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HUMAN RIGHTS IN CONTEMPORARY AFRICA

*A Case Study of the Sources of Their Validity, Their Rationale, Their Place in a Hierarchy of Values, Their Relation to the Sense of Justice, and Their Potential Efficacy**

Denis V. Cowen

IN AN ARTICLE on African legal studies which I contributed recently to *Law and Contemporary Problems*, I was rash enough to say:

Sooner or later in any really serious discussion of human rights and their protection, the foundations of the subject will be probed. . . . At that point, lawyers may perhaps be forgiven for not being adherents of natural law in the Aristotelian-Thomistic tradition, but it is less pardonable if their condition is based on an assured and glassy ignorance, on equating Rousseau with, say, St. Thomas, or John Locke with Hooker, or Descartes with Socrates.¹

In retrospect these words of mine have a high-minded ring, an almost aggressive quality, which makes me catch my breath; nor perhaps is it sufficient excuse to say that when I wrote them I had recently been irritated by a man who told me that, during his professional career, he had met quite a number of well-meaning people who seemed to imagine that there was something in so-called natural law; but that not one of them could even begin to give an example of either a natural law or a natural right. He was a sharp but arid man.

However, be this as it may, I did, in fact, write in the vein which I have quoted; and so it was perhaps poetically just that it should have been suggested that I give an account of myself before this Editorial Board. More specifically, I have been invited "to spell out the foundations of the subject by developing the relationship between specific guarantees of human

* This paper is an address given to the eighth annual meeting of the Board of Editors of the NATURAL LAW FORUM, November 3, 1963.

The quotations of various Basotho reported in the article are not verbatim, but reflect, in substance, the points made by them.

1. Denis V. Cowen, *African Legal Studies — A Survey of the Field and the Role of the United States*, 27 LAW AND CONTEMPORARY PROBLEMS 545 (1962).

rights in contemporary African Constitutions, and the assumptions and postulates on which they rest." And I have been informed, "It would be helpful if you could exemplify and illustrate what you have to say by drawing specifically on your own practical experience in Africa in this field." So here I am, pinned like a very ordinary moth in a splendid case.

The remarks which I propose to address to you are an attempt to meet these requirements. I can only hope that you will judge them with mercy. If what I have to say is heavily autobiographical, if it takes the form of a dialogue based on actual concrete experience, this is because I do not claim to be an expert on law in Africa in the abstract. Professed experts are almost invariably wearisome, and experts on Africa in the lump, so to speak, are an abomination.

I was, at first, tempted to try to paint a large canvas, including, for example, a sketch of the working of the Nigerian Bill of Rights, as illustrated in reported decisions during the last ten years; comparing the position in a typical territory (if there is such a thing) in French-speaking West Africa, and tracing the influence of French ideas on public law in that Afro-Anglo-French phenomenon, the Republic of the Cameroons. Then I planned to look north to Egypt and discuss the ever-increasing significance of the army in African public life; thereafter, I would journey down the continent speculating upon the future of constitutionalism in East Africa, and especially in Zanzibar; taking in also, if there were time, the more tempestuous areas of Central Africa and the Republic of South Africa. Fortunately I managed to resist this wild temptation. Though I am reasonably familiar with the general outline and some of the detail of constitutional developments in several African countries, I prefer to draw primarily on the range, however limited, of my own direct experience. I shall therefore try, on the whole, to illustrate my remarks by reference to two small territories in which I have recently been personally involved in constitution making, namely Basutoland and Swaziland — both at present under the jurisdiction of Great Britain.

In the course of my academic work, I had often asked myself what conditions have to be fulfilled in order that a document embodying constitutional doctrines may be effective and capable of survival. Why is it, for example, that the American Constitution has proved to be germinal and vital? At the obvious level I understood that the founders had shared a common tradition in religion and culture, lived through common experiences, grappled with common problems, suffered and overcome common dangers, and had formed common aspirations. I had appreciated that the language which they used (a phrase, for example, like "due process of law") was particularly well suited to accommodate both their experience and their aspirations, be-

ing neither too precise to divide them nor too vague to be meaningless, yet ambiguous enough to permit flexible growth.²

I had understood, I thought, that when the Founding Fathers used words like "person," "liberty," "just," "justice," "equality," and "reasonable," when they denounced "arbitrariness," "cruelty," "inhumanity," and "tyranny," they were using words with layers of meaning, words with fuzzy edges, admittedly, but having nevertheless a hard core of significance, actual and potential, stretching back through the centuries to Exodus and the Greeks.

I was aware that constitutions must be made to measure; that they must take full account of local conditions, and cannot be bought off the peg. Indeed, I had often written and lectured about the dangers of the careless importation into Africa of constitutional ideas; and above all, of constitutional documents — whether they be English, American, or French.

At a somewhat deeper level, I appreciated that when it came to listing the human rights which should be guaranteed or recognized in a constitution, one of the critical factors would be the framers' views about the source of their authenticity — what is it, in the ultimate analysis, that gives a particular formulation of a human right its validity, its claim to allegiance or fidelity? A constituent assembly, confronted with this question, cannot rest content with the answer that all one needs to do is to identify the authority recognized as the ultimate constitution- and law-making authority in the community, and then take account of its edict; for the constituent assembly is that authority, and the predicament of decision is *theirs*. Faced with this predicament, they may seek, as Reinhold Niebuhr suggests they should, to formulate the aspirations of a particular culture as these have developed in historical fact;³ or, as the late Justice Learned Hand once suggested, they may give utterance to the altogether human expression of their majority will;⁴ or, with greater humility, they may feel that there are at least some human rights which are not a human concession, either as determined by historical evolution or by a particular declaration of human will, but that some such rights are rooted in the metaphysical structure of man — that they exist, as part of man's being, to be discovered by the free exercise of his intelligence (or reason). In short, in this latter view, some of man's rights exist because of what he is.⁵

2. For a literary study of the uses of ambiguity, see WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* (Meridian Books, 1955). For a lawyer's appreciation, see E. H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (Chicago, 1948).

3. In MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS* vii (New York, 1962).

4. LEARNED HAND, *THE BILL OF RIGHTS* 2-3 (Harvard, 1958).

5. Martin Versfeld, *On Justice and Human Rights*, 1960 ACTA JURIDICA 1 (University of Capetown Law School).

And, to round off the alternatives, I had, I thought, appreciated that the constitution maker may, as a matter of prudence, perform all three of these exercises at the same time; for it is by no means the case that all the rights enumerated in a constitution derive their ultimate validity and value from the same source.

Finally, I had learned that when it came to give meaning and practical effect to guarantees of human rights, when in practice one was called upon to evaluate and balance one interest against another — for example, freedom of speech against state security, or the right of association against the right to work — the critical factors were likely to range well beyond a study of the written text and of legal decisions as to its meaning; and would include, in addition, one's convictions (or absence of convictions) about such matters as the purposes which various individual rights are designed to serve, and, equally important, one's sense of justice and of procedural due process.

All these truisms were my professional stock in trade — liable, however, with the passing of the years to get increasingly threadbare and moth-eaten; and so I was very glad when an opportunity was given to me to put my stuff to the test.

Some five years ago I played a part in drafting the existing Constitution of Basutoland — a small territory of some 800,000 African inhabitants and 2,000 whites, entirely surrounded by the Republic of South Africa.⁶ At that time it was not generally considered either necessary or desirable to insert in the Constitution any specific protection for human rights; but in the intervening years, along with a rapidly mounting demand for independence, conviction grew in Basutoland that a court-enforced Bill of Rights should be included in a thoroughly revised new Constitution, designed to prepare the way for independent national status.⁷ The reasons for this change of view will become manifest presently. In the result, I was again approached to assist in the work of revision and redrafting; from which you may infer that the Basotho are a kindly and generous people, prepared to overlook past errors. I spent the summer of 1963 in Basutoland, working on the redraft with an officially sponsored and representative Commission which

6. For a general account of what occurred, see British Command Paper, No. 637 of 1959.

7. Perhaps the main reason for the omission of a court-enforced Bill of Rights from the 1958 Constitution was a desire among those concerned to confine their proposals to the bare minimum necessary to make a start along the road towards full self-government of a democratic and responsible kind. Constitutionally, Basutoland was very backward in 1958. Considerable opposition existed even in regard to the basic idea of representation in the legislature. It was, accordingly, felt at the time that attention should be concentrated on a few agreed essentials as a first step, and that the less room there was in the proposals for controversy the better.

had been set up to do the work.⁸ If I was able to give the benefit of some experience and a little skill to the Basotho, I was, in turn, and in overflowing measure, enriched by their intelligence and wisdom. In this paper, I shall, in the main, follow the sequence of discussion (both formal and informal) which I had with the Commission in Basutoland; for it led slowly but surely from interest in detail, especially local detail, to concern for increasingly universalized principles.

I shall also confine attention to the Bill of Rights provisions of the proposed Constitution, save where an excursus into the general governmental structure may provide necessary or useful background. By way of such background it may, perhaps, suffice at the outset to say that the basic plan of the proposed governmental structure is to provide Basutoland with a bicameral legislature, a British-style executive responsible to a democratically elected legislature, a Bill of Human Rights, and an independent judiciary charged with the duty of enforcing the Constitution.⁹ The Commission was aware of the dangers of instability to which a parliamentary executive may lead in contemporary African conditions,¹⁰ but for much the same reasons of "acquired habit and familiarity" which weighed with the framers of the West German Constitution, the Basotho decided to retain the essentials (but not all the details) of the Cabinet system, whose seeds had already been planted in their country and had begun to sprout.¹¹

The general idea of constitutionalism, of limited government, has long been familiar to the Basotho, as indeed it has been to many other African peoples.¹² The Basotho, along with other African peoples, have for generations known how to deal with tyrannous rulers, rulers who neglect the truth that you cannot keep a social group together for long — be it a state or a family — by fear and the threat of force, who neglect the truth that men respond more easily to persuasion than compulsion. Thus, in the old days, they would simply transfer their allegiance to another ruler, another chief. Again, long before the arrival of the white man, the Basotho had developed the art of government by discussion, coupled with a remarkable tolerance

8. See the *Report of the Basutoland Constitutional Commission* (Maseru, 1963). The report was agreed to by the Commission in September, 1963. Its main features, including the Bill of Rights provisions, were accepted in principle by the Basutoland legislature in February, 1964. They will be discussed — with a view to their legal implementation — at a further conference in London in April, 1964.

9. For such details as are available at the date of going to press, see the *Report of the Basutoland Constitutional Commission* (Maseru, 1963).

10. For fuller discussion, see D. V. COWEN, *SOME PROBLEMS OF CONSTITUTION-MAKING IN CONTEMPORARY AFRICA* 22 (University of Natal, 1962).

11. *Report of the Basutoland Constitutional Commission* sec. 56 (Maseru, 1963).

12. See, generally, the *Report on Constitutional Reform and Chieftainship Affairs* sec. 37 *et seq.* (Maseru, 1958).

of individual opinion. Indeed, when Lord Bryce visited Basutoland near the turn of the present century, he was struck (as many had been before him) by the acute rationality and the freedom of discussion which marked the indigenous Basotho assemblies, or *pitso*s, whose proceedings reminded him of the Greek agora.¹³ He noticed, too, something which put him in mind of the parliamentary freedom of debate with which he was familiar in Britain. The Basotho have, for example, an old maxim that no man shall be punished for what he says in a *pitso*.¹⁴

Here, then, was favorable ground for the development of constitutionalism; though it is important to remember that constitutional safeguards may take many forms, and that safeguards which are suited to one day and age in a particular country may be unsuited to the needs of another generation in another country or, for that matter, in the same country. For example, the old remedy of leaving a tyrannous chief and transferring allegiance to another, was potent enough when national boundaries were fluid, and when intertribal war was common and chiefs needed men. Today this remedy is no longer available. Again, there are African peoples who prefer, and very understandably prefer, to evaluate certain interests in a rather different way from that which has become habitual in the older and distinguishable societies of the West. Nevertheless, one is given a head start in constitution making if one knows — as I had learned — that opposition to arbitrary government is indigenous to the people with whom one is working.

I had sent the Basotho a representative group of constitutions to study before my arrival; and had suggested a fairly extensive reading list of materials on comparative constitutionalism. I found them well prepared and we made rapid initial progress.

As my instructions had been that a court-enforced Bill of Rights was desired, we gave no attention, in the early stages, to the English idea that human rights "are best maintained in a democratic society where the government is responsible to a freely elected but sovereign Parliament representative of the people, and where the Courts of Law are independent and impartial."¹⁵ It was simply assumed, to begin with, that the authority of governmental organs should be limited by a Bill of Rights.

We also — at the beginning, and I stress at the beginning — cut through a great deal of doctrinal difficulty concerning the actual list of rights to be included in the Constitution, by agreeing that we should take the provisions

13. JAMES BRYCE, *IMPRESSIONS OF SOUTH AFRICA* 352-53 (1897).

14. *Ibid.*: "A man who makes a mistake in a public assembly cannot be killed."

15. Preamble to the 1961 preindependence Constitution of Tanganyika. This has consistently been President Julius Nyerere's strongly held opinion; and it is still the dominant point of view in independent Tanganyika.

of the Nigerian Constitution as a rough working model of the kind of thing that we were after — it being understood that we would add to, or delete, or otherwise modify clauses as we went along.

After I had explained the general background of the Nigerian Bill of Rights (broadly speaking, it was an attempt by the English-trained lawyers to adapt to the circumstances of Nigeria an American-style Bill of Rights, in the light of the Universal Declaration of Human Rights of 1948, and the 1950 European Convention on Human Rights),¹⁶ it was suggested that we should work through a few specific articles to get the flavor of the document, and also to illustrate the range of its applicability in practice. We began with Section 24, which guarantees freedom of expression.

Now, the first lesson that was driven home to me in a practical and somewhat novel setting was the crucial importance of local background, of the need to take constant account of local facts, local problems, and local aspirations. In its first subsection, for example, Section 24 provides that "every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference." Fastening on the words "without interference," several members of the Commission asked: "Without interference by whom? Do these words bind the Executive as well as the Judiciary, or only the Legislature?" This, of course, was comparatively easy to answer (all three were bound),¹⁷ though the answer took up considerable time and called for careful illustration, especially in regard to the notion of "judicial self-restraint."

The next question, though a closely related one, was more searching. "Does Section 24 bind private persons and groups as well as state organs?" In Hohfeldian terms, I was being asked whether the constitutional guarantee conferred a right against private persons as well as an immunity from state interference, or merely the immunity.¹⁸ The person who raised this issue — a leading politician — explained why he had done so in the following way:

I am aware that an American-style Bill of Rights is designed to place limits upon what organs of government may competently do, but I have some difficulty with this. At the present stage of our development in Basutoland I do not think that our prime need is for protection against governmental organs; the need is rather for protection against powerful private interests. After all, it is possible that I may be the government

16. *Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying Them* (The Willinck Commission) (1958).

17. Compare Art. 1 (3) of the West German Constitution: "The following basic rights shall be binding as directly valid law on legislation, administration, and judiciary."

18. Compare the discussion in Sir Ivor JENNINGS' *SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION* ch. IV (Oxford, 1953).

quite soon, and I am not likely to hurt anybody. The real trouble here is that the churches have too much power, and so, too, do the Chiefs, and so do the white traders. What I would like to know is whether we will be able to rely on the Bill of Rights if a white trader tries to keep Africans out of his restaurant or his bar. Again, can we use the Bill of Rights when the Roman Catholics preach in their sermons that the voters should not vote for the Congress Party? Can we use the Bill of Rights when the Chiefs refuse permission to people to hold political meetings?

Several of those present demurred to the questioner's particular enumeration of the private interests against which protection might be needed; but all felt that the question was an important one. In reply I referred to some of the developments now taking place in the United States in regard to the judicial interpretation of "state action" under the 14th Amendment.¹⁹ And I referred also to the comparable and even more extensive developments taking place under the West German Constitution.²⁰

After full discussion we agreed that the binding efficacy of a Bill of Rights for Basutoland should not be confined to action by State organs, but should extend, in appropriate cases, to persons and groups other than State organs. In a recent African Constitution dealing with the point, that of Kenya, the circumstances in which constitutional guarantees can be invoked against private individuals and groups are spelled out with some particularity. Thus, in effect, the Kenya Constitution limits constitutional litigation between private persons to cases concerning equal protection in the use of public premises.²¹ We, however, felt that it might be desirable to go further and allow a constitutional remedy against private persons in other appropriate cases; but, not surprisingly, we found it very difficult to give precision to what we meant by "an appropriate case" — the trend of our thinking being that the constitutional remedy should be available in cases where the common

19. The trend being to interpret the phrase "state action" very widely, at any rate when discrimination on racial grounds is the issue.

20. In recent years, some German Courts — notably the labor courts — have developed a theory of so-called *drittwirkung*, in terms of which constitutional guarantees may, in certain circumstances, be invoked against the action of private persons and groups. See, for example, 1 BAGE [*Bundesarbeitsgericht Erlass* — Decision of Federal Labor Court] 187 (1955); 4 BAGE 240 (1958); 3 BAGE 296 (1957); 7 BVG [*Bundesverfassungsgericht* — Federal Constitutional Court] 198 (1958). The whole subject is, however, a matter for very warm debate among German constitutional lawyers. Indeed, the German development is no less controversial than the attempts now being made in the United States to give a wide interpretation to "state action" in the 14th Amendment. See, generally, MAUNZ-DURIG, *GRUNDGESETZ KOMMENTAR* 64 ff., Art. 1, Abs III (Munich, 1963); NEUMANN-NIPPERDEY-SCHEUNER, *DIE GRUNDRECHTE* 18 ff. (Berlin, 1954).

21. See the Report of the Kenya Constitutional Conference, 1962, Cmnd. 1700 of 1962, p. 24, where a suitable amendment of earlier constitutional provisions is suggested. And see section 13 (7) of the Kenya Order in Council, 1963.

law might be inadequate, or where, for technical reasons, legislation could not be used to remedy a widely felt evil.

I was then faced with the task of drafting what we had agreed on. My own preference was to include an "equal protection clause" in the Constitution as well as a "nondiscrimination clause,"²² and to give particularity to the reach of the nondiscrimination clause in regard to places of public resort, along the lines of the Kenya Constitution. For the rest, it would probably be wise to leave the document vague, hoping that the vagueness or the ambiguity (or the mess, if you like) will prove, in E. M. Forster's phrase, to be "creative." Of course, if constitutional clauses are to prove flexibly creative, it is essential that judges should not, when interpreting them, adopt a rigorously literalistic approach by putting on judicial blinkers, and denying themselves the benefit of access to the record of the *travaux préparatoires*. As this is precisely what happens in the Courts of the British Commonwealth, I felt, in addition, that we should specifically provide in a general interpretation section that the judges should regard themselves as free to look at official records of the work which preceded and led to the introduction of the Constitution.

Thus far, however, we had merely been skirmishing with our subject. One of the members of the Commission was plainly concerned about the wide scope for judicial discretion which the interpretation of a Bill of Rights seemed to entail; and so, diverting attention from the technical details of Section 24, he felt that we should discuss, and if possible dispose of, the more general and basic question of the objections to a court-enforced Bill of Rights which had been raised by African leaders, such as President Nkrumah and President Nyerere. These objections were not equally familiar to all members of the Commission, and so the person who had raised the point essayed to summarize them; and he did so along these lines:

In the first place, limited government is a bit of a luxury. It presupposes a substantial degree of economic affluence, and is all very well in the rich countries of the West. But we in Africa, in common with many of our fellow men in the Far East and in Latin America, are economically frightfully poor. In addition, we are scourged with ill health, malnutrition, and lack of education. What we need is emphasis upon what government should do, positively, to remove these evils. The trouble with eighteenth and nineteenth century constitutionalism, which permeates the American Constitution and, it would seem, the Nigerian Constitution (which, incidentally, was enacted in London), is that it is *laissez faire* and negative in character. It emphasizes what government should not

22. As in the constitutions of India and West Germany.

do, mainly, it would seem, in the interests of private enterprise and private property. We need more emphasis upon what government should do; more emphasis on planning, and less on noninterference with private enterprise.

I would go further and say that we need strong government. I do not say tyrannical government; but it would be foolish for us to place such severe and vague limitations upon government that it may not be able to carry through plans for the provision of at least an adequate minimum of food, clothing, and shelter. There can be no point in having freedom of speech, and freedom to worship, and all the other worthy classical freedoms if people are not at the same time free from the pains of hunger and ill health and the evils of illiteracy. President Roosevelt was aware of this in wealthy America; and there is all the more need for us to be aware of it in poor Africa. What I fear is that the Bill of Rights and especially the judges (whose preserve these documents seem to be) might get in the way of social and economic reforms, as they once did in America.

It should not be forgotten, that, because of long exploitation and neglect, we in Africa are attempting to crowd into a few years what the countries of the West have taken hundreds of years to achieve. Coupled with the magnitude of our task, the sense of urgency and the pressing demands made on politicians by their constituents make the African situation one of almost unrelieved emergency. If anything, therefore, the presumption should be in favor of the exercise of state power. Perhaps Ayub Khan is right; and what we need in Africa is benevolent autocracy rather than limited government.

When I had last heard this argument put forward in Swaziland, along substantially the same lines, three additional points had been made, and so I added them for good measure.²³

In the first place, one of the troubles about introducing a court-enforced Bill of Rights in a newly independent African territory is that for some years, usually critical years, the judges are likely to be foreigners, unsympathetic or unresponsive to local aspirations.

Secondly, in adopting a written constitution, framed substantially along American lines, as the Nigerian Constitution had been framed, there is the danger that judges, when casting about for judicial precedents in aid of

23. About two years before, I had been retained by one of the political parties in Swaziland (with a strong nationalist orientation) to draft a constitution "which would embody full nonracial democracy and adequate protection for human rights" among the country's population of 250,000 Africans and 10,000 whites. Swaziland is politically far more divided than Basutoland; for not only are the traditional chiefs suspicious of the politically minded commoners, but, in addition, there is a serious white minority problem — many of the whites being South African citizens. Unlike Basutoland, where the whites own no land, the whites own about one-half of the land in Swaziland, and they are politically and economically influential. Not surprisingly, there soon developed a bitter wrangle over the shape of the constitution — a wrangle which has not yet been settled.

interpretation — when seeking to put content into abstract phrases — might rely on American decisions, which had either read into the words of the American Constitution, or spelled out of the words, social and economic adjustments making sense locally, but which might not be suitable in an African territory or elsewhere.

Thirdly, what, if anything, the Swazi politicians had asked, was wrong with President Nyerere's attitude that human rights were best protected if left, as in England, to a government responsible to a freely elected Parliament representative of the people? They added, "might it not be thought that all this preindependence concern for Bills of Rights is disingenuous, and shows lack of confidence in Africans? While the British were firmly in command, no one heard of Bills of Rights, but now that they are withdrawing we hear a great deal about them."²⁴

Let me now summarize the way in which these arguments were dealt with in Basutoland by leading members of the Commission.

They all felt that there was a good deal of substance in these points of criticism but that it was easy to exaggerate their force, and they emphasized that we should, above all, avoid intemperate extremes. It was generally agreed that freedom from arbitrary government was not worth much if people were left free to starve and languish in squalor and illiteracy. But it did not follow that restraints upon governmental power were incompatible with the provision of a reasonable share of economic security. On the contrary, it was felt that the critics were prepared too easily to abandon a sound principle merely because it might be difficult to apply. As one of the Commissioners put it, "Life itself is difficult and its facts are variable. It does not follow that the same principle, applied in different countries to different situations, would lead to the same conclusion." Rather than abandon what he regarded as the cardinal principle that government should in all cases be called upon to justify any *prima facie* infringement of human rights, he felt it important to adhere to that principle, while conceding that "it should be *easier* for an African government, in present circumstances, to justify curtailments of private rights in the interests of economic security than it should be for a government operating in an affluent society." But he would in all cases insist on the need for justification.

He went on to say that if it were felt that economic prosperity could only be achieved at the cost of unlimited government, this was potentially too big a price to pay. Nor did he believe that Africans really placed economic prosperity as high in their scale of values as did some Western countries.

24. Cf. D. V. COWEN, *THE FOUNDATIONS OF FREEDOM* 120 (Oxford, 1961).

The avoidance of grinding poverty was, he said, one thing, the rapid achievement of an affluent and even wasteful society quite another. He saw no reason why the reasonable satisfaction of economic needs could not be combined with a Bill of Rights.

At this point several members of the Commission said they felt it was relevant to refer to the position in England. Africa, they said, was not England; its needs, history, and traditions were different, and in their view the restraints of convention which had evolved in England were unlikely to operate in the same way in African countries. They cited South Africa as an example, though other examples are not lacking.

Developing this theme, they went on to say that they felt that appropriate techniques for the protection of identical human rights might, and almost certainly should, differ from state to state. In a few states the safeguard of a representative legislature and an informed and enfranchised electorate might be enough. In other states, however, it might be wise to bring a measure of limited government, backed by judicial review, firmly into the picture. No one, in their view, could say that one technique was more "natural" than another. This was simply an issue to be resolved by exercising the virtue of political prudence or statesmanship, which should always carefully weigh the particular facts of the specific situation with which one had to deal. In Basutoland the question was what was right for Basutoland; and so far as they were concerned they had no doubt that limited government and a court-enforced Bill of Rights were the answer, at any rate during the foreseeable future. This did not mean that the Basotho were less worthy than the British, any more than it meant that the Americans were less worthy because they had a different form of government. It simply meant that the ideals of good government were best satisfied in different countries by different means. They very much hoped therefore that not only would Basutoland have a Bill of Rights,²⁵ but that it would have one with a

25. Sections 146 and 147 of the Report of the Commission [*supra* note 8] state:

We desire to have the basic principles which should guide Lesotho's [Basutoland's] public life specifically formulated and given legal force in the country's constitution, so that they may be a present and effective restraint upon the abuse of power, as well as a guide and inspiration to the people. . . .

In making these recommendations we are conscious of the fact that it is believed in some quarters that the Rule of Law is best preserved, and decency of government best maintained, not by formal guarantees in a Bill of Rights — which may give rise to dissension between Parliament and the Executive on the one hand, and the Judiciary on the other hand — but simply by ensuring that the Government be responsible to a freely elected Parliament representative of the people, and that the Courts be independent and impartial.

We differ from this view. It seems to us to be based on excessive trust in human nature; and in matters of government it is essential not to trust in human nature. It is not sufficient, in our view, to speak of an independent judiciary being free to administer "justice," free from all political pressure, unless the essential characteristics

distinctively Basotho look about it; for it was essential to take account of Basutoland's specific needs and of many existing laws and customs which the people would not be willing to abandon.²⁶ They emphasized that they wished to add that whatever techniques were finally resorted to for the protection of human rights, all people should equally enjoy the benefit of the protection, regardless of such irrelevant considerations as race, color, or creed. This, they said, was a requirement of elementary justice, a recognition of what was due to human beings simply because of the quality which they equally shared in common, namely their humanness.

Dealing with the argument that Bills of Rights might lead to unsympathetic decisions by foreign-trained judges, and to the careless importation of foreign ideas which were unsuited to the territory, one of the Basotho said:

Of course there is some risk of these evils. But the first is surely only temporary; it will disappear as Basotho judges are increasingly appointed to the bench. And the second will disappear as the legal profession and the judiciary become more efficient, more sophisticated, and more learned. What we need is sound and liberal legal education as an essential corollary to the introduction of a Bill of Rights. Indeed, unless our people and our lawyers are educated in the use of a Bill of Rights, and in the values which they are meant to preserve, the whole exercise may become a farce.²⁷

Many hundreds of pages of books and articles have been devoted to the issues which I am now discussing. But I am not aware that they have been dealt with more penetratingly and more incisively than by these Basotho spokesmen; and it was quite plain that they were speaking for all their colleagues. In short, we had, for the time being, surmounted a major obstacle and were in a position to return to the seemingly still waters of Section 24 of the Nigerian Constitution.

Now subsection (2) of Section 24 makes it plain that freedom of ex-

of political and social justice are stated and given legal efficacy in the Constitution itself. No doubt there are old established communities where respect for the Rule of Law has — after long and very great travail — become an ingrained public habit. But, in the circumstances of Lesotho, we deem it wise to minimise, as far as possible, the risks involved in national growth.

26. Section 144 (c) of the Report of the Commission specifically recommends that the decision to guarantee human rights along familiar lines be qualified, *inter alia*, to the extent reasonably required (i) to preserve the cohesion and security of the Basotho nation by the proper regulation of immigration, and (ii) to ensure that any guarantee of property rights should not in any way change, or infringe upon, the basic principles of the present land tenure system in Lesotho [Basutoland], or accord greater rights in property than exist at the present time.

27. A new university has recently been established in Basutoland. It would be gravely shortsighted if this kind of legal education were not soon included among the offered courses of instruction.

pression — in common with most other human rights — should not be regarded as absolute or unqualified. It may have to give way either (a) to an overriding public interest (the due exercise of the police power), or (b) to a countervailing private interest. Thus, after stating the guarantee of freedom of expression in subsection (1), the authors of the document went on, in subsection (2), to provide that

Nothing contained in, or done under the authority of, any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably justifiable in a democratic society:

- (i) in the interests of defence, public safety, public order, public morality, or public health; or
- (ii) for the purpose of protecting the reputations, rights and freedoms of other persons.

One of the Basotho asked for an example of a qualification in favor of the public interest which would be justifiable in a democratic society. I suggested that a law penalizing the giving of military secrets to an enemy in time of war would be a clear case. He then asked for an example of a qualification in favor of private rights, and I gave him Mr. Justice Holmes' example of the person in a crowded theater shouting "Fire!" when there was no fire, merely to indulge his whim. Everyone agreed that this particular urge to self-expression should not be allowed to prevail against another's right to life.

Our difficulties now began. After we had discussed about a dozen other examples of a more borderline character (the sort of cases one deals with in an elementary course in Constitutional Law in the United States), I was asked:

Is it not necessary to place the various legitimate public interests in a hierarchy of importance? For example, is the interest of the State in the tidiness of its streets as important as the interest of the State against subversion by violence? If the State seeks to limit freedom of speech in the interests of keeping the streets tidy, might it not have a heavier onus to discharge than where it claims protection from subversion?²⁸ Conversely, is it not essential that we should try to group private interests in a hierarchy of importance, and if we don't do this job, won't the judges have to do it?

More specifically, I was asked whether I thought that the right to bear arms in the Second Amendment of the American Constitution was entitled

28. Some attention was given, during discussion, to technical aspects of the question of "onus," including the topic of a presumption in favor of constitutionality.

to the same weight as freedom of speech in the First Amendment. And — as people are not often given the opportunity to subject professors to this kind of examination — he added: “If it is necessary for us, or for the Courts, to arrange various private rights and various public interests in an order of importance, how precisely should this be done, and by reference to what criteria?” Looking squarely at me he added: “Have you found any guidance on these points in your natural law studies?”

My first answer was that, up to a point, it certainly was possible, and maybe it was desirable, for a constitution maker to place individual rights and public interests in a certain order of value or importance. This had, in fact, been done by the framers of the Nigerian Constitution. Thus, if you look at Section 18, which guarantees immunity from inhuman treatment, you will notice that it is drafted in far more absolute terms than Section 24. More particularly, the exception in Section 24 based on “reasonably justifiable state action” is specifically excluded. I suggested that, in this respect, there might, possibly, be some value in following the basic structure of the Nigerian Bill of Rights, which had been used as a model elsewhere in Africa.

But, having said this, I felt obliged to add that I knew of no technique and certainly of no natural law theory, which would provide men with a slot-machine facility for evaluating conflicting interests — a sort of open sesame or ready reckoner which would provide patently correct and quick answers to actual problems. As I understood the position, the very process of evaluation demanded an *act* of prudence or judgment; and human judgment or action was necessarily concerned with concrete situations, that is, with the historical and the contingent. Indeed, one “might almost say that rules for just or wise action are, in a certain sense, a contradiction in terms since rules are general and abstract whereas action is concrete and existential.”²⁹ Was this not, in part, what Aristotle had in mind when he observed that “law is a general statement, yet there are cases which it is not possible to cover in general terms . . . the material of conduct is essentially irregular”?³⁰

It seemed to me that men merely did the law a disservice — and more especially the natural law — by expecting it to sustain more than it was designed to bear. No amount of rule making could relieve men of the agony of personal decision in a specific case; no man, while he remains alive, can escape from having to live in a world of knotty facts that constantly presents new predicaments which — to the extent that they are personally experienced or grasped by individual intelligence — are always and necessarily unique.³¹

29. Versfeld, *op. cit. supra* note 5, at 6.

30. ARISTOTLE, NICHOMACHEAN ETHICS 5:10, 1137^b.

31. It is high time that a vigorous piece were written on “Saving Natural Law from Its Friends,” in which the points might be made that not every adherent of natural

This being so, I ventured to suggest that in a given situation in the United States, in 1789, it might well have been that the right to bear arms was just as important as freedom of speech, if not more important — in a given situation, it might, in short, be but another way of claiming a right to life.

I tried to illustrate this point further by referring to a topic which always excites interest in African and other territories, namely, the right of individuals to preach Communism. I suggested that an evaluation of the conflicting claims of freedom and security is bound to produce different results, according as the constitutional system to be protected in a given country is more or less stable, and more or less strongly rooted in public opinion. For example, the constitutional system of the United Kingdom might well be able to sustain a heavier attack than, say, that of Brazil.

Again, even though one might believe with Milton that "Truth is strong, next to the Almighty"; even though one might believe with him that when truth and falsehood grapple "Who ever knew Truth put to the worse, in a free and open encounter"³² (sentiments which were voiced in slightly different language by Mr. Justice Holmes in the *Abrams* case), it would still be necessary to assess the power of truth to prevail in the *particular situation* with which one was concerned. It would, for example, make a difference whether Communism were preached openly, so that it could be rebutted by argument, or whether it were preached furtively and underground. Again it would make a difference whether there was, in fact, time to rebut by argument, or whether, having regard to the actual situation, the danger to the state was too immediate and present to allow of the free play of public discussion and public debate. As far as I knew, there were no automatic and self-evident answers to questions of this kind — turning, as they did, on the exercise of the virtue of practical prudence or judgment.

At this point in our deliberations a very interesting change in the tenor of discussion took place. Expressing some disappointment that I was not prepared to extract more definite and clearer-cut answers from the nature of man, one member of the Commission began to quote me against myself:

If you are unable to provide clear rules for evaluating interests, when human rights and public welfare come into conflict with each other, does

law is inevitably committed to perpetrating the "naturalistic fallacy" in logic, nor is he necessarily an intellectual imbecile, nor yet a believer in the sacrosanctity of private property; nor, if he has any knowledge of the subject at all, does he believe that the answers to the great majority of practical questions which have to be decided in a legal system can be deduced from readily identifiable principles with mathematical precision. The sort of straw man which Mr. Justice Holmes gaily constructed in his jeu d'esprit on "Natural Law" (COLLECTED PAPERS, 310), in order, presumably, to knock it down with equal gusto, is not worth defending.

32. John Milton, *Areopagitica*, 4 WORKS 348, 347 (Columbia, 1931).

it not follow that you should be equally hesitant in enumerating the basic human rights themselves? Yet you are on record as saying that the basic rights are inherent in man's very structure, or "nature," as man. If you really believe this, please tell us, for example, whether private property, free education, and a claim to a periodic holiday with pay are basic rights — as suggested in the Universal Declaration of Human Rights.

This is what they do to professors in Basutoland! I drew breath and plunged, or rather belly-dived, into the water — and, mercifully, as the day went on my Basotho friends saved me from drowning.

I conceded very readily that I was hesitant about deducing a comprehensive list of the rights of man as being implicit in his essential nature. Indeed, I felt that the task called not only for hesitation, but for a considerable excursus into both ethics and epistemology. In ethics one would have to demonstrate the central position of humility, or the habit of placing oneself, with objective realism, in a universe which is given and not created by ourselves. Epistemologically, I added, one would have to show that the process of understanding the world, of making it one's own, is a process by which the mind surrenders itself to the nature of things — the very opposite of Cartesian imperialism.³³

In short, I was very ready to admit that to list the basic human rights is notoriously difficult precisely because it depends on our conception of man and of his being and destiny. I went on to add, however, that, in my view, the conception which men formed of the nature of their being and of their destiny was not simply a matter of subjective preference. Men could form objectively right or wrong conceptions about themselves depending on whether they were able to grasp the distinction between human beings, on the one hand, and stones and trees and mice and horses on the other.

At this point one of my Basotho friends — I suppose out of the kindness of his heart — said:

Perhaps we don't really have to probe the matter so deeply. Would it not be sufficient for our purposes to rest content with the enumeration of human rights in the Nigerian Constitution? After all, these have their origin in the work which was done by the United Nations in 1948, as refined by the European Convention on Human Rights in 1950. More or less the same list of rights is to be found in several other African countries;³⁴ and more or less the same list of rights was agreed to by over 100 representatives of many nations of the Free World who met together

33. Versfeld, *op. cit. supra* note 5, at 4.

34. For example, Sierra Leone, Kenya, and Uganda.

to discuss the subject in New Delhi in January 1959.³⁵ Admittedly if we simply adopt the Nigerian formulation with suitable amendments, it may be said that we are giving expression to the product of a given historical culture, rather than deducing the rights from the nature of man. But won't this save us, and you, a lot of sweat?

This proposal, however, met with some opposition; several members of the Commission saying, in effect:

The Nigerian formulation is all very well and maybe we should go along with it in a substantial degree. But some of us have at least three difficulties with the Nigerian Bill of Rights which have not yet been disposed of. In the first place, it is confined to what we might call the negative immunities from State action, which characterize nineteenth century constitutionalism. There is no mention in the Nigerian document of a positive duty on the part of the State to provide a basic minimum of, say, education, or health, and this we feel to be a defect. Secondly — and this is another aspect of the negative character of the Nigerian document — while it emphasizes the *rights* or immunities of individuals, and the State's corresponding duty of noninterference, it is silent about any *duties* which individuals may owe to the State and to their fellow men. Do not human rights carry with them certain duties? And thirdly, we have some doubt about the emphasis placed upon the notion of private property in these Western-style Bills of Rights. We here in Basutoland have a communal system of land tenure, and we doubt — to give one example — whether the concept of just compensation for expropriation in the public interest is fully applicable in our circumstances. We feel, therefore, that we should probe the subject a little more deeply, and not merely adopt a precedent which has commended itself to other people, no matter how worthy or numerous they may be. So, perhaps, Professor Cowen, it might be useful for you to go back to what you were saying about the nature of man in society. What propositions about his nature are, in your view, objectively and essentially correct; and how do your views bear on the problems which we have raised?

Once again, I drew breath and prepared for another plunge. The ensuing dialogue went something as follows, as I said:³⁶

"I would like to suggest to you that man is a created being, made to use his intelligence and free will in order to find knowledge, more particularly to discover the truth about his own being, and about the world in which he lives; in short, to know himself and to act in accordance with his

35. See "The Declaration of Delhi," in International Commission of Jurists, *THE RULE OF LAW IN A FREE SOCIETY* 3 (1959).

36. At this point I have drawn heavily upon Martin Versfeld's essay, *On Justice and Human Rights*, *op. cit. supra* note 5.

knowledge. This, I think, is the essential characteristic of man, which differentiates him from stones and tables and muskrats and from dogs and horses and white mice. Men can behave like stones and even like wild cats and dogs, and I have seen some of them put up a very convincing performance along these lines; but I have never seen stones, or for that matter, chimpanzees, behave in a way which is characteristically human. The point I am trying to make is that men may formulate many different concepts and propositions about their nature and their destiny, *and that these propositions influence the way in which they act*. I am not aware that vegetables, minerals, and animals other than man have the same capacity; or, if you wish, share the same noble predicament. No doubt, the difference in these respects between men and chimpanzees is, in a sense, one of degree; but it is a striking and significant difference — so striking that we properly describe it as a difference in kind. The difference is even more striking than that between a grain of sand and the Rock of Gibraltar.

"I would, therefore, say that the most basic human right is the right to discover the truth about human nature and to act in accordance with one's discovery.

"As we cannot seek the truth without being alive, I would suggest that the right to truth implies the right to live; or, more accurately, the right not to be deprived of life without adequate reason. I do not pause to go into the question what, in various circumstances, would constitute 'adequate reason'; the mere proposition that any killing calls for justification, or the giving of adequate reasons, is, in itself, a fundamentally important proposition.

"Now man does not simply accept his position in space and time like a stone or a horse. He has been given a free will and a free intelligence. In his predicament he may exercise a freely ranging intelligence and a controllable will. This capacity to determine what he is, where he is, and what he is made for, and to act in accordance with his convictions, I call freedom, or liberty, in the widest sense of that term. And so I would say that man, as man, has a basic and characteristically human right to liberty or freedom.

"I would suggest, too, that with the right to liberty there is connected a right to some measure of property, since a man cannot act without the material means to do so. As an old German proverb puts it, 'men without property tend to become property.'³⁷ I would not presume, I am not wise enough, to dogmatize about the right to property, but it would seem that it involves the right to property both privately and publicly held, since sometimes we may need to act on our own initiative and at other times co-

37. See H. A. ROMMEN, *THE NATURAL LAW* 234 (1947).

operatively. Indeed, the issue between private ownership and communal ownership posed as an 'either/or' is, I think, spurious. We have to determine empirically and historically how, in the case of a particular job to be done in a particular community, during a particular period of history, liberty in this field is best served. It is not a case for general rules but for political prudence, alive to the needs of the historical situation.

"Here in Basutoland I would suggest that we should not immediately convert from a system of communal ownership of land to private negotiable title; for one thing the disruption caused by sudden and drastic change would not be worth it. Let me add, however, that we do find that people in Basutoland enjoy traditional rights of user of land, that these rights of user have with the passage of time become inheritable, that persons have formed reasonable expectations that land into which they have put their labor will not arbitrarily be taken away from them and their children; and so I would like to suggest that without in any way changing the present factual situation, or the present theory which exists about ownership of land in Basutoland, it would be fair in a case of public expropriation to give compensation for, at any rate, the improved value of the land which a man and his family have been allowed to use or occupy and which they have improved by their use."

The right to property was especially interesting because it illustrated graphically the need to place some emphasis on human duties as well as on human rights. No community and indeed no legal system could survive without imposing duties in connection with the use of property — if only the duty of nonabuse so as to avoid prejudice of others.³⁸

Proceeding with my enumeration of basic rights, I suggested that as we cannot easily find knowledge without discussion, it follows that freedom of speech, or freedom of expression, is a basic right. Further, as we cannot progress in knowledge or even keep alive, save by cooperative action in association with others, I argued that the right of association is also basic.

I went on to say that the right to marriage and a family, while it might be classed under the right of association in order to achieve an end which requires cooperation, is so important that it should be mentioned separately. There are several grounds for regarding it as a fundamental part of the human make-up, the main one being that the urge to establish and live in a family colors our whole attitude to reality. Where it is not rightly channeled, it leads to a distorted view of men and things. Mankind's work of discovering truth, and of understanding reality, requires the accumulated

38. Compare Art. 14 (2) of the West German Constitution: "Property shall involve obligations. Its use shall simultaneously serve the general welfare."

effort of many generations, and hence we need the orderly propagation of the species.³⁹

Finally, I suggested that the basic human rights are all related to the concept of justice. In attempting a description of justice I thought one could do worse than to start with the ancient proposition that justice consists in "giving to each man his due," that is to say, according to each man his rights as a man. By according to men the rights specified above, we were merely according men their due as human beings. It followed, moreover, that if men have these rights simply because they are men, they should all equally have them by virtue of their common humanity. In addition, they should all equally enjoy the means of making them effective; they should all equally enjoy what one might call "procedural due process."

In regard to a possible right against the State to free education and a holiday without pay, I said that I had difficulty in accepting this position as universally self-evident. In a country where massive illiteracy was a scourge, and where there was sufficient money and material means to finance a scheme of free public education, perhaps man's right to know truth might best be implemented by placing a positive duty on the State to give free education. On the other hand, in a poor country like Basutoland, it might not be either wise or necessary to go so far. In such a country, where the need to provide sufficient food to sustain life among the young was itself a national burden, I thought that perhaps the best means of dealing with the educational problem would be the traditional technique of preventing government from interfering unduly with freedom of religion, or with freedom of association, or with freedom of speech.

We were not yet through. One member said:

You have spoken about making these basic rights effective. Is this not the heart of the matter? And do not these rights depend for their efficacy upon the existence in the community of the will to make them effective and upon physical force to do so? Two points are involved here. In the first place, if there is no will power and no force to make the rights effective, are they anything more than moral aspirations? Secondly, do not all these rights get their meaningfulness from the fact that certain people, recognized as having authority to do so, have declared them to exist? If we incorporate them in a written Constitution, and even if we go on to lay down a special procedure for amending the Constitution (say, a two-thirds majority vote in the legislature), what is to prevent future generations from ignoring the special procedure and abolishing the whole thing?

39. Versfeld, *op. cit. supra* note 5, at 9.

To this I attempted to reply as follows: "Law and power are not the same thing. I do not believe that force and fear are the criteria of obedience to law as distinguished from morality. Men obey the law, and they accord human rights to others, primarily because they recognize that it is right to do so. Admittedly the use of force is often necessary to give full effect to rights, and, admittedly, there may be small comfort in having a right that is not enforced, but it is not the existence of force that leads to the existence of the right. Conversely, if people are not persuaded as to the justice of a claim, force may be quite ineffectual to implement it."⁴⁰

"In regard to the question about future generations ignoring the prescribed procedure for constitutional amendments, I would suggest that we should distinguish between two categories of provisions in a constitution: (a) those dealing with basic human rights, such as those which I have enumerated, and (b) those dealing with such matters as whether or not there should be two houses of Parliament. The source of validity of the latter are acts of human judgment as to the requirements of a given situation. The former are rooted in the nature of man, though it may very well be that the enumerated list is not exhaustive. In regard to *both* categories of matters, the prescribed procedure should be followed for at least one good reason; for unless we accept the proposition that the law for the time being in force should be observed, there can be neither expectability nor stability in a legal system, and these are in themselves morally desirable qualities. They may, of course, in a given case, be offset by more compelling moral considerations: for the proposition that the law for the time being in force should be observed, is not an absolute moral imperative; the law may be too immoral to warrant allegiance or fidelity. However, in regard to the category of rights which are rooted in the nature of man, additional and different considerations come into the picture. As these are propositions about man's nature, to disregard them is to deny something essential to a man's existence as a human being. This is not to say that infringements of basic human rights do not often occur. All we can hope for is that with improved education and insight, and with better organized world opinion, respect for human rights will increase."

This, I fear, was the best I could do. The members of the Commission

40. It is submitted that a truncated view of law is given by those who suggest that law is what is enforced in the law courts. For a recently stated view, opposed to my submission, see CRANSTON, *op. cit. supra* note 3, at 18, 21. Moreover, the attempt that is often made to distinguish between certifying a rule as legally valid, on the one hand, and its claim to obedience, on the other hand (see, e.g., H. L. A. HART, *THE CONCEPT OF LAW* 205-206, Oxford, 1961), raises at least as many difficulties as it solves. Comprehensive discussion of these themes would, however, require a separate essay.

indicated that they were prepared to accept, in principle, the inclusion of the rights which we had discussed. I do not say that they all did so for the same reasons. Some might have done so because the suggested list of rights accords closely with precedent, with what they could see before them in black and white in the Nigerian and other constitutions. But some, I like to believe, might have accepted the importance of giving constitutional recognition to basic human rights because of their sense of the humanness within them.

Indeed, from what followed, I believe it is not false to draw this latter conclusion, because it was one of the Basotho — a tough man, a fighter, a hardheaded politician — who then proceeded to say something I shall never forget. He had in front of him a book which I had written, entitled *The Foundations of Freedom*. Turning to Chapter 10, which I had called "Under God and the Law," he proceeded to read the first four paragraphs, as follows:

Fifteen hundred years ago, in the fifth century of our era, there lived and worked in the North African town of Hippo a non-white bishop who decisively "moulded the thought of Western Christendom so that our very civilization bears the imprint of his genius."⁴¹ St. Augustine lived in times of upheaval and ruin. Rome had just fallen to the Barbarian hordes; and to Pagan and Christian alike, it seemed the end of all things — in St. Jerome's words "the light of the world was put out."⁴²

There is an ominous parallel between the age of St. Augustine and our own. Pleasure-seeking and material progress marked the later years of the Roman Empire, yet — to quote St. Gregory — while superficially the world flourished, "in men's hearts it had already withered" — *in cordibus aruerat*. Similarly, today, despite man's technological achievements, there is inner doubt and tension, and a groping for values and meaningfulness which mock at the achievements themselves.

In the West the very freedom implicit in true democracy is menaced with becoming license, freedom of thought with becoming anarchy of thought; and there is danger that, taken at its face value "western civilization" will seem just as materialistic as, and considerably less cogent than, the communist philosophy to which it declares itself opposed.

If true democracy is to survive, those who would give it allegiance must become more fully conscious of the real significance and place in history of the values which it must serve. It is senseless to compete with Russian Communism on a materialistic basis — with bigger and better Luniks or production figures. And certain it is that the West will be in

41. Christopher Dawson, *St. Augustine and His Age*, in *A MONUMENT TO ST. AUGUSTINE* 39 (London, 1945).

42. Quoted by Dawson, *id.* at 37.

no shape for any struggle without a clear idea of what it does stand for. As Father John Courtney Murray puts it, "the trouble is that even a damnable philosophy is more effective than no philosophy at all."⁴³ The West, then, must rediscover itself.

He then turned to me, and said: "I do not know that I can go along with you in your manifestly theological position. Nor do I speak so readily about 'The West.' Again, when you say that man exists to seek the truth, I have a feeling that to know what truth is is very, very difficult. Perhaps Pilate was right: truth may be impossible for us to discover. Maybe there is no objective truth. I do not know. But I will concede this: we do not have to wait for the answer — because I think it at least belongs to the nature of man to ask the question what is truth. And having made this concession, perhaps the real value of entrenching a Bill of Rights in our Constitution is that it may stimulate us to place an ultimate value on humane education and our need to discover ourselves." "Our need to discover ourselves!" There was no more to be said. *Exaltavit humiles*; all of us were deeply moved.

43. J. C. MURRAY, S.J., *WE HOLD THESE TRUTHS* 91 (New York, 1960).