

THE AMERICAN LAW INSTITUTE

THAT'S DEBATABLE": THE ALI AS A PUBLIC POLICY FORUM

*The Statement of Essential Human Rights—A Groundbreaking Venture **

Conceived in hope during a time of global turmoil, when the ALI was struggling to redefine itself, it caused discord among its creators and was deemed to delve too deeply into political issues by the ALI Council, which elected not to present it for approval to the Institute's membership: nevertheless, the Statement of Essential Human Rights (1945) may be one of the Institute's most influential projects.

The late 1930s and early 1940s were a critical time for the ALI. Notwithstanding that its founders in 1923 envisioned "A Permanent Organization for the Improvement of the Law," the organization that we today take for granted was by no means secure. The country had suffered through the Great Depression, the Carnegie Corporation's original grant of over \$1 million to fund work on a Restatement of the Law was running out, and work on the Restatement itself (the first series) would soon be completed. ALI's first Director, William Draper Lewis, worked tirelessly in those years to guarantee the Institute's permanence, seeking funding for new projects, reluctantly recommending that members should pay dues, and agreeing that customers should be charged for published copies of the Restatements. As Professor N. E. H. Hull notes, "When necessary, [Lewis] acted as though it was simply unthinkable that the ALI would disband after the first Restatement, when in fact he was paddling furiously beneath the surface of the water to convince donors to keep the lights on and the telephones working." As work on the Restatements wound down, Lewis turned the Institute's attention from the private-law focus of the Restatements to public law, proposing a model code of evidence, a model youth authority act, a model code of criminal procedure, and an "International Bill of Rights."

In 1941, before the United States had even entered the conflict, thoughtful people were already concerned about the fate of the world in the

aftermath of World War II. Appalled by the fascist regimes' total disregard for individual rights, they hoped to establish a new world order that would preserve the peace, once it was won, and protect the individual. On January 6, 1941, Franklin D. Roosevelt delivered to Congress his famous "Four Freedoms" speech enumerating those fundamental freedoms that "everyone in the world" ought to enjoy: freedom of speech, freedom of worship, freedom from want, and freedom from fear. Later that year, Roosevelt and British Prime Minister Winston Churchill negotiated the Atlantic Charter, a joint declaration embracing the right of self-determination, the right to be free from want and fear, and principles of global economic cooperation in a post-war world. In this atmosphere, two other visionaries—William Draper Lewis and Warren A. Seavey of Harvard Law School—began a correspondence in April 1941 about a proposed International Bill of Rights.

Seavey was the quintessential law-school professor and, in the words of the late Professor Livingston Hall, "the very personification of the Restatement generation," having been involved in the ALI from its earliest days as a co-Reporter for the original Restatements of Agency, Judgments, Restitution, and Torts, and later as the Reporter for Agency 2d and an Adviser for Torts 2d and Trusts 2d. (He was also the first ALI Reporter to append the now-familiar "Reporter's Notes" to his Restatement draft.) Their correspondence reflects the warmth and regard they must have felt toward each other; in his letters Seavey often addressed Lewis as "Dear Commander." On July 10, Lewis wrote to Seavey from his summer home in Northeast Harbor, Maine:

In writing me a more expanded statement of your suggestions in re the Institute's undertaking a statement of fundamental civil rights applicable to all nations in the world that must be recognized

after the War ends with the destruction of Hitlerism, please think up and let me have your idea of a good, reasonably short title. Nothing helps the growth of an idea more than a short label.

Seavey complied the following week with a memo entitled “Laying the Foundations for a New World Order,” in which he contended that ignorance and lack of preparedness after the first World War led directly to the failure of the League of Nations and the current conflagration. Once this current war was successfully concluded, it was clear that some form of international cooperation among governments would be necessary. Whether isolationist or internationalist, one would be “unintelligent” not to attempt to forecast potential problems and formulate principles that would govern the relations of one government to another and of citizens to their government. Seavey wrote:

Many of the problems which must be faced involve a consideration of what is politically expedient and economically possible and are beyond the scope of the work of the Institute as now organized. But there is one group of problems with which the Institute is especially prepared to deal and which it is very important for us to enter at the present time. I am referring to a statement of the minimum individual rights to which a person should be entitled under any form of government.

Both men believed that the Institute—because of its prestige, its contact with outstanding legal scholars, and its long history of group work, not just with lawyers but with other professionals such as economists and political scientists—was especially qualified to perform the task of finding and enunciating principles of individual rights that could be said to be universal and of devising a means for enforcing them.

In the weeks that followed, Lewis and Seavey refined their ideas, and a proposal to draft an international Bill of Rights was presented to the Executive Committee of ALI’s Council, which authorized Lewis to proceed. He began the delicate task of assembling a drafting committee of experts representing “principal cultures of the world”—no easy feat during a time of war, since he was constrained to find them all in the United States—and by mid-1942 had secured contributions

of \$5000 each from the Commonwealth Fund, the American Philosophical Society, and the Carnegie Foundation for International Peace to fund the project. Lewis chaired the drafting committee, whose members represented the cultures of Canada, China, France, pre-Nazi Germany, Great Britain, Italy, India, Latin America, Poland, Soviet Russia, Spain, and Syria. Among its members were Ricardo J. Alfaro, the former president of Panama, John E. Mulder of the University of Pennsylvania (who would later become the first director of ALI-ABA), and Warren Seavey. In a paper written for the American Philosophical Society (April 25, 1942), Lewis outlined the plan:

In carrying out its proposed work, the Institute will follow a group plan which it has adopted in drafting all its important legal statements of law and model acts. The essence of the plan is the development of a draft by a small group of advisers and then by larger groups, which can be discussed, adopted, amended, or rejected by the Council and members of the Institute.

The drafting committee’s work extended over 18 months. At their first conference in November 1942 the members discussed the classes of rights to be considered for inclusion in an International Bill of Rights, and Reporters were appointed for each of the following subcommittees: personal liberties, political rights, due process, property rights, and social rights. With the inclusion of property rights and social rights in the discussion, it was already clear that something other than Seavey’s proposed statement of “minimum individual rights” was on the table.

By the spring of 1943, work on the International Bill of Rights had progressed to the point that it was scheduled for discussion at that year’s Annual Meeting (our first in Philadelphia). Each of the Advisory Committee’s five subcommittees on the various classes of rights (personal, political, due process, property, and social) had held two or more meetings, all attended by Director William Draper Lewis. Reams of source materials had been collected, translated where necessary, and studied, including the Atlantic Charter, Roosevelt’s “Four Freedoms” address, and the individual rights embodied in all then-existing national constitutions. During the full Committee’s deliberations, certain

problems and questions had emerged, chief among them whether the proposed bill of rights should be confined to traditional “negative” rights restricting the power of government, or whether it should also include “positive” rights—such as the right to education, to fair pay, or to social security—that imposed affirmative responsibilities on government. Although the Committee of Advisers had not yet completed even a tentative draft for the Council to consider, interest in the project was so high that it was felt it would be useful at this juncture to acquaint the membership with the issues in the project. Accordingly, the afternoon and evening of May 12, 1943, were devoted to discussion of the International Bill of Rights.

Attendance at that Annual Meeting session, which lasted until 11:30 p.m., was even higher than anticipated. Issues discussed included whether aliens as well as citizens should be entitled to freedom of speech, whether freedom of speech should be afforded to proponents of Nazism, and whether a democratic form of government should be mandated by the proposed bill of rights. Much of the discussion focused on whether to include the “social rights” that imposed positive duties upon the state. Advisers David Riesman, Jr., of New York, Ricardo J. Alfaro of Panama, and Professor Percy E. Corbett of Yale argued that a modern bill of rights would be useless if confined solely to traditional rights, pointing out that social rights were already guaranteed in the constitutions of some 35 nations. Warren A. Seavey of Harvard objected to the inclusion of social rights on the ground that it was too great a departure from the American idea of a bill of rights and too ambitious an undertaking. ALI President George Wharton Pepper reminded the assembly that the political and economic organization of the postwar world was beyond the project’s scope; the Institute was seeking only to identify “universal human needs which can be crystallized into rights....” A reading of the transcript makes it clear that the idea of imposing positive obligations on the state was a “tough sell” to American lawyers raised on the traditional Bill of Rights.

The Advisers labored on after the Annual Meeting, and differences of opinion persisted. Although the Advisers agreed that the right to emigrate was an essential right, they could not come to an accord

on a satisfactory expression of that right, so it was excluded from their document. The article on property rights required reflection of a balance of individual rights against the state’s right to appropriate property for the common good. By this time the project was called the Statement of Essential Human Rights, probably to prevent additional comparison to the American Bill of Rights.

Lewis had from the outset insisted on substantial agreement among the Advisers as to what constituted an “essential” human right. In the end, all but one of the 24 Advisers agreed as to the essential character of all of the rights set forth in the 18 Articles reported to the Council in February 1944. The lone dissenter was Seavey, who predictably refused to agree that the social rights embodied in Articles 11 to 15 (education, work, conditions of work, food and housing, and social security) were essential. Lewis permitted Seavey to express his objections in a forcibly worded “Caveat” appended to the Committee’s report. Not surprisingly, Seavey would have included in his international “constitution” only the “freedoms of speech, religion, equality, and free courts.” He was not completely opposed to “some idea of democracy, . . . some protection of property, some provision for internal peace.” He believed these freedoms were obtainable within the foreseeable future, without much opposition, and with a degree of completeness. Beyond that, he felt, it was not safe to go. Of a constitution embodying social rights, Seavey wrote:

It is a document for a group of slaves; it leads them to believe that they will be taken care of provided they obey the rules. It not only creates hopes which cannot be fulfilled, but it creates the wrong emphasis; it necessarily leads men away from that self reliance (or family reliance) which to me is more important than security. . . . If human society is to be bettered, it will be by the efforts of those who seek freedom for themselves and only protection from their government. Weakening this group or unnecessarily impairing its freedom to act is a disservice to the world; if we permit politicians and government to take their places, the freedoms we now fight for will

be gone and with them those who might regain them.

The Council concurred with the lone dissenter: the Statement of Essential Human Rights was more than they had bargained for. On February 24, the Council resolved that “there is at the present time no reasonable probability that an International Bill of Rights or a Charter of Essential Human Rights can be formulated by the Institute”; it further resolved that the Committee’s Report and the Statement of Essential Human Rights, including Seavey’s Caveat, be “communicated in the usual form” to the membership.

As Lewis related to Seavey in a letter dated March 2, 1944, many on the Council had expected to see a first draft of a Bill of Rights that could eventually be recommended for incorporation into the constitution or charter of an international organization and thus “were especially antipathetic to social rights.” Under the present circumstances, to proceed with drafting an international statement of human rights would inevitably draw the ALI into an impermissible discussion of issues regarded as primarily or purely political. Lewis acknowledged that Seavey’s view probably represented the dominant American view of essential human rights, but he nevertheless maintained that certain social rights were essential rights in a modern world. Lewis concluded:

I know, Warren, that you are disappointed, and think a great opportunity has been lost when the Institute did not suggest a bill of rights confined to three or four matters such as free speech, religion, etc. Likewise, I regret that the great majority of members of the legal profession do not think as I do on what are essential human rights. From our respective viewpoints we can each say, “If only.” However, those two little words have shattered more than one dream.

Thus ended the Institute’s official involvement with the Statement of Essential Human Rights. But the story does not end there. Although the ALI took no official position on the Statement of Essential Human Rights, the Statement was published in pamphlet form in 1945 by Americans United for World Organization and appeared in a special issue,

edited by Lewis, of the *Annals of the American Academy of Political and Social Sciences* in January 1946, with commentary by leading scholars. Lewis continued his personal commitment to human rights, urging Presidents Roosevelt and Truman to include human rights in the platform of the Democratic party.

When delegates from 50 countries gathered in San Francisco in April 1945 to establish the United Nations, the Panamanian delegation, headed by Ricardo Alfaro, sought to have a draft declaration of human rights (identical to the Statement of Essential Human Rights) incorporated in the UN Charter. The effort was unsuccessful, but the Charter did include a provision establishing a Commission on Human Rights. At the Commission’s behest, John Humphrey, the Director of the UN’s Human Rights Division, prepared a first draft of what was to become the Universal Declaration of Human Rights, the best-known and most-cited human-rights document in the world. Adopted in 1948, it has been translated into almost 250 languages and has been incorporated into the constitutions of many countries. In his memoir *Human Rights and the United Nations: A Great Adventure* (1984), Humphrey gave appropriate credit to the Statement of Essential Human Rights:

I was no Thomas Jefferson and, although a lawyer, I had had practically no experience drafting documents. But since the Secretariat had collected a score of drafts, I had some models on which to work....With two exceptions, all these texts came from English-speaking subjects and all of them from the democratic West....The best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it.... It had been drafted in the United States during the war by a distinguished group representing many cultures....

On May 13, 2003, Mary Robinson, the former UN High Commissioner for Human Rights, addressed the Institute’s members at the Annual Dinner in Chicago. She said:

I would like to thank the Institute-better late than never!-for its pioneering and prophetic

work in the 1940s in drafting the Statement of Essential Human Rights....

The Statement broke new ground in identifying not only civil and political liberties, but also education, food, housing, and social security as human rights, and through its broad membership—from China, the Arab world, India, and Latin America—it anticipated and answered later critics who would claim that human rights are a product of western culture and history.

The history of the Statement of Essential Human Rights demonstrates that the Institute can be influential in the ideas it disseminates, even if it does not always take an official position with the requisite concurrence of both the Council and the members. The Reporters' Study on Enterprise Responsibility, which was a report *to* the Institute rather than *by* the Institute, was influential and helped set the stage for the rational debate that led to the Restatement Third of Torts: Products Liability. There are likely to be other projects we might foster or undertake that would make a

contribution even if they are not official statements of the Institute. What is “debatable” is not only the subject matter of a project, but whether the subject matter is one to which the Institute can add value through an official position.

Despite their differences of opinion, both Lewis and Seavey might view with pride the far-reaching outcome of the project they fathered in the summer of 1941.

Michael Traynor
President

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Editor's Note: A selected bibliography of related materials with links, where available, to relevant documents will be posted on the ALI website, www.ali.org, under the “News: ALI Reporter” section.