

**KEMPTON MAKAMURE LABOUR JOURNAL**  
No. 2: 2009

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



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

**KEMPTON MAKAMURE LABOUR JOURNAL**

**NUMBER 2: 2009**

**SPECIAL ISSUE**

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

PUBLISHED BY

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

**SUPPORTED BY: ROSA LUXEMBURG FOUNDATION**

---

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

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

ISBN 978 0 797437 791

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

And

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

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

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

---

# Table of Contents

Page

<b>Acknowledgements</b>	i
<b>Legacy of Kempton Makamure</b>	i
<b>Editorial Note</b>	1
<b>Welcome Remarks</b>	3
<b>Solidarity Remarks</b>	4

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

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

## **PART TWO: HISTORY OF CONSTITUTIONAL REFORM IN ZIMBABWE**

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

## **PART THREE: OUTLINE OF FUNDAMENTAL RIGHTS**

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

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

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

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

### **(C) Fundamental Gender Rights under International and Zimbabwean Laws**

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

## **PART FOUR CONSTITUTIONAL REFORM IN ZIMBABWE: WAY FORWARD**

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

## **ANNEXURES:**

Conference Report	127
Consolidated Bill of Rights	133

---

# The Defence, Enforcement and Funding of Socio-Economic, Labour and Gender Rights

Oscar Simbi

It is all good and fine to proclaim rights of the poor and working people in a constitution, but whether they are realized in practice is another thing. Over and above the proclamation of rights any constitution that is "people-driven" must provide certain basic essential structures for the realization of the proclaimed rights, especially of working people, the poor and groups that have suffered historical and social marginalization like women and the disabled. These structures include:

- (1) Inclusion of the socio-economic, gender and labour rights in a justiciable and universally applicable and sourced Declaration of Rights;
- (2) Provisions for economic democracy, in particular the funding of the socio-economic, gender and labour rights from both public and private property and wealth;
- (3) Provisions for judicial democracy, in particular in relation to institutions and procedures;
- (4) Provisions for political democracy, in particular the democratization of state power;
- (5) Provision of citizens' right to organize in defence of the constitution and their rights.

In this concluding paper on rights we briefly look into each of these areas:

## 1) Socio-Economic Rights in a universal Bill of Rights

In any people-centred constitution it is essential that there be the inclusion of socio-economic rights including gender, labour and youth rights in the Bill of Rights, which are clearly and precisely – worded and legally enforceable. The rights recognized should not just include individual rights but Peoples, National, and Group Social Economic Rights. The failure to do the above and the designation of such demands as "National Objectives" is one of the the fundamental weaknesses of the 2000 Constitution Review Commission Draft Constitution and the Kariba Draft Constitution, and some other such neoliberal constitutional documents that have emerged in Africa in the last two decades. This shows that such constitutions are meant to primarily protect the property of the wealthy and few whilst pretending to the masses that their concerns have been taken on board. Sometimes the demands of the working people are included as "rights" under the Bill of Rights but encumbered with such draconian exemptions and escape clauses, usually based on an ill-defined concept of the "resources available to the state" or "reasonable measures," to also render the rights granted largely academic or of minimum value. Such is the Bill of Rights under the Constitution of South Africa. What is required is the unequivocal specification of such rights in the Bill of Rights which applies to all persons and is sourced not only from domestic norms but also the international human rights instruments that the country has ratified. This is provided in a number of progressive national constitutions and constitutional norms as shown below.

### Inclusion of socio-economic rights in the Bill of Rights

A number of constitutions and constitutional norms at international, regional and local levels directly provide for socio-economic rights in the Bill of Rights:

- Regionally in Africa: Constitution of Ethiopia, Arts 41 – 44; Constitution of Malawi, Chapter IV; Constitution of South Africa, Chapter 2; Constitution of Uganda, Chapter 4; Constitution of Mozambique, Part II, Chs. II and III; and Constitution of Namibia, Chapter 3.
- Internationally: Constitution of Venezuela, Title II, Chs. V - IX and Constitution of Bolivia, Title II
- In Zimbabwe: NCA Draft Constitution, Ch. 3, Part 1; and Section 4 of the Peoples' Charter, which reads:  
*"Social and Economic justice as a fundamental principle that guides a new people driven constitution and in particular the specification of the people's social economic rights in the Bill of Rights."*

---

## Universal Application of the Bill of Rights and Constitution

The Declaration of Rights and the Constitution must apply universally, that is equally apply to the public and private domains. This is unlike under the current constitution in Zimbabwe whereby the Declaration of Rights largely only applies to the public domain, meaning that private actors including employers and businesses are not bound. Thus the courts have held that discriminatory provisions against women compelling the suspension of pregnant students are not unconstitutional because section 23 of the Constitution only applied to public authorities and not private actors like private colleges.<sup>1</sup> In progressive societies, the constitution and Bills of Rights have vertical and horizontal application to the state and other public authorities as well as to the private sector, covering natural persons (human beings) and non-natural persons (called juristic persons):

- See for instance: Section 8 Constitution of South Africa; and Art. 1 Constitution of Uganda.
- In terms of Zimbabwean constitutional documents see: Section 34 Kariba Draft; Section 34 Constitutional Commission Draft; and Section 8 NCA Draft

## Direct Application of international laws into domestic Zimbabwean law

The struggles of working people at global and regional scales have won many important rights for workers, women and other sections of working people and the oppressed. Many countries in the Global South, including Zimbabwe have ratified the relevant treaties, but often merely as international posturing, when in reality they do not enforce such laws in their domestic laws. Hence in Zimbabwe under Section 111B of the current constitution and Section 262 of the Kariba Draft Constitution, international laws and treaties that Zimbabwe has ratified only apply in Zimbabwe if they have been directly incorporated by an enactment of Parliament. The way forward is to ensure that ratified international laws directly apply in domestic law and in the Declaration of Rights, as is done in other progressive constitutions:

- See for instance Art. 13.IV, Constitution of Bolivia; and Art. 23, Constitution of Venezuela, which provides:  
*"The treaties, pacts and conventions relating to human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power."*
- Section 39 (1) (b) of the Constitution of South Africa provides for a more diluted version stating that in interpreting the Bill of Right a court "must consider international law."

## Universal and Group Rights to approach the courts

Rights are useless if one cannot enforce them. But most working people and the poor lack the resources and means to individually action their rights under the complex legal system which requires lawyers. Yet the law currently provides very restricted rights for their associations, movements, NGOs or other interested person to do so on their behalf, what is called *locus standi*.<sup>2</sup> There is therefore the need to give this right of audience to the courts, not only to the individuals directly affected but also groups or classes of people affected or organizations representing the same; anyone acting in the public interest; or anyone acting on behalf of another person who cannot act in their own name. This is covered in various progressive constitutions, including:

- Section 38 of the Constitution of South Africa; and Art. 37 Constitution of Ethiopia
- Section 64 of the Kariba Draft Constitution; Section 12 NCA Draft and Section 64 of the Constitutional Commission Draft.

---

<sup>1</sup> *Chaduka NO & Anor v Mandizvidza* SC 114-01

<sup>2</sup> For instance there has been various decisions denying workers committees and trade unions full rights to represent their members in the higher courts – *Cold Storage Workers Committee v Cold Storage Co Ltd* 2002 (1) ZLR 141 (H); *Chisvo & Ors v Aurex (PVT) Ltd & Anor* 1999 (2) ZLR 334

---

## **(2) Economic Democracy Provisions and Funding of Rights**

A second fundamental constitutional structure essential for the practical realization of socio-economic rights including labour and gender ones, are provisions ensuring that there are adequate resources to fund the rights. The funds of society are found both under the public domain as well as under the private domain, but in all cases the ultimate source and guarantor of all wealth, public or private are the collective people of a society and the work they do to produce the various necessities of life. Private property, profits and wealth cannot exist outside the base and protection it derives from the general public and the natural resources that collectively belong to society. Therefore the fundamental principle of all civilized societies is the right of everyone to life and the necessary means of sustaining life. This is why the ICESCR holds that under no circumstances may a people be denied its means of existence and places a duty on the state to progressively achieve the full realization of the people's economic rights "to the maximum of its available resources."

There is therefore no absolute right to private property under any constitution in the world, as all private property is subject to compulsory state regulation, acquisition or expropriation for the public good in defined circumstances. Where constitutions differ is in the definition of what amounts to "public good" and the compensation payable, if any, on expropriation. Thus funding for socio-economic, gender and labour rights must come from all sources of wealth in society, public and private, whether this is done as direct levies or indirectly through general taxation. It is a reality under capitalist societies that most of the wealth of society is in the hands of the private sector under the few who own and control the means of production. Therefore the issue of how far socio-economic rights are adequately funded is ultimately determined by the extent to which individual private property is protected in the Bill of Rights and how far it is subordinated to the public and collective good. This issue goes to the very heart of capitalism, especially under neoliberalism as under the STERP programme of the Inclusive Government, which seeks to give the maximum protection to private property. The more protected the right to private property is and the more restricted public property is, as under colonial, neo-colonial or neoliberal constitutions, the harder it is to fulfill socio-economic, labour and gender rights.<sup>3</sup> Thus even in an otherwise progressive constitution like that of South Africa which specifies numerous socio-economic rights, ultimately their realization in practice is made tenuous because of numerous exemption clauses that make the duty of the state to provide such rights subject to the resources available to the state. Yet the Constitution does very little or anything to ensure that the state has the maximum possible resources to fulfill such obligations.

On the other hand where the right to private property is subordinated to the general good, including public ownership and control of major natural resources and businesses, as under the anti-neoliberal constitutions of Venezuela and Bolivia or that of state-capitalist Cuba, the greater the capacity of the state to progressively fulfill its socio-economic, gender and labour rights, even in poor countries like Bolivia and Cuba. Locally, the subordination of the right to private property in land that was done under Constitution of Zimbabwe Amendment (No. 16) Act, greatly facilitated the de-colonisation of the land question in Zimbabwe, including significant re-distribution of land to peasants. Just like the oil and natural gas resources of Venezuela and Bolivia have been placed under public ownership and democratic control and today fund the needs of the poor, in Zimbabwe there is the need to place the diamonds of Chiadzwa and the platinum and gold of the Great Dyke under not only public ownership but also public democratic control to fund the needs of the working people of Zimbabwe. There is therefore the urgent need to deepen, democratize and extend the gains made under the Land Reform Programme to all the other key economic sectors, if the poor are to live.

It is indeed a truism that as long as the primary and fundamental wealth, natural resources and property in society is under the ownership and control of the minority classes, and not collectively owned and democratically controlled, then the vast majority of society shall remain oppressed, exploited and marginalized whatever legal rights might be proclaimed in the Constitution. To achieve a people-driven constitution that fulfills the socio-economic justice demands of working people, economic democracy is essential, including the recognition of the following National and Peoples Economic Rights under the constitution:

### **The People's Right to National Economic Sovereignty and to Sustainable Development**

Because much of the wealth of many countries in the Global South is under the ownership and control of multinationals and governments of the developed capitalist countries, many of whom being former colonial powers, it is essential for poor countries to have the right to re-claim their national resources, natural and otherwise in order to be able to chart independent sustainable economic and development programmes and fulfill the socio-economic rights of the people. This therefore inevitably means the right to assert national ownership and control over a country's main natural resources, wealth and other resources, including expropriation of external or foreign interests. This right is recognized under various international laws and national constitutions.

---

<sup>3</sup> As for instance under: Section 80 of the 1969 Rhodesia Constitution, Section 16 of the 1979 Lancaster House Constitution and S.56 of the Kariba Draft

---

In terms of international laws, the following apply:

- ♦ Art. 1 of the ICESCR provides for the right of all peoples to freely dispose of their natural wealth and resources without prejudice to international law, but in no case "may a people be deprived of its own means of subsistence." Art. 2 (1) places a duty on the state to progressively achieve the full realization of the people's economic rights "to the maximum of its available resources."
- ♦ The African Charter provides for the people's rights to: economic development (Art. 22); freely dispose of their wealth and natural resources as individual states or regionally, which right is to be exercised in the exclusive interest of the people, and in no case shall the people be deprived of it; and to existence, Art. 20.
- ♦ In relation to women see: Paragraph H. iii of the SADC Declaration on Gender; and Arts. 13 and 14, CEDAW.

The right is recognised to varying degrees in different national constitutions: In terms of national constitutions, see:

Arts. 35, 38, 45 and 46 Constitution of Mozambique; Art 40 (3) Constitution of Ethiopia; Arts. 311 – 313 and 316 of the Constitution of Bolivia; and Art. 87 - 88 of the Constitution of Venezuela.

In terms of Zimbabwean constitutional documents, a general right to sustainable development is provided under:

- ♦ Section 16 of the Constitution of Zimbabwe; Section 57 of the Kariba Draft Constitution and Section 57 of the Constitutional Commission Draft.
- ♦ Section 32 of the NCA Draft Constitution, which recognizes that "Land is the basic resource available for food production and economic development... and must therefore be used for the benefit of all the people of Zimbabwe, and the state is entitled to compulsorily acquire land or other natural resources to achieve an equitable land ownership pattern or resource redistribution either to redress past racial discrimination or for the benefit of the people of Zimbabwe" on payment of fair and equitable compensation to the property owners and farm workers.
- ♦ aRT. 4 of the Zimbabwe Peoples Charter provides for the rights to: "Equitable access to and distribution of national resources for the benefit of the people of Zimbabwe; (and a) transparent process of ownership and equitable, open and fair redistribution of land from the few to the many."
- ♦ More radically is the Indigenisation and Economic Empowerment Act, [Chapter 14: 03] providing for majority ownership of businesses and enterprises in Zimbabwe by "indigenous" companies, or associations of local workers and producers.

### **The People's Right to Public Ownership and Democratic Control of Land, Natural Resources and Strategic Businesses**

To capacitate the state and society to progressively fulfill the proclaimed socio-economic, gender and labour rights, the primary wealth, resources and property of society including land, and the major companies that produce services and goods essential for the livelihoods of the many, must remain under public and democratic control. This may be through various participatory means such as state, provincial, local authority, co-operative, worker, community and joint worker-community-state ownership and control schemes that also take into account the affirmative action needs of historically and socially marginalized groups such as women. Components of this right are recognized under various international laws and national constitutions including:

- Designation of certain economic activities, resources or industries as exclusively belonging to the state or the public domain. Under this therefore the diamonds of Chiadzwa and the platinum of the Great Dyke should belong to the state and public with proceeds thereof used for the fulfillment of socio-economic needs. Examples include: Art. 3 and 45 Constitution of Mozambique; and Art. 313 Constitution of Bolivia. The Constitution of Venezuela in Arts. 302 - 303 provides for exclusive state ownership of "the petroleum industry and other industries, operations and goods and services which are in the public interest and of a strategic nature." In particular "the State shall retain all shares of *Petróleos de Venezuela, S.A.* or the organ created to manage the petroleum industry" with the exception of subsidiaries and strategic joint ventures.
- Prohibition of privatization of certain public enterprises, such as public health institutions : See Art. 84 Constitution of Venezuela and Art 313 Constitution of Bolivia.

- The right of the state to expropriate private property for the public and social good. Progressive constitutions and laws provide a broad framework of what constitutes the “public good.” This includes the economic interest of the state and the need to fulfill its socio-economic obligations under the constitution and international law. Some constitutions provide for the payment of “fair or just” compensation, depending on the circumstances, whilst in some cases compensation is not payable. Examples of the later include under the Zimbabwe, Venezuela and Bolivia constitutions in relation to formerly colonially seized land or property acquired through corruption or abuse of public office. This principle could be extended to private companies that sabotage or unlawfully fail to fulfill their obligations in terms of socio-economic rights under the Bill of Rights. In progressive constitutions, where compensation is payable it will depend on a consideration of various factors that take into account historical, social and equitable considerations including: historical injustices under colonialism, neo-colonialism and dictatorship; the history of the property, the extent of state or public investment in the property; the resources available to the state and the urgency or imperativeness of the objective to be fulfilled by the state. The following examples apply:
  - ♦ Some national constitutions provide for expropriation of private property on payment of fair compensation: Section 25 Constitution of South Africa; Art. 86 Constitution of Mozambique; Art. 40 (8) of the Constitution of Ethiopia.
  - ♦ Other constitutions provide expropriation of private property without compensation. Art. 116 Constitution of Venezuela, which provides for the confiscation of property of persons convicted of crimes against the “public patrimony” and those who illicitly enrich themselves abusing public office or through drug trafficking.
  - ♦ In Zimbabwe, Section 16 A of the constitution provides for the right of the state to compulsorily acquire land without compensation and pay historically, socially and equitably determined compensation for improvements, after considering factors like: the dispossession of local peoples of their land and resources under colonialism without compensation; the obligation to pay compensation for compulsorily acquired land thus lies with the former colonial power; the history of the ownership, use and occupation of the land; the cost or value of improvements on the land; the current use to which the land and any improvements on it are being put; any investment which the State may have made which improved or enhanced the value of the land and any improvements on it; any financial constraints that necessitate the payment of compensation in installments over a period of time; and any other relevant factor that may be specified in an Act of Parliament.
    - ♦ See also: Section 57 of the Kariba Draft Constitution and Section 57 of the Constitutional Commission Draft.
    - ♦ More radically and requiring constitutional incorporation are provisions of the Indigenisation and Economic Empowerment Act, providing that “at least fifty-one *per centum* of the shares of every public company and any other business shall be owned by indigenous Zimbabweans,” including through co-operatives and worker-community owned companies.

### **People’s Right not to pay odious debts**

Democracy entails that sovereignty lies with the people. Where a government or public authority usurps the power of the people as for instance through the establishment of a state which is not based on the public will or sovereignty or even where an otherwise sovereign state engages in activities that run contrary to the will of the people such as building debts to sustain repression, authoritarianism or anti-working people economic programmes such as ESAP or STERP, what is collectively called “odious debts”, then there is no obligation on restoration of constitutional democracy, to honour such odious debts. Instead public authorities are entitled to repudiate such odious debts as against the public will or morality, *contra bonos mores*, and utilize the funds that would have otherwise been used to pay off the debts to fund the socio-economic demands of the working people. Thus in the case of Zimbabwe, any outstanding debts that were used to fund the Rhodesian regime, and post-colonial anti-people operations like Gukurahundi and Murambatsvina and the political repression after 2000 as well as earlier on under ESAP should be repudiated as odious debt.

- Art. 4 of the Zimbabwe People’s Charter provides for “The right of the people of Zimbabwe to refuse repayment of any odious debt accrued by a dictatorial government.”

### **People’s Right to Democratic and Participatory Budgetary Processes**

To ensure that appropriate resources including subsidies are allocated for the fulfillment of socio-economic rights it is essential that citizens’ participation in budgetary processes be mandatory at all levels of the state including provinces and local authorities.

---

There should also be the inclusion of agreed and specified quotas in public budgets at various levels, national, provincial and local authority directed to the fulfillment of socio-economic rights and public works programmes for the creation of jobs. Examples include:

- See: Art. 254, Constitution of Venezuela; Art. 41 (6) Constitution of Ethiopia; Section 143(2) (f) NCA Draft; and Art. 4, Zimbabwe People's Charter.

### **Special Taxes and Levies to fund Socio-Economic Rights**

Special levies and taxes may be levied on profits and private property to enable realization of specific socio-economic rights. Levies may be general or specific to particular sectors relevant to the concerned socio-economic right. The general principle being "tax the rich to fund the poor." There must be explicit provisions specifying that the raised revenue is not to be used for any other purpose other than that for which it was raised.

- Examples of such provisions include: Art. 50, Mozambique Constitution, providing that taxes "shall be set according to criteria of social justice;" and Art. 86 of the Constitution of Venezuela.

In Zimbabwe this principle is already applied in legislation in various circumstances, and now only needs upgrading to constitutional status. For instance, there are special levies on businesses to provide funds for previously disadvantaged indigenous peoples including workers, women and the disabled to acquire majority share-holding in businesses under the National Indigenisation and Economic Empowerment Fund;<sup>4</sup> levies on employers to compensate workers injured at work under the Workers Compensation Fund;<sup>5</sup> the AIDS levy on workers and employers to provide funds in AIDS/HIV programmes; and the levies on workers and employers to provide for social security in cases of retirement, death, or invalidity.<sup>6</sup>

- This principle could be extended and made more sector specific with for instance:
  - √ In education the levying of a special Education Social Responsibility levy on all private pre-schools, schools, colleges and universities of a specified income, which fund will be used to fund less-privileged institutions.
  - √ In health the levying of a special Health Social Responsibility levy on all companies involved in the production, sale and distribution of medical drugs and equipment including pharmacies; on all private hospitals, surgeries and health homes of a specified income to fund public hospitals, clinics and the needs of the disabled.
  - √ In communities, the levying of a special Community Social Responsibility levy on all businesses operating in the community of a specified income, to fund various community needs, including upgrading of schools, health institutions, child-care facilities and recreational or cultural facilities.

### **Right to Equitable Profit Sharing by Workers, Farmers and Communities**

This involves the right of producers including workers and communities to a direct specified share of the profits of enterprises in which they work or which operate from their areas, including those extracting natural resources. Such levies can be used to fund community programmes in areas like education, health and basic services. Private companies already do this as a so-called corporate social responsibility contribution, but this is often unilateral, arbitrary and not necessarily related to the profits made whilst the community is not involved in programmes chosen.

- Examples include: Art. 91 Constitution of Venezuela; Art. 51, Mozambique Constitution; and Art. 4 Zimbabwe Peoples' Charter; and Section 16 (4) Constitutional Commission Draft.

---

<sup>4</sup> Section 17 of the Indigenisation and Economic Empowerment Act, [Chapter 14:33]

<sup>5</sup> Under Section 29 of the National Social Security Authority (Accident Prevention) (Workers Compensation Scheme) Notice No. 68 of 1990

<sup>6</sup> In terms of Section 3 of the NSSA (Pension and Other Benefits Scheme) Notice S.I. 393 of 1993

---

## Right to Price Controls on Basic Goods and Services and Control on Monopolies

This involves the right of the state and consumers to regulate prices of basic goods and services essential for the livelihood of the many and prohibition of private monopolies or abuse of dominant position in the market in businesses providing services of a public nature, including basic goods and services.

- ◆ See: Arts. 113 and 117, Constitution of Venezuela.
- ◆ Art. 4 Peoples' Charter.

## 3.) Provisions on the Democratisation of the Judicial Power

The judiciary is a fundamental part of the state which plays an enormous role in whether and how rights are realized. Because it is impossible to legislate for every detail, it is inevitable that disputes will arise as to the meaning of rights and duties under the Constitution, of individuals and various organs of the state. The judiciary, especially its highest organs such as the Supreme Court adjudicate in such disputes, and in the process in fact makes law. It is essential for the judiciary to have independence in order to fairly adjudicate disputes in society. However, this independence is not absolute. Judicial power, like all state power is derived from the people and therefore its exercise must be accountable to the people.<sup>7</sup> This is especially so in constitutional disputes which essentially involve value and ideological judgments on the meaning of the law. Whilst judges claim to be "neutral" in reality under most constitutions the manner in which they are appointed, the social classes and groups from which they are drawn and the absence of accountability mechanisms to the people, ensures that they are inherently biased against working people and in favour of the rich and propertied classes from which they are drawn. This was so under colonialism, where judges played a key role in the suppression of blacks and the anti-colonial movement. It has been true in the post-colonial era where judges fought hard to reverse the expropriation of land from white farmers and where they have passed vicious judgments against women and opposition activists, especially after the packing of the senior levels of the judiciary and law enforcement agencies with highly political partisan persons in favour of the ruling party. After the adoption of the neoliberal policy of ESAP, judges have played a critical role in attacking workers and trade unions in favour of employers, for instance virtually abolishing the right to strike, to organise and to protection from unfair dismissal given under subordinate legislation. It is estimated that out of every ten labour cases before the Supreme Court, nine are always in favour of employers, usually overturning Labour Court judgments. The rich and elites therefore insist on constitutional provisions that provide absolute judicial independence but only after ensuring that they are the ones who appoint the judges and that they come from their class. In many African countries, including South Africa, such provisions were inserted in the independence constitutions to ensure that the property of elites acquired under colonialism would not be affected after independence, with judges given the ultimate role in defending such elite and colonially acquired property. Without democratizing the judicial power and making judges accountable to the sovereign will of the people, then many rights that will have been won in a constitution will simply be lost in the courts. Thus in progressive constitutions there are provisions guaranteeing judicial independence but with provisions democratizing judicial power, making it accountable to the sovereign will of the people, in terms of the appointment, powers and removal of judges. In South Africa following ample experience of how the judiciary has been politically partisan in favour of the incumbent neo-liberal Thabo Mbeki presidency, there have been growing calls for the review of the massive powers of the judges, with in-coming new president Jacob Zuma, saying judges are not "gods." Various constitutions have provisions providing for the democratization of judicial power to various degrees:

- Making the selection of judges from the pool of persons who qualify, subject to direct election by the people or nominated by citizen groups or the executive and in all cases involving public hearings and participation with final approval by Parliament, representing the sovereign will of the people. This is opposed to appointment by the president as in the Lancaster House constitutions such as of Zimbabwe.
  - ◆ See: Art. 255 Constitution of Venezuela; Art 170 of the Constitution of Mozambique; Arts. 81 and 82 of the Constitution of Ethiopia; Arts. 142 (1) and 127, Constitution of Uganda; Section 111(1) Constitution of Malawi (for the Chief Justice) and appointment provisions in the constitutions of Bolivia and the USA.
  - ◆ In Zimbabwe, previously Section 159 (3) of the 2000 Constitutional Commission Draft made the appointment of judges by the President subject to approval by Senate, but such provision has been removed under the Kariba Draft, Section 163.

---

<sup>7</sup> See for example Art. 126 (1) of the Constitution of Uganda stating: "Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."

- Expanding the pool from which judges are selected not only from senior lawyers, but lawyers with sufficient experience and representing historically and socially disadvantaged groups such women, blacks, workers and so forth and experts from other disciplines of relevance such as labour, gender, land or socio-economic justice.
  - ♦ Art. 8 (e) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; Section 174(2) Constitution of South Africa.
  - ♦ in Zimbabwe see: Section 21 (1) Constitutional Commission Draft; Section 21 (1) Kariba Draft. Previously Constitution of Zimbabwe Amendment (No. 3), 1983 lowered the experience of lawyers who could be appointed to the Supreme Court to enable more blacks to qualify.
- Giving senior judges a definite single or two term appointment as opposed to indefinite appointments until retirement or resignation, as is currently the case in Zimbabwe.
  - ♦ Art. 264, Constitution of Venezuela (12 years); Section 176(1) Constitution of South Africa.
- Subjecting judges to a revocable mandate by parliament or the population through referenda for reasons of misconduct or loss of confidence. This is unlike the situation in Zimbabwe where only the executive represented by the president has final authority to discipline judges on limited grounds.
  - Art. 79 (4) Constitution of Ethiopia
- Making the highest appellate judicial organ, such as the Supreme Court or Constitutional Court, multi-divisional with special divisions for labour, gender, agrarian and socio-economic justice appeals and composed of professional and elected judges drawn from multi-disciplines and with expertise in such issues.
  - ♦ See: Art. 262, Constitution of Venezuela; and Art. 170 Constitution of Mozambique

Restricting the constitutional jurisdiction of the highest court, such as the Constitutional Court, by making decisions on constitutional disputes reversible by a special majority of parliament, say a two thirds majority or special referenda or making such disputes adjudicable by a mixed body of the legislature and highest court.

- ♦ See: Art. 83 Constitution of Ethiopia and Art. 184 Constitution of Mozambique
- ♦ In Zimbabwe, Constitution of Zimbabwe Amendment (No. 11), 1990 ousted the jurisdiction of courts in determining the fairness of compensation paid in land cases.
- ♦ Ensure judicial autonomy by giving it a minimum specific constitutionally protected budgetary allocation.
  - √ See: Art. 254 Constitution of Venezuela.

#### 4.) Provisions on the Democratisation of Executive Power of the State

Rights are under threat where the executive power of the state is concentrated in one office or organ or where there are insufficient checks and balances on the exercise of such power and there is absence of effective overall supervision of its exercise by the elected organ of the state, the legislature. Such has been the experiences of the executive presidency, military juntas and one-party states of Africa and the Global South.

Progressive constitutions therefore provide for the establishment of a pluralist and diversified state with checks and balances on executive, legislative and judicial authority 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, permanent secretaries, ambassadors, central bank governor and members of constitutional commissions to participation of the public and parliament with all appointments having gender equity provisions and representation of other socially and historically marginalized groups including workers, the youths and peasants. Other provisions include:

- Provisions for the special entrenchment of rights under the Declaration of Rights requiring approval by referendum whenever amended. Providing the public with the right to initiate referendum on major issues such as contentious legislation and international treaties that abrogate national and socioeconomic rights.
- ♦ Subjecting all fundamental decisions like declaration of a state of emergency, prerogative of mercy and declaration of war to approval by the legislature.
  - √ See provisions on appointment of judges under various constitutions above.

---

√ In Zimbabwe examples include: Chapters VIII, IX, X, XI, XIII, Constitutional Commission Draft; and Chapter 9 NCA Draft.

## **5.) The right of the people to participatory democracy and to organize and self-defence**

Ultimately only the people themselves can defend their own rights from usurpation by hostile public and private actors. This presupposes two main rights of citizens, namely the right to participatory democracy in public programmes; and secondly the right to organize and defend their rights.

### **Right to participatory democracy**

Various international instruments and progressive national constitutions provide for the direct participation and control by the people in programmes meant for their benefit by public authorities and institutions. This is captured in the popular slogan "nothing for us without us." The right includes the right of participation in the conceptualization, planning, implementation and evaluation of programmes that affect them, including at the workplace.

- Examples include: Art. 19, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; Section 16 (2) Constitution Commission Draft; Section 16 Kariba Draft; and Arts. 84-86 and 118, Constitution of Venezuela.

### **Right to Organise and Self-Defence**

The ultimate defenders of any rights proclaimed under a Constitution are the people themselves. It is therefore essential that the people have the right to bring elected officials under democratic control and accountability and to retain the initiative for reform of the laws and constitution. This may be provided through various means including:

- Provisions for revocable mandates of elected officials, that is the right of the people to recall or pass a vote of no confidence in all elected public officials including members of parliament and the president.
  - ♦ Examples include: Art. 84 Constitution of Uganda; Art. 54 (7) Constitution of Ethiopia; Arts. 71 – 72 Constitution of Venezuela; Section 62 NCA Draft; and Art. 3 (c) Zimbabwe People's Charter.
- The right of citizens to directly initiate constitutional reform or amendment of laws. For instance Arts. 73 and 341 of the Constitution of Venezuela provides for such rights, on presentation of a petition signed by at least 15% of registered voters.
- The right to organize of citizens and sections thereof including the right of workers, communities and movements to freely strike, to boycott, to assemble, to demonstrate, to present petitions and other necessary and legitimate means to defend the Constitution.



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

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

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