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Law and Post-Apartheid South Africa

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Abstract

This Article examines South African perspectives on the legal system within South Africa post-Apartheid, in particular the new focus on human rights.

LAW AND POST-APARTHEID SOUTH AFRICA†

*Winston P. Nagan**

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† This Article is based on a speech that was given at the University of Pittsburgh on March 18, 1988. The views expressed are personal to the author.

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The author would like to dedicate this article to the faculty members and student leaders of the University of Fort Hare who were fired, imprisoned, repressed, or abused when the Pretoria authorities took over Fort Hare in 1960. The article is particularly dedicated to the memory of Professor Z.K. Mathews (Law) and Griffiths and Victoria Mxenge (civil rights lawyers who died for their beliefs) and in honor of Professors Gertrude Darroll (English) and James Davidson (Physics).

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INTRODUCTION

On a recent visit to South Africa, I had occasion to talk to various community leaders about the relevance of human rights to a new post-apartheid legal order. The impression I received from the few white South Africans I was able to meet was extraordinarily positive. In contrast, the impression I received from talking to black South Africans was exactly the opposite. They saw a post-apartheid legal order in compliance with human rights as, at best, something of a political hoax or, worse, an elaborate fraud, generated by a ruling-class interest in the preservation of economic and social privileges, historically allocated to white South Africa by naked expropriation, plunder, and brute-force. From those with an articulate leftist orientation, there was the additional charge that human rights are essentially a ruling-class myth, designed to hijack fundamental structural changes in South Africa, changes that are the only sure guarantee of a just society. Under this view, human rights represent something like a false consciousness or a kind of secular religion—a secular opiate of the masses. Human rights are either irrelevant to the future South African legal order or downright dangerous, in that they could be an impediment to the total eradication, not only of visible elements of the apartheid state but of less visible “structural” forms of power, which sustain the pattern of oppression and exploitation over time.

These impressions may be compared to perceptions South Africans generally hold of the notion of law and legality itself.¹ Since white South Africans, or at least the majority of them, are prime beneficiaries of the apartheid legal order, their image of law and its place in society and culture is generally a positive one.² If, however, one is black, the image of the law may be

1. For an introduction to the South African legal system and an examination of the attitudes of both white and black South Africans toward the law, see J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978); A.S. MATHEWS, *FREEDOM, STATE SECURITY AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY* (1986); A.S. MATHEWS, *LAW, ORDER AND LIBERTY IN SOUTH AFRICA* (1972); A. SACHS, *JUSTICE IN SOUTH AFRICA* (1973).

2. See H.R. HAHLO & E. KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* (1968) [hereinafter *SOUTH AFRICAN LEGAL SYSTEM*] (general outline of tradi-

negative. For blacks, law is an instrument of coercive oppression, and the image of legality and legalism is nothing but a cold form attempting ineptly to provide a convenient mask for brute, naked power. Law is simply power by another name. Correspondingly, the relationship of law to justice may be seen in the image that both law and justice are not only blind, they are deaf and dumb.

I would describe these perspectives as the products of observation and conversation with a wide variety of "ordinary" South Africans. The themes they represent would not be a deep focal point of intellectual discussion in South Africa, since, on the white side, with very few exceptions, the nature of law is more an assumed datum than a continuous part of the public debate about the nature of a just society.³ South Africa's abstract, positivistic tradition virtually excludes from the purview of legal education, legal scholarship, and the intellectual lines of jurisprudential discourse such questions as the relationship of law to social process, the relationship of law to the power processes and constitutional order, the nature of the public order sustained by "law," the role of law in the promotion of human dignity, and solidarity with human kind from the local to the global level.⁴

From the perspective of the black community, there is such an astonishing exclusion from the legal profession that the alien nature of law permeates social and intellectual life at almost all levels within the community. Black lawyers, the few

tion and history surrounding South African legal system); H.R. HAHLO & E. KAHN, *SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* (1960) (examining system of law in South Africa). The important South African law journals have a history of being notoriously uncritical of the theoretical and jurisprudential assumptions that underlie South African law. These journals include *The South African Law Journal*, especially earlier volumes under the editorial aegis of Professor Hahlo. *The Afrikaans Journal*, *Tydskrif vir Hedendaagse Romeins—Hollandse Reg*, founded by Dean Pont of Pretoria and Fort Hare is another example. Modern scholars, a minority to be sure, are challenging this. See J. DUGARD, *supra* note 1.

3. See generally *SOUTH AFRICAN LEGAL SYSTEM*, *supra* note 2 (emphasizing established nature of South African legal system).

4. See generally Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943) (outlining possible paths of reform in legal education); Reisman, *Designing Curricula: Making Legal Education Continuously Effective and Relevant for the 21st Century*, 17 *CUMB. L. REV.* 831 (1986-87) (critiquing current state of legal education with substantive and structural suggestions for change).

of them that there are, practice on the margins of a legal order that moves between humanitarian legal band-aid and crisis management. All of this takes place in a legal game of "one-up"—the state always being the one-up. For these lawyers "the life of the law," to misuse a famous Holmesian quotation, is a "hell of an experience."⁵

This perspective is one that generates a high skepticism of law and its relationship to freedom. Professor Gilmore seems to echo this sentiment. In his now famous Storrs lecture he stated that "the less just a society, the more law there will be; the more just a society, the less law there would be."⁶ "In hell" he said, "all would be law, and due process would be meticulously observed."⁷ Black South African lawyers have little time to theorize about these larger questions. Their role in the entire framework of South African legal culture presents a level of marginality that is downright dangerous if it is representative of the pool of experience that is to manage legal culture in the post-apartheid period.

I. *LAW AND THE UNJUST STATE*

The perspectives I have tried to describe have generated for me an interest in the problem of law in an unjust legal order—not a new or novel problem—and the relationship of this issue to the possibilities for either the continuation of an unjust legal order or a new legal order for a more just South African society. My comments must, therefore, be speculative and preliminary.

The nature of the legal order of an unjust state has been well canvassed in Anglo-American legal literature.⁸ Those familiar with the literature of Anglo-American jurisprudence will perhaps recall the famous Hart-Fuller debates of the late 1950s.⁹ To simplify the theme of those proceedings, Profes-

5. See O.W. HOLMES JR., *THE COMMON LAW* 1 (1881). The actual quotation is: "[T]he life of the law has not been logic: it has been experience." *Id.*

6. G. GILMORE, *THE AGES OF AMERICAN LAW* iii (1977).

7. *Id.*

8. See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958) (distinguishing law that is from law that ought to be); Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958) (stressing need to recognize internal "morality of order" necessary to creation of all law).

9. See *supra* note 8.

sors Hart and Fuller debated whether Nazi law really was "law." Since some writers on the South African scene have characterized the apartheid system as a South African reich, the analogy to Nazi Germany and the Hart-Fuller problem would appear to be compelling.¹⁰ Fuller, the conservative natural lawyer, had argued that law is in effect a complex of interacting moral systems and that a legal system such as that of Nazi Germany, without even a minimal internal morality of law, simply was a negation rather than an affirmation of the idea of law and legality.¹¹

Hart, from the perspective of modern analytical positivism, argued that although Nazi law was bad law, it was nonetheless law.¹² This debate raised the question of whether a moral minimum was an essential condition of law. The problem as applied to the South African legal order suggests an obvious question: Is the law of the apartheid state so morally decrepit as to represent a state of brute force masked occasionally in technical form? Or, is the law of the apartheid state bad law, but law nonetheless?

Both these perspectives address the Anglo-American legal heritage notion that law generally has an uneasy relationship to power and that the overriding preponderance of coercion or naked power in both the Nazi and apartheid systems undermines, weakens, or totally destroys the principle of legality. In this view, law may have an affinity with power, but law is not naked power and, conversely, naked power is not law.

I would suggest that the relationship of law to power is one of the most important questions confronting a legal theorist concerned with the future of law in the post-apartheid state. Since I would prefer to understand power in a realistic sense, I may venture a conception of law that is correspondingly realistic: Law in any community is a process of decision-making that is both controlling (power) and authoritative (authority) whereby members of the community clarify and implement their common interests.¹³

10. See generally B. BUNTING: THE RISE OF THE SOUTH AFRICAN REICH (1969) (postulating existence of roots of a neo-Nazi drift in manner in which apartheid program was set in place).

11. Fuller, *supra* note 8, at 650-54.

12. Hart, *supra* note 8, at 620.

13. For various discussions of the relationship of law to power, see generally

Having forged this operational definition of what law is—in a realistic, as distinct from a “formalistic” or “moralistic,” sense—I want to briefly explore the problem of law and power in the colonial state and the problems of the reception of the colonial legal culture into the post-colonial state. Here I am talking in terms of paradigms rather than actual states. I am, of course, trying to distill a paradigm problem and then apply its lessons to the South African legal scene.

II. *POST-COLONIALISM AND THE SOUTH AFRICAN STATE*

In many ways the apartheid state shares forms of governance characteristic of colonialism. The colonial state usually inherited a legal culture based upon the legal culture of the metropole but with crucial variations, variations that included a coercive element substantially different from that which would be permitted in the metropole itself. Some colonial societies simply had a dual-stream legal culture.¹⁴ They sometimes adopted, in an exaggerated manner, the forms, rituals, and even apparel of the metropole, while simultaneously sustaining, sometimes in complex patterns of interdependence or relative autonomy, a heavy emphasis on coercion and brute

International Law Essays: A Supplement to International Law in Contemporary Perspective (M. McDougal & W.M. Reisman eds. 1981) [hereinafter *INTERNATIONAL LAW SUPPLEMENT*] (collection of essays relating global constitutive process of authoritative decisions to more comprehensive processes of effective power); M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER, THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980) [hereinafter *HUMAN RIGHTS AND WORLD PUBLIC ORDER*] (“framework of inquiry” into human rights suggesting classification of such rights in a manner appropriate to world order); M. McDUGAL & W.M. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: PUBLIC ORDER OF THE WORLD COMMUNITY* (1981) (coursebook examining moral and intellectual responsibilities in international law); M. McDUGAL & W.M. REISMAN, *POWER AND POLICY IN QUEST OF LAW* (1985) (collection of essays examining relationship between power of law and its effects upon policy); W.M. REISMAN & A. SCHREIBER, *JURISPRUDENCE, UNDERSTANDINGS AND SHAPING LAW* (1987) (collection of essays examining relationship between power of law and its effect upon policy); W.M. REISMAN & B. WESTON, *TOWARD WORLD ORDER AND HUMAN DIGNITY* (1976) (collection of essays examining relationship between power of law and its effect upon policy).

14. See Address by Okoth-Ogendo, National Security in Kenya, the Preservation of Public Security Act Uhuru at the Whim of Government, given at Seminar on National Security and Human Rights (Feb. 12, 1987) [hereinafter *Okoth-Ogendo Address*]; see also, C. DE KIEWIET, *THE IMPERIAL FACTOR IN SOUTH AFRICA* (1966) (discussing effects of colonialization in South Africa); M. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975) (discussing effect of colonialization in South Africa).

force.¹⁵ Indeed, in very many contexts, the law of the colonizer and the colonized was a brutal affair, with the colonizer on the giving end and the colonized on the receiving end.¹⁶ “Law” here, by any standard of appraisal, was very much a coercive order, a matter of effective power. To be fully appreciated, this coercive order must be seen in the micro-details of its operation, details that are frequently not observed by social scientists, lawyers, or even economists. In most cases, the preemptive design of the colonial state in its infrastructural particulars, its administrative-bureaucratic processes, and its processes for the administration of justice all evidence coercive modalities of rule rationalized and made more efficient by advanced technologies of both coercion and administration.

What is perhaps partially obscured in this model is that in many instances the resistance to colonialism made the nature of the independent colonial state even more intensely coercive.¹⁷ This coercive structure was bequeathed to the newly independent elites of many “new” nations.¹⁸

Hidden in the euphoria of past independence celebrations was the realization that the apparatus of state—the inheritance of the prior regime—was a conception of public order based less on authority, and more on power. Perhaps the signal event that obscured this reality was the fact that grandiose constitutions were crafted, some after long and tortuous negotiations and dialogue, and were engrafted onto this post-colonial state. The operative disjunction between constitutional ideals and the inherited apparatus of the state, with its highly coercive characteristics, could not have provoked a more cynical juxtaposition of hopes and ideals with power and pragmatics. Something had to give. Dean Okoth-Ogendo of the University of Nairobi describes the outcome in general terms: Constitutions without constitutional law.¹⁹

Since South Africa is rapidly coalescing around alternative paradigms about its future, and since power-related outcomes may be crucial to appreciate the nature of that future, it is appropriate to spell out the threshold practical problem. Since

15. See *supra* note 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. Okoth-Ogendo Address, *supra* note 14.

the apparatus of state is in the hands of the Afrikaner elite, a transfer of that state to a post-apartheid black government would generate the transmittal of a highly centralized "garrison" state, with a massive apparatus of coercion and administration. Constitution-making may prescribe a new idealistic legal agenda, which may simply mask the operative reality of law, power, and administration. In a context of insurrectionary violence there is a serious question about what exactly of the old legal order will survive. It should be recalled, however, that the United States had a revolution and retained the common law as the law of the land—a system more in tune with vested than revolutionary interests.²⁰ The French went one better. They codified the existing Franco-Germanic-Roman law.²¹ Indeed, the revered Socialist Karl Renner argued that legal forms are essentially neutral²²—depending on politics, one can put either capitalist or socialist content into contract, delict, and property.

With this background let us examine some core theoretical concerns about constitutionalism, power, and law and then attempt to apply them to the post-apartheid legal order.

III. THEORETICAL CONCERNS ABOUT THE PROBLEM OF POWER

The basic technique of the comparative theorist is simplification. The mental tools of simplification are reductionism and model-building. Social scientists who focus on the description of power in society have utilized a form of conceptual reductionism effectively. Thus, theorists have argued that South Africa's power relations are defined by race relations issues, by class relations, or, indeed, by the interactions of the elite and non-elite.²³ More recently, theories of pluralism and

20. The United States Constitution assumes the continued validity of the common law in Article III: "The judicial Power shall extend to all Cases, in Law and Equity . . ." U.S. CONST. art. III, § 21, cl. 1. The seventh amendment preserves the common law institution of the jury trial: "[T]he right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." *Id.* amend. VII.

21. See A. VON MEHREN, *THE CIVIL LAW SYSTEM* 1-6 (1957); *A GENERAL SURVEY OF CONTINENTAL LEGAL HISTORY* 16-17 (N.J. Rothman Reprints 1912).

22. K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW* 2 (1949).

23. For discussion of the factors behind the political and social change that has occurred within South African society in the 19th and 20th centuries, see R. PRICE &

consociationalism have been used either descriptively and/or prescriptively to describe or prescribe for the system of power relations in that state.²⁴ A point of general concern in social science is that descriptive concepts may frequently mask prescriptive preferences. Once the problem has been conceptually reduced to a relatively simple formula, models using salient features of the society under examination can be constructed. The prime function of such theorizing is explanation. The precise technique is simplification, although the "good" models will have graduated levels of complexity, until presumably the model as a model so simulates reality that the two are practically indistinguishable. Perhaps the model then ceases to be a model at all. Realities organized through such a process become more accessible, possibly meaningful, and, in extreme cases, even "rational."

In general social theory, two dominant concepts vie for supremacy in the explanation of power relationships in any society. These concepts generate two distinct models. The first model is that of consensus-collaboration. This model posits that societies strive towards equilibrium and collaboration in pursuit of common interests.²⁵ This model has received strong support from structural-functional social science.²⁶ The second model is the model of conflict.²⁷ This is a model inspired

C. ROSBERG, *THE APARTHEID REGIME* (1980) (general discussion of political and racial issues in modern South Africa); A. SAMPSON, *BLACK & GOLD: TYCOONS, REVOLUTIONARIES AND APARTHEID* (1987) (emphasizing economic and social changes in South Africa as being the result of race and class relations); H.J. SIMONS & R.E. SIMONS, *CLASS & COLOUR IN SOUTH AFRICA 1850-1950* (1969) (analyzing South African history as being the product of racial and class struggles); F.A. VAN JAARVELD, *THE AWAKENING OF AFRIKANER NATIONALISM 1868-1881* (1961) (postulating how and when Afrikaner nationalism arose, emphasizing the "birth of Afrikaner national consciousness" as a reaction to the "Imperial Factor" in South Africa); NAGAN, *American Policy in Southern Africa: The Stakes and the Stance*, in *THE U.S. AND SOUTH AFRICA: THE LIMITS OF "PEACEFUL CHANGE"* (1978) (outlining United States's efforts in South Africa and the ramifications of such efforts).

24. See L.J. BOULLE, *CONSTITUTIONAL REFORM AND APARTHEID* 25-72 (1984) (defining "pluralism" and "plural society" and seeking to illustrate theory of consociationalism by relating it to different traditions in political theory).

25. For a theoretical discussion of the origin and development of social classes, see T. BOTTOMORE, *CLASSES IN MODERN SOCIETY* 9 (1966).

26. Bottomore discusses how there is a high degree of social mobility between the classes and that the classes seek to achieve similar goals. *Id.* at 57.

27. See T. HOBBS, *LEVIATHAN* (E. Rhys ed. 1914) (1655) (stating that classes exist in conflict).

by both the left and the right. On this issue each side has its champions. The champion of the right is Hobbes, with his modern successors such as George F. Will and William F. Buckley. Those of the left are also well represented by such figures as Karl Marx and his successors.²⁸

Both the consensus and the conflict theorists are concerned with explaining the nature of power in society. They do this by using various strategies designed to frame or structure inquiry in such a manner as to frequently confirm their own basic conceptual assumptions. To the consensus theorist, social mobility undercuts class conflict. Elite circulation is usually conditioned by meritocracy and contains the potential for social conflict. To the conflicts theorist, model building by social stratification is crucial for understanding conflict, especially class conflict. These models are useful in explaining the nature of the South African power process and perhaps help us as lawyers to clarify the conceptual underpinnings of the constitutional scheme we create, assume, or describe.

IV. *THE RELEVANCE OF THE POWER PROCESS TO CONSTITUTIONAL LAW*

Efforts to integrate conflict and consensus paradigms of social process are rooted in the intuitive insight that in all human interaction, one can discover patterns of both collaboration and conflict. The trick is to discover when people will collaborate and when they will fight and, from a policy-making standpoint, to prescribe the situations in which either conflict or consensus is desirable. In other words, the control and regulation of collaboration and conflict, in the common interest, poses a significant problem for law and for the conceptions of law that one holds. If we accept the sociological idea that law is a major—indeed massive—instrument of social control, then the relationship of law to the process of effective power is an entirely relevant datum to both theorist and practitioner.²⁹ If

28. See K. MARX, *CAPITAL* (Int'l Pub. 1967) (1864) (positing theory of economically based classes antagonistic to one another—class conflict reflects the incompatibility of differing modes of production).

29. See generally H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950) (commentary on influences of different legal forces within society); M. McDUGAL, *THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO* (1978) (discussing balancing of power in conjunction with the constitutive process and pro-

the formal foundations of the process of effective power are reflected in constitutive arrangements, the relevance of power to constitutionalism would seem to be apparent.

I suspect that in its most basic sense, a constitution is not a document fed by precedents about its scope and relevance. In its most fundamental sense, a constitution is really a process by which the basic power expectations of any community are institutionalized by understandings about appropriate allocations. Indeed, these understandings ultimately may be codified in a document or appropriate representative symbol. If it is true that constitutions are decisional techniques by which societies contain conflict between different power groups and alignments, conflict control must then be a major purpose of any constitutive scheme. But the impetus to limit the cost of conflict through constitutional containment is not all. For the very purpose of containment may lead to a recognition of broader vistas of collaboration on matters of common advantage. I would, therefore, suggest that both conflict and collaboration are intrinsic to any constitutive process and are central features of the conditions that sustain such processes.

V. CONFLICT-CONSENSUS, PLURALISM, AND THE CONSTITUTIVE PROCESS

It has been fashionable to describe the political culture of the United States as pluralist.³⁰ The reconciliation of pluralism with democracy is simple: Pure democracy is a theoretical myth, not an operational reality. Pluralistic realities make democracy practically possible, hence the label "pluralistic democracy." Contemporary lawyers are concerned with the relevance and salience of theories about the basic institutions of U.S. society. For example, the legal process jurisprudential school bears a close affinity to theories of political pluralism

tection of individual human rights); HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 13, at 161-307; INTERNATIONAL LAW SUPPLEMENT, *supra* note 13, at 1-14; R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (5th ed. 1943) (outlining authoritative precepts, techniques, and ideals of private law); Nagan, *Civil Process and Power: Thoughts from a Policy-Oriented Perspective*, 39 U. FLA. L. REV. 453 (1987).

30. For a general discussion of the political structure within the United States, see R. DAHL, MODERN POLITICAL ANALYSIS (1963) (discussing how democratic society is composed of numerous subsystems); D. NIMMO & T. UNGS, AMERICAN POLITICAL PATTERNS: CONFLICT AND CONSENSUS (3d ed. 1973) (general discussion of democracy and composition of different political systems).

and even views law as a neutral, yet principled, back-bone of a kind of political pluralism.³¹ Indeed, the theory that underlies the modern form of the U.S. Constitution, in the opinion of many mainline theorists, is political pluralism.³² It is unclear whether historically, the Constitution is a consequence or a condition of pluralism or, indeed, whether the complex alliances of interest groups and individuals can be fairly described as pluralistic in the sense that the term is used today. Theories of pluralism compliment the conflict theory of social organization, and it is argued that the experience of segmented societies sometimes generated special versions of pluralism.³³ Indeed, social theory suggests that there are three distinct variations of pluralism,³⁴ not all of which are compatible with democratic ideals. First, there is conflict-pluralism,³⁵ which may result in a single group dominating other groups. Second, there is consensual-pluralism,³⁶ in which cultural differences are minimized by high social mobility, in which individuals frequently enjoy multiple group affiliations. The third model is consociational pluralism.³⁷ This model is the one that

31. See H. WECHSLER, *TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW IN PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 27 (1961) (discussing how the courts of law must be entirely principled. The law is a "principled decision . . . one that rests on . . . reasons that in their generality and their neutrality transcend any immediate result that is involved."); see also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* vii (1978); HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 13, at 1; Nagan, *Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 343, 472 n.331 (1982). See generally H. HART & S. SACKS, *THE LEGAL PROCESS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958) (collection of essays on study of law as functional process, focusing upon institutions through which law is expressed).

32. See R. DAHL, *supra* note 30, at 9-10; S. MONSMA, *AMERICAN POLITICS* 51 (1969). Dahl states that a "'democratic' society properly describes a social system that not only has democratic political (sub)systems but also a number of other sub-systems that operate so as to contribute directly or indirectly to the strength of the democratic political processes." *Id.*

33. In discussing the formation of the U.S. Constitution, Monsma emphasizes that it was "the product of political struggles and conflicts among contending forces." S. MONSMA, *supra* note 32, at 51-52. See generally D. NIMMO & T. UNGS, *supra* note 30.

34. See A. LIJPHART, *THE POLITICS OF ACCOMODATION I* (1968).

35. *Id.* at 3.

36. *Id.* at 5.

37. See L.J. BOULLE, *supra* note 24, at 25; Daalder, *The Consociational Democracy Theme*, 26 *WORLD POL.* 604 (1974). See generally Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969). The two key themes in the notion of consociational democracy are (1) group dynamics and (2) allocation of power. The idea incorporates prob-

Afrikaner intellectuals urge has promise for South Africa. This form of pluralism suggests a highly segmented society (perhaps extensively segmented) in which a high degree of cooperation exists at the elite level of social process. The Afrikaner philosopher Degenaar suggests that "[t]he present situation

ably all of the following: "vertical pluralism," "segmented pluralism," "social fragmentation," "ideological compartmentalization," pillarization, and more. Daalder, *supra*, at 606. The model of consociational democracy tends to "show a curious mixture of ideological intransigence on the one hand and pragmatic political bargaining on the other. Separatism makes for a dogmatic, expressive style of politics within ideological families. But relations among subcultures are settled by a process of careful and businesslike adjustments." *Id.* at 607. See generally L. POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1971) (analyzing substantive law of different legal systems across cultural lines). Daalder continues:

[C]onsociational democracy tends to have an extensive network of functional organizations within ideological families, which allows a means of controlled representation for special interests. The prevalence of myriad ideological organizations is therefore not necessarily a sign of impending battle. Rather, it provides the organizational infrastructure on which elites can operate in an atmosphere of discretionary freedom, coupled with a fair guarantee of consensus. In the view of some authors, such ideologically separate groups also help to minimize opportunities of conflict: "good social fences," in Lijphart's words, "may make good political neighbors."

Daalder, *supra*, at 608.

A major weakness in the typological model of consociational democracy is its reticence on why and how such consociational systems develop. Major exponents of its development have included such scholars as Arend Lijphart. See A. LIJPHART, *supra* note 34. The most refined answer is proffered in HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 13; see also, Kaplan, *Balance of Power, Bipolarity and Other Models of International Systems*, 51 AM. POL. SCI. REV. 684 (1957); McDougal, Willard & Reisman, *The World Process of Effective Power*, in INTERNATIONAL LAW SUPPLEMENT, *supra* note 13, at 357. Kaplan notes that within the structure of the international system,

functional lines of organization are stronger than geographical lines

Functional cross-cutting makes it most difficult to organize successfully against the international system or to withdraw from it. Even if the constitution of the system were to permit such withdrawal, the integration of facilities over time would raise the costs of withdrawal too high.

Kaplan, *supra*, at 694.

In his discussion of the subject, Pospisil's basic thesis is that "every functioning subgroup of a society has its own legal system which is necessarily different in some respects from those of the other subgroups." Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 J. CONFLICT RESOLUTION 2, 9 (1967). Pospisil concludes in this regard as follows:

Consequently, law in a given society differs among groups of the same inclusiveness (within the same legal level); thus different laws are applied to different individuals. Law also exhibits discrepancies between legal systems of subgroups of different inclusiveness (between different legal levels), with the consequence that the same individuals may be subject to several legal systems different in the content of their law to the point of contradiction.

Id. at 9.

can be described in terms of conflict pluralism with a possible development in the direction of consociational pluralism which could be the stage of transition towards a fully-fledged consensus pluralism'³⁸

This perspective builds upon a conception of South Africa's power and constitutive process as seen essentially through the prism of white hegemony. One will appreciate the inherent difficulty of adequately describing the complex power realities of South Africa in terms of general abstractions like "conflict," "consent," or "pluralism."

I would suggest that the South African power process, for the purpose of the kind of understanding that is attempted here, might require an approach that is more radically contextual, such as the general outlines of the processes of effective power pioneered in the classic expositions of Lasswell and Kaplan, Lasswell and McDougal, and others associated with the policy-sciences.³⁹ A radically contextual view of the processes of effective power would ask a range of questions perhaps obscured by some of the more conventional frames of reference. Such questions include: who are the power-conditioned actors; what are their perspectives of identity, demand, and expectation; what bases of power are at their disposal; what strategies of power do they have access to (diplomatic, ideological, economic, military); in what situations do they interact (geographic, temporal, institutional, crisis, etc.); and with what results and effects? Such a perspective about power may enable us to explore and observe the South African power process without a rigid fixation either on the institution of white power exclusively or on examining power relations purely through the prism of the state. Indeed, such a focus may enable the observer to see more explicitly the dynamics of black power. It cannot be gainsaid that black culture is inert, on the contrary, it is a vigorous, power-generating, norm-creating community, which generates an alternative frame of expectations about law, legal culture, and most importantly, about constitutive process. Let us, therefore, assay some of

38. L.J. BOULLE, *supra* note 24, at 37 (quoting Degenaar, *Pluralism and the Plural Society*, in *THE GOVERNMENT AND POLITICS OF SOUTH AFRICA* 238 (1978)).

39. *See supra* note 29.

the dominant elements of the complex South African power process.

VI. CHANGES IN THE SOUTH AFRICAN POWER PROCESS AS INDICATORS OF A TREND TOWARDS AN ALTERNATIVE LEGAL ORDER

The crisis that presently exists in South Africa seems more serious than the events that occurred in Sharpsville in 1960 and Soweto in 1976-77.⁴⁰ Power relationships within all segments of society are in the midst of change. There are four factors that are central to understanding the race and power dynamics of South Africa:

- (1) the extent of the political mobilization of blacks under the umbrella of the United Democratic Front [the "UDF"];
- (2) the emerging attitude in various sectors of the white community (including the Afrikaners) that the African National Congress [the "ANC"] is a force to be reckoned and spoken with;
- (3) the tangible effects of international sanctions on the South African economy; and
- (4) the position of influence and legitimacy of the ANC inside and outside South Africa.⁴¹

VII. THE SOUTH AFRICAN POWER PROCESSES

The most important power-conditioned occurrence within

40. See Address by Winston Nagan, in PROCEEDINGS, EIGHTIETH ANNUAL MEETING, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 320-22 (Apr. 9-12, 1986) [hereinafter Nagan Address]. In Soweto in late 1976 and 1977 numerous riots took place, many of which were initiated by students protesting government decrees on educational policies. See *South African Police Use Tear Gas to Quell Soweto Student Protest*, N.Y. Times, Feb. 10, 1977, at A3, col. 1. In Sharpsville similar rioting occurred in 1960. In one particular incident, 56 persons were killed and 162 were wounded after police opened fire on a crowd of 20,000 that had surrounded a local police station. See *The Tragedy at Sharpsville*, N.Y. Times, Mar. 22, 1960, at A36, col. 1. For discussions of the economic and political changes that have occurred within South Africa, see *Internal Political Situation in South Africa: Hearings Before the Subcomm. on Africa of the Comm. on Foreign Affairs*, 98th Cong., 1st Sess. (1983); *The Possibility of a Resource War in Southern Africa: Hearings Before the Subcomm. on Africa of the Comm. on Foreign Affairs*, 97th Cong., 1st Sess. (1981); COMMONWEALTH GROUP OF EMINENT PERSONS, MISSION TO SOUTH AFRICA: THE COMMONWEALTH REPORT (1986); K. GRUNDY, THE MILITARIZATION OF SOUTH AFRICAN POLITICS (1986); M. MBEKI, PROFILE OF POLITICAL CONFLICTS IN SOUTHERN AFRICA (1987); SOUTHERN AFRICA IN CRISIS (G. Carter & P. O'Meara ed. 1977); Nagan, *An Appraisal of the Comprehensive Anti-Apartheid Act of 1986*, 5 J.L. & RELIGION 327 (1987).

41. Nagan Address, *supra* note 40, at 320-21.

South Africa has been the extent of black political mobilization,⁴² specifically the growing strength of the ANC, the UDF, and the trade unions.⁴³ In spite of the government's attempts to eliminate it,⁴⁴ the UDF remains an influential force within South Africa. While the UDF has not sought to use the violent techniques practiced by the ANC,⁴⁵ it shares the same objectives.

The ANC, with its union support, is the most prominent organization seeking to influence the formation of a new South African government.⁴⁶ If the ANC were legalized and operational, observers predict the UDF effectively would be absorbed into the ANC.⁴⁷ In sum, effective mobilization under the umbrella of the UDF and the trade unions promises changes in the black power process and solidarity with the ANC.

A second noteworthy change within South Africa has been the fragmentation of politics within the white community. Vast changes have occurred in business, educational, and religious structures within society.⁴⁸ In spite of the fact that it has been labeled as a terrorist group by the government, the ANC has established significant contacts in all three of these areas.⁴⁹ The ANC has sought to solidify its power base within society by maintaining both coercive and negotiating strategies in hopes that such tactics will further isolate President Botha's wing of the nationalist party while at the same time increasing

42. *Id.* at 321.

43. *Id.* It was not until late 1970 that black unions were given the same rights to bargain and strike as white unions. R. SINCERE, *THE POLITICS OF SENTIMENT* 79 (1984). Due to this, the impact of the black union movement is just beginning to be felt. *Id.* The UDF was formed in response to the 1983 Constitution. *Id.* at 3. Hence, its impact upon events in South Africa is also comparatively recent.

44. See Cowell, *South Africa Puts 16 Blacks on Trial in a Treason Case*, N.Y. Times, Aug. 6, 1985, at A1, col. 4 (16 UDF leaders placed on trial).

45. *Id.* Unlike the UDF, since the early 1960s, the ANC has claimed responsibility for numerous terrorist attacks. R. SINCERE, *supra* note 43, at 21.

46. See generally Cowell, *Lesotho Expels 60 South African Insurgents*, N.Y. Times, Jan. 26, 1986, at A6, col. 1; Gwertzman, *U.S. Ask Inclusion of Mandela Group to Pretoria Talks*, N.Y. Times, Aug. 31, 1985, at A1, col. 4 (emphasizing prominence of ANC within South Africa).

47. See *supra* note 46; see also Nagan Address, *supra* note 40, at 320-21.

48. See Nagan Address, *supra* note 40, at 321. For a commentary on the social, economic, and religious changes that have taken place within South Africa, see R. SINCERE, *supra* note 43.

49. R. SINCERE, *supra* note 43.

ANC exposure.⁵⁰

It may also be observed that the acts that consolidated and formalized black urban ghettos (townships),⁵¹ and the fragmentation of South Africa in line with the policies of statal "Bantustan" apartheid,⁵² have also sown the seeds for pockets of black autonomy from day to day white control—white administration. One of the key points of conflict in the ghettos and townships is the spontaneous development of alternate community structures that are culturally representative of black rather than white expectations of governance. The coercive side of these developments (apart from state repression and reaction) have meant that it is almost impossible to secure the physical integrity of black state functionaries in the townships.

The above mentioned data reflect in only the most cursory manner the complex trends in the disposition of power—especially informal power in South Africa—but they enable us to suggest a tentative hypothesis: Black South Africa and white South Africa over time generate power outcomes that may suggest a normative order for both blacks and whites that, although frequently interdependent and sometimes even inter-determining, can sometimes be seen as relatively discrete. The dynamics of white power have been closely assayed in many eminent works.⁵³ Its processes of norm creation have been an almost axiomatic product of those researches. But the business of norm creation among blacks remains an understudied matter for reasons probably too numerous to mention here.

VIII. PRESCRIPTION AS A NORM-GENERATING PROCESS

Let us examine the business of norm-creating activity with a mildly heretical notion. Let us suppose that the apartheid state represents largely the "formal" law of the land. Let us assume, however, that South Africa and its complex, discrete, and interlocking power arrangements constitute a living, vigorous, norm-creating system. Let us further hypothesize that

50. See Nagan Address, *supra* note 40, at 321.

51. See J. DUGARD, *supra* note 1, at 80.

52. *Id.* at 188.

53. *Id.*; see, e.g., R. LEONARD, SOUTH AFRICA AT WAR: WHITE POWER AND THE CRISIS IN SOUTHERN AFRICA (1983); R. PRICE & C. ROSBERG, *supra* note 23; D.J. VAN VUUREN, SOUTH AFRICA: A PLURAL SOCIETY IN TRANSITION (1985).

while there are such things as laws on the books, there is also such a phenomenon as the "living law"—a kind of law-making, norm-generating process arising out of actual behavior, a process that produces expectations sometimes inconsistent with the formal law, the official myth of apartheid law.

Perhaps we might examine the roots of this development in terms of such matters as the delegitimizing of the law of the ruling group, a practice inaugurated by Gandhi prior to the Great War and continued through the campaigns against unjust laws and the resistance to "law" internally and externally at complex levels of social, political, and interpersonal interaction. Let us look at such efforts as the Unity Movement Ten Point Program,⁵⁴ The Freedom Charter,⁵⁵ the UDF Declaration,⁵⁶ and more recently the update of the Freedom Charter of 1988,⁵⁷ not so much as "law" in any formalistic sense, but as outcomes of the discrete black power process and as codifications of norm-creating activity of those actors and institutions opposed to the apartheid legal order.⁵⁸ Perhaps we might go

54. See generally H.J. SIMONS & R.E. SIMONS, *supra* note 23.

55. THE FREEDOM CHARTER OF SOUTH AFRICA (U.N. Center Centre Against Apartheid pub. 1979), *reprinted infra*, appendix A.

56. UDF Declaration, *reprinted infra*, appendix B.

57. Freedom Charter—1988 version [hereinafter Charter 88], in *ANC's Post-Apartheid Guidelines—A-Y*, Front File, Aug. 1988, at 1 [hereinafter Front File], *reprinted infra*, appendix C.

58. Two thoughtful essays that explore South African black constitutional expectations are Dlova, *Towards a Non-Racial Majoritarian and Quasi-federal Constitution in South Africa*, 3 *LESOTHO L.J.* 117 (1987) and Pheko, *Constitutional Reconstruction of South Africa*, 3 *LESOTHO L.J.* 145 (1987). Dlova's paper underlines the differences between the ANC and the Pan Africanist Conference ("PAC") perspectives regarding the status of whites and other minorities under an ANC or PAC dominated regime. Perhaps the most important difference lies in the "charterists" versus "Africanist" symbology. Charterists are essentially progressive democrats. They are non-racial; whites and other minorities are clearly included in the definition of who is a South African. Africanists are inclined to be more ethnically exclusive about South African or "Azanian" identity. Dlova, *supra*, at 120-22. In the context of the Freedom Charter, Dlova points out that the Charter firmly stipulates a commitment to universal franchise and a non-racial democracy. On the structural configuration of a post-apartheid South Africa, federal-type ideas are present in the Freedom Charter, since the Charter promises a guarantee of equal rights for all national groups. The territorial and ethnographic implications of this guarantee are unclear. The problem of a one-party versus a multiparty state is also problematic, because South Africa's diversity stratifies the power process. A multiparty system may be necessitated by the conditions of effective power. Again the Charter guarantees the prospect of freedom of association. A multiparty constitutional arrangement in a post-apartheid society is certainly consistent, possibly even mandated, by the Freedom Charter. See Freedom Charter.

beyond the heretical and suggest that in South Africa, incipient legal expectations among the oppressed are already a part of the legal landscape. The way to make sense of these expectations, norm-generating communications, is perhaps to borrow from the model of classical communications theory:

Who?

Says What?

About What?

Through What Channel?

To Whom?

With What Result?

With What Effects?⁵⁹

And perhaps the most adventurous idea of all: Let us use this model to approximate the making of the living law of black South Africa. Such a model would contain the following elements:

Communicators	}	Target Audience Authority Signal Control Intention	}	Policy Content ⁶⁰
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The instruments identified and the particular activities specified are by no means exclusive indicia of what we are attempting to describe. However, we have tried to suggest that there is symbolic importance to those instruments in a double sense.

supra note 55, *reprinted infra*, appendix A. Portions of the Freedom Charter do, at least in form, resemble expectations codified in constitutions that honor a bill of rights. *Id.* However, recent human rights developments make the Charter somewhat out-of-date in the field of human rights, regional or universal.

59. Reisman, *International Lawmaking: A Process of Communication*, in AM. SOC'Y OF INT'L L., PROCEEDINGS OF THE 75TH ANNUAL MEETING 101 (1981). Reisman emphasizes that in 1948 Lasswell formulated this series of questions. These questions provide the means by which one can understand how "lawmaking or the prescribing of policy as authoritative for a community is a process of communication." *Id.* at 105.

60. *See id.* Using similar language, Reisman discusses how

"control analysis" focuses on the Who, the communicators. "Content analysis" focuses on the What. Those who look primarily at the institutions specialized to print, as audio or visual communications, the channels of communication, we are engaged in "Media Analysis." "Audience Analysis" focuses on the Whom and "Effects Analysis" focuses on the personal and social consequences of a flow of communications. Ideally, all these types of analysis should be studied in ensemble, but any one provides a useful window of the process.

Id. at 106.

First, they symbolize the alternative possibilities of a different legal and social process. Second, they are important symbols of the struggle itself. Unfortunately, the instruments, of necessity, are also more a product of a reaction to the apartheid state. From this point of view, a critical content analysis would seem to undercut the authority these instruments symbolize. And yet, with or without a critical assessment, these instruments may indeed be the future blueprint of the new legal order. And, like some predecessor examples, they may form a kind of constitutional blueprint without practical significance.

For those South Africans who believe in liberation but do not believe in human rights, let us start with the language of the Freedom Charter for illustration: The Charter says that "[a]ll national groups shall have equal human rights!"⁶¹ The rights recognized under this heading are a very small cluster of the rights that are recognized today as "human rights" and a tiny cluster of those promoted in the Third World. In fairness, the instrument contains many other provisions that, although not designated as human rights, are clearly human rights. Let us examine this trend more systematically.

IX. *TRENDS IN CONSTITUTIVE EXPECTATIONS ABOUT LIBERATION AND HUMAN RIGHTS IN SOUTH AFRICA*

A. *The Atlantic Charter*

The idea of fundamental law in a post-apartheid society will in some degree be influenced by the perspective of blacks about the nature of law and constitutionalism. The idea of law will probably be conditioned also by international expectations of the modern era. These expectations are capsuled in contemporary international law, which include human rights standards, as well as peremptory standards of *ius cogens*. It may be surprising to some that black expectations about a future dispensation of "African claims" have been indelibly influenced by World War II and the allied instrument of codified war aims, the Atlantic Charter.⁶² The ANC Annual Conference of December 16, 1943, contains a document entitled "Africans'

61. Freedom Charter, *supra* note 55, *reprinted infra*, appendix A.

62. Joint declaration of the President of the United States and the Prime Minister of Great Britain, 5 DEP'T ST. BULL. 125 (1941).

Claims in South Africa, Including 'The Atlantic Charter from the Standpoint of the Africans Within the Union of South Africa.'"⁶³ This document is not only a codification of black demands, it is also a document that places those demands within the framework of allied war aims—that is to say, within an international context, making those demands a matter of international concern.

In the preface to this document, Dr. A.B. Xuma, President-General of the ANC and the Secretary-Organizer of the Atlantic Charter Committee, South Africa, noted that there were differences in the interpretation of the Charter.⁶⁴ According to Xuma, President Roosevelt envisioned that the Charter would apply to the "whole world," whereas Winston Churchill was thought to have held the view that it only applied to "the white people of occupied Europe."⁶⁵ Xuma then made the following statement:

We urge that if fascism and fascist tendencies are to be uprooted from the face of the earth, and to open the way for peace, prosperity and racial good-will, the "Atlantic Charter" must apply to the whole British Empire, the United States of America and to all the nations of the world and their subject peoples. And we urge that South Africa . . . must grant the just claims of her non-European peoples to freedom, democracy and human decency, as contained in the following document.⁶⁶

The primary document is entitled "The Atlantic Charter and the Africans."⁶⁷ It is there noted that Field-Marshal Smuts, the South African Prime Minister, endorsed the Charter on behalf of South Africa.⁶⁸ The document also notes that the "Honorable" Deneys Reitz, representing the South African government in a speech to "the African people," indicated that "the Freedoms vouchsafed to the peoples of the world in the Atlantic

63. *The Atlantic Charter from the Standpoint of Africans Within the Union of South Africa*, reprinted in 2 G. CARTER & T. KARIS, *FROM PROTEST TO CHALLENGE: DOCUMENTS OF AFRICAN POLITICS IN SOUTH AFRICA 1881-1964*, at 209-23 (1972) [hereinafter *FROM PROTEST TO CHALLENGE*].

64. *Id.*, reprinted in *FROM PROTEST TO CHALLENGE*, *supra* note 63, at 209-11.

65. *Id.*, reprinted in *FROM PROTEST TO CHALLENGE*, *supra* note 63, at 209.

66. *Id.*, reprinted in *FROM PROTEST TO CHALLENGE*, *supra* note 63, at 209-10.

67. *Id.*, reprinted in *FROM PROTEST TO CHALLENGE*, *supra* note 63, at 211.

68. *Id.*

Charter were indicated for the African people as well.”⁶⁹

The document then gives the African interpretation of the Atlantic Charter covering the subjects of (i) aggrandizement; (ii) territorial changes—interpreted in terms of self-determination; (iii) the right to “choose” the form of government—again interpreted in terms of self-determination; (iv) an open-door policy on trade and raw materials; (v) economic issues including labor rights; (vi) defeat of Nazi tyranny; (vii) freedom of the seas; (viii) abandonment of the use of force; and finally, (ix) the Bill of Rights.⁷⁰

The Bill of Rights section is itself a comprehensive document covering both civil and political rights as well as cultural and economic rights.⁷¹ Although these rights are not as comprehensively or systematically developed as modern human rights instruments permit, they represent a precocious anticipation of a larger and more comprehensive agenda of fundamental human rights. The document covers the following demands, which are then set out in detailed sub-categories: (i) full citizenship rights and demands, (ii) land, (iii) industry and labor, (iv) commerce, (v) education, (vi) public health and medical services, and (vii) discriminatory legislation.⁷² It is unclear whether any of these claims were in fact submitted to the peace conference. While the “African claims” inspired by the Atlantic Charter found no international support among the victorious allied powers, they were an important symbol of black aspirations and, together with the Atlantic Charter, a further symbol of the legitimacy of those aspirations. These claims were also the core inspiration for the Congress of the people in Kliptown in 1955 where the ANC’s Freedom Charter was adopted.⁷³

69. *Id.*; see also Laurence, *Apartheid Foes Vow to Fight Jail for Black Leaders Convicted of Treason*, *Christian Sci. Monitor*, Nov. 21, 1988, at 12, col. 1; Lekota, *From a Pretoria Jail, a Plea to Blacks*, *N.Y. Times*, Nov. 20, 1988, at A23, col. 3 (insisting that fight against racism must be fought “from both sides of the color line” and urging reconciliation with whites).

70. See 2 G. CARTER & T. KARIS, *supra* note 63, at 213-22.

71. See *id.* at 217-22.

72. *Id.*

73. See Front File, *supra* note 57, at 1.

B. *The Freedom Charter (1955)*

The Freedom Charter of 1955 (the "Charter") proclaims in its preamble that South Africa "belongs to all who live in it"; that the only legitimate basis of governance is one whose "authority" rests on the "will of all the people."⁷⁴ The Charter notes that the white government is one founded upon "injustice" and "inequality," and the development of "equal rights and opportunities"⁷⁵ are the major expectations of South Africa's black majority. The preamble portion of the Charter concludes with an express commitment to a "democratic state."⁷⁶

The substantive aspect of the Charter covers such issues as governance ("The people shall govern!"), which includes civil and political rights, such as the universal franchise, rights of "national" groups, and economic rights and expectations, under titles such as "The people shall share . . . in the country's wealth" and "The land shall be shared among those who work it."⁷⁷ The principle of non-discrimination appears in various positive and negative guises in the document, including a section titled: "All shall be equal before the law," a section that sets out principles of fair trials and humane standards in the administration of justice, including the revolutionary idea that punishment in the criminal justice system should aim at "re-education" rather than "vengeance."⁷⁸

The Charter also focuses on matters of economic security in the form of principles to govern labor relations; matters of education and culture; rights to housing, medical care, decent living conditions, recreation, and leisure.⁷⁹ Finally, the Charter makes an explicit commitment to human rights: "All national groups have equal human rights!"⁸⁰ Under the label of human rights, the Charter maintains that the law guarantees "rights to speak, to organise, to meet together . . ."⁸¹ These rights may have been meant to include what is conventionally

74. Freedom Charter, *supra* note 55, *reprinted infra*, appendix A.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

meant, perhaps more broadly, as freedom of expression and the freedom of association.⁸² The reference that the law guarantee the "right to punish" in this same paragraph is unclear unless it is with reference to children, which is the last word in the sentence: "The law shall guarantee to all their rights to speak, to organise, to meet together, to punish, to preach, to worship and to educate their children."⁸³ The sentence also includes what conventionally might fall under freedom of belief and conscience as well as the education of children. Additionally, the human rights provisions include references to a narrow conception of privacy, the right to travel, and the abolition of pass laws.⁸⁴

The Charter finally and importantly makes an explicit commitment to promote international peace and security as well as the principles of international friendly relations and cooperation.⁸⁵

The Freedom Charter was adopted unanimously by a "Congress of the People" held in Kliptown (near Johannesburg) on June 25-26, 1955.⁸⁶ The Congress was convened by the Congress alliance,⁸⁷ with the African National Congress playing the lead role.⁸⁸ The other congresses that were fully represented were the South African Indian Congress, founded in the late nineteenth century by Gandhi, the South African Coloured Peoples Organization, and the Congress of Democrats (a white group supporting liberation).⁸⁹ The Kliptown Congress of the People was attended by some 2888 delegates of all races and all geographic regions of South Africa.⁹⁰ This document notes that the Freedom Charter of South Africa became a "manifesto" of the freedom struggle.⁹¹

In the year following the Charter's adoption, Pretoria authorities arrested 156 leaders (of all racial groups) of the Con-

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

gress movement and tried them for high treason.⁹² The defendants were acquitted after over four years of legal proceedings. In the early sixties, the ANC and the Congress of Democrats were banned outright, and the other elements of the Congress alliance were demolished along with political repression of its leadership.

The Charter is both a statement of principle, codifying black expectations about a post-apartheid South Africa, and a key symbol of struggle. These are essentially the same qualities that moved the Allies to proclaim the Atlantic Charter during the early and dark years of World War II.

The Charter commits the "liberation" forces to a democratic South Africa: It uses as the core index of authority and legitimacy "all" the people of South Africa, because it is "we the people of South Africa, black and white together—equals, countrymen and brothers" who adopt the Charter.⁹³

The Charter codifies both civil and political rights of individuals and of all "national groups."⁹⁴ The document articulates some kinds of "group" rights, but does not exhaustively assay in detail the full range of possible points of conflict between group and individual rights or the character of the allocation of authority for the resolution of points of friction. Given the fact that proposals of several white constitutional scholars have assayed the potential relevance of variants of federal-consociational models for a post-apartheid society, the recognition of both group and individual civil, political, and cultural rights raises questions about the perpetuation of group or racial identities in a post-apartheid order. As a legitimate constitutional goal, how is one to distinguish coherently between a color-blind, "group blind" society on the one hand, and a vigorous and exciting diversification of culture and society on the other?

Within this framework, the idea of the rule of law seems to be an assumed datum rather than a conscious and explicit policy design of the Charter. However, we can clearly see the influence of the rule of law idea in the fair trial and administrative arbitrariness provisions. However, there are good reasons

92. See Laurence, *supra* note 69, at 12, col. 1.

93. Freedom Charter, *supra* note 55, reprinted *infra*, appendix A.

94. *Id.*

for a measure of ambivalence or ambiguity. In the South African context, "unjust laws," even in the 1950s, were an integral part of the political landscape, and because law was an indispensable part of the repressive apparatus of state, the idea of equating the rule of law with the rule of freedom and liberation was and remains a difficult proposition. Moreover, the repressive apparatus of law was managed by those who were most responsible for repression. The concept of law in an alternative vision, however difficult, is still an important element of Charter expectations.

In the economic sphere, the Charter endorses the principle of permanent sovereignty over natural resources, many years before it became the cornerstone of international economic "soft" law and a key element in the New International Economic Order (the "NIEO").⁹⁵ The economic provisions of the Charter refer to the "mineral wealth," the banking industry, and "monopoly industry" being transferred to "the people as a whole,"⁹⁶ which probably means that the charterists envisioned the nationalization of large-scale economic enterprises. This suggests that the Charter was a socialist-leaning document. We say socialist-leaning because the Charter says that "all other industry" will be subject to controls to secure the well-being of the people.⁹⁷ This implies a private sector as well. Moreover, the Charter contains the complementary principle that all people have the right, *inter alia*, to "trade" and "manufacture."⁹⁸ The labor-rights provisions codify the right to collective bargaining and the principle that the state should honor the right to work. These references imply a directive both at state and private industry. It may also have been an implicit economic assumption of the Charter that socialization of key elements of the economy would enable the state, in the future, to bankroll the promise of a welfare state. In many respects these provisions of the Charter seem to resemble the Swedish model of the welfare state.⁹⁹

95. For an explanation and analysis of the NIEO, see E. LASZLO, *THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER* (1978).

96. See Freedom Charter, *supra* note 55, reprinted *infra*, appendix A.

97. *Id.*

98. *Id.*

99. For a general discussion of the Swedish welfare state, see SWEDEN—LIMITS OF THE WELFARE STATE: CRITICAL REVIEWS IN POST-WAR SWEDEN (J. Krey ed. 1979).

Finally, the references to human rights and international peace and security clearly indicate the commitment of a post-apartheid regime to both the direct historical heritage of the Atlantic Charter and, more importantly, to an identification with the policies, purposes, and principles of the United Nations Charter system.¹⁰⁰ Indeed, the Freedom Charter commits itself to a form of authority identified with the major purposes of the U.N. and may be contrasted with the apartheid regime, which symbolizes the exact opposite. Judged by 1989 standards, the Charter may be a bit creaky. The anti-human rights epidemic of torture, extra judicial executions, and the untold number of detainees—prisoners of conscience—have made the international rule of law an indispensable element of a just society.

The sophistication and sheer breadth of the comprehensive view of what human rights make the Charter's human rights provisions, even when read in light of other entitlements that the Charter does not designate as human rights, seem rather grudging. The socialization of the means of production as a short-cut to an economy of fairness and abundance has been the focus of controversy, and in some cases retreat, in the countries that promoted these ideas as universal truths. Still, the document is an important and updated instrument of the African claims formulated after the proclamation of the Atlantic Charter. And in its own historic context it is a precocious and far-sighted symbol of liberation.

C. *The UDF Declaration*

As the apartheid plan envisioned by the Verwoerd/Vorster wing of the National party became patently unworkable in the light of the Soweto insurrection of 1976, the elites of the party were confronted with an adapt-or-die crisis. One of the core outcomes of this crisis was the formulation of a neo-apartheid strategy built around a new constitutional dispensation.¹⁰¹ It is beyond the scope of this paper to outline

100. Compare Freedom Charter, *supra* note 55, reprinted *infra*, appendix A with U.N. CHARTER art. 2, para. 4 (primary goal of United Nations is the settlement of disputes through peaceful means).

101. REP. OF S. AFR. CONST. ACT 110 OF 1983, Proc. 119 GG 9308. For an analysis of the new South African Constitution, see Note, *The Republic of South Africa Constitution Act 110 of 1983*, 9 S. AFR. Y.B. INT'L L. 96 (1983).

the key elements of the new dispensation. It may be sufficient to say, however, that it created a tri-cameral parliament composed of whites, indians, and coloureds, with the whites being the unassailable majority.¹⁰² Power was concentrated in the state president who could and did invoke a near permanent rule by state of emergency. This constitution completely excluded blacks from its power dispensation.¹⁰³ With the ANC and the Pan Africanist Congress (the "PAC") banned and unlawful in South Africa, black South Africans began to reorganize resistance under the umbrella of the UDF. In 1983, in the Rocklands Civic Center, Mitchell's Plain, South Africa, the assembled conference of delegates of civic, labor, sports, educational, and community organizations from all over South Africa reaffirmed the principle of a "united democratic South Africa based on the will of the people."¹⁰⁴ This was the cornerstone of the UDF Declaration (the "Declaration").

The Declaration affirmed the Charter principle that all South Africans have a right to participate in the governing of the country. The document condemns the new South African constitution in these terms: "We say NO to the Republic of South Africa Constitution Bill, a bill which will create yet another undemocratic constitution in the country of our birth."¹⁰⁵

The UDF Declaration recites the evils of a modified apartheid regime and affirms a resolve to reject the entire apartheid heritage, however packaged. The UDF is a non-violent political umbrella group that has affirmed the substantive principles of the Freedom Charter, which explicitly endorses the principle of non-violence as a strategy of change.¹⁰⁶ In other words, while they share the common goals of, for example, the ANC, as reflected in the Freedom Charter, they do not share the commitment to violent modes of political action to secure the demise of apartheid. The UDF Declaration does not mention one word about nationalization or the take-over of private enterprise and vested economic interests. Indeed,

102. REP. OF S. AFR. CONST. ACT 110 OF 1983, Proc. 119 GG 9308, July 6, 1984, pt. 6, § 67.

103. See *supra* note 101.

104. UDF Declaration, *supra* note 56, reprinted *infra*, appendix B.

105. *Id.*

106. See Freedom Charter, *supra* note 55, reprinted *infra*, appendix A.

the Declaration is free from the usual anti-colonial, anti-imperialist language. This, I suspect, has the advantage of blunting the communist bogie as an excuse for repression and gives a measure of clarity about what is wrong and what needs to be done. In much the same way as the leadership responsible for the promulgation of the Freedom Charter, the UDF leadership has been hounded, persecuted, and repressed. Once more a major treason trial, lasting years, secured the conviction for high treason of these non-violent leaders.¹⁰⁷

D. *Constitutional Guidelines for a Democratic South Africa*

More recently, the draft of a document entitled "Constitutional Guidelines For a Democratic South Africa" (the "Guidelines" or "Charter 88") was leaked to a British-based publication, *Front File*.¹⁰⁸ The ANC's Guidelines are a partial response to the evolution of the constitutive process from the perspective of the nationalist party. They are also in part a response to the escalating condition of instability within South Africa and with expectations among blacks that constitutive expectations reflective of an alternative to the paradigm of apartheid are critical. Finally, the Guidelines are a response to the fact that there are many influential whites, including Afrikaners, who are disenchanted with the new Pretoria constitution and are searching for alternatives that are realistic and workable in a future post-apartheid South Africa.

The preamble statement to the Guidelines notes the immediate debt to the Freedom Charter: "The Freedom Charter remains today unique as the only South African document of its kind that adheres firmly to democratic principles as accepted throughout the world."¹⁰⁹

107. See Laurence, *supra* note 69.

108. See Charter 88, *supra* note 57, reprinted *infra*, appendix C.

109. *Id.*; see also FUNDAMENTAL RIGHTS (J.W. Bridge, D. Lasok, D.L. Pertout, & R.D. Plender eds. 1973) (collection of essays outlining the basic principles of fundamental rights); HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS (A.H. Henkin ed. 1979); HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 13. (general discussion of international human rights). For an earlier work that seeks clarification of the conception of the public interest that today can be justified as a public order and a constitutive process that sustains human dignity on the largest possible scale, see NOMOS, THE PUBLIC INTEREST (C.J. Friedrich ed. 1962). For other works on the subject, see Weston, Lukes & Hnau, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

The Guidelines affirm the commitment to a "free, democratic and non-racial South Africa."¹¹⁰ This goal is, today, fully consonant with the major understandings and expectations of the larger planetary community and demonstrates that more and more expectations of the oppressed South African masses for constitutional governance are fully consistent with the mandate of international law and morality. Moreover, it acknowledges the fact, implicitly, that apartheid is criminal under international law, as evidenced in the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹¹¹ and that in any event, the key policies and practices of apartheid are themselves crimes against humanity under the law of the Nuremberg Tribunal, which now has the status of customary international law.¹¹²

The preamble statement of the Guidelines addresses the core policy questions that confront any radical reconstruction of South Africa along the lines of contemporary expectations of governance, accountability, fairness, and economic equity. One of these is, for example, the South African heritage of discrimination and oppression as reflected in both law and social practice. Here the preamble, in effect, hints at the salience of a completely new paradigm, not just of governance but of thinking—a paradigm intrinsic to the notion of constitutional process:

The structures and institutions of apartheid must be dismantled and be replaced by democratic ones. Steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old or new forms. . . . The constitution must . . . promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness.¹¹³

What is envisioned here is obviously not simply the constitution as a disembodied-from-reality document, but indeed, a constitutive process—a living-dynamic process about law-making and law application in a fundamental sense. A key point of

110. Charter 88, *supra* note 57, *reprinted infra*, appendix C.

111. International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

112. Judgment of the Military Tribunal at Nuremberg, 6 F.R.D. 69 (1946).

113. Charter 88, *supra* note 57, *reprinted infra*, appendix C.

divergence from the 1955 Charter is the rejection of the constitutional protection of "group rights."¹¹⁴ The idea is that the privileged position of the white group may serve to preserve the status quo with the "mass" of the people constitutionally "trapped" in poverty. The Guidelines, however, do indicate that the state "shall recognize the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development."¹¹⁵ This seems to suggest that while the principle that individual rights are the prime constitutional sanction, carefully defined "group" rights are also licit. However, the language of the 1955 Charter is much more emphatic about equal rights for national groups.¹¹⁶ Indeed, the Guidelines recede from this level of emphasis. Again, the roots of this change may be the business of the balkanization of South Africa through the Pretoria Bantustan program,¹¹⁷ group areas decrees,¹¹⁸ and the "groupness" and lack of individual rights in the South African Constitution of 1983.¹¹⁹

As indicated earlier, Charter 1988 is meant to be viewed more from a constitutional point of view than the 1955 instrument. The framers of Charter 88 sought, in effect, to convert the vision of the 1955 Charter into a "constitutional reality." However, this instrument—as I have tried to show—is a part of a process of law-in-the-making, a kind of living law about black constitutional expectations. The 1988 version significantly sharpens those expectations. The document covers ten broad themes: the state, franchise, national identity, bill of rights and affirmative action, economy, land, workers, women, the family, and international relations.¹²⁰

The organization of the state seems unexceptional. Charter 88 envisions an "independent, unitary, democratic and non-racial state."¹²¹ The Guidelines contain an insistence that the organs of state administration and governance be repre-

114. Compare Freedom Charter, *supra* note 55, reprinted *infra*, appendix A with Charter 88, *supra* note 57, reprinted *infra*, appendix C.

115. See *supra* note 114.

116. The Freedom Charter states that "[t]here shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races." *Id.*

117. See J. DUGARD, *supra* note 1, at 188.

118. *Id.* at 80.

119. See *supra* note 101.

120. Charter 88, *supra* note 57, reprinted *infra*, appendix C.

121. *Id.*

sentative of the people and that their function be to protect and enhance the constitution.¹²² Sovereignty (authority) reposes in "the people as a whole"¹²³ and in the exercise of sovereign rights, the franchise—the right to vote—is universal.¹²⁴ In another reversal of the South African tradition, all voters have the right to run for elective office.¹²⁵ In a culturally diverse and apartheid-fragmented society, the question of the critical symbols of loyalty looms large. Charter 88 stresses the centrality of national identity and loyalty: "It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans."¹²⁶ Since central elements of the apartheid scheme were designed to balkanize national identity along tribal lines through, inter alia, the creation of such entities as the Transkei,¹²⁷ it is apparent that the question of national loyalty and the generation of inclusive symbols of identity are of great importance. Indeed, even apart from the ravages of apartheid, South Africa would still be a cultural and linguistic entity of great diversity. It may be suggested that the search for an inclusive unity in diversity by the ANC Guidelines could be formulated in terms of a more internationalist, humanitarian idiom, so that the pattern of identification being promoted involves a commitment to the symbol of human dignity as understood in contemporary international law under the U.N. Charter, the International Bill of Rights,¹²⁸ and the African (Banjul) Charter;¹²⁹ and further, these symbols could

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. The United Nations General Assembly Resolution on the Transkei stated that the Transkei was created in order to consolidate apartheid and perpetuate white minority domination. G.A. Res. 3116A, 31 U.N. GAOR Supp. (No. 39) at 10, U.N. Doc. A/31/39 (1976). For an in-depth discussion of the Transkei, see G. CARTER & T. KARIS, *SOUTH AFRICA'S TRANSKEI* (1967).

128. The following documents comprise what is known as the International Bill of Rights: Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); see Hassan, *Solidarity Rights: Progressive Evolution of International Human Rights Law?*, 1 N.Y.L. SCH. HUM. RTS. ANN. 51 (1983).

129. Document CAB/LEG/67/3/Rev. 5 of the Organization of African Unity. For a commentary on the African Charter, see Ake, *The African Context of Human Rights*, 34 AFR. TODAY 5 (1987).

also be promoted as the core symbols of a more inclusive South African nationhood. The advantage of such a strategem is that South African nationhood may itself be identified with the values of a more universal ethos—with mankind as a whole. Indeed, the very next section in the document itself, under the heading “Bill of Rights and Affirmative Action,” indicates that “[t]he Constitution shall include a Bill of Rights” that shall “guarantee the fundamental human rights of all citizens, irrespective of race, colour, sex or creed”¹³⁰ There is no reason why South African identity and the national symbols of loyalty should not unequivocally embrace the symbols of human rights and human dignity. Anything less, in this writer’s view, would be a betrayal of the values for which African patriots have sacrificed themselves.

The Bill of Rights section refers to the norms of non-discrimination as well as of affirmative action as vehicles for securing a more just and equitable allocation of the valued things in life.¹³¹ As has been seen in the United States, affirmative action, when applied with prudence and determination, is a central element in the achievement of social justice for groups with a long heritage of discrimination.¹³² Since social and economic justice will not be an overnight proposition, the constitutional status of affirmative action as a principle of social justice will be a key element in the post-apartheid legal order. It should be noted, also, that affirmative action is fully consistent with the International Convention on the Elimination of All Forms of Racial Discrimination.¹³³

Another, perhaps controversial, guideline is the outlawing of the “advocacy or practice of racism, fascism, and nazism or the incitement of ethnic or regional exclusiveness or hatred”¹³⁴ Since this principle is a limitation on the principle of

130. Charter 88, *supra* note 57, *reprinted infra*, appendix C.

131. *Id.*

132. See *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (upholding New York legislation reapportioning three New York City counties so as intentionally to increase non-white majorities in certain districts); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding use of race-conscious pupil assignment to remedy past intentional segregation).

133. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter *Convention on Racial Discrimination*].

134. Charter 88, *supra* note 57, *reprinted infra*, appendix C.

free expression, there will certainly be those who will fear that it may be abused. In a democracy, freedom of expression, although concededly indispensable, is also frequently under fire. Consequently, limitations on its exercise in a free society should be grudgingly conceded. Here, perhaps, legislation defining more precisely what the operative terms mean may be helpful in limiting the provision to the kinds of circumstances it is genuinely intended to involve. Again, this provision is in accord with the Convention on Racial Discrimination.¹³⁵ It may be questioned why the advocacy of apartheid is not also outlawed in the same provision, since apartheid is itself outlawed under customary international law¹³⁶ as well as by the import of the Apartheid Convention itself.¹³⁷ The Bill of Rights of the Guidelines does appear to be broader than those conventionally found in such instruments and, therefore, provides fruitful grounds for discussion and negotiation for the future. Freedom of association, thought, worship, and the press, the right to work, education, and social security are all part of the proposed constitutional Bill of Rights landscape. Finally, there are some glaring and obvious omissions under the Bill of Rights provisions. The document is silent on capital punishment and torture.¹³⁸ Since these institutions have been, and are the cornerstone of the repressive apparatus of the Pretoria authorities, I would suggest that they be firmly and categorically abolished in a new constitutional order.

The Guidelines respecting economic matters significantly sharpen earlier formulations about the role of law in determining basic economic expectations. The Guidelines state that the economy is to serve the common interests of all and not simply the special interests of the few.¹³⁹ The model of the economy is described as mixed and envisions public, private, co-opera-

135. See Convention on Racial Discrimination, *supra*, note 133.

136. See Nagan, *Judicial Executions Under Apartheid: The Case of the Sharpsville Six*, 2 *WITHOUT PREJUDICE* 61-71 (1988).

137. See Apartheid Convention, *supra* note 111.

138. Compare European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126 with Charter 88, *supra* note 57, *reprinted infra*, appendix C (Charter 88 does not contain any of the anti-torture provisions set forth in the Torture Convention). For an in-depth discussion of the historical and legal implications of punishment and torture in South Africa, see D. FOSTER, *DETENTION AND TORTURE IN SOUTH AFRICA* (1987).

139. Charter 88, *supra* note 57, *reprinted infra*, appendix C.

tive, and small-scale family sectors.¹⁴⁰ Given South Africa's diverse populations and the complex levels of economic stratification that they represent, the Guidelines seek to "mix" both the advanced industrial sectors with concerns for local and village-level development. Indeed, one might say that the provisions *imply* a right-to-development goal for the impoverished masses. For example, paragraph (R) holds that "[c]o-operative forms of economic enterprise, village industries and small scale family activities shall be supported by the state."¹⁴¹

It may be that these activities can also be successfully supported by a committed private sector (national and international). Again, the state's positive vote in training for various important economic skills is acknowledged in Charter 88: "The state shall promote the acquisition of managerial, technical and scientific skills among all sections of the population, especially the blacks."¹⁴² Here again the private sector must assume a significant role. Indeed it may be implied that for the state to "promote" such economic outcomes means that the state promotes these at every level of economic organization.

The last few themes in Charter 88 deal with land reform, a charter of worker's rights, women's rights (which include affirmative action), family rights, and South Africa's international status as a non-aligned state committed to national liberation, world peace, and disarmament.

X. APPRAISAL

What do these documents and the processes behind them represent? If we accept the proposition that law-making is (i) a dynamic enterprise and (ii) not the exclusive monopoly of the state, then we come to the conclusion that a national liberation movement-in-exile, like the ANC, and an umbrella non-violent movement within South Africa, like the UDF, although persecuted, are active agents in the dynamic processes of norm generation—or norm creation. Without norms we cannot have prescription—law-making—in any operational sense. We then come to the conclusion that informal groups and associations operating in the national and international environment are

140. *Id.*

141. *Id.*

142. *Id.*

not only active agents in the process of effective power, they are active law-making agents in an ongoing, though admittedly fluid, constitutive process. The final point in this context is the danger of dissociating the constitution (as a document) from the "living" or behavioral constitutive process itself. The obvious danger of any group taking control of the South African state is that the constitution, instead of generating a process that honors the historically conditioned claims to human dignity, may yield to the temptation of using the coercive state apparatus to hijack the expectations of the people.

I suggest that all these documents, especially Charter 88, would have to be supplemented by the understanding that (i) law-making is dynamic and that it is not the exclusive monopoly of the state, (ii) informal groups and national liberation movements should give attention to this phenomenon, and (iii) human rights could be in jeopardy if the coercive apparatus of the South African state is masked by a meaningless, hortatory constitution, while power is perhaps hijacked and abused by others. Thus, efforts should be made to institutionalize in every available instance, the major purposes of the Charter notwithstanding the continued existence of the apartheid state. This would include, for example, matters like affirmative action and leadership training.

I would also suggest two important guides to an improvement of the long-term prospects of an alternative law paradigm for South Africa. Important as it is to identify and codify law at the bottom, it is also important to integrate into those expectations law-making standards and processes consistent with the principles of the U.N. Charter and with progressive humanity.

It was Nelson Mandela who said in his early years that the ANC had to "assess our situation in a global context."¹⁴³ And as we have earlier noted, the claims to self-determination and independence of the South African people are indeed rooted in the principles of the Atlantic Charter, the immediate precursor of the U.N. Charter. Viewed in this light, the living law of human rights and liberation at the global level is a significant

143. M. BENSON, *NELSON MANDELA: THE MAN AND THE MOVEMENT* 216 (1986); see also L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 506, 507 (1973).

element in principled and strategic goal guidance and an important supplement to the living law of the people of South Africa.

One need only briefly canvass the framework of the International Bill of Rights, the principles codified in the NIEO and now reflected in the so-called third generation of human rights, to appreciate the breadth of vision of the modern human rights outlook.¹⁴⁴ I may also briefly refer to the African Bill of Rights¹⁴⁵ and the proposed Arab Bill of Rights¹⁴⁶ as instruments suggestive of a constitutional order committed to a broad conception of human dignity and respect. While Charter 88 seems to have capsuled many of these developments, a fuller development of an alternative law paradigm requires a much more systematic appreciation of the comprehensive human rights agenda of the larger world community.

One last point needs to be mentioned. The law of liberation and freedom requires a legal profession that will clarify and implement principles of liberation and freedom in the common interest. It may be a boon that so few of South Africa's black population have been trained for managerial roles in the apartheid form of law and administration. But the challenge remains that a group of lawyers is needed—informed not by the paradigm of the status quo but by the paradigm of liberation and international solidarity. This is a present challenge of increasing urgency.

The speculations that I have ventured so far have ignored a crucial issue of significant import to the future of law in South Africa. The issue may be framed as follows: The character of the processes of transformation of South Africa may themselves have a significant influence on the type of legal culture that might emerge in a post-apartheid society. Two possibilities might ensue. First, the more coercive the strategies of transformation and change, the more coercive the new legal order might be. Second, the less coercive the strategies of transformation, the less coercive the new legal order might be.

144. For various discussions of current human rights issues in Africa, see Bello, *Human Rights: The Rule of Law in Africa*, 30 INT'L & COMP. L.Q. 628 (1981); see also Nagan Address, *supra* note 40, at 320-22; 32 AFR. TODAY (1984).

145. See *supra* note 128.

146. INT'L INST. OF HIGHER STUDIES IN CRIMINAL SCIENCES, DRAFT CHARTER ON HUMAN AND PEOPLES RIGHTS IN THE ARAB WORLD (1987).

To put these speculations into a practical context, the last section of this paper suggests potentials and challenges between blacks and whites about the nature of the options for change and the relevance of explicit reliance on the living law perspective—national, regional, and transnational—for a future South African public order committed to the principle of human dignity.

*THE STRUGGLE AND THE FUTURE LEGAL ORDER:
CONCLUDING CONSIDERATIONS*

The political future of South Africa will ultimately have to reflect core understandings about the allocation or distribution of power. If these understandings are at all realistic, they will be responsive to the bases of effective power that the key power-brokers control. At present, Mr. Botha and his wing of the national party are key power-brokers. Mr. Botha represents a shrinking constituency. However, that constituency has a core that is difficult to penetrate with an agenda of fundamental change, let alone, mild, neo-apartheid reform. Notwithstanding this historical impediment to change, this constituency may experience further erosion when their representatives attempt to make strategic adjustments necessary to the survival of white hegemony. A keener appreciation of political reality may even require greater risks of constituency erosion where accommodation and support for basic changes, seen in mature reflection as realistic alternatives, mandate that the ruling elite accommodate reality or assume unimaginable costs.

A catastrophe for white South Africa can best be avoided by a realistic cost assessment of the options by all enlightened and thoughtful segments of that community. One strategic option may be for whites, or as many of them as possible, to align themselves in a coalition that might ultimately supersede and possibly even effectively replace the Botha wing of the nationalist party as well as to secure the isolation of the *verkramp*te elements¹⁴⁷ in the party and their lunatic-fringe allies. In any

147. Within the Afrikaner nationalist party perspective there have been two loosely emergent wings. One wing is styled "*verligte*," meaning politically enlightened—either flexible about apartheid or willing to see its demise. The second wing of the party has been loosely styled "*verkramp*te." The "*verkramp*te" range from the

event, the white posture that should prove fruitful as a starting point for negotiations is obvious: first, the principle that apartheid must be eliminated, root and branch—a point conceded by most enlightened white South Africans including many Afrikaners and second, that negotiations must take place between the white representatives and real black leadership and not the synthetic black leadership produced by the apartheid machine. The basic starting points of negotiations are not hard to imagine; they include conflicting claims to nationalism. On the white side is the extreme claim of Afrikaner nationalism—a form of self-determination that means domination over everyone else. On the black side is the claim to majority rule, with the attendant classical fears that the majority will abuse its position of power in its own self-interest.

Just as we see an identity of “ethic” interest among the whites crumbling, so too it may be too large an assumption that all blacks will coalesce around an identity of “ethnic” interest. If the principles of democratic political participation reflected in the major purpose of Charter 88 and the International Bill of Rights are honored to the highest degree, a black democratic system based on the principle of majority rule does not mean black domination. It will be recalled that white power became unfettered, in part, because of the exclusion originally of the Cape Africans and Cape coloureds from the discriminatory patterns of drawing electoral districts and, finally, the emasculation of the courts.¹⁴⁸

As a caution, it should be noted that the international law principle of self-determination as majority rule is complemented by the emerging law of human rights, which recognizes both a “hard law” of civil and political rights and perhaps a “soft law” of economic, social, and cultural rights. Self-determination that excludes the relevance of protecting and enhancing the claim of the individual to a concrete manifestation of human dignity in the political, social, cultural, and religious spheres is indeed a hollow right, and theories that advance the principle of self-determination as a human right without re-

outright fascist to rock-ribbed reactionary and fundamentally believe that not only should there be no deviation from apartheid, but that apartheid law should be more vigorously made and more vigorously applied.

148. See *supra* note 1. See generally H.J. SIMONS & R.E. SIMONS, *supra* note 23.

gard to the complementarity of rights that limit the principle of self-determination within a contextual assessment of the meaning, relevance, and applicability of other human rights respecting individuals, is a sham claim. This is precisely the claim Malan, Strijdom, Verwoerd, Voster, and perhaps Botha have made on behalf of Afrikaner nationalism.¹⁴⁹ The realization of this claim has not been freedom but domination and repression and has led to international censure of apartheid as a crime against humanity.

The U.S. experience is relevant here. It is the oldest continuous political tradition that is explicitly based on the principle of limited government. The central policy question the founders faced, and which successive generations of politicians and lawyers have faced, is a simple one: What principles of political and social morality are sacrificed at the altar of the sovereign majority and what principles are "traded off" against that process? Each political culture must ultimately put some values beyond the reach of instant and ephemeral majorities. Each political culture must assess what is salient and crucial to its existence and to its capacity to live up to the fullest expectations of hope that the United Nations Charter system gives, namely, that the human dignity of every person whatever the race, creed, or status be honored in the highest degree. A new legal order informed by the heritage of the Atlantic Charter, the Freedom Charter, and Charter 88 has an impressive pedigree from which to proceed, since the living law of liberation forces and the living and formal law of international human rights are indispensable and complementary conditions of a truly just society.

149. *See generally* B. BUNTING, *supra* note 10.

APPENDIX A

*The Freedom Charter**

The "Freedom Charter" was unanimously adopted at a "Congress of the People", held in Kliptown, near Johannesburg, on 25 and 26 June, 1955.

The Congress was convened by the African National Congress (ANC), together with the South African Indian Congress, the South African Coloured Peoples' Organization and the Congress of Democrats (an organization of whites supporting the liberation movement). It was attended by 2,888 delegates from throughout South Africa, and was perhaps the most representative gathering ever held in the country.

The Charter was adopted by the four sponsoring organizations as their policy and became a manifesto of their struggle for freedom.

A year later, 156 leaders of these organizations were arrested and charged with "treason". They were acquitted after a trial lasting more than four years, but the ANC and the Congress of Democrats were soon banned, while the other two organizations were effectively prevented from legal operation by the banning of their leaders.

THE FREEDOM CHARTER

We, the people of South Africa, declare for all our country and the world to know:

—that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;

—that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;

—that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;

—that only a democratic state, based on the will of all the peo-

* Reprinted from THE FREEDOM CHARTER OF SOUTH AFRICA (U.N. Centre Against Apartheid pub. 1979).

ple, can secure to all their birthright without distinction of colour, race, sex or belief;

And therefore, we the people of South Africa, black and white together—equals, countrymen and brothers—adopt this Freedom Charter. And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes set out here have been won.

The people shall govern!

Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws;

All people shall be entitled to take part in the administration of the country;

The rights of the people shall be the same, regardless of race, colour or sex;

All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government.

All national groups shall have equal rights!

There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

All people shall have equal right to use their own languages, and to develop their own folk culture and customs;

All national groups shall be protected by law against insults to their race and national pride;

The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;

The people shall share in the country's wealth!

All apartheid laws and practices shall be set aside. The people shall share in the country's wealth!

The national wealth of our country, the heritage of all South Africans, shall be restored to the people;

The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole;

All other industry and trade shall be controlled to assist the well-being of the people;

All people shall have equal rights to trade where they

choose, to manufacture and to enter all trades, crafts and professions.

The land shall be shared among those who work it!

Restrictions of land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it, to banish famine and land hunger;

The state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers;

Freedom of movement shall be guaranteed to all who work on the land;

All shall have the right to occupy land wherever they choose;

People shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.

All shall be equal before the law!

No one shall be imprisoned, deported or restricted without a fair trial;

No one shall be condemned by the order of any government official;

The courts shall be representative of all the people;

Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance;

The police force and army shall be opened to all on an equal basis and shall be the helpers and protectors of the people;

All laws which discriminate on grounds of race, colour or belief shall be repealed.

All shall enjoy equal human rights!

The law shall guarantee to all their rights to speak, to organize, to meet together, to punish, to preach, to worship and to educate their children;

The privacy of the house from police raids shall be protected by law;

All shall be free to travel without restriction from countryside to town, from province to province and from South Africa abroad;

Pass laws, permits, and all other laws restricting these freedoms, shall be abolished.

There shall be work and security!

All who work shall be free to form unions, to elect their officers and to make wage agreements with their employers;

The state shall recognise the right and duty of all to work, and to draw full unemployment benefits;

Men and women of all races shall receive equal pay for equal work;

There shall be a forty-hour working week, a national minimum wage, paid annual leave, and sick leave for all workers, and maternity leave on full pay for all working mothers;

Miners, domestic workers, farm workers, and civil servants shall have the same rights as all others who work;

Child labour, compound labour, the tot system and contract labour shall be abolished.

The doors of learning and of culture shall be opened!

The government shall discover, develop and encourage national talent for the enhancement of our cultural life;

All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands;

The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace;

Education shall be free, compulsory, universal and equal for all children;

Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit;

Adult illiteracy shall be ended by a mass state education plan;

Teachers shall have all the rights of other citizens;

The colour bar in cultural life, in sport and in education shall be abolished;

There shall be houses, security and comfort!

All people shall have the rights to live where they choose,

to be decently housed, and to bring up their families in comfort, and security;

Unused housing space shall be made available to the people;

Rent and prices shall be lowered, food plentiful and no one shall go hungry;

A preventive health scheme shall be run by the state;

Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children;

Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, crèches and social centres;

The aged, the orphans, the disabled and the sick shall be cared for by the state;

Rest, leisure, and recreation shall be the right of all;

Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed;

South Africa shall be a fully independent state, which respects the rights and sovereignty of nations:

There shall be peace and friendship!

South Africa shall strive to maintain world peace and the settlement of all international disputes by negotiation—not war;

Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all;

The people of the protectorates—Basutoland, Bechuanaland and Swaziland—shall be free to decide for themselves their own future;

The rights of all the peoples of Africa to independence and self-government shall be recognised, and shall be the basis of close cooperation;

Let all who love their people and their country now say, as we say here:

'These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty.'

APPENDIX B

*The UDF Declaration**

WE THE FREEDOM LOVING PEOPLE OF SOUTH AFRICA
SAY WITH ONE VOICE TO THE WHOLE WORLD THAT
WE

cherish the vision of a united democratic South Africa based on the will of the people, will strive for the unity of all our people through united action against the evils of apartheid, economic and all other forms of exploitation.

We stand for the creation of a true democracy in which all South Africans will participate in the government of our country;

We stand for a single non-racial, unfragmented South Africa. A South Africa free of Bantustans and Group Areas;

We say, all forms of oppression and exploitation must end. In accordance with these noble ideals and on this 20th day of August 1983, at Rocklands Civic Centre, Mitchell's Plain, we join hands as community, women's, students, religious, sporting and other organisations and trade unions, to say no to apartheid.

We say NO to the Republic of South Africa Constitution Bill, a bill which will create yet another undemocratic constitution in the country of our birth.

We say NO to the Koornhof Bills which will deprive more and more African people of their birthright,

We say YES to the birth of the United Democratic Front on this historic day.

WE KNOW THAT

this government is determined to break the unity our people, but our people will face greater hardships, that our people living in racially segregated and relocated areas will be cut off from the wealth they produce in the cities. That rents and other basic charges will increase. And, that our living standards will fall;

that working people will be divided urban from rural; employed from unemployed, men from women. Low wages, poor working conditions, attacks on our trade unions will continue;

* Reprinted from flyer printed by the United Democratic Front.

students will continue to suffer under unequal education, created to supply a reservoir of cheap labour. Ethnic control and unequal facilities will remain. Apartheid will still be felt in our classrooms.

The religious and cultural life of our people will be harmed. The sins of apartheid will continue to be stamped on the culture and religions of our people;

The oppression and exploitation of women will continue. Women will suffer greater hardships under the new pass laws. Women will be divided from their children and families. Poverty and malnutrition will continue to disrupt family life. The brunt of apartheid will still be carried by our families; non-racial sport will suffer. There will be less money for the building of sports facilities. And, forced separation will deal non-racial sport a further blow.

WE KNOW THAT APARTHEID WILL CONTINUE that white domination and exploitation will continue; that forced removals, the Group Areas Act and the Bantustans will remain.

WE KNOW that there will not be an end to the unequal distribution of the land, wealth and resources of the country. That the migratory labour system will live on to destroy family life. **We KNOW** that the government will always use false leaders to become its junior partner and control us. Our lives will still be filled with fears of harassment, bannings, detentions and death.

Mindful of the fact that the new Constitutional Proposals and Koornhof measures will further entrench apartheid and white domination.

And in our march to a free and just South Africa, we commit ourselves to uniting all our people wherever they may be in the cities and countrysides, the factories and mines, schools, colleges and universities, housing and sports fields, churches, mosques and temples, to fight for our freedom.

We therefore resolve to stand shoulder to shoulder in our common struggle and commit ourselves to

WORK TOGETHER TO

organise and mobilise all community, worker, student, women, religious, sporting and other organisations under the banner of the United Democratic Front;

consult our people regularly and honestly and bravely, and strive to represent their views and aspirations.

APPENDIX C

*The Freedom Charter—1988 Version**

The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown, near Johannesburg, was the first systematic statement in the history of our country of the political and constitutional vision of a free, democratic and non-racial South Africa.

The Freedom Charter remains today unique as the only South African document of its kind that adheres firmly to democratic principles as accepted throughout the world. Amongst South Africans it has become by far the most widely accepted programme for a post-apartheid country. The stage is now approaching where the Freedom Charter must be converted from a vision of the future into a constitutional reality.

We in the African National Congress submit to the people of South Africa, and to all those throughout the world who wish to see an end of apartheid, our basic guidelines for the foundations of government in a post-apartheid South Africa. Extensive and democratic debate on these guidelines will mobilise the widest sections of our population to achieve agreement on how to put an end to the tyranny and oppression under which our people live, thus enabling them to lead normal and decent lives as free citizens in a free country.

The immediate aim is to create a just and democratic society that will sweep away the country's old legacy of colonial conquest and white domination, and abolish all laws imposing racial oppression and discrimination. The removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are, however, not enough. The structures and institutions of apartheid must be dismantled and be replaced by democratic ones. Steps must be taken to ensure that apartheid ideas and practices are not permitted to appear in old or new forms.

In addition, the effects of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all. The

* Reprinted from Freedom Charter—1988 Version in *ANC's Past Post-Apartheid Guidelines*—A-Y, Front File, Aug. 1988, at 1.

constitution must also be such as to promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness.

The constitution must give firm protection to the fundamental human rights of all citizens. There shall be equal rights for all individuals irrespective of race, colour, sex or creed. In addition, the constitution must entrench equal cultural, linguistic and religious rights for all.

Under the conditions of contemporary South Africa, 87% of the land and 95% of the instruments of production are in the hands of the ruling class, which is drawn solely from the white community. It follows, therefore, that constitutional protection for group rights would perpetuate the status quo and would mean that the mass of the people continue to be constitutionally trapped in poverty and remain as outsiders in the land of their birth.

Finally, the efficacy of the constitution will, to a large extent be determined by the degree to which it promotes conditions for the active involvement of all sectors of the population at all levels in government and in the economic and cultural life.

Bearing these fundamental objectives in mind, we declare that the elimination of apartheid and the creation of a truly just and democratic South Africa requires a constitution based on the following principles:

THE STATE

(A) South Africa shall be an independent, unitary, democratic and non-racial state.

(B) Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive, judiciary and administration.

Provision shall be made for the delegation of the powers of the central authority to subordinate administrative units for purposes of more efficient administration and democratic participation.

(C) The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.

(D) All organs of government, including justice, security and

armed forces, shall be representative of the people as a whole, democratic in their structure and functioning, and dedicated to defending the principles of the constitution.

FRANCHISE

(E) In the exercise of their sovereignty, the people shall have the right to vote under a system of universal suffrage based on the principle of one person/one vote.

(F) Ever [sic] voter shall have the right to stand for election and to be elected to all legislative bodies.

NATIONAL IDENTITY

(G) It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.

BILL OF RIGHTS AND AFFIRMATIVE ACTION

(H) The Constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens, irrespective of race, colour, sex or creed, and shall provide appropriate mechanisms for their protection and enforcement.

(I) The state and all social institutions shall be under a constitutional duty to eradicate race discrimination in all its forms.

(J) The state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination.

(K) The advocacy or practice of racism, fascism, nazism or the encitement of ethnic or regional exclusiveness or hatred shall be outlawed.

(L) Subject to clauses (I) and (K) above, the democratic state shall guarantee the basic rights and freedoms such as freedom of association, thought, worship and the press.

Furthermore, the state shall have the duty to protect the right to work and guarantee the right to education and social security.

(M) All parties which conform to the provision of (I) to (K) above shall have the legal right to exist and to take part in the political life of the country.

ECONOMY

(N) The state shall ensure that the entire economy serves the interests and well-being of the entire population.

(O) The state shall have the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity.

(P) The private sector of the economy shall be obliged to cooperate with the state in realising the objectives of the Freedom Charter in promoting social well-being.

(Q) The economy shall be a mixed one, with a public sector, a private sector, a co-operative sector and a small-scale family sector.

(R) Co-operative forms of economic enterprise, village industries and small scale family activities shall be supported by the state.

(S) The state shall promote the acquisition of managerial, technical and scientific skills among all sections of the population, especially the blacks.

(T) Property for personal use and consumption shall be constitutionally protected.

LAND

(U) The state shall devise and implement a land reform programme that will include and address the following issues:

—Abolition of all racial restrictions on ownership and use of land.

—Implementation of land reform in conformity with the principle of affirmative action, taking into account the status of victims of forced removals.

WORKERS

(V) A charter protecting workers' trade union rights, especially the right to strike and collective bargaining, shall be incorporated into the constitution.

WOMEN

(W) Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.

THE FAMILY

(X) The family, parenthood and children's rights shall be protected.

INTERNATIONAL

(Y) South Africa shall be a non-aligned state committed to the principles of the Charter of the Organisation of African Unity and the Charter of the United Nations and to the achievement of national liberation, world peace and disarmament.