PAPUA-NEW GUINEA GOVERNMENT—CONSIDERATION OF A BILL OF RIGHTS

Enid Campbell*

On the last occasion the Constitution of the Commonwealth of Australia was reviewed by an official body,[1] some attention was given to suggestions that the Constitution be amended by the incorporation of comprehensive guarantees of basic human freedoms. There were already a few provisions in the Constitution which had the effect of controlling the making of federal laws contravening certain freedoms,[2] but these did not add up to the kind of general charter which is commonly termed a Bill of Rights. The Joint Committee of the federal Parliament which considered possible changes in the Constitution chose not to recommend the adoption of a charter of individual liberties, mainly because it was not satisfied that constitutional guarantees of these liberties were necessary and because it believed "that as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia".[3] Nevertheless, the Committee thought it appropriate that the Constitution be amended "to protect the position of the elector and the democratic processes essential to the proper functioning of the Federal Parliament".[4] What it had in mind was the insertion of provisions which would ensure that there would be regular review of electoral divisions and which would "accord near uniformity to the value accorded to the votes of the electors for each of the States".[5]

The sentiments voiced by this Committee reflect what I believe to be a fairly widespread apathy, perhaps even scepticism, among Australian politicians and lawyers towards Bills of Rights. Such an attitude is by no means peculiar to Australians. It is a prejudice deeply embedded in British consti-

* Professor of Law, Monash University.

1 Commonwealth of Australia, Parliament, *Report from the Joint Committee on Constitutional Review*, 1959.

2 Section 51(xxxi) limits compulsory acquisition of property by requiring that payment be made on just terms. Section 92 provides that trade, commerce and intercourse between the states shall be absolutely free, and s. 116 prevents the making of federal laws prohibiting the free exercise of religion. No court has yet decided whether s. 116 applies to laws made by the Commonwealth Parliament for the government of territories under s. 122 of the Constitution. However, in *Lamshed* v. *Lake* (1958) 99 Commonwealth Law Reports, 132 at 143, Dixon, C.J. suggested that s. 116 did apply to the territories power. If it does, then it must also apply to any legislative act of a territorial legislature constituted by Act of the Commonwealth Parliament. This view is supported by dicta in *Kean* v. *The Commonwealth* (1963) 5 Federal Law Reports, 432 and in *Tau* v. *The Commonwealth* (1969) 44 Australian Law Journal Reports, 25. In the latter case the High Court held that the power to make laws for the territories is not qualified by s. 51(xxxi) of the Constitution or any other paragraph in that section, since s. 51 is concerned with "federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent states".

3 Commonwealth of Australia, Parliament, *Report from the Joint Committee on Constitutional Review*, 1959, paragraph 328.

4 *Ibid.*

5 Ibid., paragraph 329.

tutional traditions, and rests not on any fundamental disagreement with the precepts enshrined in Bills of Rights, but on an overwhelming confidence that these precepts will generally be adhered to in the making and administration of the laws, and if not adhered to will be enforced by normal political and judicial processes.[6] This point of view has not prevailed when the time has come to prepare constitutions for those of Britain's former colonies and dependencies which are about to achieve independence. Most of the constitutions of what has been termed the new Commonwealth [of Nations] do include comprehensive guarantees of fundamental rights and freedoms, and the current trend is to include them almost as a matter of course. D. V. Cowen recalls that in discussions he had with Swazi politicians who had sought his assistance in the drafting of a Constitution for their country, he was asked in effect why, if a Bill of Rights was thought unnecessary in Great Britain, it should be necessary in Swaziland. The tenor of the question put to him was "might it not be thought that all this pre-independence concern for Bills of Rights is disingenuous and shows lack of confidence in Africans? While the British were firmly in command, no one heard of Bills of Rights, but now that they are withdrawing, we hear a great deal about them."[7]

We have heard little about a Bill of Rights as part of the Constitution for an independent, or almost independent, Papua-New Guinea,[8] but since Bills of Rights have become a standard feature of the constitutions of those countries which have recently grown to full nationhood, the problem that now has to be resolved is not so much whether Papua-New Guinea really needs a Bill of Rights, but whether it should depart from the norm. This is not to say that there is no need to consider the policy of having a Bill of Rights. It would be quite wrong, I believe, for a Bill of Rights to be written into the new Constitution merely because other countries whose history was not dissimilar from Papua-New Guinea's had constitutional guarantees of fundamental rights and freedoms. Any decision on this question must, I suggest, be arrived at after a thorough and thoughtful investigation of Bills of Rights elsewhere, the assumptions underlying them, the objects they are supposed to serve, and their practical operation. For reasons which I shall mention presently, I think it vital that the investigatory work and the final decision be in large part the responsibility of those who will eventually have to govern and administer according to the new Constitution.

In this paper I shall attempt to say something about the Bills of Rights which are most directly relevant to the situation of Papua-New Guinea, to comment on their strengths and weaknesses and to isolate some of the main questions that have to be considered before a decision is taken on the form and content of the new Constitution. I shall assume throughout that the

6 See de Smith, S. A., *The New Commonwealth and its Constitutions*, London, 1964, pp. 162-70.

7 Cowen, D. V., "Human Rights in Contemporary Africa" [1964], *Natural Law Forum*, 1 at p. 11.

8 The trusteeship agreement for New Guinea provides that the administering authority will "guarantee to the inhabitants of the Territory, subject only to the requirements of public order, freedom of speech, of the press, of association and of petition, freedom of conscience and worship and freedom of religious teaching" (Article 8(2)(d)). Section 55(b) of the *Papua and New Guinea Act* 1949-1968 requires the Administrator to reserve for the Governor-General's pleasure any ordinance "that may not, in the opinion of the Administrator, be fully in accordance with the treaty obligations of the Commonwealth or with the obligations of the Commonwealth under the Trusteeship Agreement".

Constitution will at the very least provide an institutional framework for a parliamentary democracy and that it will be framed so as to impede the introduction of a non-democratic system by any means short of revolution, against which no constitution can provide complete protection.

It may be helpful to begin by explaining what is meant by a Bill of Rights. The term has been popularized by the Americans (who in turn borrowed it from the English Act of Parliament of that name[9]) and is used to refer to those provisions of a documentary constitution which declare rights and freedoms of individuals and require that they be respected. The set of rules comprising the Bill of Rights is usually a superior set of rules with which other rules, in order to be valid legal rules, must conform. Constitutions are not immutable and those which operate as a higher law customarily provide for their own amendment in a certain manner. When the manner in which the rules of the constitution may be amended differs from that in which other legal rules may be changed, then the constitutional rules are said to be entrenched.

An examination of the purposes of and justification for Bills of Rights involves much more than a consideration of constitutional technique. Basic questions of political philosophy are at stake. At the very least a Bill of Rights imposes restrictions on the exercise of governmental power and since it phrases these restrictions in terms of what individuals may not be required or compelled to do and what must be permitted to them, it implies that government exists primarily for the good of the people and that certain rights and liberties need to be accorded to individuals for them to achieve the good life, however that may be conceived. It is extremely difficult to formulate what is the indispensable minimum of rights and liberties that should be secured for individuals, and more difficult still to determine what minimum requirements are appropriately included in a constitutional instrument. One may find that there is ready agreement on what rights and liberties are necessary to ensure human survival, but people do not see mere survival as the only purpose of life. Certainly the Bills of Rights go much beyond what should be necessary for preservation of human life. They give expression to certain aspirations which may or may not be rooted in the shared culture of the people for whom the Bill of Rights is made, and which may or may not represent the desires of the majority.

The prototype of a Bill of Rights which is most likely to commend itself to the draftsman of the Papua-New Guinea Constitution is that contained in the Nigerian Constitution of 1960. (The republican Constitution of 1963 substantially reproduces the relevant part of the 1960 Constitution.) This was the work of English-trained lawyers and the models on which it was based were the United States *Bill of Rights*, the *Universal Declaration of Rights of* 1948 and the European *Convention on Human Rights of* 1950.[10] It has been used as a precedent for many of the later constitutions in Africa and elsewhere, but in the process has undergone many refinements.[11] The

9 The English Act of 1689 is concerned principally with restriction of executive power and it has the status of an ordinary Act of Parliament.

10 See de Smith, *op. cit.*, pp. 183-93.

11 *Id.*, pp. 193-9. In addition see the Fiji *(Constitution) Order* 1966; the Mauritius *Constitution Order* 1966; the Barbados *Independence Order* 1966; the Lesotho *Independence Order* 1966; the Botswana *Independence Order* 1966; the Guyana *Independence Order* 1966; the Gilbert and Ellice Islands *Order* 1967; the Antigua *Constitution Order* 1967; the Dominica *Constitution* 1967; the Grenada *Constitution Order* 1967; the Saint Christopher, Nevis and Anguilla *Constitution Order* 1967; the Bermuda

widespread acceptance of this particular model should not be allowed to obscure the fact that the values it enshrines are values of Western European culture which are not necessarily shared or fully supported by the peoples whose cultural experience has been different. This makes it all the more important that when the suitability of existing precedents of Bills of Rights for Papua-New Guinea is being considered, every formulation of individual rights and freedoms in these precedents should be closely scrutinized and tested. What needs to be asked in each case is why a certain declared right or freedom is worthy of support and protection, whether it accords with local aspirations and if not whether there are good grounds for attempting to foster its acceptance by means of the constitutional instrument.

As I have said, the reluctance of the British (and Australians) to write Bills of Rights into their own constitutions stems not from any opposition to the values to which these documents give expression or from any disagreement with the idea that the declared rights and freedoms should be legally protected, but from a lack of conviction that it is necessary to give those rights and freedoms the status of constitutional guarantees. There has also been some doubt about the appropriateness of the constitutional technique which a Bill of Rights entails, and about the possibility of drafting a satisfactory instrument. The kinds of worries that many have had include the difficulty of framing a document which both gives positive guidance to agencies of government yet is not so detailed and inflexible as to "place an embarrassing restriction on the powers of the legislature",[12] and the enormous power that would be reposed in the judiciary if governmental acts which were alleged to contravene the Bill of Rights were to be subject to judicial review.[13]

The most recent, Nigerian-type, Bills of Rights go a long way towards meeting these difficulties. I shall take as my chief example the Constitution of Mauritius of 1968. Chapter II of the Constitution, entitled "Protection of Fundamental Rights and Freedoms of the Individual" begins with a section which declares in general but positive terms certain human rights and fundamental freedoms. The section is as follows:

> "3. It is hereby recognized and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—
>
> (a) the right of the individual to life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and
>
> (c) the right of the individual to protection for the privacy of his

Constitution Order 1968; the Mauritius *Constitution Order* 1968; the Swaziland *Independence Order* 1968; the Bahama Islands *(Constitution) Order* 1969; the Gibraltar *Constitution Order* 1969. These instruments are set out in the United Kingdom Statutory Instruments. See also the Constitution of Western Samoa, 1960 and the Constitution of Nauru, 1968.

12 *Report of Joint Select Committee on Indian Constitutional Reform*, 1934, Vol. I, paragraph 366.

13 See Cowen, D. V., *The Foundation of Freedom*, Cape Town, 1961, chapters 6 and 7.

home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to the said 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 individual does not prejudice the rights and freedoms of others or the public interest."

Subsequent sections of the chapter contain prohibitions against interference with these rights and freedoms except in defined circumstances, for certain defined purposes and subject to various limitations. I shall have occasion to refer more fully to these qualifications later in the paper. There is in addition a section providing that no person shall be deprived of his freedom of movement (s. 15) and a prohibition against discriminatory laws (s. 16), both of which are subject to qualifications. Section 10 details requirements to be observed in the prosecution of criminal charges, and gives content to the concept of "due process of law". The section also prohibits the application of retrospective penal laws, incorporates the principles against double jeopardy and self-incrimination.

None of the family of Bills of Rights to which Chapter II of the Constitution of Mauritius belongs contains anything answering the description of a declaration of social and economic rights (excluding perhaps the safeguards against compulsory acquisition of property). Nor do any of them attempt to define the duties of individuals as citizens. There is no mention, for instance, of any right to work, or of any right against the state to the means for a decent standard of living, social welfare or education. Such provisions do appear in some constitutions. In the Constitution of Cyprus, 1960, for instance, there are the following articles. "Every person has the right to a decent existence and to social security. A law shall provide for the protection of workers, assistance to the poor and for a system of social insurance" (Article 9). "Every person has the right to receive, and every institution has the right to give, instruction or education. . ." (Article 20.1). "Any person reaching nubile age is free to marry and to found a family according to the law relating to marriage, applicable to such person under the provisions of this Constitution" (Article 22.1). "Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right" (Article 23.1). "Every person is bound to contribute according to his means towards the public burdens" (Article 24.1). "Every person has the right to practise any profession or to carry on any occupation, trade or business" (Article 25.1). I have omitted mention of the qualifications to these provisions.

If a Bill of Rights is meant to give legal expression to common aspirations which ought to be both respected and fostered by governments, it may at first glance seem strange that it should exclude from the range of protected rights and freedoms those human demands which go to the essentials of livelihood. What, it may be asked, is the use of political freedoms such as freedom of expression and conscience, assembly and association, if people are not also free from hunger, poverty, avoidable or remediable sickness, and from ignorance and illiteracy? A complaint which if it is well founded is especially serious, is that restrictions on governmental power in the interests

of political freedom and protection of private property may, unless coupled with guarantees of social and economic rights, deny governments the legal means of doing what is necessary to provide economic and social security.

Care obviously must be taken to see that a Bill of Rights does not impede the implementation of governmental programmes that are aimed to promote public health and education, to combat poverty and illiteracy, but the main argument against guaranteeing such things as the right to work, to a decent standard of living and education, is that these are difficult if not impossible of effective legal enforcement. On this point Professor S. A. de Smith has suggested that: "There may . . . be a stronger case than our constitution-makers have hitherto been ready to concede for writing objectives, aspirations and moral obligations into a constitution, provided that it is made abundantly clear (by including them in a preamble or a section on directive principles) that they are programmatic and therefore of a fundamentally different character from those rights which are directly enforceable through the medium of the courts."[14]

I turn now to the qualifications that are made to the various general prohibitions against interference with declared rights and freedoms. The main justification for introducing these qualifications is that the exercise of one freedom may interfere with the exercise by another of the same or another freedom. A sample of how substantive guarantees are qualified is s. 12 of the Constitution of Mauritius. This provides as follows:

> "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, 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 provision—
>
> (a) in the interests of defence, public safety, public order, public morality or public health;
>
> (b) 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 technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainment; or
>
> (c) for the imposition of restrictions upon public officers,
>
> 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.

The concluding words of this section, which follow a formula used in the Nigerian Constitution, merit particular attention. Their effect is that if a

[14] De Smith, *op. cit.*, p. 185. There is an interesting catalogue of directive principles of state policy in the Constitution of India, most of which concern economic and social welfare. See Articles 37-51. It is expressly stated that the Articles "shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental to the governance of the country and it shall be the duty of the State to apply these principles in making laws". See also Constitution of Malta, 1965.

law is made which hinders the enjoyment of freedom of expression, but this law is also in the interests of, let us say, public order, that law is not valid unless it is "reasonably justifiable in a democratic society". This requirement is more exacting than that found in s. 10 of the Malaysian Constitution. After declaring that "every citizen has the right to freedom of speech and expression" the section goes on to authorize the federal Parliament to impose by law "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 and 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". If a law is challenged on the ground that it violates freedom of expression, then so long as a court is satisfied that it is in furtherance of any one or more of the enumerated interests, the court cannot call into question Parliament's judgment that the law was necessary or expedient for that interest.[15] The task of a court applying the Mauritius formula is more demanding for it is not enough that the legislature should have judged that the occasion made it necessary or expedient to make a law abridging freedom of expression in one of the specified interests. The court must also decide whether the law is reasonably justifiable in a democratic society. The requirement that the law should be so justifiable is not an invitation to the court to substitute its opinion for the legislature's, as it might do as a chamber for legislative review. It cannot properly hold the law invalid because it thinks it was unnecessary in a democratic society or undesirable or even unreasonable.[16]

To permit the legislature to make laws derogating from declared rights and freedoms "in the interests of defence, public safety, public order, public morality or public health" so long as the laws are reasonably justifiable in a democratic society is to allow it a great deal of latitude; indeed so much that it may be wondered whether the restrictions imposed upon it are at all meaningful. To what extent the legislature is restrained will depend to a large extent on how far the courts are prepared to defer to the legislature and what they conceive to be an indispensable minimum in a democratic society. It may be that their role as censors of legislation will be less active than that of the United States Supreme Court, for the constitution positively discourages them from holding a law invalid for violating freedom of expression unless they can say that it was not a law which the qualifications permit. Despite their breadth, these qualifications may at least serve to remind legislators that a law contravening declared rights is a law that is liable to be challenged and that they must be prepared to justify it on any one of the permitted grounds.

Under the Mauritius Constitution, the only declared rights and freedoms which are liable to be qualified "in the interests of defence, public safety,

15 There was an interesting variation of the Malaysian provision in the Rhodesian Constitution of 1961. The Constitution authorized derogation from the guarantees of freedom from deprivation of property, privacy and freedom of conscience, expression, assembly and association when "necessary" for any one of specified purposes. If a Minister certified that a law was necessary for any of these purposes, then according to the Constitution, the law should "be deemed to be so necessary unless the court decides as the result of hearing the complaint that, in a society which has a proper respect for the rights and freedoms of the individual, the necessity of that law on the grounds specified in the certificate cannot reasonably be accepted without proof to the satisfaction of the court". See de Smith, *op. cit.*, p. 201.

16 See de Smith, *op. cit.*, p. 190.

public order, public morality or public health" are the right not to be deprived of property; the right to privacy of person, property and premises; freedom of conscience, expression, assembly and association, to establish schools, and freedom of movement. The provisions respecting right to life and personal liberty, the prohibition against slavery and forced labour and inhuman treatment and the provisions to secure protection of law to persons charged with criminal offences are subject to qualifications but of a different kind.

Related to the question of how far a Bill of Rights fetters legislative freedom is the question of the ease with which the constitutional guarantees may be amended. If the provisions of a Bill of Rights may be overridden by an Act of the legislature passed in the ordinary way, there is little point in having the Bill of Rights, for every Act which is inconsistent with or which contravenes it will repeal the relevant provisions by implication. The Canadian *Bill of Rights* suffers from this drawback.[17] To give a Bill of Rights controlling effect over subsequent Acts of the legislature it is necessary to provide at the very least that Acts to amend or repeal the provisions of this instrument shall not take effect unless passed by a legislative majority larger than that required for enacting other Acts. This is a type of amendment procedure that has been prescribed in most of the new Commonwealth constitutions, the majority required normally being two-thirds of the total membership of the legislature, or if it is a bicameral legislature, a two-thirds majority in each of the two chambers.[18] Under the Constitution of Sierra Leone, 1961, amendment of some provisions of the Constitution may be effected by an Act passed by a majority of two-thirds of all members of the House of Representatives, but other provisions, including the provisions of the Bill of Rights, may be amended only if the Bill for amendment has been passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions. The purpose of this procedure is presumably to allow electors an opportunity to express a view on a proposed amendment before it takes effect.

Amendments which require only special legislative majorities are obviously much easier to accomplish than amendments which, to be effective, must be approved not only by the legislature but by a majority of electors voting at a referendum. Although it may be thought unwise to make the amendment process so cumbersome and difficult as to make change almost impossible to bring about, there are also dangers in making it too easy to achieve. In a two-party system, there may be circumstances in which the party in power may not find it hard to secure the requisite two-thirds majority necessary to effect amendment or repeal. Too frequent amendment may diminish respect for the constitution and if it is specifically aimed to get around judicial decisions which the ruling party does not like, it may

17 The Bill of Rights, 1960 declares certain rights and freedoms and provides that every Act of the Dominion Parliament or regulation made thereunder shall, unless an Act expressly declares that it shall operate notwithstanding the Bill of Rights, be "so construed and applied" as not to derogate from or authorize derogation from the declared rights and freedoms. The effect of the Bill of Rights seems to be to amend all Dominion legislation in force when it came into effect to the extent that this legislation is inconsistent with the Bill of Rights. Cf. *Reg.* v. *Drybones* (1970) 9 D.L.R. (3d) 473. However, legislation made after 1960 which is repugnant to the Bill of Rights would, I submit, prevail even if it omits to state that it shall operate notwithstanding the Bill of Rights.

18 See de Smith, *op. cit.*, pp. 192-3, 199, 209.

also undermine confidence in the ability of the courts to uphold the constitution. On the other hand, a situation which prevents constitutional changes being accomplished with reasonable facility could encourage the courts to play a more creative role in constitutional interpretation than was envisaged by the framers of the constitution, and could also mean that an unsatisfactory line of judicial decisions on constitutional matters would become virtually irreversible by legislative action. From time to time judges do discover defects in the law, both common law and statute, and commend changes to the legislature. It is not inconceivable that in the course of interpreting a constitution, the courts may also find fault with that constitution, and conclude that it does not authorize a piece of legislation which is entirely defensible even if judged by the standard of what is reasonably justifiable in a democratic society. Should they also form the conclusion that there is little likelihood of the necessary constitutional amendment being made to legitimize this legislation, there is a strong temptation for them to assume the mantle of constitutional reformers and stretch the constitution to accommodate the legislation under review. This temptation must surely be reduced when the judiciary know that formal constitutional amendment is not a remote possibility.

When all that is required to effect a change in the constitution is an Act of the legislature passed by special majorities, there is a risk that the constitution will be amended or repealed unintentionally. A routine piece of legislation may be passed without any thought about whether it conforms with the constitution or else on the assumption that the constitution permits it. If a court later finds that the legislation is inconsistent with or in contravention of the constitution, but that it was passed by the legislative majority requisite for amendment, the court has no alternative but to say that an amendment has been effected, by implication.[19] If it is thought that amendment of the constitution should not be possible by implication and should result only after the legislation has been deliberated upon as a proposed amendment, then it is necessary to devise a procedure for amendment which prevents unintentional change. An example of a constitutional provision which seeks to prevent unintentional legal change is Article 19(1) of the Basic Law of the Federal Republic of Germany. The Article states: "Insofar as under this Basic Law a basic right may be restricted by or pursuant to a law, such law . . . must name the basic right, indicating the Article." It will be noticed that this Article does not relate to constitutional amendments but to those laws derogating from basic rights which the constitution permits to be made. The type of provision I have in mind is one which has the effect of preventing constitutional amendment by implication. Another kind of safeguard against amendments being made unintentionally is the constitutional requirement that some person or body scrutinize Bills introduced in the legislature and certify to the legislature those which are found to be inconsistent with or which contravene the Bill of Rights. That procedure would at least alert legislators to the possible implications of the proposed legislation and perhaps induce them to deliberate more carefully upon the measure.

So far I have spoken of Bills of Rights mainly as they affect the Acts of the legislature after the Bill of Rights has come into operation. Unless the Bill of Rights is declared to operate only with respect to future laws, it will apply to pre-existing laws made at a time when there were no constitutional

[19] *Kariapper* v. *Wijesinha* [1968] Appeal Cases 717.

restrictions of this kind. In some of the new constitutions of the Commonwealth the operation of the Bill of Rights or parts of it has been postponed for a short period in order to give the legislature an opportunity to bring existing law into line.[20] This seems a sensible course as otherwise provisions of existing legislation might be held invalid and whole statutory schemes rendered useless. The Canadian *Bill of Rights* of 1960 operates upon existing legislation; indeed that is its principal effect. Any such legislation which is inconsistent with the declared rights and freedoms is to be construed and applied so as not to derogate from or authorize derogation from those declared rights and freedoms. The Bills of Rights in the Jamaican Constitution and the Rhodesian Constitution of 1961 (since superseded) had no application at all to existing law; however, in Rhodesia a Constitutional Council was established, one of whose functions was to draw the legislature's attention to existing legislation which appeared to it to be incompatible with the Bill of Rights.

One of the problems that needs to be borne in mind when framing a Bill of Rights is whether the constitutional guarantees should control legislation only. Legislation, conceived in the broadest sense, covers a wide spectrum of the law, but does not exhaust it. The Mauritius Constitution like the Nigerian Constitution states that any law inconsistent with the Bill of Rights is void to the extent of the inconsistency.[21] It may be that the term "law" does not for this purpose cover administrative acts, but an administrative act which is done in pursuance of invalid legislation cannot be legally effective, and there are some acts which are either unlawful or not legally justified unless authorized by valid legislation. A harder question is to what extent, if at all, a Bill of Rights should provide protection against private power. Members of the commission that considered a new constitution for Basutoland (now Lesotho) were particularly concerned about this, and suggested that the activities of private persons and bodies could present a greater threat to individual liberties than the activities of government agencies.[22] In the absence of a Bill of Rights, individuals do have recourse to a number of remedies against other individuals for invasion of their legal rights and breach of legal duties owed to them. These remedies include damages and injunction to restrain the repetition or to prevent the commission of an apprehended wrong. If a Bill of Rights generally prohibits interference with declared rights and freedoms without limiting the class of persons or bodies to whom the prohibitions apply, does a prohibited interference which is not authorized or excused by a valid law create a cause of action? Many of the new constitutions do authorize legal action by a person who alleges breach of declared rights and freedoms and who has an interest in enforcement of the same, but are not specific about the nature of the remedies that are available.[23]

A peculiar difficulty that a Bill of Rights for Papua-New Guinea would present is the effect of the constitutional guarantees upon native custom. Under the *Native Customs (Recognition) Ordinance* 1963, native custom "shall be recognized and enforced by, and may be pleaded in, all courts" subject to many exceptions. In non-criminal cases, it cannot be taken into

20 See de Smith, *op. cit.*, pp. 198, 200.
21 Constitution of Nigeria, 1963, s. 1; Constitution of Mauritius, 1968, s. 1.
22 See Cowen, D. V., "Human Rights in Contemporary Africa" [1964], *Natural Law Forum*, 1 at pp. 7, 8.
23 See for example, Constitution of Mauritius, 1968, s. 17.

account except in relation to enumerated matters, and in criminal cases only in relation to determining the existence of a state of mind and penalty. But in both types of cases, the court has an overriding discretion to take custom into account in any case where it considers that by failing to do so "injustice will or may be done to a person". Whether or not native custom is regarded as law, there can be little doubt that under a constitution containing a Bill of Rights, a court could not recognize and enforce any custom if it was repugnant to the Bill of Rights. Already the recognition and enforcement of native custom by the courts in Papua-New Guinea is controlled by the requirements that the custom be not "repugnant to the general principles of humanity" and not inconsistent with legislation in force in the Territory or any part of it, and that its recognition or enforcement would not result in injustice or be contrary to the public interest. Whether or not native custom was repugnant to the constitutionally guaranteed rights and freedoms would normally be for magistrates to decide. The decision may be a difficult one, but is it any more difficult than that of determining whether custom offends against "general principles of humanity"?

So far I have taken it for granted that where there is an entrenched Bill of Rights, the function of finally deciding whether it has been infringed will devolve upon the courts. One of the most common arguments against adopting a Bill of Rights the application of which falls to be decided by judges is that the kinds of issues that the judges will have to decide are inappropriate for judicial determination. The reasons for suggesting that they are inappropriate for judicial decision rest on certain assumptions about the proper relationship between the courts and other institutions of government, notably the legislature, and about judicial decision-making procedures. Put at its strongest, the argument against judicial review is that judges interpreting a Bill of Rights are deciding questions which are not dissimilar to questions decided by legislatures and as a result cannot avoid deciding with reference to matters of policy. So, it is said, the Supreme Court functions as a chamber of review, which is non-elective and accountable to no one.

Some critics are less disturbed by the fact that a Supreme Court is an unelective chamber of review censoring the acts of an elective chamber, than by the risk that the judiciary will be drawn into the area of political controversy. De Smith summarizes this point of view as follows: "Decisions in highly controversial cases are likely to be ascribed to the judge's personal predilections. In such circumstances the reputation of the judiciary may well suffer (though its prestige may still stand higher than that of any other branch of government) and its independence of political influence in matters of appointment and promotion will be imperilled."[24]

How far the courts do compete with the legislature depends on how the Bill of Rights is framed and on judicial policies and practices with regard to constitutional adjudication. As I have indicated previously, the Bill of Rights on the Nigerian pattern keeps the judges' censorial authority within narrower bounds than does the American Bill of Rights and encourages passive rather than active virtues. The impact of judicial review on the functioning of the other branches of government may also be diminished and kept in check by the courts themselves adopting strict rules on such matters as who has standing to challenge governmental action, what issues are justiciable, when a controversy is ripe for adjudication, what decisions are judicially reviewable, and what considerations are relevant in determin-

[24] De Smith, *op. cit.*, p. 168.

ing the validity of governmental acts. These might seem to be rather technical matters but the rules that govern them are generally rules of judicial making and reflect the considered views of the judges on the proper limits of judicial authority and the suitability of the judicial process for resolving certain issues.

Whether the kinds of issues that arise under a Bill or Rights can be satisfactorily resolved by adjudication is open to debate. Judicial review takes place in an adversary context. How a case is decided often has implications reaching far beyond the particular case, but in deciding it the court can be influenced by its peculiar and possibly atypical features. Unlike a legislature, a court is not able to entertain submissions from all the parties and groups that have an interest in the outcome of the case, and its understanding of the problem before it, and of facts bearing on that problem, is partly determined by the facts that the parties to the suit place before it. These may be incomplete. I have some sympathy with the view that the procedural framework within which constitutional questions of the kind here in point are decided is not entirely satisfactory. The procedure was not specifically designed for constitutional adjudication but for the disposition of ordinary law suits. The main defects are, in my opinion, the limitations on participation by other interested parties, confinement of the issues to those raised by the parties to the suit, the fact that the presentation of relevant evidence is primarily the responsibility of the parties, and the haphazard and unreliable methods of establishing legislative facts. Ways in which these deficiencies might be met include provision for more extensive use of the *amicus curiae* brief[25] and investiture in the courts (or at least those having jurisdiction to decide constitutional questions) of authority to take evidence and call experts on their own initiative to inform them not only of the facts in dispute but of legislative facts.[26]

There are some dangers in relying solely on judicial review as a method of ensuring compliance with a Bill of Rights, especially in a country where a high proportion of the population are unlikely to recognize when they have cause for complaint, where resort to action in the courts is infrequent or tends to be confined to persons of a certain class, and where the expense of constitutional litigation is beyond the means of the majority. Even when these conditions are not present to any marked degree, judicial review cannot be relied upon to prevent the enforcement of all unconstitutional laws, for its operation is spasmodic. Courts do not themselves initiate litigation except for contempt of court, and do not pass on the constitutionality of governmental acts unless a dispute comes before them which requires a determination to be made. Persons who believe that some act is unconstitutional and who are prepared to seek a court ruling may not have sufficient standing to sue.[27] If it happens to be a case in which the Attorney-General

25 See Krislov, S., "Amicus Curiae Brief: From Friendship to Advocacy" (1963), 72 *Yale Law Journal*, 694 and in Dietze, G. (ed.), *Essays on the American Constitution*, Englewood Cliffs, N.J., 1964, pp. 77-98; Angell, E., "The Amicus Curiae—American Development of English Institutions" (1967), 16 *International and Comparative Law Quarterly*, pp. 1017-44; Weiler, P., "Two Models of Judicial Decision-Making" (1968), 46 *Canadian Bar Review*, 406 at pp. 445-9.

26 Scharpf, F. W., "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 *Yale Law Journal*, 517 at pp. 524-7.

27 The constitutional provision that a person alleging that the Bill of Rights has been contravened in relation to him may apply to a court for redress (e.g. Constitution of Nigeria, 1963, s. 32(1), Constitution of Mauritius, 1968, s. 17(1)) appears not to authorize any relaxation of the rules on standing to sue. See *Olawoyin* v. *Attorney-General, Northern Region* (1961) 1 All Nigeria Law Reports, 269.

might sue as protector of the public interest, then unless there is a legal duty on that officer to take action, he cannot be compelled to sue even though there is a *prima facie* case for suit. What this means is that unconstitutional legislation may be enforced for years before its validity is tested before a court. It means also that when the highest court hands down a judgment which is unsatisfactory, there is no opportunity for it to be corrected until a case arises when that court is invited to reconsider its previous ruling.

It would be quite impracticable to establish machinery for the review of every government act. On the other hand, there are means whereby the system of judicial review can be supplemented so as to provide for continuing superintendence of the activities of governmental agencies. The Rhodesian Constitution of 1961 provided for an independent Constitutional Council, one of whose functions was to vet Bills introduced in the legislature in the light of the constitutional declaration of rights. If the Council decided that a Bill passed by the Legislative Assembly was inconsistent with the declaration of rights, then the Bill could not, unless it was amended or certified as an urgent measure by the Prime Minister, be presented to the Governor for assent until after six months had elapsed and the Assembly resolved that it be presented for assent. Alternatively the Assembly had to resolve by a two-thirds majority that the Bill be presented for assent.[28] The Council was permitted no more than a suspensory veto over proposed legislation, but if despite its report that a measure was inconsistent with the declaration of rights, the measure became an Act, the Act could still be challenged in the courts. Moreover a person who challenged the Act could apply to the Council for a certificate that there was a suitable test case, and the certificate would entitle him to reimbursement from public funds of reasonably incurred costs of proceedings.

The Canadian *Bill of Rights* of 1960 requires the Minister of Justice to examine Bills and draft regulations and to report to the House of Commons any inconsistency between the proposed legislation and the Bill of Rights. This is a much weaker provision than that in the Rhodesian Constitution of 1961, for an adverse report by the Minister of Justice does not necessitate the adoption of a special legislative procedure, and in any event the obligation imposed on the Minister is not legally enforceable.

Legislative activity is not the only governmental activity which merits regular scrutiny; indeed the individual's protection against violation of his constitutionally guaranteed rights and freedoms depends more on supervision and control of officials who administer the law. Some control may be exercised within the different governmental services, by, for example, a public services commission, a police services commission and a judicial services commission. But the concern of these bodies could not be specifically or exclusively that of policing the Bill of Rights. In the United States there is a Commission on Civil Rights created by the *Civil Rights Act* of 1957. The Commission is an investigatory body and its duties include the investigation of sworn complaints "that certain citizens of the United States are being deprived of their right to vote and to have that vote counted by reason of their color, race, religion or national origin"; to "study and collect information concerning legal developments, constituting a denial of equal protection of the laws under the Constitution because of race, color,

[28] Sections 84 and 85.

religion or national origin or in the administration of justice", to appraise federal laws and policies "with respect to denials of equal protection of the laws" and to "serve as a national clearing house for information in respect to these things".[29]

Should it be thought desirable to write a Bill of Rights into the new Constitution for Papua-New Guinea, attention ought at the same time be given to the establishment of a permanent and independent commission charged with responsibilities such as those of the bodies I have described. The suggestion is one that could usefully be considered in conjunction with any proposal for appointment of a parliamentary commissioner or ombudsman. It is not essential for provision for a commission of this kind to be made in the Constitution. It could be established under an ordinary Act of the legislature and its continued existence and authority secured, if need be, by entrenching sections. The development of civil and criminal remedies might also be left to ordinary legislation, for it is not conveniently dealt with in a constitutional instrument.[30]

About the particular rights and freedoms written into Bills of Rights I have said little. That is a subject for a much more extensive commentary. Mention should, however, be made of emergency powers and how they may affect the constitutional guarantees. There are some interesting differences in this regard between the new constitutions both with respect to who is authorized to proclaim a state of emergency and for how long, and with respect to what may be done when a state of emergency exists.[31] Under the Mauritius Constitution a state of public emergency exists if Mauritius is at war, or "there is in force a Proclamation by the Governor-General declaring that a state of emergency exists; or there is in force a resolution of the Assembly supported by the votes of a majority of all the members of the Assembly declaring that democratic institutions in Mauritius are threatened by subversion".[32] Any proclamation of emergency by the Governor-General lapses within a short time unless it is approved by resolution of the Assembly and the Assembly may revoke the proclamation at any time. The Assembly's power to declare an emergency is limited; any declaration made by it operates for no more than twelve months at any one time. Laws may be made to enable measures to be taken during a period of public emergency that are reasonably justifiable for dealing with the situation, and no such law is to be held invalid merely because it contravenes the guarantee of personal liberty or freedom from discrimination. Other guaranteed rights and freedoms cannot be affected.[33]

29 42 United States Code (Annotated), ss. 1975-1975(d).

30 Section 32(3) of the Constitution of Nigeria, 1963 authorizes legislation to provide additional or alternative remedies to those available under existing law for the purpose of redressing contravention of the constitutionally guaranteed rights and freedoms; cf. Constitution of Mauritius, 1968, s. 17 (31e(4)). But in deciding applications for redress by persons who complain of violation of their rights, the Nigerian Constitution empowers the court to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement" of those rights (s. 32(2)). It has been held that in the absence of legislation dealing with procedure for enforcement of rights, an application for the quashing of an illegal conviction could be dealt with, even though it did not comply with rules governing applications for certiorari: *Olawoyin* v. *Attorney-General* (1961) 1 All Nigeria Law Reports, 269. See also *T. C. Basappa* v. *Nagappa*, All India Reports, 1954, Supreme Court, 440. On remedies for enforcement of civil rights under United States law see 42 United States Code (Annotated), ss. 1983, 1984, 1987, 1988.

31 See de Smith, *op. cit.*, pp. 191-2, 198; Sawer, G., "Emergency Powers in Nigerian and Malayan Federalism" (1964), *Malaya Law Review*, pp. 83-99.

32 Section 19 (7)(8)(9).

33 Section 18.

Leaving aside a situation of war, I wonder whether, in the light of the qualifications made to the substantive guarantees, emergency powers are necessary. Where the constitution authorizes laws to be made which contravene declared rights and freedoms in the interests of defence, public safety, or public order, it is hard to imagine any emergency law that could not be justified in one of these interests. Preventive detention on security grounds also falls within the ordinary exceptions and is not confined to situations of emergency. Under the Mauritius Constitution such detention must be authorized by law and if anyone is detained, his case must be reviewed periodically by an independent tribunal. If the tribunal finds that is not sufficient cause for the detention, the detainee must be released.[34] Where a state of emergency exists, these safeguards need not be observed, but there are others which apply in their stead.[35]

It would be a mistake to expect too much of a Bill of Rights. It is not a self-enforcing instrument and its effectiveness will always depend ultimately on the willingness of officials to accept and act in accordance with its dictates and with whatever judgments may be made by the courts on the validity of governmental acts. If there is a reasonable expectation that it will be accepted as controlling, then I think that, on balance, the advantages of including it within the constitution slightly outweigh any disadvantages. That was essentially the conclusion arrived at by the Willinck Commission on the protection of minorities in Nigeria. The presence of an entrenched Bill of Rights, the Commission observed, "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."[36]

I am not disturbed by the prospect that under a constitution containing entrenched rights and freedoms, the courts should exercise what in result is a limited power of veto over the acts of the legislature, though I would strongly urge against a constitution which was so difficult to amend that the judicial view was in practice the final view. The Nigerian model for a Bill of Rights commends itself as one that goes as far as a written instrument can towards allowing some latitude for judicial creativity whilst positively discouraging the courts from presuming to act as an upper house. Adoption of a Bill of Rights similar to the Nigerian type would have the further advantage that the courts interpreting the constitution would be able to draw assistance from the decisions of courts in other jurisdictions where the same type of Bill of Rights exist. Although the framers of a constitution cannot themselves fashion the course of judicial review, they can and should, I believe, give thought to the part that the courts might and ought to play in enforcing the constitution and how, if at all, the constitution should control the scope and procedure of judicial review. One matter that might conceivably be considered in this context is whether the Constitution should contain a provision authorizing, perhaps even commanding, the

[34] Section 5 (1)(k), 4.
[35] Section 18.
[36] *Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying Them*, 1958, Cmnd. 505, 97.

courts to refer to the *travaux préparatoires*.[37] If courts other than the Supreme Court will have occasion to interpret and apply the Bill of Rights, there is something to be said for permitting judicial officers to refer to the official records of the commissions and committees that were responsible for preparing a constitution, especially if these elucidiate the spirit and philosophy behind the constitutional provisions. A section to make this possible might be drafted along the lines of clauses suggested by English and Scottish Law Commissions in their recent report on the interpretation of statutes.[38]

37 The general view is that *travaux preparatoires* should not be consulted where the constitutional provisions are unambiguous See *Katikiro of Buganda* v *Attorney-General* [1961] 1 Weekly Law Reports, 119 at 128, *Olawoyin* v. *Commissioner of Police* (1961) 2 All Nigeria Law Reports, 203 at 215

38 The Law Commission and the Scottish Law Commission, the *Interpretation of Statutes*, 1969 (Law Comm No 21), (Scot Law Comm No 11) p. 51 The draft clause provides

1 (1) In ascertaining the meaning of an Act, the matters which shall be considered shall, in addition to those which may be considered apart from this section, include the following, that is to say— . . . (b) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed, . (d) any other document bearing on the subject matter of the legislation which has been presented to Parliament by command of Her Majesty before that time, (e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of the section

(2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances