

Extending Democracy in South Africa

Heinz Klug

Introduction

Instead of responding directly to Cohen and Rogers's paper I shall attempt to explore the significance of this discussion for debates among participants in South Africa's transition to democracy. For this reason I have tried to locate the debate within the context of the continuing political transition and those aspects of recent political and social struggles which impact on the growing pressures for participation.

When F. W. de Klerk publicly launched South Africa's democratic transition, by announcing the unbanning of the liberation movements in February 1990, there was no agreement either on the specifics or on the extent of this process of democratization. At that time de Klerk's National Party was proposing a fifteen-year transitional period with a new constitution providing for a multi-party executive, a revolving presidency and a regionally elected upper house – with equal representation for any party receiving over 10 percent of the vote per region – wielding absolute veto powers. The democratic movement, on the other hand, began demanding an interim government and a democratically elected constituent assembly to draft a new constitution. Activists within the democratic movement, critical of 'bourgeois' democracy, began debating associational socialism, participatory democracy and the role of civil society.

I shall attempt to place these debates, focusing on issues of associative and participatory democracy, within the context of the process of continuing transition and of constitutional mechanisms which may promote the emergence and consolidation of democratic participation in South Africa. First, I shall describe briefly the historical context of these debates in South Africa and then begin to explore various suggestions for encouraging a process of sustained democratic participation in a future constitutional order.

In the Context of a Democratic Transition

With the convening of the Conference for a Democratic South Africa (Codesa) on 20 December 1991, South Africa entered into a process of formal negotiations expected to extend political rights to all the country's citizens. Although the major parties – the African National Congress and the ruling National Party – agreed in principle on a multi-party democracy based on a system of proportional representation with a justiciable constitution containing a Bill of Rights, they were diametrically opposed in their understandings of the transitional process and the parameters of future governance. While the National Party sought to weaken the state by proposing a minimalist government based on the Thatcherite model, the ANC saw a future government playing a central role in the post-apartheid reconstruction of the country.

The assassination of South African Communist Party and ANC leader Chris Hani, and the mass outpouring of grief and anger which his death precipitated, galvanized the negotiating process. This event, after the collapse of the first round of negotiations, provided a glimpse of the consequences of a continuing failure to reach agreement. Having agreed to reopen multi-party negotiations at a multi-party planning conference on 5 and 6 March 1993, the parties refused to allow the right-wing assassins to achieve their aim of shattering the already brittle negotiations process and instead appealed in the name of Hani for heightened efforts to achieve a settlement.

Within weeks of his death formal negotiations reopened in the form of a Multi-Party Negotiations Process at the World Trade Centre outside Johannesburg. Unlike the failed Codesa talks, in which negotiations were conducted between party representatives in the different working groups, the new process provided for a negotiating council to discuss and decide on reports from seven technical committees whose role it would be to clarify and present alternatives and issues for negotiation. In addition a ten-person planning committee would be responsible for keeping the process on track by structuring the debates and dealing with grievances.

Dominated by academics and lawyers, the technical committees facilitated the emergence of clear alternatives. However, a range of participants and parties from within and outside the multi-party talks remained suspicious of the 'professionalization' of an essentially political process. Despite often harsh criticism of the initial proposals of some of the technical committees, and active intervention through the negotiating council and public debate, the process, focused as it

was on the production of written proposals, gained in momentum. Although sent back to rework and reconsider their 'technical' inputs, the series of reports that flowed from the committees slowly crystallized the position of the negotiating council.

The adoption in December 1993 of an interim constitution requiring power-sharing in a government of national unity for five years after the first democratic elections facilitated the democratic transition but merely extended the debate over future democratic structures and procedures. Both the formal debate over a new constitutional order and the debates and struggles for a wider process of democratization in the society have continued since the elections. The most dynamic aspect of the democratization process has now shifted away from the negotiating process to the newly elected provincial and national legislatures, to the trade unions and civic organizations, within the ranks of the ANC and among non-government organizations. In these forums there is a dynamic debate about the nature of the democracy which should be cultivated in this transitional period and enshrined in the next constitution. Unlike the process of negotiations between the old and new orders which produced the 1993 Constitution, these debates, experiments and struggles are of vital importance to the democratic transition, as they will provide the immediate conditions within which the constitutional assembly, dominated by the ANC, will write the new constitution.¹

Organic Precedents for Associational and Participatory Democracy

Despite the importance of intellectual debates and democratic advocacy, it is the experience of democratic participation during the struggle against apartheid which provides the foundation for the extension of democracy. For most activists and communities this exposure to active political participation came in the trade unions, United Democratic Front affiliates, civic associations (voluntary organizations which took up community issues such as the high cost or lack of municipal services, including rents, electricity, water and transport costs) or local community structures – street committees and people's courts – which carried forward popular resistance to apartheid from the early 1970s until the states of emergency which dominated the late 1980s.

Central to this process was the role of the trade union movement, and in particular the Congress of South African Trade Unions

(Cosatu), which has repeatedly called for the participation of organized representatives of the working class in the political process, and for the incorporation of trade unions and management in the formulation and development of national economic policies. As the most structurally organized element of the democratic movement, Cosatu's centrality in the present debate is enhanced by its position as an arm of the tripartite alliance of the ANC, South African Communist Party and Cosatu.

The influence of the trade union movement is reflected in the ANC's proposed Bill of Rights, which will form an important source of guidance for members of the constitutional assembly. Workers' and union rights are enumerated in detail compared to the rights of other elements of the democratic movement such as civic associations and youth and student movements, which are not explicitly elucidated. This disparity is partly the result of the trade union movement's organizational resources, but is also due to the direct repression suffered by the democratic movement under the state of emergency: organized labor was able to protect its organizational capacity by exploiting differences between the state and business interests. These relative capacities of different sections of the democratic movement may best be understood by briefly examining the development of mass organizations and participation during the struggle against apartheid over the last two decades.

Grounded in the trade union movement which re-emerged in the 1970s and the development of community-based organizations in the late 1970s and early 1980s, the United Democratic Front (UDF) was launched in 1983. Unifying over six hundred organizations, the UDF was established to oppose a new, undemocratic constitution, through which the apartheid state attempted to divide the black community by extending political rights to members of the Indian and Colored communities while continuing to exclude the African majority from political participation. Although it was made up of women's, youth, sporting and other community-based organizations, civic associations formed the backbone of the UDF.

Despite the exclusion of Africans at the national level, the regime's 1983 reforms did include government participation for urban African communities in powerless local government structures or community councils. It was the attempt by these councils to raise rents and other municipal service charges in late 1984, coinciding with the implementation of the 1983 Constitution, which sparked off the urban revolt that shook South Africa from 1984 to 1987.

Although of uneven strength and character, many black townships

experienced different forms of mass participatory organization during the uprising as the ANC called on activists to make the country ungovernable. Street Committees and People's Courts functioned with varying degrees of success; at times they provided models of direct mass participation, while in some instances they degenerated into individual fiefdoms and coercive ad hoc kangaroo courts for one faction or another.

By the time the state of emergency was lifted following the unbanning of the ANC and other political organizations in February 1990, the trade union movement and various non-governmental service organizations – including public interest legal institutions – were the only parts of the mass democratic movement that had not suffered nearly total disruption as a result of state repression. However, as the ANC began to establish legal organizational structures and a mass-based membership from mid-1990 so the civic and other organizations which made up the mass democratic movement also began to re-emerge in the townships. Having failed to break township rent boycotts and other forms of local resistance the state now attempted to begin local negotiations with the civic organizations in order to strike separate deals and to preclude local socioeconomic struggles – housing, services, education – from the national negotiations agenda.

Although the mass struggles of the 1980s seem to have prepared the ground for the extension of democratic participation in South Africa and even for the possibility of establishing some forms of associational democracy, there was a number of developments which militated against the emergence of democratic alternatives. Most dramatic was the violence – both communal and state-sponsored – which was directed at both the disruption of political organization and at destabilizing the black townships with random attacks on black civilians, creating a climate of fear and instability. This fueled a tendency to political intolerance and was itself exacerbated by the consequences of political intolerance. The most direct effect of the violence – random attacks on civilians and the public slaughter of people wearing politically partisan colors – was to inhibit public political participation. Although ANC membership continued to grow, the early blossoming of ANC colors, sweatshirts and other garments gave way to ordinary members concealing their membership cards and avoiding being identified in public as ANC members.

In an attempt to reduce the violence, the major parties, including the ANC, Inkatha and the government, backed a business-church initiative which led to the adoption of a National Peace Accord on 14

September 1991. The Accord included detailed codes of conduct for political organizations and the security forces, as well as mechanisms for dispute resolution in areas of violent conflict. A significant aspect of the Accord was its inclusion of parties other than government in managing the transition process.² This set an important precedent for the involvement of non-government organizations and political parties in the monitoring of state institutions as it included multi-party monitoring of the South African police and multi-party participation in commissions of inquiry into violations of the Accord. However, it must be noted that the Peace Accord's police board was merely an advisory structure and fitted with the police force's own strategy of 'depoliticizing' the police force. Similarly, the establishment of police-community liaison structures and special police investigation units to investigate police misconduct was consistent with the South African Police's own agenda to build police credibility.³

Despite these criticisms the implementation of the Peace Accord at the local level took on wide significance. Even short-term failure of the peace process would affect community attitudes toward participatory structures such as the police-community liaison committees, police reporting officers and civilian police management boards. The result of such failure in the long term would be to delegitimize community control of policing both within the community and within the police force itself.⁴

Political intolerance is the product of both apartheid's historical repression of free political activity and, to a lesser extent, the polarization of communities during the struggle against apartheid. On the one hand, communities often rejected and expelled those who collaborated with the apartheid state while on the other, activists – in their attempts to mobilize communities – often advocated a simplistic division of all members of the community into those who were for or against 'the system'. All too often this leads activists to characterize those with whom they have political differences as the enemy.

The consequences of this political intolerance was felt within civic associations. Even when an attempt was made to define the civic association as representative of the community and not part of a particular political formation, there were conflicts over which political formation was ultimately in control of a particular civic association. As a result, there was internal confusion over the future political role of the civics. On the one hand, some ANC members accused others who were active in the civics of prematurely distancing the civics from the ANC. On the other, members of the Pan-Africanist Congress (PAC) and the Azanian People's Organization (Azapo) charged that because

the very same civics refused to distance themselves from the ANC, they were therefore aligned with the ANC and not independent community organizations.⁵

New Opportunities to Participate?

Despite these difficulties there is a continuing debate on democratization within the democratic movement. Discussions range from different ways of promoting democratic participation, to the building of civil society and how to increase the role of existing popular organizations, such as the trade unions and civic organizations, in public policy formulation and implementation. The call to expand democratic participation since the elections also has been taken up by newly elected Members of Parliament and in the newly established provincial legislatures.

The trade unions' demand for a macroeconomic negotiating forum, asserted in the 1991 anti-VAT campaign, is an important indication of the relevance these discussions have for associational democracy. The anti-VAT campaign had two central focuses: first, it articulated a general political challenge to the government's legitimacy, demanding there be no taxation without representation; and second, it demanded a macroeconomic negotiating forum.⁶

The general strike on 5 and 6 November 1991, in which about 3.5 million people, or 90 percent of the black workforce, participated, was a dramatic assertion by the trade union movement that it could not be excluded from the process of economic policy formulation. Organized to protest against the government's imposition of VAT, the issues underlying the strike went far beyond the tax; Jay Naidoo, then Cosatu general secretary, described it as 'a referendum which demonstrated a vote of no confidence in the government'.⁷

Stimulated by the experience of the trade unions in negotiating the Cosatu-Saccola-Nactu⁸ accord on the Labor Relations Act in 1990 – a bilateral agreement between the trade unions and business, which forced the state to withdraw unacceptable labor legislation – the debate on the role of the trade unions in a post-apartheid South Africa ranges from the notion of a multilateral 'reconstruction accord' to arguments for a new social contract founded on bilateralism or even the more established European model of trilateralism.⁹ At first the debate focused on the distinction between a proposal developed within the National Union of Metalworkers for a union-led national development strategy to be based on a 'reconstruction accord' negotiated

between the unions and other mass-based organizations, including progressive political parties,¹⁰ and a bipartite approach which envisions unions exerting their influence on society through collective bargaining with employers,¹¹ such as the Cosatu-Saccola-Nactu accord.

Trade union practice seems, however, to involve a complex array of strategies including exchanges of views between Cosatu and ANC economists on the one hand, and continuing bilateral negotiations with organized business, and assertions of the need for trade union independence from a future government, on the other. Central to the discussion of trade union independence has been the process of preparing a Workers' Charter to supplement the proposed Bill of Rights in a post-apartheid constitution. As a result, discussion has increasingly turned to the question of whether the trade unions are moving toward support for the idea of a social contract or partnership.¹²

Complicating any analysis of this debate, however, is the fact that different strategies will be required for different aspects and stages of the transitional process now underway. Cosatu's general secretary, now Minister of Reconstruction and Development, Jay Naidoo, emphasized both the centrality of the 'organizations of civil society' to the strength of the democratic movement and the need to ensure that, although only political parties take part in political negotiations through the 'All-Party Conference, the interim government and the constituent assembly', this does not preclude negotiations over economic issues.¹³

Cosatu's call for a macroeconomic negotiating forum and the suggestion that a number of working forums on housing, education, health, technology, investment policy and industrial restructuring¹⁴ be established to include 'broad constituencies that represent the people',¹⁵ seems to reflect the earlier call for a 'reconstruction accord'. However, this proposal goes beyond the earlier proposal of negotiations within the democratic movement and toward a notion of a wider social contract on which to base the democratic transition. It is this principle of direct participation by civil society-based associations in policy formulation and decision-making that highlights the associational aspects of these developments.¹⁶

Committing themselves to addressing issues of economic growth, social equity and democratic participation in decision-making, labor, business and government launched the National Economic Forum on 29 October 1992. In their statement of intent the parties 'noted the severe inequality in incomes, skills, economic power and ownership in South Africa and agreed to establish a "consensus geared co-operative

body to deal with economic and related socioeconomic issues and the economic challenges facing the country".¹⁷ Although these specific developments do not exclude the possibility of pursuing different strategies in the future, they may have negative implications for the possibility of democratic participation. While most now agree that the trade unions should maintain their independence in post-apartheid South Africa, the trilateralism implicit in the formation of a macro-economic negotiating forum presents a danger that the trade unions and other democratic formations may become tied into a trilateral negotiating system at the national level, becoming bureaucratized over time and thus weakening or excluding local participation.¹⁸

Community organizations too are beginning to assert an independent role for themselves. Despite a lack of national leverage, civic associations have demonstrated, through consumer boycotts and other actions, that they have the capacity to mobilize communities at the local level. There is, however, no clear consensus about the long-term role of the civics. Some activists argue for an independent 'watchdog' role over a new government, while others argue that they should take a more proactive stance and become directly engaged in the development process.¹⁹

Although community organizations played a major role in the democratic movement during the 1980s, they were severely weakened by state repression. Their relative weakness was evident in their inability to make an impact on the constitution-making process – for example, the failure to protect or promote civic organization in the ANC's proposed Bill of Rights. After the lifting of the State of Emergency, however, civic associations re-emerged and began to unite in regional bodies, such as the Civic Association of the Southern Transvaal (CAST). In 1991 the UDF was formally disbanded and its resources devoted to the establishment of a national civic coordination body which was transformed into the South African National Civic Organization (Sanco), seen by some as setting itself up as a 'watchdog' over the ANC. Another significant initiative was the establishment of a National Development Forum which, although initiated by the ANC, aimed to pull together regional and local development actors to discuss a national development policy for adoption by the ANC. In addition, the development forums were conceived as mechanisms through which to promote participation and to direct resources to locally determined needs and projects. Although the ANC adopted a national Reconstruction and Development Program, which has become the formal policy of President Mandela's government, it was shaped more by internal ANC policy procedures – including a series of conferences

culminating in a national policy conference in December 1993 – than by the National Development Forum.

Representing the black townships whose formal authorities were swept away by anti-apartheid resistance, civic associations became deeply involved in negotiations at local and metropolitan levels for the establishment of transitional local government forums with a view to beginning the task of integrating the administrative and resource bases of former apartheid cities and towns. What remains uncertain is the future of civic associations once local government structures are democratized and local government elections held. Some activists argue that civics should remain autonomous of local government which will be contested on a party political basis. Instead, they argue, the civics should retain an independent role as 'secondary' associations raising community issues. Whether this will allow civics to continue to play an active role in local development forums, and what their relationship will be to democratically elected local government remains unclear. It is in this arena in particular that the debate over the role of secondary associations and associational democracy is most pertinent to the events presently unfolding in South Africa.

Debating Civil Society

Despite the new constitution's commitment to judicial review, the separation of powers and other tenants of constitutionalism, activists in the democratic movement continue to debate socialism, participatory democracy and the role of civil society. Concerned to 'prevent the consolidation of democracy destroying the popular organizations that were the protagonists of the struggle' and which have the greatest potential of contributing 'to establishing the consensual basis and values upon which democracy could be built',²⁰ these debates within the democratic movement focus on alternative ways of promoting democratic participation, of building civil society or increasing the roles of existing popular organizations such as the trade unions and civic organizations in public policy formulation and implementation. On the one hand, there has been increasing debate on the nature of civil society²¹ and its role in what one commentator termed 'building "voice" at grassroots level'.²² On the other hand, existing social formations such as the trade unions and civic associations have begun articulating new roles for themselves as participants in the democratic process.

The South African debate²³ reveals a degree of confusion over the

nature of civil society and the resultant conceptions of associational democracy and democratic socialism. Although it was recognized that civil society tends to be dominated by private capital, one writer argues that it is possible to define 'civil society' so as to exclude private economic power; thus

a true 'civil society' is one where ordinary everyday citizens, who do not control the levers of political and economic power, have access to locally-constituted voluntary associations that have the capacity, know-how and resources to influence and even determine the structure of power and the allocation of material resources.²⁴

Associationalism is thus conceived as an essentially local-level system of voluntary associations which have greater political access to local government than does the central state.²⁵

Criticizing this approach as a definition which allows 'civil society' to become 'all things to all people',²⁶ another contributor to the debate adopts a broad definition of civil society as a contested terrain which is 'located between the public sphere of the state and the private sphere of the individual'.²⁷ The significance of this critique is its insistence that it is not possible merely to declare certain organized interests to be in or out of civil society and its recognition that unequal power relations will continue to dominate this arena. Instead, it is argued that the vitality of civil society cannot be determined by the number of voluntary associations, but should rather be assessed in terms of a number of factors, including 'the extent to which they are politically dominated; whether they can balance their own interests against broader political imperatives; whether they have organized democratic expression, and whether interest groups can be sufficiently non-sectarian'.²⁸

The implications of this analysis for the South African debate, particularly with respect to notions of associational democracy, lies in its recognition that given the large economic monopolies that dominate South African society and the resources at their disposal to 'influence, coerce and shape institutions and individuals',²⁹ other organizations, including voluntary associations, will remain marginalized. In this context, the state is not only a means to 'mediate between the interests of capital and others',³⁰ but the fundamental arena within which struggles over the 'structure of power and the allocation of material resources'³¹ will continue to be determined. This perspective both recognizes the reality of the growth of the modern state and breaks with the notion that, despite the growing complexity of

delivering such services as health care and education in the late twentieth century, the state should wither away.

A possibly more productive line of enquiry would be to concentrate on developing a notion of participatory democracy or associationalism which is premised on the need to democratize the state.³² This change in emphasis would enhance the possibility of constructing a notion of associational democracy based on privileging certain institutions or voluntary associations in an effort to influence allocation decisions within the state, whether at the national, regional or local level. Not only may secondary organizations be allocated local state functions and resources for distribution, but a matrix of organizational supports and mechanisms could both encourage the development of secondary organizations in the society and inhibit the ability of any particular interest to gain permanent control over such bodies.

However, this raises the problem of recognition. Who is to determine whether a particular organization or institution should qualify for privileged access or be entrusted with state functions and resources? It has been suggested that the determining factor would be the democratic character of the organization or association; this would be based on regular elections to determine participation in its decision-making bodies and an open membership, or at least a membership defined in a manner reasonably related to its function or purported representativeness. Although this may be a reasonable determinant of whether a local government structure is democratic, how are we to decide between any two voluntary associations which lay claim to the same functions? This may not be an uncommon scenario in circumstances where different political factions are active in the community and feel uncomfortable working in a situation where their policy options are unacceptable to a slight majority of the organization who may be politically aligned to an opposing political formation. One solution is to grant a right of access to all voluntary groups that are able to demonstrate their adherence to democratic processes. However, this is only possible when it comes to access to information or to policy discussions or hearings; it would be more difficult with respect to the distribution of governmental functions or resources.

This approach, however, fails to confront the problem of the continuing power of private economic interests in the society as a whole. Even if denied privileged access to the state, private corporations are able to assert their economic power in their interactions with individuals and communities through their general legal status. This is particularly evident in situations where social and production costs in the form of unemployment or air pollution are borne by the

community, to retain the competitiveness of the local economy, while corporations are able to assert rights of autonomy in the distribution of their resources. But this balance of forces may be dramatically altered if we question the privileged legal status of private business corporations, as being equal to natural persons. To do this a distinction may be made between autonomy rights – which are inherent to individual human beings, singularly or collectively – and utilitarian considerations, which are the basis of an organization's assertions of right.³³ Once such a distinction is made, it is possible to conceive of the corporation-individual as a

clash between utility and autonomy, in which the individual will insist on the supremacy of autonomy rights, whereas the organization will point out the magnitude of the social interest that its claims represent.³⁴

In such a clash, the constitutionally protected autonomy rights of the human being deserve the greatest consideration, while the private corporation will, by virtue of its utilitarian basis, be given a separate and weaker constitutional and legal status. Thus although still active in the contestation of civil society, private centers of interest, particularly those whose purpose is profit and not the specific assertion of the rights of human collectivities, will receive weaker constitutional protection and be able to assert fewer social and legal rights.

In contradistinction to this vision and the continuing struggles to broaden democratic participation, the National Party is determined to build a constitutional 'firebreak' between the state and 'civil society'. Emphasizing the public/private distinction, the National Party is determined to insulate private power from state intervention. To this end a provision in an early draft of the interim constitution making the chapter on fundamental human rights binding 'where just and equitable' on non-state action was struck out and replaced with a separate clause prohibiting only unfair discrimination by private bodies and persons. Although the government seems to have adopted the fundamental premiss of the ANC's constitutionalist approach – the constitutional protection of individual rights – they continue to differ on the content of this alternative.

Having retreated from the advocacy of racially defined 'group rights', the National Party seems to have latched on to a notion of individual rights which places the protection of individual property rights at the very heart of the constitutional order. However, unlike the founders of the US Constitution who were only concerned to 'protect property rights against the depredations of the demos',³⁵ the National

Party's notion of property rights and local autonomy would ensure that the owners of property are constitutionally empowered to extend their right of property into a right of spatial control. This notion of property centered individual rights – reflected too in the constitutional protection of a right to engage in economic activity – would work to ensure the perpetuation of the benefits of apartheid in which ownership of property automatically translates into power over the lives of others – employees, tenants and others without property.

Aimed at the protection of existing rights and privileges this approach may prove to be farally flawed. On the one hand, unless the new constitutional order is able to gain public support and confidence a government frustrated by judicial review in its attempts to address inequality will be sorely tempted to begin amending the constitution. The tendency in such cases is to devalue the whole notion of constitutional democracy and soon the rights of personal freedom and security will suffer a similar fate. On the other, failure to address the colonial legacy of poverty and inequality leaves the constitution and new state politically vulnerable. Even a prolonged battle in the courts, in which property-owners are able to invoke the constitution to prevent redistribution, will endanger the new order. Eventually, as in other post-colonial situations, the constitutional constraints placed on the new state last only as long as it takes for a new officer class to emerge in the military and in the name of national salvation and development to suspend the constitution.

Associational Democracy in the New Order?

Describing the ANC's Reconstruction and Development Program (RDP) as a site of struggle, the ANC Member of Parliament and former general secretary of the National Education, Health and Allied Workers Union, Phillip Dexter, argues that the RDP 'presents an opportunity to set our struggle for socialism back on its feet again'.³⁶ His claim that the RDP offers an 'opportunity to establish a new, progressive hegemony that embraces the values and principles to which the mass democratic forces have committed themselves' is based on the RDP's explicit commitment to democratizing the state and society. Stating that 'democracy for ordinary citizens must not end with formal rights and periodic one-person, one-vote elections', the RDP envisions a democratic order which fosters a 'wide range of institutions of participatory democracy in partnership with civil society'.³⁷

The RDP, which is now government policy and subject to constant

reinterpreted by the bureaucracy, envisions two distinct forms of associational participation in governance. First, it foresees a role for democratic associations in the policy-making process.³⁸ In this context the RDP calls for a continued role for various sectoral forums such as the National Economic Forum and for the establishment of more multiparite policy forums at the national, regional and local level 'to promote efficient and effective participation of civil society in decision-making'.³⁹ Second, the RDP argues that organizations within civil society 'will be encouraged by an ANC government to be active in and responsible for the effective implementation of the RDP'.⁴⁰ It is in this context that the RDP calls on the trade unions, sectoral social movements and community-based organizations – particularly the civic associations – to 'develop RDP programmes of action and campaigns within their own sectors and communities',⁴¹ and for their active involvement in 'democratic public policy-making'.⁴²

While the RDP is in the hands of minister without portfolio, Jay Naidoo, its implementation – although guided by a national framework – will be dependent on the functioning of local and regional government through which communities and community-based organizations are to access the program. Aside from the difficulties of establishing nine new regional governments and resolving the division of powers between the national and regional levels, the transitional arrangements for local government impose potentially serious limitations on democratic participation.

Although the RDP calls on democratic associations to establish their own RDP programs in their communities the transitional arrangements for local government lock community-based associations into a continuing process of negotiations with institutionalized remnants of the old order. The 1993 Constitution provides for the phasing in of local government through interim procedures detailed in the Local Government Transition Act.⁴³ Once these measures have restructured local government, 'democratic' local governments are to be established, based on a mixture of proportional and ward representation⁴⁴ designed to ensure a disproportionate representation of the formally non-African sections of town and city. The first phase of this process toward the restructuring of local government is to be achieved by the establishment of a Provincial Committee for Local Government in each of the Provinces, which will be empowered to recognize negotiating forums responsible for negotiating the terms for establishing transitional local or metropolitan councils in the particular areas.⁴⁵ Section 11 of the Local Government Transition Act also establishes provincial Local Government Demarcation Boards

which may be directed to delimit local government areas and electoral wards within such areas. Once the exact structure and geographical jurisdiction of local and metropolitan governments have been negotiated, local government elections will be held on a day set by the Minister of Local Government for the election of transitional councils – probably in late 1995 or 1996.

Autonomous local government is guaranteed in terms of section 174 of the 1993 Constitution. This guarantee carries with it a constitutional obligation on the part of a local government to 'make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment'.⁴⁶ Although this provision recognizes the socioeconomic rights demanded by the ANC's constituency, it is immediately constrained by the proviso that 'such services and amenities can be rendered in a sustainable manner and are financially and physically practicable'.⁴⁷ This attempt to place obligations on government to provide basic services in relation to the government's capacity to deliver these services bears resemblance to the framework for the advancement of socioeconomic rights established under the International Covenant on Economic, Social and Cultural Rights of 1966, but fails to establish any link with the RDP's commitment to empowering community based democratic associations.

Although section 179(1) of the 1993 Constitution requires local governments to be democratically elected, the electoral system for local government established by this section has the effect of establishing a consociational system of local government. Based on a combination of proportional and ward representation, with wards distributed according to old apartheid boundaries rather than in proportion to the number of voters in any particular area, the electoral system ensures that the realities of apartheid geography will provide a veto power over budget allocations at local government level.⁴⁸ This will perpetuate a degree of racial representation in local government until either the form of representation is changed or communities become effectively integrated. Whether these provisions granting unequal weight to individual votes will survive a constitutional challenge or whether they will have to wait to be swept aside by the constitutional assembly is not yet clear. However, they will certainly become the focus of political conflict as local sections of the democratic movement attempt to engage the RDP only to find themselves faced with the local embodiment of the government of national unity and the commitment to national reconciliation which made the transition possible.

Constitutionalizing Participatory Democracy

Cosatu's debate on a Workers' Charter revealed a growing concern in civil society – particularly those sections dominated by the democratic movement – that the election of a non-racial government not bring the process of democratization to an end. In addition to ensuring the protection of workers' and union rights in the new constitution the Workers' Charter discussion stressed that the trade union movement consider how other constitutional proposals may help to secure democratic government in the future. Some of the issues discussed were proposals for citizens' initiatives or petition rights which would require the state to submit the challenged issue or law to a national referendum; a limit on the number of terms of office the head of the executive branch may serve; and support for a separate Constitutional Court with powers of judicial review.⁴⁹

Although it can be argued that the constitutional guarantees of freedom of association, assembly, expression and information included in the ANC's proposed Bill of Rights are adequate in that they are at least equal if not more protective than constitutional guarantees in most democratic societies, it must also be acknowledged that even these provisions do not explicitly guarantee the degree of access or participation which would encourage the emergence of participatory democracy. Suggestions that citizens be given the right to petition against particular laws and to demand that referendums be held, or even have the ability to place propositions on the ballot – such as the initiative system in California – go some way toward encouraging participation but still maintain a strict barrier between formal processes or 'the state' and popular participation or 'civil society'. Furthermore, as the initiative system in California has demonstrated, these provisions fail to distinguish between democratic participation and the ability of powerful private interests – particularly large corporations – to use their resources to dominate the debate around an issue placed before the public in a referendum or regular ballot.

However, if increased participation is a means to address the interaction of democracy and diversity it becomes important to clarify exactly what is understood by citizenship and the 'civil society' into which a diversity of citizens will enter in order to coexist peacefully. If we accept that a single notion of the substantive common good will at all times be inadequate to address the dynamics of democratic participation and diversity, then we can begin to understand citizenship not simply as a legal status but rather as a form of political identity.⁵⁰ This approach implies an understanding of citizenship

which sees a collective identification with a radical democratic interpretation of the principles of liberty and equality – 'understood in a way that takes account of the different social relations and subject positions in which they are relevant: gender, class, race, ethnicity, sexual orientation etc.'⁵¹ This conception of citizenship is furthermore consistent with a notion of civil society that rejects any single notion of the good life and instead posits the associational life of civil society as the ground upon which social beings – as citizens, producers, consumers, members of the nation, and much more – continually work out and test their versions of the good. In the end, the 'quality of our political and economic activity and of our national culture is intimately connected to the strength and vitality of our associations.'⁵²

Next, it is necessary to ask whether there are any specific constitutional issues which may be identified as pivotal to the emergence and strengthening of participatory democracy in its various forms, including associational democracy. If such issues are identified, it will become possible to consider whether there is any way to guarantee their promotion or protection in South Africa's new constitution. There are a number of prerequisites to increased participation which we can identify. First, there is the need to enhance the society's organizational capacity, both in terms of the ability of different interests to organize themselves and to engage in democratic governance by gaining access to policy-making and decision-making processes; second, there is the need to gain access to information in order to participate fully in policy debate; and third, there must be the ability both to hold the government accountable and to organize against the government's decisions and actions.

Participation could be encouraged in several ways, both constitutional and institutional.⁵³ These could include first, the explicit protection of rights and granting of privileges of association and participation to specific organizational forms such as trade unions, civic associations, student organizations and nonprofit, non-government organizations. Instead of relying on the courts and their future interpretation of a broad guarantee of freedom of association, there could be, for example, explicit guarantees of trade unions' right to organize in factories and government institutions and student organizations' right to access to classrooms to organize without fear of expulsion from the school system. The state may also be constitutionally mandated to encourage the formation of voluntary associations through institutions such as a department of community organization through which resources and services could be obtained by communities or associations, in addition to guaranteed free access to public buildings for meetings.

Given the centrality of the legal process under a justiciable Bill of Rights, the state may be constitutionally mandated to facilitate the access of voluntary associations to the legal arena. This would need to go beyond the government's creation of a human rights commission or public protector (ombudsoffice) as are provided for in the ANC draft Bill of Rights⁵⁴ and the interim Constitution,⁵⁵ but may require a department of public advocacy to include not only public defenders and public advocates, but also a program of direct support to an independent public interest law sector.

Participation is dependent on access to information and to government officials. The provision in the interim Constitution guaranteeing citizens access to 'information . . . in so far as such information is required for the exercise or protection of any of his or her right'⁵⁶ is inadequate in that it places no explicit limit on the state's right to regulate 'required' information on the grounds of national security, nor does it explicitly establish the right of interested organizations such as trade unions or even environmental groups to gain access to private corporate financial records or documents.

A necessary corollary to the need for information is the ability to gain access to government officials and others involved in policy debates. In the case of proposed legislation this is normally achieved by holding public hearings; but members of the legislature or the government normally decide whether public hearings will be held. Instead, we may include a constitutional guarantee requiring the establishment of a system through which secondary organizations are entitled to notification of proposed legislation or even government regulations and may demand hearings before the bill goes before the legislature or regulations promulgated.⁵⁷

Creating the necessary information on which to make informed decisions is a fundamental aspect of participation. A constitutional mandate that all proposed legislation or government regulation be preceded by a 'social impact study' to determine what impact the legislation is expected to have on the poor, rural and other undeveloped areas of the country or even constitutionally mandated affirmative action programs would require government or the advocates of new legislation to produce research detailing the impact they expect their proposal to have. In response, voluntary organizations active in the particular arena may enter policy debates by evaluating this research or providing counter-information on the expected impact of the new law or policy.

Finally, it is necessary explicitly to protect the right to oppose government action. Not only must there be a right to protest, but there

should also be a right to demand and receive a public accounting of actions and decisions taken by government officials; to gain access to public places and buildings to hold meetings; and for voluntary organizations to present and defend their views in the mass media, particularly government-controlled radio and television.

Conclusion

Out of the experience of mass action and popular organization during the anti-apartheid struggle there has come increasing debate and demands for popular participation in the new order in South Africa. As the transition continues there will be a growing debate on the specifics of the future constitution. It is in this context that I have attempted in this paper to outline the problems confronting those who are seeking ways of increasing popular participation in the future and sought to identify specific means through which this process may be encouraged. More specifically, I have attempted to identify a number of constitutional provisions that should either be strengthened or introduced in order to facilitate participation by voluntary associations, including the idea of a social impact statement as a means of focusing debate and public attention on the expected consequences of government action or legislation.

Notes

1. Although the Constitutional Assembly is bound, in drawing up the new constitution, by the constitutional principles included in Schedule IV of the 1993 Constitution, there is in fact a great deal of latitude within these constitutional principles to define the exact content of the new constitutional order. The most important influence on these processes will be the degree and source of political pressure on the various parties to ensure a two-thirds majority for passage of the new constitution.
2. E. Marais and J. Rauch, 'Policing the Accord', 78 *Work In Progress* (henceforth *WIP*) 14 (Oct/Nov. 1991), p. 14, col. 1.
3. *Ibid.*, p. 15, cols 2-3. See also C. Shearing, 'Police and Government: The Quest for Impartial Policing', 78 *WIP* 17 (Oct/Nov. 1991), pp. 17-19.
4. Marais and Rauch, 'Policing the Accord', p. 16, col. 3.
5. G. Daniels, 'Beyond Protest Politics', 76 *WIP* 13 (July/Aug. 1991), p. 13, col. 1.
6. Interview with J. Naidoo, 'National General Strike: "It's more than VAT, it's the entire economy"', 16 (2) *South African Labour Bulletin* (henceforth *SALB*) 13 (Oct/Nov. 1991), p. 13, cols 1-2.
7. G. Daniels, 'The Great VAT Strike', 79 *WIP* 18 (Dec. 1991), p. 19, col. 1.
8. Saccola is the South African Employers Consultative Committee on Labour Affairs; NACTU is the National Council of Trade Unions.
9. See 'Special Focus: The Reconstruction of South Africa', 15 (6) *SALB* 14 (March 1991), pp. 14-33.

10. See K. van Holdt, 'Towards Transforming SA Industry: A "Reconstruction Accord" between Unions and the ANC?' 15 (6) *SALB* 17, p. 17.
11. J. Copelyn, 'Collective Bargaining: A Base for Transforming Industry', 15 (6) *SALB* 26 (March 1991), p. 26.
12. K. von Holdt, 'From Resistance to Reconstruction: The Changing Role of Trade Unions', 15 (6) *SALB* 14, p. 16, col. 1.
13. Labor Bulletin, interview with Naidoo, p. 14, cols 1-2.
14. *Ibid.*, p. 14, col. 3.
15. *Ibid.*
16. See D. Nkosi, 'Building Civil Society for Reconstruction', *The Shopsteward*, vol. 2 (3), June/July 1993, pp. 4-6.
17. Ebrahim Patel, 'New Institutions of Decision-making: The Case of the National Economic Forum', in *Engine of Development: South Africa's National Economic Forum*, ed. E. Patel, Kenwyn, South Africa: Juta & Co. Ltd 1993, p. 6.
18. See C. Ryan, 'NEF: Likely Results', *People Dynamics*, vol. 11, no. 11, Sept. 1993, pp. 8-12.
19. An example of such engagement in the development process was the agreement between Sanco, Cosatu and the civil engineering industry, which provided a framework for labor-intensive public works projects while averting conflict between the labor movement and unemployed communities. See K. Cullinan, 'Union-Community Clash Avoided', in *WIP* 91 (Aug./Sept. 1993), supplement no. 12, Aug.
20. A. J. Manuel Parraguez, 'The Privatization of the State and Community Legal Strategies in the Democratization of Local Power in Chile', 1 *Social and Legal Studies* 229 (1992), p. 232.
21. The South African debate on the nature of civil society reflects a conflict between the two sources of the concept identified by Cohen and Arato – conceptual history and the self-understanding of social movements'. J. Cohen and A. Arato, 'Politics and the Reconstruction of the Concept of Civil Society', in *Cultural-Political Interventions in the Unfinished Project of the Enlightenment*, ed. A. Honneth, T. McCarthy, C. Offe and A. Wellmer, Cambridge, MA: MIT Press 1992, p. 121. See also J. Cohen and A. Arato, *Civil Society and Political Theory*, Cambridge, MA: MIT Press 1992. This conflict is especially evident in the debates between Friedman and Swilling in *Theoria* vol. 79 (May 1992).
22. M. Swilling, 'The Case for Associational Socialism: Socialism, Democracy and Civil Society', 76 *WIP* 20 (July/Aug. 1991), p. 22, col. 1.
23. As reflected in *Work in Progress*, an independent left magazine, and the academic journals *Theoria* and *Transformation*. See D. Nina, 'Beyond the Frontier: Civil Society Revisited', *Transformation* 17 (1992), pp. 61-73.
24. M. Swilling, 'The Case for Associational Socialism: Socialism, Democracy and Civil Society', 76 *WIP* 20 (July/Aug. 1991), p. 22, col. 1.
25. *Ibid.*, p. 23, col. 2.
26. M. Narsoso, 'Civil Society – A Contested Terrain', 76 *WIP* 24 (July/Aug. 1991), p. 24, col. 2.
27. *Ibid.*, p. 25, col. 3.
28. *Ibid.*, p. 27, col. 3.
29. *Ibid.*
30. *Ibid.*
31. M. Swilling, 'The Case for Associational Socialism: Socialism, Democracy and Civil Society', 76 *WIP* 20 (July/Aug. 1991), p. 22, col. 1.
32. See P. Q. Hirst, *Law, Socialism and Democracy* (1986), pp. 108-23; and P. Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, London: Allen & Unwin 1994.
33. See M. Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society*, Chicago: University of Chicago Press 1986, pp. 55-119.
34. *Ibid.*, p. 83.
35. William W. Fisher III, 'Making Sense of Madison: Nedelsky on Private

- Property', 18 (3) *Law and Social Inquiry* 547 (1993), p. 548; *American Constitutionalism: The Madisonian Framework and its Legacy*, Chicago, IL: University of Chicago Press 1990; James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, New York: Oxford University Press 1992.
36. P. Dexter, 'Make the RDP make the Left', *Work in Progress* 95, Feb./Mar. 1994, p. 30.
37. ANC, *Reconstruction and Development Programme* (1994), para. 5.2.6, pp. 120-21.
38. See M. Hlangeni, 'Implementing the RDP', *Mayibuye* 4 (5), May/June 1994, p. 23, col. 2.
39. *RDP*, para. 5.13.7, p. 132.
40. *RDP*, para. 1.1.5, p. 1.
41. *RDP*, para. 5.13.2, p. 131.
42. *RDP*, para. 5.13.3, p. 131.
43. Act 209 of 1993.
44. *Ibid.*, section 179.
45. *Ibid.*, section 3.
46. 1993 Constitution, s. 175(3).
47. *Ibid.*
48. 1993 Constitution, s. 176(a).
49. Copelyn, 'Collective Bargaining', p. 29, col. 3.
50. Chantal Mouffe, 'Democratic Citizenship and Political Community', in *Dimensions of Radical Democracy*, ed. C. Mouffe, London: Verso 1992, p. 235.
51. *Ibid.*, p. 236.
52. Michael Walzer, 'The Civil Society Argument', in Mouffe, *Dimensions of Radical Democracy*, p. 98.
53. See R. B. Seidman, 'On the Legal Structure of a Vigorous Civil Society: A Research Agenda', unpublished, July 1991.
54. See ANC Constitutional Committee, *A Bill of Rights for a New South Africa*, Art. 16, paras 6-14 (1990).
55. *Constitution of the Republic of South Africa*, Act 200 of 1993, Articles 110-18.
56. *Ibid.*, Article 23.
57. See H. Klug, D. Davis and E. Mureinik, Submission to the Rules Committee of the Pretoria-Witwatersrand-Vereeniging Provincial Legislature, June 1994.