

KEMPTON MAKAMURE LABOUR JOURNAL
No. 2: 2009

Constitutional Reform in Zimbabwe: Labour, Gender and Socio-Economic Rights



**Zimbabwe Labour Centre and Kempton
Makamure Labour Lecture Series Board -
University of Zimbabwe**

KEMPTON MAKAMURE LABOUR JOURNAL

NUMBER 2: 2009

SPECIAL ISSUE

**CONSTITUTIONAL REFORM IN ZIMBABWE:
LABOUR, GENDER AND SOCIO-ECONOMIC RIGHTS**

PUBLISHED BY

**ZIMBABWE LABOUR CENTRE
AND
KEMPTON MAKAMURE LABOUR LECTURE SERIES BOARD
UNIVERSITY OF ZIMBABWE**

SUPPORTED BY: ROSA LUXEMBURG FOUNDATION

This journal has been published by Zimbabwe Labour Centre and Kempton Makamure Labour Lecture Series Board - University of Zimbabwe. Printing of the journal has been made possible by funding from Rosa Luxemburg Foundation. This journal is copyright under the Berne Convention. Under the Copyright and Neighbouring Rights Act, [Chapter 26:05], no part of the journal may be reproduced or transmitted in any form or by any means, mechanical or electronic, including photocopying, duplicating, recording or by any information storage and retrieval system, without permission in writing from the Publishers and Copy Right holders

© Zimbabwe Labour Centre P. O. Box 6758 Harare, 2009

ISBN 978 0 797437 791

Published in 2009 by:
Zimbabwe Labour Centre
Box 6758 Harare
Zimbabwe

And

Kempton Makamure Labour Lecture Series Board
Faculty of Law
University of Zimbabwe
P.O. Box MP 167
Mount Pleasant
Harare
Zimbabwe

General Editor
Cover Designs
Cover Photo (Protest against attacks on women wearing miniskirts)
Typesetting T
Printing and Binding

Munyaradzi Gwisai
Tafadzwa A. Choto
Claire Ceruti
Tafadzwa A. Choto and Michael S Sozinyu

Table of Contents

Page

Acknowledgements	i
Legacy of Kempton Makamure	i
Editorial Note	1
Welcome Remarks	3
Solidarity Remarks	4

PART ONE: NEO-LIBERALISM AND THE CONSTITUTIONAL AND POLITICAL CRISIS IN ZIMBABWE

1. Neo-liberalism, the constitutional and political crisis in Zimbabwe, L Matombo	6
2. Ideology, capitalism and the crisis in Zimbabwe, M. Sambo Sozinyu	10
3. Regional perspectives on working people and the constitutional crisis in Zimbabwe, D McKinley	18
4. Sown on good soil: Political, economic and social factors which gave birth to the Constitution of the Bolivarian Republic of Venezuela, T. S. Mombeyarara	20

PART TWO: HISTORY OF CONSTITUTIONAL REFORM IN ZIMBABWE

5. Constitutional reform in Zimbabwe: History and way forward, Muinyaradzi Gwisai	26
-----------------------------------------------------------------------------------	----

PART THREE: OUTLINE OF FUNDAMENTAL RIGHTS

(A) Fundamental Socio-Economic Rights under International, Regional and Zimbabwean Laws and Norms

6. Know your social-economic rights, G. Kanyenze	46
7. Socio-economic rights under international and Zimbabwean laws, F. Hwenhira E. Matika and A. Chikwayi	52
8. The informal sector, trade justice and constitutional reform, A. Tawanda	68

(B) Fundamental Labour Rights under International, Regional and Zimbabwean Laws and Norms.

9. An outline of fundamental labour rights under international laws, national constitutions and Zimbabwean constitutional norms, M. Gwisai, R. Matsikidze, S. Ushewekunze and K. Musoni	71
10. The struggle for labour rights requires a struggle against capitalism, C. Gwiyo	84

(C) Fundamental Gender Rights under International and Zimbabwean Laws

11. An outline of fundamental gender rights under international and regional and national constitutions, S. Mombeyarara and S. Barangwe	88
12. Defence, enforcement and funding of socio-economic, labour & gender rights	99

PART FOUR CONSTITUTIONAL REFORM IN ZIMBABWE: WAY FORWARD

13. Why the NCA says: We will die for a people-driven constitution, L. Madhuku	108
14. Zimbabwe People's Charter, Constitutional Reform	114
15. Reaffirmation of ZLHR's position on the process of constitutional reform	115
16. What does "people-driven constitutional reform" mean? M. Gwisai	118

ANNEXURES:

Conference Report	127
Consolidated Bill of Rights	133

What does “People-Driven Constitutional Reform” Mean?

Munyaradzi Gwisai

Introduction:

A massive debate has emerged in Zimbabwe over the nature of the process of constitutional reform. Virtually all players, from the political parties under the GPA, to civic society as represented in the Zimbabwe People's Charter and the National Constitutional Assembly proposals, agree on the need of a constitutional reform process which is “people-driven.” The disagreements are on what this means. Below we assess the various contentions in the context of experiences from other countries in the region and internationally and proffer suggestions on the way forward for working people.

Theoretical foundations

The concept of a “people-driven” constitution derives from values and institutions developed in the first democratic bourgeois constitutions in the world, principally the 1787 USA Constitution and the 1776 French Constitution, which were in turn based on the Social Contract Theory.¹ Virtually all modern constitutions derive their fundamental values from such theory and early constitutional frame-work. Central to this theory of constitution-making is that sovereignty or ultimate political, executive, judicial and legislative power in any democratic society lies and always remains with the people. Where authority or power is delegated to a body such as parliament when it makes legislation, that authority must be exercised for the people and on behalf of the people and always remains subordinate to the sovereign will of the people. A Constitution is the supreme law of the land, the *Grundnorm*, and as such represents the highest civil manifestation of the sovereignty or will of the people. Because of this, the people themselves must be directly involved in the making of a constitution, at all levels of the process, that is in the conceptualization, formulation, planning, implementation and approval of the new constitution. Any constitution not so made lacks social legitimacy and therefore fails to provide a basis for durable harmonious social and political relations.² To paraphrase Vivien Hart, a constitutional expert, commending on the South African process and the need for a public-made as opposed to an elite-made constitution:³

“It is not the lawyers or the politicians whose rights are protected by the Constitution. It is not lawyers or politicians who will defend those rights, nor the Constitution itself, at the barricades or in the streets. A Constitution which is drawn up without popular participation will have little resonance in the hearts and minds of the people who are its final guardians.”

So the full involvement of the people in the formulation, drafting and approval of the constitution is what is meant by a “people driven constitutional process.” In other words unlike in ordinary law-making where laws may be made by the freely elected representatives of the people in the incumbent national legislature, that is through representative democracy, in constitution law-making what is required is the fullest and direct involvement of the people themselves, through what is termed “participatory democracy.” Thus in constitution-making, even where principles of representative democracy may inevitably operate, they remain subordinate to those of “participatory democracy”, including ultimately the right of the people to directly approve or reject any draft constitution through a referendum.

The above principles mean that an incumbent parliament, even one elected under the most democratic conditions cannot appropriate to itself this fundamental right of citizens to write their own constitution. This is because the parliament itself derives its authority from the constitution. If an incumbent parliament was given the power to substantially write or influence the constitution-making process, there is an inherent danger of conflict of interest, of it abusing that authority to the advantage of those currently in power. The temptation to abuse such power to suit the specific, temporary and partisan needs and interests of the incumbent parliament and politicians would just be too great. In other words there would be an absence of the minimum checks and balances needed to come up with a social contract that truly reflects the will and sovereignty of the people. As has been

¹ Popularised by 18th century philosophers like John Locke and Montesquieu.

² Skjelten S, *A people's constitution: Public participation in the South African constitution-making process*, (Institute for Global Dialogue, Midrand, South Africa, 2006) p 34 – 38; Ghai Y and Galli G (contributors), *Constitution building: processes and democratization*, (Institute for Democracy and Electoral Assistance – IDEA, 2006)

³ Hart V, *Democratic constitution-making: The South African experience*. www.usinfo.state.gov/journals/itdhr/0304/ijde/hart.htm

observed, "...the underlying premise is that in order for a constitution to attain legitimacy, a genuine and comprehensive participatory constitution-making process has to take place."⁴

Historically the process of a people-driven constitution and modern liberal democracy was set under the 18th century American and French constitutions, and developed in subsequent experiences globally over the next two centuries. The essence of this historical process was the establishment of a special assembly elected directly from the citizens with the specific mandate of writing a draft constitution, which draft is then subjected to a referendum of all the citizens. This special assembly has been called, a Constituent Assembly, Constitutional Assembly or Constitutional Convention. In the case of the USA it was the Philadelphia Convention of May – September 1787, which was chaired by George Washington, the victorious commander of the army which had defeated the British.⁵ In France, it was the elected National Convention, which was set up after the fall of the monarchy at Bastille in 1789, which on 26 August 1789 proclaimed the Declaration of Human and Civic Rights and declared France a republic. Over time this process has been developed to deepen the participation of citizens in the constitution-making process and ensure the widest possible representation of all major social groups of society, including civic society groups, and historically and socially marginalized groups like women, the disabled, youth, and oppressed or minority racial, religious or ethnic groups. It has also involved the establishment of a special implementing organ of the Constitutional Assembly, to carry out exhaustive consultation of the people, constitutional education and gather the people's inputs into an initial draft constitution to be debated and adopted by the Constitutional Assembly. This has generally been called a Constitutional Commission, with again the widest and broadest possible representation of the social forces represented in the Constitutional Assembly. Further, the election of representatives to the Constitutional Assembly, has been subjected to a mixed electoral system that incorporates the proportional representation system and mandatory affirmative action requirements to ensure participation of the marginalized groups and to ensure the explicit involvement of special interest groups from civic society. But this special representation always remains subordinate to that of the common will as expressed through the universal franchise. Further have been the development of rules and procedures governing the Constitutional Assembly that ensure the widest possible involvement of the participants but ultimately subject to the decision of the majority. Finally has been the establishment of enabling laws that ensure that the constitution-making process is not subject to the arbitrary or unilateral will of any individual or body other than the Constitutional Assembly.

Finally the term "people-driven" is not is not limited to the issue of process alone, especially under modern recent constitutions. It also inherently refers to the content of such constitution. If the people are truly involved in the drafting of the constitution, it follows that the content of the constitution will also satisfy the fundamental political, civic and economic needs and rights of the majority of the people. In short this means provisions providing for both political democracy and economic democracy.

The above frame-work is what has generally governed constitution-making processes that claim to be people-driven, that is based on the sovereign will of the people and not some arbitrary body such as a monarch, a colonial power or an incumbent parliament. To paraphrase a resolution of the South African Constitutional Assembly – "the essential principle of the constitution-making process from the outset is that the process of drafting and adopting the new constitution, is as important as the final product itself."⁶ The demand for such process was one of the central demands of the anti-colonial war of independence and indeed the principle of sovereignty lying with the people is at the centre of both the 2000 Chidyausiku Draft Constitution and the Kariba Draft Constitution,⁷ as well as most recent constitutions, regionally and globally.⁸ This principle is also recognized in international human rights instruments that Zimbabwe has ratified which place an obligation on the state to directly involve persons or social groups affected by its programmes from the conceptualization to planning and implementation of the programmes.⁹ Recent constitution-making processes that have followed to a substantial degree the above principles of a people-driven process have been in South Africa but above all in the Latin American countries of Venezuela, Bolivia and Ecuador, which countries, not surprisingly have produced the most democratic and pro-working people constitutions in the world. Diluted versions but still relatively democratic processes have been manifest in a number of countries in Africa recently emerging from one party state or military authoritarian regimes, including Uganda, Kenya, Ethiopia and Namibia.¹⁰

⁴ Skjelten S, *op cite* p 37

⁵ Mulei C (ed), *Our Stand on Constitutional Change*, (Citizens Coalition for Constitutional Change, Nairobi, 1996) p 10

⁶ CA 1995g

⁷ Section 9 of the Kariba Draft lays out one of the fundamental principles of the Constitution as that: "The legal and political authority of the State derives from the people of Zimbabwe and must be exercised, in accordance with this Constitution, solely to serve and protect the people's interests."

⁸ See for instance Art. 8 of the Constitution of the Federal Democratic Republic of Ethiopia which holds: "1. All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia; 2. This Constitution is an expression of their sovereignty; 3. Their sovereignty shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation." Also: Art 1, Constitution of the Republic of Uganda; Art. 2 Constitution of Mozambique; and Art. 5 Constitution of Venezuela.

⁹ Examples include: Art. 14 Convention on the Elimination of All Forms of Discrimination against Women; Art. 13 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

South Africa and Venezuela Experiences

Following massive working class-led struggles against the Apartheid regime in South Africa, a constitution-making process was engaged in, which involved the widest ever involvement of the people of South Africa, and for that matter in Africa.¹⁰ The process started with an interim constitution agreed in 1993 after a two year negotiation process by twenty of the country's political parties and the Government, at a constitutional forum called the Convention for a Democratic South Africa (CODESA). Initially some groups boycotted but later joined. The interim constitution provided for the election of a Constituent Assembly (CA) on a system of proportional representation, which CA was to write a final draft constitution within a two year period, but subject to adoption by a two thirds majority of the CA, the incorporation of 34 principles agreed on at CODESA and certification by the constitutional court of compliance with the 34 principles. On failure of receiving two thirds affirmation in the CA, a draft constitution approved by a simple majority of the CA could be referred to a national referendum after receiving certification by the constitutional court. It required a 60% approval in the referendum to be enacted. The CA also acted as the interim legislature.

The CODESA Interim Constitution was accepted by the parties as a "truce" or a "peace treaty", and not the final framework for democracy in South Africa. It was very much like the GPA agreed to by the Zimbabwean political parties. The negotiations were bitter and bloody marked by intensive protest campaigns, "rolling mass actions" by the ANC and a united front of democratic and working people forces called the Mass Democratic Movement, and the United Democratic Front, (UDF). The later, by 1987 had over 600 groups affiliated to it encompassing civic, religious, student, professional, worker, business and community organizations. On the other hand was continued state-orchestrated violence, usually through right-wing white and black political parties, including the assassination of key ANC and SACP leader, Chris Hani and the Boipatong Massacre of June 1992, when 40 people were massacred.

Elections were held in April 1994 resulting in a 490-member CA representing seven political parties and chaired by Cyril Ramaphosa, from the trade union federation, COSATU. The ANC had ensured a very wide representation from its various allies especially from the MDM, COSATU, SACP and UDF. In September 1994 the CA agreed that the constitution-writing process should involve civil society and the broad public in order to ensure that it was "transparent" and "people-driven." This was encompassed in the CA's "public participation programme" (PPP) which mainly targeted three groups, namely: political formations with political representation, organized civic society groups outside parliament and individual citizens. Right from the start the CA invited the public to make submissions on how the public could participate in the constitution-making process, which submissions formed the basis of the public outreach programme in which civic society played a decisive role. The main co-ordinating structure of the CA was a 44 member Constitutional Committee (CC). The CA released its first draft in November 1995, which draft was translated into the 11 official languages, and 4 million copies distributed, followed by a massive national consultative process, including media campaigns and "constitutional public meetings" with "affected interest" groups and "the general public." Over 2 million submissions were made resulting in a draft constitution, which after further debate and public discussion, was adopted by the CA in May 1996 and subsequently certified by the constitutional court in December 1996.

Whilst substantially democratic the South African process had major flaws in that the process was hamstrung by a framework and principles that had been secretly concluded by unelected political representatives at CODESA and granted disproportionate ultimate supervisory power to an equally unelected constitutional court to certify the final draft constitution without need of a referendum. Further the composition of the CA, at least formally ended up being confined to political parties, although in practice this was largely mitigated by the ANC's broad representation structure, which involved a decisive civic society component. These compromise provisions, so-called "sunset clauses" were designed to ease the transition from political Apartheid to independence but in a manner that ensured the continuation of the Apartheid economic base that marginalized the black working classes and peasantry. It is for that reason that for all its progressive provisions, the South African constitution still fails to effectively provide for the socio-economic rights of the poor, due to the numerous exemptions placed on the proclaimed rights. Venezuela and Bolivia offer much more radical examples.

In the case of Venezuela as discussed in an earlier article, within six months of being elected in December 1998 the MVR government of Hugo Chavez initiated a constitutional reform process that was much more people-driven and democratic than the South African one. It involved the election of a 131 member Constitutional Assembly to write a new constitution within a six

¹⁰ See, Hlatshwayo B, "The Constitution-Making Process in Zimbabwe: Lessons from Africa" 1998 Vol. 10 No 2 *Legal Forum* 52

¹¹ See : Skjeiten S, (2006); Mulei C (ed), (1996) p 20

months period. Progressive forces including the MVR, communist and left parties, social movements, grass-roots organizations and women's organizations formed a united front to campaign for election of candidates into the CA and to carry out advocacy and education campaigns on the new constitution. It was called the Patriotic Pole and won 120 of the 131 seats in the CA. On election of the CA, parliament was dissolved with the CA acting as an interim legislature. This was followed by a massive process of national discussion of constitutional proposals and the draft constitutions of the CA, in which the decisive factor was the self-activity of the ordinary people, including women, workers and the poor in the *barrios*. Unlike in South Africa, the final draft was referred to a national referendum in December 1999, where it received overwhelming approval. After adoption of the new constitution, Chavez stood down and fresh elections were held in mid-2000 under the new constitution where he was re-elected. The Constitution of Venezuela has probably the most democratic, participatory and pro-working people provisions of any constitution in the world, including revocable mandates by citizens of elected officials, right from the president to the lowest elected office, which recall provisions have in fact already since been exercised by the opposition against Chavez.

Other African experiences

Lessons may also be learnt from recent examples from other African countries, although not as democratic as the experiences from South Africa and Venezuela.¹² In Uganda after a bitter civil war, won by Yoweri Museveni's National Resistance Movement (NRM) in 1986, a constitutional reform process was undertaken starting in 1988. Initially the government had appointed a 21 member Constitutional Commission chaired by a Supreme Court judge to gather information from the public and prepare a draft constitution. The Commission reported that the people preferred that a Constitutional Assembly be elected directly by them, which would debate, modify, and adopt or reject the draft constitution of the Commission. The government agreed and set into motion the election of a Constitutional Assembly, which was made up of 284 delegates of whom 214 were directly elected members from the common suffrage roll on the principle of one delegate per 70 000 people. The remaining 70 delegates were elected from civic society as follows: 39 women, one per district; 10 army personnel elected by the army Council; 2 workers elected from the national trade union federation; 1 person with disability; 4 youths elected from the four regions of the country; 4 political leaders representing the two main opposition parties and 10 Presidential nominees. The CA was involved in a thorough-going democratic and participation process and sat for 18 months. For the first two months, each delegate was given a chance to address the plenary on important issues from their constituency, whereafter consensus emerged on some issues whilst others were designated "contentious matters." In terms of the rules every decision had to be by consensus or by a two thirds majority. If a matter received a majority vote but less than the two thirds majority, a recess of not less than one week was taken for delegates to consult their constituencies and a second vote then taken. If on the second vote a matter remained contentious, a referendum had to be done. In practice the majority decisions were made by consensus except for the issues of national language, land, federalism and the political system, for which a vote had to be taken. No referendum was done on any issue with one consultation recess called for the issue of national language. The CA adopted the new constitution on 22 September 1995 and it was promulgated on 8 October 1995.

In Kenya in 1998 the government invited representatives of political parties, institutional organizations, and civic organizations including trade unions, farmers, religious, professional, youth, disabled and women organisations to submit names of nominees for a 29 member Constitution of Kenya Review Commission. Following debate and negotiations amongst these groups, the list was whittled down to 45, from which President Moi chose the 29. The chairperson had to be an eminent lawyer knowledgeable in constitutional matters and the commissioners must have attained at least Form 4 level of education. The Commission then embarked on a two year constitutional reform exercise.

Kariba Process fails the 'People-Driven' Test.

The above allows us to carry out a relatively objective analysis of the various positions in Zimbabwe. The process of constitutional reform that has been chosen by the government and the three main parliamentary parties, referred to as the Kariba process is contained in Article 6 of the Global Political Agreement of the three parties. Its key features include: establishment of a Select Committee of Parliament which may incorporate civic society representatives in its sub-committees, to spearhead the constitutional reform process, including the convening of two All-Stakeholders Conferences to come up with a draft constitution; a national consultative process after the 1st Conference to gather public views and draft the initial draft constitution spearheaded by the Select Committee; the power to make the final draft constitution lies with the incumbent parliament elected in the March 2008 general elections; and the subjection of the Parliament draft to a national referendum. The process is scheduled to take 18 months running from the establishment of the All-Inclusive Government, that is on the 13th February 2009. The approximate timeline of the process using 13th February 2009 as the base line is as follows:

¹² See generally: Hlatshwayo B, (1998) *op cite*

1. **13th April 2009** - *Select Committee of Parliament* set up: The Committee is to be set up within 2 months of the establishment of the Inclusive Government. It is set up from the incumbent parliament with civic society represented in the sub-committees. The Committee convenes the 1st Stakeholders Conference.
2. **13th July 2009** - *1st Stake-holders Conference*: The Conference is to be held within 3 months of the setting up of the Select Committee. The Conference is made up of an unspecified number of representatives from political parties, the state and civic society. Further representatives to be added to the Select Committee.
3. **July – November 2009**: *National Outreach and Consultation* exercise carried out by the expanded Select Committee, using the Kariba Draft as the initial reference point.
4. **November 2009 – February 2010**: *1st Draft Constitution* prepared by Select Committee within 3 months of conclusion of national outreach programme.
5. **February – March 2010**: *2nd All – Stakeholders Conference* debates for up to one month the initial Draft Constitution, and comes up with a *2nd Draft Constitution*.
6. **March – April 2010** - *Parliament* debates the *2nd Draft Constitution* for up to one month, and may adopt, modify, or amend it to come up with the *Final Draft Constitution*.
7. **April 2010** – *Gazetting of the Parliament Draft Constitution*.
8. **July 2010** – *National Referendum* held within 3 months of the conclusion of parliament debate.
9. **August 2010** – If approved, the draft Constitution is gazetted within 1 month of the referendum.
10. **September 2010** – The draft Constitution is introduced into Parliament not later than 1 month after expiration of the period of 30 days from the date of its gazettement.

The NCA, the ZLHR and other civic society groups have levied justified criticisms against the Kariba process, as a parliament and politicians' driven process inconsistent with the principles of a people-driven process:

- a. The process is unduly dominated by the parliamentary political parties and the incumbent parliament, from the inception to the conclusion stages. This is not only inconsistent with the principles of sovereignty of the people but moreso in the case of Zimbabwe whereby the legitimacy of the March and June 2008 elections was severely questioned, locally, regionally and internationally. The resultant GPA is at most a "ceasefire truce" like the CODESA interim constitution, and can therefore not be the basis of a durable new constitutional framework.
- b. The Select Committee is not broadly representative and lacks democratic mandate. It is exclusively dominated by the three parliamentary parties with ultimate decision-making authority within it lying with the MPs, excluding the civic society representatives. The selection of the civic society representatives is the sole prerogative of the Committee.
- c. The terms of reference of the Committee relating to the convening of the Stake-Holders Conferences are vague, leaving too much arbitrary discretion with the Committee.
- d. The holding of fresh elections after the referendum should be mandatory and not discretionary.
- e. The incumbent parliament reserves for itself a veto power over the constitutional process through the Select Committee as well as over the final product of the All-Stake-Holders Conferences, whereby the Kariba Draft has been imposed as a pre-determined outcome. This is the most grave indictment of the Kariba process, as the Stakeholders Conferences are turned into at most consultative platforms and not a constituent assembly as was the case across the continent and globally. It is this which turns the process into a politicians or parliament – driven process rather than a people-driven process.

From the above it is obvious that the Kariba process is deeply flawed. Underlying it is the determination of the parliamentary political party elites to deliver a product that benefits the capitalists, the rich and politicians. What is paramount for them is the establishment of rules and laws that govern their access and control of political power ensuring that no single party is able to abuse the state in a manner that the colonial and post colonial ruling parties were able to do. Further an analysis of the contents of the Kariba Draft Constitution shows that another major objective of this process is to draw a line behind the process of economic democratization that started in 2000 on the land reform and ensure henceforth maximum protection of private property thereby preventing the use of private and public wealth to fulfill the socio-economic demands of working people. The Draft completely fails to incorporate socio-economic rights. Consequently the constitutional process envisaged under the Kariba Draft Constitution process is one dominated by the parliamentary political parties in which they have ultimate control of the setting up, composition and procedure of the making of the Draft Constitution and a veto power over the draft that comes from the stakeholders conference. This is very much similar to the process that the ZANU PF regime had sought to impose in 1999, but which was stopped after resistance from civic society and reformists within ZANU PF.

Critique of Civic Society Alternatives

The principal alternatives to the Kariba process are those outlined in Art. 3 of the Zimbabwe People's Charter, the NCA Proposals and the ZLHR Proposals. The Charter calls for the comprehensive consultation of the people of Zimbabwe and compilation of a draft constitution through a broadly representative All-Stakeholders Commission and the holding of a referendum on the draft constitution. The NCA proposals call for a constituent assembly in the form of a 3000 member All-Stakeholders Conference chaired by a judge and comprising representatives drawn from political parties, parliament, government and civic society but with the aggregate representation of the political parties, parliament and government not exceeding 20%. The implementing organ to carry out a national consultative process and compile the initial draft constitution for debate and adoption by the Conference, is a 600 member Commission. The draft constitution is to be submitted directly to a national referendum, and if approved it is automatically enacted by Parliament, immediately followed by fresh elections under the new constitution.

The civic society alternatives seek correctly to establish a process that is not dominated by an incumbent parliament and that draws from a wide spectrum of society. They are loosely modeled on the process that took place in countries like Kenya. However, they contain some major weaknesses including that: Firstly they seek to establish a constituent assembly which is not substantially directly elected by the citizens themselves, as required by principles of sovereignty of the people and as applied in countries like South Africa, Namibia, Uganda, Venezuela, Bolivia and Ecuador. Secondly there are no details on how the civic society representatives are to be selected, whether by election or the self-appointment of civic society elites. Finally there is no need to specify that a judge chairs the CA, moreso given the disputed legitimacy of many current judges. The Conference should choose its own chairperson and vice – chairpersons, who need not be judges as was the case in South Africa and Venezuela. There is thus the danger that the civic society suggested processes, whilst well-meaning, may simply substitute the political party elites with civic society elites, who do not have any democratic mandate and most of whom are accountable and driven by the agendas of their donors, who are mostly western governments, multinationals and capitalists. Such representatives will not deliver a pro-working people constitution or constitutional process but will also seek to protect the private property of the rich and their control of the state.

What is required is neither a parliament nor a civic society driven process, but a truly people driven process through their own elected representatives in a constituent assembly. The regional and global experiences and that of the NCA in the 2000 process in Zimbabwe, clearly show the legitimacy and importance of civic society involvement in constitutional reform processes, including representation in the constitutional assembly. Civic society groups played a decisive role in the South African and Venezuelan processes even if their representation was indirect through dominant political party-civic society united fronts. Uganda did even better by providing for the direct representation of civic society representatives in the constitutional assembly. However, despite this, in a normal constitutional process civic society groups cannot claim majority representation in a constitutional assembly as asserted by the NCA, because civic groups inherently represent specific or sectoral interests and not the whole will of the people, which can only be ascertained by elections of the whole citizenry. Besides there are serious issues of mandate, accountability, subservience to foreign external interests and class and ideological bias with many NGOs, as raised above, besides serious concerns of absence of internal democracy in many civic groups. The Uganda experience providing civic society groups with representation of about a third of the constitutional assembly, provides a useful pioneering example of how to balance the conflicting issues raised by civic society representation.

However, in the current Zimbabwean scenario, if the progressive forces are unable to stop the political parties from following the flawed GPA process, then there are very strong grounds for arguing, as the NCA broadly does, for a two thirds representation of civic society in the All-Stakeholders Conferences and in the Commission/Select Committee to do the national consultation outreach. This is not only because the political parties lack a specific constitutional mandate but that the March and June 2008 elections were deeply flawed and cannot be held to be a sufficient indicator of the popular or sovereign will. Further, under the Kariba process, the Conferences are mere consultative platforms, whose outcomes can be reversed by the main political parties in parliament — so if the idea is to sound the views and mood of society, then the political parties cannot at the same time stack the conferences and Commission/Select Committee with their own representatives, when they have already reserved for themselves the authority to make the final decision.

Also critical will be the rules and procedures of the Conferences and the Select Committee, whereby those developed in Uganda, South Africa, Venezuela and Bolivia provide very useful precedents for democratic, inclusive and participatory processes, but still

ultimately respecting the democratic will of majorities, whether simple majorities for most cases or special two thirds majorities or even special referenda, in relation to major contentious areas.

Way Forward: To Go in or to Stay out of the Kariba Process?

Looking at the constitutional history of Zimbabwe, regionally and across the Global South it is clear that only significant and sustained struggle from below by working people with ideological clarity and organizational autonomy from the elites, can truly major democratic constitutional reforms be attained. Illusions in the current top-down Kariba constitutional reform process being pushed by political elites in the government of national unity (GNU) and supported by various of their civic society surrogates will be disastrous for working people. It is clear that this process is designed to deliver a product chiefly meant for the politicians, the rich, the capitalists and the so-called "international community" and not working people or the poor. Indeed a pre-condition that has been put by the western governments for lifting the sanctions and providing the funds and aid necessary for the success of STERP and the GNU, is that of restoration of the protection of private property and the rule of law. This means allowing free market neoliberal policies in which the state is constrained from providing socio-economic demands of the poor. They will thus seek to deliver a new constitution that will please their international paymasters.

This then raises the question whether progressive social movements and the left should participate in such process or boycott it and continue mobilizing from outside for a true people-driven process. We believe that this is a question of tactics rather than strategy. The nature of the GNU, including the continued arrest of opposition and civic society activists, human rights lawyers and journalists and other major outstanding issues to be fulfilled including in relation to key state appointments and the obvious and public contempt for the prime minister, M. Tsvangirai, by the security service chiefs, all show that Mugabe and ZANU PF continue to call the shots in this so-called "Inclusive Government." That the dictatorship therefore remains intact and most likely just using the current arrangement to get breathing space, whilst the MDC opposition naively demobilizes its rank and file activist base in the belief that the GNU will last. The reality is that the GNU is fragile and could easily unravel especially in the context of failure to mobilize sufficient western economic support and the removal of the sanctions and the global economic crisis. The MDC leaders and their allies in the moderate civic society groups, believe that the country has now entered into "a new era" in which the oppositional and democratic movement must now shift focus from "resistance" to "reconstruction," and therefore call for demobilisation of the activist base of the opposition and civic society and full co-operation with the structures and institutions of the GNU. This is not only wrong and naïve but dangerous as the democratic movement and opposition will be completely unprepared should the deal unravel and the regime re-escalates repression. The actions so far of Mugabe, ZANU PF and the security chiefs show that the dictatorship remains intact ... and because of that we cannot therefore be out of the mode of struggle or resistance. In which case therefore the central strategy on the way forward can only be mass action and peoples' power through a united front of oppositional and progressive forces and based on the bread and butter demands of the people and demands for full democracy, including a full people-driven constitutional reform immediately followed by fresh elections. The correctness and effectiveness of such strategy was recently demonstrated in Madagascar where people power overthrew an unpopular regime at the beginning of 2009. The same time things were beginning to happen in Zimbabwe as shown by the riots by junior soldiers and an emerging wave of strikes, which was only neutralized with the establishment of the GNU.

The above means there should be no illusions in processes run by a state still controlled by the old regime, including the Kariba constitutional reform process. However, this does not mean non-engagement with such processes, but that as a question of tactics, the progressive movements and the left can in fact utilize the spaces that open up as secondary sites of struggle, and use this to strengthen the main struggle of resistance outside the frameworks set by the state. This is moreso when the assessment of the balance of forces and readiness of the masses to fight is not in favour of the resistance forces. It is our submission that in the current scenario as a result of the misleadership and strategic blunders of the MDC leaders and their civic society allies, together with the exhaustion, tiredness and their battering by hunger and repression over the last ten years, the working classes and their movements including the trade unions and the left, are in a much weaker position than they were ahead of the February 2000 referendum. Because of this there are naïve illusions and acceptance amongst the ordinary people and many activists in the promises being given by the MDC leaders and the GNU that things will get better and that they will undertake a people-driven constitutional reform process, all they need is to be given a chance and time. In such circumstances for progressives and radicals to stay out of the unfolding constitutional process merely on arguments of processes, will not be understood by the masses, who yearn for a stabilization of their economic and political living conditions. Indeed for the radical movements to boycott the process now, would be greatly welcomed by the elites in the GNU, as it would make it much easier to marginalize and isolate them from the masses as well as divide the radical and progressive movement itself because many progressive social movements and organizations will join the unfolding constitutional processes, well-meaning but naively. This is the lesson we

must learn from the experiences of the March 2008 elections, when many such groups initially resolutely stood for the position that they will not support any elections without a new constitution, but as the elections approached one by one they ended up changing and campaigning for the MDC. There just has not yet been enough time and experience for the true anti-working class, anti-poor character and anti-democratic character of the GNU and the elites who run it to be exposed, especially their extreme neoliberal STERP economic programme.

So at this stage it would be a tactical blunder for the radical movements to allow themselves to be isolated from the masses or to divide themselves, by refusing to enter into the unfolding constitutional reform process, despite all its flaws. The objective of engagement would not be any naïve illusions that the Kariba process will deliver a democratic pro-working outcome but to achieve various tactical and ideological gains for our movements including: to provide greater access to the people at a time when many amongst them retain illusions in the opposition MDC and its leader Morgan Tsvangirai; to use the platform to expose the fakeness of the Kariba constitutional process and continue the demands for a genuine people-driven process; to expose the fakeness of the inclusive government and show that the ZANU PF dictatorship remains in charge; to expose the neoliberal and anti-working people class objectives of the Kariba Draft Constitution and the GNU itself, especially its STERP programme; to use the constitutional platform and the relative opening up of democratic space that this will entail to popularize anti-neoliberal and anti-capitalist constitutional ideas and to initiate or strengthen mass actions against the dictatorship, the GNU's neoliberal programmes and to demand that only the people and not parliament should write a new constitution; and finally to strengthen the foundations of a working people based united front of the poor to continue the struggle against the dictatorship and neoliberal capitalism and for a truly people –driven constitutional reform anchored by a Constitutional Assembly directly elected by the people.

Conclusion: Build a democratic constitutional united front: Radical forces must not be divided by Kariba process!

However, what we must not do at all costs, as we disastrously did in 2008 following the disagreements at the Peoples Convention over whether or not to support MDC in elections without a new constitution, is to divide the progressive and radical movements over a tactical question, such as that of engagement or non-engagement with the Kariba process. Some progressive organizations will choose to join the Kariba process as a tactical manoeuvre, but others will choose to remain outside. But whichever way both sets must continue working together because what binds them, namely continued mass action –based resistance against the dictatorship and GNU and the demand for a truly people driven constitutional process, is greater than what divides them, namely the tactical differences over whether or not to participate in the Kariba process. To facilitate this working together, what is urgently needed now is to establish a constitutional united front of radical, progressive and anti-neoliberal constitutional forces, within and outside the Kariba process, to fight internally and externally to the Kariba process, the neoliberal political and civic elites around the GNU and their elitist constitutional reform process. This will entail a roll-out programme of mass action campaigns, advocacy, education, petitions, public meetings, rallies, protests, demonstrations, boycotts and strikes. These actions will need to be accelerated ahead of the national outreach programme, the 2nd All Stake-Holders Conference and the parliament constitutional debate where if the political elites insist on imposing their neoliberal draft constitution, as is most likely, then all progressive forces, within and outside the Kariba process will unite in a massive campaign for a Vote NO! But by then, it is likely that sufficient time and experiences of poverty and harshness under STERP, will have elapsed for the elites in the GNU and the fakeness of their Kariba constitutional reform process, to have been sufficiently exposed to increasing numbers of the masses, social movements and organizations, including many who would have previously had naïve illusions in them and joined the process. Many of these are likely therefore to be encouraged to join a massive united front campaign against any anti-people neoliberal constitutional draft that may emerge from parliament or even in earlier campaigns against the Kariba process, especially the provisions authorizing parliament to draw up the final draft constitution to be submitted for referendum.

After all we must take into account that Article 6 of the GPA is actually just a private agreement between the three parties as it was not included in Constitution of Zimbabwe Amendment (No. 19) Act, meaning it can be changed if sufficient mass pressure is built from below. This is the real lesson from our own experiences in Zimbabwe and regionally in South Africa and internationally in Latin America, that it is possible to fight for major constitutional reforms, in process and content, but that the elites, the rich and politicians, will not surrender or concede such reforms unless there is real mass action pressure from below by working people and the poor. In particular the history of constitutional reform in South Africa and Latin America shows the power of such social and class struggles in ensuring a people driven constitutional reform in process and content. Therefore constitutional reform or objections to elitist process like the Kariba process, which are not backed by social struggle will not achieve significant results. It is not brilliant leaders, lawyers or intellectuals or nicely-worded process documents or laws or merely shouting the loudest, that

will deliver the people – driven constitution reform we desire but concrete social and class struggles within and outside the legal and moral parameters set by the ruling classes. It is that struggle we must now mobilize for starting with the urgent setting up of the vehicle for doing so, namely a constitutional reform united front of radical, progressive, anti-neoliberal and socialist forces within and outside the Kariba process.

And in all this, working people and the poor must remain cognizant of the fact that without expropriating the capitalists and the rich, and seizing control of state power, constitutional reforms at most can only provide temporary relief from the ravages of the system of capitalism, which breeds poverty and dictatorship in the first place, regardless of the finest provisions in the laws and constitutions of any society. Real freedom therefore ultimately requires the revolutionary overthrow of capitalism and its substitution by socialized relations of production, namely socialism.



This work is licensed under a
Creative Commons
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs
<http://opendocs.ids.ac.uk/opendocs/>