INSTITUTE OF CURRENT WORLD AFFAIRS

JCB-26 Constitutional Council: Watchdog of Liberty in Southern Rhodesia

2952 N. Kendale Avenue
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November 10, 1962

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Dear Mr. Nolte:

Liberals in the Republic of South Africa have strong feelings about whether or not a written bill of rights in the Constitution of a country can guarantee the rights and liberties of a minority. Some believe that a bill of rights backed by the courts could make it difficult, if not impossible, to pass discriminatory legislation. Others disagree, contending that the Government could always find some way around it. Since South Africa doesn't have a bill of rights and is not about to add one the debate remains theoretical. Now both sides are watching Southern Rhodesia where a bill of rights is confronting a Government which seeks to perpetuate the supremacy of the White man.

The Southern Rhodesian Constitution which came into operation in November, 1962, not only included a Declaration of Rights but a provision for a Constitutional Council (CC) to see that legislation conformed to the Declaration. The Council of eleven members with a chairman were elected by a specially created Electoral College made up of Southern Rhodesia's Chief Justice, prisine judges, retired High Court judges and the President of the Council of African Chiefs. Membership of the CC had to include at least 2 Africans, 2 Europeans, 1 Asian and 1 Coloured and the chairman had to be of "high legal standing". Sir Victor Robinson, QC, a born Southern Rhodesian and Federal Attorney General until 1959, was elected chairman over a membership of 5 Africans, 4 Europeans, 1 Asian and 1 Coloured.

The Constitution gives the CC power to examine legislation before it is passed into law. If the Council finds that it would infringe one of the freedoms guaranteed by the Constitution it is sent back to Parliament to be changed. Government leaders representing the majority party in Parliament must then decide whether to amend the act, withdraw it or try to pass it and take the risk of having it challenged in the courts.

If the decision is to pass it without changes acceptable to the Constitutional Council it must gain a 2/3 majority and if this vote fails the bill cannot be re-introduced for another six months at which time, however, it can be passed by a simple majority. (At present the Rhodesian Front Government has only a few seats over the majority and needs the support of the Opposition to over-rule a Constitutional Council veto.) If and when such a piece of legislation is voted into law against the recommendation of the CC any person who believes that the law discriminates against him is entitled to take the case to the High Court and can, in the last extreme, appeal it to the British Privy Council. If the CC approves of such a case it will assume the expenses of the plaintiff. Before the present Constitution the High Court was able to test an act's validity only if it was questioned in the course of civil or criminal proceedings. Now the Council itself is given the right to institute cases in the court to test legislation which has been passed over its disapproval.

These provisions appear to give the Constitutional Council a fairly strong arm against any Government attempt to pass unjust legislation. However, liberal European and African leaders are as critical of it today as they were before the Constitution came into effect. They point out that the CC does not have any authority to make Parliament revise or throw out laws already on the books before the present Constitution came into operation; it can only make Parliament reconsider legislation which is now proposed. The Council can review old laws, and it has, but Government and Parliament do not have to consider its findings. What good is it then when all the discriminatory laws which a White-dominated Government needs to keep itself in power and the African a second rate citizen had already been passed? The Constitution did not remove the major obstacles facing the African's emancipation: it allowed the African a limited vote but it did nothing to change the iniquities, for instance, of the Land Apportionment Act. And this is a law which the CC cannot challenge or legally contest when considering the application of the Declaration of Rights.

They are also critical of Britain for not seeing that justice was done to the African in the past and for trying to back further away from moral responsibility in Southern Rhodesian affairs. They point out that Britain, since 1923, had the right to interfere in Southern Rhodesia's affairs, to amend and to veto laws which it considered unjust. Never once did Britain intervene although there were many unjust laws and acts. Britain gave up this right in exchange for the Declaration of Rights and the Constitutional Council at a time when its unused right of intervention is more than ever needed. While it still has considerable influence over Southern Rhodesia it can no longer take direct steps to safeguard the rights of the unprotected.

Sir Robert Tredgold, former Chief Justice of the Federation who resigned in 1960 to protest the harsh laws passed to control African freedom of speech and assembly, said he considered the Constitutional Council "rather futile" as a safeguard for future legislation. "Its functions are so circumscribed it is going to be like an advisory board whose recommendations can be ignored by the Government. The Council can only delay....it will have a life similar to the Federal African Advisory Board, a history of frustration and disillusionment." (An African Advisory Board was created by the Federal Constitution to protect the rights of Africans from discriminatory legislation but its findings were virtually ignored by Sir Roy Welensky and his Federal Government. Since the Board had no real power to enforce its findings its watchdog function was rendered useless). Sir Robert added, "I do not wish to imply there is no effective way of enforcing the Declaration of Rights. The testing power of the courts is always there and it is that which makes the Council redundant."

Sir Roy Welensky (JCB-21) has also said that a Constitutional Council or an African Advisory Board offers no guarantee of a bill of rights. Even further, he doubts whether a bill of rights, even when backed by the courts, can protect the rights and liberties of people if the attitude of those in power is not interested in seeing justice done. He believes the effectiveness of a bill of rights depends entirely on the integrity of the Government; if it were bent on creating a dictatorship or in preserving privileges of one group then all the noble words written would not stop it.

He was thinking primarily of the emerging independent African states and his opinion that most African political leaders could not be trusted to be democratic even with

a democratic constitution. But his opinion seemed to apply with equal validity to his own now-dying Government and to that of White Southern Rhodesia.

In spite of criticism and pessimism the Constitutional Council has gone about its work seriously and industriously. The Rhodesian Front Government has been wary of the Council. Prior to the election last December its candidates had criticized the United Federal Party Government for allowing the public swimming pools to be integrated. They promised that they would change the situation when they came into power. This year when it came to passing such a law which would have to be discriminatory in intent and would probably have been found so by the CC, the Rhodesian Front backed off and let the swimming pools remain as they were.

But when the Government came to passing its Law and Order (Maintenance) Amendment, which further limited African freedoms and severely increased the penalties for acts against the Government, it found a way around the Constitutional Council. A clause in the Constitution states that if the Prime Minister considers a law urgent in the public interest it does not have to wait for the scrutiny of the Council but can be passed immediately into law. Since the Council has no power to make Parliament reconsider a law already on the books all the CC could do in this case was to examine it, unhappily, after it was passed.

Although it did not report adversely on the part of the Law and Order Amendment which makes mandatory a death sentence for throwing petrol bombs and other forms of arson (which caused the most controversary when the legislation was discussed in Parliament) it did on other sections. It found particularly that a ban on Sunday meetings, the day on which most Africans are able to attend political meetings, hindered people's freedom of assembly. The Council said there was sufficient legislation existing to give the Magistrates and the Minister of Law and Order all the powers they need to limit and control public meetings. "Without freedom of expression," said the Council's report on this section, "the appeal to reason which is the basis of democracy cannot be made."

It has also stated that regulating authorities do not have the right to limit the speakers at a public meeting to those on a specific list prepared before the meeting.

Of course none of this legislation was recalled or changed. But the ruling of the Council has made it possible for a test case to be brought against the validity of the "never on Sunday" ban on political meetings. In the first test case to be brought under the present Constitution, Mr. J.T. Maluleke, a union leader, charges that he "was and is being hindered by Section 6A of the Law and Order (Maintenance) Act as amended in the exercise of his rights of freedom of expression and freedom of assembly as set out in the Declaration of Rights." In his affidavit, Mr. Maluleke said the executive committee of his trade union decided to hold an open air meeting on Sunday, June 23, to discuss the relation of the Constitution to trade unionism. They were not allowed to hold the meeting.

The defense argued that the Declaration of Rights pertains only to freedoms or rights which have been threatened since its enactment; it does not safeguard freedoms taken away before it came into being. Since the Plaintiff had been deprived of some of his freedoms of speech and assembly before the present Constitution came into effect he had no grounds for complaint against laws which deprived him of these freedoms which had already been taken away. According to him the Law and Order Amendment caused no new loss of freedom but only continued that loss in a new administrative form; previously the Minister could ban meetings for three months at

a time, now he could ban them permanently. Mr. Maluleke claimed that the new law deprived him of greater freedom than he had lost before. The most interesting point that came out of this case was the agreement on both sides that the people of Southern Rhodesia had lost significant freedoms. It also made clear that liberties lost prior to the Declaration of Rights could not be challenged in the courts.

In August the Chief Justice ruled that neither party had been able to prove his case. At the same time he ordered the Minister to show why section 6A should not be declared invalid. As of now the final outcome is still pending. However the Government has now decided to end its "never on sunday" ban on political meetings next year and an amending bill to remove the permanent ban has been introduced in Parliament. The Government also decided to abide, at least to some extent, by the ruling the Council made against regulating authorities limiting speakers at public meetings to those pre-listed.

While the Chairman of the CC, Sir Victor Robinson, has complained about the difficulty of accurately interpreting the Constitution and getting the Council to function as it should (five of the eleven members live outside of Salisbury and there is little staff , "I suppose they expected me to do the typing myself") he is convinced that the Council serves a useful function. He says, "No one likes to be criticized and so the Government has had to be very careful in framing its laws. We are no doubt an extreme irritant on the Government."

What African leaders and liberal Europeans want is something more than an irritant. They want a roll-back on all discriminatory legislation. Yet the CC, within its limitations, has proved somewhat effective. It has limited the Government in its actions; it has been a brake.

Actually it is interesting to speculate why the present Government hasn't tried to get around it more. It could. The answer seems to be in the wish for a White-dominated independent Southern Rhodesia. England, pressured by world opinion, does not dare give independence to a Government that practices outright discrimination against the African. The Rhodesian Front Government, fearful of the economic consequences if it took independence against British consent, has sought to woo Britain and it knows it can't do that if laws are pushed through over the Constitutional Council's cry of "unjust".

In the next month or two the Southern Rhodesian Government must pass legislation to take over the functions of Government that were handled by the defunct Federation. These include European services of education and agriculture. The Government does not want to integrate them but if it tries to pass laws that make a racial distinction in these fields it will be confronted by the disapproval of the CC. What will the Government do? It may make a pretence of integration and keep it at a minimum by administration. Or, if worse comes to worse, they may well flaunt the CC and Britain's favor in a gigantic sacrifice to preserve their "way of life".

In the meantime, the argument over a written Declaration of Rights remains unresolved.

Sincerely yours,

James C. Brewer

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Received in New York December 6, 1963.