

WHAT DOES THE ENTRENCHED BILL OF RIGHTS ENTAIL

- (a) The concept "entrenched bill of rights" was referred to in our President's press statement of the 9th January, 1986. Our committee has reason to suppose that people at home favour the inclusion of such a bill in the constitution.

Clarification is sought from the NEC as to whether the Bill of Rights should form part of our constitution and be entrenched and in considering the matter the NEC will bear in mind the following consideration:

- i) Entrenched clauses of a constitution require special majorities and are therefore not easily altered or amended;
 - ii) It is impossible to proclaim rights which cannot be effectively fulfilled by the resources available to the state;
 - iii) Bills of Rights in constitutions are sometimes used as a device by minorities to protect and entrench their former positions;
 - iv) Human rights cannot be regarded in the absolute since they are limited by the obligations and structures of the society.
- (b) Which organs of state will be empowered to enforce the said Bill or Rights?
- (c) The following categories of fundamental rights are contained in various constitutions: OAU and United Nations Documents, e.g.
- i) First Generation of Rights which are classical liberal rights contained in UN Universal Declaration.
 - ii) Second Generation of Rights which are the Social, Economic and Political Rights contained in UN conventions of the 60s.
 - iii) Third which includes the Rights of Peoples to Peace, Development and a Clean Environment.

The question is, does the entrenched bill of rights envisaged include all or part of these contained in the three categories?

AFRICAN NATIONAL CONGRESS CONSTITUTIONAL COMMITTEE

25.03.1986

Notes: re Inclusion of Democratic Mass Organisations in the Constitution.

Memorandum by Albie Sacks

Maputo

This is clearly a question that has to be determined in the light of the overall character and structure of the Constitution. Constitutions of a liberal-democratic type normally do not contain such provisions. Essentially they state the rules of the game without identifying ^{any} social forces or organisations as having a leading or important role in governing society or managing public affairs. Constitutions of a 'people power' or 'socialist' type may or may not have references to democratic mass organisations. Where they do (for example, the 1977 Soviet Constitution) it will normally be after reference to the leading role of the vanguard party. The Soviet Constitution thus spells out the role of the Communist Party as the leading and guiding force of Soviet society in an extensive article (art 6) and then goes on to declare: Trade Unions, the all union Leninist Young Communist League, cooperatives, and other public organisations, participate, in accordance with the aims laid down in their rules, in managing state and public affairs, and in deciding political, economic, and social and cultural matters. (Art 7)

It will be noted that apart from the YCL, organisations are not mentioned by name, not even the Trade Union organisation, nor the Soviet Women's organisation.

On the other hand, there are 'Peoples Power' type constitutions which do not mention Democratic Mass Organisations. The function of these organisations is determined by their statutes and not by the Constitution.

Thus the Constitution of the People's Republic of Mozambique refers to the leading role of FRELIMO (Arts 1,2 and 3) and the special role of the Peoples Army (Art 5) but makes no reference to Democratic Mass Organisations.

Such organisations exist e.g. the organisation of Mozambican workers the organisation of Mozambican Women, the organisation of Mozambican Youth. There are also what are called Socio-Professional Organisations e.g. the National Organisation of Teachers, the National Organisation of Journalists, the National Organisation of Photographers. Infact only the organisation of Mozambican women ~~existed~~ ^{was existed} at the time the Constitution was adopted, namely, on the eve of Independence. But there has been no move since to give constitutional as opposed to political recognition of the role of these organisation, neither generally nor specifically.

A reference to the Draft Nicaraguan Constitution indicates that no special place is allotted to either a leading Party or to Democratic Mass Organisation.

Re; SOUTH AFRICA

An article in a future constitution based on Peoples Power principles could refer to the constitutionally recognised role of Democratic Mass Organisation. In the absence of an article dealing with the special role of the ANC (and its allies?) such a provision might lead to confusion, however. My recommendation, therefore, is that the matter be looked at as a whole before any attempt be made to draft provision dealing with PMO's. In the absence of such an analysis, I would suggest ~~and~~ generalised formulation on the following lines.

ORGANISATIONS OF THE PEOPLE

"~~Trade union, Women's~~, women's, youth, students', community and other democratic organisations of the people shall, in accordance with the aims laid down in their statutes, participate actively in the formulation and the implementation of social, economic, political and cultural policy".

There should be a ^{separate constitutional} ~~special~~ section on workers' rights and trade unions. In any constitution there should be a special ~~section~~ provision made for workers rights and trade unions.

LAND AND RURAL POLICY

Our land and rural policy as spelt out in the fundamental documents of the movement (the Freedom Charter and the Road to South African Freedom) involves confiscation, redivision and redistribution of the land amongst those who work it, and this implies the extension of private ownership of the land, though, of course, this was qualified in 1969 by the phrase ".....those who do not exploit the labour of others."

In the light of the current set up in South Africa, where the monopoly giants like Anglo-American, Balow Rand and Rembrandt, to mention just a few, have made significant inroads into agriculture, and also in the light of our desire to blunt petit-bourgeois and bourgeois aspirations among our people, particularly in the rural areas, a mechanical approach to an application of this policy would not be appropriate. In the 1984 and 1986 statements of January the 8th we have as the movement used the slogan "seize the land" and expressed the need for the movement to address the central task of the landless masses seizing the land which rightfully belongs to them.

Our commission has looked at how this question was addressed in other jurisdictions. Land was confiscated and the erstwhile owners expropriated, with or without compensation. Then the land was allocated to the state, to co-operatives and to individual citizens who will indulge in personal, private farming without using and exploiting the labour of others. We believe that in South Africa a national basis already exists for the creation of state and co-operate farms, with the proviso that those small farms who do not use and exploit the labour of others, shall be allowed to work. We are requesting and expecting proper instructions from the NEC in this regard.

WORKERS' RIGHTS; PLACE AND ROLE OF TRADE UNIONS

- (a) It is a considered opinion of the Consitution Committee that in any future constitution there be a special provision dealing with the workers' rights, the place and role of trade unions.

This is in recognition of the leading rokle of the workers in our revolutionary struggle. Further there is bound to be a preponderance of workers to other classes in the new state. Black workers are in the majority and suffer double oppression as a nation and class.

Fial

Finally we can say with confidence that workers in South Africa are relatively more class conscious than others in the rest of Africa.

- (b) The questions which are raised for the considerstion of the NEC are the following:-

- i) Since the working class shall not yet be the collective owner and master of all national wealth what will be the nature and extent of their rights, i.e.

(1) their right to form trade unions.

- How autonomous shall these trade unions be, taking into consideration ideological differences within the trade union movement at present;

(2) what will be the relationship between ANC as the ruling party and trade unions.

(3) what will be the nature and content of the right of workers or trade unions to strike.

- (c) NEC is required to give further guidelines as regards worker participation in management oof enterprises; right of workers or trade unions to initiate legislation and their overall participation in the governance of the country.

After receiving NEC's response the Constitution Committee will draft a more comprehensive article on this.