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SOME PROSPECTS AND PROBLEMS OF A POST-APARTHEID CONSTITUTION FOR SOUTH AFRICA

Sammy Adelman*

I. Introduction

In February 1990, after decades of internal resistance and international sanctions, the Nationalist Government in South Africa finally acknowledged that the demise of apartheid is inevitable by unbanning the African National Congress (ANC) and other anti-apartheid organizations, and releasing Nelson Mandela. It is hoped that during the coming months the main protagonists will hammer out a constitution consigning apartheid to the rubbish heap of history. It is not, however, inevitable that political liberation will be accompanied by economic emancipation, and, as has been the case elsewhere in the Third World, South Africa may be subjected to a form of neo-colonialism.¹

The abolition of the legal forms of apartheid is a necessary but insufficient condition for correcting the massive inequalities between the races which are the legacy of more than 300 years of racial discrimination, and particularly the forty-two years of apartheid.² Similarly, the passage of progressive legislation will not by itself be sufficient to bring about a more equitable redistribution of wealth and resources. Nonetheless, leg-

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1. See Stoneman & Suckling, *From Apartheid to Neocolonialism*, 9 *THIRD WORLD Q.*, April 1987, for a discussion of the possibility of apartheid evolving into neo-colonialism, the term for which I will use in this paper being neo-apartheid. The ANC/SACP alliance has long argued that South Africa has been subjected to "colonialism of a special type" (H. WOLPE, *RACE, CLASS AND APARTHEID STATE*, (1988); SOUTH AFRICAN COMMUNIST PARTY, *SOUTH AFRICAN COMMUNISTS SPEAK*, Inkululeko Publications (1981)), a theoretical formulation which has been severely criticized. All references to neo-apartheid in this paper therefore refer to the possibility of continued white and imperialist domination, particularly of the economy, despite the fact that the majority exercises political power.

2. Apartheid has been described by some writers as racial capitalism in order to emphasize the fact that it is based upon capitalist relations of production in which racialism has been a predominant influence. See, e.g., J. SAUL & S. GELB, *THE CRISIS IN SOUTH AFRICA* (1986). It is precisely for this reason that the repeal of racist legislation alone will not bring about a more equitable distribution of wealth and resources.

isolation will play a key role in the country's future and no piece of lawmaking will be more important than South Africa's first postapartheid constitution. Unfortunately, in the euphoria which has surrounded recent events there has apparently been little appreciation of the numerous obstacles to be surmounted, particularly the contradictory nature of the constitution-making process.

True liberation must mean that the different races, classes, cultures and ethnic groups of South Africa forge a pluralist society in which all citizens are able to participate fully and equally in political, economic, social and cultural life irrespective of race, color or creed. As we shall see, however, the Government and monopoly capital are advocating constitutional mechanisms designed to decentralize power in ways which will prevent the emergence of a pluralist participatory society, their goal being to ensure that the ceding of political power does not undermine white economic hegemony in a system of neo-apartheid.

This paper analyses the contradictions underpinning the forthcoming negotiations in order to explain why a liberal bourgeois constitution is the likely outcome and what the implications of such a constitution might be. I begin by outlining some of the factors determining the context in which negotiations will take place and then examine the demands of three of the main protagonists. I then discuss two of the issues likely to dominate the negotiations: political decentralization and the role of a bill of rights. Finally, I look at the likely effect of the constitutional outcome on one important section of South African society, the non-racial trades unions.

II. Constitution-Making in the South African Context

The fact that South Africa's first post-apartheid constitution will be the result of a process of negotiation means that it will essentially comprise a series of compromises between the aspirations of the black nationalism represented by the ANC and the residual desires of Afrikaner Nationalism as represented by the Government.³ As Nelson Mandela has argued: "You need a compromise on fundamental issues. If you are not prepared to compromise, then you must not enter into or think about the process of

3. While the ANC and the Government will not be the only parties to negotiations, no agreement can be reached without their consent. This is not to imply that they are fully representative of all viewpoints on the political spectrum. The Government, for example, is increasingly alienated from the hardline Afrikaner Nationalists to its right. What I am acknowledging is the fact that these two parties have either the greatest power or support, or both.

negotiation at all.”⁴ There are, in addition, at least four other reasons why the constitution will be a compromise.

The Balance of Forces

First, neither side has won the war in South Africa because it is a war which neither side can win. As the Americans found in Vietnam, the British in Ireland and the Israelis in Palestine, it is difficult to vanquish a guerilla army. Despite the rise of black trade unions, the successes of the Mass Democratic Movement (MDM) — which replaced the banned United Democratic Front — and the effects of international sanctions, white South Africa retains enormous power, and *UmKhonto we Sizwe*, the armed wing of the ANC, has neither the resources nor the firepower to overcome the strongest military force on the continent. The outcome of the liberation struggle has thus been to propel both sides to the negotiating table. The ruling Afrikaner Nationalist Party has chosen to negotiate now because it understands that doing so from a position of relative strength is the only remaining way of securing any semblance of white wealth and privilege; the ANC is willing to negotiate because the abolition of apartheid is finally on the agenda. The balance of class forces in the present conjuncture is therefore such that neither side can dictate to the other. In the long term, through intensified military struggle and an economic war of attrition, the black majority would triumph in a war which would ensure the destruction of both the material basis of white privilege and the potential for black economic advancement.

The South African Economy

Second, the new constitution will be a compromise because of the present plight and uncertain future of the South African economy. The cost of waging war throughout the sub-continent and the effects of economic sanctions have undoubtedly been decisive factors in bringing the apartheid regime to the negotiating table.⁵ Since 1985, when the Government was forced to declare a partial debt moratorium after foreign banks refused to grant new loans, there has been a net capital outflow of R30bn. A structural adjustment program, in which privatization plays

4. Reuter, Johannesburg, 16 Feb. 1990.

5. The Washington-based Investor Responsibility Research Centre (IRRC) estimates that sanctions have cost South Africa between \$15bn and \$27bn and that the economy is 20 to 35 percent smaller than it would have been in the absence of sanctions, particularly restrictions on capital inflow and expensive import substitution strategies (Financial Times Survey (London), 11 June 1990, at 2).

a pivotal role in bringing down government spending, has been implemented — inevitably to the detriment of the black majority — and it will be interesting to see the extent to which current fiscal discipline is maintained in the face of the inevitable attractions of trying to buy off the ANC.

Disparities between white and black remain huge, despite a decade of “reform.” Per capita expenditure on black education (excluding capital spending) was R765 in 1988-89, against R3,082 for whites, while health spending was \$137.84 for blacks and R.597.11 for whites.⁶ Housing constitutes an even more urgent problem: The Urban Foundation calculates that nearly half of all African families are housed in shacks and the National Building Research Institute has calculated that 3.2 million housing units would have to be constructed at an average of 200,000 per year if every black South African is to be housed by the end of the century.⁷ According to Servaas van den Berg, an economist at Stellenbosch University, the cost of abolishing fiscal apartheid (introducing parity between black and white benefit levels) in the fields of education, health and housing would be approximately R75bn, more than the whole of the 1990 budget.⁸

Economic growth was negative during the first half of 1990, and even the most optimistic forecasts predict growth of no more than 0.5 percent for the year as a whole. The potential for social and political unrest can be measured by the fact that growth of at least 4 percent is essential if (black) unemployment is to be stabilized at its current high levels, and this cannot be achieved without foreign capital.⁹ It is a problem for the ANC because it limits the scope of their control and intervention as the new government, and a problem for the existing government because it limits the range of its options going into constitutional negotiations.

Despite these problems, the economy remains the key to a successful transition to a post-apartheid society, and the key actors inevitably have differing views about its direction in the future. The Government and big

6. Hospitals have now been desegregated, but this does not necessarily mean that expenditure has been equalized.

7. SOUTH AFRICAN BUILDER, Sept. 1986.

8. Unless otherwise stated, the information in this paragraph is derived from the Financial Times Survey (London), 11 June 1990.

9. South Africa does not qualify for World Bank assistance (which, given the insanities of that organization's structural adjustment programs, may in fact be a blessing) because per capita income is too high; because of its balance of payments surplus it does not qualify for assistance from the IMF; and because Eastern Europe is likely to provide stiff competition when it comes to other sources of capital.

business seek to maintain capitalist relations as the bedrock of continued white privilege. The ANC, which has not yet clearly defined its position, seeks a mixed economy with at least a modicum of nationalization as the means of bringing about a redistribution of wealth and resources.¹⁰ Despite their differences, both sides need each other: White confidence must be maintained if white capital and skills are to be retained and foreign investment to return, while the historic inequalities of apartheid must be ameliorated if stable growth is to be possible.

Table 1

ECONOMIC INDICATORS	1988	1989
Total GDP (\$m)	87,993	89,409
Real GDP growth	3.7%	2.0%
GDP per capital (\$)	2,451	n/a
Current account balance (\$m)	1,272	1,595
Budget deficit as percentage of GDP	4.4%	1.5%
External debt as percentage of GDP	24.1%	23.0%
Debt services/exports	9.6%	8.9%
Exports incl. non-factor services (\$bn)	22.4	24.3
Imports incl. non-factor services (\$bn)	17.2	18.8
Trade balance (\$bn)	5.2	5.5
Export volume growth rate	5.7%	9.5%
Import volume growth rate	22.5%	0.0%
Inflation	12.9%	14.7%

Source: EIU, Reserve Bank Quarterly, reproduced in Financial Times Survey (London), 11.6.90.

Eastern Europe

The third reason why the new constitution will be a compromise is the changed international environment brought about by the accession to power of Mikhail Gorbachev in the Soviet Union and the consequent

10. I am assuming that the ANC, which enjoys the support of an overwhelming majority of blacks and progressive whites, will be one of the two main protagonists along with the government.

collapse of Stalinism in Eastern Europe. President de Klerk has admitted that the rise of Gorbachev has facilitated negotiations by diminishing the threat from this quarter perceived by the Government to exist.

More important, however, is the fact that centralized, planned economic development has been discredited with the disintegration of Stalinism in Eastern Europe. In turn, the statist constitutional conception which has influenced so many socialist and African countries has been discredited, leaving neo-conservative economic policies and liberal constitutionalism in the ascendancy. The essentially liberal constitution which emerged in Namibia is perhaps a reflection of these influences, as well as a potential model for South Africa.¹¹

Events in the Soviet Union may, paradoxically, have one other effect on constitutional negotiations. To a government in whose demonology there has been little difference between the threats posed by communism and the black majority, events in the Soviet Union may provide the outlines of a desirable constitutional settlement. As we shall see, the white ruling class is trying desperately to evolve mechanisms for the protection of "group rights" (a euphemism for apartheid) based upon some form or combination of federalism, confederalism or the Swiss canton system. It would indeed be ironic if Gorbachev's moves towards greater confederalism as a means of containing the centrifugal forces at work in the Soviet Union provided the basis for the apartheid regime's thinking about South Africa's future.

Civil Conflict

The potential for civil war is the fourth factor likely to impinge directly upon constitutional negotiations. The transformation of South African politics since February has simultaneously heightened black expectations and fuelled white fears. The threats come from three sources.

Most dangerous are the white neo-Nazis drawn primarily from the white working class and farming communities, who correctly perceive the end of apartheid as a direct threat to their material privileges.¹² Brainwashed for four decades into believing that they have a divine right to

11. Nelson Mandela has praised Zimbabwe for its achievements since independence and referred to it as a possible model for South Africa.

12. The emergence by the 1970s of an Afrikaner bourgeoisie through National Party control of the state initiated the breakup of traditional Afrikaner Nationalism. It is this more affluent and educated section of Afrikanerdom which, responding increasingly to the logic of capital rather than the ideology of apartheid, has presided over reform and the move to negotiations.

the land and that all blacks are either communists, terrorists or savages, they have threatened to launch a *Boerevryheidsoorlog* (Boer freedom war), a threat not to be taken lightly. They have formed paramilitary units and have begun to resort to terrorism. With significant numbers in the police and the military, they have access to arms and ammunition and appear to be willing to fight to the death in defence of racism and their demand for a white state.¹³ The ability of the Government to control or coopt these groups may have an important bearing on the outcome of negotiations, not least because the ANC may be forced into concessions in order to placate them.

A threat is also posed by what might be termed the black right, led by Chief Gatsha Buthelezi, head of the *KwaZulu* bantustan and standard-bearer for those who desire the retention of untrammelled capitalism in which the only significant difference would be the color of the faces of the oppressors. Buthelezi has attempted to play both ends against the middle by participating in the bantustan system while courting the ANC, and has readily resorted to tribalism and coercion in order to build and reward his constituency.¹⁴ He commands significant support, though probably far less than the numbers he claims. In the mid-1980s Inkatha launched what amounts to a civil war in Natal against the followers of the ANC and the MDM.¹⁵ The conflict between Buthelezi and the ANC has been simmering for years, and will continue to do so to the detriment of South Africa as a whole unless it is definitively resolved.

A threat of a different nature is posed by the masses of militant youth in the townships who have led the resistance to apartheid on the streets. They are committed to the ANC but are unlikely to be satisfied with a compromise constitution in terms of which they are required to wait for the fruits of liberation. The longer negotiations take and the more the ANC is seen to compromise, the greater will be the anger and impatience of these urban blacks. This may give rise to a crisis of expectation which some will attempt to resolve through violence.¹⁶ Alternatively, they may

13. Arms stolen from military installations have been discovered. These have presumably been used in attacks on black civilians which these groups have claimed responsibility for (The Guardian (London), 11 July 1990).

14. While four of the six "independent" homelands have committed themselves to supporting the ANC in constitutional negotiations, Buthelezi continues to assert his claim to a national constituency.

15. The ANC's response to Buthelezi has been contradictory since Mandela's release. On the one hand, overtures have been made in an attempt to bring him on board; on the other hand, a full-scale attempt to crush Inkatha appears to be in progress.

16. One of the most unfortunate aspects of apartheid is the generations of disenfranchised,

transfer their support to other groupings, the most likely beneficiaries being the South African Communist Party (SACP) or (less likely but not impossible) the Pan-Africanist Congress (PAC), thus undermining the ANC's position at the negotiating table.¹⁷

If the ANC's decision to virtually terminate the armed struggle does not yield results quickly, and the Government cannot control the neo-Nazis which apartheid has fostered, the tensions in South Africa could become explosive. Given these realities, along with the models provided by neighboring Zimbabwe and Namibia, South Africa's first post-apartheid constitution is likely to be essentially liberal and bourgeois in character.¹⁸

III. The Positions of the Main Protagonists

The prospects for pluralism and democratic participation in post-apartheid South Africa are thus dependent upon the success of the main protagonists in the negotiations in achieving their goals. Apart from the ANC and the Government, groups such as the PAC (despite its current stance), the SACP, the trades unions, Inkatha, the neo-fascist white and other parties in the racially-based tricameral parliament will all lay claim to seats at the negotiating table. The following section examines the positions of three of the most important groups, the ANC, the Government, and monopoly capital.¹⁹

disenchanted black youth who have been subjected to the violence of a system which has, in effect, educated them into believing that this is the only way of resolving problems. The amount of violence in South African society is appalling, and is a legacy of apartheid which may take generations to eradicate.

17. The PAC does not enjoy widespread support, and its refusal to countenance negotiations runs counter to the prevailing mood. However, its stance on issues such as land — which it demands must be returned to the black majority — may well win it support in the future should the ANC be seen to be conceding too much. Already the desanctification of Nelson Mandela (which the Government hoped would occur as he became an actor in the real world once more) has proceeded to the point at which he is regarded as a legitimate target of criticism.

18. The Namibian Constitution, which has been described as the most liberal in Africa, does not contain a Bill of Rights. Rather, Chapter 3 outlines fundamental human rights and freedoms. Article 21 of that Chapter guarantees freedom of speech, the press, thought, conscience and belief, freedom of religion, assembly and association, the right to strike, to move freely throughout the country, and to leave and return to Namibia. Citizens are entitled under Article 78 to a fair trial from a judiciary which shall be independent and subject only to the Constitution and the law.

19. It is unlikely that monopoly capital will sit at the table in any overt guise such as Anglo-American or the recently formed South African Chamber of Business. Instead the views, demands and desires of big business are most likely to be represented by the small white liberal Democratic

The ANC

For the ANC the writing of a new constitution is a necessary but insufficient condition for the ending of apartheid: The "removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are . . . not enough; the structures and institutions of apartheid must be dismantled and be replaced by democratic ones."²⁰ Its Constitutional Guidelines contain an implicit recognition of the dangers of neo-apartheid in arguing that "steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old forms or new" and it calls for "a rapid and irreversible redistribution of wealth."

The document calls for the firm protection of the human rights of all citizens with equal rights for all irrespective of race, color, sex or creed and demands "the entrenching of equal cultural, linguistic and religious rights for all." It abjures the concept of "group rights" advocated by the Government on the basis that this would perpetuate the apartheid status quo and mean that the majority would continue to be constitutionally and politically exploited. It demands that South Africa "be an independent, unitary, democratic and non-racial state," the government of which shall be elected "under a system of universal suffrage based on the principle of one-person one-vote." All political parties will have the right to organize and take part in political processes, other than those advocating racism, fascism, nazism or the incitement of ethnic or regional exclusiveness, which would be excluded by law. The Guidelines call for the inclusion of "a Bill of Rights [which] shall guarantee the fundamental human rights of all citizens irrespective of race, color, sex or creed, and shall provide appropriate mechanisms for their enforcement." The democratic state shall guarantee "basic rights and freedoms, such as freedom of association, expression, thought, worship and the press. Furthermore, the state shall have the duty to protect the right to work, and guarantee education and social security."

The major question facing the ANC is how to achieve a constitutional settlement compatible with the demands contained in the Freedom Charter

Party, until the last whites-only election the official opposition in the white chamber of parliament. The reason for including the views of capital in this section is that its influence on the future economic well-being of South Africa is likely to be significant even if its ability to affect the outcome of constitutional negotiations is less so.

20. AFRICAN NATIONAL CONGRESS OF SOUTH AFRICA, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988).

in a context in which compromise is inevitable.²¹ One example of the difficulties to be confronted is the issue of land. The abolition of apartheid and the collapse of the bantustan system will mean that 87 percent of the population will no longer be legally confined to the 13 percent of land which simply cannot sustain them. Many of these people are likely to drift towards the cities in search of employment, but economic stagnation means that they will be unable to find work. The obvious solution might be to expropriate white-owned farms and resettle Africans on the land which was historically theirs, but this — apart from the political ramifications — raises the problem that Zimbabwe has not yet successfully solved, namely that modern farming methods and economies of scale ensure that white farmers are generally more productive and the last thing the first post-apartheid government would wish to do would be to spend foreign currency on food imports.

The Government

Government thinking on a new constitution has so far stipulated the need for regular elections, a ban on one-party rule imposed by “unsophisticated majority vote,” a free market economy, jobs in government for minority leaders and guarantees that people will be able to live in their own communities. There should be state funding for racially exclusive schools and no expropriation of property without compensation. The Government wants to promote strong, relatively small, local government units that control their own schools, police and other municipal services. Whites would not only run their own local affairs on the basis of “group rights,” but would command resources, from an infinitely wealthier tax base, that would enable them to maintain their separate and privileged way of life. In this way the Group Areas Act and Bantu education could be perpetuated in other forms.

Capital

It was the Anglo-American Corporation, the giant of the South African economy, that, in the person of Gavin Relly, may be said to have broken the logjam in white politics by visiting the ANC in Lusaka in 1985. In a recent publication, “Anglo-American, Its Associates and South Africa,” the Corporation argues (in a chapter entitled “Corporate Citizenship”)

21. For a discussion of the Freedom Charter see section 5, *infra*. See R. SUTTNER & J. CRONIN, THIRTY YEARS OF THE FREEDOM CHARTER (1986), for a more extensive discussion.

that "South Africa must move towards being a prosperous, non-racial, multi-party democracy" and that "a high degree of individual economic freedom is characteristic of prosperous societies. This is most clearly expressed in the freedom to acquire private property. Other features include a broadly based and non-punitive tax system, sound fiscal policy, prudent management of the money supply and the proper recognition of the power and place of the market in allocating economic resources."²²

This is not so much a call for the retention of the status quo, which has become increasingly contradictory for capital, but rather for a *laissez-faire* system in which state intervention is reduced to an absolute minimum.

The recently formed South African Chamber of Business (SACOB) has published a Charter of Economic, Social and Political Rights which we shall examine in greater depth below. In a statement accompanying the publication of the Charter SACOB asserts that it "is in business to create a climate of opinion in [South Africa] in which companies can operate efficiently and profitably for the benefit of all" — apparently forgetting capital's historic failure to mitigate the grossest inequalities of apartheid. Obviously a response to the influence of the Freedom Charter, SACOB's document signals monopoly capital's intention of influencing the constitutional negotiations through a bill of rights essentially bourgeois in form and designed to perpetuate minority power by de-emphasizing race while intensifying the existing class distinctions arising from apartheid.

Capitalists have thus realized, no doubt with Zimbabwe in mind, that the ceding of political power to the black majority does not necessarily constitute an insurmountable barrier to the retention of a free enterprise system and capitalist relations of production because white skills, capital and confidence will be essential to the return of foreign investment confidence and hence to future development. Monopoly capital is therefore advocating a constitution which entrenches free enterprise, capitalist relations of production, the rule of law, a separation of powers, an independent judiciary and a bill of rights — primary among those rights being that of owning private property. As we have seen, most of these demands are common to both the ANC and the Government. Where big business differs from the Government, and both of them from the ANC, is on the question of decentralization.

22. ANGLO-AMERICAN CORPORATION OF SOUTH AFRICA, *ANGLO-AMERICAN: ITS ASSOCIATES AND SOUTH AFRICA* 27 (1990).

IV. Decentralization

As we have seen, the ANC (along with virtually every other representative black political organization of any significance, apart, possibly, from Inkatha) is demanding universal adult suffrage in a unitary state. Freedom of religion, language and culture in a bill of rights are regarded as sufficient protection for any minority. The ANC is not opposed to decentralized political power in principle, but what it will not accept are constitutional mechanisms for devolving political power which would effectively amount to a disguised form of apartheid.

There has long been a tension in state policies between centralization and decentralization.²³ Separate development was premised upon the “decentralization” of political power to the bantustans and the decentralization of economic activity to the white-controlled areas bordering them. The former failed because it was both illogical and genocidal, the latter because it confounded the logic of the market. “Total Strategy,” P.W. Botha’s version of “reform,” also had dual and contradictory goals. On the one hand it aimed to incorporate blacks in more effective local government organs in an attempt to foster a black buffer middle class and thereby deflect political demands away from the center. On the other hand, it involved a massive centralization of power in the hands of the central state through the State Security Council system and State of Emergency powers. The latest attempt by the Government to maintain apartheid takes the form of a demand for “group rights.” Gerrit Viljoen, the Minister for Constitutional Development, has argued that minorities must be protected by a charter of human rights and by constitutional provisions ensuring participation in political decision-making, and by measures granting autonomy to minorities and political regions.²⁴ In Woollacott’s words, the Government seems

to want some recognition of whites and other ethnic groups under the less offensive label of ‘cultural affiliation’ to be constitutionally embodied. That would seem to point towards a bill of rights for minorities, and towards mechanisms like entrenched seats or rules under which parliamentary candidates would have to secure a proportion of the votes of each racial group to win a seat.²⁵

Monopoly capital’s proposals are more subtle but ultimately lead to a similar position. Anglo-American disingenuously claims that “it is not

23. See S. Adelman, *THE CRISIS IN SOUTH AFRICA*, Ch. 3 (Pluto, forthcoming).

24. Reuter, Cape Town, 9 May 1990.

25. Woollacott, *South Africa: The New Apartheid*, *The Guardian* (London), 22 Feb. 1990.

the role of business in general, or Anglo in particular, to write constitutions or create political processes,"²⁶ and then proceeds to celebrate the role of one of its employees in producing a booklet published by the Corporation entitled "Shaping the Future: A citizen's guide to constitution-making"²⁷ in which Godsell discusses decentralized political power. He argues that in a centralized system of government power is concentrated in a few institutions and although some functions of government may be delegated, "the authority of the central institutions remains supreme and subject to very few restraints. In a decentralized system . . . power is divided and devolved to a range of regional or local institutions which exercise full or partial authority over their respective areas. In this way, they act as a check on one another."²⁸

The dangers of neo-apartheid are reflected in SACOB's Charter, which mirrors the Government's concern to promote neo-apartheid through strong local government units in which whites would maintain a large degree of political autonomy. SACOB's support for this position is evident in its affirmation of a strong belief in, *inter alia*, a market economy and economic growth, private property, and cultural and minority rights.²⁹ Cultural and minority rights are fleshed out in Sections 19 and 20 of the Charter:

19. The form of any new constitution shall be the subject of negotiation between interested parties, and it is essential that any future political system in South Africa provides:
 - 19.1 the necessary checks and balances;
 - 19.2 the safeguard of basic human rights;
 - 19.3 protection for minorities against domination.
20. The State shall not be above the law, but shall, through decentralization and devolution of state powers, be close to the people and responsive to their needs.

The Charter is silent as to what form protection for minorities against domination should take, but given the historic relationship between Anglo-American and the liberal Democratic Party, we may assume that some form of federalism or confederalism is envisaged.

26. ANGLO-AMERICAN CORPORATION OF SOUTH AFRICA, *supra* note 22, at 27.

27. B. GODSELL, SHAPING A FUTURE FOR SOUTH AFRICA: A CITIZEN'S GUIDE TO CONSTITUTION-MAKING, (Cape Town, 1990).

28. *Id.* at 49 (emphasis added).

29. H. PARSONS, INTRODUCTORY COMMENTS ON THE SACOB CHARTER OF ECONOMIC, SOCIAL AND POLITICAL RIGHTS IN SOUTH AFRICA 4-5 (1990) (emphasis added).

The ANC cannot compromise on the demand contained in the Freedom Charter for universal suffrage in a unitary state. If the Government is to lead the white right peaceably into a new South Africa it will have to assuage their fears. The two positions are apparently incompatible, but a system of proportional representation which maximizes the value of white votes may form the basis of a compromise, one of many which will have to be struck.³⁰

V. A Bill of Rights

Two years ago, Albie Sachs noted that "argument about a Bill of Rights in post-apartheid South Africa is beginning to rage."³¹ Today, most of the major political actors agree that the new constitution should contain a bill of rights. The ANC advocated such an instrument as early as 1988; SACOB issued its Charter in May 1990, and the Government-appointed Law Commission came out in favor of the idea in June. Agreement in principle is, however, the only thing which these groups have in common thus far.

There are two basic approaches which can be taken towards a bill of rights. The first is traditional, limited, and potentially reactionary and is that adopted by the Government and big business in their attempt to institute neo-apartheid. The primary objective of a bill of rights would be "to protect the existing and unjustly acquired rights of the racist minority rather than to advance the legitimate claims of the oppressed majority."³² Godsell not surprisingly disagrees:

The purpose of a Bill of Rights is to ensure the necessary degrees of freedom for all citizens to join or form political parties, articulate and debate political aspirations, and engage in peaceful political activity. At the same time this concept is designed to protect public order against political violence. Surely this instrument — if supported by a political culture which makes it more than a piece of paper — holds the promise of reconciling freedom and order in a way that will make debate about future constitutions both possible and constructive. Perhaps the first debate should be about the Bill of Rights.³³

30. It may be argued that the proportional representation has the further advantage (depending upon the threshold laid down) of providing most of the diverse political groups in the country with representation in the parliament thereby reducing the potential for extra-parliamentary resistance from either extreme.

31. A. SACHS, *TOWARDS A BILL OF RIGHTS IN A DEMOCRATIC SOUTH AFRICA* 1 (1988).

32. *Id.* at 4.

33. B. GODSELL, *supra* note 27, at 47.

Another, more progressive conception is that propounded by Albie Sachs on behalf of the ANC, which regards a bill of rights "as an instrument for enlarging the freedom of the oppressed majority, thereby creating a South Africa in which equal rights become a reality and in which the whole population, irrespective of color or origin, can live in peace and with dignity."³⁴ He argues for the inclusion of Second and Third Generation rights, which relate to the material needs of citizens, because it would be perverse to restrict a bill of rights to First Generation, predominantly bourgeois rights, and that it would "be grossly anachronistic to start post-apartheid South Africa with a Bill of Rights document as archaic (even if not as vicious) as the system it is designed to replace."³⁵

One of the problems which has bedeviled rights theory is that of defining who is entitled to enforce a particular right. Take for example the right to development, a so-called Third Generation right predicated upon the entitlement of every human being to basic human dignity and progress. Leaving aside the vexed question of what this right may in fact consist of, a major problem in asserting its existence is deciding whether it is a right to be exercised by the state, by a collective, or by individuals.³⁶ The dilemma facing the ANC is that the bourgeois legal form, structured as it is to promote individualism and protect private property, is likely to be contradictory to the goals of a more just and equitable South Africa. No matter how progressive the content of a bill of rights is it will founder on the rocks of bourgeois legality unless the contradiction between individual and collective rights can be resolved.

To date, the ANC has not published a draft bill of rights. However, its Constitutional Guidelines contemplate the possibility that a bill of rights might in effect be a collection of different charters (with the Freedom Charter as the foundation) reflecting the demands of different sectors of society.³⁷ Such a document would have the advantage of being fundamentally democratic, and would constitute an interesting attempt to

34. A. SACHS, *supra* note 31, at 3.

35. *Id.* at 6.

So-called First Generation rights are bourgeois in origin, being derived from the French and American Revolutions and are codified in the International Covenant on Civil and Political Rights of 1966. Second Generation human rights were inspired by the Russian Revolution and are contained in the International Covenant on Economic, Social and Cultural Rights of 1966. Third Generation rights, largely embodied in the still somewhat nebulous concept of the right to development, are inspired by decolonization and the struggle of Third World countries to develop.

36. See S. ADELMAN, *THE RIGHT TO DEVELOPMENT: PROBLEMS AND POTENTIAL* (1989), and I. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* (1989).

37. For a discussion of a Workers' Charter see Section 7, *infra*.

underplay the individualism inherent in the bill of rights concept by providing substantive material rights. There would, however, also be several potential disadvantages, not least would be a bourgeois system of enforcement. This eventuality would be inevitable unless a fundamental restructuring of the legal system is contemplated. This knotty issue is unlikely to be confronted by a democratically elected government in the immediate future. A further problem might arise in deciding which social groups would have the right to have their charters incorporated in the bill of rights.

As we have seen, the ANC regards provisions for freedom of language and for cultural and religious freedoms in a bill of rights as sufficient protection for any minority. This may well be so, but not perhaps for the reasons envisaged by the ANC. The enforcement of a bill of rights by courts in an unreconstructed bourgeois legal system with a separation of powers and an independent judiciary is, theoretically, all that the white minority requires in order to maintain its economic ascendancy and should render any talk of group or minority rights irrelevant. Entrenched clauses in a bill of rights appended to the constitution which sanctify private property and regulate the means of nationalization and expropriation with compensation will do more to make neo-apartheid possible than all other mechanisms put together. And if, as seems likely, there are clauses guaranteeing freedom of language and religion, Afrikaners should be able to maintain their lifestyle and protect their culture with relatively little difficulty.³⁸

Once again, we have the basis for a flawed, contradictory compromise. By protecting individual rights, such a constitution would guarantee majority rule, but at the cost of accepting a legal form which places private property at the centre of the universe and is hence inherently unprogressive. The protection of individual rights makes redundant the need to protect group rights, because individuals secure in their property and able to freely associate can exercise those rights in order to maintain their cultural or ethnic identity. After apartheid, such a bill of rights might be regarded as the lesser of two evils, and it is likely that this is what South Africa will get.

38. I am not arguing against the rule of law, separation of powers or an independent judiciary, much of which I favor and which it would be foolish to abjure in light of recent events in Eastern Europe and elsewhere, such as Kenya and Zambia. Rather, I am trying to point out that bourgeois legality is contradictory in that while it may well provide procedural constraints upon state power, it is a legal form structured to facilitate capitalist exploitation.

There are in existence two documents designed to form the basis of a bill of rights: the Freedom Charter passed by the Congress Alliance in 1955 and SACOB's Charter of Economic, Social and Political Rights published in 1990.

The Freedom Charter was adopted at the Congress of the People in Kliptown, Johannesburg on 25-26 June 1955 and was the outcome of an extensive process of consultation throughout the country. Possibly the most democratic document ever formulated in Africa, it has been the ideological foundation of the liberation struggle, particularly during the decades in which the peoples' leaders were either in prison or in exile. It demands that the people shall govern; all national groups shall have equal rights; the people shall share in the country's wealth; the land shall be shared among those who work it; all shall be equal before the law; all shall enjoy equal human rights; there shall be work and security; the doors of learning and culture shall be opened; there shall be houses, security and comfort; and there shall be peace and friendship.

SACOB's Charter contains some constitutional prescriptions but is essentially an embryonic bill of rights. Apart from its prescriptions for the protection of minority rights through decentralized power structures, it is largely unexceptionable and limited. The Preamble states the organization's belief that "the optimal wealth creation for the benefit of all is best achieved through a market economy," and section 21 calls for the entrenchment of "economic freedom and the private enterprise ethic" in any new constitution. The Charter is preoccupied with the free market system, individual rights, and private property ("everyone has the right to own property" and cannot be deprived of it "without due process of law and compensation" — section 1). It does not, however, confine itself to representing essentially bourgeois or "First Generation" rights. Acknowledging the realities of apartheid's fate in the current global context, the Charter reflects, rather belatedly, a willingness to act as a catalyst for propelling South Africa towards the twenty-first century, into which the rest of the world is preparing feverishly to enter. To this end, Second Generation rights — that is, social, economic and cultural rights—are also included.

Part I consists of a statement of Economic Rights and Principles and provides that there shall be equal work opportunities, free choice of employment and fair remuneration, freedom of contract and equal pay for equal work, as well as the right to form and join trade unions (section 3). However, the Charter omits the right to strike provided in Article 8(1)(d) of the 1966 UN Covenant on Economic, Social and Cultural Rights and does not contemplate a right to work.

The Social and Cultural Rights envisaged in Part II consist of respect for private and family life, freedom of thought, conscience and religion, and rights to equal education, freedom of language and to participate in the cultural life of the nation. The right contained in section 8.1 of "a person belonging to an ethnic, religious or cultural grouping" to "use his own language" would, on face value, appear to be unexceptionable; indeed, the ANC has indicated its agreement with such a position. This provision can be interpreted either altruistically, as a genuine attempt at promoting a multi-ethnic non-racial society, or more cynically, as agreement with the Government's concept of "group rights." While there can be no disagreement in principle about protecting the right of people to use their own language, it is precisely such a clause which might provide the basis for neo-apartheid in the form of exclusively white schools with Afrikaans as the medium of instruction.

Part III lays down SACOB's desired Civil and Political Rights, which provide that all shall be equal before the law, and prohibits arbitrary arrest, detention without trial, torture, slavery and servitude. It calls for freedom of movement, opinion and expression, freedom of association and peaceful assembly. Incitement of racial, national or religious hatred shall be prohibited by law.

The final and briefest part of the Charter covers Personal and Public Responsibilities, and includes the right of the State to take action in accordance with the law to defend itself during times of public emergency. This ominous sounding provision is a common constitutional mechanism, appearing for example in Chapter 4 of Namibia's constitution.

At face value, then, much of the Charter is consistent with many of the demands of the ANC and the Mass Democratic Movement. However, the aim of monopoly capital is primarily to entrench existing disparities in economic power, and to reduce to an absolute minimum the amount of state-directed restructuring necessary to begin correcting the ravages of nearly 350 years of racial discrimination. It is important to emphasize that the predominant thrust of the Charter is in favor of individual rather than collective rights and to secure the reign of the Rule of Law, with all people having "the right to recognition as a person before the law," equality before the law without discrimination, the right to life, liberty and security of person, and no arbitrary deprivation of these rights. Once again, much of this would be unexceptionable — at least in the absence of bourgeois legality.

VI. The Contradictions of Liberal Constitutionalism

One of the effects of the collapse of Stalinism has been to emphasize the ascendancy of the liberal democratic constitutional conceptions over

the statist ones associated with the Soviet bloc. Liberal constitutional models are characterized by their emphasis on limited and ostensibly accountable government and on individual rights. On these two pillars other structures are erected, such as periodic elections; a separation of powers; the rule of law; an impartial and independent judiciary; and procedural rights commonly enunciated in a bill of rights.³⁹ At face value such a conception is desirable, embodying as it does many of the freedoms underpinning the recent revolutions in Eastern Europe. However, as Engels noted and history has proved, it is the bourgeois democratic form of state which is most likely to throttle progressive aspirations, for "it is precisely the democratic republic which is the logical form of bourgeois rule."⁴⁰

The rule of law, for example, is predicated upon the ostensible neutrality of the state in conflicts between classes, interest groups and individuals. Power must be achieved in a constitutional manner and must be employed neutrally: Economic might or claims of privilege must be ignored. The laws, among which the constitution is preeminent, thus determine who should hold political power and how it can be exercised. A constitution will specify procedures for the creation of all other laws, which must be public, capable of being readily understood, and enforced according to their obvious meaning. No person may arrogate to her/himself the power to ignore them or to dispense with due process. Indeed, the Rule of Law insists that the legal procedures be followed even when this inconveniences the dominant class. Citizens must be able to exercise their respective rights with the confidence that the courts will uphold them.⁴¹ A concrete example is provided by SACOB's Charter which, in section 22, demands that "the institutions of democratic government, and in particular, the separation of state powers, the independence of the judiciary and the supremacy of the law, the freedom of the press and the free formation of political parties shall be the foundation of South African statehood."

The problem with the bourgeois law, and with the Rule of Law in particular, is that it is more concerned with form than with substance; it privileges individualism at the expense of the collective, and it fetishizes law. Thus, apparent formal equality before the law disguises and ignores

39. I. SHIVJI, *STATE AND CONSTITUTIONALISM IN AFRICA: A NEW DEMOCRATIC PERSPECTIVE* [Paper presented to the African Regional Institute of the American Council of Learned Societies, Comparative Constitutionalism Project] 3 (1989).

40. ENGELS, Letter to Bernstein, 24 Mar. 1884 in K. MARX & K. ENGELS, *SELECTED CORRESPONDENCE* 350 (Moscow, 1975).

41. H. COLLINS, *MARXISM AND LAW* 136 (1982).

substantial social inequalities. While formal equality of bourgeois law would certainly be an improvement on the apartheid legal system, the danger is that a de-racialized post-apartheid constitution will ultimately form the basis for a more subtle form of class domination. By refusing to take substantive issues into consideration, bourgeois legal systems are able to pull off the vital trick of granting preeminent protection to private property, and hence to capitalist social relations as a whole. It is therefore the bourgeois legal form upon which capital's constitutional proposals are necessarily predicated, and the bourgeois legal form must at least be contained if liberation is not to be confined to the shell of majority rule.

VII. Workers and Constitutional Change⁴²

This section analyses some of the problems which are likely to arise in the relationship between one important section of South African society and a post-apartheid government, that of the non-racial trades unions. In making a prognosis, I draw upon the experience of Zimbabwean workers during a decade of independence, and the shorter but no less relevant experience of workers in Namibia. It is of course not certain that South African trades unions will experience similar problems, but comparisons between these states are nonetheless apposite for two reasons. First, all three economies are dominated by the apartheid regime and, in particular, by Anglo-American. In addition, all three have faced British colonialism and South African neo-colonialism to one degree or another. Second, the traditions of struggle and the relations between the liberation movements in all three countries bear striking resemblances, particularly as far as the ANC and SWAPO are concerned.⁴³

One of the main differences between unions in South Africa, Zimbabwe and Namibia is their size. The Congress of South African Trade Unions (Cosatu) was formed in 1985 with a membership of more than 500,000 and 33 affiliated unions. Despite this impressive figure, Cosatu is only one of several trade union groupings in South Africa, representing

42. This section is derived from a paper presented to the Annual Conference of the Canadian African Studies Association in Halifax, Nova Scotia, 9-12 May 1990.

43. It is true that the Angolan and Mozambiquan struggles and political economies also have the ravages of apartheid in common. On the other hand, the nature of the MPLA and Frelimo liberation movements was somewhat different, given that their immediate struggle was against Portuguese colonialism. It is for this reason that comparisons are confined to South Africa, Namibia and Zimbabwe.

a total black work-force of nearly seven million.⁴⁴ Between 1979 and 1985, union membership increased six-fold, from 70,000 to half a million and has continued to do so every since. In Zimbabwe, union membership trebled from 57,000 to 170,000 during the same period despite far more favorable conditions. In Namibia, the National Union of Namibian Workers (NUNW) represents about 100,000 workers in a total population of 1.5 million — approximately one in every seven adults.⁴⁵

Labor and the State in Post-Colonial Societies

Nationalism has been a factor common to many social and political struggles against dependent capitalism or direct colonialism. It is a unifying ideology which brings cohesion to a disparate coalition of subordinate classes and potential ruling classes. However,

when nationalism achieves its objectives — usually the consolidation of a unified nation-state — the social contradictions of the nationalist movement tend to sharpen. As the nationalist regime is consolidated, it will act as any other dominant class, albeit with some secondary contradictions with imperialism. . . . On the one hand there is a tendency towards state incorporation of labor (corporatism) under the mantle of legitimacy provided by nationalism and, on the other hand, the labor movement may be the “power behind the throne” of the new nationalist regime.⁴⁶

In Africa, many unionists have been conscious of the need to maintain a power base independent of the nationalist movement even when they were basically in accord with the broad political objectives of that movement.⁴⁷ This has certainly been the case in South Africa and Namibia although, as we shall see, unions in Zimbabwe have suffered from corporatism. Throughout the continent, governments have chosen to deal with the “labor issue” in different ways, but this has almost always culminated in the government taking over labor organizations.⁴⁸ This has led Munck, for one, to argue that “only autonomous working class

44. In 1986 the economically active African population was 6.7 million, excluding the Transkei, Venda, Bophutatswana and Ciskei bantustans. The figures were 324,000 for Asians, 1.13 million for Coloureds and 2.12 million for whites (ANNUAL SURVEY OF RACE RELATIONS - Part 2, 1986, South African Institute of Race Relations, 717-18 (1988)).

45. M. Verbaan, *Namibian Unions: Not Quite There*, WORK IN PROGRESS 64 34 (1990).

46. R. MUNCK, THE NEW INTERNATIONAL LABOR STUDIES 265 (1988).

47. R. COHEN, LABOR AND POLITICS 243-44 (1984).

48. *Id.* at 252.

organizations can represent workers' interests consistently in any 'partnership' with Third World nationalist regimes."⁴⁹

Whether South Africa remains capitalist, moves towards a mixed economy, or undergoes socialist transformation, the famous "trade union debate" in post-revolutionary Soviet Union has

demonstrated the continued importance of trade unions under socialism to express the basic social and economic interests of workers. Yet in practice "actually existing socialism" has stripped trade unions of their class role and converted them into "transmission belts" to take party directives down to the masses. . . . There is, in short, no alternative between, on the one hand, a genuinely organized workers' power and, on the other, a bureaucratic state socialism which will steadily develop its own elite class and claw back the gains of the revolution.⁵⁰

Labor and the State in Zimbabwe⁵¹

According to the ZANU PF government of Robert Mugabe, the period since independence in Zimbabwe has been one of socialist transformation. This corresponds to the "two-stage" theory adhered to by the ANC/SACP alliance. Zimbabwe, according to Mitchell, has been seen in many quarters as a model for a democratic South Africa, despite the fact that the two liberation struggles have taken very different forms.⁵² This raises some interesting questions.

An article entitled "The Second Phase of the Revolution" in ZANU PF's official organ in July 1983 examined the role of workers in Zimbabwe's liberation struggle and, after noting that foreign investors were required to aid in the country's development, concluded that "co-operation between the workers and employers in economic activities of the country is essential." This attitude, that economic development requires a disciplined, peaceful work-force which is not helped by strong, independent unions, has underpinned the government's attitude towards the labor movement since independence. The Zimbabwe government "has sought to maintain a favorable business climate and encourage foreign investment, and has waged a relentless campaign against strikes and taken a range of

49. R. MUNCK, *supra* note 46, at 167.

50. *Id.* at 178.

51. This section is based on B. Mitchell, *The State and the Workers Movement in Zimbabwe*, 12 S. AFR. LAB. BULL., August-September 1987. See also B. Wood, *Roots of Trade Union Weakness in Post-Independence Zimbabwe*, 12 S. AFR. LAB. BULL., August-September 1987.

52. B. MITCHELL, *supra* note 51, at 104.

measures intended to prevent the emergence of a truly independent union movement.”⁵³

This might be taken as a warning to the South African labor movement of what an avowedly socialist government is capable of upon the assumption of power. However, the history of the Zimbabwe labor movement is crucial to an understanding of the relative weakness of trade unions in the post-independence period. The history of Zimbabwean unions runs roughly parallel to that of the unions in South Africa up to the early 1960s; but unlike the unions in South Africa, those in Zimbabwe remained largely non-political during the peasant-based liberation struggle and, although the working class was not passive, a combination of state repression and bureaucratic leadership kept the unions weak. Whereas the resurgent unions in South Africa in the 1970s had learned the lessons of their history and built democratic structures based upon the shop-steward movements and were thus better placed to resist state repression, the unions in Zimbabwe succumbed first to repression and then to corporatism.

What may well be replicated in South Africa is the attitude of a new government beset by the myriad problems of development. Soon after Independence in 1980, the ZANU PF government went so far as to argue that “large strikes should not be permitted in developing countries since the social costs of disruption were too high.”⁵⁴ What is also likely to be similar in South Africa is the inheritance of a set of deep structural economic problems which encourage attempts to co-opt, control or dominate the labor movement “in the national interest.” In Zimbabwe, the Labor Relations Act of 1985 introduced, *inter alia*, controls over unions through compulsory registration and certification; gave the Minister of Labor wide powers to fix wages and intervene in union affairs; provided for a complex and bureaucratic dispute settlement procedure and an effective ban on strikes; and made contravention of the legislation a criminal offence. In South Africa, the recent Labor Relations Amendment Act constitutes an attempt on the part of the state and monopoly capital to claw back many of the gains won by workers’ struggle since the 1970s, and to bureaucratize and dull shop-floor resistance.

Mitchell concludes that

[t]he winning of Independence in Zimbabwe has given workers definite gains. . . . But the capacity for further reforms in an economy faced

53. *Id.* at 105.

54. *Id.* at 108.

with deep structural problems is very limited. The increase in living standards after Independence, a product of the workers' own struggle, has already been reversed. The theory of a steady transition to socialism through capitalist growth together with an expanding state sector is a complete illusion. Instead, workers will be compelled in future to struggle against capital and the state to defend what they have.⁵⁵

Zimbabwean workers have achieved minimum wage laws and controls on dismissals; they have also been subjected to "wage freezes and price rises, thousands of job losses (100,000 jobs were lost in commercial agriculture [in the period] 1980-1985), and laws banning virtually all strikes."⁵⁶

It is not beyond the realms of possibility that workers in South Africa might find themselves in a similar position. Granted, unions in the Republic are far more powerful, and the gains they have made during the past decade will prove far more difficult for capital and the state to erode. Perhaps the real lesson is that workers in South Africa can ultimately rely on nobody but themselves.

Labor and the State in Namibia

No sooner had negotiations for Namibian independence begun, than the workers in that country discovered that liberation did not necessarily imply the satisfaction of all their demands. Despite having been a loyal ally of SWAPO during the liberation struggle, the powerful NUNW was frustrated in its demand that all of its fifteen "fundamental rights and freedoms" be included in the new Namibian constitution.⁵⁷ This may have been due to the fact that SWAPO was forced to compromise on constitutional issues through not having secured the two-thirds majority necessary to dominate the Constitutional Assembly, but it certainly brought home to the Union that it would in future be forced to rely upon its own organisational strength as its most reliable guarantee of workers' rights.

The NUNW is committed to a socialist economy, the struggle for which is likely to be all the more difficult in the light of the liberal constitution adopted and the mixed economy which the new government appears to favor. A further key objective is the establishment of a powerful, unified, free and democratic trade union movement independent of any internal or external domination and influence by political forces.

55. *Id.* at 121.

56. Hall, *Zimbabwe: The Gulf Widens*, 14 S. AFR. LAB. BULL. 60 (1990).

57. The substance of this section is derived from M. VERBAAN, *supra* note 45.

Time will tell whether the inevitable flexing of union muscles in Namibia will lead to controls and repression similar to that experienced in Zimbabwe and other newly independent developing countries. The Union insists that workers' interests are paramount, and that it will maintain its independence; it vows that it will not be dictated to by any Namibian government.

The new Namibian constitution entrenches the right of free association and the right to strike without fear of criminal prosecution — themselves rights which have been denied to workers in many other countries in Africa. However, several other rights demanded by the Union, including the right to a living wage, are not included in the constitution but rather in the constitution's "principles of state policy," which represent a statement of intent rather than entrenched and legally enforceable rights.

These principles also include a commitment to "the active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labor relations and fair employment practices" and a commitment to join the International Labor Organization (ILO) and to adhere to its international labor standards.

The NUNW was clearly unhappy at the failure of its full set of fundamental rights to be included in the constitution, and feared that the granting of those rights which do not appear in it would now be dependent upon the whim of the state. Among the full set of demands made by the NUNW were the right of recognition of trades unions by all employers, including the state; the right to strike; the right of all to work; the right to proper training and education for workers; and the application of United Nations' Decree Number One — that the natural resources of Namibia belong to the people of Namibia.

The Prospects for Workers in South Africa

The ANC has often been accused — usually by ultra-leftists with little understanding of the nature of the struggle — of being a petty bourgeois organization. The ANC was, until it was unbanned and began to face the problems of operating as a political party, a national liberation organization, which was at once its biggest virtue and its biggest vice. It was a virtue because as a liberation organization it proved to be remarkably successful in building and consolidating a non-racial multi-class alliance against apartheid. It was a vice because the multi-class nature of the organization inevitably meant a dilution of the socialist principles which are arguably essential for true liberation.

As negotiations unfold, the resolution of issues like nationalization — a key demand contained in the Freedom Charter — will provide indications

of how a black government will juggle the necessities of economic development, the maintenance of white skills, and the demands of the black working class.⁵⁸ There is growing agreement among unions on the need for a Workers' Charter, with the aim of having it incorporated in the new constitution. The SACP has published a draft Charter,⁵⁹ while Cosatu resolved at its third Congress to consult its membership on the issue.⁶⁰ SACTU, which decided to effectively merge with Cosatu, has also published a draft Workers' Charter which, *inter alia*, includes demands for the right to work; for full freedom of trade union activity; the right to freedom of movement, speech and assembly; for workers to be able to live with their families; equal opportunities for all workers; the right to strike; an eight-hour working day; non-discrimination against female workers; and full political rights.⁶¹ There have also been calls for the right to picket to be included in such a Charter.⁶²

The confidence of South African workers in making such calls results from rapid union expansion since the early 1970s and the numerous gains which they have been able to enforce against the apartheid regime. They have "successfully forged a central place for [themselves] in South African liberation politics" and the

kind of union movement which emerges, as well as the system of industrial relations that is presently being struggled over, will provide the framework for the relations between capital and labor well into the future. The struggle to define the future is taking place within structures inherited from the past. The labor movement is clearly at the crossroads: capital and the state could succeed in containing it, or labor could continue playing a leading role in internal resistance to apartheid. The implications of unbanning the political movements for labor's role in the negotiating process remains to be seen.⁶³

More germane to this paper is the question of whether capital and particularly the state will be able to contain labor in a post-apartheid South Africa.

58. Already the ANC is talking of nationalization as something of a "last resort" and indicating that it is only certain sections of monopoly capital which it has in mind. Walter Sisulu, interviewed on *Whose Shall Be the Land?* (BBC Radio, 1 May 1990).

59. See S. AFR. LAB. BULL. 14(b).

60. R. Roux, *Workers Charter Campaign*, 14 S. AFR. LAB. BULL. 29-30 (1990).

61. *Id.* at 30-31.

62. Patel, *The Right to Picket Facilities: A Workers' Charter Demand*, 15 S. AFR. LAB. BULL. 75-6 (1990).

63. Leger & Webster, *Labor at the Crossroads*, 5 S. AFR. REV. 254-5 (1989).

The ideological differences which beset Cosatu during the first eighteen months of its existence resolved themselves in the form of a strategic compromise during the state onslaught against anti-apartheid organizations in 1987 and 1988. One of these ideological differences was over the relationship between the workers' movement and the liberation struggle. This issue came to the fore when a Cosatu delegation visited the ANC in Lusaka in February 1986, leading some within the shop-floor tradition in the federation to argue that this identification with the national-democratic struggle was problematic in that this tradition stood in absolute contrast to working class politics. "Organisational style and political content were such, it was argued, that any involvement of the working class in such politics must lead to the surrendering of trade union independence and with it the abandonment of working class politics."⁶⁴

One example of the "strategic compromise" reached within the movement was the adoption of the Freedom Charter by several of Cosatu's leading affiliates, leading general secretary Jay Naidoo to comment that "the struggle for socialism is already unfolding within the struggle for national liberation."⁶⁵ Cosatu adopted the Freedom Charter as "a guiding document which reflects the views and aspirations of the majority of the oppressed and exploited in our struggle against national oppression and economic exploitation."⁶⁶ However, the National Union of Mineworkers (NUM) resolution which led to the adoption of the Charter noted that Cosatu viewed these struggles as "complementary to each other and part of an uninterrupted struggle for total liberation."⁶⁷ Interestingly, the then exiled South African Congress of Trade Unions (SACTU), which is closely affiliated to the ANC, sent a telegram to Cosatu's second Congress in July 1987, stating that the struggle for socialism should not be a priority at that stage.

In adopting this approach, the dominant position in Cosatu was rejecting any chronological two-stage theory of change in favor of a view that the struggle for national liberation was part of the struggle for socialism. Indeed, it was asserting that there is no contradiction between the struggles for socialism and national liberation.⁶⁸ At Cosatu's first

64. Fine & Webster, *Transcending Traditions: Trade Unions and Political Unity*, 5 S. AFR. REV. 261 (1989).

65. Jay Naidoo on COSATU, interview in 12 S. AFR. LAB. BULL. 5 (1987).

66. Quoted in Fine & Webster, *supra* note 64, at 262.

67. Carrim, *Cosatu: Towards Disciplined Alliances*, WORK IN PROGRESS 49 (1987), quoted in Fine & Webster, *supra* note 64, at 263.

68. Fine & Webster, *supra* note 64, at 263.

Congress Cyril Ramaphosa, general secretary of the powerful NUM, stated that "the struggle of workers on the shop floor cannot be separated from the wider struggle for liberation."⁶⁹ At its third Congress, Cosatu reaffirmed its belief in the leading role of the working class in the struggle for democracy and socialism, and its commitment to the strategic alliance between the federation and the United Democratic Front (as it then was), the latter's policies being closely aligned with those of the ANC. It also resolved that the trade union movement should retain its independence and decision making structures.⁷⁰

According to Fine and Webster,

the necessity of forced unity has not removed the differences underlying the competing political traditions. Implicit in this broad-front conception of unity is the view that class contradictions are secondary to the national democratic struggle. In a post-apartheid society these class contradictions are likely to come sharply to the fore as the new state embarks upon the task of national development. Trade unions which emphasize their representative role by struggling to defend and improve members' working conditions could easily be seen as opponents of the new state's attempt at national development.⁷¹

They go on to make the point that "attempts to limit the role of trade unions in post-colonial Africa have often been justified on the grounds that trade unions represent only a tiny fraction of the labor force. Compared to the mass of unemployed living below subsistence, workers organized in trade unions are regarded as a privileged labor aristocracy."⁷² All governments are of necessity forced to balance the competing demands of all groups in society, and must do so within a limited set of resources. In southern Africa, every national liberation movement which has come to power has done so after a struggle in which a commitment to socialism has played some part. In Zimbabwe, socialism appears to have been stillborn; in Namibia the signs are not promising, and in South Africa only time will tell. Treading a thorny path towards majority rule, and facing complex economic problems when it comes to power, the new government may not have workers' demands at the top of its list of priorities.

69. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, ANNUAL SURVEY OF RACE RELATIONS 1985 180 (1986).

70. 14 S. AFR. LAB. BULL. 3 (1989).

71. Fine & Webster, *supra* note 64, at 272-3.

72. *Id.* at 273.

The history of workers' movements and trade unions throughout much of post-colonial Africa — indeed, throughout much of the less developed world — indicates that it is essential that South African unions retain their independence and decision making structures and that they remain as democratic as possible, if for no other reason than to be able to withstand the possible cooptation and opportunism of some union leaders. Even these, however, will not guarantee the realization of their demands and the protection of workers' rights. Conflict between labor and the state in post-apartheid South Africa is almost inevitable, given the underlying structural crisis in the political economy and the rash of competing demands likely to face the new administration. Historically, workers have made and consolidated gains only through class struggle, and the situation is unlikely to be different in South Africa. As for the future of socialist struggle, only time will tell. What is certain is that this struggle will have to be elevated from the level of rhetoric and will manifest itself in forms of conflict which may not be to the taste of the new state.

According to Munck, "it is a general phenomenon that socialist states strive to develop industrial production in the belief (disputed by some) that this is the key to modernization and development."⁷³ The rationale commonly put forward by the governments of less developed countries — often self-styled socialist administrations who practice totally contradicts their rhetoric⁷⁴ — for subordinating trade unions is that overall economic development is in the interests of all citizens and that trade unions cannot be allowed to act against this national interest. As Marx argued, "the emancipation of the working classes must be conquered by the working classes themselves."⁷⁵ Munck asserts

[t]his means that no elite group, however well intentioned, can substitute for the active and conscious participation of the working classes. It is not merely an abstruse sociological debate to consider the class make-up of Third World revolutions, and in particular the role of the urban working class. It is even more important to consider its role once state power has been seized by the revolutionary forces. If the working class is not fully engaged in running a society at all levels, it is simply not socialism according to basic Marxist criteria. The final point. . . is

73. R. MUNCK, *supra* note 46, at 179-180.

74. Recent events in Eastern Europe have, hopefully, finally laid to rest the idea that democracy can or should be subordinated in order to achieve socialism. Socialism is meaningless in the absence of democracy.

75. Quoted in R. MUNCK, *supra* note 46, at 181.

that of democracy. Socialism cannot be forced; if it is not democratic, it is not socialism.⁷⁶

VIII. Conclusion

Apartheid is a form of capitalist production in which racial discrimination has played a predominant role.⁷⁷ The removal of the formal legal manifestations of racism is, therefore, a necessary but insufficient condition for the true liberation of the black majority. The problem, in other words, is not simply one of racial discrimination but rather that of a set of social relations of production in which race has heretofore been definitive. Abolishing the Population Registration Act will not provide the fifth of the African population living in shacks with houses.

It would thus appear logical to conclude that not only must the racial aspects of capitalism be swept away, but that ravages of the capitalist side of the equation need to be addressed as well. Contrary to the views of the Government, monopoly capital and Western imperialism, capitalism in South Africa is very much part of the problem rather than a potential solution. The legacy of Eastern Europe and the realities of South Africa today dictate that some form of welfare state with a mixed economy is the least that is required if racial capitalism is not to metamorphose into neo-apartheid. Even this, however, is unlikely to be enough.

Our study of South African workers illustrates some of the difficulties and contradictions which may lie in the path of transition to a post-apartheid society. We have seen, for example, that the major contradiction facing the labor movement in South Africa is that while democracy is essential to the achievement of its goals, a bourgeois democratic system might well be the very thing which makes the realization of those goals difficult to attain. The labor movement has played and continues to play an important role in the struggle to destroy apartheid and transform South African society, but workers' demands, though important, are only one set among many. Liberation will come to South Africa, but it is likely to bring with it an intensification of other contradictions: between labor and the national liberation movement, labor and capital, and labor and the new state. The struggle for socialism, for a genuinely pluralist and participatory democracy, will probably have to begin in earnest on the day that apartheid is finally buried.

76. *Id.* at 181-2.

77. For a discussion of the relationship between race and class see S. ADELMAN, *supra* note 23, and H. WOLPE, *supra* note 1.

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