

has been passed and any attempt to have it adopted is bound to run into strong opposition from the side of those who do not want federal interference with State rights.

This kind of problem thus needs to be approached in a different way. The endeavour must be to unify the substantive law itself by mutual agreement, and this has been done with a fair degree of success for the law of secured transactions. In the new Uniform Commercial Code, jointly prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, there is a chapter on Secured Transactions and, to the extent that the Code is adopted by the States (six or seven States have already adopted the Code) the law of secured transactions will have become uniform. This does not necessarily solve all the problems satisfactorily from the point of view of bankruptcy law, but legislation under the federal bankruptcy power will be able to concentrate on one single type of transaction, instead of having to cope with a great variety. Unification of law through uniform legislation is a long-drawn-out affair, but it is the only practicable approach to the problem in the United States.

We do not feel competent to discuss the problems of the European Economic Community. But the general comment may be valid that, when better co-ordination of bankruptcy law and bankruptcy administration is given consideration, as in the United States, success may depend upon unification, at the same time, of relevant parts of the substantive law within the Community. Quite obviously, legislating on bankruptcy alone cannot solve all the problems. Thus one of the most challenging aspects of the task of better co-ordination of matters in the field of bankruptcy is determination of what can be done within the bankruptcy-law field proper and what needs to be done outside it in addition.

In this work a joint effort of the bankruptcy and conflicts specialists is indispensable. Many of the present troubles stem from the fact that legislation was prepared without consideration of its conflict of laws aspects. No real progress can be expected, especially with regard to co-ordination and unification of law, without the continuous joint effort of the experts. How such planned work can best be organised, whether existing institutions may sponsor it or whether something new needs to be set up, is a matter which should be given serious attention, and without delay, in the interest of better international judicial co-operation.

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FUNDAMENTAL RIGHTS IN THE NEW COMMONWEALTH

By

S. A. DE SMITH *

I. ANGLO-SAXON ATTITUDES

WHEN Alice paid her visit to Looking-Glass Land, she was puzzled to observe the curious postures adopted by the White King's Messenger ("wriggling like an eel, as he came along, with his great hands spread out like fans on each side").¹ She was not altogether reassured by the explanation that he was an Anglo-Saxon Messenger and that these were Anglo-Saxon attitudes. If, however, he had been an Anglo-Saxon constitutional adviser, she might have correctly interpreted his attitudes as signifying another successful skirmish with the forces who were advocating a Declaration of Fundamental Rights for Looking-Glass Land. For until a few years ago Anglo-Saxon attitudes towards declarations of fundamental rights were almost uniformly unfavourable.² Neither in the British Constitution itself nor in any of those Commonwealth constitutions in which British influence had been predominant was there to be found any comprehensive statement of human rights.

Yet today one sees a startling transformation taking place. In 1959 a list of fundamental rights was incorporated in the Nigerian Constitution.³ In 1960 a list of agreed provisions for fundamental rights, based on the Nigerian pattern, was drawn up for inclusion in the Constitution of Sierra Leone upon the attainment of independence⁴; Her Majesty's Government formally expressed its "firm view" that legal provisions were "needed" in the proposed new Constitution of Kenya for "the judicial protection of human rights,"⁵ and provision was made for this purpose before the end of the year^{6a}; and the Monckton Commission recommended that a Bill of Rights be written into the constitutions of the Federation

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¹ Lewis Carroll, *Through the Looking Glass*, Chap. 7.

² For this purpose Americans are deemed not to be Anglo-Saxons.

³ Nigeria (Constitution) (Amendment No. 3) Order in Council, 1959 (S.I. 1959, No. 1772), s. 69 and Sched.; see now Nigeria (Constitution) Order in Council, 1960 (S.I. 1960, No. 1632), Second Sched., Chap. III.

⁴ Cmnd. 1029 (1960), pp. 4, 7, 8, 16-21.

⁵ Cmnd. 960 (1960), p. 9.

^{6a} S.I. 1960, No. 2201, ss. 15, 17 and Sched.

of Rhodesia and Nyasaland and its three territories.⁶ Can it be that Anglo-Saxon attitudes have been so reshaped that those peoples who have neither been born with nor achieved human rights are now to have human rights thrust upon them? Or is this nothing more than a manifestation of that familiar process in which the deplorable becomes recognised as the inevitable and is next applauded as desirable? Have we opened a new chapter in the history of political thought, or have we merely entered another wilderness of single instances? In what proportions are the elements of principle and expediency commingled? It may be imprudent to offer answers to these questions in 1961, but the facts are sufficiently remarkable to warrant further exploration.

II. ATTITUDES AMPLIFIED

An anthology of English writing on constitutional affirmations of fundamental rights might well begin with Jeremy Bentham's comments on the French revolutionary Declaration of the Rights of Man⁷:

"Look to the letter, you find nonsense—look beyond the letter, you find nothing. . . . *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of the pretended natural rights is given, and those are so expressed as to present to view legal rights."

It would doubtless find place for Dicey's delicate observation⁸:

"Now, most foreign constitution-makers have begun with declarations of rights. For this they have often been in no wise to blame."

There would be an extract from the Report of the Simon Commission on the Indian Constitution (1930)⁹:

"Many of those who came before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are

⁶ Cmnd. 1148 (1960), pp. 44, 80–82, 116–118. The Commission disagreed (para. 115) with the view expressed by the Nyasaland Constitutional Con-

aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective."

And this would be linked with the still harsher judgment of the Joint Parliamentary Committee on Indian Constitutional Reform (1934).¹⁰

The anthology would include selected passages from the writings of Sir Ivor Jennings and Professor K. C. Wheare:

"... the English constitutional lawyer . . . has never tried to express, and does not think of expressing, the fundamental ideas which are implicit in his Constitution" . . . "an English lawyer . . . is apt to shy away from a general proposition like a horse from a ghost." . . . "On the whole the politician of tomorrow is more like to be right than the constitutional lawyer of today." . . . "the presumption is that the constitutional guarantee of principles of civil and political liberty is unnecessary." . . . "The conclusion to be drawn from the experience of India, Pakistan and Ceylon is . . . that one should not attempt to deal with the problems of minorities by constitutional guarantees in Bills of Rights."¹¹

"The ideal Constitution . . . would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless."¹²

If the anthology had been compiled in 1957 it might well have ended at this point, though the anthologist would have had to place on record the dissenting voices of one or two international lawyers and the ephemeral burst of enthusiasm for human rights that the Second World War had evoked.

Every criticism must be viewed in its context. Bentham's strictures were directed against a document impregnated with a vulnerable theory of natural law and stained by its association with the worst excesses of the Jacobin Reign of Terror. Modern commentators have in mind the state of civil liberty in the

mid-twentieth century, the fate of constitutions overseas and the jurisprudence of the Supreme courts of the United States and India. Again, constitutional provisions about individual rights are far from being homogeneous. They may take the form of assertions of fact with normative implications (the Republic "respects all beliefs" ¹³). They may be statements of the objectives that are intended to be or must be pursued under the Constitution; such statements may well appear in the Preamble to the Constitution, in so far as they reflect general aspirations,¹⁴ or in a set of Directive Principles of State Policy, in so far as they purport to impose on the State a positive duty to act in conformity with them in the interests of the people.¹⁵ They may be rules of strict law purporting to confer rights on individuals to secure the fulfilment of duties owed to them, or otherwise restricting the competence of the legislative and executive organs of the State for the protection of individual interests. Persons aggrieved by legislative acts or omissions that violate the letter or spirit of the Constitution may or may not be afforded an opportunity of obtaining judicial redress. And there is no uniformity in the substantive content of these constitutional affirmations, obligations, guarantees and prohibitions. No critic will be so lacking in discrimination as to treat all these classes of provisions on the same footing. Nevertheless, the predominant Anglo-Saxon attitude has been one of disapprobation, with the temperature ranging from the frigid to the lukewarm.

The reasons underlying this attitude are too well known to call for full elaboration. Some of them are explicit or implicit in the passages already quoted. The English lawyer finds political manifestoes out of place in a legal document,¹⁶ particularly when their philosophical foundations are insecure. He instinctively prefers brass tacks to noble phrases, pragmatism to metaphysics, and obstinately insists that the proof of the pudding is in the eating. Nor is he in the least impressed by the history of liberty in the majority of countries which have had constitutional declarations or guarantees of rights. Above all, there is the natural tendency to feel that lessons drawn from one's own experience have universal validity. What is good for General Motors is not necessarily good

¹³ Constitution of the Fifth French Republic (1958), art. 2.

¹⁴ As in the Constitution of India (1950). The Preamble, with its statement of the objectives of justice, liberty, equality of status and opportunity, and fraternity, was reproduced as the first page of Sir Ernest Barker's *Principles of Social and Political Theory* (1951). See also p. vi of the author's introduction.

¹⁵ Constitution of India, Part IV; Constitution of Burma, Part IV; Constitution of the Republic of Ireland, art. 45.

¹⁶ The Weimar Constitution of 1919 was described by an English writer as "the best textbook so far written on modern democratic ideas" (R. T. Clark, *The*

for the United States, and what is good for Britain is not necessarily good for Ruritania; but an English lawyer, when he addresses himself to the problems of Ruritania, can hardly be blamed if he begins with the presumption that what has worked admirably in Britain is likely to be better for Ruritania than what has worked very badly in Arcadia and Utopia. When Dicey declared that the Habeas Corpus Acts were "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty,"¹⁷ he spoke for the mass of English constitutional lawyers. And it was his sternest critic who wrote that "in Britain we have no Bill of Rights; we merely have liberty according to law; and we think—truly, I believe—that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man."¹⁸ Attitudes such as these, when forcefully expressed, are apt to exasperate foreign constitutionalists who see in them smugness and insularity; but they are woven into the fabric of the English constitutional tradition.

The most obvious target for criticism is the unqualified constitutional guarantee covering a large area of human conduct. "All citizens shall have freedom of speech." This cannot possibly mean what it appears to say. If it is intended to mislead, the Constitution will soon earn the disrepute attached to a fraudulent prospectus. If it is intended as a statement of an ideal which the organs of the State should strive to attain, it ought not to be expressed as a legal guarantee.¹⁹ If the freedom thus posited is intended to be not absolute but qualified, it is better to say so. And where the task of making sense of an unqualified guarantee is left to the judges, the burden thrust upon them may well be excessive. The judicial history of section 92 of the Australian Constitution, which provides that inter-State trade, commerce and intercourse shall be "absolutely free," stands as a warning to constitution-makers.

If the guaranteed freedoms are subject to explicit qualifications, the critic has to shift his ground. He may have to point out that the qualifications are so far-reaching as to empty the guarantee of meaningful content. Article 21 of the Indian Constitution, providing that "no person shall be deprived of his life or personal liberty except according to the procedure established by law,"²⁰

¹⁷ *Op. cit.*, 10th ed., p. 199.

¹⁸ Jennings, *The Approach to Self-Government*, p. 20.

¹⁹ To Latin Americans a Constitution is "a record of what should be done under ideal conditions. When those ideal conditions have been achieved, the Constitution will be respected in its entirety. But, until that happy day arrives, more practical solutions must be found to pressing problems" (Austin F. Macdonald, *Latin-American Politics and Government* (2nd ed., 1954), p. 8).

²⁰ A phrase that does not import the American concept of due process of law: *Constitution*.

is no more impressive than the Preamble to the French Constitution of 1946 guaranteeing the right to strike "within the framework of the laws that govern it,"²¹ or article 77 of the Turkish Constitution of 1945, which provided that the Press was to "enjoy freedom within the framework of the law."²² If, however, the qualifications are so framed as to leave a significant area of conduct outside the competence of the legislature—if, for example, the Constitution guarantees freedom of religious observance subject only to reasonable restrictions imposed by the State in the interests of public order and morality—difficulties will arise. The vaguer the standards to which legislative encroachments on the guaranteed freedoms must conform, the wider will be the field of uncertainty and the scope for speculative litigation.²³ In the process of constitutional interpretation the private philosophies and prejudices of individual judges will inevitably emerge. Decisions in highly controversial cases are liable to be ascribed to the judge's private predilections. In such circumstances the reputation of the Judiciary is likely to suffer²⁴ and its independence of political influence in matters of appointment will be imperilled. If, moreover, amendment of the Constitution is not easy, a handful of judges may exercise too much influence over political policy through their decisions. If, on the other hand, constitutional amendment is very easily procured and the effect of inconvenient judicial decisions is thereby regularly nullified, the prestige of the Judiciary and of the Constitution alike must suffer. If judicial discretion is kept within narrow limits because the Constitution specifies with great particularity the circumstances in which guaranteed rights may be abridged, the Constitution may become still more rapidly unsuited to changing conditions. The constitution-maker should beware of "the old conceit of being wiser than all posterity."²⁵ Is it not wiser to leave these matters to be provided for by the ordinary law of the land? In any event, constitutional guarantees are always difficult to draft, and the draftsman's task is not made any the easier by the political pressures to which he is subjected.

There is the further danger that the standards of public conduct prescribed by the Constitution may come to be regarded as maximum rather than minimum standards. Important aspects of

²¹ See Wheare, *op. cit.*, pp. 60-61.

²² See generally Balta and Kubali in (1959) 9 *Annales de la Faculté de Droit d'Istanbul*, at pp. 301-303.

²³ This observation and the remainder of the paragraph are based on the assumption that provision exists for judicial review of legislation.

²⁴ Though its prestige may still stand higher than that of any other institution of government.

²⁵ Bentham, *op. cit.*, Vol. 2, p. 494. See also Jennings, *The Approach to Self-Government*, p. 102; and the Report by the Committee of Officials, Cmd. 1150 (1960), para. 13.

freedom that are not constitutionally guaranteed may enjoy less respect than those formally enumerated: *expressio unius est exclusio alterius*. However, it is possible to insert a saving clause to the effect that exclusion does not necessarily imply absence of every form of legal protection.²⁶ Again, the criticism is sometimes offered that constitutional guarantees of individual rights are habitually disregarded when they are most needed, in times of war and other serious emergencies. In so far as this amounts to criticising other countries for doing what has been found unavoidable in Britain, the complaint may be dismissed as frivolous; but there is a great deal to be said for the view that a Constitution should state clearly the circumstances in which guaranteed freedoms may be suspended or abridged, and modern constitutions do in fact usually adopt this course.

Paradoxically, the historical origins of some of the most famous declarations of individual rights are traceable to sources that lie in Anglo-Saxon attitudes. The American revolutionaries drew inspiration for their new State constitutions from ideals thought to be implicit in Magna Carta, the Petition of Right, 1628, and the Declaration and Bill of Rights, 1689, and from concepts of fundamental law and natural rights expressed in the writings of Coke, Locke, and the polemicists of the Puritan Revolution. The content of those State constitutions materially influenced the wording of the Declaration of Independence and the American Bill of Rights. The French Declaration of the Rights of Man owed as much to Tom Paine as to any other author.²⁷ And part of the credit for the adoption of the Universal Declaration of Human Rights by the United Nations has been formally ascribed to British initiative.²⁸ But, as Mr. Podsnap said, other countries do as they do; and English constitutionalists have felt no real embarrassment in brushing aside a *tu quoque*. Now, however, the latest developments in constitution-making in the Commonwealth raise questions that might have embarrassed even Mr. Podsnap for a fleeting moment.

III. ATTITUDES IN THE COMMONWEALTH

The constitutions of the senior Members of the Commonwealth follow the British pattern in so far as they eschew any general

²⁶ See, e.g., United States Constitution, 9th Amendment; Canadian "Bill of Rights," 1960, s. 5 (1). But constitutionally guaranteed rights may well be more firmly protected (e.g., protected against invasion by the legislature as well as by the executive) than other legal rights, and more efficacious remedies may be available to vindicate them.

²⁷ See further Lauterpacht, *op. cit.*, Chap. 8.

²⁸ *The Impact of the Universal Declaration of Human Rights* (Revised ed., U.N. Dept. of Social Affairs, 1953), p. 4.

the ownership and use of private property.³⁹ The 1937 Constitution also embodied (art. 45) a set of non-justiciable Directive Principles of State Policy. The constitutions made on the Liffey were far removed from the mainstream of British thought flowing through Westminster, but they were to influence the minds of constitution-makers in New Delhi and Rangoon, and the clear-cut separation of fundamental rights from directive principles was to be reproduced in the constitutions of India, Burma and, later, Pakistan.⁴⁰

In India nationalist agitation for a comprehensive guarantee of fundamental rights was not immediately quenched by the Simon Commission's douche of tepid water.⁴¹ To the Commission, what India needed was not a general declaration of rights but impartial authorities to protect the interests of the weaker communities; and fortunately the Governor-General and the Provincial Governors were impartiality incarnate. But the demand was pressed during the three Round Table Conferences, and by 1933 the United Kingdom Government had shifted its ground to the point where it was prepared to contemplate a constitutional guarantee of personal liberty.⁴² In the event the Government followed the less expansive recommendations of the Joint Parliamentary Committee on Indian Constitutional Reform,⁴³ and the safeguards written into the Government of India Act, 1935, were limited to property rights and certain forms of discrimination. It would, indeed, have been difficult for the United Kingdom Government to go further without raising hopes which it had no immediate intention of fulfilling.

Elsewhere in the dependent territories of the Commonwealth local pressure for constitutional reform was directed before 1945 almost exclusively towards securing better representation in the legislature and an effective share in the determination of local policy. In plural societies, the growth of elected representation was often accompanied by demands from minority communities and other interest groups for a guarantee of adequate representation for themselves. Not infrequently such claims appeared to be

both reasonable and consistent with good government. And they had their analogues in English parliamentary history. Hence the most characteristic constitutional safeguard in the dependent territories assumed a political form; and it was a safeguard for the group rather than for the individual. In so far as communal representation presupposes the reservation of seats for members of a particular community to be elected exclusively by members of that community, it has now fallen into disfavour; but in 1960 it was still surviving in this form in New Zealand (for Maoris only), Fiji, Kenya, Uganda and Nyasaland. There are variants which are *prima facie* less objectionable. For example, as in India, Tanganyika, the Federation of Rhodesia and Nyasaland, Northern Rhodesia and (when the 1960 constitutional proposals have come into operation) Kenya, seats may be reserved for particular communities with the members elected on a common voters' roll; or reserved seats may be filled partly by election and partly by nomination by the Governor, or (as with the Anglo-Indian seats in the Indian lower House and certain seats in the Malayan Senate) wholly by nomination; or a judicious delimitation of constituencies may (as in Ceylon and Mauritius) give minorities adequate representation.⁴⁴ In the Federation of Rhodesia and Nyasaland and its constituent territories the introduction of carefully weighted qualitative franchises has been sufficient by itself to ensure the continuance of a very high level of European representation in the legislatures.

Here, however, we are concerned not with political contrivances designed to protect group interests indirectly (even though they may be more effective than any other form of constitutional device) but with provisions explicitly formulated for the purpose of directly safeguarding the interests of individuals and groups by restricting freedom of legislative action. Provisions of this type may be conceived primarily as administrative and political barriers against the enactment of objectionable legislation or as judicially enforceable

³⁹ Donaldson, *op. cit.*, pp. 164-168, 176-180; E. McWhinney, *Judicial Review in the English-Speaking World*, Chap. 8.

⁴⁰ The origins of the Irish directive principles have been attributed to the Spanish Constitution of 1931 (for which see Mirkine-Guetzevitch and Réale, *L'Espagne* (1933)). But although that Constitution formally separated "Individual and Political Guarantees" from provisions relating to "Family, Economy and Education" in the title on Rights and Duties of Spaniards, it conformed to the usual continental pattern in not specifying their respective legal implications.

⁴¹ See pp. 84-85, *ante*.

⁴² Proposals on Indian Constitutional Reform (Cmd. 4268 (1933), p. 37). But the Government did not embody such a guarantee in its draft proposals.

⁴³ H.L.6 and H.C.5 of 1933-34, pp. 215-218.

⁴⁴ See generally Martin Wight, *The Development of the Legislative Council, 1606-1945* (1946), pp. 88-89; Jennings, *Constitution of Ceylon*, 3rd ed., pp. 52-62, 213-214; *Approach to Self-Government*, Chap. 5; T. E. Smith, *Elections in Developing Countries* (1960), pp. 13-15, 111-114; W. J. M. Mackenzie, *Free Elections* (1958), pp. 32-37, 110-112; and, for the most-quoted attack on communal representation, the Report of the Donoughmore Commission on the Ceylon Constitution (Cmd. 3131 (1928)), p. 39. In Ceylon today the Delimitation Commission is empowered to define the boundaries of two-member constituencies with a view to securing the representation of a racial minority: Ceylon Constitution (Amendment) Act (No. 4 of 1959), s. 3.

Corporate (as distinct from communal) representation, which was once a common feature in imperial constitutions (Wight, *op. cit.*, pp. 85-86; Government of India Act, 1935, First Schedule, Part I), has now almost disappeared; but see for Aden, S.I. 1955, No. 1654, s. 2; and for Hong Kong, Halsbury's *Laws of England*, 3rd ed., Vol. 5, pp. 643-644.

measure." A differentiating measure is one "by which Africans are subjected or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans are not also subjected or made liable," or one "which will in its practical operation have such an effect."⁵⁷ The Board may lay before the Assembly a reasoned statement of its opinion why a Bill is a differentiating measure. If a Bill that it considers to be a differentiating measure is passed it may submit a reasoned request for the Bill to be reserved, and the Governor-General will normally be obliged to comply with the request.⁵⁸ If the Bill also purports to effect a constitutional amendment, the royal assent cannot be given except by an Order in Council which must be laid in draft before both Houses of the United Kingdom Parliament subject to the negative resolution procedure.⁵⁹ In accordance with requests made by the Board, the Constitution Amendment Bill was reserved in 1957 and the Electoral Bill in 1958⁶⁰; both Bills were debated in the House of Commons; both were assented to by the Crown.⁶¹ In 1959 changes in the membership of the Board left supporters of the Federal Government in the majority^{61a}; but by this time, as the Monckton Commission conceded,⁶² African confidence in the Board had already been lost.

(3) *Institutional Safeguards as an Independent Device*

From the first the African Affairs Board suffered from major weaknesses. It had been set up to allay the fears of Africans and to protect them if necessary against the measures of an all-European Government and a predominantly European Assembly, but its composition was potentially subject to effective control by the party in office. And having regard to the degree of self-government achieved by the Federation and to the realities of political power, it was unlikely that the United Kingdom Government would feel able to advise Her Majesty to refuse her assent to a Bill that had been reserved as a differentiating measure save in a very extreme case. Nor would the position of the United Kingdom Government be a particularly strong one in the informal intergovernmental discussions that would take place on the content of a possibly discriminatory Bill in the preparatory stages. The Monckton Commission

⁵⁷ Constitution, art. 71 (2).

⁵⁸ *Ibid.*, arts. 74, 75; for subordinate legislation, see art. 77.

⁵⁹ *Ibid.*, art. 97 (2), (3).

⁶⁰ Cmnd. 298 (1957), 362 (1958).

⁶¹ Philip Mason, *Year of Decision* (1960), pp. 84-87. In April 1957, before the legislation had been introduced, the United Kingdom Government had accepted in principle the proposals contained in the former Bill (*Commonwealth Survey* (1957), p. 372).

^{61a} See Hasson and Armour in (1960) *Public Law* 141-144.

⁶² Cmnd. 1148, pp. 19-20, 79.

sought to remedy these defects by recommending the replacement of the Board by a Council of State which would stand apart from the Assembly and the members of which would be selected by the Governor-General and the four Chief Justices of the Federation. The membership of the Council would be drawn from three new territorial Councils of State. Each Council would have power to consider and report on legislation that discriminated unfairly against persons of any racial or religious community; and if its recommendations for amendment were to be rejected by the legislature a suspensory veto would come into operation. The procedure for overcoming this suspensory veto would be difficult to operate successfully.⁶³

In their status, composition and general powers the proposed Councils would resemble the Council of State established under the Kenya Constitution of 1958.⁶⁴ But they would have far more significant powers of delay; they would, moreover, have the function of reviewing and reporting on existing legislation for unfair discrimination, as well as on "unfairly discriminatory trends"; the power to require reservation of a Bill, which is vested in the Kenya Council and would be vested in the Councils for the two protectorates, would not be vested in the Federal or the Southern Rhodesian Council; and the members of the Federal Council would not be members of any legislature.

These recommendations must be considered in the light of the Commission's general objective of reconciling the African majority to the continuance of a federal link in Central Africa. The Commission went on to express the hope that the proposed arrangements would be a permanent feature of the federal and territorial constitutions and would continue to be embodied in the Constitution of a territory even if it opted to secede.⁶⁵ But in the long term the problem of appointment to membership would be crucial. No independent government could be expected to acquiesce in the presence of what would be in effect an extra-parliamentary branch of the legislature, lacking the prestige enjoyed by the Judiciary but vested with an entrenched power to obstruct and thwart the implementation of major policy decisions, unless it had effective control over the membership of that body; and once it had control over membership the character of such a safeguard would almost inevitably be transformed.

Indeed, in the last analysis the dominant factor must be the attitude of the Government itself towards communal discrimination

⁶³ *Ibid.*, pp. 83-89.

⁶⁴ See S.I. 1958, No. 600, Part VI; S.I. 1959, No. 1302, ss. 3-8; Cmnd. 309 (1957), 369 (1958); Cmnd. 960 (1960), p. 4.

⁶⁵ Cmnd. 1148, para. 261.

(including the degree of its readiness to face unpopularity among its own supporters). One has the impression that, given a favourable political climate, the power of the African Affairs Board to make representations to the Federal Government in the interests of Africans—a power which the Monckton Commission, with an eye on the model of the Kenya Council of State, proposed to broaden and strengthen when confided to the new constitutional councils—could have been appreciably more fruitful than its power to require the reservation of discriminatory legislation.⁶⁶ Experience in India, the United States and elsewhere suggests that significant progress can be made by specifying positive and continuing responsibilities for looking after the interests of the weaker and more vulnerable communities, and placing those responsibilities in resolute hands. It may be desirable, but it is not essential, for these responsibilities to be spelt out in the Constitution.⁶⁷ The necessary provision may be made by ordinary legislation—and in this context the Northern Rhodesian Race Relations Ordinance, 1960,⁶⁸ is worthy of careful study—or even by administrative action. Legal sanctions against various types of discriminatory conduct may well be required to reinforce powers of persuasion.⁶⁹ But it is not to be assumed that any of these safeguards will obviate the need for constitutional guarantees against discriminatory legislation, coupled with judicial review of legislation that is alleged to infringe the constitutional guarantees.

One further comment must be added. Although discrimination based on such criteria as colour or race, religion, language, sex or tribal or other social groupings is generally to be reprobated, a blanket prohibition of discrimination on these grounds may be imprudent. To prescribe that employment in the public service shall be determined exclusively by the applicant's competence, experience and suitability⁷⁰ may be to retard the process of

⁶⁶ For the Board's general responsibilities, see Constitution, art. 70. Some information about the manner in which it discharged them is given in Cmnd. 1149 (1960) at p. 17. It is worth remarking that the Board was created on the insistence of the United Kingdom Government, and that on December 30, 1959, the Federal Prime Minister made a public statement calling for the abolition of the Board.

⁶⁷ For the present position in India, see D. D. Basu, *Introduction to the Constitution of India* (1960), Chap. 28; Gledhill in (1959) 1 J. of the Ind. Law Inst. 403.

⁶⁸ The Ordinance (No. 32 of 1960) provides for the setting up of (i) a Central Race Relations Advisory Committee, and district committees, and (ii) a Race Relations Board with power to impose cautions and monetary penalties and in the last resort to withdraw the licences of proprietors of specified places of refreshment and recreation against whom complaints of discriminatory practices are proved to the satisfaction of the Board.

⁶⁹ A view endorsed by the Monckton Commission (Cmnd. 1148, para. 230).

⁷⁰ Constitution of the Federation of Rhodesia and Nyasaland, art. 40 (2); though the strength of this guarantee is diluted by art. 40 (3).

Africanisation or to increase the likelihood of covert discrimination. To guarantee, directly or indirectly, a free market in land may provoke communal disturbances and social and economic chaos. To exclude the possibility of giving special assistance to members of backward communities in public education may be to perpetuate their backwardness. In many countries it may therefore be necessary so to frame a general prohibition of discrimination as to leave room for discriminatory measures that are not unreasonable. The Monckton Commission, indeed, conceived the function of the proposed Councils of State to be that of preventing *unfair* discrimination, though whether their suggested terms of reference were well calculated to achieve that result is questionable. Alternatively, there may be a general prohibition of discrimination subject to specific exceptions. Under the Indian Constitution, for instance, the State may make special provision for the protection of backward classes, including the reservation of appointments in the public service, and in particular the claims of members of the scheduled tribes and castes must be taken into account in making such appointments.⁷¹ In the Federation of Malaya the Constitution expressly recognises the "special position of the Malays" (the largest community) and the "legitimate interests" of other communities, and proceeds to safeguard the special position of the Malays by providing for the reservation of quotas for them not only in the public service but also in educational facilities and the allocation of business and trading licences.⁷² And the Constitution of Cyprus, rigorously unique, prescribes a 70:30 ratio for the distribution of posts in the public service between members of the Greek and Turkish communities, a ratio that is to be applied as far as possible in all grades.⁷³

(4) *Constitutional Safeguards as Restrictions on Legislative Competence*

In the constitutions of the dependent territories, restrictions on the power of the local legislature to make laws for the peace, order and good government of the territory have seldom been imposed for the protection of individual or group interests, and the constitutions where such restrictions have been imposed remain exceptional even today. The exceptional cases fall into several groups.

First, there are the constitutions (e.g., Northern Rhodesia)

⁷¹ Arts. 14 (4), 16 (4), 335. The Indian Government has in fact issued an administrative order reserving for the scheduled castes and tribes a percentage of vacancies for which recruitment is by open competition. See further art. 46, a Directive Principle of State Policy.

⁷² S.I. 1957, No. 1533, Annex, First Sched., art. 153; see also arts. 89, 159 (5).

⁷³ Cmnd. 1093 (1960), Appendix D, art. 123.

where the obligation to reserve discriminatory legislation is set out not in the Governor's Instructions but in the principal constitutional instrument. It is almost certain that the requirement of reservation would not be regarded as merely directory: if, therefore, a Bill were to be assented to in breach of this requirement the measure would be invalid.

Secondly, international obligations undertaken by the United Kingdom Government have been reflected in the constitutions of some (but not all) mandated and trust territories. The mandate for *Palestine* required the Mandatory to see that complete freedom of conscience and the free exercise of all forms of worship (subject only to the maintenance of public order and morals) were ensured to all, and that no discrimination was made between the inhabitants on the ground of race, religion or language.⁷⁴ These obligations were translated into constitutional guarantees, and the Constitution further provided that no legislation was to be repugnant to the mandate.⁷⁵ Legislative competence was thus effectively restricted.⁷⁶ The 1923 Order in Council for *Togoland* expressly provided that ordinances were to be void to the extent that they were repugnant to the mandate.⁷⁷ After 1946, when *Togoland* became a trust territory, a similar restriction was reproduced in the constitutional instruments, and the powers of the Gold Coast Legislative Council in relation to *Togoland* continued to be limited by the trusteeship agreement⁷⁸ until the birth of Ghana. The particular restrictions on legislative power were not spelt out, but the agreement⁷⁹ required the Administering Authority to ensure (*inter alia*) freedom of religious practice (so far as was compatible with public order and morality) and, subject only to the requirements of public order, to guarantee the inhabitants freedom of speech, of the Press, of assembly and of petition. For reasons that are not obvious, the similar duties undertaken by the United Kingdom in respect of the Cameroons and Tanganyika (both formerly mandated territories) have never been given express constitutional recognition except in so far as the Governor's Instructions have obliged him to reserve Bills that are discriminatory or are inconsistent with international obligations.⁸⁰

Thirdly, in a few colonies special local conditions have called for the inclusion of specific constitutional guarantees. In *Malta* the spirit of the Declaration of 1802⁸¹ has been enshrined in a

⁷⁴ Cmd. 1785 (1922), art. 15; Wight, *British Colonial Constitutions* 1947, p. 102.
⁷⁵ S.R. & O. 1922, No. 1282, ss. 18, 83; S.R. & O. 1923, No. 619, s. 3.

⁷⁶ *Jerusalem-Jaffa District Governor v. Suleiman Murra* [1926] A.C. 321 at p. 327.
⁷⁷ S.R. & O. 1923, No. 1284, ss. 5, 6.

⁷⁸ S.I. 1954, No. 551, s. 36.
⁷⁹ Cmd. 7083 (1946), arts. 13, 14.
⁸⁰ See Halsbury's *Laws of England*, 3rd ed., Vol. 5, p. 546, note (u), for the constitutional position in 1953. ⁸¹ Reproduced in Cmd. 9657 (1955) at pp. 35-36.

guarantee of religious toleration which has reappeared in a succession of constitutions.⁸² In *Aden* (which was severed from British India and established as a separate colony in 1937)⁸³ the Constitution includes a section⁸⁴ borrowed almost verbatim from the Government of India Act, 1935, guaranteeing all British subjects freedom from racial and religious discrimination in appointments to office under the Crown, in the acquisition, holding and disposition of property, and in the carrying on of any occupation, trade or profession.⁸⁵ The origins of this guarantee are traceable back to the Charter Act of 1833, when India was still under the administration of the East India Company.⁸⁶

Fourthly, a carefully drafted provision for the payment of adequate compensation (which is to be judicially ascertainable) on the compulsory acquisition of property has begun to appear in colonial constitutions. First incorporated in Ghana's 1957 Constitution,⁸⁷ it was applied to Nigeria in 1958⁸⁸ and to Malta in 1959.⁸⁹ It is, of course, possible to point to earlier precedents in Australia, Northern Ireland and the Government of India Act, 1935.

Fifthly, as a colony approaches the threshold of independence it may be thought desirable to attempt to allay the fears of minorities by writing anti-discrimination provisions into the principal constitutional instrument for the first time. In 1944 a draft Constitution submitted by the Ministers of *Ceylon* included a guarantee of religious freedom and a prohibition of communal and religious discrimination; the wording was suggested partly by section 5 of the Government of Ireland Act, 1920.⁹⁰ This proposal was approved in principle by the Soulbury Commission in 1945,⁹¹ and

⁸² See now Malta (Constitution) Order in Council, 1959, (S.I. 1959, Vol. 2, Appx.), s. 49; see also *ibid.*, s. 50 and Fourth Schedule for guarantees for Maltese and English as official languages.

⁸³ Government of India Act, 1935, s. 288; S.R. & O. 1936, No. 1031.

⁸⁴ S.R. & O. 1936, No. 1031, s. 21. The Governor is also instructed to allow all residents full liberty of conscience and the free exercise of their respective modes of religious worship, "provided they be content with a quiet and peaceable enjoyment of the same, not giving offence or scandal to the Government" (Royal Instructions, 1937, cl. 21 (Wight, *British Colonial Constitutions*, 1947 p. 161)).

⁸⁵ Cf. Government of India Act, 1935, ss. 298, 462; and see now Constitution of India, art. 16 (1), (2). The terms of the 1935 guarantee were similar to, though somewhat narrower in scope than, those suggested by the Indian Central Committee in 1929 (Cmd. 3451, p. 70). See further, p. 92, *ante*. The Governor-General and Governors were required to secure for minorities a due share in public appointments (Cmd. 4805 (1935)); see also ss. 12 (1) (a) and 52 (1) (b) of the 1935 Act.

⁸⁶ 3 & 4 Will. 4, c. 85, s. 87 (employment under the Company).

⁸⁷ S.I. 1957, No. 277, s. 34.

⁸⁸ S.I. 1958, No. 429, s. 106; see now S.I. 1960, No. 1652, Second Sched., s. 30.

⁸⁹ Constitution (see note 82, *ante*), s. 51. The constitutional safeguards of private property rights recently adopted for Kenya (S.I. 1960, No. 2202, Sched., s. 10) go further and are the strongest yet devised, though it remains to be seen whether they will be adequate to achieve their purpose.

⁹⁰ See Cmd. 6677 (1945), pp. 121, 125.

⁹¹ *Ibid.*, pp. 64, 90, 96.

the Constitution granted to Ceylon immediately prior to independence contained a section founded on this proposal,⁹² a section which survives with minor amendments in the present Constitution. This constitutional guarantee has not, however, invalidated local legislation making it difficult for Indian and Pakistani residents to acquire citizenship of Ceylon, although citizenship is a prerequisite to registration as an elector.⁹³ Agitation by the Ceylon Tamil minority for fuller guarantees of fundamental rights has been unproductive.⁹⁴ In the *Gold Coast* the 1950 Constitution included a prohibition of racial discrimination.⁹⁵ To this were added in Ghana's first Constitution⁹⁶ a guarantee of religious freedom (subject to restrictions imposed in the interests of public order, morality or health) and provisions for adequate compensation on the compulsory acquisition of property.

The limited safeguards adopted in Ceylon and Ghana will not bear comparison with the comprehensive set of fundamental rights written into the Constitution of *Nigeria* in 1959.⁹⁷ The Nigerian scheme has set a precedent that is being followed elsewhere; but it has its own precedents, and the historical background to these precedents is important enough to call for a separate discussion. It should be said, however, that even before the adoption of the Nigerian scheme an exceptional situation might be regarded as calling for exceptionally wide constitutional safeguards. The justiciable safeguards for communal interests proposed by Lord Radcliffe for Cyprus in 1956⁹⁸ went some distance beyond any that had appeared in a colonial Constitution up to that time, though they still fell short of a comprehensive statement of civil liberties. And in the following year the Reid Commission firmly recommended that guarantees of individual rights be written into the Constitution of an independent Federation of Malaya.⁹⁹ It may be relevant, however, that this Commission included representatives from India and Pakistan.¹

(To be concluded.)

⁹² S.R. & O. and S.I. Revised. 1948, Vol. 3, p. 560, s. 29 (2).

⁹³ *Pillai v. Mundanayake* [1953] A.C. 514. See generally W. Howard Wriggins, *Ceylon: Dilemmas of a New Nation* (1960), pp. 212-238.

⁹⁴ Wriggins, *op. cit.*, p. 258.

⁹⁵ S.I. 1950, No. 2094, s. 50; repeated in the 1954 Constitution (S.I. 1954, No. 551, s. 36).

⁹⁶ S.I. 1957, No. 277, ss. 31, 34. The present position in Ghana will be reviewed at a later stage.

⁹⁷ *Nigeria* (Constitution) (Amendment No. 3) Order in Council, 1959 (S.I. 1959, No. 1772), s. 69 and Schedule; see now S.I. 1960, No. 1652, Second Sched., Chap. III.

⁹⁸ Cmd. 42 (1956), pp. 14, 30-31, 43-44.

⁹⁹ Colonial No. 330 (1957), pp. 69, 70; see now Part II of the present Constitution (note 72, *ante*).

¹ Nevertheless, the Commission rejected the idea of incorporating Directive Principles of State Policy in the Constitution (*ibid.*, p. 70).

THE GERMAN ATTORNEY—EXPERIENCES WITH A UNIFIED PROFESSION (II)*

By

E. J. COHN

VIII

THIS is not the place in which to give even a bare outline of the history of the German legal profession.⁴³ It may suffice to say that the German legal profession has not at any previous time in its long and tangled history enjoyed anything like the amount of autonomy and freedom from State supervision which has been so marked a characteristic of the development of the English Bar. In fact, the German attorneyship has today in the Federal Republic of Germany reached the highest degree of independence from the State which it has ever succeeded in attaining.

This does not mean that it is in any way free from such influences. Admission to the profession is still in the hands of the Ministers of Justice of the *Laender*, not of the self-governing authorities of the profession. A typically pseudo-logical argument is advanced to justify this situation: it is argued that the State, through legal provisions enacted by it, has granted to members of the legal profession the monopoly of appearing in court and that it "logically" follows from this that it is for the State to secure the existence of a reliable legal profession for the citizens of the country.⁴⁴ However, the Ministers of the *Laender* do not necessarily have the last word in the matter. They have to ask for the advice of the Chamber of Attorneys, a democratically elected body formed by all attorneys admitted to practice within the district of a court of appeal. If the Chamber objects to the admission of a candidate, the latter can apply to a professional tribunal for a decision on the application. From the decision an

* The first part of Dr. Cohn's article was published in (1960) 9 I.C.L.Q. 580.

⁴³ Apart from Döhring's work (see above note 38) the standard work is Weisler, *Geschichte der Rechtsanwaltschaft* (1905). Short summaries are contained in J. Magnus, *Die Rechtsanwaltschaft* (1925), by C. v. Schwerin and in *Die juristischen Berufe in Vergangenheit und Gegenwart* (see note 25 above) by Berner.

⁴⁴ See *Official Motives* (Beck edition), p. 22.