BRIEFING PAPER:

Analysis of Provisions Relevant to Economic, Social, and Cultural Rights in Zimbabwe's 2013 Constitution

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Zimbabwe Lawyers for Human Rights

The International Human Rights Clinic at Harvard Law School

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I. Introduction

Economic, Social and Cultural Rights in Zimbabwe: Options for Constitutional Protections—the 2009 report by Zimbabwe Lawyers for Human Rights (ZLHR), the National Constitutional Assembly (NCA), and the International Human Rights Clinic at Harvard Law School (the Clinic)—recommended the inclusion of six economic, social, and cultural rights (ESCR) in Zimbabwe's new Constitution and provided details about the desirable content of each right. It also made suggestions in relation to other constitutional provisions and institutions that could contribute to the full realisation of ESCR in Zimbabwe. This briefing paper summarizes those 2009 recommendations and analyses the extent to which they were met by the 2013 Constitution.

II. The Rights

The Universal Declaration of Human Rights, the foundational document of international human rights law, gives full recognition to ESCR. Moreover, Zimbabwe is party to a number of treaties that protect ESCR, including the African Charter on Human and People's Rights and the International Covenant on Economic, Social and Cultural Rights. Under international law, Zimbabwe is obligated to respect, protect, and fulfill ESCR.

The 2009 report recommended the inclusion of the rights to work, food, housing, the highest attainable standard of health, education, and culture in a new constitution. Elements of all six of these rights, among other rights, have been included in the 2013 Constitution. Some have been protected as justiciable rights in the Declaration of Rights (Chapter 4), meaning that these rights can be enforced through court proceedings. Others have been included as National Objectives (Chapter 2), which guide state policy and influence the interpretation of other constitutional provisions and laws, and which may also be justiciable. Importantly, rights contained in the 2013 Constitution are binding on all levels of government and enjoy supremacy over all other laws and government actions.

A. Manner of Incorporation

2009 Report's Recommendation: Zimbabwe's Constitution should explicitly enshrine ESCR in a fully justiciable Bill (or Declaration) of Rights. Other methods of protecting ESCR—including the extrapolation of those rights from civil and political rights, or the recognition of non-justiciable directive principles—may offer some opportunities, but fail to guarantee the full protection provided by inclusion in a justiciable Bill of Rights.

2013 Constitution: Chapter 4 of the 2013 Constitution sets forth a fully justiciable Declaration of Rights, which incorporates many ESCR, including the rights to education, health care, and food and water. Core components of other rights—including the rights to work and housing—are addressed under the Constitution's National Objectives.

Analysis: Although the National Objectives in Zimbabwe's Constitution may influence political processes and provide a foothold for civil society advocacy, the justiciablility of these

rights is not as secure as those contained in the Declaration of Rights. Therefore, the rights to work and housing are not protected as strongly as possible or as recommended by the 2009 report.

B. The Right to Work

2009 Report's Recommendation: Zimbabwe's Constitution should protect the right to work, including the following: the right to freely seek employment; the right to safe, just, and favourable working conditions; non-discriminatory access to training, employment, and promotions, and equal pay for equal work; the right to be free from forced labour or servitude; the prohibition on child labour; the right to form and participate in trade unions; and the right of such trade unions to operate with minimal governmental interference. Additionally, special recognition should be given to vulnerable populations such as women and the disabled.

2013 Constitution: The right to work is contained in only the National Objectives, and not in the Declaration of Rights of the 2013 Constitution. Sections 14 and 24 list the promotion of employment and the opportunity to work as National Objectives that guide state policy. Various sections in the Declaration of Rights provide limited protections to workers. For example, Section 64 recognizes individuals' right to choose a profession and Section 65 addresses the right to fair and safe labour practices and conditions as well as the right to form labour unions, negotiate with employers, and strike. Section 55 prohibits forced labour. Various sections offer special protections to youth, women, and the disabled.

Analysis: When juxtaposed against the recommendations outlined in the 2009 report, the new Constitution has made important strides towards respecting and protecting the right to work. That right, as articulated in the 2013 Constitution, incorporates virtually all of the elements outlined in the 2009 report, including sensitivity to the heightened needs of special groups such as children, women, and persons with disabilities. However, because the right to work is contained only in the National Objectives, and not in the Declaration of Rights, the extent to which the right can be protected and enforced in court remains an open question and will require interpretation by the Constitutional Court to be adequately protected.

C. The Right to Food

2009 Report's Recommendation: Zimbabwe's Constitution should protect the right to food, including the following: the need to ensure an adequate quantity and quality of food to provide nutrients for physical and mental growth and development; the need to ensure that food is safe, uncontaminated, available and accessible, and that the cost of food its kept at a reasonable level attainable at the average income level; and the particular needs of special groups including pregnant and breastfeeding women, children, the ill, and the elderly in relation to food.

2013 Constitution: The Declaration of Rights, in Section 77, establishes the right to clean water and sufficient food as a justiciable right. However, the section provides very little detail about what these rights require, so courts will therefore be required to define the contours of

these rights. In addition, Section 15 establishes the availability of food and proper nutrition as non-justiciable National Objectives. Sections 19, 21, and 81 address the particular needs of children and elderly persons in relation to food and nutrition. The specific nutritional needs of women are not explicitly addressed in the Constitution.

Analysis: It is commendable that the 2013 Constitution includes the right to clean water and sufficient food in the Declaration of Rights as fully justiciable rights. However, the provisions would be even more meaningful if, beyond merely guaranteeing a right to sufficient food, they also guaranteed access to safe food free from adverse substances and committed the government to ensuring that food is economically and physically accessible.

D. The Right to Housing

2009 Report's Recommendation: Zimbabwe's Constitution should protect the right to housing, including the following: legal security of tenure and the prohibition of forced evictions; the affirmative right of inhabitants to adequate, affordable, and accessible housing in a location that is proximate to goods and services; and the requirement that housing be culturally appropriate.

2013 Constitution: There is no general right to housing in the Constitution's Declaration of Rights. Rather, within the National Objectives, Section 28 describes the state's duty to ensure access to adequate shelter by taking reasonable legislative and other measures, while Section 19 addresses the particular rights of children to shelter. Within the Declaration of Rights, Section 74 limits the state's ability to conduct evictions or demolitions and Section 81 address the particular rights of children to shelter.

Analysis: More could have been done to effectively protect the right to housing in the new Constitution. The relevant provisions do not include many of the core elements recommended in the 2009 report, including availability of services, materials, and infrastructure, affordable housing, habitable housing, accessible housing, and culturally adequate housing. In addition, the Constitution fails to provide special protections to migrant workers and women, two vulnerable populations that face special obstacles in accessing adequate housing.

E. The Right to the Highest Attainable Standard of Health

2009's Recommendation: Zimbabwe's Constitution should protect the right to health, including the following: the availability of healthcare facilities, goods, and services that are functioning and of a sufficient quantity, that respect medical ethics, and that are gender and culture sensitive; an equal opportunity to attain the highest standard of health for all people, without discrimination; and the physical and financial accessibility of healthcare facilities, goods, and services, as well as accessibility of health-related information and education. Additionally the Constitution should take special note of the need for maternal, childhood, and reproductive health care.

2013 Constitution: The Declaration of Rights, in Section 76, provides a justiciable right to basic health care services, specifically for services relating to reproductive health, chronic illness, and emergency situations. Section 73 of the Declaration of Rights further protects the right to a healthy environment, and other sections address the special needs of children, the elderly, and the disabled. In addition, Section 29 makes the provision of medical services a National Objective.

Analysis: Unlike its predecessor, the 2013 Constitution recognizes the right to health care services, which is an important development. The relevant provisions track many of the recommendations outlined in the 2009 report, and reinforce the right to health for certain special populations including children, the elderly, and the disabled. However, some significant gaps remain. In particular, the Constitution fails to ensure that healthcare will be acceptable, meaning it should respect medical ethics and be gender and culture sensitive. It also lacks non-discrimination language, and fails to recognize the importance of popular participation in national and community health decision-making.

F. The Right to Education

2009's Recommendation: Zimbabwe's Constitution should protect the right to education, including the following: educational institutions are available in sufficient quantity, and contain adequate and appropriate infrastructure to operate; educational institutions and programmes are geographically and financially accessible to everyone, without discrimination; the form and substance of education, including curricula and teaching methods, are relevant, culturally appropriate, and of high quality; and education is adaptable to the needs of changing societies and communities and responds to the needs of diverse students.

2013 Constitution: The Declaration of Rights, in Section 75, guarantees citizens and permanent residents the justiciable right to basic education, including adult basic education and the right of individuals to establish private educational institutions. It also provides a right to "further education" which the state must make "progressively available and accessible." Section 27 establishes free and compulsory basic education and higher and tertiary education as National Objectives. Sections 19, 81, and 83 address the educational needs of children, girls, and persons with disabilities.

Analysis: The right to education is arguably the weakest of the ESCRs provided for in the 2013 Constitution. Although the Constitution contains a broader treatment of the right to education than its predecessor, it incorporates only the most basic elements of the right. The relevant sections disappointingly fail to address the issues of adequate infrastructure or educational quality. None of the provisions explicitly provide the substance of the right to education as recommended in the 2009 report.

G. The Right to Culture

2009 Report's Recommendation: Zimbabwe's Constitution should protect the right to culture, including the following: the ability to engage in cultural and religious practices and form cultural or religious groups; protection of the right to language; and a "clawback" provision

limiting the protection of the right to culture in circumstances where traditional practices conflict with other fundamental human rights.

2013 Constitution: The Declaration of Rights, in Section 63, guarantees individuals the justiciable right to use the language of their choice and participate in the cultural life of their community. Section 56 prohibits discrimination, including on grounds of race, tribe, religion, and culture. These rights are subject to a general "clawback" provision that applies to all rights, and specifies that the enjoyment of a right does not prejudice the rights and freedoms of others. In addition, Sections 16 and 33 describe National Objectives to promote the preservation of Zimbabwe's "cultural values," heritage, traditional institutions, and "indigenous knowledge systems."

Analysis: The right to culture provisions included in the new Constitution closely track the recommendations included in the 2009 report and mark significant progress towards protecting the right to culture.

III. The Legal Framework

The degree to which ESCR will be realised depends not simply upon their inclusion in a Declaration of Rights, but also upon the broader legal framework that a constitution creates and the context in which it is applied. Other constitutional provisions will heavily influence the manner in which ESCR are interpreted and implemented.

The 2013 Constitution has adopted several of the recommendations contained in the 2009 report regarding the background legal framework, including that courts look to international law when interpreting ESCR, that courts be granted broad remedial powers, and that liberal standing rules be established. In other places, however, the Constitution falls short of the 2009 report's proposals. For example, it fails to make treaties self-executing and lacks robust protections against constitutional amendments that could undermine existing rights protections.

A. The Role of International Law

2009 Report's Recommendation: Zimbabwe's Constitution should require that courts look to international law when interpreting ESCR. The Constitution could also allow judges to review foreign law when considering rights protections.

2013 Constitution: Section 46 of the Constitution requires that courts, when interpreting constitutional rights, "take into account international law and all treaties and conventions to which Zimbabwe is a party." The section also states that courts "may consider relevant foreign law."

Analysis: By mandating that judges look to international law, and allowing them to consider foreign law, the 2013 Constitution fully complies with the recommendation made in the 2009 report.

B. Remedial Powers

2009 Report's Recommendation: Zimbabwe's Constitution should give courts broad remedial powers that extend beyond the ability to grant injunctions or monetary damages. These could include the power to, for example, issue supervisory orders, demand legislative or administrative action, or order reparations.

2013 Constitution: Section 85 of the Constitution empowers courts to "grant appropriate relief" for rights violations. Section 175 further allows any court considering a constitutional question to "make any order that is just and equitable."

Analysis: The 2013 Constitution grants courts broad remedial powers in relation to constitutional rights, as recommended by the 2009 report. The provisions included in the Constitution are similar to those in the South African Constitution, which was suggested as a model by the 2009 report.

C. Standing

2009 Report's Recommendation: Zimbabwe's new constitution should provide broad standing rules, which could be used to allow human rights organisations to act on behalf of individuals alleging violations of ESCR. Standing rules could be further strengthened by including a constitutional provision waiving court fees for litigation involving the Bill of Rights.

2013 Constitution: Section 85 of the Constitution provides a standing rule that allows "any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests, of a group or class of persons; any person acting in the public interest; [or] any association acting in the interests of its members," to bring a case alleging the violation of a constitutional right. The Constitution does not provide for a waiver of court fees in cases involving constitutional rights.

Analysis: The 2013 Constitution's standing rules in relation to constitutional rights are sufficiently broad to allow human rights organizations and other interested parties to act on behalf of victims, as recommended by the 2009 report. This is a very important improvement over the Lancaster House Constitution, and one that will significantly empower human rights advocates. Unfortunately, the 2013 Constitution does not waive court fees for cases involving constitutional rights, thereby missing an opportunity to further support survivors of rights violations.

D. Enforceability Against Private Parties

2009 Report's Recommendation: Zimbabwe's Constitution should allow individuals to sue private (non-state) parties for actions that infringe upon ESCR.

2013 Constitution: Section 45 of the Constitution states that the Declaration of Rights "binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it."

Analysis: The language of Section 45 recognizes that private parties, or non-state actors, are bound by constitutional rights. In other words, Section 45 can be read to indicate both the vertical application of the Constitution—that rights violations can be enforced by individuals against the state—as well as horizontal application of the Constitution—that rights violations can be enforced by individuals against other individuals or private parties.

E. Scrutiny of Legislation

2009 Report's Recommendation: Zimbabwe's Constitution should establish a truly independent legal committee or similar entity to determine whether proposed legislation violates constitutional rights, including ESCR.

2013 Constitution: Section 152 establishes a Parliamentary Legal Committee (PLC) to determine whether proposed laws "would contravene any provision of th[e] Constitution." The PLC is appointed by the Committee on Standing Rules and Orders.

Analysis: The PLC established by the 2013 Constitution has a mandate that allows it to act as a check on the legislature's ability to infringe on constitutional rights. However, the PLC is appointed by the Committee on Standing Rules and Orders—a group composed of parliamentarians—raising concerns about the independence of that body. A process by which members of the bar, or law professors, or some other recognized group of independent legal experts puts forward names of proposed members for the PLC, some of whom are then selected by the Committee on the Standard Rules and Order, might help address such concerns.

F. Self-Executing Treaties

2009 Report's Recommendation: Zimbabwe's Constitution should ensure that treaties are self-executing and automatically incorporated into domestic law.

2013 Constitution: Section 327 of the Constitution is explicit that treaties are not self-executing, stating that a treaty concluded under the President's authority "does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament."

Analysis: By failing to provide for self-executing treaties, Zimbabwe's constitutional drafters missed an opportunity to draw from the extensive ESCR protections already enshrined in international treaties to which Zimbabwe is a party.

G. Amending the Constitution

2009 Report's Recommendation: Zimbabwe's Constitution should limit the ability of the executive or the legislature to amend the Bill of Rights. This goal could be accomplished by requiring public assent in a national referendum in addition to two-thirds passage in both houses when a constitutional right is concerned. A constitution could specify that the Bill of Rights is unalterable, or that enumerated rights may only be added or augmented, not removed or diminished.

2013 Constitution: Section 328 of the Constitution requires that a constitutional amendment pass both houses of parliament by a two-thirds vote and also be approved by a majority vote in a nationwide referendum. No special procedures are provided for amendments to the Declaration of Rights.

Analysis: The frequency with which the Lancaster House Constitution was amended raises serious concerns that ESCR protections in the 2013 Constitution could be altered for political reasons. The failure to include stronger protections against the amendment of constitutional rights leaves them potentially vulnerable to repeal or reform. Possible approaches to address this concern include: a bill amending the constitution must not contain any provisions other than the proposed constitutional amendment and directly related matters; amendments that alter the Declaration of Rights must also be approved by a supermajority of the provinces; and amendments that alter fundamental constitutional principles require not simply a two-thirds vote in both houses of parliament, but rather a three-quarters vote.

IV. The Institutions

Zimbabwe's state institutions are generally very weak. Corruption and lack of independence threaten the ability of courts and other bodies to act as impartial arbiters of rights. Many factors contribute to the competency and effectiveness of state institutions, and constitutional reform alone cannot adequately address all the shortcomings of Zimbabwe's courts, commissions, and other bodies. Unless remedied, such shortcomings will continue to undermine rights protections in the country.

The 2013 Constitution established some new bodies that—if they operate in an independent and robust manner—could contribute to the realization of ESCR. At the same time, the 2013 Constitution failed to address the executive branch's inappropriate influence over the judiciary and other constitutional bodies.

A. The Judiciary

2009 Report's Recommendation: Zimbabwe's Constitution should establish an independent judiciary committed to upholding rights and liberties. The Constitution must provide protections against political influence over the judiciary. Most importantly, the means of appointing and removing judges must give autonomous bodies, the Senate, or a truly independent commission the ability to block a presidential appointment made for overtly political reasons. Judges must also be protected from intimidation and influence by financial

incentives or penalties. Constitution-makers could also consider inclusion of constitutional provisions that facilitate the review of the performance of sitting judges.

2013 Constitution: Section 164 of the Constitution states that "[t]he courts are independent and subject only to this Constitution and the law." However, the selection process for judges—set out in Section 180—is controlled by the President, who appoints judges from a list of candidates provided by the Judicial Service Commission, a body which he himself appoints. If he does not like the proposed list, he can request a new list from the Judicial Service Commission. The removal of judges is also subject to significant executive control. Per Section 187, the President appoints the tribunal which advises him whether or not a judge should be removed.

Analysis: The weakness and lack of independence of Zimbabwe's courts is likely the single greatest threat to constitutional rights in Zimbabwe. Although the 2013 Constitution discusses the independence of the judiciary, it includes very few provisions to ensure such independence. Rather, selection and removal procedures for judges are controlled by the executive, enabling the President to remove judges for political reasons. Corruption, judicial incompetence, and other deficiencies further undermine courts' ability to vigorously uphold ESCR protections.

B. Zimbabwe Human Rights Commission

2009 Report's Recommendation: Zimbabwe's Constitution should provide for a Human Rights Commission with the authority, independence, and resources to protect, promote, monitor and assess the human rights situation in Zimbabwe. The Zimbabwean human rights community should be involved in making appointments to the Commission. The Commission should be granted broad powers that do not require implementing legislation but are constitutionally mandated. These should include the power to conduct educational campaigns, receive complaints, initiate investigations and prosecutions, and visit government detention facilities.

2013 Constitution: Sections 242 to 244 establish the Zimbabwe Human Rights Commission, with a mandate that includes promoting and monitoring human rights and freedoms, receiving complaints from the public, investigating alleged violations of constitutional rights, ensuring the redress of such violations, recommending the prosecution of perpetrators of rights violations, advising Parliament on rights issues, and inspecting prisons and other places of detention. The President appoints the chairperson of the Commission after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders, and selects other members from a list provided by the Committee on Standing Rules and Orders. Commissioners may be removed using the same procedure as that used for judges. While the Commissioner-General of the Police is required to comply with directives from the Zimbabwe Human Rights Commission, the Commission has few other enforcement powers.

Analysis: The Constitution establishes a human rights commission with a very broad mandate, covering many of the functions recommended by the 2009 report. This is a major accomplishment, and may offer a venue for human rights organizations and victims of human rights abuses to raise their concerns. However, the President retains considerable control over

the Commission, particularly through the processes of selecting and removing commissioners. Contrary to the recommendation of the 2009 report, civil society has no role in the selection of commissioners. Moreover, the Commission has limited enforcement powers, and therefore may not be able to remedy rights violations. For these reasons and others, it is unclear the extent to which the Commission will be able to uphold ESCR protections in the country.

C. Other Constitutional Bodies

2009 Report's Recommendation: Zimbabwe's Constitution could establish various offices and bodies that could help to ensure ESCR. These might include a Public Protector, Anti-Corruption Commission, Gender Commission, and commission dedicated to truth, justice, reconciliation and conflict prevention. Additionally, the Constitution could create a commission dedicated specifically to the protection of ESCR. For any such bodies to be effective, their independence would need to be constitutionally guaranteed.

2013 Constitution: Chapter 12 of the Constitution establishes various "independent commissions," which, in addition to the Zimbabwe Human Rights Commission, include the Zimbabwe Anti-Corruption Commission, Zimbabwe Gender Commission and the National Peace and Reconciliation Commission. Section 235 states that the commissions "are independent and are not subject to the direction or control of anyone." Members of the commissions are appointed by the President and may be removed using the same procedure as that used for judges. The Constitution does not provide for a Public Protector.

Analysis: The 2013 Constitution establishes many of the bodies recommended in the 2009 report. However, similar to the Constitution's treatment of the courts, the gesture towards independence is only surface-deep. The President's retains control over these bodies through selection and removal procedures mandated by the Constitution. The executive branch therefore has an improper ability to influence the commissions, undermining their ability to act independently to protect ESCR from detrimental governmental actions.

V. Conclusion

As is clear from the analysis contained herein, gaps remain in the constitutional framework to protect and promote ESCR in Zimbabwe.

For example, with respect to the rights themselves, the right to work and the right to housing are enshrined only in the National Objectives section of the 2013 Constitution, not in the Declaration of Rights, meaning that these two rights could have been more strongly protected. The right to education, while recognized in the Declaration of Rights, is a weak articulation that includes only the most basic elements of the right and fails to address important issues like adequate infrastructure and educational quality. The rights to health and food, while more robustly protected in the 2013 Constitution than in its predecessor, could have been detailed in a manner to make them even more meaningful.

With respect to the broader background framework of the 2013 Constitution, the Parliamentary Legal Committee may lack the independence necessary to faithfully determine whether proposed

legislation violates constitutional rights, including ESCR. The failure to include stronger protections against the amendment of constitutional rights leaves them potentially vulnerable to future, politically-motivated alternation or curtailment. Finally, an opportunity was missed in not providing for treaties to be self-executing, as courts would have been more explicitly empowered to drawn from the extensive ESCR protections already enshrined in international treaties to which Zimbabwe is a party.

With respect to state institutions charged with upholding rights, the challenges remain serious. The weakness, lack of capacity, and lack of independence of Zimbabwe's courts are likely the greatest threats to constitutional rights in Zimbabwe, and may prevent the court system from fulfilling its role as an impartial arbiter and enforcer of rights. The Human Rights Commission may offer a venue for human rights organizations and victims of human rights abuses to raise their concerns, although it lacks robust enforcement powers and the President retains considerable control over that body, particularly through the processes of selecting and removing commissioners.

Despite these shortcomings, the 2013 Constitution offers multiple opportunities for lawyers and activists in Zimbabwe to confront violations of constitutional rights, including by litigating rights contained within the Declaration of Rights. In addition, strategic litigation that focuses on asking the Constitutional Court to read justiciable rights protections into the National Objectives is another avenue to be pursued. Strengthening advocacy efforts to address and capacitate constitutional institutions, in particular the new Human Rights Commission, may help these bodies better carry out their role in protecting and promoting rights. Education and empowerment of communities as to the protections, opportunities, and avenues for relief now available under the new constitutional framework are also critical.

The realization of ESCR in Zimbabwe will be an ongoing and evolving process that requires a long-term commitment as well as creative advocacy and litigation strategies. But lawyers, human rights activists, and communities have already begun to advance this goal by asserting rights, challenging injustices, and advocating for the reform of flawed institutions.