a weapon *against* trade unionism: *the government's* Charter *of* Rights

PAUL BENJAMIN argues that the debate about a bill of rights holds too many dangers for it to be ignored by the trade union movement.

In the first part of this series published in SA LABOUR BULLETIN Vol 17 No 1, readers were introduced to the concepts of a constitution and a bill of rights. The author, Firoz Cachalia, posed the question of whether a bill of rights would protect democracy or privilege. In this article, we wish to take the debate forward by scrutinising one of the draft bills of rights currently in circulation – the Government's draft Charter of Rights.

We will look in particular at how this Charter of Rights (if it becomes law) would restrict the

ability of a future parliament and government as well as tripartite forums such as the NEF or the NMC to develop policies within the labour market and to regulate labour relations. Hopefully, we will show that debate about a bill of rights holds too many dangers for it to be ignored by the trade union movement.

The Charter primarily regulates legal relations between the state and its subjects. Its general thrust is therefore to regulate the future exercise of public or state power but not to regulate the exercise of private power. This has a number of effects. First, it entrenches current free enterprise ideologies. Second, it ignores the fact that many of the most powerful holders of power in our society are situated in the private sector. The failure to regulate relations between subjects will entrench the position of the powerful at the expense of the rest of society. And it will inhibit the power of future democratically elected parliaments to make laws aimed at achieving equality.

Employer and employee rights

The Charter contains nine employee rights and eight employer rights – an apparent attempt to be even-handed. This overlooks the subordinate position in society occupied by employees; their lack of social power, in terms of the employment relationship.

Property and labour

Before looking at the specific employer and employee rights, it is useful to comment on two other sections that will impact upon employment relations. Both show how the commitment of the Charter to free market ideologies will favour the interests of employers at the expense of employees. For instance, the Bill, in Clause 18, gives people the right to use the property they own. The property clause is designed to protect the position of current owners of property. It also curbs the ability of future governments to redistribute land by saying that if land is expropriated the owners must be compensated at its value. This means that historical claims to land cannot be taken into account in allowing the dispossessed to reclaim their land.

What is the significance of the property clause to labour? Certainly, it will strengthen the position of employers because one of the reasons for the inequality between bosses and workers is that it is the boss who owns the factory and the land on which it is built. The property clause may become a basis for employers arguing that any legislation designed to allow trade union officials rights of access to employers' property would be unconstitutional. Rights of access of this nature are an essential feature of trade union organisation, particularly where employees reside on the employers' premises such as in the mining industry and agriculture. It is likely that a future government would seriously consider introducing the right of access - but the government's charter would make this unconstitutional.

Minimum standards and the constitution

Another provision reflecting the free market bias of the Charter is section 15 which deals with participation in the economy. It gives all people the right "to offer and accept employment against remuneration". This clause could be used to attack the ability of a future government to legislate on minimum conditions of employment. This would be based on the argument that the clause entitles citizens to accept employment on any conditions they like. As minimum standards (such as those in the Basic Conditions of Employment Act or in a wage determination or industrial council agreement) restrict people to accepting employment on terms and conditions of employment that are at least good, these laws infringe the constitutional right to accept employment. If this argument were accepted, the whole of the Basic Conditions of Employment Act and the Wage Act would be unconstitutional and the entire industrial council system would have to be dismantled. It would mean that many groups of employees, particularly the less skilled, would be subject to exploitation and exploitative conditions of employment against which these laws are designed to protect them.

Employee rights

The right not to associate

The first right of employees is to join and participate in employees' organisations as well as their right not to do so and not to associate with such organisations. The clear impact of this provision is to outlaw all legislation providing for the establishment of closed shops or other security arrangements. While the closed shop is a controversial subject, it is not appropriate for a charter to prevent all laws that would allow for the creation of these types of institutions. It also ignores the fact that closed shops have long been a feature of the statutory industrial relations system in South Africa and have been present in South African industrial relations for more than a century.

It is also not correct to say that a right not to associate in the trade union context is a basic and universally accepted legal norm. Many countries permit closed shops, agency shops and other union security arrangements while others prohibit them.

Individual bargaining

The next employee right establishes the right of employees to negotiate or bargain, both collectively or individually. The promotion of an individual right to negotiate is a deliberate attempt to undermine trade unionism and the development of orderly collective bargaining. There is no such right in our common law. Its inclusion in the Charter would outlaw any legislative system that would require trade unions to have a certain threshold level of membership before entering into negotiations with employers (such as in Canada and the USA) and would entrench the fragmentation of collective bargaining. It would also prevent the industrial court from using the unfair labour practice to develop sensible rules of collective bargaining such as those in the NUM v ERGO.

The origin of this provision is not internationally accepted norms. Its origins rather lie in the controversial 1988 amendments to the Labour Relations Act which provoked massive opposition and in 1991 were withdrawn and replaced by legislation based on agreement between government, organised labour and organised capital.

It would appear that the hand which drafted the controversial 1988 legislation has played a role in the Charter of Fundamental Rights. The ideological basis of both of these provisions is the anti-union labour legislation used by the Thatcher government in the UK in the 1980s to break the power of organised labour. The Charter is not neutral on these issues but reflects a world view that is hostile to trade unions and collective bargaining.

Essential services

The third employee right is to take part in strikes. This is subject to the qualification that strikes may be prohibited in strategic industries and essential services or by persons in the service of the state. International standards do accept that employees in industries whose interruption would endanger the health and safety of the community and limited categories of central civil servants may be prohibited from striking. But they provide that in return these employees are entitled to refer unresolved disputes to an alternative form of dispute resolution such as compulsory arbitration. This is not reflected in the Charter.

Employers' rights

The first right given to employers is that of joining employers' associations.

Hiring and recruitment

The second provision gives employers the right to offer employment and engage employees "according to their needs and with due regard to the fitness, qualifications, level of training and competence of employees". This creates a right to hire which would undermine any legislative attempt at correcting the current imbalances in the workforce on the grounds of race or sex by affirmative action or other means. This would entrench the ability of employers to hire who they wish and would counter attempts to create equity and equality in the workplace.

The right to lock out

Employers are given the right to lock out labour. While the right to strike is universally accepted, the right to lock out is not. In some countries the right to lock out is seen as the equivalent of the right to strike. In others it is accepted that the right to strike is needed to correct the power imbalance between employers and employees, and that the right to lock out disturbs this balance. Therefore, in the constitutions of countries such as Italy, France and Portugal, the right to strike is protected but not the right to lock out.

Termination

The next provision allows employers to "terminate the services of an employee under the common law, a contract of employment with the employee or legislation, as the case may be." It is not clear what this means. One possible interpretation is that as long as a dismissal is in compliance with either the common law, a contract of employment or legislation, it cannot be ruled. This would make the unfair labour practice jurisdiction of the industrial court unconstitutional. Employers will not be slow to raise this argument.

'No work, no pay'

The Charter proclaims the 'principle' of 'no work, no pay'. Most readers will recognise this as a phrase used by employers, particularly in stayaways. It is not a fundamental principle of our labour law. There are situations in which an employer must pay employees who have not worked but have tendered their services. These include an illegal lock-out or where some external circumstance (such a flooding) has made work impossible. Again, it is not a universal right.

The right to manage

The right that employers have to manage their business "with a view to its economic viability and continued existence" could make legislation aimed at requiring any form of worker participation (such as worker directors) in the running of a company unconstitutional. Also, these are hardly internationally accepted norms – a large number of countries such as Germany and Sweden have legislation requiring some form of worker participation in the running of companies. Again the question we must ask is not whether we support policies of this type. It is whether a future government should be able to consider introducing these policies without their being ruled unconstitutional.

Alternative labour

Next, the employer is given the right to use alternative labour where necessary to maintain production or service. In some countries use of alternate labour during strikes is restricted or prohibited as a means of reducing conflict. For instance, some Canadian provinces prohibit the use of replacements; others prohibit professional strike-breakers.

Conclusion

If the government's draft Charter of Rights is adopted, it is certain employers will bring these issues to court. It will be for the constitutional court to decide what a future government may or may not do. While constitutions are designed to achieve equality, in practice they can have the opposite effect as it is the powerful and the wealthy who have the greatest resources to use the courts to protect their interests.

This has not been an exhaustive look at the impact of the government's draft Charter on the fabric of labour law. However, what is does show is that the Charter would have disastrous implications for our system of statutory labour law and severely undermine the capacity of future governments to develop labour policy. This could mean the unions would sit on a future NEF or NMC and find that they cannot develop appropriate policies because of the bill of rights.

The unions cannot afford to remain outside of this debate. They must protect their members by ensuring that our bill of rights and constitution promote equality, not inequality. ☆