

For the record No. 2



**ZIMBABWE
RHODESIA'S
NEW
CONSTITUTION**



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CONSTITUTION OF ZIMBABWE RHODESIA, 1979

The Constitution of Zimbabwe Rhodesia, 1979, is based on the Rhodesian Constitutional Agreement signed at Salisbury on 3rd March, 1978, by the Hon. I. D. Smith, on behalf of the Rhodesian Government; Bishop A. Muzorewa, on behalf of the United National African Council (UANC); the Rev. N. Sithole, on behalf of the African National Council (Sithole) (as ZANU was then called); and Senator Chief Chirau, on behalf of the Zimbabwe United People's Organization (ZUPO).

At that stage, Senator Chief Ndiweni, the present leader of the United National Federal Party (UNFP), was the Vice-President of ZUPO and was present at the talks leading up to the Agreement.

The negotiations took place over a period of three months and the basic principles for the new Constitution, which were unanimously agreed, were as follows—

- (a) there would be a Common Voters' Roll, with all citizens of 18 years and over being eligible for registration;
- (b) in the Legislative Assembly there would be 72 seats reserved for blacks and 28 reserved for whites;
- (c) there would be a justiciable Declaration of Rights protecting the rights and freedom of individuals;
- (d) the independence and qualifications of the judiciary would be entrenched and judges would have security of tenure of office;
- (e) the Public Service, Police Force, Defence Forces and Prison Service would be maintained in a high state of efficiency and free from political interference.

The March 3rd Agreement also provided for the establishment of a Transitional Government, which would be responsible for the preparation and drafting of a new Constitution based on these principles.

A Constitution Drafting Committee was established under the chairmanship of the Director of Legal Drafting (a civil servant) and the UANC, ZANU and ZUPO each appointed two members to this Committee and the Rhodesian Front, one member. With

one exception, the members were either advocates or attorneys. Thus, each of the signatories to the March 3rd Agreement had his representatives on the Constitution Drafting Committee to ensure the draft Constitution contained the principles that had been agreed, and otherwise contained provisions acceptable to the parties. When a final draft of each chapter had been approved by the Constitution Drafting Committee, it was submitted to the Ministerial Council (which consisted of nine black members and nine white members) for discussion and comments.

In the Ministerial Council all the political parties involved in the March 3rd Agreement were represented and had a full opportunity to discuss the drafts. Thereafter, each draft chapter was submitted to the Executive Council, which consisted of the four leaders of the parties concerned (being three black members and one white member). This Executive Council operated on a basis of consensus, so any member could have rejected any provision to which he or his party took exception.

Thus, all the parties to the March 3rd Agreement participated fully in the drafting of the Constitution and in the subsequent steps of considering and approving the legal drafts before the final Bill was submitted to Parliament for enactment. The black parties and their leaders concurred fully and freely with the provisions.

At the election, which was held under the new Constitution, to elect the 72 black members, 1 869 077 people, constituting 64.45 per cent. of the voting population, cast their votes for the various parties contesting the election. Of the parties which participated in the election, only the NDU, which received 18 170 votes — 1 per cent. of the valid votes cast — was not represented during the discussions leading up to the March 3rd Agreement and the subsequent preparation of the new Constitution.

It is obvious from the above that the blacks in Zimbabwe Rhodesia have accepted the new Constitution and therefore no referendum is necessary.

White representation

The principle that the white community should have separate white representation in the House of Assembly is not a novel principle. In the Zambia Independence Order, 1964, provision

was made for a National Assembly of 75 elected members and up to five nominated members. Of the elected members, 10 were whites elected by whites on a special White Voters' Roll. In the Fiji Independence Order, 1970, provision was made for separate voters' rolls for Indians, Fijians and Others, in addition to the National Roll, and a specific number of members of the House of Representatives had to be Indian, Fijian or "Other" and registered on the appropriate racial roll.

Likewise, the Mauritius Independence Order, 1968, contained racial provisions in Schedule 1 which provided for a Hindu Community, a Muslim Community, a Sino-Mauritian Community, with the General Population as a fourth Community, and eight seats in the Legislative Assembly were allocated to members of the various registered political parties based on the racial community to which the candidate belonged. Even the Anglo-American proposals for the settlement of the Rhodesia question envisaged that there would be an Assembly consisting of 100 members elected by voters on the Common Roll, with an additional 20 members to cater for the separate representation of the white community.

With regard to the proportion of white members in the House of Assembly, it must be remembered that the British Government in 1971 accepted that there would be "majority rule" in Rhodesia if there was a House of Assembly consisting of 50 blacks elected by black voters, 50 whites elected by white voters and 10 additional members elected by black and white voters. Although the support of some of the white members will be required for any amendment to specified parts of the Constitution or to parts of eight Acts presently in force, it cannot be truthfully stated that the whites "have carved out vast residual power for themselves". This is a completely false statement of the new Constitution.

Commissions

To give effect to the independence of the Public Service and Prison Service, a Public Service Commission was established and given the function of making appointments to, and discharges from, the Public Service and Prison Service.

The establishment of such a Commission has been adopted in many other Constitutions in an attempt to maintain a Public

Service free from political interference. In addition, in the Constitution of Zimbabwe Rhodesia it is provided that the Public Service Commission will make appointments on merit and thus considerations of race or political preference cannot be allowed to influence the Commission.

The members of the Transitional Government accepted that, in order to maintain the present high standards in the Public Service and the Prison Service, it was essential the majority of members of the Commission should be people who had held high office in the Public Service for a number of years, because such people could be expected to understand the needs and requirements of the Public Service and the Prison Service. At present, the Public Service Commission consists of one black and three white members.

There are a number of blacks in the Public Service who presently hold posts which are equivalent to Under-Secretary in a Ministry and therefore within two or three years there will be sufficient specially qualified blacks to ensure that the majority of the members of the Commission will be black if the Government of the day so wishes. It is expected, though, that future appointments to the Commission will be again made on the basis of merit and not on racial grounds. It must be noted, of course, that the members of the Commission, including the white members, are appointed by the President, who is black, on the recommendation of the Executive Council, of which more than two-thirds of the members are blacks.

In relation to the Police and Defence Forces, it was similarly agreed that these should be maintained as efficient forces free from political interference. The principle set out in the Mauritius Independence Order, 1968, was adopted whereby the Commissioner of Police and Commanders of the Army and Air Force are given command of the appropriate force with responsibility for the administration thereof, subject to any general directions of policy given by the Prime Minister or any other designated Minister.

The only novel provision in the Zimbabwe Rhodesia Constitution is that providing that the Commissioner or Commander should be appointed from people who have held senior rank in the force concerned for a specified period. This was done to

maintain the traditions of the various forces and to retain the confidence of the members serving in the forces.

Obviously, a person who has knowledge of local conditions and has worked his way through the ranks is better fitted to command than an outsider would be. The Constitution also provides for the establishment of a Police Service Commission and a Defence Forces Service Commission. The concept behind these two Commissions is the same as the concept behind the Public Service Commission but, because they deal with disciplined forces, the Commissioner and the Commanders obviously have to have greater powers of command. Although, in the case of these two Commissions it will be at least five years before there are black specially qualified members, there will be two black members and two white members from the start, with the chairman of the Public Service Commission as a common chairman.

Reserved seats

When the reservation of 28 seats for white representation was agreed, it was also agreed that such representation should be guaranteed for a minimum of 10 years. There could be no such guarantee unless the amendment of the provisions concerned required the concurrence of some of the white members.

Consequently, the Constitution provides that the specially entrenched clauses can only be amended if the amendment is passed by 78 votes in the House of Assembly. However, because of the racial connotations in having a separate white voters' roll, it is provided that after the second Parliament, or 10 years, whichever is the longer, a Commission will be established under the chairmanship of the Chief Justice to report on the desirability of retaining the special white representation.

If this Commission reports that the special white representation should be abolished or reduced, then a Bill to give effect to the recommendation may be passed by a 51 per cent. majority in the House of Assembly. Of course, the white representation can be altered at any time if the Bill providing therefore is passed by 78 members in the House of Assembly.

Entrenchment

The Constitution provides for the entrenchment of certain provisions of the Constitution and of various other laws. The pro-

visions of the Constitution which are entrenched are mainly those dealing with matters of fundamental constitutional importance such as the appointment and functions of the President, the composition of Parliament and the tenure of office of members of the Legislative Assembly or of the Senate.

The principle of an Executive Council to advise the President and the authority of the President to declare public emergencies subject to the approval of the House of Assembly, provisions relating to the Judicature and the various Commissions, the Consolidated Revenue Fund, the Declaration of Rights, citizenship and the procedure for amending the Constitution or other specially protected laws are also entrenched.

The other laws which contain provisions that are specially entrenched, either directly or indirectly, are:

- The Electoral Act specifies that the provisions thereof providing for the appointment and functions of the Delimitation Commission and the Registrar-General of Elections, the qualifications for election as a Senator or member of the House of Assembly and the system of elections for the first Parliament are specially entrenched. This is to ensure that the foundations of the Constitution cannot be undermined by a lesser number of members than is necessary to amend the entrenched provisions of the Constitution. The other provisions of the Electoral Act, which set out the mechanics for elections, can be amended by Parliament by an ordinary majority.
- The Education Act, 1979, provides for the establishment and operation of private schools and community schools and also government schools. In order to ensure that education will continue to be provided by the government at present standards, the Act provides for three classes of government schools — high fee paying, low fee paying and free schools. The number of schools which may be established by government, and the facilities to be provided at the schools, is within the complete discretion of the government of the day. All the Act requires, however, is that the government shall maintain the various classes of schools which are presently maintained in the country. The provisions of the Education Act which are entrenched are those which ensure the retention of these principles. Admission to government or community schools cannot be regulated on a racial basis.

- The Medical Services Act, 1979, requires the government, as far as is reasonably possible, to provide and maintain or encourage the provision and maintenance of comprehensive and constantly developing hospital services. Government hospitals are required to be classified as open or closed, depending on the basis of the fees to be charged thereat. Admission will not, however, be regulated on a racial basis. The Act specifies that provisions providing for the above matters are specially entrenched.
- The Housing Standards Control Act [Chapter 208] provides for the control of the standard and safety of buildings and also for the control of the harmful use or occupation of premises and undue interference with the rights of persons. The Act specifies that the relevant provisions, which are not racially discriminatory, are specially entrenched.

In addition, the Parks and Wild Life Act, 1976, and the Forest Act [Chapter 125] prescribe the areas of the country which are set aside for national parks and the conservation of wild life and for forestry purposes. The Constitution provides that the areas as set aside on 31st May, 1979, may not be reduced by more than one per cent, unless the Bill providing for such reduction is passed by 78 votes in the House of Assembly. The purpose of this provision is to ensure that the total extent of the areas set aside for national parks or forestry is not reduced to any great extent unless the necessary majority of the members of the House of Assembly agree thereto.

Local government in the country is provided by a system of municipalities, town councils, rural councils and local boards. These are administered throughout the country on a completely non-racial basis. The Constitution provides that any Bill which amends certain provisions of the Acts regulating these local authorities requires to be passed by 78 votes in the House of Assembly.

Declaration of Rights

As mentioned above, the Constitution contains a justiciable Declaration of Rights providing for the protection of the right to life and the right to personal liberty, protection from slavery or forced labour or inhuman treatment, protection from deprivation of property and from arbitrary search or entry, protection of the

law, protection of freedom of conscience, of expression, of assembly and association and of movement and protection from discrimination.

Subject to the limitations contained in this Declaration of Rights and the provisions referred to above, which are specially entrenched, Parliament, under the Constitution, can legislate in any sphere of government by a simple majority. As far as the Declaration of Rights itself is concerned, if the government of the day considers that a state of emergency should be declared and such a declaration is approved in the House of Assembly, most of the protections contained in the Declaration of Rights are suspended to the extent necessary to deal with situations arising during the state of emergency.

The American Secretary of State, Mr. Cyrus Vance, is reported to have criticized the Declaration of Rights in the following terms: "The Constitution does contain prohibitions against racial discrimination in the content or execution of the laws. However, it exempts from the discrimination ban such areas as family law, entry into employment, the appropriation of public funds, and important aspects of criminal proceedings. As a result, the Rhodesian Constitution legalizes the treatment of blacks as second class citizens."

This criticism is, of course, completely fallacious and the *bona fides* of any person making such a criticism must be doubted. The true position is that the Declaration of Rights prohibits discrimination in the content or execution of the laws and the exemptions from this prohibition are as follows—

- (a) any matters relating to marriage, divorce, succession and other spheres of personal law and the application of African customary law to cases involving Africans. The reason for this is to permit African customary law to be applied in personal matters and is a normal provision in African countries;
- (b) restrictions on entry into or employment in Zimbabwe Rhodesia or the enjoyment of services provided out of public funds. These restrictions may, however, only be applied to persons who are not citizens of, or permanently resident in, Zimbabwe Rhodesia. They are designed to permit the Government of the day to regu-

late immigrants, just as many countries today are refusing to admit Vietnamese refugees into their countries. This is necessary because the Declaration of Rights is applicable to all persons, whether or not they are citizens of Zimbabwe Rhodesia;

- (c) the appropriation of public revenues or other public funds. In this respect the government of the day, through the House of Assembly, regulates appropriations;
- (d) the according to African tribesmen of privileges or rights relating to Tribal Trust Land — these of course cannot be restrictions forcing them to live on "reservations" as was done in the United States of America.

In addition, it is provided that the provisions of the prohibition do not apply to the exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings. This, too, is a standard provision found in other Constitutions enacted by the British Government. It is not a novel provision inserted in the Zimbabwe Rhodesia Constitution for the purpose of creating second-class citizens. The discretion to institute or discontinue criminal proceedings vests in a public official and the provision in question is obviously designed to prevent him being harassed by vexatious applications in the exercise of his functions.

Finally, it must be noted that the above exemptions are not substantive provisions; they are merely permissive, that is they permit the Parliament of the day to make laws falling within the exemptions and any laws so made may, of course, be amended or repealed by that Parliament or a subsequent Parliament. The Parliament of the day can provide for any such exemption which it considers to be necessary in the circumstances and as the substantial majority of the members of Parliament are black, they can safely be expected to look after the rights of blacks and ensure that they are justly treated. They are hardly likely to legislate for the purpose of treating blacks as second-class citizens, even if this were permissible under the Declaration of Rights.

It is a gross distortion to state that the exemptions referred to above legalize the treatment of blacks as second-class citizens. The absurdity of the statement is shown by the fact that in relation to paragraph (d) above in connection with Tribal Trust Land, which

constitutes almost 40 per cent. of the area of Zimbabwe Rhodesia, tribesmen are given special privileges and rights which are denied to whites and non-tribesmen.

Power of Parliament

The Constitution confers on Parliament power to make laws for the peace, order and good government of the country and such laws may have extra-territorial effect. Thus, Parliament may, by a simple majority, amend most of the laws currently in force in Zimbabwe Rhodesia, including, *inter alia*, those providing for the national flag, the administration of prisons, immigration control, civil evidence, the Criminal Code, extradition, censorship and entertainments control, control of correspondence colleges, official secrets, the production and marketing of agricultural products, plant breeders' rights, animal health and plant protection, deeds registries, land settlement, natural resources, the administration of parks and wild life areas, Tribal Trust Land and the development thereof, the mining industry, the Reserve Bank, currency and exchange control, customs and excise, income tax, sales tax, the control of banks, building societies and companies, patents, trade marks and copyright, the control of professions, African tribal law and custom, postal, radio and telecommunications services, transportation, including the national airline, air services, the national railways and road motor transportation, industrial conciliation, apprenticeship training and skilled manpower development, the control of trade and commerce, including the generation and distribution of electricity, the iron and steel industry, public health, including drugs control and control of food and food standards, and the control of national bodies such as the National Archives, National Arts Foundation, National Free Library, National Gallery, National Museums and Monuments and Colours Control Board.

From this list it can be seen that the powers of the government to run the affairs of the country are only slightly circumscribed. Of course, the Legislature may enact new legislation not mentioned or dealt with on this list. In fact, the legislative powers of the Parliament are much wider than those conferred on the Commonwealth Parliament in Australia or on any of the State Legislatures in Australia. Moreover, if the Prime Minister wished to introduce a new energy policy or fuel rationing scheme, he could do so very easily.

As far as the control of finances is concerned, Bills appropriating public funds are passed by a simple majority in the

House of Assembly and cannot be delayed by the Senate for more than eight sitting days. Thus, the government cannot be hindered in its financing of government policies otherwise than by financial considerations.

In relation to the maintenance of law and order, although the administration of the Police Force is vested in the Commissioner of Police, it is only Parliament that can create criminal offences and prescribe penalties. Parliament, by a simple majority, can amend the Criminal Code and any other law in force relating to the maintenance of law and order.

Racial discrimination

The last Parliament constituted by the Constitution of Rhodesia, 1969, made the following laws—

- (a) it enacted the Public Premises (Prevention of Racial Discrimination) Act, 1979;
- (b) it repealed the racially discriminatory provisions in the following Acts—
 - (i) General Law Amendment Act [Chapter 43];
 - (ii) Services Levy Act [Chapter 185];
 - (iii) Rural Councils Act [Chapter 211];
 - (iv) Urban Councils Act [Chapter 214];
 - (v) African Beer Act, 1974;
- (c) it repealed the following Acts which contained racially discriminatory provisions—
 - (i) Education Act [Chapter 82];
 - (ii) Land Tenure Act [Chapter 148];
 - (iii) African Education Act [Chapter 233];
 - (iv) Africans (Urban Areas) Accommodation and Registration Act [Chapter 242];
 - (v) Shop Hours Act, 1975;
- (d) it enacted the Tribal Trust Land Act, 1979, which sets aside approximately 40 per cent. of the area of Zimbabwe Rhodesia for occupation by tribesmen on a voluntary basis — not on a compulsory basis as has been done in other countries.

