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COLONIAL CLAUSE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950, AND THE UNITED KINGDOM AND THE COMMONWEALTH

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1. Adoption of Colonial Clause

The European Convention on Human Rights in 1950, and its ratification by the United Kingdom in 1953 was great "political and legal land mark"[1] in the history of Europe in general and the United Kingdom in particular. Besides the rights and freedoms contained in the Convention, there was an international aspect of the civil liberty which has been recognised in Article 63 of the Convention. This Article was known as the 'colonial clause' of the Convention. This Article provided that any Contractlng Party might at the time of ratification or at any time extend the application of the Convention to "all or any of the territories for whose international relations it is responsible."

There is a short history of insertion of this colonial clause.[2] From the history of adoption of the Convention it is revealed that during the negotiations among the Contracting Parties question arose whether the Convention would apply to the overseas and colonial territories of the Contracting Parties. There were two schools of thought in this regard. One school expressed the view that the Convention would be so drafted as to apply automatically to such territories unless they were specifically excluded. The other school expressed the opinion that it would apply in the first place only to the metropolitan territories but would be capable of extension to overseas territories by express declaration. The protogonists of the first school were anxious to secure as extensive an application of the Convention as possible and felt that the governments of the Contracting Parties were less likely to exclude the colonial territories

1. S.A. de Smith, *The New Commonwealth and Its Constitutions* (London : Stevens and Sons Ltd., 1964) at p. 180.

2. This history was described by A. H. Robertson in his *Human Rights in Europe*, at pp. 26-28. The following discussion is based on the work solely.

if such exclusion involved a public declaration. The protagonists of the second school maintained that certain countries, particularly the United Kingdom, could not constitutionally apply the Convention to their colonoial territtories without first consulting the colonial legislatures. Thus, if the extension to the colonies were automatic it would not be possible for the governments of these countries to ratify the Convention before consulting a large number of separate legislatures to obtain their approval. Consequently the practical result of the formula proposed would be to delay the ratification of the Convention by some of the principal signatories for such period as would be necessary for these consulations to take place-which might mean a very considerable delay. France, the Netherlands and the United Kingdom were all directly interested in this question which, of course, had important political aspects.

So, these two schools of thought gave rise to a problem which was was referred for decision to the Committee of Ministers. The Committee of Ministers in August, 1950, decided to insertion Article in the proposed Convention on Human Rights requiring express declarations by the Contracting Parties before the Convention would extend to their colonial territories. This text provoked a lively discussion in the Assembly during the course of its examination of the draft Convention later in the same month, and some members were of the view of automatic extension. The Assembly made a recommendation 24 (1950) asking the Ministers to delete the 'colonial clause' which they had incorporated in their draft Convention. The effect of the recommendation would be, if it would be implemented, this that the Convention would apply automatically to overseas territories.

However, the question of colonial clause was then reconsidered by the Committee of Ministers in November, 1950, but the Assembly's proposal was not found acceptable, with the result that Article 63 remained in the final text as approved by the Committee of Ministers in August, 1950. Therefore, the Convention had no scope of automatic application to any overseas territory without the formal declaration of extension by the metropolitan country, whether the declaration would be made at the time of ratification or subsequently; which was responsible for the international relations of the said territory.

In accordance with the colonial clause provision of the Convention the Government of Denmark, in April, 1953, extended the application of the Convention to Greenland, the Government of the Netherlands, in Novembər, 1955, to Surinam and the Netherlands West Indies, and the Government of the United Kingdom in October, 1953, to forty-one overseas territories[3]. With the passage of time many of these overseas countries attained their independence, by 1969 a declaration by the Government of the United Kingdom attached a revised list of eighteen overseas territories to which the Convention still applied[4] Moreover, the Netherlands had also extended the right of individual Petition to Surinam[5] and the United Kingdom to the overseas territories to which the Convention had been extended.[6] This was another land mark in the history of the colonial individuals who, like the individuals of their metropolitan countries, acquired the right of Petition before the European Commission of Human Rights and through it before the European Court of Human Rights against any infringement of the rights enshrined in the Convention.

This was an excellent development".[7] Side by side of this development, there raised the problem of what would happen when those territories become independent. In such circumstances, the metropolitan countries would then cease to be responsible for their international relations and the provisions of the Convention would thus automatically cease to apply. On this point A.H. Robertson writes: "It would, however, be highly regrettable if one of the results of independence was the diminution in the protection to human rights in the newly-independent country. Some other means of ensuring their Potection must therefore be found and this is precisely what is happening"[8]

From the above observation it is clear that the colonial clause as contained in Article 63 of the Convention was of vital importance in ensuring the rights of the colonial people who were under the control of the metropolitan country. This sort of protection under the

3. (1955-1957)1 *Yearbook of the European Convention on Human Rights* 1950. pp. 40-47.
4. (1969)12 *Yearbook* p. 24.
5. *Ibid.*
6. *Ibid.*, at pp. 26-28,
7. A.H. Robertson, *Law of International Institution in Europe*, at p. 62.
8. *Ibid.*, p. 62.

Convention would cease if their territory earned independence. It meant these people would have no protected rights until and unless alternative arrangement was made. This sort of alternative arrangement was made and these rights were incorporated in their constitutional instruments a discussion of which has been made in the following sections of this chapter.

2. Nigerian Model

The alternative arrangement referred to in the preceding section had been made in the case of Nigeria to which the colonial clause of Convention had been extended by the United Kingdom in 1953. Thus, after 1953 when the decision was taken to grant Nigeria independence, it became necessary to ensure that human rights would continue to be protected, all the more so as one of the major problems that arose in determining its future political structure was that of the status of important minorities in the country. With this end in view, in 1957, there was a constitutional conference in London at which it was agreed that fundamental rights should be included in the proposed constitution of independent Nigeria.[9]

The delegates of certain minority ethnic groups demanded for definite provisions to be written into the independence constitution to serve as a "bulwark against any invasion of their rights and libertries by the majority groups after the British power would have been withdrawn."[10] The Constitutional Conference set up a Minority Commission to ascertain the fact about the fears of minority in any part of Nigeria and to propose means of allaying those fears. The Report of the Commission[11] recommended *inter alia* that one of the principal means of allaying the fears of minorities should be the inclusion in the constitution of detailed provisions based mainly on the European Convention on Human Rights, 1950. In September and October, 1958, the Constitutional Conference resumed and approved clauses containing enforceable fundamental rights model-

9. Report of the Constitutional Conference held in London, May and June, 1957 (Comnd. 207, 1957) p. 67.
10. T.O. Elias, Nigeria : *The Development of Its Laws and the Constitution* (London : Stevens and Sons, 1967). 141.
11. Comnd. 50 H.M.S.O. London. 1958, para, 38.

led on the European Convention.[12] After a detailed discussion of these draft clauses and other supplementary papers the Constitutional Conference agreed that provisions should be made in the constitution under these fourteen heads; (1) right to life; (2) freedom from inhuman treatment; (3) freedom from slavery and forced labour; (4) right to personal liberty; (5) rights concerning civil and criminal law; (6) right to private and family life; (7) rights concerning religion; (8) right to freedom of expression; (9) freedom of peaceful assembly and association; (10) freedom of movement and association; (11) right to compulsory acquisition of property (12) enjoyment of fundamental rights without discrimination and freedom from discriminatory legislation; (13) derogation from fundamental rights; and (14) power of the Federal Government to safeguard the nation. A fifteenth heading entitled the enforcement of fundamental rights concluded these vital provisions of the modern constitution of Nigeria.[13]

This list showed that the proposed constitution of Nigeria contained almost all the rights and freedoms guaranteed in the European Convention on Human Rights, 1950.

The constitutional Conference held in London in 1959 considered the Report and recommendations of the Minority Commission formed in 1957. It again directed that the constitution should contain human rights guarantees on the model of the European Convention on Human Rights.[14] The human rights adopted by the Constitutional Conference of 1958 became part of the pre-independence Nigerian Constitution[15] and was recognised as the Nigerian Bill of Rights, 1959. However, the code of fundamental rights was subsequently reproduced in Chapter III of the independence constitution of the Federation of Nigeria, set out in the Second Schedule to the Nigeria (Constitution) Order in Council, 1960.[16]

12. Comnd. 569, London, 1958, para, 7. See also E. Michael Joye and Kingsley Igweike, *Introduction to the 1979 Nigerian Constitution* (London: Macmillan Press Limited, 1982) at p. 292.
13. See T.O. Elias, *op. cit.*, at p. 143.
14. D.I.O. Ewezukwa *et al.* in Albert. P. Blaustein and Gisbert H. Flanz (ed.), *Constitution of the Countries of the World : Nigeria* (New York : Oceana Publications Inc. 1988) at P. 17.
15. Nigeria (Constitution) (Amendment No. 3) Order in Council 1959 (S.I. 1959 No. 1772), Article 69 and the Schedule.
16. S.I. 1960. No. 165.

It would be relevant here, to give a short description of the rights guaranteed by the pre-independence Nigerian Constitution of 1959 called Nigerian Bill of Rights. The Bill of Rights provided that any law inconsistent with the Bill of Rights would be void to the extent of the inconsistency.[17] During the continuance of emergency derogation from certain fundamental rights by the Federal Parliament was permissible.[18]

According to the provisions of the Bill no person would be—deprived of life; subjected to torture or inhuman ar degrading treatment; held in slavery or required to perform forced labour.[19] Any person who was arrested on a criminal charge was to be promptly informed of the reasons for this arrest. He was to be brought before a court without undue delay, and if not tried within a reasonable time he was to be released either unconditionally or subject to reasonable condition.[20] One who was unlawfully arrested or detained was entitled to compensation. Retrospective penal legislation and double jeopardy were prohibited ; the accused could not be compelled to give evidence at his trial: all criminal offences and penalties save in respect of contempt of court was to be laid down in written laws of the country.[21] Freedom of conscience, expression and peaceful assembly and association, subject to reasonable restrictions, would extend to all persons.[22] Guarantee of respect for private and family life, home and correspondence was also offered to all persons.[23] But the guarantees of freedom of movement and freedom from discrimination extend only to the citizens of Nigeria.[24] No citizen might be expelled from or refused

17. Section 1 of the Bill of Rights, 1959.
18. Section 28(1) *Ibid. Adeglunro* v. *Att. General of the Federation,* (1962)11 I.C.L.Q. 920.
19. Sections 17-19 of Nigerian Bill of Rights, 1959.
20. *Doherty* v. *Balewa,* 4 Nig. Barr, Jr. (June 1962) ; *Balewa* v. *Doherty,* (1963)1 W.L.R. 949.
21. Sections 20-21 of Nigerian Bill of Rights, 1950. See *Aoko* v. *Fagbemi,* (1961)1 All. W.L.R. 400 *Gokpa* v. *Inspector-General of Police,* (1961)1 All. N.L.R. 423.
22. See *R* v. *Amalgated Press of Nigeria Ltd.* (1961) All N.L.R. 199; *Director of Police Prosecutor* v. *Obi,* (1963) All N,L.R, 186.
23. Sections 22-25 of Nigerian Bill of Rights, 1959.
24. Sections 26-27, *Ibid.*

entry into Nigeria; but this guarantee did not cover freedom to leave the country.

This Bill of Rights in a modified form became the model for the codes of fundamental rights which were to be found in the great majority of independent Commonwealth countries. There were large number of the Commonwealth countries into whose independent constitutions the Convention in general and the Nigerian version in particular, were transplanted in chronological order : Sierra Leone, Jamaica, Uganda, Kenya, Malawi, the Gambia, Mauritius, Swaziland, Fiji, the Bahamas, Granada, the Seychelles, the Solomon Island, Dominica, St. Lucia, Zimbabwe, and Belize. The Constitutions of Cyprus and Malta, also contained provision deriving from the European Convention but differing in important respect from the Nigerian model. The Nigerian model was however used also for the constitutions which gave dependent territories a substantial measure of self-government : Bermuda, Gibralter, the Gilbert and Ellis Island. A brief discussion of the rights contained in the constitutions of some of these above-mentioned countries will be made in the following pages with a view to showing how far these constitution followed the Nigerian model.

To begin with Sierra Leone which achieved independence and dominion status within the Comonwealth on the 27th April, 1961, under the Sierra Leone (Constitution) Order in Council, 1961.[25] A Constitutional Conference for Sierra Leone sat in April and May, 1960 and it was agreed in that Conference that a new constitution would be framed for Sierra Leone in which certain fundamental rights on the Nigerian Model, should be included in the independence constitution.[26] A list of human rights and freedoms was annexed to the report of the Conference and again reproduced almost exactly the text of the relevant provisions of the European Convention. However, following the Conference a constitution[27] was framed in that year in which it was incorporated as Chapter II "Protection of the Fundamental Rights and Freedoms of the individual."[28]

25. H.M.S.O.S.I., 1961, No. 741.

26. T.O. Elias, *Ghana and Sierra Leone : the Development of their Laws and the Constitutions* (London : Stevens and Sons, 1962) at p. 259,

27. Comnd. 1029, 1960.

28. See (1961)61 *Yearborsl* 656.

It was provided in that Constitution that every person in Sierra Leone was entitled to the fundamental rights and freedoms whatever might be his race, tribe, place of origin, political opinions, color, creed or sex.[29] But subject to respect for the rights and freedoms of others and for the public interest he was entitled to the following rights and freedoms : (a) life, liberty, security of person, the enjoyment of property and the protection of law; (b) freedom of conscience, of expression and of assembly and association; (c) respect for his private and family life.[30]

The constitution guaranteed that no person would be deprived of his freedom of movement.[31] No person would be held in slavery or sertitude or required to perform forced labor.[32] No person would be subject to torture or to inhuman or degrading punishment or other treatment.[33] Except with his consent, no person would be subjected to the search of his person or his property or the entry by others on his premises.[34] Whenever any person was charged with a criminal offence he would, unless the charge was withdrawn, be afforded fair hearing within a reasonable time by an independent and impartial court established by law.[35] Enjoyment of freedom of conscience would not be hindered, which included freedom of thought and of religion, freedom to change of religion or belief.[36] No law would make any provision which was discriminatory either of itself or in its effect.[37] For the contravention of the rights every person had the right to the Supreme Court for redress.[38]

From the above discussion on the rights guaranteed by the Constitution of Sierra Leone it is evident that in these rights there was mixed-influence of the European Convention on Human Rights and the Nigerian Bill of Rights. This might be regarded as neo-Nigerian Bill of Rights.

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29. Article 11 of the Constitution of Sierra Leone, 1960.
30. Article 11 read with Articles 20-22 a 12-13, *Ibid.*
31. Artiele 14, Ibid.
32. Article 15, *Ibid.*
33. Article 16, *Ibid.*
34. Article 16, *Ibid.*
35. Article 18, *Ibid.*
36. Article 19, *Ibid.*
37. Article 20, *Ibid.*
38. Article 23, *ibid.*

Cyprus became independent on the 16th Augst, 1960, and the Constitution of Cyprus[39] came into force on the 6th April, 1960, was operative until the outbreak of the anomalous situation in December, 1963. Part II of the Constitution contained an extremely comprehensive list of rights and freedoms to be protected. "Here again, it is evident that the European Convention has been the source of inspiration, but various additional provisions have been included, in particular, to deal with the special problems arising in Cyprus."[40] Thus, there were unusual clauses in the relevant Article guaranteeing freedom of religion to the effect that "religions whose doctrines or rites free,"[41] that the use of force to make a person change was prohibited and in addition, that no one would be compelled to pay taxes the proceeds of which were allocated for the purpose of a religion other than his own. The minority groups were catered for in the Articles concerning education and marriage.[42] The Article prohibiting discrimination that in the case of Nigeria, including membership of a community or social class.[43]

Moreover, the Constitution contained right to life and corporal integrity;[44] prohibition against torture or inhuman or degrading punishment or treatment;[45] prohibition against slavery;[46] right to liberty and security of persons;[47] protection in respect of trial and punishment;[48] right to freedom of movement and residence, of speech and expression, of thought, conscience and religion, of speech and expression of peaceful assembly, of freedom of profession;[49] protection against punishment;[50] right to respect for a person's private and family life and correspondence;[51] right to

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39. Article 24, *ibid.*
40. Cyprus Comnd. 1093 H.M.S.O. London, 1960.
41. A,H. Robertson, *Law of International Institutions in Europe*, at p. 64.
42. Article 18 of the Constitution of Cyprus, 1960.
43. Article 20 and 22, *ibid.*
44. Article 6, *ibid.*
45. Article 7, *ibid.*
46. Article 8, *ibid.*
47, Article 10, *ibid.*
48, Article 11, *ibid.*
49. Article 12. *ibdi*
50. Articles 12, 18, 19, 21, and 25, *ibid.*
51. Article 14, *ibid.*

property;[52] right to strike;[53] right to election;[54] right to equality before the law.[55] The right to petition and access to the court was also guaranteed.[56]

Though the rights guaranteed by the Constitution were much wider than the European Convention, but the influence of the Convention and its Nigerian version was very much apparent therein.

The influence of the European Convention and its Nigerian version was apparent in the case of Malta which earned its independence on the 21st September, 1964 by the Malta Independence Order, 1964.[57] The Constitution of Malta which was annexed to the Schedule to Malta Independence Order, 1964, contained a list of rights in its Chapter IV under the heading "Fundamental Rights and Freedoms of the Individual." The Constitution provided that every person in Malta was entitled to the fundamental rights and freedoms whatever might be his race, place of origin, political opinions, colour, creed or sex.[58] But subject to respect for the rights and freedoms of others and for the pulic interest he was entitled to the following rights and freedoms; (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life.[59]

Moreove, the Constitution contained protection from arbitrary arrest or detention;[60] protection from forced labour;[61] protection from inhuman treatment;[62] protection for privacy of home;[63]

52. Articles 15 and 17, *ibid.*
53. Article 27, *ibid.*
54. Article 27, *ibid.*
55. Article 31, *ibid.*
56. Article 28, *ibid.*
57. Article 29, *ibid.*
58. Malta Government Gazette No. 11, 688, September 18, 1964.
58. Article 33 read with Article 46, of the Constitution of Malta, 1964.
59. Article 33 read with Article 34, 38, 40, 41, 42 and 43 *ibid.*
60, Article 35, *ibid.*
61. Article 36, *ibid,*
62, Article 37, *ibid.*
63. Article 39, *ibid.*

prohibition of deportation;[64] protection of freedom of movement.[65] These rights could be enforced by the civil court of Malta.[66] Moreover derogation was permitted during the public emergency.[67]

From the above observation on the rights guaranteed by the Constitution Malta it is evident that the modified version of the Nigerian Bill of Rights had been incorporated in the Constitution of Malta. Moreover, similar rights and freedoms and similar pattern of their description had been provided in the Constitution of Kenya, 1963,[68] Constitution of Uganda, 1962,[69], Constitution of Jamaica, 1972,[70] Constitution of Zambia, 1964,[71] Constitution of Guyana, 1966,[72] Constitution of Malawi, 1964,[73] Constitution of Mauritius,[74] etc.

Another pattern was followed in the case of Tanganyika which earned independence on the 9th December, 1961. The Constitution of Tanganyika, 1961, was replaced by that of 1962.[75] The new

64. Article 44, *ibid.*
65. Article 45, *ibid.*
66. Article 47, *ibid.*
67. Article 48, *ibid.*
68. See Chapter II of the Constitution of Kenya, *Kenia Gazette* Supplement 105, December 10, 1963 (Legislative Department No. 69).
69. See Chapter III of the Constitution of Uganda, 1962, *Uganda Constitutional Instruments*, Government Printers, Entabbe, 1962.
In this context H.F. Morris and James S. Read observed that "the Uganda provisions show certain notable improvements on the earlier froms adopted in Nigeria, Sierra Leone, and elsewhere."
See *Uganda : the Development of Its Laws and Constitution* (London : Stevens and Sons, 1966) p. 169.
70. See Chapter III of the Constitution of Jamaica which was annexed to the Second Schedule of the Jamaica (Constitution) Order in Council, 1962 (S.I. 1962, U.K. No. 1550).
71. See Chapter III of the Constitution of Zambia, 1964.
72. See Chapter II of the Constitution of Guyana, 1966, which was annexed to the Second Schedule to Guyana Independence Order, 1966, published by Government Printers, George Town, C.G. P & S 1179/66.
73. See Chapter II of the Constitution of Malawi, 1964, which was annexed to the Malawi Independence Order, 1964 (S. I. 1964, No. 916, H. M. S .O.).
74. See Chapter II of the Constitution of Mauritius, 1968, For the text see Albert P. Blaustein and Gisbert H. Flanz (ed). *Constitutions of the Countries of the World* : Muritius.
75. C.A. No. 7, Government Printers, Dares Salam, 1962.

Constitution of 1962, in its "Preamble" contained some rights. It stated that recognition of the inherent dignity and of equal and inalienable rights of all members of the human family was the foundation of freedom, justice and peace. It also stated the rights included the right of the individual, whatever might be his race, tribe, place of origin, political opinions, colour, creed or sex. But subject to respect for the rights and freedoms of others and for public interest, the right further included the rights to—life, liberty security of person; the protection of the law; freedom of conscience, of expression, of asssembly and association; and respect for his private and family life. It was also commented that "the said rights are best maintained and protected in a democratic society where the government is responsible to a freelyelected Parliament representative of the people and where the courts of law are independent and impartial."[76]

The rights which were mentioned in the Preamble to the Constitution of Tanganyika, 1962, were the echo of the rights guaranteed by the European Convention on Human Rights, 1950, and which carned independence in 1960s.

In should be noted in this connection that all these countries were the colonies of the United Kingdom and when they earned independence the colonial clause as provided in Article 63 of the Convention would case to be extended by the United Kingdom and in consequence the people of these countries would have been deprived of rights and freedoms which they had enjoyed through that extension of the colonial clause by the United Kingdom.

With this end in view, "Parliament of Westminster had exported the fundamental rights and freedoms without parallel in the rest of the world."[77] In those Commonwealth countries which have preserved their democracies since independence, judges habitually review the constitutionality of legislation and administrative action against standards derived from the Convention. Some of these Commonwealth countries preserve appeals to the Judicial Committee of the Privy Council and accordingly the British judges, as discussed earlier, perform the same constitutional role.

76. See Preamble to the Constitution of Tanganyika, 1962.
77. Anthony Lester, "Funamental Rights : the United Kingdom Isolated!" at p 56.

It should be pointed out that in some of countries which earned independence from the United Kingdom during 1960s the constitution entailing a list of rights framed by the British experts were either abrogated or suspended by the new government overthrowing the existing one either by *coup d' etat* or other way. Accordingly the fundamental rights incorporated in the said constitution ceased to exist, at least for some time, and in this way the alternative arrangement made for the continuation of the protection of the rights and freedoms under the European Convention on Human Rights failed to succeed and the people of these countries, who had been apparently deprived or usurped of their rights by the colonial rulers, became again deprived of the rights by their own rulers, the neo-colonial rulers. During the colonial period even after 1953 the people of the colonies, due to the extension of operation the Convention made to these regions, by the United Kingdom, were entitled to seek protection and enforcement of the rights enshrined in the Convention, but after independence when the existing constitutions were abrogated and the rights entailed therein became — incapable of being enforced the position of the people became worse than they had been during the colonial period.

3. Canadian Model

In the preceding section the impact of the European Convention on Human Rights, 1950, on the incorporation of human rights in the constitutions of the newly independent countries has been discussed. In the present section it will be shown how the Convention created an impact on the adoption of a Bill of Rights in an old Commonwealth country, like Canada, and how the Canadian model was followed in other parts of the world.

In 1960 Parliament of Canada passed an Act for the recognition and protection of human rights and fundamental freedoms known as Canadian Bill of Rights.[78] The Preamble to the Act affirmed the "ethical principles"[79] on which the Canadian nation was founded and expressed the desire of Parliament to enshrine those principles and the human rights and fundamental freedoms derived therefrom in a

78. 8 & 9 Eliz, 2 C. 44 (1960),

79. S.A. de Smith, *the New Commonwealth and Its Constitutons* (London : Stevans and Sons Ltd. 1964) P. 162.

Bill of Rights which shall "reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada."[80]

Part I of the Canadian Bill of Rights recognised and declared the existence and continuance of the following rights and freedoms without discrimination by reason of race, national origin, colour religion or sex. The Act declared the right of the individual to equality before the law and to equal protection of the law. It ensured the right of the individual to life, liberty, security of the person and enjoyment/property, and the right not to be deprived thereof except by "due process of law." Freedoms of religion, speech, assembly, association and press were also recognised.[81]

No such law would be so construed or applied as to authorise or effect arbitrary detention, treatment or exile; to impose or authorise cruel or unusual treatment or punishment; to deprive a person arrested or detained of his right to be informed promptly of the reasons for his arrest or detention, to have counsel and to apply for *habeas corpus*; to allow a person deried certain basic safeguards to be compelled to give evidence; to deprive a person of the right to a fair hearing in accordance with fundamental justice for the determination of his rights and obligations; to take away the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal in a criminal case, the right to reasonable bail in the absence of just cause; or to deprive a person of the right to an interpreter when needed in judicial or quasi-judicial proceedings. All these provisions were contained in Section 2 of the Bill of Rights. On these provisions Bora Laskin commented, "any positive effect which the Bill of Rights is likely to have will more probably be founded on the stipulations in Section 2 respecting substantive and procedural regularity, mainly in criminal prosecutions and in administrative proceedings; and the effect will be more corroborative of existing statutory and common law precepts than original." [82]

However, the interesting and original provision of the Canadian Bill of Rights, 1960, was Section 3 which required the Minister of

80. See Preamble to the Canadian Bill of Rights, 1960.
81. Section 1 of the Canadian Bill of Rights, 1960.
82. Bora Laskin "Canada's Bill of Rights : A dilemma for the Courts" (1962)11 I.C.L.Q. 519 at 531-

Justice to examine every bill introduced in the House of Commons and every draft regulation submitted to the Privy Council in order to determine whether they were consistent with this Bill of Rights; if they were not, he was required to report the fact to the House of Commons at the first convenient opportunity.

Part II of the Canadian Bill of Rights provided that nothing in the Bill of Rights was intended to derogate from any right or fundamental freedom not expressly enumerated. It also provided that the Bill of Rights applied only to matters within the authority of the Federal Parliament. It also permitted derogation from the Bill of Rights during times of war, invasion, or real or apprehended insurrection though not in other classes of emergencies.[83]

Though the Canadian Bill of Rights was not incorporated into the constitution as an amendment to the British North America Act, 1867, now the Constitution Act, 1867, because the Canadian Parliament was not empowered to amend its own Constitution, the Bill of Rights had a great influence on the legislatures and executive in the exercise of their powers and authority.

"The Bill surely is destined to enjoy a status higher than that of other enactments of the same Parliament."[84] Whatever status it might enjoy, it was surely capable of being amended or repealed by the Federal Parliament by ordinary legislative procedure. Because "the Canadian Bill of Rights is not constitutionally entrenched ; it is an ordinary statute of the Parliament of Canada, applicable only to matters within the Federal sphere of jurisdiction, and subject to alteration by the normal legislative process."[85]

Taking these factors into consideration Clara F. Beckton went to the extent of saying :

> "*** The Bill was not going to protect rights for several reasons. First it was not entrenched so the concept of parliamentary sovereignty continued to dominate the interpretation of these rights by the courts. If the court could find a valid Federal objective for limiting the legislation would not

83. Section 6 of the Conadian Bill of Rights, 1960.

84. Z. I. Choudnury, "Universal Declaration of Human Rights and Its Impact on the National Constitutions" (1977)1 *the Rajshahi University Law Review* 20, at p. 26.

85. Dale Gibson, *the Law of the Charter : General Principles* (Toronto : Carswell, 8986) at p 12.

be considered as an infringement on the guarantees contained in the Bill. Secondly, the Bill did not prescrible the consequences of a finding that a statute infringed upon one of the guaranteed rights."[86]

So, it can be said that new legislation would prevail over the Bill of Rights and to this extent the Bill of Rights was merely" admonitory enunciating a rule of conduct for Parliament and a rule of interpretation of federal statutes for the courts."[87] That was why the Canadian model would prove less obtrusive to the legislative freedom of action and would cast a higher burden on the courts than would provide a set of fundamental rights similar to the Nigerian provisions.

In 1982, however, a radical change took place in the history of development of human rights in Canada. In that year the Constitution Act, 1982, was passed in Part I of which Canadian Charter of Rights and Freedom was accorded the constitutional status. Under the heading of Guarantee of Rights and Freedoms it is provided that the Canadian Charter of Rights and Freedoms guarantees to rights and freedoms set out in it subject only and to such reasonable limits prescribed by a law as can be demonstrably justified in a free and democratic society.[88] Under the heading of Fundamental Freedoms the Charter declared the following fundamental freedoms : (a) freedom of conscience and religion ; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ; (c) fredom of peaceful assembly ; and (d) freedom of association.[89] Under the heading of Democratic Rights every citizen has the right to vote in an election of members of the House of Commons of a legislative assembly and to be qualified for membership therein.[90] Under the heading of Mobility Right every citizen of Canada has the right to enter, remain in and leave Canada ; and every citizen and permanent resident in Canada has the right (a) to move and to take up residence in any province, and (b) to pursue the gaining of a

86. Clare F. Beckton in Albert P. Blaustein and Gisbert H. Flanz (ed)., *Constitutions of the Countries of the World, Canada,* at p. 12.

87. Bora Laskin, *op. cit.*, at p. 527.

88. Article 1 of Canadian Charter of Rights and Freddoms 1982.

89. Article 2, *ibid.*

90. Article 3, *ibid.*

livelihood in any Province.[91] Under the heading of Legal Rights the following rights are guaranteed : (a) right to life, liberty and security of person;[92] (b) right to be secured against unreasonable search or seizure;[93] right not to be arbitrarily detained or imprisoned;[94] rights concerning criminal and penal matters;[95] right not to be subjected to any cruel and unusual treatment or punishment ;[96] and the right against self-crimination.[97]

Under the heading of Equality Rights the Charter provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination basedon race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[98] Under the heading Minority Language Educational Rights Citizens of Canada—(a) whose first language learned and still understood is that of the English ar French linguistic minority population of the Province in which they reside or (b) who have received their primary school instruction in Canada in English or French and reside in a Province where the language in which they received that instruction is the language of the English or French linguistic minority population of the Province—have the right to have their children receive primary and secondary school instruction in that language in that Province.[100] It is also provided that citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.[101]

Under the heading of General it is provided that the aboriginal rights and freedoms and other rights and freedoms are not affected

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91. Article 6, *ibid.*
92. Article 7, *ibid.*
93. Article 8, *ibid,*
94. Article 9, *ibid.*
95. Article 11, *ibid.*
96. Article 12, *ibid.*
97. Article 13, *ibid,*
98. Article 15, *ibid.*
99. Articles 16-23, *ibid.*
100. Article 23(1), *ibid.*
101. Article 23(2), *ibid.*

by the Charter.[102] It is provided that the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.[103] The rights and freedoms referred to in the Charter are guaranteed equally to male and female persons.[104] The rights respecting denominatonal, separate or dissentient schools are preserved.[105]

Under the heading Enforcement it is provided that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or drived may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.[106]

The some basic concepts of the Charter share their origin in the American Bill of Rights but the enforcement provision is unique and there is no comparable section in the American Bill of Rights. "The Charter impose substantal new responsibilities on the courts. It requires not only that they deal with new issues but that they reconsider traditional methods of reasoning. The Supreme Court of Canada has clearly recognised this challenge and has adopted a broad, purposive analysis, which interprets specific provisions of a constitutional document in light of its larger objects."[107]

The Charter is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[108] With the Charter come "a new dimension, a new yardstick of reconciliation between the individual and the Community are their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court"[109]

This is a substantial development which must be recognised. However, the present discussion is related to the Canadian Bill

102. Article 25 and 26, *ibid.*
103. Article 27, *ibid.*
104. Article 28, *ibid.*
105. Article 29, *ibid.*
106. Article 24(1), *ibid.*
107. *Hunter* v. *Southam Inc.*, (1984) 2 S.C.R. 145 at p. 156.
108. Article 52(1) of Canadian Charter of Rights and Freedoms.
109. *Law Soc. of Upper Can.* v. *Skapinkar*, (1984)9 D. L. R. (4th) 161, per Estery J. at pp. 167-161 (S.C.C.).

of Rights which was used as a model for Chapter I of the Independence Constitution of Trinidad and Tobago of 1962.[110] The Preamble to the Constitution proclaimed that "the people of Trinidad and Tobago... have affirmed that the nation is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person, and the equal and inalienable rights with which all members of the human family are endowed by their Creators..."

Chapter I of the Constitution dealt with "the Recognition and Protection of Human Rights and Fundamental Freedoms." Article 1 of this Chapter recognised that in Trinidad and Tobago there existed without discrimination by reason of race, origin, colour religion or sex, the following human rights and fundamental freedoms, namely, (a) The right of the individual to life, liberty security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law, (b) the right of the individual to equality before the law and the protection of the law; (c) the right of the individual to respect for his private and family life; (d) the right of the individual to equality of treatment from any public authority in the exercise of any function; (e) the right to join political parties and to express political views; (f) the right of a parent or guardian to provide a school of his choice for the education of his child or ward; (g) freedom of movement; (h) freedom of conscience and religious belief and observance; (i) freedom of thought and expression; (j) freedom of association and assembly; (k) freedom of the press.

Article 2 provided that subject to exceptions no derogation, abrogation, infringment was allowed. Article 4 provided that during the continuance of emergency derogation was permitted. Under Article 6 the High Court was entrusted to enforce these rights.

From the above discussion it is evident that the wording and substantive content of the rights contained in the Constitution of Trinidad and Tobago were similar to those of the Canadian Bill of Rights., 1960. In this respect the European Convention on Human

110. The Constitution was scheduled to Trinidad ad Tobago (Constitution) Oder in Council (S.I. 1962 Nn. 1875).

Rights, 1950, was not used but it did not mean that the Covention did not have any impact in the incorporation of human rights and fundamental freedoms in the Constititution in a general way.

The Canadian model was used in a limited sense in New Zealand which still retains an unwritten costitution on the British model. It has imported Ombudsman to ensure justice and fair play to all in the hands of officials. In 1977 some positive improvement and development was made in the field of human rights because in that year Human Rights Commission Act, 1977,[111] was passed. The Preamble to the Act, proclaimed that the aims of the Act was to promote "the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights."

Section 5 of the Human Rights Commission Act, 1977, states the general functions of the Commission. The general function of the Commission shall be (a) to promote respect for and observance of human rights; (b) to encourage and co-ordinate programes and activities in the field of human rights (c) to receive and invite representations from members of the public on any matter affecting human rights; (d) to make public statements in relation to any matter affecting human rights; (e) to report to the Prime Minister from time to time under section 6 of the Act on the progress being made towards—the repeal or amendment of provisions in any enactment which conflict with the provisions of Part II of this Act, and the elimination of discriminatory practices, being laws and practices which infringe the spirit and intention of the Act.

Section 6 of the Act deals with the Report to the Prime Minister. According to sub-section (1) the Commission shall have the function of reporting to the Prime Minister from time to time on—any matter affecting human rights, including the desirability legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards on human rights, the desirability of the acceptance by the New Zealand of any international instrument on human right: the implications of any proposed legislation or prosposed policy of the Government-which the Commission considers may affect human rights.

111. For the text of the Human Rights Commission Act, 1977, See Albert P. Blaustein and Gisbert H. Flanz (ed.) *Constitution of the Countries of the World : New Zealand*, Vol. XI, at p. 409.

Sub-section (2) of Section 6 states that where the Commission makes to the Prime Minister a report pursuant to this section, it may, thereafter, subject to this Act, publish the report or such parts of the reports as it thinks fit.

Thus, it is observed that in New Zealand though there is no writen Bill of Rights, but it does not deny the existence of rights. The Human Rights Commission Act, 1977, is a great step in the development and promotion of the protection of Human Rights. The Canadian Bill of Rights, 1960, was not a constituent part of the Constitution of Canada, yet it was recognised as a great step in the protection of human rights of the people of Canada, and following it in 1982, the Canadian Charter of Rights and Freedoms was adopted, Like the Canadian Bill of Rights, the Human Rights Commission Act of New Zealand, 1977, is not also a constituent part of the Constitution of New Zealand - the New Zealand Constitution Act, 1852—and it is expected within a short time a new entrenched Bill of Rights would be adopted in New Zealand.

From the above discussion it is found that in the case of Canada within two decades a substantial improvement is marked and the Charter of Rights and Freedoms has been accorded constituional status by the Constitution Act, 1982, In the case of New Zealand some sort of improvement is made in the sense that in 1977 the Human Rights Commission Act was passed which was not a constituent part of the Constitution but which gives some sort of protection of human rights in New Zealand. As Nigarian Bill of Rights became the model of for the New Commonwealth, so the Canadian Bill of Rights became a model for the old Commonwealth, at least in the sense of application of its provisions to New Zealand.

4. Indian Model

In the preceding sections it has been shown how the provisions of the European Convention on Human Rights, 1950, was incorporated, in a modified form, in the constitutions of the new Commonwealth or in independent Acts of the Old Commonwealth. In the present section the issue will be discussed in the Indian context,

In theory, the convention did not have any impact on the incorporation of human rights in the Constitution of India, because the Constitution of India was adopted in 1949, though it came into

force in 1950, one year before the adoption of the Convention. But in fact, there was a parallel of thinking which arose after the second world war, in the case of India it has also a long history behind it.[112] Both the Convention and the Fundamental rights under the Indian Constitution owed their origin to the Universal Declaration of Human Rights, 1948. So, there were similarities among the wording and substantive provisions of these two instruments.

However, the Indian venture in 1949, was a great break-through in the attitude of the lawyers and political leaders trained in the Anglo-Saxon traditions. Following the British practice it was thought that the inclusion of a Bill of Rights in the constitution was futile exercise, and was apt to create complications in enforcing these rights by the court. The statutory Commission on the Indian Constitution in 1930, rejected the demands of the Indian leaders for insertion in the future constitution of India, guarantees for certain rights. The Commission referred to the constitutions of some European countries, and remarked that experience had not shown them to be of any great practical value.' 8 Its abstract declarations were 'useless' unless there existed 'will' and 'means' to make them effective.[113] "...The Indian leaders in 1949 in incorporating human rights in their Constitution showed their determined 'will' to make them useful and provided 'means' for making them 'effective."[114]

The Constitution of India, 1949, provides that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far they are inconsistent with the provisions of fundamental rights, shall to the extent of such inconsistency, be void.[115] The State is forbidden to "make any law which takes away or abridges the rights conferred... and law made in contravention of this clause shall, to the extent of the contravention, be void."[116]

112. For history of development of Human Rights in India see A.B.M. Mafizul Islam Patwari, "*Development of the Concept of Fundamentai Right during the British India Regime*", I. A. S. B. (Hum) Vol. XXX(2) 1985 at P. 208.

113. *Report of the Statutory Commission on Indian Constitution*, vol. II. (London : H.M.S.O. 1930) Para, 36.

114. A.B.M. Mafizul Islam Patwari, *Fundamental Rights and Personal in India, Pakistan and Bangladesh*, (New Delhi : Deep & Publications, 1988) p. 64.

115. Article 13(1) of the Constitution of the Republic of India, 1949.

116. Article 13(2), *ibid.*

Under the heading of Right to Equality the following rights are guaranteed: equality before law; prohibition of discrimination on grounds of religion, race, caste, sex or place of birth ; equality of opportunity in matters of public employment; abolition of untouchability and abolition of titles.[117] Under the heading of Right to Freedom the following rights are guaranteed to all citizens: rights to freedom of speech and expression; right to assemble peaceably and without arms; right to form associations or unions ; right to move freely throughout the territory of India; right to reside and settle in any part of the territory of India; right to acquire, hold and dispose of property; and right to practise any profession, or to carry on any occupation, trade or business.[118] Under the same heading protection in respect of convictions for offences of life and personal liberty; and against arrest and detention in certain cases, has been guaranteed.[119]

Under the heading of Right against Exploitation prohibition of traffic in human beings and forced labour, and of employment of children in factories has been made.[120] Under the heading of Right to Freedom of Religion freedom of conscience, of religion of management of religious affairs, of payment of taxes for promotion of any particular religion of attendance at religious instruction or of religious worship in certain educational institutions have been guarateed.[121] Under the heading of Cultural and Educational Rights protection of interests of minorities and right of minorities to establish and administer educational institutions have been guaranteed.[122] Under the heading of Right to Property protection against deprivation of property and against undue compulsory acquisition of property has been guaranteed.[123]

Under the heading of Right to Constitutional Remedies right to move the Supreme Court by appropriate proceedings for the enforcement of the rights has been guaranteed[124]. Accordingly, the Supreme Court has the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition,

117. Articles 14-18, *ibid.*
118. Articles 19, *ibid.*
119. Articles 20-22, *ibid.*
120. Articles 23-24, *ibid.*
121. Articles 25-28, *ibid.*
122. Articles 29-30, *ibid.*
123. Articles 31-31-C, *ibid.*
124. Article 32(1), *ibid.*

quo warranto and *certiorari*, whichever may be appropriate, for the enforcement of any of the abovementioned rights.[125] Besides the Supreme Court, the High Courts were also empowered to issue appropriate orders and writs to enforce these rights.[126]

However, the Indian model was followed by a number of the Commonwealth countries. In the fundamental rights provisions of the Constitutions of these countries the impacts of the Indian Constitution and the European Convention on Human Rights, 1950, along with the Universal Declaration of Human Rights, 1948, were/ are clearly evident.

To begin with the case of fundamental rights as guaranteed by the Constitution of Malaya[127] in which mixed-impacts of the Indian provisions, European Convention and the Universal Declaration are observed. In part II of the Constitution liberty of the person; prohibition against slavery and forced labour; protection against retrospective criminal laws and repeated trials; equality before law; prohibition against punishment; freedom of movement, of speech, of assembly, of association, of religion; rights in respect of education and right to property have been guaranteed.[128]

The Constitution of Pakistan, 1956, contained a better darfted Chapter on fundamental rights similar in nature to that of the Constitution of India.[129] The Supreme Court of Pakistan and the High Courts were empowered to enforce these rights through there writ jurisdiction.[130] The Constitution of Pakistan, 1956, was abrogated in 1958 and Martial Law was declared throughout the country. In 1962 a new Constitution was "enacted" by the Chief Martial Law Administrator and the President, Field Marshal Mohammad Ayub Khan. In the Constitution of Pakistan, 1962, fundamental rights were reduced to non-justiciable "Principles of Law-making."[131] "Here one detects a soldier's exasperation with the delays of the law, coupled perhaps with an unstated determination not to allow political

125. Article 32(2), *ibid.*
126. Article 226, *ibid.*
127. Federal Constitution Ordinance, 1957. (Ordinance No. 55 of 1957).
128. Articles 5-13 of the Constitution of Malaya.
129. Articles 3-21 of the Constitution of Pakistan, 1956.
130. Articles 22 and 170, *ibid.*
131. Articles 5 and 6 of the original Constitution of Pakistan 1962.

battles to be waged through the medium of courts of law."[132] Here it is found Ayub khan's love of concentration of all powers in his hands like any other military dictator of the world. It is significant to note that the First National Assembly summoned under the Constitution of Pakistan, 1962, had substituted for the Principles of Law-making the fundamental rights of the Constitution of 1956 without remarkable change.[133] This was done by enacting the Constitution (First Amendment) Act, 1963 (Act I of 1964), under heavy pressure of public opinion. The Constitution of 1962 was abrogated in 1969, and again martial law was declared throughout Pakistan. In 1973, a new Constitution was framed for new Pakistan in which fundamental rights have been guaranteed.[134]

The influence of the fundamental rights as incorporated in the Constitutions of India, 1949, of Pakistan, 1956 and 1962 (as amended) is evident in the fundamental rights incorporated in the Constitution of the People's Republic of Bangladesh, 1972.[135] The influence of the fundamental rights incorporated in the Constitution of India is also evident in the fundamental rights incorporated in the Constitution of Democratic Socialist Republic of Sri Lanka, 1978.[136]

5. Conclusion

From the above discussion it is seen that the fundamental rights incorporated in the Constitution of India, 1949, was influenced by the provisions of the Universal Declaration of Human Rights, 1948.

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132. S.A. de Smith, *op. cit.*, at p. 214.
133. See Arlicles 5-6 of the Constitution of Pakistan 1962 as amended.
134. Articles 7-28, 184 and 199 of the Constitution of the Islamic Republic of Pakistan, 1973.
     For a detailed Study See A. B. M. Mafizul Islam Patwari, *Protection of the Constitution and Fundamental Rights under the Martial Law in Pakistan*, 1958-1962 (Dhaka : Uhiversity of Dhaka, 1988).
135. Articles 26-47 A and 102 of the Constitution of the People's Republic of Bangladesh, 1972.
136. Articles 10-17 of the Constitution of Democratic Socialist Republic of Sri Lanka, 1978.
     All issues relating to fundamental rights in the context of India, Pakistan, Sri Lanka and Bangladesh will be discussed in the authors forthcoming work entitled *Human Rights in South Asia* which is under Preparation under the sponsorship of the University Grants Commission, Bangladesh.

The Indian venture ran parallel with the European venture which was also influenced by the same Declaration. In the fundamental rights provisions of the Constitutions of Malaya, Pakistan, Sri Lanka and Bangladesh the mixed—influences of the Indian Constitution, European Convention and the Declaration are evident.

Another point may be noted in this connection. In Pakistan, Sri Lanka and Bangladesh though fundamental rights had/have been guaranteed by their Constitutions, but due to political instability there were/are violations of human rights therein and the constitutional courts became/become powerless to enforce the constitutionally guaranteed rights. In India, in spite of political calamities, the Constitution and constitutionally guaranteed rights remain intact and the Supreme Court as well as High Courts are empowered to enforce the rights guaranteed by the Constitution. So, it can be said that the Indian model in relation to human rights, was theoretically followed in Pakistan, Sri Lanka and Bangladesh, but in practice there were/are violations of human rights in these countries to such extent which never have been contemplated by the people of this regions.

From the above discussion and observation on the Nigerian model, Canadian model and Indian model one thing is clear that the framers of the Constitutions of the newly emerged States (except India) were motivated by the adoption of the European Convention on Human Rights, 1950, and they incorporated the main provisions of the Convention into the relevant constitutions. But with a short period their 'will' and 'means' became futile exercise because of the existence of political instability prevalent therein. Only in India, Canada, New Zealand ete. a substantial improvement is evident. So, it can be said that though Parliament of the United Kingdom had exported human rights and fundamental freedoms to the new Commonwealth countries on a scale without parallel in the rest of the world, but that noble intention failed to succed in the majority cases due to political instability prevalent therein. Accordingly, the alternative arrangements made against the cessation of extension of colonial clause by the United Kingdom on independence of a territory for whose international relations the United Kingdom was responsible also failed to succeed in the majority cases.