THE GOOD, THE BAD, AND THE UNWORTHY:
ZIMBABWE'S DRAFT CONSTITUTION AND ITS IMPLICATIONS FOR LAND POLICY

Dale Doré
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"All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."

~ President Thomas Jefferson's first inaugural address, 4 March 1801

Executive Summary

On the 6th February 2013, four years after the formation of a Government of National Unity, a draft Constitution was laid before Parliament and unanimously approved by the House of Assembly and the Senate. The parties that negotiated the Global Political Agreement (GPA) are urging the people to vote 'Yes' in a referendum on this proposed Constitution before it becomes our fundamental law. In this paper I explore those sections relevant to land policy, especially sections 296 and 297 on establishing a Land Commission and its role to conduct land audits; and section 72 governing rights to agricultural land. Section 72 is controversial because it incorporates key provisions from the previous constitution that were struck down by the SADC Tribunal on the basis that they were discriminatory and inimical to international law and the rule of law. The paper concludes that compromises made between political parties have produced a patchy charter with a mix of good and bad clauses. But the draft Constitution also includes provisions that make it unworthy of a democratic society based on justice, equality and the rule of law.

1. Introduction

The draft Constitution brings together what had been two related but disparate land policy issues: the establishment of a Land Commission, and the carrying out of a land audit. Section 297(1)(b) now makes the Zimbabwe Land Commission responsible for conducting audits of agricultural land. When originally conceived, both the Land Commission and the land audit were to be independent, impartial and technically sound in order to bring sanity to an otherwise deeply politicised and polarised issue. The paper therefore explores the background and need for a Land Commission and a land audit.

More controversially, the draft Constitution separates general Property Rights [71] from Rights to Agricultural Land [72]. Its provisions governing Property Rights hold that no person may be compulsorily deprived of their property unless i) they are given reasonable notice, ii) they are paid fair and adequate compensation, and iii) the acquiring authority applies to the courts to

confirm the acquisition if it is contested [71(3)(c)]. If the court does not confirm the acquisition, a person may apply to the court for the prompt return of their property. It also allows a person to challenge in a court of law the legality of the acquisition, the amount of compensation, as well as ask for prompt compensation. Yet none of these rights are protected regarding Rights to Agricultural Land.

2. The Zimbabwe Land Commission

The Genesis of an Idea

The idea of a Land Board or Commission has had different incarnations and its functions varied from a purely advisory role to a fully-fledged parastatal organisation, replete with executive powers over all agricultural land matters. The Rukuni Commission first mooted the idea of a decentralised system of Land Boards to avoid repeated failures of narrowly defined, top-down centrally planned programmes.[1] An independent National Land Board was to advise government on land policy, monitor programme implementation, and develop farmer selection and arbitration procedures. Provincial and district land boards would have similar responsibilities at their respective levels of governance. By 1999, the Framework Plan for the Inception Phase of the Land Reform Programme called for the "establishment of an extra-ministerial and *autonomous* National Land Board responsible for all land management".[2] This was followed by the Presidential Land Review Committee's suggestion for a National Land Board to "allow major players on land matters to come together and resolve the administrative issues on land and advise Government."[3]

A Land Commission

It was the newly formed Movement for Democratic Change (MDC) that took up the idea of a Land Commission in August 1999.[4] The Land Commission would manage land redistribution and policies, while village and district land boards would operate as its decentralised agents. The United Nations Development Programme (UNDP) also proposed a Land Commission to counter the highly centralised, complex and opaque decision-making process that had come to characterise Zimbabwe's land policy after 2000.[5] By January 2004, the MDC's RESTART Programme advocated the establishment of an impartial, *independent* and professional Land

[1] Zimbabwe (1994) *Report of the Commission of Inquiry into Appropriate Land Tenure Systems,* under the chairmanship of Prof. M. Rukuni. Government Printers: Harare. (p.128)
[2] Zimbabwe (1999) *Inception Phase Framework Plan: 1999 to 2000*. Inter-Ministerial Committee on Resettlement and Rural Development / NEC Forum Land Reform Task Force: Harare (p.24)
[3] Zimbabwe (2003) *Report of the Presidential Land Review Committee.* Vol.1 (Main Report) Under the chairmanship of Dr. Charles Utete: Harare (p.157)
[4] Movement for Democratic Change (1999) *Manifesto*: Harare (p.22)
[5] UNDP (2002) *Zimbabwe: Land Reform and Resettlement: Assessment and Suggested Framework for the Future.* Interim Mission Report: New York.

Commission, vested with the powers to formulate, plan and coordinate the resettlement programme.[6]

The MDC, buoyant with optimism, even drew up an accompanying Land Commission Bill (2004). The Commission's powers and functions included the planning and implementation of national land policies and resettlement programmes. Its proposals for the selection of members of the Commission and the Bill's oversight procedures made it the fullest expression of the party's determination to remove the political sting from implementing land policy. Members of the Commission were to be appointed by the President, but only on the advice of Parliament's portfolio committee on lands, which would select suitable candidates. Not only would the Land Commission be required to report regularly to Parliament, but only Parliament would have the power to provide the Land Commission with general policy directives.

Land Fund and Dispute Resolution Courts

Proposals for a revolving fund for the resettlement programme were first found in the Inception Phase Framework Plan of 1999.[7] Government and donor contributions would be pooled to support either land acquisition or infrastructure for resettlement. The Framework Plan also included village and district land dispute resolution courts. UNDP adopted similar ideas, but suggested that an Independent Trust Fund be managed by UNDP to reduce fiduciary risk.[8] Its board of directors would include the Government of Zimbabwe, donors, and international finance institutions, such as the World Bank.[9] However, it was the Land Commission Bill of 2004 which proposed that a Rural Development Fund be specifically vested in a Land Commission. Its primary purpose was to acquire land for resettlement. The Bill also stressed that the Fund's accounts would be thoroughly audited. Another adjunct to the Land Commission Bill was the establishment of a land court to hear disputes and appeals. More recently, the central feature of the Commercial Farmers Union's Proposal is the Land Bank itself.[10] It not only funds a Land Commission, but provides finance for farming capital, infrastructure for resettlement schemes, mentoring schemes; as well as research, extension and marketing services.

The Draft Constitution

Having gone unmentioned in the GPA, the idea of a Land Commission re-emerges in the Draft Constitution, but only as a shadow of its original conception. Gone are the provisions that the Parliament would be responsible for appointing members to the Land Commission. Instead it is

[6] MDC (2004) *RESTART: Our Path to Social Justice*, Harare (p.16)
[7] Zimbabwe (1999) *ibid*. (p.36)
[8] UNDP (2002) *ibid*, (p.54)
[9] Letter from UNDP Administrator dated 15 December 2000 to the President of Zimbabwe (Zimbabwe, 2003: Appendix D).
[10] Commercial Farmers Union (2013) *The Way Forward – Agricultural and Economic Recovery in Zimbabwe – A Proposal* <www.cfuzim.org>

the President – once again – who makes the appointments [296(1)]. Nor does Parliament provide policy guidelines. Instead, it is the Minister of Lands who gives policy directives to the Land Commission [297(3)]. Any regulations, too, are subject to ministerial approval. Sub-sections 5 and 6(a) try to give the Commission a veneer of independence and impartiality. In reality, though, these provisions are included only to give the impression of an 'independent and impartial' Commission.

The most important retreat, however, has been to make the Land Commission an advisory body to Government rather than an independent parastatal organisation with executive authority. The Commission may make recommendations on a host of issues – including land tenure and compensation – but it lacks any real powers of implementation or teeth for enforcement. Decisions governing land remain firmly in the hands of the President and his appointed minister. The Commission may investigate land disputes, but gone are the land courts with judicial powers to resolve disputes and enforce decisions. Nor is there any mention of a Land Fund to finance the Commission and its programmes. The Commission will now depend on allocations from the near empty coffers of the national exchequer. Gone, too, is the establishment of decentralised land boards or committees as proposed by the Rukuni Commission and by the Land Commission Bill. The draft Constitution therefore places the Land Commission and land policy firmly back into a toxic political arena.

3. Land Audit

Scope

Following election violence and the seizure of commercial farms between 2000 and 2002, the United States and the European Union (EU) imposed certain conditions and measures on Zimbabwe. The United States passed a law restricting Zimbabwe's access to international loans or debt relief until its President certifies, *inter alia*, that Zimbabwe has demonstrated its commitment to an equitable, legal and transparent land reform programme.[11] For its part, the EU imposed targeted measures in February 2002 against those primarily responsible for violence, intimidation and farm invasions.[12] It also set benchmarks to assess Zimbabwe's progress towards demonstrating its commitment to human rights, democracy and the rule of law. One key benchmark for normalising relations was for Zimbabwe to carry out an independent audit of the land reform programme in collaboration with UNDP. The audit was to assess the fairness of the land reform process and recommend ways "to resolve all outstanding issues, including the revival of production."[13]

[11] Section 4(c) as read with 4(d)(3) of the United States' Zimbabwe Democracy and Economic Recovery Act of 2001.

[12] Suspension of EU-Zimbabwe development cooperation pursuant to Articles 9 and 96 of the ACP-EC (Cotonou) Partnership Agreement, to which Zimbabwe is a party

[13] Zimbabwe Human Rights NGO Forum (2006) *Zimbabwe's Failure to Meet the Benchmarks in the Cotonou Agreement* (p.5).< www.hrforumzim.org>

Unfortunately, an obdurate Zimbabwe Government was in no mood for compromise. Amid calls to end the chaotic seizure of land, the government undertook its own audit. The first audit by Flora Buka, the Minister of State for the Land Reform Programme, was unusually forthright.[14] It provided details of how political elites squabbled and grabbed multiple farms while displacing newly settled A1 farmers. More typically, when the report was leaked, the government moved quickly to suppress it. Instead, a Presidential Land Review Committee under the chairmanship of Dr. Charles Utete was appointed in March 2003. Despite some merits of the report, it did little to meet the conditions and criteria set by the EU and the United States.

The MDC, then in opposition, called for a physical audit of farms that included a legal component to assess the constitutionality and legality of the process.[15] A subsequent UNDP report in 2008 recommended a land audit with three components.[16] First, it suggested a *farm acquisition and settlement survey* to document the process of farm occupations and the patterns of resettlement. Its purpose would be to determine how, when and which farmers lost their land, and how, when, and by whom the land was taken over. In the process, multiple farm owners would be identified. Second, it suggested a *legal study* to bring an authoritative judicial opinion to bear on the legality of possession and settlement. And, third, it suggested a *physical and production survey* to assess compensation payable and the cost of rehabilitation to bring farms back to their full production potential. The report stressed that the audit be conducted in a rigorous manner by independent researchers to ensure that its impartiality and creditability were never in doubt.

The Global Political Agreement

In terms of Article 5.9(a) of the GPA, the main political parties agreed to "conduct a comprehensive, transparent and non-partisan land audit ... for the purpose of establishing accountability and eliminating multiple farm ownerships." Unfortunately, by stating a purpose of the audit, it has come to be seen solely as eliminating multiple farm ownership, thereby significantly narrowing its scope. Its mandate now seems a far cry from its original purpose of establishing an equitable, legal and transparent land reform programme to resolve all outstanding land issues. Even so, ZANU(PF) has used its toolkit of excuses to renege on its commitment to carry out the land audit and other GPA reforms.

More than a year after signing the GPA in October 2009, little progress had been made. The Minister of Lands and Rural Resettlement claimed that Treasury had not released funds required for the audit.[17] Sensing an opportunity, the EU offered to fund a 'meaningful' land audit that would help resolve the land issue.[18] But the offer was rebuffed. The Minister said

[14] Addendum to the Land Reform and Resettlement Programme National Audit Interim Report

[15] MDC (2004), *ibid.*, (p.17)

[16] UNDP (2008) *ibid*., (p.168)

[17] *ZimOnline*, 'Lack of funds stalls Zim land audit', 9 September 2009

[18] *The Zimbabwean*, 'EC offers to fund probe into farm ownership', 18 October 2009

that Zimbabwe would not accept any funding related to land from foreign groups and countries that wanted to push 'dubious agendas'.[19] Further obstacles to implementation were created at the ZANU(PF) Congress, held in December 2009. It resolved not to support the land audit and other GPA reforms until the MDC had prevailed upon its 'Western allies' to lift travel bans and financial restrictions applied to its leaders.[20]

Amid growing frustration at the stalled GPA process, SADC leaders urged the parties to develop an implementation mechanism and roadmap to elections.[21] The result was a 24 point 'implementation matrix' endorsed by the SADC Summit held in Windhoek in August 2010.[22] In it, the parties agreed to "Appoint an inclusive and balanced Land Audit Commission" within one month. It was not just to be the responsibility of the Minister of Lands and Resettlement, but the Cabinet and the Principals as well. While MDC and SADC leaders, including the South African President, appealed in Western capitals for 'sanctions' to be lifted, ZANU(PF) stubbornly refused to address any of the outstanding GPA issues, including the land audit.

ZANU(PF) not only reneged on the implementation of the GPA; it tried to fudge the meaning of an 'independent' audit. The Minister for Lands claimed that, "We are also seeking to establish an independent land committee – an inter-ministerial [body] to be made up of permanent secretaries and other senior government officials. The committee will also be replicated at provincial and district levels."[23] As the CFU President was quick to point out: "As an interested party [the government] cannot be involved in auditing themselves."[24]

Draft Constitution

The draft Constitution vests the responsibility for land audits in the Land Commission. The question is: would this mean an independent audit? Section 297(6) tries to give the impression of independence and impartiality; but the substantive part of the section tells us otherwise. First, the current President, who appoints members of the Land Commission, is also the President and First Secretary of ZANU(PF). He has not only been the main driver of the contested and controversial land reform programme, but is believed to own many farms himself.[25] Furthermore, he appoints the Minister who gives policy directives to the Land Commission and has a veto over any regulations. An independent Commission and land audit? Hardly.

[19] *The Herald*, 'No to Dubious Funding', 20 October 2009

[20] Resolution D(3) of the Zimbabwe African National Union—Patriotic Front (ZANU-PF) party held at its 5th Ordinary National People's Congress at the Harare International Conference Centre in Harare (9th -13th December 2009).

[21] Communiqué of Extraordinary Session of the Summit of Heads of State and Government of the Southern African Development Community (SADC) held in Luanda, Angola, on 1st June 2012.

[22] Bill Watch, 'Implementation Matrix for 24 Agreed Inclusive Government Issues', No.33, 30 August 2010

[23] *IRIN* (UN), 'Who actually owns the farm?' 24 September 2009

[24] *The Zimbabwean,* 18 October 2009.

[25] ZimOnline, "Zimbabwe's new land barons", 30 November 2010 <www.zimonline.co.za/>

4. Rights in Agricultural Land

A wrongful 'right'

Chapter 16 of the draft Constitution deals with agricultural land. In essence it maintains all the discriminatory provisions governing farmland found in the current Constitution. Section 289 laudably gives every Zimbabwe citizen the right to agricultural land *regardless of his or her race or colour* – subject to Section 72 – which then extinguishes other core rights. First, Section 72 removes the right to be given reasonable notice. In fact, no notice need be given at all. Land can be acquired and vested in the State with full title by the government doing nothing more than publishing a notice in the *Gazette*. Second, compensation is not payable for the land, only improvements [ss.(3)(a)], despite the land having been bought by most farmers after independence. The legal position under international law, as the SADC and ICSID Tribunals made clear, is that the State has a responsibility to pay fair compensation based on the genuine value of the property, including land, if owners have clear legal title to it. Section 72(3)(a) therefore contradicts section 12(1)(b) of the draft Constitution which requires Zimbabwe to respect international law.

Third, the draft Constitution disallows owners to apply to the court for the determination of any question relating to compensation for land and "no court may entertain any such application" [ss.(3)(b)]. As the learned judges stated in the SADC Tribunal: "the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation."[26] Section 72(3)(b) therefore contradicts a founding value and principle – Section 3(1)(b) – of the draft Constitution, which states that Zimbabwe is founded on respect for the rule of law. The draft Constitution is also at variance with section 69(3) which states that "Every person has the right of access to the courts ... for the resolution of *any* dispute" [emphasis added]; and Section 56(1), which holds that everyone has the right to equal protection and benefit of the law.

Justifiable discrimination?

Section 72(3)(c) is particularly curious, especially for a Constitution. Why does it specifically state that the acquisition of agricultural land may not be challenged on the grounds that it was discriminatory? The answer lies in the ruling of the SADC Tribunal. The Tribunal held that Zimbabwe's Constitutional Amendment 17, now fully incorporated in Section 72 of the draft Constitution, is in breach of article 6(2) of the SADC Treaty, because the acquisition of agricultural land discriminated against farm owners on the grounds of race.[27]

Section 72 tries to circumvent this SADC ruling by justifying discrimination. First sub-section (7) is inserted justifying discrimination on the grounds that the people of Zimbabwe were

[26] Mike Campbell (Pvt) Ltd. and Others vs The Republic of Zimbabwe, SADC (T) Case No. 2/2007
[27] *Ibid*.

unjustifiably disposed of their land without compensation and, hence, must reassert their rightful ownership over it. Section 56(5) then gives affect to this justification. It grants every person the right not to be treated in a discriminatory manner on the grounds of race or colour, *unless* it is 'fair, reasonable and justifiable in a democratic society'.

The problem with the justification for discrimination [72(7)] is that it has already failed the test of being 'fair, reasonable and justifiable' in an international court. When the Zimbabwe Government put the same argument to the SADC Tribunal, it was rejected. Instead the Tribunal found that Amendment 17 constituted indirect discrimination or substantive inequality because it had an *unjustifiable* and disproportionate impact upon a group of individuals distinguished by race. Furthermore, the criteria for differentiation were "*not reasonable* and objective but arbitrary and based primarily on considerations of race." It cannot therefore be justifiable in a democratic society.

Unworthy of a democratic society

Shamefully, none of the political parties involved in the constitution-making process made the slightest attempt to defend the SADC Treaty, its Tribunal, or its Tribunal's rulings. But at least one Parliamentarian voiced his opinion on Section 72. He said that certain provisions regarding rights in agricultural land are so racially discriminatory that they "should never be in any modern democratic constitution."[28]

5. The Outlook

Not good...

Given that the draft Constitution will almost certainly be accepted in a referendum, the central question is whether it can bring about a just, legal and transparent land policy. The prospects, unfortunately, look decidedly bleak. Chapter 16 entrenches the outcome of land invasions and the seizures of farms and property. The draft Constitution also retains provisions under section 72 that are inimical to international law, human rights and the rule of law. Zimbabwe's Minister of Justice, Legal and Parliamentary Affairs – who remains on the EU's list of those undermining these very rights and principles – was upbeat. "This is a beautiful document", he gushed, referring to the draft Constitution:

> "We have managed to protect those issues that are dear to us. The land issue is a foregone conclusion. We agreed that it is irreversible. The issues which were in contention are now history … We have made sure that our revolution has been consolidated."[29]

The mystery is why the MDC allowed Section 72 and Chapter 16 to become foundational law. A senior policy-maker helpfully explained that the MDC's aim was to reform the electoral system

[28] David Coltart replies to Ben Freeth, *Sokwanele*, 31 July 2012,
[29] *The Zimbabwe Mail*, 'Diaspora can still register to vote – Chinamasa', 11 February 2013

to achieve its main goal – free and fair elections.[30] All else, including the land issue, were secondary. The MDC had to make compromises. If it conceded to ZANU(PF) on the land issue, he said, "so what?" Anyway, he added, land is not a major issue for the great majority. The issue of land and land policy was something the MDC could fix once in power.

A winning strategy?

Those not privy to the machinations of party politics have been left pondering whether sacrificing fundamental principles to win power was necessary or wise. The MDC have, after all, made little progress in reforming the electoral process on which free and fair elections – and victory at the polls – depend. Zimbabwe's Finance Minister and MDC's Secretary-General recently said that his party would continue pressing for major GPA reforms to the Zimbabwe Electoral Commission. But such forlorn hopes were quickly dashed by the Justice Minister, who bluntly dismissed any idea of ZANU(PF) making further concessions.[31]

While ZANU(PF) doggedly refuse to contemplate GPA reforms for free and fair elections, the MDC dutifully calls for the removal of 'illegal sanctions' against its erstwhile persecutors. This strategy is dumbfounding. First, it makes the MDC look responsible for the 'sanctions' and their removal. Second, it gives credence to a contrived conspiracy theory of collusion between the MDC with 'Western allies' bent on 'regime change'. But, most seriously, it has whittled away the international community's attempt to put pressure on those responsible for gross human rights violations and it has compromised efforts to bring about a just, legal and transparent land reform process.

International response

In February 2012, under pressure from SADC and Zimbabwe, the EU removed 51 individuals and 20 companies from its list of those accused of aiding and abetting human rights abuses.[32] Again, this year, a further 21 names were removed from the EU list.[33] Curiously, those removed included a former Deputy Minister who was responsible for invading the Save Conservancy, which is protected by a bilateral investment treaty with an EU member county. It included a war veteran accused, but never charged, of brutally beating members of a family because they dared lodge an appeal with the SADC Tribunal.[34] And it included the Minister of Lands who refused EU assistance to carry out a meaningful land audit (still not done) in terms of the GPA. The EU has promised to remove most of the remaining restrictive measures following free and fair elections. But where does this leave the land reform process?

[30] Eddie Cross, 'Diamonds, the CFU, the MDC, and protecting the people', Email message, 18 February, 2013
[31] *The Independent*, 'MDCs can forget about reforms: Chinamasa', 1 February 2013
[32] *New Zimbabwe*, 'Sanctions lifted on Reutenbach, Bredenkamp', 17 February 2012
[33] *SW Radio Africa*, 'EU criticised after lifting Zim targeted 'sanctions' against 21', 18 February 2013
[34] *SW Radio Africa*, 'Violent Chegutu 'war vet' removed from sanctions list', 19 February 2013

The enforcement of bilateral investment treaties, an independent land audit, and a resolution of all outstanding land issues were supposedly benchmarks for lifting restrictive measures.[35] None of these have been achieved. If most restrictive measures are lifted without key land reforms, does the EU risk legitimising and rewarding those responsible for gross human rights violations and who plundered and nationalised the commercial farms without paying compensation? Does it risk losing its leverage over provisions in the draft Constitution – born of compromise and an elite pact – which undermine human rights and the rule of law? In short, how will the EU and other members of the international community continue to support the people of Zimbabwe to seek just solutions and closure to the land issue?

The first measure, in my view, is to insist that international development assistance be conditional upon Zimbabwe abiding by the decisions of international tribunals based on international law, meeting international standards of land acquisition and compensation, and carrying out a land audit. The land audit should encompass an assessment of:

- The fairness, legality and transparency of the land reform process
- The level of farm production, productivity and utilisation of land
- A register of all land, its value, and its owners and occupiers.

The remit of the land audit should also be to make recommendations on how to resolve all outstanding land policy issues, reduce poverty, and put agriculture back on a sustainable growth trajectory.

The second measure is to support the rule of law, whenever possible, by affording the protection of the law to citizens, and providing them with access to independent, impartial and competent courts of law. They should support judicial reform to make courts accessible both to settle land disputes and hold those responsible for violence and crimes to account. The international community should consider supporting the SADC Treaty and the reestablishment of the SADC Tribunal to protect human rights, democracy, and rule of law (Article 4.c) and prevent discrimination against any person on the grounds of race (Article 6.2).

Those countries with bilateral investment promotion and protection treaties with Zimbabwe should also protect their own citizens. Bilateral investment treaties are signed between countries, but the consequences of a breach fall on an aggrieved country's citizens. Over a hundred farms protected by such treaties have been seized since 2000, but no foreign citizen has yet been paid compensation. Is it not the duty of a country, whose citizens have been prejudiced by a breach of a bilateral treaty, to hold the culpable party to account? Countries whose citizens' farms were seized in contravention of Zimbabwe's treaty obligations should jointly institute class action proceedings at the International Centre for Settlement of International Disputes.

[35] Zimbabwe Human Rights NGO Forum (2006) *Zimbabwe's Failure to Meet the Benchmarks in the Cotonou Agreement* (p.5).< www.hrforumzim.org>

Can do better

The *sine quo non* of any democratic constitution is to enshrine fundamental rights that protect *all* persons. These constitutional rights are essential to safeguard minorities against the tyranny of the majority. In any true democracy, the minority's rights must be protected no matter how singular or alienated that minority may be from the majority society. There cannot be room to argue, for example, that the black majority do not care about a white minority being discriminated against and stripped of their property rights in agricultural land. By that measure alone, the draft Constitution fails. It is not worthy of Zimbabwe or Zimbabweans.