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THURGOOD MARSHALL'S BILL OF RIGHTS FOR KENYA

Mary L. Dudziak

IN THURGOOD MARSHALL'S SUPREME COURT OFFICE after his death, draped over an armchair in the morning sun, was a cloak made of monkey skin. The cloak was from Kenya, and was among the Justice's most treasured possessions. For years, Marshall had told his friends and his law clerks stories about Kenya. The cloak was a gift, he told them, from the time he was made an honorary tribal chief. He would light up when he talked about it, and no other object he possessed had such an effect on him.¹

The cloak was simply a memento, of course, a physical reminder of an earlier time. Its presence signified a closely held memory. But even those closest to Marshall knew little about the Kenya adventures he so keenly remembered.²

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¹ Thurgood Marshall Jr., interview by author, June 2007, Washington, DC. See also the photo of the cloak on page 308.

² The full story of Marshall's work in Kenya is told in MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (Oxford University Press, 2008). See also Mary L. Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya*, 56 DUKE L. J. 721 (2006).



Thurgood Marshall's Kenyan monkey-skin cloak. Photograph by Franz Jantzen, Collection of the Supreme Court of the United States, March 19, 1993.

Marshall was a robust man of fifty-one when he arrived in Kenya for the first time in January 1960. He was a Supreme Court Justice, at seventy, in 1978 when he traveled to the country for the last time to see President Jomo Kenyatta, who had become a treasured friend, laid to rest. The basic outlines of what he did during those years were, of course, known to those around him. When Solicitor General Drew S. Days, III eulogized Marshall in the chambers of the U.S. Supreme Court in 1993, he knew to commemorate Marshall's work in Kenya. Marshall had worked "tirelessly for weeks" on the Kenya constitution, Days said.³

But just what Marshall did when he wrote a bill of rights for Kenya has been a mystery. He apparently told Juan Williams that when he went to Kenya he "looked over just about every constitution in the world just to see what was good." Pounding his fist on the desk, he exclaimed, "And there's nothing that comes close to

³ *In Memoriam: JUSTICE THURGOOD MARSHALL*, 510 U.S. iii, x (1993) (remarks of Solicitor General Drew S. Days, III).

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comparing with this one in the U.S. This one is the best I've ever seen." Drew Days remarked that Marshall "relied on the model of fundamental rights in the American Declaration of Independence and the Constitution."⁴ Marshall drew upon available texts when he wrote a bill of rights for Kenya, but curiously, the U.S. constitution was not one of them.

Marshall was part of an earlier moment of global constitutionalism, framing rights that drew upon both developing conceptions of rights in world constitutions, and upon international human rights. In some ways, of course, he took American ideas to Kenya. He took his necessarily American conception of judicial review, home-grown through years of battles in American courts over the meaning of equality.⁵ But in the halls of Lancaster House in London, at a conference on the Kenya constitution, he offered a draft bill of rights for Kenya that had no American constitutional language in it. The rights Marshall embraced as ideal, at least for an emerging African country, drew most extensively from the Universal Declaration of Human Rights, and parts were based on the constitutions of two newly independent countries, Nigeria and Malaya.⁶ Long before constitutional borrowing became a buzz-word, and the value of global constitutional influences was debated by scholars and judges, Marshall was a practitioner.

How did this come about? In 1960, Kenyans seeking independence from Britain invited Marshall to serve as an advisor in constitu-

⁴ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (Times Books, 1998), 285; *In Memoriam*, 510 U.S. at x.

⁵ On Marshall as a civil rights lawyer, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (Oxford University Press, 1994). On other Americans involved in constitutional development overseas, see PAUL D. CARRINGTON, SPREADING AMERICA'S WORD: STORIES OF ITS LAWYER-MISSIONARIES (Twelve Tables Press, 2005).

⁶ Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, February 2, 1960, Folder: Kenya Constitutional Conference, 1960 Committee on Safeguards, Memoranda, CO 822/2362, Public Records Office, National Archives of the United Kingdom, Kew, England. The bill of rights is reprinted in DUDZIAK, EXPORTING AMERICAN DREAMS, 173-183.

tional negotiations. He traveled to Africa for the first time, and then participated in the landmark 1960 Conference on the Kenya Constitution, during which the British government supported the idea of majority rule in Kenya for the first time, setting the colony on the road to independence in 1963. There was much excitement and drama in the story. In Kenya, Marshall saw first-hand what colonial restrictions were like when he was excluded by the colonial government from participating in a meeting with the group he had been asked to represent.⁷ Then in London, when a political dispute disrupted the meeting, Marshall found himself sitting in a hotel room “too cold by American standards’ ... sipping ‘warm beer’ and fretting for action.” He told reporters that if the conference failed, resulting in “what the Kenyans considered to be an ‘imposed’ constitution ... a revolt might occur.” There could be “a new uprising in Kenya that nobody can control – any more than they could control” Kenya’s anticolonial movement, the Mau Mau.⁸

Ultimately Marshall would write a forward-looking bill of rights that was crafted to address the pressing problem of minority rights in a colony that had substantial white and Asian minority populations. This was a sticking point without which Kenya’s white settlers were unwilling to continue peaceful deliberations. The bill of rights also sought a future for Kenya in which equality was paramount. In that sense it allowed Marshall to imagine a legal world that he had long fought for, but was yet to realize for his own people at home.⁹

The most important principle in the bill of rights was set forth in the preamble: the principle of equality. “All persons are equal before the law,” Marshall wrote, “and are entitled without any discrimination [sic] or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social

⁷ DUDZIAK, EXPORTING AMERICAN DREAMS, 40-44.

⁸ *Thurgood Freezes as Kenyans Feud*, CLEVELAND CALL & POST, Jan. 30, 1960, at 1A; *Kikuyu Protest at Second Advisor: Telegram from Loyalists Sent to Mr. Macleod*, EAST AFRICAN STANDARD, Jan. 25, 1960, at 5.

⁹ Proposed Draft Bill of Rights; Dudziak, *Working Toward Democracy*.

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Kenyan Prime Minister (later President) Jomo Kenyatta (left) and U.S. Circuit Court Judge Thurgood Marshall in Nairobi on July 11, 1963, during one of Marshall's return trips to Kenya. Associated Press photo. Reprinted by permission.

origin, property, birth or other status, to equal protection of the law.” Marshall hoped that the preamble would “help the Courts when interpreting the particular provisions of the Bill by setting out general principles on which it would be based.” It illustrated two of Marshall’s fundamental priorities. The starting point, upon which other rights were built, was equality, not liberty. And independent courts would be an essential part of the political structure that gave these rights meaning.¹⁰

Section I of the bill of rights protected freedom of religion, speech, press, and association. The United States Constitution pro-

¹⁰ While Kenya’s democracy includes a judiciary, judicial independence from the executive branch remains a goal not yet achieved in that country. Makau Mutua, *Justice under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUMAN RIGHTS QUARTERLY 96 (2001).

protects these rights, but Marshall's clauses were based not on the American text, but on the Universal Declaration of Human Rights. Instead of the sparse words of the American first amendment, Marshall's text declared that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." It protected rights to "freedom of opinion and expression," including the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers." The right to freedom of assembly and association also protected against being "compelled to belong to an association." Marshall included the right to privacy: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." Government could not interfere with these rights, and had a duty to "take all necessary steps to protect said rights from interference by individuals."¹¹

Section II protected rights to "Personal Security," which included rights to life and liberty, and rights against slavery. It also prohibited "discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office of employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment." This Section was identical to clauses in the constitution of newly independent Malaya.¹²

¹¹ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, at 75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), Sections 12, 18, 19 and 20. On the Universal Declaration, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Random House, 2001).

¹² Proposed Constitution of Federation of Malaya (Malayan Independence Constitution) (Kuala Lumpur, 1957), Part II, Sections 8 (1) and (2).

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Section V protected the right to vote, providing that “[e]veryone has the right to take part in the Government of his country, directly or through freely chosen representatives,” and that “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal, and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” These clauses were based on voting rights in the Universal Declaration of Human Rights.¹³

The greatest departures from an American style constitution came in Sections III and IV, guaranteeing rights to education, health, and welfare and protecting a right to work. The U.S. constitution largely protects individuals against government misconduct. It protects against discrimination in provision of government services, but it does not require affirmative government assistance, such as health care or education. In contrast, Marshall’s Kenyan bill of rights included affirmative rights to protection of social welfare. These rights were based on provisions in the Universal Declaration. Under Section III, “[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” This section included requirements concerning the nature of education. It “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups.” Also protected were parents’ rights to choose their children’s education, and a right “freely to participate in the cultural life of the community.” Everyone also had the right “to adequate health and welfare facilities.”¹⁴

Section IV protected rights “to form and join trade unions,” something that was protected by statute in the United States. Also

¹³ Draft Bill of Rights, Section V; UDHR Article 21.

¹⁴ Draft Bill of Rights, Section III; UDHR Article 25, 26 and 27.

included were rights unknown in the American experience. “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment,” Marshall’s bill of rights declared. “Everyone, without any discrimination, has the right to equal pay for equal work.” Beyond the right to work itself, citizens who worked also had a right to a sufficient income, to what would now be called a living wage: “Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”¹⁵

Most important to the 1960 Lancaster House Conference was Section VI protecting property rights. Marshall simply incorporated the property rights clauses from the Constitution of Nigeria, which would become independent in 1960. It provided that no property “shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily,” without just compensation. Those wishing to challenge a government taking had a right to access to court.¹⁶

When Marshall first arrived at Lancaster House, he was viewed with great skepticism by the British government and the British people, but in the end he was embraced as “a very distinguished lawyer” that the Colonial Secretary was “very glad to see at our Conference.”¹⁷ His draft bill of rights was lauded as a helpful contribution that the British would rely on in future deliberations. When

¹⁵ Draft Bill of Rights, Section IV; UDHR Article 23.

¹⁶ Draft Bill of Rights, Section VI; Nigerian (Constitution) Order in Council (1960) (Nigerian Independence Constitution). The issue of property rights is discussed extensively in DUDZIAK, *EXPORTING AMERICAN DREAMS*, chapter 3. Rights in the Nigerian Constitution were based on the European Convention on Human Rights. See A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (Oxford University Press, 2001), 863–869.

¹⁷ London to Secretary of State, Telegram no. 3552, January 18, 1960, Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives, College Park, MD.

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Kenyans and the British government convened again two years later to debate constitutional development, Marshall's draft was among the demands of one of two principal Kenyan delegations, and both listed him as a potential advisor.¹⁸

Some of Marshall's handiwork was retained in the final Kenya independence constitution in 1963, particularly an expanded version of his property rights clauses, but much of it was not. Kenya's first attempt at democracy would not endure, but its memory would inform a later generation pushing for democratization and new constitutional reforms.¹⁹

In the bill of rights Marshall wrote for Kenya, we can see what, for him, an ideal conception of rights appeared to be. For this lawyer, enmeshed in battles over civil rights in his own country, soon to become a federal judge charged with interpreting American rights, he looked outside his own experience, while at the same time placing front and center the right to equality that he still sought to realize at home.



¹⁸ Nairobi to Secretary of State, Airgram no. 60, November 28, 1961, Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.03/11–2861, National Archives, College Park, MD.

¹⁹ See MAKAU MUTUA, *KENYA'S QUEST FOR DEMOCRACY: TAMING LEVIATHAN* (Lynne Rienner, 2008).