The Rights of Wage Earners: Of Human Rights and International Labor Standards

William B. Gould†

Any movement to guarantee human rights to the citizens of all countries must recognize the sometimes repressive backgrounds in which workers sell their labor. This article identifies the basic human rights at issue, focusing on the idea of international labor standards and its concomitant tool—codes of conduct developed on the basis of international consensus or promulgated unilaterally by a nation-state. The author advocates acceptance of the ideal of international labor standards, but warns that imposition of standards not properly characterized as protections of human rights may serve only to further handicap developing nations in their pursuit of a competitive position in world economic markets.

I

INTRODUCTION

The advent of the Carter Administration in the United States has produced a dramatic and welcome emphasis upon international human rights.1 While the worldwide plight of wage earners has not been ignored, it is fair to say that to date human rights for labor have not received equal billing in the debate that has ensued. The rights of labor involve not only the opportunities to obtain better economic and working conditions, but also the dignity that comes from possessing a recognized status in the workplace and in the community. Employment conditions are not simply "outer benefits" for workers. Rather, they involve fundamental human rights, for they deal with the ability to provide for one's own family in an environment which expands the next generation's aspirations and opportunities.2

† Professor of Law, Stanford University.

This article is based on a paper delivered to the First South African Conference on Human Rights in Cape Town, South Africa, on January 23, 1979. The author is grateful to Professor John Barton for a number of stimulating discussions during the early stages of the article's development. While these conversations have encouraged me to reflect on my ideas more carefully, I am fully responsible for the article and any deficiencies that it may contain.


2. See Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); Universal
On an international level, the rights of labor deserve attention for many of the same reasons that they have clamored for attention in a federalist system like that of the United States. If each nation is able to devise its own policies without consideration of basic standards, and some therefore suppress or ignore the interests of wage earners, business has an additional incentive to invest in production facilities in countries which are least civilized in terms of the treatment of employees. Under such circumstances, the ability of organized labor to drive a bargain which effectively protects its members is undermined even where unions are well established.

Granted, competition based upon labor cost considerations can never be totally eliminated. This is especially so on the international level where protection afforded workers inevitably takes a variety of forms. In addition, both labor and nonlabor costs vary considerably between companies and industries in nation-states themselves, let alone across national boundaries, and collective bargaining arrangements vary according to the preferences and strengths of the parties—labor, management, and sometimes the government. But in the United States, and indeed in much of the West, the driving force behind trade unionism and legislation designed to promote the collective bargaining process has been the recognized need to eliminate unfair competition between workers in the same plant, the same town, the same part of the country, and eventually, with the rise of the great national unions, throughout the entire nation-state itself.

All of this means that the unions have accumulated power in some sectors of the economy. From time to time, union abuses against the public and individual employees have been associated with that power; in most of the West, this has meant that union as well as employer behavior is regulated by law. There is no question that unbridled competition between workers is not only demeaning and exploitative, but also inconsistent with the view that the labor of human beings is not a commodity. The centerpiece of American labor-management legislation, the National Labor Relations Act, is predicated upon the view that in the absence of federal regulation companies probably would be lured to states and areas without basic safeguards—in the case of the United States, unfair labor practice prohibitions and the right to select collective bargaining representatives of the worker's own choosing.

The concept of international labor standards which contain within them protection for basic human rights for labor is just and proper and

Declaration of Human Rights, art. 23 (United Nations 1948); cf. Address by J. Kuhn at Columbia University Human Rights Seminar (November 9, 1978).


therefore deserving of support. By international labor standards I do not mean uniformity with regard to wages, fringe benefits, and most employment conditions for the workers in, for instance, San Francisco, Cape Town, and Calcutta. Although minimum pay rates may be an important feature of a code of conduct aimed at a particular country, I do not advocate an international minimum wage that would require as an international labor standard the same wage for employees in Sydney, Lagos, and Tel Aviv. For a whole host of reasons, such ideas cannot command support and are decidedly impractical; nonlabor costs for automobile manufacturers in, for instance, Germany, Australia, and Kenya vary enormously. Even inside the European Economic Community, the harmonization of wages is still a distant dream. Previous efforts for international labor standards have faltered at least in part because their proponents have been unrealistically optimistic about what could be accomplished.

But today the international community should place human rights for labor high on its agenda. The time is right because of the confluence of three different dramas whose plots are just now unfolding upon the world’s stage. The first is directly bound up in the worldwide economic crisis from which the West and Japan seem thus far unable to extricate themselves. The concern about unfair competition from the developing economies and the consequent displacement of workers in the industrialized countries has encouraged the AFL-CIO and most of its constituent unions in the United States to abandon the free trade posture once so closely identified with organized labor. The AFL-CIO has argued that the flight of multinational corporation investment to other countries has lengthened the unemployment lines in the United States. Adjustment assistance under the auspices of the Trade Act of 1974 has not dampened fiery and understandable resentment on the part of workers in the industrialized world whose expectations and life patterns have been severely disrupted.

At the same time, the desperate need of the developing nations to establish competitive production facilities has temporarily blunted the swelling cry for protectionism. An intermediate approach to this dilemma is one which would keep the free trade doors open to those nations which are in compliance with basic labor standards. As the Director General of the International Labor Organization has said: “There is great advantage in countries being free to compete in quality,
prices, design, and so on; they should not be free to compete with sweated labor.”

Last year, Congressman Reuss introduced a concurrent resolution in the United States House of Representatives requesting the inclusion of environmental and safety and health standards in negotiations on labor standards under the Trade Act. An Interagency Task Force on Labor Standards has been established to carry out that statute's mandate directing the President to seek “adoption of international fair labor standards [under the GATT procedures] . . . .” During the Multilateral Trade Negotiations of a year ago, the Nordic countries suggested the inclusion of labor standards considerations in the GATT safeguards system so that the importation of foreign goods made under unacceptable working conditions would not be required. Also, the European Economic Community is exploring approaches aimed at including labor standards as part of Lomé II, its economic agreement providing for preferences for associated African, Caribbean, and Pacific developing countries.

The second push toward the development of international labor standards can be seen in the new-found willingness of some national trade union movements to boycott goods. On February 24, 1978, the AFL-CIO endorsed the idea of “selective boycotts against South African exports” and called for aid and assistance to trade unions “operating under repressive conditions” in South Africa. For violation of human rights, the Inter-American Regional Organization of Workers has proclaimed a boycott for violation of human rights of goods coming from Chile, Nicaragua, and Cuba—and American unions have stated that they will participate. In January 1979, in apparent response to the above, Chile purported to restore collective bargaining rights for unions in that country, although the bona fide nature of the reforms undertaken is suspect.

standards. These conventions, when ratified by member nations, have the same binding effect as treaties. As of October 1977, ILO had 135 members. 1 EUROPA YEAR BOOK 48 (1978).
9. Pub. L. No. 93-618, § 121(4), 88 Stat. 1978, 1986 (1974). GATT, or General Agreement on Tariffs and Trade, is a specialized agency of the United Nations whose goal is to promote the liberalization of world trade and to provide a forum in which differences on trade matters among the members can be settled. As of September 1977, the organization had 83 nations as signatory members. 1 EUROPA YEAR BOOK 32 (1978).
The third factor favoring the creation of international labor standards is the adherence of certain nations to inhumane policies that cut through all aspects of political, economic and social life. South Africa with its apartheid policies is a prime example of such a nation. I shall refer to the special case of South Africa throughout this article because it is both likely and necessary that this country will be the frontier for codes of conduct for multinational corporations doing business within its borders. As the world knows, South Africa fails to provide basic human rights in both the political and trade union arenas for the overwhelming majority (approximately ninety percent) of the work force—black African, colored, and Indian workers. Whites are required by law to hold the leadership positions in the remaining "mixed unions," which include coloreds and Indians. However, black Africans, who may belong to unions which can be recognized by management, cannot be members of a registered union which has bargaining rights under the country's major labor-management relations law, the Industrial Conciliation Act of 1956.\footnote{Industrial Conciliation Act, 1956 Stat. S. Africa No. 28. See generally A. DeKock, Industrial Laws of South Africa (2d ed. 1965).}

The migrant labor system makes it impossible for black workers to bring their wives and children with them, and often relegates them to single-sex hostels near their place of work. The result is insecurity and dehumanization. The Environment Planning Act of 1967 places restrictions on the number of blacks to be employed in the major industrial areas, intended as it is to push them back to the homelands.\footnote{Environment Planning Act, 1967 Stat. S. Africa No. 88.} The Group Areas Act, which divides residences on the basis of race, makes it difficult for nonemployee union organizers (especially if they are white) to contact black workers in the segregated township to which they are confined.\footnote{Group Areas Act, 1966 Stat S. Africa No. 36.}

The South African government's attempts to achieve internal solutions to these problems have been inadequate. The Vorster government appointed two commissions—the Wiehahn and Reikhart Commissions—to consider recommendations for revision of South African labor laws. One does not know what they will produce, although the record to date does not give much cause for optimism. Although the Wiehahn Commission has provided a preliminary report,\footnote{See generally Report of the Commission of Inquiry into Labor Legislation: Part I (1979); New York Times, May 6, 1979, at 2E, col. 3. For a discussion of the pre-Wiehahn situation, see Gould, Are Black Unions the Answer?, Commonweal, Nov. 10, 1978. Subsequent to the Wiehahn Report itself, the government enacted legislation which was considerably more restrictive. See Industrial Conciliation Amendment Bill (B94-79) and an Explanatory Memorandum on Industrial Conciliation Amendment Bill, 1979. Unlike the Wiehahn Report, the Bill excluded black workers who are "commuters" and "migrants" from the scope of the legislation and sub-}
employers, including major Western multinationals, confronted with black union recognition demands have not infrequently used the fact that the Wiehahn Commission's deliberations have been pending as an excuse for denying such demands, stating that they are awaiting the Commission's recommendations.

Efforts have been made on the international level to develop codes of conduct that would safeguard the human rights of South African workers. The International Labor Organization and the Organization for Economic Cooperation and Development (OECD) have both formulated voluntary codes of conduct for multinationals operating throughout the world.\(^\text{17}\) The European Economic Community has promulgated a Code applicable to companies doing business in South Africa—once again without the force of law—which emphasizes industrial relations and the recognition of black trade unions by multinationals from its member nation-states.\(^\text{18}\)

But of all the major investors in South Africa, only the United States has not set out such a code of conduct—thus far apparently relying upon the relatively amorphous, although perhaps well-meaning, Sullivan Principles of fair employment practices, to which more than one hundred American multinationals are signatory.\(^\text{19}\) The Sullivan Principles are simply not enough. The primacy which they accord desegregation of workplace facilities are the least of black workers' concerns, and is the least important matter confronting the employment relationship. Moreover, while the Principles quite properly address the equal pay issue, they do not appear to even touch upon the question of minimum pay rates above the subsistence standard, an issue which is vital to South Africa's wage earners.\(^\text{20}\)

In contrast to the European Economic Community Code, the Sul-


\(^{18}\) EUROPEAN ECONOMIC COMMUNITY, CODE OF CONDUCT FOR COMPANIES WITH INTERESTS IN SOUTH AFRICA, CMND. No. 7233 (1978).

\(^{19}\) In March 1977, the Reverend Leon Sullivan announced the endorsement by twelve companies of a "Statement of Principles" designed to end racial discrimination and to improve the lot of black workers in South Africa. The Sullivan Principles are a voluntary code of conduct for American multinationals without the force of law behind them. As of November 28, 1978, when the First Report on the Signatory Companies to the Sullivan Principles was issued, 107 companies had endorsed the principles.

\(^{20}\) For the situation in the gold mines, see F. WILSON, LABOUR IN THE SOUTH AFRICAN GOLD MINES 1911-16 (1972).
livan Principles do not address the all-important migratory labor issue—a vicious instrument of the government's apartheid policy which demands treatment.\(^\text{21}\) Also ignored by the Sullivan Principles is the unanimous refusal of white trade unions to indenture black apprentices, despite the fact that the South African Apprenticeship Act\(^\text{22}\) does not forbid it. Although the Sullivan Principles have belatedly included the fact that the recognition of black unions is an important issue in South Africa, there remain deficiencies in the provisions, to which I return below.

Finally, the Sullivan Principles provide no effective monitoring and reporting procedures to ensure that the goals, limited as they are, are being implemented.\(^\text{23}\) The recent and well-publicized revelation of discrimination at Anglo American makes it unnecessary for Americans to remind the South Africans how critical this issue is.\(^\text{24}\) The questionnaires prepared by the Sullivan representatives and circulated to signatory corporations as a monitoring mechanism are so bland and general as to be meaningless.

Recent Congressional efforts to augment and support the policies embodied in the Sullivan Principles are praiseworthy, but they have not gone far enough. Congressman Markey has introduced a bill which would amend the Tariff Act of 1930 so as to bar the import of goods produced by "labor whose wages are differentiated on the basis of race."\(^\text{25}\) Congresswoman Collins has introduced a concurrent resolution urging the President to adopt as a standard for American business the "entire Code of Conduct" adopted by the EEC.\(^\text{26}\) Congressman Solarz has introduced a bill to amend the Export Administration Act of 1969 so as to both prohibit new investment in South Africa and to impose sanctions on "United States persons with existing investments in businesses in South Africa that engage in unfair employment practices."\(^\text{27}\) A 1978 amendment\(^\text{28}\) to the Export-Import Bank Act of 1945 forbids the Bank to guarantee, insure, or extend credit where exports are destined for South Africa—except that support may be forthcoming if the United States Secretary of State certifies that

---

21. Subsequent to this article's completion, purportedly the principles have been amended so as to address the migratory labor problems. However, as of the summer of 1979, the reporting questionnaire distributed to the Sullivan Principles signatories does not address this subject.
23. This is one of the most difficult problems in the American civil rights arena. See W. Gould, Black Workers in White Unions: Job Discrimination in the United States 281-362 (1977).
24. Sunday Express, Jan. 21, 1979, at 8, col. 3.
As of this date, although the Carter Administration has quite properly disassociated itself with the ruling Nationalist government in South Africa to an extent unthought of at the time of Presidents Nixon and Ford, no affirmative steps beyond the 1978 amendment have been taken. The next logical and moral step for the Carter Administration is to impose a code of conduct upon American multinationals doing business in South Africa.

Even though the President thus far has been silent on the question of a legally binding code of conduct applicable to South Africa, the trend of the Administration's foreign policy as enunciated by both the President and the Secretary of State is geared toward retaining investments without approving governmental policy. A code of conduct for multinationals is admirably suited to riding these two horses for the time being at least. Moreover, black Americans with a new sense of consciousness and moral commitment engendered by the civil rights struggle of the 1960's are now more aware of South African policies, and will, along with some activist student and religious bodies, act as a pressure point on South Africa. Thus, this factor will contribute toward the evolution of international labor standards both generally and as they relate to South Africa.

That South Africa will be a frontier for the development of codes of conduct for employers is further evidenced by the existing proliferation of codes in that country. In addition to the Sullivan Principles for American companies doing business in South Africa and the European Economic Community Code of Conduct, a Johannesburg Urban Foundation Code of Conduct has been devised by South African companies which are not foreign-owned. Other South African business groups have entered the fray with their own suggestions, and a number of South African organizations such as Inkatha and the Trade Union Congress of South Africa (TUCSA) have announced an intent to monitor the implementation of such documents. Also, as noted, the International Labor Organization has devised a declaration of principles. The United Nations Group of Eminent Persons has advocated a code of conduct for multinational corporations which, while not compulsory (as is the ILO's Declaration), would nevertheless act as an instrument of "moral persuasion." There is ample precedent for the appropriateness of this approach throughout the world, let alone in South Africa.

But what international labor standards should be incorporated in such a code, and what form should they take? Should these principles be binding rather than merely an attempt at persuasion, and, in either case, how should they be employed? The best way in which to attempt
an answer to these questions is to deal with the subject matter of international labor standards at the outset.

II

THE PROBLEM OF STANDARDS

International labor standards must be practical and rest upon considerations of broad international consensus. The focus here must be in two directions. The first are internationally promulgated standards like the Universal Declaration of Human Rights\(^\text{29}\) which states in Article 23:

Everyone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Because of the gross inequities which exist among the peoples of the world, one of the most formidable and significant questions of the future is the admission and treatment of foreign workers seeking positions in industrialized countries. Promotion of the free movement of capital has prompted the European Economic Community to provide for the free movement of workers under the Treaty of Rome.\(^\text{30}\) The future of international stability may depend in substantial part upon the ability of the international community to determine what reasonable limitations may be imposed upon the immigration of foreign workers, and the extent to which jobs can be brought to workers rather than workers to jobs.

While the free movement of labor across borders is an important issue to the United States and other Western nations, a problem that is equally important to many other nations is the fundamental right of workers to move freely with their families within their nation's borders. The most narrow interpretation of the Universal Declaration of Human Rights as well as elemental notions of civility demand that the freedom of workers to move within their homeland form the foundation of any set of international labor standards.

As noted above, South Africa is a prime example of a nation that denies this right to its workers—a denial which not only stifles the desires and aspirations of the individual worker but also gives rise to the worst forms of criminality such as are seen to flourish in the single-


sex hostels in which migrant workers are housed in South Africa. Nevertheless, as John Kane-Berman has noted, reliance upon the migrant labour system is increasing in South Africa. Government, business, and labor cannot contend that this environment is in any way compatible with an existence worthy of human dignity for the worker and his family.

But there are other basic human rights beyond the right to move freely with one's own family. The Universal Declaration also states that "[e]veryone has the right to form and to join trade unions for the protection of his interests." Closely associated with this notion are the International Labor Organization and the basic human rights which are among its Conventions—statements of policy which, when ratified by members, have the same binding effect as a treaty. These basic concerns include the freedom of association and protection of the right to organize and bargain collectively; prohibition of employment and occupation discrimination; prohibition of forced labor; and guarantee of the right to equal remuneration. These conventions have direct relevance to countries like South Africa, Chile, Nicaragua, Cuba, and Argentina.

However, a different range of issues and considerations have been raised in connection with the problem of "sweated labor." Here, both the International Agency Task Force and the EEC have focused less upon human rights than upon specific efforts to regulate conditions in the workplace. The argument is that such fundamental human rights goals are not practicable and realizable ones, especially given the alleged politicization of ILO and the difficulties in establishing in that forum real freedom of association rights in Third World countries. Accordingly, the Task Force has set forth four minimum standards: (1) prohibition of slave or forced labor; (2) prohibition of child labor; (3) promotion of standards on toxic substances which create unsafe and unhealthy conditions; and (4) prohibition of discriminatory labor standards in the export production or import substitution industries. The application of the last standard would address the problems in free export or trade zones like those in Korea and Taiwan, where trade union and collective bargaining rights are denied workers employed in mul-

32. J. Kane-Berman, Soweto (1978).
33. Convention (No. 87), Freedom of Association and Protection of the Right to Organize (1948); Convention (No. 98), Right to Organize and Collective Bargaining (1949); Convention (No. 111), Discrimination (Employment and Occupation) (1958); Convention (No. 105), Abolition of Forced Labour (1957); Convention (No. 100), Equal Remuneration (1951). These Conventions are reprinted in INTERNATIONAL LABOR ORGANIZATION, CONVENTIONS AND RECOMMENDATIONS, 1919 TO 1966 (1967).
tinationals, and "pioneer" industry policies, which have made basic labor laws inapplicable in Singapore and in the Penang area of Malaysia. Only standards (1) and (4) are sufficiently fundamental and unambiguous that they can be regarded as human rights. Both practices are prohibited by numerous ILO Conventions and Recommendations, and both, like the free movement of workers and the right to organize and engage in collective bargaining, should be part of any international labor standards code which is formulated at an international or national level.

The more troublesome of the four are those concerning child labor and toxic substances. ILO Conventions address these problems as well, and many of the Third World countries have pushed for tougher regulations at the ILO within the past year. Yet the complexities and difficulties involved in enforcement in the industrialized countries, including the United States, make this effort on an international level applicable to the developing countries extremely and overly ambitious. Moreover, the size of the cost disadvantages imposed upon Western producers in this area is arguable as of this time. Accordingly, one wonders whether the West would have a substantial competitive advantage even if the developing countries are obliged to abide by standard (3).

In a sense, the child labor issue, which was so strenuously fought out in America in the earlier part of this century, brings us to the heart of our problem in the formulation of international standards. All countries have laws prohibiting child labor in industrial production; the problem, where it exists, is in enforcement. From this we can deduce that none of the countries has a moral preference for child labor, but where child labor is used it is a perceived or real economic necessity impels it. If we erect trade barriers in response to such practices, in all probability the countries affected would not be able to compete. This may mean greater unemployment and other forms of devastation in the

34. Recommendation (No. 97), Protection of Workers’ Health (1953); Recommendation (No. 112), Occupational Health Services (1959); Convention (No. 115) and Recommendation (No. 114), Radiation Protection (1960); Convention (No. 119) and Recommendation (No. 118), Guarding of Machinery (1963); Convention (No. 121), Employment Injury Benefits (1964); Convention (No. 120) and Recommendation (No. 120), Hygiene (Commerce and Offices) (1964); Convention (No. 136) and Recommendation (No. 144), Benzene (1971); Convention (No. 139) and Recommendation (No. 147), Prevention and Control of Occupational Hazards Caused by Carcinogenic Substances and Agents (1974). These materials are reprinted in International Labor Organization, Conventions and Recommendations, 1919 to 1966 (1967 and Supp.).


Third World, and perhaps both a serious threat to international stability and an increased economic assistance bill as well.

On the nation-state level, trade unions can put economic pressure on substandard employers. But this may not be the appropriate solution to this problem on the international level. Before risking the consignment of Third World workers to a loss of jobs—and after all, employment is the critical issue in such countries—we ought to proceed with caution.

On the other hand, broader human rights issues such as the right to organize and the right to migrate freely are less problematical for developing countries seeking access to the markets of the industrialized world. Human rights for workers throughout the world ought to be the first priority of any international agenda. The first step toward a general realization of this goal would be an American application for readmission to the International Labor Organization. An attempt to have an international consensus about both the standards and the machinery to be used is fundamental; the Carter Administration and the American labor movement should try again with the ILO. In the first place, there are indications that the ILO has developed a new awareness of human rights transgressions committed by the Communist bloc nations. The next time around, more attention should be given to utilizing quasi-judicial bodies like the ILO Freedom of Association Committee and the Committee of Experts. GATT, which is viewed by the Third World as a rich man’s club, does not appear to be an acceptable forum for complaints about unfair employment conditions.

But this is not to say that American membership in the ILO would be a panacea. It would do little to ameliorate the problems of workers in countries like South Africa which are not members of the ILO and hence beyond the sanctions of that organization. The limited jurisdiction of the ILO provides one more reason why the Carter Administration must move ahead with a code of conduct relating to employment practices for multinationals doing business in South Africa—a code which, unlike the EEC Code, should have the force of law behind it. Consensus, if it is to emerge between countries like the United States and South Africa, is just too remote. An essential ingre-

37. See, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
41. See note 9 supra.
dient for change in South Africa is not simply protest by good people of all races in that country—although that is both important and laudable—but also external pressure from the West. If further proof of this was needed, it was amply provided by the wave of detentions and bannings of black and white moderates in October 1977. Through the formulation of its own code, the European Economic Community has taken its first tentative step down the path of pressure through examination of its own multinationals’ conduct. America should do likewise.

International labor standards must emphasize broad and fundamental human rights issues, not specific regulation of the conditions of the workplace. The chief reason for this—that outside efforts to ameliorate the problems of “sweated labor” may prove too burdensome on the economies of developing nations—has been discussed above. There is another, and equally important, reason why human rights must be the centerpiece of international labor standards. The acceptance or imposition of human rights for labor is likely to provide a framework through which the problem of “sweated labor” can be addressed. That is to say, if free institutions which represent the interests of working people can be created in countries like Taiwan, Chile, and South Africa, it is more likely that issues such as child labor and health and safety conditions will be taken up in the developing countries. Exposure to harmful chemicals as well as the loss of an arm or leg are matters which transcend national boundaries and are understood throughout the world. Therefore they incidentally provide the unions and their international trade secretariats with one of the best opportunities for coordinated demands on a transnational basis.\footnote{See Gould, \textit{Multinational Corporations and Multinational Unions: Myths, Reality and the Law}, 10 \textsc{Int’l Law} 655 (1976).} What is lacking in South Africa, for example, are trade unions representing the racially exploited (and for that matter all) workers which have the political and economic muscle to make demands to government and employers about economic unfair labor conditions. Until there are free labor organizations, efforts directed at other labor problems will fail. We cannot know whether pressure from America designed to aid black unions will fail until such tactics have been tried.

This means that those in the West who advocate an attack on such evils as child labor and toxic substances, and who argue in the next breath that such reforms will create an atmosphere in which trade unions can flourish, have it all backwards. Any scenario which relies primarily on outsiders for workplace reform ultimately creates trade barriers and not trade unions. Human rights for labor in South Africa and in other countries where workers are without rights and dignity should have the highest priority.
III

THE FORUM OF INTERNATIONAL LABOR STANDARDS

Earlier in this article it was stated that South Africa is likely to serve as the frontier for the establishment of codes of conduct for multinational corporations. This is true not only because of that government's adherence to inhumane apartheid policies, but also because that nation has placed itself beyond the ambit of international organizations like the ILO. The human rights problem in a country like South Africa cannot be addressed on the basis of international consensus. For this reason both the European Economic Community Code of Conduct and the more limited Sullivan Principles have been promulgated unilaterally, without the consultation of the South African government. Accordingly, any code or standard must take the form of legislation by the nation-states whose corporations have subsidiaries or affiliates operating within South Africa. The obstinacy of South Africa and its manifested hostility toward black unions, as well as the difficulties involved in obtaining compliance with the Sullivan Principles, make it unlikely that anything promulgated without the force of law will be successful.

What form should such a code take? Although American antitrust law has been held to have extraterritorial coverage because of the impact that such corporate activity abroad would have upon the price of imports charged to American consumers, it seems unlikely that there are comparable theoretical underpinnings now available which would convince the courts that the writ of civil rights legislation—that is, Title VII of the Civil Rights Act of 1964—runs abroad. The argument for the extraterritorial application of United States' employment discrimination law to multinationals in South Africa is that racial discrimination in that country undermines the competitive position of American workers employed by the same corporations in this country. The difficulty with this approach is that it has been rejected by a series of Supreme Court decisions involving the applicability of the National Labor Relations Act to so-called "flags of convenience" ships operating in American territorial waters. The Court has required evidence of an affirmative intention on the part of Congress to apply the statute to extraterritorial conduct even through the principal concern of American unions involved in the litigation has been substandard wages and working conditions which undermine American workers' employment?

44. United States v. Alumninum Co. of America, 148 F.2d 416 (2d Cir. 1945).
opportunities. It seems improbable that a Court which has reacted to the "flags of convenience" cases with an affirmative intention requirement would treat employment discrimination cases differently, with the job competition argument being potentially a more difficult one. In any event, American civil rights legislation does not include the recognition of trade unions within its subject matter coverage (that is left to the National Labor Relations Act) and thus would be inadequate in dealing with some of the most significant problems of racial discrimination against blacks in South Africa.

However, the present assumption in the "flags of convenience" cases is that Congress has the power, if it chooses to exercise it, to legislate in this area pursuant to its authority under article 1, section 8 of the U.S. Constitution to regulate foreign commerce. There are, of course, limitations upon Congressional authority with regard to this kind of issue which focus principally upon the potential for conflict with foreign law.47 At this juncture South African law does not collide with the proposals outlined above; putting legal arguments aside, however, the more immediate practical problem is that Congress has little interest in such legislation.

Could the President impose such a code upon multinationals in South Africa by Executive Order without the legislative concurrence of Congress? Mr. Justice Sutherland, in United States v. Curtiss Wright Export Corp., has spoken of the President's authority in foreign affairs as belonging to the individual who "alone has the power to speak or listen as a representative of a nation. . . ."48 The Justice further described that authority:

the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution.49

In the Steel Seizure case50 a majority of the Supreme Court held that the President's seizure of the steel mills during the Korean War was legislative conduct outside of his proper constitutional domain. Mr. Justice Jackson, concurring in the judgment and opinion of the Court, categorized the President's action in the following manner: (1) where the president acts pursuant to expressed or implied authorization of Congress and where, therefore, it is his authority at its maximum; (2)

49. Id. at 320.
where the president acts in the absence of a congressional grant or denial of authority and is therefore relying upon "independent powers;" and (3) where the president's action is "compatible" with the expressed or implied will of the Congress, the last of the categories being where his powers are at their "lowest ebb."\textsuperscript{51} It would appear as though the code of conduct proposed here would fall into category (2) inasmuch as this area is a "zone of twilight" where "distribution" of authority between Congress and the president is "uncertain."

Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility. In this area, any actual test of power is likely to depend upon the imperatives of events and contemporary imponderables rather than on abstract theories of law.\textsuperscript{52}

Subsequent to \textit{Curtiss Wright}, courts have spoken of the president's "independent authority over foreign commerce" and his "authority in foreign affairs where his preeminent role has had, quite properly, long firm Constitutional recognition."\textsuperscript{53} Yet there are limits upon presidential authority, independent of statute, expressed in the area of foreign commerce.\textsuperscript{54} Precise boundary lines have not been demarcated. One can argue that the Executive Power ought to be exercised through the President's procurement authority, as has been done for almost forty years in connection with equal employment opportunity standards for the work force of business contractors in this country.\textsuperscript{55} Of course, the best avenue through which a code can be imposed upon corporations who do business with government and who have subsidiaries operating in South Africa is through statute. Since contract compliance relating to equal employment opportunity in this country has not been a roaring success, a requirement of divestiture would be more practical and effective. But the constitutional uncertainty about an executive order which proceeds beyond procurement authority makes contract compliance the best first of many steps that the Carter administration should take in this area. The constitutional terrain here appears to be firm because Congress can protest policy with which it disagrees through the attachment of riders to the appropriations.

\textsuperscript{51} Id. at 635-37.
\textsuperscript{52} Id. at 637.
\textsuperscript{54} L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 92-94 (1972).
The remaining problem is one of implementation or monitoring. The role cannot be performed by a foreign government. The major burden must be shouldered by black unions. This is another reason why any code necessarily must promote the emergence of established organizations which play the key role in assessing the extent of any change in employment conditions. As noted above, the ILO Conventions (and some of the Recommendations as well) ought to be the analytical starting point in considering how human rights for labor are to be translated into a code. Perhaps equally important are the national labor laws of some of the countries which have multinationals doing business in South Africa. In an attempt to peer more carefully into the details, with particular reference to South Africa, I should like to address three subjects: (1) freedom of association for workers to join unions and engage in union activities; (2) job security, particularly with reference to dismissals; and (3) protection from employment discrimination based upon race and color particularly, since this is the major problem confronting South Africa.

IV

FREEDOM OF ASSOCIATION

I have previously referred to the right to move freely as a basic human right of workers, but clearly there are others. That the right of workers to freely associate for the purpose of participating in the collective bargaining process through their designated representatives is recognized internationally can be attested by the promulgation of the International Labor Office Conventions on the subject. The Johannesburg Urban Foundation Code has acknowledged the right since its inception. In the summer of 1978, the Sullivan Principles were revised to provide, perhaps somewhat ambiguously, that American employers:

[support the elimination of discrimination against the rights of Blacks to form or belong to government registered unions and acknowledge generally the right of Black workers to form their own union or to be represented by trade unions where unions already exist.]

But as both the ILO Conventions and national labor law acknowledge, a very critical preliminary question relating to freedom of association and the right to organize is the location at which the communication and solicitation for the purpose of organizational activity may take place.

In the United States, the first amendment to the Constitution, which protects freedom of speech and assembly among other things,

56. See note 33 supra.
57. See note 19 supra.
has been important in this connection. In *Thomas v. Collins*, a statute requiring a trade union official to register prior to making a speech prompted this comment by the Supreme Court:

As a matter of principle, a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. . . . The right thus to discuss, and inform people concerning the advantages and disadvantages of the unions and joining them is protected not only as part of free speech, but as part of free assembly.

More recently, the Court has held that licensing criteria for unions or their organizers which lack definitiveness are unconstitutional prior restraints on speech. But in South Africa, the Group Areas Act, which appears to be the heart of South African race relations law, makes it impossible for nonresidents and whites to visit most black townships without government permission. Generally, only individuals of the race of the township's residents are afforded access without a permit. This means that neither nonemployee organizers or fellow employees of another race or township may visit a black township to carry the message of trade unionism in most instances. Yet solicitation at the home is often critical to the success of an organizational drive, and not infrequently it serves the important interest of secrecy, for both union and worker, at the campaign's inception when key workers are being identified as union supporters. But where homes are difficult to reach, the work place as a forum for the union can be especially critical. After all, it will always be a forum for the employer and it is a place where the employees spend a considerable amount of their daily existence.

The EEC Code properly recognizes this issue's importance as the Code says in section 1(E):

Steps should be taken in particular to permit trade union officials to explain to employees the aims of trade unions and the advantages of membership, to distribute trade union documentation and to display trade union notices on the company's premises, to have reasonable time off to carry out their union duties without loss of pay and to organize meetings.

This provision establishes the means through which one of the aims of the Code—permitting black workers to choose unions—is to be made a reality. The subject is not even addressed by the Sullivan Principles.

59. 323 U.S. at 532.
61. See note 15 *supra*.
The EEC Code\textsuperscript{63} is compatible with internationally established principles in respect to freedom of association. The International Labor Organization Conventions cover the same subject matter and buttress the appropriateness of the Code in this respect.\textsuperscript{64} The ILO Conventions and Recommendations and the EEC Code together dramatize the point made by Mr. Justice Douglas five years ago in the American context: "The place of work is the place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees."\textsuperscript{65}

The nation-states have taken different approaches to this problem. Perhaps because of their confused trade union structure and the consequent potential for recognitional and jurisdictional rivalry, the British, in their Employment Protection Act of 1975,\textsuperscript{66} have provided for limited union rights on company property. Section 53 states that every employee is to be protected against employer conduct which "prevents" or "deters" an employee from seeking union membership and engaging in union activities. In conjunction with this, section 57 states that an employer shall permit "an employee of his who is an official of an independent trade union recognized by him to take time off" during the employee's working hours for the purpose of engaging in either industrial relations matters or training in industrial relations. Section 58 of the same statute provides that an employer shall permit an employee who is a member of an "appropriate trade union" to take time off during working hours to engage in "any trade union activity." However, that section, in accord with section 57, defines an "appropriate trade union" as one which is "recognized by his employer." Of course, this does not preclude British employers from permitting union organizational activity to take place on their property. Still, the British approach is not an ambitious one. Perhaps it is designed to avoid encouraging recognitional disputes where more than one union is present, a problem endemic to that country because of its unwieldy trade union structure.

For other reasons, Japanese case law under the Trade Union Law of 1949\textsuperscript{67} has restricted union activity on company property, including the right to distribute literature as well as the right to post notices on the employer's premises. In the Japanese context, such tactics are engaged in during collective bargaining or "struggles" between labor and management, and are deemed by a number of courts to be distracting for workers. The Japanese, like the British, do not address the question

\begin{itemize}
\item \textsuperscript{63} See note 18 \textit{supra}.
\item \textsuperscript{64} See note 31 \textit{supra}.
\item \textsuperscript{65} \textit{NLRB v. Magnavox Co.}, 415 U.S. 322, 325 (1975).
\item \textsuperscript{66} \textit{Pub. Gen'l Acts and Measures of 1975}, ch. 71.
\item \textsuperscript{67} Law No. 174, June 1, 1949.
\end{itemize}
of union organizational activity on company property. This is because in Japan, as compared to countries like the United States, there has been relatively little resistance by employers to union organizational efforts, particularly those on behalf of the Japanese "enterprise" unions.

In any event, the International Labor Convention No. 13568 reaches further than the British Employment Protection Act, in that it affords facilities in the undertaking to workers' representatives and prohibits prejudicial action taken against them which is based on their "status or activities as workers' representative[s] or on union membership or participation in union activities. . . ." American case law, which has been fashioned in the context of considerable organizational strife, is expansive and compatible with the EEC Code insofar as union organizational activity by employees on company property is concerned. So is the Italian Statuto dei Lavoratori of 1970,69 a statute which Professor Kahn-Freund has called "one of the most remarkable enactments in labour law known to me."70 Part III of the Statute, which protects workers in their right to belong to trade unions, establishes the right of "[t]rade union representation at the factory level (works unions, shop stewards, etc.)." Representation may be established "on the initiative of the workers in each production unit" and section 20 of the statute states that workers "shall be entitled to meet within the production unit" and section 20 of the statute states that workers:

shall be entitled to meet within the production unit where they are employed, outside working hours (also during working hours up to a limit of ten hours a year, for which they will receive their normal pay). More favorable rules may be laid down by collective agreement.

Moreover, the trade union leadership which is "not employed in the undertaking" may attend these meetings with prior notice to the employer. In West Germany, union delegates may attend statutorily guaranteed meetings of works councils which are mandated by the Works Constitution Act of 1952, but only if requested by one-fourth of the members of the union or the majority of a group represented on the works councils.71 In the United States, non-employee union access to the plant is regulated by collective agreement where a union is recognized by the employer.72

---

68. 56 International Labor Conference 780 (1971).
72. Union representatives have access to company premises in 58% of collective bargaining agreements covered by a survey. They have bulletin board rights in 68% of the agreements. The respective figures for manufacturing are 60% and 77%. However, 25% provide that there shall be no union activity on company time and 15% provide that there shall be no solicitation for union
Both the American and Italian approaches contemplate union organizational activity, although American case law circumscribes non-employee union access to company property during organizational campaigns. Indeed, the position of the United States Supreme Court has been that the employee's right to select a collective bargaining representative is so fundamental that an incumbent trade union may not waive the employee's right to solicit workers and distribute union literature on company property through the collective bargaining agreement, even though the union may waive its own institutional right to distribute literature on subjects unrelated to the question of union representation. Both the Italian and American approaches seem particularly relevant to the South African situation, inasmuch as implementation of section I(E) of the EEC Code of Conduct would, in practically all instances, concern black unions attempting to organize and attain collective bargaining representative status. Yet as the American cases show, the principle is often more easily articulated than realized. As the Supreme Court has said:

These rights [self-organization rights] are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Similarly, the Court has said that:

Accommodation between the two [organizational rights and company property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.

Accordingly, because the employer has an interest in production and discipline, a rule prohibiting union activity during working time is presumptively valid. Both the National Labor Relations Board and the Supreme Court have for the past thirty-six years taken this view and the converse one that prohibitions of such activity during non-working time are presumptively unlawful.

Still, practical problems remain. Sometimes the materials used by trade unionists may be so hard-hitting as to constitute defamation or

---


75. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1948).


disloyalty in the employer's view. The Supreme Court has indeed said there are areas which are properly out of bounds for employees. Still, the mere fact that the speech or material is likely to create discord and protest does not make it unprotected. Criticism, wide-open debate and "robust" free speech are part of the democratic tradition; in order for freedom of association to be implemented, this tradition of democracy must be recognized in the workplace.

This has broad implications. For instance, the United States Supreme Court recently held in Eastex, Inc. v. NLRB that the distribution on company property of literature which concerned political issues involving workers as well as employment conditions at the employer's own plant was protected activity within the meaning of the Act. The Court specifically noted that Congress "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." The Court also noted that part of the union protest was aimed at minimum-wage legislation and that this would have an impact upon the level of negotiated wages. Observing that management had not shown its interests were in any way prejudiced by distribution of the literature, a "substantial portion" of which was conceded by the employer to be protected activity, the Court ruled that the union undertook the activity to "boost its support and improve its bargaining position in upcoming contract negotiations"—a purpose "closely tied to vital concerns" of the National Labor Relations Act.

While political strikes or union workplace tactics unrelated to employment conditions are not protected by the ILO Conventions, a considerable case law has evolved from the decisions of the Freedom of Association Committee of the Governing Body of the ILO; free trade unions must be able to address political issues which will affect their membership and society. No exact boundary line can be drawn between labor-management relations and politics.

The foregoing comparative glance at principles relating to freedom of association adopted by the EEC, the ILO, the United States, Britain, Japan, Italy, and Germany reveals a number of differing approaches to the balancing of the interests of workers and management. Any code of conduct for multinational corporations operating in South Africa es-

80. Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976).
83. Id. at 565.
84. Id. at 575.
established by the United States must include within it a section parallel to section 1(E) of the EEC Code of Conduct. Such a section should then be implemented and interpreted according to the more expansive United States and Italian principles of freedom of association.

V

JOB SECURITY

To some extent, protection against dismissals is inevitably bound up with freedom of association; an employer that can dismiss workers arbitrarily or because of union membership can scuttle the desire of workers to band together and to protect themselves through collective bargaining.

The country which seems to have pioneered in forging a legal framework in this respect is West Germany. Since 1951, the Act to Provide Protection Against Unwarranted Dismissals has established the rule that dismissals which are not "socially justified" are "without effect." This means that the employer has the burden to prove that job misbehavior is the basis for the dismissal. Even more ambitious provisions severely restrict the employer with regard to so-called "collective dismissals" or layoffs. Additionally, the Works Constitution Act of 1952, as amended in 1972, provides that works councils (which all employers are obliged to provide in any plant with at least five employees) have the right of "codetermination." That is, a works council may "refuse its consent" where "... the staff movement is likely to result in the dismissal of or other prejudice to employees of the establishment not warranted by operational or personal reasons ..." Under the same statute, the employer cannot normally dismiss a worker pending the outcome of the case, where a works council lodges an objection and where the matter is taken up under the Protection Against Dismissal Act.

The Codetermination Act of 1951, which applies to steel and coal, affords workers equal representation or parity on the supervisory board (Aufsichtsrat) as well as a labor director on the management board (Vorstand). This provides the workers with some security, although it seems to be less important in connection with job security than either the Works Constitution Act or the Protection Against Dismissal Act. More recently, the Germans have extended this concept to other areas of the economy through the Codetermination Act of 1976, which provides slightly less than equal representation.

86. 1951 BUNDESGESETZBLATT TEIL 1 1317.
87. 1951 BUNDESGESETZBLATT TEIL 1 1317, § 99(2).
88. 1951 BUNDESGESETZBLATT TEIL 1 347.
89. 1976 BUNDESGESETZBLATT TEIL 1 1152.
Sweden and Great Britain are two European countries which have enacted recent legislation which partially mirrors the German model. In 1974, Sweden enacted legislation prohibiting unfair dismissals, and, like Germany, it enacted a codetermination statute—the Act on Joint Regulation of Working Life—in 1976. However, the Swedish approach to codetermination is fundamentally different from the German, as it emphasizes the collective bargaining process itself. Among other things, it requires the negotiation of a collective bargaining agreement concerning “the conclusion and termination of contracts of employment, the management and distribution of the work, and the activities of the business in other respects.” The union has a veto over the contracting out of any work which takes place on plant premises. This is not to say that the Swedes have ignored the German idea of workers on the board. Indeed, a 1973 statute provides for one-third worker representation and the Swedes seem reasonably satisfied with this approach.

Ever since 1963, British law has required that notice prior to dismissal be incorporated into the individual contract of employment. And, ironically, the Industrial Relations Act of 1971, so roundly condemned and excoriated by that country’s trade unions and their advocates, brought into existence the prohibition of unfair dismissals. When the Act was repealed with the advent of the Wilson Labor government in 1974, the unfair dismissal provisions were retained and subsequently embodied in slightly altered form in the Employment Protection Act of 1975. Yet while the British have followed the German lead in connection with both protection in dismissals and requiring notice of sixty to ninety days in connection with collective dismissals, their attempt to introduce codetermination has foundered.

Japan, although culturally dissimilar in a number of major aspects from the West, provides an example of both practices and law which are far-reaching indeed. The practice in major corporations of shushin koyo, or permanent employment, is well-publicized. In addition, the Labor Standards Law requires employers to devise, in consultation

---

90. 1974 S.F.S. 12.
with unions where they exist, Rules of Employment which deal with a variety of matters including the circumstances under which an employee may be dismissed or disciplined.\textsuperscript{98} Quite often, these Rules will deal with the question of whether prior warnings must be given to the worker for the offense involved and will address other kinds of procedural due process problems as well. The courts frequently base their decisions on these Rules. In this respect, the Japanese approach resembles the American arbitration process, which generally prohibits dismissals except for just cause and has developed a law of procedural due process in connection with discipline and dismissal. The problem with the American system is that it applies only to the twenty-five percent of the work force that is organized, although both the National Labor Relations Act and the Civil Rights Act of 1964 interdict dismissals for union membership, race, color, sex, religion and national origin.\textsuperscript{99}

The International Labor Organization issued a Recommendation on job security in 1963.\textsuperscript{100} The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,\textsuperscript{101} issued in 1977, provides that "arbitrary dismissal procedures should be avoided," and that protection should be given to workers in collective dismissal situations. Although the legislation enacted in Germany, Sweden, Britain, and Japan are important models for the world, a first step for South Africa would be an obligation less ambitious—either protection of trade union leaders or, preferably, protection against dismissals because of union activities.

As trade unions flourish in the less-developed economies, it may be that they will negotiate collective bargaining agreements which relate to this matter. Of critical importance in this area are the following: (1) unlawful dismissal must be found when there are both lawful and unlawful reasons for the action taken;\textsuperscript{102} (2) the burden of proof must be formulated in a way which does not put an excessive burden upon


\textsuperscript{100} International Labor Organization, Recommendation (No. 119), Termination of Employment (1963).

\textsuperscript{101} \textit{See note 17 supra}.

the union or worker; (3) the procedures must be both informal and expeditious (lack of speed has been the major reason that Americans are now debating new amendments to the National Labor Relations Act in the form of the Labor Reform Bill); and (4) the remedies must be tough and effective.

VI
EMPLOYMENT DISCRIMINATION

Probably no country has had more experience with case law and legislation fashioned to prohibit employment discrimination than the United States. After the initial question of whether legislation is appropriate was surmounted, a whole host of problems confronted the courts and the Equal Employment Opportunity Commission in the interpretation of Title VII of the Civil Rights Act of 1964, the most comprehensive legislation on the subject in America. The first and most basic issue was how discrimination was to be proved. Proceeding upon the unarticulated assumption that employers and labor organizations (where they are defendants) are more likely to have the relevant information about applicants and workers who are chosen for the job, the Supreme Court has held that a statistical absence or near exclusion of minorities or women constitutes a prima facie case of discrimination and that the same case is made out where a minority applicant shows that he or she had qualifications for the job and was denied it.

Second, the Supreme Court held in 1971 that at least under some circumstances, an employer could be guilty of discrimination as defined by Title VII without having an intent to discriminate, where there was a disparate or disproportionate negative impact upon job opportunities for minority workers. These decisions have helped the judiciary and the EEOC move mountains in bypassing what had previously been a rather arduous task of ascertaining intent to discriminate.

Still, the most essential question is remedy. As Lord Coke said: "[W]ant of right, and want of remedy are in one equipage." Back pay, front pay, punitive damages, and attorneys' fees for prevail-

109. On the appellate level, the majority view is that punitive damages are awardable under employment discrimination legislation. See Claiborne v. Illinois Cent. R.R., 583 F.2d 143 (5th
ing plaintiffs have all created an incentive for obedience to law. As Mr. Justice Stewart has said for the Supreme Court, Title VII is essentially prophylactic in nature: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." The Court has adopted the reasoning of the Court of Appeals for the Eighth Circuit:

Back pay awards play a crucial role in the remedial process . . . they provide a spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. If back pay is consistently awarded, companies and unions will certainly find it in their best interest to remedy their employment procedures without court intervention whether that intervention is initiated by the Government or by individual employees.

With the use of class actions in employment discrimination cases, awards of back pay have involved hundreds and sometimes thousands of workers, and therefore awards or settlements of millions of dollars.

Another remedy designed to deal with employment discrimination has been quotas or timetables and goals. The Supreme Court in the Bakke case in 1978 produced a stalemate on the so-called affirmative action issue, although the majority of the Court approved of race-conscious affirmative action programs under some circumstances. A major question that confronted the Supreme Court during the 1978-1979 term was whether employers, to avoid litigation, may institute race-conscious affirmative action programs in the absence of a court order requiring them to do so. The issue was recently resolved in favor of voluntary affirmative action plans in United Steelworkers v. Weber. This decision will enable employers to engage in effective affirmative action programs without risking litigation and liability.

The significance for South Africans of the American experience is that the legal prohibition of discrimination is not enough. Only with tough and thoughtful remedies can the roots of discrimination be eradicated.

---


I regret that a case I argued before the Sixth Circuit Court of Appeals is the one decision to the contrary. Stamps v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).


114. Since this paper was written, the Supreme Court has reversed the Court of Appeals in United Steelworkers v. Weber, 563 F.2d 216 (5th Cir. 1977) and upheld the validity of affirmative action plans. United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).
cated. Further, it is necessary and desirable that most parties resolve their problems out of court. Weber, which involved voluntary affirmative action programs created in response to law, may clear the way for this to be done extensively.

VII
CONCLUSION

International labor standards designed to protect wage earners throughout the world must be formulated. These standards must emphasize basic and fundamental human rights and should be based upon international consensus. International organizations like the ILO can provide both the forum to achieve a consensus and the machinery to enforce the standards that grow out of that consensus.

Nonetheless, some nations, such as South Africa, will continue to place themselves outside the ambit of internationally agreed-upon labor standards. In such cases pressure must be brought both by the international community and by the individual nation-states to force South Africa and other countries to conform to basic notions of human rights. The ILO conventions and the EEC Code of Conduct provide models that the United States should look to in establishing its own binding code of conduct for American corporations with subsidiaries operating in South Africa. Whatever form such an American code may take—whether Congressional enactment or Executive Order—it is crucial that it be backed by the force of law, not simply the voluntary pledge of good conduct requested by the Sullivan Principles.

International agreed-upon labor standards and unilateral codes of conduct must focus on broad and fundamental human rights such as freedom of association, job security, and protection against discrimination; outside attempts to regulate the specific conditions of the workplace may prove to be too economically burdensome on developing nations. International labor standards and codes of conduct emphasizing human rights can provide the framework in which the specific problems of "sweated labor" can be solved through trade union activity and collective bargaining on the local level. The goal must not be to dictate terms and conditions of employment to workers and employers around the world, but instead to increase the level of freedom and dignity of workers to the point where they can effectively speak and bargain for themselves, thereby determining their own destinies.