ANC LEGAL AND CONSTITUTIONAL COMMITTEE
LABOUR COMMISSION PRELIMINARY REPORT

CONFIDENTIAL

THE CONSTITUTION AND LABOUR RIGHTS

by Fink Haysom and Prof Halton Cheadle (Consultant)

1. INTRODUCTION

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welcome such criticism from our allies. In this regard the report may serve as a set of proposals which can be concretely addressed in place of the current abstracts and general discussions. The same consideration would apply to any draft constitution which may be based on this and similar commission reports. Full circulation is thus envisaged as part of a structured process of consultation.

1.3 It is also necessary to point out that this report is not a report on behalf of labour or workers. It is a preliminary report prepared for, and on behalf of the African National Congress Constitutional Committee. It is not intended to pre-empt any proposals by COSATU or the SACP. Indeed proposals from our allies are envisaged and to be encouraged, but are to be properly regarded as their own independent proposals.

1.4 We have accordingly taken as our starting point the economic programme of a transitional government, as outlined in the Freedom Charter and in the Constitutional Guidelines. We have assumed an open and democratic constitution, and not a socialist prescriptive constitution. In this regard we insist on all the organisational rights through which labour is enabled to express its power and determine the direction of society. As we discuss below, we would resist any constitutional

measures which would limit, or foreclose, on the direction the state might take in giving democratic expression to socialist aspirations. In this we would anticipate that the COSATU Charter might differ. We would properly expect, that such a charter would envisage or embody the aspirations for a socialist rather than transitional state, and would set socialism as its explicit goal. The adoption of the demands of the Charter into the constitution may then raise the associated problems of the express inclusion of such socialist goals in a transitional phase, and the constitutional role of such a charter. It may well be that those demands which do not find expression in clauses of the constitution, may be incorporated as aspirational goals in the form of policy guidelines (See Namibian Constitution Chapter 11 and paragraph 4.1 below).

1.5 Labour's expectations of the Constitution, and the law, differ in breadth and perspective from that of other groups. The usual interest of citizens in regard to the nations constitution is their concern over the exercise of public power - how to exercise it and how to limit it. Labour is certainly interested in such issues, but it is equally interested in the exercise of private power, specifically the private power which is the ancillary of ownership of economic resources. In this report we hope to touch on those issues in which the repository of power

is not the state but a private power holder. For example, the right to information must be framed sufficiently broadly to enable workers (and consumers) to investigate the toxic nature of the substances to which they are exposed. One means of limiting the reach of private power, in the economic sphere, is by empowering those who are subject to that power. In this regard labour seeks a pre-eminent position in the protection of its rights to organise, and to take action, a pre-eminence even recognised in the Apartheid Public Safety Act which prohibits emergency measures which impinge on the conduct of matters covered by the Labour Relations Act of 1982 (See 3 of Act 3 of 1953).

1.6 In this report we deal with protection of labour rights and interests in line with the following distinctions:

1.6.1 Those issues which may be regarded as labour issues. These must be divided between (a) those which should be dealt with in the constitution, such as an entrenched right to strike; (b) those which should be dealt with in labour statutes, such as Basic Conditions of Employment or Safety Regulations.

1.6.2 Those issues which are of universal or wider interest but in respect of which labour has a special interest. These issues include the rights of assembly, association and expression. Labour's interest here lies not only in the affirmation of these freedoms, but may also lie in their careful qualification.

1.6.3 General rights in which labour also has a special interest include the Economic (2nd Generation or 'Red') Rights to housing, health care, education, employment and social security.

1.6.4 Finally labour has a legitimate interest in the overall structure of the constitution, more particularly the ability, or the right, of workers to participate in the management of the economy. In regard to this aspect the report will propose various measures which will enable or facilitate trade union participation in the overall structure. The report refers only briefly to the general constitutional structure, specifically to the composition of the judiciary, a second chamber, and referenda/plebiscites and initiatives.

2. LABOUR RIGHTS

We have distinguished here between those rights of labour that ought to be contained in the basic law of the new South Africa and those rights that should be left to statutory enactment. Although the distinction will not excite controversy, what rights are to fall into the respective categories will most certainly do. We have accordingly made the choice to give the ANC a basis from which to consult its allies and to formulate policy. The reasoning underlying our choice is the anti-apartheid nature of the constitution (ie the specific experience of the labour movement under apartheid) and comparative constitutional and labour law (ie the categorization employed in other constitutions). We urge that the following rights be entrenched in the constitution:

2.1 Forced labour. The specific experience of forced labour under apartheid makes the inclusion of this prohibition obvious. The wording employed by the International Labour Organization in Convention ...[1] and the wording of Article 9 of the Namibian Constitution should form the basis for a draft provision. Consideration ought to be given to national service that is not military in nature. In other words, the constitution should not limit other forms of national service and not limit, as the Namibian Constitution does, these alternative forms

of service to conscientious objectors. A limit however ought to be placed on the duration of alternative forms of national service. Consideration ought also to be given to legislation that might require students that have been educated at the expense of the State to work in South Africa for a period before being entitled to emigrate. Although these limitations would generally fall to be considered under freedom of movement, there might be a conflict under this head. In other words, if the ANC or any future government wishes to restrict emigration to those whose schooling and tertiary education have been subsidized by the State,[2] then this provision must be drafted in such a manner as to permit the necessary legislation.

2.2 Child labour. There should be specific provision to prevent the economic exploitation of children. The provision in Articles 15(2) to (4) of the Namibian Constitution should form the basis for the draft. The generality of Article 15(2) does not prohibit the use of child labour where it is not socially or physically harmful or economically exploited. This means that many of the traditional uses of children in family-run businesses are permissible. Article 15(3) however prohibits the use of child labour in factories and mines. The recommendation however is that the age limit should be 16 and not 14 years.

2.3 Trade union organization rights. These rights are normally located in statute. The proposal that these rights find a place in the constitution does not mean that their detailed elaboration should not be left to statute and collective bargaining. The reasoning behind their proposed inclusion is drawn from the specific experience of the labour movement under apartheid and the way in which constitutions have been interpreted in other jurisdictions to undermine these rights. On the assumption that the economy will remain in private hands during the transitional phase, any entrenchment of the right to property and privacy will perpetuate the practice of pitting these rights against the right to organize. The bitter experience of the trade unions in organizing workers on the mines and the farms is the primary source for this proposal. By denying access to trade union organizers on the grounds of property rights (now at common law and maybe later under the constitution) make it imperative that the organizational rights of access, representation, check-off, and information are positively stated in the constitution, or, at the very least, qualify the right to property and to privacy. If there is no positive statement (or negative qualification) of the classical individual rights any legislation[3] that seeks to confer these

rights will be vulnerable to be struck down for being in conflict with the constitution.

2.4 The right to strike. This is the most controversial of the rights and the most fundamental. Quite apart from any constitutional guarantees that there may be, there is no surer means for ensuring the independence, the autonomy and the influence of the trade union movement than conferring the right to strike. The controversy centres around two related poles: the limitations on the right and the extent of the right. In order to arrive at a formulation that meets the needs of economic development, we have turned to international labour law as enunciated by the constitution, the Conventions ... and ..., the decisions of the Committee on Freedom of Association and the findings and reports of the Committee of Experts of the International Labour Organization. The structure of the ILO is tripartite - representing states, labour and employers. Their standards are thus representative of the three interests that have to be taken into account in limiting and entrenching the right to strike. It is also important to stress that the right to strike is not only an economic right (ie an essential element of collective bargaining) it is also a political right (ie a means of bringing pressure on a government or the private

holders of power) insofar as the economic and social interests of labour are concerned.

(a) The limits on the right to strike: It is universally accepted that there should be limits on the right to strike. There are three broad limitations:

(i) the prohibition of strikes in essential services. The parameters of the exception are relatively simple to set out in the constitution. The elaboration can be done at the level of the statute and collective agreement;

(ii) the limitations of the right to strike that have as their object the pursuit of the economic, social interests of workers. This formulation widens the right beyond the confines of collective bargaining and into the realm of political pressure. In other words, a strike to increase wages would be subject to the right. A strike to protest the introduction of labour legislation which is considered prejudicial to the labour interests should similarly be subject to the right. A strike, however,

to prevent the loading or off-loading of cargo to or from a foreign country because the trade union objects to the politics of that country does not fall within the bounds of the protection.

(iii) the temporary limitation on the right to strike to permit disputes that might give rise to a strike to be resolved through the collective bargaining processes established by statute or by collective agreement.

(b) <u>The extent of the protection</u>: A strike, the deliberate withholding of labour, can, at common law, constitute a crime, a breach of contract and a delict. The breach of contract not only entitles the employer to seek relief against the trade union for soliciting a breach of contract by way of an interdict or an action for damages, it also entitles the employer to dismiss the employees either on notice (if the breach is not material such as might be the case in an overtime ban) or summarily on grounds of a material breach. If the right to strike is to go beyond a formal freedom, the activity and the actors have to be protected from the long arm of the common law. This protection is partially

realized in the Labour Relations Act. Strikes that are in compliance with the Act (ie in compliance with these limitations referred to above, namely: s46 (essential services); the definition of 'strike' read with s65(1)(A) (limitations on the object of the strike); and s65 (the temporary procedural limitation)) are protected from actions for damages and interdicts at common law (s79). To some extent the protection against dismissal for participating in strikes has been won in the courts. However, the experience of the 1988 amendments to the Labour Relations Act has left the indelible impression on the labour movement that these protections, so vital to their independence, autonomy and economic influence, cannot be left to the vagaries of the legislative and judicial process.

The wording of the right can take several forms. The Italian constitution merely states '.....'. The French constitution states '.....'. We propose the following wording: '.....'.

2.5 HARD RIGHTS (NON-CONSTITUTIONAL)

These are listed firstly to alert the Constitution Committee to the laws we think ought to be relegated to legislation and ought to be taken into account when drafting the constitution.

2.5.1 Basic conditions of employment. We suggest that the innovation introduced in the Namibian Constitution in respect of principles of state policy ought to constitute part of a draft constitution. It should be state policy to enact legislation to protect employees from exploitation.

2.5.2 Minimum wage legislation. We suggest that it should be state policy to ensure payment of a living wage. We think however that the provision in the Namibian Constitution (Article 95(i)) ought to include the enactment of legislation to achieve this end.

2.5.3 Collective bargaining. The details of collective bargaining ought to be left to collective bargaining itself and to legislation where appropriate. The laws regulating collective bargaining ought not to be subject to attack under other provisions of the constitution. We accordingly believe that the

constitution should expressly support collective bargaining as a policy of state and to make the necessary derogations from the traditional rights where these rights may be used to strike down the legal framework of collective bargaining. To illustrate the potential dangers that might arise, there have been several constitutional attacks on the collective bargaining institutions in Canada. They have all concerned the reach of the Canadian Charter of Rights, ie the Charter does not apply to private contracts), the fact is that these challenges, had they been directed to legal frameworks, such as our system on industrial councils, the extension of agreements to non-parties, the closed shop, etc, they may well have been successful. The 'rights' that generated these challenges were the right to freedom of association, the right to freedom of expression. It is therefore vitally important to ensure that the institution of collective bargaining and the legal framework that buttresses these institutions are not made vulnerable to constitutional challenges. We accordingly propose (a) that collective bargaining be a principle of state policy, and (b) that the individual rights be drafted in such a way as to insulate collective bargaining.

2.5.4 Social welfare. We support the manner in which this is dealt with in the Namibian Constitution. It should constitute state policy to provide for adequate compensation for injury on duty, unemployment and retrenchment.

2.5.5 Safety in the workplace. We support the manner in which this is dealt with in the Namibian Constitution.

3 CONSTITUTIONAL RIGHTS IN WHICH LABOUR HAS A SPECIAL INTEREST IN THE AFFIRMATION AND FORMULATION

3.1 Freedom of association Freedom of association is a fundamental freedom It applies to all aspects of civil society: from political parties, civic associations, to trade unions. Its content however changes, for in international labour law the freedom is understood to include collective bargaining and the right to strike. In the political arena the corollary of the freedom of association, namely the freedom not to associate, is not controverted. In the context of labour relations, the freedom not to associate carries a very different valency - it becomes the basis for challenging a whole range of collective bargaining institutions. While freedom of association is generally accepted within the trade union movement and the slogan of 'one union one industry' is considered as an asperation (ie to be

achieved through voluntary association rather than by legislative imposition), there must be a specific derogation from this freedom. It should not be used to strike down laws regulating collective bargaining.

3.2 Freedom of Assembly and Expression As with the freedom of association, labour requires an entrenched and fundamental right to assemble to demonstrate, to express themselves freely, subject only to universal and ordinary requirements that these be subject to the usual limitations of law regarding violence to persons or property or lible.

The importance of these rights for the formation of political parties and trade unions representing labour is self-evident. However these rights are also important ancilliaries of the right to strike. in particular the right to picket is both an exercise of the right to assemble, and a widely recognised labour right.

It is, in any event anticipated that South Africa would subscribe and adopt the many international conventions which enshrine these rights. In particular the ratification of the ILO conventions dealing with the freedom to organise (Convention No. 87, adopted in 1949)*

would itself impose a duty to observe the recognised labour organisation rights.

This report need not detail the provisions that should be included in the constitution save to say that the form in which these rights appear in the Namibian constitution, and the limitations, appear suitable.

3.3 Derogation from the right/freedom of Association, Assembly and Expression, with reference to labour's exercise of these rights

This report subscribes to the view that derogation from constitutionally protected rights in times of national disaster or emergency should also be provided for in the constitution. In short, it is better that the circumstances of the derogation, the manner of its periodic review, the extent of the derogation, and the rights which are incapable of limitation should be specified. It is better to do so in advance than in the heat of the crisis. However it seems there is authority for the proposition that even during an emergency such rights should not be limited where the exercise of such rights relate to industrial or labour disputes. It is significant that even the apartheid emergency powers were precluded from impinging on the conduct of disputes covered by the Labour Relations Act. It is difficult to

see how the limitation of these rights in an industrial dispute can ever be justified in a state of emergency.

Secondly, in regard to the limitation of the rights of freedom of assembly et al, (where the exercise of these rights is subject to the permission of an official), the discretion to refuse permission should be limited. The right to picket, for example, is extensively frustrated by the refusal of municipal authorities to sanction pickets. In our view the right to picket should be clearly recognised, and where permission is required such must be given if a minimum of technical criteria are met. In short, officials must be disarmed of their political discretion to veto pickets.

The same consideration applies to the right to strike. Where a derogation from this right is provided for, the applicability and extent of the derogation must be expressly set out in the constitution or labour statute. For example, it is conceivable that special arrangements may have to apply to workers in the energy sector, or to pilots while in flight. What is to be associated is the conferral of a broad discretion upon officials or bodies to veto strikes in 'essential' services or in Uganda, the executive power to schedule industries as essential services as and when industrial disputes arise.

3.4 Freedom of Movement The experience of workers under apartheid places the right to live and work in areas of ones choice as a fundamental right. Little more need be said of this right.

4. ECONOMIC RIGHTS

4.1 Labour, representing the working class has a special interest in assertion and mechanisms of enforcement of economic rights which would serve to guarantee a minimum quality of life and security for all. This is particularly so in the wake of decades of exploitation and apartheid. Labour's concern to establish these rights is evident in the SACTU and SACP Charters* and will, we believe, be reflected in the COSATU Workers Charter. The 'rights' of concern to labour include the following:

(a) the right to 'shelter' or housing close to places of work;

(b) the right to employment, alternatively to unemployment benefits or social security;

(c) the right to pensions in old age;

(d) the right to both a safe working environment as well as a safe and healthy living environment;

(e) the right to assistance and support in regard to the duties of childrearing;

(f) the right to health care;

(g) the right to education;

(h) the right to an acceptable level of nutrition.

4.2 The entrenchment of such rights in the constitution has been criticised on three grounds:

(a) These rights are, is is claimed, not 'rights' in the ordinary sense, and are programatic demands which belong in political manifestoes or charters. They are the goals of the political policy of elected governments.

(b) These rights raise problems of enforcement. Who will enforce them? Who will provide the money? Patently, it is argued, the courts cannot enforce them out of their own resources. "A dozen interdicts will not

deliver a meal for the hungry if the granaries of teh nation are empty."

(c) In enforcing such rights what standards are to be applied. Is everyone entitled to a house in Houghton or a hostel flat, to pills or to a dialysis machine.

4.3 We submit that the accepted notions of enforcable rights are too rigid. Further, it is clear that aspects of these rights, particularly the manner of provision of these resources, is capable to supervision by the courts. Thus pensions should never be allocated in a discriminatory fashion. Secondly, it may be possible to argue, with a clear understanding of the fiscal implications that some minimum provision of these welfare entitlements be guaranteed. The actual extent could be fixed according to the circumstances by legal or by other political mechanisms.

Thirdly, there are various ways in which a programmatic charter, or set of goals could be given some legal effect or influence. It is possible to require consultation or the approval of certain sectoral constituencies in regard to all legislation or programmes having a bearing on such areas. We make proposals in regard hereto below. Alternatively, these social economic goals can be used, as

in the Namibian Constitution, (and perhaps the Soviet Constitution) as guidelines for state policy or as aids in legal interpretation. To cite one example, widespread retrenchment of civil servants in Namibia in line with, say, IMF proposals for restructuring the economy may be open to be challenged on the basis of Article 95 of that country's constitution.

4.4 It is not the task of this report to finally resolve the manner and extent to which effect is given to these social and economic rights in the constitution. We merely reiterate that a constitution which is silent on these issues may not only fail to extend the potential protection in these areas, but will also appear to many workers as a document which is remote from the actual substance of life.

4.5 A 'right' not usually included in the catalogue of economic rights is that of the capacity to influence or participate in decisions relating to the economy. Decisions to nationlise or privatise sectors of the economy, by way of example, should require the prior consultation or consent of labour. This is dealt with more fully below.

A concrete economic policy that is capable of constitutional form is that of a duty on the part of the state to support co-operatives or co-operative ventures. Whether this should be effected by means of legally enforceable rights, or by means of policy guidelines, we leave open for the present.

5. GENERAL CONSTITUTIONAL STRUCTURE

Mechanisms for the enforcement of Constitutional Rights and for the structured participation of labour.