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You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review"!

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.
In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.
THE UNITED STATES BILL OF RIGHTS AND ITS INTERNATIONAL SIGNIFICANCE

by

Louis Henkin

Introduction

The Bill of Rights was added to the United States Constitution in 1791, two hundred years ago. It was not the first bill of rights in history. It was not a perfect instrument even for its time in the United States itself. It may not be sufficient to our time, even for the United States itself.

But the United States Bill of Rights has been crucial to life in the United States and of major significance for the world. It represents the first, lasting commitment by any country to the idea of human rights as supreme law. For 200 years it has been at the heart of a political system committed to constitutionalism, now recognized as the hallmark of legitimate government. The Bill of Rights has inspired and provided a model for national constitutions and for the Universal Declaration of Human Rights and other international human rights instruments which have given expression and reality to the human rights idea in our century.

The two hundredth anniversary of the Bill of Rights is an appropriate occasion to celebrate its history, note its content, and ponder its international significance.

Antecedents

That every human being has inherent rights and freedom and that society must respect these rights and freedom and make them secure, is a political idea that grew in the intellectual air of England and France in the seventeenth and eighteenth centuries. That idea made its way to the English colonies in the Western Hemisphere. It received formal expression in bills of rights adopted by several of the former colonies immediately upon achieving their independence, such as the Virginia Bill of Rights (1776). The most famous and most elegant expression of that idea is in the Declaration of Independence of the American Colonies in 1776:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....

As Thomas Jefferson expressed the idea in those words, everyone is born free, with equal inherent rights, including rights to life and liberty and the right to pursue happiness as one sees it. Governments are created for the purpose of securing such
individual rights. Governments are legitimate only if they respect those rights, and if they continue to have the consent of the governed. Unlike many of the constitutions adopted by the states of the union after independence, the United States Constitution, as originally drafted, did not contain a bill of rights. The Framers did not think that one was needed. Individual rights, they thought, would be protected by the form of government which the new U.S. Constitution would establish; its system of separation of powers and checks and balances would prevent tyranny. Also, they thought, it might be dangerous to include a bill of rights since no bill could list all of the individual’s inherent rights, and failure to list some rights might be interpreted as denying those omitted. Principally, it appears a bill of rights was not included because the U.S. Constitution was designed to address the needs of the union of the states, not directly the governance of the individual inhabitants of the new nation. The government they were about to create to preside over the union of the states would have only few, specified, limited powers, and would exercise little direct authority over individual human beings that might impinge on their rights. The individual would be governed principally by his (her) state government, and rights would be protected against that government by the state constitution and its bill of rights.

Although the original constitution contained no bill of rights, it clearly assumed and reflected the commitment to rights expressed in the Declaration of Independence. The sovereignty of the people and the consent of the governed are implied in the preamble to the Constitution in which “we the people.... do ordain and establish this Constitution”. The title given to one part of the legislature, “the House of Representa­tives,” and the provision for electing its members, reflect commitment to representa­tive government.

A few individual rights were expressly recognized and safeguarded. The privilege of the writ of habeas corpus may not be suspended (except in cases of rebellion or invasion), implying the right not to be arrested or detained without due process of law. Bills of attainder and ex post facto laws are forbidden to both state and federal governments. States may not impair the obligation of contracts. They must respect the privileges and immunities of citizens of other states. The Constitution also provides for trial by jury in federal trials for federal crimes, and establishes safeguards in trials for treason.

1 Similar ideas were expressed in the Declaration of the Rights of Man and of the Citizen adopted in France by the Constituent Assembly in 1789. It is known that the French Declaration was influenced by the early American bills of rights, notably the Virginia Bill of Rights. The French Declaration formed part of the short-lived Constitution of 1791, but had no subsequent constitutional status until it was incorporated by reference in the Preamble to the Constitution of 1946, (and subsequently in the preamble to the 1958 Constitution).

2 The Federalist Papers No. 84.


4 See Article 1, section 2: “The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for elections of the most numerous branch of the state legislature”.

5 U.S. Constitution, Art. 1, sections 9, 10; Art. 111, sections 2, 3; Art. IV, section 2.
Despite explanations and assurances, the absence of a bill of rights was an obstacle to ratification of the Constitution by the states. Supporters of ratification therefore promised that after the Constitution came into effect the new Congress would move to have a bill of rights added by constitutional amendment. Thus, ten amendments were approved by Congress in 1789 and were ratified by the states and became part of the Constitution in 1791. These Amendments, taken together, were commonly designated and have been universally described as "The Bill of Rights".

The Theory and Content of the Bill of Rights

The Bill of Rights does not articulate any theory of rights; it takes rights for granted. But by clear implication it reflects the theory of inherent rights expressed in the Declaration of Independence. The Amendments did not confer rights; they recognized and sought to secure pre-existing, inherent rights. "Congress shall make no law ..... abridging the freedom of speech". "The right of the people to be secure in their persons, houses, papers and effects ..... shall not be violated". That, for the Framers, individual rights existed before the Constitution and continued to exist apart from the Constitution is made explicit by the Ninth Amendment. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people".

The Bill of Rights, then, was only a partial enumeration of the inherent rights which the individual had under the eighteenth century theory of rights. There is no agreed explanation why particular rights were included in the Constitutional Amendments and others were not. Doubtless, the Framers and the First Congress decided to give constitutional status and protection to those rights which were of paramount concern to their constituents at the time and which they feared might be threatened some day by the new central government. They wished to secure rights which the colonists had enjoyed as English subjects, such as trial by jury; some rights which English subjects had but which English officials had violated, such as security from unreasonable search and seizure; and other rights which were of importance to the particular circumstances of the new states in the new union, such as freedom of religion and freedom from any establishment of religion.

The text of the Amendments that constitute the Bill of Rights is brief. The principal rights which it safeguards can be quickly summarized: Freedom of religion, speech, press and assembly; freedom from unreasonable arrests, searches and seizures; the right not to be deprived of one's life, liberty or property without due process of law, and not to have one's property taken for public use without just compensation; the principal elements of a fair trial for a person charged with crime; and the right not to be subject to cruel and unusual punishment if one is convicted.

A crucial element of the commitment to rights is explicit in the first words of the First Amendment. "Congress shall make no law ..." By that phrase the Framers rejected their English inheritance of parliamentary supremacy; under that principle of English constitutionalism there are no limits on what the legislature can do, and the
individual enjoys only those rights that the legislature sees fit to recognise or grant. The Bill of Rights did not derogate from the Framers' commitment to representative government, but even representative government, it makes clear, is subject to individual rights.

**Rights Not Enumerated**

The rights enumerated in the Bill of Rights are fundamental, but the Bill did not include other rights also essential to human dignity. Major omissions, recognized at the time, reflected the fact that many of the states were, and insisted on remaining, slave societies: The Bill of Rights did not guarantee freedom from slavery. State societies were non-egalitarian in other respects as well: the Bill of Rights makes no mention of equality or the equal protection of the laws, nor of freedom from discrimination on the basis of race, religion, gender or other invidious grounds.

Other rights that are recognized today, for example, a universal right of suffrage, were not recognized as human rights- as the rights of all- in the 18th century; the Bill of Rights added nothing to the limited right to vote (for members of the House of Representatives) provided in the original Constitution. A number of rights that the Framers doubtless recognised as important were not seen as appropriate for constitutional protection, surely not for protection by the U.S. Constitution; they were left to the care of the political process through the ordinary laws, or of the states.

For example, the Fifth Amendment provided that no person may be deprived of life, liberty and property without due process of law; but, as originally intended, that provision afforded no protection against arbitrary, exorbitant or unwise law. The Bill of Rights protected the individual, his (her) liberty from incarceration or other physical restraint (without due process of law); but, as originally intended, it did not protect individual freedom and autonomy generally, the right to travel, to change one's residence, to choose one's occupation or how one spends one's leisure. Similarly, neither the Constitution nor the Bill of Rights addressed basic civil rights, the rights of “personhood,” before the law; the right to acquire and own property, to make contracts, to resort to the police and courts, to marry (and perhaps divorce). Doubtless, the Framers valued such rights as fundamental but they saw no need to enumerate them in the U.S. Constitution. Such rights were protected by law, principally state law, and to some extent by the state constitution. At least some of these rights were doubtless among the unenumerated rights the Framers had in mind in the Ninth Amendment.

Even the rights that the Bill of Rights enumerated were protected only against invasion by public authority (and only against federal authority, not against state laws and officials). The Bill of Rights did not protect one's rights against violation by one's neighbour: the Constitution contained no obligation — surely no express obligation for public authority to “ensure” the individual's freedom of speech or the
privacy of one's home against violation by private persons. That too was left to the
general law, principally state law.

By the lights of contemporary, 20th century ideas of rights, the Bill of Rights suffered
omissions of another kind. The Constitution protected only inherent rights, therefore
only "negative rights," what are now commonly described as "civil and political
rights," it did not guarantee "positive rights," the entitlements now associated with
the welfare state. The Constitution did not require the U.S. government (or the state
governments) to provide food, housing, health care, public education, social secu­
ry, even to those who could not provide these needs themselves. The Framers of the
Bill of Rights did not see it as a responsibility of government to provide such benefits.

Growth and Development

Some of the omissions and deficiencies in the original Bill of Rights were supplied by
later constitutional amendment and some others by interpretation. The Thirteenth
Amendment, adopted immediately after the Civil War (1865), abolished slavery. The
Fourteenth Amendment (1868) conferred rights of citizenship on all persons born or
naturalized in the United States; it also mandated that the states shall not deprive
any person of life, liberty or property without due process of law (as the Fifth
Amendment had earlier required of the federal government); it required that the
states not deny to any person the equal protection of the laws. Subsequent
Amendments to the Constitution forbade denial of the right to vote on grounds of
race, gender or age (for those over 18 years old).9

The later Amendments of the Constitution supplied deficiencies in the Bill of Rights
and expanded its scope in important respects, but major developments in constituti­
ional rights come without formal amendment, by constitutional construction and
interpretation. The development of the Bill of Rights owes much to "judicial review,"
a major contribution by the United States to constitutionalism and to the idea of
rights. Although not provided in the Bill of Rights (and not explicitly elsewhere in the
Constitution), the courts have asserted the authority to adjudicate claims by
individuals that their rights have been violated, and the political branches have
accepted the authority of the courts in that respect as dispositive and final. Assuming
the role of protecting rights, the courts have had to construe what are sometimes
Delphic articulations in the constitution, sometimes giving them new scope and
content.

Several judicial interpretations have achieved radical increase in the constitutional
protection of individual rights. A major addition to constitutional rights resulted
when the courts interpreted "liberty" in the due process clauses in the Fifth and the
Fourteenth Amendments as protecting not only freedom from incarceration but
individual liberty generally, that is, individual autonomy and freedom of choice.
Moreover, the court construed those Amendments as requiring not only fair
procedures but also "substantive due process," i.e., protection against arbitrary
laws. Therefore, neither the federal government nor any state may deprive any person
of life, liberty (autonomy) or property by laws that are not for a public purpose, that

9 Amendments XV (1870), XVIII (1920), XXVI (1971). Amendment XXIV (1965)
pursue public ends by unreasonable means, or that impinge unduly on individual rights. By these constructions of the due process clauses the courts have established individual freedom and autonomy (and individual rights in property) as the constitutional norm, requiring government to justify any invasion or regulation.

By construction, too, the courts have held that, by virtue of the Fourteenth Amendment, almost all of the provisions of the Bill of Rights, originally governing only the Federal Government, are binding also on the states, and respect for those rights by the states will be monitored by the courts and may be enforced by Congress. In addition, though on its face the Constitution requires the equal protection of the laws only of the states, the Bill of Rights was later interpreted to require the equal protection of the laws of the federal government as well. Then the requirement of equal protection was construed as requiring also an equal right to vote for all, thereby effectively making suffrage universal in the United States.

As a result of such (and other) creative and imaginative interpretations of the principal provisions of the Bill of Rights and of the Civil War Amendments, the United States model of constitutionalism, with its commitment to fundamental rights, came into its own, especially after the Second World War. Eighteenth century rights were expanded in conception and in content. Constitutional provisions probably designed primarily to protect the respectable citizenry have been opened to every man and woman, to the least and the worst of them. Constitutional protection has been extended to civil and personal rights rooted in conceptions of the essential dignity and worth of every human individual. The constitution safeguards not only the political freedom with which the Framers were primarily concerned, but, in principle, also social, sexual, and other personal freedoms, and individual privacy, autonomy, idiosyncrasy. Notably:

- Freedom of speech and press now protects even advocacy of radical ideas, and even expressions that are deeply disturbing or offensive, as long as they do not incite to violence or other unlawful action. It protects not only political and religious expression but also economic speech and publication, e.g., labour picketing and commercial advertising, as well as "self-expression" even if it approaches "obscenity". Speech is protected even when it is "symbolic," as in wearing an arm band to protest a war. One's money, too, may talk, without ready limits, as by contributions to political campaigns.

- The press enjoys freedom far beyond the original conception based on relevance to the political process. The freedom to publish is now associated with the reader's "right to know". Prior restraint on publication as by censorship, requirement of license, or by judicial injunction is virtually excluded. The right to publish and the right to know may outweigh also the right of an official or of another "public" person to be protected against libel, or the privacy rights

10

Prohibited denying the right to vote for failure to pay a tax.

In this section I draw on my books *The Rights of Man Today* (1978), Ch. 2, and *The Age of Rights* (1990), Ch. 7.

The courts refused to enjoin the New York Times from publishing confidential official documents relating to the Vietnam war because the Government could not persuade the Supreme Court that there was a compelling need for such prior restraint on publication. See *New York Times v. United States*, 403 U.S. 713 (1971).
of even private persons. Freedom of speech and press includes a right of access
to a public forum. It includes also the freedom not to speak or publish, to speak
or publish anonymously, to be free of governmental inquiry into what one
thinks and says. Out of these rights, together with the right of assembly, the
courts have made a right of association, of anonymous association, of non-
association.

- Freedom of religion means not only that there must be no state interference
  with the free exercise of religion, but also that the state cannot impose burdens
  on such exercise. The prohibition on establishing religion requires a wall of
  separation between church and state. Neither the federal nor the state
governments may give financial aid to religious institutions or permit Bible
reading or prayer in public schools. Government must neither advance nor
inhibit religion, and must not be excessively entangled with religion.

- Freedom from unreasonable search and seizure applies, though perhaps
differently, not only to the home but also to the office and the automobile; not
only to physical but also to technological intrusion, e.g., wiretapping or "bugging";
not only to incursions by the police, but also to visits by health and fire inspectors.

- Perhaps the greatest expansion has been in the rights of those accused of crime.
The Bill of Rights — its principal provisions applicable also to the states —
protects not only the respectable and innocent: even criminals have rights to
a fair trial (without improperly obtained evidence), to counsel (provided by the
government if the defendant cannot provide his own), to freedom from self-
incrimination (and from comment on one's failure to testify).

- The equal protection of the laws, required of the federal government as well as
of the states, has also acquired new ramifications. Official separation of the
races, even "separate but equal," is outlawed. All racial classification are
suspect, and invidious discrimination on account of race, "whether accom­
plished ingeniously or ingenuously," is readily rejected.

- There has been a fundamental and, I believe, irreversible transformation in the
constitutional status of women. Discriminations against women on the basis
of generalizations reflecting stereotyped and outdated sociological assump­
tions no longer seem "natural" and inevitable, and are invalid. And the new
equality of the genders entitles males also to freedom from unwarranted
discrimination.

- The poor, too, enjoy the benefits of some special application of equal protection.
A state that offers, for pay, benefits that only the state can provide — a criminal
appeal, a divorce — must make them available gratis to those who cannot pay.

- Other once-axiomatic inequalities are no longer acceptable. The states cannot
deny to aliens (because they are aliens) welfare benefits, public employment,
or admission to the professions; they cannot maintain irrelevant distinctions
between legitimate and illegitimate children. Other once excluded categories of
persons now enjoy rights: prisoners have rights, as do military personnel,
mental patients, publics in the schools; children have rights independently of
and even against their parents.

- The Constitution now protects new rights, for example a right to travel, abroad
as well as interstate; a local residence requirement as a condition of enjoying rights or benefits is invalid because it burdens the right to travel.

- In what can be seen as a reversion to the eighteenth century theory of antecedent natural rights of liberty, the courts have accorded special protection to an area of fundamental individual autonomy ("privacy"). Hence, the state may not forbid the use of contraceptives, or the resort to abortion in the first trimester of pregnancy, or indulging oneself with obscene materials in private. Parents may send their children to private schools; they may even refuse to send their children to high school at all when to do so would offend their religious scruples.

- Finally, the United States has become a democracy. The indirect election of the President through an electoral college remains in the Constitution but has been largely reduced to a formality, and the Presidency is now generally responsive to popular suffrage. The Supreme Court has built a constitutional right to vote, and a right to a vote of equal weight, out of the right to the equal protection of the laws. The Constitution seemed to leave voting qualifications to the states, but Constitutional Amendments forbidding the denial of the vote on invidious grounds (race, sex, age, poverty) have supported federal voting rights legislation that has rendered suffrage virtually universal in fact.

The explosion of rights I have described confirms the essentially open character of the U.S. Constitution and its Bill of Rights, and constitutional rights in the United States as the fruit of a continuing synthesis of immutable principle with contemporary values both home- grown and imported. Old assumptions are re-examined, stereotypes are penetrated, and rights are accepted today that were not conceived a few decades ago.

Perhaps the inevitable consequence of expanding and proliferating rights was the clear emergence of the principle of "balancing" individual liberty and public interest to determine the limits of each. The courts do not now attend seriously to objections that common economic and social regulation limits individual autonomy or liberty, but in principle all government action must justify itself as a means rationally linked to some public purpose. Rights are not absolute, however, and virtually every right might, in some times and circumstances, give way to some other public good. Some individual rights and freedoms, however — speech, press, assembly, religion, privacy, freedom from racial discrimination — are fundamental, preferred; invasions are suspect, will be sharply scrutinized by the courts, and will be sustained only for a compelling state interest.

Towards the end of the twentieth century, one constitutional blessing is noteworthy.

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12 Article II, section 2; Amendment XII.
13 See p 12 above.
14 On the horizon may be rights undreamed of — a right to be born and a right to die, and rights for the dead and the unborn. A right to die at least in certain circumstances was recognized by the Supreme Court in 1990.
There have been no emergency suspensions of the constitution or of particular rights, such as have bedevilled constitutional government and human rights in other countries. The constitutional theory of the Framers, the institutions they established, the availability of the judiciary to adapt and develop the general principles of the Constitution and to arbitrate political controversy, as well, no doubt, as great good fortune, have saved the United States from extra — constitutional government. The constitution and the Bill of Rights cannot be suspended, even in time of war. *Habeas corpus* was suspended during the Civil War and on two or three other occasions. The relocation of Americans of Japanese ancestry during the Second World war was an inglorious chapter, held by the courts at the time to be constitutionally permissible, but there have not otherwise been mass detentions or other major derogations from rights.

I have been discussing constitutional rights — the rights that inhabitants of the United States enjoy as higher law, regardless of the will of majorities and of their representatives and officials. But, by interpreting the constitutional powers of Congress broadly, the courts have unleashed and encouraged congress to expand individual rights. The extension of federal power has enabled congress to legislate against private discrimination on account of race or gender and other private infringements of rights. Expansive interpretations of the Civil War amendments have permitted sophisticated legislation to protect the right to vote and some other rights from both official and private interference.

With all its growth and development, constitutional rights remain — as they were from their beginnings in the 18th century — “negative” rights, rights to be let alone. In particular, the constitution has not been interpreted to require either the federal government or the states to provide welfare benefits. Yet the United States too is a welfare state. Except for public education (provided by the states early), the United States has become a welfare state slowly, and not by constitutional imperative or encouragement. The Sixteenth Amendment was required to permit a federal progressive income tax, on which the welfare state depends. Only after deep economic depression in the 1930’s did traditional fear of government begin to give way to demands upon government—for intensive regulation of business and labour relations, for minimum wages and maximum hours, social security, expanding government employment and government work programmes — with constitutional reinterpretations to make them acceptable.

A second world war, decades of technological, political, and social change, and ideas and examples from abroad have proliferated welfare programs in the United States and magnified them manifold. Economic and social benefits have effectively established equal entitlement as regards minimum basic needs; they have even moved United States society a few steps from equal opportunity to somewhat less inequality in fact. But not being constitutional rights, economic and social entitlements are subject to political and budgetary restraints, sometimes also to recurrent ideological

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15 The suspension of the privilege of the writ of *habeas corpus* is permitted in time of invasion or rebellion. Art. 1, section 9.

16 Congress has also created the “right to know” by freedom of information acts. It has extended the right of conscientious objection to military service. It has created rights to a more healthful environment. Federal example has encouraged emulation by the states, and some states have taken such rights further.
resistance. In the 1980's the drive for lower taxes and higher defence expenditures, some ideological commitment to "market forces," and some resistance to the welfare state in principle, significantly weakened economic-social "rights" in the United States. But the United States remains a welfare state and welfare programs are likely to increase again.

The International Influence of the Bill of Rights

The U.S. Bill of Rights was ordained for the United States alone, but it reflected a universal idea: All men (including women), Jefferson said, are created equal and are endowed with inalienable rights. The Bill of Rights and the U.S. constitutional experience have helped spread the idea of rights around the world.

Since the end of the 18th century, the idea of rights has never been absent from constitutions and draft constitutions, from platforms of political parties and revolutionary programs. Rights were in the French Constitution of 1791 and in the short-lived constitution of Poland of that year. In the 19th century, the United States — the first "new nation," liberated from colonialism — became an inspiration and a model for the countries that liberated themselves from Spanish rule in Latin America. New Latin-American states adopted constitutions that, in different measures, followed the presidential system and the federal system of the United States; almost without exception they adopted bills of rights which in theory and content drew on the U.S. Bill of Rights.

To this day, the constitutions of Latin America include bills of civil and political rights like those of the United States. Unlike the United States, Latin-American constitutions, beginning with the Mexican constitution of 1917, have added economic and social rights as well, but the idea of rights, of individual claims upon society as a matter of right not of grace, can fairly be traced to the U.S. Bill of Rights. One country after another has adopted also the particular U.S. contribution to the jurisprudence of rights; judicial review.

Elsewhere, for example in Western Europe, even countries that did not move to ordain constitutional bills of rights adopted rights by legislation, rights that became recognized and established as entitlements, as of right. The history and influence of ideas are difficult to trace but the spread of religious freedom, the freedom of expression, the freedom of the press, and rights of privacy, property, due process of law, and the equal protection of the laws, was surely inspired in significant measure by the United States example.

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17 In France rights lost their constitutional status with the reign of Terror and the rise of Napoleon, and did not regain constitutional character until the Constitution of 1946. Although the French Declaration of the Rights of Man and of the Citizen had no constitutional status in France it was an important influence in Latin American and later in other parts of the world. It is difficult to disentangle the influence of the U.S. Bill of Rights from that of the French Declaration, which itself had been inspired by American rights instruments. See Note 1 above.

18 Or on the French Declaration which paralleled the U.S. Bill of Rights.

After the Second World War, the idea and the content of rights entered international life "wholesale". Virtually all the countries liberated from Hitler, and then the flood of new countries following decolonisation, adopted constitutions that accepted individual rights, in many cases including bills of rights.

**The Bill of Rights and International Human Rights**

A principal medium for translating the idea of rights onto a world screen was the international human rights movement, born during the Second World War and came to fruition in the aftermath of the war. In a famous address President Franklin D. Roosevelt declared Four Freedoms to be essential to a decent world. The Allies declared the achievement of respect for human rights to be a crucial aim of the war and a purpose of the new order to be established following victory. The idea of human rights acquired new significance as the world became fully aware of Hitler's unspeakable atrocities culminating in the Holocaust. In the United Nations Charter, the nations of the world declared it to be a principal purpose of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

The U.N. Charter does not define human rights but the provisions of the U.S. Bill of Rights as they have developed over 200 years, and the U.S. constitutional experience, were doubtless in the minds of the Framers of the Charter. They are clearly reflected in the Universal Declaration of Human Rights (1948), perhaps the most significant international instrument of our time. Through the Declaration the idea and content of right entered the constitutions of the many new countries of the world, as well as international covenants and conventions that have been adhered to by most nations of the world. Now the behaviour of all nations toward their own inhabitants is judged by those human rights standards.

The U.S. Bill of Rights and the U.S. constitutional experience launched the idea of rights and gave much of the content to what has become the idea of our times:

- that every human being has rights, legitimate claims upon his (her) society, which society must respect and ensure;
- that respect for individual rights is an essential element of constitutionalism and the rule of law;
- that living in an authentic democracy with authentic self-government and an authentic right to vote is human right, but the individual has other rights as well, even against the majority and against representative government.

These ideas are clearly articulated in the Universal Declaration of Human Rights, the charter of rights which the twentieth century has established for itself and is bequeathing to the centuries ahead. The Universal Declaration does not necessarily assume individual autonomy or require government to justify everything it does, but it is firmly committed to individual rights in relation to government.

All human beings are born free and equal in dignity and rights ....without distinction of any kind, such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status. (Articles 1 and 2).
Like the U.S. Bill of Rights, the Universal Declaration recognizes that "Everyone has the right to life, liberty and security of person" (Article 3). Like the U.S. Bill of Rights as it has developed, the Declaration recognizes that everyone is entitled to:

- personhood before the law without discrimination and to equal protection of the law;
- fair and public hearing and trial in the criminal process;
  - rights to privacy, freedom of movement and residence;
  - freedom of thought, conscience and religion, of opinion and expression, of assembly and association;
- The right to take part in government, to have access to the public service, to vote.

The international law of human rights is not identical to that of the Bill of Rights. Being universal and designed for various countries and cultures, international instruments do not require institutions and procedures particular to the United States (and a few other countries) such as trial by jury. The Universal Declaration and the covenants and conventions that derive from it may not demand the same balance between individual rights and public interest that the United States has put into the Bill of Rights.

In particular, the Universal Declaration adds to the rights that parallel those in the U.S. Bill of Rights, a series of rights that cannot be traced to the eighteenth century idea of rights. In the twentieth century, under international instruments (and some national constitution) every individual has not merely his (her) natural rights but also, as a member of society, a right to social security, to work, just and favourable remuneration, and leisure, to a decent standard of living including food, clothing, housing, medical care and necessary social services, to education. But economic and social rights too depend on the idea of rights, of individual claims upon society as of right which the society must realize, which the U.S. Bill of Rights represents.

**Conclusion**

The U.S. Bill of Rights has contributed the idea of rights, and the content of the civil and political rights which the world has recognized and on which it has built additional rights including the economic and social benefits of the welfare state. The United States and its jurisprudence of rights have provided the example of a political system committed to, and living with reasonable success by, the idea of rights incorporated in a larger concept of constitutionalism and the rule of law. The United States has contributed the institution of judicial review to monitor and develop rights and to maintain constitutionalism.

Beyond its particular terms, the Bill of Rights has come to represent the constitutional system of the United States. It is shorthand to describe a political culture that is governed by "constitutionalism". Constitutionalism implies government strictly in

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20 Notably, the United States may be unique in the lengths to which it safeguards freedom of expression: Other legal systems and international instruments would permit limitations on expression for large public interests and might require greater protection against libel, racist speech or war propaganda than the Bill of Rights permits.
accord with the constitutional blueprint, commitment to the rule of law and limited government, and respect for human rights. It is the system, even more than the particular legal provisions, that has served as an example for other countries, a system of democracy, with individual freedom and respect for the freedom by public authority.

There have been competing models. Tyranny provided its own alternative, but Hitler did not survive. Democracy flourished in other countries in Western Europe, but before the Second World War those democracies— even at their most progressive, generally were not committed to respect for individual and minority rights as supreme law. So-called “socialist” countries such as the USSR were committed to all powerful, not limited, government, and individual rights had no claim against the socialist interest as determined by political authority.

The ideas which the Bill of Rights represents may not be eternal but they are universal for our times. The ideas have developed, learning from what other societies have done with them. All people, in all countries, will doubtless learn more. Already the United States has made freedom from want national policy, and social security and various welfare benefits are “entitlements” by law, by some state constitutional provisions, even if not by U.S. constitutional mandate. The Bill of Rights can claim to have inspired the world to commit itself to the principle that promoting the human dignity of every individual human being is the principal purpose of every good society and an essential value of the international system of states.

Democracy subject to individual rights is the model represented by the Bill of Rights. The revolutions in Eastern Europe in 1988-90 responded in large part to those ideas. Similar revolutions are promised in other countries of the world. That is cause enough for celebration.

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21 U.S. constitutionalism has other dimensions, including federalism and checks and balances which are only indirectly related to rights and, strictly, are not governed by the Bill of Rights.
ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

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 of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIII

Section 1. *Neither* slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV footnote 6

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of
representation therein shall be reduced in the proportion which the
number of such male citizens shall bear to the whole number of male
citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector
of President and Vice President, or hold any office, civil or military,
under the United States, or under any State, who, having previously
taken an oath, as a member of Congress, or as an officer of the United
States, or as a member of any State legislature, or as an executive or
judicial officer of any State, to support the Constitution of the United
States, shall have engaged in insurrection or rebellion against the same,
or given aid or comfort to the enemies thereof. But Congress may by a
vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law,
including debts incurred for payment of pensions and bounties for
services in suppressing insurrection or rebellion, shall not be ques­tioned. But neither the United States nor any State shall assume or pay
any debt or obligation incurred in aid of insurrection or rebellion against
the United States, or any claim for the loss or emancipation of any slave;
but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate
legislation, the provisions of this article.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or
abridged by the United States or by any State on account of race, colour,
or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate
legislation.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by
the United States or by any State on account of sex. Congress shall have power to
enforce this article by appropriate legislation.

Amendment XXIV

Section 1. The right of citizens of the United States to vote in any primary or other
election for President or Vice President, for electors for President or Vice
President, or for Senator or Representative in Congress, shall not be
denied or abridged by the United States or any State by reason of failure
to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate
legislation.
Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. * Professor Emeritus, Columbia University, United States of America.