

# MIDLANDS STATE UNIVERSITY



**A COMPARATIVE ANALYSIS OF THE LANCASTER HOUSE  
CONSTITUTION AND THE NEW CONSTITUTION OF ZIMBABWE  
(2013) IN THE CONTEXT OF HUMAN RIGHTS PROTECTION**

**BY**

**TAPFUMA RONALD JONGWE**

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# MIDLANDS STATE UNIVERSITY



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## **Dedication**

To Zvikomborero; your continuous encouragement and belief in my potential remains a source of inspiration, for that, you will always be treasured.

To Chelsy, Jayden and Tyler for giving me the strength and drive to pursue excellence, you will always be treasured.

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## ACRONYMS

UDHR	Universal Declaration of Human Rights
ZLHR	Zimbabwe Lawyers for Human Rights
MDC	Movement for Democratic Change
ZANU PF	Zimbabwe African National Unity People's Front
LHC	Lancaster House Constitution
CSOs	Civil Society Organisations
FTLRP	Fast Track Land Reform Program
COPAC	Parliamentary Select Committee on the Constitution
GNU	Government of National Unity
NCA	National Constitutional Assembly
ZHRC	Zimbabwe Human Rights Commission

## **Abstract**

*This study sought to carry out a comparative analysis of the Lancaster House Constitution and the Constitution of Zimbabwe (2013) in the context of human rights protection. Through the gathering and subsequent analysis of data gathered from both primary and secondary sources the research sought to establish the provisions of the 2013 constitution that guarantee human rights protection and also establish the provisions of the Lancaster House Constitution that were a direct violation of human rights and establish how such provisions have been dealt with as provided for by Chapter 4 of the new constitution or any other provisions provided for in the new constitution. The research was mainly qualitative in nature and used interviews and FDGs as the sources of primary data whilst a thorough document analysis was carried out so as to gather secondary data and build a better understanding of the background of the research problem. The research established that the 2013 Constitution is by far a better off document than the Lancaster House Constitution as it provides for a Declaration of Rights that is binding and enforceable at law. The research also noted that Zimbabwe stands to enjoy a better human rights record under the new supreme law as among other issues it ensures the separation of powers and establishes key institutions and provides for judicial avenues that may be sought in cases where human rights are violated.*

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# CHAPTER I

## INTRODUCTION

### 1.1 Background of study

Like most countries, Zimbabwe has international legal obligations to observe, uphold and respect human rights for all its citizens and all human beings within the country's jurisdiction. The United Nations Human Rights (2013) avers that such international legal obligations should be openly offered and entitled to anyone regardless of their ethnic origin, race, sexual orientation, political affiliation and religion or any other status. As such, as a signatory and state party to numerous international and regional human rights treaties, declarations and statutes Zimbabwe has overtly accepted its human rights obligations by becoming state party to the said statutes and treaties. Over the years Zimbabwe has ratified and domesticated several regional and international human rights treaties and statutes such as the;

- African Charter on Human and Peoples' Rights (ACHPR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- African Charter on the Rights and Welfare of the Child (ACRWC)
- UN Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention)
- International Convention on the Rights of the Child (ICRC)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)
- UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)

By virtue of becoming a state party to these treaties and conventions Zimbabwe was/is obliged to uphold and guarantee fundamental rights such as the right to freedom of expression, right to life, children's rights, the rights of minority groups, women's rights, the right to freedom of association and assembly, the right to an adequate standard of living, the right to human dignity and the right not to be subjected to torture or any forms of degrading inhuman treatment among other fundamental rights. It is imperative to note that the State can only guarantee the protection and upholding of such rights if it has a legal framework that ensures the protection of these human rights in place, as Human Rights Watch (2009) notes that member states need to go beyond being mere signatories to international human rights treaties by ratifying and passing laws that resonate with such treaties. Perhaps the key point that is brought to the fore through this argument is the notion that there is an inseparable relationship between the constitution of any country and its human rights record.

Owen (2010) underscores this relationship when he notes that "Human Rights can only be respected, observed, guaranteed and protected by state nations if there are legal provisions within the constitutional law frameworks of such states that ensure that all the human rights as ascribed by the Universal Declaration of Human Rights (UDHR) and other alike international and regional treaties are fully realized." It is Owen's (ibid) assertion that human rights protection can only be fully realized if nations make deliberate effort to come up with national laws that ensure the protection of human rights. This school of thought is also reiterated by Bezuidenhout and Nel (1995) when they posit that States have an obligation to implement treaty provisions of human rights instruments that they are party to. Against this backdrop it is important to note that states indeed play a very pivotal role in guaranteeing the protection of human rights by ensuring that there are legal provisions for such protections.

The Lancaster House Constitution of Zimbabwe which was in effect from independence in 1980 up to the 22<sup>nd</sup> May 2013 when President Mugabe signed into law the new Zimbabwe Constitution has been accused of having several provisions and Acts that violated fundamental human rights. Despite Zimbabwe being a state party to the prior mentioned treaties, the Lancaster House Constitution was laden with numerous Acts that were a direct violation of human rights as Amaral (2012) notes that the 1979 Lancaster House Constitution, with its 19 amendments had singularly failed to defend human rights and the rule of law. The weaknesses of the Lancaster House Constitution in terms of upholding human rights are also lamented by Hatchard (1993) when the scholar argues that the gradual deterioration in the rule of law in the country since the attainment of independence in 1980 has raised questions on the fundamental principles of policing and human rights. The essential point to note here is that while scholars like Owen (ibid) and Amaral (ibid) argue that the constitution should be the fulcrum and repository of human rights protection the Zimbabwean case has however been uniquely poignant as Human Rights Watch (2008) notes that the Zimbabwean government under the leadership of President Robert Mugabe and specifically under the Lancaster House Constitution has ‘legally’ violated fundamental human rights as it continues to amend and pass constitutional provisions that infringe on human rights.

Over the years the Zimbabwe government had passed laws like the Interception of Communications Act [Chapter 11:20], Broadcasting Services Act [Chapter 12:06], Miscellaneous Offences Act, the Presidential Powers (Temporary Measures) Act [Chapter 10:20], the Public Order and Security Act [Chapter 11:17], the Access to Information and Protection of Privacy Act [Chapter 10:27], Land Acquisition Act [Chapter 20:10] read with section 16 of the Constitution as amended and some aspects of the Criminal Law (Codification

and Reform) Act [Chapter 9:23]; among other laws which were viewed as an infringement of peoples' fundamental rights as enshrined in the numerous treaties that Zimbabwe is part of. This view is also seconded by Makwerere et.al (2012) when they note that in Zimbabwe, there are some pieces of legislation that are not in sync with the international minimum human rights standards. A poignant example is POSA which curtails the rights of freedom of association which is a violation of Article 9 of the UNDHR.

Zimbabwe's human rights record over the years has become a cause of concern as the state has violated fundamental human rights through constitutional provisions. The late former Zimbabwean Minister of Legal Affairs Edison Zvobgo (2002), in a parliamentary debate of the draft bill of AIPPA before it was passed into law argued that "I can say without equivocation that this bill in its original form, was the most calculated and determined assault on our liberties guaranteed by the constitution..." To Zvobgo (ibid) the constitution was supposed to guarantee human rights but surprisingly, the Lancaster House constitution was "assaulting" the people's liberties, thus cementing the earlier given views that the Lancaster House constitution was very weak in guaranteeing human rights protection as it actually had provisions that violated human rights.

With the coming in of the new Zimbabwe constitution in 2013 human rights activists, constitutional lawyers, political actors and other interested parties have applauded the new law as an epitome of human rights protection. This is mainly because the new Constitution provides for and guarantees for a plethora of human rights through the Declaration of Rights (Chapter 4), including some rights that were formerly not guaranteed under the Lancaster House Constitution. Against this backdrop there was a need to dig deep into the provisions of the new constitution as set out under Chapter 4 (Declaration of Rights) or any other provisions of the new constitution

and establish how the new constitution is an antithesis of the Lancaster House constitution in regard to human rights matters, and at the same time make an assessment to establish if there are prospects of a better human rights record under the new supreme law.

## **1.2 Statement of problem**

With many concerned parties expressing hope in the Declaration of Rights (Chapter 4 of the Constitution of Zimbabwe 2013) as a new trajectory to full human rights protection and observance in Zimbabwe, It is within this vein that this research sought to assess Zimbabwe's human rights record as provided for under the Lancaster House Constitution and at the same time identify and shed more light on provisions from the new Zimbabwe constitution that are likely to create opportunities and prospects for positive change in as far as human rights protection and observance are concerned. This was coming from a background where Zimbabwe's pre and post-independence histories have been marred by allegations of human rights violations through arbitrary means as well as through constitutional provisions. This murky human rights record especially under the Lancaster House Constitution has affected Zimbabwe's international relations in many facets.

The suspension of the country from the Commonwealth in March 2002 for human rights violations during the presidential election of 2002 is one of the many poignant examples of how Zimbabwe's human rights record has hindered the country's relations with other states and international bodies. This international isolation has had negative effects upon the country's economic growth thereby affecting all facets of development as the European Parliament (2011) in its report on the impact of economic isolation of Zimbabwe, Iran and North Korea notes that,

“targeted sanctions have restricted the ability of Zimbabwean actors to access international credit and grants”; and this has contributed to a dire economic situation.

Considering that most of the human rights violations that led to the said isolation were committed under the auspices of the Lancaster House Constitution there was a need to carry out a thorough analysis of the provisions of the new Constitution in terms of human rights protection so as to establish prospects of a better human rights record under the new supreme law. A systematic analysis and documentation of provisions of the new constitution that uphold human rights and promote human and social development was envisaged to provide valuable information on how the new constitution is an anti-thesis of the Lancaster constitution especially in terms of human rights protection thus making a significant contribution to the sustainable development agenda as UN Human Rights (ibid) avers that sustainable development can only be attained where human rights are observed and protected. It is in this context that the study was carried out, with the objective of highlighting and discussing provisions of the new Zimbabwean constitution that promote and guarantee human rights thereby paving way for legal provisions that will guarantee a good human rights record for the country. The research was thus premised on the notion that protection and respect of human rights significantly contributes to sustainable development.

### **1.3 Theoretical framework**

There is a strong nexus between practice and theory in the field of human rights and international law. As such, this research process was based on Alexy’s Theory of Constitutional Rights (2002) which argued that, in any country which has a declaration of rights or a bill of rights, constitutional rights thinking is an essential part of the governance and legal process of that



particular country. Alexy's Theory of constitutional rights is premised on the notion that human rights protection and observance is only guaranteed by a national constitution that incorporates a bill of rights thus protecting and guaranteeing human rights in the process, Alexy (2002). Within this vein Menéndez and Eriksen (2006:5) commenting on Alexy's theory aver that the theory is a *“chief theoretical achievement, which has made a major contribution to the development of a normatively grounded, post-positivistic analysis of constitutional law...a seminal contribution to the analysis of how legal reasoning on fundamental rights is intimately connected to the very foundation of democracy and the constitution”*.

The theory of constitutional rights thus represents a magnum opus in modern legal and constitutional theory and provides an exceptional analytical framework to explain the inseparable and inevitable relationship between the observance and protection of human rights and the national constitutions of individual countries especially in the context of sustainable development. Menéndez and Eriksen (ibid) underscore that “the very survival and development of open democratic societies depends on taking fundamental rights seriously”, as human rights are linked to sustainable development. Against this backdrop this research thus sought to establish if the constitution of Zimbabwe (2013) through the Declaration of Rights will create opportunities of a better human rights record thereby contributing to sustainable development as Alexy's theory on Constitutional rights posits that human rights observance and respect can only be guaranteed through a declaration of rights in the national constitution and were such a bill exists and is honored, national development becomes inevitable.

## **1.4 Objectives of the research**

**The specific objectives of the research were as follows:**

- i. To identify and explain provisions of the new Zimbabwean constitution that guarantees human rights.
- ii. To determine the prospects of a better human rights record as provided for by the new supreme law
- iii. To carry out a comparative analysis of the Lancaster House Constitution and the new Constitution of Zimbabwe (2013) in the context of human rights protection.
- iv. To identify and document provisions of the Lancaster House constitution which were a direct violation of human rights and discuss how such provisions have been addressed in the new constitution.

## **1.5 Research questions**

The specific research questions were as follows:

- i. What is the role of the constitution in guaranteeing human rights protection
- ii. What are the specific provisions of the new constitution that guarantee human rights protection and observance
- iii. In what ways do the said provisions guarantee human rights
- iv. What are the major differences and similarities of the Lancaster House Constitution and the new constitution of Zimbabwe in as far as protecting and guaranteeing human rights is concerned
- v. Are there any prospects for a better human rights record under the new constitution

- vi. What ways can be used to educate people about the provisions of the new constitution that guarantee the protection of their fundamental rights

## **1.6 Literature review**

Gall et.al (2000:11) posits that “unless your research is based upon fellow researchers’ works, your research is bound to go nowhere”. It is within this vein that this section will locate the research within the context of existing literature thereby providing a framework for a better understanding of the human rights discourse in general as well as the imperative role of the constitution in guaranteeing human rights as mandated by international law. In synopsis a review of existing studies, research and literature was carried out so as to establish how other scholars have examined the human rights discourse in Zimbabwe vis-à-vis the constitution as a supreme law that guarantees such rights. The section will explore diverse themes on the symbiotic relationship between human rights and country constitutions which have already been studied and which connect the aim and research questions in this study to a broader research viewpoint.

The importance of human rights in the modern world cannot be undermined at any point and time. The human rights phenomena has grown over the years and gained prominence as it continues to directly and indirectly influence different spheres of human development be they political, social, economic and or environmental. In pointing out to the vitality of human rights in modern development Henkin (1990) underscores that *“Human rights are the idea of our time, the only political-moral idea that has received universal acceptance...Human rights are enshrined in the constitutions of virtually every one of today’s 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian;*

*market economy, socialist, and mixed; rich and poor, developed, developing and less developed.*” By and large, Henkin (ibid) is arguing that human rights cut across all borders and countries have universally accepted them regardless of the differences in political and economic ideologies that countries have. Human rights have thus become the only phenomenon where there is global acceptance as all member states of the UN have enshrined at least some key components of the UDHR.

Donnelly (2003:10) notes that the universality of human rights stems from the conception that human rights are inalienable, self-evident and applicable to all human beings. It is imperative to point out that such arguments are linked to natural law and western philosophy which indirectly argued that human rights were ‘pre-political’ and thus should be not affected or influenced by variations and changes in the cultural or political environ. While there has been debate on the universality of human rights as different regions have come up with their own regional human rights statutes so as to incorporate the political and cultural realities of their region it should be noted that the UDHR remains the blue print document of such treaties thus reaching the conclusion that human rights indeed hold universal values which have been accepted by all nations as standard practice.

Against this backdrop the research noted that while the issue of cultural relativism plays a key role in the defining and contextualization of human rights, the underlying factor which remains is that state nations have a consensus to a greater extent on some fundamentals that need to be upheld and respected in the context of human rights. An example of Zimbabwe was given that while the country has endured an abhorrent human rights record it had also made significant strides in protecting numerous rights under the LHC. It is within this backdrop that Feltoe and

Sithole (2010:20-21) acknowledged that despite the country's human rights record it had also passed key laws that are instrumental in protecting human rights such as the; Administrative Justice Act [*Chapter 10:28*] Disabled Persons Act [*Chapter 17:01*] which advances the rights of disabled persons and guards against their discrimination in key areas like employment, Legal Age of Majority Act [*Chapter 8:07*], which protects against children abuse and child marriages; Domestic Violence Act [*Chapter 5:16*] which guards against physical violence in the home and the Labour Act [*Chapter 28:01*] which speaks of issues related to labour rights, among other Acts. Perhaps the key point to note from the above given argument is that progress and effort was made by the successive governments of Zimbabwe to try and protect certain rights under the LHC.

While Henkin (ibid) points out to the universality of human rights, he also makes another interesting reference; on the pivotal role of national constitutions in addressing human rights matters. It is Henkin's (ibid) contention that human rights are part of constitutions of individual nations be they developing or developed, poor or rich, democracies or authoritarian states. In summary one can thus conclude that the relationship between national constitutions and human rights protection can thus not be undermined as the universality of human rights is brought out and maintained through the different national constitutions that have enshrined human rights as guided by the UDHR. It is this line of thinking that informed the research process were the researcher saw the need to look at the new constitution of Zimbabwe (2013) and try to analyse it in comparison with the LHC in the context of human rights as a lot of advocacy work had been put by different human rights organisations during the making of the new constitution so that the country came up with a constitution that guaranteed and protected human rights.

While different scholars have alluded to the paramount role of the constitution in guaranteeing human rights thereby contributing to sustainable development, Zimbabwe's post-independence legal history has been dogged by cases of human rights violations. In its letter to President Mugabe dated 4 September 2013, the Human Rights Watch declares that; "*We at Human Rights Watch, ..., write to you to express our concerns about the human rights situation in Zimbabwe and to request that you give priority to improving human rights during your presidency.*" In synopsis this letter can serve as a testimony to the disturbing human rights situation that Zimbabwe had endured before the introduction of the new constitution in 2013 as the dire human rights situation prompted the Human Rights Watch to write a personal letter to President Mugabe to encourage him to see to it that the country prioritizes human rights respect and protection.

Within the same context the Africa Union (AU) in 2009 produced a report that was adopted by its Executive Council prior to the AU Annual Head of States Summit of 2009 in which it abhors the Zimbabwean government for arbitrary arrests and torture of opposition members, civic activists and human rights lawyers. The report among other areas of concern lamented a deteriorating human rights record in Zimbabwe especially during the Presidential run-off of 2008. By and large it was noted that there were a lot of concerns that were raised by different national, regional and international stakeholders in regard to Zimbabwe's human rights situation.

Basing on these submissions were different scholars have underscored the critical role of the constitution in guaranteeing human rights protection, the interdependent relationship between the respect for human rights and sustainable development as well as the disturbing human rights

record that Zimbabwe had built under the LHC, the researcher was prompted to carry out this research and do a comparative analysis of the LHC and the new constitution in the context of human rights protection especially given that the new constitution includes a declaration of rights which was not part of the LHC.

### **1.7 Purpose and significance of study**

The purpose of the study was to identify, document and assess the provisions of the new constitution that guarantee fundamental human rights and determine if such provisions will create prospects for a better human rights record under the new supreme law. The study also sought to identify provisions of the Lancaster House Constitution that were a direct violation of fundamental human rights as enshrined in the numerous international human rights treaties that Zimbabwe is state party to and discuss how such provisions have been addressed under the new Constitution.

While literature and information on human rights protection and violations in Zimbabwe under the Lancaster House Constitution is fairly available it is essential to note that literature on the new Zimbabwean constitution in general and the human rights guarantees in specific is still scanty as the supreme law is still new thus creating the need for more research and coming up with more informative literature in regard to the new law. On paper the new Zimbabwe constitution has been upheld for guaranteeing fundamental rights which were previously violated under the Lancaster House Constitution, it was thus imperative to carry out research that sought to do a comparative analysis of the two laws in the context of guaranteeing human rights protection. With such information being brought to the fore the necessary need for research that

seeks to shed more light on the prospects of a better human rights record under the new law can thus not be underestimated.

Besides contributing to the little literature that is there on the new Zimbabwe constitution, the research will also serve as a source of information to scholars, academics, institutions and ordinary people including those that do not have a legal background as it will seek to unpack the human rights benefits of the new constitution and explain them in a language that is understandable to all regardless of their educational background. Within this vein the research will thus serve as a point of reference in spaces and places where those that seek to develop a better understanding about human rights as guaranteed by the new Zimbabwean constitution may be seeking beacons of expertise be it in the public sector, academic sector, private sector, legal sector or any such sector that may seek clarity on the symbiotic relationship between the new law and human rights.

The research was therefore essential as it identifies and documents provisions of the Lancaster House Constitution that were an infringement to fundamental human rights thereby contributing to existing literature on the subject. The significance of the study rested in identifying and clarifying provisions of the new constitution that ensure the total guaranteeing, protection and respect of human rights especially such rights that were previously subjugated under the Lancaster House constitution. The relevance of the research is also underpinned in the fact that the research can also identify some key rights that are still missing in the new constitution thus passing recommendations on future improvements through relevant constitutional amendments, new Acts of Parliament and or the ratification of other treaties that Zimbabwe is a signatory to.



The Legal Resource Foundation (2009) and the Zimbabwe Lawyers for Human Rights (2011) concur that knowledge on human rights in Zimbabwe is limited and only circulates among a few institutions and individuals that are working specifically in the field of human rights as such the research also identifies ways in which these fundamental rights that are now guaranteed by the constitution could be shared and made known to the general populace so that people are well informed of their fundamental rights as guaranteed by the supreme law of the land.

## **1.8 Research methodology and methods**

### **1.8.1 Research Approach**

In order to fully address the research questions given herein, the research approach was qualitative in nature. While the issue of human rights can be static as enshrined in different provisions that spell out those particular rights it is imperative to note that in practice the human rights discourse is largely dynamic thus a qualitative approach was seen as the most ideal research approach as the data that the researcher was looking for is largely based on perceptions and individual reflections based on past legal and human rights experiences and the provisions of the two constitutions under analysis.

### **1.8.2 Research Design**

The research was analytical as it undertook an analysis of both primary and secondary data sources. Primary data was gathered from in depth interviews with key informants. A total of 25 constitutional lawyers, judicial officers, human rights activists and representatives from human rights organisations were interviewed during the research process. Two separate Focus Group Discussions (FGDs) were also conducted with legal officers from the Zimbabwe Legal Aid Trust

and officers from the Legal Resource Foundation with the information received through these methods analysed and incorporated into this analytical study. Document Analysis was also used as the main source secondary data sources in the form of review of; related literature, past human rights cases, journal articles and parliamentary debates among others which were reviewed in order to gain a better understanding of the historical background of the research.

### **1.8.3 Target Population of the Study**

For the purposes of this research the population was comprised of key informants who were drawn from constitutional lawyers and legal experts, human rights activists and representatives of the judiciary. The research also drew representatives from Civil Society Organisations (CSOs) whose prime mandate is to advocate for the respect and observance of human rights as such organisations have also carried a lot of research and documentation that may be highly beneficial to the research process. The said individuals and organisations were targeted because the researcher believes they had the adequate knowledge, experience and information that was required to achieve the research objectives of the study.

### **1.8.4 Sampling procedures**

The study was carried out using respondents based in the city of Harare. The city was selected because of the high number of constitutional experts based in the city and also considering that the two local NGOs that provided participants for the FDGs are located in the city. Considering that the researcher is based in Harare practical considerations like accessibility, time and resources also played a pivotal role in the final selection of the geographical location of the research.

The researcher used purposive sampling and specifically the snowballing technique as Isaac and Michael (1997:223) posit that the snowball technique is the best sampling method in -situations where the researcher may be seeking information rich cases and key informants who may have first-hand information on the subject under review. The researcher requested key informants to recommend individuals and organisations that are well knowledgeable about the human rights situation in Zimbabwe vis-à-vis the provisions of the Lancaster House constitution and the new constitution of Zimbabwe. This referral process was repeated till those that are more knowledgeable in regard to the matter under study were identified through repetitive reference. Feltoe and Sithole (2010) noted that human rights advocacy, human rights research and documentation in Zimbabwe has mostly been carried out by organized groups of lawyers like the Zimbabwe Lawyers for Human Rights, human rights activists and also by NGOs and CSOs that have a direct interest in the field of human rights. As such the sample population in this study was therefore biased towards the identified groups as there was an underlying research assumption that they possess the relevant knowledge needed for the attainment of the research objectives.

### **1.8.5 Instruments**

Basing on the available and reviewed literature a semi-structured questionnaire with open ended questions was designed and used to interview key informants. It is imperative to note that a different questionnaire was used for the respondents from the CSOs and NGOs as compared to the questionnaire that was used for constitutional lawyers and individual human rights activists as the information to be gathered from these two sources was anticipated to be different as they deal with matters of human rights and the constitution in different settings which are both,

however, paramount to the research process. An FGD guide was also used to guide the FGDs that were conducted.

### **1.8.6 Data Collection**

Dauids et al. (2005:174) notes that the best results of a qualitative study can be attained through a plurality of data collection methods. As such, the research used in-depth interviews and focus group discussions as the said methods of data collection resonate well with exploratory research as they allow the unearthing of new components of the problem under study by detailed exploration of the views provided by respondents. Focus group discussions were deemed to be particularly appropriate to collect data on human rights and the constitution as they allow for an open discussion and exchange of perceptions and in the process provide a better and wider understanding of the topic under study.

### **1.8.7 Data Analysis**

Considering that the research was largely qualitative in nature, a comprehensive data analysis was carried out using appropriate techniques such as mind mapping so as to reduce the data and organize it into patterns, relationships, themes and trends. As advocated for by Nachmias and Nachmias (1996:294) and Mouton (2001:108) data interpretation involved extracting and deducing data and incorporating the views of past scholars into the deduced data so as to ensure that the research findings will not be a mere duplication of existing literature but a new body of knowledge that would have been drawn from primary research sources.

## **1.9 Delimitation of study**

The research was carried out using respondents from the city of Harare. Despite the limited geographical coverage it was anticipated that the research findings can however be generalized to the whole country as the variable under review is a national document whose mandate is nationwide and is not influenced by geographical location. The research sought to identify and explain the provisions of the new constitution of Zimbabwe that protect and guarantee human rights and determine the prospects for improvement as perceived by constitutional lawyers, human rights defenders and activists and human rights oriented non-governmental organizations based in Harare.

## **1.10 Limitations of study**

The major constrain in this research was time since the research was effectively carried out in less than three months. This may have affected the research process as Cally (2001) postulates that time is an indispensable source that inevitably determines the quality, validity and generalization of any research findings. The researcher would have preferred to also cover other respondents outside Harare but due to the highlighted limited time frame and a limited research budget, the research was mainly concentrated in Harare. Furthermore the research was confined to Harare as it was a qualitative research were Eichelbeger (1990) notes that representation is not a prerequisite in qualitative research. The research focused on identifying and explaining provisions of the new constitution that guarantee human rights protection and based on the findings went on to make predictions for future scenarios but did not go on to test the research

findings as testing the findings required experimental research, which was outside the delimitation of this study.

### **1.11 Ethical considerations**

Walliman (2006) avers that ethics are the rules of conduct in research. As such, ethics play a pivotal role in any research process as they serve as the code of conduct on how the researcher carries out the research, conducts' him/herself during the research process as well as how he/she uses the gathered data. Against this backdrop the research took into cognisance the following ethical issues during and after the research process;

- The research background and the objectives of the research were shared with all research participants and respondents so that they have a full understanding of the research.
- Due consent was sought from all the research participants and their right to willingly participate in the research was fully respected
- All secondary data sources to be used during the research process were acknowledged.
- After completion the researcher will share the research findings with the research participants.

### **1.12 Chapter Outline**

The entire dissertation will comprise of five chapters including this introductory chapter. The next chapter will provide an overview of the human rights discourse as well as the nexus between human rights and the constitution, the human rights and sustainable development debate will also be explored. The third chapter will dwell on the Lancaster House Constitution (LHC) and the struggle for constitutional reform in a post independent Zimbabwe. Zimbabwe's human rights record under the LHC will also be discussed. The fourth chapter will focus on the new

Zimbabwe constitution and try to give more insight on the new supreme law specifically within the paradigm of human rights protection. The fifth and final chapter will draw a comparative analogy of the two constitutions in question, with the idea of reaching a conclusion on the contribution of the said supreme laws to human rights protection in Zimbabwe. The sixth chapter will conclude the thesis by providing a summary of the key findings and arguments made throughout the research process.

## **CHAPTER II**

### **HUMAN RIGHTS OVERVIEW, THE CONSTITUTION AND THE HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT DEBATE**

#### **2.1 Introduction**

While the gist of the research process was to carry out a comparative analysis of the two successive constitutions of Zimbabwe namely the LHC and the Constitution of Zimbabwe (2013) in the context of human rights protection, the researcher saw it fit to first give an overview of the human rights discourse including a discussion on how the human rights idea has developed and evolved over the years. This was premised on the argument that an appreciation of human rights debates in the modern context can only be better articulated through a good understanding of the historical journey of the human rights phenomenon. Against a background where Zimbabwe's poor economic growth and development challenges have been attributed to a myriad of factors including the country's poor human rights record it was also imperative for the research process to unpack the supposed nexus between human rights observance and protection and sustainable development. As such this chapter will focus on the evolution of the human rights discourse, the relationship between human rights protection and the constitution as well as the human rights and sustainable development debate.



## **2.2 The Evolution of the Human rights Discourse**

While the human rights discourse only started to take precedence in the post 2<sup>nd</sup> world war period, Flowers (1998) argues that as late as the 13<sup>th</sup> century human rights were already into practice as people in each society were ascribed certain responsibilities and rights through their membership “in a group, a family, indigenous nation, religion, class, community, or state”. Gibson and Reacher (2007) writing in the International Journal of Human Rights support Flowers’ assertion when they highlight that the biblical teaching of “do unto others as you would have them do unto you” is evidence enough that human rights were already there especially from a religious perspective as the Hindu Vedas, the Bible, the Koran, the Babylonian Code and the Analects of Confucius are five of the oldest written sources in which matters of people’s rights, duties and responsibilities are discussed, Flowers (1998). It is thus important to note that the human rights discourse has evolved over the centuries and this shows the importance of human rights within any civilized society as literature shows that ancient writings like the Christian bible spoke of issues related to human rights albeit in an indirect way.

Perhaps the key point to note is that all societies have had systems of executing justice and practice propriety as well as ways of tending to the social needs of their members. It is within this given context that Shinman (1993) notes that “...documents asserting individual rights, such as the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791)” thus serve as the written forerunners to a plethora of modern human rights treaties and declarations.

While most of the said documents were translated into binding policies and laws in their different countries Flowers (1998) notes that one common thing about them despite the

difference in the countries of authorship and origin is that they excluded the rights of women, members of certain races, members of particular religious, economic, social and political groups were also excluded. It is thus the contention of this discourse that while human rights were already in existence and enshrined in the given documents they were mainly serving the rights of white males and excluded all other groups including white women. The French Declaration on the Rights of Man and Citizen (1789) is one typical document that points out to the exclusionary rights that were in practice during the periods in question as its name alone was a reflection of human rights being a privilege of the white males only. Shinman (ibid) notes that despite the shortcomings of these precursor documents, oppressed people throughout the world have alluded to the binding principles of the said documents in their quest to assert the right to self determination.

Gordon (2003) notes that the idea of human rights as we know them today, whilst borrowing from the precursor documents referred to earlier on, was moulded mainly after the second world war as the brutal killing of over six million Jews, gypsies and persons with disabilities by the Nazi German horrified the world and reminded the global village that there was a need to have universally accepted standards on matters related to the value placed upon human life, international justice and human dignity. Flowers (1998) notes that after the 2<sup>nd</sup> world war there were trials in Nuremberg and Tokyo where officials from the defeated nations were tried and punished for war crimes, crimes against humanity and crimes against international peace.

The key point to note from the said trials is that they served as the basis for establishing the Universal Declaration of Human Rights (UDHR). Moyn (2010) notes that after the 2<sup>nd</sup> world war governments committed themselves to the establishment of the United Nations, whose primary mandate was to promote international peace and prevent future conflicts, especially those of the

magnitude of the 2<sup>nd</sup> world war. The world wanted to ensure that history would not repeat itself and never again should people be unjustifiably denied shelter, life, personal identity, nationality and freedom. Moyn (ibid) notes that the importance of human rights was underscored by President Roosevelt's State of the Union address in 1941 when he advocated for a world founded on fundamental freedoms and human dignity. Bryce and Cohen (2011) writing about the history of human rights note that Roosevelt's speech of 1941 indeed came across as a global call for standard human rights aimed at protecting the general citizenry from wanton abuse by their governments, agreed human rights standards through which member states could be held liable for the treatment of those living within their jurisdiction.

Against the given background the United Nations upon its formation in 1945 pledged to ensure the total protection of human rights for all human beings. As a way of achieving this goal the UN set up a Commission on Human Rights and mandated it to come up with a framework that defines fundamental human rights and the role of states in safeguarding these rights. Bryce and Cohen (ibid) note that the commission's work eventually resulted in the production of the Universal Declaration of Human Rights in 1948. In highlighting the essential role of the UDHR in international law and safeguarding human rights, Faun (1999:46) noted that upon its adoption by less than 60 member states in 1948, the UDHR stamped authority in international law as like the United Nations Charter, it could cut across nations thus making governments accountable to the international community in matters of how they treat their citizens.

The UDHR thus became the fulcrum of international relations and international law especially in matters related to equality, justice, freedom, human dignity and human rights in general. Since its inception the UDHR has had a substantial influence on a global scale. The UN Human Rights website notes that the principles of the UDHR have been integrated into the constitutions of most

member states of the United Nations and while it is not a legally binding document the UDHR serves as customary international law as the world refers to it as a “common standard of achievement for all people and all nations.”

Flowers (ibid) explains that “...with the goal of establishing mechanisms for enforcing the UDHR, the UN Commission on Human Rights proceeded to draft two treaties: the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR).” The key point to note from Flowers’ explanation is that through the advent of the UDHR numerous international treaties and declarations have been drawn out and adopted with the main purpose of strengthening and effecting the provisions of the UDHR. The ICCPR, the ICESCR, the CEDAW, the ACHPR, the CRC and the CPED among others are some of the international statutes that have been developed over the years with the sole mandate of protecting different human rights.

The trend of developing binding human rights treaties and statutes has not been a preserve of the international community but has also cascaded down to continental and regional bodies. For example the Africa Union has developed its own specific charter on Human rights referred to as the African Charter on Human and People’s Rights (ACHPR) and the SADC region has also come up with specific statutes like the SADC Protocol on Gender and Development which speaks out on issues of women’s rights. Heyns (2005) noted that while continental and regional bodies adopted the UDHR and other international instruments, they also modelled their regional treaties in line with the norms and values specific to their individual regions. For example, part of the preamble of the ACHPR reads, “Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights;” in synopsis, while human rights are

universal it is imperative to note that certain aspects of human rights have also been viewed from a historical and cultural perspective thus the development of regional human rights treaties such as the ACHPR, the European Convention on Human Rights and the American Convention on Human Rights.

Against all the given history and background information it was imperative for the research process to unpack the history and evolution of the human rights concept as such a reflection helped the research process to not only understand how the human rights discourse has evolved over the years but to also locate the importance of human rights in development and also establish why national constitutions should serve as a repository of human rights protection. A look at the evolution of human rights was also pertinent to the research process as it widened the researcher's understanding of how human rights matters go beyond national borders but above all this historical flashback was essential in that it widened the understanding of human rights thus significantly adding value to the research process especially in trying to address some of the research questions.

### **2.3 The Role of the Constitution in Guaranteeing Human Rights Protection**

Carter (2008) avers that constitutions regulate the rapport between the state and its citizen's and thus form the foundation for political, civil and human rights. It is Carter's (ibid) contention that the constitution by the virtue of it being the supreme law of any nation thus serves as the repository of human rights protection and observance. The constitution of any member state that is signatory and state party to the numerous international human rights treaties are thus supposed to guarantee human rights and ensure that people's fundamental rights are protected through constitutional provisions. Alexy (2002) also underscores the imperative role of the constitution in

guaranteeing human rights through a theory called the Constitutional Rights Theory. The key point to note from Alexy's theory is the argument that human rights and sustainable development are inter-dependent. By and large there is a plethora of literature and scholars who have pointed out the symbiotic link between human rights protection and national constitutions.

Neuman (2003:1863) notes that "Two leading systems exist today for protecting the fundamental rights of individuals: constitutional law and international human rights law. . . .for liberal states that actively enforce constitutional norms, the relationship between these two systems assumes increasing importance." A closer look at Nueman's ideas will point out to the fact that Nueman (ibid) like Alexy (2002), Owen (2010) and the Human Rights Watch (2009) is also highlighting the essential role of the constitution in guaranteeing human rights and actually refers to the constitution as a "leading system" in guaranteeing human rights. The research process thus noted that human rights protection cannot be discussed nor guaranteed outside the confines of the national constitution.

All the constitutional experts who were interviewed during the research process concurred with Nueman's (ibid) argument as they all noted that human rights protection is guaranteed by state nations only through constitutional provisions that guarantee such protection. A comparison was also given of how numerous countries are signatories to different human rights treaties but have failed to domesticate and ratify such statutes into their national laws. This therefore means that such states are not legally bound by such statutes as they have not incorporated them into their national laws. Feltoe and Sithole (ibid) support this notion when they note that Zimbabwe has failed to ratify the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment and the Rome Statute on the International Criminal Court. While

torture is a not just a criminal offence but also a gross human violation one respondent from the Zimbabwe Human Rights Commission (ZHRC) noted that the government cannot hold itself accountable to matters related to torture from a human rights perspective as it has not acceded the treaty that guards against torture. In a nutshell the key argument that is derived from these submissions is that the constitution indeed serves as the fulcrum of human rights protection as all international treaties and conventions that member states become part to, still have to be ratified so that they are in line with the constitutional provisions of individual members states thus cementing the argument that there is an inseparable relationship between human rights protection and the constitution. This view thus made an interesting perspective for the research process given that the research aimed at comparing the two successive constitutions of post independent Zimbabwe in the context of their capacity or lack of it thereof, to protect human rights.

The Council of Europe (2007) posits that states and consequently governments have a triple-fold mandate to respect, protect and implement human rights. The state must thus not only respect human rights but must also put in place mechanisms that ensure that human rights are respected between individuals. It is thus imperative to note that the constitution is indeed the hinge of human rights protection in any state as it is the state's instrument of not only protecting but also implementing human rights. The given argument formed the crux of this research given the murky history that the LHC had endured specifically because of its supposed inability to protect human rights complemented by its record 19 amendments and the given argument of the constitution being the mechanism of protecting

Fox-Decent and Criddle (2010) further highlight the imperative role of the constitution in guaranteeing and ensuring human rights protection when they bring forward their theory called

the fiduciary theory on human rights. The scholars underscore that “By reframing human rights as legal entitlements grounded in the state-subject fiduciary relationship, the fiduciary theory provides a fresh perspective.” As such, human rights under the fiduciary theory can be termed to be both institutional and relational as they respond to the needs and demands that may arise from the “relational interactions between public institutions and the people they serve”. The key point to note from this submission is that when the constitution guarantees human rights it does so in a two pronged approach i.e. the constitution should protect the citizens of the state by guaranteeing and protecting their human rights but at the same time, from an institutional perspective, that very same constitution must also spell out the institutional mandate of the state or its delegated institutions in upholding such rights.

This view was also shared by most of the respondents who participated in the research process as they pointed out that while the new Zimbabwe constitution has a Declaration of Rights, there is a need to establish institutions that over see that specific provision. By and large one can thus conclude that the constitutions should go beyond proclaiming laws that protect human rights but should also see to it that the state establishes institutions that will ensure that such rights are indeed protected, as advocated for by Fox-Decent and Criddle (2010) in their fiduciary constitution of human rights.

Against the given backdrop and also considering that human rights are underpinned by impartiality and equality of all human beings Louis (2008) notes that modern organized society cannot afford to arbitrarily discriminate among its citizens because its laws and institutions should be under “a fiduciary obligation to treat people even-handedly, as equal co-beneficiaries of the fiduciary state”. This view adds a lot of weight to the gist of this argument that the



constitution is paramount in terms of protecting human rights as Louis (ibid) argued that issues of discrimination or any form of human rights protection are best addressed in “modern societies” through constitutional provision that should spell out the relations between the state and its subject in the context of human rights.

Cassese (1990) underscores the fundamental role of the constitution in guaranteeing people’s rights when the scholar notes that having a constitution that guarantees and spells out human rights is vital as it imposes certain bench marks on governments and legitimizes the individual citizen’s complaints in cases where fundamental rights and freedoms may have been violated. As such, such norms will then form the basis for the protection of human rights and also ensure the presence of legal provisions that bind even the government itself thus ensuring that the protection of human rights is ensured by all stakeholders. By and large the crux of this argument is that the constitution’s paramount role in the protection of human rights can never be undermined as a constitution ensures and binds even the government to ensure that it plays a role in the protection of human rights. The research thus noted that there is a consensus between human rights advocates and activists alike that a constitution has a dual mandate of ensuring that the state puts in place mechanisms to protect peoples fundamental rights as per the dictates of international law but at the same time the constitution should also hold the state itself as the main guardian of human rights protection.

In discussing some of the key strategies that individual states can employ so as to ensure human rights protection Maiese (2004) identify a myriad of strategies that can be utilised by states in human rights protection. Relevant to this research Maiese (ibid) posits that “...external specialists

can offer legislative assistance and provide guidance in drafting press freedom laws, minority legislation... and can also assist in drafting a constitution, which guarantees fundamental political and economic rights.” The key point to note from the given argument is that to Maiese (ibid) while states can employ different strategies so as to ensure that fundamental rights are protected the constitution still returns its role as the key legal and binding provision in guaranteeing such rights.

In synopsis the research noted that international human rights law has had a great impact on national legal systems. Since the adoption of the UDHR and subsequent human rights treaties, state nations have gone on to pass national legislature that resonates with the said international laws. National courts have referred to international and regional human rights laws and norms in interpreting and develop national law. The research thus noted that international law and human rights treaties, norms and principles can only be internalized and adopted at a national scale through the constitution of the respective country thus reaching the important conclusion that any discussion on human rights protection which is divorced from the constitution of the country in question is a farce as human rights protection can barely be guaranteed outside the confines of the constitution.

While the research has noted that the constitution was identified as a key document in guaranteeing human rights protection, it is imperative to note that more than 90% of the interviewed respondents noted that a constitution that protects human rights best works out in a system where an independent judiciary prevails. These sentiments are also expressed by Macovei (1999) when the scholar underscores that “...as a necessary check on the potential excesses of

both the executive and legislative branches, only an independent and impartial judiciary may effectively guarantee the protection of human rights.” By and large the given argument thus concludes that while the constitution maintains its role of protecting human rights as it engulfs international law and tailors it to national and domestic realities and standards, the success and unmitigated protection of human rights can only be attained in situations where an impartial and independent judiciary exists as the nexus between the human rights protection and the independence of the judiciary are indeed essential elements of safeguarding human rights and guaranteeing human right protection. The research thus concluded that while the constitution is very vital in the protection of human rights its success in doing so strongly hinges on an independent judiciary and law enforcement system, which ensure the impartial protection of human rights and prosecution of human rights violations.

#### **2.4 The Human Rights and Sustainable Development Debate**

The former Secretary General of the UN Kofi Annan once said, "*Humanity will not enjoy security without development, it will not enjoy development without security, and it will not enjoy either without respect for human rights. Human rights and human development are one and the same*". It is against this backdrop that this section of the research will explore the relationship between human rights and development as the research process noted that there is a strong nexus between human rights and development. As such, as the research sought to carry out a comparison of the two successive supreme laws of Zimbabwe it was impossible to carry out this comparative analysis outside the development sphere as the researcher also sought to establish how and if, a better human rights record for Zimbabwe has a significant bearing on the country's development.

The Youth Source Book on Sustainable Development (1995) maintains that the respect and observance of human rights is recognized as a prerequisite for development. The Source Book (ibid) also notes that “If people's fundamental human rights are threatened, if people lack the basic human rights of food, health, education, shelter, freedom of expression and the right to political participation, their ability to participate in sustainable development is hindered.” This perspective brings in an interesting paradigm which maintains that sustainable development can only be realized in an environment where human rights are respected and protected.

In light of the above given assertions one can therefore conclude that human rights and development are inextricably linked. The research noted that human rights and development both share the ultimate paramount objective of improving the well being of humans; improve freedom, dignity and equality of all persons. As such, development and human rights strategies and policies are largely complementary. On one hand development focuses on economic growth and the welfare of citizens while on the other hand human rights ascertained a universal legal regime that defines human rights in the context of 'duty bearers' and 'rights holders'. This universal consensual legal framework has expanded over the years and has been adapted to different social and political environments. The research noted that the nexus between human rights and development gave birth to the rights based approach to development which focuses on the empowerment of citizens so that they are able to prioritise and demand service delivery which they are entitled to and at the same enhance the capacity of governments so that they are able to uphold their mandate of respecting and observing human rights by providing a legal and operational environment that necessitates human rights protection.

The emerging incorporation of human rights in development policies and strategies has thus proved to be a vital tool in the strengthening of participatory and bottom-up approaches meant to empower marginalised groups. The research also noted that beyond the rights based approach, the failure by the global village to combat poverty and other related indexes has been largely fuelled by the failure by some states to uphold and respect certain political human rights. In cementing this argument Hughes and Connolly (2007) gave an example of how some forms of discrimination and cultural practices that violate women's rights like female genital mutilation have an adverse impact on maternal health. The key point noted through this argument is that where certain human rights are violated and not respected this can negatively affect development goals. For example, in the given case, the violation of women's rights retards global progress on meeting some key Millennium Development Goals (MDGs) like MDG number 3 and MDG number 5.

Hughes and Connolly (ibid) also point out to the human rights-development nexus when they aver that while global institutions like the UN and the World Bank used to treat the two (human rights and development) as independent and non-related variables, of late there has been a shift as the fence between the two has been taken down with the UNDP and the World Bank having begun to acknowledge and emphasise the importance of human rights to economic development. The respondents that took part in the research process had a general consensus on this notion as they all opined that where certain economic and social rights are denied this can have an adverse effect on the economic development of the state. For example if the state denies its people their right to education, which is a social right, this may expose the people to poverty thereby eventually impacting on their economic development and well being. Stevens (2012) notes

education is a fundamental human right and provides the basic building blocks for opportunity, social and economic mobility, and a catalyst for growth. As such if a state invests in an inclusive quality education for all its citizens it will be significantly contributing towards national development. Barder (2012) defines development as not only the improvement in the well being of citizens but also the ability of the economic, political and social systems to provide the circumstances for that well being on a long term basis. Barder's (ibid) definition of development draws attention to the inevitable relationship between human rights and development as the scholar covertly posits that the provision of social and economic rights is a pre-requisite for development.

Hammaberg (2008) argues that the issue of accountability is important to human rights as much as it is to development. From a development perspective accountability centres on the need for a judicial system that is effective, inclusive legislation that protects human rights and a transparent political system. Whereas from a human rights perspective accountability is all about the government and states being responsible for protecting their citizens as well as being transparent in their utilisation of resources aimed at development. In a nutshell the notion being brought to the fore here is that certain benchmarks of development can only be attained when certain human rights are respected, observed and protected.

Writing in the book "Development as Freedom" Amartya Sen (2000) opines that development is a "process of expanding the real freedoms that people enjoy". To Sen (ibid), the human rights discourse or the human rights phenomenon is in itself an invaluable component of development thus the attempt to separate the two is spurious and recalcitrant. Freedom is a key variable within the human rights discourse, and Sen (ibid) argues that development and freedom are intertwined.

Perhaps the key point to note is that in the quest for development and the promotion of human rights there is no point and time were the pursuance of human rights will negatively impact development as the other depends on the other. Amartya Sen (ibid) has convincingly argued that press freedom, freedom of expression and free open debates are vital factors in the prevention of famine. This simply means that a starving citizen is likely not to exercise his/her right to freely participate in civic matters. In a nutshell the gist of Sen's (ibid) thinking is that by depriving one right we will be undermining the possibility of enjoying other rights. Sen's ideas were significant to the research process as Zimbabwe provided a good case study of situations where certain rights have been violated in the name of pursuing development and eradicating poverty. A case in point is the Fast Track Land Reform Program (FTLRP) which was implemented in 2000. Sachikonye (2003) notes that the FTLRP was a chaotic process that was marred by human rights violations such as the right to property ownership and even the right to life as some white farmers lost their lives during the process. To the government this process was meant to economically develop the majority poor peasant black families by giving them land which can be a source of wealth and food security.

Against the given backdrop it should be noted that Amartya Sen's (2000) submissions in "Development as freedom" have indeed gone a long way in unpacking the inevitable and interdependent relationship between human rights and development. Hammaberg (2008) notes that the United Nations has taken a stance which promotes and mandates the mainstreaming of human rights standards and principles in all programs that aim at promoting social and economic development. Today, development agencies are engrossed with the 'rights based approach' to development where human rights are mainstreamed into all development programs. This approach means that development strategies, plans and programs should be participatory and consultative

by treating individuals as significant participants and not mere recipients of aid; they should also be non discriminatory and ensure that development programs are pursued in a sustainable manner that ensures the protection of 2<sup>nd</sup> and 3<sup>rd</sup> generational rights.

The UN High Commissioner for Human Rights Ms. Navi Pillay summarises the strong complementary relationship between human rights and development by noting that the right to development is the pivot upon which human rights and development rest. UN Human Rights note that the right to development is an inalienable human right which is entitled to all people thereby the people should participate in this right, contribute to its realisation as they enjoy social, political, cultural and economic development. The whole human rights-sustainable development nexus is explicitly and unequivocally spelt out by Pillay (ibid) in a document titled “Development is a Human Right for All” when she identifies 6 pillars that form the basis of the right to development thereby cementing the notion that human rights and development are two sides of the same coin. Pillay (ibid) underscores that the right to development includes:

- a) People-centred development- that is development which places the human person as the key player, participant and beneficiary development processes;
- b) Human rights-based approach- with specific emphasis on that all development should be pursued in a manner that fully respects and upholds all human rights and freedoms;
- c) Participation-which entails the promotion of free and meaningful participation of people in development programs;
- d) Equity-where emphasis is put on the need for equal, fair and transparent under distribution of the benefits of development



- e) Non-discrimination-a zero tolerance to discrimination on the basis of sex, race, language, religion or political view among others.
- f) Self-determination-sovereignty over resources and self determination by individuals, regions or states.

The above given points clearly summarise the relationship between human rights and development as they explore how human rights are pivotal in pursuing development plans and how development in itself aids human rights protection and observance.

This section of the research explored the emerging global consensus on the inseparable link between human rights and development. This section was of particular interest to the research process as Zimbabwe has endured a damning human rights record under the LHC and at the same time has also had to bear the brunt of a deteriorating development and economic growth that has resulted in a runaway inflation, a deteriorating social service delivery sector and international isolation. Given such a background, exploring the nexus between the two variables namely development and human rights became imperative as the research sought to establish how these two variables are connected in the Zimbabwean context. A full analysis of the said variables vis-à-vis the Zimbabwean situation will be discussed in a later chapter of this discourse.

## **2.5 Conclusion**

This chapter provided key background information that was deemed pertinent for the success of the research process. The history of the human rights concept was discussed with emphasis on how world events and international law have shaped human rights as we understand them today. These historical traverses on the evolution of the human rights discourse was hinged on the

notion that in order to fully understand human rights as we view and understand them today; including their universality it was indeed imperative for the research process to do this flash back as it helped the researcher to have an appreciation of human rights' evolution over the years. The chapter also explored the nexus between human rights and national constitutions; this was done with specific reference to existing literature as well as some submissions shared by the different people that were interviewed during the research process. The Chapter concluded by discussing the interdependent relationship between human rights and sustainable development where it was noted that the two variables are complementary as the existence and promotion of human rights protection and observance will aid development or vice-versa. The discussion on human rights and development was also carried out bearing in mind the Zimbabwean situation where the country has been accused by the international community of violating human rights and at the same time the country's economic growth has plummeted from being one of the largest economies in Africa to one of the worst. The next Chapter will dwell on the constitution making process in Zimbabwe from the pre-independent Zimbabwe to a post independent Zimbabwe and try to locate the human rights debate within the identified processes.

## **CHAPTER III**

### **THE LANCASTER HOUSE CONSTITUTION AND ZIMBABWE'S POOR HUMAN RIGHTS RECORD**

#### **3.1 Introduction**

Having explored the evolution of human rights concept from a global perspective and having outlined the relationship between human rights protection and national constitutions as well as the human rights-sustainable development debate the research will now zero in on Zimbabwe and unpack Zimbabwe's journey in regard to the constitution with emphasis on human rights related provisions. Musekiwa (2013) avers that among other functions the purposes of a constitution are to regulate the exercise of power and to also organize how the power is exercised; the constitution also defines the relationships between individuals and the state. As such, the research felt that it was essential to look at Zimbabwe's history in regard to human rights and constitutional provisions as this has a direct bearing on how we view Zimbabwe's human rights record today.

#### **3.2 The Constitutional History of Zimbabwe in the context of Human Rights**

##### **3.2.1 The Colonial period**

The researcher saw it necessary to first discuss the history constitution making in Zimbabwe specifically in the context of human rights. This emanates from a background where the current constitution of Zimbabwe (2013) has been lauded by different stakeholders as key document that will shape and redefine the history of human rights in Zimbabwe, Adams (2013). Against this backdrop this section of the research will briefly look at the pre-independent Zimbabwe in the context of the then constitution/s vis-à-vis human rights protection and observance. It should be

borne in mind that this section was specifically included so as to serve as a build up to chapters that will follow as the research was premised on the notion that Zimbabwe's constitutional amendments and human rights poor human rights protection under the Lancaster House Constitution were largely influenced by pre-independent events.

Muna Ndulo (2013) argues that the poor human rights protection in Zimbabwe did not start with the ZANU government after independence but was a build-up from colonial systems that had ensured that the rights of the black majority were violated as the minority white colonial government set to ascertain its authority. Ndulo (ibid) notes that in 1923 under the letters patent Rhodesia became a self governing colony with its own constitution. In the context of this research, perhaps what is important to note is that in as much as Rhodesia was established as an autonomous colony, Britain retained the powers to veto legislation of Rhodesia as a measure of safeguarding the rights of Africans. While this power was never exercised by the British as the Africans' rights were violated throughout the colonial rule it is imperative to note that the issue of rights vis-à-vis the constitution or the legal framework were already in practice as late back as 1923. The reluctance of the British to exercise their veto meant that the majority black natives were being governed by a system that was not representative of their needs and worse more a system that did not respect their rights.

The colonial government would go on to pass laws that violated key human rights of the black majority. For example the Land Apportionment Act of 1930 formally introduced the racial discrimination in the allocation of land which led to the majority of the black population having to settle on less than 50% of the land yet they constituted more than 75% of the population with

the white minority occupying 50.8 % yet they were less than 25% of the total population, Palley (1966:265). Through the given example and others not referred to here, the research noted that violation of human rights in Zimbabwe through constitutional provisions did not just start in a post independence Zimbabwe but can be traced back to the colonial government as it perpetuated gross human rights violations against the natives through different constitutional provisions.

The above given assertion was also confirmed by one constitutional lawyer who was interviewed during the research process who noted that independent Zimbabwe seemed to have inherited the culture of passing repressive laws that directly violated human rights from the colonial government. The Native Land Husbandry Act 1951 and the Land Tenure Act of 1969 violated the right to property ownership as they ensured the compartmentalisation of land via racial categories. The respondent also noted that that the Unlawful Organisations Act (1959), the preventive Detention Act (1959) and the Law and Order Maintenance Act (1960) among others were laws that violated black people's rights especially the right to freedom of assembly and association as well as the right to freedom expression.

As the issue of human rights and the constitution continued to haunt the colonial government as a result of mounting pressure from Britain, Rhodesia adopted a new constitution in 1961. The 1961 constitution included a declaration of rights which according to baron (1969) was supposed to be the initial step towards majority rule as the declaration would eliminate all forms of discrimination, promote equality before the law and promote the right and liberties of the individuals regardless of their race. Ndulo (ibid) however laments that the declaration was a paper tiger as it skipped key human rights enshrined in the UDHR like the right to freedom of

movement and the right to free choice of employment. The 1961 constitution was largely flawed and illusory as the rights guaranteed by the declaration were undermined by some carefully far reaching and careful exceptions which allowed the state to discriminately violate the stated rights under circumstances deemed necessary. Baron (ibid) further laments that the major weakness of the 1961 constitution in the context of human rights protection was that it safeguarded all the existing repressive laws and their support machinery as it exempted all pre-existing laws from complying with the declaration of rights. As such despite the entrenchment of the declaration of rights in the 1961 constitution laws like the LOMA (1960) remained in force.

Scholars like Ranger (1985) and Ndulo (ibid) concur that while a new constitution (1965) was drafted as a result of the Unilateral Declaration of Independence (UDI) that Rhodesia had declared in 1965, it is the 1970 constitution that is worthy giving more attention as its provisions precluded the possibility of majority rule. Ndulo (ibid) notes that while the constitution had a declaration of rights this declaration was spurious as the constitution went on to declare that, “...no court shall inquire into or pronounce upon the validity of any law on the grounds that it is inconsistent with the Declaration of Rights.” This meant that Rhodesia was being governed through a constitution that cared less for the protection of the fundamental rights of its citizens especially the black citizens. The CCJP in Ndulo (ibid) noted that human rights violations against the black people continued all the way up to the ceasefire period of 1979, especially violations against the black guerrilla fighters that were fighting against the colonial government or any discerning voices with such violations aimed at instigating fear, deterrence and intimidation.

Based on the gathered and discussed information as well exchanges between the researcher and constitutional lawyers and experts interviewed during the research process, the research concluded that human rights violations in post independent Zimbabwe are residual remnants of more than a century long system that had been entrenched by the colonial government and unfortunately was adopted by the black majority government despite them having denounced the very system during their armed quest for majority rule. This view is cemented by Sachikonye (2011:3) when he posits that *“Violence thus became ingrained in the Zimbabwean political culture, and this would have long-term consequences for the shaping of post-independence politics. Just as state violence as a method of repression had been a prominent feature of the minority regime before 1980, so it would also be employed in the suppression of political dissent in the Matabeleland provinces in the early 1980s.”*

It is against this backdrop that this research is of the contention that human rights violations in Zimbabwe especially through constitutional provisions are not necessarily the creation of the black majority government but are part of a system that had already been established by the minority government. While the majority government had an opportunity to correct some of these mistakes it is unfortunate that human rights violations were further perpetuated under the majority government through the Lancaster House Constitution. The research will thus now focus on the birth of the Lancaster House Constitution herein after referred to as the LHC and discuss how the development of this constitution had a bearing on human rights. The research will also discuss the human rights violations under the LHC and the subsequent amendments that the LHC endured with specific emphasis and reference on how such provisions have impacted on Zimbabwe’s human rights record. Considering that the gist of this research was to carry out a

comparative analysis of the LHC and the Constitution of Zimbabwe (2013) the following section of the research became very imperative to the research process as it was not only addressing the research objective of identifying and documenting provisions of the LHC which were a direct violation of human rights but was also laying a basis for an effective comparison of the LHC and the 2013 constitution specifically in the context of human rights protection.

### **3.2.2 The Birth of an Independent Zimbabwe and the Lancaster House Constitution**

After mounting pressure from the British government and the war of liberation that was being propelled by the ZANLA and ZIPRA forces the colonial government of Ian Smith was forced to go on the negotiating table and eventually called for a cease fire which subsequently led to the political independence of Zimbabwe from white minority rule. Zimbabwe's independence constitution was thus negotiated and crafted in Britain at the Lancaster House in 1979 and was subsequently referred to as the LHC. The constitution shared a lot in common with other independence constitutions that were agreed upon by colonial powers and representatives from the colonized people.

While the LHC was not people driven as it was the creation of political leaders and arbitrators it was commended for upholding the liberal ideas of constitutionalism. In supporting this assertion Ncube (1991) noted that the LHC embraced the notions of constitutionalism through its incorporation of the concepts of separation of powers, independence of the judiciary, supremacy of the legislature over the executive, public service neutrality and governmental accountability. The constitution thus entailed limited powers of the government vis-à-vis individual rights and at the same time endeavored to put in place mechanisms to check the powers of the executive.



Sachikonye (2011) highlighted that a provision was also placed in the constitution which spelt out that the constitution was not going to be have any substantial changes for the next ten years. The LHC ensured the protection of property owned by the white minority and also provided for their exclusive seats in parliament. These provisions were put in place so as to ensure that the transition to majority rule will not be characterized by a significant shift in the property and social relations that existed before. The Lancaster house negotiations and their outcome, the LHC, failed to correct the historical imbalance that had been created by colonial constitutional provisions like the Native Land Husbandry Act. Given that the rural population accounted for the bulk of the population at almost 65% the failure to address the land question was indeed a time bomb that eventually exploded through the FTLRP in 2000.

In retrospect, the remarkable strength of the LHC was that it provided for a framework that allowed a peaceful transition from white minority rule to majority rule but like most independence constitutions it was a compromise document that lacked the input of the people to be governed by it and was built through the input of those seeking to end the war and those who were going to use it to govern. This lack of people's input led to the constitution being described as poor in terms of human rights, governance and safeguarding democracy as Hlatshwayo (1998) lamented that the LHC was “an outdated, imposed and transitional instrument...which does not represent the aspirations of the people for good governance and development”

The research thus noted that the LHC was largely a compromise document that managed to offer a peaceful transition from the white minority government to the majority government. However, as a way of safeguarding the interests of the white minority as well as those of the common

wealth the LHC it failed to address the issue of the land which in itself was a contentious issue given that the war of liberation had been waged by the nationalist movements so as to address the land question as President Robert Mugabe (1989) during an interview with the Herald newspaper underscored that “the land question was at the centre of the factors that propelled us to launch our war of national liberation”

Based on the prior shared notions there were some notable flaws in the LHC especially in clauses or matters related to economic and political arrangements. Makumbe (2000) lamented that while the LHC had its own flaws as a compromise document, at the same time, the new majority government proved that it was not very eager to make any changes towards full democratization and human rights protection. While independence brought majority rule and also accorded voting rights for the first time to the black natives as well as open participation in all electoral processes, it should be noted that some principles of democracy like tolerance and respect of the rule of law as well as the respect of the fundamental right to life and freedom of political choice were not respected by the New majority government.

Through document review and analysis the research noted that the new ZANU government was putting much emphasis on the expansion of its hegemony in every strata of the society and was even pushing towards the idea of a de jure one party state there by violating the people’s right to political choice. Sachikonye (ibid) noted that the new government “was aimed at self-perpetuation in power...there was a strong constituency in the ruling party for this type of authoritarian political arrangement, and the political leadership pandered to this undemocratic sentiment.” The idea of a one party state was however abolished as a result of concerted

opposition to the idea by civil society and opposition parties. Manadaza and Sachikonye (1991) however note that through continuous repression and manipulation of state resources the ZANU-PF government smuggled back the idea of a one party state and ended up establishing what Sachikonye (ibid) refers to as a *de facto* one party state.

Based on the given assertions in this section the research thus noted that the coming in of a new majority black government through the Lancaster House negotiations and the subsequent adoption of the Lancaster House Constitution did not have much impact on the country's human rights record as the new government continued to use repression and violation of human rights as it sought to expand its hegemony and influence.

Having realized that the adoption and enactment of the LHC did not bring about significant changes in terms of democratization and human rights protection, it became imperative for the research process to unpack the LHC and document and discuss its numerous provisions that are deemed to have directly and indirectly violated human rights. This will also be done in reference to some incidences where human rights were violated. It is within this given context that the next section of the research will now critically look at Zimbabwe's human rights record under the LHC.

### **3.3 The Lancaster House Constitution and a disturbing Human Rights record**

Zimbabwe's post independence history has been punctuated by interesting and controversial incidences from the political, social and economic realms. Within the confines of this research the country's history in regard to human rights protection, observance and upholding has indeed

been worrying as the ZANU led government has been accused of administering a system that perpetuated human rights violations for more than 3 decades. It should be noted that most of the said violations were done through the confines of the law as the LHC had some provisions that enabled the government or its machinery to violate fundamental human rights such as the right to life, freedom of association and assembly as well as the contentious right to sexual orientation of one's choice among others. This section of the research will thus walk us through the human rights record or violations in Zimbabwe under the Lancaster House Constitution.

As noted earlier on scholars like Ndulo (ibid) and Sachikonye (ibid) concur that human rights violations in Zimbabwe started soon after the independence in 1980 as the new majority government continued to use the same tactics that had been used by the minority government especially in matters related to suppressing dissent and government criticism. One poignant example that points out to this assertion is that upon independence the new government did not abolish the state of emergency that had been declared by the colonial government way back in 1965, with the state of emergency only being revoked 10 years after independence in 1990. Ndulo (ibid) notes that the remaining of the State of Emergency meant that the government could still use draconian laws like the Preventive Detention Act and the Law and Order Maintenance Act which had been inherited from the colonial regime. It is important to note that these laws had been criticized even by the nationalist themselves during the time of the colonial government as they were said to violate certain human rights like the right to freely participate in political processes.

### **3.3.1 The Gukurahundi Massacres**

Makina (2002) underscores that any discussion about conflict and human rights violations in Zimbabwe that does not account for the period 1980-1988 is not a true history of post independence Zimbabwe. While the newly elected ZANU government was mollifying white apprehensions, over property ownership specifically land and other social and economic privileges, there was not much co-existence between the ZANU government and their black brothers from ZAPU and their former ZIPRA veterans. This lack of trust between the two liberation movements led to a government sponsored clampdown in the Matebeleland and Midlands provinces with the target being former ZIPRA cadres aligned to Joshua Nkomo who the government had classified as terrorist that were aiming to destabilise the newly found independence through acts of banditry, terrorism and sabotage.

As the research has already highlighted the period in question was the same period were the new government had kept the State of Emergency that had been enacted by the colonial government in 1965. Draconian laws and means were thus used to clampdown the suspected terrorists with independent sources like the Catholic Commission for Justice and Peace (1997) estimating that around 20 000 civilians mainly those of the Ndebele tribe were killed during this time. Mashingaidze (2009) posits that this was a government sanctioned massacre that was instituted by the Korean trained 5<sup>th</sup> Brigade which was not part of the conventional army but reported directly to the then Prime Minister's office. The 1981-88 period has grown to be referred to as the Gukurahundi Era as Gukurahundi is a Shona name that refers to the first rains of the season or the rains that wipe away the trash.

The ZLHR (2008) highlights that while organised and sporadic cases of violence were recorded during the first national elections in 1980, the Gukurahundi era was of a high magnitude and has

left a dent on the country's history especially in the context of conflict, human rights and tolerance. The research thus noted that human rights violations under the Lancaster House Constitution started as early as after independence as the Gukurahundi era endured a lot of human rights violations from torture, to detention, violation of the right to life, violation of the right to freedom of association and assembly among other violations. The research also noted that Zimbabwe was very hypocritical in its approach as the second human rights linked international convention/treaty that the country ratified was the African Charter on Human and People's Rights which the country ratified on 21 October 1986; hypocritical in the sense that while people were being tortured and murdered the government was ratifying a treaty that denounces the same. All having been said and done it is imperative to note that the culture of human rights violations in post independence Zimbabwe or specifically under the Lancaster House Constitution started soon after independence as summed up by the referred Gukurahundi case.

### **3.3.2 Politically Motivated Violence**

Another human right impediment that has hounded post independent Zimbabwe is the issue of political intolerance which subsequently leads to political violence especially during election time. Reeler (2004) cements the given notion when the scholar noted that general elections of 1985, 1990, 1995 and 2000 saw ZANU PF sanctioning the use of violence, torture and arbitrary arrests against its political opponents. The harmonised elections of 2008 were the zenith of political violence (during election time) in Zimbabwe as the ZLHR(2009) reported that the period led to the death of more than 200 political activists affiliated mainly to the country's main opposition party the MDC-T. The period in question also saw arbitrary arrests of civil leaders,

torture and maiming of political activists as well as the banning of Non Governmental Organisations.

It is however important to note that many a times the perpetrators of these human rights violations were neither prosecuted nor condemned by the state for their actions. In fact in some instances they were actually pardoned by the highest office in the land; the office of the President/Prime Minister. Mashingaidze (2009) posits that Presidential Amnesty was given to perpetrators of political violence in 1980, 1990, 1995 and in 2000. Members of the 5<sup>th</sup> Brigade that had committed gross human rights violations in Matebeleland and the Midlands provinces during the referred Gukurahundi era were also pardoned through the Unity Accord of 1987. The case of Patrick Kombayi an opposition activist who was shot by known assailants is one case in point of how the culture of allowing human rights violators to walk scot free had become entrenched into the Zimbabwean political culture. According to the News Day newspaper (May 27, 2013) Patrick Kombayi was shot by one Elias Kanengoni who was sentenced to 7 years in prison but was immediately pardoned under the said amnesties.

The research thus noted that this reluctance to punish the perpetrators of human rights violations significantly contributed towards the development of a culture of impunity in Zimbabwe and a culture of wantonly violating human rights as a way of dealing with those that may share a different political opinion from you. Feltoe (2004) laments the loathness of the government to deal with matters related to human rights violations when he notes that in October 2000 the President gave a clemency order that allowed human rights violators to walk free, yet these are people who had burnt houses, tortured political opponents and assaulted people in the run up to the country's elections in 2000. The research thus noted that politics has had a negative bearing

on the human rights record of Zimbabwe as a lot of human rights violations were committed under the guise of politics and electoral campaigns.

### **3.3.3 Violation of Property Rights**

The damning human rights record under the Lancaster house constitution did not just end with political violence and the Gukurahundi crimes but also involved other human rights violations like the violation of property rights. The FTLRP in 2000 and the Operation Murambatsvina of 2005 are some poignant cases of how human rights were violated in Zimbabwe specifically the right to property ownership and the right to shelter. The FTLRP was characterised by violent takeover of farms that were owned by white farmers with the government and the war veterans who spearheaded the invasions arguing that the land did not belong to the white farmers as their fore fathers had grabbed the land from the native Zimbabweans during the colonisation era.

Sachikonye (2003) noted that the fast track land reform process was characterised by coercion, violence, human rights violation and lawlessness. In some instances the white farmers were killed as Sachikonye (ibid) noted that some farm owners who tried to resist the takeover of their farms were violently killed while those that complied were ejected out of their houses without any prior notice as mandated by the constitution. While the violation of the right to property ownership is the most outstanding human right violation perpetrated during the period in question, it should be noted that a lot of violations were also committed during this time as there was no respect for human dignity with the violation of social injustices being rampant. The fast track land reform was also characterised by unconstitutional behaviour even at the highest levels. For example the Land Acquisition Act was amended in May 2000 using the Presidential Powers Temporary Measures Act so that the legal framework was in tandem with the vents on the



ground. This was unconstitutional in that amendments were only made to legalise a scenario that had already unfolded yet it's supposed to be the amendment that comes first before the action is taken. The principal aim of the constitutional amendments was to place Britain under the obligation to pay compensation for agricultural land compulsorily acquired for resettlement and simultaneously to relieve Zimbabwe from paying any compensation for such land (Constitutional Amendment No. 16 of 2000). Contrary to the 1992 Act, the amendments provided that, should Britain not establish a compensation fund, compensation would only be payable for improvements to the land and not the value of the land itself. This therefore meant that all the white commercial farmers were not going to be compensated for the actual value of their land thus being short-changed in the process. This is a direct violation of property rights as enshrined in the Rome Statutes which clearly spell out the issue of compensation in circumstances where property is involuntarily acquired for any purposes.

In May 2005, with very minimal warning the Zimbabwe government launched a mass demolitions and eviction program dubbed "Operation Murambatsvina" which was implemented across the country, mostly in urban centres. While the government justified the operation as a means of getting rid of illegal structures the ZLHR and COHRE (2007) in their report on how the operation violated human rights note that the evictions and demolitions led to the loss of livelihoods of more than 700 000 people, destruction of homes and businesses, displacement of hundreds of thousands of people and the injury and deaths of some residents. The UN Special envoy Dr Tibaijuka (2005) in her report of the displacements also concurred that the operation was a violation of human rights and had led to the loss of livelihoods for many families when she underscored that "...around 700,000 people had their homes destroyed or left without a livelihood...children were made homeless, left without food, water...a further 2.4 million were

indirectly affected.” As such the ZLHR and COHRE (ibid) have concluded that the operation was a direct violation of many fundamental human rights as among other things it robbed people of their livelihoods, left people homeless and violated social rights as it cut people’s access to social services such as schools health services.

The research thus concluded that the FTLRP and the Operation Murambatsvina are two significant phases in the history of violation of human rights in Zimbabwe as they did not only violate the right to property ownership but also violated other fundamental human rights and were not in tandem with key international provisions such as the Rome Statute. One respondent from the ZLHR and another respondent from the Combined Harare Residents Association (CHRA) who were all interviewed during the research process concurred that some provisions of the new constitution such as Chapter 4, Part 2-Section 71 of the new constitution which clearly spells out the issue of property rights were introduced as measure of ensuring that the country will not repeat the violations that were perpetrated during the two periods under discussion.

### **3.3.4 Repressive Legislature**

The Human Rights Watch (2013) in their open letter to President Mugabe lament that Zimbabwe has endured 3 decades of repressive legislation that violates human rights and reduces the government’s accountability to the citizens. The Human Rights Watch goes on to encourage the government to repeal all the repressive laws that have been in place as they adopt align the new constitution. Perhaps the key issue to note from the above given argument is that since independence Zimbabwe has been accused of passing laws that promoted the violation of human rights. As already indicated in this research report, some of these repressive laws were not creations of the nationalist government but were adopted from the colonial government. Having

said that, it is imperative to still acknowledge that the majority government passed a lot of laws, that were deemed as a direct violation of human rights. Feltoe and Sithole (2010) note that while Zimbabwe is a signatory to almost all the key human rights treaties with exception of the Convention Against Torture and the Rome Treaty of the International Criminal Court, the country has continued to pass laws that violate the treaties it is signatory to.

Accountability on the part of the government has also been minimal as the government has paid lip service to matters related to corruption. Ndulo (ibid) laments the continuous amendments that the LHC endured from the period 1980-2013 as it was amended a record 19 times before the adoption and enactment of the 2013 Constitution. It is imperative to note that scholars like Sachikonye (ibid), Feltoe and Sithole (ibid) and Ndulo (ibid) all concur that the numerous amendments that were made to the LHC were mostly made to expand the powers of the Presidency and reduce the government's accountability to its citizens as some amendments like Amendment No. 7 of 1987 bestowed executive powers on the President and made the presidency a supreme office that was not answerable to parliament. Feltoe and Sithole (ibid) identify the following laws as some of the key repressive laws that Zimbabwe has passed under the era of the LHC;

- a) Interception of Communications Act [Chapter 11:20], B
- b) Broadcasting Services Act [Chapter 12:06],
- c) Miscellaneous Offences Act,
- d) Presidential Powers (Temporary Measures) Act [Chapter 10:20],
- e) Public Order and Security Act [Chapter 11:17],

- f) Access to Information and Protection of Privacy Act [Chapter 10:27],
- g) Land Acquisition Act [Chapter 20:10] read with section 16 of the Constitution as amended
- h) And some sections of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

It is imperative to note that these and other laws are a direct violation of and an infringement of peoples' fundamental rights as enshrined in the numerous treaties that Zimbabwe is part of. For example the laws like POSA and AIPPA have been used to clampdown activities of opposition parties as well as the activities of CSOs that were deemed to be promoting activities that denounce the government. One key aspect that the research noted is that Zimbabwe has indeed passed laws and amended the LHC a record 19 times as a way of maintaining the ruling party's hegemony and control and ensures that they remain in power against all odds but violating human rights in the process.

### **3.3.5 Electoral Fraud and Other Human Rights Violations**

Writing about Zimbabwe's electoral history Chadwick (2010) posits that while recent elections like the 2008 elections and the 2002 presidential elections have gained prominence for electoral fraud and rigging claims it should be noted that Zimbabwe's electoral history has been dotted by complaints of voter manipulation, vote buying and rigging claims from as early as the 1980 elections were cases of intimidation against the ZAPU supporters were recorded. Were electoral laws are not respected it means the people's right to choosing a leader of their choice in a free and fair environment becomes compromised. Sachikonye (2011:15) points out to the concerns that had been raised about Zimbabwe's electoral system in the context of human rights particularly political rights by those that were pushing for constitutional reform in the country

when the scholar notes that “It was scarcely surprising that one of the principal arguments of those who advocated for constitutional reform was that Zimbabwe’s electoral system was defective and prone to patronage”. In a nutshell Zimbabwe’s electoral laws have been accused of being inclined towards the ruling party and the independence of the Electoral commission had also been questioned especially given the fact that the commission was appointed by the president. It was only after Amendment No. 19 of 2009 that the electoral commission showed some semblance of independence.

By and large the research noted that Zimbabwe’s human rights record under the LHC was not one of the best as the country had violated some key and fundamental human rights including those that were supposed to be protected by numerous statutes and treaties that the country is state party to. This was very key to the research process as one of the objectives of the research process was to identify provisions and Acts from the LHC that were a direct violation of human rights. Having discovered the said rights, the research will at a later stage seek to establish how the said provisions have been addressed in the new constitution given that the new constitution has restored hope in terms of human rights protection as guaranteed by the constitution.

While the research paid particular attention to those provisions that violated human rights under the LHC it should be acknowledged that the research also discovered that Zimbabwe made significant strides in protecting certain rights like children’s rights and women’s rights among others through constitutional provisions. All the constitutional lawyers that were interviewed during the research process noted that Chapter 3 of the LHC endeavoured to protect civil, political and individual rights of Zimbabwean citizens. Among other rights this Chapter guaranteed were protection of the right to life, protection from slavery and forced labour, protection from deprivation of property, protection of freedom of conscience and protection of

freedom of assembly and association and political rights among others. On top of the above mentioned rights and others not stated herein Sithole and Feltoe (2010) note that the LHC should be commended for having the following pieces of legislation as they were also instrumental in the context of human rights protection;

Legal Age of Majority Act [Chapter 8:07]

Administrative Justice Act [Chapter 10:28]

Domestic Violence Act [Chapter 5:16]

Disabled Persons Act [Chapter 17:01]

Maintenance Act [Chapter 5:09]

Labour Act [Chapter 28:01]

The identified laws and others not referred herein were identified by the research process as some of the key laws within the LHC that were positive in the context of human rights protection. Ndulo (2011) however laments that the major challenge with Zimbabwe was that it lacked in the area of constitutionalism as even the few rights that were protected by the constitution were still violated by the ruling party and the presidency as they sought to maintain their hold on the country. The ZLHR specifically pointed out to the abuse of the Presidential Powers (Temporary Measures Act) which essentially give the president rule/law making powers that are equivalent to that of the parliament and place the president above the judiciary as the judiciary was prohibited from questioning the decisions of the president, Ndulo (2011:186). After discussing all the arguments highlighted above, perhaps the key issue that was noted by the research process is that Zimbabwe has endured a damning human rights record were some

repressive laws and subsequent constitutional amendments have been passed by the ruling party and the government of the day with the prime aim of maintaining power and control. In as much as legislature that protects some human rights was passed, the impact of such legislature was watered down by the lack of commitment by the government to fulfil such legislature as well as by other laws like the Presidential Powers Act which allowed one man to make laws above the legislative arm of government.

### **3.4 Conclusion**

The chapter explored the LHC and the Human Rights record in Zimbabwe where it was noted that Zimbabwe has endured a bad human rights record as the LHC had some legislation that violated human rights. Zimbabwe's history in the context of human rights protection as provided for by the constitution was also explored from both a pre and post-independence perspective. Having explored the given themes the research also noted that efforts were made by the government of Zimbabwe to come up with laws that protect human rights and the said laws were outlined. The research however concluded that political willingness and constitutionalism were the major impediments to the full implementation of some of these laws that protect human rights thus contributing to the countries' abysmal human rights record. Having explored the LHC and its flaws in the context of human rights protection the research will now focus on the constitutional reform process in Zimbabwe which subsequently gave birth to the new constitution of Zimbabwe (2013)

## **CHAPTER IV**

### **CONSTITUTION OF ZIMBABWE (2013): A PANACEA TO HUMAN RIGHTS PROTECTION AND A BETTER HUMAN RIGHTS RECORD?**

#### **4.1 Introduction**

Zimbabwe's pre and post-independence histories have been marred by a condemnable human rights record. Violation of property rights, non-respect for the rights to life and personal liberty, violation of the right to freedom of assembly and association and the violation of political and civil rights are some of the human rights violations that the country has endured over the years. The coming in of a new constitution in 2013 was however been described as a new development trajectory for Zimbabwe given that the new constitution is seen as a significant improvement from the LHC. Before discussing the new constitution and its provisions in the context of human rights, this chapter will first discuss the long struggle for constitutional reform in Zimbabwe which eventually gave birth to the 2013 constitution. The constitution making process by the parliamentary select committee (COPAC) will also be discussed as well as the new provisions of the new constitution that guarantee human rights protection will also be discussed.

#### **4.2 1980-2013: The long struggle for Constitutional Reform**

The long debate about constitutional reform in Zimbabwe was prompted by what CSOs and other constitutional activists viewed as arbitrary amendments to the LHC for the purposes of extending the powers of the presidency and perpetuating the ruling ZANU-PFs hold on power. Amendments like Amendment No.7 of 1987 were far-reaching as they created an executive President, who was not answerable to Parliament on many matters, Sachikonye (2011). There was however no participation of the citizens in effecting such substantial amendments of the



constitution. Against this backdrop it is imperative to note that this lack of participation in constitutional processes was not unique to Amendments such as Amendment No.7 herein referred but can be traced back to the making of the LHC itself which was perceived as centralized and meant to protect individual/group interests at the expense of the whole nation. As a result, Sachikonye (ibid) argues that “numerous amendments were effected –many of which were also perceived to have largely entrenched the executive branch of government.” The crux of Sachikonye’s argument is that the numerous amendments that characterized the LHC over the 33 years it was in force can thus be traced back to the fact that its making was not inclusive and participatory. Within the same vein the Centre for Democracy and Development (2000) noted that the citizens were never actively consulted or involved in the crafting and effecting of all the amendments nor was there extensive parliamentary debate in regard to the said amendments.

By the time a new constitution was adopted, the LHC had been amended a record 19. In a Press Statement released after the enactment of Amendment No. 18 in 2007 the National Constitutional Assembly (NCA) argued that constant amendments of the LHC were barely adequate and clear evidence of the urgent need for a new people driven constitution that will promote democratic governance, separation of powers between the arms of the government and promote the protection and upholding of human rights. It was the NCA’s argument that had the LHC been people driven it would have provided for a more democratic way of doing things as the people would have had a say and an input on how they want to be governed.

This mode of constitution making via amendments which in turn did not involve the people thus resulted in more pressure from CSOs calling for constitutional reform. Ncube (1991) summarizes this debate when the scholar notes that in synopsis the key question that was raised was “ whether the idea of constitutionalism as a means of regulating and limiting the exercise of

political power had found root in Zimbabwe’s system of government.” As discussed earlier on, the ZANU-PF led government was approaching the issue of constitutional amendments in non-participatory approach were the constitution was being amended to suit certain individual needs with the aim of centralizing power and protect and prolong ZANU-PF hegemonic hold on the country. The table below which was originally adopted from Sachikonye (ibid) summarizes all the 19 amendments that the LHC went through from 1981 to 2009:

### **Lancaster House Constitution 19 Amendments From 1981-2009**

<b>Amendment No.</b>	<b>Year</b>	<b>Description of Amendment</b>
1.	1981	The amendment reduced the required qualification period for lawyers to the judiciary as well as the Senate Legal Committee so as to increase the number of black lawyers who could access these offices.
2.	1981	A separate Supreme Court was created which was different from the High Court and also reviewed the qualification period for judges so as to make the office more accessible to blacks.
3.	1983	Gave the Parliament the powers and mandate to abolish dual citizenship.
4.	1984	Gave the President more control over the Judicial Services Commission and introduced the Office of Ombudsman
5.	1985	Gave the President powers to appoint Provincial Governors
6.	1987	Abolished the separate roll for whites.
7.	1987	Abolished the office of the Prime Minister and created an

		Executive Presidency
8.	1989	The Attorney General was made a member of the Cabinet and this exposed the judiciary to executive influence.
9.	1989	Created a one chamber Parliament through the abolishment of the Senate.
10.	1990	Created the office of the second Vice-President.
11.	1990	Terminated land provision for 'willing buyer, willing seller' in favor of 'fair compensation'.
12.	1993	Rearranged the armed services, prison and public services thereby reducing their independence.
13.	1993	Reversed a Supreme Court ruling on the death sentence and stated that delayed execution is not a human right violation.
14.	1996	Reversed a Supreme Court ruling on women marrying foreign men with their spouses not becoming automatic citizens.
15.	1998	The financial year of the government was changed from the 1 <sup>st</sup> of July to the 1 <sup>st</sup> of January.
16.	2000	Amended the issue of land compensation from the Zimbabwe government to the British government.
17.	2005	Reintroduced the Senate and Upheld the nationalization of farms acquired under the FTLRP
18.	2007	Introduced harmonised elections from Presidential to

		Parliamentary and Local Government at the same time. Also changed the composition of the Senate and the House of assembly. Established the Human Right Commission
19.	2009	Provided for the implementation of the GNU which established the offices of the Prime Minister and the Deputy Prime Ministers

Based on the above given table it is lucid that most of the amendments that were effected on the LHC were meant to increase the powers of the government and specifically give more powers to the President. For example the awarding of powers to the President to single handedly appoint the members of the different commissions such as the Electoral Supervisory Commission and the Judicial Services Commission as well as the appointment of the Attorney General by the President meant that the independency and impartiality of the said offices and commissions was compromised.

The research thus noted that in particular, the provision that allowed the President to appoint up to 30 members of parliament indeed increased patronage as all the appointed MPs would naturally feel indebted to the President. Writing about the LHC, human rights and the democratization process, Sachikonye (2011) underscored that there was reluctance on the part of the government to amend the LHC so that it became more democratic, even after the expiration of the 10 year provision that barred any significant changes to the LHC. The research thus noted that there was no political will in drafting a more people driven and inclusive constitution post the LHC as the government was more comfortable with ‘panel beating’ the existing LHC and add more influence and powers ion the office of the President.

As such issues such as human rights, electoral reform, independence of constitutionally established commissions, gender equity and land redistribution did not take much precedence in the constitutional reform debate in the early 1990's as there was no such debate given that the country had a poor opposition as result of the merger of ZANU and PF ZAPU in 1989 to come up with the 'new' party ZANU-PF. The research also noted that another contributing factor that led to little pressure and less noise being made about the need for constitutional reform in favour of a constitution that was more people driven, ensured government accountability by limiting the powers of the Presidency and opened up to a more democratic country was that civil society was not very active in the early 90's. Almost all the CSOs that were interviewed during the research process were only established either in the late 90's or post 2000.

It was noted that as the ruling party continued to amend the LHC with such amendments increasing the powers of the presidency. As such, the CSOs and the opposition parties began to push for constitutional reform as the LHC was now being seen as an appendage of the ruling part which was mainly meant to safeguard the interests of those in power and not necessarily save the interests of the citizens. Within this vein, a founder member of the National Constitutional Assembly (NCA), one of the foremost proponents of Constitutional reform in Zimbabwe, who was interviewed during the research process noted that the mandate of the NCA was derived from the National Constitutional Assembly which was convened in 1997 and resolved that there was not going to be any significant change in the political, social and even economic realms unless a new people driven that will be premised on the principles of democracy, good governance and accountability is in place. The research also noted that within the SADC region

the other countries like South Africa and Botswana had also adopted progressive constitutions in the 90's and this also mounted the pressure on Zimbabwean CSO's to push for constitutional reform.

It is against this background that a broad based alliance of CSOs like the Zimbabwe Congress of Trade Unions (ZCTU), the Zimbabwe National Students Union (ZINASU) and the Zimbabwe Council of Churches (ZCC) among others came together in 1998 and formed the NCA with the prime mandate of pushing the government to allow for a process that would give birth to a new people driven constitution. Upon its formation the NCA identified its objectives as:

- To identify shortcomings of the current constitution and to organize debate on possible constitutional reform,
- To organise the constitutional debate in a way that allows broad-based participation, and
- To subject the constitution-making process in Zimbabwe to popular scrutiny in accordance with the principle that constitutions are made by and for the people (National Constitutional Assembly 1997).

The preceding chapter and sections have already highlighted on some of the major weaknesses of the LHC which prompted the CSOs to come together and establish the NCA. On top of the highlighted objectives the NCA also identified several clauses that and provisions of the LHC which it argued did not have place in a democratic country. Of particular interest to this research process was one of their major observations that the Bill of Rights as provided for in the LHC was not fully protecting all the fundamental rights of human beings as its guaranteed protections were not as wide as is desirable in a democratic society, NCA (1998). The NCA also raised arguments on the electoral provisions of the LHC such as the independency or lack of it thereof,

of the Electoral Supervisory Commission (ESC), and argued that such provisions did not guarantee free and fair elections. The continuous amendments that the LHC had endured over the years, had thus undermined the power and binding role of the constitution. What had become clear to those that were pushing for constitutional reform is that the government and parliament had bestowed upon themselves the powers to change the constitution as and when they felt it necessary, without the input of the people. As such, it was against this backdrop that the NCA argued that a constitution reform was the only way to go for Zimbabwe as the country needed to embrace a new constitution that among other things allowed for democratic governance and guaranteed the full promotion of human rights.

The research noted that while the government also felt the pressure and the need to reform the LHC by writing a new constitution it was very reluctant to do so especially through working with the CSOs or the opposition the Movement for Democratic Change which had just been formed in 1999 amidst the ongoing debate for constitutional reform. The government thus tried to monopolize the constitution reform process by ensuring that it cuts out the CSOs and the opposition in the constitutional reform process.

The ZLHR (2009) and Sachikonye (ibid) resonate that by 1999 three approaches were being proffered as the possible avenues for constitutional reform in Zimbabwe. The first was what was referred to as the Mugabe Way, then the Zvobgo way and Lastly the NCA way. The Mugabe approach was premised on the submissions or arguments from the president himself who was quoted as saying, “... *the procedure which all along I thought we would adopt is one which would first enable our party at the provincial and then at Central Committee level to address the matter and come to some initial conclusions on the various parts of the constitution needing*

*amendment. The views of other organizations will be collected in the process but only for consideration by us and in comparison with our own...”* (President Mugabe on 21 March 1998).

Reading between the lines from the given quote the research noted that this approach was still not people driven and was going to be void of addressing the gap of human rights protection and other identified gaps in the LHC as it was being done within the confines of the very same party that was responsible for countless amendments to the LHC. Furthermore this approach was ZANU PF centered and driven as the president made it clear that the input from non-ZANU-PF institutions or individuals will only be considered in comparison to the ZANU PF submissions.

The second approach which Hlatshwayo (1998) referred to as the ‘Zvobgo way’ having been named after the ZANU-PF constitutional guru at the time Dr Eddison Zvobgo sought to incorporate the ‘Mugabe approach’ with parliamentary input that that would call on the Executive to devise ways in which constitutional reform could be pursued. While this approach sought to involve other players in the Constitution reform debate it still retained ZANU\_PF as the key player in the constitutional reform process. While on one hand the two approaches from ZANU-PF were very self centred and did not locate the role of the citizens in the constitution process but rather focused on constitution making from above, on the other hand the NCA approach was one that advocated for an all-inclusive process that involved all strata of the society.

In synopsis the research thus noted that while there was a general consensus on the need of coming up with a new constitution there were diverging views on the trajectory to follow in coming up with the new supreme law. Despite the indicated stalemate, the government went on



to set up the Constitutional Commission which was made up of 400 members including 150 Parliamentarians. It is imperative to note that the first identified challenge of this commission is that it was appointed by the President thus reducing its independency. The Commission went on to carry out outreach meetings that gathered public views on what they want to see in the new constitution. The outreach meetings were carried out across the country for six months with the coming up with a draft constitution afterwards.

The composition of the Commission and how it was constituted was in itself a cause for concern to the NCA and other related stakeholders. The NCA founder member who was interviewed during the research process also indicated that it was not just the composition and constitution of the Commission that they did not agree with but also the fact that the commission was responding to the back and call of the president thus as the NCA they were already convinced that the outcome of the process was going to be a flawed document as to them, there was no flawed process that could yield good results. The respondent also noted that based on these arguments the NCA launched its own parallel outreach process where it engaged the citizens through an extensive civic education program which among other things aimed at outlining the challenges of the LHC, the importance of the constitution and also sought for proposals from the people on what they thought should be included in a new constitution.

Sachikonye (ibid) notes that, the NCA outreach exercise was not as extensive as that of the CC but it had greater depth as a consequence of its preceding civic education programme. There was thus competition between the official process and the parallel process and the NCA also came up with its own draft whilst the CC also came up with its own draft. The draft of the CC was

however thrown into doubt as there were reports that it had deliberately omitted some submissions shared by citizens during the outreach process. Some poignant examples that were cited were that there were recommendations to the CC that the powers of the President needed to be trimmed and more power be accorded to the Parliament, the electoral commission was to be empowered from political influence by making it independent and a trimmed cabinet of about 15 people was to be put in place among other recommendations. Despite the popularity that these sentiments had enjoyed during the outreach process they were however mysteriously missing in the draft constitution. Because of these and other misrepresentations the NCA and other CSOs as well as the opposition MDC engaged in a robust campaign that was aimed at encouraging people to reject the draft constitution of the CC when it will be scheduled for a referendum. Subsequently the draft from the CC was out rightly rejected by the people of Zimbabwe when it was presented for a referendum in February 2000. The NCA and its allies as well as the opposition MDC had significantly contributed to this rejection as they had campaigned for a NO vote during the referendum citing that the draft was not representative of the people's views as shared during the outreach process.

The rejection of the government sponsored draft meant that the country was stuck with the LHC, which was amended a further three times before it was eventually replaced in 2013. The key issues that the research noted from this rich history of constitutional reform is that the ZANU-PF led government tried by all means to maintain a hold on to power and one easy way of doing that was to ensure that the constitution concentrated power in presidency at the expense of the parliament. Furthermore this drive to expand hegemonic influence on the part of the ruling part meant that certain fundamental rights were being violated. For example, by diluting the powers

of the Parliament and vesting them in the Executive, it means that the people's right to determine how they are governed is undermined as the Parliament serves as the representative of the citizens in a constitutional democracy, that is one in which the sovereign power is vested in and exercised by all the free citizens of the country through a direct or indirect system of representation. The research thus noted that full human rights protection was not at the centre of the government's priorities as the CC draft was also lacking in as far as human rights protection was concerned. The CC had not made enough efforts to incorporate a justiciable Bill of Rights in its draft meaning to say that the CC draft was not much different from the LHC in the context of human rights protection. After the failure of the CC, it should be noted that the stalemate over a new constitution persisted all the way to 2009 until the formation of the Government of National Unity, which was established by yet again another amendment, which was Amendment No. 19 and apparently the last amendment of the LHC.

#### **4.3 The Government of National Unity (GNU) and the Constitutional Select Committee (COPAC) Process**

After the disputed Presidential elections of 2008 where no outright candidate was elected President after the front runners Robert Mugabe of ZANU-PF and Morgan Tsvangirayi of the MDC-T had both failed to garner the required 51%, which was required for one to be declared an outright winner the country was forced to go for an election run-off which pitted the two mentioned candidates. The ZLHR (2008) posits that the run up period to the presidential run-off was characterised by violence and intimidation mostly being perpetrated by the ZANU-PF supporters and their allies who included state security agencies and members of the uniformed

forces. The arbitrary arrests, the torture, maiming, harassment and killings that the opposition members were subjected to led to the eventual pull out of Morgan Tsvangirayi from the election run-off and President Mugabe was declared the winner. A report from the ZLHR(2008) about the period in question indicated that about 200 opposition activists lost their lives with thousands being injured and displaced. This disputed phase in the country's history led to the intervention of SADC as they tried to broker a power sharing deal between the MDC and ZANU-PF.

The negotiations between the two political nemeses were arbitrated by the then South African President Thabo Mbeki. Through President Mbeki's mediatory efforts the two political parties eventually agreed to a power sharing arrangement through the Global Political Agreement (GPA) in September 2008. The GPA subsequently led to the establishment of a coalition government in Zimbabwe in February 2009. The coalition government was commonly referred to as the GNU and was established in line with Amendment No. 19 of the constitution and created the office of the Prime Minister which office was held by Morgan Tsvangirai of the MDC-T and the Presidency was held by Robert Mugabe of ZANU-PF. Through interviews with representatives from organisations like the ZLHR, the Human Rights NGO Forum and Zim Rights the research discovered that during the GNU era that is from 2009-2013 Zimbabwe recorded a decline in human rights violations. At this juncture it is very important to note that what was recorded was just a decline as compared to the other years but not necessarily an end of human rights violations. The Human Rights NGO Forum in their 2011-2012 report on the human rights situation in Zimbabwe acknowledged that the country had witnessed a better human rights record but still had a long way to go. The report noted that efforts had been made under the GNU to implement the provisions of the GPA, to come up with a new people driven constitution, to

establish an independent Human Rights commission and the historic visit to Zimbabwe by the UN High Commission on Human Rights at the invitation of the government.

Of significant note during the GNU era was the constitution making process that was spearheaded by the Parliamentary Select Committee on the Constitution (COPAC). COPAC was the organ of the GNU that was mandated to spearhead the constitution making process. This was in line with Article 6 of the GPA which mandated the GNU to initiate a constitution making process that would be people driven and ultimately result in a constitution that among other things guarantees the full protection of human rights. While three political parties that formed the GNU, that is, ZANU-PF, MDC-T and MDC were the main drivers, the COPAC constitution making process was generally regarded as widely consultative as it incorporated all political parties as well as the members of the civil society and other interest groups. Furthermore the COPAC outreach meetings were held in every District and in almost all the wards within the country. The openness and all-encompassing approach that COPAC used in coming up with the draft constitution was generally derived from Articles 21 of the UDHR and Article 25 of the International Covenant on Civil and Political Rights which guarantees and establishes the right to vote freely, the right to political participation, freely participate in public affairs and to also have access to public service. According to COPAC (2010) their whole constitution making process was premised on the notion that a democratic, open and consultative constitution making process is the bedrock to the legitimacy, acceptability and strength of the final outcome.

While organisations like the NCA raised concerns about the way COPAC was conducting its business specifically citing the influence of the political parties, it should be acknowledged that

the COPAC process was largely regarded as the best constitution making process that Zimbabwe had gone through specifically in comparison to the 1999/2000 process as well as the Lancaster House Constitution Conference of 1979. Groups with their specific interests were also given an opportunity to submit their views outside the outreach platforms and this meant that marginalised groups like gay activists and gay people also had an opportunity to air their views for consideration in the draft process.

A lot of effort was thus put by different CSOs so as to ensure that the different ethos and principles that these CSOs stand for and advocate for in their day to day work were incorporated into the new supreme law. Respondents from the ZLHR noted that they were pushing for a constitution that guarantees human rights protection through a binding justiciable Bill/Declaration of Rights whilst women's organisations were also pushing for a viable gender commission as well as for provisions that strengthened the numerous efforts that had been made in the quest for women empowerment and gender equity.

After three years of consultations, outreach meetings, drafting and continuous accusations and counter accusations between ZANU-PF and the 2 MDC formations the COPAC process eventually came up with a proposed draft constitution which was put up for referendum in February 2013. The people of Zimbabwe resoundingly voted in favour of the draft constitution as 95% of those who participated in the referendum voted in favour of the constitution. The constitution was subsequently enacted in May 2013 and adopted as the new supreme law of Zimbabwe.

While Zimbabwe is still in the process of realigning some of its laws as well as repealing some laws so that the country's legislative law is in sync with the constitution it should be noted that the COPAC constitution herein referred to as the Constitution of Zimbabwe 2013 has been embraced as a progressive document especially from a human rights perspective as among other provisions it promotes accountability, establishes independent commissions that will ensure that the provisions of the constitution are abided to, but above all the constitution has a justiciable Declaration of Rights thus ensuring that human rights are not only protected and guaranteed by the constitution but are also safeguarded from wanton changes by those that may seek serve their individual interests. It is within this vein that the next section of the research will discuss the Declaration of Rights as provided for by the constitution (2013) and establish how this section has been viewed as a step in the right direction.

#### **4.4 The Declaration of Rights: A step in the right direction**

The research noted that there was consensus from constitutional lawyers and human rights defenders and activists who were interviewed during the research process alike that the new Constitution offers a golden opportunity for Zimbabwe to right the past wrongs on human rights, to promote more participation of its citizens in matters related to governance and to protect fundamental rights that had been looked over or trembled upon by the LHC especially that there now was a Declaration of Rights which was binding at law. As such the research noted that the declaration of rights formed the fulcrum of human rights protection within the new constitution as it was enforceable at law and also binds all arms of the government that is the legislature, the executive and the judiciary.

Within this vein this section of the research will seek to discuss the powers of the Declaration of Rights that makes it to stand out especially in comparison to human rights provisions as set out in the LHC. The research noted that the major strength of the 2013 constitution is that it does not give room for the compromise of the rights it seeks to protect. Section 46(1)(a) enjoins the court in interpreting the declaration of rights to “*give full effect to the rights and freedoms enshrined in this chapter*”. In international law state parties are given a provision that is commonly referred to as the “margin of appreciation” when they are localising international human right treaties and instruments. The margin of appreciation therefore allows attenuation of the afforded right so as to take into account the local conditions that may be prevailing in the context in which the human rights are being implemented. The margin of appreciation can however be prone to abuse as some parties may perpetuate human rights violations under the guise of the margin of appreciation. The research however noted that the 2013 constitution does not give room for a margin of appreciation as the emphasis on “full effect to the rights...” mean that the declaration is to be accepted as it originally appears in the constitution. This assertion was also shared by Matyszak (2013) when he notes that “The use of the word “full” suggests that no margin of appreciation is to be permitted under Zimbabwean law.” The key point noted by the research from the given argument is that the declaration of rights as provided for by the 2013 constitution was airtight as it mandates the rights stated therein to be read in full and without room for a margin of appreciation. This therefore guards against the abuse of human rights under the guise of local interest such as local cultures and religious practices that may not be in tandem with the fundamental rights provided for by the declaration.



Another major strength that was pointed out by most of the constitutional experts that were interviewed during the research process was that Section 46(c) notes that in implementing and applying the declaration of rights the Zimbabwean Courts must take into account the relevant international treaties that Zimbabwe is State party to and section 46(e) gives room for the Zimbabwean courts to consider relevant international law that may be applicable to the situation at hand. It was noted that the major strength of the said provisions is that they allow the human rights debate in Zimbabwe to be located on an international scale and be judged against international standards and practices.

This means that in areas where human rights may be violated based on local provisions, local practices or even local religious beliefs the new constitution now gives room for reference to international law. Section 46(d) of the 2013 constitution also states that in interpreting Chapter 4 which is the declaration of rights due regard must be paid to the principles and objectives of the constitution. This means that in a case where one may have been evicted from their property, in interpreting the right to property and freedom from arbitrary eviction as spelt out in the declaration of rights the courts must thus take into account the international laws that protect such rights as well as the national objectives stated in the constitution. Against this backdrop the research thus noted that the declaration of rights has indeed widened the room for human rights protection as it tries to link the declaration of rights not only to other provisions of the constitution that protect such rights but also to international laws that also protect the said rights thus offering a double pronged approach to human rights protection.

Based on the above given assertions the research thus concluded that the Declaration of Rights is indeed a step in the right direction as it safeguards fundamental human rights especially 1<sup>st</sup> generational rights and above all ensures that all citizens of Zimbabwe and those within the country's borders enjoy and are entitled to full protection of first generational rights in accordance with international law, established jurisprudence and international best practice. It was noted that the binding mandate of the Declaration of Rights to be read and argued within the confines of international law and national objectives as stated in Chapter 2 of the Constitution gives more credence to the declaration as it is read in line with the national objectives as well as the founding principles of the constitution. By and large the research noted that a great improvement has been registered by the nation of Zimbabwe in the context of human rights protection from a constitutional perspective as the declaration is not only enforceable at law but also that the constitution provides stringent conditions upon which the declaration can be amended. This goes a long way in ensuring that the constitution is not amended willy-nilly by those that may seek to serve individual interests and expand their hegemony at the expense of national interests, human dignity and full citizen participation as was the case with the LHC which, as already highlighted was amended a record 19 times.

#### **4.5 Human Rights Protection: The Major Weaknesses**

While the preceding Chapter has discussed the research findings in the context of the merits of the Declaration of Rights as provided for in Chapter 4 of the new constitution of Zimbabwe (2013) the research also noted that there were some shortcomings of the new supreme law in the context of human rights protection. At this juncture it is imperative to underscore that the research noted that the strengths and improvements made in the new constitution especially in

comparison to the LHC indeed supersede its weaknesses. The researcher however deemed it necessary to record the said challenges as most of the respondents indicated that the Declaration can only be made best and improved if its few weaknesses and challenges are pointed out, documented and made known.

Considering that LHC was constantly attacked for vesting too many powers in the President at the expense of the legislature the research noted that the major shortcoming of the new constitution especially in comparison to the LHC is that it retains the president as the head of state and government and commander in chief of the Zimbabwe Defence Forces. Furthermore the constitution provides for the President to unilaterally appoint key positions that have a bearing on human rights protection such as the attorney general, cabinet ministers and even ambassadors. The new constitution also allows the President to deploy the military within Zimbabwe at his/her discretion without the consent of the Parliament. Based on these observations the research thus noted that the major weakness of the said provisions in the context of human rights protection is that the President still has control over all arms of state thus making the office of the president prone to impunity and patronage.

One typical example that was given by one of the respondents was that the Gukurahundi 'massacres' were committed by the army and the fact that the president is given powers to deploy the army without consulting the parliament means that we can have another Gukurahundi. This submission was of interest to the research process as the research thus concluded that the powers of the President as provided for in Chapter 5 of the Zimbabwe Constitution (2013) are in excess as they allow the presidency to violate human rights through constitutional provisions.

The issue of the Presidential powers referred herein was also lamented by Lovemore Madhuku, the chairman of the National Constitutional Assembly when he noted that, "Our major problem in Zimbabwe has been the concentration of power in the president...That problem has not been solved by the current constitutional". In synopsis the research thus noted that one of the major weaknesses of the new constitution is that it accords too much power in the office of the president thus making the office prone to violation of rights.

The UN Human Rights (2013) underscored that there is an intrinsic link between human rights and accountability and transparency. The research however noted that the new constitution can to some extent allow for human rights violations as it curtails the issues of accountability and acceptance of due responsibility in cases where rights may be violated by the office of the president or at his instruction. For example, it was noted that Section 98 of the new constitution protects the incumbent President from prosecution of any matter, human rights included, when it states that "*The President enjoys immunity from civil or criminal proceedings for things done in his or her personal capacity until after he or she has ceased to be President*". What is even more worrying is the fact that prosecution after ceasing office is also difficult given that the constitution allows for "good faith" to be cited as a legitimate defence for acts committed in the official capacity of the president. The long and short of this observation is that the President can instigate human rights violations like property demolitions, arbitrary arrests, torture or even killings and still get away under the pretext that such acts were committed in "good faith" and in the interests of the nation.

The research also noted that while the constitution goes a long way in protecting the rights of citizens it does not guarantee the protection of judicial officers and lawyers who will be carrying

out their professional duties. Constitutional experts interviewed during the research process concurred that a clause on the protection of legal officers was necessary given that in the past their rights have been violated and they also have been targeted by the state. The example of Beatrice Mtetwa, a prominent lawyer, who was arrested whilst trying to establish the charges that were being brought against her client was cited as one typical example of how at times law officers have been targeted specifically by law enforcement agencies.

Given that Article 21 of the UDHR and Article 25 of the International Covenant on Civil and Political Rights establish the right of citizens to vote and participate in public affairs, the research noted that the new constitution was weak in that it denies this right to political participation to Zimbabweans living in the Diaspora. It was noted that Article 7 of the constitution which speaks on elections made some strides in ensuring the free participation of people in electing leaders of their choice but it unfortunately reserved that right to Zimbabweans living within the country thus sidelining those that are based outside the country from exercising their right to political participation by voting for leaders of their choice.

Considering that scholars like Macovei (1999) and the UN Human Rights underscore the importance of an independent and impartial judiciary as pathway to human rights protection in any country, the research noted that the independence of the Judiciary Services Commission (JSC) is subject to question especially due influence from the executive given the number of people in the Commission who are directly or indirectly appointed by the President. Furthermore the president reserves the right to reject some names that may have been submitted as proposed members of the JSC. This basically means that the president still has some fringe influence in the appointment of members of the JSC thus putting a compromise on checks and

balances that may ensure full human rights protection given that the judiciary is a key stakeholder in the promotion of human rights.

Based on the shortcomings that were shared by the interviewees during the research process and the subsequent discussions carried out herein, the research noted that the new constitution has made a lot of strides in guaranteeing human rights protection as enshrined specifically in Chapter 4 of the constitution and also in other provisions of the constitution. In comparison to the LHC it was noted that there has been a significant improvement as the constitution seeks to correct past mistakes. Besides the said glories of the new constitution it was also noted that there is opportunity for improvement so as to move towards a full realisation of human rights protection as guaranteed by the constitution, given that the constitution is silent on certain key issues that have been discussed in this section.

#### **4.6 Conclusion**

This chapter started by exploring the long struggle for constitutional reform in Zimbabwe where it was noted that the numerous amendments that the LHC had been subjected to forced the opposition and CSOs in Zimbabwe to push for the government to rewrite the constitution as they felt that the said amendments had undermined the supremacy of the constitution. The chapter also discussed the COPAC constitution making process which subsequently gave birth to the Constitution of Zimbabwe (2013). Considering that the Declaration of Rights as provided for in Chapter 4 of the new constitution has been identified a damascene phase for Zimbabwe's human rights record it was imperative for the research process to discuss how the declaration can be seen as step in the right direction as it is a significant improvement from the LHC. It is

imperative to note that the actual provisions of Chapter 4 of the constitution will be discussed in the following chapter. The chapter concludes by discussing the major weaknesses of the 2013 constitution in the context of human rights, with the pretext of offering new ideas to the existing body of knowledge on the new supreme law, specifically on areas that may need attention and improvements if the 2013 constitution is fully safeguard human rights protection without equivocation.

## **CHAPTER V**

### **THE LANCASTER HOUSE CONSTITUTION AND THE CONSTITUTION OF ZIMBABWE (2013): ANTITHESES OF EACH OTHER OR TWO SIDES OF THE SAME COIN?**

#### **5.1 Introduction**

Having explored the provisions of the LHC that violated fundamental human rights as well as the constant amendments to which the constitution was subjected to, and also having discussed the binding provisions of the declaration of rights, this chapter will discuss some of the research findings by drawing a detailed comparison of the provisions set out in the new constitution in comparison to the LHC with the ultimate aim of establishing if the two constitutions in question are antitheses of each other in the context of human rights protection or if they are simply a same letter written in a different ink. The chapter will also discuss the research findings on the issue of second and third generational rights specifically on how they were dealt with in the new constitution in comparison to the LHC. The Chapter will conclude by discussing the prospects of a better human rights record as submitted by those who took part in the research process.

#### **5.2 Declaration of Rights in the 2013 Constitution v/s provisions of the LHC**

This section of the research report will discuss some of the key findings about the different provisions of the declaration of rights specifically in comparison to how the said provisions differ with what was guaranteed or not guaranteed by the LHC. The conclusions reached and shared herein are based on the frequency the subject under discussion enjoyed from the respondents thus allowing the researcher to draw common and constant submissions from the research participants.



### **5.2.1 Non Discrimination and Equality**

One of the core principles of human rights protection is the issue of equality, as such, a constitution that guarantees human rights protection should be very clear on matters related to equality and non discrimination. The research noted that despite the equality clause in the new constitution being very broad it however does not include sexual orientation in its provisions of anti-discrimination grounds. Given that the issue of sexual orientation and gay rights have proved to be contentious in Zimbabwe it was noted that there was a need for the constitution to be very clear in regard to the said rights. Most respondents however noted that the issue of sexual minorities is now arguable in a court of law as opposed to the LHC were it was completely outlawed. This notion was premised on the fact that the non discrimination clause bars discrimination of individuals who may be different as a result of “place or circumstances of birth”. The research thus noted that, based on this clause, at law sexual minorities can fight for their non discrimination basing on the fact that they were born with a different sexual orientation.

It was noted that the wording in the constitution is similar to the provision that is used by the constitution of Switzerland which bars discrimination based on ‘form of life’ and has been interpreted as to include sexual life thus the clause is used to provide a constitutional guarantee that prohibits discrimination based on one’s sexual orientation. Given that Lesbian, Gay, Bisexual, and Transgender (LGBT) have been discriminated upon in Zimbabwe the research noted that the vagueness of the term ‘circumstances of birth’ may open room for LGBT people to fight for discrimination in courts thus leaving the Zimbabwean courts with the mandate of providing an interpretation of the fuller meaning of the phrase in relation to the protection of the rights of those of a different sexual orientation.

### **5.2.2 Media Freedom and the Freedom of Expression**

The research noted that the new constitution goes a long way in allowing for freedom of expression and media freedom by encouraging the promotion of diversity and pluralism. Of particular interest to this research is Section 4.12 which states that states that *“broadcasting and other media of communication have freedom of establishment...are independent of control of government or by political or commercial interests...all State-owned media of communication must be impartial and afford fair opportunity for the presentation of divergent views and dissenting opinions”*.

The research thus noted that the new constitution is miles away from the LHC in terms of guaranteeing the impartiality of the media specifically the state media that has been subject to state manipulation for years. It was however noted that for these provisions to be fully functional there is a need to repeal existing media laws like AIPPA and the Broadcasting Services Act and the Interception of Communications Act. While the issue of repelling laws that are out of rhythm with the new Supreme law is not unique to media laws only the research noted that there is an urgent need for the government and parliament to realign media laws so that they are in sync with the new provisions as set out in the 2013 constitution.

### **5.2.3 Access to Information**

The research noted that the new constitution as opposed to AIPPA as provided for by the LHC promotes the unbiased access to and provision of information. Section 4.13 of the new constitution provides that whatever information that is available and needs to be used for public purposes or whatever purposes should be made available for the purposes that it intends to be used regardless of such information being held by the state, the organs of the state or nay other

institution private or public, such information will have to be availed so as to give meaning to this right. What is paramount in this clause is that it juxtaposes the right to information and public accountability, meaning that even in cases where the state is holding any information such information should be availed in the interest of accountability.

The research however noted that access to information can still be restricted especially in cases where professional confidentiality, state security and public security may be cited. Within the same vein it is important to highlight that the constitution cautions that such restriction has to be justifiable and reasonable in a just, democratic open society. The key issue noted by the research from this specific clause is that the new constitution upholds the right to information access and makes it even difficult for the state to manipulate any information even on the basis of state security. Some respondents noted that if the LHC had included such a clause then the President would have been compelled to release the report of the Chihambakwe Commission which was set up to look into the Matebeleland disturbances of 1981-1988, with the report of the commission never being made public up to today.

#### **5.2.4 Freedom of Assembly**

One of the key provisions of the LHC that has been attacked left, right and centre as a direct infringement of people rights is the Public Order and Security Act (POSA). Among other provisions POSA barred people from exercising their freedom of expression in public places such as streets, roads, pavements, pathways or any place that ‘exists for the free passage of people and vehicles’. Furthermore the law forced the people to apply to the police in order for them to exercise their freedom of association and assembly, in cases of CSOs or any other parties

that intended to convene a gathering that was deemed as an attack to the government such gatherings were not cleared thereby curtailing the people's right to freedom of assembly. Section 58 of the new constitution now guarantees the people's right to freedom of assembly including picketing and demonstrations, rights which were formerly prohibited. Most respondents indicated that this clause will lead to the repelling of POSA as the dictates of POSA are not in tandem with the provisions states in Section 58 of the new constitution.

### **5.2.5 Removal of Corporal Punishment**

While Zimbabwe has not ratified the UN Convention against Torture and other Cruel, Inhumane and Degrading Form of Treatment or Punishment (CAT), the new constitution has adopted one of its key principles by outlawing corporal punishment which is regarded as a cruel and inhuman form of punishment in the context of human rights. The research thus noted that by adopting laws that are in sync with the CAT, Zimbabwe is proving that at times you do not necessarily need to ratify international treaties in order to enact their key principles into your laws.

### **5.2.6 The Death Penalty**

Human rights activists the world over have been calling for the total abolishment of capital punishment as they argue that this form of punishment is a direct violation of the right to human life and undermines the dignity associated with humanity. The research noted that Zimbabwe missed an opportunity to join the new world order in which capital punishment is regarded as an inhuman and barbaric act. While the new constitution embraces the death penalty albeit with notable changes as compared to the LHC the Zimbabwe Minister of Justice has openly condemned capital punishment arguing that, *"As someone who has been on death row myself*

*and only saved by an 'age technicality', I believe that our justice delivery system must rid itself of this odious and obnoxious provision.*”, Mnangagwa (2013). It should however be noted that efforts were made to completely remove capital punishment from the laws of Zimbabwe but the new law however retains death penalty with an attempt to make strict adherence to international standards where death penalty can only be passed in aggravating circumstances. In trying to limit the death penalty the new constitution makes the following provisions;

1. The death penalty can only be passed on people who are convicted of murder which was committed under aggravating circumstances
2. Men under the age of twenty one or above the age of seventy are exempted from the death penalty.
3. All women are exempted from the death penalty
4. Those sentenced to death may seek the revocation of the sentence through a presidential pardon
5. The Courts have the discretion to pass or not pass the death penalty.

In the context of human rights some respondents noted that the retention of death penalty being applicable to men only is arbitrary discrimination. It is also imperative to note that capital punishment has not been outlawed by international law as there are a lot of countries that are still practising it. The research noted that in the SADC region alone, countries like Botswana, Malawi, the DRC, Swaziland and Tanzania all have the death penalty within their provisions. The research thus noted that the death penalty as provided for by Chapter 48 is a significant improvement as it differs from the LHC that provided for the passing of death penalty in a plethora of cases such as treason, mutiny, drug trafficking and non-aggravated murder.

### **5.2.7 Rights of Accused People and Detainees**

The research noted that the new constitution is very detailed in regard to the rights of accused persons, detainees and suspects. It was noted that the new constitution is in tandem with international standards as it seeks to protect the rights of the accused from the pre-trial period all the trial itself. This provision was highly welcome given that under the LHC section 121 of the Criminal Procedure and Evidence Act had been used to deny accused persons their freedom even in cases where the high court would have cleared them for bail. Furthermore the research noted that the guaranteed rights of accused persons and detainees are a major milestone in human rights protection as they now guard against arbitrary arrests and unlawful detention of the accused but above all guarantee the accused persons the right to legal representation of their choice and access to the court within the period guaranteed at law.

Another milestone that was noted by the research in line with this clause was that it guards against arbitrary arrest and unlawful detention as it provides for punitive action against those that may abuse their office specifically the officers of law that may illegally arrest or detain accused persons. This means that the officers that exercise arbitrary arrests or unlawful detention will be personally liable for the said acts as the detained persons are now entitled to sue or seek legal recourse against those that may have unlawfully detain or arrest them.

### **5.2.8 Property Rights**

While the right to property ownership is guaranteed under the new supreme law it should be noted that this right is undermined in circumstances where public and national interests may be concerned. The constitution states that "...public safety, public order, public morality, public

health or town planning” are some situations that may supersede the right to property ownership. The research noted that one of the major milestones that was achieved by the new constitution in comparison to the LHC is that it provides for those who lose their property through compulsory acquisitions to seek legal recourse in regard to the legality of their eviction as well as the reasonable compensation that may be awarded to cover for their eviction.

The research also noted that the major weakness of the right to property ownership specifically in matters related to Agricultural land is that the provisions stated in Chapter 72 (3)b of the constitution which prohibit compensation and legal recourse on cases involving land compulsorily acquired for agricultural and resettlement purposes contradicts Chapter 16 of the same constitution and also undermines the SADC Tribunal Judgement in the case of Campbell (Pvt) Ltd et al. v/s the Government of Zimbabwe which ruled that Amendment No. 17 had hindered the applicant’s access to the local courts and also denied them access to a fair hearing. The key point noted by the research in regard to the issue of property rights is that while the constitution now provides for legal recourse and possible compensation in cases where property may have been compulsorily acquired this benefit does not apply to Agricultural land as it denies those who lose agricultural land the rights to challenge their loss through the courts and this is in violation of the jurisprudence of the African Commission on Human and People’s rights.

### **5.2.9 Freedom from Arbitrary Eviction**

Unlike the LHC, the new constitution guarantees the right to shelter as Section 74 makes it clear that people are not to be evicted from their houses nor have their houses demolished without an order of the High court that would have been made after pursuing all the possible avenues. The

key point to note is that the new constitution safeguards against an eviction and demolition program of the magnitude of operation Murambatsvina and only warrants evictions and demolitions as the last option when all relevant alternatives and ‘circumstances’ have been considered. The research thus noted that the recent interdict by the High Court through a High Court order that was sought by the ZLHR in October 2014 to stop planned demolitions in Chitungwiza and Epworth is a bare and lucid testimony of the strength of the Declaration of Rights in safeguarding certain rights that were formerly not guaranteed under the LHC.

#### **5.2.10 Other Freedoms and Rights**

While the research report limited itself to the rights stated and discussed herein, it should be acknowledged that the Constitution of Zimbabwe indeed guarantees the protection of a plethora of rights including those that were not discussed in this research report. Some of the key rights that are also protected under the declaration of rights include but are not limited to the following: rights of the elderly, rights of children, rights of women, right to education, right to food and water and environmental rights among others. Perhaps the key point to note at this juncture is that the research noted that in protecting all the identified rights the new constitution strives to improve and build on what was earlier on provided for in the LHC.

In synopsis the research noted that the constitution of Zimbabwe (2013) provides for better human rights protection as compared to the LHC. As highlighted through the given cases one can conclude that some of the rights enshrined in the new constitution were a response to the rights that were not originally guaranteed in the LHC or those rights which were violated by the LHC.



### **5.3 Prospects of a Better Human Rights Record**

By and large the research noted that the coming in of a justiciable Declaration of Rights that is enforceable at law will greatly improve the country's human rights record for the better. For example the research noted that the country was already recording some cases where some charges were being thrown out under the pretext that the said charges were a violation of some rights as guaranteed by the Declaration of Rights in the new constitution. The recent revoking of the defamation laws by the Constitutional court of Zimbabwe and the High Court order stopping planned demolitions of houses in Chitungwiza are some of the recent cases that the research noted which point out to the fact that the country is indeed poised for a better human rights record. Besides the two cases referred herein the new constitution also comes with certain provisions that will ensure that the rights it guarantees are fully upheld. It is within this vein that this section will now discuss some of the provisions of the new constitution that were identified as the pillars and drivers of a better human rights record.

The research noted that the new constitution is in line with contemporary progressive constitutions which give the Declaration of Rights supremacy over all laws including the laws provided for in the constitution. This provision is clearly spelt out in Section 46 of the new constitution which provides for the declaration being supreme and mandates all "common law, customary law, courts, forum, tribunal or body" to be guided by the spirit and objectives of Chapter 4. As such, any act, law or policy that is deemed to be incompatible with any provisions provided under the Declaration of Rights shall be "declared invalid to the extent of the inconsistency". The Declaration of Rights also establishes the Constitutional Court as the arbiter of the declaration of rights thus offering a legal binding route to the protection of human rights.

The research noted that by appointing the Constitutional court as the final arbiter in terms of human rights protection and by insisting on the supremacy of the constitution in guaranteeing human rights Zimbabwe is setting precedence for a better human rights record under the new constitution as compared to the LHC.

Another observation that points out to a better human rights record under the new constitution is that the constitution sets guidelines on how the declaration of rights should be interpreted. What is key is that in interpreting the declaration of rights or any such provisions of the new constitution, such interpretation must be guided by the rights and freedoms spelt out in the constitution and *'promote the values that underlie an open, just and democratic society based on human dignity, equality and freedom'*. Another important factor that shows that the country is poised for a better human rights record under the new constitution is that interpretation of the Declaration must also be done in line with provisions of international treaties that Zimbabwe is state party to. Ideally this means that Zimbabwe's human rights protection is now based on international best practice and standards.

The research also noted that the new constitution fosters for a more independent judiciary by establishing an independent JSC. An independent judiciary is the fulcrum of human rights protection thus the success of the Declaration of rights in safeguarding and protecting the rights of the Zimbabwean people largely depends on the independency of the judiciary and the ability of the judiciary to discharge its duties and assume its responsibilities in an independent manner void of political influence. These stringent conditions thus create prospects for a better human rights record as the JSC will be established as an independent institution that will also recruit its

judges in a transparent manner. The research noted that this has already been put into practice as there is an on-going selection of Judges that is being done in the public domain.

The research also noted that the new constitution will present a better human rights platform as the provision provided therein make it very difficult for anyone to try and temper or amend the declaration of rights. Coming from a background where the LHC was amended a record 19 times, more than often, with the aim of expanding political power and influence; the water tight provisions provided for in amending the Declaration of Rights thus serve as a step in the right direction in as far as future protection of human rights is concerned. For the record the constitution provides that if the Declaration of Rights is to be amended such proposed amendment should be approved by two-thirds majority of the parliament and Senate before being presented to a referendum. Ideally this means that the amendment of the Declaration of Rights is not only a long cumbersome process but is also a process that will have to involve all citizens as it is decided through a referendum.

Another key strength of the new constitution that creates prospects for a better human rights record is that the constitution bestows the powers of being the custodian and guardian of human rights protection to the judiciary. This means that the rights enshrined in the Declaration of Rights are also binding to the state meaning to say that the judiciary can take the state to task in situations and circumstances where it may feel that the state is not taking adequate measures to ensure the protection of the guaranteed rights. Within the same vein the research noted that unlike the LHC, the new constitution gives a *locus standi* to any individual or group of persons acting on their own behalf or on behalf of others to approach the courts for a relief in cases where

a certain right or freedom provided for by the constitution is being violated or is likely to be violated. This means that the constitution grants the right to approach the courts in matters related to human rights violations thereby creating prospects for a better human rights record under the new supreme law.

The research also noted that the constitution is in sync with modern progressive constitutions as it states certain rights and freedoms which can never be limited nor compromised at any point and time. Rights such as the right to life, the right not to be tortured, the right to human dignity and the right not to be placed in servitude are some key rights that can never be limited at any point and time regardless of circumstances. The constitution goes further in guaranteeing a better human rights record by safeguarding the limitations of other rights citing that limitations of other rights must be done only in a manner that is legal and justifiable in an “open, just and democratic society.

By and large the research noted that the new constitution indeed sets room for a better human rights record as provided for by the findings discussed herein. Furthermore the research noted that the new constitution reduces the powers vested in the office of the president in a number of ways thereby promoting public accountability as well as participatory governance in decision making. For example the president now requires consent from two-thirds majority of the parliamentarians in order for him to dissolve parliament. Furthermore the presidential powers which were previously provided for in the LHC that allowed the president to veto legislation or gazette new legislation under the Presidential Powers Temporary Measures Act were removed. By and large the research noted that the new constitution creates opportunities for a better human

rights record as it transfers some powers and responsibilities from the presidency to the legislature thereby allowing governance decisions to be exposed to public scrutiny and approval by a parliamentary majority.

In as much as the Declaration of Rights may be termed as the panacea to constitutionally guaranteed human rights protection in Zimbabwe it should be noted that without legally binding mechanisms that support the implementation and enforcement of the Declaration of Rights it will remain a paper tiger whose influence and effectiveness will largely remain a pipe dream. Within this backdrop the constitution provides for the establishment of what are termed as ‘Independent Commissions Supporting Democracy’. The commissions are established to help in monitoring the protection, respect and implementation of the rights and freedoms enshrined in the constitution. Such commissions include the Zimbabwe Human Rights Commission (ZHRC), the Zimbabwe Gender Commission (ZGC), The Zimbabwe Electoral Commission (ZEC), the Zimbabwe Media Commission (ZMC) and the National Peace and Reconciliation Commission (NPRC). The most important aspect that the research noted was that the commissions are established as independent entities thus minimising their undue influence by structures such as the executive. This means that the Commissions can discharge their duties in an impartial way there by aiding the protection of human rights in the country. It should however be noted that some respondents questioned the ‘independency’ of the Commissions given that the President appoints some of the Chairs of the commissions for example the chairs of ZEC, ZHRC and the NPRC.

## 5.4 2<sup>nd</sup> and 3<sup>rd</sup> Generation rights

The research noted that the constitution is quite broad in covering first-generation rights that is rights pertaining to civil and political rights but is a bit lacking when it comes to second-generation and third-generation rights. Second generation rights are rights that cover cultural, economic and social rights while third generation rights are rights that include community rights. This section of the research will briefly look at how the said rights were covered or protected by the 2013 constitution. It should be noted that the research observed that the LHC was largely silent about these rights thus the need for the research to explore how the said rights are dealt with in the new constitution.

The research noted that while the clauses on second-generation rights may appear to be conservative they however still provide for the same level of protection as that granted to first-generation rights. The research noted that unlike the LHC the new constitution made an effort to cater for a wide range of second-generation rights as it guarantees the protection of the right to basic education, shelter, water, food and health. It was however noted that limitation clause is included in the realisation of these rights as the constitution mandates the state to ensure the realisation of these rights but ‘within the limits of available resources’. This may be that second generation rights by their nature have a cost implication on the state and the state may apply the limitation clause so as to avoid the direct costs which may be incurred in trying to satisfy the said rights. One good example is that the constitution provides for state funded education as a right that should be accessed for free but does not make the same provisions for secondary and tertiary education. Of particular interest is Section 75(4) which notes that the state can only pursue the provision of the right to education “within the limits of the resources available to it.” The

research observed that like other issues contained in the constitution, the court will have to give meaning to second-generation rights by interpreting them as well as establishing to what extent the government or its organs is working towards the realisation of such rights.

There has always been some dispute between human rights defenders and state representatives on whether second-generation rights are justiciable or not. This is premised on the notion that at times the guaranteeing and lawful enforcement of some first generation rights like the right to liberty is superficial and may only be realised after the intervention of the courts, the enforcement of second generation rights under such circumstances therefore become farfetched. The key point being made is that the research noted that generally the realisation of second-generation rights is often not prioritised especially in situations where first generation rights might be facile. The fact that the new constitution leaves the implementation of second-generation rights to the mercy of the availability of government resources does not help the situation either.

As Laswell (1936) posited, “Politics is who gets what, when and how”, as such politics is all about resource allocation and distribution. The research noted that second generation rights if they are to be effected normally require the order of the court in allocating state resources. Considering that resource allocation is the mandate of the Executive whilst formulation of policy on how such resources should be utilised is the mandate of the legislature, and that second generation rights normally involve the judiciary in ensuring that the rights are enforced, debate has thus been proffered on whether second generation rights should be justiciable or not.

It was observed that the determination on whether second generation rights are justiciable or not requires jurisprudential balancing by the courts. The jurisprudential balance can be attained if the

state is allowed to take legislative measures within the confines of its available resources so as to attain the progressive realisation of the 2<sup>nd</sup> generation rights. The research thus noted that the new constitution follows this trend as it limits the progressive realisation of second generation rights to the limits of the resources available to the government.

The research also noted a worrying trend where most second generation rights are not provided for under the Declaration of Rights but are discussed in Chapter 2 as national objectives. This separation is significant in that it limits the enforcement of second generation rights as Chapter 2 does not provide for enforcement of the national objectives whereas Section 85 provides for the enforcement of first generation rights as provided for in Chapter 4 of the new constitution. This therefore means that second generation rights are merely providing a guide to the state and related institutions that when implementing and drafting laws and policies they should pay attention to second generation rights especially when they are interpreting the obligations of the state under the law.

What becomes lucid from these findings is that by relegating the second generation rights to national objectives it becomes difficult to ascertain if the Constitutional Court has jurisdiction in situations where the state may fail to be guided by the national objectives in discharging its functions. The long and short of the observation is that the classification of most second generation rights as national objectives makes it difficult for the state to be accountable for their progressive realisation as the binding call on national objectives is simply ensuring that the objectives inform planning and implementation of laws and policies and not necessarily that the objectives are implemented.



It is however essential to note that whilst the bulk of second generation rights are placed under Chapter 2, some second generation rights are included in Chapter 4 thereby being guaranteed and enforced by the enforcement clauses of the Declaration of Rights. These are the right to education, the right to food and water and the right to healthcare. As such, while the state is not mandated to ensure the realisation of second generation rights that are carried in Chapter 2, its provision of and ensuring the protection of the three second generation rights stated in Chapter 4 is mandatory given the binding enforcement clauses contained in Chapter 4.

The research thus concluded that the new constitution gave more attention to first generation rights with second generation rights being given little importance as they are mostly stated as national objectives that should just guide the implementation of other provisions of the constitution. The research however noted a worrying trend that 3<sup>rd</sup> generation rights are not prioritised throughout the new constitution with the exception of Environmental rights which are outlined in Section 73. This can be attributed to the fact that third generation rights are still a developing part of international rights law, Matyszak (2013) thus their coverage is still limited given that there is still debate on whether second generation rights are justiciable or not.

## **5.5 Conclusion**

By and large this chapter was largely comparative as it placed the provisions provided for by the new constitution and provision of the LHC and try to establish how the two constitutions dealt with the issue of human rights protection. The Chapter noted that the new constitution is by far a better document in as far as human rights protection is concerned. The chapter also established that Zimbabwe will definitely have a better human rights record under the new constitution as

compared to the record endured under the LHC. This is mainly attributed to the fact that the new constitution establishes enforceable provisions, limits powers of the executive and makes provision for independent institutions thereby guaranteeing human rights protection in the process by curbing ways in which human rights can be violated.

## CHAPTER VI

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Recommendations

The following were identified as the key recommendations that came out of the research process;

- The national needs to practice and develop a culture of constitutionalism as constitution that uphold human rights is null and void when it governs in a state that lacks constitutionalism
- The supremacy of the constitution must be upheld especially given that the new constitution underscores on its supremacy with Zimbabwe being a constitutional democracy
- The government should quickly realign laws so that they are in sync with the new constitution
- The establishment of Independent Commission should be prioritised as they play a key role in guaranteeing human rights protection
- There is need for more public awareness on the human rights protections that are guaranteed by the constitution as knowledge of human right is not reaching grass root levels
- Production of simplified human rights booklets, manuals, newsletters should be encouraged so that there is increased knowledge on human rights
- The government and related stakeholders to make use of the advancement in ICT and use public platforms such as social networks to educate and advice people about their human rights and how the new constitution protects such rights

- Capacity building training on appreciation of human rights, as guaranteed and protected by the constitution, for uniformed forces especially the Police Force as they have been linked to cases of human rights violations in the past.
- Introduction of human rights education in the school curricula so that the nation embeds a culture of human rights respect and observance from an early age.

## **6.2 Conclusive Remarks**

In synopsis the research concluded that the new constitution is miles ahead of the LHC in terms of human rights protection. This is mainly premised on the fact that the new constitution has a justiciable Declaration of Rights which is enforceable at law. This is a step in the right direction given that the Bill of Rights that was enshrined in the LHC was not enforceable at law and also that the numerous amendments that had been burdened on the LHC had watered down its legitimacy in human rights protection.

While the research noted that the new constitution has been lauded as a possible panacea to a good human rights record for Zimbabwe, it should be noted that the research recommends that what Zimbabwe now needs to develop is a culture of constitutionality and constitutionalism as a good constitution that exists in a setup where constitutionalism does not prevail is not worth the paper that it is written on. There is a need for all arms of the state from the Executive to the judiciary to uphold their different mandates as provided for by the new constitution.

As a contribution to the existing body of knowledge there is a need for organisation like the ZHRC to come up with simplified booklets or information packages that educate the people

about the new constitution especially given the fact that the constitution makes a lot of provisions that were not previously provided for by the LHC.

The research also noted that while emphasis of human rights protection is placed on first generational rights the Declaration of Rights in the new constitution endeavours to protect all three generations of rights albeit to different extents and in different contexts. The strength of the new constitution was also noted in that it helped to clarify a lot of grey areas that had been established under the LHC. For example the new constitution places the duty of human rights protection upon all the arms of the state and provides for the Declaration of Rights as the fulcrum for implementation and formulation of policies and laws alike.

Coming from a background where the LHC had been constantly manipulated through a myriad of amendments the prescriptive Declaration of Rights is a real achievement as it creates a constitutional democracy where the constitution reigns supreme even over the executive thus safeguarding the country from impunity and abuse of office by the executive, the judiciary or the legislature. Furthermore the research noted that the new constitution brings Zimbabwe closer to international best practice as most of the provisions set out in the Declaration of Rights are in sync with international law. Despite the fact that Zimbabwe has not ratified the CAT it should be noted that some key principles of the CAT have been incorporated into the new constitution, for example the protection of citizens from any form of torture.

While the research concluded that Zimbabwe will definitely enjoy a better human rights record under the new constitution it should be borne in mind that some of the rights may be limited as the constitution makes provision for violating some rights in the name of ‘state security’, ‘public

safety', 'public morality' and public health among others. For example the right to property ownership is not 100% guaranteed as the government reserves the right to compulsorily acquire land for purposes it deems necessary with such acquisition not being liable to court proceedings or compensation.

Overall, the Declaration of Rights and the entirety of the new constitution is a very progressive document that cannot even be placed at par with the LHC as among other strengths the new constitution transfers more power to the legislature and the judiciary as opposed to the LHC where the Executive was almost omnipotent. Furthermore the incorporation of a justiciable Declaration of Rights which is flexible enough to allow incorporation and consulation of international rights law is also a commendable idea. Other provisions of the new constitution like the establishment of independent commissions, reduced powers of the executive and stringent conditions in amending the Declaration of Rights complete the merits of the document in comparison to the LHC.

## REFERENCES

African Union (AU) (2008) *Report on the 2008 Zimbabwe Elections* (Addis Ababa: AU)

Agenda For The Government, 2013 – 2018

Alexander, J and McGregor, J (1999) *Representing Violence in Matebeleland: Zimbabwean Press and Internet Debates* in Allen and Seaton (eds). *The Media and Conflict*. Zed Books.

London

Alexy R., *A Theory of Constitutional Rights*, 2002, Oxford: Oxford University Press (Hereafter TCR).

Amnesty International (2013) *Zimbabwe: Human Rights*

Amnesty International, 2005, 2006, 2007, 2008, 2009, 2010, 2011

Antonio Cassese, *Human Rights in a Changing World*. (Philadelphia: Temple University Press, 1990), 2.

B. Hlatshwayo (1998)'Making a Constitution: background and lessons from Uganda and Kenya'

Bezuidenhout J, and Nel F, 1995, *Policing and Human rights*, Juta & Co. ltd, Cape Town

Cally, RF (2001) *An Introduction to Reserach*. Cambridge. University Press

Catholic Commission for Justice and Peace (1997) *Breaking the Silence, Building True Peace. A Report on the Disturbances in Matabeleland and the Midlands 1980–1989*

Centre for Democracy and Development (CDD) (2000) *The Zimbabwe Constitutional Referendum* (London: CDD)

Church and Civil Society Forum (2012): A Study on the Role of the Church in Violence in Zimbabwe, Harare

Constitution of Rhodesia 1969

Constitution of Zimbabwe (1979) as amended

Constitution of Zimbabwe (2013)

Crisis in Zimbabwe Coalition (2012). *Revisiting the mandate of the ONHRI*. A paper presented at the Crisis in Zimbabwe Coalition National Conference on National Healing and Reconciliation

David Shiman, *Teaching Human Rights*, (Denver: Center for Teaching International Relations Publications, U of Denver, 1993)

Eichelberger , RJ (1990) *Disciplined Enquiry: Understanding and Doing Reserach*. Newyork. Long man

European Parliament (2011) *Impact of Sanctions and Isolation measures on N. Korea, Burma, Iran and Zimbabwe as Case studies*.

*Evan Fox-Decent* & *Evan J. Criddle* (2010) *The Fiduciary Constitution Of Human Rights in Legal Theory*

Feltoe, G and Sithole E (2010) *Review of the Rights discourse in Zimbabwe*. University of Zimbabwe

Feltoe, Geoffrey (2004) *The Onslaught Against Democracy and rule of Law in Zimbabwe in 2000*. In Harold-Barry, David (ed.) *Zimbabwe: The Past is the Future*. Harare: Weaver Press.



Flowers, N (1998) Human Rights Here and Now-Celebrating the UDHR

French, RF (2010). *Protecting Human Rights Without a Bill of Rights*. John Marshall Law School, Chicago

Hammarberg T (2008), No Real development Without Human Rights- Lecture on the inter-relationship between development and human rights when implementing the UN Millennium Development Goals Council of Europe Commissioner for Human Rights

Trinity College, Dublin

Human Rights NGO Forum (2013) Zimbabwe-Human Rights, Rule of Law & Democracy 2013

Human Rights Watch, 2004, 2006, 2012, 2013

I.Mandaza (ed.) (1986) *Zimbabwe: the Political Economy of Transition* (Dakar: Codesria)

Isaac, S. and Michael, W.B. 1997. *A hand book in research and evaluation*. 3rd ed. California: Edits *Journal of Social Change*, 45

L. M. Sachikonye (2004) ‘‘Zimbabwe: Constitutionalism, the Electoral System and Challenges for Governance and Stability’’

Legal Resource Foundation (2009) Resource handbook on understanding Human Rights. LRF

Macovei (1999) , *Protection of Human Rights by the Judiciary in Romania*, in JUDICIAL Protection Of Human Rights: Myth Or Reality, *supra* n. 1, at 6.

Maiese, M (2004), What are Human Rights-online article

Makina, G (2001) *Zimbabwe’s Land Question: Lessons for South Africa*. International Journal for Politics and Development Vol 3

Makwerere et.al (2012) Human Rights and Policing: A Case Study of Zimbabwe. *International Journal of Humanities and Social Science Vol. 2 No. 17; September 2012*

Mandaza, I. & Sachikonye, L.M. (eds.) 1991. *The One-Party State and Democracy: The*

Mashingaidze, TM (2009) *Zimbabwe's illusive national healing and reconciliation processes: From Independence to the Inclusive government 1980-2009.* Conflict Trends

Matyszak, D (2013) Human Rights And Zimbabwe's Draft Constitution. Research and Advocacy Unit

Menendez A. J., Eriksen, O. E., (eds.), *Arguing Fundamental Rights*, Springer, 2006, 1, 5

Mouton, J. 2001. *How to succeed in your masters and doctoral studies. A South African guide and resource book. 8th ed..* Pretoria: Van Schaik.

Nachmias, C.F. and Nachmias, D. 1996. *Research methods in the social sciences.* 5th ed. London: Arnold.

National Constitutional Assembly (NCA) (1998) 'Building a People's Constitution', *Newsletter*, Harare

Ndulo, M (2013) Zimbabwe's unfulfilled struggle for a legitimate constitutional order in Framing the State in Times of transition

Nueman (2003) *Social Reserach Metthods.* London, allyn and Bacon

Owen, T (2010) *Human Rights and the Constitution*, New Delhi. Grasshoper Printers

Palley, C (1966) *The Constitutional History and Law of Souther Rhodesia 1888-1965*, Oxford, Clarendon Press

Palmer, R (1990) *Land reform in Zimbabwe, 1980-1990*, African Affairs, 89, p 163

Ranger, T (1985), *Peasant Consciousness and Guerilla war in Zimbabwe*. London. James Carrey

Reeler, A.P. (2004) *Sticks and Stones, skeletons and Ghosts*. In Harold-Barry, David (ed.)  
*Zimbabwe: The Past is the Future*

Sachikonye (eds.) *The One-Party State and Democracy: the Zimbabwe Debate* (Harare: Sapes

Sachikonye, L (2011) *Constitutionalism, the Electoral system and challenges for governance and stability in Zimbabwe*

Sachikonye, L (2011) *Zimbabwe Constitution-Making and Electoral Reform Processes: Challenges and Opportunities* Draft paper prepared for the Conference on ‘Legitimacy of Power- Possibilities of Opposition’ organised by Department of Political Science and Public Administration, Makerere University and Chr. Michelsen Institute (CMI)

Sachikonye, LM (2003) *The situation of commercial farm workers after land reform in Zimbabwe: A report prepared for the Farm community trust in Zimbabwe*: Mike Campbell Foundation: London

Stevens (2012) *Human rights and Development Two sides of the same coin*

*The Herald*, 20 December 1989. *Interview with President Robert G. Mugabe*

Theron, F. 2005. Guidelines for writing scientific documents and using basic social methodology. In Davids, I., Theron, F. & Mapunye, K.J., *Participatory development in South Africa: A development management perspective*. Pretoria: JL van Schaik.

UN Human Rights (2013) *Development is a Human Rights Goal*. Speech by UN HR High Commission Navi Pillay

UN Human Rights website

W. Ncube (1991) 'Constitutionalism, Democracy and Political Practice in Zimbabwe' in I. Mandaza and L.

*Zimbabwe Debate*. Harare: SAPES Books

Zimbabwe Lawyers for Human Rights (2009) *Zimbabwe's Presidential Election Runoff of 2008: An Account of Victims of Electoral Violence*. ZLHR Report

ZLHR and CHRE (2007) Operation Murambatsvina: A Crime against Humanity- an Independent Legal Opinion whether the 2005 Operation Murambatsvina Forced Evictions constituted a crime against humanity under the Rome Statute

## **APPENDICES**

### **Annex 1: QUESTIONNAIRE for Constitutional Experts**

#### **Introduction**

My name is Tapfuma R. Jongwe, a Master of Arts in Development Studies student studying with the Midlands State University. I am carrying out a research which is a comparative analysis of the Lancaster House Constitution and the 2013 Constitution in the context of Human Rights Protection

I am kindly asking you to respond to the questions in this questionnaire and would like to assure you that your responses will solely be used for the purposes of this research. If you are in agreement I will record your responses using an audio record but will also take down written notes in regard to your responses.

For any questions concerning this research, please do not hesitate to contact my Supervisor, Mr D. Munemo from the University.

**SECTION A: Personal Information**

Sex ..... Female  Male

Years in Practice 0-5  5-10  10-15  15+

**SECTION B: Key Questions**

**Objective: To identify and explain provisions of the new Zimbabwean constitution that guarantees human rights.**

1. What's your understanding of Human Rights?

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2. What are the major differences between the LHC and the New Constitution in terms of human rights Protection

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3. Does the New Constitution provide for better mechanisms for human rights protection in comparison to the LHC

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4. Have you deal with any cases that involve human rights vis-à-vis the provisions of the New Constitution (If Yes-Please Explain)

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**Objective: To determine the prospects of a better human rights record as provided for by the new supreme law**

5. What are the main improvements that are brought about by the new constitution in terms of human rights protection

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6. How does the new constitution differ with the LHC in terms of offering rights protection that are enforceable at law

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**Objective: To carry out a comparative analysis of the Lancaster House Constitution and the new Constitution of Zimbabwe (2013) in the context of human rights protection.**

7. What are the specific and significant differences between the 2 supreme laws

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8. What new provisions are provided for by the new Constitution that were never provided for in the LHC

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**Objective: To identify and document provisions of the Lancaster House constitution which were a direct violation of human rights and discuss how such provisions have been addressed in the new constitution**

9. What are the main human rights violations that were provided for by the LHC that are now outlawed by the new law

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10. What mechanisms need to be put in place to ensure that the new provisions set out in the new constitution become binding

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11. How does the 2 documents differ in the context of protecting 2<sup>nd</sup> and 3<sup>rd</sup> Generation Rights

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12. Any recommendations or comments that you think will add significant value to the research process?

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## **ANNEX 2: LETTER OF INTRODUCTION FOR FACILITATION OF FOCUS GROUP DISCUSSIONS**

My name is Tapfuma Jongwe a Master of Arts in Development Studies student studying with the Midlands State University. I am carrying out a research which is a comparative analysis of the Lancaster House Constitution and the 2013 Constitution in the context of Human Rights Protection

You have been selected to participate in the focus groups because of your valuable knowledge in the field of Human Rights and specifically because of the work your organization is doing in regard to Human Rights in Zimbabwean traditional agriculture. I really thank you for being available for this FDG.

I will be asking you some guiding questions in regard to your knowledge about human rights and specifically about the new constitution of Zimbabwe and the LHC in terms of Human Rights. The information that you will provide based on your knowledge and experience will go a long way in adding value to the existing literature on the new constitution but above all will inform policy and educate people in spaces where they may be searching for beacons of expertise in regard to Human rights.

Please note that this is a discussion so all people are free to participate and the shared information will be shared in confidentiality, no names will be captured in compiling the report.

### **Ground rules**

1. Compulsory participation for all members in the FDG
2. All answers are correct-
3. The facilitator will give guiding questions that will stimulate discussion
4. All cell phone to be switched off to avoid unsanctioned recordings.

### **Annex 3: QUESTIONNAIRE for Organisations/NGOs/CSOs**

#### **Introduction**

My name is Tapfuma R. Jongwe, a Master of Arts in Development Studies student studying with the Midlands State University. I am carrying out a research which is a comparative analysis of the Lancaster House Constitution and the 2013 Constitution in the context of Human Rights Protection

Your organisation was chosen to take part in this research process based on the work that it does which the researcher believes will add great value to the research process and help the research to meet its objectives.

I am kindly asking you to respond to the questions in this questionnaire and would like to assure you that your responses will solely be used for the purposes of this research. If you are in agreement I will record your responses using an audio recorder but will also take down written notes in regard to your responses.

For any questions concerning this research, please do not hesitate to contact my Supervisor, Mr D. Munemo from the University.

**SECTION A: Organisational Information**

**Name of Organisation:** .....

**Year Established:** .....

**Registration Status:** .....

**SECTION B: Programmatic Questions**

1. What is your organisation’s main area of focus?

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2. Can you briefly explain some of the projects/activities that your organisation is implementing?

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3. What activities/projects/programs have you implemented in regard to human rights?

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4. What is your organisation's position/perception in regard to the new constitution specifically in the context of Human Rights?

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5. Have you carried out any activities/programs in regard to the new constitution in the context of human rights?

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6. Has your organisation produced any information pamphlets/newsletters/books/magazines in regard to the new constitution in the context of human rights?

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7. From the work that your organisation has carried so far, what do you think are the main strengths of the new constitution in comparison to the LHC?

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8. Based on your organisation's experience do you think the New Constitution provides prospects for a better human rights record?

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9. Are there any gaps/shortcomings of the new constitution in the context of human rights protection?

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10. From interactions with members of the public in your day to day work, do you think the ordinary citizens are aware of their rights as provided for by the new Constitution

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11. What strategies do you think the government, NGOS, CSOs or any other related stakeholders should put in place in order to promote public awareness about human rights issues?

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12. Any recommendations or comments that you think will add significant value to the research process?

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