰ the right to privacy,⁵¹ and freedom from arbitrary arrest.⁵² Freedom of assembly does not mean that people are free to organise themselves into political parties in opposition to the Communist Party.⁵³ All rights must be exercised 'in conformity with the interests of the working people and for the purpose of strengthening the socialist system'.⁵⁴ This places a severe limitation on the enjoyment of all the rights.

An interesting provision is that on the reciprocal obligation of citizens to the state. If citizens have rights, the state also has rights, and the citizens' rights are inseparable from their duties and obligations to the state, in particular, their observance of the Constitution and the laws of the USSR and their compliance with 'the standard of socialist conduct'⁵⁵ and the maintenance of the honour and dignity of Soviet citizenship. Finally, the enjoyment of the rights must not be detrimental to the interests of the state, or infringe the rights of others.⁵⁶

39 Art 46.

40 Art 52.

41 Art 40.

42 Art 60.

43 Ibid

44 Art 41.

45 Art 45.

46 Art 43.

47 Ibid

48 Art 54.

49 Art 50.

50 Art 52.

51 Art 51.

52 Art 54.

53 Hazard, 'Explanatory Note on the 1977 USSR Constitution' supra n 35 at 2.

54 Art 125.

55 Art 59.

56 Art 39.

(b) *Japan*

The Japanese constitution⁵⁷ was an American-inspired document, and as would be expected, it guaranteed the right to life, liberty and pursuit of happiness.⁵⁸⁻

It imposes both rights and corresponding duties; citizens are required to refrain 'from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare'⁵⁹ to the extent that the public welfare is not interfered with.⁶⁰ It recognises equality of all under law and prohibits discrimination on ground of race, creed, sex, social status or family.⁶¹ Universal adult suffrage is guaranteed.⁶² Freedom of thought, conscience, religion and assembly is recognised.⁶³ A person's right to choose his place of abode and residence is recognised,⁶⁴ and so is the right to leave and return to the country.⁶⁵ A man may renounce his nationality. Academic freedom and the right to have equal education in consonance with one's ability are assured. The right to contract marriage by consent is provided for.⁶⁶ A minimum standard of wholesome and cultured living is recognised, and the State is enjoined to promote social welfare and security and public health;⁶⁷ there is a right in workers to organise and bargain collectively.⁶⁸ There are procedural safeguards for arrest, detention and trial of an accused person⁶⁹ - the right to counsel,⁷⁰ the right of an accused to be informed of his offence, examination of witnesses, the right of an accused not to give evidence against himself,⁷¹ the right not to stand in double jeopardy and the right not to be convicted under a retroactive law.⁷² The constitution prohibits the subjection of a man to torture and cruel punishment.⁷³

On property rights, the constitution states that they must be defined by law in conformity with public welfare and that private property may only be taken for public use 'upon payment of just compensation therefore'. Thus while the protection which the constitution of Japan gives to personal liberty is not different from the US position, and while the right to have compensation for expropriated property is unimpaired, what property may be acquired, enjoyed and dealt with is subject to legal control. This taken together introduces what Professor Gledhill calls a 'new concept, a welfare State'.⁷⁴ According to Professor Gledhill, 'In the bourgeois world, these were by-products of the right to acquire and enjoy property'.⁷⁵

57 Constitution of Japan (1946).

58 Art 13.

59 Art 12.

60 Art 13.

61 Art 14.

62 Art 15.

63 Arts 19, 20.

64 Art 22

65 Ibid.

66 Arts 23, 24.

67 Arts 27, 28.

68 Arts 30, 40.

69 Art 35.

70 Art 37.

71 Art 36.

72 Ibid

73 Art 29.

74 Art 31.

75 Supra at 87.

(c) *India*

Before the Nigerian Bill of Rights, there was of course the Indian model which is autochthonous, ie home-grown.⁷⁶ The Simons Commission, it will be recalled, answered the Indian nationalists who agitated for a comprehensive Bill of Rights by saying that what India needed was not a Bill of Rights but impartial authorities bold enough to protect the rights, claims and interests of minorities and the weaker communities. In the Government of India Act 1935,⁷⁷ therefore, guaranteed rights were limited to property rights and protection against discrimination. However, when after independence the nationalists were called upon to frame a Republic Constitution, they preferred to follow the American example.⁷⁸ It was Jefferson who said:

‘The inconvenience of the Declaration is, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflictive and irreparable. They are in constant progression from bad to worse. The executive in our governments is not sole, it is, scarcely the principal object of jealousy. The tyranny of the legislature is the most formidable dread.’⁷⁹

The India Constitution of 1946 therefore in Part III (Articles 12-35) places substantial limitations on executive and legislative dealings with individual authorities. The provisions contain the traditional or classical type of fundamental rights. In addition, there are in Part IV the so-called Directive Principles of State Policy⁸⁰ which by Article 37 are not justiciable. Part III and IV of the Constitution of India taken together enshrine ‘cherished principles of liberal democracy and the rule of law and (offer) a viable constitutional framework for satisfying the evolving aspiration and needs of the future generations’.⁸¹ Professor Gledhill says:

‘The political philosophy behind the Fundamental Rights is liberal, that behind the Directive Principles is socialistic.’⁸²

Here is a blending of the liberal principles such as are known in most democratic countries and the welfare principles such as are contained in the UN Declaration of Human Rights. The State is enjoined to direct its policy towards securing that ‘the ownership and control of the material resources of the community are so distributed as best as not to subserve the common good’;⁸³ and that

‘the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.’⁸⁴

76 Cmnd 505 (1958) p97.

77 UK 25 & 26 Geo 5, c42.

78 Wheare, *supra* n 19, chapter 4.

79 Cited in DD Basu, *Commentary on the Constitution of India*, Vol A (6th edn 1973) p251.

80 Art 37.

81 R Rao, ‘Law and Social Change: A Historical perspective: Independence and After’ *Indian Yb IA Vol 17* (1977) p460.

82 ‘Fundamental Rights’ in *Changing Law in Developing Countries*, JN Anderson, (edn New York Praeger Co 1963) p81 at p88.

83 Art 39(b).

84 Art 39(c).

The preamble indicates that the Constitution is designed to secure: '*Justice*: social, economic and political'.⁸⁵ The fact that these rights are not legally enforceable rights does not detract from their efficacy. It has been argued that the fact that the Constitution says the principles 'shall not be enforceable by any court' does not mean they are not justiciable, for while enforcement connotes the availability of a remedy only, justiciability entails recognition from the law and validity for all purposes. Although the courts may not provide remedy for their violation, they are binding on other government organs.⁸⁶ Article 37 imposes a duty on the state 'to apply these principles in making laws'.⁸⁷

No doubt, the Indians were influenced by similar provisions in the Irish constitution (1937).⁸⁸

So much has been written on the Directive Principles of State Policy of the Constitution of India; it will, therefore, not be fruitful to engage in any lengthy discussion on it, beside alluding to it as an example of constitutional provisions touching on economic and social rights. True, there may be rights without remedies. But a Constitution which leaves rights without remedies only generates more problems when it should be solving them.

(d) *Indonesia*:

The Constitution of Indonesia, 1946 is unique in the way it provides for socio-economic rights. It has been suggested by Professor Gledhill that the UN Declaration of Human Rights greatly influenced the writing of the Constitution of Indonesia.⁸⁹

Article 27(2) provides: 'Every citizen shall have the right to work and to a living befitting [for] human beings.' The Constitution guarantees the right to education. On social well-being, the Constitution provides in Article 33 which says: '(1) The economy shall be organised as a common endeavour based upon the principle of the family system. (2) Branches of production which are important for the State and which affect the life of most people shall be controlled by the state. (3) Land and water and the natural riches contained therein shall be controlled by the State and shall be made use of for the people.' Article 34 provides: 'The poor, and destitute children shall be cared for by the State.' Article 33 may be superfluous in an African constitution since most corporations which provide utility services (communication, radio, broadcast and TV, water, sewerage and electricity) are state owned. However, if only for emphasis and to convince the citizens that the companies are run in their interest and thus stimulate them to give their best in their performances, it may be necessary to insert such a clause. Article 34 is however very significant. The State is obliged to maintain only the 'poor' and 'destitute'; there

85 See the Preamble.

86 Art 39. See also Chapter II (Articles 13-22) of the Constitution of Nigeria, 1979.

87 NK Rao, 'The Indian Directive Principles: A Case for New Interpretation': supra n 18.

88 VT Delany 'Fundamental Liberties in the Constitution of Ireland' U Malaya LB Vol 2 (1960) p17; also C O'Normain, 'The Influence of Irish Political Thought on the Indian Constitution' Indian Yb IA Vol 6 (1952) 156; also VP Nauda 'The Constitutional Framework and the Current Political Crisis in India' Hastings Constitutional LQ Vol 2 (1976) 859.

89 Supra n 82 at 87.

is no blanket provision to maintain everybody.⁹⁰ It should be fairly easy to determine those who fall within this category of citizens.

A criticism often levelled against Western type of Bill of Rights is that such a Bill of Rights does not impose positive duties on the citizen. The Constitution of the USSR meets this criticism by providing for 'Fundamental Rights and Duties of Citizens'.⁹¹ Of the individual's duties to the State, those contained in Articles 159 and 161 are very important. Article 159 provides:

'It is the duty of every citizen of the USSR to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labour discipline, honestly to perform public duties, and to respect the rules of socialist intercourse.'

Article 131 provides for the duty to protect public property. It states:

'It is the duty of every citizen of the USSR to safeguard and fortify public, socialist property as the sacred and inviolable foundation of the Soviet system, as the source of the wealth and might of the country, as the source of the prosperity and culture of all the working people. Persons committing offences against public, socialist, property are enemies of the people.'⁹²

(e) *Nigeria*

The 1979 Constitution of the Federal Republic of Nigeria makes provision for Fundamental Objectives and Directive Principles of State Policy in Chapter II (Articles 13-22) of the Constitution. The principles seem to have been inspired by the Indian model. The provisions are perhaps the most detailed in any contemporary African Constitution and reflect the growing realisation on the part of constitution-makers for the need to expand the compass of fundamental rights. Unlike the Indian example, however, there is no express provision in the Chapter which renders the rights non-justiciable.

Article 13 places a duty on all organs of government authorities and persons who exercise any legislative, executive or judicial powers to conform to and observe and apply the provisions of the Chapter.

Article 14 recognises that sovereignty resides in the people and that public officers are truly servants and not masters of the governed, and

90 For example, Article 64 of the 1972 Algerian Constitution provides for the maintenance of 'Citizens who have not reached the working age, who can no longer work and can never work'.

91 Art 43 of the 1977 Constitution of the USSR provides:

'Citizens of the USSR have the right to maintenance in old age and also in case of sickness or disability. This right is ensured by the extensive development of social insurance of factory and office workers - at state expense, free medical service for the working people, and the provision of wide network of health resorts for the use of the working people.'

92 Enemies of the people are those who commit 'subversion' and are severely punished. See generally JH Barman, *Justice in USSR* (Cambridge, Mass 1963) p69; also J Hazard, *Communists and Their Laws* (Chicago, 1969) p421; J Cohen, *The Criminal Process in the Republic of China* (Cambridge Mass 1968) p72ff; O Kirchheimmer, *Political Justice*, (Princeton 1981) p372; JH Barman, 'Soviet Law Reform - Dateline Moscow' *Yale LR* vol 66 (1956/57) P1191 and M Pasqualini and Chelminski, *Prisoner of Mao* (New York 1976) passim.

declares that the security and welfare of the people shall be the primary purpose of government, and that government shall ensure the participation by the people in their government.

On the basis of the diversity of the peoples, it is provided that the Federal Government or any of its agents shall so conduct its affairs as 'to reflect the federal character of Nigeria'.⁹³

This is perhaps the most important provision in the chapter, for it introduces a sort of quota system on the basis of which appointments do not favour some sectional groups alone to the detriment of others. This would certainly occur if appointments were to be based on qualification alone, for as is well known certain ethnic groups are educationally more advanced than others and, if appointment were to be based on qualification only, it would result in the dominance at the center of such groups. Nothing can be more fatal to the continuing unity of a nation which has once experienced the horrors of a cessionist attempt. In a lecture 'Viable Political Order for Nigeria' delivered by Professor BO Nwabueze at the 1986 Nigerian Bar Association Law Week, the learned lecturer said of the Federal character principle:

'The principle required that public appointments at all levels, and in particular strategic departments and functions of government, should be equitably distributed among all the component groups. Only if the strategic departments and functions of government are so distributed can it be said that there is 'no predominance of persons from...a few ethnic or other sectional groups' in the conduct of the affairs of the Federal Government.

Equitable distribution does require that public appointments should be spread among the groups roughly or approximately according to their respective numerical strengths, since only so can they be seen to be fair and equitable. *This does not amount to a fixed quota system.* The federal character principle is not conceived as a formula but as a broad guide. As such guide, it needs to be applied not with mathematical exactitude, but only with a due sense of equitable balance. This calls for a high degree of statesmanship. To apply the principle in the form of fixed quotas would result in the abandonment of acceptable minimum entry requirements in public appointments and admissions to federal universities and colleges. The principle does not require the appointment or promotion of anyone who does not possess the qualification required for an office or the admission to a university or college of any one who did not score the minimum pass mark in the entrance examination. *All it does is to permit a person with the requisite qualification to be appointed or admitted to represent his group, although he may not be the best man available in a nation-wide competition.*

Admittedly, he may not perform as well as the best man. Yet, so long as acceptable standards determined by prescribed minimum qualifications or experience is not lowered to unacceptable level simply to accommodate the disadvantaged

groups, his appointment or admission to represent his group fulfils a higher societal need than that of the highest standard of performance which may be expected from the best man.’⁹⁴ (emphasis added).

Article 15 enjoins the state to promote national integration by encouraging mobility, inter-tribe marriage, residence and the formation of associations that cut across sectional barriers. It also enjoins the state to take steps to abolish corruption and the abuse of power. Article 16 addresses economic security and welfare by providing that the State shall ensure that the operation of the economic system does not lead to the concentration of wealth in the hands of a few people and that it should provide ‘suitable and adequate shelter, food, reasonable national minimum living wage, old age care and pensions and unemployment and sick benefits’ for all citizens. Article 17 reiterates some of the traditional rights already guaranteed under Chapter IV: equality before the law, the sanctity of the human person, equal access to the courts, and enjoins the State to ensure that the exploitation of human or natural resources of the nation shall be for the common good; that there is adequate opportunity for all to secure adequate means of livelihood; that the health, safety and welfare of workers are not endangered; that there is equal pay for equal work, that children and young persons are protected from vice and material neglect, and that there is public assistance for the needy in deserving cases, not public assistance for *all* the needy.

Article 18 enjoins the state to eradicate illiteracy, promote science and technology and provide free and compulsory universal primary education, free secondary education and a free adult literacy programme.

Article 19 enjoins the State to promote African unity and to combat racial discrimination.

Article 20 deals with the protection and sustenance of the Nigerian culture.

Article 21 makes it the state’s responsibility to ensure such freedom of the press as would make it an effective instrument for sustaining the principles and objectives of state policy and also ensure ‘public accountability’.

Article 22 concludes the chapter with a provision on the National ethic which shall be ‘Discipline, Self-reliance and Patriotism’.

5 THE COMPATIBILITY OF NATION BUILDING AND HUMAN RIGHTS

Dr Asante says:

‘Nation-building in Africa is indeed fraught with formidable difficulties. The typical new African state was originally an artificial creation of the metropolitan power, encompassing a heterogenous collection of tribes, and representing at best a colonial, administrative or economic convenience. National boundaries are not referable to any criteria other than the accident of colonial partition. This means that upon attaining independence, African governments are confronted with a

situation in which the very existence of their respective nations has yet to be established as a meaningful concept.

Development is further bedevilled by poverty, disease and illiteracy and a serious dearth of human and material resources. On this fragile foundation, the leaders of an emergent African nation are charged with accomplishing at least four herculean tasks in their lifetime: first, to forge the bonds of unity and nationhood, and to foster wider loyalties beyond parochial, tribal or regional confines. Second, to convert a subsistence economy into a modern cash economy without unleashing social turbulence and economic chaos. Third, to industrialize the country and to introduce a sophisticated system of agriculture. Fourth, to erase poverty, disease and illiteracy, raise the standard of living of the people, and in short create a modern state with all its paraphernalia. The ex-President of Ghana, Kwame Nkrumah, proclaimed that he had to accomplish in ten years what the developed countries had achieved in a hundred:

This unprecedented pace of development and modernization can only be feasible, if at all, within a stable political framework; and there can be no political stability without a national political consensus. Most African nations are yet to attain this consensus; the frequent incidence of coup d'etat graphically demonstrates the terrible convulsions through which African nations are passing. *Political instability obviously militates against the establishment of any articulate body of social or political values, but further it undermines the inculcation of healthy and meaningful human rights traditions.*⁹⁵

It has generally been asserted that Ghana's Nkrumah and Tanzania's Nyerere represent those leaders in the new nations which reject the necessity for having a Bill of Rights in a national constitution.⁹⁶ As far as this author is aware, Dr Nkrumah in his numerous speeches and publications nowhere denounced human rights. On the contrary he asserted their validity and the need to uphold them.⁹⁷ But it may be inferred from his authoritarian, ruthless and arbitrary exercise of power, his liquidation of the opposition, the Preventive Detention Act and his mass-mobilization drive which compelled all to give the CPP their unflinching loyalty, were all inimical to the maintenance of a human rights tradition. Tanzania's Commission on the Establishment of a One Party State which articulates the argument against human rights declares:

'A Bill of Rights limits in advance of events the measures which Government may take to protect the nation from the threat of subversion and disorder. However, the course of events cannot always be foreseen and constitutional guarantees for the individual will defeat their own purpose if they were to protect those whose object is to subvert and destroy democracy itself. It is of course, possible to draft a Bill of Rights in which the statements of principle are so hedged about with provisos

95 SK Asante, 'Nation Building and Fundamental Rights' Cornell ILJ Vol 2 (1969) p84.

96 D Cowen, 'Human Rights in Africa' Natural L Forum Vol 9 (1964) p 1; also M Glouchman, 'Natural Justice in Africa' Natural L Forum Vol 9 (1964) p25.

97 K Nkrumah, 'African Prospect' Foreign Affairs Vol 37 (1958/59) p45.

and qualifications that Government retains in large measure its freedom of action. This technique has the effect of divorcing the provisions of the law from the ethical principles on which they should be based. A Bill of Rights in this form provides little by way of protection for the individual and induces in the ordinary citizen a mood of cynicism about the whole process of Government.’⁹⁸

The Commission also notes the possibility of conflict between the Judiciary and the Executive by the conclusion of justiciable fundamental rights in a constitution. It says:

‘If a Bill of Rights were written, into the Constitution, it would have overriding legislative effect. This means that the Courts could be asked to declare invalid any laws passed by Parliament if it were inconsistent with a provision contained in the Bill of Rights. By requiring the courts to stand in judgment on the legislature the Commission feels that the judiciary would be drawn into the area of political controversy.’⁹⁹

On the problems which a Bill of Rights would create in the country’s economic development and planning, the Commission says that Tanzania is committed to dynamic plans for economic development which cannot be implemented without ‘revolutionary change in the social structure’.¹⁰⁰ And ‘decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate’.¹⁰¹

It has generally been recognised that the ideals which human rights represent are steeped in the economic philosophy of the West, especially in *laissez faire* philosophy and that in the conditions and circumstances of the new states these ideas need not have the same validity for the new state. The Indian philosopher Humayun Kabir says:

‘The problem of the 20th Century is to reconcile the conflicting claims of liberty and security. A new charter of human rights must secure to each individual, irrespective of race, colour, sex or creed, the minimum requirements for a bare human existence, namely:

- (a) the food and clothing necessary for maintaining the individual in health,
- (b) the housing necessary for protection against the weather and for allowing space for relaxation and enjoyment of leisure,
- (c) the education necessary for developing the latent faculties,
- (d) the medical and sanitary service necessary for checking and curing disease and for ensuring the health of the individual and the community. These are the four basic rights on which all other rights depend. It will be noticed that they appertain to the security rather than the liberty of the

98 Quoted in R Martin, *Personal Freedom and the Law in Tanzania*, Nairobi, Oxford UP (1974) pp40-41.

99 Ibid.

100 Ibid.

101 Ibid.

individual. The demands for security must take precedence over the demands for liberty in respect of the minimum human needs.¹⁰²

Cowen takes issue with Kabir's assertion and maintains that certain fundamental rights are so basic that the state must on no account interfere with their enjoyment; among these are the so-called special or 'preferred freedoms', as they are called in American constitutional law: personal liberty and the right to a fair trial; freedom of association and assembly; freedom of religion, thought and opinion; freedom of expression and freedom of speech. He contends that whereas in the USSR the state becomes the universal provider, the individual ceases to count at all and that 'the safeguarding of individual liberty and the provision of social and economic security are not mutually exclusive. They are complementary: without some amenities the traditional freedom are small comfort, and without freedom the amenities are not worth having'.¹⁰³

It would seem both men are not necessarily saying different things; Kabir merely wants a shift in emphasis from personal liberty to personal security. The problem really is one of balancing: Cowen also agrees that in exceptional circumstances, the preferred rights may be derogated from. But what is exceptional in the circumstances of one state may not be so in another.

Professor Laski, in supporting the view of Kabir, says that in the changed conditions of the world, an insistence on the formulating of a declaration of human rights in individualistic terms would be courting inevitable failure because such a declaration would 'have little authority in those political societies which are increasingly, both in number and in range of effort, answering the need to plan their social and economic life'.¹⁰⁴ Taking freedom of speech as an example where there is in fact no freedom of speech where it is proclaimed, Professor Laski says:

'Freedom of Speech cannot be seriously said to exist in any political society (a) in the absence of economic security and (b) where the vital means of communication, the Press for example, the radio and the cinema and all departments of big business are tending increasingly to monopoly in each instance; without economic security, only the very exceptional citizen will speak his full mind for fear of losing his job...Freedom of speech is largely a function of economic power; even more so, the right to freedom of association especially in the context of industry. The right to strike, for example, is of necessity severely limited in any vital area of a complex economic community. A government is compelled to intervene wherever a strike endangers food or health, communication or transport. If the services which provide these goods are privately owned, the inevitable result is that government intervention, save in the most exceptional circumstances, renders the power to strike, as a weapon of effective protection for the worker, largely null and void.'¹⁰⁵

A view often expressed in opposition to human rights is that there is too much emphasis on the negative duty of what government should

102 *UNESCO Symposium on Human Rights*, supra n 4 at 192.

103 *Foundations of Freedom*, supra n 8 at 117.

104 *UNESCO Symposium on Human Rights*, supra n 4 at 89.

105 *Ibid* 90.

not do instead of delineating the positive duties of what government must do: the point was made by one of the Commissioners on the Basutoland (Botswana) Constitutional Commission (1963) thus:

'Limited government is a bit of luxury. It presupposes a substantial degree of economic affluence and is all very well in the rich countries of the West. But we in Africa, in common with many of our fellow men in the Far East and in Latin America, are economically frightfully poor. In addition we are scrued with ill health, malnutrition, and lack of education. *What we need is emphasis upon what government should do, positively to remove these evils.* The trouble with eighteenth and nineteenth century constitutionalism, which permeates the American Constitution and it would seem, the Nigerian Constitution (which incidentally was enacted in London), is that it is *laissez faire* and negative in character. It emphasizes what government should not do mainly, it would seem, in the interest of private enterprise and private property. *We need more emphasis upon what government should do; more emphasis on planning, and less on non-interference with private enterprises.*'¹⁰⁶ (emphasis added)

The one decided advantage of this kind of Bill of Rights is that it will set a standard of accountability to which government accomplishment will be subjected. The attitude of African politicians is to treat government as their private property and to behave as if government is not accountable to the people; one of the attitudes which invites military take-overs and the frequent spectacle of the setting up of commissions of enquiry after the fall of a regime to probe certain aspects of its affairs.

The reasons for the insufficiency of the traditional Bill of Rights in a developing nation's constitution may be summarised thus:

- (a) A Bill of Rights is essentially a bourgeois concept impregnated with eighteenth and nineteenth century concepts of individualism and *laissez faire*. A new society faced with the problems of underdevelopment, political instability, disease, poverty, and illiteracy can least afford the luxury of limited government. Freedom of speech has no meaning to hungry people. Government must be strong to initiate policies unhampered by considerations of individual freedom, for the integration of the fragmental tribal groups into a strong united nation, for raising the standard of living of the people and generally ensuring their economic well being. A Bill of Rights rigidly enforced by a judiciary which looks to American and English precedents for inspiration would set it on a collision course with the executive, especially where, as at the time of independence, the Judiciary in the new African states was almost entirely of expatriate origin whose juristic concepts and ideals were formed in climes and terrains essentially different from those of Africa and who might be apt to be unresponsive and unsympathetic to African aspirations.
- (b) The critical formative years of a new nation are akin to emergency situations which may require stern, indeed draconian, measures to thwart subversion; political stability and internal peace can be sustained at the expense of the individual's fundamental rights. Mr

106 Quoted in Cowen, 'Human Rights in Africa' supra n 96 at 7.

Geoffrey Bing, one time Attorney General of Ghana, in justifying Preventive Detention in Southern Rhodesia in 1960 said:

'In fairness to the Government it must be conceded that political subversion preached and practiced among illiterate and semi-illiterate African masses can spread like a forest fire unless subjected to the most strict police and governmental surveillance. The normal trappings of a democratic judicial system are ill-equipped to deal effectively with such threats to public safety. Freedom of association for instance should not be invoked in support of parochial and tribalistic interests inimical to the survival of the state; and freedom of speech should not be tolerated as a vehicle for spreading subversive falsehood among gullible and illiterate people.'¹⁰⁷

- (c) All aspects of human rights need not be given the same status of importance. A new nation should be free to determine its own national values, political, social and economic priorities, uninfluenced by the preference of the West. This question, which was put to Professor Cowen during the Basutoland Constitutional talk, sums up the view:

'Is it not necessary to place the various legitimate public interests in a hierarchy of importance? For example, is the interest of the state in the tidiness of the streets as important as the interest of the state against subversion by violence? If the state seeks to limit freedom of speech in the interests of keeping the streets tidy, might it not have a heavier onus to discharge than where it claims protection from subversion? Conversely, is it not essential that we should try to group private interests in a hierarchy of importance and if we don't do this job, won't the judges have to do it?'¹⁰⁸

- (d) The constitution of a new nation should contain a Bill of Duties as well as a Bill of Rights. The traditional type of Bill of Rights merely imposes limitations on the sovereign's power. It is necessary in a developing nation to also emphasize the positive aspects of a state's duty to the individual. The citizens must also know what duties they owe to their fellow citizens.

6 CONCLUSION

What has been attempted in this paper is the highlighting of the problems concerning the content of a Bill of Rights in the constitution of a new nation. It has been argued that the traditional type of a Bill of Rights which does not include socio-economic rights is inadequate for the purposes of new nations; that socio-economic rights are not antithetical to the traditional rights; that although socio-economic rights may be merely declaratory of state goals and policy and not justiciable, they nevertheless serve a certain purpose. It is clear from the totality of available evidence that more new nations are opting for a Bill of Rights of the socialist type, a thing which attests to its popularity.

It is not possible to foreclose the debate in this regard; this paper, therefore, would have achieved its objective if it provokes further discussion, rebuttals and rejoinders.

107 Quoted in Asante, 'Nation Building and Fundamental Rights' supra n 95 at 85.

108 Cowen, *Foundations of Freedom*, supra n 10 at 14