# CONSTITUTIONALISM IN THE COMMONWEALTH TODAY*

" Perhaps never in its long history has the principle of constitutionalism been so questioned as it is questioned today." So declared Professor Mcllwain, the eminent American historian, in a famous series of lectures delivered just before the outbreak of the Second World War.[1] In the revised edition of the lectures, published in 1947, these words remained, and I doubt whether Mcllwain would have wished to change them if he had been speaking in 1962. But the words may now sound a little odd, for the term "constitutionalism" is no longer part of the ordinary vocabulary of political controversy. Amidst the jangling cacophony of strident ideological protestations it is in danger of becoming one of the world's forgotten "isms". I cannot hope to rescue it from obscurity, but I can at least pay it the courtesy of offering to define it. To me, constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. The rules may be at one extreme (as in the United Kingdom) mere conventional norms and at the other directions or prohibitions set down in a basic constitutional instrument, disregard of which may be pronounced ineffectual by a court of law. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.

To be more specific, I am very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government, and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary; and I am not easily persuaded to identify constitutionalism in a country where any of

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1. *Constitutionalism: Ancient and Modern,* 1.

those conditions is lacking. These are, I think, modest standards. I do not insist on a constitutional bill of rights, or judicial review of the constitutionality of legislation, or on a parliamentary executive, or even on a written constitution, though these features of a polity may well serve to fortify constitutionalism. Nonetheless, my standards are sufficiently idiosyncratic and contemporary for them to have been largely incomprehensible to Bracton, Coke and other revered progenitors of the idea of constitutionalism, and at least one of my standards is sufficiently old-fashioned to stamp me as a milk-and-watery liberal in the eyes of a substantial number of modern political leaders.

Yet only a few years ago, in the heyday of the Statute of Westminster Commonwealth, some would have dismissed my short list of minimum requirements as a platitudinous catalogue of truisms. The Westminster system of parliamentary democracy had been successfully transported to Canada and the Antipodes, and if it had suffered some damage in transit to the Cape of Good Hope there was nothing that could not be rectified in a century or two. Indeed, the formal characteristics of constitutionalism were more readily apparent in Canada and Australia than in the mother country; for there not only the powers of the executive but also those of the legislatures were limited by strict law, and the courts were entrusted with the function of resolving disputes about legislative competence. This was the era of encyclopaedic surveys of the Constitutional Laws of the British Commonwealth, of comparative studies of Democracy in the Dominions. There were fixed rules of the political game, and they were habitually observed; except in South Africa there was widespread agreement about the fundamental bases of the constitutional order; changes took place gradually and in familiar ways; like could be meaningfully compared with like.

The extension of the Commonwealth association into Asia introduced new political factors and some novel constitutional forms, but the constitutionalist lost hardly a moment's sleep save when he turned his mind to the unnaturally prolonged period of constitutional gestation in Pakistan. The Constitution of Ceylon faithfully reproduced the essential features of the Westminster model of parliamentary democracy, with some of its conventional institutions (ministerial responsibility, the Cabinet and the Prime Minister) clothed in the garb of strict law.[2] Nor did India's adoption of a republican Constitution in 1950 mark a decisive breach with the Westminster tradition; there remained a "constitutional" head of State, a parliamentary executive and responsible government. India's most important contribution to subsequent constitutional thought in the Commonwealth was its elaborate set of guarantees of fundamental rights; but the impact of this innovation was deferred. For the time being the constitution-mongers of the Colonial Office were not urgently concerned with the evolution of special safeguards for the protection of

2. See Jennings, *Constitution of Ceylon* (3rd ed.).

minority groups and civil liberties. But precedents set in Ceylon were soon to broaden downwards till they became typical features of colonial constitutions at an advanced stage of development. As executive power moved from the hands of the Governor and his official advisers to an elected Chief Minister and his political colleagues, the constitutional relationships between the Queen's Representative and his Ministers had to be explicitly defined; and when full internal self-government was granted it became the practice to spell out more fully than in the Ceylon Constitution those rules which in the United Kingdom had been crystallised over the years in the form of conventions.[3] These provisions have been retained after independence. Anyone who is interested in these matters will find the relevant sections of the Nigerian Constitution[4] a particularly interesting field of study. Again, the system of vesting full control over the recruitment, promotion and discipline of civil servants in an independent commission was reproduced elsewhere, the local Public Service Commission being advanced from an advisory to an executive body upon the attainment of self-government. In this way it was sought to institutionalise the principle of a non-political civil service — a principle upon which inroads have inevitably been made in some of the newly independent states.

Another model was furnished by the Ceylon Judicial Service Commission, to which was entrusted full control over the appointment, discipline and tenure of magistrates and judges of inferior courts. Similar commissions, composed primarily of superior judges, have been set up in a large number of other Commonwealth countries, and some of them have been given the function of advising on the appointment of superior judges other than the Chief Justice. This attempt to exclude political influence in the general run of judicial appointments has been complemented by a new method of safeguarding judicial tenure. Before 1957 judges in the Commonwealth were removable either at the pleasure of the Crown or (in the self-governing countries) in pursuance of a resolution passed by the legislature — which might well, of course, be dominated by a single party. It could not be assumed that the habits of self-restraint practised by governments and legislators in the United Kingdom and the older Dominions would immediately establish themselves in new states; but the maintenance of judicial independence was a primary requisite of constitutionalism. A new device was therefore introduced into the constitutions of the Federation of Malaya and the now defunct West Indies Federation. Superior judges would be removable for misconduct or infirmity of mind or body, but only on the report of a specially constituted commission of judges. The advantages of this method over the Westminster system are so obvious that it has

3. See de Smith, "Westminster's Export Models" (1961) 1 Jl. of Cwth. Pol. Studies, 2.

4. S.I. 1960, No. 1652, Second Schedule, *passim.*

been adopted in the large majority of constitutions made since that time, with provision for a further reference of the case to the Judicial Committee of the Privy Council.

British pre-occupation with the due administration of justice as a vital aspect of constitutionalism reveals itself in other ways also. In the Ceylon Constitution there was no special provision designed to immunise the Attorney-General against political pressure. But in the most recent constitutions one will find that if he is a civil servant he will be expressly invested with full personal responsibility for the prosecutions that he institutes and exclusive control over the taking over or discontinuance of any other prosecution; and if he is a politician exclusive responsibility for taking over and discontinuance is likely to be placed in the hands of a permanent Director of Public Prosecutions.

When the secret history of those obscure constitutional conclaves that take place in the Colonial Office and Lancaster House comes to be written, I think it will be found that not every one of the devices to which I have been referring was conjured up by the United Kingdom Government's advisers. Some at least may have been suggested by independent advisers or by local political leaders or officials taking part in the discussions. But they have all come to commend themselves to Secretaries of State as instruments for giving effect to the principles of constitutionalism as they are understood in Britain. That they involve deviations from the strict letter of English constitutional law is wholly unimportant. And in so far as Secretaries of State have positively urged local political leaders to accept them in their new constitutions they have generally found themselves pushing at an open door. Whatever may be said in the period of disenchantment that may follow independence, colonial politicians have seldom, if ever, had constitutionalism thrust upon them. Nor has the Cabinet system of parliamentary government been forced down their throats: it has been persistently and insistently demanded as the one and only brand.

Indeed, most of Westminster's export models have displayed the typical characteristics of constitutionalism more openly than the domestic prototype. And in quite a few Commonwealth countries local political pressure has resulted in adaptations that go a long way farther in the direction of limiting the powers of government than the United Kingdom could originally have envisaged. In substance the Nigerian Constitution was made by Nigerians, after seven years of conferences, during the course of which the Constitution became equipped with an elaborate mechanism of checks and balances, guarantees and prohibitions; and the first serious proposal for a constitutional bill of rights in a British dependency emanated from Nigerian delegates at the London Conference

of 1957.[5] Similarly, a widespread local distrust of unqualified majority rule explains the intricate networks of safeguards that are to be built into the constitutions of Uganda[6] and Kenya.[7] There the special emphasis has been placed on regional autonomy — an emphasis that is not incompatible with authoritarian methods of government within the several units in the absence of effective safeguards of individual rights. Yet I think there is a broad presumption that in a new state the existence of substantial minorities regionally grouped tends to make it easier to construct a system reflecting the principles of constitutionalism; on the other hand the presence of serious group tensions within a society inevitably endangers the stability of constitutional government. But even within a relatively homogeneous unitary state the possibilities of devising novel safeguards against the abuse of majority power are by no means exhausted. This point is well brought out by the provisions for the entrenchment of Jamaica's new Constitution — provisions which are all the more interesting because they had their origin in a scheme drafted in Jamaica by Jamaicans.[8] We are all familiar with the long story of false hopes that have been placed in second chambers as a safeguard for special interests. Second chambers have too often proved to be either pale reflections of the lower House or thorough nuisances. Jamaica has a Senate, but it is to be constituted in a unique fashion. Of its twenty-one members, thirteen will be appointed on the advice of the Prime Minister and eight (that is to say, just over a third) on the advice of the Leader of the Opposition. Thus the Government should be assured a permanent majority in the Senate. But it will lack the two-thirds majority in the Senate required for the amendment of the entrenched sections of the Constitution, so that a degree of political bipartisanship must be achieved for the purposes of constitutional change. A modified version of that ingenious arrangement has been adopted in Trinidad,[9] where the Leader of the Opposition will have a smaller number of senatorships in his gift. And among the entrenched provisions in both Jamaica and Trinidad is a bill of rights.

## II

My approach up to this point may perhaps justly be stigmatised as Anglocentric, for I have been concentrating upon those countries in which effect has been given, by a variety of expedients, to the principles of constitutionalism as they are understood in Westminster and Whitehall. To those countries I might have added the Federation of Malaya

5. See de Smith, "Fundamental Rights in the New Commonwealth", (1961) 10 Intl. and Comp. L.Q. 215-225.
6. Cmnd. 1523 (1961), 1778 (1962). See now S.I. 1962, No. 2175.
7. Cmnd. 1700 (1962).
8. Cmnd. 1638 (1962), paras. 12, 17. See now S.I. 1962, No. 1550.
9. Cmnd. 1757 (1962), para. 18. See now S.I. 1962, No. 1875.

and Singapore, though I am well aware that in the making of the Malayan Constitution the Colonial Office played only a supporting part. But I must now turn to new fields. Three full members of the Commonwealth — Cyprus, Pakistan and Ghana — have recently adopted constitutions that were neither drafted in Britain nor significantly influenced by the Westminster model, and they may soon be joined by Tanganyika. All these new constitutions bear one common characteristic: the executive branch of government is presidential rather than parliamentary. India is also a republic, but the President is not the effective head of the executive branch of government: this role is fulfilled by the Prime Minister, and the President's constitutional status is comparable with that of the Queen in the United Kingdom. In Cyprus, Pakistan and Ghana the President is both head of State and head of the government. No American, least of all Professor Mcllwain, would regard this fact alone as impairing the principles of constitutionalism. But we do not need to probe deeply before we discover that in almost every other respect Pakistan and Ghana stand apart from Cyprus, and that Cyprus might be chosen as an appropriate setting for The Constitutionalist in Wonderland.

The Constitution of Cyprus [10] was drafted in 1960 by a Joint Commission of Greeks, Turks and Cypriots; the United Kingdom Government was not represented on the Commission. The Republic was born after years of bloodshed and travail, in which the demands of the Greek Cypriot majority for *enosis* were resisted not only by the colonial power but by the Turkish Cypriot minority, implacably resolved not to submit to majority rule, and by the Turkish Government. The wonder is not that the agreed Constitution is phenomenally complicated, but that agreement was reached at all. In the circumstances it is not surprising that the Constitution is the most rigid in the world. Its basic articles — and there are many of them — cannot be amended at all, and the procedure for amending the other articles is such as to exclude the possibility of any controversial change being made. Salmond once observed that a constitution which will not bend will sooner or later break. [11] One can perhaps console oneself with the reflection that he could not have had Cyprus in mind.

The principal features of the Constitution are diarchy and what may be called ethnic, non-territorial federalism. All Cypriots are classified as members of the Greek Community or the Turkish Community. The President must be a Greek, elected by the Greek Community, and the Vice-President a Turk, elected by the Turkish Community. Some executive powers can be exercised only by the President, some only by the Vice-President and some only by both conjointly. Each has a right

10. See Cmnd. 1093 (1960), Part II, Appx. D, for the full text.

11. *Jurisprudence* (11th ed.), 496.

of veto over laws relating to foreign affairs, defence and internal security. There is a Council of Ministers consisting of seven Greeks appointed and removable by the President and three Turks appointed and removable by the Vice-President. Ministers must not be members of a legislative body, and are not responsible to the House of Representatives. The House is likewise composed of Greeks and Turks in the proportion of seven to three, elected on separate communal rolls. It can be dissolved before its five-year term has expired only upon its own resolution passed with the support of at least one-third of the Turkish representatives. Bills imposing taxes require the support of a majority of members from both communities. Exclusive legislative competence over several matters, including education, is vested in two distinct bodies, the Greek and the Turkish Communal Chambers. To this extent the distribution of legislative powers is indistinguishable from that of a federal regime except in so far as it lacks a territorial basis. The powers of the House of Representatives are also limited by constitutional guarantees of fundamental rights and liberties, which are modelled on the European Convention on Human Rights.

The 7 :3 ratio must be adhered to as far as possible in all grades of the public service; in the armed forces it is varied to 6 :4. The highest public offices must be communally apportioned; if, for example, the Attorney-General is a Greek the Deputy Attorney-General must be a Turk and *vice versa.* There is a Supreme Constitutional Court, consisting of a Greek, a Turk and a neutral President (who is a German), and a High Court of Justice, consisting of two Greeks, one Turk and a neutral President — this time an Irishman — who has the rare judicial privilege of being accorded two votes.

And so it goes on. This is surely the only constitution in the world which allocates the proportion of television time that must be made available to communal groups; and the ratio is, of course, seven to three. This ubiquitously entrenched ratio has been a source of frequent friction ; there have also been serious difficulties in securing the passage of essential financial legislation; and one does not care to think what might happen if the President and Vice-President were to fall out with one another. But the Constitution has survived for two years, and the two nations still dwell together under its shadow in uneasy juxtaposition. I doubt whether the Nicosia model will ever attract a horde of enthusiastic emulators; but one must remember that it was the only acceptable remedy for a desperate situation.

## III

The short history of parliamentary democracy in Pakistan was an unhappy one. I am not qualified to judge whether the politicians deserved all the harsh words that have been directed against them,[11a] but it is certain that after seven years of independence governmental instability seemed to be endemic and the parliamentary system stood low in public esteem; no General Election had been held, and the country still functioned under a transitional constitution. When the Governor-General, Ghulam Muhammad, summarily dissolved the Constituent Assembly in October 1954 and proceeded to assert legislative authority not conferred upon him by statute he evoked a series of constitutional cases unparalleled in the complexity of the issues raised.[12] The exquisite satisfaction that a constitutional lawyer may derive from contemplating the reports was hardly shared by the judges at the time; indeed, the then Chief Justice was later to speak of "mental anguish" amounting to "judicial torture".[13] But the body politic was saved (with the assistance of an apposite quotation from Bracton) and a republican constitution was adopted in 1956. It bore many similarities to the Indian Constitution, though greater emphasis was given to presidential authority. In October, 1958, however, martial law was proclaimed by President Mirza and within a few weeks the military authorities had taken over the reins of government, as they have taken over in Burma, the Sudan and a number of other Asian and Middle Eastern states. In February, 1960, General Ayub Khan, who had been appointed as Prime Minister by President Mirza, was confirmed as President. This year Pakistan received its second Constitution; and it has precious little resemblance to the Westminster model. President Ayub Khan, introducing the Constitution in a speech of Baldwinian frankness, informed his fellow-countrymen that they lacked the political sophistication and evenness of temperament necessary for the successful working of a parliamentary system[14] — qualities which, he seemed to think, were the preserve of inhabitants of cooler climes.

Undoubtedly, the Constitution does not rest on favourable assumptions about popular sagacity. Elections are indirect; for the recently held General Election to the National Assembly the electoral college consisted of 80,000 representatives of the Basic Democracies,[15] and candidates were forbidden to hold themselves out as members of

11a. For some perceptive comments see K.J. Newman, "The Constitutional Evolution of Pakistan" (1962) 38 International Affairs 353.

12. See Jennings, *Constitutional Problems in Pakistan.*

13. (1960) Pakistan Bar Jl., Vol. 5, No. 2, at p. 16.

14. "Don't let's kid ourselves and cling to cliches and assume we are ready to work such a refined system, knowing the failure of earlier attempts . . . ." (Speech of March 1, 1962, reported in (1962) Commonwealth Survey at 278-279).

15. For comment and analysis, see (1962) Round Table 228-237, 291-294, and Newman, *The Times,* March 16, 1962.

political parties.[16] The President, who will also be indirectly elected, will hold office for a fixed term subject to removal for gross misconduct upon a resolution of three-quarters of the Assembly to that effect; but the frivolous are supplied with an interesting disincentive by the provision that if such a resolution fails to obtain the support of half the members its sponsors shall lose their seats forthwith. All effective executive power is concentrated in the President's hands. As in the United States, Ministers are excluded from membership of the legislature and are responsible to the President alone. Like President Kennedy, President Ayub Khan has a right of legislative veto which may be overridden by a two-thirds majority of the legislature; but unlike President Kennedy he can then appeal to the electoral college to vindicate him. Moreover, he has the power of dissolution, and wide powers to make ordinances when the Assembly is not in session and during emergencies. Nor is his authority materially circumscribed by the federal features of the Constitution. I am not sure whether Pakistan really ought to be called a federation — the preamble cautiously describes it as a "form of federation" — but it is quite plain that the provinces are neither independent of nor co-ordinate with the Centre. Provincial Governors are appointed by and subject to the directions of the President. Disputes between a Governor and a Provincial Assembly may be resolved by the National Assembly in the Governor's favour, and the Governor may then dissolve it with the President's concurrence. The legislative competence of the Central Legislature is very wide and becomes all-embracing when the national interest so requires. In any event, the courts are deprived of jurisdiction to pass on the *vires* of legislation, though they are required to hold provincial legislation inoperative when it conflicts with central legislation; a provincial law may therefore have to give way to an inconsistent central law although the latter is strictly *ultra vires.* The former justiciable guarantees of fundamental rights have been supplanted by non-justiciable Principles of Law-Making and Principles of Policy. Judicial review is manifestly in bad odour in Pakistan.[16a]

Like Sir Ivor Jennings,[17] I find writing history easier than writing prophecy, and I am unwilling to predict the future of this experiment in guided democracy. But it is noteworthy that members of the old political parties are strongly represented in the new legislatures and that many have already shown a disinclination to accept emasculation without protest.[17a] For the student of constitutional government the outstanding features of Pakistan's new order will be the dominance of the executive organ and the diminution of status suffered by the judiciary.

16. On which see Newman, "Basic Democracy as an Experiment" (1962) 10 Political Studies 46.

16a. Notwithstanding the compliant attitude adopted by the Federal Supreme Court towards the martial law régime in 1958: see *The State* v. *Dosso* [1958] 2 P.S.C.R. 180.

17. *Party Politics.* Vol. 3. *The Stuff of Politics,* 3.

17a. The right to form political parties was granted by statute after the elections, subject to various restrictive conditions,

## IV

Like features stand out no less prominently on the face of Ghana's republican Constitution of 1960. There too the Westminster model of parliamentary democracy has been scrapped; but there is an important difference between the two cases, for nobody could suggest that in Ghana it had already proved to be unworkable. On the contrary, the government was stable and strong; yet it chose voluntarily to strike out on new paths.

In 1957 the Gold Coast became Ghana, the first non-white Member of the Commonwealth on the African continent. It had an agreed Constitution very similar to Ceylon's.[18] Relationships between executive and legislature followed the Westminster pattern. There were provisions guaranteeing freedom from racial discrimination and freedom of conscience and religion, and prohibiting the compulsory acquisition of property except on payment of adequate compensation, though these fell short of a comprehensive bill of rights; there were also institutional safeguards for the independence of the public service and the judiciary. Ghana was a unitary state, with regional assemblies the powers of which were undetermined but which were to be subordinate to Parliament. The Constitution itself could be amended by a two-thirds' majority of the members of the unicameral legislature. Dr. Nkrumah's Convention People's Party commanded a two-thirds' majority. Within two years that majority had been used to abolish the regional assemblies and the fetters on parliamentary sovereignty. Meanwhile, the harried Opposition began to disintegrate.

The authors of the 1960 Constitution drew eclectically upon the British and American constitutions and the constitutions of French-speaking African states; but they eliminated from them almost every check and balance designed to contain governmental power within constitutional boundaries. The President is head of State and the repository of executive power, and he is irremovable during his term of office.[19] He has the power of dissolution; and a General Election is geared to a presidential election inasmuch as every successful candidate for a seat in the Assembly is bound by a formally declared preference in favour of a candidate for the Presidency. Hence a President will always begin his term with the support of the Assembly, and if the parliamentarians later become fractious he can (unlike the American President) appeal to the people over their heads. He has an absolute right of veto over Bills, and he is directly invested by the Constitution with almost unrestricted legislative power exercisable in normal times as well as

18. de Smith, "The Independence of Ghana" (1957) 20 Mod. L. Rev. 347.

19. If he is adjudged incapable of acting for medical reasons a Presidential Commission will be constituted to exercise his function temporarily.

during emergencies.[20] There is no justiciable bill of rights; instead, the President, on assuming office, must proclaim his adherence to a set of Fundamental Principles which have no greater legal effect than the Queen's Coronation Oath.[21]

This constitution can only be understood in its political context — a context dominated by the oft-repeated words of President Nkrumah: "Ghana is the C.P.P. and the C.P.P. is Ghana." Whereas Pakistan was, till a few weeks ago, a no-party state, Ghana is very nearly a one-party state, in which there is no place for organised dissent. Implicit in the Westminster system lies the right of an Opposition to oppose, to campaign freely for support and to present itself as a potential alternative government. Because these implications were unacceptable to the Ghanaian leaders it had to be replaced by a system rooted in a more congenial political philosophy. The Leader, the party and the people are the three pillars of the new edifice. Legalistic refinements such as judicially enforceable constitutional guarantees of the rights of the individual against the state would be alien intruders within the walls.

I believe that the Constitution of Ghana will prove to bear a larger significance than the new Constitution of Pakistan. Each marks a rupture with the traditions of the former metropolitan power. Each has its analogues in the recent practice of neighbouring states. But whereas one can discern few potential imitators of Pakistan who have not already preceded her along a similar road, Ghana's example may offer allurements to politicians in other new African Commonwealth countries — not necessarily because of any inclination to accept President Nkrumah's moral leadership or political counsel but because of the serious difficulties that they are likely to experience in operating parliamentary democracy as a going concern.

In the first place, all new African governments are faced with the problem of building nations within the arbitrarily drawn geographical frontiers that they have inherited from the colonial powers. Almost invariably the main divisive force is not religion, economic interest or political ideology but tribal particularism. The fierce strength of tribalism has revealed itself most starkly in the former Belgian Congo, but it is an omnipresent phenomenon. For example, although Uganda is to become independent in October the word "Ugandan" is scarcely known; a citizen of Uganda will still think of himself as a Muganda, a Munyoro, a Tesot, a Karamojong. The task is to tame tribalism. One method may be to come to terms with it by agreeing to a federal system of government or otherwise institutionalising the tribe within the frame-

20. See generally de Smith (1960) Public Law 134, 240; 10 I.C.L.Q. 227-228, Rubin and Murray, *The Constitution and Government of Ghana, passim;* Bennion, *The Constitutional Law of Ghana.*

21. *Re Akoto* (1961), reported in (1961) Jl. of the Intl. Commn. of Jurists, Vol. 3, No. 2, p. 86.

work of the constitution. But it is tempting for a majority party to move in another direction — to insist on the acceptance of a single national ideology under a single national leader, and to reduce the tribal strongholds by a judicious combination of strong-arm methods and material inducements. In most of the new African states the latter course has been followed. This has placed opposition political groups at a grave disadvantage, for they generally rest on a tribal basis. Where they are still permitted to exist they labour under handicaps so great that their prospects of ever winning a General Election can seldom be taken seriously. And an Opposition that finds itself in a permanent minority may itself be tempted to resort to unconstitutional methods and conspiracies with the governments of neighbouring states, thereby prejudicing its claim to be recognised as a legitimate political association.

Secondly, with the best will in the world it is difficult to fight the enemies of poverty, ignorance and disease according to the Queensberry rules or, for that matter, the Westminster rules. The people often have unreasonably high expectations, and they are apt to be quickly disillusioned with the first fruits of independence. Rapid economic development is sought after, but this involves hard work, the renunciation of immediate benefits, perhaps higher taxation, and the abandonment of deep-rooted traditions — for instance, customary methods of cultivation, and marketing. In short, the people must be *led* into the paths of righteousness. But, as the politicians in power are well aware, they can easily be swayed by meretricious promises of Utopias round the corner offered by those who have no present responsibility for carrying them out. An Opposition which conceives its sole function as being the undermining of the government's prestige can destroy the effects of months of patient persuasion, and in a free exchange of ideas Gresham's law is not unlikely to prevail. And I suspect that in recent years western commentators have tended to underestimate the importance of illiteracy and ignorance in the political process. We have observed clear demonstrations in India and elsewhere that illiterate persons are quite capable of exercising a reasonable choice at an election — at least, a choice that may be as rational as that exercised by voters in Western countries. Nevertheless, in between elections it becomes extremely difficult to explain a government's problems frankly to people with whom communication through the press or by radio or television is impracticable and who have only the vaguest conception of international economics or the national budget.

Thirdly, nearly every African country is desperately short of skilled human resources. To many people it seems incongruous and wasteful that men of ability should be sitting on the Opposition benches, criticising instead of participating in the business of government. Is not the whole game of opposition a by-product of developed western societies, a dispensable luxury for those who are trying to pull themselves up by their own bootstraps?

Fourthly, the idea of a constitutional Opposition is not readily understood by the majority of ordinary people in Africa. The notion of the legitimacy of organised and sustained opposition to government is quite uncharacteristic of African traditional society. I am not asserting for a moment that at all times all African tribes have been governed despotically. The records of explorers and investigations by modern anthropologists reveal a wide variety of forms of government. There are tribes in which the very institution of chieftaincy is unknown.[22] Again, there are tribes in which the chief was elected or appointed as the most generally acceptable leader; he could not take any major decision without the concurrence of the elders, or perhaps a tribal gathering; if he affronted the sentiments of his people he was liable to be deposed. But in how many tribal societies was it recognised as permissible for a group of tribesmen to set themselves up as an organised permanent opposition to the chief and elders and to campaign for support among other members of the tribe without let or hindrance? Opposition groups might indeed form, and they might capture power; but when clubs were trumps all that succeeded was success. The modern political leader has supplanted the chiefs, and his followers often find it impossible to stomach the suggestion that public opposition to him ought to be tolerated. And where opposition is identified with minority tribes, distaste for its existence is enhanced by the nature of the source from which it springs. It is not altogether surprising, therefore, that in those African countries where organised opposition is still tolerated, political activity sometimes tends to resemble the continuance of tribal warfare by other means.[23]

These are some of the factors which are inimical to the development of constitutionalism in Africa to-day. One can see them operating in North Africa, in the large majority of French-speaking African states, and in some (though not all) of Britain's former colonies. And they are re-inforced by factors of a less complicated kind. Men who have been denied responsibility for too long, who have experienced humiliation because of the colour of their skins, who have been told that they are too immature to be entrusted with real authority, who have perhaps spent most of their lives in a condition of relative poverty, find themselves in power, dispensing favours, making big decisions, addressing enthusiastic mass meetings, listened to with apparently respectful attention at international gatherings, received at the White House and the Kremlin as distinguished visitors, and also enjoying the seductive material perquisites of high office. Once this eminently desirable way of life is lost it may be (and probably will be) lost for ever. A primary object of political activity all the world over is to attain power and then to hold

22. See, *e.g.,* Lucy Mair, *Primitive Government,* Chaps. 2, 3.

23. *Cf.* Chief H. O. Davies, "The New African Profile" (1962) 40 Foreign Affairs 293 at 295, 297.

on to it as long as possible. In developing African countries there exists a wide range of methods of clinging on to power and at the same time buttressing and expanding power by making life agreeable for one's friends and disagreeable for one's opponents. It is naive to be shocked when advantage is taken of the opportunities thus proffered. [24]

## V

Africa is a complex, diverse and large inscrutable continent, and the more sweeping the generalisation that one makes about it the more certain is it that one will soon be contradicted by the turn of events somewhere between the Cape and Cairo. But, for the reasons that I have given, I cannot view with buoyant optimism the immediate future of parliamentary democracy, or indeed the general principle of constitutionalism, in most parts of Africa. One day the historian may be able to say that in the 1960's African countries were passing through a transitional phase of protracted emergency conditions. Yet it would be just as imprudent for us to assume that present trends are nothing more than a temporary aberration as it would be to assume that the norms of modern western political thought are imperishable. To replace autocratic habits of government by the quintessence of liberalism is the rarest and most difficult of political accomplishments, and one wonders how many African statesmen will consider the attempt worth making in the future.

The prevailing constitutional trend in Africa has other implications. In so far as federalism presupposes limited government, the entrenchment of divided loyalties, political pluralism, and bargain and compromise it becomes very difficult to work except in a climate where the fundamental principles of constitutional democracy are accepted. In a one-party state federalism will come to mean little more than administrative decentralisation. And the obstacles that impede the fulfilment of the federal idea in the domestic field will surely inhibit the growth of pan-African federal structures, quite apart from the obvious fact that no independent government is eager to relinquish the trappings of sovereignty unless it acquires powerful compensating advantages in return.

Again, the prevailing trend induces one to eschew starry-eyed optimism when contemplating the bills of rights that have recently been written into the constitutions of several Commonwealth countries in Africa and elsewhere. Bills of rights have been designed to serve two purposes: to reassure minority groups (*e.g.* in Nigeria, Kenya and Cyprus) that they will not suffer unfair discrimination, and to fortify the basic civil liberties of the individual. In Commonwealth jurisdictions they entail judicial review of the constitutionality of legislation and

24. *Cf.* Davies, *Nigeria: The Prospects for Democracy*, 73-74.

administrative action. Inasmuch as they are in form guarantees of individual rights and do not single out minorities as such for specially preferential treatment, they are the most widely acceptable constitutional safeguard against the abuse of majority power. But it is clear from recent experience in the United States that a bill of rights can also serve indirectly as a potent instrument for sustaining the interests of a minority group. Moreover, it can lend strong support to the principles of constitutional government. It sets standards by which governmental action can be measured. It can arrest a piecemeal erosion of fundamental freedoms. It can be used as a means of educating public opinion — and not only sophisticated opinion, but the body of opinion that is shaped in the schools and the villages — to respect the Constitution and the values that it enshrines.[25]

In order to assess the value of a bill of rights as a safeguard for the interests of minority groups we may look briefly at the United States. Why is it that the American bill of rights has served to enhance the civil rights of coloured people? In the first place, because all the present Supreme Court judges reprobate discrimination against the negro minority. Secondly, because they are joined in these sentiments by a majority of Americans influential in public life and by a large section of public opinion. Thirdly, because on the whole Americans venerate their Constitution and respect the judges and their decisions interpreting the Constitution even when they disagree with them, so that it is extremely hard to reverse a Supreme Court decision by constitutional amendment. Fourthly — and most important of all — the government itself approves of the relevant decisions and has taken positive action to give effect to them as far as it deems politically practicable.

One does not need to be an expert on African affairs to realise that in few (if any) African states to-day will all these favourable conditions be present. Seldom in any country is any minority group popular; and a minority group which forms a centre of political opposition to the government may find itself very unpopular indeed. A government finding itself in difficulties may be tempted to improve its own popularity by taking action detrimental to the interests of the dissident minority. Even if it resists that temptation it may find itself carried along willy-nilly by a wave of prejudice that surges through its supporters. In such a political situation it is all very well to advise a judge to do his duty without fear or favour and apply the constitutional guarantees according to the letter and the spirit; but a judge cannot blind himself to political realities. African constitutions are far too young to have acquired an aura of sacrosanctity. Judicial review of the constitutionality of legislation is a novelty. Lawyers as a class are not conspicuously revered; and judges who are thought of as belonging to a privileged elite are apt to be politically suspect, particularly if they are non-Africans, as they must be for some time to come in East and Central

25. *Cf.* D. V. Cowen, *The Foundations of Freedom,* 118-133, 152-155.

African countries. The independence of the judges may be formally respected, but it may hang by a precarious thread if they give decisions which are seriously damaging to the prestige of the party in office. At best one may expect that the Constitution will at once be altered to reverse the effect of such decisions. If amendment is impracticable the very foundations of the Constitution may be challenged.

This is perhaps an unduly pessimistic analysis, for no African state which has had a constitutional bill of rights has yet discarded it. But Pakistan has done away with hers; Ghana has refused to countenance what it regards as legalistic obstruction to the realisation of the general will; and Tanganyika has also rejected a justiciable bill of rights. Some of the French-speaking African states have what look like authentic bills of rights, but I am not aware that any of them yet recognises in practice judicial review of the constitutionality of legislation in the manner of the common-law systems. To estimate the prospects of bills of rights in Africa to-day one may look at the record of Nigeria. The time-span is too short — less than three years — for any firm conclusion to be drawn, but three points are already worth making. First, the Action Group, the federal opposition party which until recently was in power in the Western Region, hoped at one time to use the bill of rights as a lever to prise open the stronghold of the Northern traditionalists who hold the majority interest in the Federal Government. Its hopes have been disappointed, and it is plain that the constitutional guarantees, though they may be an indispensable shield, are not a serviceable sword. Secondly, to the best of my knowledge not a single statute, and only one administrative order, has yet been held invalid for repugnancy to the constitutional Bill of Rights. Thirdly, most of the fundamental rights are now in suspense in the Western Region, where the federal authorities have imposed a state of emergency and placed the reins of government in the hands of an Administrator.

The delicately balanced compromises that supported the federal structure in Nigeria have been upset, and it remains to be seen whether equilibrium will be restored. In the meantime the future of parliamentary democracy in Nigeria as it was conceived at the time of independence remains uncertain. And I have no doubt at all that only in an atmosphere where organised dissent is tolerated can a constitutional bill of rights acquire a meaningful content. For the present the outlook for constitutionalism may be brighter in some of the Commonwealth countries in Asia and the Caribbean; but I watch the course of events in Africa eagerly, without illusions and not without hope.

S. A. DE SMITH. *

* Professor of Public Law, University of London.