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Constitutional law

FUNDAMENTAL RIGHTS IN THE NEW COMMONWEALTH-II¹

By

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V. NIGERIA AND EUROPE

The full story of the Nigerian constitutional conferences preceding independence has yet to be written, but it is believed that the origins of the decision to incorporate fundamental rights in the Constitution are directly traceable to local political rivalries. By 1957 each regional government was controlled by a political party resting on a primarily tribal and linguistic basis. At the federal level relations between the parties were uneasy; opposition to the governing party in each region came mainly from the party in power in another region or its associates; and in each region there were smaller tribal and linguistic minorities. The Northern Region, by far the most populous, was dominated by the traditionalist, Muslim and paternalistic Northern People's Congress.² At the 1957 Constitutional Conference the Government of the Western Region sponsored two proposals that would have tended to weaken the position of the N.P.C.: the creation of a small number of new States (which would diminish the size of the Northern Region) and the adoption of a set of fundamental rights (which might affect the policies pursued by the N.P.C. and make it easier for its opponents to organise freely in the North). The Government of the Eastern Region favoured the creation of a large number of new States, though it rejected the idea of self-determination for its own ethnic minority within the existing constitutional structure. The Government of the Northern Region adamantly opposed the whole idea of new States. The United Kingdom Government would doubtless have agreed to new States if all the Nigerian delegations had wanted them, but it was conscious of the dangers of balkanisation, administrative breakdown and eventual disruption.

In the event, the Conference agreed in principle to the subsidiary and less controversial proposal for fundamental rights³ and postponed a decision on the larger issue of new States. It

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¹ The first part of this article was published in the I.C.L.Q., Vol. 10, p. 83.

² Though the Northern Region did not attain to full internal self-government till 1959.

³ Cmd. 207 (1957), p. 32.

was agreed that a commission should be appointed to inquire into the fears of minorities and the means of allaying them, but new States were to be recommended only as a last resort.⁴ The Minorities Commission came to the conclusion that the case for new States had not been made out. It discovered little enthusiasm in Nigeria for the entrenchment of fundamental rights as a safeguard for minorities; nevertheless, it recommended that they be written into the Constitution together with other checks against the abuse of power. Its detailed proposals closely followed the terms of the European Convention on Human Rights (the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950),⁵ with the addition of one or two provisions borrowed from Malaya and Pakistan.⁶ These recommendations were substantially approved at the Constitutional Conference held in 1958⁷; and the United Kingdom Government having made clear its view that independence would have to be postponed if the question of new States were to be further pursued, the proponents of new States reluctantly gave way. But (apparently in deference to the strong views expressed by the N.P.C.'s opponents⁸) the fundamental rights provisions were brought into operation in time for the Federal General Election campaign at the end of 1959. Consequently Nigeria obtained its Bill of Rights before independence was achieved.

These fundamental rights do not in terms safeguard the rights of minorities; they safeguard the enumerated rights of individuals and groups generally. Their efficacy is not easily predictable. However, as the Minorities Commission observed⁹:

"Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A Government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a Government on individual rights."

One recalls that in 1934 another British constitutional committee, in turning down a proposal to embody a set of fundamental rights

⁴ *Ibid.*, pp. 13-14. See generally Kalu Ezera, *Constitutional Developments in Nigeria* (1960), pp. 244-252; James S. Coleman, *Nigeria: Background to Nationalism* (1958), pp. 384-396.

⁵ Cmd. 8969 (1953).

⁶ Cmd. 505 (1958), pp. 97-103.

⁷ Cmd. 569, pp. 3-9, 21-23. For special provisions on minority areas, see *ibid.*, pp. 24-25; S.I. 1960, No. 1652, Fourth Schedule, s. 73, Fifth Schedule, s. 73. For the procedure for creating new regions, see S.I. 1960, No. 1652, Second Schedule, s. 4.

⁸ See Elias in (1959-60) 2 *Jl.Intl.Comm. Jurists* at p. 30.

⁹ Cmd. 505, p. 97.

as the Indian Constitution, had remarked that a cynic might find plausible arguments in contemporary history for asserting that "the most effective method of assuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional document." It had gone on to say "either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws will be declared invalid by the courts."¹⁰ *Tempora mutantur, et nos mutamur in illis.*

Even if the United Kingdom Government had thought it prudent to resist the plea for fundamental rights at the 1957 Conference it would have found difficulty in resting its opposition on grounds of principle, for it had ratified the European Convention in 1951,¹¹ and it had extended its obligations under the Convention to forty-two dependent territories (including Nigeria) in 1953.¹² These obligations were binding on the United Kingdom in international law; and if they had been found to be acceptable to this extent, it was scarcely arguable that it would be improper for a Commonwealth country with a federal and relatively rigid Constitution to be equipped with similar provisions in its own municipal law. Indeed, the United Kingdom would not have acceded to the Convention if its terms had been either incompatible with the basic values of a liberal society or inimical to good government.

The ratification of the European Convention received scant attention from English lawyers at the time, and it had no immediate impact on constitution-making in the Commonwealth, yet it stands as a political and legal landmark. It was adopted under the auspices of the Council of Europe, of which the United Kingdom became a founder member in the first flush of post-war enthusiasm for closer association with the European democracies. Among the aims of the Council of Europe is the achievement of greater unity between its members by agreements and common action in the maintenance and further realisation of human rights and fundamental freedoms.¹³ The European Convention has been its main contribution towards the fulfilment of this objective. Unlike the Universal Declaration of Human Rights, on which it

¹⁰ Report of the Joint Parliamentary Committee on Indian Constitutional Reform (H.L. 6 and H.C. 5 of 1933-34), p. 216.

¹¹ A Protocol to the Convention (Cmd. 9221 (1954)) was ratified in 1952.

¹² Cmd. 9045 (1953), pp. 7-8. This extension was to cause the United Kingdom Government some embarrassment in connection with the activities of the security forces in Cyprus and the enactment of new emergency legislation in some dependent territories in Africa.

¹³ Statute of the Council of Europe (Cmd. 7778 (1949)), art. 1. See generally A. H. Robertson, *The Council of Europe* (1956).

was founded, it represents more than a "common standard of achievement"; it imposes legal obligations on the parties to it to ensure that their laws are in conformity with it,¹⁴ and supplies machinery for securing compliance with its provisions. Complaints of breaches of the Convention may be addressed to the European Commission of Human Rights, which acts as an investigatory and conciliatory body; if a friendly settlement cannot be reached by the Commission it reports to the Committee of Ministers, which may prescribe remedial measures to be taken by the Government against which the complaint has been lodged; alternatively, within a period of three months after the submission of the Commission's report the case may be brought before the European Court of Human Rights, a judicial body constituted in 1959.¹⁵

The United Kingdom has not accepted the compulsory jurisdiction of the European Court. Nor has it yet lodged any declaration recognising the right of individuals to address petitions to the European Commission against it; any allegation that it has committed a breach of the Convention must therefore emanate from one of the other High Contracting Parties. Nor, unlike some of the other signatories, has it embodied the Convention in its municipal law. But it is worth remarking that the present Lord Chancellor took a prominent part in the preparatory work of drafting the Convention, and that the Chairman of the European Commission and the President of the European Court are distinguished English lawyers. And it is undoubtedly significant that by binding itself to conserve the rights and freedoms set out in the Convention and to give effect to the decisions of the Committee of Ministers¹⁶ this country has undertaken an obligation to modify its own laws and those of its dependent territories to conform with a specific concept of human rights.

The European Convention and its Protocol affirm the rights not to be deprived of one's life; not to be subjected to torture or degrading punishment; not to be held in slavery or to be required to perform forced labour; to be granted a fair hearing before an impartial tribunal in the determination of civil rights and obligations and criminal charges; to respect for private and family life, home and correspondence; to freedom of thought, conscience and religion; to freedom of expression; to freedom of peaceful assembly

¹⁴ Waldo in (1958) B.Y.I.L. at p. 358.

¹⁵ For analysis of the Convention, the Commission and the Court, see Robertson, (1950) B.Y.I.L. 145, (1951) B.Y.I.L. 359, (1959) 8 I.C.L.Q. 396, (1960) 8 Am.Jl.Comp.L. 1; *The Council of Europe*, Chap. 9; Waldo, (1958) B.Y.I.L. 356; McNulty and Eissen, (1958) 1 Jl.Intl.Comm.Jurists 198; Boyle, (1960) 23 M.L.R. 170; Lauterpacht, *International Law and Human Rights*, Chap. 18.

¹⁶ Convention, arts. 1, 32.

and association (including the right to form trade unions); to the peaceful enjoyment of possessions; and to education. They also provide for the presumption of innocence, specify minimum safeguards for persons arrested and tried on criminal charges, prohibit retroactive penal legislation and impose on the High Contracting Parties the duty to hold free elections. The enjoyment of these rights and freedoms is to be secured without discrimination on any ground such as sex, race, colour, language, religion, opinion, origin, association with a national minority, property, birth or status (art. 14); and for every violation of them there is to be an effective remedy before a national authority, notwithstanding that the violation may have been committed by persons acting in an official capacity.

It was possible for the United Kingdom to accede to the Convention without any undue straining of conscience. The rights and freedoms there proclaimed were, to a very large extent, already recognised in English law¹⁷—not as formal constitutional or statutory guarantees but as residual rights, liberties and immunities of the individual. On the whole the Convention avoided the vague generalities that characterised the Universal Declaration of Human Rights. For example, whereas the Universal Declaration baldly asserts that everyone has the right to life, liberty and security of person and that no one shall be subjected to "arbitrary" arrest, detention or exile (arts. 5, 9), the European Convention sets out four grounds on which a person may lawfully be deprived of his life and six grounds for lawful deprivation of liberty (arts. 2, 5) and lays down specific safeguards on lawful arrest and detention. It is true that the Universal Declaration does recognise that the law may impose limitations on the guaranteed rights and freedoms for the purposes of protecting the rights and freedoms of others and "meeting the just requirements of morality, public order and the general welfare in a democratic society" (art. 29 (2)), but the European Convention defines the range of permissible restrictions

¹⁷ It is doubtful whether any subsequent change in English law is directly attributable to the United Kingdom's accession to the Convention. But the Secretary of State for the Colonies has been induced to give an assurance that in those dependent territories to which the Convention has been applied, powers to detain persons and to impose forced labour will be exercised only in accordance with the requirements of art. 15 of the Convention (*post*): see 623 H.C.Debs. Written Answers, cols. 133-134 (May 19, 1960). And the United Kingdom's accession to the European Convention on Establishment (also concluded under the auspices of the Council of Europe) led to an important change in administrative practice with regard to the procedure followed prior to the deportation of certain classes of aliens (see de Smith, *Judicial Review of Administrative Action* (1959), p. 117, note 22).

with greater particularity.¹⁸ Moreover, the European Convention, unlike the Declaration, explicitly authorises the parties to it to derogate from certain rights to a limited extent in times of war and other serious public emergencies.¹⁹ And the emphasis on efficacious remedies commended itself to an English lawyer, even if some of the proposals for affording redress through supra-national agencies were unacceptable.

VI. THE NIGERIAN CONSTITUTION AND THE EUROPEAN CONVENTION COMPARED

The similarities between Chapter III of the Nigerian Constitution of 1960 and the European Convention are more obvious than the differences; but the differences are interesting and in some respects may prove to be significant.

- (1) Both the Constitution and the Convention eschew the shadowy concepts of equality before the law, the equal protection of the laws and due process of law—concepts which demand nothing less than judicial legislation before they can take firm shape and which are therefore inevitably a prolific source of litigation.
- (2) The Convention makes only an oblique reference, and the Constitution makes no reference at all, to the duties of the individual. The emphasis is almost exclusively on individual rights, liberties and immunities—an emphasis less apparent in many Continental and Latin American constitutions, which not infrequently have sections on the rights and duties of the citizen.²⁰
- (3) Neither instrument has much to say about social, cultural or economic matters. The Convention proclaims the right to marry; on this the Constitution is silent.²¹ The Protocol to the Convention says that no person shall be denied the right to education and that the State shall respect the religious and philosophical convictions of parents in the

¹⁸ See, e.g., art. 10, on freedom of expression. In this respect the Draft Covenant on Political and Civil Rights prepared by the United Nations Commission on Human Rights resembles the European Convention rather than the Universal Declaration. For the text of the Draft Convention see M. Moskowitz, *Human Rights and World Order* (1958), pp. 215–229. There are, of course, many difficulties in specifying exhaustively the permissible limitations on a general right. See, e.g., Lauterpacht, *op. cit.*, p. 336, note 24.

¹⁹ Art. 15 (1). See note 17 (*ante*) and p. 224, *post*.

²⁰ See also Universal Declaration of Human Rights, art. 29 (1); cf. European Convention, art. 10 (2).

²¹ Any such guarantee would in any event have had to take into account the prescriptions of Muslim law.

provision of teaching²²; the Constitution deals with education only in the context of freedom of conscience, and (adopting the wording of the Pakistan Constitution of 1956) merely prohibits the imposition of religious teaching or observances on persons of other religions, and guarantees religious communities the right to provide religious instruction for their own adherents in schools maintained by them.²³ The Protocol affords private property only ambivalent and half-hearted safeguards,²⁴ but the Constitution (s. 30) requires adequate compensation to be provided by law in respect of compulsory expropriation, specifies in detail the classes of laws that fall outside the scope of this guarantee, and gives jurisdiction to the High Courts to determine the right to compensation. The Convention and the Constitution both assert the right to join and belong to trade unions and other associations subject to the prescribed classes of restrictions that may be imposed by law. Both in Europe and in Nigeria the individual's home is to remain his castle, his privacy undisturbed, his family circle unbroken, his correspondence unopened, unless higher interests require intrusions to be made. Otherwise the two sets of guarantees are concerned almost entirely with the freedoms upon which Dicey concentrated in his analysis of the Rule of Law.²⁵

- (4) Both the Convention (art. 6) and the Constitution (s. 21) prescribe that a person whose civil rights and obligations are in issue shall be entitled to a fair hearing within a reasonable time by an independent and impartial tribunal; but Dicey might have looked askance at the proviso to section 21, that a law shall not be invalidated "by reason only that it confers on any person or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights or obligations of any person." Even so, this section could become a constitutional lawyer's gold-mine.
- (5) The Constitution (s. 26) guarantees every citizen of Nigeria freedom of movement and residence, freedom of entry into the country and freedom from expulsion, subject to

²² Cind. 9221 (1954), art. 2; the United Kingdom accepted this article subject to reservations (*ibid.*, p. 7).

²³ Constitution, ss. 23 (2), (3); cf. Pakistan, arts. 13 (1), (2).

²⁴ Art. 1. For a comment on the political background, see Robertson, *The Council of Europe*, pp. 156–157.

²⁵ Though the Protocol (art. 3) also guarantees free elections.

reasonably justifiable restrictions²⁶; the Convention has no corresponding provision.

- (6) The anti-discrimination clause in the Constitution (s. 27), though wide in its scope, is limited to citizens of Nigeria and does not cover discrimination on the ground of sex (*cf.* Convention, arts. 14, 16); and among the several classes of laws that will fall outside the guarantees are those imposing restrictions with respect to the acquisition or use of land or other property²⁷ and any discriminatory law which, "having regard to its nature and to special circumstances pertaining to the persons to whom it applies, is reasonably justifiable in a democratic society."
- (7) The words "reasonably justifiable in a democratic society" recur in the Constitution like a refrain. They express a standard to which laws qualifying the guaranteed rights and freedoms must conform. Thus, a law restricting freedom of assembly or association will be valid only if it is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; for the purpose of protecting the rights and freedoms of other persons; or imposing restrictions on holders of office under the Crown, members of the armed forces or the police.^{27a} Under the European Convention the permissible restrictions must be such as are "necessary in a democratic society."²⁸ What is necessary and what is reasonably justifiable may be fundamentally different in a given situation, and it is impossible to avoid the conclusion that of the two instruments the Constitution offers appreciably less scope for judicial review of legislation and administrative action. Whether the Nigerian formulation offers as much scope for judicial review as is offered by the guarantees of fundamental rights under the Indian Constitution remains to be seen. Article 19 of the Indian Constitution guarantees seven freedoms (of expression, peaceful assembly, association, movement, residence, property and occupation), subject to the imposition of "reasonable restrictions" by the State in the interests of public order and other desiderata. The criterion of reasonableness

²⁶ *Cf.* Constitution of Malaya, art. 9.

²⁷ See further, s. 26 (3); and for the political background to these exceptions. see Elias, *loc. cit.*, at pp. 38-39.

^{27a} Constitution, s. 25. See generally *ibid.*, ss. 22-27.

²⁸ Deprivation of the right to life is justifiable only when it results from the use of force which is "no more than absolutely necessary" for the purposes specified (art. 2 (2)). The Nigerian Constitution (s. 17 (2)) refers to the use of "such force as is reasonably justifiable."

is objective; the courts have shown reluctance to substitute their own value-judgments for those of the legislature, but have held many restrictions to be unreasonable and invalid because they have evinced no rational relationship with the permitted purposes, because they have conferred unfettered discretion on the executive to restrict a guaranteed freedom, because an ostensibly regulatory provision has been in effect prohibitory, or because an encroachment has been authorised in disregard of the procedural requirements of natural justice.²⁹ It can be argued that the words "reasonably justifiable in a democratic society" ought to be construed as leaving the legislator a wider area of discretion than the word "reasonable" would leave him; but the Nigerian courts need not be irresistibly driven to such a conclusion.³⁰ Certainly the Nigerian standard is more exacting than the standard laid down by the Malayan Constitution, which empowers the Federal Parliament to impose "such restrictions as it deems necessary or expedient" on the rights to freedom of expression, peaceable assembly and association.³¹

- (8) Under the Nigerian Constitution, derogation by Parliament from certain fundamental rights is permissible during periods of emergency to the extent that the measures taken are "reasonably justifiable" for the purpose of dealing with the situation.³² In this context a period of emergency means³³ a period during which the Federation is at war, or in which there is in force either a resolution of each House of Parliament declaring that a state of public emergency

²⁹ See generally D. D. Basu, *Commentary on the Constitution of India*, 3rd ed., Vol. 1; Alan Gladhill, *Fundamental Rights in India* (1955).

³⁰ Though a law prohibiting the dissemination of literature advocating a totalitarian form of government, which would doubtless be held in Nigeria to be a restriction reasonably justifiable in a democratic society, might well be held to be invalid in India (*cf.* Gladhill, (1960) *Jl.Afr.L.* at pp. 115-116).

³¹ Constitution, art. 10 (2); the interests in furtherance of which the restrictions may be imposed are specified, but once a court is satisfied that an impugned restriction genuinely purports to protect a prescribed interest it would appear to have no power to inquire into the reasonableness of the restriction. See Groves in (1959) 5 *Howard L.J.* at pp. 205-217; Sheridan in (1959) 1 *U. of Malaya L.Rev.* at pp. 175-187; R. H. Hickling, *An Introduction to the Federal Constitution* (1960), pp. 19-23.

³² Constitution, s. 28. The guarantees from which Parliament may derogate are contained in ss. 17, 20, 21 and 27 (right to life, right to liberty, rights in respect of the determination of civil rights and obligations and criminal charges, and freedom from discrimination). But the permissible derogation from the right to life covers only death resulting from acts of war; and in any event no retroactive penal legislation may be enacted.

³³ Constitution, s. 65.

exists or a resolution of each House supported by two-thirds of its full membership declaring democratic institutions in Nigeria to be threatened with subversion. During a period of emergency the Federal Parliament becomes competent to make laws with respect to matters otherwise reserved to the territories.

A person whose movements or residence are lawfully restricted, or who is detained without trial in derogation from the right to personal liberty during a period of emergency, is entitled to have his case referred within one month, and thereafter at intervals of not more than six months, to a special advisory tribunal with a legally qualified chairman.³⁴

These provisions may be contrasted with those of article 15 of the European Convention, under which derogation is permitted in time of war "or other public emergency threatening the life of the nation," and then only to the extent "strictly required by the exigencies of the situation,"³⁵ and the measures taken must not be inconsistent with the signatory's international law obligations. It would seem that the existence of the emergency, the necessity for the measures taken and their conformity with international law are all justiciable issues; whereas in Nigeria the question of the existence of the emergency is non-justiciable, the international law issue does not arise, and the courts have merely to be satisfied that the impugned measures are reasonably justifiable in the circumstances.

* * *

The Constitution has the force of law throughout Nigeria, and any other "law" inconsistent with it is void to the extent of the inconsistency.³⁶ It is thought that "law" for this purpose includes rules of common law and customary law, save in so far as the term comprises laws in force at the commencement of the Constitution; the definition of "existing laws" appears to exclude "unwritten" rules of law.³⁷ But existing laws, as so defined (and subject to certain qualifications), are to be so construed as to bring them into conformity with the Constitution.³⁸ Those provisions in

³⁴ s. 29. Cf. Pakistan, art. 7 (3); and for Malaya, see Constitution (Amendment) Act, 1960, s. 30.

³⁵ Art. 15 (1). See note 17, *ante*.

³⁶ Constitution (*sc.* Constitution Order in Council, Second Schedule), s. 1.

³⁷ Constitution Order in Council, s. 3 (7). The term covers "Ordinances, Laws, rules, regulations, orders and other instruments."

³⁸ *Ibid.* s. 3 (1). However, the guarantee of compensation for compulsory acquisition of property does not apply to laws in force before April 1958 (Constitution, s. 30 (2)).

the Chapter on fundamental rights which protect from invalidation any law that is reasonably necessary in a democratic society for the prescribed purposes do extend to unwritten rules of law.³⁹

Unlike the Indian Constitution, the Nigerian Constitution does not grant any constitutional right to named remedies for the vindication of fundamental rights. However, it authorises any person who alleges that any provision of the Chapter on fundamental rights has been contravened "in relation to him" to apply to the appropriate territorial High Court for redress, invests the High Courts with original jurisdiction in such a matter, and leaves questions of practice and procedure to be regulated by the Federal Parliament.⁴⁰ Moreover, where a question as to the interpretation of the Constitution arises in an inferior court the matter may (and, at the request of a party, must) be referred to the High Court if a substantial question of law is involved; and there is provision for the reference of such a substantial question of law by the High Court to the Federal Supreme Court.⁴¹ From any decision of a High Court on a question whether a fundamental right has been contravened an appeal lies as of right to the Federal Supreme Court,⁴² and a further appeal will lie as of right to the Privy Council.⁴³

The provisions of the Constitution relating to fundamental rights and the procedure for enforcing them cannot be repealed or altered except by the Federal Parliament, and in accordance with a procedure which would seem at first sight to be so cumbersome as to be almost unworkable. The amending Bill must obtain the support of not less than two-thirds of the total membership of each House at second and third readings, and the Act still cannot come into operation until each legislative House of at least two Regions has signified consent to its having effect.⁴⁴ But this degree of entrenchment is not in fact tantamount to permanent installation; the parties in power in the Northern and Eastern Regions can command today between them a majority capable of carrying through the Federal Parliament an amendment that would destroy the guarantees. Their survival during the next few years is in effect dependent on political acceptance of the proposition that they are reasonably justifiable in a democratic society.

³⁹ Constitution, s. 32.

⁴⁰ *Ibid.*, s. 31.

⁴¹ *Ibid.*, s. 106.

⁴² *Ibid.*, s. 110 (2) (d).

⁴³ *Ibid.*, s. 114 (1) (c).

⁴⁴ *Ibid.*, ss. 4 (1), (2).

VII. THE REPUBLIC OF CYPRUS

In the Nigerian Constitution communities and groups have these interests safeguarded indirectly—through the guarantees of individual rights and freedoms already discussed, through the provisions for constituting provincial administrations in the North and East and minority areas in the East and West, through the special arrangements for control of the police, and through the working of parliamentary democracy under a federal system. In the Republic of Cyprus, on the other hand, the rights of the two main communities, the Greeks and the Turks, are directly safeguarded by constitutional provisions of unparalleled complexity, and there is an elaborate set of fundamental rights and liberties of the individual into the bargain.⁴⁵ Cyprus ceased to be of the Commonwealth on August 16, 1960; but early in 1961 its House of Representatives resolved that Cyprus should seek admission to the Commonwealth for a five-year period, and in March the Commonwealth Prime Ministers agreed to the admission of the Republic as a full member.

The President of the Republic must be a Greek and the Vice-President a Turk, elected by their respective communities; the meaning of the Greek and Turkish communities is defined by the Constitution.⁴⁶ Executive functions are in effect federalised; the President and the Vice-President each has an exclusive field of competence, and there is a further field of joint competence. There is a communally elected House of Representatives and there are two Communal Chambers; each has its own exclusive field of legislative competence. The allocation of ministerial offices and public offices at all levels between members of the two communities is explicitly prescribed. The provisions relating to the composition and jurisdiction of courts defy sober analysis. There are detailed provisions governing the flying of the republican, Greek and Turkish flags, the observance of Greek and Turkish national holidays, and even the number of hours to be allotted to radio and television programmes for each community each week.

The fundamental rights provisions owe a good deal to the European Convention (of which both Greece and Turkey are signatories) and the Universal Declaration of Human Rights, and

⁴⁵ The Constitution (drawn up by a Joint Commission on which the United Kingdom Government was not represented) acquired the force of law by virtue of S.I. 1960, No. 1368, made under the Cyprus Act, 1960. It is set out at pp. 91-172 of Cmd. 1093 (1960). Part II deals with Fundamental Rights and Liberties.

⁴⁶ Art. 2. Citizens who were not members of either community as so defined could opt as individuals or as religious groups to belong to either community (*ibid.*) For the constitutional position of the minor religious groups, see Cmd. 1093, p. 175.

something to the Greek and Turkish constitutions, particularly to the former. Among the interests explicitly protected which are not guaranteed by the Nigerian Constitution are the rights to enjoy personal security, to have free primary education, to marry freely, to strike, to carry on a profession, occupation, trade or business, to have freedom of contract, to enjoy equality before the law and equal protection of the laws, and to vote. Citizens are formally reminded of their duty to pay taxes. Where authority is given for restrictions to be imposed by law on the rights and freedoms guaranteed the language is reminiscent of the European Convention rather than the Nigerian Constitution—the restriction must be “necessary,” or even “absolutely necessary,” if it is to be lawful—but, for reasons that may be the subject of speculation, the phrase “in a democratic society” is absent.

The fundamental right embodied in Article 29 is novel and interesting, and it is worth setting it out in full:

1. Every person has the right individually or jointly with others to address written requests or complaints to any competent public authority and to have them attended to and decided expeditiously; an immediate notice of any such decision taken, duly reasoned, shall be given to the person making the request or complaint and in any event within a period not exceeding thirty days.
2. Where any interested person is aggrieved by any such decision or where no such decision is notified to such person within the period specified in paragraph 1 of this Article, such person may have recourse to a competent court in the matter of such request or complaint.

There is a Supreme Constitutional Court, composed of a Greek, a Turk, and a neutral President, having jurisdiction over questions of constitutionality and jurisdictional conflicts between governmental organs of the Republic.⁴⁷

VIII. THE REPUBLIC OF GHANA

Ghana's first Constitution included three restrictions on legislative competence that were typical of modern guarantees of fundamental rights.⁴⁸ No law was to make persons of any racial community liable to disabilities to which persons of other such communities were not made liable, or (subject to any restriction imposed for the purpose of preserving public order, morality or health) deprive any person of his freedom of conscience or the right freely to profess,

⁴⁷ Constitution, Part IX.

⁴⁸ S.I. 1957, No. 277, ss. 31, 34.

practise or propagate any religion; and adequate compensation, to be judicially ascertainable, was to be paid upon the compulsory taking of possession or acquisition of property.

By the Constitution Act, 1960, enacted by a Constituent Assembly, these restrictions were swept away.⁴⁹ They were replaced by a Declaration of Fundamental Principles to be made by the President immediately after his assumption of office.⁵⁰ The principles to which the President declares his adherence include the following: that freedom and justice should be honoured and maintained; that no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief; that every citizen of Ghana should receive his fair share of the produce yielded by the development of the country; that subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law; and that no person should be deprived of his property save where the public interest so requires and the law so provides.⁵¹

These unexceptionable precepts may be likened by some to Directive Principles of State Policy, by others to the terms of a Coronation Oath. Certainly they have nothing to do with judicial review. It is no doubt true that Ghana is not troubled by communal problems comparable with those which bedevil Cyprus and harass Nigeria; but there is no reason to think that in Ghana the civil liberties of individuals are less in need of judicial protection against the legislature and the executive than in these and other new States. During the next few years other newly independent members of the Commonwealth, beguiled by the attractions of autochthony,⁵² will replace constitutions made by Her Majesty in Council by home-grown products. In the matter of fundamental rights it remains to be seen whether they will be guided by the example of Ghana or the example of India.

IX. THE CANADIAN BILL OF RIGHTS

Cyprus and Ghana stand at two extremities. The provisions of the Constitution of the Federation of Malaya on fundamental liberties

⁴⁹ See further de Smith, (1960) *Public Law* 134, 240.

⁵⁰ Constitution Act, art. 13.

⁵¹ In the Ghanaian Government's draft constitutional proposals (W.P. No. 1/60 (Accra)) the affirmation relating to deprivation of property provided that (subject to certain exceptions) adequate compensation should be prescribed by law (p. 15). The affirmation was subsequently reworded and the reference to compensation deleted.

⁵² Cf. Wheare, *The Constitutional Structure of the Commonwealth* (1960): Chap. 4.

and communal rights (which will not be considered in detail here) occupy an intermediate position.⁵³ But the Canadian Bill of Rights, embodied in the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms,⁵⁴ is so unusual in its form and content, so unpredictable in its effects, that it must be placed in a category of its own.

The Act begins with a Preamble affirming the ethical principles on which the Canadian nation is founded and expressing the Federal Parliament's desire to enshrine those principles and the human rights and fundamental freedoms derived therefrom in a Bill of Rights "which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada." Part I of the Act is to be known as the Canadian Bill of Rights. It recognises and declares the existence and continuance in Canada of the following human rights and fundamental freedoms, without discrimination by reason of race, national origin, colour, religion or sex: the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; the right of the individual to equality before the law and the protection of the law; freedom of religion; freedom of speech; freedom of assembly and association; and freedom of the press. It goes on to provide that every law of Canada (by which is meant any existing or future Act of the Federal Parliament or regulation made thereunder, or any other existing law that can be repealed, abolished or altered by the Federal Parliament) shall, unless an Act of Parliament expressly declares that it shall operate notwithstanding the Canadian Bill of Rights, be "so construed and applied" as not to derogate from or to authorise derogation from these rights and freedoms. In particular, no such law shall be so construed or applied as to authorise or effect arbitrary detention, imprisonment or exile; to impose or authorise cruel or unusual treatment or punishment; to deprive a person arrested or

⁵³ The Constitution recognises the "special position" (or primacy) of the Malays in the provisions relating to Malay reservations (arts. 89, 153) which derogate from the general guarantee of equality before the law and non-discrimination (art. 8), and in other provisions relating to the headship of the State and the conference of rulers (arts. 32, 33, 38). The status of Islam as the religion of the Federation (art. 3) leads to qualifications of the guarantees of freedom of religion and educational rights (arts. 11, 12). The restrictions that Parliament is empowered to impose on freedom of speech, assembly and association do not have to conform to a standard of reasonableness (art. 10). The powers of Parliament to derogate from the fundamental liberties guaranteed in Part II of the Constitution in various emergency situations are extensive and in some circumstances unrestricted; see Constitution, arts. 149-151 as amended by ss. 28-30 of the Constitution (Amendment) Act, 1960 (No. 10 of 1960); and note 31. *ante*.

⁵⁴ 8 & 9 Eliz. 2, c. 44 (1960).

detained of his right to be informed promptly of the reasons for his detention or arrest, to retain counsel and to apply for habeas corpus; to permit a person who is denied certain basic safeguards to be compelled to give evidence; to deprive a person of the right to a fair hearing in accordance with fundamental justice for the determination of his rights and obligations; to take away the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal in a criminal case, or the right to reasonable bail in the absence of just cause; or to deprive a person of the right to an interpreter's assistance where required in judicial or quasi-judicial proceedings. The Minister of Justice is to examine draft regulations and Bills and to report to the House of Commons any inconsistency with the Bill of Rights.

Part II of the Act provides that nothing in the Bill of Rights is intended to derogate from any human right or fundamental freedom not expressly enumerated, and that the Bill of Rights applies only to matters within the authority of the Federal Parliament. It also permits derogation from the Bill of Rights during times of war, invasion or insurrection, real or apprehended, though not in other classes of emergencies.

The Act has an air of the political manifesto about it, but it poses some pretty problems for the judges as well. All Canadian courts are now required to construe and apply laws falling within the ambit of federal legislative jurisdiction so as not to encroach upon certain rights and freedoms which are stated in the broadest possible terms; the particular illustrations of infringements of those rights and freedoms are obviously not intended to be exhaustive. A court may first be obliged to determine whether a matter falls within federal legislative competence or whether it comes within the exclusive provincial sphere—a problem to which the case-law relating to civil liberties in Canada seldom supplies an unequivocal answer.⁵⁵ What, then, if a law within the federal sphere of competence is manifestly designed to restrict (say) freedom of speech in what is conceived to be the public interest? Do the terms of the Bill of Rights merely enunciate presumptions of legislative intent, in which case they cannot prevail over the clear words of a statute? Or do they require the courts to go so far as to treat as nugatory clear statutory provisions which are inconsistent with the Bill of Rights? It is arguable that, since the courts are required not only to construe but also to apply laws so as not to

⁵⁵ See generally Scott, *Civil Liberties and Canadian Federalism* (1959), and the symposium of articles in (1959) 37 Can. Bar Rev. at pp. 1-146, 218-236, 247-262. Among these articles and comments there are numerous criticisms of the Bill in its earlier form.

infringe the guaranteed rights and freedoms, and since it is laid down that (except in warlike emergencies) an express declaration in an Act of the Federal Parliament is needed to exclude the operation of the Bill of Rights, the latter is the correct interpretation. If this is so—and the matter is not free from doubt⁵⁶—then whenever a law is impugned on the ground that it derogates from freedom of speech the courts will have to shoulder a burden as onerous as any with which the United States Supreme Court has been saddled. Legal limits to the exercise of freedom must undoubtedly be set; but by what criteria is their validity to be determined? Are they to be found solely within the framework of existing legislation? Again, what is meant by the proposition that no one is to be deprived of the enjoyment of his property except by due process of law? Is this to be understood as importing into Canada at the federal level the entire American concept of due process, substantive as well as procedural?⁵⁷ No matter what answers may be given to these questions, the statutory entrenchment of the *audi alteram partem* principle will undoubtedly give rise to a good deal of litigation.⁵⁸ And if the scope of the Bill of Rights were to be extended, by a constitutional amendment, to laws within exclusive provincial competence—and these include the bulk of legislation relating to property and contract—the tide of litigation might well reach flood level.

One wonders how many of these difficulties were considered by the Monckton Commission before it decided to recommend the adoption of a Bill of Rights on the Canadian model for the Federation of Rhodesia and Nyasaland and its three territories.⁵⁹ It may well be that in Canada the narrower of the two main alternative interpretations of the Bill of Rights will be followed. It is more than likely that in the context of Rhodesia and Nyasaland the courts would be chary of fettering the freedom of legislative action, and that in any event the legislatures would readily exclude the operation of the Bill of Rights for the avoidance of doubts about

⁵⁶ Probably the better opinion is that Acts of the Federal Parliament passed after the enactment of the Bill of Rights prevail to the extent that they are clearly inconsistent with it, inasmuch as Parliament cannot bind its own future action in relation to the substantive content of legislation. But this still leaves open the effect of the Bill of Rights on laws in force before its enactment.

⁵⁷ If so, does this mean that in the federal field a decision like that in *Copithorne v. Calgary Power Ltd.* [1959] S.C.R. 24 (expropriation of interest in right of way by Minister without giving prior notice or opportunity to be heard, held valid) will no longer be possible?

⁵⁸ A similar provision is contained in the European Convention and the Constitutions of Nigeria and Cyprus.

⁵⁹ Cmd. 1148 (1960), Chap. 12. Some arguments in favour of the principle of a Bill of Rights and against the Nigerian model are set out in the Report of the Committee of officials (Cmd. 1150, paras. 12-21).

the constitutionality of statutes. The Commission may have acted upon these unexpressed assumptions; and it may have thought that in so doing it was casting a lighter burden on the courts than if it had recommended the adoption of a set of fundamental rights similar to the Nigerian provisions. The fact that it preferred the function of reviewing unfairly discriminatory legislation to be performed by Councils of State rather than by courts is a pointer in this direction. But if it was moved by a desire not to put judges in an invidious position its solicitude was misplaced. The Canadian Bill of Rights may possibly have been "drawn up in accordance with the traditions of the English-speaking world"; it is indeed "a fairly brief document expressed in general terms"⁶⁰; but it is a seed-bed of uncertainty. The Nigerian formulation of fundamental rights may have had exotic origins; it is a fairly long document expressed in specific terms; it may constitute the more formidable obstruction to the will of a temporary majority in a legislature; but, although it leaves room for a large measure of judicial discretion, it provides judges and legislators alike with clearer criteria and reduces the area of uncertainty.

X. KENYA

Kenya's political problems have for long appeared to be peculiarly intractable. At the time of the outbreak of the Mau Mau insurrection in 1952 no one could have confidently predicted when or in what form independence would be achieved. The Africans, numbering 97 per cent. of the population, were under-represented in the legislature—not until 1944 had an African been appointed to the Legislative Council—and riven by tribalism, economically depressed, educationally backward and subjected to unofficial social discrimination. A settled European minority was predominant in agricultural development and (together with the larger Asian minority) in industry, commerce and the professions, and was strongly represented by its spokesmen in the Executive and Legislative Councils of the Colony. But the insurrection made it clear that drastic social, political and constitutional changes were needed (although their implementation was to take place in an embittered atmosphere) and that the European settlers' hopes of replacing Colonial Office control by their own hegemony were unattainable. Inexorably the pressure of circumstances led to the formulation of the principle, definitively accepted at the Lancaster House Conference held in January and February 1960,⁶¹ that Kenya's destiny was to be that of an independent State with the

⁶⁰ Cmnd. 1148, para. 236.

⁶¹ Cmnd. 960 (1960).

government of the country primarily in African hands. New constitutional arrangements introduced late in 1960 foreshadowed an African majority in the Legislative Council early in 1961.⁶² To the United Kingdom Government, conscious of its responsibilities for the safety of settlers whose immigration into Kenya it had encouraged, of the serious stagnation in the country's economy induced by the prospect of the new régime, and of the danger that radical African politicians would vie with one another in their search for electoral support by promising to redistribute European-owned lands without adequate compensation, the entrenchment of proper constitutional safeguards became a matter of paramount importance. For it could not be long before the imperial factor would be effectively removed and supplanted by an African-dominated Cabinet.

One safeguard had already been provided in 1958—the Council of State, which was to be a watchdog and a bloodhound in relation to discriminatory legislation.⁶³ But the long-term value of this safeguard was problematical, and special importance was attached to the additional safeguard of a constitutional Bill of Rights. The fundamental rights provisions, which came into force on December 7, 1960,⁶⁴ are consequently of exceptional interest. In general they follow the Nigerian scheme. Many of the provisions are almost identical with the Nigerian clauses, apart from an improvement in drafting here and there.⁶⁵ Some variations were necessitated by prevailing conditions. For example, whereas in Nigeria preventive detention on political grounds is unconstitutional except in a period of emergency and a restriction of movement order cannot be made in normal times except in pursuance of a law that is reasonably justifiable for the fulfilment of prescribed purposes, in Kenya existing legislation prescribes circumstances in which preventive detention orders may validly be made and restriction of movement orders do not have to be "reasonably justifiable."⁶⁶ However, significant differences of emphasis and substance are apparent in the provisions made for the protection of economic interests in the two countries.

⁶² Kenya (Constitution) (Amendment No. 2) Order in Council, 1960 (S.I. 1960, No. 2201).

⁶³ See pp. 97, 98, *ante*.

⁶⁴ By Proclamation of the Governor (*Kenya Gazette Supplement*, 1960, p. 1124) bringing into effect the relevant provisions of the Order in Council.

⁶⁵ *e.g.*, the guarantee of a fair hearing within a reasonable time before an independent and impartial tribunal for the determination of civil rights and obligations is so worded as to cover only those situations in which a court or tribunal has been expressly invested with jurisdiction (S.I. 1960, No. 2201, Sched., ss. 5 (1), (2)).

⁶⁶ See Preservation of Public Security Ordinance, 1960 (No. 2 of 1960); Detained and Restricted Persons (Special Provisions) Ordinance, 1960 (No. 3 of 1960); S.I. 1960, No. 2201, s. 15; Sched., s. 4 (1) (a).

In the first place, in Kenya, the safeguards surrounding compulsory acquisition of private property go further inasmuch as they (i) define restrictively the conditions under which property may be compulsorily taken possession of or acquired, (ii) require the "prompt" payment of "full" (not merely "adequate") compensation and (iii) provide that the same rights of appeal shall be available from decisions of the Supreme Court in such cases as in other classes of civil cases. Compulsory taking of possession or acquisition is permissible only if "necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development and utilisation of any property to the promotion of the public benefit," and where the necessity is "so imperative as to afford reasonable justification for the causing of any hardship that may result" to any person interested.⁶⁷ These are strong words, too strong for some African political leaders but not strong enough for many Europeans who distrust the intentions of their prospective rulers and who can already point to the catastrophic fall in land values. Land ownership is the most contentious of all political issues in Kenya, and it is likely that a very heavy burden of responsibility will lie upon the courts in the not distant future.

In the second place, the Constitution gives every person the right to carry on any trade, business, profession or occupation, subject to the imposition of reasonably justifiable restrictions in the public interest. Moreover, it forbids discrimination against or in favour of any person (other than a temporary immigrant) in the enjoyment of these rights or with respect to taxation, property or employment because of his race, tribe, community, place of origin, religion or political opinion, save where a discriminatory measure is reasonably justifiable in a democratic society.⁶⁸ Thus the constitutional prohibition of discrimination is expressed in narrower terms than the corresponding provision of the Nigerian Constitution; but it is supplemented by a separate provision prohibiting the creation of new racially restrictive covenants affecting land,⁶⁹ and it is fortified, at least for the time being, by the general surveillance over legislation exercised by the Council of State.

For a number of reasons it is not easy to be optimistic about the durability of the Kenya Bill of Rights. But if it survives the first crucial years after independence it may yet act as a stabilising factor in a troubled multiracial society.

⁶⁷ S.I. 1960, No. 2201, Sched., s. 10 (1) (a).

⁶⁸ *Ibid.*, Sched., s. 11.

⁶⁹ Kenya (Land) Order in Council, 1960 (S.I. 1960, No. 2202), s. 16.

XI. ATTITUDES REVISED

Recent developments in the framing of constitutions and constitutional proposals for Commonwealth countries in Africa are not to be understood as meaning that in this country prejudices against declarations of fundamental rights have suddenly been thrown overboard. Fundamental rights are still for export only. But it seems fair to assume that at governmental level the long-established presumption against including them in a Commonwealth constitution has been replaced by a presumption against excluding them if they are asked for. The new presumption is particularly strong where power is to be transferred to an African majority in a country where there is a substantial European minority. It is also strong wherever intercommunal tension is a significant political factor. The United Kingdom Government has a responsibility for doing its utmost to see that the transfer of power is pacific, that the new order will not dissolve into a Congolese nightmare, that independence will not be accompanied by mass emigration or a flight of capital, and that there is a reasonable prospect of stability under a non-authoritarian régime. Minorities must therefore be offered some measure of assurance by the Constitution that they will not become the victims of oppressive discrimination. Political safeguards of the types characteristically found in colonial constitutions are unlikely to be acceptable to the majority community. Entrenched institutional safeguards, such as a Council of State, may also be viewed with suspicion. History does not encourage hopes that a second chamber will prove an effective bulwark against a majority in the lower House. Schemes for redrawing the country's internal boundaries to satisfy minorities may be impracticable or excessively controversial. But a proposal for a constitutional guarantee of fundamental rights is likely to evoke the largest measure of agreement among the various interest-groups, even if to some of them it is no more than a *pis aller*. And if a proposal initiated by one local group is acceptable to all the others, it will be manifestly unwise for the United Kingdom Government to oppose it unless there are compelling reasons for doing so. As far as is known, the United Kingdom Government accepted the proposals for fundamental rights in Nigeria cheerfully, and gave similar proposals at the Kenya Constitutional Conference in 1960 an almost enthusiastic reception.

Alongside these strictly practical considerations there has developed a fuller appreciation of what may be called anti-Saxon attitudes towards fundamental rights. The Monckton Commission believed that a constitutional Bill of Rights would not only help to

allay fears of domination and promote confidence but would also "provide a criterion or standard upon which institutions, whether political or judicial, could base their protection of the people's rights" and would "guard the liberties of all persons."⁷⁰ Gone is the scepticism of yesterday. For many years foreign constitutionalists have been saying that to enshrine a common standard of achievement in rules of positive law can do little harm and may do some good, and that in so far as this standard is observed the Constitution and the order that it supports gain in authority. They now find their opinions restated more emphatically in unexpected places.

Nevertheless, one is not easily persuaded that the proclamation of generalities is the best answer to these problems, and one prefers to defend the claims of fundamental rights more cautiously. An entrenched Bill of Rights tends to make a constitution rigid; but in many new States a completely flexible constitution will be unacceptable to important groups, or contrary to the general interest, or both. Judicial review tends to make for uncertainty and to give rise to long-drawn-out, expensive and often trivial litigation; but on great issues it may well be found that (as in the United States at the present time) basic rights of individuals receive firmer protection from the courts than from the legislatures. In the last resort no constitutional safeguard can withstand a determined assault by a Government backed by the weight of public opinion; but, as the Minorities Commission for Nigeria observed, safeguards of individual rights may tend to make it more difficult for a Government gradually to erode the liberties of the governed.

Today the most appropriate Anglo-Saxon attitude is one of benevolent neutrality. An English constitutional lawyer will not exert himself to stimulate a non-existent local demand for a constitutional guarantee of fundamental rights. But if any genuine local demand exists, he may be ill-advised to do anything to discourage it. He will, however, be right to point out the dangers of drafting guarantees in language that will buoy up false hopes, and the undesirability of casting too heavy a burden on the courts. It is likely, therefore, that he will commend a set of guarantees that resemble the Nigerian rather than the Canadian provisions.⁷¹

⁷⁰ Cmnd. 1148, para. 235.

⁷¹ To the list of countries with fundamental rights provisions of the Nigerian (or Indian) type there must soon be added Western Samoa, at present a New Zealand trust territory. A Constitution for an Independent State of Western Samoa was enacted by the people in a Constitutional Convention on October 28, 1960; the Constitution is to come into force on the termination of the trusteeship agreement.

New Zealand itself, like Britain, has no written Constitution and no

In any event he will stress the paramount importance of ensuring the integrity and independence of those upon whom the task of constitutional interpretation will fall. Unless the quality and status of the Judiciary are commensurate with its responsibilities the spirit of the Constitution will escape into emptiness.

general statutory guarantee of fundamental rights, but the National Party, which was successful at General Election held late in 1960, has proclaimed its intention to procure the enactment of a Bill of Rights.

In February 1961 the Southern Rhodesia Constitutional Conference agreed that a Declaration of Rights should be incorporated in the Constitution (Cmnd. 1291, p. 4); the Secretary of State for the Colonies proposed that the Constitution of Northern Rhodesia should include a Bill of Rights (Cmnd. 1295, p. 8); and the Blood Commission recommended constitutional guarantees of human rights based mainly on the Nigerian model for the Constitution of Malta (Cmnd. 1261, pp. 21, 27, 69-70).