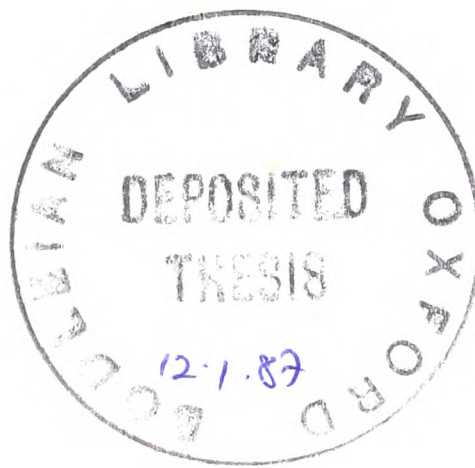


COMMONWEALTH BILLS OF RIGHTS:
THEIR NATURE AND ORIGIN

by

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Abstract

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Commonwealth Bills of Rights: Their Nature and Origin

The thesis surveys and analyses Commonwealth Bills of Rights. It examines the content of these Bills of Rights and considers their origin and political implications.

The first chapter reviews the political history of Bills of Rights generally. This is followed by a chapter dealing with the initiation and introduction of Commonwealth Bills of Rights. Particular attention is given to the attitudes and influences of British officials and advisors. The third chapter considers the general forms of Commonwealth Bills of Rights and the ways in which such guarantees are qualified. The next three chapters examine the substance of the particular guarantees and note judicial cases that are of particular interest. In the seventh chapter some of the political implications of these Bills of Rights are considered. The eighth chapter concerns judicial attitudes toward the enforcement of a Bill of Rights. This is followed by concluding remarks.

The length of the thesis is approximately 80,000 words.

PREFACE

What follows is a general survey of Commonwealth Bills of Rights. One of the challenges of such a survey is that of selecting appropriate examples for consideration. Although effort has been made to include the examples that are particularly relevant, the selection is by no means exhaustive.

Most of the judicial cases considered have originated in Commonwealth courts. Occasionally, however, there are references to decisions of the American Supreme Court or the European Court of Human Rights. Such references are intended to indicate cases where issues have arisen similar to those in Commonwealth courts.

I would like to express my thanks to my supervisor, Dr. Geoffrey Marshall for his encouragement, criticisms and suggestions: his help has been invaluable. For shortcomings which remain, the responsibility must of course be mine.

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ABBREVIATIONS

A.C.	Appeal Cases (House of Lords and Privy Council Reports)
A.D.	Appellate Division (South African Law Reports)
A.I.R.	All India Reporter
All E.R.	All England Law Reports
All N.L.R.	All Nigeria Law Reports
CLB	Commonwealth Law Bulletin
CLR	Cyprus Law Reports
D.L.R.	Dominion Law Reports
E.A.	East African Law Reports
E.H.R.R.	European Human Rights Reports
H.C.Deb.	House of Commons Debates
H.L.Deb.	House of Lords Debates
M.R.	Mauritius Reports
N.Z.L.R.	New Zealand Law Reports
S.I.	Statutory Instruments
S.Ct.	Supreme Court Reporter (USA)
U.S.	United States (Supreme Court) Reports
W.I.R.	West Indian Reports
W.L.R.	Weekly Law Reports
Z.R.	Zambia Law Reports

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Botswana

The Botswana Independence Order 1966 (S.I. 1966/1171)

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The Commonwealth of Dominica Constitution Order 1978 (S.I. 1978/1027)

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Ireland

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Malawi

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Constitution (1977 reprint)

Maldives

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Malta

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Code of Organisation and Civil Procedure (Chapter 15)

Commercial Code (Chapter 17)

Civil Code (Chapter 23)

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Mauritius

Constitution (1977 reprint)

Constitution of Mauritius (Amendment) Act, 1983

Nauru

Constitution, 1968

New Zealand

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Nigeria

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Pakistan

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Papua New Guinea

Constitution of the Independent State of Papua New Guinea, 1975

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Seychelles

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Sierra Leone

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Singapore

Constitution (1980 reprint)

Solomon Islands

The Solomon Islands Independence Order 1978 (S.I. 1978/783)

Sri Lanka

The Ceylon (Constitution) Order in Council, 1946

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Swaziland

The Swaziland Independence Order (S.I. 1968/1377)

Proclamation by His Majesty King Sobhuza II, 1973

Tanzania (United Republic of Tanzania)

Constitution, (1977 reprint) (Laws Ch.1:01)

Tonga

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Trinidad and Tobago

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The Slavery Abolition Act, 1833

The Roman Catholic Relief Act, 1845

The Places of Worship Registration Act, 1855

The Liberty of Worship Act, 1867

The Emergency Powers Act, 1920

The Roman Catholic Relief Act, 1926

The Statute of Westminster, 1931

Incitement to Disaffection Act, 1934

The Sex Discrimination Act, 1975

The Race Relations Act, 1976

United States

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 Maryland Act for the Liberties of the People, 1639
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Constitution, 1980

Western Samoa

Constitution, (1981 reprint)

Zambia

Constitution of Zambia, Laws, cap.I., (1979 reprint)

Zimbabwe

Law and Order (Maintenance) Act, 1960
 Southern Rhodesia (Constitution) Order in Council (S.I. 1961/2314)
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It should be noted that many of the constitutions take the form of a schedule to a statutory order. Sections that are cited refer to the part of the order that includes the constitution.

CHAPTER 1

THE HISTORY OF BILLS OF RIGHTS

In 1960 a Canadian parliamentary committee was taking evidence on a proposal to enact a statutory Bill of Rights as part of Canadian law. Among the various people giving evidence to the committee was a Jesuit teacher. The Jesuit teacher explained to the Special Committee on Human Rights and Fundamental Freedoms that man had but one fundamental right-the right to reach out to God. The committee chairman replied by asking the Jesuit teacher to confine his remarks to the proposed bill 'which deals with specified types of freedom.'¹

The preference to giving legal force to specified types of freedom, often under the rubric of high-sounding intentions, is one that has found favour among those who have helped to frame some contemporary declarations, laws, and constitutions.

In outlining the evolution of Bills of Rights we should consider in the first place what exactly is meant by the term Bill of Rights. Like so many other terms encountered in the study of politics it is difficult to define its meaning precisely. For instance, the American Bill of Rights is often referred to in learned journals and books as well as in the popular media - but the American Constitution contains no written title for the first ten (or fourteen) amendments which are usually considered to comprise the Bill of Rights. In fact, the original proposal by Madison was for the amendments to be scattered throughout the relevant sections of the constitution; it was a subsequent motion that provided for the amendments

1. House of Commons Special Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings and Evidence, (1960), p.62.

being listed together.¹ It is commonplace to say that Britain enjoys no Bill of Rights despite the fact that there are a number of statutes that provide protection for the kinds of things one finds in conventional Bills of Rights.² There is, of course the famous seventeenth-century English Bill of Rights which is really an assertion of the rights of Parliament rather than of the individual, or a statement on the location of legislative power rather than its limits;³ but its full title does not actually include the phrase 'bill of rights'.⁴ Some legal dictionaries define the term by providing a description of the seventeenth-century English Bill of Rights.⁵ But according to one recent dictionary, Bills of Rights are 'general statements declaratory of the human or civil rights

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1. For descriptions of how the proposed amendments ended up being listed together, see Irving Brant, The Bill of Rights, Its Origin and Meaning (New York, Bobbs, Merrill Co. Ltd., 1965), p.45; and Bernard Schwartz: The Great Rights of Mankind (New York, Oxford University Press, 1977), p.173.
 2. There is, for example, the Magna Carta of 1215, the Petition of Right of 1628, the Habeas Corpus Act of 1679 the Slavery Abolition Act of 1833, the Sex Discrimination Act of 1975, and the Race Relations Act of 1976. As well, there are a number of statutes giving legal protection to religious toleration. Such statutes include the Scottish Episcopalians Act 1711, the Roman Catholic Relief Act 1846, the Places of Worship Registration Act, 1855, the Liberty of Religious Worship Act 1867, and the Roman Catholic Relief Act 1926.
 3. See Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, Clarendon Press, 1957), p.48.
 4. The full title is actually 'an Act declaring the rights and liberties of the subject, and settling the succession of the Crown'.
 5. See, for example, John S. James, Stroud's Judicial Dictionary, 4th edn. (London, Sweet and Maxwell, 1971), i.291, and John Burke, Jowitt's Dictionary of English Law, 2nd edn., (London, Sweet and Maxwell, 1977), p.219.

which the proposers assert individuals should enjoy against states and governments'.¹ Here the term takes on a wholly different meaning from that of the seventeenth-century statute known by the same name.

The terms employed to describe the legal protection of so-called fundamental rights vary. The United Nations offers the 'Declaration of Human Rights'. The European Convention includes the phrase 'and Fundamental Freedoms'. The relevant section in the 1982 Canada Act is entitled 'The Canadian Charter of Rights and Freedoms'.² The Tanzanian Constitution limits its delineation of rights to the preamble under the title of 'Foundations of the Constitution'.³ The Papua New Guinea Constitution has a section entitled simply 'Basic Rights'.⁴ Many Commonwealth constitutions place provisions intended to outline the citizen's rights under the heading 'Fundamental Rights and Freedoms of the Individual'. The nomenclature is not without importance. It is, for example, quite possible for different scholars to look at the same document and not agree as to whether it should

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1. David M. Walker, The Oxford Companion to Law (Oxford, Clarendon Press, 1980), p.131.
 2. Charter of Rights and Freedoms, Part I, Constitution Act 1982, Schedule B, Canada Act 1982, 1982, c.11(U.K.); hereafter referred to as Canadian Charter of Rights and Freedoms.
 3. 1977 reprint, (Laws Ch.1:01); hereafter referred to as Tanzania Constitution.
 4. Constitution of the Independent State of Papua New Guinea 1975, Part III, Division III; hereafter referred to as Papua New Guinea Constitution.

be referred to as a Bill of Rights.¹

One can see therefore that there is no easy way of defining the term Bill of Rights. For our purposes, however, a Bill of Rights will be taken to be a legislated statement of the supposedly fundamental rights of persons within a particular state. The Bills of Rights that we shall consider are subject to enforcement by the courts and can check legislative and administrative action.

Similarly no agreed definition exists for the Commonwealth either. For example, one edition of Halsbury's Laws of England notes that 'having regard to the variant conceptions of the Commonwealth association held by different members, no attempt has been made or is likely to be made to prescribe a uniform terminology to designate the association.'² Most of the places that formerly were a part of the British Empire, however,

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1. For example, in reference to the Federation of Malaya Independence Order in Council, S.I. 1957/1533 Professor J.S. Read writes that 'A bill of rights was included in the Constitution of Malaya at independence in 1957....' See J.S. Read, 'Bills of Rights in the Third World: Some Commonwealth Experiences', Verfassung Und Recht In Ubersesse Hamburg, 6 (1973) 21. On the other hand Professor de Smith wrote that 'Apart from the ambiguous signals hoisted in Kuala Lumpur and Accra, no portent of a trend towards comprehensive constitutional Bills of Rights was visible before the Nigeria Constitutional Conference of 1957'. See S.A. de Smith, The New Commonwealth and Its Constitutions (London, Stevens and Sons, 1964), p.177. The difference may be slight, but it does underline the ambiguities of the term.
 2. 3rd edn. (London, Butterworths 1953), v.431. The fourth edition, however, suggests that 'the term 'the Commonwealth' ordinarily signifies, first, the voluntary association of independent sovereign states which are recognised by each other as associated for purposes of consultation and co-operation, and which recognise the Queen as the symbol of their free association and as such the Head of the Commonwealth; and secondly, the whole of the territories and dependencies of the States thus associated as members of the Commonwealth.' But later it is stated that 'The term 'Commonwealth' may be used adjectivally in either of the two principal senses indicated above, and is to be interpreted according to its context.' (London, Butterworths, 1974), vi.319.

continue to acknowledge such historical ties in a variety of ways, including membership in the present-day Commonwealth.¹ We shall not limit our examination to any set number of Bills of Rights or confine ourselves to any one definition of Commonwealth. In what follows different Bills of Rights shall be examined depending on the issue under consideration.

After having decided what a Bill of Rights might be, one may ask whether the idea and its exemplification is worth serious consideration by students of politics. It is understandable that Bills of Rights might interest legal scholars. Similarly, one can see that the notion of rights in the abstract is an appropriate subject of contemplation for the moral philosopher. But why would Bills of Rights be of interest to someone who is concerned less with laws or their philosophic underpinnings, than with the politics of the societies they are meant to serve? Some political scientists would dismiss the issue as one that typifies a formalistic or legalistic approach to the study of politics and ignores the realities of political power. But any academic discipline that hopes to elucidate the many ways in which politics operates should most certainly include consideration of the basic rules and arrangements that purport to serve as guidelines for political activity. As Aristotle reminds us, only by examining other constitutions can we begin to realise the most

1. There are some exceptions. South Africa left the Commonwealth in 1961. Pakistan withdrew in 1972 as a way of protesting about some other member countries' recognition of Bangladesh. Ireland withdrew in 1948.

Some countries that were part of the British Empire chose not to be part of the Commonwealth when achieving independence. Included in this group are Burma, Somaliland, and Sudan. When the Federation of South Arabia became South Yeman in 1967 it no longer continued to be a member of the Commonwealth. As well, some of the countries ruled by the British under mandates did not join the Commonwealth upon independence. Such countries include Jordan, Israel, United Republic of Cameroons, and the Persian Gulf States.

satisfactory constitutional arrangements for our own communities.¹

A review of some of the more noteworthy developments in the evolution of Bills of Rights provides the background to our central concern: the origin and nature of Bills of Rights in the Commonwealth. After noting the recent discussions on the desirability of a British Bill of Rights, we shall then review the introduction of Commonwealth Bills of Rights. This will be followed by discussion of the general forms of Commonwealth Bills of Rights, and the ways in which various rights have been safeguarded. Such discussion will include reference to the judicial cases which are particularly important or interesting. There will then be discussion of some of the political implications of these Bills of Rights.

It might well be wondered why Commonwealth Bills of Rights deserve special consideration. Is the Commonwealth anything more than an attempt to mitigate the effects of the disintegration of the British Empire? It can be argued that it indeed represents more than that. Commonwealth countries continue to acknowledge their historical ties with Britain. Even those who are reluctant to concede that the legacy of a colonial power could include anything beneficial or useful cannot deny that British influences have had a notable impact on the way in which political and legal institutions have evolved in many Commonwealth countries. Many of these countries share a common system of law - the common law. To examine the way in which the idea of a Bill of Rights has been a part of the development of Commonwealth political and legal institutions is therefore a project worthy of consideration. And since laws and constitutions are

1. The Politics of Aristotle trans. by B. Jowett (Oxford The Clarendon Press, 1885), p.27.

continually being created, abrogated and amended, the issue can be seen as one that raises important issues of public policy.

Some inquiry has already taken place. The late Professor Stanley de Smith wrote a perceptive chapter on the subject over twenty years ago.¹ But constitutions and Bills of Rights have come and gone since de Smith's book and there are thus many new changes to take note of. Gaius Ezejiofor, a former student of de Smith has also examined the development of some Commonwealth Bills of Rights.² But his study is over twenty years old and unable to take account of recent changes. Sir Kenneth Roberts-Wray drew on his experiences as Legal Advisor to the Secretary of State for the Colonies and the Secretary of State for Commonwealth Relations and provided descriptions of many Commonwealth Bills of Rights.³ But there is no single full-length up to date work examining the topic.

Bills of Rights can differ greatly as to what peculiar influences may have led to their enactments, and similarly in what they may contain. But what most of them do have in common is that they represent an attempt on the part of some parties to give particular emphasis to certain principles, often with some special legal force. Much discussion of the philosophical underpinnings of Bills of Rights begins by looking at the idea of natural law. As with many other ideas in the study of politics, or of law, the

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1. S.A. de Smith, op.cit., Chapter 5.
 2. Gaius Ezejiofor, Protection of Human Rights Under the Law (London, Butterworth, 1964).
 3. See 'Human Rights in the Commonwealth', International and Comparative Law Quarterly, 17(1968), 908-925. Commonwealth and Colonial Law (London, Sweet and Maxwell, 1968). Another general survey of Commonwealth Bills of Rights by a former Legal Advisor in the Colonial Office is by Sir William Dale, in The Modern Commonwealth (London, Butterworths, 1983), Chapter 12.

term can mean different things to different writers; and indeed it has taken on different meanings throughout history. The Stoics are often cited as the first philosophers to express some of the ideas that contemporary scholars refer to when talking about natural law. To the Stoics right reason could be invoked to discover the natural, that is to say the correct way in which the world should operate. Some Roman jurists, such as Cicero, used such an idea to suggest that rules of justice could be discerned by right reason. Justinian, author of the code that inspired present-day civil law, subscribed to such views when trying to formulate some of the basic laws under which a society should operate.

Centuries later the Scholastics used the idea to give credence to their belief that some divine law was not directly revealed, but discernible to reason. According to Max Weber, the original Stoic theory was 'taken over' by Christianity for the purpose of linking its own ethics with the norms of this world.¹

But it was in the sixteenth century that the idea of fundamental laws took root. S.R. Gardiner suggested that the phrase was first used by opponents to a scheme of shipping taxation invoked by Charles I. 'A phrase which sprang into existence in these first days of doubt and hesitation', observed Gardiner 'had a long and brilliant future before it.'² According to Gardiner, 'it soon became the watchword of the common feeling of

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1. Max Weber in Law in Economy and Society, ed. Max Rheinstein, (Cambridge, Massachusettes, Harvard University Press, 1954), p.287.
 2. History of England 1603-1642 (London, Longmans, 1884) viii.84.

dissatisfaction spreading over the kingdom'.¹

It is in the eighteenth century, however, that interpretations of natural law were combined with the idea of fundamental laws with the resultant bold assertions of the existence of 'natural rights'. Weber suggested that bureaucratic rationalism together with a belief in 'knowing better' caused political authority to combat the formal and specialist character of legal thought by pointing to certain natural laws which would enlighten the subjects about rights and duties without any outside aid. Weber explained that there have been many influences on the elaboration of natural law. Such influences include the religious motivations provided by rationalistic Protestant sects, the Renaissance idea of trying to discover the ends of nature's will, and the idea that a subject enjoyed certain natural rights. The last influence was, according to Weber, particularly indigenous to England.²

Weber suggested that natural law is the only really consistent kind of legitimacy a legal order can enjoy once religious revelation and authoritarian sacredness no longer command the authority they once did; thus it is a convenient form of legitimacy for revolutionary-created political authorities.³ Indeed any attempt to trace the history of contemporary Bills of Rights points to the rhetoric and promulgations of

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1. Ibid., p.85. According to Gardiner the phrase fundamental laws was 'started into life' by courtiers of the Queen who favoured a Parliament that would force upon the King a French alliance. They were worried that a permanent taxation on ships in peacetime would allow the King more freedom in choosing his allies and enemies, and thus the country would not be dependent on a French alliance.
 2. Weber, op.cit., p.289.
 3. Ibid., p.288.

eighteenth-century revolutionary governments, that is to say the United States and France, as important examples in the development of codified rights.

But before considering such examples, one should first take account of some other enactments that came before. There is, of course, the Magna Carta of 1215. The most significant part was probably article 39 which stated that a free man could not be imprisoned unless he had been judged by his peers on the law of the land. But the Magna Carta is usually considered to be a document which adumbrated the rights of the barons vis a vis the King rather than affirming the rights of subjects, or citizens, as do most contemporary Bills of Rights.

The 1628 Petition of Right was also a document that was not so much a declaration of the rights of citizens, but rather one that was meant to outline - and indeed restrict - the authority of the sovereign. It provided for Parliamentary authority to check the sovereign's practice of arbitrary imprisonment and taxation, and was an important stage in the power struggle between Parliament and the Crown.

The English Bill of Rights of 1689 was, as previously mentioned, an assertion of the rights of Parliament vis a vis the monarch. Of the thirteen articles contained in the 1689 bill, only two are obvious statements of the rights of the subject.¹ It is also interesting to note that some parts of the seventeenth-century Bill of Rights are assumed still to be in force. It was cited recently by the Chief Justice of New Zealand

1. The right to address petitions to the King is assured by Article Five. Article Seven provides for the right of Protestant subjects to carry arms for their own defence suitable to their conditions.

in declaring an executive act to be ultra vires.¹

Any commentary on Bills of Rights should include some consideration of the American experience because there can be no doubt that the Americans have offered remarkable ideas on the theory and structure of government. Adjectives such as bold and innovative despite their cliché qualities do probably best sum up the American contribution to constitutional theory. The American Bill of Rights is obviously an important example in the development of constitutional theory. In addition to being a source for a great amount of litigation - much of it based on some rather creative and novel interpretations of the Bill of Rights - it is one of the more noteworthy items in the American popular media's version of the contribution of the American Constitution to political history in general. The Bill of Rights is something that captures the attention of not only

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1. The Chief Justice of New Zealand granted a declaration stating that the New Zealand Prime Minister was in breach of section one of the 1688 Bill of Rights in the exercise of an assumed power of suspending a law on the execution thereof. A 1974 Act had allowed for a Superannuation Fund to be contributed to by employers and employees equally. In the November 1975 election the former opposition was elected and three days later Robert Muldoon issued a press statement saying that the Act was suspended. Government departments reacted accordingly. The Chief Justice concluded that the Prime Minister was in breach of section one of the 1688 Bill of Rights and said that

'It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe, and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact it is rarely that a litigant takes up such a cause as the present, or it may be because Governments usually follow established constitutional procedures.'

Fitzgerald v. Muldoon and others [1976] 2NZLR 615.

lawyers or constitutional theorists, but all kinds of other people as well.¹

There are a number of reasons that might explain the American penchant for codified rights though a review of such explanations is beyond our present purposes. George Jellinek, however, summed it up well when he noted that the original American settlers had envisioned a society that would allow people to live 'outside' the state.² Despite the developments of the last couple of centuries one could still provide a cogent argument that this is a part of the American ethos. Jellinek also noted that the preference of placing certain laws beyond the will of the majority was evident in some of the early American attempts at law-making.³

The original American attempts at giving legal force to certain rights is to be found among the laws and constitutions of the states. In 1639 the Maryland General Assembly approved an 'Act for the Liberties of the People' though many commentators consider this law to be an inchoate attempt at codified rights and point to the 1641 Massachusetts Body of Liberties as a more important forerunner of the more formal Bills of Rights.⁴ Similar to

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1. An interesting example of the American interest in Bills of Rights is to be found in Handbook of Clinical Nursing, ed. Margaret E. Armstrong et al. (Tokyo, McGraw-Hill Kogakurha, 1979). On the inside cover is something called 'A Patient's Bill of Rights' which is reprinted therein with the permission of the American Hospital Association.
 2. The Declaration of the Rights of Man and of Citizens (New York, Henry Holt and Co., 1901), pp. 68,69 and 80.
 3. Jellinek drew particular attention to a plantation agreement concluded by the Pilgrim Fathers while at sea on 11 November, 1620, and the Fundamental Orders of Connecticut of 14 January 1638-9 in which a detailed constitution was drawn up. See The Rights of Minorities, op.cit., p.13.
 4. See, for example, Schwartz, op.cit., p.33

the 1689 English Bill of Rights, many of these provisions that were obviously a reflection of the times. For example, the Delaware Declaration of Rights limited its guarantees of rights and privileges to Christians.

The idea of using constitutions as a kind of repository for rights that were deemed of sufficient importance not to be changed by the whims of a simple legislative majority is apparent in many of the state constitutions that preceded the federal constitution. The phrase 'Bill of Rights' or 'Declaration of Rights' appeared in many of the state constitutions prior to the enactment of the federal Bill of Rights in 1791.¹ The Virginia Declaration of Rights of 1776 was the first example of a written constitution providing for the protection of rights from the possible encroachment by a simple majority, and thus is considered by many scholars to be the first modern Bill of Rights. Pertaining to an American document the phrase 'Bill of Rights' first made its appearance on the title page of a document outlining a declaration of resolves prepared by a committee of the First Continental Congress of 1774.² It was New Hampshire that first included the phrase in its Constitution.

At the time of the Philadelphia Convention there was no strong initiative for a Bill of Rights. During the final hour of that convention a proposal was made for a Bill of Rights, but for whatever reasons it was

1. See Schwartz, op.cit., p.67.

2. See ibid., p.63.

overwhelmingly turned down by the delegates.¹ Until the proposed second American Constitution of 1787 there was apparently no strong demand for the enactment of a federal Bill of Rights. Many people thought that rights were already adequately safeguarded by state constitutions.² Furthermore, the existence of a federal Bill of Rights possibly could have proven to be a problem for states where there were many slaveowners.

But when the proposed Constitution of 1787 was presented to the states for ratification the issue of a Bill of Rights became a rallying point for opponents of the federal proposal. There were undoubtedly many people who simply thought that a federal Bill of Rights would serve as a guarantee of the liberties for which the revolution had supposedly been fought. But other motives explained much of the opposition. Many politicians who enjoyed much of their influence from the relative powers of the states saw a federal Bill of Rights as a way of preventing the federal government from increasing its power at the expense of the state governments.³

Eventually the advocates of ratification worked out a strategy that allowed for the Constitution without a Bill of Rights to be ratified with the possibility of a Bill of Rights taking the form of subsequent amendments. The relevant amendments were, of course, ratified and in

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1. More than one scholar suggests that the heat of the summer combined with the fatigue of the delegates (the proposal was made at the end of the conference) may explain the lack of enthusiasm for the idea. See, for example, Schwartz, op.cit. p.104, and Brant, op.cit., p.37.
 2. This point is dealt with, for example, in The Federalist (no.84) particularly so in the first few pages. See Alexander Hamilton, James Madison, and John Jay, The Federalist ed. Max Beloff (Oxford, Basil Blackwell, 1948), pp. 436-437 in particular.
 3. Brant suggests that this may have been part of the motive of Virginia's Patrick Henry in being an ardent supporter of a federal Bill of Rights. See Brant, op.cit., p.39.

1791 the Bill of Rights became law.¹

The same year that the American Bill of Rights became law, France promulgated a constitution that included in its preamble La Déclaration des Droits de l'Homme. It has been suggested that the proposal for a constitutional declaration, introduced in the National Assembly by Lafayette, was very much a result of the influence of some of the American state constitutions that already contained such declarations.² There was, however, no effective legal machinery to back up the Declaration; it was retained in the preambles of the various French constitutions subsequent to the revolution but did not enjoy any particular legal status. But in recent years the Declaration has been looked upon in a new light. In 1971 the Conseil Constitutionnel - the body charged with control of the constitution - affirmed that a phrase in the preamble of the 1958

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1. Twelve amendments were actually presented to the state legislatures for ratification. The first two dealt with the number of representatives and congressional compensation; these amendments did not pass. The states of Connecticut, Georgia, and Massachusetts did not at the time ratify the other ten amendments though they did so in 1939 as a symbolic gesture.

It is also important to note that reference to the American Bill of Rights might also include subsequent amendments. The Thirteenth Amendment, passed in 1865, provided for the abolition of slavery. In 1868 the Fourteenth Amendment, among other things, outlined a definition of citizenship and the limits of state laws in abridging the rights of citizens. The Fifteenth Amendment which was adopted in 1870 was meant to establish that American citizens would not be denied the vote 'on account of race, color, or previous condition of servitude'. Fifty years later the Nineteenth Amendment extended the right to vote to women. The Twenty Fourth Amendment of 1964 ensured that the poll tax would no longer be used as a way of restricting the right to vote. And the Twenty-Sixth Amendment of 1971 allowed that all people of eighteen years of age or older had the right to vote.

2. George Jellinek, The Declaration of the Rights of Man and of Citizens (New York, Henry and Holt Company, 1901), p.19.

Constitution gave legal force to the Déclaration.¹

In the nineteenth century the constitutions of various countries did include a recognition of fundamental rights,² but it was in the twentieth century that Bills of Rights became standard form. Following the First World War Germany and many of the new European states included in their Constitutions the recognition of fundamental rights. The Russian Constitution of 1918 included a declaration of rights. The Irish Free State Constitution of 1922 included provisions for fundamental law; in the 1937 constitution there were five articles titled 'Fundamental Rights'. Many Latin American and Asian constitutions included similar declarations. During this time one example particularly worth noting is that of the Soviet Union.³ The 1936 Soviet Constitution contained provisions that could be called a Bill of Rights. It is a sad fact, of course, that such provisions have not prevented the Soviet authorities from flagrantly ignoring the rights that are meant to be protected. But what is of interest in the Soviet Constitution is the inclusion of economic rights in addition to the more traditional political rights. Many constitutions since then - including some constitutions of Commonwealth countries - have also included economic rights as part of their Bills of Rights.

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1. See Barry Nicholas, 'Fundamental Rights and Judicial Review in France', Public Law, (1978), 82-101; 155-177.
 2. Declaration of rights were included in the constitutions of Sweden in 1809, Spain in 1812, Norway in 1814, Belgium in 1831, Denmark in 1894 and Switzerland in 1874. In Liberia the 1847 constitution included a Bill of Rights. In 1868 the Fourteenth Amendment became part of the American constitution.
 3. For a description and analysis of Soviet constitutional development generally, see Aryeh L. Unger in Constitutional Development in the USSR (London, Methuen and Co., 1981).

The awareness of the atrocities of the Second World War caused many people to give thought to the way in which certain rights could best be protected. One result of such sentiments was the enactment of the Universal Declaration on Human Rights which was adopted in 1948. The Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention, was signed in Rome in 1950 by the member states of the Council of Europe and entered into force in 1953. The United Kingdom ratified the Convention in 1951; two years later it extended its obligations to its dependent territories.

The post-war fashion of codified rights was also taken up by many Commonwealth nations. To examine the initiation, content and political implications of Commonwealth Bills of Rights is the purpose of the following chapters. But before beginning such an examination, it would be useful briefly to review the British debates about Bills of Rights.

The Commonwealth is a part of the epilogue of British colonial history; most of its member countries enjoy legal systems that to varying extents are derived from English law, and many Commonwealth constitutions have been written with the help of British advisors.

People who talk about constitutional issues will often point to British attitudes that illustrate a traditional aversion to constitutional declarations of rights. Included in the late Professor de Smith's review of notable British scholars who were sceptical about such declarations are the opinions of Bentham, Dicey, Sir Ivor Jennings, and Sir Kenneth Wheare.¹ Such opinions are perhaps partly attributed to the belief that Britain has

1. S.A. de Smith, op.cit. pp.164-165.

managed to get along quite well without such ambitious declarations.¹ But as Professor de Smith pointed out some of the historical and philosophical underpinnings to the idea of a Bill of Rights can be traced to British influences.² Documents such as Magna Carta, the 1628 Petition of Right, and the 1689 Bill of Rights were known to the architects of the American Bills of Rights. Locke described the restrictions that should be placed upon legislative power.³ Blackstone described what he called absolute

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1. Sir Ivor Jennings, for example, asserted that, 'we have no laws against discrimination because our laws do not discriminate....' See The Approach to Self-Government (Cambridge, Cambridge University Press, 1956), p. 103. More recently Lord Denning has told the House of Lords that the 600 year old tradition of habeas corpus 'has protected the freedom of the individual far better than any Convention could ever do.' See 369 H.L.Deb., 5s., col.789. Lord Diplock has said that with the exception of Northern Ireland, he could not imagine an infringement of human rights that could not be adequately dealt with under the present system. See Minutes of Evidence taken Before the Select Committee on a Bill of Rights, H.L.81(1977-78), p.91. Lord Hailsham, has claimed that 'A sophisticated jurisprudence does not require these rhetorical jurations to good behaviour because effect is already given to them by developed legal values and procedures'. See ibid, p.12.
 2. de Smith, op.cit., pp. 169, 170.
 3. Although he described the legislature as 'the Supream Power in any Commonwealth', Locke concluded that, 'the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as others. The Rules that they make for other Mens Actions, as well as their own, must be conformable to the Law of Nature, i.e. to the Will of God, of which that is a Declaration, and the Fundamental Law of Nature being the preservation of Mankind, no Humane Saction can be good or valid against it.' See 'An Essay Concerning Civil Government', in Two Treatises of Governments, ed. Peter Laslett, (Cambridge, Cambridge University Press, 1960), p. 375.

rights,¹ a description that Austin judged to be 'a singular confusion of ideas'.² More recently, British delegates were prominent in the enactment and design of the modern day U.N. Declaration of Human Rights and the European Convention.³ But despite such influences the British approach to the protection of fundamental rights is typically described as one where emphasis is more on customary practice than on an ambitious declaration.⁴

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1. Blackstone explained that the creator 'graciously reduced the rule of obedience to this one paternal precept, 'that man should' pursue his own happiness.' He went on to say that 'This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.' See Commentaries on the Laws of England, A Facsimile of the First Edition (Chicago, University of Chicago Press, 1979), i.41. Such thoughts notwithstanding it should be noted that Blackstone was a firm believer in the supremacy of Parliament. He resisted Locke's assertion that inherent in the people was the power to remove a legislature when the legislature abused the trust imposed in them (see ibid. p.157) and declared that
 'An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligations,' See ibid., p.178.
 2. Lectures on Jurisprudence (London, John Murray, 1904), p.365.
 3. For the British influence on the U.N. Declaration see The Impact of Universal Declaration of Human Rights (revised ed., U.N. Department of Social Affairs, 1953) p.4, (cited in de Smith, op.cit., p.170). For a description of the influence of British representatives on the European Convention, see Anthony Lester, 'Fundamental Rights: The United Kingdom Isolated?', Public Law, (1984), 46-72.
 4. For example, in a recent book on privacy it is suggested that because in the United Kingdom privacy inheres more in the character of the people, it is thought that there is less requirement for protection from governmental institutions. See Walter F. Pratt, Privacy in Britain (London, Associated University Press, 1979), p.16.

As previously noted there are a number of statutes that can be said to have some of the same purposes as a Bill of Rights. In addition, the United Kingdom is a signatory to the United Nations Declaration of Human Rights and has also ratified the European Convention.¹ The obligations the United Kingdom assumed by signing the Convention have involved the United Kingdom Government in a variety of legal cases. But since the Convention has not been incorporated into British domestic law, it is debateable as to what the justiciability of the Convention should be. There have been cases where it has been declared that the Convention should be taken into account in the interpretation of a statute,² but generally most commentators consider the Convention to be a limited legal instrument.³

The post-war enthusiasm for Bills of Rights has not bypassed the United Kingdom.⁴ In 1947 the Marquess of Reading introduced the

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1. The Convention is overseen by a Committee of Ministers, the European Commission of Human Rights, and the Court of Justice. The Commission receives complaints from signatory states against other states and by individuals if the relevant state has agreed to allow them to do so. United Kingdom citizens have had the right to lodge individual complaints with the Commission since 1966. The Court of Justice which sits at Strasbourg hears cases that are brought to it by the European Commission. For a more complete description, see Francis G. Jacobs, The European Convention on Human Rights (Oxford, Clarendon Press, 1975), pp. 215-271.
 2. See Halsbury's Law of England, 4th edn. (London, Butterworth, 1977), xviii.841.
 3. See, for example, Lord Scarman, English Law - The New Dimension (London, Stevens and Sons, 1974), p.14; J.A. Jolowicz, 'The Judicial Protection of Fundamental Rights Under English Law' in The Cambridge - Tilbury Law Lecture, 2nd series, (London, n.pub., 1980), pp.7-8; and Lord Diplock's comments in Minutes of Evidence taken Before the Select Committee on a Bill of Rights, H.L.81 (1977-78), p.91.
 4. A concise and clearly written account of the recent history of proposals for a United Kingdom Bill of Rights can be found in Michael Zander's A Bill of Rights?, 2nd. edn. (London, Barry Rose, 1979).

'Preservation of the Rights of the Subject Bill' and in 1950 Lord Samuel introduced the 'Liberties of the Subject Bill'. However, perhaps these bills, should not be described as Bills of Rights in that they were relatively specific and limited in their puposes. Lord Reading's bill, for example, primarily dealt with controls on ministerial powers.

It was in the late sixties, however, that proposals for a United Kingdom Bill of Rights were introduced by various parliamentarians. In 1969 Bills of Rights were introduced by Emlyn Hooson of the House of Commons and by Viscount Lambton and Lord Wade in the House of Lords. Viscount Lambton's proposal was for a Bill of Rights modelled on the 1960 Canadian Bill of Rights. It was prompted by various considerations, including some of the policies of the Labour Government that in the opinion of Viscount Lambton infringed on the rights of the individual. Lord Wade's proposal was for a Bill of Rights that would be enforceable in the Courts and could only be amended by legislation specifically indicating that it was meant to amend the Bill of Rights. The proposal was prompted partly by concern about technological advances and the need to safeguard the individual's right to privacy. None of these bills were even given first reading.¹ In 1970 Lord Arran introduced a bill to be modelled on the Canadian Bill of Rights though after some debate it was withdrawn. In 1971 Sam Silkin introduced a bill that would have set up a United Kingdom Commission of Human Rights to hear complaints by citizens, investigate and report to the government.

The idea of a United Kingdom Bill of Rights received further attention in 1974 when Lord Scarman considered the proposal in his Hamlyn Lectures.²

1. The bills were introduced under the ten minute rules.

2. See English Law - The New Dimension (London, Stevens and Sons, 1974).

In 1975 proposals regarding Bills of Rights were introduced into the House of Commons by James Kilfedder and A.J. Beith. Mr. Kilfedder's proposal was that a Royal Commission should be set up to investigate the possibility of a Bill of Rights. Mr. Beith's bill was introduced under the ten minute rule and read only a first time. The following year Lord Wade once again introduced a Bill of Rights, and Lord Brockway proposed a Bill of Rights for Northern Ireland, a proposal he had first made in 1971. Lord Wade's proposal was that the European Convention should be incorporated into British law. Lord Brockway withdrew his bill after receiving assurances that the government would be introducing legislation for human rights in Northern Ireland.¹ In 1977 the ever-determined Lord Wade yet again proposed a Bill of Rights. Again, the proposal was for the European Convention to become part of British domestic law. This time the bill was read a second time and sent to a Select Committee of the House of Lords. It eventually passed in the House of Lords, but the Government of the day declined to introduce it into the House of Commons.

1. Prior to direct rule being imposed on Northern Ireland in 1972 there had been proposals at Stormont for a Northern Ireland Bill of Rights. The issue of a Northern Ireland Bill of Rights was also considered in 1977 by the Standing Advisory Commission on Human Rights (Cmd. 7009 (1977)) who recommended that there should be a Bill of Rights for all the United Kingdom and not just Northern Ireland. During the last several years there have been various proposals for a Northern Ireland Bill of Rights. Claire Palley, who has followed the issue believes that most people in Northern Ireland now support the idea of a Bill of Rights for Northern Ireland alone; (interview, 26 January 1985).

For whatever reasons, however, the United Kingdom still does not enjoy a Bill of Rights that checks domestic law and is enforceable in British Courts.¹

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1. A recent Oxford thesis explored some of the reasons why a Bill of Rights became a popular issue in the 1960s and 1970s and why proposals for a United Kingdom Bill of Rights were not successful. The author quotes Anthony Lester, who for a while was an advisor at the Home Office as suggesting that the interest in a Bill of Rights could be traced to different issues of the time: the experience of the United States civil rights movement, the campaign for laws against race discrimination, the misuse of Parliamentary power in excluding colonial migration, and the effect of allowing individuals to sue the United Kingdom in Strasbourg, (cited in the thesis, p.11). The author concludes that the reasons that such proposals were not successful were because of the attitudes of the top echelons of the two parties, the civil servants' views, the power and position of the Bills of Rights proponents, and the very characteristics of the Bill of Rights as an issue. See Susan Maddox, 'Why Britain Does Not Have a Bill of Rights: 1968-1978' (Oxford University M.Phil. thesis 1983).

CHAPTER 2

THE INITIATION AND INTRODUCTION OF COMMONWEALTH BILLS OF RIGHTS

Most Commonwealth countries have Bills of Rights that are typically included in constitutions and Commonwealth constitutions have evolved in different ways. Constitutions enacted or amended after a country has achieved independence are usually a result of political discussions and decisions within that country.¹ Constitutions enacted prior to independence are in the final instance the responsibility of the colonial power. Constitutions that are designed to take effect at the time of independence can be the result of different methods of constitution-making. Sometimes the colonial power does not play any prominent role in the preparation of the constitution: instead, most of the discussions and decisions take place in the soon-to-be independent country itself, though foreign advisors may exert much influence. Sometimes the colonial power - the United Kingdom, for most Commonwealth examples - plays an active role in the constitutional discussions, which have often taken place in London.²

Although the political histories of Commonwealth Bills of Rights will

1. Usually but not always: one example of a presumed-to-be independent country that relied on its former colonial rulers to play a role in its constitutional development is that of Canada in 1982. Before that time, amendments to the British North America Act (the main document of the Canadian Constitution) had, with some exceptions, to be passed by the British Parliament. The reason for this was that prior to that time the federal government and the provincial governments could not agree on an amending formula. Thus, the 1982 constitutional proposals were considered by British parliamentarians. As might be expected, the debate came to include the question of what were the British Parliament's responsibilities in those circumstances. See British North America Acts: The Role of Parliament, H.C.42(I)(1980-81). See also Geoffrey Marshall, Constitutional Conventions (Oxford, Clarendon Press, 1984), Chapter 11.
2. For purposes of these remarks the term colonial power includes countries who have assumed responsibility for another country through means other than colonisation.

be reviewed generally, particular attention will be given to those examples where the British played a significant role.

Commonwealth Bills of Rights Prior to the Second World War

As mentioned in Chapter One, the traditional British attitude towards declarations of rights has been marked by skepticism. As the late Professor de Smith explained, such an attitude 'has been one of disapprobation with the temperature ranging from the frigid to the lukewarm.'¹ Such an attitude may well have been contagious in that prior to the Second World War Bills of Rights were not typically included in the constitutions of other Commonwealth countries.²

But such declarations were not, however, completely absent from Commonwealth constitutions. Tonga has had a Bill of Rights as part of its Constitution since 1875. Apparently the Tongan Monarch, King George Tapou I had had contact with the Hawaiiin Consul-General for Australia and had been encouraged to adopt a written constitution for Tonga.³ Included in that Constitution was a Bill of Rights that was based on the 1839 Hawaiiin Declaration of Rights, which itself has long been defunct.

1. The New Commonwealth and Its Constitutions. (London, Stevens and Sons, 1964), p.162.

2. There are many examples where it is contended that the British attitude toward Bills of Rights has contributed to the lack of enthusiasm in a Commonwealth country for such a declaration. For example, in reference to Canada, Pierre Trudeau explained that:

Je crois qu'il n'est pas injuste de dire que ceux qui, au Canada, manifestent une certaine appréhension à l'endroit d'un projet de charte des droits de l'homme, de meme que ceux qui sont sceptiques quant a sa nécessité, réagissent ainsi presque par instinct, influencés qu'ils sont par l'exemple britannique.

Pierre Trudeau, 'Les Droits de l'homme et la suprematie parlementaire' in Human Rights, Federalism, and Minorities ed. Allan Gotlieb (Toronto, Canadian Institute of International Affairs, 1970), p.4.

3. See J.S. Read, 'Bills of Rights in the Third World: Some Commonwealth Experiences', Verfassung Und Recht In Ubersesse Hamburg, 6(1973), 21.

Although there were probably a variety of reasons why a Bill of Rights was included in the Tongan Constitution - King George's explanation was that with a Bill of Rights 'a Tongan can boast that he is free as were the Romans of former days and as the British are now'¹ - there was apparently a British influence prevalent. British Wesleyan missionaries had advised the King on legislative matters; for the 1875 Constitution the chief advisor was the Reverend Shirley Baker. Reverend Baker later became embroiled in disputes resulting from rivalries among different church sects, and an attempt was made on his life. The unsuccessful assassination was used as a pretext for further persecution of a rival sect. The ensuing troubles led to an enquiry by the British High Commissioner for the Western Pacific who observed that some constitutional guarantees - most conspicuously the freedom of worship provision - had not been adhered to. He concluded that the main cause of the troubles was the Reverend Baker, the man who had previously been the chief advisor on the Constitution containing the Declaration of Rights.

It is difficult to determine who originally thought of the idea of a Tongan Bill of Rights. As noted above, King George Tapou I had been in contact with the Hawaiian Consul-General for Australia and considering that the Tongan Bill of Rights was based on the Hawaiian Declaration of Rights, one might reasonably conclude that the idea of a Tongan Bill of Rights grew out of this contact. Nevertheless, the possible influence of The Reverend Baker should also be borne in mind.

But the Tongan example is an exception. Bills of Rights generally were absent from various Commonwealth constitutions prior to the Second World War, that is to say for the countries to which the Statute of

1. Cited in J.S. Neill, Ten Years in Tonga (London, Hutchinson, 1955), p.101

Westminster applied. With the passage of the 1931 Act the British Parliament declared that no future British Act would extend to a Dominion unless the Dominion requested and consented to such an Act. The Statute of Westminster also made provision for a Dominion Parliament to be able to pass legislation repugnant to British law and make laws having extra-territorial operation. Within the Dominions there was no great clamouring for Bills of Rights. The Bills of Rights that have become part of Canadian law have all been enacted in the post-war period: the federal statutory Bill of Rights was passed in 1960, and it was not until 1982 that there was a Bill of Rights as part of the Constitution.¹ The Australian Constitution still does not include a Bill of Rights, though there have been various proposals for one. There are, however, in the Australian Constitution guarantees regarding trial by jury, freedom for inter-state traders and travellers and freedom of religion. New Zealand does not have a Bill of Rights, though the New Zealand Parliament has considered the issue.²

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1. A survey of the political debates surrounding the enactment of the 1982 Charter is offered by Edward McWhinney in Canada and the Constitution 1979 - 1982; Patriation and the Charter of Rights (Toronto, University of Toronto Press, 1982). A more detailed consideration of the politics involved is to be found in Peter Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' Canadian Bar Review, 61(1983), 30-54. Recent textbooks on the Charter also include some reference to its political history: see David C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto, Carswell, 1982); Morris Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (Toronto, Edmond-Montgomery Ltd., 1983); and Walter Tarnopolsky and Gerald A. Beaudoin (eds.) The Canadian Charter of Rights and Freedoms (Toronto, Carswell, 1982).
 2. A proposal for a New Zealand Bill of Rights was introduced into the 1963 session of the House of Representatives. The Bill was based on the 1960 Canadian Bill of Rights. The New Zealand Bill passed first and second reading and then was considered by the 1964 Constitutional Reform Committee. The complete report of the committee chairman read as follows: 'I am directed to report that the Constitutional Reform Committee has carefully considered the New Zealand Bill of Rights and recommends that it not be allowed to proceed'. See Appendix to the Journal of the House of Representatives, 1964, iii.14.

Two countries included in the ambit of the Statute of Westminster are no longer in the Commonwealth: Ireland withdrew in 1948, and South Africa was forced to leave in 1961. Ireland's 1922 Constitution did in fact include some guarantees of fundamental rights, but the courts generally declined to accord the Constitution superior status to any subsequent statutes.¹ The 1937 Constitution elaborated on these guarantees and gave them more force by providing that the Constitution itself was to have superior status to ordinary statutory law. The South African Constitution only entrenched guarantees regarding the status of the two main languages and the existing rights of certain non-white voters; but subsequent events showed that a determined legislature could override such guarantees.²

International Declarations in the Immediate Post-War Period

It is generally thought that the awareness of the atrocities of the Second World War provoked interest in human rights. As previously noted, one of the results of such interest was the Universal Declaration of Human Rights which was adopted in 1948. The limitations of international law, however, are of such a nature that the Declaration's main effect, generally speaking, is a symbolic one.

In 1950 the European Convention on Human Rights was signed. The European Convention fulfills more than just symbolic purposes in that there is a judicial body charged with its interpretation.

Opportunity was made for a signatory state to include its dependent territories within the purview of the Convention. There was discussion as

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1. See J. M. Kelly, Fundamental Rights in the Irish Law and Constitution 2nd edn., (Dublin, Allen Figgis and Co Ltd., 1967), pp. 16,17.
 2. See Collins v. Minister of the Interior, 1957, (1) S.A.552A.D. For further discussion, see Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth, (Oxford, The Clarendon Press, 1957), Chapter 11.

to whether the Convention should extend to Britain's dependencies, and if so whether there should be the right of individual petition. The British Colonial Secretary, Jim Griffiths, circulated a memorandum which noted that:

The introduction of such a system of appeal to an international authority is likely to cause considerable misunderstanding and political unsettlement in many Colonial territories. The bulk of the people in most Colonies are still politically immature and the essence of good government among such people is respect for one single undivided authority which they are taught to recognise as responsible for their affairs. The right of petition to an international body would obscure this principle and would suggest to Colonial peoples either that the ultimate authority in the affairs of their territory is not the Crown or that there is more than one ultimate authority. This confusion would undoubtedly be exploited by extremist politicians in the Colonies in order to undermine the authority of the Colonial Government concerned. Loyalty would be shaken: administration would be made more difficult and agitation more easy. 1

Such concerns notwithstanding, the United Kingdom did in 1953 extend the Convention to most of its dependencies. It should be noted, however, that since the British Parliament continued to be the final authority for these countries, the Convention did not apply in the way that a constitutional Bill of Rights would apply to an independent country.

Commonwealth Bills of Rights in the Immediate Post-War Period

Of the Commonwealth countries that became independent soon after the Second World War there were different ways in which their constitutions provided for the protection of fundamental rights.

1. Cited in by Anthony Lester in 'Fundamental Rights: The United Kingdom Isolated?' Public Law, (1984), pp.49-50.

India became independent in 1947. A Constitution containing a Bill of Rights came into effect in 1950. Some Indian nationalists had long called for the inclusion of fundamental rights within the Constitution. But the British were not so keen on the idea of a Bill of Rights. The Simon Commission of 1930 took a view which has been cited as a particularly illustrative example of the traditional British attitude toward declarations of rights. In their report the Commission noted that:

We are 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 practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective. Until the spirit of tolerance is more widespread in India and until there is evidence that minorities are prepared to trust to the sense of justice of the majority, we feel that there is indeed need for safeguards. But we consider that the only practical means of protecting the weaker or less numerous elements in the population is by the retention of an impartial power, residing in the Governor-General and the Governors of province, to be exercised for this purpose.

Notwithstanding such a view, there were continuing demands for an Indian Bill of Rights. A few years later the British Government did indicate that it was contemplating some constitutional fundamental rights when in a 1933 White Paper it noted that:

His Majesty's Government see serious objections to giving statutory expression to any large range of declarations of this character, but they are satisfied that certain provisions of this kind, such, for instance, as the respect due to personal liberty and Rights of property and the eligibility of all for public office, regardless of differences of caste, religion, etc., can appropriately, and should, find a place in the Constitution Act. 2

But the Joint Parliamentary Select Committee on Indian Constitutional Reform was not so enthusiastic about the inclusion of a Bill of Rights,

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1. Report of The Indian Statutory Commission Cmd. 3568 (1930), p.23.
 2. Proposals For Indian Constitutional Reform Cmd. 4268 (1933), p.37.

preferring the Constitution to include only some limited guarantees.¹

Subsequently, the Government of India Act, 1935, included only rights regarding property and guarantees against some forms of discrimination.

British attitudes notwithstanding, fundamental rights were eventually included in the Indian Constitution. The 1950 Constitution that was formulated by the Constituent Assembly was obviously the result of a variety of considerations and any British influence was an indirect one. According to Professor de Smith, the decision to have a constitutional Bill of Rights is one that could not be attributed to any Anglo-Saxon initiative.² Interestingly enough, however, one respected scholar suggests that the nationalist preference for a Bill of Rights was 'because the experience gathered from the British regime was that a subservient Legislature might serve as a handmaid to the executive in committing inroads upon individual liberty.'³

Similarly, the Constitution designed by Pakistan's Constituent Assembly included a Bill of Rights, though such guarantees did not appear in the Constitution introduced in 1962. Ceylon's Constitution at the time of independence in 1948 did include a guarantee of religious freedom and prohibition of communal and religious discrimination, but not a full-fledged Bill of Rights.⁴ But since 1972 the country now called Sri Lanka has included a Bill of Rights in its Constitution.

1. See H.L.6 (1 Part 1) (1933-34) and H.C.5 (1Part 1) (1933-34).

2. de Smith, op.cit., p.162.

3. Durga Das Basu, Introduction to the Constitution of India (Calcutta S.C. Sarkar and Sons (Private) Ltd., 1960), p.63.

4. The Ceylon (Constitution) Order in Council, 1946, sec.29(2).

Ghana's Independence Constitution did not include a Bill of Rights per se, though there were some guarantees that to some extent served a similar purpose. According to some sources, there was a Ghanaian request for a Bill of Rights to be included in the Independence Constitution, but the British declined to comply.¹

The Independence Constitution for Malaya did include some guarantees that are often found in Bills of Rights; but only some of those guarantees could not be overridden by ordinary Parliamentary legislation.² The Constitution did allow Parliament to restrict the guarantees of expression, assembly and association if it were deemed 'necessary or expedient', and prohibited the courts from inquiring into the necessity of such a restriction.³ The Malayan Independence Constitution had been prepared by a constitutional commission made up of Commonwealth lawyers; representing the British were Lord Reid and Sir Ivor Jennings. After visiting Malaya,

1. J.S. Read explains that:

It has been seen that the Independence Constitution of Ghana had not included a Bill of Rights; but it is instructive to recall that this omission was apparently at the will of the British government. The then Attorney-General of Ghana has recounted how the then Gold Coast Government prepared a draft of the constitution which it wished to adopt for the independence of the country; the draft included seven articles for the protection of fundamental rights, mainly based upon provisions in the Constitutions of India and of the Irish Free State. The draft proposed was rejected as a whole by the United Kingdom Government and Ghana at independence had no Bill of Rights.

See Bills of Rights in the Third World: Some Commonwealth Experiences, Verfassung Und Recht In Ubersesse Hanburg, 6(1973), 28.

The source Read cites is the appendix of a book written by the then Attorney-General Geoffrey Bing, Reap the Whirlwind (London, Macgibbon and Kee, 1968).

2. The guarantees regarding slavery and compensation for property, for example, could not be overridden by ordinary Parliamentary legislation.
3. S.I. 1957/1533, sections 10(2) and 4(2)(b).

the Commission retired to Rome to prepare its report.¹ In that report the Commission seemed to be favourably inclined toward the idea of a justiciable Bill of Rights. In its report the following was noted:

A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. 2

Accordingly, the Constitution proposed by the Commission included the following section:

3. (1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any state or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy be void.
- (2) Where any public authority within the Federation or within any state performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void. 3

However, the subsequent proposals of the British government made 'some changes in drafting.' It was argued that the clause regarding the Enforcement of the rule of law was 'unsatisfactory'. The proposals noted that the clause 'has been omitted on the ground that it is impracticable to

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1. 'Practical difficulties' prevented the Commission from staying in Malaya; 'Various reasons' combined to prevent them from going to another Commonwealth country; and the idea that it would be 'inappropriate' for the constitution to be prepared in London contributed to the group deciding to spend that December in Rome. Report of the Federation of Malaya Constitution Commission 1957, Colonial Papers No.330, p.8.
 2. Ibid., pp.69, 70.
 3. Ibid., Appendix II, pp.1,2.

Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by the ordinary law.¹

The Independence Constitution did in fact allow Parliament much latitude in the ways that some of the guarantees could be derogated from.²

Interestingly, when the United Kingdom House of Commons was debating the Malayan Independence Act, the Secretary of State for Colonies, Mr. Lennox-Boyd, spoke as follows

At this point I must say one word about a reference in paragraph 3 of the White Paper to the drafting of the present Constitution. The intention in that paragraph was to make clear that the reviewing work of the draftsmen did not involve any alteration of principle or policy, but was concerned solely with wording. In trying to make this clear I fear that we may, unintentionally, have given the impression that the Commission's drafts did, in fact, contain substantial inconsistencies or ambiguities. This was not so, and it was not our intention to suggest that it was. 3

Nigeria's Bill of Rights

There is no doubt that the decision to include a Bill of Rights in the Nigerian Independence Constitution marks a significant point in the development of Commonwealth Bills of Rights generally. According to one scholar writing at that time, the Nigerian Bill of Rights was the beginning of 'a great new venture.'⁴ A prominent British parliamentarian described

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1. Constitutional Proposals for the Federation of Malaya, Cmnd.210 (1957), p.18.
 2. It was Sir Ivor Jennings who was responsible for the drafting of the Malayan Independence Constitution. (This is according to notes provided by Sir James McPetrie who was the Legal Advisor to the Secretary of State for the Colonies). Sir Ivor was probably satisfied with the way the guarantees had been formulated. When later writing about the ways in which Bills of Rights are limited, he discussed both the American and Indian approaches and concluded that 'Either type leads inevitably to a good deal of litigation unless it is expressly prevented, as in the constitution of the Federation of Malaya'. See Democracy in Africa (Cambridge, Cambridge University Press, 1963), p.80.
 3. 573 H.C.Deb. 5s, col.636.
 4. D.V. Cowen, The Foundations of Freedom (Cape Town, Oxford University Press, 1961), pp.122, 123.

it as 'important and extraordinary.'¹ According to a former Legal Advisor to the Secretary of State for Colonies it was 'a remarkable breakthrough',² Its significance lies not only in its originality, but also in its influence on subsequent Commonwealth Bills of Rights. The Nigerian guarantees of 1959, 'may be regarded as the progenitor of nearly all of them', according to Sir Kenneth Roberts-Wray, who was Legal Advisor to the Secretary of State for the Colonies and the Secretary of State for Commonwealth Relations.³

British scepticism toward Bills of Rights had been apparent at some Nigerian constitutional discussions prior to 1959. When in 1953 the Colonial Secretary invited Nigerian leaders to London in order to discuss complaints about constitutional arrangements he was faced with suggestions for a Bill of Rights. The Colonial Secretary abruptly dismissed such suggestions and said that if the Nigerians wanted to put 'God is Love' in the Constitution they could do so, but not while he was chairman.⁴

But the problems that had prompted proposals for the Nigerian Bill of Rights did not go away. At the time of the 1957 constitutional conference, each of the regional governments of Nigeria was controlled by political parties who were identified as generally representing particular tribal and linguistic interests.⁵ It was at the 1957 conference that a proposal was

1. Arthur Creech Jones, 626 H.C. Deb., 5s., col.1815.

2. Sir James McPetrie, notes.

3. 'Human Rights in the Commonwealth', International and Comparative Law Quarterly, (17) 1968, p.916.

4. See Gaius Ezejiofor, Protection of Human Rights Under the Law (London, Butterworths, 1964), p.180.

5. See de Smith, op.cit., p.177.

made for a Bill of Rights. The conference did agree in principle to such a proposal but delayed taking a decision on the contentious issue of new regions.¹ It was decided that a commission be appointed 'to enquire into the fears of Minorities and the means of allaying them'. Although there was no widespread demand for the entrenchment of rights, the Willinck Commission did recommend that a Bill of Rights be included in the Constitution. In its report the following was noted:

Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. 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. 2

When the constitutional conference resumed, it approved the recommendations of the Willinck Commission. At the insistence of some of the Nigerian representatives the Nigerian Bill of Rights was brought into force before the enactment of the Independence Constitution.³

When the British Parliament debated the Nigerian Independence Act there were some members who commented on the Bill of Rights, most of them favourably. The only doubts were expressed by a Conservative Member of the House of Commons, Sir Kenneth Pickthorn. He noted that:

1. Cmnd.207(1957), p.32.

2. Reports of the Commission appointed to enquire into the fears of Minorities and the means of allaying them, Cmnd.505(1958), p.97.

3. According to T.O. Elias the provisions were introduced in 1959 because some of the Nigerians believed that it would enable them to campaign more freely, particularly in the Northern Region. See Nigeria: The Development of Its Laws and Constitution (London, Stevens and Sons, 1967), p.141.

I suppose that human rights have been better defined and better protected in the history of the world, so far as any of us know, by the Roman law and common law. They did not - and much less did the common law even than Roman law - go in for definitions of human rights. On this occasion, it may be a very good thing, but I would not have it thought that we all of us assume that declarations of human rights are always a very good thing. 1

With the exception of those remarks, there was not much evidence in Parliament of the 'British attitude' of skepticism toward constitutional declarations of rights.

The Nigerian Bill of Rights was based upon the European Convention. This had been recommended by the Willinick Commission. Why was this kind of model favoured by the British instead of one with more general wording such as the American Bill of Rights? According to Anthony Rushford, a former Foreign and Commonwealth Office official who helped draft the Nigerian Independence Constitution, there were three main reasons. First, there was the British tradition of drafting in detail. Secondly, there was the preference of the Nigerians to have the guarantees (and the limitations) expressed in specific terms. Thirdly, both local administrators and local politicians wanted reasonable freedom to administer, hence the detailed limitations to many of the guarantees. The European Convention was considered as a possible model, supposedly because it was already binding on Britain's dependent territories. But after considering the Convention the draftsmen decided to re-draft it for Nigerian purposes because it, 'smacked more of continental jurisprudence rather than Anglo-Saxon jurisprudence.'²

Considering the importance of the Nigerian Bill of Rights in the

1. 626 H.C. Deb. 5s., col.1831.

2. Interview, 9 May 1985.

development of Commonwealth Bills of Rights generally, a question to consider is who persuaded whom to include a Bill of Rights in the Constitution? Ian Macleod, the Secretary of State for Colonies told Parliament that 'It was very much the desire of the Nigerian leaders themselves that there should be such a code.'¹ On the other hand the Willinck Commission had noted that there was no widespread demand from the witnesses that appeared before them for a Bill of Rights; the only strong representations made for such guarantees were from some Christian groups.² Anthony Rushford concedes that 'there was U.K. prompting' though he maintains that 'this wasn't a Whitehall imposition.'³ According to Professor de Smith the issue of fundamental rights was very much tied in with proposals for new regions and concern for the protection of minorities.⁴ At any rate it is difficult to describe 'a Nigerian position' or, for that matter, a British one. The 1958 constitutional conference was attended by no fewer than 108 Nigerian delegates representing three different political parties, and on the British side there were more than a few people involved in the constitutional negotiations, so there were likely a variety of viewpoints on both sides.

1. 625 H.C.Deb. 5s., col.1793.

2. Cmnd. 505 (1958), p.97.

3. Interview, 9 May 1985.

4. de Smith, op. cit. pp. 177, 178. He also noted that 'the new vogue for Bills of rights in Commonwealth constitutions is traceable to a desire to afford concrete reassurance to minority groups in Nigeria which would have preferred other forms of consitutional protection'. Ibid., 210.

Commonwealth Bills of Rights Enacted Soon After the Nigerian
Independence Constitution

Most Commonwealth constitutions enacted since the Nigerian Independence Constitution have included a Bill of Rights. Cyprus became independent in 1960 (actually shortly before Nigerian independence) and its Constitution included a Bill of Rights. That Constitution was not prepared by the Colonial Office, but by a Joint Commission established in Cyprus. The Constitution is not recognised by the Turkish-Cypriot community and since 1975 there has been a defacto separate administration in the Turkish part of the island. The lack of present popular support for the Constitution may be partly because there was never popular support for the 1960 Constitution at the time of its enactment.¹ At any rate, it is interesting to note that the present constitutional advisor for the Greek Cypriot side sees the inclusion of a Bill of Rights in a Cypriot constitution as 'absolutely essential'.²

A Bill of Rights was included in the 1961 Constitution of British Guiana which provided for internal self-government. Whatever the British attitude toward the desirability of constitutional protection of rights for British Guiana may have been, it is clear that there was support among the British Guiana representatives themselves for such provisions. In 1958 the British Guiana Legislative Council had passed a resolution asking the Secretary of State for Colonies to receive a delegation to discuss

1. According to Polyvios Polyviou, 'The Zurich and London agreements, on which the republic (sic) of Cyprus was founded, did not emanate from the free will of the people but were imposed on them. Furthermore, the resulting constitution had been put into force without being approved by the people.' See Cyprus, Conflict and Negotiation 1960-1980 (London, Duckworth, 1980), pp.36, 37.

2. Claire Palley, interview, 26 January 1985.

constitutional reform and the possibility of British Guiana becoming a fully self-governing territory. The committee that considered that resolution unanimously recommended that the new constitution include 'a Bill of Rights providing for freedom of the individual as set out in the thirty articles of the United Nations Declaration of Human Rights.'¹ At the independence conference itself the leaders of both of the main political parties lent support to the idea of a Bill of Rights. The Premier, Dr. Jagan, proposed that the Constitution include a declaration of fundamental rights, 'although we realise that this might provide too rigid a framework and might possibly impinge upon the sovereignty of the people.'² The leader of the People's National Congress, Mr. Burnham, also supported the inclusion of fundamental rights into the Constitution.³ Not surprisingly then, the Independence Constitution included in it a justiciable Bill of Rights. In 1980 the Constitution of the Co-operative Republic of Guyana was enacted. Although the fundamental rights included in the previous Constitution were retained, there were a number of social and economic rights that were added.

Bills of Rights in Commonwealth Africa in the Early Sixties

At the Sierra Leone constitutional conference of 1960, it was agreed that fundamental rights should be incorporated into the Constitution.⁴ Accordingly the 1961 Independence Constitution did include a Bill of Rights. At least one commentator has suggested that there was no local demand for a

1. See M. Shahabuddeen, Constitutional Development in Guyana 1621-1978 (London, Duckworth, 1980), pp.36, 37.

2. Cmnd.1870(1962), p.7.

3. Ibid., p.13.

4. Cmnd.1029 (1960), p.4.

Sierra Leone Bill of Rights.¹ When in 1978 a new 'One Party Republican Constitution' was enacted, the Bill of Rights was included, though in a modified form.

Tanganyika also became independent in 1961, but its Constitution did not include a Bill of Rights, save for a statement of some fundamental principles in the preamble. A former Foreign and Commonwealth Office official explains that President Nyerere rejected British proposals for a constitutional Bill of rights; although the British 'would have rather he had it', they felt obliged to pay attention to what the Tanganyikans wanted.² Professor Ghai points out that unlike some other Commonwealth countries, in Tanganyika there was no big ethnic or racial group lobbying for a Bill of Rights.³ Professor de Smith suggested that 'the fact that most of the superior judges would necessarily be non-Africans may have been a relevant consideration.'⁴

There is evidence to suggest that all these considerations contributed to the Tanganyika Constitution not including a Bill of Rights. The Nyerere Government was certainly not enthusiastic about such a possibility. In the Government's proposals for a Republican constitution it was noted that:

The determination of Government to maintain the Rule of Law has already been emphasized in the introduction to these proposals. The Government believes that the Rule of Law is best preserved not by formal guarantees in a Bill of Rights, but by independent judges administering justice free from political pressure.

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1. A.B. Timbo, 'Human Rights in Sierra Leone: A Comparative Study' (University of London PH.D. thesis 1979), p.55.
 2. Anthony Rushford, interview, 9 May 1985.
 3. Interview, 17 January 1985.
 4. de Smith, op.cit., p.213.
 5. Proposals of the Tanganyika Government for a Republic, Government Paper No.1, 1962, p.6.

A few years later a Tanzania Government Commission referred to the British experience of protecting individual freedoms. It was noted that:

...the Commission are (sic) unanimous in reaching the conclusion that an attempt to protect individual freedom by a Bill of Rights would in the circumstances of Tanganyika today be neither prudent nor effective. Behind this decision is our belief that the rights of the individual in any society depend more on the ethical sense of the people than on formal guarantees in the law. The process of Government in the United Kingdom provides a striking example of the force of a national ethic in controlling the exercise of political power. A Government in Britain with a majority of one seat in Parliament could legislate to abolish elections, detain political opponents without trial and establish a censorship of the Press, radio, and television. Indeed most of these things were done by Parliament when the British people stood on the brink of disaster in the Second World War. They are not done in peacetime; not because there is anything in the law to prevent a Government acting in this way but because they are unthinkable. In other words there is a consensus between the people and their leaders about how the process of Government should be carried on.

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The potential conflict between the legislature and the judiciary was also considered when the Commission noted that:

There is a further aspect to this matter. Tanganyika has dynamic plans for economic development. These cannot be implemented without revolutionary changes in the social structure. In considering a Bill of Rights in this context we have had in mind the bitter conflict which arose in the United States between the President and the Supreme Court as a result of the radical measures enacted by the Roosevelt Administration to deal with the economic depression in the 1930s. Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate.

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The suggestion that the non-African background of most of the Tanganyikan judiciary may partly explain their reluctance for a Bill of Rights seems to have been a correct one. The Commission observed that:

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1. Report of the Presidential Commission on the Establishment of a Democratic one (sic) -Party State, 1965, pp.31, 32
 2. Ibid., p.31.

At the time of independence the Judiciary in Tanganyika was of almost entirely expatriate origin. Although this situation is rapidly changing it is likely to be some years before the Judiciary is accepted by the public as an entirely indigenous institution. In this transitional period the maintenance of the rule of law to which we attach the greatest importance requires particular care that occasions for conflict between the judges and the Executive and Legislature should be reduced to a minimum. ¹

Furthermore, the suggestion that there was no great ethnic or racial group strongly lobbying for a Bill of Rights would appear to be a fair one. When the British Parliament debated Tanganyikan independence most of the speeches referred to the lack of racial or ethnic problems in Tanganyika.

Uganda's 1962 Independence Constitution included a Bill of Rights. The Uganda Relationships Commission (The Munster Commission) thought this to be 'desirable' and recommended guarantees modelled on the Nigerian Bill of Rights 'subject only to minor changes'.² In 1981 a previous constitution that included the Bill of Rights was resurrected as part of an attempt to counter the problems resulting from the years when there was a breakdown of law and order. But Uganda's problems continue to be of such a nature that the Bill of Rights is perhaps only important to the extent that it is a striking example of how ineffective such guarantees can be.

A Bill of Rights was incorporated into Kenya's Constitution in 1960; the British Government had already expressed their commitment to such a measure. When the Kenyan Independence Constitution was being negotiated a couple of years afterward, British enthusiasm for a Kenyan Bill of Rights had not diminished. The Governor of Kenya told the delegates negotiating the Independence Constitution that the British Secretary of State for the Colonies had urged that the talks continue 'with the specific purpose of reaching agreement, so far as that is possible, on the principles on which

1. Ibid., p.31.

2. Report of the Uganda Relationships Commission, 1961, p.6.

Kenya's new constitution should be framed including the protection of property rights and the rights of minorities.'¹ The Governor himself said 'we must determine...the protection of individual rights, including land titles and property rights.'² He also explained that:

I have seen the vital contributions that Europeans and Asians have made, and are making, to the economy of Kenya, and I have seen with admiration the work that has been done by a devoted public service. Kenya needs the brains, devotion, and capital of all its peoples. This calls for a society and an economy without discrimination of race, creed, or colour, where individual rights are firmly recognised and maintained.

3

The Committee that did draft the proposed Bill of Rights took as its model the Ugandan Bill of Rights 'since that was the most up-to-date model and was also of special relevance as being part of the Constitution of a neighbouring East African country.'⁴ It is interesting to note this concern for geographical relevance because the Ugandan Bill of Rights was based on the Nigerian guarantees which in turn were derived from the European Convention.

One analysis of the Kenyan Constitution suggests that 'It is hard to escape the conclusion that the Bill of Rights has had little impact on government and administration in Kenya' due to a legal profession unaware of the possibilities offered by a Bill of Rights and a judiciary that was not 'imbued with the philosophy behind the Bill, and willing to implement it.'⁵ Furthermore, it is argued that with a war of secession in the North Eastern Province, tribal animosities exacerbated by constitutional negotiations, and serious economic problems, the Government at the time of

1. Report of the Kenya Constitutional Conference, Cmd.1700 (1962), p.7.

2. Ibid., p.8.

3. Ibid., p.8.

4. Ibid., p.19.

5. Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya (Nairobi, Oxford University Press, 1970), p.455.

independence was understandably more concerned with public order rather than human rights and in that way were no different from the departing administration.¹ It is debateable though whether such problems necessarily explain or justify less of a commitment to the enforcement of a Bill of Rights. Concerns about tribal animosities or economic problems are not likely to be short-term, and indeed when such difficulties arise is the time when a Bill of Rights might be most useful.

The penchant for constitutionally-codified rights was evident elsewhere in East Africa. A Bill of Rights for Southern Rhodesia came into effect in 1962. The discussion surrounding its desirability had been tied in with consideration of the powers of reservation and disallowance held by the British Government. The Government of Southern Rhodesia had wanted such powers to be eliminated but the British were reluctant to agree to that unless there were other provisions to guard against discriminatory actions. The Monckton Commission was charged with exploring possible constitutional changes for the Federation of Rhodesia and Nyasaland and as part of their recommendations the following was noted:

We believe that the Bill of Rights should be drawn up in accordance with the traditions of the English-speaking world (emphasis added) and the current practice of the multi-racial Commonwealth; and we hope that, though comprehensive in scope, it may be a fairly brief document expressed in general terms. 2

The Report then went on to point to the 1960 Canadian Bill of Rights as a possible model to base the Bill of Rights upon, though interestingly there was no reference to the legislative override clause that was a part of the Canadian declaration. In the end a Bill of Rights based on the Nigerian model was adopted for Southern Rhodesia. A Bill of Rights was also in the Zambian Independence Constitution.

1. Ibid., p.455.

2. Report of the Advisory Commission on the Constitution of Rhodesia and Nysaland, Cmnd.1148 (1960), p.80.

The possible symbolic purposes of a Bill of Rights had obviously been considered by some British officials. One report reviewed the possible disadvantages of a Southern Rhodesian Bill of Rights, but noted that 'these arguments are not necessarily decisive and that there might well be a psychological advantage in incorporating in the Constitution a definition of fundamental human rights which might help to create a new sense of confidence and a fresh purpose of co-operation.'¹ Claire Palley suggests that 'the people who pushed for a Bill of Rights were the Commonwealth Office' because they wanted to eliminate the reserve powers and 'they wanted to look good.'² When the British House of Commons was considering the Southern Rhodesian Bill, one member claimed that 'the idea that [the Bill of Rights] is going to protect the African population of Southern Rhodesia is very nearly illusory.'³

Discussions about Bills of Rights were going on elsewhere in the ill-fated Federation. The Nysaland Constitutional Conference of 1960 had considered the possibility of a Bill of Rights, but had decided that though 'such a provision would not be appropriate to the next stage of constitutional advance in Nysaland, a study of the matter might usefully be started so that when the time came suitable provisions could be included to this end.'⁴ But the Monckton Commission recommended that fundamental rights be included in the Constitution. The 1963 Constitution that granted self-government did include a Bill of Rights as did the Independence

1. Cmnd.1150 (1960), Appendix VII, p.9.

2. Interview, 26 January 1985.

3. Sir Frank Soskice, 648 H.C.Deb., 5s. col.1060. Some members also pointed to qualifications of the rights, particularly the section that allowed existing law to continue to have effect notwithstanding any inconsistency with the Bill of Rights.

4. Report of the Nysaland Constitutional Conference, Cmnd. 1132 (1960), p.8.

Constitution of 1964. But the Malawi Republican Constitution of 1966 did not include such provisions.

Whose idea was it to have a Bill of Rights for Nysaland, and why was it dropped with the introduction of the Republican Constitution? Prior to independence there was obviously concern about attitudes toward Europeans. The 1959 Nysaland Commission of Inquiry had reported that:

In a democracy politicians are frequently scoffed at. If one were referred to as 'a little boy of 25 years old direct from Oxford,' no one would worry. But when Dr. Banda referred to District Commissioners in these terms (not an individual but the genus) it was thought by the administration to be dangerous. A District Commissioner cannot afford to be jeered at or insulted in public; if that is tolerated, it would lead to a loss of authority which would be fatal. Many unofficial Europeans consider that the same thing applies to them. This must be remembered when the reaction of the Government is considered to some of the demonstrations which took place in October; the stoning of European cars was resented as a sign of disrespect as well as because of the damage that was done and the unpleasantness that was caused.

1

In the report of the 1962 constitutional conference, R.A. Butler, the Head of the Central African Office had noted:

I should now like to say something on the question of safeguards for minorities. I have been giving a good deal of thought to this important question, which is ever present in Her Majesty's Government's mind. In this constitution we shall be transferring as is right and proper, the substance of political power to the African people in Nysaland. I have listened to what Dr. Banda and his colleagues have had to say on this subject and do not doubt their sincerity in maintaining that people of other races have nothing to fear from this transfer. It is very natural and understandable in multi-racial communities that individuals many of whom have made and are making a substantial contribution to the Nysaland economy, should be at a time like this subject to doubts and fears as to what the future may hold. (emphasis added). I do not doubt that the ultimate solution is the establishment of relations of confidence in a society where racial distinctions have ceased to be significant; yet Her Majesty's Government do feel it is necessary meanwhile to find some means of allaying the apprehensions of individuals by giving them some tangible form of reassurance. The main way to do this is to

1. Report of the Nysaland Commission of Inquiry, Cmd.814 (1959), pp.16-17.

accord to everyone, not as members of a particular community but as individuals, some guarantee of protection against infringement of ordinary human rights. That is the significance, as I see it, of the proposal we have been discussing for a Bill of Rights. It is essentially a means of establishing that confidence which is essential at this time of major social and political change, a confidence which will also assist Nysaland's external credit, political, and financial. (emphasis added). 1

It is interesting to note how a Bill of Rights can be seen as especially relevant to the concerns of people who make a substantial contribution to the economy and to a country's financial credit.

When the proposals for the 1966 Republican Constitution were being considered, it was claimed that some of the Nysaland representatives at constitutional conferences preceding independence were not enthusiastic about a Bill of Rights. A Malawi Government White Paper noted that:

When Malawi became independent on 6th July 1964, the Independence Constitution conferred upon it by the British Government included a comprehensive Bill of Rights setting out in detailed form the natural liberties which persons living in Malawi were entitled to enjoy, coupled with a provision for the enforcement of these rights in the Courts. The Malawi Government itself accepted this document with considerable reserve (emphasis added) considering that a Bill of Rights was an unrealistic, illusory and ineffectual safeguard for minority groups. 2

When the Malawi Parliament was debating the Republican Constitution, President Banda explained that:

...in 1963 I went back to have a talk with Mr. Butler to negotiate the Independence Constitution.... When I am doing anything at all, I always concentrate on my mind on the main issue, major issue, main goal, and ignore all the rest of it. So in this case when I was negotiating our independence or the

1. Cmnd.1887 (1962), p.7.

2. Proposals for the Republican Constitution of Malawi, Government White Paper 002, (1965), p.14. The White Paper then went on to recommend that a Bill of Rights not be included in the Republican constitution for the following reasons: existing laws were sufficient in serving a similar purpose; that Malawi by virtue of being a member of the United Nations had guaranteed that they would respect the guarantees contained in the United Nations Charter of Human Rights; and that a Bill of Rights tended to invite conflict between the executive Government and the judiciary. It did, however, accept that the preamble might include a statement of fundamental principles.

independence of this country with Mr. Butler last year, I ignore all these minor things such as for example, citizenship, fundamental rights, Director of Public Prosecutions, (sic). I concentrated my mental eye - my attention on the main issue. I was in a hurry for our independence and I wanted it now and therefore I wasn't going to wait. So I said, to Mr. Butler, 'all right, you want every non-African, which means Europeans and Asians, who was either born here or has been here for five years or seven years to be automatically a citizen. All right, you have your way.' But I said to Mr. Butler [that the constitution could be amended after independence...] He said, 'I know that the minute you are independent you are going to amend your Constitution - but we are thinking of the present time - it's all right.'

1

During the debate the one member of the Opposition did confirm that at the independence negotiations Dr. Banda 'had considerable reservations on the subject of the Bill of Rights.'²

It has been suggested that the Bill of Rights was originally included at the insistence of the minority United Federal Party.³ Indeed, in the 1962 Report of the Nysaland Constitutional Conference Mr. Butler explained that 'The United Federal Party Delegation urged strongly that the position of minority communities should be protected by means of a Bill of Rights and a Council of State.'⁴ One former British official suggests that Dr. Banda exaggerated the extent to which the British pushed for a Bill of Rights; after all President Nyerere of Tanganyika had got an independence constitution without a Bill of Rights.⁵ But the lobbying of minority groups from Nysaland may well have been more determined, and the British

1. Official Report of the Proceedings of the Parliament of Malawi, 29 October 1964, pp.222, 223.

2. Ibid., p.227.

3. Simon Roberts, 'The Republican Constitution of Malawi', Public Law, (1966), 321.

4. Cmnd. 1887 (1962), p.7.

5. Anthony Rushford, interview, 9 May 1985.

may well have perceived the Nysaland situation differently than the Tanganyikan one.

Bills of Rights in the Commonwealth Caribbean in the Early Sixties

Meanwhile in the Caribbean, Bills of Rights were finding their way into different West Indian constitutions. Jamaica became independent in 1962 and included in its Independence Constitution was a Bill of Rights which was modelled on the Nigerian guarantees. Prior to the constitutional conference in London the Jamaican legislature set up a joint committee to consider what form the independence constitution should take. Apparently a number of organisations were in favour of an entrenched Bill of Rights.¹ But some Jamaicans were uncertain as to whether the Constitution should include such guarantees. The Premier, Mr. Norman Manley, reminded the Jamaican House of Representatives that England did not have such guarantees. Suggesting that the rigid codification of rights did not necessarily preclude the possibility of ways being found to circumvent them, Mr. Manley concluded, 'So when you have put into the Constitution these things let no one imagine that you have secured your future forever.'² But Mr. Manley later went on to concede that there was 'no doubt...the overwhelming wish of the articulate members of the community appears to be in favour of writing them in detail.'³

The Joint Committee agreed that the Independence Constitution should include some sort of Bill of Rights and asked the Attorney-General to set up a sub-committee in order to prepare a draft. The sub-committee members

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1. See Trevor Munro, The Politics of Constitutional Decolonization in Jamaica 1644-62 (Jamaica, Institute of Social and Economic Research, University of West Indies, 1972), p.161.
 2. Proceedings of the House of Representatives 1961-62, pp.721-722.
 3. Ibid., p.751.

could not agree on what form the Bill of Rights should take. One of the sub-committee's members who was of Mr. Manley's party preferred to see the Bill of Rights confined to the preamble. He was against 'placing it in the body of the Constitution for the reason that that would have the effect of derogating from the sovereignty of Parliament.'¹ The sub-Committee report ended up being appended by two minority reports.

The Jamaican representatives ended by agreeing on a Bill of Rights that would be included in the main part of the Consitution. It appears that the Law Society was particularly influential in persuading the Government that entrenched rights were preferable. As the Jamaican Minister of Finance candidly explained to the House of Representatives:

First of all we did not entrench it, pressure was applied and we have entrenched it. That is an index of the power of the articulate in this country. Let us be frank. It was because the Law Society said so why we (sic) entrenched it. If it had been said by the Ratepayers Association, we would not have entrenched it.

2

There may have been several reasons why the Law Society preferred an entrenched Bill of Rights. A revealing comment, however, was made by one of their representatives to the Joint Committee. The representative explained that:

I represent...a number of foreign corporations who have invested largely in this country and who contemplate considerable investment...I am constantly arguing with them and telling them 'what are you worrying about this, that and the other, we are not a Central American Republic, we...have been trained in democratic ideas and you are never going to run up against any sort of trouble that you run up against in your Central American Republics... How am I going to face them? That is my problem (they) like to see it in black and white.

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1. See Munro, op.cit., p.158.

2. Proceedings of the House of Representatives 1961-62, p.751.

3. See Munro, op.cit., p.161.

As might be expected there were different opinions about whether the Bill of Rights should include a guarantee regarding property. In Mr. Manley's words, the issue of property rights was 'more controversial than any other.'¹ But whatever Mr. Manley's misgivings about such a guarantee, he appreciated what was at stake. As he explained to the House of Representatives, the Constitution was designed 'to let the world know that...people can come here to invest...fully protected by the laws of the land, that we are not committed to any extreme policies whatever, and that property would be fully protected.'² Even after it was agreed that the Constitution should include rights regarding property, there was the question of who should determine the extent of any compensation for the deprivation of property. The final agreement allowed for deprivation of property in accordance with a law, though the Constitution specifically assigned to the courts the responsibility of applying the law.

When the Jamaican representatives went to London, a few additional changes were made to the Bill of Rights. A section pertaining to forced labour and slavery that appears in many Commonwealth Bills of Rights and is derived from the European Convention was dropped. Mr. Manley later explained that he favoured the exclusion of the section. 'I have never thought it was appropriate to a country with Jamaica's civilization', he explained to the Jamaica House of Representatives.³

The constitutional conference did agree that the Independence Constitution would include a Bill of Rights.⁴ When the Independence Bill

1. Proceedings of the House of Representatives 1961-62, p.722.

2. Ibid., pp.722, 723.

3. Ibid., p.775.

4. Cmnd.1638 (1962), p.12.

was presented to the British Parliament there was not much discussion about the desirability of a Bill of Rights being included in the Constitution. Admittedly the Constitution itself would take the form of a statutory instrument; nonetheless there is no reason why British parliamentarians could not have made comments on such an issue during the debate. Rather, the contributions were similar to many debates in the British Parliament on independence Bills: accolades for leaders of the country soon to be independent and reminiscences of time spent in that particular place. The only comment on the question of a Bill of Rights was offered by Viscount Massereene and Ferrard who said, 'I think we can rest assured that in Jamaica the freedom of the individual will not be - shall we say? - slightly whittled away, as has happened in one or two other Colonies which have become independent.'¹

It will be seen that the Jamaican Independence Constitution was the result of local initiative in many ways, though it took the form of an Order in Council after discussions with the Colonial Office.

Elsewhere in the Caribbean, Trinidad and Tobago became independent in 1962. Jamaica's withdrawal from the ill-fated Association of West Indian States caused Trinidad and Tobago to seek independence on her own and a select committee of the Legislative Council was appointed in 1958. The Committee's membership comprised Trinidadian politicians from the Government and Opposition and its purpose was to discuss independence with British representatives.

The original proposal was for the Constitution to include a fully-justiciable Bill of Rights similar to the one that was a part of the Nigerian Independence Constitution. These proposals were put forward in

1. 241 H.L. Deb. 5s., Col.13355.

February of 1962 and were the subject of much debate. Two months later the Premier, Dr. Eric Williams, went on radio to discuss the proposed Independence Constitution. He indicated that the Trinidadian Government had in previous constitutional discussions been against a fully-justiciable Bill of Rights, but had preferred that guarantees of rights be confined to the preamble. He acknowledged that many people preferred provisions based on the 1960 Canadian Bill of Rights which he said 'merely state the rights in general terms.'¹

The main constitutional advisor to the Trinidadian cabinet, Mr. Ellis Clarke, believed that 'certain subjects of their nature, are incapable of being drafted in precise terms,' and that human rights and fundamental freedoms were such subjects.² He did, however, think that the Independence Constitution should include a Bill of Rights. He argued that if the newly-independent countries all possessed similar declarations of rights, then useful precedents from appeals to the Judicial Committee could be established. Mr. Clarke also pointed to what he considered to be a major flaw in the Canadian Bill of Rights - the legislative override clause. 'Is this a preferable pattern to that which has been worked out with such pains and at such length in Nigeria, British Guiana, and Sierra Leone?' he asked.³

The proposal for the Independence Bill of Rights to be based on the Canadian model was one that was favoured by the Bar Association who claimed that in the original proposal the rights were qualified and that 'many of

1. Report of Radio Broadcast, Sunday 8 April 1962, p.14.

2. See Explanatory Memorandum by the Constitutional Advisor to the Cabinet on the Draft Independence Constitution for Trinidad and Tobago (1962), p.7.

3. Ibid., p.6.

the qualifications are so imprecise and dependent upon the interpretation of language.' The Association preferred a version 'made unalterable by the Constitution, or alternatively deeply entrenched therein.'¹

There were other groups that also expressed a preference for a Bill of Rights derived from the Canadian model. Groups as disparate as the Agricultural Society, the Chamber of Commerce, and the Trinidad Wide Cane Farmers Association all pointed to the many qualifications in the original proposal (that was based on the Nigerian Bill of Rights) and suggested the Canadian version as an alternative.² This kind of Bill of Rights is still justiciable in that the courts are charged with its interpretation and application, but as will be seen in the next chapter, there is a legislative override clause which can diminish the power of the judiciary to review legislation.

In April of 1962 it was announced that there would be a three-day public meeting in order for people to discuss the proposed Independence Constitution. The Government's constitutional advisor was at the meeting and defended the original Bill of Rights proposal. 'There is more than one way of drafting such a chapter' explained Mr. Clarke, 'and what was put forward is the latest effort that I was able to discover at any attempt to draft human rights.'³ He later conceded that this was probably the most controversial part of the draft constitution, but that 'The subject of fundamental rights and the freedom of the individual is a comparatively new one to British jurisprudence and I believe that we are still, here,

1. See Memorandum 144, Draft, Independence Constitution, Memorandum received from Organizations and Citizens (1962), pp.5, 6.

2. Ibid., Memorandum 141, pp.2, 3; Memorandum 71, p.2; Memorandum 56, p.22.

3. Verbatim Notes of Proceedings of Meeting on Draft Constitution held at Queen's Hall, Port of Spain, 25 to 27 April 1962 (1962), p.9.

expecting to follow the system of British jurisprudence.'¹ Mr. Clarke was, however, one of the few people at the meeting who offered comments on the purposes of a Bill of Rights in general. For most people, the question appeared to be what kind of Bill of Rights to have; not whether it was desirable to have one.

Immediately after the meeting, Premier Williams announced that the Government would propose to substitute for Chapter II in the draft constitution a Bill of Rights similar in drafting to the 1960 Canadian Bill of Rights.² Shortly after that Dr. Williams proposed such a change at the constitutional conference in London, and the proposal was accepted. When the amended proposal was debated in the Trinidadian legislature in May, the reservations about the Bill of Rights dealt with the form of the declaration, rather than the general consideration of whether there should be one. One politician, Mr. Hosein, drew attention to the legislative override clause and calculated that it would not be difficult for an Act to pass by a three-fifths, (the required majority for opting out), and thus the Bill of Rights was perhaps too limited in its guarantees. He also complained about the provision that allowed existing law to continue to have effect notwithstanding any inconsistency with the Bill of Rights.³ Responding to charges that he was unyielding, Dr. Williams argued that his original proposals had been different and it was only because of representations from various groups that his Government put forward the

1. Ibid., p.43.

2. Press Release No. 125, 27 April 1962.

3. Trinidad and Tobago House of Representatives, 11 May 1962, Vol. I, cols. 1245, 1246.

proposal based on the Canadian model.¹ He went on to discuss how 'the principal exponent' of the Canadian-like model, Mr. Wooding representing the Bar Council, had met with the Government's constitutional advisor in order to work out an acceptable draft.

When the British Parliament debated the Trinidadian Independence Bill, there was not much attention given to whether the Constitution should contain a Bill of Rights, and if so what kind. In the House of Commons, the only relevant query dealt with whether the Constitution contained sufficient safeguards for Trinidad and Tobago's Indian population.² In the House of Lords there was some concern about the extent to which the Bill of Rights was entrenched. Lord Walston pointed out that the section dealing with fundamental rights could be amended more easily than the section dealing with remuneration for the Governor-General and he wondered whether priorities were misplaced.³ The Marquess of Lansdowne who was the Minister of State for Colonial Affairs explained that at the independence conference there 'was quite a degree of disagreement' on how to entrench the Bill of Rights and that what was presented was a compromise.⁴ He did go on to give assurances that the fundamental rights 'are in fact very deeply entrenched.'⁵

So Trinidad and Tobago became independent with a constitution that included a Bill of Rights that was similar to the 1960 Canadian

1. Ibid., cols. 1173, 1174.

2. Mr. Norman Pannell, 662 H.C. Deb. 5s., col. 567.

3. 242 H.L. Deb. 5s., cols. 478, 479.

4. Ibid.,

5. Ibid.,

Bill of Rights.¹ Clearly, there was much local influence on the question of the Bill of Rights.

But there was to be further general debate about the Trinidad and Tobago Bill of Rights. By the time of the 1971 general elections Trinidad and Tobago's political problems were of such a nature that only one third of the electorate cast ballots, and one political party (the Democratic Labour Party) whose main support came from Trinidadians of East Indian origin, decided to boycott the election. Parliament used section 5 of the constitution (the legislative override clause) to amend the Sedition Act. A state of emergency was declared in 1971.

In 1974 a constitutional commission was appointed. The Commission reported that 'it is wrong to set out rights and freedoms in absolute terms, defining them as fundamental, and then to provide that Parliament may pass laws expressly declaring that they shall have effect notwithstanding those rights and freedoms.'² Accordingly, they suggested that a new constitution should adopt the pattern of the European Convention. They also recommended that the section protecting existing legislation from the purview of the Bill of Rights be excluded from the new constitution.

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1. The differences between the two Bills of Rights should be noted. The Trinidadian Bill of Rights is contained in a constitution (amendable by a two-thirds majority) whereas the 1960 Canadian Bill of Rights took the form of a Parliamentary statute. The Trinidadian Bill of Rights can only be overridden by a three-fifths majority and there is a limitation that the Act is not valid if it 'is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual', whereas the Canadian Bill of Rights could be overridden with a simple majority. Furthermore, the Trinidadian guarantees were not meant to extend to existing law at the time of its enactment.
 2. The Constitutional Commission of Trinidad and Tobago, The Constitution of Trinidad and Tobago (1974), p.19.

But by the time the proposals were debated in the Trinidadian Parliament, the Government offered its own proposed constitution. The Government proposal retained the controversial Bill of Rights with only some minor changes. The Government won the day and the 1976 Constitution includes the Bill of Rights that is similar to the one in the Independence Constitution.

Commonwealth Bills of Rights Dating From the Mid-Sixties Onwards

When Malta became independent in 1964 its Constitution included a Bill of Rights which apparently had been first proposed by the Church.¹ The following year Singapore became a separate country. The Bill of Rights contained in its Constitution was virtually the same as the one in the Malaysian Constitution.

In the mid-sixties many more Commonwealth independence constitutions were enacted. In Africa, Lesotho became independent in 1966 and included in its Constitution was a Bill of Rights that first appeared in the self-government Constitution of 1965. But in 1970 the Independence Constitution was suspended and with it the Bill of Rights. Similarly, the Bill of Rights which had been in Swaziland's Constitution providing for self-government was later included in the Independence Constitution, but in 1973 the Independence Constitution was suspended. In Botswana the 1965 Constitution included a Bill of Rights and those guarantees were preserved in the Independence Constitution of 1966 which continues to have effect.

Mauritius became independent in 1968 and in its Constitution was a Bill of Rights that had first appeared in the 1964 Constitution. A review of British attitudes towards Mauritius constitutional arrangements illustrates how, in some ways, times have changed. In 1947 the Governor of

1. See Edith Dobie, Malta's Road to Independence (Norman, Oklahoma, University of Oklahoma Press, 1967), p. 254.

of Mauritius explained that 'the bulk of the people are unprepared for democratic institutions and do not understand them'.¹ He proposed 'a system which conforms more nearly to British ideas than that which is embodied in the existing constitution.'² He anticipated the Indo-Mauritian majority having political control over the minority of people of European origin and he suggested that 'It may well be that the institution of a second Chamber will at no distant date become a matter of urgency.'³ But in 1965, the Secretary of State for the Colonies, Mr. Greenwood, told the constitutional conference that '...I do not think that it is right that the British Government, although it has ultimate constitutional responsibilities, should attempt to lay down in advance constitutional solutions for highly developed communities many thousands of miles away - those days are far behind us....'⁴ Nonetheless, it was noted that 'It would be the British Government's intention in preparing the draft of the Independence Constitution, to recommend the inclusion in it [of the Bill of Rights]'.⁵

Of the various Caribbean and South Pacific countries that have become independent in recent years, Bills of Rights have typically been included in their constitutions. For many of those countries, Bills of Rights had already been inserted into their constitutions prior to the independence negotiations. Interestingly, Bills of Rights were included in the

1. Cmd. 7228 (1947), p.3.

2. Ibid., p.5.

3. Ibid., p.10.

4. Cmd. 2797 (1965), p.19.

5. Ibid., p.8.

Constitution of some of the countries that have been administered by either Australia or New Zealand. Papua New Guinea, Nauru, Western Samoa, and the Cook Islands all have Bills of Rights despite the fact that Australia and New Zealand do not.

At the conferences where independence constitutions for Caribbean and South Pacific countries were negotiated, there was often support for proposals to include Bills of Rights in the constitutions. The Chief Minister of Tuvalu assured participants at that country's independence conference that 'the kind of Constitution we are seeking will take full account of the concern of Parliament in the United Kingdom to ensure that our Constitution provides for the protection of Fundamental Human Rights and Freedoms and the maintenance of the Rule of Law.'¹ The leaders of the two major political parties in Seychelles endorsed the idea of a Bill of Rights,² as did the leaders of the two Dominican political parties.³ The Belize Deputy Premier explained that 'We have been at pains to provide insurance for the rights of the individual; to protect and preserve human rights and fundamental freedoms.'⁴ The leader of the Bahamas Labour Party proclaimed that 'we seek to buccaneer every lofty idea included in the Human Rights division of our Constitution which will enable every individual to develop himself to the fullest of his capabilities.'⁵ But not everyone was always in agreement; for example, the leader of one of

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1. Report of the Tuvalu Constitutional Conference, Cmnd.7144 (1978), p.17.
 2. The Seychelles Constitutional Conference, Cmnd.6042 (1975), p.16.
 3. Report of the Constitutional Conference Held in Marlborough House London in May 1977, Cmnd.6901 (1977), pp.11 and 18.
 4. The Report of the Belize Constitutional Conference, Cmnd.8245 (1981), p.29.
 5. Report of the Bahamas Constitutional Conference Cmnd.3792 (1968), p.20.

Antigua's political parties regretted that provisions had not been made for the right to strike, the right to collective bargaining, and the collection of union dues.¹

Zimbabwe became independent in 1980 and included in its Independence Constitution was a Bill of Rights. Robert Mugabe has said that the group he represented played no part in the drafting of the Constitution but agreed to abide by it 'without having seen or analysed its actual terms.'² According to Mr. Mugabe, the Constitution 'is British rather than Zimbabwean in origin.'³ But he has explained that 'we favour the concept of the Declaration of Rights in principle and are very happy that we already have such a Declaration of Rights in our constitution.'⁴ According to Claire Palley, representatives of the blacks in Zimbabwe had initially supported the idea of a Bill of Rights, but they grew increasingly skeptical about it because of the guarantees regarding land.⁵ She also suggests that the Foreign and Commonwealth Office used the Bill of Rights as an easy way out of a difficult problem in order to protect their image.

The Influence of the British

To what extent did the British authorities pressure representatives of soon-to-be independent countries into accepting a Bill of Rights? To what extent did British authorities simply comply with the wishes of those representatives?

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1. Report of the Constitutional Conference 1980, Cmnd.8142 (1981), p.20.
 2. See 'The Parliament of Zimbabwe and Some Aspects of the Constitution', The Parliamentarian, LXV(1984), 1 et seq.
 3. Ibid., p.8.
 4. Ibid., p.7.
 5. Interview, 26 January 1985.

One scholar notes that 'the United Kingdom encouraged the overwhelming majority of new states in the Commonwealth to adopt, at independence, enforceable Bills of Rights as part of their constitutional settlement.'¹

Another scholar who has served as a constitutional advisor for various Commonwealth countries admits that 'In one sense the British pushed human rights'.² Lord Hailsham, when offering a dissenting opinion on a case involving the interpretation of the Trinidadian Bill of Rights explained that:

The 1962 Constitution is one of a family of constitutions similar, but not now identical, in form enacted for former colonial dependencies of the Crown on their attaining independence, as the result of negotiations and discussions relating to the terms on which independence should be granted. (emphasis added) 3

But many commentators deny that the British forced Bills of Rights on Commonwealth countries who would otherwise not have them. Sir Kenneth Roberts-Wray, the former Legal Advisor to the Secretary of State for the Colonies and the Secretary of State for Commonwealth Relations wrote that:

I must join issue with those who have used expressions such as 'imposed' implying that local governments were compelled by the United Kingdom, or at least subjected to strong pressure to accept Fundamental Rights as a condition precedent to the attainment of independence. I am not in a position to affirm that persuasion has never been necessary, or indeed to deny it; but it can easily be demonstrated that the suggestion is not in keeping with the facts in some cases. 4

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1. J.S. Read, 'Human Rights Protection in Municipal Law' in Human Rights: The Cape Town Conference eds., C.F. Forsyth and J.E. Schiller (Capetown, Juta, 1979), p.160.
 2. Professor Y. Ghai, interview 17 January 1985. It should be noted that Professor Ghai's comments refer to 'in one sense'; as noted below, he explains that at some constitutional conferences there was no opposition to proposals for a Bill of Rights.
 3. Maharaj v. Attorney-General of Trinidad and Tobago (no.2) [1979] A.C. 385 at 403.
 4. Sir Kenneth Roberts-Wray, 'Human Rights in the Commonwealth', International and Comparative Law Quarterly, 17 (1968), 917.

Another former Legal Advisor to the Secretary of State for Colonies suggests that 'once Nigeria had a constitution containing a code of Fundamental Rights, the political leaders of other territories (apart from Tanganyika) came to the conference table expecting it to be offered, and prepared to accept, a constitution containing such a code and that discussion in conference was directed to the details of the code rather than to the general principle.'¹

The Secretary-General of the Commonwealth has referred to the inclusion of Bills of Rights in independence constitutions as 'a parting gift' and has added 'but let it be remembered, if parting gift it be, that in nearly every case it was one selected for the occasion by the fledging state itself.'² A scholar who has served as a constitutional advisor says that at the conferences he was at it 'seemed to be taken for granted' that provision would be made for a Bill of Rights.³ A former Foreign and Commonwealth Office official explains that at constitutional conferences there was not much disagreement with proposals for Bills of Rights generally; any criticism was usually in regard to details.⁴ Similarly, the former Legal Advisor to the Secretary of State for Colonies notes that after the enactment of the Nigerian Bill of Rights 'neither H.M.G. nor, I think, the territories that came along the pipe-line after Nigeria could have been expected to throw the question of how to protect Human Rights back into the melting pot.'⁵

1. Sir James McPetrie, notes.

2. S.S. Ramphael, 'Fundamental Rights - The Need For a New Jurisprudence', Caribbean Quarterly, 8(1962) 142.

3. Professor Y. Ghai, interview, 17 January 1985.

4. Anthony Rushford, interview, 9 May 1985.

5. Sir James McPetrie, notes.

At many constitutional conferences, it does seem to have been assumed that a Bill of Rights would be part of the constitution. Part of the reason may have been because the constitutions prior to independence had included such declarations. But considering the possible significance that a constitutional Bill of Rights might come to have, it is surprising that in some countries there was not more discussion on the issue generally, particularly so when one considers that the country that was granting independence does not have a Bill of Rights. British officials seemed to sometimes start with a particular outline of a constitution with the intention of adopting it to local circumstances. One official from the Foreign and Commonwealth Office conceded that he was glad he was able to work from such a model when drawing up a proposed constitution, rather than have to start from scratch. It is difficult to determine whether the tendency to work with a certain model was helpful or whether it had the opposite effect because these constitutions have had different effects in varying ways. It is nevertheless interesting to see the way in which some of these constitutions were derived from a particular model. When Professor de Smith noted the growing number of Bills of Rights in the Commonwealth, he wondered if a pattern was developing, and if so, what the significance of it was. He wrote as follows:

Old attitudes had been discarded, new attitudes assumed; but why? Is the new fashion a reluctant response to an irresistably clamant local demand? Or does it perhaps represent nothing more than a series of ad hoc responses to particular situations? Or has there been a deliberate and fundamental change of policy? We could be witnessing yet another manifestation of that familiar process in which the deplorable becomes recognised as the inevitable and is next applauded as desirable; or the unfolding of a wilderness of single instances; or the opening of a new chapter in the history of British political thought. If the truth of the matter is complex (as indeed it is), in what proportions are the elements of principle and expediency, virtue and necessity, comingled?

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1. The New Commonwealth and Its Constitutions (London, Stevens and Sons, 1964), p.163.

Twenty years later it is still difficult to answer these questions. What can be safely said is that the truth of the matter is complex. It does seem that in many instances the new fashion was not 'a reluctant response to an irresistably clamant local demand'. Was there a fundamental change of policy? Perhaps not to the extent that it was articulated as such, but in many instances it does seem to have been assumed that an independence constitution would include a Bill of Rights - an assumption that was not so apparent for the constitutions enacted prior to the time of Professor de Smith's comments. The suggestion that the deplorable was becoming recognised as the inevitable and might soon be seen as the desirable was perceptive and in many ways has been borne out.

It is probably fair to say that more constitutions have been written in London than in any other place in the world. Yet the British Constitution is typically described as unwritten. As a Secretary of State for the Colonies once explained to a constitutional conference, 'We in Britain have no constitution of our own, but we have quite a lot of experience of writing constitutions for other people, and our advice may therefore be useful.'¹ In some ways one is reminded of Jeremy Bentham residing in England and writing a general constitutional code that he thought could be useful for countries all over the world though one would not want to take the analogy too far because as has been noted, many Commonwealth constitutions are drawn up after consultation with representatives of the country concerned.

It is worth noting the influence of the Foreign and Commonwealth Office (or the previous ministries from which the FCO was formed). For example, at the Seychelles constitutional conference in 1975, Lord Goronwy-

1. The remarks were made by Duncan Sandys at the Malta Independence Conference, Cmnd.2121 (1963), p.6.

Roberts, the Parliamentary Under-Secretary at the Foreign and Commonwealth Office explained that:

The conference itself will naturally be chaired by Sir Duncan Watson who, as you know, is a senior member of the Foreign and Commonwealth Office. This is the procedure for important matters like this. I myself will remove myself from the scene ... I would have liked to have stayed to hear your Excellency the Chief Minister and the Honourable Leader of the Opposition but I think that wisdom must supersede desire and I must remove myself and invite Sir Duncan Watson to take the Chair, with my warm personal as well as Ministerial hope that you will have a good and successful Conference.

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But one would not want to exaggerate the bureaucrats' influence. The former Legal Advisor to the Secretary of State for Colonies explains that:

So far as 'officials', i.e. civil servants were concerned our constitutional conferences were not a free-for all at which any individual civil servant could air his personal views on Fundamental Rights. The purpose of such a conference was to enable H.M.G. to negotiate from the territory in question a constitution that was generally acceptable. The U.K. team at such a conference was headed by a Minister (usually the Secretary of State) and it went to the conference table with a policy which had been worked out at a series of meetings between officials and ministers during the preceding months. At these briefing meetings anyone who wished to make a suggestion regarding Fundamental Rights would be free to do so and his suggestion might be accepted as part of the policy or rejected. At this distance in time I cannot remember any particular suggestions for departing from the Nigerian prototype; but I think it quite likely that such suggestions were made from time to time and accepted. They would, however, all have been directed to matters of detail rather than to the general principle.

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British ministers had the opportunity to contribute to discussions on the independence constitutions, but one wonders whether for negotiations they did not consider important or interesting, they let the civil servants take

1. Cmnd.6042 (1975) p.14.

2. Sir James McPetrie, notes.

charge. The influence of Parliament was in many ways minimal.¹ What should be remembered here is that over a relatively short period of time British officials negotiated independence with several countries, and perhaps it was inevitable that a certain pattern would develop and some things would be taken for granted. But the countries becoming independent were going to be involved in independence negotiations only once.

What does a review of the discussions surrounding various independent constitutions indicate about the attitude and influences of British officials? As has been noted, at many such conferences the representative of the country to become independent expressed support for the idea of a Bill of Rights. Indeed in some countries, Jamaica and Trinidad and Tobago for example, there had been discussion and agreement about a Bill of Rights before formal negotiations with British officials began.

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1. On the tendency of British officials to presume what Parliament wants, Professor Y. Ghai explains that at the Solomon Islands constitutional conference British officials would sometimes claim that something would not be acceptable to Parliament, but that it was doubtful whether these officials were really speaking for Parliament. He notes that:

We had written to all the Members of Parliament who were known to have an interest in the Pacific, and held a meeting with them and some of their colleagues in the Commonwealth Parliamentary Association on our arrival in London. Apart from general expressions of support, the meeting was useful in that we were able to tell British officials that Parliament was unlikely to object to proposals that they had earlier assured us Parliament 'would not wear', especially on questions on budgetary aid. It also enabled us to obtain access to British ministers through one or two parliamentarians. In this way we were able to present our views directly to the British minister, by-passing his officials, and sometimes to learn that the minister was agreeable to what his officials would tell us was most unacceptable to him!

See 'The Making of the Independence Constitution' in Solomon Islands Politics ed. Peter Larmour (Suva, n. pub., 1984), p.20.

But there is certainly some indication that British officials strongly encouraged the inclusion of Bills of Rights in some independence constitutions. As has been noted, Bills of Rights were included in some African constitutions as a result of British instigation. When more countries were becoming independent British authorities were typically presuming that an independence constitution should include a Bill of Rights. No doubt British officials would like to believe that they were taking into account the particular local circumstances and requirements. For example, George Thomas, the Secretary of State for Commonwealth Affairs told a Bahamas constitutional conference that there did not exist, nor did there ever exist, any detailed blueprint for future constitutions of ex-British colonies.¹ Such an assertion notwithstanding, there is some evidence that British officials have taken for granted the constitutional arrangements of countries becoming independent. Although the Secretary of State for Commonwealth Affairs denied the existence of a detailed blueprint for future constitutions, a Government White Paper published in 1966 did in fact contain such a blueprint for some Caribbean constitutions. The section was titled 'Outline Constitution For _____'; the obliging constitution maker needed only to fill in the blanks.²

Similarly, when reviewing some of the speeches given at constitutional conferences one sees evidence of a standard British procedure in reference to the question of a Bill of Rights. During a 1977 constitutional conference for Dominica, Mr. Evan Luard, Parliamentary Under Secretary for

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1. Report of the Bahamas Constitutional Conference, 1968,
p.18.
 2. Constitutional Proposals for Antigua, St. Kitts/Nevis/Anguilla, Dominica, St. Lucia, St. Vincent, Granada, Cmnd.2865 (1965), p.5.
It should be noted that this particular white paper outlined provisions regarding associated statehood. Under such arrangements, the United Kingdom government would continue to assume responsibility for the countries' external relations and defence requirements.

Foreign and Commonwealth Affairs told the Dominican representatives that 'we, like you, are responsible to Parliament and Parliament in London will, I think, wish to be satisfied that the proposed constitution will provide for the protection of fundamental rights....'¹ In 1978 at the constitutional conference for Tuvalu, Richard Posnett, Dependent Territories Advisor, assured the conference participants that 'Lord Goronway-Roberts, if he had been here, would have wished to say to you that Parliament in London will need to be satisfied that the proposed Constitution provides for the protection of fundamental human rights....'² It is interesting to note that British representatives assumed Parliament to be in favour of Bills of Rights despite the fact that during that same time the Government of the day declined to follow up the recommendations of the House of Lords Select Committee that recommended the European Convention be incorporated into British law.

It is apparent that at different Commonwealth constitutional conferences the British have been involved in, circumstances have varied. Discussions on constitutional arrangements have taken place amongst different people against the backdrop of different problems.³ There are

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1. Report of the Dominica Constitutional Conference Held in Marlborough House London in May 1977, Cmd. 6901 (1977), p.9.
 2. Report of the Tuvalu Constitutional Conference, Cmd. 7144 (1978), p.15.
 3. Different personalities may have been of some significance in the negotiations surrounding different independence constitutions. Anthony Rushford, notes that the Malays were 'very much more relaxed' with the British than were the West Indians; (interview, 9 May 1985). Professor Y. Ghai when writing about the way in which the Solomon Islands delegation went over the heads of British officials and appealed to Members of Parliament directly explains that 'It became necessary to resort to this procedure only because the British officials of the Foreign and Commonwealth Office (FCO), for reasons which escaped us, took a most hostile and patronising attitude to the Solomon Islands delegation.'
See 'The Making of the Independence Constitution' in Solomon Islands Politics ed. Peter Larmour (Suva, n.pub., 1984), p.20.

different ways in which the discussions on the Bills of Rights could be summed up. Sir Kenneth Roberts-Wray, the former Legal Advisor to the Secretary of State for the Colonies and the Secretary of State for Commonwealth Relations wrote of 'chapters on Fundamental Rights that were apparently prepared more with scissors and paste than with pen or pencil.'¹ Another former legal advisor to the Colonial Office suggests that there may have been encouragement for Bills of Rights in some Commonwealth constitutions because 'one didn't know what these people would be up to.'² A distinguished Commonwealth lawyer suggests that some Commonwealth countries may have been encouraged to have a Bill of Rights because the British 'may well have judged they lacked the maturity.'³ Anthony Rushford considers the readiness of the British officials; he refers to the 'increased affinity for Commonwealth Bills of rights after the 1959 Nigerian one was enacted.'⁴ Perhaps the best way of summing up is Mr. Rushford's observation that it is 'very amusing that so much of what we dished out, we don't have.'⁵

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1. 'Human Rights in the Commonwealth', International and Comparative Law Quarterly, 17(1968), 908.
 2. Sir William Dale, interview, 23 January 1985.
 3. Sir Zelman Cowen, interview, 25 January 1985.
 4. Interview 9 May 1985.
 5. Ibid.

CHAPTER 3

THE GENERAL FORMS OF COMMONWEALTH BILLS OF RIGHTSAND THEIR ATTENDANT QUALIFICATIONS

Most Commonwealth countries include in their law provisions that could be termed Bills of Rights, the most typical form being the spelling out of certain guarantees in a part of the constitution. There are almost fifty independent countries in the Commonwealth as well as a number of associated states and dependencies.¹ The Bills of Rights vary in style. As noted in the previous chapter many of them are similar to the 1959 Nigerian Bill of Rights which itself was modelled on the European Convention of Human

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1. In discussing various characteristics of different Commonwealth Bills of Rights words such as 'most', 'many', and 'few' are used to describe the extent and frequency of some of their features, rather than attempting to mark out with numbers the extent or prevalence of different provisions. This is for two reasons: first, constitutions are forever being amended, abrogated, suspended, or enacted; secondly, the nuances and ambiguities of Bills of Rights are of such a nature that any reference to the number of Bills of Rights that include a particular provision would at best be an approximation since the wording, context, and elaboration of such provisions vary.

This point can be illustrated by considering how many countries are members of the Commonwealth. When Brunei became independent on 1st January 1984, the number of fully-independent countries that could be said to be embraced within the Commonwealth was forty-nine. But four of these countries - Maldives, Nauru, St. Vincent, and Tuvalu - are by their own choice special members. All four countries have small populations. Although they participate in different Commonwealth activities, they do not take part in the pan-Commonwealth Heads of Government meetings, and they make voluntary contributions to the Commonwealth Secretariat rather than being assessed for subscriptions. Thus, even when referring to the number of countries in the Commonwealth, certain provisos must be mentioned.

Rights.¹ The Indian guarantees are very different in the way they are drafted. The Malaysian and Singapore Bills of Rights are very similar to each other and are not as detailed as the ones derived from the European Convention. Similarly, the Bills of Rights of Sri Lanka, Papua New Guinea, and Western Samoa are drafted in different ways. The 1982 Canadian Charter of Rights and Freedoms is not modelled on any one Bill of Rights,

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1. At the time of writing the following countries have Bills of Rights that are derived from this common model: Antigua and Barbuda, The Bahamas, Barbados, Botswana, Dominica, Fiji, The Gambia, Guyana, Jamaica, Kenya, Kiribati, Mauritius, St. Lucia, St. Vincent and the Grenadines, Sierra Leone, Solomon Islands, Tuvalu, Uganda, Zambia and Zimbabwe. The Constitution affirmed by the 1984 post-coup Nigerian government included the Bill of Rights derived from the same model, though allowance is made for decrees to override its provisions. Grenada's Independence Constitution also included a Bill of Rights derived from the same model though at the time of writing the exact status of the Grenada Constitution is unclear. The relevant Cypriot and Maltese provisions also contain provisions derived from the same model, though there are several differences, particularly so for the Cyprus Bill of Rights which is drafted quite differently. Some of Britain's dependent territories possess Bills of Rights derived from the same model, i.e. Anguilla, Bermuda, Gibraltar, and the Turk and Caicos Islands. The Cook Islands which are self-governing but in association with New Zealand have had a Bill of Rights since 1981. There are also other countries that are associated with a member of the Commonwealth but are not fully independent. The Isle of Man, Jersey, Guernsey, Alderney, and Sark are governed in association with the British crown and their constitutions do not contain Bills of Rights. The remaining dependencies that are associated with the United Kingdom, Australia, or New Zealand do not have Bills of Rights as part of their law.

but a number of other Bills of Rights have influenced its style.¹ The guarantees found in the Constitution of Maldives are succinctly stated and very much reflect the prominence of Islamic law within that country. The drafting of the Trinidad and Tobago Bill of Rights is, in some ways, very similar to that of the 1960 Canadian statutory Bill of Rights. And the nineteenth century Tongan Bill of Rights is peculiar not only to the extent that it pre-dates other Commonwealth Bills of Rights, but also in the way that many of its provisions are drafted. In Tanzania the statement of rights is confined to the preamble as it is in Seychelles where after a 1977 coup the Bill of Rights contained in the short-lived 1976 Independence Constitution was not included in the new constitution which provided for a one-party socialist state.²

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1. The 1960 Canadian Bill of Rights continues to be part of Canadian law though it is unlikely to receive much attention now that the Canadian Charter has been enacted as part of the 1982 Constitution Act. The 1960 Bill takes the form of a federal statute and is meant only to apply to federal law. The Bill purports to override all federal legislation - including all subsequent legislation - inconsistent with its provisions unless there are explicit provisions stating that the legislation is meant to be valid notwithstanding any inconsistency with the Bill of Rights. Generally the Canadian judiciary has been reluctant to accord the Bill any special status. There has been only one case where the Supreme Court of Canada rendered inoperative a federal statute that conflicted with the Bill of Rights. In Regina v. Drybones (9D.L.R.(3d)473) the Court declared that a part of the Indian Act (passed prior to the enactment of the 1960 Bill of Rights) that prohibited an Indian from being intoxicated away from the reserve was inconsistent with the Bill of Rights provision for equality before the law. The Bill's purported superior status to conflicting subsequent legislation has never been confirmed by the Canadian courts.
 2. The Independence Constitution can be found in S.I. 1976/894. The present constitution is Constitution of the Republic of Seychelles Decree 1979 (Decree no.14 of 1979).

As already noted, the 1957 Ghana Independence Constitution did not contain a formal Bill of Rights though there were some safeguards that to some extent served a similar purpose.¹ In the succeeding years there have been three Republican constitutions promulgated, each followed by a coup. Although the 1979 Constitution did contain a statement of fundamental human rights, the subsequent 1981 coup did away with that constitution.²

There are Commonwealth countries that did at one time possess a Bill of Rights but no longer do so. As noted in the previous chapter Lesotho's 1966 Independence Constitution contained a Bill of Rights, though it did not survive the suspension of the Constitution in 1970.³ Similarly, the section on fundamental freedoms included in Swaziland's Independence Constitution was repealed by a public declaration issued by King Sobhuza II in 1973.⁴ Bangladesh's Independence Constitution of 1972 contained a statement of fundamental rights, but since that time various coups and

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1. There were, for example, provisions that no law could make persons of any racial groups liable to disabilities that persons of other groups were not liable to. There were also provisions (limited by restrictions to safeguard the public interest) stipulating that laws should not infringe a person's right to conscience and religion. There was also a section stating that property could not be taken unless adequate compensation was paid. See S.I. 1957/277.
 2. The Constitution of the Third Republic of Ghana 1979, was repealed by Provisional National Defence Council (Establishment) Proclamation, 1981.
 3. The Bill of Rights of the Independence Constitution can be found in S.I. 1966/1172. Subsequent constitutional provisions are contained in Lesotho Order 1973 (No. 13 of 1973).
 4. The Swaziland Independence Constitution can be found in S.I. 1968/1377. On 12 April 1973 King Sobhuza II, taking account of resolutions passed by Parliament suspended the constitution and assumed all legislative, executive, and judicial power to be exercised in cooperation with a Council comprising his former Cabinet Ministers.

political assassinations have resulted in that constitution being inoperative; in effect the country is now ruled under martial law.

As previously noted the Constitution that proclaimed Malawi to be a republic refrained from including a package of guarantees that could be called a Bill of Rights despite the fact that such guarantees were included in the Constitution when Nysaland was granted self-government in 1963 and in the subsequent Independence Constitution of 1964.¹ But despite the absence of a set of provisions that could be called a Bill of Rights, the Republican Constitution does contain some similar guarantees.²

Some Commonwealth countries can be said never to have enjoyed a justiciable Bill of Rights. Tanzania's Constitution has never included a fully-fledged Bill of Rights and, as already mentioned, the relevant guarantees are confined to the preamble. It is commonplace to say that the

1. The Republican Constitution is Republic of Malawi (Constitution) Act 1966 (reprint 1974). The guarantees that were a part of the Nysaland self-government constitution are found in S.I. 1963/883, Sections 1-16. For the Independence Constitution the relevant guarantees are found in S.I. 1964/916, Sections 11-27.

2. See, for example, Ch.I. sec. 2(1)

(iii): The government and people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights and of adherence to the Law of Nations.

(iv) No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires;

(v) all persons regardless of colour, race, or creed should enjoy equal rights and freedoms.

These guarantees, however, are followed by a clause allowing for derogation that is 'reasonably required in the interests of defence, public safety, public order and the national economy.' Malawi 1966 Constitution op.cit.

United Kingdom enjoys no Bill of Rights though as noted in the first Chapter it is a signatory to the European Convention on Human Rights (as are Malta and Cyprus) and there are as well a number of Acts and statutes that do provide protection for the kinds of things that are often contained in conventional Bills of Rights. The Commonwealth of Australia does not possess a declaration of rights though the Constitution does contain some kinds of guarantees that are often found in Bills of Rights.¹ New Zealand's constitutional arrangements are similar to those of the United Kingdom in that there is no single written document that could be identified as the constitution. There is not any one statute that could be said to be a Bill of Rights, though there have been proposals for such an enactment.

Finally Brunei, which became independent in 1984 does not have a Bill of Rights. For several years the British have not had a voice in the country's internal affairs and have limited their involvement to matters of defence and foreign policy. The country is, in effect, ruled by an autocratic sultan.

The Bills of Rights that are included in the main body of the constitutions are justiciable and are liable to be enforced by the courts. It is worth noting that a number of Commonwealth countries' judicial systems provide under some circumstances for appeals to the Judicial Committee of

1. The Constitution makes provision for trial by jury on indictment (sec. 80), freedom for inter-state traders and travellers (sec. 92), and for freedom of religion (sec. 116). See Commonwealth of Australia Act 1900, (1977 reprint). None of the state constitutions include Bills of Rights though Tasmania has guarantees of religious freedom and no religious test for office.

the Privy Council.¹

To Whom the Bills of Rights Are Meant to Apply

Generally speaking the Bills of Rights are usually assumed to afford protection against actions by the state, though it is arguable that in the absence of an express provision to the contrary they need not apply only to state authorities. The Canadian Charter of Rights explicitly states that it is meant to apply to 'all matters within the authority' of the federal Parliament and the provincial governments.² But it is not clear how one identifies such matters. For example, would a university largely funded by a government be subject to the provisions of the Charter? The Papua New Guinea Bill of Rights on the other hand explicitly allows for its provisions to apply 'as between individuals' and also to corporations and associations.³

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1. The judicial systems of the following Commonwealth countries allow for appeals to the Judicial Committee of the Privy Council: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Fiji, Gambia, Jamaica, Kiribati, (for questions regarding the rights of the Banaban people), Malaysia (if referred by the Head of State), Mauritius, New Zealand, St. Christopher and Nevis, St. Lucia, St. Vincent, Singapore (if referred by the President), Trinidad and Tobago, and Tuvalu. With the exception of Australia and New Zealand all these countries have Bills of Rights, and cases involving those guarantees can be heard by the Judicial Committee. In addition, several of the dependent territories allow for such appeals including the ones where constitutions include Bills of Rights, that is to say, Anguilla, Bermuda, Gibraltar, and the Turk and Caicos Islands. According to Anthony Rushford, a former British official who participated in many constitutional conferences, a system allowing for appeals to the Judicial Committee 'never happened without strong sentiment on the part of some of the leaders;' (interview 9 May 1985). The appropriateness of the Judicial Committee's serving in some cases as the final court of appeal has been a subject of debate. Some of the implications of such an arrangement are discussed in Chapter Eight.
 2. Canadian Charter of Rights and Freedoms, sec. 32(1).
 3. Papua New Guinea Constitution, sec. 34a.

In the Indian Constitution many, though not all, of the fundamental rights are expressly declared to pertain to state action. Article 12 of that Constitution defines the State as including the Government of India (or a State Government) unless the context necessitates a different interpretation. State action is not limited to Government departments alone but also applies to 'all local or other authorities,' a definition which one learned commentator concludes to be 'an expression of the widest amplitude.'¹ The Indian judiciary has concluded that public corporations may be considered liable to the restrictions on state actions even if the Government does not directly hold shares in them. If the corporation is created by the state and if some other criteria are applicable (for example, the extent to which it receives financial assistance from the government; the extent to which it enjoys tax exemptions; whether it is a monopoly, or the extent of government control over its finances) then it is possible to consider the corporation to fall within the ambit of the limitations on state action.² It is interesting to note that in a recent case involving this same issue the Sri Lanka Supreme Court decided that the Bill of Rights there did not afford protection against the actions of a

1. Durga Das Basu, Commentary on the Constitution of India, 6th edn., Vol.C (Calcutta, Sri R.N. Sarka, 1977), p.131.

2. See, generally, H.M. Seervai, Constitutional Law of India, 3rd edn. (London, Sweet and Maxwell, 1983), i. 218-224.

commercial bank that had received financial assistance from the Government.¹

The Indian guarantees that arguably apply to non-state corporations or individuals include Article 17 (outlawing untouchability), Article 23 (prohibiting the trafficking of human beings and forced labour), and Article 24 (the prohibition of employment of children in factories, etc.).

Furthermore it is clear that some of the provisions of Article 15(2) (for example, prohibition of discrimination in public shops or places of public entertainment) could apply to private individuals.

This question of the extent to which a Bill of Rights is intended to apply to non-state action was recently considered by the Supreme Court

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1. Wijeratne and Bodaragama v. The People's Bank and the Attorney-General, cited in (1984) 10 CLB 1502. The applicant claimed that administrative decisions by the bank were an infringement of the right to equality. The Court had accepted that its jurisdiction in such matters was limited to violation by executive or administrative action. Counsel for the applicants sought to establish that the Bank was an organ of the Government and/or an administrative agency of the State, as it was a part of the Co-operative Movement which in part had been organized by executive and administrative action. The Court decided, however, that the discharge of State policy by the grant of financial assistance did not make the Bank an agent of the government and that the administrative decisions relevant to the case were not relevant to the relationship between the Bank and the Co-operative Movement as such but were connected with the Bank's commercial activities. Accordingly, the Court decided that the applicants were not State employees and thus could not invoke the equality guarantee against their employer.

The American courts have in some cases allowed for a wide-ranging interpretation to the Fourteenth Amendment which on its face applies to the states of the Union only. In Shelly v. Kraemer (334 U.S. 1(1948)) the Supreme Court decided that a state court's issuing of an injunction to enforce a racially discriminatory agreement between private parties involved sufficient state action to allow the plaintiff the protection of the 'equal protection of the laws' guarantee of the Fourteenth Amendment.

of Cyprus. In The Police v. Andreas Georghiades¹ the Court had to determine whether the constitutional right to privacy could apply to a case in which one private individual had unknowingly been the victim of a wiretap by another individual. Reviewing the ambiguities involved in the issue, Pikis, J. noted that there was academic disagreement as to whether the guarantees afforded by the European Convention on Human Rights (on which the Cypriot Bill of Rights is loosely based) are meant to apply to non-state actions.² In the end he decided that interference by anyone - 'be it the state or an individual' - is unconstitutional.³

In a case involving the Trinidadian Bill of Rights Lord Diplock speaking for the Judicial Committee declared that 'The chapter is concerned with public law, not private law.'⁴ An opinion rendered by Lord Hailsham explained that the Trinidadian Bill of Rights 'is concerned with future abuses of authority, usually (emphasis added) state authority, and it is largely preoccupied with the possibility of abuse of authority by the legislative (see section 2), or the executive, though doubtless as Lord

1. (1983) 2 C.L.R.33.

2. Pikis J. cited Francis Jacobs who in The European Convention on Human Rights (Oxford, Clarendon Press, 1975), p.11 argues that the Convention can be applied against everyone and contrasted that opinion to Castberg, (The European Convention on Human Rights (Dobbs Ferry, N.Y., Oceana, 1974, p.13) who argues that the Convention is a matter of public law for each member. It should be noted, however, that Jacobs admits the following: 'On the European level, however, the Commission can only deal, under Article 25, with an individual claiming to be a victim of a violation by one of the Contracting Parties. If the violation is by a private individual, therefore, a State may have fulfilled its obligations if its law adequately protects the rights guaranteed and provides for an effective remedy in the event of such violation.'

3. The Police v. Andreas Georghiades (1983) 2 C.L.R 63.

4. Maharaj v. Attorney-General of Trinidad and Tobago (no.2) [1979] A.C.385 at 396.

Diplock said it binds the judiciary and inferior authority, and presumably also individuals.¹ (emphasis added). Although the Trinidadian Bill of Rights was not derived from the same model as many of the Bills of Rights of other Commonwealth countries, Lord Hailsham made his comments in regard to them all.²

Having pointed to some of the ambiguities involved in the question of who is limited by the constraints of a Bill of Rights, we may briefly note that the question of who should enjoy the protection afforded by such guarantees can also be unclear. One important example of this question is whether a corporation should be able to be protected by the guarantees of a Bill of Rights. It is possible for a Bill of Rights to deal expressly with the question, but curiously enough few do.³ In the Indian Constitution some of the rights are meant for the benefit of 'citizens' whereas others are for the benefit of 'any person' or 'all persons'. Generally speaking the Indian courts have allowed corporations to enjoy the protection of guarantees meant to apply to all persons, but have hesitated to allow them

1. Ibid., 385 at 403.

2. For the Commonwealth Bills of Rights that were designed with the assistance of the Foreign and Commonwealth Office (or the previous ministries from which the FCO was formed) the assumption seems to have been that they were not meant to apply to private law. According to Anthony Rushford who as a Foreign and Commonwealth Office advisor played an important role in the drafting of many Commonwealth constitutions, the Bills of Rights were meant to be a part of fundamental public law; (interview, 9 May 1985).

3. As already noted one example of a Bill of Rights that does explicitly deal with this matter is that of Papua New Guinea which states that the guarantees are meant to apply 'to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals, except where, or to the extent that, the contrary intention appears in this Constitution.' Papua New Guinea Constitution, sec. 34(b).

to enjoy the rights afforded 'citizens'.¹ The Judicial Committee has decided that a corporation could enjoy the protection of some of the provisions of the Antigua Bill of Rights, which is derived from the same model as several other Commonwealth Bills of Rights. Speaking for the Court, Lord Fraser noted that some rights 'clearly cannot apply to corporations',² (for example right to life and right to liberty) but that other rights could, (for example, protection against compulsory acquisition of property) which he described as the section 'most clearly applicable to corporate bodies'.³ In Canada recently, the Supreme Court decided that a corporation could be protected by the Charter of Rights' guarantee prohibiting unreasonable search and seizure.⁴

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1. For a complete discussion of the important Indian cases dealing with this issue see Seervai, op. cit pp. 486-487. It should be noted that in at least one important case a court ruling enabled corporations to enjoy the benefit of a guarantee meant for citizens, albeit in an indirect way. In the Bank Nationalization Case (R.C. Cooper v. Union of India A.I.R. Supreme Court 564), the Indian Supreme Court considered the petition of one shareholder of a bank that had been nationalized and decided that the guarantee regarding deprivation of property was relevant to the case. By allowing the shareholder who was a citizen to claim such a right the court thereby in effect allowed the nationalized banks to enjoy the protection of the guarantee.

It should also be noted that the Indian courts have not always assumed that a corporation should enjoy all the rights meant to benefit persons. For example, in Common. Hindu Religious Endowments, Madras v. Sri Lakshimindra (A.I.R. 1954 Supreme Court 282) it was stated that corporations were not protected by the guarantee of free conscience (meant to apply to 'persons') because corporations did not practise or propagate religion.

2. Attorney-General v. Antigua Times Ltd. [1975] 3 All ER 81 at 85.
3. Ibid., 81 at 86.
4. Hunter et al v. Southam Inc. [1985] 11 D.L.R.(4th) 641. The Court did not directly address the issue of whether a corporation could enjoy the protection of the Charter; it did, however, decide in favour of a corporation that claimed infringement on the right not to be subjected to unreasonable search or seizure.

Having considered the general style of various Commonwealth Bills of Rights, we may go on to examine some of the qualifications that can be attached to them. Such qualifications are, perhaps, inevitable for as Sir Kenneth Wheare explained, an unqualified declaration of rights is incompatible with government.¹ The American Supreme Court, for example, has explained that there have to be some qualifications on Bills of Rights, even if those qualifications have not been explicitly written in.² It should be noted that though the qualifications we shall review are the kinds that are most pertinent, they by no means represent all the ways in which a Bill of Rights can be qualified. Some qualifications can be more indirect. For example, the discretionary powers enjoyed by a Head of State or Head of Government can be considered non-justiciable and thus exempt some decisions of the authorities from the purview of a Bill of Rights. An example of judicial recognition of such powers in relation to a case involving a Bill of Rights is de Freitas v. Benny³.

1. The Constitutional Structure of The Commonwealth (Oxford, The Clarendon Press, 1960), p.104.

2. For example, the First Amendment's guarantee of free expression which is limited by the 'clear and present danger doctrine' that is to say, a speaker can be penalized if what he says occurs 'in such circumstances or have been of such a nature as to create a clear and present danger.' See Schenck v. United States 249 U.S. 47 (1919).

3. [1976] A.C. 239.

The appellant had been sentenced to death. He appealed to the Judicial Committee, arguing that the execution of that sentence (in light of delays) was unconstitutional. In rejecting these arguments the Judicial Committee noted that the appellant had no legal right to the material used in advising the Governor-General on the exercise of his prerogative, because that prerogative was solely discretionary and not quasi-judicial.¹ Interestingly, in a recent English case the House of Lords decided that in principle an instruction given in the exercise of a delegated power conferred under the royal prerogative could be reviewed.²

General Limitations

One way of qualifying the guarantees found in a Bill of Rights is to include a separate section that sets out the limits of those rights. Many Commonwealth Bills of Rights include such a section. The Bill of Rights contained in the 1981 Belize Independence Constitution is typical of many of the Bills of Rights derived from the same model and in what follows its provisions will be cited as representative examples. The general limitation of the Bill of Rights is set out in the following section:

3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place or origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (a) life, liberty, security of the person, and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association;

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1. For discussion of such discretionary powers and the way in which they may not be susceptible to the usual constraints on governments, see Sir William Dale, The Modern Commonwealth (London, Butterworths, 1983), pp.147-156.
 2. Council of Civil Service Union v. Minister for The Civil Service [1985] A.C. 374.

- (c) protection of his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and
- (d) protection from arbitrary deprivation of property, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.¹

Most of the other Bills of Rights derived from the same model include a virtually identical provision though some of them have interesting differences. The Sierra Leone provision includes 'tribe' in the list of attributes that should not undermine one's rights; and it goes on to note that not only are the rights exercised subject to respect for others and for the public interest, but are also subject to respect for 'the recognised Party.'² A similar stipulation appears in the relevant provision of Zambia.³ The analogous Ugandan provision is worded somewhat differently and also prohibits any citizen from enjoying special privilege by virtue of birth, descent, or inheritance.⁴

One way in which the Belize provision is different than the other provisions derived from the same model is that in the general limitation it does not acknowledge the right to compensation for deprivation of property,

1. S.I. 1981/1107, sec.3.

2. The Constitution of Sierra Leone (Act No. 12 of 1978); (hereafter cited as Sierra Leone Constitution), sec.5.

3. Constitution of Zambia Laws, cap I, 1975 reprint; (hereafter cited as Zambia Constitution), sec.13.

4. Constitution 1967, (restored 1981) (hereafter cited as Uganda Constitution), sections 8(3) and 8(4).

whereas most of the other ones do.¹

The other Commonwealth Bills of Rights have different ways of spelling out provisions for general limitations. The 1975 Papua New Guinea Constitution stipulates that a law that aims to come within the limitation clause must specify which part of the limitation clause applies to it. Such a law must also specify the right that is being restricted, and must be 'reasonably justifiable in a democratic society.' The burden of showing that such a law has complied with these requirements is on the party relying on its validity. In determining whether such a law is reasonably justifiable in a democratic society it is suggested that the judiciary may look to the United Nations Charter, previous laws, and 'any other material that the court considers relevant.'² The Canadian limitation states that 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'³ This appears to put the burden of proof on the authorities. The relevant Nigerian provision from the 1979 Constitution is meant to apply to only

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1. The analogous provisions in the general limitation clause of the following countries' Bills of Rights (derived from the same model) specifically mention the right of compensation for property: Bahamas, Barbados, Dominica, Gambia, Guyana, Kenya, Kiribati, Mauritius, St. Christopher and Nevis, St. Lucia, St. Vincent, Solomon Islands, Tuvalu, Uganda, Zambia, Zimbabwe, Bermuda, Gibraltar, and Turk and Caicos Islands. The Antiguan provision refers to 'fair compensation'. Some of the Bills of Rights derived from the same common model, however, are like Belize in that they omit in the general limitation any specific reference to compensation for deprivation of property, i.e. Jamaica, Malta, Nauru, Sierra Leone, and Anguilla. It should be noted though that guarantees for compensation can be found in the separate sections dealing with property rights.
 2. Papua New Guinea Constitution, sections 38 and 39.
 3. Canadian Charter of Rights and Freedoms, sec.1.

some of the rights.¹ In the Singapore Constitution an amendment dating from 1978 states that some of the liberties are not to be held inconsistent with arrests attributed to public safety and good order or laws relating to misuse of drugs.² Some Commonwealth Bills of Rights do not include any clause of general limitation and thus the only clauses of limitation are those that are placed after and pertaining to specific guarantees.³ Although discussion of such specific limitations is reserved for the chapters pertaining to those guarantees, some general points about those limitations are worth mentioning here. The European Convention limits many of its guarantees by describing the circumstances under which laws may restrict those guarantees. For many of the Conventions' guarantees, the derogations must be 'necessary in a democratic society.' The Bill of Rights contained in the 1960 Nigerian Independence Constitution stipulates that a law derogating from many of the guarantees must be 'reasonably

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1. The limitation applies to the rights to private and family life, conscience, expression, assembly and association and movement. The Constitution of the Federal Republic of Nigeria 1979, (hereafter cited as Nigerian Constitution 1979), sec.41(1).
 2. The liberties that are affected by this limitation pertain to the right of an accused person to be informed of the charges brought against him and to consult a lawyer and the right to appear before a magistrate within twenty-four hours. The same amendment also allows for laws enacted before March 1978 to remain operative notwithstanding any inconsistency with those same guarantees. Singapore Constitution, 1980 reprint; (hereafter cited as Singapore Constitution), sec.9(6).
 3. See, for example, the Bills of Rights of India, Sri Lanka, Vanuatu, and Western Samoa, and Cyprus. The draftsmanship of some constitutions - the Indian one for example - is such that several (though not all) of the guarantees are included in one article. Thus, the specific limitation on such an article is in some ways a general limitation.

justifiable in a democratic society.'¹ Most of the Bills of Rights that are derived from the Nigerian guarantees have a different style of limitations: many of them simply state that a derogation from a particular guarantee must be 'reasonably required' for one of a list of specified purposes, or that it must make 'reasonable provision' and be 'required' for one of those purposes. Several of these Bills of Rights elaborate on such limitations by stating that a law taken under those provisions will be deemed invalid if it is shown to be 'not reasonably justifiable in a democratic society.' Professor de Smith described such elaborations as 'puzzling'. He noted that 'one can imagine unjustifiable action being taken in pursuance of a reasonably required law, but it is very hard to see how a law in itself can be both reasonably required and not reasonably justifiable.'² But perhaps the elaboration is not so superfluous if one considers the phrase 'in a democratic society.' A law might be reasonably required for any number of reasons, but difficult to justify in a democratic society. For example, a law proclaiming a one-party state may in some peoples' minds be reasonably required but be difficult to justify in a democratic society. This kind of elaboration is also noteworthy in that it is written in the negative, that is to say a law must be shown not to be reasonably justifiable, rather than shown to be justifiable as in the Nigerian version. This phrasing appears to shift the burden of proof from the authorities to a plaintiff and perhaps makes the judiciary's task easier in that it is arguably easier to say what is not justified in a democratic society rather than what is.

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1. Professor de Smith suggested that 'it is obvious that the scope of judicial review envisaged by [the 1960 Nigerian Bill of Rights] is narrower than under the European Convention.' The New Commonwealth and Its Constitutions (London, Stevens and Sons, 1964), p.189.
 2. Ibid., p.194.

Preambles as Qualifications on Bills of Rights

As we have seen some Commonwealth countries confine guarantees of individual rights to preambles, and it is usually thought that some preambles are non-justiciable. In fact the general limitation on the Belize Bill of Rights which is typical of the general limitation on other Commonwealth Bills of Rights can arguably be said to be in the nature of a preamble, thus bringing into question its justiciability. The reasons for this are varied. First, it begins with the word 'whereas' and refers to subsequent provisions; secondly, most of the subsequent guarantees are followed in any case by specific limitations and some (for example, the right not to be subject to inhuman treatment) conspicuously are not; and thirdly, the subsequent guarantees are not necessarily consistent with the provisions of the clause of general limitation. On the other hand such clauses are in the body of the Constitution and are numbered. Various judicial decisions have referred to the question regarding the status of these introductory sections. The Judicial Committee has recently handed down a decision that addressed this issue. The introductory section of the Mauritius Bill of Rights refers to deprivation of property in a general way whereas the specific property guarantee refers to property deprivation resulting from compulsory acquisition. An argument had been advanced that because of the more general wording of the introductory section, the guarantee in regard to property was not limited to property being compulsorily acquired. But the Judicial Committee chose to interpret the relevant sections by way of construction. Lord Templeman explained that 'all the provisions of [the Bill of Rights, including the property guarantee] must be construed in the light of [the introductory section]. The wording of [the introductory section] is only consistent with an enacting section; it is not a mere

preamble or introduction.'¹ A similar interpretation had been given by the Mauritius Supreme Court previously.²

Other courts have also commented on such provisions. The High Court of Kenya concluded that the analogous section of the Kenyan Bill of Rights was 'quite clearly in the nature of a preamble,' and explained that the section 'may be of help in interpreting any ambiguous expressions in later sections of [the Chapter containing the Bill of Rights] but it itself gives no rights or freedoms.'³ As previously noted, the analogous section of the Ugandan Bill of Rights has somewhat different wording. The relevant section does not begin with the word 'whereas', and it includes a clause stating that 'The provisions of this article shall have effect subject to the limitations contained in this Chapter.'⁴ It is apparent that the Ugandan provision should be considered to be justiciable as has been indicated by the Ugandan High Court.⁵

According to Anthony Rushford, who as a British official helped draft many Commonwealth constitutions, these introductory sections were not generally meant to be fully justiciable, but were meant to be 'quasi-preambular.'⁶

The Indian Supreme Court has also considered the issue of a preamble's effect on the fundamental rights contained in the Constitution. A 1976

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- . Société United Docks v. Government of Mauritius [1985] 1 All ER 864 at 870.
 - . Hawaladar v. Government of Mauritius, 1978 M.R.37; see also Jualim v. Director of Public Prosecutions and the Honourable The Attorney-General, 1976 M.R. 96.
 - . Shah Vershi and Co. Ltd. v. The Transport Licensing Board [1981] A.C.61 at 70.
 - . Ugandan Constitution, sec.8.
 - . Shah v. Attorney-General (No.2) [1970] E.A. 523.
 - . Interview, 9 May 1985.

amendment to the Constitution¹ introduced the word 'socialism' to the preamble.² In Excel Wear v. Union of India,³ the Court learned that a company had incurred huge losses (partly due to labour unrest) and decided to close down. However, under the Industrial Disputes Act, 1947 the state authorities could refuse to allow the company to cease operations, and in this case they decided to do so. The employers argued that the right to close down a business was an integral part of the right to carry on business as guaranteed in the Constitution. The respondents' arguments included the assertion that it was in the general interests of the community for the business to continue to operate and that the courts should take note of the addition of the word 'socialist' to the preamble of the constitution. The decision conceded that in view of the amended preamble, the courts could lean more and more toward nationalisation, but that so long as the private ownership of industry is recognised, the interests of private owners had to be considered.⁴

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1. See the Constitution (Forty-second Amendment) Act, 1976.
 2. Basu explains that 'the Preamble is not an operative part of the Constitution', though he concedes that the addition of the word 'socialism' to the preamble 'is of the highest significance in that for the first time the Constitution is made to expressly profess that Socialism is the goal of the Indian polity.' Basu is of the opinion that this represents a shift in goals in that the Independence Constitution was founded on the individualistic doctrine of private property with no indication that socialisation, nationalisation or the abolition of private property was the goal of the Indian polity. See Commentary on the Constitution of India, 6th edn. (Calcutta, Sri R.N. Sakar, 1977) Vol.C, p.287. A different view, however, was taken by the Indian Supreme Court in Sanjeev Coke Manufacturing Company v. M/S Bharat Coking Coal Ltd. where according to O. Chinnappa Reddy J. 'that socialism has always been the goal is evident from the Directive Principles of State Policy. The amendment was only to emphasize the urgency.' A.I.R. 1983 Supreme Court 239 at 251.
 3. 1979 A.I.R. Supreme Court 25. The petitioners included other employers.
 4. Ibid., 25 at 36.

Provisions Exempting Existing Law From the Purview of a Bill of Rights

Some Commonwealth constitutions contain clauses that explicitly, or arguably implicitly, exempt the existing law at the time of the enactment of the Bill of Rights from the purview of the guarantees. As will be seen it can be a debatable point as to what extent the provisions of a Bill of Rights repeal any seemingly inconsistent existing law. An early example of a Bill of Rights qualified by a provision allowing for existing law to continue to have effect can be found in the Southern Rhodesian Constitution of 1961. This is a particularly illustrative example of this kind of qualification in that much of the existing law was clearly contrary to the spirit and intention of the Bill of Rights.¹ Of Bills of Rights that are still in force, the relevant section of the Bahamas Constitution is typical of many similar sections in the constitutions of the Commonwealth.

It states that:

...nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of [the Bill of Rights] to the extent that the law in question - (a) is a law (in this Article referred to as 'an existing law') that was enacted or made [before Independence Day] and has continued to be part of the law of the Bahamas at all times since that day,
 (b) repeals and re-enacts an existing law without alteration;
 or
 (c) alters an existing law and does not thereby render that law inconsistent with any provision [of the Bill of Rights]₂ in a manner in which, it was not previously so inconsistent.²

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1. A thorough analysis of the existing law provisions in the 1961 Southern Rhodesian Constitution is offered by Claire Palley in The Constitutional History and Law of Southern Rhodesia (Oxford, Clarendon Press, 1966), pp. 533-627. Palley reviews each of the various guarantees of the Bill of Rights and points to all the existing statutes that could be said to be contrary to those guarantees. She concludes that the existing law qualification did much to limit the efficacy of the Bill of Rights.
 2. S.I. 1973/1080, sec.30.

Several other Commonwealth constitutions include similar provisions.¹

The Zimbabwe Constitution is similar to the Bahamas Constitution in the status it accords existing law, but it then goes on to say that the relevant provisions 'shall cease to apply after the expiration of a period of five years beginning on the appointed day'.² Interestingly, there is a qualification to this time limit stating that it 'shall not apply in respect of any law relating to the compulsory acquisition of property of any description or of any interest or right therein.'³ Similarly, the Malta Constitution allows that for a period of three years all laws at the time of independence are not to be deemed inoperative because of any inconsistency with the Bill of Rights and goes on to state that all laws prior to independence shall continue to be operative notwithstanding the guarantee regarding deprivation of property.⁴ The Belize Constitution of 1981 allows for existing laws that may be in contravention of the Bill of

1. See, for example, the constitutions of Tuvalu (S.I. 1978/p.3781 sec. 15(9)); Jamaica, (S.I. 1962/1550, sec. 26(8)); Barbados, S.I. 1966/1455, sec. 26) and The Constitution of Trinidad and Tobago, Act 4 of 1976; (hereafter cited as Trinidad and Tobago Constitution) sec.6. The relevant section of the 1980 Guyana Constitution reads that 'except in proceedings commenced before the expiration of a period of six months from the commencement of this Constitution, with respect to a law made under the Guyana Independence Order 1966 and the Constitution annexed thereto, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of [the Bill of Rights]....' See The Constitution of the Co-operative Republic of Guyana, Act No. 2 of 1980; (hereafter cited as Guyana Constitution), sec.152.
2. S.I. 1979/1600, sec. 26(3)(b).
3. Ibid., sec. 26(3)(a).
4. Malta Constitution, 1974, (hereafter cited as Malta Constitution), sections 48(7), (8), and (9). It should be noted that some scheduled laws are meant to be beyond the purview of the Bill of Rights entirely.

Rights to remain valid for up to five years.¹ The relevant clause in the 1978 Sri Lanka Constitution is meant to extend to 'unwritten law' as well.²

It should be noted that this kind of qualification can take forms other than explicit exemptions for existing law. For example, the Act that includes the Canadian Charter of Rights includes a section stating that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'³ It is difficult to know just how the Canadian courts will interpret such a guarantee, but it is arguable that such an affirmation could be seen to give credence to any relevant existing laws that contravene the Charter's guarantees.

There have been a variety of judicial interpretations in regard to savings clauses.⁴ The Judicial Committee has handed down some important decisions on the status of saving clauses. Some of these decisions appear to contradict one another. In 1962 the Committee heard a case involving a possible conflict between existing law and a provision of the Malayan Constitution. Although the issues raised in Kanda v. Federation of Malaya⁵ did not involve a part of the Bill of Rights per se, they are relevant to the questions that were subsequently considered regarding Bills of Rights and savings clauses for existing law. The Constitution had given the Police Commission the right to dismiss an

1. S.I. 1981/1107, sec. 21.

2. The Constitution of the Democratic Socialist Republic of Sri Lanka, 1972; (hereafter referred to as Sri Lanka Constitution), sec. 16(1).

3. Canadian Charter of Rights and Freedoms, sec. 35(1).

4. A description of the judicial interpretations of savings clauses with particular reference to the Caribbean can be found in Francis Alexis, 'When is an 'Existing Law' Saved?', Public Law, (1976) pp.256-282.

5. [1962] A.C. 322.

inspector, but had specified that the Commission was to operate 'subject to provisions of existing law.' The existing law had allowed the Police Commissioner to dismiss an inspector. Such a dismissal by the Commissioner was being challenged. Their Lordships declared that all relevant laws must still be brought into conformity with constitutional provisions.

A few years later in R. v. Runyowa¹ the Judicial Committee decided that notwithstanding any conflict with a constitutional guarantee, a Southern Rhodesian Act that provided for the death penalty could continue to have effect because of the clause purporting to save all existing law. At about the same time the Committee also handed down a decision regarding the death penalty in Jamaican law. In Director of Public Prosecutions v. Nasralla² the Judicial Committee was asked to decide whether the constitutional guarantee against being tried twice for the same punishment could be overridden by the savings clause. A jury had acquitted Nasralla for murder but could not agree as to whether he was guilty of manslaughter. Accordingly, the judge had adjourned the case until the next sitting of the circuit court. It was argued that the savings clause for existing law should not apply to the common law that allowed such an adjournment to take place. But the Judicial Committee decided that the common law could be included in the purview of the savings clause. The decision also took note of the 'introductory' section to the guarantees and the assertion that at the time of enactment it was stated that one 'is entitled' to the various rights. Accordingly, it was concluded that since such rights already

1. [1967] 1A.C. 26.

2. [1967] 2A.C. 238.

existed, then any existing laws could not by definition be contrary to the guarantees of the Bill of Rights.¹

Subsequent decisions of the Judicial Committee followed this reasoning to varying degrees. In Jamaican cases questions were raised as to whether people who committed murder as juveniles but sentenced when they were adults were liable to suffer the death penalty which was reserved for convictions against adult offenders. In Maloney Gordon v. R.² the Committee decided that the guarantee that one should not be punished more severely than one was liable to be at the time that a crime was committed should go toward ensuring that the accused would not be liable to suffer the death penalty. But in Baker v. The Queen³ the Committee decided that the accused could be sentenced to death. Although the Judicial Committee did not agree that there was any significant conflict between the existing law and the relevant constitutional guarantees, they nonetheless pointed to Nasralla and declared that the savings clause would allow the existing law to continue to have effect in any case.

The reasoning invoked in Nasralla was again followed in a case originating in Trinidad and Tobago, once again involving the death penalty. In de Freitas v. Benny⁴ it was argued that the delay of the execution of the death penalty was cruel and unusual punishment and was thus contrary to the Bill of Rights. Speaking on behalf of the Judicial Committee, Lord Diplock

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1. It is interesting to note that the savings clauses in some independence constitutions referred to 'any law' (for example, Jamaica and Trinidad and Tobago) whereas in others the relevant clauses made reference to 'any written law' (for example, Bahamas, Barbados, and Guyana). See Alexis, op.cit., p. 262.
 2. [1969] 15 W.I.R. 359.
 3. [1975] AC 774.
 4. [1976] A.C. 246.

declared that it was 'clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution'.¹ In Mahraj v. Attorney General of Trinidad and Tobago² the question at issue was whether a barrister could get constitutional redress for his having been committed to prison by a High Court judge in facie curiae without a fair hearing. Speaking for the Committee, Lord Diplock conceded that there was no de facto right which could exist because of the Bill of Rights assertion that such rights existed. As had been said in previous cases, the relevant existing law could include non-statutory law, and as long as there was not an express provision to the contrary then it was assumed that such a right existed, even if prior to the enactment of the Bill of Rights there was no available remedy. Similar reasoning was invoked in Thornhill v. Attorney General of Trinidad and Tobago³ where the refusal of police to allow a detainee to communicate with his lawyer was alleged to have been a contravention of his rights. Again, the assertion that certain rights existed prior to the enactment of the Bill of Rights was cited in the decision as explaining how de facto rights could be recognised.

There are different reasons why provisions exempting existing law from the purview of a Bill of Rights might be thought to be desirable. First it ensures a certain continuity in the law and does not necessitate a review of any existing law. Secondly, it recognises that previous legislatures did not have a Bill of Rights to look to when they passed laws. It could be argued that a previous legislature passed certain laws on the under-

1. [1976] A.C. 239 at 246.

2. (no.2)[1979] A.C. 385; [1978] 2 All ER 902.

3. [1981] A.C. 61.

standing that there was not a Bill of Rights with which those laws would have to conform; if a Bill of Rights had existed then those laws may have taken a different form. This is not to suggest that a previous legislature might have taken advantage of the absence of a Bill of Rights in order to pass laws that would obviously conflict with such guarantees; but it is to suggest that a previous legislature might have passed laws with the same intention, but that would have taken a different form due to the recognition of a Bill of Rights. Notwithstanding these considerations, there are some doubts that could be raised about provisions allowing for existing law to continue to have effect notwithstanding any conflict with a Bill of Rights. First, some of those laws might flagrantly violate the spirit and intention of the Bill of Rights and to allow such laws to continue to have effect could be undermining the purpose of a Bill of Rights. Second, it is not necessary that allowance must be made for the laws of a previous legislature that were passed on the presumption that there was not a Bill of Rights. If some law that is overturned is really necessary and supported by the legislature, then a subsequent legislature can pass it in a form that will not conflict with the provisions of the Bill of Rights. In Canada, for example, some provisions of the existing law regarding obscenity were struck down after the enactment of the 1982 Charter of Rights, and the Canadian Parliament quickly passed a revised version of that law. There was no great dispute (within Parliament) about the necessity for provisions, so the revised law was able to be passed quickly. If there had been significant dispute then it is not clear that such laws should have been able to continue to have effect. It is true that if some laws substantially conflict with the guarantees of a Bill of Rights, then a constitutional amendment might be necessary and it is likely that more than a simple Parliamentary majority would be needed in

order to pass such an amendment. This, it could be argued, undermines the sovereignty of Parliament. But this argument is not a very convincing one: once it has been decided that the constitution and not the legislature is to be supreme then the consequences of judicial review should not be denied. If judicial review has been provided for, why should it only apply to laws that come into effect after the enactment of the Bills of Rights? The criticisms that have been made about this kind of qualification do seem well-founded in many ways.

Specific Legislation Excepted

As has been noted it is possible for a general constitutional clause to be read as exempting all previous law from the purview of the Bill of Rights. Another version of this qualification is for a constitution explicitly to state which Acts are meant to remain operative notwithstanding any inconsistency with the Bill of Rights.

The Indian Constitution lists a number of Acts that are meant to remain valid despite any inconsistencies with the Bill of Rights contained therein.¹ The Article that provides for a schedule listing Acts to be considered exempt from the purview of the Bill of Rights was introduced in 1951. It was intended to apply to some matters relating to land reform. Since 1975, however, the Government has taken advantage of a Supreme Court decision where it was declared that Acts pertaining to other matters could be included² and has added to the schedule Acts such as the Monopolies and

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1. Indian Constitution, 1981 reprint, (hereafter referred to as Indian Constitution); sec.31B refers to the Acts listed in the ninth schedule of the Constitution.
 2. Kesavananda Bharati v. State of Kerala A.I.R. 1973 Supreme Court 1461. It was decided however that any amendments could not damage or destroy the basic structure of the Constitution.

Restrictive Trade Practices Act 1969, the Foreign Exchange Regulation Act 1973, and part of the Motor Vehicles Act, 1939. But in Waman Rao v. Union of India¹ the Supreme Court declared that all Acts passed after 1973 could not automatically be protected by virtue of being added to the schedule in question; if such Acts were found to be contrary to the basic structure of the Constitution, then they would be void.² Similarly, the Malta Constitution lists several Acts that are intended to be exempt from the purview of superior status over the Bill of Rights.³

In some ways this kind of qualification might seem to have the same disadvantages as the kind of qualification that provides a blanket exemption for all existing law. But the specification of the Acts is perhaps a preferable way of exempting some legislation in that it indicates that some attention has been given to which Acts might conflict with the Bill of Rights and that after such consideration it is still intended that

1. A.I.R. 1981 Supreme Court 271.

2. The Court considered the 1973 decision of Kesavananda Bharati v. State of Kerala to be a landmark case because of the declaration that amendments could not alter the basic structure of the Constitution; accordingly, Acts passed after 1973 could be examined to see whether they violated the basic structure of the constitution.

3. See Malta Constitution, sec. 48(7). The relevant section reads as follows: 'Nothing contained in any such law as is specified in the First Schedule to this Constituion and, until the expiration of a period of three years commencing with the appointed day, nothing contained in any other law made before the appointed day shall be held to be inconsistent with the provision of [the Bill of Rights] and subject as aforesaid, nothing done under the authority of any such law shall be held to be done in contravention.' The Acts cited in the First Schedule are the following: Criminal Code (Chapter 12); Code of Police Laws (Chapter 13); Code of Organisation and Civil Procedure (Chapter 15); Commercial Code (Chapter 17) and Civil Code (Chapter 23).

those Acts be exempted. The qualification allowing for all existing law to be exempted does not indicate that there has been consideration as to which Acts specifically should be allowed to be exempt from the ambit of the Bill of Rights.

Provision for Override by Future Legislation

A Bill of Rights can be qualified by provision being made for some legislation to continue to have effect notwithstanding any inconsistency with the guarantees contained within the Bill of Rights. As we have seen this kind of qualification can take the form of a general override of all laws already passed, that is to say exemption made for existing law, or it can specifically indicate the legislation that is meant to continue to have effect notwithstanding any inconsistencies with the Bill of Rights. Another kind of qualification is one that makes provision for future legislation to override the guarantees of the Bill of Rights.

There are different ways of allowing for legislative override of a Bill of Rights. The relevant provision in the 1982 Canadian Charter of Rights has received much attention. It allows the Canadian Parliament or the legislature of a province expressly to declare in an Act that the Act or a part of it is intended to be operative notwithstanding some of the guarantees of the Charter of Rights.¹ Such an override provision will cease to have effect at the end of five years unless it is renewed. It can moreover apply only to a part of the Charter of Rights. Fundamental Freedoms, Legal Rights, and Equality Rights can be overridden by the expressed method whereas Democratic Rights, Mobility Rights, Language Rights, and Minority Language Educational Rights remain beyond the reach of

1. See Canadian Charter of Rights and Freedoms, sec.33.

the legislative override.¹ These different levels of entrenchment obviously reflect the political issues of Canada as well as the aims, influences, and compromises of the various participants involved in the design of the 1982 Charter of Rights. It was the Quebec Government that first took advantage of this clause. Bill 62 which was proclaimed in June 1982, a few months after the enactment of the Charter, purported to exempt all existing Quebec statutes from the provisions of the Charter that could be overridden. Although the guarantees that the Quebec Government would have been most interested in circumventing - language rights and mobility rights - are included in the provisions that are beyond the reach of a simple legislative override, Bill 62 certainly had symbolic value in underlining that Government's displeasure with the 1982 constitutional agreement. The Quebec Superior Court upheld the override provisions of

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1. Fundamental freedoms include freedom of conscience and religion, thought, belief, opinion and expression including freedom of the press, freedom of peaceful assembly, and freedom of association. 'Legal rights' include the right to life, liberty, the right to be secure against unreasonable search or seizure, the right not to be arbitrarily detained or imprisoned, rights of due process, rights not to be cruelly punished, and the right to have an interpreter in court.

Equality rights are spelled out in sec. 15 and read as follows:

'(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on or physical disability.' The subsequent part of the section allows for affirmative action programmes that have as their object 'the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

Bill 62,¹ but recently the Quebec Court of Appeal declared that the Charter could not be overridden in the way that Bill 62 had purported to do.² The case will likely be heard by the Supreme Court of Canada. It should be noted that the 1960 Canadian federal statutory Bill of Rights, a simple Act of Parliament meant only to apply to the jurisdiction of the Federal Government, incorporated a similar clause. Generally speaking, however, the courts were reluctant to allow the provisions of such a statute to override subsequent Parliamentary legislation.³

The constitutional Bill of Rights of Trinidad and Tobago also contains a section providing for the possibility of legislative override clauses. The section stipulates that any legislation intended to override the Bill of Rights must expressly so declare and must be approved by three-fifths of each House of Parliament. Such an override will not have effect, however, if it 'is shown not to be reasonably justifiable in a society that has a

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1. In Malartic v. The Queen Deschenes C.J. said he was amazed that none of the parties raised the issue in a case where a Quebec statute that denied an out-of-province lawyer a permit for occasional practice in Quebec was challenged. It had been alleged that freedom of expression had been violated. The Court chose to give effect to the provisions of Bill 62; (Malartic v. The Queen [1982] 142 D.L.R. (3d) 518.) The Court applied the same reasoning in Alliance des Professeurs de Montreal v. Attorney-General of Quebec [1984] 5 D.L.R. (4th) 157.
 2. The decision was in regard to Alliance des Professeurs de Montreal v. Attorney-General of Quebec and at the time of writing is unreported.
 3. For a thorough analysis of the 1960 Bill of Rights and the ensuing judgements see Walter Tarnopolsky, The Canadian Bill of Rights 2nd ed. (Toronto, McClelland and Stewart, 1975). See also Anne Bayefsky, 'Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms', Political Studies XXXI, (1983), 239.

proper respect for the rights and freedoms of the individual.'¹ Thus, the override provisions appear still to be subject to judicial review.²

In Jamaica provision is made for 'Special Acts' to be passed which can override the Bill of Rights, but such Acts must be passed by two thirds of each House, which in effect guarantees that at least some Opposition senators would have to support such an Act.³ Such a provision has some advantages. First, it ensures that only a special majority can override the Bill of Rights, but it allows for an Act to override the Bill of Rights without having to alter the Bill of Rights itself. Secondly, whereas the process of amendment necessitates a period of several months for all the necessary stages to be completed, a 'special act' overriding the Bill of Rights can go through the legislative process more quickly. Thirdly, it allows a certain majority of the legislature to pass a bill that could contravene the Bill of Rights without having to rely on the judiciary to confirm that it would be within the spirit of a vague limitation on the Bill of Rights, for example, whether the measure was reasonably justifiable. Such advantages are only advantages to the extent that they allow the

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1. Trinidad and Tobago Constitution, sec.13. The clause was also included in the 1962 Independence Constitution, S.I.1962/1875, sec.5.
 2. The clause has in fact been taken advantage of. For example, a controversial act, The Sedition (Amendment) Act no. 36 of 1971, which amended the Sedition Ordinance of 1920, was passed under the analogous section of the 1962 Constitution (S.I. 1962/1875). Industrial relations legislation (Act 23 of 1972), and national insurance legislation (Act 35 of 1971) have also been protected by having been passed under the override section.
 3. See S.I. 1962/1550, sec. 50.

legislature more manoeuvrability; and not everyone would agree that increased manoeuvrability is an advantage.¹ The Malaysian and Singapore Constitutions allow for an Act to override the Bill of Rights if the Act recites that the action is being taken because of certain circumstances.² It can be argued, then, that the judiciary's role would be limited to determining whether a particular Act did in fact make the necessary recital, and the question of whether the alleged circumstances really existed would be beyond the purview of the courts. The Malaysian Constitution does in fact add that the validity of any law that restricts

1. The clause allowing for special acts was the result of a compromise reached during discussions on the independence constitution. Apparently many people wanted a fully-entrenched Bill of Rights, but it was also thought desirable to provide a way for the government to act relatively quickly. See Proceedings of the House of Representatives 1961-62, p.745.
2. Malaysian Constitution, 1977 reprint; (hereafter referred to as Malaysian Constitution), sec.149. The section reads as follows:
 - (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -
 - (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
 - (b) to excite disaffection against the Yang di-Pertuan Ogang or any Government in the Federation; or
 - (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
 - (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
 - (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
 - (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
 any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of [the guarantees regarding liberty, banishment and movement, speech, assembly and association] or would apart from this Article be outside the legislative power of Parliament.

The analogous clause (virtually identical) for Singapore is found in Singapore Constitution, sec.149.

some freedoms shall not be questioned even if those restrictions are not necessary for the purposes contained in the article.¹

A recent amendment to the Constitution of Mauritius also allows for the possibility of legislative override, but only in regard to laws pertaining to property. Such a law must be passed at its final reading by three-quarters of the Assembly, and it can only be amended or repealed by the same majority. It appears that it need not expressly declare that it is to be operative notwithstanding the Bill of Rights.²

As we have seen legislative override clauses take different forms. In the Canadian and Trinidadian versions it is necessary that the Act in question recite that it is meant to be valid notwithstanding any inconsistency with the Bill of Rights. The requirement would usually ensure that the legislature has recognised that the Act may conflict with the Bill of Rights, but that it chooses to give effect to the Act. In such instances the Bill of Rights is more of a guideline of which the legislators take note of rather than a set of provisions that the Act must measure up to. It might be supposed that a legislature would be less

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1. Section 4(2) reads as follows: 'The validity of any law shall not be questioned on the ground that -
 (a) it imposes restrictions on the right mentioned in [the clause pertaining to restrictions or the mobility clause] but does not relate to the matters mentioned therein; or
 (b) it imposes such restrictions as are mentioned in [restrictions on speech, assembly and association clause] but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.'
 2. Cited in 9CLB (1983) 770. The law was brought into question in Société United Docks v. Government of Mauritius [1985]
 1 All ER 864. The amendment was in fact passed to allow the government exemption from challenges arising from the case in question.

likely to pass an Act that flagrantly violated the guarantees of the Bill of Rights if there was a requirement that a recognition of the possible conflict be noted in the Act itself, since this might attract the public's attention. But this might not be so; it is unlikely that such a requirement would serve to attract the public's attention to the Act in question. In Quebec the legislature purported to exempt all Quebec statutes from the purview of the Charter of Rights, and though this prompted much debate among lawyers and legal scholars, it did not really become an issue that was of interest to most Quebecers, certainly not to the extent that it threatened to become an issue during an election. It could be argued that if the Act which was overriding the Charter had some specific purpose other than providing an exemption for all Quebec statutes, then there might have been more interest on the part of the public. Perhaps there is such a possibility; but if the Quebec Government was able to pass a law that rendered ineffective many of the provisions of the Charter of Rights and not suffer from any significant public backlash, then one might be understandably reluctant to believe that the acknowledgement that an Act might conflict with the guarantees of the Charter would result in drawing the public's attention to the status of the Charter. If the Quebec way of overriding the Charter was decided to be legal then it would illustrate how easily the guarantees of a Bill of Rights could be rendered ineffective if a government chose to invoke the legislative override provisions.

What purpose do these legislative override provisions serve?

Generally, it can be said that they allow a legislature to pass an Act if the legislature is determined to pass such an Act, but by setting out additional criteria in order for such an Act to be valid, they might go

toward ensuring that the legislature has considered some of the ways in which such an Act might conflict with the guarantees of a Bill of Rights. It is therefore unlikely that there will be a conflict between the judiciary and the legislature, where the judiciary refuses to allow certain legislation to be valid, even though an overwhelming majority of a legislature might be in favour of such legislation. This might not be so for the Trinidadian version where the judiciary is invited to determine whether such provisions are reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. In some ways these clauses seem to be a reasonable way of allowing the judiciary to review the ways in which legislation might conflict with a constitutional Bill of Rights yet preventing the possibility of a democratically-elected legislature being thwarted in its initiatives by the judiciary. But the strategy employed by the Quebec Government to override the Canadian Charter of Rights seemed to diminish in a significant way the purpose of the Charter. Ideally, this way of invoking the legislative override provisions should be prohibited.

Provisions Allowing For Override By Legislation

Giving Effect to Directive Principles

Some Commonwealth countries include in their constitutions a list of directive principles. For some countries the directive principles are justiciable and provision is made that any legislation meant to give effect to them is to remain operative notwithstanding any inconsistency with the Bill of Rights. In the 1980 Guyana Constitution a chapter entitled 'Principles and Bases of the Political, Economic, and Social System' claims that 'the State will revolutionise the national economy' and that such action is to be 'in accordance with the economic laws of socialism on the

foundation of socialist relations of production and development of the production forces.'¹ These principles amongst other things allow for a right to work and a right to leisure.² One section in the chapter notes that 'It is the duty of Parliament, the Government, the courts and all other public agencies to be guided in the discharge of their functions by the principles set out in this Chapter, and Parliament may provide for any of those principles to be enforceable in any court or tribunal.'³

The Indian Constitution, is particularly illustrative of this kind of qualification. Originally the directive principles contained in that constitution were non-justiciable. Then in 1971 the Constitution (Twenty-fifth Amendment) Act was passed that allowed for some laws to be exempt from the purview of the Bill of Rights if such laws were meant to give effect to the directive principles regarding the abuses of property and the economic system derived from it.⁴ Then in 1976 the Constitution (Forty-second Amendment) Act extended such exemption to all laws meant to give effect to any of the directive principles. Commenting on this last amendment one distinguished scholar observed that 'the play of the Fundamental Rights has been reduced to a pitiable minimum, and one of the

1. Guyana Constitution, sec.15.

2. Ibid., sections 22 and 23.

3. Ibid., sec. 39.

4. See section 31C. The relevant section of the directive principles notes that the government should strive to ensure 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good', (Article 39(b)) and 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.' (Article 39(c)).

essential foundations of democracy has been devalued, if not 'degenerated'.¹

The Indian Supreme Court has examined the validity of these amendments. In Minerva Mills Ltd. v. Union of India¹ it was declared that the amendment exempting from the purview of the Bill of Rights, laws giving effect to any of the directive principles was unconstitutional. But a different view was taken in a recent judgement offered by the Court. In Sanjeev Coke Manufacturing Company v. M/S Bharat Coking Coal Ltd.² the Court considered Acts passed during the early nineteen seventies that provided for the taking over of certain coke oven plants. One of these Acts³ was challenged. It was claimed that because some coke oven plants that were in the same position had not been taken over, this constituted discrimination. The Government's position was that the provisions of the relevant Act were exempt from such a challenge because of the amendment discussed above, though reasons were offered anyhow as to why certain coke plants were not included. The Court noted that it had previously upheld the 1971 amendment (which was confined to laws meant to further only some of the directive principles) and had struck down the part of the second amendment that allowed laws giving effect to any of the directive principles to come within the ambit of the qualification. In this case the Acts in question had been passed before the second, more far reaching amendment. Nonetheless the Court did express misgivings about the Minerva Mills

1. Basu, op.cit., p.123.

2. A.I.R. 1980 Supreme Court 1789.

3. A.I.R. 1983 Supreme Court 239.

4. The Coking Coal Miners (Nationalisation) Act, 1972.

decision which declared that the second amendment was unconstitutional. It decided to uphold the validity of the Act in question. But the Court also went on to say that the amendment 'does not give protection to a law which has merely some remote or tenuous connection with a Directive Principle. What is necessary is that there must be a real and substantial connection and the dominant object of the law must be to give effect to the Directive Principle, and that is a matter which the Court would have to decide before any claim for protection under the amended Article 31-C can be allowed....'¹ One sees, then, that unlike the provisions of a general legislative override clause, such as the Canadian one, which can allow a legislature to override the Bill of Rights because certain procedural requirements are fulfilled irrespective of their substantive merit, this kind of qualification can still leave it to the courts to determine the relevance of any laws brought into question.²

The Nigerian Constitution includes a chapter entitled 'Fundamental Objectives and Directive Principles of State Policy.' A section in that chapter states that 'It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe, and apply the provisions of this Chapter of this Constitution.'³ Amongst other things the authorities are meant to 'encourage intermarriage among persons from

1. Ibid., 239 at p.249.

2. The 1971 amendments had in fact included a phrase stating that 'no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy', but such a clause was found to be invalid in Kesavananda Bharati v. State of Kerala A.I.R.1973 Supreme Court 1461.

3. Nigeria Constitution, 1979, sec. 13.

different places of origin, or of different religious, ethnic or linguistic association or 'ties', to prevent the 'exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community' and 'to promote African Unity, as well as total political, economic, social and cultural liberation of Africa....',¹

Provisions That Some Actions By the Authorities Are

Beyond the Purview of the Bill of Rights

As has been seen it is possible to qualify a Bill of Rights by rendering legislative Acts non-justiciable in relation to the Bill of Rights. Another way in which a Bill of Rights can be qualified is by recognition that some actions by the authorities cannot be challenged on the basis of guaranteed rights. Such recognition can be an acknowledgement of the discretionary powers enjoyed by certain officials, for example the Head of State, or it can take the form of an explicit provision exempting some executive decisions from the purview of the Bill of Rights.

Many Commonwealth constitutions explicitly state that the actions of certain commissions are non-justiciable. Given the kind of matters that such commissions usually deal with, such stipulations can be viewed as another kind of qualification of a Bill of Rights. For example, a part of the Malta Constitution reads as follows:

The question whether

- (a) The Public Service Commission has validly performed any function vested in it by or under the Constitution;
- (b) any member of the Public Service Commission or any public officer, or other authority has validly performed any function delegated to each member, public officer or authority in pursuance of the provisions of subsection (1) of section 113 of this Constitution; or

1. See Ibid., sections 15(3), 17(d) and 19.

(c) any member of the Public Service Commission or any public officer or other authority has validly performed any function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding paragraph, shall not be enquired into any court. 1

The Jamaican Constitution includes a similar provision² as does the 1980 Guyana Constitution.³ The analogous section in the Sierra Leone Constitution renders the official action of 'any Commission or Council, established by this Constitution' non-justiciable.⁴ In Trinidad and Tobago, similar provisions are made for the Public Service Commissions, the Police Service Commission, and the Teaching Service Commission.⁵ There have been various cases involving interpretation of such clauses. The Jamaican Supreme Court, for example, has declined to hear an application to review a recommendation of the Police Commissioner that an official be demoted.⁶ A similar issue was later considered by the House of Lords: in Anisminic Ltd. v. Foreign Compensation Commission their Lordships declined to exclude the courts from a case where the jurisdiction of a tribunal had been misinterpreted.⁷ But in a recent case originating in

1. Malta Constitution, sec. 118.

2. S.I. 1962/1550, sec.136.

3. Guyana Constitution, sec. 226(6). The Guyana Independence Constitution (S.I. 1966/575) was unclear in this matter in that one section seemed to render a commission's actions non-justiciable, yet another did not. The 1980 Constitution, however, gave superior status to the section outlining non-justiciability. The point is discussed by Dale, op.cit., pp.156-157.

4. Sierra Leone Constitution, sec. 149.

5. Trinidad and Tobago Constitution, sec. 129(3).

6. Re Fisher 9 W.I.R. 465.

7. [1969] 2A.C. 147; [1969] 1A11 ER 208. It should be remembered that in this case it was not a section of a written constitution that is being considered.

then the court should be able to inquire into an order of the commission. A similar issue arose in Harikisoon v. Attorney General of Trinidad and Tobago,¹ a recent case that originated in Trinidad and Tobago. The Judicial Committee considered and confirmed the status of a clause excluding judicial review in the Constitution and decided that a decision of a Teaching Commission could not be the subject of review by the court. In his decision Lord Diplock made reference to Anisminic, but he contended that the circumstances in that case were very different in that the ouster clause under consideration was part of the Constitution unlike Anisminic where it was an Act of Parliament that had been brought into question.² Interestingly Lord Diplock was one of the Court of Appeal judges whose decision was overturned by the House of Lords in Anisminic. The difference between the two cases as explained by Lord Diplock is no minor one of course; nevertheless the decision of the Judicial Committee in Harikisoon does not really offer enough of an explanation as to why the arguments advanced by the House of Lords in Anisminic were not relevant. Even if one allows for the different status accorded a constitutional provision as confirmed with an Act of Parliament, there is still no obvious reason why the arguments allowing the court to review the tribunal's decision could not apply in Harikisoon as they had in Anisminic.

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1. Harikisoon v. Attorney-General of Trinidad and Tobago [1980] A.C. 265.
 2. Ibid. at 272.

Provisions For Emergency Measures

Another qualification or restriction on the operation of a Bill of Rights is one that allows for the derogation from the guarantees during times of emergency. The constitutional provisions allowing for declarations of emergencies are certainly more than simply paragraphs for academic consideration. In recent years states of emergency have been declared in several Commonwealth countries. These include India, Malaysia, Sri Lanka, Kenya, Sierra Leone, Zambia, Zimbabwe, Jamaica, and Canada.

Virtually every Commonwealth Bill of Rights can be overridden in times of emergency. The relevant section in the Belize Constitution is in many ways typical of the provisions in the Bills of Rights derived from the same model and reads as follows:

18.(1)I. this Chapter 'period of public emergency' means any period during which -

- (a) Belize is engaged in any war; or
- (b) there is in force a proclamation by the Governor-General declaring that a state of emergency exists; or
- (c) there is in force a resolution of the National Assembly declaring that democratic institutions in Belize are threatened by subversion.

(2) The Governor-General may by proclamation which shall be published in the Gazette, declare that a state of public emergency exists for the purposes of this Chapter.

(3) A proclamation made by the Governor-General under subsection (2) of this section shall not be effective unless it contains a declaration that the Governor-General is satisfied -

- (a) that a state of war between Belize and another State is imminent or that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other similar calamity; or
- (b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life.

(4) A proclamation made under subsection (2) of this section may be made so as to apply only to such part of Belize as may be specified in the proclamation (in this subsection called 'emergency area'), in which case regulations made under subsection (9) of this section shall except as otherwise expressly provided in such regulations have effect only in the emergency area.

(5) A proclamation made by the Governor-General for the purposes of and in accordance with this section -

(a) shall, unless previously revoked, remain in force for a period not exceeding one month;

(b) may be extended from time to time by a resolution passed by the National Assembly for further periods, not exceeding in respect of each extension a period of twelve months; and

(c) may be revoked at any time by a resolution of the National Assembly.

(6) A resolution of the National Assembly passed for the purposes of subsection (1) (c) of this section shall remain in force for two months or such shorter period as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding two months from the date of the resolution effecting the extension; and any such resolution may be revoked at any time by a further resolution.

(7) A resolution of the National Assembly for the purposes of subsection (1)(c) of this section, and a resolution of the National Assembly extending or revoking any such resolution, shall not be passed unless it is supported by the votes of two-thirds of the members of the House of Representatives present and voting.

(8) Any provision of this section that a proclamation or resolution shall lapse or cease to be in force at any particular time is without prejudice to the making of a further such proclamation or resolution whether before or after that time.

(9) During any period of public emergency the following provisions shall have effect -

(a) the Governor-General may make such regulations as are necessary or expedient for securing public safety, the defence of Belize, the maintenance of public order and the suppression of meeting, rebellion and riot, and for maintaining supplies and services essential to the life of the community;

(b) any such regulations may empower such authorities or person as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorised by this subsection to be made and may contain such incidental and supplementary provisions as are necessary or expedient for the purposes of the regulations;

(c) any such regulations or any order or rule made in pursuance of such regulations may amend or suspend the operation of any law and shall have effect notwithstanding anything inconsistent therewith contained in any law;

(d) in this subsection, 'law' does not include this Constitution or any provision thereof or any law that alters this Constitution or any provision thereof.

(10) Nothing contained in or done under the authority of any law (including any regulations made under subsection (9) of this section) shall be held to be inconsistent with or in contravention of [sections dealing with liberty, protection of law, slavery and forced labour, arbitrary search and entry, movement, expression, assembly and association, privacy; work, discrimination, deprivation of property; not included are the guarantees regarding life, inhuman treatment, and conscience] to the extent that the law in question makes in relation to any period of public emergency provision, or authorises the doing during any such period of anything, that is reasonably justifiable in the circumstances of any situation arising or existing during¹ the period for the purpose of dealing with that situation.

Following this section there are provisions outlining the rights of a person detained under emergency laws for example the right to have his case reviewed by a tribunal after a certain period.²

It should be noted that there are some noteworthy differences in the design of the analogous provisions in the other Commonwealth constitutions. A few constitutions include threats to the economic life of the country as sufficient criteria for the introduction of emergency measures that

1. S.I. 1981/1107 sec.18. The wording is different to varying degrees in the other Bills of Rights. Many of them use phraseology that bears some resemblance to the UK Emergency Powers Act 1920.

2. Ibid., sec. 19.

might impinge upon the guarantees outlined in the Bill of Rights.¹ Many of those constitutions specifically outline which rights can be overridden, and it is not always the same rights, though the guarantees of liberty and non-discrimination are ones that are usually identified as possibilities.² There are also differences in the procedures for declaring a state of emergency, for example in the legislative majority required to approve such measures, or the length of time that lapses before such a confirmation must be renewed. Many Commonwealth constitutions allow for a simple majority of the legislature to approve a declaration of emergency. Typically, provision is made for the Head of State (or the Governor-General) to make such a declaration though usually it has to be approved by the legislature within a specified time. But several countries require special majorities in order for such provisions to take effect. For example, in Sierra Leone, the Solomon Islands, St. Christopher and Nevis, Vanuatu, Nigeria, Malta, Mauritius, India, and Guyana a two-thirds majority is required. In Trinidad and Tobago only a simple majority is required but if the state of emergency is to be extended beyond six months then a three-fifths majority is needed. In Barbados a simple majority suffices if the House of Assembly is simply approving a resolution of the Head of State, but if the resolution originates in the House of Assembly then a two-thirds majority is required.

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1. Examples include the constitutions of Singapore, Malaysia, and Western Samoa.
 2. Many of the Bills of Rights allow for other guarantees to be overridden as well, for example guarantees against forced labour, freedom of movement, and privacy of the home and property.

The analogous provisions in the Indian Constitution have proven to be controversial in recent years. In 1975 Prime Minister Gandhi issued a proclamation of emergency and ordered the arrest of several hundred of her political adversaries. Legal challenges to this action included cases involving questions of habeas corpus. In 1976 the Indian Supreme Court reversed decisions of lower courts and decided that those people arrested under the Maintenance of Internal Security Act could not seek relief by the form of habeas corpus proceedings. The Court held that the Presidential order that had suspended the fundamental rights was constitutionally valid.¹

A 1981 amendment to the Malaysian Constitution states that the Yang di-Pertuan Agong's (the Supreme Head of the Federation) decision to declare a state of emergency 'shall not be challenged or called in question in any court on any ground' and that no court has the right to hear a case regarding the validity of such a proclamation.²

It seems reasonable that provisions be made for states of emergency which might result in official actions that could be contrary to a Bill of Rights. The obvious problem, however, is whether such provisions are likely to be abused by the legislature. It could be argued that the legislature should be assumed to act in a responsible way as to not invoke emergency provisions unnecessarily. Unfortunately, experience does not provide such encouragement for this point of view. Canada, for example, is considered to have a history of respecting legal traditions, yet the

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1. The issue is discussed at length by Seervai, op.cit., pp.1020-1048 who concentrates on the case A.D.M. Jahalpur v. Shivkant Shuk la (A.I.R.1975 Supreme Court 1207).
 2. Malaysian Constitution, sec.150(8).

decision of the Government in 1972 to take advantage of the War Measures Act prompted much criticism and it was charged that the Government had abused the purposes of that Act. A government should not be hindered by a Bill of Rights when trying to confront the problems of an emergency, but perhaps it seems reasonable to allow another body to determine how long a time a state of emergency should last, and to be able to recompense affected parties if it is judged that the authorities did not act in good faith.

Amendment of a Bill of Rights

Having reviewed some of the qualifications that can restrict the operation of a Bill of Rights we must also consider another way in which the guarantees of a Bill of Rights can be inhibited: namely by way of amending the Bill of Rights itself.

Most Commonwealth Bills of Rights are subject to amendment through a legislative process, though approximately one quarter of them require referendums to take place as well. There are, however, some interesting exceptions. The 1960 Cyprus Constitution stated that the articles protecting fundamental liberties 'cannot, in any way, be amended, whether by way of variation, addition or repeal.'¹ To borrow Lord Bryce's terminology, this is an extreme example of an inflexible part of a Constitution. Such extreme assuredness on the part of the designers of the Cypriot Constitution may partly explain why that Constitution does not enjoy widespread recognition or support. The Zimbabwe Constitution

1. Cmnd. 1093, (1960) Art. 182(1). It is interesting to note that an advisor to the Greek Cypriot side during recent constitutional negotiations described such an amendment (or non-amendment) formula as 'crazy'. Claire Palley, interview 26 January 1985.

stipulates that any amendments affecting basic rights that are proposed within ten years of the appointed day must have the support of two-thirds of the Senate and unanimous support in the House of Assembly; and that amendment clause can only be amended in the same way.¹

Of the Commonwealth Bills of Rights that can be amended without a referendum, typically a special majority is required. The most typical special majority required is two-thirds, though there are a number of examples where three-quarters support of the legislative is needed in order to amend the part of the constitution containing the Bill of Rights. The Papua New Guinea Constitution allows for some parts of the Bill of Rights to be amended by two-thirds of the National Parliament whereas other provisions can only be changed with a three-quarters majority. The Guyana Constitution also allows for different rights to be amended in different ways: for the so-called social and economic rights only a majority of the National Assembly's support is needed whereas the other rights can be amended by either a two thirds majority of the National Assembly or by a majority vote there followed by a majority vote in a referendum. Of the other constitutions that require referendums in order to amend the Bill of Rights, some require a special majority in the referendum, whereas for others a simple majority will suffice.

It should be noted that the use of amendment procedures as a kind of entrenching device need not rely only on special majorities or referendums, but can also involve the timing of such changes in a way that will make it more difficult for subsequent changes to take effect. Many Commonwealth constitutions, for example, specify that a number of weeks must pass

1. S.I. 1979/1600, sec.52.

between the different stages in the reading of a bill to amend part of the constitution. If nothing else this probably reduces the possibility of impetuous proposals.

There are some interesting examples of a constitution being amended so that legislation that might otherwise conflict with the Bill of Rights would be able to remain valid. In Guyana the Government realised that the guarantees regarding deprivation of property could make nationalisation of the country's bauxite industry difficult to accomplish. The Bill of Rights included in the Independence Constitution had required that 'prompt' and 'adequate' compensation be paid for any property expropriated. Accordingly a 1971 amendment to the Bill of Rights was made solely to allow the nationalisation of the bauxite industry.¹ After this amendment compensation needed only to be 'reasonable'. Then in 1975 a further amendment extended such criteria to all kinds of property expropriated. The amendment stated that any law taking away property must provide for compensation and that 'no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.'²

The question of in what ways the Indian Bill of Rights can be amended has been considered by the Indian courts. In 1951 the Indian Supreme Court had ruled that the Constitution (First Amendment) Act 1951 was valid and that Parliament had the right to amend all provisions of the Constitution, including the fundamental rights sections, provided that the requirements

1. Further discussion on the amendments to the Guyana guarantees regarding property is found in Francis Alexis, Changing Caribbean Constitutions (Bridgetown, Barbados Antilles 1983), pp.162-168.
2. Constitution (Amendment) Act, 1975.

of the Article outlining the amending procedure were adhered to.¹ Then in Golak Nath v. State of Punjab² the Court declared that Parliament could not further amend the Fundamental Rights sections of the Constitution. But in Kesavaranda Bharati v. State of Kerala³ the Court decided that fundamental rights could be amended, but that such amendments could not destroy the basic structure of the Constitution.

As we have seen many Commonwealth constitutions stipulate that the amending process must follow a certain timing which in effect makes such amendment less likely. This does not, however, necessarily prevent a legislature from trying to change the constitution as is evident from a case heard by the Judicial Committee in 1969.⁴ The Independence Constitution for Sierra Leone had laid down that any amendment to the Constitution, including the Bill of Rights guarantee against discrimination, had to be passed in two successive sessions with Parliament being dissolved in the interim. In 1962 the legislature of Sierra Leone passed a law limiting citizenship to persons of 'Negro African descent'.⁵ The law was challenged by someone who under the Independence Constitution was a citizen but who would lose his citizenship status under the new Act. The Act was not reported as being passed by a special majority and was thus questioned. The legislature then passed another Act with the appropriate majority in

1. Shankari Prasad v. Union of India A.I.R. 1951 Supreme Court 458.

2. A.I.R. 1967 Supreme Court 1643.

3. A.I.R. 1973 Supreme Court 1461. For discussion of the way this case has been applied see Seervai, Constitutional Law of India 3rd edn., (London, Sweet and Maxwell, 1984), ii. Chapter XXX.

4. Akar v. Attorney General of Sierra Leone [1970] A.C.853; [1969] 3All ER 384.

5. Constitution (Amendment) (No.2) Act 1962.

the prescribed way.¹ When the Judicial Committee heard the case the majority held that Act to be unconstitutional because in its drafting it made reference to provisions of the first Act, an Act that the Judicial Committee had already decided to be unconstitutional. The second Act, then, though enacted by the prescribed method, was rendered 'meaningless'.² It would seem that if the draftsmen had designed the second Act so as not to make reference to the first the decision might well have been different. An interesting dissent was offered by Lord Guest who pointed to the qualifying clauses 'reasonably justified' and 'special circumstances'. He argued that for any democracy to be concerned with questions of citizenship was 'reasonably justified'. He went on to add that 'Parliament speaks only through the provision of the statute book. The courts cannot go behind the scenes and enquire what were the motives or policy behind a particular piece of legislation.'³ Thus, the courts should be hesitant to assume that the legislature's actions were not valid because of the clause outlining the amendment procedures. Accordingly, he thought that the first Act - even though it may not have passed by the amendment procedure - should have been held to be constitutional.

With all due respect, Lord Guest's judgement is encouraging in at least one way, namely that it was a minority point of view. Lord Guest presumed that for a government to be concerned with citizenship was reasonably justifiable. On the basis of this presumption he then concluded

1. Constitution (Amendment) (No.3) Act 1962.

2. [1970] A.C.853 at 870.

3. Ibid., [1969] 3 All ER 384 at 394.

that any concern with citizenship must be reasonably justifiable, the logic of such a conclusion being quite dubious. He noted that the courts cannot inquire into the motives of any piece of legislation. But no one expects the courts to conduct such an inquiry; rather it is expected that the courts will simply consider the constitutionality of the Act in question. It is encouraging that not all judges on the Judicial Committee have adopted Lord Guest's reasoning, otherwise the amendment provisions for many Commonwealth constitutions could be rendered meaningless.

It is interesting to note that the possibility of amendments serving as qualifications on Bills of Rights has been noted during constitutional negotiations,¹ and as the above examples illustrate, legislatures have been willing to amend constitutions in order to alter a Bill of Rights.

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1. Professor Y. Ghai who has served as a constitutional advisor for various Commonwealth countries recalls that during one set of negotiations a Foreign and Commonwealth Office official tried to persuade a representative of a soon-to-be-independent country to accept a certain provision as it could always be amended afterwards. Ghai advised against accepting such an argument because he did not believe a constitution should be immediately amended after its enactment and also because subsequent changes could be very conspicuous; (interview with Professor Y. Ghai 17 January 1985). As noted in the previous chapter a similar kind of strategy was employed in the independence negotiations for Malawi. According to President Banda the U.K. Secretary of State, Mr. Butler, was reminded that the Constitution's guarantees could be amended after independence and that Mr. Butler replied 'I know that the minute you are independent you are going to amend your Constitution - but we are thinking of the present time - it's all right'. Official Report of the Proceedings of the Parliament of Malawi, 29 October 1964, pp.222,223. But according to Anthony Rushford who as an official in the Foreign and Commonwealth Office participated in many constitutional conferences, the intention was that the guarantees would remain in effect. According to Rushford, the British representatives did not hint at the possibility of subsequent amendments as a way of achieving an agreement; (interview 9 May 1985).

CHAPTER 4

GUARANTEES OF EXPRESSION, ASSEMBLY AND ASSOCIATION,
CONSCIENCE AND NON-DISCRIMINATION

There are a variety of rights that can be included in Bills of Rights. Attention will now be given to the guarantees affirming rights of expression, conscience, assembly and association, and the guarantees prohibiting discrimination.

Guarantees of Expression

It is probably not surprising to learn that all Commonwealth Bills of Rights include guarantees providing for freedom of expression. This is one of the kinds of freedoms that people typically think of when they refer to a Bill of Rights. The First Amendment to the American Constitution is rivalled only by the Fifth in being the best-known article of the American Bill of Rights. But unlike the unqualified American command that 'Congress shall make no law abridging the freedom of speech', most Commonwealth constitutions allow for some kind of limitation on any right to free expression. For example, the European Convention which is a progenitor of many of the Commonwealth Bills of Rights has its free expression clause followed by a paragraph limiting that freedom.¹

1. Article 10 of the European Convention reads as follows:

'1. Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive or impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

2. The exercise of those freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of disorder or crime for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The freedom of expression guarantee contained in the 1981 Belize Independence Constitution is typical of the analogous provisions of several Commonwealth Bills of Rights.¹ The article reads as follows:

12.(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to communicate ideas and information without interference (whether the communication be made to the public generally or to any person or class or persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision -

(a) that is required in the interests of defence, public safety, public order, public morality, or public health;

(b) that is required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the administration or the technical operations of telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or

1. At the time of writing the other Commonwealth constitutions that include a section with identical or very similar wording are as follows: Sierra Leone, Bermuda, Malta, Zimbabwe, Guyana, Anguilla, Turk and Caicos Islands, Gibraltar, Zambia, Uganda, Tuvalu, Solomon Islands, St. Vincent, St. Lucia, St. Christopher and Nevis, Mauritius, Kiribati, Kenya, Fiji, Gambia, Dominica, Botswana, Bahamas, Jamaica and Barbados.

(c) that imposes restrictions on officers in the public service that are required for the proper performance of their functions.

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Of the Bills of Rights that are derived from the same model, there are some differences worth noting. The comparable guarantee in the Antiguan Bill of Rights is virtually identical except that included at the end of the limitation are the words 'and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'² Many of the other Bills of Rights derived from the same model include such a phrase as part of the limitation.³ These added words are perhaps best described as an elaboration of the limitation. Of what significance are they? As referred to in Chapter Three it would seem that such an elaboration serves to check the use of the limitation in that any actions taken in the spirit of the limitation must be 'reasonably justifiable in a democratic society'. But as the phrase refers to the possibility of something being shown 'not to be reasonably justifiable' this appears to shift the burden of proving whether justified or not from the state authorities.⁴

1. S.I. 1981/1107, sec. 12.

2. S.I. 1981/1106, sec. 12.

3. All the Bills of Rights that include freedom of expression guarantees similar to the Belize one include a qualifier similar to the Antiguan one, except for those of Barbados, Jamaica, and Guyana which are like Belize in that they omit the added qualifying phrase.

4. For further discussion of the Antiguan limitation see Margaret Demerieux, 'The Deliniation of the Right to Freedom of Expression', Public Law, (1980) 359-366.

The Sierra Leone Bill of Rights contains a similar qualifier, though it also allows for measures 'safeguarding the proper functioning of the Recognized Party.'¹ Malta's guarantee of free expression is prefaced by a qualifying 'Except with his own consent or by way of parental discipline....'² The Guyana Consitution recognises the possibility of a measure 'that imposes restrictions upon public officers or officers of any corporate body established on behalf of the Government of Guyana'.³ The Cypriot Constitution explicitly prohibits seizure of newspapers or other printed matter, unless written permission is given by the Attorney-General of the Republic and is confirmed by a competent court within seventy-two hours.⁴ The relevant Nigerian guarantee notes that 'no person, other than the Government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.'⁵

Of the Bills of Rights not derived from the same model as Belize's, the freedom of expression guarantee of the Malaysian Constitution is particularly interesting because of its wide-ranging limitation. The

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1. The Sierra Leone Constitution, 1978, sec. 15 (2)(a)(ii).
 2. Malta Constitution, sec. 42.
 3. Guyana Constitution, sec. 146.
 4. Cyprus Constitution, Cmd. 1093, (1960) Art. 19(4). The section is followed by a provision that allows the Republic to license sound and vision broadcasting or cinema enterprises.
 5. Nigeria Constitution, 1979, sec. 36(2).

relevant section also includes the guarantee and association and reads as follows:

10.(1) Subject to (2), (3) and (4) -

- (a) every citizen has the right to freedom of speech and expression;
- (b) all citizens have the right to assemble peaceably and without arms;
- (c) all citizens have the right to form associations.

(2) Parliament may by law impose -

- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
- (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
- (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2).

(a) Parliament may pass law (sic) prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of [the sections of the Constitution dealing with language, quotas safeguarding Malays, citizenship, ruler sovereignty] otherwise than in relation to the implementation thereof as may be specified in such law.¹

It will be seen that Parliament has the right to impose restrictions

1. Malaysia Constitution, sec.10.

it deems necessary for purposes which are very general. Another section of the Constitution renders the question of Parliament's intentions non-justiciable. It notes that:

(2) The validity of any law shall not be questioned on the ground that...

(b) it imposes such restrictions as are mentioned in [the limitation of the guarantee of expression, assembly, and association] but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

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Thus, there is not much opportunity to check Parliament's adherence to this guarantee.

There have been a variety of judicial interpretations of Commonwealth guarantees of free expression. In an early ruling on the Bill of Rights included in the Nigerian Independence Constitution, the Nigerian Federal Supreme Court held that a pamphlet attacking the authorities could be prevented from being distributed because it was restrained by a valid section of the criminal code dealing with sedition. The Court did acknowledge the qualifying phrase 'justifiable in a democratic society', warned against it being interpreted in too narrow a way, and pronounced the Court to be the fit arbiter of whether or not a particular law is reasonably justifiable.² The Court also ruled that truth was no defence to

1. Ibid., sec. 4(2)(b).

2. Director of Public Prosecutions v. Obi [1961] 1 All N.L.R. 186. The Court suggested that the way to discover whether a provision was 'reasonably justifiable in a democratic society' was to consider whether the statute had been enacted by a democratic legislature. Similar reasoning was invoked in Lord Guest's minority decision in Akar v. Attorney-General of Sierra Leone which was noted in Chapter Three.

a charge of sedition. In a recent case that also dealt with truthfulness of statements the Supreme Court of Cyprus claimed that the freedom of expression guarantees found in the Cypriot Constitution could extend to both truthful and false statements.¹

The Judicial Committee has ruled that a requirement that police permission be obtained before using a loudspeaker was valid notwithstanding a constitutionally-guaranteed freedom of expression.² But this does not mean that all executive discretions are beyond the purview of the Bill of Rights. In Olivier v. Buttigieg³ the Committee decided that the Chief Government Medical Officer in Malta had violated the guarantees of free expression when he issued a circular meant to prohibit the distribution in state hospitals of a newspaper that was published by an opposition party and condemned by the Archbishop.

There have also been cases dealing with a government's right to regulate newspapers. The Indian Supreme Court has decided that the Indian Government could not regulate the number of pages in a newspaper.⁴ In the same case the Court ruled that a corporation is entitled to the guarantees

1. Police v. Ekodotiki (1982) 2CLR 63.

2. Francis v. Chief of Police [1973] 2 All ER 251. The American Supreme Court has considered similar questions. In Saia v. New York it concluded that a permit for a loudspeaker should be issued in accordance with 'narrow' guidelines and not be simply left to the discretion of the prescribed authority; but in Kovacs v. Cooper (335 U.S. 77(1949)) the Court upheld an ordinance which prohibited 'loud and raucous noises', declaring that 'loud and raucous' was a clear enough definition of the crime.

3. [1967] 1A.C. 115.

4. Bennett Coleman and Co. Ltd. v. Union of India A.I.R. 1973 Supreme Court 106.

of free expression. But the Court agreed that it would be legal for the Government to regulate the importation of newsprint. The Supreme Court of Guyana has more recently confirmed that the government's regulation of the importing of newsprint does not violate the free expression guarantee contained in the Constitution.¹ The Judicial Committee has ruled that Antiguan Acts requiring newspapers to pay for a licence and to deposit money as a security against libel action was not contrary to the Bill of Rights. In reading the judgement Lord Fraser noted that 'Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required....'² In the same case the Committee overturned a decision of the West Indies Associated Court and ruled that a corporation does have a right to enjoy the constitutional guarantees of free expression.

There have been cases where United Kingdom actions have been challenged in light of the European Convention guarantee of free expression. In a case that attracted much attention, the European Court of Human Rights (by 11 to 9) ruled that an injunction preventing The Sunday Times from commenting on current litigation was a violation of the Convention's guarantee of free expression.³ But there have also been

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1. Hope and Attorney-General v. New Guyana Co. and Teekah [1979] 26 W.I.R. 233.
 2. Attorney-General v. Antigua Times Ltd [1975] 3 All ER81 at 90. The Acts under consideration were the Newspapers Registration (Amendment) Act 1971 and the Newspaper Surety Ordinance (Amendment) Act 1971.
 3. Sunday Times Case , Publications of the European Court of Human Rights, Series A, no.30; 2 E.H.R.R.245.

decisions that have upheld the right of the British Government to regulate the freedom of expression. In Handyside v. United Kingdom¹ it was decided that the seizure of copies of a book, as provided for by the Obscene Publications Acts 1959 and 1964 was not contrary to the Convention. In Arrowsmith v. United Kingdom² the European Commission of Human Rights found that a conviction under the Incitement to Disaffection Act was not contrary to the Convention. The applicant had been charged with distributing leaflets at an army camp, leaflets that encouraged the soldiers to desert or refuse to obey orders if they were posted to Northern Ireland. It should be remembered, however, that as previously noted decisions of the European Court of Human Rights or of the European Commission of Human Rights, does not directly change the law of the United Kingdom.

Guarantees of Assembly and Association

Almost every Commonwealth Bill of Rights includes a guarantee protecting a person's rights of assembly and association. The only exception is the Tongan Bill of Rights.

The relevant guarantee contained in the 1981 Belize Bill of Rights is typical of many and reads as follows:

13. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interest or to form or belong to political parties or other political associations.

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1. Publications of the European Court of Human Rights, Series A, No.24; 1E.H.R.R.737.
 2. 3 E.H.R.R.218.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision -

(a) that is required in the interests of defence, public safety, public order, public morality or public health;

(b) that is required for the purpose of protecting the rights or freedoms of other persons;

(c) that imposes restrictions on officers in the public service that are required for the proper performance of their functions;

(d) that is required to prohibit any association the membership which is restricted on grounds of race or colour.

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Of the other Bills of Rights that are derived from the same model there are various differences. There are only a few other Bills of Rights derived from the same model that similar to the Belize provisions explicitly guarantee the right to form or belong to a political party; several of the other Bills of Rights derived from the same model do not. Indeed some of the constitutions include provisions stating that the country is to operate under a one-party system, provisions that seem not so much to attach reasonable limits on the guarantees of association, but

1. S.I. 1981/1107, sec. 13.

rather blatantly to contradict the intention of such guarantees.¹

Most of the Bills of Rights derived from the same model as Belize's include a provision for the right to join a trade union, though Kiribati is an exception.

There are some noteworthy differences in the way that the clauses of limitation are drafted. As with some of the limitations on the freedom of expression guarantees, the provisions that can limit some of the assembly and association guarantees are followed by the phrase 'and except so far as that provision, or, as the case may be, the thing done under the

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1. Bills of Rights that are derived from the same model and whose freedom of association guarantees do not expressly extend to political parties include those of Antigua, Botswana, Dominica, Fiji, Gambia, Jamaica, Kiribati, Malta, St. Vincent, Uganda, Gibraltar, Anguilla, and Cyprus. Examples of countries where provision is made for a one-party state are Kenya, Sierra Leone, and Zambia. In Uganda provision is made 'for the regulation and control of the formation, management and operation of political parties.' (Uganda Constitution, sec. 18(2)(g)). The 1979 Nigerian Constitution allowed for freedom of association in regard to political parties but the Constitution (Suspension and Modification) Decree of 1984 did not include references to political parties in its assembly and association guarantee.

Since 1973 the Zambian Constitution has included provisions for a one-party state. Prior to such provisions being enacted, it had been announced that the Government was setting up a Commission in order to explore the ways of setting up a one-party state. A case was heard where it was alleged that the setting up of such a Commission contravened the guarantee of assembly and association. The Court declared that under the circumstances it could not rule on the constitutionality of legislation not yet introduced. The decision of the Court did note, however, that 'it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impart whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole'; (Nkumbula v. Attorney-General (1972) Z.R.265.

authority thereof is shown not to be reasonably justifiable in a democratic society.'¹

An interesting difference in drafting is to be found in the relevant part of the Anguilla Bill of Rights. It reads:

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision [for various limitations]

Provided that ... (ii) the provision or, as the case may be, the thing done under the authority of any such law is shown to be reasonably justifiable in a democratic society.

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It will be noticed that this elaboration on the limitation requires proof that a measure is reasonably justifiable and differs from the kind of elaboration on the limitation clause of Antigua (already noted) which stipulates that an action taken in pursuance of such a limitation is to be considered valid unless it is proven not to be reasonably justifiable in a democratic society. As we have seen it can be argued that this implies a different burden of proof.³

There are a variety of other differences in regard to the limitations

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1. See, for example, the relevant provisions in the guarantees of Antigua, Bahamas, Botswana, Dominica, Fiji, Gambia, Kenya, Kiribati, Malta, St. Christopher and Nevis, St. Lucia, St. Vincent, Sierra Leone, the Solomon Islands, Tuvalu, Zambia, Zimbabwe, Bermuda, Gibraltar, and the Turk and Caicos Islands. Of the Bills of Rights that are derived from the same model, Barbados, Guyana, Jamaica, Uganda, and Nigeria are like Belize in not including such a phrase.
 2. S.I. 1982/334 sec. 12(3). Similar wording is used in the Anguilla limitation on the guarantee of free expression.
 3. According to Anthony Rushford, a former British official who participated in many constitutional conferences, the negative phraseology was typically used because it is easier to define what is not justifiable in a democratic society rather than what is; (interview 9 May 1985).

on the guarantees of assembly and association. The Guyana limitation allows for the introduction of a scheme 'that imposes an obligation on workers to become contributors to any industrial scheme or workers' organisation intended to work or provide for the benefit or welfare of such workers or of their fellow workers or of any relatives or dependents of any of them.'¹ In the Kenyan Bill of Rights the limitation allows

for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that any other trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought)...

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A similar provision is to be found in the Zambian guarantee, as well as in the Bill of Rights of Gibraltar.³

As has been noted the limitations on the Malta guarantee are not valid if 'the thing done under the authority thereof is shown not to be

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1. Guyana Constitution, sec. 147(d).
 2. Kenya Constitution, 1979, reprint (hereafter cited as Kenya Constitution), sec. 80(d). The provision has been in effect since 1966. Its adoption was partly the result of inter-union rivalry, a rivalry which the Government reacted to by disbanding two competing trade union groups and creating a new one that was more sympathetic to the Government's aims. For further discussion see Y.P. Ghai and J.P.B. McAuslan, Public Law and Political Change in Kenya (Nairobi, Oxford University Press, 1970) pp. 446-447.
 3. Zambia Constitution, sec. 23(2)(d) and S.I. 1969, Pt.II, p.3602 sec. 21(2)(d).

reasonably justifiable in a democratic society.' It goes on to explain that 'For the purposes of this section, any provision in any law prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages shall be held to be a provision which is not reasonably justifiable in a democratic society.'¹

Guarantees of association are not necessarily concerned with only the right to associate, but sometimes refer to the right not to associate. The 1960 Cypriot guarantee states that 'no person shall be compelled to join any association or to continue to be a member thereof.'² Similar provisions are found in the guarantees of Zimbabwe³ and Anguilla.⁴

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1. Malta Constitution, sec. 43(3).
 2. Cyprus Constitution, Cmd. 1093 (1960), Art. 21(2).
 3. S.I. 1979/1600, sec. 21(2).
 4. S.I. 1980/1953, sec. 12(2). Although the limitation on the guarantee of assembly and association allows for provisions 'for the purpose of protecting the rights or freedoms of other persons,' a subsequent clause states that that limitation shall not allow trade unions or other associations to prevent someone from pursuing a particular kind of employment unless such a provision is contained in a written law (sec 12(3)(b)(i)). Such a stipulation was probably meant to anticipate arguments that closed-shop regulations were an allowable limitation on the right not to associate since they were meant to protect someone else's rights. The European Court of Human Rights recently decided that trade union closed-shop agreements enforceable by dismissal infringed on the European Convention's guarantee of freedom of association. Although the majority of the Court declined to decide whether the assertion of a positive right of association implied a negative right not to associate, it did rule that British legislation requiring British Rail employees to join a union (a requirement that was not in force at the time that they were hired) violated the Convention; (see Young, James, and Webster v. United Kingdom. Publications of the European Court of Human Rights, Series A. No.44; 4E.H.R.R.38. It should be noted that other grounds were also cited in the case.) The Indian Supreme Court decided that a rule requiring every employee to join a 'recognised' or Government-sponsored association was unconstitutional because the freedom to belong to an association also implied the freedom not to belong. See O.K. Ghosh v. Joseph, A.I.R. 1962 Supreme Court 812 at 815-816; a similar decision had been reached by the Andhra Pradesh High Court in Sitharamacharya v. Senior Dy. Inspector A.I.R. 1958 Andhra Pradesh 78.

There have been a number of cases based or partly based on the guarantees of assembly and association. Not surprisingly, a number of these cases have dealt with the powers and prestige of trade unions. In Collymore v. Attorney-General¹ the Judicial Committee upheld a decision of the Trinidad and Tobago Court of Appeal that the Industrial Stabalisation Act 1965 of Trinidad and Tobago was not an infringement on the right of association. The Act provided for a system of compulsory arbitration. Their Lordships decided that the abridgement of the right to free collective bargaining and of the freedom to strike did not violate the freedom of association provision.

In Banton v. Alcoa Minerals² the Supreme Court of Jamaica ruled that the Jamaican guarantee of association did not mean that a worker had a right to be represented by the union of his choice. In the aftermath of a dispute as to which union would represent the workers at a particular worksite, Banton and others claimed to be represented by a different union from the one that the company recognised. The Court said that a worker's right to join a union did not imply a right to have that union represent him in negotiations with the company, nor did it impose upon the employer an obligation to recognise that union. Graham-Perkins, J. observed that:

...there is not a scintilla of evidence in this case that the plaintiffs, or any of them, have been hindered in the enjoyment of their freedom of association. There is not the vaguest suggestion that they, or any of them were in any way hindered in the exercise of their right to join or to belong to the union of their choice. No one sought to deny them, or any of them, that right, nor indeed, to interfere with its exercise. They were, at all material times, free to join any union they chose to join. 3

1. [1969] 2 All ER 1207; [1970] A.C.538.

2. [1971] 17 W.I.R. 275.

3. Ibid., at 289.

As previously noted there are some guarantees of association whose limitations allow for the requirement that trade unions be registered, and that such registration may be denied if it is decided that the representation afforded by the existing union is sufficient. The High Court of Kenya upheld that provision of the Kenyan limitation and also decided that the petitioning unions need not be made aware of the existing union objections.¹

In Guyana, a case regarding freedom of assembly is illustrative of how reluctant the judiciary can be in applying a Bill of Rights. The Guyana High Court decided that it was not an infringement of the guarantee of assembly and association if the police assault a person who is standing in the area where an unlawful public meeting had taken place. The Chief Justice held that the assault on the applicant was not aimed directly at hindering him in the enjoyment of the fundamental freedoms in question even though indirectly or consequently it was instrumental in having that effect and thus the assault, constitutionally, did not hinder the man in his enjoyment of those freedoms. For it to have been an infringement on the right of assembly the assault would have had to have been committed with the intention of hindering the man.²

1. Angaha and Others v. Registrar of Trade Unions [1973] E.A. 297.

2. Ramsan v. Lloyd Barker, Commissioner of Police and the Attorney-General of Guyana (1979) 6 CLB 808.

Freedom of Conscience and Religion

Virtually every Commonwealth constitution includes in its Bill of Rights provisions for freedom of conscience or religion.¹ The relevant guarantee in the 1981 Belize Bill of Rights which is typical of many reads as follows:

11. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, including freedom of thought and religion, freedom to change his religion or belief and freedom, either alone or in a community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice, and observance.
- (2) Except with his own consent (or, if he is a person under the age of eighteen years, the consent of his parent or guardian) a person attending any place of education, detained in any prison or corrective institution or serving in a naval, military or airforce shall not be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony, or observance relates to a religion which is not his own.
- (3) Every recognised religious community shall be entitled at its own expense to establish and maintain places of education and to manage any place of education which it maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided by that community whether or not it is receipt of a government subsidy or other form of financial assistance designed to meet in whole or in part the cost of such course of education.

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1. The one exception is the Constitution of Maldives. This exception is perhaps not too surprising considering that the Constitution begins with the words, 'In the Name of Allah...' and goes on to explain that 'Maldives is a composite, sovereign and fully-independent Islamic State;' (Maldives Constitution, 1975, preamble and article 2). It should be noted that although Australia does not have a Bill of Rights, section 116 of the Constitution reads as follows:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

It is interesting to note that for some countries there were doubts about the inclusion of guarantees of freedom of religion. According to Professor Y. Ghai, some South Pacific countries' representatives at constitutional conferences included priests who had doubts about such guarantees because they wanted to keep out competing sects; (interview 17 January 1985).

(4) A person shall not be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion; or

(c) for the purpose of regulating educational institutions in the interest of the persons who receive or may receive instruction in them.

(6) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly. 1

Similar to their limitations on the guarantees of free expression and assembly and association, many of the Bills of Rights derived from the same model elaborate the limitation on the freedom of conscience guarantee by adding on the phrase 'and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society'.²

The provisions of sub-section (2) of the Belize limitation are also somewhat different from most of the Bills of Rights derived from the same

1. S.I. 1981/1107, sec.11.

2. See, for example, the relevant provisions in the constitutions of Antigua, Botswana, the Bahamas, Dominica, Fiji, Gambia, Kenya, Kiribati, Malta, Mauritius, St. Christopher and Nevis, St. Lucia, St. Vincent, Sierra Leone, Tuvalu, Uganda, Zambia, Zimbabwe, Bermuda, Gibraltar, the Turk and Caicos Islands, Anguilla, and the Solomon Islands. For Gibraltar the added phrase does not apply to provisions similar to those outlined in subsection (2) of the Belize guarantee.

model. Whereas the protections afforded by that clause for Belize apply to 'a person attending any place of education, detained in any prison or corrective institution or serving in a naval, military or airforce' (sic), for most of the other guarantees derived from the same model the protection is limited to 'a person attending any place of education'.

There are also differences in regard to the rights of a religious community to manage places of education. In Belize subsection (3) guarantees such rights for a community 'whether or not it is in receipt of a government subsidy or other form of financial assistance designed to meet in whole or in part the cost of such course of education.' Some countries' Bills of Rights extend such a guarantee only to education provided by that community or denomination.¹ Some of the clauses refer to the religious education of a community 'which it wholly maintains or in the course of education which it otherwise provides.'² Some of the guarantees do not include any explicit mention of a right of a religious community to run its own schools.³

Looking at the guarantees of conscience of all the Commonwealth Bills of Rights, one sees that there are a variety of limitations on those guarantees. The Indian guarantee is followed by a section which states

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1. See, for example, the relevant sections for the Bills of Rights of Mauritius, Sierra Leone, Zambia, and Gibraltar.
 2. See, for example, sec 11(3) of the Solomon Islands Bill of Rights, S.I. 1978/783. Similar wording is to be found in the relevant provisions of the Bills of Rights of Anguilla, Botswana, Gambia, Kenya, Kiribati, St. Christopher and Nevis, and Tuvalu.
 3. Malta and Uganda which have Bills of Rights derived from the same model are two examples. Other countries whose Bills of Rights do not include explicit guarantees for a religious community to manage its own education include Tonga, Guyana, Papua New Guinea, Sri Lanka, Trinidad and Tobago, and Vanuatu.

that:

(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

1

Similarly, the Malaysian guarantee allows that:

(4) State law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

2

The Sri Lankan Constitution allows for freedom of religion though apparently not all religions enjoy the same stature. The relevant sections note that:

9. The Republic of Sri Lanka should give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuming to all religions the rights granted by Articles 10 and 14 (1)(e).

10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

3

Similarly the Malta Constitution notes that:

2.(1) The religion of Malta is the Roman Catholic Apostolic Religion.

(2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.

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1. Indian Constitution, Art. 25(2).
 2. Malaysia Constitution, Art.11.
 3. Sri Lanka Constitution, articles 9 and 10.

(3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all state schools as part of compulsory education.

1

The freedom of religion clause contained in the Tongan Bill of Rights includes a limitation with interesting wording. The relevant section reads as follows:

5. All men are free to practise their religion and to worship God as they may deem fit in accordance with the dictates of their own consciences and to assemble for religious service in such places as they may appoint. But it shall not be lawful to use this freedom to commit evil and licentious acts or under the name of worship to do what is contrary to law and peace of the land.

2

In Nigeria there is a stipulation that:

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society, and for the purposes of this subsection, 'a secret society' means a society or association, not being a solely cultural or religious body, that uses secret signs, oaths, rights or symbols.

(a) whose meetings or other activities are held in secret; and

(b) whose members are under oath, obligation or other threat to promote the interest of its members or to aid one another under all circumstances without due regard to merit, fair play, or justice, to the detriment of the legitimate expectation of those who are not members.

3

The 1960 Cypriot Constitution also seems to be biased against secrecy in religion.⁴

1. Malta Constitution, sec. 2.

2. Act of Constitution of Tonga, Art.5.

3. Nigeria Constitution, 1979, sec. 35(4).

4. The relevant section reads, '2. All religions whose doctrines or rites are not secret are free...;' (Cmd. 1093 (1960), Art. 18(2)).

In Olivier v. Buttigieg¹ the Judicial Committee considered the question of whether a circular meant to prohibit a newspaper's distribution in state hospitals was an infringement of the Malta Bill of Rights. The Voice of Malta was the newspaper of the Malta Labour Party and the Archbishop of Malta had declared it a mortal sin to print, write, sell, buy, distribute, or read it. The Judicial Committee decided that the circular issued by Malta's Chief Medical Officer prohibiting distribution of the newspaper in a hospital did not violate freedom of conscience though as previously mentioned it did violate the freedom of expression guarantee.

In India a 1954 ruling by the Supreme Court declared that it was permissible for authorities to be concerned with the administration of a trust that was overseen by a religious leader.² More recently the Indian Supreme Court ruled that a local Act did not curtail the right to freedom of conscience though it allowed for a certain society to have its management taken over.³ The majority of the Court decided that the Society was not a religion, partly because of the teachings of the Society's inspirational leader, which had said just that. The majority decision went on to suggest that even if the Society was founded upon a religion, the right to conscience had not been violated. An interesting dissenting opinion was offered by Chinnappa Reddy, J. who said that the fact that the inspirational leader denied founding a religion, did not

1. [1967] 1A.C. 115.
2. Commr. Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamlar of Sri Shirur Mutt [1954] A.I.R. Supreme Court 282.
3. S.P. Mittal v. Union of India A.I.R 1983 Supreme Court 1. The Act that was considered was the Auroville (Emergency Provisions) Act, 1980.

mean that one had not been founded. Chinnappa Reddy J. argued that 'No great religious teacher ever claimed that he was founding a new religion or a new school of religious thought.'¹

In Zambia an education regulation requiring students to sing the National Anthem and salute the national flag was challenged by a student and her father who were Jehovah's Witnesses. It was claimed that such a regulation conflicted with the guarantees of a right of conscience. The High Court looked to the limitation on the guarantee and concluded that such a regulation was reasonably required both in the interests of defence and for the purposes of protecting the rights and freedoms of others in a democratic society.²

In Western Samoa the Supreme Court decided that it had been an infringement of the guarantee of conscience for village chiefs to banish a man from a village because of his failure to attend church.³

Guarantees Against Discrimination

One guarantee that is typically found in Bills of Rights is the right not to be subject to certain kinds of discrimination. Virtually every Commonwealth constitution that contains a Bill of Rights includes some

1. Ibid., at 2.

2. Kachosv v. Attorney-General (1967) Z.R.145. The case is discussed by Mohammed R. Zafer in Zambia Law Journal, I.(1969). 44-48. The American Supreme Court has also considered the issue in cases involving similar circumstances. In Minersvilles School District v. Gobitis (310 U.S. 586 (1940)) the Court sustained the requirement of saluting the flag but the Court overruled that decision three years later in Board of Education v. Barnette (319 U.S. 624 (1943)).

3. Tariu Tuivaiti v. Sila Fa'amalaga (1982) 8CLB 62.

version of this guarantee.¹ The 1981 Belize guarantee which is typical of many, reads as follows:

16.(1) Subject to the provisions of subsections (4), (5), and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7), and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions of sex, race, place of origin, political opinions, colour, or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

(a) for the appropriation of public revenues or other public funds;

(b) with respect to persons who are not citizens of Belize;

(c) for the application, in the case of persons of any description as is mentioned in subsection (3) of this section (or of persons connected with such persons) of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or

(d) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be

1. Australia does not have a Bill of Rights, but sec. 117 of the Constitution reads as follows:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The Nauru Bill of Rights does not have an explicit non-discrimination guarantee.

accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to sex, race, place of origin, political opinions, colour, or creed) to be required of any person who is appointed to or to act in any office or employment.

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or subsection (5) of this section.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by [the sections dealing with arbitrary arrest and entry, movement, conscience, expression, and assembly and association] of this Constitution, being such a restriction as is authorised by 9(2) paragraph (a), (b), or (h) of section 10(3), section 11(5), section 12(2) or section 13(2), as the case may be. 1

(8) Nothing contained in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this constitution or any other law. 2

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1. Section 9(2) is the limitation on the right regarding arbitrary search and entry; section 10(3) is the limitation on the right to movement; section 11(5) is the limitation on the right to conscience; section 12(2) is the limitation on the right to expression; and section 13(2) is the limitation on the right regarding assembly and association.
 2. S.I. 1981/1107, sec. 16.

The extent to which a guarantee of non-discrimination is to check the law varies. For example, it will be noticed that subsection (5) of the Belize guarantee allows for standards or qualifications to be required as long as those standards or qualifications do not specifically relate to sex, race, place of origin, political opinions, colour or creed. As it happens, another section of the Belize Bill of Rights states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'¹ But most other Bills of Rights derived from the same model do not include a general 'equal protection of the law' phrase. For those Bills of Rights it would seem possible that a required qualification could constitute substantive discrimination, but still be exempted from the purview of the guarantee afforded by the analogous provisions to subsection (1) because there was no explicit requirement regarding sex, race, place of origin, political opinions, colour or creed.

There are some Commonwealth Bills of Rights that do include a general 'equal protection of the law' kind of provision. As noted above, the Belize Bill of Rights includes such a guarantee. The Cyprus guarantee states that 'all persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.'² The analogous Vanuatu guarantee refers to 'equal treatment under the law or administrative action.'³ Article 14 of the Indian

1. Ibid., sec. 6(1).

2. Cyprus Constitution, Cmd. 1093 (1960), Art. 28(1).

3. Vanuatu Constitution, 1980, sec. 5(1) (k).

Constitution notes that 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'¹ The Trinidad and Tobago Bill of Rights refers to 'the right of the individual to equality before the law and the protection of the law.'² The Constitution of Malaysia and Singapore include sections with similar wording.³ The introductory section to the Ugandan Bill of Rights states that 'Every person in Uganda shall enjoy equal protection of the law of Uganda.'⁴ These kind of provisions probably allow the judiciary more latitude in the interpretation of a Bill of Rights. But even without such a clause it could be possible for the judiciary to assume an active role in applying the provisions prohibiting discrimination. The Belize provision which is typical of several Commonwealth Bills of Rights begins by declaring that subject to certain limitations, 'no law shall make any provision that is discriminatory either of itself or in its effect.'⁵ Although there are potentially wide-ranging limitations on the guarantee - for example, the clause allowing for some discrimination which may be

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1. Indian Constitution, Article 14. Seervai suggests that the phrasing of Article 14 'combines the English doctrine of the rule of law with the equal protection clause of the 14th Amendment.' See Constitutional Law of India 3rd edn. (London, Sweet and Maxwell 1983), i.292.
 2. Trinidad and Tobago Constitution, 1974, sec. 4(6).
 3. Malaysia Constitution, section 8(1); Singapore Constitution, sec.12(1).
 4. Uganda Constitution, sec.8(1).
 5. S.I. 1981/1107, sec.16(1).

'reasonably justifiable',¹ - there is still opportunity for the judiciary to interpret this guarantee in an extensive way.

Some Bills of Rights derived from the same model as Belize include a subsection specifically prohibiting discrimination in public places. The Bahamas provision is typical of many and reads as follows:

(7) Subject to [particular local limitations] no person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

2

It will be noticed that the Belize Bill of Rights prohibits discrimination by 'any persons or authority', which arguably includes prohibition of discrimination in public places. Thus, the extent to which the non-discrimination clauses are meant to extend beyond governmental activities vary. In a Bill of Rights such as Belize's it applies to 'any person....,' whereas in the Bahamas Bill of Rights it is limited to certain facilities. In some Bills of Rights the discrimination clause would appear

1. Ibid., sec.16(4)(d). The clause exempts from the purview of the discrimination guarantee a law that makes provision 'whereby persons of such description as is mentioned in [the subsection defining discriminatory treatment] may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable.'
2. S.I. 1973/1090, sec. 26(7). A similar provision appears in the Bills of Rights of Kenya, Solomon Islands, Bermuda, and the Turk and Caicos Islands. Such a provision suggests that at least a part of these Bills of Rights can be invoked against non-governmental actions. The Sri Lankan and Indian Bills of Rights also include provisions that explicitly prohibit discrimination in public places.

not to apply at all to private concerns.¹

As is seen in the Belize Bill of Rights, there can be a subsection explaining what the word 'discriminatory' means. Such a sub-section appears in all the Bills of Rights derived from the same model. What is interesting to note is that unlike Belize not all of them include sex in the list outlining the criteria of discrimination.²

In conversations with Foreign and Commonwealth Office officials it was explained that prohibition of sexual discrimination may not have been included in some of the Bills of Rights for a few reasons. First, there was not always much interest in the issue generally; secondly, whatever interest there has been is more or less recent; and thirdly, many Commonwealth countries have different traditions and cultures, and these differences were taken account of.³ The first two explanations are

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1. For example, see the Bills of Rights of Zimbabwe, Zambia, Uganda, Tuvalu, Singapore, Malaysia, St. Christopher and Nevis, Sierra Leone, St. Vincent, Kiribati, Jamaica, Gambia, Botswana, Barbados, Gibraltar, Anguilla, and Guyana.
 2. See for example, the Bill of Rights of Bahamas, Zimbabwe, Fiji, Zambia, Uganda, Tuvalu, Mauritius, Sierra Leone, Malta, Kiribati, Kenya, Jamaica, Gambia, Botswana, Barbados, Bermuda, Gibraltar, Turk and Caicos Islands, and Anguilla. Similarly, the Singapore and Malaysian Bills of Rights do not include any specific reference to sexual discrimination.
 3. For example, Sir James McPetrie, a former Legal Advisor to the Secretary of State for Colonies notes that, 'the particular issue of discrimination on grounds of sex was not so fashionable in my day as it has since become.' He also points out that section 39(c) of the original Constitution of the Federation of Nigeria disqualifies a woman from standing for election in Northern Nigeria as a member of the Federal House of Representatives and that a section of the original Constitution of Nigeria disqualifies a woman from being elected to the Regional House of Assembly. According to Sir James these provisions 'derive from the fact that the Northern Region was a predominantly Muslim society and in 1960, at any rate, women there did not participate in public affairs.' (Sir James McPetrie, Notes).

reasonable enough, but the third one is questionable in some ways. Part of the philosophical underpinning to the idea of a Bill of Rights is that there are some rights which all people should enjoy irrespective of what particular society they happen to be a part of. Once one accepts such a premise - and not everyone would, of course - then it seems reasonable to assume that some rights, freedom from sexual discrimination being a possible one, should be recognised as fundamental rights irrespective of whether there has been much recognition of such a right in a particular society. If one adopts the other point of view, that is to say that it is naive and presumptuous to assume that all Commonwealth countries should recognise the same set of rights as being fundamental to all people, then one wonders why there was such an interest in providing constitutional guarantees such as the right to receive adequate compensation for deprivation of property for countries that do not exactly have an obvious tradition of adherence to such a right. One possible response to this issue is to agree that, there are some rights that can be described as standard to all societies but realistically certain circumstances particular to some societies should be taken into account. Accordingly one might say that the question of sexual discrimination is very different from say, the question of racial discrimination and that it is not contradictory to apply standard values to racial discrimination yet allow the question of sexual discrimination to be considered by noting circumstances particular to some societies. Such an argument is plausible enough in some ways. Nevertheless it is interesting to note how some rights are proclaimed to be standard and possessed by all people irrespective of the extent to which the society they are a part of has traditionally recognised such rights, whereas other rights are viewed in a more relative way.

Some Bills of rights include 'tribe' when listing the attributes that if used as a basis for judgement may constitute discriminatory behaviour.¹ Some of the Bills of Rights also specifically prohibit discrimination based on caste.²

There are various ways in which these guarantees against discrimination are qualified. First, there is the kind of limitation that is described in subsection (4)(d) of the Belize Bill of Rights, which allows for circumstances that are 'reasonably justifiable' and pertains to a particular guarantee. This is typical of many of the Commonwealth Bills of Rights though interestingly many of them opt for the larger phrase 'reasonably justifiable in democratic society.'³

A second kind of qualification attached to the guarantees against discrimination is one that allows any existing legislation at the time of the enactment of the Bill of Rights to remain valid notwithstanding any inconsistency with the guarantee.⁴ It will be recalled, however, that some Bills of Rights include such a qualification as part of a general limitation on the Bill of Rights itself, and thus there is no need to insert it

1. See, for example, the Bills of Rights of Zimbabwe, Zambia, Papua New Guinea, Sierra Leone, Nigeria (where the wording refers to 'citizens of Nigeria of other communities, ethnic groups') Kenya, Gambia, Botswana, and Uganda.
2. See, for example, the Bills of Rights of Mauritius, India, and Gibraltar.
3. See, for example, the Bills of Rights of Fiji, Zambia, Uganda, Tuvalu, the Solomon Islands, Sierra Leone, St. Vincent, St. Lucia, Gambia, Dominica, Botswana, Barbados, Bermuda, and Anguilla.
4. See, for example, the Bills of Rights of Fiji, (where laws enacted before 1966 are to remain valid), Western Samoa, Tuvalu, Kiribati, and Botswana.

again in the form of a specific limitation.¹ Another version of this limitation is to allow customary law to continue to have effect notwithstanding any inconsistency it may have with the Bill of Rights.²

Some of the limitations on the guarantees against discrimination reflect local or immediate concerns. The Zimbabwe Bill of Rights exempts rights or privileges relating to Tribal Trust Land.³ In Vanuatu allowance is made for 'the special benefit, welfare, protection or advancement of females, children, and young persons, members of under-privileged groups or inhabitants of less developed areas.'⁴ In Sri Lanka the Bill of Rights allows for 'special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children, or disabled persons.'⁵ Malaysia permits special provision to be made for 'the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.'⁶ In the Malta Bill of Rights it is noted that: 'a requirement, however made, that the Roman Catholic Apostolic Religion shall be taught by a person professing that religion shall not be held to be inconsistent with or in contravention of this

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1. See, for example, the Bills of Rights of Jamaica, Bahamas, Zimbabwe (the existing law provision being limited to five years after independence) Belize (the existing law provision being limited to five years after independence), Sri Lanka, and Trinidad and Tobago.
 2. See, for example, the Bills of Rights of Zimbabwe, Fiji, Zambia, Kenya, Gambia, Botswana, and Uganda.
 3. S.I. 1979/1600, sec. 23(3)(f).
 4. Vanuatu Constitution, 1980, sec. 5(1)(k). The Papua New Guinea Constitution contains a similar provision though the wording is slightly different; (sec. 55(2)).
 5. Sri Lanka Constitution, sec. 12(4).
 6. Malaysia Constitution, sec. 46(9).

section.'¹ The Nigerian Bill of Rights optimistically promises that 'No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.'² In India a state is allowed to enact provisions 'for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes....'³ In Canada provision is made for 'any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability....'⁴ The Canadian judiciary is also instructed to interpret the Charter of Rights 'in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'⁵

The judicial reaction to these guarantees of non-discrimination has varied. A particularly noteworthy case is that of Akar v. Attorney General of Sierra Leone.⁶ This case has been previously noted in the context of a government's attempt to amend a constitution in order to circumvent the guarantees of a Bill of Rights. The Judicial Committee ruled that a Sierra Leone Act dealing with citizenship was discriminatory since 'different treatment was accorded to different people' and 'the

1. Malta Constitution, sec. 46(9).

2. Nigeria Constitution, 1979, sec. 39(2).

3. Indian Constitution, sec. 14(4).

4. Canadian Charter of Rights and Freedoms, sec. 15(2).

5. Ibid., sec. 27.

6. [1970] A.C. 853; [1969] 3 All E.R. 384.

differentiation was attributable wholly or mainly to respective descriptions by race.'¹ The Committee considered the meaning and applicability of the limitation in the phrase 'reasonably justifiable in a democratic society'. Lord Morris of Borth-Y-Gest who read the majority decision reasoned as follows:

It seems very doubtful whether it could be said that to impose a disability on the ground that someone's father and paternal grandfather were not 'negros of African descent' was something which having regard to its 'nature' was reasonably justifiable in a democratic society. But apart from this it is to be observed that to justify (under sub. 5(4)(f)) making discriminatory legislation not only must the disability be of itself of a nature that makes it reasonably justifiable but there must also be 'special circumstances pertaining' to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society. Their Lordships can see no trace of any 'special circumstances' pertaining to the appellant or to those similarly placed to him whose fathers and grandfathers were not negros of African descent. 2

This is the one leading Commonwealth decision where an infringement of the Bill of Rights was deemed not to be 'reasonably justifiable.' The Jamaican Court of Appeal considered the non-discrimination section of the

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1. Ibid., [1969] 3 All E.R. 384 at 388. The Act considered was the Constitution (Amendment) (No.2) Act 1962.
 2. Ibid., at 389. As already noted in the previous chapter Lord Guest offered a questionable dissent. He declared that Parliament speaks only through the statute book and thus should not be relied upon to offer a statement as to why a particular piece of legislation is justifiable in a democratic society. He did go on anyhow to consider the meaning of the phrase 'reasonably justifiable in a democratic society' and declared that any democratic society would be concerned with questions of citizenship and thus an action in regards to a question of citizenship must be reasonably justifiable. The dubious logic invoked in such reasoning has already been referred to in the previous chapter. One commentator has explained that: 'What Lord Guest illustrates is the inhibition of judges which used to be so common earlier this century in the field of administrative law.' Graham Zellick, 'Comment', Public Law, (1970), 110.

Jamaican Constitution when a teacher claimed that he had suffered from discrimination because of his political opinions.¹ The teacher had applied for a job as head teacher in a school and had won the support of the local school board. But the final decision was up to the Minister of Education who declined to hire the teacher though he offered him a job at a different school. The Minister explained that the first school was due to become comprehensive shortly and the teacher did not have the necessary qualifications to be the head teacher of such a school. The Court was also made aware that the Minister was fearful that the teacher would use the position to forward political opinions. The teacher alleged that the Minister would not allow him to take up the post because the Minister's party (the Jamaican Labour Party) did not want the teacher (who was a known supporter of the People's National Party) to be able to teach in a particular constituency. The Court dismissed the teacher's application and held that the inference that the teacher was seeking the appointment for the purposes of furthering his political career was a reasonable one and that the decision not to appoint the teacher was not attributable to his political opinions.

A minority opinion, however, was put forward by Graham-Perkins, J.A. who recorded his 'very strong dissent'. He explained that the refusal of the Minister to give the teacher the job was the result of reasons which 'were attributable wholly to the appellant's political opinions.'²

1. Byfield v. Allen [1970] 16 W.I.R. 1.

2. Ibid., at 54.

It is surprising that the majority of the judges did not consider any of the limitations on the non-discrimination clause in pronouncing their judgement. To decide that there was a clear distinction between political opinions and the fear that the teacher would use his position to forward his political career, despite the fact that the teacher had never previously used the classroom as a political podium, was a remarkable way of interpreting the section. The minority judgement strikes one as keeping more to the spirit of the clause.

Some cases in Kenya illustrate the way that a non-discrimination clause can hinder the activities of government authorities who want to take action that they would consider appropriate to redressing certain inequalities. In Madhuwa et al v. City Council of Nairobi¹ the High Court of Kenya ruled that the public authorities were wrong in denying the six plaintiffs the right to continue to operate their stalls in the city's marketplace. The decision to evict the vendors was the result of a policy to 'Africanize' the market. The plaintiffs were not yet citizens of Kenya though they had applications pending. The limitations on the Kenyan non-discrimination guarantee do allow for laws to discriminate against non-citizens; but all persons are protected against the actions of a public

1. [1968] E.A. 406.

authority.¹ The Court ruled in favour of the plaintiffs.

In Shahvershi Devshi and Co. Ltd. v. The Transport Licensing Board,² The High Court of Kenya ruled that the refusal to renew licenses as part of an attempt to remove imbalances between Kenyan citizens was unconstitutional in that it was not expressly authorised by any provision of law. The Court decided that the non-discrimination guarantee could be enjoyed by corporations where the context allowed.

These Kenyan cases illustrate why designers of Bills of Rights are sometimes interested in allowing for some sort of affirmative action limitations. If the Kenyan Bill of Rights included such provisions, the cases might well have had a different outcome.

In Sri Lanka the Supreme Court ruled that a decision to apply district quotas to university admissions was contrary to the provisions of the constitution allowing for equality of treatment under the law.³ In India the Supreme Court ruled that provisions of the Foreign Service Rules that

1. Similar to subsections 16(1), 16(2), and 16(4)(a) of the Belize Bill of Rights, the Kenyan Bill of Rights includes the following provisions:

82(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to [provisions analogous to Belize's sec. 16(6), (7), and (8)] no person shall be treated in a discriminatory manner by any person or authority....

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

(a) with respect to persons who are not citizens of Kenya.

2. [1971] E.A. 289.

3. N.R.W. Perera and another v. University Grants Commissions and the Attorney-General (1980) 7CLB 71.

required a female employee to obtain the permission of the Government in writing before her marriage was solemnised and that denied the right to be appointed on the ground that the candidate was a married woman were discriminatory against women.¹ Krishna Iyer J. ruefully observed that 'This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom.'² There have been several notable cases resulting from the Indian guarantee of non-discrimination; some distinctions have been deemed not to conflict with the spirit of the guarantee whereas others have been judged as offensive.³

In Trinidad and Tobago the Court ruled that a non-natural person can enjoy the protection of the non-discrimination guarantee.⁴

In Mauritius an interesting case involving the draftsmanship of non-discrimination guarantees was heard.⁵ The plaintiff had been charged with murder. He objected to being tried by a jury consisting only of men (as provided by a section of the Court's ordinance) on the ground that those provisions by excluding women from jury service violated sections 3 and 16

1. C. B. Muthamnea v. Union of India and others A.I.R. 1979 Supreme Court 1868.
2. Ibid., at 1870.
3. Examples and discussion are offered by H.M. Seervai in Constitutional Law of India 3rd edn., (Bombay, N.M. Tripathi Private Ltd; and London, Sweet and Maxwell Ltd., 1983) i. 330-342.
4. L.J. Williams Ltd. v. Pervical Smith and the Attorney-General (1979) 6 CLB 810.
5. Jaulim v. Director of Public Prosecutions and the Hon. The Attorney-General 1976 M.R. 96.

of the Constitution, the combined effect of which was to forbid discrimination by reason of sex, among other grounds. Section 3 is written in the style of a section meant to preface the subsequent guarantees and includes a reference to non-discrimination because of sex. But section 16 which was the non-discrimination guarantee itself did not include sex in its list of attributes that were not to be criteria for discriminating against a person. The argument put forward by the plaintiff was that the two sections read together constituted a guarantee against discrimination by reason of sex. The Mauritius Court disagreed.¹

Guarantees prohibiting discrimination will undoubtedly continue to provide many difficult cases in the future.

1. The Court's decision seems to be a reasonable one. The introductory section allows that sex shall not be used as a criterion for one enjoying the subsequently referred to rights which do not include a right not to be discriminated against because of sex. Most probably the reference to sex in the introductory section was to ensure that both males and females were entitled all to the rights that are outlined.

CHAPTER 5

RIGHTS REGARDING LIFE, CRUEL AND UNUSUAL PUNISHMENT, PROPERTY,
SLAVERY AND FORCED LABOUR, FREE MOVEMENT, AND OTHER MATTERS

Right to Life

Most Commonwealth Bills of Rights include an explicit guarantee of the right to life.¹ The Belize guarantee which is typical of many reads as follows:

- 4.(1) A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.
- (2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, of such extent and in such circumstances as are permitted by law of such force as is reasonably justifiable -
- (a) for the defence of any person from violence or for the defence of property;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) for the purpose of suppressing a riot, insurrection or mutiny, or
 - (d) in order to prevent the commission of that person of a criminal offence, or if he dies as the result of a lawful act of war.

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It will be noticed that this guarantee unlike the ones noted in the previous chapter does not include a long limitation that allows for derogation in the interest of public safety, public morality, etc. It can be argued that such a limitation already exists in the form of the

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- 1. Exceptions are Sri Lanka, Tonga, and Maldives whose Bills of Rights do not include a direct reference to the right to life.
 - 2. S.I. 1981/1107, sec. 4.

general limitation stated in the first section of the Bill of Rights. But as noted previously the status of the introductory section is debatable.

Of the Bills of Rights derived from the same model as Belize some include an interesting difference in the drafting of the first subsection. The relevant part of the Barbados guarantee reads as follows:

12.(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Barbados (my emphasis) of which he has been convicted. 1

The wording of the Barbados version explicitly states that the law that is violated must be a law of Barbados. The Belize version is more ambiguous. It can be argued that it does imply the same thing, but it also seems plausible to suggest that it is not necessarily a Belize law that is being referred to.

It seems that for both these kinds of guarantees any crime can be punishable by death as long as the law allows for such a punishment. But some of the Bills of Rights are more specific in referring to what kind of offence one is liable to lose one's life for. The St. Christopher and Nevis guarantee notes that:

4.(1) A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of treason or murder under any law of which he has been convicted. 2

1. S.I. 1966/1455, sec. 12(1). Analogous provisions appear in the guarantees of Botswana, Dominica, The Gambia, Guyana, Kenya, Malta, Sierra Leone, Solomon Islands, Uganda, and Zambia. In Nigeria the wording is somewhat different. The relevant section reads:

30.(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria...
(Nigeria Constitution, 1979, sec. 30(1)).

2. S.I. 1983/881, sec. 4(1).

Similarly the 1960 Cypriot Bill of Rights states that

2. No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy jure gentium and capital offences under military law.

1

The Cypriot guarantee also illustrates another point of interest. It notes that a person can only be deprived of his life for an offence 'for which this penalty is provided by law'. Similarly, the Papua New Guinea guarantee refers to 'an offence for which the penalty of death is prescribed by law.'² In the Western Samoa Bill of Rights, the analogous provision refers to 'an offence for which this penalty is provided by Act.'³ It can be argued that the Papua New Guinea and Cypriot provisions mean the same thing, but since it is not absolutely clear what 'law' means, then the provisions are slightly more ambiguous. Provisions that are even more ambiguous are to be found in the relevant guarantees of India, Malaysia, and Singapore. The Singapore provision states that '9.(1) No person shall be deprived of his life or personal liberty save in accordance with law.'⁴ Such wording begs the question of what is meant by the

1. Cyprus Constitution, Cmd. 1093 (1960), Article 7(2).

2. Papua New Guinea Constitution, sec. 35 (1).

3. Western Samoa Constitution, 1981, sec. 5(1).

4. Singapore Constitution, sec. 9(1). The analogous Malaysian provision is identical. (Malaysia Constitution, sec. 5(1)). The wording in the Indian guarantee is slightly different. It states that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' (Indian Constitution, sec. 21). David Pannick explains that 'Article 21 would appear to be narrower than 'Article 9(1) of the Singapore Constitution, being confined to procedure and allowing no scope for substantive due process of law.' See Judicial Review of the Death Penalty (London, Duckworth, 1982), p.28.

phrase 'in accordance with law'. Does it pertain to only statutory law, or could it also include other law, for example principles of common law.

Some Commonwealth Bills of Rights mention legal principles that might not be given effect in statutory law. The Trinidad and Tobago Bill of Rights refers to '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....'¹ The Canadian Charter of Rights and Freedoms states that 'Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'²

The question of what law means in the context of the guarantees discussed above has been considered in court. The most notable case is Ong Ah Chwan v. Public Prosecutor,³ a case that originated in Singapore and was heard by the Judicial Committee. The accused had been sentenced to death for drug trafficking. The law that provided for such a penalty included reverse onus provisions. The Singapore government argued that law meant only that which was contained in a duly-enacted statute. The argument put forward by the representatives of the accused was that law included principles of fundamental justice and that certain criteria needed to be met in order for reverse onus provisions to be constitutional. Counsel for the accused explained that:

...it is not necessarily a breach of the rule of law for a statute defining a criminal offence to provide for a rebuttable presumption of guilt. But such a presumption is contrary to the rule of law if there is no natural connection in common experience between the fact proved and the conclusion presumed therefrom; if there is no compelling reason of

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1. Trinidad and Tobago Constitution, sec. 4(a).
 2. Canadian Charter of Rights and Freedoms, sec.7.
 3. [1981] A.C. 648.

legislative policy to justify the existence of such a presumption; or where such a presumption operates unfairly. The presumption contained in sections 15 and 16 transgresses in all three respects and amount to a denial of the presumption of innocence. 1

The Committee did agree that law included principles of fundamental justice but decided that there was no conflict with any such principles and the statutory presumptions of the Act in question.²

The Indian Supreme Court had considered a similar issue previously. In Gopalan v. State of Madras³ the Court held that in the context of the relevant Indian guarantee, law meant state-made law and did not necessarily include principles of fundamental justice. But in Maneka Gandhi v. Union of India the Court ruled that the procedure established by law could not be arbitrary, unfair, or unreasonable.⁴ More recently, the Indian Supreme Court gave much consideration to the question of whether the law that provided for hanging was a violation of Article 21.⁵ After exploring various methods of capital punishment the Court concluded that 'the

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1. Ibid., at 653. Counsel for the accused also referred to the approach of the European Court of Human Rights which has given the phrase 'in accordance with law' a wide meaning. The European Court decided that there must be proper justification for any statutory interference with the presumption of innocence. (Winterwerp Case, Publications of the European Court of Human Rights, Series A, no.33; 2E.H.R.R. 387).
 2. The issue in general and the case in particular are discussed at length by David Pannick in Judicial Review of the Death Penalty (London, Duckworth, 1982).
 3. A.I.R. 1950 Supreme Court 27.
 4. A.I.R. 1978 Supreme Court 597 at 622. The case actually dealt with the issuing of a passport, but the constitutional section considered included the right to life guarantee.
 5. Deena v. Union of India A.I.R. 1983 Supreme Court 1187. In Jagmohan Singh v. State of U.P. A.I.R. 1973 Supreme Court 947 the Court had held that capital punishment did not violate the Indian right to life guarantee. In Rajendra Prosad v. State of U.P. A.I.R. 1979 Supreme Court 916) the Court had purported to lay down the guidelines under which capital punishment could be inflicted.

State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the Constitution.'¹

The Judicial Committee has considered whether the delay in the execution of the death penalty violates the right to life guarantee of the Trinidad and Tobago Constitution. In Abott v. Attorney-General of Trinidad and Tobago² Lord Diplock explained that:

Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open. 3

In Canada, it was recently declared that though section 7 of the Canadian Charter states that everyone has the right to life, liberty and security of the person, 'everyone' does not include an unborn foetus and, thus, the provisions of the Criminal Code allowing for therapeutic abortions do not offend the section.⁴

Guarantees Against Cruel and Unusual Punishment

The next right to be considered has prompted some questions similar to those discussed above in the cases involving the right to life. Most

1. Ibid., at 1188.

2. [1979] 1 W.L.R. 1342.

3. Ibid., at 1348.

4. Borowski v. Attorney-General of Canada and Minister of Finance of Canada; 4 D.L.R. (4th) 162.

Commonwealth constitutions include a provision prohibiting cruel or unusual punishment.¹ The 1981 Belize provision reads as follows: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'² It will be noticed that similar to the right to life provision this guarantee is not qualified by several general limitations. There are a few interesting differences in the style of the other analogous guarantees. In Antigua the relevant provision reads as follows:

- 7.(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Antigua on 31 October 1981.

3

Several of the other Bills of Rights also qualify their guarantees against cruel and unusual punishment by allowing for existing law at the time the constitution was promulgated to continue to have effect.⁴

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1. The Bills of Rights of India, Malaysia, Singapore and Tonga do not include explicit provisions prohibiting cruel or unusual punishment. It is possible, however, that other guarantees, for example the right to life, and the right to protection of due process, can have a similar purpose. As already noted the Indian Supreme Court, for example, has when examining Article 14 of the Indian Constitution considered whether execution by hanging was cruel and unusual punishment and whether it conflicted with the Articles guarantees. Deena v. Union of India A.I.R. 1983 Supreme Court 1155.
 2. S.I. 1981/1107, sec. 7.
 3. S.I. 1981/1106, sec. 7. It will be noticed that in the Antigua version the word 'such' is added before the word treatment. It is difficult to explain why there is such a difference and whether it is of any importance.
 4. See, for example, the relevant provisions in the Bills of Rights of Barbados, Bahamas, Botswana, The Gambia, Guyana, Jamaica, Kenya, Kiribati, Malta, Mauritius, Sierra Leone, Uganda, Zambia, Bermuda, Gibraltar, and the Turk and Caicos Islands.

In the Maldives Constitution it is specified that: 'No person shall be penalized except convicted (sic) under Shariath or on conditions specified by Law. Under no circumstances can an injury be inflicted.'¹

The Malta guarantee includes a qualification that:

- (1)(a) No law shall provide for the imposition of collective punishments,
- (b) Nothing in this subsection shall preclude the imposition of collective punishments upon the members of a disciplined force in accordance with the law regulating discipline of that force.

2

The Papua New Guinea Constitution anticipates possible interpretations of its guarantees when noting:

- (1) No person shall be submitted to torture (whether physical or mental) or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.
- (2) The killing of a person in circumstances in which section 35(1)(1) (right to life) does not, of itself, contravene subsection (1), although the manner of the circumstances of the killing may contravene it.

3

In the Zimbabwe Bill of Rights a limitation on the relevant guarantee notes that '(2) No treatment reasonably justifiable in the circumstances of the case to prevent the escape from custody of a person who has been lawfully detained shall be held to be in contravention of subsection (1) on the ground that it is degrading.'⁴

There have been a variety of judicial decisions in regard to the interpretation of such guarantees. The analogous provision of the European Convention on Human Rights has been invoked to challenge the actions of

1. Maldives Constitution, 1975, sec. 7.

2. Malta Constitution, sec. 37(1).

3. Papua New Guinea Constitution, sec. 36.

4. S.I. 1979/1600, sec. 5.

British authorities. In Ireland v. United Kingdom¹ the European Court of Human Rights decided that the British method of interrogating suspected terrorists (by covering their heads with hoods, subjecting them to intense noise, the deprivation of sleep, and a limited diet of bread and water) was in fact inhuman and degrading, though was not torture. In Tyrer v. United Kingdom² the Court ruled that a sentence of birching awarded by a juvenile court on the Isle of Man was 'degrading' and contravened the Convention's Article 3.³

The Judicial Committee has considered guarantees prohibiting cruel and unusual punishment. In R v. Runyowa⁴ the Board considered the constitutionality of a Southern Rhodesian law. The appellant had been

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1. Publications of the European Court of Human Rights, Series A, No.25; 2E.H.R.R.25.
 2. Publications of the European Court of Human Rights, Series A, No.26; 2E.H.R.R.1.
 3. The ambiguous legal status of the Convention is illustrated by a subsequent case heard by the High Court of the Isle of Man. Despite the Tyrer ruling, the relevant law had not been changed. The Court concluded that since the Convention had not been incorporated into the domestic law, the law permitting birching was still valid; the Court said, however, that the failure of the Isle of Man to alter its law was 'unsatisfactory'. Teare (Sergeant of Police) v. O'Callaghan [1982] 4 E.H.R.R.232.

In another case involving this guarantee, the European Court of Human Rights decided that corporal punishment in schools did not violate Conventions Article 3, though it did conflict with Article 2 of Protocol No.1 which requires the State to respect the right of parents to ensure that education conforms with their philisophic convictions. The case had been brought by parents who objected to corporal punishment in Scottish schools, Campbell and Cosans v. The United Kingdom, Publications of the European Court of Human Rights, Series A, No. 48; 4E.H.R.R.293.

The American Supreme Court has held that the inflicting of corporal punishment on students by school officials does not contravene the ban on 'cruel and unusual punishment' nor the guarantee of due process. Ingraham v. Wright 430 U.S.651 (1977).

4. [1967] 1A.C. 26.

convicted under a section of the Law and Order (Maintenance) Act, 1960 and was sentenced to death. A petrol bomb had been thrown at a house with the purpose of setting the house on fire. The evidence had shown that the appellant had bought the paraffin for the bomb, and had known the purpose it was to be used for. But he had not been present when the bomb was thrown. It was contended that the relevant section of the Law and Order (Maintenance) Act was ultra vires the Constitution in that it provided for a punishment which was entirely out of proportion for the circumstances of the appellant's offence, and thus was an inhuman punishment. The Judicial Committee dismissed the appeal. Lord Morris of Borth-Y-Gest noted the following:

The provision contained in sec. 60 of the Constitution enables the court to adjudicate as to whether some form or type or description of punishment newly devised after the appointed day or not previously recognized as inhuman or degrading, but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence. Harsh though a law may be which compels the passing of a mandatory death sentence...it can be remembered that there are provisions...which ensure that further consideration is given to a case.

1

Their Lordships seem to have concluded that they were not so much judges of the appropriateness of a punishment, but rather judges of the technique to be employed. This is a particularly illustrative example of judicial reluctance to check legislative action. The power conceded to the legislature allows for the efficacy of such a guarantee to be virtually non-existent. If, for example, Parliament enacted a law that provided for

1. Ibid., at 55. In a case involving the constitutionality of a mandatory death sentence the American Supreme Court held that before the imposition of a capital sentence there must be opportunity 'for consideration of mitigating circumstances that may be relevant to either the particular offender or the particular offense'; (Roberts v. La. 428 U.S. 325 (1976)).

major punishments for minor crimes - say, capital punishment for the criticising of a Judicial Committee decision - then (according to the reasoning put forward in this case) the courts would only be concerned as to determining the cruelty or unusualness of the method of execution.

A particularly notable recent decision of the Judicial Committee was in Riley and Others v. Attorney-General of Jamaica.¹ The applicants had been sentenced to death after having been convicted of murder. Ensuing Parliamentary controversy over the death penalty caused the execution of the sentences to be delayed. After the Jamaican Parliament did confirm the death penalty, the argument put forward on behalf of the applicants was that the delay of the sentence's execution - almost four years - was cruel and unusual punishment. The majority of the Committee noted that any existing law prior to the enactment was explicitly meant not to be overridden by the Bill of Rights.² They concluded that since the death penalty was in force prior to the enactment of the Bill of Rights, then it was constitutional. Lords Scarman and Brightman offered a minority judgement claiming that not the sentence but the delay in execution by the executive (a power conferred not by pre-existing law, but by the Constitution) was cruel and unusual punishment. One commentator explained that 'Once again English judges have demonstrated their inability to deal satisfactorily with Bills of Rights and by so doing have confirmed the undesirability of incorporating the European Convention on Human Rights

1. [1983] 1A.C. 719.

2. As noted in Chapter Three, the exact purpose of the existing law provision is not as straightforward as may appear.

into English law.¹

One can admire the humanity and compassion underlying the minority dissent, but the reasoning of such a dissent could be challenged. Lords Scarman and Brightman argued that the delay was cruel and unusual punishment. Assuming this to be correct (which it may not be) one wonders how the rescinding of the death penalty would mitigate such a punishment since such punishment (the waiting) had already been suffered regardless of the outcome of the case. At best the cancellation of the execution could be seen as some sort of compensation for the cruel and unusual punishment of delay. Considering that this is a matter of life and death, such compensation is no minor matter. Nonetheless it proves interesting to examine the reasoning involved.

The Judicial Committee had a few years earlier considered very similar arguments in de Freitas v. Benny.² This case also involved consideration of the status of a constitutional section meant to save existing law, and to what extent it affected a pre-independence law providing for a mandatory death

Graham Zellick, 'Comment', Public Law, (1982), 344. The American Supreme Court has considered whether the death penalty should be considered cruel and unusual punishment. In Furman v. Georgia (408 U.S. 238 1972) the Court declared that State statutes that allowed for the imposition of the death penalty without guiding the discretionary powers of judges or juries violated the Eighth Amendment. State legislatures then made various changes to laws imposing the death penalty. A few years after Furman the Court reviewed different cases involving the death penalty and declared that the punishment of death was not necessarily a violation of the Constitution. See Gregg v. Georgia 428 U.S.153 (1972); Profitt v. Florida 428 U.S. 242 (1976); and Jurek v. Texas 428 U.S. 262 (1976).

[1976] A.C.239.

sentence. The Committee agreed with the Trinidad and Tobago Court of Appeal that the execution of such a sentence was not an imposition of cruel and unusual punishment, and at any rate the constitutional guarantee was not meant to extend to the law enacted before independence. For good measure their Lordships added that the seventeenth-century English Bill of Rights (arguably declaratory of the common law) which refers to cruel and unusual punishment would not affect the legality of the mandatory death sentence.

It had been argued on behalf of de Freitas that the execution of the death sentence was an executive act, and that because the executive powers had been conferred by the Constitution and not by pre-independence law, such powers were not exempt from the ambit of the constitutional Bill of Rights. Their Lordships did not accept the argument. They noted that it was 'clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the constitution.'¹ Although it was 'clear beyond all arguments' to their Lordships then, it obviously was not as clear to Lords Scarman and Brightman who a few years later in Riley (see above) registered a dissent partly on those very grounds.

Rights Regarding Property

There has been much attention given to property rights. Locke identifies such rights as guarantees derived from the state of nature.² Blackstone included the right to private property along with the rights to personal

1. Ibid., at 246.

2. 'An Essay Concerning the True Original, Extent, and End of Civil Government' in Social Contract, intro. Sir Ernest Baker (London, Oxford University Press, 1946), p.7. It should be noted that Locke believed property to be in a man's 'person' and that a man's labour is what enables him to make a claim on something tangible. Locke's views on property are set out in the above essay, pp.23-43.

security and personal liberty when describing what he believed to be the three absolute rights.¹ Austin described Blackstone's view as absurd.²

Contemporary scholars continue to debate the notion of property rights.

Most Commonwealth Bills of Rights stop short of asserting a positive right to property; but typically there is included a right not to be deprived of property without some kind of compensation.³ In a decision of the Judicial Committee, Lord Diplock stated that 'the right to the enjoyment of landed property is, and for a long time has been, subject to the right of the state to acquire it compulsorily on payment of compensation. This is part of the statute law of virtually every civilized country.'⁴ The European Convention which indirectly has served as the model for many Commonwealth

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1. Commentaries on the Laws of England, ed. George Tucker (Philadelphia, William Young Birch and Abraham Small, 1903; reprint, Buffalo, Dennis and Co. Inc., 1965), p.129.
 2. Lectures on Jurisprudence (London, John Murray, 1904) p.365.
 3. The Bills of Rights of Canada, Sri Lanka, and Singapore do not include any such provisions explicitly. But it is possible for such a right to be recognised as implicitly a part of a Bill of Rights. In Canada, for example, the New Brunswick Court of Appeal agreed with a lower court that in the absence of clear words to the contrary, a statute should not be construed as intending to take the property of an individual without compensation. The judge in the lower court had conceded that the Charter of Rights was silent on specific reference to property rights, but pointed to section 26, which states that 'The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.' It was suggested that the right to enjoyment of property has unquestionably been a traditional right of Canadians, and accordingly the guarantee of a right to security was interpreted as a guarantee of a right to property. When upholding the decision in the Court of Appeal, La Forest J.A. claimed that the right not to have property taken without compensation was a fundamental principle in the British sense. (The Queen in right of New Brunswick v. Esterbrook's Pontiac Buick Ltd. et al; The Queen in right of New Brunswick v. Fisherman's Wharf Ltd. 144 D.L.R. (3d) 21 at 29.
 4. Maharaj v. Attorney-General of Trinidad and Tobago (No.2) [1979] A.C. 408.

Bills of Rights does not include any guarantees regarding deprivation of property.¹ But according to a former U.K. Foreign and Commonwealth official such a guarantee was included in the Commonwealth Bills of Rights 'because we thought it was important'.² Anthony Rushford explains that though British officials 'naturally wanted to safeguard British investments' they were equally concerned about protecting indigenous people from summary expropriation. The Belize guarantee reads as follows:

- 17.(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that -
 - (a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and
 - (b) secures to any person claiming an interest in or right of access to the courts for the purpose of -
 - (i) establishing his interest on right (if any);
 - (ii) determining whether that taking of possession of acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
 - (iii) determining the amount of the compensation to which he may be entitled; and
 - (iv) enforcing his right to any such compensation.
- (2) Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property -
 - (a) in satisfaction of any tax, rate, or due;
 - (b) by way of penalty for breach of the law or forfeiture in consequence of a breach of the law;

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1. The guarantee against discrimination does, however, prohibit discrimination based on property, and the first article of Protocol One states that 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.'
 2. Interview with Anthony Rushford, 9 May 1985.

- (c) by way of taking a sample for the purpose of any law;
- (d) as an incident of any deposit required to be made with the Government of a reasonable number of copies of every book, magazine, newspaper or other printed work published in Belize;
- (e) where the property consists of an animal, upon its being^o found trespassing or straying;
- (f) as an incident of a lease, tenancy, mortgage, charge, bill of sale or other right or obligation arising under a contract;
- (g) by way of requiring persons carrying on business in Belize to deposit money with the Government or an agency of the Government for the purpose of controlling credit or investment in Belize;
- (h) by way of the vesting and administration of trust property, enemy property, the property of deceased persons, persons of unsound mind or persons adjudged or otherwise declared bankrupt or the property of companies or other societies (whether incorporated or not) in the course of being wound up;
- (i) in the execution of judgements or orders of courts;
- (j) in consequence of any law with respect to the limitation of actions;
- (k) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;
- (l) for the purpose of marketing property of that description in the common interests of the various persons otherwise entitled to dispose of that property; or
- (m) for so long as may be necessary for the purpose of an examination, investigation, trial or enquiry or, in the case of land, the carrying out on the land -
 - (i) of work of soil conservation or the conservation of other natural resources or;
 - (ii) of agricultural development or improvement which the owner or occupier of the land has been required and has without reasonable and lawful excuse refused or failed to carry out.

There are various differences between the Belize guarantee and the analogous provisions of the other Bills of Rights derived from the same model. One important difference is in regard to the compensation that is to be paid. As detailed above in the Belize Bill of Rights, property can only be acquired under the law that 'prescribes the principles on which and the manner in which reasonable compensation therefore is to be determined....' Most of the analogous guarantees do not stipulate that the law must prescribe the principles of compensation.¹ Many of the Bills of Rights derived from the same model use different ways to describe the compensation to be paid. The Solomon Islands Bill of Rights, for example, is similar to the Belize Bill of Rights in that 'reasonable compensation' must be paid.² Many of the Bills of Rights refer to 'adequate compensation'.³ The Antiguan provision refers to 'fair compensation

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1. The relevant guarantees of St. Christopher and Nevis and Anguilla do contain a stipulation similar to the Belize one.
 2. Professor Y. Ghai who served as a constitutional advisor for the Solomon Islands explains how the wording was a compromise. The Solomon Islanders wanted to be certain they would be able to formulate what they would consider to be appropriate land policies. The British representatives did not want the Solomon Islands Parliament to determine the compensation; rather they preferred that full compensation be required, and the High Court would decide what full compensation was. (Ghai, 'The Making of the Independence Constitution' in Solomon Islands Politics ed. Peter Larmour (Suva, n.pub; 1984) pp. 41, 42). According to Ghai the British were 'quite firm' on the provisions regarding the deprivation of property. He suggests that the lobbying of MPs by a major corporation and a major bank may have influenced British attitudes. (Interview, 17 January 1985).
 3. See, for example, the relevant provisions in the Bills of Rights of Botswana, Dominica, Fiji, Gambia, Kiribati, Malta, Mauritius, St. Vincent, Sierra Leone, Tuvalu, Uganda, Zimbabwe, Gibraltar, Bermuda, Anguilla, and the Turk and Caicos Islands. Of the Bills of Rights not derived from the same model, the Western Samoan one requires that adequate compensation be paid, as does the Malaysian Bill of Rights.

within a reasonable time'.¹ The Cyprus Bill of Rights states that the compensation must be 'just'.² The Jamaican provision also requires that a law regarding property deprivation include the principles of compensation. It also notes that:

- (5) In this section 'compensation' means the consideration to be given to a person for any interest or right which he may have in over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been compulsorily taken possession of or compulsorily acquired. 3

The Kenya Bill of Rights requires 'full compensation' to be paid.⁴ In Malta, compensation must be adequate, but a 1974 amendment added that:

Provided that in special cases Parliament may, if it deems it appropriate so to act in the national interest, by law establish the criteria which are to be followed, including the factors and other circumstances to be taken into account, in the determination of the compensation payable in respect of property compulsorily taken possession of or acquired; and in such case the compensation shall be determined and shall be payable accordingly. 5

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1. S.I. 1981/1106, sec. 9(1).
 2. Cyprus Constitution, Cmd. 1093 (1960), Art. 23(3). The Papua Guinea Bill of Rights also calls for 'just' compensation (Papua New Guinea Constitution, sec. 53(2)).
 3. S.I. 1962/1550, sec. 18(5). During the debates on the proposals for the Independence Constitution Prime Minister Manley explained to the Jamaican House of Representatives that the court would only decide the means by which compensation would be paid. (Proceedings of the House of Representatives of Jamaica 1961-62, p.775).
 4. Kenya Constitution, sec 75(1)(c). Similar wording is used in the St. Lucia guarantee.
 5. Malta Constitution, sec. 38(1)(c).

The 1984 Nigerian Constitution (Suspension and Modification) Decree repealed all the limitations regarding property deprivation so that now one has the right not to lose property 'except in a manner prescribed by law.'

The Zambian Independence Constitution required that 'adequate compensation' be paid. But a subsequent amendment revised the limitations of the guarantee and noted that:

(3) An Act of Parliament such as is referred to in Clause (1) shall, inter alia -

- (a) provide that compensation shall be paid in money;
- (b) specify the principles on which the compensation is to be determined; and
- (c) provide that the amount of compensation shall in default of agreement be determined by resolution of the National Assembly.

(4) No compensation determined by the National Assembly in terms of any such law as is referred to in clauses (1) and (3) shall be called in question in any court on the grounds that such compensation is not adequate. 1

Similarly, the Guyana Bill of Rights was amended in 1971 and 1975 to change the rules of compensation. The 1980 Constitution states that compensation should be fixed by law and that 'no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.'²

1. Zambia Constitution, sections 18(3) and 18(4).

2. Guyana Constitution, sec. 142(1). The 1971 amendments pertained to nationalization of the bauxite industry; the 1975 amendment dealt with nationalization of all other property.

Some of the Bills of Rights include provisions that allow a person to remit compensation to another country.¹

Many of the limitations include parts that are elaborated by the phrase and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. 2

The Indian protections regarding property have been amended and qualified in different ways. The 1950 Constitution guaranteed the right to private property subject only to restrictions meant to protect 'the interests of the general public and of the Scheduled Tribes.'³ But concern for the implementation of land reform programmes caused the Constitution to be amended in 1951. Two new articles were inserted which in effect exempted some Government acquisition of land from the purview of the property guarantee. Part of the qualification was in the form of a exemption for all scheduled Acts; in the subsequent years more Acts were added to that schedule. Then in 1971 a further amendment was made that was meant to allow any legislation giving effect to Parts of the Directive

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1. See the relevant provisions for the Bills of Rights of Dominica, Fiji, St. Christopher and Nevis, St. Lucia, St. Vincent, Zimbabwe, and Gibraltar. A recent amendment to the Mauritius guarantee deleted an analogous provision. Reported in (1983) 9 CLB 770.
 2. See the relevant provisions for the Bills of Rights of Antigua, Dominica, Fiji, The Gambia, Kenya, Kiribati, St. Lucia, St. Vincent, Solomon Islands, Tuvalu, Zimbabwe, St. Christopher and Nevis, Mauritius, Botswana, and the Turk and Caicos Islands.
 3. Indian Constitution, Articles 19(1)(f) and 19(5). Article 19(1)(f) read: '(1) All citizens have the right -...(f) to acquire, hold, and dispose of property....'

Principles to be exempt from the purview of the Bill of Rights.¹ There was also an amendment that purported to give Parliament the sole authority of determining the amount of compensation to be paid in eminent domain cases. In 1978 the property guarantee allowing for the right 'to acquire, hold and dispose of property' was omitted along with article 31 that included details of paying compensation, and the following guarantee was added: 'No person shall be deprived of his property save by authority of the law'.²

The Trinidad and Tobago Bill of Rights refers to the 'enjoyment of property and the right not to be deprived thereof except by due process of law'.³

There have been a variety of cases dealing with these guarantees. As might be expected, many cases involved the question of what should be

1. Article 39 which includes the Directive Principles, instructs the Government to 'direct its policy towards securing -

...(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of the wealth and means of production to the common detriment...'

As noted in Chapter Three, the 1971 amendment purported to allow legislation meant to give effect to the above sections to be constitutional notwithstanding any inconsistency with the article containing the property guarantee. A 1976 amendment extended this qualification to include legislation giving effect to any of the directive principles.

2. See section 300A. For a detailed analysis of property guarantees in the Indian Constitution see H.M. Seervai, Constitutional Law of India, 3rd. edn., (London, Sweet and Maxwell, 1984), ii. chapters XIV and XV.

3. Trinidad and Tobago Constitution, sec. 4.

included in a definition of property.¹ The British Caribbean Court of Appeal decided that money could be considered property; they declared that a British Guiana ordinance requiring employers to deduct compulsory savings from paycheques was not taxation, but a forced loan, and thus contrary to the property guarantee.² Similarly, the Mauritius Supreme Court declared that money could be considered property, but that a regulation that required importers to deposit fifty per cent of the c.i.f. value of their imports refundable in three months without any interest was not a forced loan and therefore not an infringement of the guarantee regarding property deprivation.³ In Uganda, the High Court decided that a contract could be considered property and that a law that took away the right of a person to obtain a judgement on a contract was unconstitutional.⁴ In Zambia it was

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1. Many Commonwealth Bills of Rights refer to property only in general terms; the phrase used in the Belize guarantee - 'property of any description' - is a common one. But some Bills of Rights derived from the same model elaborate on the definition of property. The St. Lucia guarantee notes that

(8) In this section -

'property' means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional;

(S.I. 1978/1901, sec. 6(8)). A similar provision appears in the St. Vincent Constitution.

2. Inland Revenue Commission and Attorney-General v. Lilleyman and Others 7 W.I.R. 496. As already noted the property guarantee of the present Guyana Constitution reads differently. The ordinance under consideration was the National Development Savings Levy Ordinance, 1962.
3. Hawaldar v. Government of Mauritius 1978 M.R.37.
4. Shah v. Attorney-General (No.2) [1970] E.A.523. The decision was reached partly on the grounds of deeming justiciable the introductory section of the Bill of Rights. The question of justiciability of this section has been noted in Chapter Three.

decided that exchange controls came within the limitations on the guarantee regarding deprivation of property.¹

The Judicial Committee has considered what should come within the ambit of the property guarantees. In Government of Malaysia v. Selanger Pilot Association² the Committee heard that a group of pilots had formed an association in order to provide pilotage services. A few years later the Malaysian Government had passed the Port Authorities Act, 1963 that in effect required all the pilots in the area in question to be employed by the port authority. Although the port authority offered employment to the pilots and purchased the assets of the association, an action was brought against the authority and the Government for declarations that the pilots were entitled to compensation because of the loss of the goodwill of their business. The majority of the Committee declared that the rights of licensed pilots to provide pilotage services were not rights of property and that even if the association had possessed goodwill, such goodwill had not been acquired by the port authority and thus there was no need for compensation. The Committee also drew a distinction between property deprivation and compulsory acquisition.³

In a case regarding the Trinidadian Bill of Rights, Lord Diplock explained that the argument that loss of a teaching post was loss of property 'needs only to be stated to be rejected.'⁴

1. Patel v. Attorney-General (1968) Z.R.99.

2. [1978] A.C.337.

3. The relevant section of the Malaysian Constitution is as follows:

13.(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

4. Harikissoon v. Attorney-General of Trinidad and Tobago [1980] A.C.265 at 268.

In a recent case that originated in Gambia, the Judicial Committee considered whether an Act that provided for the seizure of property and the freezing of funds belonging to people charged with theft of public funds and property was contrary to the property guarantees of the Bill of Rights. The Committee ruled that such provisions came within the exception that allowed for the taking of property for so long as might be necessary for the purposes of a trial. But when reading the Committee's decision, Lord Diplock did note that the guarantee's reference to property 'is to be read in a wide sense.'¹

Another recent decision of the Judicial Committee dealt with the claims of compensation by dock companies who had in effect lost their business because of the establishment of a Sugar Terminal set up as a statutory corporation controlled by the Government.² The Committee ruled that the companies' loss of business was not caused by coercive actions of the Government but by the companies' inability to provide an efficient service for the sugar industry. In the same decision the Committee also considered whether the deprivation of property guarantee applied in a case where the Government decided not to implement salary increases that had been set by a compulsory arbitration decision agreed to by the Mauritius Marine Association and unions representing workers. It was decided that the Mauritius Marine Authority was contractually bound to accept the arbitration award and therefore the Government had no power to direct it not to implement the award.³

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1. Attorney-General of the Gambia and Mamodou Jobe [1984] A.C.689 at 700. The Act under consideration was the Special Criminal Court Act 1979.
 2. Société United Docks v. Government of Mauritius [1985] 1 All E.R.864.
 3. Marine Workers Union and Others and Mauritius Marine Authority [1985] 1 All E.R. 864.

It is interesting to note that a recent amendment to the Mauritius Bill of Rights states that notwithstanding the guarantee regarding deprivation of property, no law relating to the acquisition of property shall be questioned if it is passed at its final reading by three-quarters of the assembly, and such a law can only be amended by a three-quarters majority.¹ The amendment may well have been partly a result of the Supreme Court of Mauritius ruling in Mahboob v. Government of Mauritius.² In 1967 a piece of land had been sold by a person to a society. Some years later, a dispute between the person and the society prompted the person to ask the court not to recognise the sale since the society was a foreign institution and did not have legal personality. After the Court upheld this argument the Government passed an Act stating that the original sale was to be considered legal. The person took the case to the Supreme Court and argued that his constitutional right regarding property had been violated. The court agreed.

As might be expected there have been many cases where the Indian courts have considered the meaning of the Indian property guarantee. A case of particular note is that of R.C. Cooper v. India.³ An Act nationalizing certain banks within India, purported to state the principles for determining what compensation was to be paid for the acquisition of the Bank. A person who was a director and shareholder of one of those

1. The Constitution of Mauritius (Amendment) Act, 1983; reported in (1983) 9CLB 770.

2. (1982) 9 CLB 81.

3. A.I.R. 1970 Supreme Court 564.

banks challenged the Act on various grounds.¹ The majority decision declared the Act to be void for a variety of reasons. As part of its decision, the Court noted that what were meant to be the terms of compensation that were provided in the Act were not relevant and could not be considered compensation. Due to such cases as this, subsequent amendments to the constitution were made.

As has been mentioned, the St. Christopher and Nevis Bill of Rights states only that the principles of compensation are to be included in any Act regarding deprivation of property. The High Courts there has ruled that compensation must mean 'full money equivalent.'²

There have been some interesting cases involving a tenant's or landlord's rights under guarantees regarding property. In Attorney-General v. Kennette Morgan³ the Trinidadian Court of Appeal considered the Rent Restriction Dwelling Houses Act, 1981. The Court declared that if the Act had frozen rents at the date of its commencement and if provision had been made for review of individual cases, then the Act would have been valid; but in the absence of such provisions the Act did take the property of the landlord. Nonetheless the Act had been passed under the guidelines of the Trinidadian legislative override provision and thus was to be considered valid unless it could be shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the

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1. As noted in Chapter Three, an interesting feature of this case was that the petitioner did not bring the action on the ground that Banks' rights had been violated but on the ground that his own rights had been infringed. Under consideration were the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 and the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969.
 2. Yearwood v. Attorney-General (1977) 3CLB 593.
 3. Cited in (1984) 10 CLB 1505.

individual. The Court decided that the applicant had failed to prove that the law should not be allowed under such a proviso.

Recently the Zimbabwe Supreme Court also heard a case involving rent controls.¹ A rent had been agreed upon. Then the Emergency Powers (Control of Non-residential Rent) Regulations were published which included guidelines for rent. The tenant paid only the rent required by the new guidelines. The landlord claimed that his rights regarding property had been violated. The Court looked to the limitations on the guarantee and decided that a part of the limitation did apply to the case in question.

Guarantees Prohibiting Slavery and Forced Labour

Many Commonwealth Bills of Rights include guarantees against slavery and forced labour.² The guarantee in the Belize Bill of Rights reads as follows:

- 8.(1) No person shall be held in slavery or servitude.
- (2) No person shall be required to perform forced labour.
- (3) For the purposes of this section, the expression forced labour does not include

1. Zimbabwe Township Developers (Private) Ltd. v. Lou's Shoes (Private) Ltd. (1983) 10 CLB 1508.

2. There are, however, several exceptions. There do not appear to be any corresponding guarantees in the Bills of Rights of the Maldives, Sri Lanka, Trinidad and Tobago, Canada, and Jamaica. It will be recalled that the Jamaican Bill of Rights is derived from the same model as the Belize Bill of Rights is. Apparently it was at the London independence conference that it was decided not to include such a guarantee in the Jamaican Bill of Rights. 'I have never thought it was appropriate', explained Prime Minister Manley; (Proceedings of the House of Representative of Jamaica 1961-62, p.775.

Some of the guarantees come under a heading referring to 'forced labour or inhuman treatment'.

- (a) any labour required in consequence of the sentence or order of a court;
- (b) labour required of any person while he is lawfully detained that though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;
- (c) any labour required of a member of a disciplined force in pursuance of his duty as such or in the case of a person who has conscientious objections to service as a member of a naval, military or airforce (sic), any labour that the person is required by law to perform in place of such service; or
- (d) any labour required during any period of public emergency or in the event of any accident or natural calamity that threatens the life and well-being of the community to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that accident or natural calamity for the purpose of dealing with that situation. 1

There are some differences in the ways that the other Commonwealth Bills of Rights provide for this protection. Some of the Bills of Rights that are derived from the same model add another clause that allows for 'any labour reasonably required as part of reasonable and normal communal or other civic obligations.'² The comparable Malta clause allows for:

1. S.I. 1981/1107, sec. 8.

2. See, for example, the analogous provisions in the Bill of Rights of Botswana, Fiji, the Gambia, Kenya, Kiribati, Nauru, Tuvalu, Uganda, and Zimbabwe.

labour required of any person while he is lawfully detained by sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose... 1

In the Indian constitution the relevant provision is under the heading 'Right against Exploitation'. It states that 'Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law'. The subsequent section guarantees that 'No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.'²

Guarantees of Free Movement

Virtually every Commonwealth Bill of Rights has a guarantee regarding free movement.³ The relevant guarantees contained in the Belize Bill of Rights read as follows:

- 10.(1) A person shall not be deprived of his freedom of movement, that is to say, the right to move freely throughout Belize, the right to reside in any part of Belize, the right to enter Belize, the right to leave Belize and immunity from expulsion from Belize.
- (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

1. Malta Constitution, sec. 36. The Zimbabwe guarantee includes similar provisions in that it allows for an action

'in execution of the order of a court or with the consent of his parent or guardian for the purposes of his education or welfare during a period beginning before he attains the age of twenty-one years and ending not later than the date when he attains the age of twenty three years;...if he is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his case treatment or rehabilitation or the protection of the community;' (sec. 14(2)(b)(ii)); the guarantee also permits 'any labour required by way of parental discipline'; (sec. 14(2)(d)).

2. Sections 23(1) and 27.

3. Exceptions are the Bill of Rights of Nauru and Tonga.

- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision -
- (a) for the imposition of restrictions on the movement or residence within Belize of any person or any person's right to leave Belize that are required in the interests of defence, public safety or public order;
 - (b) for the imposition of restrictions on the movement or residence within Belize or on the right to leave Belize of persons generally or of any class of persons in the interests of defence, public safety, public order, public morality or public health or, in respect of the right to leave Belize, of securing compliance with any international obligation of the Government;
 - (c) for the imposition of restrictions by order of a court, on the movement or residence within Belize of any person or any person's right to leave Belize either in consequence of his having been found guilty of a criminal offence under a law or for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings relating to his extradition or lawful removal from Belize;
 - (d) for the imposition of restrictions on freedom of movement of any person who is not a citizen of Belize;
 - (e) for the imposition of restrictions on the acquisition or use by any person of land or other property in Belize;
 - (f) for the imposition of restrictions on the movement or residence within Belize or on the right to leave Belize of any officer in the public service that are required for the proper performance of his functions;
 - (g) for the removal of a person from Belize to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of a court in respect of a criminal offence under a law of which he has been convicted; or
 - (h) for the imposition of restrictions on the right of any person to leave Belize that are required in order to secure the fulfilment of any obligation imposed on that person by law.
- (4) If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in subsection (3)(a) of this section so requests at anytime

during the period of that restriction not earlier than twenty-one days after the order was made or three months after he last made such a request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the Chief Justice from among persons who are legal practitioners.

- (5) On any review by a tribunal in pursuance of subsection (4) of this section of the case of any person whose freedom of movement has been restricted the tribunal may make recommendations concerning the necessity or expediency of of the continuation of that restriction to the authority by whom it was ordered and, unless it is otherwise provided by law, that authority shall be obliged to act in accordance with any such recommendations. 1

Of the Commonwealth Bills of Rights that are derived from the same model, there are some interesting differences. One such difference is in regard to the guarantees included in the provisions analogous to subsection (1) of the Belize guarantee. Whereas the Belize guarantee allows for the right to enter and to leave the country, some of the other Bills of Rights do not include any explicit provision allowing for exit from the country.² The Gambian guarantee includes neither the rights to enter nor to exit.

Several of the Bills of Rights derived from the same model include an elaboration of the guarantee's limitation by adding the phrase 'except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.' Typically the phrase is added after the provisions corresponding to clauses (3)(b) and (3)(h) of the Belize limitation;³ though for some of the limitations the phrase is added on only at the end that is to say after

1. S.I. 1981/1107, sec. 10.

2. See, for example, the relevant provisions of the Bills of Rights of Botswana, Gambia, Jamaica, the Solomon Islands, Zambia, the Turk and Caicos Islands, and Bermuda.

3. See for example, the relevant sections of the Bills of Rights of Antigua, Dominica, Fiji, Kenya, Kiribati, Malta, Mauritius, and St. Vincent.

the provision corresponding to subsection (3)(h) of the Belize Constitution.¹ There are other ways in which the phrase is added to the guarantee.² Some of these deserve particular mention. The Nigerian limitation involves the 'reasonably justifiable' phrase but appears to shift the burden that is to say it is written in the positive style rather than the negative.³ For Zimbabwe the 'reasonably justifiable' phrase is explicitly meant to pertain to all the limiting sub-clauses except for one that allows 'for the imposition of restrictions on the residence within Tribal Trust Land of persons who are not tribespeople to the extent that such restrictions are reasonably required for the protection of the interests of tribespeople or their well-being.'⁴ An additional phrase of the Zimbabwean guarantee notes that 'The provision of [the subsection analogous to Belize's (3)(a)] shall not be construed as authorizing a law to make provision for preventing any person from leaving Zimbabwe or excluding or expelling from Zimbabwe any person who is a citizen of Zimbabwe.'⁵

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1. See, for example, the relevant sections of the Bills of Rights of St. Christopher and Nevis, St. Lucia, Anguilla, and Gibraltar.
 2. The Zambian version of this limitation puts the phrase only after the clause corresponding to Belize's (3)(b). The same holds true for the Bahamas version where the relevant clause also allows for provisions 'protecting the rights and freedoms of other persons'. The Bermuda limitation also allows for the protection of rights and freedoms of other persons and has the added phrase at the end of the clause corresponding to Belize's (3)(b) as well as at the end of the subsection. The Botswana limitation is not as detailed as the Belize version, though it does include the 'reasonably justifiable' phrase after the part corresponding to Belize's (3)(b). In the Gambia Bill of Rights the phrase comes after the clause corresponding to Belize's (3)(a) and at the end as well. The same style is used in the Turk and Caicos Bill of Rights.
 3. Nigeria Constitution, 1979, sec. 38(2).
 4. S.I. 1979/1600, sec. 22(3)(f).
 5. Ibid., sec. 22(4).

There are some other interesting differences in the freedom of movement guarantees of the Commonwealth Bills of Rights derived from this same model. It will be noticed that as outlined in subsections (4) and (5) of the Belize guarantee, allowance is made for a tribunal to rule on any challenge to the application of the limitation contained in clause (3)(a). Most of the other Bills of Rights derived from the same model include a similar provision though the ways in which the tribunal is appointed and the limits spelled out vary.¹ What is interesting to note is that whereas for Belize an authority is obliged to follow the tribunal's recommendations (unless otherwise provided for by law), for some countries it is stated that the authority shall not be obliged to follow the tribunal's recommendations unless otherwise provided for by law.² For the Solomon Islands the relevant clause states that 'the decision of the tribunal concerning the necessity or expediency of continuing this restricting shall be binding on the authority by which it was ordered.'³ In the Bermuda limitation corresponding to clause (3)(a) of the Belize guarantee, the phrase 'reasonably required' is used rather than simply 'required'.⁴ Similarly, some of the Bills of Rights use 'reasonably required' for the phrase corresponding to the 'required' which appears in clause (3)(f) of the Belize guarantee.⁵ In Barbados and Guyana (where the independence constitutions were drafted about the same time), the freedom of movement

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1. Bills of Rights derived from the same model that do not include any provision like this include those of the Turk and Caicos Islands, Gibraltar, Bermuda, and Zimbabwe.
 2. See, for example, the relevant provisions for Barbados, Botswana, The Gambia, Guyana, Jamaica, Kiribati, Malta, St. Christopher and Nevis, and Sierra Leone.
 3. S.I. 1978/783, sec. 14(5).
 4. S.I. 1968/182, sec. 11(2)(a).
 5. See, for example, the relevant provisions for Antigua and the Bahamas.

limitation also allows people 'to be detained for care or treatment in a hospital or other institution in pursuance of a law of Barbados, relating to persons suffering from the defect or disease of the mind.'¹ The Botswana limitation makes allowance 'for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well being of Bushmen.'² In the Kenya Bill of Rights it is stated that the Outlying Districts Act, the Special Districts (Administration) Act or any updates of those Acts shall continue to operate notwithstanding any inconsistency with the freedom of movement guarantee, unless 'it is otherwise provided by Act of Parliament....'³ The Guyana limitation corresponding to Belize's (3)(a) allows for restrictions not only for defence, public safety or public order but allows also for restrictions meant to guard against 'subversion.'⁴ Two Commonwealth Bills of Rights include restrictions meant to help protect the environment as part of the limitations.⁵ In Sierra Leone provisions are allowed 'for restricting vagrancy.'⁶

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1. See S.I. 1966/1455, sec. 22(3)(g)(iv) and Guyana Constitution, sec. 148(3)(g)(iv).
 2. S.I. 1966/1171, sec. 12(3)(c).
 3. Kenya Constitution, sec. 81(6)(d).
 4. Guyana Constitution, sec. 148(3)(a).
 5. See the Kiribati Constitution, S.I. 1979/719, sec. 14(3)(b). In Sierra Leone the limitation allows for restrictions for 'the conservation of the mineral resources of Sierra Leone;' Sierra Leone Constitution, sec. 8(3)(a).
 6. Ibid., sec. 8(3)(g).

Of the Bills of Rights that are not derived from the same model as the Belize Bill of Rights, there are some interesting features. The Malaysian guarantee is qualified by a potentially wide-ranging limitation that notes that '(2) The validity of any law shall not be questioned on the ground that -

- (a) it imposes restrictions on the right mentioned in [the guarantee of free movement] but does not relate to the matters mentioned therein;' 1

In the Indian guarantee, allowance is made for 'reasonable restrictions on the exercise of the rights conferred by [the freedom of movement guarantee] either in the interests of the general public or for the protection of the interests of any Schedules Tribe.'²

In Canada the guarantee under the heading 'mobility rights' reads as follows:

- 6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
 - (a) to move to and take up residence in any province; and
 - (b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
 - (a) any laws or practice of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
 - (b) any laws providing for reasonably residency requirements as a qualification for the receipt of publicly provided social services.

1. Malaysia Constitution, sec. 4(2).

2. Indian Constitution, sec. 19(5).

- (4) Subsections (2) and (3) do not preclude any law, program, or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

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The first decision that the Canadian Supreme Court handed down on the Canadian Charter of Rights dealt with this guarantee. In Law Society of Upper Canada v. Joel Skapinker² the Court ruled that the Ontario Law Society regulation that required a prospective member to be a citizen was allowable under subsection (3)(b). In Ontario, the Court of Appeal looked to the Charter's general limitation when it considered the guarantee of mobility. In The Federal Republic of Germany and Rauca³ the West German government sought to extradite Rauca so that he could face trial for murdering several thousand people during the second World War. Since coming to Canada Rauca had become a Canadian citizen. It was argued that he should accordingly be entitled to the guarantees of section six which allows every citizen to enter, remain in, and leave Canada. The Court upheld the decision of a lower court and decided that an extradition treaty was a reasonable limitation within the meaning of the section.

The freedom of movement guarantee for Bermuda is meant to apply to people who 'belong to Bermuda'. In spelling out who such people are, the relevant part of the guarantee refers to the 'child' of a person. In Minister of Homes Affairs and Fisher⁴ the Judicial Committee decided that illegitimate children could enjoy the protection of the guarantee.

1. Canadian Charter of Rights and Freedoms, sec.6.

2. 9 D.L.R. (4th) 161.

3. 145 D.L.R. (3d) 638.

4. [1980] A.C. 319.

In Cyprus the Supreme Court decided that an order that limited the use of motor cars to alternate weekends was an infringement of the freedom of movement guarantee.¹ The Court reasoned that because most citizens could not afford to own two cars, or to take taxis, and that because during the weekend there was not an effective public transport system, the order was an infringement on the freedom of movement guarantee.

Miscellaneous Rights

Included in some Commonwealth Bills of Rights are guarantees that are not typically found in Bills of Rights. For example, some of the Bills of Rights include provisions for what could be termed 'economic' rights.² Unlike many of the Bills of Rights derived from the same model, the Belize one includes a right to work.³ The Cyprus Constitution declares that, 'A law shall provide for the prevention of exploitation by persons who are commanding economic power.'⁴ There is also a provision that 'Every person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance.'⁵ Some Commonwealth constitutions include

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1. Elia v. The Police (1980) 2 CLR 118.
 2. Although rights regarding property could be included in a definition of economic rights, they are not considered here.
 3. S.I. 1981/1107, sec. 15.
 4. Cyprus Constitution Cmd. 1093 (1960), Art.26(1).
 5. Ibid., Art.39.

such rights in a non-justiciable section and in many ways one can understand why.¹ Unlike the other rights which have already been noted, these rights not only assume that state authorities should not be doing certain things, but they also seem to suggest that the state authorities should be doing certain things. A guarantee of free expression, for example, is usually thought to mean that the state should not interfere with a person's expression, except under certain circumstances. Such a guarantee is not, however, typically interpreted as obliging government to play an active role in providing for free expression. A guarantee of free

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1. For example, the preambles of Seychelles and Tanzania include assertions of economic rights. The 1974 Malta Constitution includes economic rights under the heading 'Declaration of Principles', though it is clearly stated that such rights are not to be enforceable in any court.

The 1980 Guyana Constitution included economic rights in a chapter called 'Principles and Bases of the Political, Economic and Social System.' A section in the chapter notes that 'It is the duty of Parliament, the Government, the Courts, and all other public agencies to be guided in the discharge of their functions by the principles set out in this Chapter, and Parliament may provide for any of those principles to be enforceable in any court or tribunal'. Included in the chapter is a right to work (sec.22), a right to leisure (sec.23), a right to housing (sec. 26) and a claim that 'Every young person has the right to ideological, social cultural and vocational development and to the opportunity for responsible participation in the development of the socialist order of society' (Sec. 28).

Although most Commonwealth Bills of Rights do not include justiciable guarantees of economic rights, some constitutional conferences did consider such possibilities. For example, according to Professor Y. Ghai, the Vanuatu (New Hebrides) constitutional conference (which included both French and British representatives) considered the inclusion of economic rights in the Constitution; but to the British representatives talk of economic rights 'sounded revolutionary'. Professor Ghai explains that some countries did consider having justiciable economic rights in their Bills of Rights, but decided they would be difficult to enforce, so instead directive principles were agreed to. Although such provisions are typically non-justiciable, some constitutions do require an ombudsman or a tribunal to consult the directive principles.

Directive Principles are included in the Indian Constitution as well; and these have to be discussed in Chapter Three.

expression can provide that the government may not impose certain restrictions on newspapers, literature, or speech-making, but it does not necessarily oblige the government to assume responsibility for ensuring that people cultivate skills as journalists, authors, and elocutionists. But for economic rights a different view might be adopted. A guarantee that a person has a right to social security could be interpreted as a provision meant not just to prevent the government from enacting legislation that would result in the loss of social security, but also as a provision requiring the government to ensure that there are adequate arrangements for social security. Admittedly, this might not be so with a guarantee such as the right to work, which is unlikely to be interpreted as requiring the government to provide jobs for everybody. Nevertheless it does seem that the assertion of these kinds of rights implies a different view of the role of government.

Rights that are meant to provide for economic well-being also imply an endorsement of materialistic priorities. It could be argued that there is nothing wrong with the state being concerned with such matters, indeed such activity makes more sense than trying to indentify and give effect to moral precepts that are not always easy to identify or put into effect. But it is debateable as to whether such matters should be endowed with the status accorded constitutional provisions which might be invoked to challenge the validity of statutory legislation. There is, of course, a philisophical or moral underpinning to the actions of government. For example, laws are enacted that provide for social assistance because most people believe that the state has a legitimate role to play in assisting people not to fall below a certain standard of living. Nevertheless, it is debatable whether people should be assumed to have a fundamental right to rely on the state

to provide material assistance.

The Indian Constitution purports to abolish titles¹ and untouchability.² There is also a provision guaranteeing all citizens the right 'to practise any profession, to carry on any occupation, trade or business.'³ The Sri Lanka Bill of Rights guarantees that every citizen is entitled to 'the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language.'⁴ Canada's Charter of Rights also includes provisions for various language rights,⁵ provisions that the Supreme Court of Canada described as 'quite peculiar to Canada.'⁶ There is also a provision that the Charter 'shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada....'⁷ In addition there is a guarantee 'This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'⁸

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1. Indian Constitution, ch. III, sec. 18.
 2. Ibid., sec. 17.
 3. Ibid., sec. 19(1)(g). A case where the Status of this guarantee was considered was Excel Wear v. Union of India A.I.R. 1979 Supreme Court 25. A similar kind of guarantee is found in the Cyprus Constitution, Cmd. 1093 (1960) Art. 25(1) and the Sri Lanka Constitution, 1979, sec. 14(1)(g).
 4. Sri Lanka Constitution, sec. 14(1)(f).
 5. Canadian Charter of Rights and Freedoms, sections 16 and 20-23.
 6. Attorney-General of Quebec v. Quebec Association of Protestant School Boards 10 D.L.R. (4th) 321 at 331.
 7. Canadian Charter of Rights and Freedoms, sec. 25; see also sec. 29.
 8. Ibid., sec. 27.

The Cyprus Bill of Rights includes a right 'to marry and found a family.'¹ It also includes a right to education.² The Papua New Guinea Constitution includes a right to freedom of information.³

1. Cyprus Constitution, Cmd. 1093, (1960), Art. 22.

2. Ibid., Art. 20.

3. Papua New Guinea Constitution, sec. 51.

CHAPTER 6

RIGHTS REGARDING THE LEGAL PROCESSGUARANTEES OF PERSONAL LIBERTY

All Commonwealth Bills of Rights include some kind of guarantee for liberty of the person.¹ The 1981 Belize guarantee reads as follows:

- 5.(1) A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:-
- (a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Belize or some other country, in respect of a criminal offence of which he has been convicted;
 - (b) in execution of the order of the Supreme Court or the Court of Appeal punishing him for contempt of the Supreme Court or the Court of Appeal or of another court or tribunal;
 - (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
 - (d) for the purpose of bringing him before a court in execution of the order of a court;
 - (e) upon a reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law;
 - (f) under the order of a court or with the consent of his parent or guardian for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;
 - (g) for the purpose of preventing the spread of an infectious or contagious disease;
 - (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

1. In some of the Bills of Rights the relevant guarantee is labelled 'Protection from arbitrary arrest or entry'; see, for example, the Bills of Rights of the Bahamas, Jamaica, and Sierra Leone.

- (i) for the purpose of preventing his unlawful entry into Belize, or for the purpose of effecting his expulsion, extradition or other lawful removal from Belize or for the purpose of restraining him while he is being conveyed through Belize in the course of his extradition or removal as a convicted prisoner from one country to another; or
 - (j) to such extent as may be necessary in the execution of a lawful order requiring him to remain within a specified area within Belize, or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against him with a view to the making of any such order or relating to such an order after it has been made, or to such extent as may be reasonably justifiable for restraining him during any visit that he is permitted to make to any part of Belize in which, in consequence of any such order, his presence would otherwise be unlawful.
- (2) Any person who is arrested or detained shall be entitled -
 - (a) to be informed promptly, and in any case no later than forty-eight hours after such arrest or detention, in a language he understands, of the reasons for his arrest or detention;
 - (b) to communicate without delay and in private with a legal practitioner of his choice and, in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice;
 - (c) to be informed immediately upon his arrest of his rights under paragraph (b) of this subsection; and
 - (d) to the remedy by way of habeas corpus for determining the validity of his detention.
- (3) Any person who is arrested or detained -
 - (a) for the purpose of bringing him before a court in execution of the order of a court; or
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law, and who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after such arrest or detention.
- (4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of the court.

- (5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall, unless he is released, be entitled to bail on reasonable conditions.
- (6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person or authority on whose behalf that other person was action:
Provided that no person shall be liable for any act done in the performance of a judicial function for which he would not be liable apart from this subsection.
- (7) For the purposes of subsection (1)(a) of this section a person charged before a court with a criminal offence in respect of whom a special verdict has been returned that he was guilty of the act or omission charged but was insane when he did the act or made the omission shall be regarded as detention in execution of the order of a court. 1

Unlike the Belize guarantee, not all the other Commonwealth Bills of Rights include the right to consult a lawyer if arrested or detained.² Some of the Bills of Rights allow for the right to see a lawyer, but specify that it is to be at the expense of the accused.³ In the Vanuatu Bill of Rights it is stated that one has the right to a lawyer 'if it is a serious offence.'⁴ The Bermuda guarantee allows for one telephone call to be made.⁵

1. S.I. 1981/1107, sec. 5.

2. For example, the relevant guarantees in the following countries' Bills of Rights do not include such a provision: Botswana, Dominica, Gambia, Jamaica, Kenya, Kiribati, Maldives, Malta, Sierra Leone, Solomon Islands, Tonga, Tuvalu, Zambia, Gibraltar, Turk and Caicos Islands, and Anguilla. But for the provisions outlining detention the Ugandan guarantee allows for a lawyer at one's own expense. Uganda Constitution, sec.10 (5)(c).

3. See, for example, the relevant provisions in the Bills of Rights of the Bahamas, Barbados, Antigua, Guyana, and Zimbabwe.

4. Vanuatu Constitution, 1980, sec. 5(2).

5. S.I. 1968/182, sec. 5(2).

It will be seen that the sixth clause of the Belize guarantee allows for compensation for unlawful arrest though it exempts anyone exercising a judicial function from assuming such liability. Most of the Bills of Rights derived from the same model include a similar guarantee, though not all of them exempt the judicial authorities from its ambit.¹ Some of the guarantees allow for derogation during times of emergency. The relevant part of the Bahamas Constitution reads as follows:

- (5) Where a person is detained by virtue of such law as is referred to in [the section of the constitution outlining emergency provisions], the following provisions shall apply -
 - (a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing, in a language that he understands, of the grounds upon which he is detained;
 - (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized;
 - (c) he may from time to time request that his case be reviewed under sub-paragraph (d) of this paragraph but, where he has made such a request, no subsequent request shall be made before the expiration of three months from the making of the previous request;
 - (d) where a request is made under sub-paragraph (c) of this paragraph, the case shall, within one month of the making of the request, be reviewed by an independent and impartial tribunal established by law, presided over by the Chief Justice or another Justice of the Supreme Court appointed by him, and consisting of persons who are Justices of the Supreme Court or who are qualified to be appointed as Justices of the Supreme Court;

1. Only the Bills of Rights of St. Christopher and Nevis, St. Lucia, St. Vincent, and Zimbabwe include a provision that explicitly exempts the judiciary from personal liability.

- (e) he shall be afforded reasonable facilities to consult and instruct at his own expense, a legal representative of his own choice, and he and any such legal representative shall be permitted to make written or oral representations or both to the tribunal appointed for the review of his case.
- (6) On any review of a tribunal in pursuance of paragraph (5) of this Article of the case of any detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by whom it was ordered, but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.
- (7) When any person is detained by virtue of such a law as is referred to in Article 29 of this Constitution the Prime Minister or a Minister authorised by him shall, not more than thirty days after the making of the previous report, make a report to each House stating the number of persons detained as aforesaid and the number of cases in which the authority that ordered the detention has not acted in accordance with the recommendations of a tribunal appointed in pursuance of paragraph (5) of this Article:

Provided that in reckoning any period of thirty days for the purpose of this paragraph no account shall be taken of any period during which Parliament stands proranged or dissolved. 1

Similar provisions are to be found in some of the other Bills of Rights though sometimes the details vary.² The relevant Fijian limitations is not as elaborate and simply states that:

- (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of public emergency measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period. 3

Some of the Bills of Rights allow for preventive detention which does not necessarily assume that a state of emergency is in force.⁴ For Nigeria

1. S.I. 1973/1080, sec.19.

2. See, for example, the Bills of Rights of Barbados, Jamaica, Malta, and Sierra Leone.

3. S.I. 1970/6630, sec. 3(7).

4. See, for example, the relevant provisions in the Bills of Rights of Guyana, India, Mauritius, Uganda, and Malta.

the provision is limited to only members of the police force or armed forces.¹ The Mauritius provision allows for a person to be detained if in the judgement of the Commissioner of Police there is 'reasonable suspicion of his having engaged in, or being about to engage in, activities likely to cause a serious threat to public safety or public order....'² In Uganda the limitation on personal liberty includes a clause stating that:

(8) No order made under such law as is referred to in [the paragraph allowing for preventive detention] shall be questioned in any court.

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The Singapore Bill of Rights (which is modelled on the Malaysian one) includes a provision stating that 'No person shall be deprived of his life or personal liberty save in accordance with law.'⁴ As noted in the previous chapter, the Judicial Committee recently decided that law in that context meant not only statutory law, but also the principles of fundamental justice that form part of the common law.⁵

The Malaysian limitation includes an exemption for some existing law.⁶

There have been a few cases of particular note in regard to the guarantee of liberty. In Maharaj v. Attorney-General of Trinidad and Tobago⁷ a barrister who was involved in a case in the High Court was sent to prison for seven days for contempt on the order of the judge. The

1. Nigerian Constitution, 1979, sec. 32(6)(b).

2. S.I. 1968/1871, sec. 5(1)(k).

3. Uganda Constituion, sec. 10(8).

4. Singapore Constitution, sec. 9(1).

5. Ong Ah Chuan v. Public Prosecutor [1981] A.C. 648.

6. Malaysia Constitution, sec. 5(7).

7. (No. 2) [1979] A.C. 385; [1978] 2 All ER 902.

barrister complained that the judge did not explain in sufficient clarity the substance of the contempt, and thus there had been an infringement of the guarantee of liberty. The Judicial Committee agreed and ruled that the judge's actions were contrary to natural justice as expressed through the common law.¹

In Chokolingo v. A.G. Trinidad and Tobago² the Court learned that the appellant had spent twenty-one days in jail after a trial judge ruled that the publication of a story under the guise of fiction which depicted the Trinidadian judiciary as corrupt had scandalised the court and thus constituted contempt of court. The appellant had originally pleaded guilty and apologised, but a few years later sought a declaration that the committal was unconstitutional and void because it violated the section of the Constitution guaranteeing him the right not to be deprived of his liberty except by due process of law. The appellant claimed that the offence of scandalising the court was not known to the common law in force when the Constitution was enacted (thus not being saved by the existing law clause) and that the trial judge had erred. The Judicial Committee declared that however erroneous the trial judge's interpretation might have been, it was not a violation of the due process provision because the law is what the judiciary or any courts of appeal (the appellant did not originally launch an appeal) deem it to be and thus the appellant had not

1. It could be argued that such law, that is to say natural justice through the common law, was in effect prior to the enactment of the Constitution and thus affected by the clause which purported to exempt all existing legislation from the purview of the Bill of Rights. This point has been noted in the Chapter Three. The case is also interesting in that the barrister sought monetary compensation from the judge; the Judicial Committee however, decided that the judge was not personally liable. As was observed previously some of the limitations of this guarantee include a provision explicitly stating that such public authorities are not to be held personally liable.

2. [1981] 1 All ER 244.

been denied due process of law.

In Grant v. D.P.P.¹ the Privy Council dismissed the appeal of the applicants who had been charged with murder. In January of 1978 five men had died from gunshot wounds at a military firing range. The jury at the inquest returned a verdict of murder of persons unknown. Afterwards a lengthy press campaign named the ten applicants as murderers. A few months later they were charged. The applicants later sought a declaration that the pre-trial publicity would not enable them to have the benefit of a fair hearing as guaranteed by section 20 of the Jamaican Constitution. The Judicial Committee disagreed. They agreed with the Jamaican Court of Appeal that it was not impossible to find a jury unbiased by the adverse publicity, something that the applicants had previously conceded. More recently the Judicial Committee considered a similar provision in the Gambian Bill of Rights. In Attorney-General of the Gambia and Momodou Jobe² the Board considered the constitutionality of a law that amongst other things restricted the granting of bail and made it an offence for a person to fail to come before a special court to prove that property seized by the police was lawfully acquired.³ The Judicial Committee decided that a part of the Special Criminal Court Act that set bail at what the Court of Appeal of the Gambia judged to be excessive was not unconstitutional in that the standard of bail came under the Criminal Procedure Act which had

1. [1982] A.C.190.

2. [1984] A.C.689.

3. The Act in question was the Special Criminal Court Act 1979. Jobe had been arrested on a charge of stealing from his employer, a public bank. The case has already been cited in the previous chapter in the discussion about guarantees regarding deprivation of property.

in effect been amended with the passing of the Special Criminal Court Act. But the Judicial Committee declared unconstitutional the section of the Act that made it an offence for a person to fail to come forward to prove the legality of seized property. Lord Diplock explained that that section of the Act was 'a plain and flagrant infringement'¹ of the constitutional guarantee to be presumed innocent until proven guilty.

Of the huge number of cases involving the Indian Bill of Rights, some of the more noteworthy ones have included consideration of the guarantee of liberty. In Gopalan v. State of Madras² the Indian Supreme Court considered the status of the Preventive Detention Act, 1950. As noted in the previous chapter, the Court decided that the guarantee of Article 21 ('No person shall be deprived of his life or liberty expected or personal liberty save by procedure established by law') referred to state-enacted law and not necessarily principles of natural justice. The Court also decided that the provision of Article 21 did not necessarily include by construction the various guarantees (for example, right to movement, right of free expression) included in Article 19 though a part of the Act was decided to be unconstitutional because it was contrary to other parts of the Constitution.³ The Court also decided that Article 21's reference to 'procedure established by law' referred to well-established criminal procedure, but did not necessarily imply due process of law as interpreted

1. [1984] A.C.689 at 703.

2. A.I.R. 1950 Supreme Court 27.

3. The Court decided that though Article 21 was independent of the guarantees of Article 19, it could, however, be read with the sections regarding preventive detention.

by the American Supreme Court.¹ But in Maneka Gandhi v. Union of India² the Court declared that the procedure cannot be arbitrary, unfair or unreasonable. More recently, the Indian Supreme Court considered a case resulting from the applications filed by several detainees for

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1. Looking to the Fourteenth Amendment, the American Supreme Court has on several occasions decided that the word liberty includes practically all of the fundamental rights. The Court has also interpreted due process in a wide ranging way. Basu explains that:

'Due Process' is a dynamic concept, and the Supreme Court has refused to give it any static definition. Broadly speaking, it negatives anything which is 'arbitrary' or 'shocking to the universal sense of justice,' having regard to the circumstances of each case.

Under this power, thus, the American Judiciary claims to nullify any legislation which may be otherwise valid, on the ground that there is something which seems to be arbitrary or opposed to the fundamental principles of liberty and justice to the Bench of Judges which tries the particular case in relation to which the statute comes to Court. Any State action, legislative, administrative, or judicial, which violates 'due process', either directly or indirectly, is void. Durga Das Dasu, Commentary on the Constitution of India 6th edn., (Calcutta, Sri R.N. Sarkar, 1977) Vol.C.24,25.

In Corwin's commentary it is explained that:

In consequence of the doctrine of due process of law as 'reasonable law', judicial review ceased to have definite, statable limits; and while the extent to which the Court would recanvass the factual justification of a statute under the 'due process' clauses of the Constitution often varied considerably as between cases, yet this was a matter which in the last analysis depended upon the Court's own discretion, and on nothing else. Corwin, The Constitution and What It Means Today revised by Harold W. Chase, Craig R. Ducat, (Princeton, Princeton University Press, 1978), p.464.

Apparently the designers of the Indian guarantees had considered the decisions of the American Supreme Court. An earlier version of the proposed guarantee referred to 'due process'. But discussion between the Indian Constitutional Advisor Sir B.N. Rau and the American jurist Felix Frankfurter resulted in the phrase 'procedure established by law' being adopted instead. See H.M. Seervai, Constitutional Law of India 3rd edn. (London, Sweet and Maxwell Ltd., 1983) i.692, 693.

2. A.I.R. 1978 Supreme Court 597.

release from illegal preventive detention.¹ The Court agreed with the State that the Constitution allowed the President to suspend the right of a person to ask a court for the enforcement of his fundamental rights. One commentator suggested that due to the decision 'the Supreme Court of India has suffered most severely from a self-inflicted wound.'² At any rate a 1978 amendment to the Constitution provided further safeguards regarding preventive detention, including a provision that the President shall not have the right during an emergency to suspend the right of a person to ask a court for enforcement of the Bill of Rights.³

Guarantees of Protection of the Law

Along with guarantees of personal liberty, many Commonwealth Bills of Rights also include a separate section called 'Protection of Law'.⁴ The Belize guarantee reads as follows:

- 6.(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
- (2) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
- (3) Every person who is charged with a criminal offence -
 - (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
 - (b) shall be informed as soon as reasonably practicable, in a language that he understands of the nature and particulars of the offence charged;
 - (c) shall be given adequate time and facilities for the preparation of his defence;

1. A.D.M. Japalpur v. Shivkant Shuk 1a A.I.R.1976 Supreme Court 1207.

2. H.M. Seervai, op.cit., p.1048.

3. The case is discussed at great length by Seervai in ibid., pp. 1020-1048.

4. For some of these Bills of Rights the heading is titled 'Provisions to Secure Protection of Law.'

- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- (f) shall be permitted to have without payment the assistance of an interpreter if, he cannot understand the language used at the trial,
and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence:

Provided that the trial may take place in his absence in any case in which it is so provided by a law under which he is entitled to adequate notice of the charge and the date, time and place of the trial and to a reasonable opportunity of appearing before the court.

- (4) A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.
- (5) A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence as for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.
- (6) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.
- (7) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.
- (8) Except with the agreement of all the parties thereto, all proceedings of every Court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the

decision of the court or other authority, shall be held in public.

- (9) Nothing in subsection (8) of this section shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and the legal practitioners representing them to such extent as the court or other authority
- (a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in proceedings; or
 - (b) may by law be empowered or required to do in the interests of defence, public safety or public order.
- (10) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of
- (a) subsection (3)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
 - (b) subsection (3)(e) of this section to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or
 - (c) subsection (5) of this section to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.
- (11) In the case of any person who is held in lawful detention the provisions of subsection (2) and paragraphs (d) and (e) of subsection (3) of this section shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in such detention.
- (12) In this section 'criminal offence' means a criminal offence under a law.

One way in which the Belize guarantee is not typical is in the inclusion of subsection (1) that provides for equality before the law. As previously noted most Commonwealth Bills of Rights include non-discrimination guarantees, but the Belize Bill of Rights is one of the few that includes a general equality before the law provision.

It will be noticed (sec. 6(8)) that an accused person has the right to be represented by a lawyer. Most Commonwealth Bills of Rights include a similar provision. The Canadian Charter allows for an accused person 'to retain and instruct counsel without delay and to be informed of that right.'¹

Some Commonwealth Bills of Rights include a guarantee of legal aid (under certain circumstances) if the accused cannot afford a lawyer.²

Some of the limitations make allowance for local or customary law. Although the Botswana Bill of Rights includes a guarantee that for a person to be charged the offence and the penalty therefor must be prescribed in a written law, allowance is made for a law 'to the extent that the law in

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- . Canadian Charter of Rights and Freedoms, sec. 10(b).
 - . See, for example, the Guyana Constitution, sec. 144(13), the Malta Constitution, sec. 40(6)(c), the Vanuatu Constitution, 1980, sec. 5(2)(a), the Western Samoan Constitution, 1981, sec. 9(4)(c), the Gibraltar Constitution S.I., 1969/3602 sec. 8(2)(d), the Cyprus Constitution Cmd. 1093 (1960), Art. 30(3)(d) and Art. 12(5) and the Indian Constitution sec. 39A. For some Commonwealth Constitutions, provisions for legal aid are outlined in the section describing the Solicitor-General's office.

question authorises a court to convict a person of a criminal offence under any African customary law to which, by virtue of that law, such person is subject.'¹ The Papua New Guinea limitation states that nothing in the guarantee 'affects the powers and procedures of village courts' though it goes on to note that 'the powers and procedures of village courts shall be exercised in accordance with the principles of natural justice.'² In Sierra Leone, allowance is made for a law that prohibits legal representation in a Local Court.³ The Zambian and Zimbabwean limitations include similar provisions.⁴

Some of the guarantees explicitly state that an offence must be defined by law. For example, the Botswana guarantee states that 'No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.'⁵ Many of the Bills of Rights that include similar guarantees explain that a 'criminal offence' means a criminal offence under the law in force in that country.⁶ The Canadian guarantee takes a different approach. It states that a person is 'not to be found guilty on account of any act or omission unless, at the

1. S.I., 1966/1171.

2. Papua New Guinea Constitution, sec. 37(21)(b) and sec. 37(22).

3. Sierra Leone Constitution, sec. 13(5).

4. Zambia Constitution, sec. 20(12)(b) and S.I., 1979/1600 sec. 18(2)(d).

5. S.I. 1966/1171, sec. 10(8).

6. See, for example, *ibid.*, sec. 10(14). The Bills of Rights of Dominica, Gambia, Guyana, Kenya, Kiribati, Tuvalu, Uganda, Zambia, and Anguilla include similar provisions. For St. Christopher and Nevis, St. Lucia, and St. Vincent the wording is different. For example, the relevant clause in the St. Christopher and Nevis Bill of Rights states that 'In this section 'criminal offence' means a criminal offence under a law.' (S.I. 1983/881, sec. 10(14)).

time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations....'¹ Such differences are interesting. For those countries whose Bills of Rights allow for prosecution only for offences under those countries' law (the majority of Commonwealth countries), it would be more problematic for a trial of war criminals to take place. In Canada, this is arguably not the case. In fact, had a Canadian man who was recently extradited to West Germany to face trial for war crimes² been successful in his attempt to invoke the mobility guarantee of the Charter in preventing that extradition, it would probably still be possible for Canadian authorities to charge the man.

Although many of the Bills of Rights allow for derogation during times of emergency, typically the guarantee for 'Protection of the Law' cannot be derogated from even under emergency measures, though there are some exceptions.³

The Zimbabwean guarantee regarding protection of the law includes in its limitation an interesting provision regarding double jeopardy. It allows a person to be tried again for an offence

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1. Canadian Charter of Rights and Freedoms, sec. 11(g). Apparently during the debates on the Canadian Charter people concerned about the prosecution of war criminals in Canada lobbied for the inclusion of this guarantee.
 2. Federal Republic of Germany and Rauca 145 D.L.R. (3d) 638. The Ontario Court of Appeal ruled that an extradition treaty fell within the ambit of the general limitations outlined in sec. one of the Charter.
 3. See, for example, the relevant provision in the Jamaican Bill of Rights.

'where a conviction and sentence of the General Division or a court subordinate to the General Division are set aside on appeal or review on the ground that evidence was admitted which should not have been admitted or that evidence was rejected which should have been admitted or on the ground for any other irregularity or defect in the procedure....'

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The Judicial Committee has recently considered a case involving the question of the right of an accused person to be represented by a lawyer.² The Jamaican Bill of Rights guarantees that every person who is charged with a criminal offence shall be permitted to be defended by a legal representative of his own choice. During a case where the defendant had been charged with murder, the defence counsel withdrew because they had not been paid. (The defendant had not applied for legal aid assistance). A legal aid assignment was offered to the defence counsel by the judge, but this was not accepted. The judge was reluctant to adjourn the case because on the day that the defence withdrew a key witness was due to appear and it was uncertain whether the witness would appear at a later date, so it was decided to proceed with the case even though the accused was not represented. The Judicial Committee decided that the guarantee in question was not an absolute right in that it was necessary that an adjournment be granted so that a defendant in a criminal trial who desired legal representation was elected.

The European Court of Human Rights has decided that a prisoner serving a sentence must be allowed access to a court for the purpose of bringing civil proceedings and must be allowed to correspond with a solicitor for that purpose.³

1. S.I. 1979/1600, sec. 18(6).

2. Robinson v. The Queen [1985] 3W.L.R.84.

3. Golder v. The United Kingdom, Publications of the European Court of Human Rights, Series A, No.18; 1E.H.R.R.525.

Guarantees Against Arbitrary Search or Entry

Most Commonwealth Bills of Rights include a guarantee against arbitrary search or entry.¹ The Belize guarantee reads as follows:

- 9.(1) Except with his own consent, a person shall not be subjected to the search of his person or property or the entry by others on his premises.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision -
 - (a) that is required in the interests of defence, public safety, public order, public morality, public health town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community.
 - (b) that is required for the purpose of protecting the rights or freedoms of other persons;
 - (c) that authorises an officer or agent of the Government, a local authority or a body corporate established by law for public purposes to enter on the premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or to that authority or body corporate, as the case may be; or
 - (d) that authorises, for the purpose of enforcing the judgement or order of the court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order.

2

1. The following countries' Bills of Rights do not have any explicit guarantees for privacy or against arbitrary search or entry: India, Malaysia, Nauru, Singapore, Sri Lanka, and Western Samoa.

2. S.I. 1981/1107, sec. 9.

A subsequent section reads as follows:

- 14.(1) Nothing contained in or done under the authority of any laws shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision of the kind specified in subsection (2) of section 9 of this constitution. 1

Belize is the only Commonwealth Bill of Rights that spells out these kinds of protections in two different sections.

The other Commonwealth Bills of Rights have various differences. Some of the ones that were derived from the same model elaborate on the limitation (for the guarantee corresponding to Belize's sec. 9) by adding at the end of the section the phrase 'and except so far as that provision or as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society'.² Some of the guarantees include the provisions outlined in section 9 of the Belize Bill of Rights, though under the heading 'Privacy of home and other property'.³

A few of the Commonwealth Bills of Rights derived from the same model allow for a search 'that is reasonably required for the purpose of preventing or detecting crime'.⁴

The analogous guarantee in the Canadian Charter of Rights is quite

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1. Ibid., sec. 14. The section includes the guarantee of the right to privacy.
 2. Such a provision follows the guarantees in the Bills of Rights of Antigua, Bahamas, Botswana, Dominica, Fiji, the Gambia, Kenya, Malta, Mauritius, St. Christopher and Nevis, St. Lucia, St. Vincent, Sierra Leone, Solomon Islands, Tuvalu, Uganda, Zambia, Zimbabwe, Anguilla, Turk and Caicos Islands, Gibraltar, and Bermuda.
 3. See, for example, the Bills of Rights of Botswana, Fiji, Jamaica, Kiribati, Malta, Mauritius, Sierra Leone, Solomon Islands, Tuvalu, Uganda, Zambia, Turk and Caicos Islands, Gibraltar, and Bermuda.
 4. See, for example, the relevant provisions in the Bills of Rights of Antigua, Barbados, Jamaica, Kiribati, the Solomon Islands, Tuvalu, and Anguilla. In the Turk and Caicos Islands limitation there is allowance 'for the prevention or detention of offences against the criminal law or customs law,' (see S.I. 1976/1156, sec.66(2)(a)(iii)).

straightforward and states simply that: 'Everyone has the right to be secure against unreasonable search or seizure.'¹ The Maldives Bill of Rights includes a very qualified guarantee of this kind. It notes that 'Private premises and dwellings shall be respected. Such premises and dwellings shall not be trespassed, save under conditions stipulated in the Law.'² The Malta guarantee is similar to that of Belize's, but there is one interesting difference: the guarantee notes that: 'Except with his own consent or by way of parental discipline no person shall be subjected to the search of his person or his property or the entry by others on his premises.'³ The designers of that Bill of Rights may well have envisioned rebellious adolescents barricading bedroom entrances and invoking the Bill of Rights against intrusive parents.

The Nigerian guarantee comes under the title 'Right to private and family life' and it states that 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'⁴ The Sierra Leone guarantee also mentions correspondence. It notes that: 'Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises, or interference with his correspondence.'⁵ The limitation includes a curious clause that allows 'for the purpose of affording such special care and assistance as are necessary for the health, safety, development and well-being of women, young persons and

1. Canadian Charter of Rights and Freedoms, sec. 8.

2. Maldives Constitution, 1975, sec. 9.

3. Malta Constitution, sec. 39(1).

4. Nigerian Constitution, 1979, sec. 34.

5. Sierra Leone Constitution, sec. 12(1).

children....¹ The Zimbabwe guarantee which is similar to the Belize one includes the following clause after the limitation: 'A law referred to [in the limitations] which makes provision for the search of the person of a woman shall require that such search shall, unless made by a medical practitioner, only be made by a woman and shall be conducted with the strict regard to decency.'²

The Judicial Committee considered the status of the Jamaican guarantee for 'the protection of the privacy of the home and other property' in King v. The Queen.³ The Jamaican Dangerous Drugs Law allowed any constable named in a warrant to search premises and persons found therein. The appellant was searched contrary to the provisions of Jamaica's Constabulary Force Law which required all such searches to be witnessed by a Justice. The appellant claimed that the drugs found had been planted on him by the police officer who was searching. It was also argued that the warrant issued to 'any lawful constable' did not comply with the Dangerous Drugs Law stipulation that the warrant name the constable. The court decided to accept the police officer's version and convicted the appellant. One of the questions dealt with was the admissibility of the evidence. The Judicial Committee decided that the search was unlawful because the warrant was not properly made out and because the accused was not searched in front of a Justice. But the Committee went on to state that even though the search was illegal the Court had discretion to admit the evidence and that the constitutional protections against search of a person or property without consent did not take away the discretion of the Court. The Court ruled

1. Ibid., sec. 12(2)(3).

2. S.I. 1979/1600, sec. 17(3).

3. [1969] 1A.C. 304; [1968] 2 All ER 610.

that in this case the evidence could be admissible. In the judgement read by Lord Hodson, the following was noted: 'This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would be in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.'¹ It seems as if their Lordships were reluctant to accord the constitutional guarantee any special status and preferred to uphold the common law principle in regard to evidence.²

A recent judgement of the Cyprus Supreme Court, however, considered the relevant constitutional guarantee and decided to deny the admissibility of evidence improperly obtained. The questions raised in Police v. Georgehiades³ were interesting in a number of ways. Georgehiades, a psychologist, was charged with perjury and related counts. His client Eracleous had sustained injuries in an accident. Georgehiades examined Eracleous in order to determine the extent of the psychological injuries. It was suspected that Georgehiades might misrepresent the actual condition of Eracleous's injuries, so Eracleous's lawyer arranged to have a microphone hidden at Eracleous's house. Although Eracleous apparently did not know the the planned evesdropping, his wife did. The court had to decide whether such evidence was admissible in the case against Georgehiades in light of the Cyprus guarantees which read as follows:

1. [1969] A.C.304 at 319.

2. Similarly in Zambia it has been held that notwithstanding the Bill of Rights, evidence that was illegally obtained evidence is admissible; Liswaniso v. The People (1976) Z.R.277.

3. (1983) 2CLR33.

Article 15. 1. Every person has the right to respect for his private and family life.

2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitution order or the public safety or the public order or the public health or the public morale or for the protection of the rights and liberties guaranteed by this Constitution to any person.

Article 17 1. Every person has the right to respect of, his correspondence and other communication if such communication is made through means not prohibited by law.

2. There shall be no interference with the exercise of this right except in accordance with the law and only in cases of convicted and unconvicted prisoners and business correspondence and communication of bankrupts during the bankruptcy administration. 1

The Court ended up deciding that the evidence was inadmissible. It is interesting to note that the conversation secretly recorded did not take place at the house of the accused but at a house where he was visiting in his professional capacity. None the less it was concluded that his privacy had been violated.²

The Supreme Court of Canada recently considered the meaning of the

1. Cyprus Constitution, Cmd. 1093 (1960), Articles 15 and 17.

2. The Canadian Charter of Rights provision regarding evidence has interesting phraseology which may mean a new approach by Canadian courts in regard to the admissibility of evidence. The relevant section reads, 'Where, in the proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.' Canadian Charter of Rights and Freedoms, sec.24(2).

The American Supreme Court has preferred not to allow the admission of evidence illegally obtained. The exclusionary rule was first established in Weeks v. United States 232 U.S. 383 (1914) and reaffirmed in Mapp v. Ohio (367 U.S., 643 (1961)).

Canadian guarantee against unreasonable search and seizure.¹ It had been claimed that a part of the Combines Investigations Act should be deemed void because of inconsistency with the constitutional guarantee. The Supreme Court agreed. The decision noted that there was too much discretion in the issuing of the search warrant and that the warrant should have been issued by a person acting in an adjudicatory role rather than an investigatory one. (The Act had allowed a member of the Restrictive Trade Practices Commission to approve the warrant).

In a case involving the seizure of personal papers, the European Court of Human Rights declared that United Kingdom authorities in Northern Ireland had violated the analogous provision of the European Convention.²

Procedures Regarding the Enforcement of Commonwealth Bills of Rights

Virtually all of the Commonwealth Bills of Rights that are justiciable detail the ways in which questions involving the applicability of the Bills of Rights should be pursued. The Belize provision comes under the heading 'Enforcement of Protective Provisions' and reads as follows:

20. (1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

1. Hunter et al v. Southam Inc. 11 D.L.R. (4th)641.

2. Dudgeon v. United Kingdom, Publications of the European Court of Human Rights, Series A, No.45; 4 E.H.R.R.149.

- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution:

Provided that the Supreme Court may decline to exercise its powers under the subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

- (3) If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous, or vexatious.
- (4) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal:

Provided that no appeal shall be from a determination of the Supreme Court under this section dismissing an application on the grounds that it is frivolous or vexatious.

- (5) Where any question is referred to the Supreme Court in pursuance of subsection (3) of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council in accordance with the decision of the Court of Appeal or, as the case may be of her Majesty in Council.
- (6) Notwithstanding the validity of any law under section 9(2), 10(3), 11(5), 12(2), 13(2) or 16(4)(d) of this Constitution, any act or thing done under the

1. Section 9(2) is a limitation on the arbitrary search and entry guarantee; section 10(3) is a limitation on the mobility guarantee; section 11(5) is a limitation on the guarantee of freedom of conscience; section 12(2) is the limitation on the freedom of expression limitation; section 13(2) is a limitation on the assembly and association guarantee, and section 16(4)(d) allows for 'affirmative action' measures.

authority of such a law shall be unlawful if such act or thing is shown not to be reasonably required in the actual circumstances in which it is done.

- (7) The Supreme Court shall have such powers in addition to those conferred by this section as may be conferred on it by this section.
- (8) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the Supreme Court. 1

It will be noticed that sec. 20(6) elaborates on some of the limitations by prohibiting a law taken under the authority of those limitations if that law 'is shown not to be reasonably required in the actual circumstances in which it is done.' It will be recalled that many (though not all) of the other Commonwealth Bills of Rights derived from the same model elaborate on some of their limitations by allowing that a law taken under the authority of such limitations might be shown 'not to be reasonably justifiable in a democratic society.' The Belize Constitution is an exception in providing a blanket limitation in the section describing the enforcement of the guarantee. The differences in wording should also be borne in mind. An action may be reasonably required in the actual circumstances in which it was done, but not be reasonably justifiable in a democratic society.

It is also interesting to note that whereas the Belize guarantee is meant to extend to the whole of the Bill of Rights, the analogous sections in many of the other Bills of Rights derived from the same model do not apply to the 'introductory' sections of the Bills of Rights, thus bringing into question the justiciability of such introductory sections.²

1. S.I. 1981/1107, sec. 20.

2. This question has been discussed at greater length in Chapter Three.

The section under consideration here is one that might well be examined when trying to determine the efficacy of a Bill of Rights. It should be remembered, however, that such a section is not complete indication of the influence a Bill of Rights might extend in practice. For example, the attitudes of the governmental authorities are very important, even given the existence of a guarantee regarding enforcement of the Bill of Rights.¹

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1. Claire Palley provides an illustration of how the attitudes of Government are important irrespective of guarantees of protective provisions. She notes that 'If a Government is prepared to 'take chances' on the law and to take controversial action possibly inconsistent with the fundamental rights provisions until such time as the action is specifically declared to have contravened the constitution, there can be considerable interference in practice with fundamental freedoms'. She points to the decision of the Southern Rhodesian Parliament in 1964 to effectively detain African nationalists despite warnings that such actions might be unlawful. The authorities' determination to detain the nationalists until all appeals had been exhausted combined with the inability of the detainees to pay for legal services that may have allowed them to be freed pending such appeals, resulted in the detainees being held for eight months though the courts in question did rule that the detentions were unconstitutional; (Claire Palley, The Constitutional History and Law of Southern Rhodesia (Oxford, Clarendon Press, 1966) p.564.

CHAPTER 7

THE POLITICAL IMPLICATIONS OF BILLS OF RIGHTS

Most laws are enacted in a political context. It is understandable therefore that political influences may be relevant in constitutional questions generally, and to the issue of a Bill of Rights in particular.

Bills of Rights and Relations Between Different Levels of Government

Bills of Rights are typically thought to define the individual's rights against the authority of the state. But the state authority is not necessarily to be found in one central body, and accordingly some of the discussions surrounding Bills of Rights have included consideration of the ways in which a Bill of Rights might affect the relative powers of different levels of government. De Tocqueville, for example, suggested that concern for equality would lead to increased centralised power which in turn would diminish individual independence and local liberties.¹

When the American founding fathers were debating the desirability of a Bill of Rights, they considered the way in which the relative powers of the different levels of government would be protected. As noted in Chapter One, there did not arise a great demand for a federal Bill of Rights when the Constitution was first being formulated: individual rights were protected by state constitutions and there was no general dissatisfaction with those arrangements. But with the enactment of the 1787 Constitution, some Americans were fearful that the Federal Government would dominate the state governments and proposed a federal Bill of Rights as a way of preventing the Federal Government from assuming too much power. As one commentator explains: 'The cry for a Bill of Rights came loudest from state-minded politicians who hoped to defeat the Constitution altogether,

1. Democracy in America trans. by Henry Reeve (New York, Arlington House, n.d.), ii.307-315.

or had dreams of a second convention in which Congress would be denied the power to lay taxes or to regulate commerce.'¹ The politicians who preferred a stronger central government resisted the proposal for a Bill of Rights. Alexander Hamilton argued that the proposed Constitution itself was a Bill of Rights.² This view, that a national Bill of Rights would serve to curtail the influence of the Federal Government is interesting in the light of the addition in 1868 of the Fourteenth Amendment which accomplished just the opposite. It has been the due process clause of the Fourteenth Amendment that has provided the way for the nationalisation of individual rights and as one commentator explains 'Federalism and individual right concerns are frequently intertwined in the process of interpreting the scope of those new national guarantees.'³

In the United Kingdom, some of the debate about the desirability of a Bill of Rights has been connected with consideration of proposals for devolution. It has been suggested that if certain powers were to be given to regional assemblies, then a United Kingdom Bill of Rights could help ensure that certain rights would continue to be protected.⁴ But the Kilbrandon Commission which examined different possibilities of devolution believed that a Bill of Rights passed by the central government 'might well

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1. Irving Brant, The Bill of Rights, Its Origin and Meaning (New York, Bobbs, Merrill 1965), p.39.
 2. See The Federalist (no.84), ed. Max Beloff (Oxford, Basil Blackwell, 1948), pp.440, 441.
 3. Gerald Gunther, Constitutional Law, Cases and Materials 10th edn., (Mineola, New York, The Foundation Press, 1980), p.459.
 4. See, for example, an article by Lord Hailsham in The Times 19 May 1975, p.12. See also Lord Wade's comments in the House of Lords, 379 H.L. Deb. 5s., col.976 and Report of the Select Committee on a Bill of Rights, H.L.176 (1977-78), p.31.

give rise to considerable confusion and inconvenience',¹ and recommended against the inclusion of a Bill of Rights in any statute establishing a regional legislature.² There has also been debate on whether there should be a Bill of Rights enacted for Northern Ireland, though it has been suggested that guarantees for Northern Ireland alone could prove to be problematic and that it would be preferable to adopt a Bill of Rights for all of the United Kingdom.³

The discussions surrounding the enactment of the European Convention on Human Rights included consideration of the extent to which the signatory parties would be surrendering a part of their sovereignty. At the time the Convention was negotiated, there was much demand for a more unified Europe and the Convention was seen as a way of further encouraging such unity.⁴

Although there is not an Australian Bill of Rights, there have been proposals for one and according to one commentator 'The whole debate on the merits of enacting a Bill of Rights in that country was embroiled in questions of federal/state government relations.'⁵

In Canada, debate on a Bill of Rights has usually included consideration of the way the powers of the different governments might be affected. When writing on the 1960 federal Bill of Rights, Bora Laskin noted that the legal tensions in Canadian federalism, the sensitivity of

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1. Royal Commission on the Constitution 1969-73 Cmnd. 5460 (1973), p.229.
 2. Ibid., p.230.
 3. Standing Advisory Commission on Human Rights, The Protection of Human Rights by Law in Northern Ireland, Cmnd. 7009 (1971), pp.58, 59.
 4. See I.N. Stevens and D.C.M. Yardley, The Protection of Liberty (Oxford, Basil Blackwell, 1981), p.169.
 5. Joseph Jaconelli, 'The European Convention - A British Bill of Rights?', Public Law, (1976), 228.

the provinces on constitutional jurisdiction, and the lack of any domestic amending procedure had all been obstacles for such a declaration.¹

Professor F.R. Scott described the question of jurisdiction over civil rights as 'a matter of the first importance'.² During the Parliamentary debates on the 1960 Bill of Rights much attention was given to the way in which the Bill of Rights would affect the purposes and practices of Canadian federalism. The Quebec Legislative Assembly unanimously passed a motion stating that the rights in the proposed bill did in fact infringe on what was properly provincial jurisdiction. Such questions were also raised during debate on the 1982 Charter of Rights and Freedoms. Pierre Trudeau saw a Bill of Rights as a way of unifying Canada. With reference to an earlier proposal for a constitutional Bill of Rights, Trudeau had noted that:

J'estime qu'aujourd'hui, au Canada, les circonstances nous permettent de commencer à édifier une nouvelle structure constitutionnelle, une structure qui serait solide parce que son armature serait composée d'êtres humains surs de leur liberté individuelle et ayant foi en la protection des valeurs fondamentales auxquelles ils sont attachés. Sachant-qu'ils soient du Manitoba, du Quebec ou de l'Ile-du-Prince-Edouard-qu'ils sont attachés à des valeurs communes qui les unissent en tant que Canadiens, au lieu d'être divisés, provincialement, par des différences.

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1. 'Canada's Bill of Rights: A Dilemma for the Courts?' International and Comparative Law Quarterly, 11(1962) 525.
 2. 'Dominion Jurisdiction Over Human Rights and Fundamental Freedoms', The Canadian Bar Review, 27(1961), 499.
 3. 'Les Droits de L'homme et la superématie parlementaire' in Human Rights, Federalism, and Minorities ed. Allan Gottlieb (Toronto, Canadian Institute of International Affairs, 1970), p.14.

One study that examined judicial decisions during the Charter's first year suggested that the Charter was having a 'centralizing' influence.¹ It was also pointed out that use of the 'intervenor' device and the reference procedure allowed the federal government to challenge provincial legislation, thus giving the federal government a kind of disallowance power.²

More generally, it has been suggested that for some Commonwealth countries, British officials may have pushed for constitutional Bills of Rights as an alternative to more complex arrangements such as a federal system of government.³

Bills of Rights and Party Politics

In the various debates on proposals for Bills of Rights, party politics has sometimes been an influence. In America the issue of a Bill of Rights served as a vehicle for attacking the constitutional proposals of the Federalist Party. According to Justice Story, the demand for a Bill of Rights was 'a matter of very exaggerated declamation and party zeal, for the mere purpose of defeating the Constitution'.⁴ The Bill of Rights proposal was politically advantageous to the anti-federalists because it was an issue that went beyond sectional interests and appealed to popular

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1. F.L. Morton, 'Charting the Charter-Year One: A Statistical Analysis' (unpublished paper presented at the annual meeting of the Canadian Political Science Association, University of Guelph, June 10, 1984), pp.23, 24.
 2. Ibid., pp.27, 28.
 3. Professor Y. Ghai, interview, 17 January 1985.
 4. Cited in Robert Allen Rutland, The Birth of the Bill of Rights 1776-1791 (Chapel Hill, The University of North Carolina Press, 1955), p.218. Rutland goes on to argue that irrespective of party politics, public opinion forced the enactment of the Bill of Rights.

sentiment. The Federalists did eventually yield to such pressure and joined the call for a federal Bill of Rights.

In the United Kingdom, members of the different political parties have held a variety of views on proposals for Bills of Rights. Different positions have been taken by members of the Labour Party. In 1968, a prominent Labour Party member, Anthony Lester, wrote a pamphlet in which a Bill of Rights based on the European Convention was proposed. The Bill would not have been enforceable in the courts, but a Constitutional Council would have had the responsibility to make recommendations in light of such guarantees. Sam Silkin, while in Opposition and prior to becoming Attorney-General, introduced a bill providing for the establishment of a United Kingdom Commission of Human Rights that would operate in a similar way to the European Commission of Human Rights. In 1975 the Human Rights Sub-Committee of the Labour Home Policy Committee recommended that the European Convention become incorporated into United Kingdom law. The sub-committee was chaired by Shirley Williams and included Lord Gardiner, Sam Silkin, and Peter Archer. But the Home Policy Committee which was chaired by Anthony Wedgewood Benn did not agree that such a proposal should become official policy of the Labour Party. The Labour members of the 1977 House of Lords Select Committee on a Bill of Rights were also skeptical about such proposals. Three of them (Lords Boston, Gordon-Walker, and Lloyd) opposed the recommendation that a Bill of Rights should be enacted. Lady Gaitskell was the only Labour member of the Committee to support the proposal.

Many members of the Conservative Party have supported the idea of a United Kingdom Bill of Rights. Lord Lambton, who in 1969 introduced into the House of Lords a proposal for a Bill of Rights, was Conservative. Lord Hailsham has sometimes supported the idea of a Bill of Rights, though at

other times he has been opposed to it. He seems to have been particularly supportive of such a proposal when it was the Labour Party that was in power. A 1975 pamphlet by Keith Joseph endorsed the idea of a Bill of Rights. The three Conservative members of the 1977 House of Lords Select Committee all supported the idea of a Bill of Rights.

The Liberals have generally been supportive of proposals for a United Kingdom Bill of Rights. Lord Wade who on a few occasions introduced into the House of Lords proposals for a Bill of Rights is Liberal. Emlyn Hooson who in 1969 introduced such a proposal into the House of Commons was Liberal as was A.J. Beith who made a similar proposal in 1975. Of the two Liberal members of the 1977 House of Lords Select Committee, one, Lord Wade, was supportive of a Bill of Rights whereas the other, Lord Foot, was opposed.

Although proposals for a United Kingdom Bill of Rights have been supported and opposed by members of all the major political parties, generally the impression is that the Labour Party has been the most skeptical about such proposals.

Of the Commonwealth countries whose independence constitutions were enacted in London, the question of a Bill of Rights has been influenced by party politics to varying degrees. In many countries there was no disagreement between the major political parties as to whether there should be a Bill of Rights included in the constitution. But there has not always been such agreement: for example, in Nysaland one party supported the idea

of a Bill of Rights, whereas the other was less enthusiastic.¹

In Nigeria the Bill of Rights was largely the result of concern about the way in which the political parties were divided along tribal lines.

Bills of Rights as Restraints on Government

The guarantees included in Bills of Rights are often thought to be protection against certain actions by state authorities and thus can serve as a check on governments. Accordingly, in some of the debates on Bills of Rights attention is given to this issue. Consideration can be given to the desirability of restraining governments generally, or restricting the actions of a particular government.

It is apparent that many commentators view the restraint on government as one of the main purposes of a Bill of Rights. As Sir Kenneth Wheare explained:

The fact is that even when people agree that they want unitary government, they often believe that some restrictions should be placed upon the powers of that government. This attitude to government shows itself in the insertion into constitutions of certain declarations of rights or liberties of the subject which is intended that the government should enforce or at any rate not invade.

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1. In the 1962 report of the Nysaland constitutional conference the following was noted:

The United Federal Party Delegation urged strongly that the position of minority communities should be protected by means of a Bill of Rights...The Leader of the Majority, Dr. H.K. Banda, emphasised that the minority communities had nothing to fear from African government provided that they accepted the verdict of a democratic majority based on non-racial elections. He would not object to a Bill of Rights enforceable by the courts but considered that the true guarantee for minorities was the goodwill of the majority and democratic justice.
Cmnd. 1887 (1962), pp.7, 8.

As stated in a Chapter Two, the Bill of Rights was not included in the 1966 Republican Constitution, and Dr. Banda claimed that he reluctantly accepted the inclusion of the Bill of Rights in the independence constitution at the insistence of British officials.

2. Modern Constitutions (London, Oxford University Press, 1951), p.55.

Similarly, in a case heard by the Judicial Committee, a distinguished counsel explained that 'the object of a Bill of Rights is to place some rights beyond the reach of a democratic majority so that there may be no tyranny by the majority, by the executive or by the courts.'¹

As already noted, one reason for the enactment of the American Bill of Rights was the desire to restrain the federal government. It has been suggested that the American Constitution 'was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.'² A similar point of view was expressed by Sir Ivor Jennings who explained that the American Bill of Rights 'is used by vested interests to protect their anti-social behaviour.'³

In the United Kingdom there has been consideration of whether a parliamentary majority could or should be limited by the guarantees of a Bill of Rights. The possibilities and appropriateness of judicial review has been debated as part of this general issue. Lord Wade, who has introduced proposals into the House of Lords for a United Kingdom Bill of Rights, terms the issue of whether a Parliament can bind its successors 'the most fundamental one.'⁴ The prospect of the judiciary assuming a more powerful role has prompted much comment. In The Politics of the Judiciary,

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1. Ong Ah Chuan v Public Prosecutor [1981] A.C. 655. The counsel involved were Anthony Lester Q.C., Alan Newman, and David Pannick.
 2. Charles Beard, An Economic Interpretation of the Constitution of the United States 2nd edn. (London, Collier - Macmillan, 1935), p.324.
 3. Some Characteristics of the Indian Constitution (London, Oxford University Press, 1953), p.49.
 4. 'Introducing a Bill of Rights', in Do We Need a Bill of Rights? ed. C.M. Campbell (London, Temple Smith, 1980), p.19.

Professor J.A.G. Griffith put forward the view that because of their background and assumed purposes, British judges are unlikely to interpret a Bill of Rights in a progressive, enlightened way.¹ Lord Diplock himself has conceded that judges tend to lead sheltered lives.²

But unlike the United Kingdom, most Commonwealth countries' constitutions are set out in a written document that invites at least some judicial review.³ In Canada, prior to the enactment of the 1982 Charter of Rights there was judicial review at least to the extent of determining the

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1. The Politics of the Judiciary 3rd edn., (Glasgow, Fontana, 1985). Professor Griffith considers the possible implications of the European Convention being incorporated into United Kingdom domestic law. He does not see such a bill as an infringement upon the sovereignty of Parliament but he does argue that British judges are too narrow in outlook to apply fairly the European Convention. According to Griffith, judges view themselves as a stabilising force and are unlikely to upset the status quo; politicians, not judges, are the people most likely to further social justice.
 2. 396 H.L. Deb. 5s; col.976.
 3. On parliamentary supremacy within the Commonwealth generally, see Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, The Clarendon Press, 1957).

jurisdictions of the federal and provincial governments.¹ During the debate on the 1982 constitutional proposals, there were different opinions about the way in which the Charter of Rights would or should affect the power of Parliament.

In reference to the West Indies, it has been suggested that because post-independence governments would not be restrained by the metropolitan power, Bills of Rights could provide some of the same safeguards and that many local politicians 'offered the guarantees as evidence of good faith and intention.'² In reference to India, it has been stated that 'the demand for fundamental guarantees was born of a sharp opposition to a large volume of repressive legislation.'³ In their report on constitutional

1. Prior to 1982 it could be argued that with the exception of the division of powers, Canada operated under a parliamentary system similar to that of the United Kingdom. See, for example, B.L. Strayer, Judicial Review of Legislation in Canada (Toronto, The University of Toronto Press, 1968) pp.5 and 29-31. Similarly, it has been claimed that 'The doctrine of parliamentary sovereignty is thought of as the basic characteristic of the British constitution. It is also the case, however, despite Canadian federalism, that the doctrine has been a fundamental tenet of the Canadian constitution.' See Anne Bayefsky, 'Parliamentary Sovereignty and Human Rights in Canada: The Promise of the Canadian Charter of Rights and Freedoms', Political Studies 31. (1983) Not all commentators, however, see the Canadian constitution as having such an affinity with British constitutional traditions. Professor F.R. Scott suggested that the Canadian courts did have the power to protect individual rights by reference to the constitution. See Civil Liberties and Canadian Federalism (n.p.: University of Toronto Press, 1959) pp.25-27. Pierre Trudeau wrote that 'Nous ne devons pas oublier que le parlement Canadien n'a jamais joui d'une suprématie absolue comme c'est le cas en Grand-Bretagne.' See 'Les Droits de l'homme et la suprématie parlementaire' in Human Rights, Federalism, and Minorities ed. Allan Gotlieb (Toronto, Canadian Institute of International Affairs, 1970), p.4.
2. S.S. Ramphael, 'Fundamental Rights - The Need For A New Jurisprudence,' Caribbean Quarterly, 8(1962) 141.
3. M.G. Gupta, 'Fundamental Rights and Directive Principles of State Policy' in Aspects of Indian Constitution (sic) ed. M.G. Gupta (Allahabad, Central Book Depot, 1964), p.115.

possibilities for Rhodesia and Nysaland, the Monckton Commission noted that:

We are convinced that parliamentary government, on the Westminster model, as it exists in the older Commonwealth Federations, will not by itself meet the special needs of the Federation of Rhodesia and Nysaland. Africans do not trust the legislatures of the present; Europeans have grave doubts about the legislatures of the future. All races cannot help but fear that their rights may be infringed and their interests prejudiced by the legislatures of either the Federation or the Territories. 1

More recently, during a constitutional conference for Antigua, the Leader of the Opposition asked for 'the sections in the proposed constitution dealing with the fundamental rights and freedoms to be crystal clear and drafted in unambiguous language,' since 'Ambiguity in the 1967 Constitution Order in the past has led to the steady encroachment of government over the interests of the people, and to the whittling away of the people's human rights.'²

The proposal for a New Zealand Bill of Rights seems to have been a result of a belief that state authority had become too intrusive. When opening the debate on the Bill of Rights proposal, the Minister of Justice stated that 'The balance between the citizen and the State over a long period has moved in the direction of the State, and many people believe that the time has come for a reassertion of the fundamental liberties of

1. Cmnd. 1148 (1960), p.79.

2. Cmnd. 8142 (1981), p.21. Mr. Hall also claimed that 'Bans on demonstrations, withholding of the right to strike, curtailment of public meetings, therefore expression, the teargassing of innocent persons who peacefully picket, even of teachers and school-children who protest, the shooting up of trade union halls for no apparent reason other than the demonstration of legalised force and the desire to intimidate, the arrest and subsequent incarceration for weeks without trial of political opponents, search and harassment of private individuals and homes, the weapon of deportation, these have become the order of the day as governments apply force and military means to solve economic and political problems; (p.19).

the individual.'¹ Many of the participants in the debate made reference to the 1947 Supply Regulations Bill. That Bill, which was introduced by the Labour Government, allowed for the continuance of some wartime economic powers and was a particular example to some National Party politicians as the kind of law that a Bill of Rights could prevent. During the debate on a Bill of Rights Robert Muldoon spoke critically of the Supply Regulations Bill and asked 'whether the measure we are endeavouring to introduce today, in the face of opposition from the other side of the House, would have any effect on such provisions should a future Labour Government try to do the same thing again.'² When closing off the debate, the Minister of Justice explained that 'a right additional to the rights contained in the Bill of Rights of 1689 would be the right for the Courts to be able to say that an enactment such as the Supply Regulations Bill of 1947 is bad.'³ The issue of setting limits to what a parliamentary majority can do is particularly interesting for New Zealand because similar to Britain, there is not a written document setting out the jurisdiction of Parliament, yet unlike Britain, it has a unicameral Parliament.⁴

Bills of Rights and the Protection of Minorities

Although Bills of Rights are often thought of as providing guarantees for the individual, in some instances it has been concern for minority groups that has prompted the enactment of such declarations. Professor de Smith wrote that 'Anglo-Saxon prejudices against constitutional Bills of

1. 336 Parliamentary Debates, p.1181.

2. Ibid., p.1197.

3. Ibid., p.1198.

4. The New Zealand Legislative Council which served as a second house, was abolished in 1950.

Rights were rapidly dissolving in the face of increasing evidence that majority political parties in new states would seldom be persuaded to accept more conspicuous guarantees for minority interests, especially where a minority was very small in numbers.'¹ He also referred to the assumption that most newly-independent Commonwealth countries would have constitutional Bills of Rights and suggested that '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 factor.'² Similarly, Sir Ivor Jennings explained that constitutional safeguards may be introduced in order to assuage minority fears about majority rule; such guarantees can take different forms and 'The most complicated is a Bill of Rights with full provision for legal remedies if any of the rights are infringed....'³

In the United Kingdom the need to protect the rights of the minority in Northern Ireland has been offered as one reason for urging that the European Convention should become part of British law.⁴

In India, a Bill of Rights was viewed as a way of providing protection for some of India's many minorities. The Simon Commission reported that:

We have had abundant evidence of the feeling of apprehension with which possible changes in the system of government are viewed by many communities. India is a land of minorities. The

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1. The New Commonwealth and Its Constitutions (London, Stevens and Sons, 1964), pp.210, 211.
 2. 'Fundamental Rights in the New Commonwealth', International and Comparative Law Quarterly, 10 (1961), 235.
 3. Democracy in Africa (Cambridge, Cambridge University Press, 1963), p.79.
 4. Standing Advisory Commission on Human Rights, The Protection of Human Rights by Law in Northern Ireland, Cmnd. 7009 (1977), p.55.

spirit of toleration, which is only slowly making its way in Western Europe, has made little progress in India. Members of minority communities have unfortunately only too much reason to fear that their rights and interests will be disregarded. The failure to realise that the success of a democratic system of government depends on the majority securing the acquiescence of the minority is one of the greatest stumbling blocks in the way of rapid progress towards self-government in India. 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. 1

As noted in the Chapter Two the Indian Constituent Assembly did decide to include a Bill of Rights in the Constitution. Apparently the issue was considered by a committee prior to the partition of India and Pakistan, and accordingly special attention was given to possible provisions to safeguard the rights of minorities. It has been suggested that although such protection did not have the same significance or relevance after the partition, 'those who framed the Constitution were mostly dominated by the conception formed by the felt needs of India before August 15 1947, and that conception has been embodied in the constitution.'² But another view is that 'the partition had temporarily accentuated the gulf between the Hindus and Muslims' prompting the Constituent Assembly to appoint a Committee to consider possible provisions relating to minorities.³ Whatever the influences may have been, the Indian constitution does include guarantees regarding language and religious education.

Although the Independence Constitution for Malaya did not include a full-fledged Bill of Rights, there had been consideration as to how the Constitution could provide protection for both the Malay and Chinese

1. Cmd. 3568 (1930), pp.22, 23.

2. G.N. Joshi, The Constitution of India (London, Macmillan and Co. Ltd., 1950), p.89.

3. M.G. Gupta, op.cit., p.117.

communities. The Secretary of State for Colonies, Mr. Lennox-Boyd, recognised that such provisions 'arouse particular interest in the House' and he gave his assurances that 'There are solid guarantees of fundamental liberties to meet Chinese fears of discrimination, and reasonable arrangements to safeguard the special position of the Malaysians without injustice to other races.'¹

In Nigeria, concern for minorities certainly figured prominently in the background to the Bill of Rights. As noted in the Chapter Two, the Willinck Commission had been appointed to consider the ways of allaying the fears of minorities, and a Bill of Rights was one of the proposals offered by the Commission. The Nigerian guarantees have served as the model for many Commonwealth Bills of Rights enacted afterwards and Professor de Smith concluded that 'the new vogue for Bills of Rights in Commonwealth constitutions is traceable to a desire to afford concrete reassurance to minority groups in Nigeria which would have preferred other forms of constitutional protection.'²

In Kenya there was concern for those residents and citizens of European and Asian origin. The strained relations between those groups and other Kenyans resulted in the consideration of possible safeguards for minorities and the interests of the minorities were given priority. As the Secretary of State for Colonies explained to the 1963 constitutional conference:

The Constitutional Framework, agreed between all parties in 1962, declared that the objective is 'a united Kenya nation, capable of social and economic progress in the modern world - a Kenya in which men and women have confidence in the sanctity of individual rights and liberties, and in the proper safeguarding of the interests of minorities'. Throughout these discussions, the

1. 573 H.C. Deb. 5s., col.640.

2. The New Commonwealth and Its Constitutions (London, Stevens and Sons, 1964), p.210.

problem has been to reconcile the first and the last phrases of that declaration - on the one hand, to create a united Kenya nation and on the other, to safeguard the interests of minorities.

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A similar view had been expressed at the 1962 constitutional conference where the Governor explained that 'I have seen the vital contributions that Europeans and Asians have made, and are making, to the economy of Kenya, and I have seen with administration the work that has been done by a devoted public service. Kenya needs the brains, devotion, and capital of all its peoples. This calls for a society and an economy without discrimination of race, creed, or colour, where individual rights are firmly recognised and maintained.'²

The concern shown for minorities in Kenya is interesting when contrasted with some opinions that were expressed during the debates on the Tanganyikan Independence Constitution. In the British Parliament reference was made to the spirit of co-operation among the different citizens of Tanganyika. The House of Commons was told by a Conservative member that:

In Tanganyika there is no heritage of racial bitterness of the sort that has done so much damage in Kenya. Whereas there are a number of members of Jomo Kenyatta's K.A.N.U. party whose political thinking even at this moment goes not further than a study of the entrails of goats, there is in Mr. Nyerere's party a genuine effort to build more than a facade of multi-racial co-operation.

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A Labour member declared:

I say to all peoples in East and Central Africa, 'You could not do better than to emulate the example of Tanganyika.' Here is a country in which there has been close and continuous co-operation among the races, among Africans, Europeans and Asians. Their leaders have shown a very great example to all the others. If the leaders of these three main communities which we find in so many countries in East and Central Africa follow the example of

1. Cmnd. 2156 (1963), p.210.

2. Cmnd. 1700 (1962), p.8.

3. Mr. Philip Goodhart, 648 H.C. Deb. 5s., col.1018.

the Africans, Europeans and Asians of Tanganyika, some day we shall have the pleasure of considering a Bill of this kind for them, also. This is an example to follow. ¹

Similarly, the House of Lords was told that:

In the first place, I think I would give the credit to the Tanganyikan people themselves. They are a happy people; they get on well with one another; and although, of course, there are many tribes, tribal rivalries have become conspicuously absent. Further - and this is most important they are mainly all of one race, the Bantu race. This is, of course, in striking contrast with the neighbouring Colony of Kenya where there are Bantu tribes, Nilotic tribes, Hamitic tribes, Somalis and others. ²

It is apparent that for Tanganyika there was not the same concern about protecting the interests of minorities as there was in Kenya. As noted in Chapter Two, it has been suggested that in Tanganyika there were no minority groups lobbying for a Bill of Rights. This absence of worry about the minority communities in an independent Tanganyika, is likely part of the reason that there was not a Bill of Rights in the Independence Constitution.

In Nysaland there was concern about the minority communities, and it was thought that a Bill of Rights would be appropriate. According to one former Foreign and Commonwealth official, 'The whites were very nervous.'³

The Cypriot Constitution of 1960 includes provisions relating to the rights of minorities. Included in the Bill of Rights is an article which states that:

Subject to the express provisions of this Constitution no law or decision of the House of Representatives or of any of the Communal Chambers, and no act or decision of any organ,

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1. Mr. James Griffiths, 648 H.C. Deb. 5s., col.1018.
 2. Lord Colyton, 235 H.L. Deb. 5s., col.750.
 3. Anthony Rushford, interview 9 May 1985.

authority or person in the Republic exercising executive power or administrative functions, shall discriminate against any of the Communities or any person as a person or by virtue of being a member of a Community. 1

Despite such a provision the Cyprus Independence Constitution has not proven to be acceptable to either the Greek-Cypriot or Turkish-Cypriot communities.

At the time that the Trinidad and Tobago Independence Constitution was being considered there were some concerns about possible racial tensions there. The Secretary of State for the Colonies admitted that such possibilities were 'a very real danger' but went on to add that 'we have made a big contribution towards its solution' and then referred to the Bill of Rights.²

When there were negotiations about Zimbabwe's Independence Constitution, concerns about minorities were certainly an important consideration in the question of a Bill of Rights.

In Canada the 1982 Charter of Rights included guarantees regarding use of the English and French languages. Such guarantees were aimed at protecting the interests of some linguistic minorities within the country generally, and within some provinces particularly. The Charter also included limited guarantees for native people and women. These minority groups (if women can be called a minority group) received much attention in Canada during the debates on the 1982 Canadian constitutional agreement.

It has been apparent that in many Commonwealth countries, Bills of Rights have been looked upon as a way of providing assurances for some

1. Cmnd. 1093 (1960), Article 6.

2. 662 H.C. Deb., 5s., col.542.

minorities. Such guarantees can refer specifically to the rights of a particular minority, or they can affirm the rights of the individual which typically would include prohibition of discrimination on grounds of being a part of a certain minority. But Bills of Rights have been included in the constitutions of countries that do not have any significant problems with minorities - Jamaica and Sierra Leone for example - concerns for minority community interests have not therefore been the only motivation for the enactment of a Bill of Rights.

Whether a Bill of Rights is a useful way of providing safeguards for minority communities is, of course, debateable. Sir Ivor Jennings had suggested that 'The conclusion to be drawn from the experience of India, Pakistan, and Ceylon is, I think, that one should not attempt to deal with the problem of minorities by constitutional guarantees in Bills of Rights. One should try to find out where the shoe is likely to pinch and to provide the necessary flexibility at that point.'¹

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1. The Approach to Self-Government (Cambridge, Cambridge University Press, 1956), p.110. A few years afterwards Sir Ivor wrote that:

In the long run democracy implies some form of majority rule: but it is precisely majority rule which minorities generally fear. For them it may be the wrong majority, or a majority dominated by the wrong ideas. It may therefore be thought desirable to introduce clauses by which even the minority will be bound. The simplest form of such clauses prevents legislation which discriminates on the ground of religion, tribe, "race" or other community, as in Ceylon. The most complicated is a Bill of Rights with full provision for legal remedies if any of the rights are infringed, as in India.

Democracy in Africa (Cambridge, Cambridge University Press, 1963), p.79. It is difficult to determine whether Sir Ivor's views had changed since his earlier criticisms of Bills of Rights as possible solutions to minority problems, or whether he was simply reporting other people's ideas.

The Effect of Immediate and Local Concerns on Bills of Rights

To say that Bills of Rights often reflect circumstances peculiar to a particular country at a particular time may seem to be stating the obvious. It has been seen that the provisions of Bills of Rights and the political background against which they were enacted have varied from example to example. But when one considers that part of the general argument in favour of Bills of Rights is that certain rights are fundamental to all individuals, then the apparent relativism of such declarations is worth taking note of.

Different commentators have noted such relativism. Claire Palley notes that 'At last it has been recognised that constitutions are the product of political forces, and reflect, or will be changed to reflect, the emotions, prejudices and capabilities of a particular society at a particular point of time. No constitution can be abstracted from the society it governs.'¹ D.V. Cowen concludes that 'modern states have with increasing frequency introduced Bills of Rights into the framework of their domestic government. And they have done so because they felt that some safeguards were called for by the particular facts of their own social and political life.'² A recent book on privacy notes that 'For about 300 years, attempts to define and to defend freedom of the press have been shaped by contemporaneous issues.'³

The American Bill of Rights has been influenced by immediate

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1. 'Constitutional Devices in Multi-Racial and Multi-Religious Societies', Northern Ireland Legal Quarterly 19(1968), 378.
 2. The Foundations of Freedom (Cape Town, Oxford University Press, 1961) p.124.
 3. Walter F. Pratt, Privacy in Britain (London, Associated University Press, 1979), p.60.

circumstances. For example the Bill of Rights of the eighteenth century did not include any explicit prohibition of racial discrimination; it was the Fourteenth and Fifteenth Amendments enacted after the Civil War which accomplished that. The relativism of the American Bill of Rights was questioned by Sir Ivor Jennings who argued that the American provisions

do not in themselves provide any precedent for other colonies which achieve independence. The first ten amendments relate to conditions in the United States in 1789. The 13th, 14th and 15th amendments deal with the consequences of slavery, which had long since been abolished in those territories which remained part of the British Empire.

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In Britain, proposals for declarations of rights have been influenced by immediate concerns. Although some of Magna Carta's provisions continue to be part of English law, many of the original guarantees would be considered irrelevant today. More recently, proposals for a United Kingdom Bill of Rights have sometimes indicated some of the concerns of the day. For example, in the late sixties, worry about the possible effects of the then new technology was one of the motivations of the proponents of a Bill of Rights.² There was concern about the possible introduction of data banks and their effect on an individual's privacy.

When the possibility of a New Zealand Bill of Rights was considered in the early sixties, it was suggested that the Government only introduced the measure as a way of circumventing demands for a bicameral legislature.³

Canada's Charter of Rights was also in some degree a reflection of immediate concerns. Pierre Trudeau had suggested that 'Il s'agit de toute

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1. The Approach to Self-Government (Cambridge, Cambridge University Press, 1956), p.99.
 2. See Pratt, op. cit., pp.189, 170.
 3. 336 Parliamentary Debates, pp.1185 and 1196.

façon d'une charte Canadienne des droits de l'homme, est, à mon avis, cette charte devrait être étudiée en tenant compte des besoins et des circonstances existants au Canada.'¹ The inclusion of language rights, 'mobility rights' and the rights of Canada's aboriginal people are all evidence of how the Charter was influenced by Canadian concerns.

The enactment of the European Convention was tied in with memories of tragedies of the Second World War and attempts at European unification in the post-war period. More recently, the French Conseil Constitutionnel's 1971 decision which breathed life into the Déclaration des Droits de l'Homme was connected with the shift in the relative powers of the different branches of the French Government.²

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1. 'Les Droits de l'homme et la suprématie parlementaire' in Human Rights, Federalism, and Minorities ed. Allan Gottlieb, (Toronto, Canadian Institute of International Affairs, 1970), p.6.
 2. See, generally, Barry Nicholas, 'Fundamental Rights and Judicial Review in France', Public Law, (1978), 82-101 and 155-177.

CHAPTER 8

Judicial Attitudes to the Enforcement of a Bill of Rights

Having considered the origins of Commonwealth Bills of Rights originated from, the form of their guarantees and some of the political implications they can have, we shall now note some general questions regarding their enforcement and justiciability.

As a starting point it would be useful to review the mechanics of enforcing a Bill of Rights. As previously noted most Commonwealth Bills of Rights are included in constitutions and most of those constitutions include some provisions regarding the enforcement of those rights. One notable exception referred to in a previous chapter is the United Kingdom. Although the United Kingdom is a signatory to the European Convention on Human Rights and Fundamental Freedoms, the Convention's guarantees are not directly enforceable in United Kingdom courts. The European Convention is in effect a treaty, and in the United Kingdom unlike some other countries - France and the Netherlands for example - a ratified treaty does not automatically become part of the domestic law. This differs from the United Kingdom's commitments as a member of the European Economic Community. The European Communities Act is an Act of Parliament and is thus part of the United Kingdom domestic law unless otherwise repealed. Notwithstanding such a difference, the presumed non-justiciable character of the European Convention in the United Kingdom is complicated by the fact that the Luxembourg Court which rules on E.E.C. law may look to the European Convention by way of a guideline and the decisions of that court are binding in the United Kingdom in regards to the administration of community law.

The way in which a declaration such as the European Convention is applied or could be applied in the United Kingdom is relevant to the

consideration of Bills of Rights in other Commonwealth countries at least by way of contrast. Most discussion on the possibilities of a United Kingdom Bill of Rights soon includes consideration of what is perhaps the most fundamental tenet of British constitutional law: the sovereignty of Parliament. Naturally there has been much debate as to the inviolability of such a precept. On the one extreme there is the view most famously expounded by Dicey that Parliament may do what it pleases; on the other hand there is the view that in some way it might be possible to check Parliamentary legislation. The House of Lords Select Committee on a Bill of Rights considered the matter and not surprisingly heard different views from the people who appeared before them. The Committee did accept the view that a United Kingdom Bill of Rights could not be entrenched so as to bind a future Parliament. This had been the view of their Specialist Advisor and similar opinions had been expressed by Lord Diplock, Lord Scarman, and Lord Wilberforce. On the other hand Lord Hailsham had suggested to the Committee that the strong presumption of indisputable Parliamentary sovereignty was based on a few cases that were not necessarily relevant to the way in which the courts of today might understand the power and status of Parliament or the judiciary.¹ Accordingly his view was that it might be possible to pass a Bill of Rights which would serve as a guideline to the interpretation of previous statutes or even future legislation unless any future legislation clearly and expressly was to amend or repeal the Bill of Rights.

Another view which should be mentioned is one which reminds us that these questions can essentially be seen as political. Whatever the law or

1. See Minutes of Evidence taken Before the Select Committee on a Bill of Rights H.L. 81(1977-78), p.16.

its interpreters may have to say about the sovereignty of Parliament, Parliament's adherence to judicial decisions and vice versa is essentially of a political nature and accordingly a discussion of the meaning or implications of something such as parliamentary sovereignty should take note of this. According to H.W.R. Wade, for example, the status of Parliament is historical and accordingly only a significant change of a political kind could change the idea that Parliament may do what it pleases.¹

A lengthy consideration of such questions is beyond our present purposes. Such questions have been noted, however, in that they point to some important matters regarding the enforcement of a Bill of Rights. The status, power, and role of a legislature or of a judicial body certainly goes toward indicating the possible purposes and influences of a Bill of Rights. The constitutional arrangements of most Commonwealth countries differ from those of the United Kingdom in a number of ways. But perhaps the essential difference is that unlike the United Kingdom, most of these countries have written constitutions which outline the basic political structure of the country. The status of the constitution is typically set out in a section of the constitution itself. The relevant provision in the Belize Constitution which is typical of the analogous provisions in many other Commonwealth constitutions states that: 'This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'² An assertion of the supremacy of a written constitution implies that a Parliament will not necessarily be completely sovereign in that any measures it takes must be done under the guidelines set out in the

1. See 'The Basis of Legal Sovereignty', Cambridge Law Journal [1955] 172-197.

2. S.I. 1981/1107, sec.2.

constitution. The extent to which the notion of Parliamentary sovereignty can survive under a written constitution has been considered elsewhere.¹ For our present purposes suffice it to say that when a written constitution serves as the guideline for the basic political arrangements of a country, then the role of Parliament may be very different from that in a country such as the United Kingdom where there are no obvious constraints on Parliament. Similarly, a written constitution would probably make provision for a judiciary to interpret and apply the constitution. If the judiciary's responsibilities were to include reviewing parliamentary legislation to ensure adherence to the Constitution, then the role of the judiciary would be different in some ways than its role in a system not allowing for such a review. If a country's constitution includes guarantees of the rights of the individual then this would seem to have implications for the status and powers of a legislature or the judiciary. On the other hand it is possible to suggest that even without a written constitution including a Bill of Rights the judiciary can establish and develop the rules regarding the relationship between a country's citizens and the government. For example, Lord Diplock has explained that the development of public law since the war has gone toward establishing the rights of the individual in some ways similar to the purposes of a Bill of Rights.²

As has been noted in Chapter Six, most Commonwealth Bills of Rights include provisions relating to their enforcement. As illustrated by the relevant Belize provision which was cited as an example, a person may apply to the Supreme Court for redress when alleging the contravention of his rights.

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1. Most notably see, Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, Clarendon Press) 1957.
 2. Minutes of Evidence taken Before the Select Committee on a Bill of Rights H.L.81 (1977-78), p.93.

In Chapter Three we noted the different meanings that the word 'person' might have; for example a corporation might be able to claim protection under the guarantees of a Bill of Rights. The Belize provision states that for an application for such redress to be considered, it must be from a person who believes that a right 'is being or is likely to be contravened in relation to him.'¹ It is difficult to determine an exact meaning for such words, though it could be argued that such a provision prohibits a disinterested third party from applying for redress on behalf of someone else. Similarly a subsequent paragraph of the Belize guarantee allows that 'Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal...'² It is uncertain who a 'person aggrieved' might be, though one commentator has pointed out that generally English courts have decided that an aggrieved person must be someone who has directly suffered from a pronouncement.³

What is of particular significance here is that there is a provision allowing a person to apply to a court for a declaration that a parliamentary measure is unconstitutional and should be considered null and void. The final decision regarding the actions of a local legislature is taken by the judiciary unlike the arrangements in a pre-independence

1. S.I. 1981/1107, sec. 20(1).

2. Ibid., sec.20(4).

3. See, generally, Chuk Okpaluba, 'Challenging the Constitutionality of Legislative Enactments in Nigeria: The Factor of Locus Standi?' Public Law, Spring 1982, pp.110-126. See also, S.A. de Smith, Judicial Review of Administrative Action, third edn., London, Stevens and Sons, 1973, pp.362-372. A related question that may be raised is one that deals with the propriety of reviewing proposed legislation that has not yet been enacted. As noted in Chapter Four a Zambian Court considered this question in Nkumbula v. Attorney-General. The question has been considered in other Commonwealth courts and different approaches have been applied; see, generally, Geoffrey Marshall, Constitutional Theory, Oxford, Clarendon Press, 1971, p.51.

constitution which might allow for the legislature of the colonial power to be the final authority. Given that the most fundamental feature of the English constitutional tradition is arguably the idea of the sovereignty of Parliament, it is interesting that most Commonwealth countries operate under a written constitution that is meant to be interpreted and applied by the judiciary. Accordingly, any claim that English colonisers forced their own political system upon unsuspecting foreigners does not ring completely true.

It will be seen that a constitutional Bill of Rights can invite the judiciary to play a more prominent and active role than they would otherwise. The desirability and significance of such a role can be the subject of debate. Some commentators acknowledge and accept such judicial activity. For example, Lord Diplock explains that

Until quite recently courts exercising jurisdiction in the United Kingdom Parliament had made and could in constitutional theory unmake as easily as it had made them. In Commonwealth countries with a Federal Constitution which includes provisions about substantive law as well as provisions about the distribution of powers between organs of government, and in those countries with unitary constitutions which entrench safeguards for fundamental human rights, the exercise by the highest court of its function of interpreting provisions of a constitution gives to it a law-making power superior to that of the legislature itself. 1

The Secretary-General of the Commonwealth Secretariat has suggested that provisions allowing for the judiciary to serve as a check on the legislature were often endorsed by the politicians of countries becoming independent 'as evidence of good faith and intention.'² A distinguished

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1. 'Judicial Development of Law in the Commonwealth', Proceedings and Papers of the Fifth Commonwealth Law Conference (Edinburgh, Blackwood and Sons, 1978), p.496.
 2. S.S. Ramphael, 'Fundamental Rights - The Need For a New Jurisprudence', Caribbean Quarterly 8(1962), p.141.

Nigerian judge suggests that for some new Commonwealth countries the judges can play a particularly important role. J. Ola Orojo explains that

It should also be mentioned that the judiciary of a new Commonwealth Country sometimes bears greater responsibility to its society than that of a more developed country like Britain and Canada. This is because, apart from maintaining the universally accepted standards, not only does it have to keep an eye on the problems of a developed country some of which are already arising in its country but it is faced with the complicated political, constitutional and social problems of its (very often unstable) country. 1

Such views hint at a certain skepticism in regard to self-restraint on the part of the legislature and suggest a certain faith in the judiciary. It is interesting to take note of views that seem to approve of judicial activism. In England, for example, some of the skepticism regarding the role of the judiciary results from concern that judges are too far removed from the concerns of most of the people they are meant to serve. It would seem that for most Commonwealth countries judges are no less an elite group than they are in England, and in many countries it is quite obvious that they are in fact much more of an elite, in terms of education and wealth. Nevertheless the argument can be and is made that this group of people is better equipped to serve as some safeguard for the peoples' interests.

Naturally, however, there are views that express doubt or concern about the implications of a more prominent judiciary. Lord Diplock himself has conceded that there can be difficulties arising from the fact that judges lead sheltered lives.² The House of Lords Select Committee on a Bill of Rights included in its final report a summary of the arguments against a Bill of Rights; the first three arguments dealt with the role of

1. 'The Role of the Judiciary in the New Commonwealth Countries', in Proceedings and Papers of the Sixth Commonwealth Law Conference (Lagos, Nigerian Bar Association, 1980) p.66.

2. 379 H.L.Deb. 5s., col.996.

Parliament and the judiciary. The report noted that many people were against issues such as freedom of the press, race relations, and freedom of speech being 'effectively handed over to the judiciary.'¹

Naturally these views represent only a small part of the very large debate on the roles and purposes of parliaments and judges. A thorough analysis of such matters is beyond our present purposes. What is of interest to us, however is the important implications for judicial and parliamentary activity that a Bill of Rights may have. As Lord Diplock explained,

'there are only two ways in which law can be changed in those Commonwealth countries that acknowledge the rule of law: and those two ways are legislation and judicial decision.' 2

As we have noted, a written constitution including a Bill of Rights may alter the roles of parliamentarians and judges, relative to each other and relative to the country's citizens generally.

It will be noticed that these ideas have been stated in tentative terms. Constitutional Bills of Rights may have certain implications which seem likely, but it is difficult to definitively state that the existence of a constitutional Bill of Rights has altered political relationships in a certain way. In order to determine the exact effects a Bill of Rights has had, we should ultimately consider the ways in which Bills of Rights have been interpreted and applied. In the previous chapters we have noted a number of cases regarding the interpretation of specific provisions included in Bills of Rights. In order to gain a further understanding of

1. House of Lords Select Committee on a Bill of Rights, Report of the Select Committee on a Bill of Rights, H.L. 176 (1977-78), pp.14,15.
2. 'Judicial Development of Law in the Commonwealth', Proceedings and Papers of the Fifth Commonwealth Law Conference (Edinburgh, Blackwood and Sons, 1978) p.493.

judicial attitudes toward the enforcement of a Bill of Rights generally, we will review some judicial decisions that serve as an indication.

One general approach towards the enforcement of a Bill of Rights is for the judiciary to apply it actively. This is to say that the judges are not hesitant to look to a Bill of Rights to determine what its ambiguously-worded guarantees may mean in specific contexts, and to decide that in view of the Bill of Rights a particular provision enacted by the government is unconstitutional. Judicial review of governmental activity can mean a particular administrative decision or directive has to be considered alongside the Bill of Rights, or it can mean that a particular piece of legislation (or part of a particular piece of legislation) is reviewed to see whether it is compatible with constitutional guarantees. Some commentators have suggested that there is an important difference between these two types of review. They argue that a judge ruling that a certain executive action is unconstitutional is different from a judge deciding that legislation passed by Parliament is unconstitutional.¹ There is a difference to be sure. But it should be borne in mind that in a parliamentary system where executive decisions are taken under the authority of parliament and where executive leaders are answerable to Parliament, there can be a fine line between which governmental actions are

1. For example, Professor Zander who has generally been a supporter of the idea of a United Kingdom Bill of Rights has written that 'The United States Supreme Court hardly ever finds itself striking down Acts of the Congress. In the United States the overwhelming majority of cases that raise Bill of Rights issues are concerned rather with the regularity or otherwise of the actions of government officials, civil servants, and others employed in the public domain.' See A Bill of Rights?, 3rd edn. (London, Sweet and Maxwell, 1985) p.69. A review of many American constitutional cases, however, does cause one to think that perhaps Professor Zander has underestimated the number of judicial challenges to sections of judicial legislation.

legislative and which are not. In a sense many executive actions are legislative in that they are taken under the authority of Parliament. It is true that some governmental action might be taken under authority of the royal prerogative but as noted in a previous chapter the judiciary may in some cases review those decisions also. For the judiciary to declare that a particular piece of legislation is unconstitutional may be different from the judiciary's declaring that an interpretation or application of a particular piece of legislation is unconstitutional; but the difference is probably a slighter one in a parliamentary system of government than in a country such as the United States, where the distinction between legislative and executive authority is more clearly defined.

Cases involving Commonwealth Bills of Rights clearly reveal different attitudes towards judicial review. Broadly speaking there are three kinds of views about judicial enforcement of Bills of Rights. First, there is the view noted above that a Bill of Rights should be actively applied and that judges should not shy away from exploring possible meanings and interpretations of constitutional guarantees written in a general way in order to determine whether an action taken by government should be allowed. Secondly, there is the view that courts should not go to great lengths to find hidden meanings or implications for a Bill of Rights and should adopt what might be described as a laissez-faire attitude, that is to say to be more inclined to apply law rather than create it. The third attitude is one where an active judicial role is preferred, but one where judges are putting much effort into ensuring that Parliament's will prevails rather than the guarantees of a Bill of Rights.

The first view referred to is the attitude that both supporters and opponents of Bills of Rights often point to as a probable implication of

fully-justiciable guarantees. Various decisions of the American Supreme Court, perhaps most notoriously those of the Warren Court, are often cited as examples of the judiciary assuming a prominent role in applying a Bill of Rights. When such a view of judicial review prevails, one result is that the individual may view the judiciary as the body safeguarding his rights from a government that may need to be checked rather than see the government as the authority most likely to provide protection for his rights.

Some decisions of the Judicial Committee of the Privy Council are illustrative of this kind of attitude. Perhaps the most noteworthy case in this regard is Minister of Home Affairs v. Fisher.¹ The case originated in Bermuda and involved the question of whether a freedom of movement guarantee that was meant to apply to the child of a citizen should be assumed to apply to an illegitimate child. The majority decision read by Lord Wilberforce reviewed some of the declarations that were the progenitors to the Bermuda Bill of Rights (that is to say the U.N. Declaration, the European Convention, and the Bill of Rights included in the Nigerian Independence Constitution) and concluded that

These antecedents and the form of [the Bill of Rights] itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of fundamental rights and freedoms referred to.

2

The decision then noted the following:

When therefore it becomes necessary to interpret "the subsequent provisions of" Chapter I - in this case section 11 - the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to

1. [1980] A.C. 319.

2. Ibid., at 328.

Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

1

As has been suggested, this kind of view allows the judiciary much latitude in the interpretation of a Bill of Rights. This 'radical' interpretation acknowledges that constitutional interpretation may be different than statutory interpretation and that the judiciary should not shy away from exploring the various meanings of a Bill of Rights. This decision has been cited in many other cases involving Commonwealth Bills of Rights. One such case in which this reasoning was followed was Ong Ah Chuan v. Public Prosecutor.² As noted in a previous chapter this case dealt with the meaning of the word 'law' as referred to in the constitutional Bill of Rights of Singapore. It will be recalled that under consideration

1. Ibid., at 329.

2. [1981] A.C. 648.

was the guarantee that 'No person shall be deprived of his life or personal liberty save in accordance with law.' One question was whether the word law meant only statutory law. The court decided that the word law should not be interpreted in a narrow way and that

the use of the expression "law" in articles 9(1) and 12(1) does not, in the event of a challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after [independence day] and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.

1

Similarly, in a more recent case heard by the Judicial Committee, a majority decision read by Lord Diplock noted that

A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction.

2

When actively applying a Bill of Rights the judiciary may not only explore the possible meanings and implications of the guarantees, but also the substance of the various qualifications. The decision of the Judicial Committee in Akar v. Attorney General of Sierra Leone³ is a notable one in that it considered the meaning of the phrase 'reasonably justifiable in a democratic society'. Although the majority of the court decided that the law under consideration was 'justifiable in a free and democratic society' the propriety of the court to consider such a question was implied.

These examples illustrate some of the ways in which one Commonwealth Court, the Judicial Committee of the Privy Council, has indicated,

1. Ibid., at 670.

2. Attorney General of the Gambia v. Momodou Jobe [1984] A.C.689.

3. [1970] A.C.853; [1969] 3 All ER 384.

explicitly or implicitly, that the judiciary can or should explore the possible meanings of a Bill of Rights in order to determine whether a governmental action, be it administrative or legislative, is compatible with the guarantees considered. These examples from Judicial Committee decisions are particularly interesting in that generally speaking the judges are British, have presumably been inculcated with the tradition of Parliamentary supremacy, and have not really devoted much of their career to cases dealing with the interpretation and application of a written constitution. That most of Britain's former colonies have a written constitution that includes a Bill of Rights is interesting in light of the largely unwritten British constitution which does not have such guarantees; that for some of those countries the highest court charged with interpretation of the constitution's provisions is one staffed mainly by British judges is particularly ironic. Nevertheless as the above examples illustrate there certainly have been cases where judges of the Judicial Committee have viewed their role as one that can provide a very real check on the activities of the government.

As noted above a second way in which a court might interpret its role is to decide that it is not the business of judges to go to great lengths to identify the subtle meaning of a constitutional Bill of Rights in order to review the actions of government. Again, decisions of the Judicial Committee provide examples of this view of judicial activity. In Hinds v. The Queen the Committee considered a Jamaican law that created a new court. One question was whether the Jamaican Parliament had the right to create new courts and if so could such courts assume part of the jurisdiction of other courts already established by the Constitution. In reading the majority decision Lord Diplock noted that:

Where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation of its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the people themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision. 1

Lord Diplock's assertion that the court is not so much concerned with whether a law is reasonable as with whether the law conflicts with an entrenched provision is a curious one in that the two criteria are not in all cases necessarily mutually exclusive. In trying to determine, for example, whether a law conflicts with a guarantee of free speech that is not worded in a particularly specific way, the court would have to give some attention to the reasonableness of the law. Indeed some of the qualifications of these guarantees seem to invite the judiciary to do just that; by implication in considering some exceptions to the guarantees of a Bill of Rights the reasonableness of a law needs to be considered. How else is one to understand the meaning of a phrase such as 'reasonably

1. Hinds v. The Queen [1977] A.C. 196 at 214.

justifiable in a democratic society'? In any event, the way in which Lord Diplock addresses this point suggests that it would be preferable for the judiciary to be hesitant about judging the reasonableness of a law. This kind of view was expressed in a more extreme way in the dissent registered by Viscount Dilhorne and Lord Fraser in the same case. They noted that:

A written constitution must be construed like any other written document. It must be construed to give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the constitution itself and not from any preconceived ideas as to what such a constitution should or should not contain. It must not be construed as if it was partly written and partly not. We agree that such constitutions differ from ordinary legislation and this fact should lead to even greater reluctance to imply something not expressed.

1

This particular opinion is questionable in some ways. To begin with it makes reference to 'a written constitution' and argues that it should not be interpreted as if it was partly unwritten. But perhaps this is too simplistic a view. Although it is commonplace to refer to 'written constitutions', it is not necessarily clear as to whether the constitution includes simply what is written. For example, various conventions or procedures established by the common law may be taken into account when deciding a case, including one of constitutional importance. In addition, it is perhaps wishful thinking to believe that a written constitution could be interpreted like any other written document, even if one were inclined to do so: some parts of a written constitution such as the Bill of Rights can be very imprecise and in many cases it would prove difficult to decide the meaning without considering what is implied. The opinion expressed may be a tempting one, but it is perhaps not a particularly realistic view.

Having noted that the judiciary can actively apply a Bill of Rights,

1. Ibid., at 238.

or can prefer not to go to great lengths to discover subtle or implied meanings we shall now note a third approach that can be taken. This approach is one where the judiciary seems to put much effort into having the will of Parliament prevail. In some ways this approach is similar to the one described above where judges are backing off from looking for hidden meanings in a Bill of Rights. The third approach, however, is different in degree: not only is the judiciary backing off from exploring the possible subtle meanings that a Bill of Rights might have, but in addition they are actively trying to ensure that the actions of Parliament are not unnecessarily restrained. An example of this view is in Attorney-General of the Gambia v. Momodou Jobe.¹ Under consideration were provisions of the Special Criminal Court Act which had been passed by Parliament. When reading his decision Lord Diplock noted the following:

The draftsmanship of those provisions of sections 8 and 10 of the Act, which their Lordships have just been examining, is characterised by an unusual degree of ellipsis that has made it necessary to spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them. In doing so, their Lordships have applied to a law passed by the Parliament in which, by the Constitution itself, the legislative power of the Republic is exclusively vested, a presumption of constitutionality. This presumption is but a particular application of the canon of construction embodied in the Latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations. In passing the Act by the procedure appropriate for making and ordinary law for the order and good government of The Gambia without the formalities required for a law that amended Chapter III of the Constitution the intention of Parliament cannot have been to engage in the futile exercise of passing legislation that contravened provisions of Chapter III of the Constitution and was thus incapable of creating the legal obligations for which it purported to provide. Where, as in the instant case, omissions by the draftsman of the law to

1. [1984] A.C.689.

state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect. 1

This view is interesting in regards to the emphasis it puts on the possibility of deeming Parliament's actions constitutional. As one commentator explained,

The Court of Appeal of the Gambia is given a new principle to follow in fundamental rights cases which will help it to find unconstitutionality only when a presumption in favour of constitutionality renders this impossible.' 2

Thus we have examples of different attitudes the judiciary may have toward the status and enforcement of a constitution generally, or a constitutional Bill of Rights in particular. It will be noticed that one judge's views can be illustrative of more than one approach; indeed examples of these different judicial attitudes can be found within one decision. For example, in the cases we noted above Lord Diplock's comments in Gambia v. Jobe have been cited as illustrative of the attitude of applying a Bill of Rights vigorously, and of the attitude of preferring to assume Parliament's actions to be constitutional. As it happens the decision in that particular case suggests that the second approach was the one followed. Nevertheless the other comments were made and were not taken out of context; the point to be drawn from this is that a judge can change his mind and indeed might offer seemingly conflicting comments within one case.

1. Ibid., at 702.

2. Barbara de Smith, 'Analysis - The Judicial Committee as a Constitutional Court', Public Law (1984) pp.561, 562.

Although we have indentified and given examples of these different approaches, it is difficult to go further and determine which approach, if any, has been the favoured one in Commonwealth courts and for how long. To answer such questions one would have to do some sort of detailed analysis of a huge number of cases and this is beyond our present purposes. What has been done, however, is to identify the different approaches that can and have been taken. Having done so we may then ask whether one is generally to be preferred. The tempting answer is simply to say that the circumstances surrounding each case differ and it would be meaningless to decide that generally speaking one kind of approach should be favoured. But perhaps some general ideas can be usefully stated.

It is entirely reasonable that a preferred role for the judiciary would be one in which they were very reluctant to contradict Parliament. There would also be nothing inconsistent about holding such a view in regards to the interpretation and application of a written constitution. A country operating under a federal system of government may require a court to decide the jurisdiction of the different levels of government. Or a court may decide whether the requirements for a particular office have been adhered to as outlined in a country's constitution. That a court could assume such responsibilities and yet conclude that it is generally deferring to the wishes of Parliament is not inconsistent. Parliament may still be allowed much latitude, though as previously noted there could not really be parliamentary supremacy in the same way that there is in the United Kingdom. But when the judiciary is invited to interpret a Bill of Rights then any assertions of the preference of generally adhering to Parliament's wishes is somewhat suspect. Ambiguously-worded guarantees accompanied by ambiguously-worded qualifications do seem to invite the

judiciary to look for subtle and implicit meanings. It is interesting that some judges prefer not to take up such a challenge. Whether a Bill of Rights is to be preferred is another question; many arguments against such guarantees have been put forth and many of these arguments are reasonable and deserve attention. Nevertheless once a Bill of Rights has been enacted, it does seem that the judiciary should give much attention to the ways in which it can be enforced. Otherwise the prestige of the Constitution, the judiciary, and even that of Parliament may suffer.

The way in which a Bill of Rights might or might not be enforced has not only do do with the attitudes of the judiciary but also with attitudes toward them. If judges are thought to be competent, independent, and effective then more attention is likely to be given to the ways in which a Bill of Rights might be enforced. For example, when reviewing decisions of the Judicial Committee one sometimes detects that the Committee is aware of the criticisms that can be made regarding their role as a constitutional court and accordingly choose to take the path of least resistance.¹ It is also interesting to note that although the Judicial Committee's membership includes first-rate judicial talent, it has been suggested that the Judicial Committee may not have the same stature as the Law Lords who consider British cases. The author of a study of the Law Lords when explaining the way that the judges are assigned to cases noted that 'A balance has to be struck to ensure that junior Law Lords are not relegated

1. Critics of Judicial Committee decisions have acknowledged such a reason for hesitation on the part of the Judicial Committee to enforce a Bill of Rights in a forceful way. For example, in criticizing the Judicial Committee decision in Gambia v. Jobe, Barbara de Smith noted that, 'Given its own equivocal constitutional status, it is hard to see what else the Judicial Committee could have done.' Ibid., p.562.

to the Privy Council for more than 50% of the year.'¹ According to this study new Lords of Appeal typically hear their first appeal in the Privy Council.² It is curious that there might be a tendency to assign the newer Law Lords to the Judicial Committee.

1. See Alan Paterson, The Law Lords (London, Macmillan, 1982) p.88.

2. Ibid., p.88.

CONCLUDING REMARKS

Commonwealth Bills of Rights vary a good deal in style. They can often reflect circumstances peculiar to a particular country at a particular time. Such relativism has been apparent in the debates surrounding proposals for Bills of Rights in addition to the guarantees themselves. Whether such relativism undermines the justification for a Bill of Rights is a debatable point, but one is prompted to wonder about the tendency to proclaim some rights as fundamental. It could be argued that there is no necessary inconsistency here: an assertion of a set of fundamental rights is only a statement of the rights that are fundamental at a given time in a given place; it is not necessarily a statement of rights that all people should enjoy in all places at all times. But in many instances one is given the impression that the possible relativism of such rights is not being conceded. In Canada, for example, rights regulating to the use of French and English are included in the Charter of Rights. Yet in 1950 when a Canadian Senate committee was taking evidence on a proposed Bill of Rights the following exchange took place:

Mr. Edward Major
representing the
Civil Liberties Union
of Montreal:

With your permission I will present my brief
in French.

Senator David:

Might I point out to you, Mr. Major, that
the majority of the committee speak English.

Senator Gowin:

It would be in your interest to speak in
English rather than French.

Senator David:

Poor Quebec! Another sacrifice!

Senator Gowin:

If he wishes to be understood by the majority
of the committee, it would be better for him
to speak in English.

Mr. Major:

Honourable members of the committee, I do speak
English, but not fluently.

Senator Kinley:

Have you a copy of your brief in English?

Mr. Major: Yes, sir. Very well, then I will read it in English. 1

So in 1950 the Special Committee on Human Rights and Fundamental Freedoms was reluctant to allow evidence to be given in French; yet in 1982 the right of a Canadian to communicate in either French or English with the federal government is included in the Charter of Rights and is among the provisions that are not susceptible to legislative override. It is obvious that in recent years the interest in Canadian bilingualism has been much more prominent than previously; but what is particularly interesting to note is how the perception of what constitutes a right can change so drastically. It could be argued that the Canadian provisions regarding language could have appeared in an identical form in a different part of the Constitution, and that the effect would still be the same even though they were not included in the Charter. But it seems to be of significance that they are included in the section that is meant to outline basic rights.

One inevitably asks whether Commonwealth Bills of Rights have mattered: have they made a significant difference to many Commonwealth countries? One has only to read the newspapers to be aware that a number Commonwealth countries these Bills of Rights have not had as great an influence as they might have. Some Commonwealth Governments have been and continue to be authoritarian and arbitrary, and have not paid much attention to Bills of Rights. Several commentators warned against optimistic and naive expectations about the efficacy of some constitutional solutions. Sir William Dale has concluded that 'It is evident that, unless a system of adequate and enforceable legal remedies is present, it is vain to enact in

1. Proceedings of the Special Committee on Human Rights and Fundamental Freedoms (1950), p.238.

a constitution a chapter declaring the fundamental rights of the citizens.'¹ Claire Palley cites Lord Bryce's view that a people should not be given institutions for which it is unique in the simple faith that the tool will give skill to the workman's hand.'² She also criticises the presumption that there is one ideal type of state to suit different conditions in different environments.³ She notes, for example, that in the late forties and fifties 'The federal fashion became the vogue...' and was viewed as a panacea for communal problems, and says that it is not surprising that a federal system of government has not always proven to be an effective solution.⁴ The late Professor de Smith observed that 'Unless the quality and status of the Judiciary are commensurate with its responsibilities the spirit of the Constitution will escape into emptiness.'⁵ It could be argued that a Bill of Rights was naively assumed to be a likely solution to complicated problems. So, Bills of Rights are perhaps not an instant solution. But have they done any harm? It could be argued that they have done harm to the extent that they have raised false hopes and have provided an excuse for other alternatives not to be pursued. It could also be argued that Commonwealth Bills of Rights are a reflection of Western liberal values which do not necessarily have any relevance to many Commonwealth countries, and that the ineffectiveness of such

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1. The Modern Commonwealth (London, Butterworths, 1983) p.165.
 2. 'Constitutional Devices in Multi-Racial and Multi-Religious Societies', Northern Ireland Legal Quarterly, 19 (1968), 378.
 3. Ibid., p.378.
 4. Ibid., pp.395, 396.
 5. 'Fundamental Rights in the New Commonwealth', International and Comparative Law Quarterly, 10 (1961), 37.

provisions has encouraged more cynicism about human rights generally.¹ On the other hand one could still resist the relativist view of human rights, and maintain that imperfect as Commonwealth Bills of Rights may be, they are still a step in the right direction.

Given the benefit of hindsight would Bills of Rights still be encouraged for various Commonwealth constitutions? Anthony Rushford claims that as a British representative at Commonwealth constitutional conferences he would still recommend that Bills of Rights be adopted. 'When they were first tabled I was more sceptical' he explains, but adds that 'I am very glad that those attempts were made.' His general view on Bills of Right is that 'They're perfectly sensible'.²

Are they perfectly sensible? It is difficult to know. But what can be stated with certainty is that there will continue to be debate about the purposes and substance of Bills of Rights. It will be interesting to

1. In reference to the Kenya Bill of Rights reflecting Western liberal values, Professor Y. Ghai and J.P.W.B. McAuslan wrote the following:
 Could the Bill be too generous to individuals at the expense of the State? Its paternity is traceable to the European Convention, which is replete with liberal and laissez-faire philosophy and may be appropriate for the advanced economies and more stable political conditions of Western, but is hardly suitable for a developing fragile polity, avowedly committed to socialism.
Public Law and Political Change in Kenya (Nairobi, Oxford University Press, 1970) p.429.

2. Interview 9 May 1985.

see whether the United Kingdom continues to be a party to the European Convention of Human Rights and whether any of the proposals for a United Kingdom Bill of Rights are ever successful. In Canada it will be interesting to see how the judiciary applies the recently-enacted Charter of Rights.¹ Whether those Commonwealth countries that do not possess a Bill of Rights decide to enact such declarations will be interesting to see. And it will prove interesting to see the ways in which existing Commonwealth Bills of Rights are interpreted and applied.

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1. As a possible indication of the attitude the Canadian Supreme Court might have toward the Charter, the following remarks by Dickson J. (who was recently appointed Chief Justice) in a case involving the Charter should be taken note of:

A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unrelenting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'.

Hunter et al v. Southam Inc. [1985] 11 D.L.R. (4th), 649.

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