

SOCIO-ECONOMIC RIGHTS IN ZIMBABWE'S NEW CONSTITUTION

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1. Introduction

The constitutionalisation and justiciability of socio-economic rights has always been debated among scholars and practitioners. While everyone agrees that every constitution should encompass socio-economic rights there is still disagreement on whether they should be under the *Bill of Rights* or *Principles of State Policy*. The constitutional debate in Zimbabwe also included such discussions which resulted in the inclusion of socio-economic rights as both *National Objectives (Principles of State Policy)* and *Declaration of Human Rights (Bill of Rights)*, under chapter two and four respectively. Though this is a welcome move towards the progressive realisation of socio-economic rights the big question remains whether this will improve the protection and promotion of these rights, subsequently bringing change to people's lives. This overview provides a critical analysis of the new constitution and offers recommendations for the improvement of the socio-economic rights regime in Zimbabwe through courts, state institutions and government.

2. The new Constitution

The preamble of the new constitution¹⁾ recognises the supremacy of God and gives special recognition to the liberation struggle, natural resources, diverse culture, democratic values, rule of law and fundamental human rights. It values the principles of rule of law, fundamental human rights and freedoms, gender equality, good governance

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and representation of the electorate and places an obligation to the State to protect and promote these values and principles.

Though the preamble of the constitution has no legal standing it spells out the purpose of the constitution and it reflects the goals and commitment of government. It is an introductory statement and courts can refer to it on cases pertaining to the constitution as reliable evidence of what the state has promised to achieve and provide for citizens. The preamble commits the state to uphold and defend fundamental human rights and freedoms, which include socio-economic rights. The protection and promotion of socio-economic rights serve to support the commitments set in the preamble, such as transparency, freedom, tradition and culture, fairness and equality. In countries such as South Africa where the preamble is not legally binding, the courts have interpreted the commitments highlighted in the preamble in, for example, the *Bato Star Fishing (PTY) LTD vs Minister of Environmental Affairs and Tourism* case, interpreting the commitments in the preamble as an obligation on the state.

In addition to traditional civil and political rights, the new constitution contains a full catalogue of economic, social, cultural and environmental rights. This includes every person's right to an environment that is not harmful to their health or well-being (section 73); and an obligation to protect the environment for the benefit of present and future generations, through reasonable legislative and other measures.

Section 75 (rights to education) entitles every citizen and permanent resident of Zimbabwe to a basic state-funded education, including adult basic education and further education, which the state, through reasonable legislative and other measures, must make progressively available and accessible. This is in line with article 13 of the International Covenant on Economic, Social and Cultural Rights (CESCR). It remains to be seen whether the Government will implement the constitution and enforce the right of girls in some rural areas of access to education where they have been hindered by traditional practises.

Section 76 (right to health) confirms the right of every citizen and permanent resident of Zimbabwe to have access to basic health-care services, including reproductive health. Every person living with a chronic illness has the right to have access to basic healthcare services for the illness. No person may be refused emergency medical treatment in any health-care institution. This is in line with article 12 of

the CESC, which states that, everyone should enjoy the highest attainable standard of physical and mental health.

Section 77 (right to food and water) gives every person the right to safe, clean and potable water and sufficient food. These rights are fully enforceable and justiciable. The constitution also specifically protects potentially vulnerable groups, including section 80 (women), section 81 (children), section 82 (the elderly), section 83 (the disabled), and section 84 (veterans of the liberation struggle). No person may be refused emergency medical treatment at any health-care institution. The right to sufficient food and portable water in section 77 has not been limited to citizens and permanent residents only, but to every person in the territory of Zimbabwe.

Some of the socio-economic rights have been included in chapter two of the constitution as national objectives.²⁾ As already noted, these principles will simply 'guide' the state in putting in place policies and laws that will enable these rights to be justiciable. It should be understood that these rights will put little burden on the State as it is not obliged to protect and promote these rights. Those who argue for this approach assert that this compromise sets out societal goals that can be used to engage government and the legislature, but not the courts. It is my view that it will create a political and societal space for a just and democratic society as a result of these objectives.

Unlike the South African constitution which has included all the rights in the *Bill of Rights*, the new Zimbabwe constitution creates complementarity between chapter two and four. Both sections 27 and 75 list the right to education; in the national objectives it speaks of the state taking practical steps to ensure this right. The *Declaration of Rights* defines the rights and their limitations. This will allow for better standing of socio-economic rights in court, especially when the case involves the state, as it has an obligation from both chapter two and four to provide for these socio-economic rights. Section 2(11) obliges the state to protect the rights in chapter four for their full realisation and fulfilment. The same is the case with the right to health care, food and water and the rights of vulnerable groups (children, women, elderly and disabled).

The constitution provides for a limitation clause in section 86. It ensures that chapter four does not destroy the principles of freedom, equality and fairness which should be interpreted in the context of a democratic society. The limitation clause does not apply to the right to

life. The limitation to the right to life does not include the death penalty as explained in section 48. The death penalty can be passed according to the law, in accordance with the full judgement but should always allow the right of the individual to seek pardon in a higher court and from the executive. Rights to human dignity, equality, and fair labour practices cannot be limited for any reason. Any limitation of rights in emergency situations must be proportionate to the circumstance and cannot justify unlawful acts by the state which will still be held to account for such acts.

Those who are not Zimbabwean citizens and do not hold permanent residence will not be able to approach courts to claim these rights. This no doubt creates problems for individuals and families who are staying in the country with no permanent residence. Residents who have these rights violated by a company, individuals and the state will not have recourse to the law. Many of the commercial farm workers in Zimbabwe are either from Malawi, Zambia or Mozambique who do not have citizenship or permanent residence. These people cannot claim these rights unless the Constitutional Court extends the interpretation of national objectives to include them.

The constitution obliges the state to ensure the recognition of all provisions of international treaties, conventions and agreements with a link to human rights in general and socio-economic rights in particular. An innovation is in section 34, stipulating that all ratified and agreed international documents should be domesticated and complied with. Section 46(c) stipulates that all institutions and courts should interpret human rights in line with international conventions, declarations and agreements. These international treaties and declarations are explained in section 327 as any agreement between one or more foreign states or governments which include, among others, United Nations (UN) International Labour Organisation (ILO) treaties, and African Union (AU) and the Southern African Development Community (SADC) agreements.

The South African and new Zimbabwean constitutions share some similarities when it comes to international treaties. Both give power to the President and Executive to negotiate international treaties, but require approval from Parliament and the National Assembly for ratification. Any international law that is consistent with the constitution and national law is valid unless there are some inconsistencies. This means that any human rights treaty that Zimbabwe and South Africa are party to are binding, and courts in both countries can hear cases

from international law that are consistent with national law.

The courts in Zimbabwe can now take into account the treaties on socio-economic rights, children's rights, women's rights, disabled people and minority rights which the Zimbabwean government is party to. This will give courts more power to preside over specific socio-economic rights issues. Courts have in the past already given positive judgements when it came to issues of women's rights. This will also allow courts to instruct government to fulfil its obligation and even give compensation to aggrieved individuals whose rights had been violated.

The constitution has also defined a war veteran in section 84(1). This is very important as many people have claimed this status to gain economic and social favours which affects the principle of fairness in the distribution of wealth and services. A war veteran is defined as anyone who fought in the liberation struggle, assisted in the liberation struggle, or was detained during the liberation struggle. The definition nevertheless remains problematic as many people continue to claim that they assisted in the liberation struggle. The Constitutional Court will have to clearly explain the term 'assisted' to prevent manipulation.

3. Institutions to enforce socio-economic rights

The constitution introduces the Zimbabwe Human Rights Commission (ZHRC) under section 242. Under section 243, the ZHRC is tasked to promote the protection and awareness of human rights and freedoms as well as to monitor implementation. The ZHRC will protect the public against abuse of power and maladministration and will provide remedies, including recommending prosecution of offenders, and will direct the Commissioner-General of Police to investigate cases. It will be important for the ZHRC to not only focus on civil-political rights. The Commission will be instrumental in monitoring the implementation and development of strategies pertaining to socio-economic rights.

The Commission has a responsibility to also table reports to Parliament and can require reports to be submitted from any person, institution or agency. The independence of the commission is of paramount importance to allow for its effectiveness. Section 242(1) calls for the President in consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders to appoint the Chair-

person of the Commission. However, Zimbabwe's institutions in the past decade have been affected by partisan policies from ZANU-PF, compromising their integrity and independence. One big gap that exists in the constitution is to allow the President to ignore any advice on the selection of the chairperson of the commission; this in itself will have a negative effect on the functions and independence from the Executive and has the potential to become an arena for political battle.

The constitution limits the functions and independence of the commission as it gives power to the Minister to make the decision on which reports can be tabled to Parliament. Sections 244(2) and 323 state that the Commission can be asked to submit reports on human rights and freedoms through the relevant Minister. This affects the accountability and transparency of issues that the commission handles as Government is involved in the processes and the Minister decides on what goes. Similar arguments can be made about the Zimbabwe Gender Commission (ZGC) which is established through section 245, and is meant to research gender and social justice issues and to make appropriate recommendations to promote gender equality.

The constitution has established constitutional democracy by giving supremacy to the constitution. It establishes the Constitutional Court in section 166. The Constitutional Court will play an important role in making sure that laws, policies and actions of the state and government are consistent with the constitution. Section 46 states that the court should give full effect to the rights and freedoms in the *Declaration of Human Rights* and must promote openness and a just democratic society based on dignity, equality and freedom. The Constitutional Court as the highest court in the country will be instrumental in interpreting the national objectives on human rights, especially on the '*locus standi*' and 'limitations'.

The new constitution was put in place as a transformative constitution, similar to the South African Constitution of 1996. But the circumstances are different. South Africa needed to transform from white minority rule and Zimbabwe had to transform from a black minority rule that had no respect for human rights, equality, fairness and democracy. The new constitution is a roadmap towards better service provisions and for transformation into good governance, accountability and transparency. It can be regarded as creating constitutional democracy where any legal changes are restricted by the constitution. Although Zimbabwe already had 'constitutional democracy',

the previous constitution vested too much power in the Executive, thereby protecting *de facto* minority rule.

4. Locus standi³⁾

The previous constitution did not allow everyone to have *locus standi* before the Supreme Court on socio-economic rights cases. In the *Law Society of Zimbabwe v Minister of Justice, Legal and Parliamentary Affairs*, the issue of *locus standi* was tested. The Supreme Court did not consider individuals to have *locus standi* on issues of human rights. However the new constitution enforces the *Declaration of Human Rights* and violations can be brought to court by anyone. It notes that anyone whose rights have been violated can approach the court for redress. Section 85 seeks to address this problem by a wide definition of persons entitled to approach the courts in this regard: Any person acting in his or her own interests; any person acting on behalf of other persons who cannot act for themselves; any person acting as a member, or in the interests, of a group or class of persons; and, most significantly, any person acting in the public interest ought to be able to approach the Constitutional Court to enforce the *Declaration of Rights*.⁴⁾

With section 85(1)(e) of the new constitution individuals will not have to wait for their rights to be violated. Rather, if there is a likely threat that their rights might be violated they can approach the courts for redress and enforcement of their rights. This allows for the rectification of situations before they effectively happen. If for example a company was planning to build a new factory close to a community which would have the potential to affect their health and housing, the community can make a case in court to stop the company from building their factory or demand the necessary measures to protect the community.

The previous constitution only allowed individuals to approach the courts on violation cases involving the state, but section 85(1) now allows cases to be brought against an individual and/or a company. Many mining companies, for instance Chiadzwa and Marange, have violated individuals' rights. Cases that have been brought before the courts were thrown out because they lacked *locus standi*. The new constitution actually rectifies that, as it also allows individuals to file cases against individuals and companies that would have violated their rights.

In section 45(1), the constitution clearly stipulates that the *Declaration of Rights* binds the executive, legislature, and the judiciary to promote and protect human rights. All the rights in chapter four should be enforced by the courts. The courts have the responsibility to ensure that all Zimbabweans living in the country enjoy their rights with no fear or favour, which is similar to the South African and Canadian constitutions.

5. Recommendations

The role of the courts will be significant in providing sufficient judicial protection of socio-economic rights. Lessons can be learnt from South Africa and India who have shown that courts have a role to play in providing positive precedence so that socio-economic rights can be better provided in a country. The South African Constitutional Court has since its inception come to the conclusion that a reasonable government policy must cater for different groups and their needs in society.⁵⁾

The partiality of the Constitutional Court and the Human Rights Commission will be crucial in the development of socio-economic rights in Zimbabwe. State institutions have been criticised in the past as machinery that has been used to support the interest of individuals in power. The High Court and the Supreme Court have been criticised for protecting the state, though they have passed some rulings that created positive precedence concerning socio-economic rights, for instance in the case of *Beckford v Beckford*, in which the High Court enforced the principles of the best interest of the child.

The following recommendations suggest ways to positively enforce socio-economic rights:

- Having socio-economic rights in the constitution is a good step towards providing for citizens, promoting equality and reducing poverty. The government will, however, need to put in place adequate budgets for the provision of services, in line with the recommendations of international instruments and conventions.
- There is a need for an infrastructure that promotes transparency and brings an end to corruption. The resources in the country must be used for the best interest of the citizens and not enrich a few elite individuals. Diamonds coming out of Chiadzwa and Marange

need to be directed to the official market and the money used for social service provisions.

- There is a need for the international community to support the efforts by the state to provide social services to citizens. Though the responsibility still rests with the state, the donor partners need to assist the government to put in place infrastructure that strengthens the provision of socio-economic rights.
- There is a need to learn lessons from South Africa; including the separation of powers when it comes to the enforcement of socio-economic rights. The state will have to clearly allow the relevant institutions, especially the courts, to exercise their power, and to respect both negative and positive remedies from the court.
- Distributive justice will be crucial in the enforcement of socio-economic rights. The courts, especially the Constitutional Court, will have to give judgements to enforce socio-economic rights through distributive justice. The enforcement of socio-economic rights requires resources and the commitment of the state but giving positive remedies will be important and the state will have to put in place structures to fulfil the remedies provided.

There is a need for the state to invest in capacity building of the courts to be able to preside over socio-economic rights. The judges and judicial officers need to be well prepared to hear these cases and interpret them according to international law in the interest of the ordinary person and the improvement of their lives.

Endnotes

1. *Constitution of Zimbabwe Amendment (No 20) Act*, 2013.
2. These include section 15 (promote food security), section 16 (cultural values), section 17 (gender balance), section 19 (children), and section 20 (youth).
3. This is the right of a party to appear and be heard before a court.
4. Matyszak, D (2013) *Human Rights and Zimbabwe's Draft Constitution*. Harare: Research and Advocacy Unit (RAU).
5. Liebenberg, S (2005) "The value of human dignity in interpreting socio-economic rights", *South African Human Rights Journal*, No 1, p 21.