Rhodesia and Her Four Discriminatory Constitutions

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INTRODUCTION

My objective in writing this article is to show how the nature of Rhodesia as a settler colony affected its constitutional evolution. Since 1923 it has been the British responsibility to provide Constitutions for Rhodesia and any new Constitution will require the authority of an act of British Parliament.[1] It is Britain alone from a constitutional law point of view that has a constitutional right to make Rhodesia independent and to decide on the terms of independence. But while Britain has this responsibility over Rhodesia, she has not exercised her powers on several issues, for example, on the discriminatory laws passed by the Rhodesian Legislative Assembly including the Land Apportionment Act, 1930, which prohibits people of different races from living in the same area. It has become a convention of the British Government not to interfere in the domestic affairs of Southern Rhodesia and successive British Ministers have referred to this convention in dealing with Rhodesian matters. This convention has no legal status in that there is no act of the British Parliament which could be declared invalid even if the British Government went contrary to the convention. It should be remembered that the convention has never meant that the British Government has lost the right to revoke the Rhodesia Constitution or to bring about changes to those parts of the Constitution which the Rhodesian Legislative Assembly could not change. Such a convention is in conflict with the Charter of the United Nations, Article 73, which requires the administrative authority (such as Britain over Rhodesia) "to ensure, with due respect, for the culture of the people concerned, their political, economic, social and educational advancement, their just treatment and their protection against abuses". The British Government has not only rights but duties to supervise the manner in which the Rhodesian colony is being run internally and externally. If the British Government seriously feels it cannot interfere with Rhodesian internal affairs,

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1 See *Southern Rhodesia Constitution Part II—Detailed Provisions Presented to Parliament by the Secretary of State for Commonwealth Relations by Command of Her Majesty, June 1961* (London: Her Majesty's Stationery Office, Cmnd. 1400, 1961), p. 3; The Final *Communiqué* of the Commonwealth Prime Ministers' Meeting, (London: H.M.S.O., Cmnd. 3919, 1969); *Rhodesia: Documents Relating to Proposals for a Settlement, 1966* (London: H.M.S.O., 1966, Cmnd. 3171), p. 3; *Basic Facts About the United Nations* (New York: UN), p. 36; "Rhodesia, Proposals for a Sell-out," South African Research Office, London, 1972, pp. 2-3; Claire Palley, "Possible Consequences of a Unilateral Declaration of Independence," in *Southern Rhodesia (Constitution) Order-in-Council* (Salisbury: Midrho Press Ltd., 1965), p. 75.

it only stands to reason that Britain was not and is not an administering authority according to Resolution 1747 (XVI) because it did not take a hand in the day-to-day administration of Rhodesia, as it did in Kenya, Ghana, Sierra Leone and other former non-self-governing territories. The other point to be remembered is that all constitutional matters fall within the external affairs of Rhodesia for which Britain is responsible, for example, the 1923 Constitution, the Federal Constitution of Rhodesia and Nyasaland of 1953, the dissolution of the same Federal Constitution, and the 1961 Constitution. Southern Rhodesia Constitutions were all made in accordance with the acts of Parliament of the United Kingdom. In 1965, when the Smith Regime declared UDI over Southern Rhodesia, the British Government passed a Rhodesia Act of 1965 which declared the Smith Regime illegal and the actions it had taken to declare Rhodesia independent without an act of Parliament of Britain were treasonable under the same act. Smith and his Cabinet were considered private persons without any authority to make laws for Rhodesia but remained in effective control of the State apparatus; thus the regime remained the *de facto* Government of the country.

In this article I intend to trace the evolution of the four Rhodesian Constitutions since 1923 and to show their differences as well as the role Britain has played in influencing the development of these Constitutions.

The 1923 Constitution

In October 1923 a responsible Government was inaugurated under the Crown, while the latter retained certain controls over:

(a) any law, except in respect of the supply of arms, ammunition or liquor to natives, which subjects natives to conditions or restrictions which do not apply to Europeans;
(b) any law amending those provisions of the Constitution which the legislature was not competent to enact;
(c) any law establishing the proposed legislative council;
(d) any law altering or amending the arrangements in force at the time of granting the new Constitution relating to mining revenue or imposing any special taxation on minerals in or under land in the colony;
(e) any law dealing with railways within the colony until legislation had been passed adopting, with necessary modifications, the United Kingdom law dealing with railway and canal commissioners and the Rates Tribunal provided for in the Railway Act, 1923.[2]

The British Government reserved the right to veto any Rhodesian legislation that adversely affected the interests of the African inhabitants of Rhodesia or ran counter to Britain's international obligations, or affected the

2 Claire Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965* (London: OUP, 1966), pp. 136-137. Colin Leys, *European Politics in Southern Rhodesia* (London: OUP, 1959), pp. 39-40.

remaining rights of the British South Africa Company. From a legal point of view, the 1923 Constitution does not manifest an absolute prohibition. Its discriminatory element is patent in its terms. The discretion in each case is exercised not by the judiciary but first by the Governor, who must decide whether the legislation is in fact unequal in its application to Africans, and secondly by the Dominion Secretary, on behalf of the British Government, who makes his decisions and is uninhibited in the exercise of his powers by any rule of law.[3] Most of the above-mentioned reservations withered away in time so far as internal affairs were concerned, leaving only those which concerned differential legislation affecting the African population.[4]

The Land Apportionment Act

Despite the fact that under the 1923 Constitution the British Government had the right to intervene if there was to be any racial discriminatory legislation without reference to the Westminster Parliament, in 1930 the Southern Rhodesia Parliament passed a discriminatory law, the notorious Land Apportionment Act, 1930, which reserved for Europeans half the total land area. This legislation discriminates on the basis of race and discriminates against Africans only.[5] The act caused discontent and bitterness among African peasants whose ancestral land was alienated to Europeans. In short, the Africans were forced off the European farms and told to move into the Reserves.[6]

The Land Commission proposed that some 7.5 million acres of land be set aside as Native Purchase Areas and, at the request of the Chief Native Commissioner, recommended that this land adjoin the Reserves "so that the progressiveness of individual landowners could infiltrate into the reserves". The Commission also suggested that well over 17 million acres be reserved for future European purchase, and just less than 17.8 million acres, in remote and tsetse infested areas, be left unassigned for the time being. Only some 88,000 acres were classified as "Semi-neutral areas where members of either race could purchase land".[7]

3 Zdenek Cervenka, *Rhodesia Five Years After the UDI* (Hamburg, 1971).
4 *The European Year Book*, II, 1972, p. 1281
5 See the report of the Special Committee on the situation, with regard to the implementation of the declaration on the granting of independence to colonial countries and peoples, CA/5800/Rev.1, A/6000/Rev.1, A/6700/Rev.1; *Study of Apartheid and Racial Discrimination in Southern Africa*, Reports of the Special Rapporteur Appointed Under Resolution 7 (XXIII) and 3 (XXIV) of the Commission on Human Rights (E/CN.4/949 Add. 1-5, E/CN.4/979 Add. 1-8), Reports of the *ad hoc* Working of Experts Appointed Under Resolutions 2 (XXIII), 2 (XXIV) and 21 (XXV), of the Commission on Human Rights (E/4646, E/CN/984, Add. 1-8, E/CN.3/1020 Add. 1-3: E4791).
6 In 1925, a land commission was appointed under the chairmanship of Morris Carter "to enquire into . . . the expediency and practicability of setting apart defined areas outside the boundaries of Native Reserves: (a) within which natives only shall be permitted to acquire ownership of or interest in land and (b) within which only Europeans shall be permitted to acquire ownership of or interest in land" (see *Quinton Report*, Rhodesia Government Printer, 1960, paragraph 28).
7 *Quinton Report*, op. cit., paragraph 35; Carter Commission Report, (Salisbury: Government Printer, 1926), p. 63; George Cunningham, "Rhodesia: The Last chance," (Publication of the Fabian Society).

Table 1—THE LAND CATEGORIES UNDER THE LAND APPORTIONMENT ACT, 1930[8]

European Area	49,149,174
Native Reserves	21,600,000
Native Purchase Areas	7,464,566
Unassigned Land	17,793,300
Forest Area	590,500
Undetermined Land	88,540
TOTAL ...	96,686,080

The Select Committee on the Resettlement of Natives submitted a report to the Southern Rhodesia Parliament on 16 August 1960 in which it unanimously recommended the repeal of the Land Apportionment October Act of 1930. The report revealed that the committee had worked for more than two years in finding out the land requirements of the Africans said to be landless, or who had settled in areas where they had no rights of occupation. The committee stated that during this period its members had travelled over 20,000 miles and had taken 2,000 pages of evidence. It concluded that from every point of view it was illogical to reserve land in a particular area for exclusive purchase by members of one race to the exclusion of members of the other race. It recommended that, subject to certain prerequisites, the aim should be for rural land anywhere in Southern Rhodesia to be purchased by any person of any race or colour as soon as possible. This meant the repeal of the Land Apportionment Act[9] which in fact ran counter to the Southern Rhodesia Constitution Letters Patent which required an amendment before the act could be passed. Lastly, it should be noted that the Land Apportionment Act had the support of the British Government.[10]

Industrial Conciliation Act, 1934[11]

This act barred Africans from specified jobs and excluded them from wage and industrial agreements negotiated under it. Africans were in practice excluded from the greater part of the available skilled employment. This

8 *Quinton Report*, op. cit., paragraph 33.
9 *Rhodesia Herald*, 17-24 June 1961; *The Times*, 17 June 1961; the *Guardian*, 24 June 1961, Muriel Howard, ed., *Days of Crisis in Rhodesia* (Johannesburg: S.A.I.R.R., 1965), pp. 10-17.
10 Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965*, op. cit., p. 266: "To conclude, the makers of the land apportionment act urgently regarded their work as an essay in imperial trusteeship; the act owes its existence to the investigations of a commission headed by an 'Imperial Judge', and every single clause in the subsequent Bill passed through the slow mill of imperial scrutiny and approval. It is therefore but a travesty of the facts to regard the measure as borne of nothing but settler selfishness, and to read into this chapter of Rhodesian History a struggle between 'enlightened' Imperial and 'reactionary Rhodesian attitudes', whereas in fact London and Salisbury worked hand in hand throughout the formulation of the colony's land policy." (See the Native Archives of Rhodesia and Nyasaland, Occasional Papers, No. 1, June 1963, pp. 85-6.)
11 Leys, *European Politics in Southern Rhodesia*, op. cit., pp. 30-31; John Parker, *Rhodesia: Little White Island* (Pitman Publishers, 1972), pp. 30-31; (Rhodesia) Industrial Conciliation Act, 1934; Industrial Conciliation Act, No. 29 of 1959, section 29; Industrial Conciliation Act No. 76 of 1964; Rhodesia Ministry of Labour and Social Welfare, "Industrial Conciliation," Salisbury, mimeo, no date

meant that the employers would not take an African at the rate laid down for Europeans.

In 1934, there were very few white settlers in the country, and consequently there was a scarcity of skilled labour. It was decided to import skilled labour from outside Rhodesia rather than recruit and train indigenous Africans. Under the Industrial Conciliation Act it was not possible to have a trade union comprising of all races since the act's main purpose was to protect the European interest in the country. The European trade unions could not accept Africans as members on the understanding that the Africans would claim as high wages as those paid to their counterpart Europeans. The Industrial Conciliation Act and the Land Apportionment Act remained twin pillars of a native policy. It is on the basis of these two acts that the present regime bases its scheme of separate development. Under the 1923 Constitution the vote was given to all men who were British subjects over 21 years of age and literate enough to fill in the particulars on the application form, and provided they had an income of £100 per annum or occupied property or buildings worth £150 or owned a mining claim. In 1912 the qualification had been raised to £100, and the property qualification was raised to £150 in 1917; it was officially stated that if these limits were in danger of being reached by Africans they could be raised again. White women settlers were allowed to vote in 1919. The average wage of an African was £3 pounds a month, which meant that only Europeans were eligible for a vote although the 1923 Constitution did not say anything specifically about races.[12] Rhodesia was well aware that Africans could not reach the same economic level as the European settlers as long as the Government remained under Europeans. If ever the Africans appeared to be nearing the mark required for them to vote, the Government would simply raise the income and property qualifications. Thus Rhodesia based its political policies not on colour but on 'equal rights for all civilized men'.[13]

THE 1961 CONSTITUTION

The Southern Rhodesia Government requested of the British Government in 1959 that the Constitution of Southern Rhodesia should be revised.[14] This meant the alteration of some parts of the 1923 Constitution with a view to transferring to Southern Rhodesia the exercise of the powers vested in the British Government. After many consultations the British and the Southern

12 *The African Communist*, No. 49, second quarter 1972 (Inkululeko Publications).
13 Ibid. By "equal opportunity for all civilized men" Rhodes referred only to white settlers.
14 Jane Symonds, *Southern Rhodesia: Background to Crisis* (distributed for the Royal Institute of International Affairs by OUP), pp. 23-24; "Rhodesian Crisis: Legal Issues," excerpts from *Africa Research Bulletin*, V, p. 957ff, pp. 691-693; Sir Frank Soskice (Attorney-General) in the House of Commons, 8 November 1961 (*The Times*, 10 November 1961); *Rhodesia: Documents Relating to Proposals for a Settlement*, op. cit., p. 3; *Republic of Ghana: Statements on Southern Rhodesia by the President and Government of Ghana* (Accra: State Publishing Corporation, 1965).

Rhodesia Governments made an Order-in-Council embodying a new Constitution. The 1961 Constitution conferred on Southern Rhodesia powers for the amendment of her own Constitution and contained a number of important additional features such as the Declaration of Rights and the creation of a Constitutional Council, which was supposed to give confidence to all races of Southern Rhodesia that their legitimate interests would be guarded.

The Constitutional Council

The weakest point of the Constitutional Council was that it had advisory power only on new legislation which was regarded as being against the Declaration of Rights. The Constitutional Council had no power to veto any discriminatory legislation. Also, the Council could not exercise advisory functions on legislation which was already on the statute book. Thus it did not serve any purpose at all because the country already had notorious laws such as the Land Apportionment Act, 1930. In its report on the Land Apportionment Act, the Council questioned the value of the Declaration of Rights in protecting rights in the future so long as one of these rights, freedom from discrimination regarding ownership of land, was specifically denied by this act. But this did not change the position of the Land Apportionment Act because the act was older than the Constitutional Council.[15]

Other legislation which called for intervention by Britain included the Land Husbandry Act of 1951. In the words of B. V. Mutshaili, "The act violated the spirit of communal ownership and assistance and deprived the chiefs of their power over the people, to whom traditionally they allot land and in exchange get loyalty. Moreover, destocking means the reduction of the African's most highly prized possession, cattle, which is a measure of his wealth and status. The Africans feel the harsh effects of this law".

The laws which were reported by the Constitutional Council as being racially discriminatory are as follows:[16] The Native Education Act, 1959; the Native Affairs Act (Ch. 92); the Land Apportionment Act, 1941; the Criminal Procedure and Evidence Act (Ch. 31); the African Development Fund Act (Ch. 96); the (African) Registration and Identification Act (Ch. 109); the African Labour Regulations Act (Ch. 100); the National Registration Act (Ch. 136); the Municipal Act (Ch. 125); and the Township Management Act (Ch. 134). Yet all of these remained in force.[17] In other words, the

15 The Constitutional Council could give financial assistance to aggrieved individuals who wanted to challenge legislation which offended the Declaration of Righs in the courts. Once again, it did not apply to existing legislation; it could only give its views.

16 Frank, *Race and Nationalism* (London, 1960), p. 19; see also the Land Apportionment Act, 1930, *Carter Commission Report* (Salisbury: Government Printer), p. 63.

17 The Council unanimously agreed that if the Declaration of Rights applied, the Land Apportionment Act would be inconsistent with section 67 of the Declaration: "that no law shall contain any discriminatory provision under which any person is prejudiced on account of his race, tribe, colour and creed". See the *Carter Commission Report*, op. cit., p. 63.

Constitutional Council could not safeguard the interests of all races in Rhodesia. The Council consists of a Chairman and eleven members comprising two Europeans, two Africans, one Asian, one Coloured, and two persons who must be either advocates or attorneys of not less than ten years' standing. The Governor must appoint the chairman on the advice of the Chief Justice. All members are appointed by an electoral college, which includes the Chief Justice, puisne judges of the High Court and the president of the Council of Chiefs. Members must be at least thirty-five years of age, Southern Rhodesia citizens and have been resident in the country for ten of the previous fifteen years.

It should be understood that a complicated electoral system was devised to ensure that no more than 15 seats out of the House of 65 seats of the enlarged Legislative Assembly would be filled by Africans; the other 50 seats were reserved for the representatives of 223,000 European Settlers. And, since the Constitution could be amended by the vote of any 44 members, the 1961 Constitution left the legislation, including the amendment of the Constitution, at the discretion of the white minority settlers who commanded the required majority. The most astonishing aspect of the whole 1961 Constitution was that, although there were limitations (for example, the Rhodesian Legislature could not abolish appeals to the Judicial Committee of the Privy Council), the Rhodesian legislature had the power to create its own capacity. It had, in fact, the power to change the legal substance of its subordination to Britain.

The Declaration of Rights

This was an entrenched section of the Constitution which set out all the fundamental rights and freedoms to be enjoyed by the people of Southern Rhodesia. Such rights were supposed to apply without distinction to race, colour or creed. People were supposed to receive protection from infringement by the legislature, executive, corporate bodies or private persons. The courts would enforce the rights and there was to be an ultimate appeal to the Judicial Committee of the Privy Council.[18] The Declaration as it appears on paper sounds good but has never been put into practice and was not retroactive. Repressive legislation such as the Law and Order Maintenance Act and the Criminal Procedure Act (which deprives non-Europeans of the right to jury trial) in principle appears to cover the whole population but actually results in *de facto* discrimination against Africans.

The amended Electoral Act requires very high property qualifications

18 The most noticeable feature in the legal system of Southern Rhodesia is that there are separate courts for Africans and for non-Africans in respect of most civil litigation and for appeal cases. No distinction is made for criminal cases which are within the jurisdiction of the Magistrate Courts and the High Court. A jury system is available to non-Africans for criminal trials in the superior courts, however, whereas Africans have no right to a trial by jury. (E/CN.4/949/Add. 2, paragraphs 999, 1000, and paragraphs 1106, 1110).

for voting which most Africans do not possess.[19] Under the Vagrancy Act anyone living in town without employment for a period of three months can be arrested, and yet the Government does nothing to provide employment for the African people. Neither does it do anything to see to it that trained people are given the right jobs. The Declaration of Rights and even the Constitutional Council left the above-mentioned laws in full force and yet these laws are decisive in the normal life activities of the people in Rhodesia.

In Southern Rhodesia thousands of Africans are arrested without trial, Africans are not allowed to hold public meetings, people of different races are not allowed to live in the same area; of what use is the Declaration of Rights if the very basic human rights are denied.[20] Under the Declaration discrimination is prohibited—but not if it takes place under an existing act; arrest and detention without trial are prohibited—but not during an emergency and not if provided for by any existing act; there is freedom of expression—but Rhodesia's press is heavily censored in accordance with perfectly 'valid' exceptions to the rule. No trust ought to have been placed in the guarantees in the 1961 Constitution; the loopholes, carelessly or deviously left in, are too great.

The Franchise

All voters must be citizens of Southern Rhodesia over twenty-one years of age, with two years' continuous residence in the country and three months' residence in the constituency or electoral district immediately preceding application for enrolment. Voters must be able to complete the application for a voter's form, unassisted and in English. Apart from the above-mentioned voting qualifications additional qualifications are:

"A" Roll

(a) Income of £792 during each of two years preceding date of claim for enrolment or ownership of immovable property of value £1,650 or

(b) (i) Income of £528 during each of two years preceding date of claim for enrolment, or ownership of immovable property to the value of £1,100; and
(ii) Completion of a course of primary education of prescribed standard or

(c) (i) Income of £330 during each of two years preceding date of claim for enrolment, or ownership of immovable property to the value of £500; and

19 *Study of Apartheid and Racial Discrimination in Southern Africa*, Reports of the Special Rapporteur appointed under Resolutions 7 (XXIII) and 3 (XXXIV) of the Commission on Human Rights (E/CN.4/949 and Add. 1.5; E/CN.4/979 and Add. 1-8).
20 See George Cunningham, *Rhodesia: the Last Chance*, op. cit., pp. 6-7.

(ii) Four years' secondary education of prescribed standard or
(d) Appointment to the office of Chief or Headman.[21]

Thus most Africans were excluded from the "A" role by this requirement and there was no chance whatsoever of an advance in average African incomes fast enough to give Africans a majority. According to Sir Edgar Whitehead, the 1961 franchise was intended to provide a prospect of an African majority at a date perhaps ten or twenty years ahead. It was impossible to estimate how long it would take for an African majority to emerge under that system because so much depended on the pace of education and economic advance, and that in turn would depend on the policies of a white dominated Government that was very conscious of the effect of its policies on the electoral register.

"B" Roll

(a) Income at the rate of £264 per annum during the six months preceding date of claim for enrolment or ownership of immovable property to the value of £495 or

(b) (i) Income at the rate of £132 per a claim for enrolment, or ownership of immovable property to the value of £275 and
(ii) Two years' secondary education, or

(c) Persons over thirty years of age with
(i) Income at the rate of £132 per annum during the six months preceding date of claim for enrolment or ownership of immovable property to the value of £275; and
(ii) Completion of a course of primary education of a prescribed standard, or

(d) Persons over thirty years of age with income at the rate of £198 per annum during the six months preceding date of claim for enrolment, or ownership of immovable property to the value of £385, or

(e) All Kraal heads with a following of twenty or more heads of families, or

(f) Ministers of religion.[22]

The 1961 Constitution was opposed by the Africans who boycotted its elections. Their main reason was that the Constitution had been designed to perpetuate white supremacy. The National Democratic Party (the only African dominated party) maintained that "one man one vote was the only realistic solution to the question of the franchise". The United Federal Party said

21 The above-mentioned figures include the recent 10% increase in the financial qualifications, added because of the decline in the value of money (see Southern Rhodesia Proclamation 32, 1964).
22 Southern Rhodesia Proclamation 32, 1964.

that it recognized that Africans must over the years play an increasing part in the affairs of the country but stressed the importance of not lowering the qualifications for the franchise. The Dominion Party advocated: (i) that there should be no change in so far as this would involve a lowering of existing standards; (ii) that the lower roll should be eliminated; and (iii) that a monetary qualification should be related to the current value of money. The Dominion Party advocated separate development, i.e., no change in the running of the country. It came out clearly with its racial policies when it suggested that the lower roll which gave Africans the opportunity to be eligible for a vote should be abolished. The Central African Party advocated a simple franchise qualification of literacy in English and the inclusion of additional categories of persons holding responsible positions in public services who would not necessarily be literate in English.

The British Government never gave any direction as to what policy the different political parties should follow in the creation of the 1961 Constitution. Instead, the British Government felt that the Constitution should be given a fair trial. All told, the African voice at the Constitutional Conference should have been respected because the NDP represented the majority.

The 1961 Constitution is worse than the earlier one in the sense that the so-called "guarantees" are riddled with loopholes. It is of historical significance in the sense that Britain, instead of taking a tougher line against discriminatory laws, allowed the situation to deteriorate by removing its power to vote against such laws and thus gave more power to the Smith regime to rule the Africans in any way it liked.[23] In 1962 the General Assembly affirmed that Southern Rhodesia was a non-self-governing territory according to Chapter XI of the Charter.[24] The United Kingdom, however, maintained that Southern Rhodesia was self-governing and, therefore, that the British Government had no power to interfere in Southern Rhodesia's internal affairs. Britain refuses to exercise her sovereign authority over Rhodesia on the grounds of this 'convention'. Legally it should be understood that Britain's sovereignty over Rhodesia establishes not only rights but also duties. Britain has an inescapable responsibility of ensuring that the majority of the people of the colony of Southern Rhodesia comes to power in conformity with the principles of international law and in accordance with Article 73 of the UN Charter.

Following detailed examination of the situation by the Special Committee

23 Rhodesian legislation allows arrest without warrant and detention without trial for indefinite periods. Under the Law and Order (Maintenance) Act as amended in 1967, death sentences became mandatory. Large numbers of Africans and very few Europeans were prosecuted under this act. In addition, the freedom of movement of the individual may be restricted by Executive Order. Between July 1965 and July 1967, restriction orders were served on 506 Africans and 14 Europeans. See E/CN.4/949/Add. 2, paragraphs 1081, 1082, E/CN.4/984/Add. 8, paragraphs 6, 69-80.

24 *Pan-African Journal*, V, No. 1, p. 27. See also General Assembly, 1960 Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples.

of Twenty-Four in 1962, 1963 and 1964, the General Assembly adopted a number of resolutions calling upon the United Kingdom Government to suspend the 1961 Constitution which virtually disenfranchised the African majority, and to formulate with the participation of all political parties, a new Constitution based on the principle of one man one vote. The Assembly further asked the United Kingdom not to grant independence until majority rule based on universal franchise had been established.[25] The OAU, the Commonwealth and certain individual African Governments also demanded that Britain should suspend the 1961 Constitution.[26]

The 1965 Constitution

The 1961 Constitution was not a Constitution for independence. It was replaced by the 1965 Constitution[27] which had some provisions purporting to legalize the seizure of independence. The British powers or responsibilities over Southern Rhodesia were removed; the Governor, representing the Queen, could no longer be recognized as the head of the State. According to the Smith regime, the British authority over Rhodesia came to an end with the 1965 Constitution.

But this last Constitution was challenged inside and outside Rhodesia. For example, when the Rhodesian Parliament met for the first time after UDI its constitutionality was challenged by Dr. A. Palley. He was, however, overruled by the Speaker who went on to suggest that any member who felt bound by the Southern Rhodesian (1965) Act of the United Kingdom should dissociate himself from the day's business. The Speaker then made a statement declaring that he had accepted the 1965 Constitution as binding on all proceedings of the House.[28]

There were, of course, fundamental differences between the 1961 Constitution and the 1965 Constitution. Among these were the abolition of the rights of appeal to the Judicial Committee of the Privy Council, and the interim provisions to amend or modify any section of the Constitution within six months. Another change of considerable significance was that the 1965 Constitution provided that amendment of any section of the Constitution was within the competence of the Rhodesian Parliament. The Smith regime

25 United Nations Council 126, 3rd Meeting, Provisional Verbal Record, 19 November 1965, S/P.V. 1263, pp. 11-12. See also, British Institute of International and Comparative Law, *British Practice in International Law* (London: Eastern Press, 1965), pp. 93-108.

26 B. V. Mtshali, *Rhodesia: Background to Conflict* (New York: Hawthorne Books, 1967), p. 5; *Republic of Ghana: Statements on Southern Rhodesia by the President and Government of Ghana*, op. cit.

27 See "The United Nations and the Problems of Sanctions," *Pan-African Journal*, V, No. 1 (Spring, 1972), p. 27; *Rhodesia: Proposal for a Constitution* (South African Research Office, February 1972), p. 11; Parker, *Rhodesia: Little White Island*, op. cit., pp. 96-107; Cunningham, *Rhodesia: The Last Chance*, op. cit.; *The Times*, 9 November 1961.

28 *Parliamentary Debates*, 25 November 1965, cols. 1939-1942; C. Palley, "The Judicial Process: UDI and the Southern Rhodesia Judiciary," *Modern Law Review*, 30 (1967), pp. 263-87; L. J. MacFarlane, "Pronouncing on Rebellion: The Rhodesian Courts and UDI," *Public Law* (1968), pp. 325-61; Reg Austin, *The Character and Legislation of the Rhodesian Front Since UDI* (London: The Africa Bureau, March 1968).

employed a new amending procedure not only to ensure legal continuity from the 1965 to the 1969 Constitution, but also to alter part of the entrenched sections of the Constitution. With the coming into force of the 1965 Constitution and the introduction of the Constitution Amendment Act of August 1966, the Government could appoint tribal courts and remove the existing necessity of getting the permission of the Tribal Trust Lands Board of Trustees before institution of new development plans in the Trust Lands.[29]

As stated at the beginning of this article, the 1965 Constitution is illegal in accordance with the British Acts of Parliament of 1961 and 1965 which stipulate that the Southern Rhodesian Constitution must be conferred or amended only by acts of British Parliament.[30] Smith and his Ministers, according to the British Act of Parliament, were regarded as private persons and could exercise no legal authority in Rhodesia. Thus any legislation made by them was invalid under British law. According to the words of Harold Wilson, at the time Prime Minister of Britain, UDI was an act of rebellion against the Crown, against the Constitution as established by law, and actions taken to give it effect were to be considered treasonable.[31] But despite all the acts of British Parliament and all the forceful words of Harold Wilson, the Smith Regime went ahead with its plans. Although the British Government insisted that Rhodesia was still a colony and that the Smith regime should go back to the 1961 Constitution, and all negotiations between Britain and the Rhodesian illegal regime were conducted on the basis of the 1961 Constitution, today in Rhodesia the 1969 Constitution is regarded as fundamental law and it is under its directive that the country is ruled. Indeed, although the British Government sticks to the 1961 Constitution, it appears that the regime has received a *de facto* recognition from Britain itself. Although under the Rhodesia Act, 1965, of the British Government, Smith and his Cabinet are considered private persons, Britain discussed all the Rhodesian constitutional matters with them.[32]

Economic Sanctions on Rhodesia

Immediately after the UDI (11 November 1965) the British Government imposed economic sanctions against the rebel regime. The following are some of the legal consequences:[33]

1. Rhodesia was expelled from the sterling area and Commonwealth preference on purchase of Rhodesian goods was ended;

29 Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965*, op. cit., pp. 751-56.
30 *Rhodesia: Documents Relating to Proposals for a Settlement, 1966*, op. cit., p. 3.
31 Ibid.
32 On 10 November 1971, the House of Commons approved the Southern Rhodesia Act 1965 (Constitution) Order 1971. The purpose of the order is to continue to enforce Section 2 of the Southern Rhodesia Act 1965, which gives the Queen-in-Council the power to take whatever measures are necessary to deal with the Constitution in the territory brought about by the illegal declaration of independence. The order authorized, *inter alia*, the continuation of sanctions against Southern Rhodesia for another year. (See UN General Assembly, A/8723/Add. 1, 28 August 1972).
33 *British Practice in International Law*, op. cit., pp. 101-103, 176.

2. The removal of Rhodesia from the Commonwealth sugar agreement which had preserved high prices for Rhodesian sugar exports;
3. A complete ban on purchases by Britons of Rhodesian tobacco or sugar was imposed;
4. Exports to Rhodesia could no longer be financed through the Export Credit Guarantees Department;
5. Transfers from British firms to Rhodesian subsidiaries (including banks) were forbidden;
6. The payment of dividends and interests and of pensions to Rhodesian residents was to be put into blocked accounts in London;
7. The Board of the Reserve Bank of Rhodesia was dismissed and replaced by a British Board;
8. Banks were forbidden to finance trade between Rhodesia and third countries;
9. A complete ban on the sales of oil by British firms to Rhodesia.

Other countries followed Britain's example and imposed sanctions on Rhodesia in compliance with the UN resolution calling for a complete economic embargo. The table below gives a summary of most of the trade sanctions imposed against Rhodesia by 16 January 1966.[34]

Table 2—SUMMARY OF TRADE SANCTIONS APPLIED AGAINST RHODESIA SINCE 11 NOVEMBER, 1965

Country	*Imports Banned*	*Percentage of Rhodesian Exports Affected*	*Remarks*
Australia	tobacco	0.5	exports subject to licence
Belgium	tobacco, sugar	1.0	exports of arms and oil banned and all trade subject to licence
Canada	tobacco, sugar chrome	1.0	—
Denmark Norway Sweden	all goods subject to licence	up to 2.0	exports also subject to licence
Egypt	—	—	—
France	tobacco	0.5	—
Greece	—	—	ban on export of arms
Holland	tobacco	1.0	ban on arms and oil exports, all trade subject to licence

34 R. B. Sutcliffe, *Sanctions Against Rhodesia, the Economic Background* (London: The Africa Bureau, 21 January 1966).

Table 2—(Continued)

Country	*Imports Banned*	*Percentage of Rhodesian Exports Affected*	*Remarks*
Italy	tobacco, sugar	negligible	main import is copper
Japan	tobacco, pig-iron	3.3	—
Jordan	all goods	negligible	all exports banned
Malawi	—	1.0	trade agreement favourable to Rhodesia ended
Malaysia	all goods subject to exchange control	up to 0.5	may continue to import tobacco
New Zealand	tobacco	0.5	all imports subject to control
Pakistan	—	—	about to apply sanctions
Singapore	all goods	negligible	all exports banned
United Kingdom	tobacco, sugar, chrome, copper meat, tea, maize, vegetables	23.0	arms exports banned, end of Commonwealth preference
USA	tobacco, sugar	2.0	expected to ban chrome and lithium (huge imports attempted 1972)
Zambia	non-essential imports	10.0	—
USSR	tobacco	0.2	—
West Germany	tobacco	4.8	—
Arab League	all goods	negligible	total economic boycott
EEC	—	—	commission offer to co-ordinate sanctions
All other OAU countries	all goods	2.8	—

Total exports roughly 52.55%.

Note: The countries participating in the oil boycott are as follows: Britain, France, Italy, USA (advisory ban), Holland, Belgium, Iran, Iraq, Kuwait, Libya.

The Effects of Sanctions

Economic sanctions alone cannot be expected to topple the Smith regime because of South Africa and Portugal which are responsible for the unequivocal evasion of sanctions. Until these two countries are also economically boycotted sanctions cannot work. It is obvious that South Africa and Portugal have vested interests in Rhodesia and for that reason they refuse to comply with the UN resolution on the economic embargo of Rhodesia. It is also an open secret that most European countries would not apply an economic boycott to Portugal for fear of antagonizing their NATO ally. Economic boycotts have been tried on South Africa but because of the European major business interests there has been unequivocal evasion of sanctions. The general effects of sanctions can be summed up as follows:

(a) They have denied outright victory to the Smith regime;
(b) They have kept Rhodesia in a state of complete diplomatic isolation;
(c) They have forced the regime to go on struggling for economic survival at ever rising costs to itself;
(d) They have encouraged and strengthened international opposition to the regime by demonstrating continuing world interest in its cause;
(e) They have maintained international concern over the Rhodesian issue;
(f) They have sustained the world view of the unacceptability of the regime.

The Franchise Based on the 1965 Constitution

The individual qualifications for registration are shown below.

European Roll and African Higher Roll Qualifications

(a) Income of not less than £1,800 per annum during the two years preceding date of claim for enrolment, or ownership of immovable property to the value of not less than £3,600;
(b) (i) income of not less than £1,200 per annum during the two years preceding date of claim for enrolment or ownership of immovable property to the value of not less than £2,400;
(ii) Four years' secondary education of prescribed standard.

African Lower Roll Qualifications

(a) Income of not less than £600 per annum during the two years preceding date of claim for enrolment, or ownership of immovable property to the value of not less than £1,100;
(b) (i) Income of not less than £300 per annum during the two years preceding date of claim for enrolment or ownership of immovable property to the value of not less than £600; and
(ii) two years' secondary education to a prescribed standard; or
(c) Persons over 30 years of age with

(i) Income of not less than £300 per annum during the two years preceding the date of claim for enrolment or ownership of immovable property to the value of not less than £600; and

(ii) Completion of a course of primary education to a prescribed standard;

(d) Persons over thirty years of age with an income of not less than £430 per annum during the two years preceding the date of claim for enrolment or ownership of immovable property of not less than £800;

(e) All Kraal heads with a following of twenty or more heads of families.[35]

It is quite clear that the franchise is based on racial discrimination with one roll for Europeans and Africans who receive high wages and with high educational qualifications; and a second roll, known as the African Lower Roll, which suggests that no European can go so low as to be on it. The impression might be given that although most Africans cannot qualify to register on the European Roll and the African Higher Roll, they can still register on the African Lower Roll thus enabling them to vote. This is a false impression. The Lower Roll could not elect more than eight Members of Parliament irrespective of whether the number of the voters increased or not.

It is clear that the factors which determine how many Africans qualify for a vote are firstly education and secondly wages. The educational system is designed so that the majority of African children enter at the base—there are about 700,000 in the system—but few emerge at the top of the pyramid. In forty years of African education in Rhodesia only 10,000 have attained 'O level' education. The official reason for providing little secondary education is that 73% of the children who emerge from primary school cannot cope with secondary education. On the other hand, education for European children is compulsory. Now that the Smith regime has introduced a new education policy akin to the South African Bantu Education which aims to make African children 'workers', they are geared to study such subjects as agriculture, technical subjects, handicrafts, commercial subjects, or home-making. The contrast in the attitudes to education of European and African children is striking and clearly demonstrated by the division in the education budget: it provided in 1965, £9.9 per annum for each African child and £99 per annum for each European child. The reason, of course, is political; if more Africans are educated more will be eligible to vote. To quote Mr. Smith: "It was not Rhodesia's policy to educate her people for the purpose of assisting them to vote."[36]

35 See Rhodesia Constitution 1965.
36 *Rhodesia: Documents Relating to Proposals for a Settlement, 1966*, op. cit.

The 1969 Constitution

On 2 March 1970 Southern Rhodesia was proclaimed a Republic by the illegal regime. This meant that the regime brought into effect the Constitution approved in 1969. The republican Constitution has no legal status. The United Kingdom Government declared that the purported assumption of a republican status by the regime in Southern Rhodesia is like the 1965 declaration of independence itself, illegal.[37] From the point of view of British constitutional law, Rhodesia remained a British colony and the Smith regime remained illegal. But according to Rhodesia, the 1969 Constitution marked the final break with Britain and its entrenched provisions were intended to perpetuate rule by the white minority. The 1969 Constitution permanently precludes any possibility of progress beyond parity of representation in the House of Assembly between Europeans and Africans.

The 1969 Constitution contained an entrenched Land Tenure Act which divided Southern Rhodesia almost equally between Europeans and Africans. This law was designed to replace the then existing Land Apportionment Act, and under it all land in Rhodesia was to be divided into a European area of 44,952,900 acres, an African area of 44,944,500 acres and 6,617,500 acres of National land, although for land tenure purposes the Bill did not differentiate between Europeans, Asians and Coloureds.[38] The main industrial and urban areas are all in the European section, and Africans cannot live or trade in them. The President may determine when land shall be transferred from one area to another, and the Minister may at his pleasure alter boundaries on the advice of a board. Africans are required to have permits to live and work in the European area. There is a commission which examines the restrictions on the movement of individuals between the European and African areas and also considers the question of removing restrictions on professional Africans who may be practising in a European area.

Under the Land Tenure Act many Africans have been removed from their homes to other places not of their choice. During the second half of 1972, the Rhodesian Government continued to implement the Land Tenure Act and Parliament approved legislation which in effect introduced additional racial discrimination. Under this act the police took action on 25-27 July 1972[39] against members of the Tangwena tribe because they were said to be illegally occupying land on the Gaeresi ranch which was classified as in the European area. Several hundred Africans were reported to have fled while 110 of their children were taken to unknown places by the Rhodesian authorities.[40] On 1 November regulations were issued under the Land Tenure

37 UN General Assembly, A/8723/Add. 1, 28, August 1972.
38 Official Records of the General Assembly, twenty-fifth session, Supplement No. 23 (A/8023/Rev. 1), Chapter V, Annex, paragraphs 14-29.
39 *The Rhodesian Herald*, 25 July 1972.
40 See *Rhodesia: The Ousting of the Tangwena*, an International Defence and Aid Fund pamphlet. "The Government in Rhodesia by its new legislation is committed politically to a policy of racial separate development. The Church is committed divinely to a policy of non-racial free development. These two policies are fundamentally opposed. The Government in direct contradiction of Christian teaching has entrenched separation and discrimination. Basing its argument on

Act preventing Africans from drinking in bars in white areas after 7 p.m. and on Saturday afternoons and Sundays.

Mr. Justice Benny Goldin, however, in a High Court judgment on 16 November, declared the regulations to be outside the terms of the act and thus *ultra vires*.[41] The Government appealed against this decision on 17 November. During the Session which ended on 8 December, the House of Assembly passed a number of Bills which imposed new restrictions on non-whites. Under an African's (Registration and Identification) Amendment Bill introduced by Mr. Lance Smith, the Minister of Internal Affairs, Africans were required under penalty of a fine of R $100 (£50) or one year's imprisonment or both, to carry valid identity documents and were forbidden to leave Rhodesia without a permit issued by a registration officer. The Bill also enabled the Government to deport foreign Africans who had registration certificates.

Removal of the Common Roll

The 1969 Constitution provided entrenched provisions of the Electoral Act, 1969, as follows:[42]

(a) *European Roll:* either an income of £900 or property to the value of £1,800, or an income of £600 or property to the value of £1,200 and four years' secondary education;

(b) *African Roll:* either an income of £300 or property to the value of £600 or an income of £200 or property to the value of £400 and two years' secondary education;

(c) *Common to Both Rolls:* citizens of Rhodesia over 21 years with an adequate knowledge of English and able to complete the application form in own writing.

The 1969 Constitution contains a number of discriminatory measures as regards the political rights of the African majority. One of the main features is the elimination of a common electoral roll and its replacement by two separate electoral rolls based on race. Furthermore, it deprives the African majority of adequate representation in Parliament.

The Bill was strongly attacked during the second reading debate in the House of Assembly on 21 November[43] by MPs as well as by Mr. Allan Savory (Rhodesian Party). Outside the House, the withdrawal of the Bill was called for by the Right Rev. Paul Burrough and the Right Rev. Mark

racial differences, it has introduced restrictive legislation which equivalently denies fundamental human rights", contained in a booklet published by the Mambo Press of the Rhodesian Catholic Bishops' Conference.

41 *The Times*, 16 November 1972; *Guardian*, 16 November 1972; "Rhodesia: The Salisbury Agreement," published by the Department of International Affairs, British Council of Churches Conference of British Missionary Societies, 1972.

42 *Rhodesia: Proposals for a Settlement*, presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, November 1971 (Cmnd. 4835).

43 *The Times*, 21 November 1972.

Wood (the Anglican Bishops of Mashonaland and Matabeleland respectively), who described it as "discriminatory". On 8 December, Parliament approved the second reading, and the committee stages and third stages reading of a Bill amending the Deeds Registration Act, under which white residents were enabled to register conditions of residence in their area, with the effect that Asians and Coloured people could be excluded from living in white-settled areas (from which Africans were already excluded under the Land Tenure Act).

Conclusion

Despite the fact that Rhodesia has had four Constitutions, two of which were created by Act of the Westminster Parliament as an administering authority over Southern Rhodesia (1923 and 1961), and the other two created by Act of Parliament of Southern Rhodesia regarded as (1) the Independent Constitution (1965) and (2) the Republic Constitution (1969), Rhodesia is in legal terms still a British colony. This is so because constitutionally, independence can be granted only by Parliament at Westminster. The Westminster Rhodesia Act, 1965, invalidates the 1965 and 1969 Constitutions, and according to the Westminster Rhodesia Act, 1965, Smith and his Cabinet are regarded as private persons and any laws or Constitutions made after the passing of the 1965 Act have no legal force.

On the other hand, Britain did nothing to replace the Rhodesian Cabinet with a body that would act on behalf of the British Government. As a result, the Rhodesian regime remains the *de facto* Government in Rhodesia because it is in effective control of the State apparatus. Britain has neglected her duties in Rhodesia which has developed into a police State, where rule is in the hands of a few fanatics, who by their fanatical laws detain anyone who opposes their oppressive and discriminatory action against Africans. Britain still regards Rhodesia as a self-governing territory; as a result she does not want to interfere in her internal matters. Britain claims that Rhodesia is still her colony under the Crown but at the same time she refuses to exercise her sovereignty over Rhodesia because of a convention. The British Government as the administering authority has not only rights but duties over Rhodesia, some of which are stated in the Charter of the UN, Article 73. If the British Government seriously feels it cannot interfere with the Rhodesian internal affairs it stands to reason that Britain was and is not an "administering authority" in the UN sense.

My own view is that although the British Government regards Rhodesia as her colony, she has lost her grip of the situation. But again this does not make Rhodesia a subject of international law for the simple reason that no Government is prepared to recognize such a regime besides Portugal and South Africa. It cannot become a member of the Commonwealth, the United Nations and its agencies. The Rhodesia regime is the *de facto* Government but receives no confidence from most other Governments. Indeed if there was a Government in exile it is likely that many States in the UN would

recognize it as the *de jure* Government. And if a liberation movement were given enough material help to be able to occupy a portion of the land in the country, it might be regarded as a subject of international law. Meanwhile, the Smith regime will not abdicate from power without force and Britain has said that she will not use force in Rhodesia. The economic sanctions cannot work successfully unless they too are applied to South Africa and Portugal. Force can only come from the people of Zimbabwe themselves through their party leadership and through the help of sympathetic Governments.

The British Government made several mistakes. It encouraged the Smith regime to take illegal action firstly by announcing that Britain would not use force in the event of UDI. Thus the Smith regime was encouraged to make a further and deplorable step in the wrong direction for Southern Rhodesia, for Africa, and for the world. Secondly, when Smith and his Cabinet were dismissed from the Government and regarded as private persons, the British Government did not appoint a body which would act as a provisional Government until such time as general elections could be held based on the principle of one man one vote. Because of her failure to appoint this body, the State organs (police, army, judiciary, etc.) were left without an authoritative body from which they could get instructions. The instructions from the British Governor that all civil servants should remain loyal to the Queen and should not do anything to help the illegal regime, were not backed up by action. Britain allowed a situation to develop whereby the State organs had no choice but to obey the Smith regime as the effective Government of the country. Under normal conditions the British Government should have arrested the whole Cabinet for taking the law into its own hands, and while these people were under arrest a new Constitution could have been made giving the people equal opportunities to vote and elect a new Government. But perhaps it was never the intention of the British Government that there should be majority rule in Rhodesia.

All four of Rhodesia's Constitutions contain mass oppressive legislation. Guided by the present generation of white politicians in Rhodesia, one concludes that there will never be a voluntary end to European domination. Even if the five million Africans qualified as voters today, we would not smell the scent of freedom and majority control, because the Legislative Assembly, the army, the civil administration and the judiciary have remained in the hands of the white minority. The African people, as the majority in Rhodesia, and the natural owners of the country, must achieve real substantive power. They will be forced to seize power by force of arms.

Lesotho, an Island Country: The Problems of Being Land-Locked

T. THAHANE*

For convenience, this discussion of the problems of Lesotho as a land-locked State will be divided into three parts. In Part One a brief review of the development within the international community of an awareness of the problems of land-locked States will be made. This should place in perspective the present world interest in the problems of land-locked countries and the search for internationally accepted solutions to these problems. In Part Two some general and theoretical considerations which may go a long way to explain some of Lesotho's unique problems will be raised. Part Three will focus exclusively on Lesotho, its controversial past and the subsequent political and economic problems which it now faces. There are no specific criteria for ordering the discussion in this manner. However, the writer feels that Lesotho's problems will be better appreciated against the points raised in Parts One and Two.

I

Before the political liberation from colonial rule of countries in Africa, Asia and Latin America, the international debates on the rights of land-locked States centred around Europe which contains a few independent, land-locked countries. While the majority of land-locked European States enjoyed bilateral agreements which were designed to facilitate transit, it is also fair to state that multilateral conventions only began with the end of the First World War. As Dr. A. Hakim Tabibi observes:

> The Treaty of Versailles in Articles 338 and 379 considered the problem of transit an important question in the world. Article 23 (e) of the Covenant of the League also contains the relevant provisions which made the council of the League of Nations convene a conference on freedom of transit in Barcelona in 1921.[1]

Switzerland, a land-locked State with considerable trade and economic interests, fought hard to get the rights of land-locked countries recognized. It claimed the right to fly its flag on the high seas in a memorandum to the President of the Paris Peace Conference in 1919 and later to the Barcelona Conference in 1921. The latter conference recognized the right of all land-locked States to fly a maritime flag. In later years, the

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1 A. H. Tabibi, *The Right of Transit of Land-locked Countries* (Kabul, Afghanistan: Afghan Book Publishing House, 1970), p. 1.