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



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

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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 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

PART TWO

Constitutional Reform in Zimbabwe: History and Way Forward

Munyaradzi Gwisai¹

Introduction: On Constitutions

Zimbabwe is in the middle of a decade old but climaxing unprecedented and multi-faceted economic and political crisis. The crisis is on the one hand, political, that is the autocratic rule and crisis of legitimacy of the Zanu PF-led state, and on the other economic, that is, a threatening economic implosion arising from an economy under siege from internal and external factors as well as the failure of neo-liberal policies pursued by the state and business elites since the end of the 1980s.

The March and June 2008 elections have failed to resolve the crisis...the likely settlement of the crisis is now through an elite compromise settlement mediated under the regional body, SADC, as encapsulated in the 15th September 2008 Global Political Agreement (GPA) between Zanu PF and the two Movement for Democratic Change (MDC) parties. A key component of the settlement is constitutional reform. Elites seek to ensure a constitutional framework that realizes sustainable intra-elite democracy including the rule of law, free elections and protection of private property. This is captured in the Kariba Draft Constitution already agreed by the three main parties. Working people also have a primary interest in constitutional reform centred around demands for greater democratization of state power to allow broader representative and participatory democracy of citizens and civic society movements as well as democratization of the property and economic power of the state and the privileged propertied few through the constitutional enshrining of socio-economic rights including labour and gender rights. The latter are well articulated in the Zimbabwe Peoples Charter of the February 2008 Peoples Convention as well as in various international human rights instruments.

The latest stage of constitutional reform is only one part of a century old struggle by working people in this country against tyrannical, hierarchical and non-inclusive state, political, economic and constitutional structures. Such struggle ultimately involves two basic questions of democracy. Firstly is that of economic democracy, that is how are the resources, property and wealth of society owned and controlled and for whose benefit –whether by a few privileged individuals as private property, including or biased gender and racial lines, or collectively and democratically by all in society as public property. Further to what extent are the social and economic rights of people like the right to food, education, shelter, fair labour standards and advancement of socially and historically marginalized groups like women, blacks, youths and the disabled constitutionally recognized and funded by society. Secondly is the issue of political democracy - that is to what extent all citizens have full political and civic rights like the right to vote, run for office, to assembly, association and expression. And also is the extent to which institutions of the state are subject to full and participatory democratic control by citizens or their elected representatives and derive their mandate from the people as a whole – whether democracy applies to only some parts of the state and not to others and the extent to which there is separation of powers including checks and balances on the exercise of state power, including the legislative, executive, judicial and economic powers of the state, so that no one organ or social or political group, especially on class and gender lines, overdominates and abuses state power for its advantage at the exclusion of others. In western classical constitutional jurisprudence this is known as the separation of powers doctrine, and is seen as an essential element of the rule of law and liberal state.

In all societies where the primary wealth, resources and property of society are owned and controlled by a minority of people as private property, with the exclusion of the majority from ownership or control of such property, then such economic minority ends up being the politically dominant class in control of the state, with the major laws and constitutions of that society primarily

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Engels F, *The Origins of the Family, Private Property and the State* (Lawrence & Wishart)

reflecting the dominance and interests of such group, against the property-less working majority.² This is so under capitalism, the system imposed in our society via colonialism slightly over a century ago – whereby all constitutions made since then up to date represent first and foremost the interests of the capitalists, local and international, and only secondarily those of the majority. Thus for working people to have meaningful constitutional reform that ensures full democracy, they must fight for both political democracy as well as economic democracy that ensures that property and wealth are owned and controlled by the majority democratically, the socio-economic rights of all people are recognized and where all state institutions and power are democratically controlled and accountable with checks and balances against concentration of power in one part or office or individual of the state. In this they will be massively opposed by all elites who will fight for only a limited version of democracy, namely partial political democracy and absolute rejection of full economic democracy or socialization of private property.

The history of constitutional reform in Zimbabwe, as it has been in other societies shows that the most important factor in determining constitutional reform have been social struggles, especially inter-class struggles between the oppressor and exploiter social groups in charge of the economic wealth of society and the state and the working but oppressed and exploited majority. Other struggles especially by women and oppressed racial, ethnic or religious groups have also contributed significantly, albeit secondarily. Under capitalism, the segment that has led other sections of working people in such struggles has been the workers or proletariat, because of their strategic role in production and their levels of organization and independent class consciousness.

Laws constitute the most important tool of social regulation under capitalism (hence the term “rule of law”) and constitutions being the foundation or supreme law in such societies, the so-called *Grundnorm*. They regulate key areas such as: how is political power constituted, regulated, exercised and dissolved; the making of laws; the powers and relationship of the different arms of the state such as the executive, legislative and judiciary; the exercise of the armed power of the state; the exercise and regulation of the fiscus and economic power of the state; the relationship of the state to its subjects and to other states; the acquisition and protection of property, especially private property; and the rights and duties of citizens and subjects of the state.

Constitutions have not in themselves been the real source of rights and duties and provisions contained therein but have acted as the mirror of the victories and defeats scored and suffered by the contesting classes and social groups in the general social struggles described above. In other words they reflect the balance or product of inter-class and social struggles. The stronger, more united and more militant and class conscious the struggles of working people have been the more democratic rights they have won in constitutions, and the converse applies when they have been weaker, divided or followed the class ideas of their rulers. And the more stable and enduring constitutions have been when they have been a correct reflection of the objective balance of social and class forces at a particular historical period.

To a lesser extent constitutions have also reflected the balance of intra-class struggles within the different sections of the ruling class who differ over how to run the state, to protect private property and to respond to the pressure from the masses or marginalized groups- whether through an iron fist that denies any rights or reforms to the revolting groups or through a carrot and stick approach of conceding some reforms to neutralize anger from below and co-option of sections of the marginalized groups. In other words elites also fight amongst themselves to find the best political, constitutional and legal frame-work to maximize their particular sectoral interests as well as the continued rule and hegemony of their class over society in general, whilst minimizing conflicts amongst themselves. The product of such struggles are also reflected in constitutions, but only to a secondary extent as compared to that of inter-class struggles.

It is the above factors that have influenced constitutional reform and history in Zimbabwe from the colonial times up to now. The principal constitutional milestones have included the laws facilitating the establishment of colonial capitalism between 1888 – 1923; the 1923 Constitution which laid the foundations of the settler colonial state; the 1963 Southern Rhodesia Constitution reflecting an attempt at partial decolonization; the 1969 Constitution representing extreme settler colonialism; the 1979 Lancaster House Constitution which laid the basis for national independence as well as constitutional reforms up to 2000; and the post-2000 constitutional reforms representing a delicate attempt by elites to placate massive social revolts and pressure from below, especially from workers, peasants, war veterans and women and pre-empt these from transforming into social revolution as well as elite attempts at laying a durable elitist constitutional and political intra-ruling class framework uniting all elites - colonial and post-colonial, black and white and opposition and ruling and based on bourgeois democracy. We look at each of these periods taking into account the above political economy.

Primitive accumulation and primitive constitutionalism

The establishment of capitalism in Zimbabwe, like elsewhere in Africa, was achieved through violent, brutal, racist and undemocratic means. Indigenous feudal ruling classes were defeated and their property, principally land, mines and cattle, expropriated by the new white colonial capitalist ruling class, and their former peasant subjects gradually transformed into wage slaves on the new mines and farms - *chibharo*. Sections of the defeated black feudal ruling classes who accepted the new order were co-opted as junior partners – traditional chiefs, with residual authority in the rural areas over land distribution and in African personal and family law matters, in return for pacifying the peasantry.

Economic democracy: The legal framework that facilitated the primitive violent accumulation of private property by the new capitalist elites and which involved the absolute denial of economic and political democratic rights for the vast majority of the people, blacks and women, and only partial or limited democracy for white settler elites, were British imperial statutes, called orders in council. The main ones were the 1898 Southern Rhodesia Order in Council, the 1894 Matabeleland Order in Council and the 1891 South Africa Order in Council, together with supporting subordinate legislation. The looted property was thereby vested in the British state through the BSA Company, the chartered company led by Cecil John Rhodes through which colonialism was achieved, and white settlers and churches to whom were sold the property at nominal values.³ Supplementary laws established ruthless labour laws which provided very little rights for workers denying the right to collective bargaining and to strike and criminalizing most aspects of the employer-employee relationship. Such laws were designed to turn into disciplined wage labour, the former black male peasants now gradually being turned into a cheap proletariat for the mines and farms.⁴ Women were generally confined to the home and black women in particular to the rural areas to subsidize the dirty low wages of their husbands through unpaid domestic and subsistent labour on land controlled under the yoke of rural patriarchy run by male traditional leaders. Women lacked full legal majority status, whilst married women could only enter or remain in formal employment with the approval of their husbands.⁵

Political democracy: Political and civic rights were totally denied by law to the vast majority of the population, blacks, including the right to vote in the elections for the Legislative Council. It was a criminal offense for blacks to be in towns without special permits, to drink "European" liquor or for black males and white females to marry or even engage in sexual intercourse with one another, yet it was not an offence for white males to have sex with black females. State-funded compulsory education was established for white children only.⁶ But only partial democracy was conceded to the white settlers, with most power concentrated in the hands of the British colonial state and BSACo without any real checks and balances consistent with the doctrine of separation of powers. Under the 1898 Order state executive authority vested in an Executive Council made up of five members appointed by the Company, including an Administrator and a resident commissioner appointed by the British imperial power. Partial legislative authority was vested in a Legislative Council composed of five Company nominees and four elected by the white settlers, but such authority was subject to a veto power by the imperial and sub-imperial powers in London and Cape Town. A local High Court was established but with the final court of appeal being the Cape Supreme Court. African traditional chiefs were left with residual judicial authority and control of land distribution in the rural areas, subject to supervision by white state officials.

Various factors account for the above set up. Chief of which was the weak state of the working classes - a result of the under-developed and pre-industrial base of the economy which resulted in a semi-migrant agricultural labour force with semi-peasant consciousness and without real proletarian organizations of struggle like trade unions. The fully proletarianised and most advanced section of the working class were the white workers, but these were divorced from the rest of the workers by the racist white supremacy ideology underlying colonialism which not only privileged them but also provided them with real possibilities of being co-opted into the white settler middle classes, with whose struggles they therefore tended to associate, albeit as junior partners. The crudity of the measures is explained by the fact that colonialism was established and run through the agency of a private capitalist company, whose primary objective was profit maximization – hence this period is referred to as "company rule." Thus the principal features of the first constitutional set up in Rhodesia was a unitary capitalist state, overwhelmingly dominated by one section of the capitalist class, a private-public company that exercised executive and legislative authority and sovereignty subject to a supervisory veto power of the British imperial sovereign. It was an openly authoritarian and sexist state that denied both political and economic rights to the majority and was not founded on the democratic will of the governed but on colonial conquest and imperial mandate. At the same time such set up oversaw the violent establishment of a hierarchical racist and

³ See - *In re Southern Rhodesia* 1919 AC 221 and also the Matabeleland Cattle Proprietary Regulations, 1895. See generally, Palley C, *Constitutional History and Law of Southern Rhodesia 1888-1965* (Clarendon, 1966)

⁴ The centerpiece of the labour legal order being the Master and Servants Ordinance No. 5 of 1901. See generally Gwisai M *Labour and Employment Law in Zimbabwe: Relations of work under neo-colonial capitalism* (ZLC and UZ, 2006) 17 - 20

⁵ Section 6, Master and Servants Ordinance.

⁶ Under various legislation like the Registration of Natives Regulations, 1895, Sale of Liquor to Natives and Indians Regulations, 1891, the Immorality Suppression Ordinance No. 9 of 1903 and the Education Ordinance No. 1 of 1903 and generally Gwisai M, *ibid*

sexist capitalist private property relations system, which privileged white male elites with the British colonial sovereign and Company at the top, white settlers and workers in the middle, followed by compliant black male traditional chiefs and black male workers and peasants at the bottom with rural black women firmly strung at the very last rung of this oppressive social ladder.

Constitutional reform in the first three decades of the colony was primarily driven by the struggles of the subordinate white elites to dilute if not remove the unitary and authoritarian power of the BSACo and imperial sovereign and establish a constitutional system based on greater intra white ruling class democracy and pluralism and the continued exclusion of the oppressed black majority. Like the plebeians in classical Rome, the Rhodesian white settlers used their decisive role in providing critical skills and personnel for the defence of the new order to exert major constitutional reforms from the ruling class. This was aided by the radicalized working class traditions of the white workers, inspired by the struggles of the South African and European working classes from which the Rhodesian white proletariat was derived from, including the massive democratic and socialist revolutions that occurred at the end of World War 1 in particular the 1917 Bolshevik Revolution in Russia. Thus white workers engaged in the first industrial strikes in the country starting with the 1916 railway strike, which was joined by some black workers and formed the country's first industrial trade unions and labour political party, the Rhodesia Labour Party. By 1911 the white settlers had achieved majority representation in the Legislative Council and following the upheavals during World War 1 further decisive gains were made leading to the country's first ever constitution, the October 1923 Southern Rhodesia Constitution, which ended Company Rule and provided "for the establishment of responsible government subject to certain limitations."⁷ The government was elected by the white settlers and had authority to pass legislation subject to residual review and veto powers of the British state.

1923 Southern Rhodesia Constitution

The 1923 Constitution established the foundations of settler colonial rule with a higher level of white intra-elite democracy marked by a compromise between the colonial power and white settlers but in which the rights of the majority blacks and marginalized groups like women continued to be trampled on.

The 1923 Constitution was a compromise between the white settler elites and the British colonial sovereign, whereby the former had won the right for limited self-rule based on the popular will or democratic mandate of the white settler elites and working class, subject to the remaining veto authority of the colonial power in certain areas such as foreign affairs, mining revenue and African administration. Hence for the first time in the colony's history, the constitution had been established after the holding of a referendum of all white settlers and workers in 1922 in which they voted in favour of "responsible government" instead of union with South Africa. The Constitution established an elected Legislative Assembly of thirty members and an executive led by a Prime Minister and five ministers appointed by the Governor, who represented the colonial power. However blacks were denied the right to vote nor to stand for office. Executive power was disproportionately concentrated in an unelected and unaccountable colonially imposed Governor who had the power to appoint and dismiss the Prime Minister, ministers and other senior functionaries of the state like the heads of the police, army, public service and the High Court judges. The constitution did not have a Declaration of Rights providing for political, civic rights let alone labour, gender or socio-economic rights. However, it provided special protection for imperial property, with the Legislative Assembly precluded from legislating on areas like mining and railways. It also reserved the privileged but junior position of the compliant black traditional chiefs, as instruments of colonial indirect rule.

Although the 1923 Constitution was made in response from pressure from below, from the white middle class settlers and white working class it remained a top-down, elitist and exclusionary document in how it was made being unilaterally made and imposed by the colonial power without a referendum as well as restrictive in content in respect to the democratic rights protected. Although white workers had won political and civic rights, their fundamental labour rights such as the right to collective bargaining or to strike were not included in the constitution although partially reflected in subordinate legislation.⁸ This reflected their role as a privileged labour aristocracy but still a junior partner in their alliance with the white settler national bourgeoisie. Prime Minister Godfrey Huggins whose United Party captured power in the wake of the Great Depression in 1933 put it well.⁹

⁷ Under the Southern Rhodesia (Annexation) Order in Council of July 1923

⁸ In the Industrial Conciliation Act, No. 10 of 1934 which provided limited collective bargaining rights to white workers but excluded black workers.

⁹ Wherein he declared – "*The European in this country can be likened to an island of white in a sea of black ...*

with the artisan and tradesman forming the shores and the professional classes the highlands in the centre. Is the native to be allowed to erode away the shores and gradually attack the highlands? To permit this would mean that the leaven of civilization would be removed from the country, and the black man would inevitably revert to a barbarianism worse than before."

Quoted in, Government of Zimbabwe Labour and Economy: Report of the National Trade Unions

Survey Vol. 1 (Harare 1984). See generally - Raftopoulos B and Phimister I (eds) *Keep on Knocking: A history of the labour movement in Zimbabwe, 1890*

– 1997 (Baobab Books); Astrow A *Zimbabwe: A Revolution That Lost Its Way?*

(Zed Books, 1983) and Gwisai M op cite at 17 – 23.

The 1923 Constitution provided a durable constitutional framework for the country for nearly four decades until it was replaced by the 1961 Constitution following huge social struggles.

Zhii and the 1961 Southern Rhodesia Constitution

The 1961 Southern Rhodesia Constitution was the next milestone in the country's constitutional history.¹⁰ It followed a constitutional conference in Britain in 1960 – 61, which for the first time included representatives of the black majority. The 1961 Constitution represents the peak of democratic constitutional reform under the colonial capitalist state, in which significant democratic reforms were made even if retaining the racist, sexist, elitist and class bias of the constitution in favour of the white male capitalist ruling class. Its main features included:

Political Democracy: - political and civic rights: Several reforms were introduced in this area. Firstly electorally the 1961 Constitution granted for the first time a right to vote and hold office to sections of the black majority, although one still inferior to that enjoyed by the whites and heavily circumscribed by class, property, educational and gender demarcations. The Legislative Assembly was expanded to sixty five members, of whom fifty were elected from the "A" Roll, and fifteen from the "B" Roll. The "A" Roll was overwhelmingly dominated by whites, due to its steep property, income and educational requirements which, because of the past racist colonial measures and policies excluded most blacks.¹¹ The "B" Roll accommodated the rising black middle classes consistent with former Prime Minister Huggins earlier calls of creating a black middle class buffer zone to neutralize the more radical black workers and peasants.

Secondly for the first time in the country's history, the constitution provided for a Declaration of Rights, which was justiciable (enforceable) and non-racially defined. It was loosely modeled on the 1948 United Nations Universal Declaration of Human Rights, selectively and partially providing various political and civic rights. These included the rights to - life, personal liberty, protection from slavery and forced labour, from inhuman treatment, from discriminatory action and laws, protection of the law and to property, and to the freedoms of conscience, expression, assembly and association. An aggrieved party could directly apply to the High Court for invalidation of a law or act that was *ultra vires* the constitution. A multi-racial Constitutional Council which was elected by current and past judges vetted bills that were inconsistent with the Declaration of Rights, and empowered to pass non-binding but highly persuasive adverse reports to the Legislature and Governor. Participatory democracy was enhanced by the requirement of referendums for certain constitutional amendments.

However, the Declaration of Rights was still highly inadequate. It excluded most of substantive socio-economic and labour and gender rights under the Universal Declaration of Rights, with only the right to property more than adequately protected; it explicitly left out gender or sex as a ground of prohibited discrimination thereby allowing the continued oppression and exploitation of women, especially black women under patriarchy as modified by colonial capitalism.¹² The referendum provision was illusory when the electorate was racially defined giving an inherent majority to the white racial minority and in any case the referendum requirement was discretionary with the option always available of amendment through the British state. The Declaration was non-racial only in nominal terms in so far as the constitution still allowed discriminatory laws against the majority blacks through provisions that authorized derogations or exemptions based on "the stage of social or economic development for the time being reached by the various descriptions of persons affected" or to achieve equitable protection of the different groups or because of the state for the time being of the economy. Critically the constitution saved as valid all existing laws at the time of the promulgation of the constitution, thus preserving the whole gamut of previous racist and repressive colonial legislation and allowed wide derogations during public emergencies. The Declaration also only applied vertically to public laws and actions and not horizontally to the private domain and did not include collective rights. Thus it has been described as "largely a useless paper Bill of Rights" wherein "the rights granted were subject to such comprehensive and broadly formulated exceptions that it would be accurate to define the Rhodesian Bill of Rights as having provided freedom with one hand and annihilated it with another."¹³

¹⁰ In the meanwhile there had been the 1953 Constitution of the Federation of Rhodesia and Nyasaland which created a federal state bringing together Southern Rhodesia, Northern Rhodesia (now Zambia) and Nyasaland (now Malawi) and which lasted until 1963 but this did not fundamentally affect the 1923 Constitution, which continued in operation.

¹¹ The qualifications were set out in the Second Schedule under s 9 as follows: Qualification requirements to be enrolled as a voter on "A" Roll included: an income of 720 pounds in each of the preceding two years or ownership of immovable property of not less than 1,000 pounds; or income of 300 pounds in the two years or ownership of immovable property of not less than 500 pounds and four years secondary education of prescribed standard; or appointment to the office of chief or headman. Those for "B" Roll included: income of not less than 240 pounds in the preceding six months or owning property not valued at less than 450 pounds; or an income of 120 pounds in the preceding six months or owning immovable property of not less than 250 pounds and two years secondary education of prescribed standard; or persons over 30 years of age with an income of 120 pounds in the preceding six months or owning immovable property of not less than 250 pounds and completion of primary education; or persons over 30 years of age with an income of not less than 180 pounds in the preceding six months or owning immovable property of not less than 350 pounds; or all kraal heads with a following of 20 or more heads of families; or Ministers of Religion.

¹² See section 67 (2)

¹³ Ncube W, "Lawyers against the Law? Judges and the Legal Profession in Rhodesia and Zimbabwe" *ZL Rev.* 1997, Vol 14, 108 at p 113

Democratisation of state power: There was partial democratization of state power with some checks and balances and dilution of the overwhelming powers of the imperial sovereign exercised through the Governor. The constitution now required that the Prime Minister be consulted in the appointment of the Governor.¹⁴ The Governor had the authority to establish executive offices or organs of the state and the appointment and dismissal of personnel thereto,¹⁵ as well as the appointment of constitutional commissions such as the constituencies Delimitation Commission and/or offices such as judges but this was subject to the advice or nomination of other state bodies such as the Chief Justice or Prime Minister,¹⁶ and generally in the exercise of functions, "with the advice of the Governor's Council" (cabinet).¹⁷ Nonetheless although legislative and executive power was shared by the elected Legislative Assembly, the Prime Minister and the Governor, the disproportionate and undemocratic power still lay with the latter whilst the power of the legislature was circumscribed in several ways. The Governor had power to assent or refuse legislative Bills, to prorogue or dissolve Parliament, to appoint the Prime Minister and ministers from the majority parliamentary party and to exercise the prerogative of mercy.¹⁸ The British state reserved authority to unilaterally amend or revoke the constitution. A two thirds majority vote of the Assembly could amend the constitution only in permissible areas. The Assembly did not have power to amend provisions relating to the office, powers and functions of the Governor, the structure of the Legislature and definition of executive authority.¹⁹ A category of specially entrenched constitutional provisions could only be amended after a two thirds majority in the Assembly and an affirmative vote in a referendum or after approval by the British Parliament.²⁰ This included amendments to the Declaration of Rights or the power to amend the Constitution, provisions on land in the Tribal Trust Lands and on the franchise and the appointment of judges.

Economic democracy – The constitution and Declaration of Rights did not include social, economic and group rights such as the rights: to work, to strike, to freely trade for the informal sector, to education and to an adequate living standard including food, clothing, housing, medical care and social security, to advancement of women's socio-economic and political rights as well as land for peasants. The only notable labour rights included were those for protection from slavery and forced labour, which was important given the earlier history of *chibharo*; the explicit specification of the right to form or join trade unions under the freedom of assembly and association and the protection of pensions and gratuities of public officers, although this largely benefited only white workers. Critically the Declaration did not have affirmative economic and political democratisation provisions to socialize or democratize property relations to the benefit of social groups and classes that had been historically marginalized by the violent, racist and sexist primitive accumulation of property that established the Rhodesian capitalist state. Without these, the democracy, rights and equality proclaimed in the constitution would remain illusory for the vast majority of society that included blacks in general and more in particular peasants, workers, women, youths and the disabled. Yet the basis for affirmative action and nationalist provisions had by then already been well established under international human rights law, particularly Article 28 of the Universal Declaration of Rights which provided that: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

From a historical perspective the above constitutional reforms marked significant steps forward in intra-ruling class democratic constitutional reform and extension of rights to sections of the hitherto excluded black majority. But the country's constitutional framework remained fundamentally elitist, racist and class and gender biased against the toiling majority black working people and women. At a deeper level, the 1961 Southern Rhodesia Constitution and the constitutional reform processes underlying it were fundamentally undemocratic in terms of content and process. Its provisions were designed to ensure that the poor and workers especially from marginalized groups like blacks, women and peasants, were excluded from the levers of state power where it was feared that they might threaten the property interests of the minority capitalist elites.

Two major inter-linking factors explain the emergence of this constitution as well as its short-lived duration compared to its predecessor, the 1923 Constitution. First and primarily is that the 1961 constitution was shaped and determined by the massive social inter-class and anti-colonial struggles that engulfed Rhodesia from the 1940s onwards, led by the new black industrial proletariat. Secondly it was an attempt to come up with a compromise arrangement to deal with intra-elites struggles that erupted as a result of these social and anti-colonial struggles. The rapid industrialization of Rhodesia after 1940 on the back of World War II, led to the emergence for the first time ever of an industrial and permanent black industrial proletariat, potentially the most powerful and conscious part of working people under capitalism. Black industrial trade unions mushroomed and flourished. From the mid 1940s onwards such class initiated massive strikes and protests, including the first ever general strike in the country, the 1948 General Strike, against their poor inhuman working and living conditions. The economic protests soon became political

¹⁴ Section 1

¹⁵ Section 47

¹⁶ See sections 36, 51,

¹⁷ Section 45

¹⁸ Section 29 as read with section 25 of the 1961 Constitution

¹⁹ Sections 1, 2, 6 and 42 *ibid.* See generally Limington G *Zimbabwe Constitutional Law* (Kluwer Law International, 2000) at 29

ones against the colonial state itself as black nationalist political parties emerged led by the workers but in alliance with the emerging but equally racially oppressed black middle classes. This included the Southern Rhodesia African National Congress and on subsequent bannings, parties like the ANC, then the NDP, all of which were led by trade union leaders like Joshua Nkomo, Jason Moyo and Joseph Msika but also increasingly black middle classes like Herbert Chitepo, Leopold Takawira and Ndabaningi Sithole. These struggles were also inspired by growing and successful anti-colonial struggles in Africa and the Global South including Ghana and India.

At the same time, the industrialization of the economy led to the emergence of a strong national settler bourgeoisie which, along with foreign capital and the British imperial state, now had a vested interest in social and industrial peace that could only be achieved by granting political, social and economic reforms to the rising masses. This included gradual de-colonisation that co-opted the rising black middle classes and moderate trade union leaders, albeit as junior partners, just as had been historically done with the traditional chiefs, but who were now clearly unable to play the leading role in pacifying the masses. Prime Minister Huggins called this "a horse and rider" relationship in which the black middle classes would act as a buffer against the radicalising black proletariat and peasantry. Addressing a special session of Parliament in the wake of the 1948 General Strike, he aptly articulated this new direction:

*"What we are witnessing is nothing new. It happened in Europe one hundred years ago. We are witnessing the emergence of a proletariat, and in this country it happens to be black. We shall never be able to do much with these people until we have established a native middle class ..."*²¹

This position was immensely opposed by the substantial white settler elites who included farmers, miners, small businesses and workers, who stood to lose the most from increased black competition in an increasingly formally de-racialised state. However, at this stage, the pressure from working class struggles was so much as to force the political and constitutional reforms that came to be represented by the 1961 Constitution. The constitution was the ruling class' compromise attempt to deal with rising social and class conflict by expanding both the autonomy of the Rhodesian state and the democratic space, principally political and civic rights in a diluted version of the western liberal state based on rule of law, private property relations and a justiciable Bill of Rights of citizens, principally political and civic. But doing so in a manner that retained the elite and racialised capitalist base of the economy and co-opting the growing black middle class elites whilst at the same time continuing with the suppression of the political and economic interests of the black workers, peasants and women, as had in fact also historically happened in the USA and UK, the bastions of modern bourgeois democracy. Thus the constitution was initially accepted not only by the British and Rhodesian political elites but also the black middle class and moderate trade union leaders led by trade union leader Joshua Nkomo, teacher Takawira and lawyer Herbert Chitepo who all initially agreed to it at the constitutional conference.

The 1961 Constitution was short-lived and failed to provide an enduring constitutional framework as its 1923 predecessor. It was repudiated less than three years later under UDI. It failed because it did not adequately reflect the balance of class power between the main contesting classes, as well as within the ruling elites. It reflected an underestimation of the powerful black proletariat and overestimation of that of the black middle classes. It was also heavily contested by the lower sections of the white settler elites.

At the end of 1961, black organized labour, at a conference of the Trades Union Congress, rejected the compromise 1961 constitution and demanded full "one man, one vote" for all citizens. It resolved on acceleration of mass struggles to win this. Nkomo and Chitepo were forced to repudiate their earlier agreement to the constitution, setting the stage for the explosions that immediately broke out, the huge and unprecedented strikes and riots of 1961 – 1962 that were led by workers but involving all sections of the oppressed black majority. These became known as the *Zhii – Zhandu* strikes and riots and which were only successfully put down by massive state repression including declaration of a state of emergency and the killing of twenty three blacks in Harare and Bulawayo, the banning of the main nationalist parties and trade unions and the arrest of many political and trade union leaders. But this came at a huge cost to the colonial state. The growing radicalization of black working people accelerated tensions within the white elites that led to the transformation of the colonial state away from the gradual de-colonisation process underpinned by a pluralist bourgeois constitutional order that had started in the 1950s to a fragile, authoritarian state based on openly racist and elitist foundations. This was reflected in the coming to power in 1962 of the Rhodesia Front. This was a party led by intransigent and conservative white settler elites, especially farmers and workers, who rejected the route of a negotiated elitist de-colonisation compromise that co-opted the black middle classes. They believed that the only way to contain

²¹ Government of Zimbabwe, *Labour and Economy: Report of the National Trade Unions Survey Vol. 1* (Harare, 1984)

the rising pressure was a bigger iron fist. Their goals were achieved in the Unilateral Declaration of Independence of 1965, which marked the country's next major constitutional milestone.

UDI and constitutional reform: 1965 - 1979

The UDI regime led by Ian Smith issued a new provisional constitution in 1965, which was subsequently replaced by the more comprehensive 1969 Rhodesia Constitution after approval in the mainly white June 1969 referendum. The constitution formally declared Rhodesia a republic, severing ties with Britain as affirmed by the regime's courts but rejected by the colonial power and the United Nations.²²

The principal features of the 1969 Constitution were the entrenchment of racist, elitist and authoritarian principles that reversed the modest democratic gains made in 1961. It created a bicameral parliament made up of a House of Assembly and a Senate. Fifty of the sixty six members of the House of Assembly members were voted for by whites on the European Roll, whilst sixteen were elected on the African Voters Roll but of whom only eight were directly elected with the other eight elected by chiefs. In the Senate, ten of the twenty three members were blacks, elected by the chiefs. Unlike the 1961 Constitution the two rolls were completely parallel with no possibility of reaching parity in future, thus permanently enshrining white minority rule. The elevation of chiefs was an attempt by the settler elites to permanently foreclose the advancement of rising black middle classes by favouring the most backward section of the black elites who were inherited from the previous feudal ruling class, but sufficiently adapted and modified to suit the interests of the capitalist colonial ruling class.

From an intra-elite perspective, the 1969 Constitution provided greater checks and balances than the 1961 Constitution including sharing of executive authority between a more powerful prime minister and cabinet and the new president as well as significant dilution of the powers formerly enjoyed by the Governor and substituting this with a less powerful and more accountable non-executive president. The president was now appointed by the cabinet and could be removed from office by a parliament vote of no confidence. The exercise of presidential powers, including appointment of public offices, had to be strictly on the advice of the prime minister or Executive Council subject to any prevailing statute, save in a few instances.²³ The 1969 Constitution removed the justiciable Declaration of Rights and replaced it with a non-justiciable one placed in the annexure section, whilst the requirement for approval by a referendum of any amendments thereto was removed. This laid the basis for the subsequent massive escalation of repressive laws and measures which virtually eliminated all civic and political rights for blacks and their political and economic organizations under the UDI era and which were enforced by an equally partisan, racist and ruthless state machinery and judiciary.²⁴ This is why it turns my stomach to hear some blacks today say - "*varungu na Smith vanga vari better.*" [whites and Ian Smith were better].

Socio-economic rights: The 1969 Constitution strengthened the protection of white settler private property in particular land by giving land tenure laws the status of specially entrenched constitutional Bills that could only be amended by a two thirds majority vote of parliament,²⁵ thereby effectively foreclosing the emergence of a black agricultural bourgeoisie.

The two notable attempts at constitutional reform before independence were the 1971 Settlement Proposals and the 1979 Zimbabwe Rhodesia Constitution. The former were a set of compromise proposals reached between the Rhodesian state and the British government which would have incorporated the black middle classes in the manner that had been envisaged under the 1961 Constitution and seen the restoration of a justiciable Declaration of Rights. Parity of black parliamentary seats with the white ones would eventually be reached, but an event calculated to occur at the earliest by 2035! Not surprising they were rejected by blacks in the Pearce Commission of 1971, with workers again playing a leading role under a united front of nationalist parties, the ANC, temporarily led by Bishop Abel Muzorewa.

²² The Southern Rhodesia Constitution Order of 1965 made in terms of the Southern Rhodesia Act of 1965, provided that the UDI was void and affirmed that Rhodesia remained a British colony and that any legislation or constitution promulgated in violation of the British statutes was null and void. However in *Madzimbamuto v Lardner-Burke NO and Another* 1968 (2) SA 284 (RAD) the majority of the highest Rhodesian appeal court, the Appellate Division of the High Court, upheld a lower court decision holding laws and statutes passed by the new regime to be valid and binding, effectively recognizing the same. Note that this decision was held invalid by the Privy Council of the British state in *Madzimbamuto v Lardner-Burke and Anor* [1968] 3 ALL ER 561 (PC).

²³ Sections 57 and 58

²⁴ Chief Justice MacDonald was notoriously known as "the hanging judge." Some of the repressive legislation used included: the Vagrancy Act, Chapter 92 which allowed the police to arrest any person who could not show he was employed or had adequate means of support; the Unlawful Organisations Act, Chapter 91 under which most nationalist parties and radical trade unions were banned; the Emergency Powers Act, Chapter 43, allowing the declaration of states of emergency under which thousands of nationalists and activists were detained without trial; and finally the Law and Order Maintenance Act, Chapter 6 which allowed the police to enter houses, ban meetings and demonstrations or ban publications, with trade unionists convicted under the Act not allowed to hold office in unions. Federal Chief Justice Robert Tredgold resigned in protest against its enactment calling it "an anthology of horrors" and a "savage, evil, mean and dirty law." For full details see - Ncube W, *op cite* at 114 - 117.

²⁵ Section 80. The new Land Tenure Act, No. 55 of 1969 gave even more fertile land to the tiny white minority.

After 1975 the anti-colonial struggles shifted to the rural peasant-based but middle class led guerilla war in which the proletariat played a subordinate role. By the end of the 1970s a combination of the massive growth of such struggle, growing economic crisis after the 1974 – 76 global economic crisis and the international sanctions, the white settler elites were sufficiently cornered to concede politically to a diluted form of black majority rule, but one in which they retained control. This was reflected in the 1979 Zimbabwe-Rhodesia Constitution, which was agreed to by the Rhodesian state and the internal black parties led by Muzorewa and Rev. Ndabaningi Sithole, the former leader of ZANU now ousted and replaced by Robert Mugabe. In elections done under the new constitution, Muzorewa became the first black prime minister of the country, but his junior status was painfully reflected in the double-barrelled name of the country, (*nyika ine mutupo*)- “Zimbabwe-Rhodesia” and the dual black-white ministers appointed for each ministry. The constitution retained a bi-cameral parliament largely elected on a universal adult franchise no longer based on property or education qualifications thus giving blacks a majority (72 out of the 100 members of the House of Assembly and 20 of the 30 Senate members) but with whites retaining a permanent legislative veto power by virtue of the specially entrenched provisions and special role of the Senate. Most provisions of the Constitution were especially entrenched requiring an affirmative vote of at least seventy eight members of the House of Assembly and two thirds of the total membership of the Senate,²⁶ which could not be reached without the support of the white legislators. There were entrenched provisions on the legislature, the judiciary, executive authority, the constitutional commissions and public offices and the now justiciable but still equally weak Declaration of Rights, albeit one which now provided huge protection from compulsory state acquisition of land, allowing such acquisition only for under-utilised land or on a willing-buyer willing seller basis on payment of market based compensation.

The 1979 Constitution brought major changes in the structure of the state such as the judiciary, constitutional commissions and public offices. Whereas before these had not been directly provided for in the constitution with appointment of public offices done by the Governor or president on the advice of the prime minister, the 1979 Constitution now not only expressly provided for such organs but also specially entrenched the relevant provisions giving them the status of constitutional bills. Special constitutional commissions were created to deal with the appointment, functions and powers of public offices such as the judiciary, public service, police, defence, ombudsman, Attorney-General, Comptroller and Auditor-General and ambassadors. The authority of the President to appoint personnel was severely circumscribed now to do so mostly no longer on the advice of the prime minister or cabinet as before but of the established commissions whose composition was restricted to a pool of persons whose experience could only be met from the previously privileged white elites.²⁷ The effect of this was an extreme version of the separation of powers doctrine that retained state power decisively and disproportionately in favour of unelected racial minority elites in the executive and judiciary away from the elected and therefore more directly accountable legislature.

The struggles from below had again forced major constitutional reforms. A key question though is how did the black proletariat lose leadership of such struggle to the black middle classes, when it had in fact initiated and led the anti-colonial struggles. Although historically militant from the 1940s onwards, the black working class was unable in the decisive period after 1962 to take its struggles to a higher level after the transformation of the colonial state into a militarized authoritarian entity. Critical perhaps was the failure of the working class to develop institutions and strategies of sufficient independent ideological and organizational autonomy, instead relying on cross-alliances led by the middle classes. Historically the most powerful working class institutions have been mass revolutionary workers parties based on communist or socialist consciousness. Mere trade union consciousness, the dominant ideology in the Rhodesian black working class, with its emphasis on compromises inherent in collective bargaining, was insufficient to develop a higher and more militant struggle or equip the working class to counter the hostile class-collaborationist strategies of the black middle classes supported by local and international liberal capitalists and right wing international trade unions. Even with increased repression after 1962, naïve illusions in a negotiated settlement remained, leading to a split in the nationalist parties with a new and more radical party, ZANU, splitting from the Nkomo-led ZAPU. It had to take the massively escalated repression of UDI as well as the obvious success of guerrilla warfare in neighboring Portuguese colonial states, to convince the black middle classes of the futility of such route in settler colonies. However, by such time the working class, especially its most militant leaders and organizations had taken the full brunt of the regime's repression and a growing economic crisis after 1976, for it to play its historical leadership role, thereby giving the newly radicalized nationalist petite bourgeoisie a window of leadership. And even then successful peasant and working people mobilization could only be achieved on a struggle based on mimicking radical communist ideology, which Zanu and Mugabe were particularly good at, including placing at the fore of the guerrilla struggle demands for socio-economic justice, especially equitable land redistribution, which soon became known as one of the primary causes of the war. This is why radical nationalist leaders like Mugabe came to be known as “communists”, even as they smashed genuine communists in the liberation war movements. An interesting comparison is South Africa in the mid 1980s, where the working class, when confronted with a similar wall as the Zimbabwean workers in the

²⁶ Section 157

²⁷ See Chapter VI of the 1979 Constitution providing for the various constitutional commissions and public offices.

early 1960s, had successfully accelerated their struggle to a higher ideological level under the influence of the Stalinist South African Communist Party and COSATU to successfully take on an even more powerful, entrenched and ruthless white settler elite, with their gains reflected in the much more radical independence constitution, one of the most democratic in the world. Thus the 1979 constitutional reforms did not stop the Rhodesian political and economic crisis with international isolation continuing after the nationalist guerrilla parties rejected them, although Nkomo nearly signed. The concessions the ruling classes were making were insufficient to quell the huge social conflicts spanned by colonial capitalism. At the same time, the high level of involvement of working people, peasants and to a lesser extent workers and students, in these struggles made it impossible for the middle class leaders to enter into elitist class compromises with the colonial elites, only conceding after further pressure from African regional leaders.

1979 Independence Constitution

The 1979 Lancaster House Constitution marked the end of the settler colonial state. The Constitution largely drew from the 1961 Constitution and the 1979 Constitution with the following principal features:

Political and civic rights: It retained the bicameral parliament still based on the privileged white electoral franchise which gave them veto power as in the 1979 Constitution, but was now time defined to last for a maximum of seven years.²⁸ It also retained the specially entrenched provisions designed to facilitate a neo-colonial transition from settler colonialism which could only be changed after seven to ten years such as the provisions on the structure of the legislature and on the Declaration of Rights. The later could only be earlier changed with a hundred percent affirmative House of Assembly vote,²⁹ which was virtually impossible. The Declaration was largely the same as under the 1961 and 1979 Constitutions, although the referendum requirement was removed. It thus suffered the same defects, including non-horizontal application, non-inclusion of group rights and affirmative provisions.

Labour, Gender and Socio-Economic Rights: Given the genesis of the constitution and the Declaration of Rights on the 1961 Constitution it again failed to provide labour, gender and socio-economic rights or the necessary socialization of private property. It did not include key social and group rights: affirmative action for historically or socially disadvantaged groups, the right to national development, economic sovereignty and the right to economic democracy;³⁰ whilst the new section 23 did not include gender as a ground of prohibited discrimination and gave an elevated status to African customs in family, personal and inheritance matters, thereby preserving the previous oppression and exploitation of women under patriarchy and colonialism. On the other hand, it retained the property provisions especially on land under the 1979 Constitution under the new and longer section 16, thus constitutionally enshrining the racist, sexist and unequal property regime established by settler colonialism.

Democratization of state power. The constitution retained the extreme and undemocratic version of the separation of powers and rule of law doctrine of the 1979 Constitution that disproportionately removed power from the elected organs in favour of the unelected ones drawn from the previous colonial elites as well as the non-elected president. The above also applied to the regulation, composition, functions and powers of constitutional commissions and public offices but with the difference that unlike under the 1979 Constitution, such provisions were this time not specially entrenched. The above was designed to ensure a proper transition from colonialism to neo-colonialism where the colonial state elites, would only over time be gradually supplemented with appropriately mentored and socialised black elites. The frame-work was aimed at establishing a weak state incapable of challenging the inherited colonial unequal property and social relations, which was a real fear given the known state capitalist or developmental state ambitions of the black nationalists, especially Mugabe and Zanu PF, who over the course of the guerrilla war had become radicalized leftwards, under a quasi- Stalinist-Maoist ideology. In any case the strong authoritarian state capitalist model was the then dominant framework across Africa and the rest of the Third World, which the Lancaster Constitution was designed to foreclose.

The 1979 Lancaster House Constitution therefore delivered national independence but in a very qualified and elitist manner only moderately better than the 1978 Constitution. It remained an elitist phenomenon, in content and process where the delegates to the Lancaster conference were not directly mandated by the citizens whilst colonial and imperialists capitalist elites still retained the dominant role, hence the anti-working people constitutional product. The constitution involved an expansion of democratic space, undoing the racist character of the colonial state but retaining its elitist, exclusionary and free-market facilitatory character, in which the liberation movement elites remained junior subordinate partners and unable to implement their state corporatist or developmental state agenda. Displeasure and discontent amongst elites over these ideological issues and continued pressure

²⁸ Section 31 (3)

²⁹ See section 52 (3) Lancaster House Constitution

³⁰ All soon to be codified under the African [Banjul] Charter on Human and Peoples Rights, 1981, especially Articles 20, 21 and 22

from below over these contested issues were to mark the essence of the constitutional reform process in the first fifteen years of independence.

Constitutional Reform: 1980 - 2000

Constitutional reform after 1980 may be categorized into two broad phases. The first phase spanning the first twenty years involved amendments that sought to reverse what were perceived by the new state elites as undesirable aspects of the Lancaster Constitution but within the framework of bourgeois rule of law. The second phase involved constitutional reforms occasioned by the massive social, political and class conflicts that hit the country after 1997 and which were done outside the parameters of the rule of law but in fact delivered the most significant and radical reforms in the country's history for peasants, women and the black middle classes and democratic rights in general.³¹

Political democracy: state power.- There were several amendments that sought to change the regulation of state power to deal with aspects that the nationalists had failed to achieve at the Lancaster House Conference, mainly involving the racist superior white franchise, the extreme version of separation of powers doctrine and the creation of an executive presidency. The first raft of amendments overturned many of the patently racist and colonial aspects of the Lancaster Constitution, the most important of which included: the one abolishing the reserved whites seats replacing this with a single common voters roll;³² those abolishing dual citizenship then mainly used by white elites to retain colonial privilege and protection;³³ those reducing the age qualification for senators from forty to thirty to accommodate the youths who had played such a critical role in the liberation war; and finally those reducing the qualifications and years of experience required by lawyers to be appointed on the Senate Legal Committee and Judicial Service Committee, including removing the distinction between "attorneys" and 'advocates,"³⁴ which increased the pool of blacks that could be appointed. The second category were those that sought to reverse the extreme version of the separation of powers doctrine under the Lancaster Constitution that marginalized the elected organs in favour of the elite, colonially-inherited dominated structures. Some of the amendments sought to increase the power of the elected organs in relation to the appointed ones in a manner that facilitated the developmental state agenda of the new leaders. Important amendments included: firstly those in relation to the judiciary which curtailed the excessive powers of the judiciary by - placing the jurisdiction powers of the new High Court and Supreme Court under an ordinary statute rather than the constitution;³⁵ ousting the jurisdiction of the courts in determining questions of fairness of the compensation paid for the land;³⁶ and restructuring the Attorney General's office from being a purely professional public service office into a quasi political-legal office with the Attorney General now an *ex-officio* member of parliament and cabinet, in a manner somewhat similar to the American system.³⁷ Secondly were amendments to: -subject the appointment of personnel in key constitutional commissions and public offices by the president to recommendations from the prime minister as in the 1969 Constitution but with the later now required to consult the service commissions before making his or her recommendation;³⁸ removing the detailed regulatory framework for the constitutional commissions from under the constitution and placing this under ordinary acts of parliament.³⁹

A critical amendment in relation to state power was Constitution of Zimbabwe Amendment (No. 7) Act, 1987 which overturned the framework built since the 1979 Constitution of an extreme version of separation of powers that severely weakened the elected parts of the executive in favour of the unelected ones. The amendment went to the other extreme of creating an elected but all powerful president combining the previous powers of the president and prime minister with very few checks and balances in a manner inconsistent with the separation of powers doctrine but with the authoritarian strong states / presidents dominant in the Global South. This included additional sweeping legislative powers for the president to make or amend any law other than the Constitution for a maximum period of six months within which such presidential laws had to be laid before parliament, or they expired.⁴⁰ This recalled the sweeping powers of the British imperial power and Governor under the 1923 Constitution. Another amendment abolished the Senate to create a unicameral legislature.⁴¹

Political, civic and gender rights democratization: Another set of amendments expanded the democratic space available to women and the young, albeit partially. ⁴² Constitution of Zimbabwe Amendment (No. 14) Act, included "gender" as a prohibited

³¹ For a summary of the details of constitutional amendments up to 1999 see – Madhuku L, "A Survey of Constitutional Amendments in Post-Independence Zimbabwe [1980 - 1999]" (2008, Harare, unpublished)

³² Constitution of Zimbabwe Amendment (No. 6) Act, 1987

³³ Constitution of Zimbabwe Amendment (No. 3) Act, 1983

³⁴ Constitution of Zimbabwe Amendment (No.1) Act, 1981; Constitution of Zimbabwe Amendment (No. 2) Act, 1981 and Constitution of Zimbabwe Amendment (No. 3) Act, 1983.

³⁵ Constitution of Zimbabwe Amendment (No. 2), 1981

³⁶ Constitution of Zimbabwe Amendment (No. 11), 1990 and reaffirmed in Constitution of Zimbabwe Amendment (No. 12) Act, 1993.

³⁷ Constitution of Zimbabwe Amendment (No. 8), 1989

³⁸ Constitution of Zimbabwe Amendment (No. 4) Act, 1984. See earlier on s 64 of the 1969 Constitution.

³⁹ Constitution of Zimbabwe Amendment (No. 12) Act, 1993. The same situation applied under the 1969 Constitution where no explicit constitutional provisions were provided

ground for discrimination, although still retaining the old customary law restrictions which encouraged the oppression of women. Thus in **Magaya v Magaya**⁴³ the court ruled that despite such amendment customary laws that favoured males to females in intestate succession were constitutional. Constitution of Zimbabwe Amendment (No. 14) Act, 1996 changed the law to allow Zimbabwean parents to have the right to confer citizenship status on their children regardless of gender, where one of the parents was an alien.

Economic democracy: A number of amendments were aimed at economic de-colonisation, especially land redistribution. The most important in this regard was Constitution of Zimbabwe Amendment (No. 11) Act, 1990, which amended section 16 to authorize compulsory state acquisition of any land for resettlement and not just "under-utilised land," removed the requirement for payment of an "adequate" compensation payable in the currency of the seller's choice, and substituted this with "fair compensation" that could be paid in local currency. The jurisdiction of the courts to determine the fairness or otherwise of the compensation was ousted.

Various factors explain the above reforms. Whilst some of the constitutional reforms were retrogressive many were progressive expanding real democracy and reflected the pressure on the new state from working people including a major strike wave by workers and farm invasions in the first four years of Independence demanding real transformation. Progressive reforms included those that subjected organs of the state, including the judiciary and executive to greater democratic control. The colonially – inherited or mentored judiciary elites responded vigorously in opposition to this dilution of their role under the Lancaster Constitution as the ultimate protectors of private property and the classical liberal state.⁴⁴ But they were met with an equally vigorous response from nationalist state elites whose legitimacy depended on successfully resolving outstanding colonial political and economic questions, especially land and which required a strong state.⁴⁵ Ultimately this intra-ruling class conflict was resolved by violent means in a process that led to the real de-colonisation of the judiciary. The abolition of the Senate was an important democratic advancement, sidelining unelected and unaccountable patriarchal or appointed elites. Moreover the institution of the Senate has, historically in western constitutional law, had a conservative, elitist and anti-working people function. Its inspiration lies with the original model – the *Senatus* of the classical Roman Republic which was dominated by the slave owning patrician orders, and subsequently the British House of Lords representing the feudal aristocracy and the American Senate representing the slave-owning plantocracy. All these played the role of facilitating compromises between old and rising ruling classes, between the elected lower house representing the popular or common will and the upper house representing the few but wealthy and propertied elites in society fearful that the masses might abuse legislative power to seize "their" wealth or property. Thus it is designed to delay or prevent any such radical legislation giving time for compromises that do not endanger the property and privileges of the elites. Not surprisingly the institution of the Senate has proven the preserve of old, male and white elites and particularly hostile to women, the young and oppressed ethnic or racial groups like blacks.

However, there were serious limitations in the reforms. The amendment creating the executive presidency was a retrogression creating an executive organ with hardly any checks and balances, going to the extreme end of the equally undesirable position under the Lancaster Constitution of too weak an executive. This expressed the long held objective of the nationalist elites to establish a one party state, which became possible after the 1987 Unity Agreement between Zanu PF and ZAPU, induced by the state murder of thousands of ZAPU supporters in the Gukurahundi Massacres. The executive presidency did not receive much opposition from local and international capitalists or western governments because it was deemed a necessary iron glove to smash the likely social protests from the new free market neoliberal economic policies that the ruling class was moving to by the end of the 1980s.

⁴⁰ Under the Presidential Powers (Temporary Measures) Act [Chapter 10:20]. See generally the extensive powers of the president under s 31H of the Constitution

⁴¹ Constitution of Zimbabwe Amendment (No. 9) Act, 1989

⁴² Section 5 (1) Lancaster House Constitution

⁴³ 1999 (1) ZLR 100 (S)

⁴⁴ For instance the courts sought to still assert jurisdiction over questions of compensation even after Amendment No. 11, but this time using the "fairness" requirement as their basis and doing so in a manner that still emphasized the free market valuation principles that favoured the white farmers – *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (SC). Further the Supreme Court used the "living tree" theory to ground a broad or liberal interpretation of the Constitution to resist the erosion of some basic bourgeois civic rights by an increasingly authoritarian state. For instance it ruled as unconstitutional violation of the Declaration of Rights: the hanging of death row prisoners after an inordinate delay in carrying out the death sentence – *Catholic Commission for Justice and Peace in Zimbabwe v A-G and Ors* 1993 (1) ZLR 242 (S); the application of corporal punishment on adult and juvenile offenders – *S v A Juvenile* 1989 (2) ZLR 61 (SC) and the denial of permanent residence status to alien husbands of Zimbabwean female citizens – *Ratigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S).

⁴⁵ Prime Minister Mugabe issued strong denunciations of judicial activism by the courts. A number of constitutional amendments were passed reversing hostile judicial decisions. Constitution of Zimbabwe Amendment (No. 11) Act, 1990 reversed the decision in *S v A Juvenile* to declare corporal punishment of juveniles constitutional; Constitution Amendment (No. 13) Act, 1993 reversed the decision in *Catholic Commission for Justice and Peace in Zimbabwe v A-G and Ors* to hold constitutional the hanging of prisoners on death row; and Constitution of Zimbabwe Amendment (No. 14) Act, 1996 reversed the decisions in *Ratigan & Ors v Chief Immigration Officer & Ors* and *In Re Mumbureso* 1994 (1) ZLR 49 (SC) holding that section 11 of the Declaration of Rights was a preamble that did not grant substantive rights and that restrictions denying permanent residency status to alien husbands married to female Zimbabwean citizens was constitutional.

On economic democracy the "fairness" measure under Amendment No. 11 was open to a hostile market related interpretation by the courts,⁴⁶ whilst the continued requirement of payment of compensation for land and improvements was unjustified given the historical context and made land resettlement too costly to be viable whilst the ouster of the courts was only partial.⁴⁷ The property clause amendments failed to provide a sufficient constitutional basis for the redress of the myriad economic and social grievances of the black workers, peasants, women, or even middle classes let alone transform the colonially constructed racist economy base nor provide for the full rights of national economic sovereignty and right to development provided under the African [Banjul] Charter on Human and Peoples' Rights, 1981.⁴⁸ With the adoption of the neoliberal ESAP programme by the state and business elites at the end of the 1980s and the local and international uproar that followed Amendment No. 11, there was a hasty retreat in the subsequent amendments for instance exempting the land of regional and international capitalists covered by international treaties and restoring the jurisdiction of the courts over most of the land disputes, reflecting the shift in state ideology from that of nationalist state corporatism of the early years to neoliberalism. On its own the nationalist middle class elites lacked the guts to openly confront the colonial and imperialist elites who dominated the economy, thereby expressing the inherent limits of the middle classes and national bourgeoisie as principal agents of social transformation. Real change and major constitutional reform had to wait for the massive social revolts from below that erupted in the subsequent period of *jambanja* after 1997.

Jambanja and constitutional reform after 2000

As stated earlier, under the new neoliberal ESAP framework adopted in the late 1980s the country's elites had moved towards a consensus of free-market ideology around a liberal bourgeois state which rejected nationalism in all its forms, economic or political. But things radically changed at the end of the 1990s as Zimbabwe was confronted with its deepest social-political and economic crises occasioned by the failure of neoliberal capitalism, which in turn unleashed a huge wave of social, political and class conflicts that resulted in the most far-reaching and radical constitutional reforms in the history of the country, delivering significant reforms and gains for political and economic democracy, for peasants, women, the black bourgeoisie and political democracy generally.

The central milestone of constitutional reform in this period was the abortive Draft Constitution of the Constitutional Commission otherwise known as the Chidyausiku Draft Constitution, named after the chairperson of the Constitutional Commission that drafted it, Judge President G. Chidyausiku. The Chidyausiku Draft Constitution may be characterized as a fine mixture of maintaining intra-ruling class stability through expanded intra-ruling class democracy and buying class peace and pre-empting social revolution through expanded economic and political constitutional reforms to the working people. Its principal features included:

Democratic reforms on the state power. Executive authority was dispersed to several elected offices including a president, prime minister and a cabinet, effectively ending the all powerful executive presidency. The president had a two term limit, was subject to a vote of no confidence by parliament and his or her exercise of power was subject to democratic regulation by parliament, the prime minister and / or special constitutional commissions. For instance the president could only appoint the judges, constitutional commissions, permanent secretaries, ambassadors and Attorney General after consultation with the Prime Minister and approval by Senate whilst the exercise of all other functions other than those explicitly specified in the Constitution, had to be "on the advice of the Cabinet."⁴⁹ The President could only declare war and peace, deploy the army outside Zimbabwe or declare a state of emergency, "on the advice of the Prime Minister" and such declarations would be revoked unless approved by a two thirds affirmative vote of Parliament sitting jointly within a defined short period.⁵⁰ The Declaration of Rights provided citizens with an explicit political right to free, fair and regular elections for any legislative body, to vote in referendums and to do so in secret and to stand for public office, and if elected to hold office. The Constitution explicitly stated 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; ... and that all persons must observe and uphold this Constitution and the rule of law." The Draft Constitution specially entrenched the provisions of the constitution dealing with executive power, the legislature and the Declaration

⁴⁶ See *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (SC)

⁴⁷ As subsequently explicitly affirmed in Constitution of Zimbabwe Amendment (No. 12) Act, 1993 and Constitution of Zimbabwe Amendment Acts (Nos. 13 and 14). The later affirmed that the ouster of the courts' jurisdiction only related to "land" and not the "improvements" and that the compulsory acquisition provisions were inapplicable to land covered by bilateral or international treaties.

⁴⁸ Various provisions are pertinent: Art. 21 provides for the right of all peoples to "freely dispose of their wealth and natural resources" for the exclusive interest of the people and that State Parties "shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources"; Art 22 provides that all peoples "shall have the right to their economic, social and cultural development" and that states "shall have the duty, individually or collectively, to ensure the exercise of the right to development."

⁴⁹ See generally Art 100

⁵⁰ Art 102

of Rights which could only be amended through an affirmative vote of three quarters of parliament and an affirmative vote in a referendum, as in the 1961 Constitution.

Democratisation of the judicial power: The judiciary was subject to greater democratic control with the appointment of judges subject to approval by Senate and an obligation placed on courts, civil and traditional, when interpreting a written law or developing the common law or traditional customary law to be "guided by the spirit and objects" of the Constitution including its principles and objectives, international law and to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."

Recognition of socio-economic and labour rights: The Chidyausiku Draft incorporated some recognition, albeit partial, of important socio-economic, labour and gender-equity demands of working people around an expanded and deeper Declaration of Rights and a National Objectives section. Firstly under the National Objectives part, all organs of the state were to be guided in taking and implementing policy decisions by a set of national objectives on various group and individual social, cultural and economic rights. Specified objectives included: the national objective of facilitating development, including affirmative action for redressal of imbalances resulting from past practices and policies; balanced regional development and the "right" of the people in an area to benefit from resources in the area and the right of the people to be involved "in the formulation and implementation of development plans and programmes that affect them"; and the national objective of providing "the people of Zimbabwe with a clean, safe and healthy environment;" and the cultural objective of preservation and development of all indigenous languages and Zimbabwe's heritage.

Important individual national objectives, were recognized, but subject to the availability of state resources, including -

- The respect, support and protection of elderly persons including the provision of facilities, food and care for elderly persons unable to provide for themselves.
- The right to dignity, to work, to assistance with specific requirements and to organize of people with physical, mental or other disabilities.
- To free and compulsory basic education for all children and equitable access to higher education.
- To emergency medical treatment at any health institution and to basic, accessible and adequate health services to the population.
- To adequate shelter to everyone.
- To social security and social care to those who need it in particular war veterans.
- To the protection of the rights of children, including to shelter and basic nutrition, health care and social services; protection from maltreatment, exploitation or degradation and to care and assistance to mothers, fathers and others in charge of children.
- To gender balance and advancement of women's rights and marginalized groups, including ensuring gender balance and fair representation of marginalized groups on all constitutional and other governmental groups; the full participation in all spheres of society on the basis of equality with men including ensuring women have access to land and other resources on the basis of equality with men and the implementation of measures such as family care that enable women to enjoy a real opportunity to work; marriage is entered into on the basis of the free and full consent of the intending spouses; there is equality of rights and responsibilities of spouses during marriage and at its dissolution and in the event of dissolution provision is made for the necessary protection of any children and spouses.
- To fair labour standards including, the right to full employment and to just, equitable and satisfactory conditions of work, including adequate remuneration, equitable opportunity for promotion, safety at work, maternity leave, rest and limitation of working hours; and "the rights of employers and employees to engage in collective bargaining and, where necessary, to engage in collective job action to enforce their rights.

Another major reform was an expanded and deeper Declaration of Rights. Firstly, Article 56 reaffirmed the right of the state to compulsorily acquire any property, including any land, for public purposes including resettlement. Article 57 specified factors of "ultimate and overriding importance" in the assessment of the appropriate compensation to be paid, which included those of historical equity and the financial capacity of the state, including that indigenous people were "unjustifiably disposed of their land and other resources without compensation (and that) the former colonial power has effectively repudiated Zimbabwe's just claims for reparations, and the investment which the State may have made which enhanced the value of the land. That "any compensation payable must reflect an equitable balance between the public interest and the interests of those from whom the land is acquired." The Declaration explicitly provided that to "promote the achievement of equality, legislative and other measures may be taken by way of affirmative action to protect or advance people or classes of people who have been disadvantaged by

unfair discrimination.”⁵¹ This could lay the legal basis for economic and social de-colonisation legislation and measures against historically and socially marginalized groups.

Unlike all previous constitutions the Chidyausiku Draft provided for a Declaration that applied in the public and private domains, vertically and horizontally applying to the state and to all natural and juristic persons.⁵² It compelled a purposive or contextual model of interpretation that facilitated realization of the declared rights to promote the values underlying an open and democratic society,⁵³ as opposed to the restrictive literal interpretation model traditionally favoured by conservative judiciaries. The provisions of the Declaration were specially entrenched with constitutional amendments requiring an affirmative vote of three quarters of parliament and approval in a referendum.

Finally were provisions creating the widest *locus standi* to persons to make applications to the Constitutional Court for rights breached, granting the right to those acting on behalf of persons who cannot act in their own name, in the public interest or as a member of a group or class of persons or an association acting in the interest of its members.⁵⁴ The above enabled collectives of working people such as trade unions, co-operatives, NGOs or social movements to access the judiciary to enforce or defend rights a thing that individual poor working people could not. This was strengthened by the new right of access to information held by “any person, including any organ or agency of the State or Government or local government, if the information is required for the exercise or protection of any right or in the interests of public accountability.”⁵⁵ The Chidyausiku Constitution was ultimately rejected in the referendum but it strongly influenced subsequent constitutional developments, including:

Constitution of Zimbabwe Amendment (No. 16) Act, 2000: This effectively ended the colonial land question, by authorizing compulsory state acquisition of land for resettlement without payment of compensation of the land with compensation only being payable for improvements, and even then taking into account the overriding factors of history and state financial capacity. Obligation to pay for the land was placed on the former colonial power.

Constitution of Zimbabwe Amendment (No. 17) Act, 2005 which: re-introduced the Senate; provided for a two thirds parliament majority to pass a constitutional bill, which was lower than under the Chidyausiku Draft which provided for a three quarters affirmative vote of parliament and approval in a referendum; made it a criminal offence for any person to occupy state land without authority; provided for restrictions on the right to movement “in the economic interests of the State.” The amendment also incorporated provisions from the Chidyausiku Draft dealing with unfair discrimination, adding “marital status and physical disability” as prohibited grounds of discrimination and obliging the state to treat men and women equally in the allocation of land regardless of the provisions of customary law.⁵⁶ It also provided for an affirmative action clause “for the protection or advancement of persons ... who have been previously disadvantaged by unfair discrimination.”

Constitution of Zimbabwe Amendment (No. 18) Act, 2007. This was passed by the ruling and opposition parties. It : shortened and brought the tenure of the President into concurrence with that of Parliament, although it did not place term limits; created the public offices of the Public Protector and Zimbabwe Human Rights Commission with the composition of the later requiring four of the nine members to be women. However unlike the Chidyausiku Draft which required the approval of Senate for such appointments, this amendment authorized the President to appoint the members from a list of sixteen nominees provided by the Committee on Standing Rules and Orders of Parliament.

However, the above reforms were still wrapped up within the capitalist framework in which the socio-economic rights of working people remained subordinate to the property rights of the elites. The Chidyausiku Draft expressly stated that the National Objectives “are directory in nature”, i.e. not enforceable as rights. The provisions themselves were carefully worded to ensure that the state fulfilled them “within the resources available to it.” This is in contrast to progressive constitutions such as those of South Africa, Venezuela and Bolivia, which provide these as rights under the Declaration of Rights. An explicitly stated objective of the Draft was “to promote private initiative” – a code word for free market neoliberal policies. Finally note that the constitutional amendments enacted after the Chidyausiku Draft actually whittled down many of its more democratic aspects.

⁵¹ Art 43 (5)

⁵² Art 33

⁵³ As for instance articulated by Gubbay CJ in *Smyth v Ushewekunze & Anor* 1997 (2) ZLR 544 (S) wherein he stated: “in arriving at the proper meaning of a constitutional provision the court should endeavor to expand the reach of the right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formalism and make human rights a practical reality.”

⁵⁴ See generally Art 64

⁵⁵ Art 52

⁵⁶ Section 4 of Act No. 5 of 2005

Factors behind constitutional reforms

Various factors underlie and explain constitutional reform in this period, but the most important of which was massive inter-class struggles that threatened the political and economic elites. These revolts initiated by workers in the period of 1996 - 1999, included general strikes, demonstrations and farm invasions, were in response to the failure of ESAP and the huge declines this brought in the living and working conditions of urban and rural working people. The economic struggles soon transformed into political struggles against the authoritarian state, including the formation of a workers-led party, the Movement for Democratic Change (MDC). A major demand was that of democratic constitutional reform centred around the middle class dominated newly formed National Constitutional Assembly, although involving ZCTU secretary general, Morgan Tsvangirai and the small socialist left under the International Socialist Organisation (ISO). These processes were inspired by similar revolts at regional and global levels. In Zanu PF itself similar demands for leadership renewal and abandonment of the one party state grew led by a neoliberal reformist wing led by E. Zvobgo and D. Mavhaire, with the later famously introducing a motion in parliament for a new constitution saying 'Mugabe must go.'

By 1999 the massive social revolts, the biggest in the country's history, forced Mugabe and Zanu PF to make major economic, ideological, political and constitutional u-turns in order to survive, abandoning their neoliberal pro-western positions to try and meet and co-opt the rising movements of the poor, especially the rural based one. Zanu PF elites led by Mugabe now endorsed the then small war veterans-led farm invasions, in an attempt to divide the rural poor and war veterans from the urban opposition. The MDC became the embodiment of the massive urban and Matebeleland based opposition to Mugabe, but the party ended up fighting the democratic battle from a neoliberal, right-wing and anti-peasant ideological basis. This reflected the triumph of the NGO middle classes, especially from the NCA, white farmers and local capitalists who flooded into it at the end of 1999 with massive funds from western capitalists and states. It also reflected the ideological and organisational weaknesses of the working class and left forces, with socialists in ISO and the working class too tiny to be a counter-force.

Faced with such mortal threats from below, the state conceded to a constitutional reform exercise that was the most broad-based and participatory in the history of the country. The NCA and MDC-led opposition further compelled the regime to try and deliver a product that would be broadly acceptable to the rising masses as well as amongst elites themselves and regionally and internationally especially following recent constitutional developments in South Africa, hence the appointment of the neoliberal reformist Zvobgo to lead it. Indeed the Chidyausiku Commission nearly became a meeting point for the ruling and opposing elites, but for the resistance of left-radical and right forces in the NCA and MDC. The key leaders of the NCA, Tsvangirai, Professor W. Ncube and Dr Mushonga had after meeting Zvobgo agreed to join the Commission but this was rejected at a special NCA meeting led by a joint force of radical middle classes and students such as Tendai Biti, Leammore Jongwe and Job Sikhala and socialists from the ISO, including the author. Participation was also opposed by the rabid rightwing white commercial farmers, who feared loss of their farms.

The Chidyausiku Draft Constitution was therefore a product of the above forces and struggles, reflecting concessions and compromises between and amongst contesting classes and political elites. Under pressure from the massive working class struggles, urban and rural, the state elites were forced to make the biggest democratic and constitutional reforms in the history of the country. Dispersal of state power centred around the Senate also reflected the interests of Mugabe and the older nationalist elites in securing their post-retirement future by ensuring that their younger successors would not enjoy similar concentrated and unchecked levels of power as they had.

The Draft Constitution, was however narrowly rejected in the February 2000 elections, the first ever national electoral defeat for Zanu PF since 1980. The referendum became one not so much on the content of the Draft but a contestation between the two main political parties, and one which the MDC-NCA alliance won, reflecting how far the post-colonial state had lost legitimacy because of growing poverty under an authoritarian neoliberal framework and the failure to deliver land.

Constitutional reforms after the February 2000 Referendum

The emerging elitist rapprochement that underlay the Chidyausiku Draft Constitution was short-lived. Frightened by the referendum results and facing sure defeat in the parliamentary elections less than six months away as had happened to Kaunda and Banda in Zambia and Malawi, Mugabe abandoned the elite rapprochement project and went for broke in the fight against the opposition. Central to this was reviving peasant support through actual delivery on the long unresolved land question through the so-called "Fast Track Land Reform Programme", emasculating bourgeois rule of law, massive escalation of state repression against its opponents, and reverting to state capitalist economic policies. It is in this context that Constitution of Zimbabwe Amendment (No. 16) Act, was passed and consequently it being even more radical than the Chidyausiku Draft. These measures, together with the

MDC's disastrous right-wing shift especially on the land question, were just enough to deliver Mugabe a thin victory in the June 2000 parliamentary elections and the 2002 presidential elections.

A critical by-product of these struggles was the de-colonisation of the colonially-inherited judiciary. When the Gubbay-led court tried to resist the fast-track land reform programme and escalation of state repression it was crushed just like in the UDI era. In **Commercial Framers Union v Minister of Lands and Others** ⁵⁷ the court declared that "the rule of law in the commercial farming areas has been overthrown." In response Minister of Justice, Patrick Chinamasa attacked the judges as colonial hangovers who should resign. This was followed with the unleashing of the war veterans on the judges just as had been done with the white farmers, with war veterans leader, Chenjerai Hunzvi declaring: –

"We are not afraid of the High Court ... this country belongs to us and we will take it whether they want it or not. The judges must resign. Their days are numbered as I am talking to you. I am telling you what the comrades want not what the law says."

War veterans subsequently invaded the judges' chambers threatening to assault them. Under such massive pressure most of the judges of the Supreme Court prematurely retired or resigned including Chief Justice Gubbay, allowing the executive to pack the court with judges who shared the same political and ideological values with it, led by new Chief Justice, G. Chidyausiku, who had been a deputy minister in the first cabinet. De-colonisation of the bench had finally been achieved on the same platform that achieved de-colonisation of the land question. The new look court quickly ruled constitutional and within the parameters of the rule of law the land reform programme under the Rural Land Occupiers (Protection from Eviction) Act, 2001 which legalized all land occupations from February 2000 to March 2001 and conferred the status of "protected occupier" on those who had invaded the farms.

Polarisation amongst elites was to remain the order of the day until 2007, as the regime tried to weather the massive economic crisis brought by the economic siege and sanctions wrought by the opposition elites and their western backers hoping for an economic implosion that would bring about regime downfall, as had happened in the "Orange Revolutions" of Eastern Europe.

Intra-ruling class rapprochement and constitutional reform after 2005

After 2003 the country entered into a period of unprecedented economic and political crisis. Even as the ruling party remained in power after the 2005 elections, it became clear that without a ceasefire in the intra-elite struggles, the country was headed for total social and political implosion, including a failed state or social revolution, either of which would imperil all propertied elites as earlier warned by bourgeois media baron, Trevor Ncube in 2003:

"Many now believe the MDC's failure to get into power was a blessing in disguise. Their obvious lack of decisive leadership and a clear vision for the nation would have plunged this nation into another crisis in the mould of Frederick Chiluba's Zambia. This political paralysis must not be allowed to continue any longer. It is time for those patriotic Zimbabweans inside and outside Zanu PF and the MDC to put real or imagined differences aside and work for the good of the nation... Let us all cut our losses while there is still time ... The way forward is one that recognizes that we have one common destiny and that none of us benefits from allowing our country to go to the dogs. In the absence of anything else to go by, the South African model of a peacefully negotiated settlement, seems to be the only way forward to go ...within the next nine months."

The ISO had also come to the same conclusion around 2002 arguing that ...

"It is such fears which in fact push the neo-liberal wings of the two parties toward rapprochement with one other. The central elements of such rapprochement might be some co-option of the MDC as a junior partner in a massively neo-liberal government of national unity together with some constitutional reforms allowing for the eventual graceful retirement of Mugabe and his replacement by a figure more acceptable to the west."

And echoing the same in 2007:⁵⁸ :

"The perspective of a government of national unity between the opposition and Zanu PF is shared by the elites now dominant in the ruling party, in the two main opposition parties and local and international capitalists. Their main efforts, despite current disagreements are driven towards achieving such goal, as an instrument in pre-emptying social revolution in an important periphery capitalist state sent into mortal crisis by the failure of neo-liberal capitalism."

With the economic crisis climaxing around 2007 the long predicted elite rapprochement became a reality under the SADC mediated talks between Zanu PF and MDC. The March 2008 parliamentary and presidential elections were won by the opposition but not decisively enough to oust Zanu PF and Mugabe with the later again proving their determination to hang onto power at all

⁵⁷ 2000 (2) ZLR 469 (S)

⁵⁸ Gwisai M *Revolutionaries, Resistance and Crisis in Zimbabwe: Anti neo-liberal struggles in periphery capitalism* 2nd ed (ISO, 2007)

- The accountability of the judiciary has been reduced by removing the requirement that the appointment of judges be subject to approval by Senate.⁶⁵
- The special entrenchment of the Declaration of Rights has been diluted by replacing the three quarters approval of parliament with a lower threshold of two thirds.⁶⁶

Way forward on constitutional reform

The current constitutional reform process is therefore one that fails to build on the promise of 2000 and in which elites across the board seem determined to deliver an elite 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. Also fundamental 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. Consequently the constitutional process envisaged under the Kariba Draft Constitution process is one dominated by the parliamentary political parties in which they will exercise an ultimate veto power, contrary to principles of participatory democracy and sovereignty of the people in constitutional reform.

For working people, concerns for democratic governance and political and civic liberties will also be paramount but also critical will be the need for constitutional mitigation and protection from the consequences of the devastating neoliberal policies of the last two decades, in other words that the constitution protects and enhances not only the political rights but also bread and butter rights as well as the freedoms to organize, assembly and information essential for self-defence. Hence it is in the interest of working people to fight for a constitutional reform process that is democratic and people driven. Central elements of this must include the following:

Constitutional reform process

The key demand here should be for a people driven process which is not dominated by one segment of society as in the current case under Article 6 of the GPA and in previous constitutional reform processes or one that grants unchecked powers to elites in civic society organizations, most of whom are not accountable to the people but to their donors, namely the capitalists and foreign imperialist governments. The process under Art 6 of the GPA is clearly undemocratic and not people-driven in so far as it vests complete control of the preparatory organ in the three parliamentary parties, whilst reducing the role of civic society groups and social movements to its sub-committees. Further the final product of its 2nd II-Stake-Holders Conference will be subject to a veto or amendment power by parliament before it goes for the national referendum. This is inconsistent with the people-driven processes called for under Section 3 of the Zimbabwe Peoples Charter and democratic experiences in other countries where such authority has been vested in Constituent Assemblies elected from the citizenry with some, albeit minority representation of special sector and interest groups in civic society. Such processes were followed in South Africa, Venezuela, Bolivia and Ecuador all of which have produced the most radical and pro-working people constitutions globally in the last two decades. Similar but somewhat watered down processes have also taken place in other countries in Africa.⁶⁷

Constitutional content

On the actual content of the constitution, key demands for working people should include:

- Inclusion of socio-economic, labour and gender rights in the Declaration of Rights to facilitate rights for workers, peasants, the young, women, the disabled and other socially and historically marginalised groups and for health, education, shelter, social security rights as already espoused in the Zimbabwe Peoples Charter and NCA Draft Constitution as well as more progressive constitutions like those of Venezuela and Bolivia and to a lesser extent South Africa as detailed in the chapters on outlines of fundamental labour, gender and socio-economic rights.

⁶⁴ Articles 106 and 111 Kariba Draft Constitution

⁶⁵ Article 163 Kariba Draft Constitution

⁶⁶ Article 139 Kariba Draft Constitution

⁶⁷ This was the model broadly followed in Uganda, South Africa, Kenya, Ethiopia and Eritrea as discussed in Hlatshwayo B *The Constitution-Making Process in Zimbabwe: Lessons from Africa* 1998 Vol. 10 No 2 Legal Forum 52

- To ensure that the property provisions of the Declaration and finance provisions of the Constitution are expressly subordinated to the fulfillment of the above rights and economic interests of society at large, including the levying of special levies to achieve the same.
- To ensure provision for economic democratization clauses whereby ownership and control of key businesses and resources are under public or co-operative control of producers and consumers and with issues of compensation determined under a model that takes into account the historical and social deprivation of workers, peasants and women under colonialism, patriarchy and capitalism in a manner already pioneered for the black elites under the land acquisition amendments and the Indigenisation and Economic Empowerment Act [Chapter 14:33] which for instance compels fifty percent ownership of all public listed companies by indigenous persons including workers.
- Establishment of a pluralist and diversified state with checks and balances on executive and judicial authority as already pioneered under the Chidyausiku and NCA Draft Constitutions including the ending of the executive presidency, restoration of a prime minister, recall provisions for elected representatives, abolition of Senate and establishment of a unicameral legislature, limited terms and subjecting all senior state executive appointments including the judiciary to participation of the public and parliament with all appointments having gender equity provisions and representation of other socially and historically marginalized groups.
- Provisions for the special entrenchment of rights under the Declaration of Rights requiring higher parliament thresholds for amendment and referendums for amendments, as well as participatory rights and mechanisms including the right to demonstration and to defend by any means, the constitution against usurpation.

In conclusion 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 elite propertied capitalist classes and their middle class social agents, can truly major democratic constitutional reforms be attained. Illusions in the elite government of national unity and its civic society surrogates will be disastrous for working people. History of constitutional reform shows that it is possible to fight for major reforms but that the elites and the rich will not surrender or concede such reforms unless they do so to minimize intra-ruling class conflicts or more fundamentally in response from real pressure from below by the working people in order to minimise social conflict or ultimately pre-empt social revolution. In particular the history of constitutional reform in Latin America shows that massive social and class struggle can achieve quite significant reforms. Therefore constitutional reform not backed by social struggle will not achieve significant reforms. It is not brilliant leaders, lawyers or intellectuals or nicely – worded documents on process that will deliver the people – driven constitution reform we fight but concrete social and class struggles outside the legal and moral parameters set by the ruling classes. And most fundamentally, without expropriating the capitalists and the rich, and seizing control of state power, all constitutional reforms at most can only provide temporary relief from the ravages of the system of capitalism, which breeds poverty and dictatorship of the few over the many in the first place, regardless of the finest provisions in the laws and constitutions of any society. Real freedom therefore ultimately requires the overthrow of capitalism.

KEMPTON MAKAMURE LABOUR JOURNAL

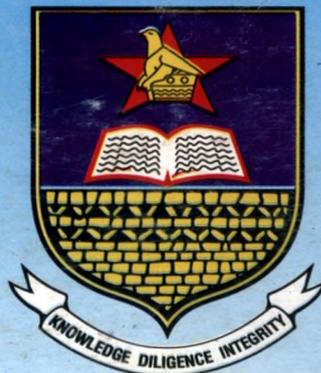
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This special issue of the Kempton Makamure Labour Journal is a joint effort of the **Zimbabwe Labour Centre** and the **Kempton Makamure Labour Lecture Series Board**. Its focus is on constitutional reform from a working people's perspective. It is based on presentations made at the **Conference on Constitutional Reform in Zimbabwe and Labour, Gender and Socio-Economic Rights** jointly hosted by the two organisations on 30th October 2008 and supported by the **Rosa Luxemburg Foundation**.

The need for constitutional reform in Zimbabwe could not be more urgent. At the end of 2008 the country stands at the climax of an unprecedented political and economic crisis that has been festering for the last decade. As the crisis climaxes consensus has emerged amongst all key sectors of society that central to any effective long term resolution of the crisis is the need for a new legitimate constitutional framework. Yet past experience from Zimbabwe and across Africa shows that unless there is sustained mobilization and intervention by working people and their movements, the elites of society, in business, politics and civic society, will impose constitutions that prioritise their own economic and political interests at the expense of those of the working people, the majority of society. Hence denied and trampled upon are provisions providing for full economic democracy that subordinate private property to the public and social needs of the ordinary people and denial of effective and legally enforceable socio-economic, labour and gender rights in the constitution. Already the three main political parties under the GPA, have agreed to try and impose on society an elitist and political party driven constitutional reform process based on a draft neoliberal constitution, the so-called Kariba Draft, which excludes provisions of economic democracy and socio-economic, labour and gender rights.

The central objective of this special issue of the journal as with the conference is to marshal well-researched theoretical positions that support the demands of working people and the poor, for their demands on economic democracy including socio-economic justice and labour and gender rights to be an integral part of any new constitutional dispensation in Zimbabwe.

The journal attempts to do so by consolidating the intellectual and academic outputs from struggles for progressive constitutional reform from our region and from the Global South, especially from South Africa, Venezuela and Bolivia, all countries where struggles against neoliberalism and dictatorship have gone the furthest in the last two decades. We also draw from the progressive outputs of our own struggles in Zimbabwe, principally as reflected in the NCA Draft Constitution and the Zimbabwe Peoples Charter. We hope the journal will act as an important theoretical and advocacy tool, for the working people's movements in the struggle for a true people-driven constitution.



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