

ZIMBABWE BRIEFING

a crisis in zimbabwe coalition regional office weekly report

08 - 15 August 2012

ISSUE 86



Property Rights In Zimbabwe's Draft Constitution



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The right to private property is an important part of any Bill of Rights in a constitution. The institution of private property is a critical part of the economic framework. Normal measurements of a country's conduciveness as an investment destination invariably refer to the extent to which a country protects property rights. Property rights serve an important role in the market, assisting in facilitating the provision of credit facilities. The general belief is that countries that protect property rights tend to do better economically than countries that have weak property rights systems. At the individual level, every person who invests his or her time, labour, money and other resources is naturally desirous of protection of the fruits of his or her labour and investment. You do not want or expect someone more powerful to take the fruits of your labour and worse still for that to happen without getting compensation.

The institution of property rights has not been without controversy in Zimbabwe. This is reflected in the contestation over land, which has occupied generations. The difficulty of over property rights is reflected in the manner in which it is dealt with in the draft constitution. As we shall observe, agricultural land is separated from all other forms of property and is therefore dealt with under entirely different provisions. For reasons explained below, this paper focuses on all other forms of property except agricultural land.

All Other Property

- According to Clause 4.28(2), "every person has the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others". This is, however, subject to section 4.29 which deals with agricultural land. It means that these provisions do not apply to agri-

cultural land which is dealt with under section 4.29. Given the sensitivities over and the historic significance of the Land Question, we shall devote an entire blog to the issue of agricultural land and how the contentious question is handled in the draft Constitution. Clause 4.28 therefore deals with all other forms of property apart from agricultural land. Indeed, Clause 4.28 (1) defines "property" as being "property of any description and any right or interest in property". Reference to "any right or interest in the property" as constituting property is significant because it includes property rights other than ownership. If you have an interest in a property, that interest constitutes property. In practical terms, if you hold a share in an asset, that interest is a form of property that is protected under this clause. If you are a partner in a business, your interest in the property of the partnership constitutes property protected under this clause. What this means is that schemes such as those falling under indigenisation policies will have to comply with these provisions to the extent that they affect the interests or rights of persons. Although it does not include agricultural land, it includes all other types of land such as urban land.

Property Rights to All Persons

Another important point to note is that unlike other rights in the Bill of Rights, the right to private property applies to "every person" and is not restricted to citizens. A closer look at some of the rights in the Bill of Rights shows that they refer to "citizens", which appears to discriminate against non-citizens. The right to private property applies to all persons, citizens and non-citizens alike. This may seem insignificant but it is important for economic purposes. It means a foreign investor in Zimbabwe would be entitled to as much protection as a Zimbabwean citizen in regards to property rights. Foreign investors and indeed any investor, look to the protection of their investments and economic interests and strong property rights are a useful indicator of a country's safety as an investment destination.

Compulsory Deprivation of Property

- Clause 4.28 prohibits "compulsory deprivation of property" unless specific conditions are met. The following conditions must be satisfied:
- The deprivation can only be done in terms of a law that applies generally. First, this means that any deprivation of property must be based on law and cannot be arbitrary. If deprivation takes place outside the law it would be a violation of this provision and therefore unlawful. This means that the law must not be targeted at specific individuals or groups. It aims to prevent selective application of the law.
- The deprivation must be neces-

sary for any of the following reasons: in the interests of defence, public safety, public order, public morality, public health or town and country planning; or in order to develop or use that or any other property for a purpose beneficial to the community. This is not an uncommon exception to the right to private property but other conditions must be satisfied.

- Before depriving a person of his or her property the acquiring authority must:
 - §Give reasonable notice to everyone whose interest or right in the property would be affected by the acquisition;
 - §Pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition;
- §If the acquisition is contested, apply to a competent court before the acquisition, for an order to confirm the acquisition. This must be done within 30 days after the acquisition.

Comment

There are some important consequences arising from this wording. Traditionally, a distinction has been made between deprivation of property and compulsory acquisition of property. The major effect of the distinction has been that there is a requirement for compensation for compulsory acquisition whereas there is no compensation for deprivation. Our own Supreme Court drew this distinction in the case of *Hewlett v Minister of Finance and Another* in 1982. This distinction is also drawn in section 25 of the South African Constitution and it is in cases of expropriation (compulsory acquisition) where a constitutional requirement for compensation exists. The major purpose of the distinction has traditionally been to allow the state to have powers to regulate the use of property for the public good without at the same time risking liability to owners of rights who are affected by such regulation.

Nevertheless, the way in which Clause 4.28 is worded seems to blur this distinction. The clause refers to both "compulsory deprivation" and the "acquiring authority" as if deprivation and acquisition refer to the same legal concept. Indeed, it refers to "compulsory deprivation", a term hitherto unused in the constitution. Significantly, the way the conditions for "compulsory deprivation" are stated suggests that deprivation attracts compensation and the traditional distinction between deprivation and acquisition will be consigned to the archives. As far as the rights of persons are concerned, this is not a bad thing as it safeguards the rights against deprivation in the same way as rights against acquisition. The need to develop a doctrine of constructive acquisition, through so-called deprivation will no longer be necessary. Whether a person

is deprived of his or her property or that property is acquired, he or she will be entitled to "reasonable notice", "fair and adequate" compensation and more importantly, to challenge the deprivation/acquisition in a court of law.

Right to a Fair Hearing

A further point to note is that procedurally, it is the acquiring authority that must apply to court for confirmation of its acquisition. A person who is affected only has to challenge the proposed acquisition. If the court does not confirm the acquisition, a person is entitled to apply to court "for the prompt return of the property". The use of the word "prompt" means it must be immediate return. They could have required return of the property "within a reasonable time" but by using the word "prompt", the intention is clear that it must be immediate. The right to challenge the compulsory deprivation of property is good and consistent with a strong regime for protection of property rights. It is consistent with the right to a fair hearing which is also provided for in the draft Constitution.

Compensation

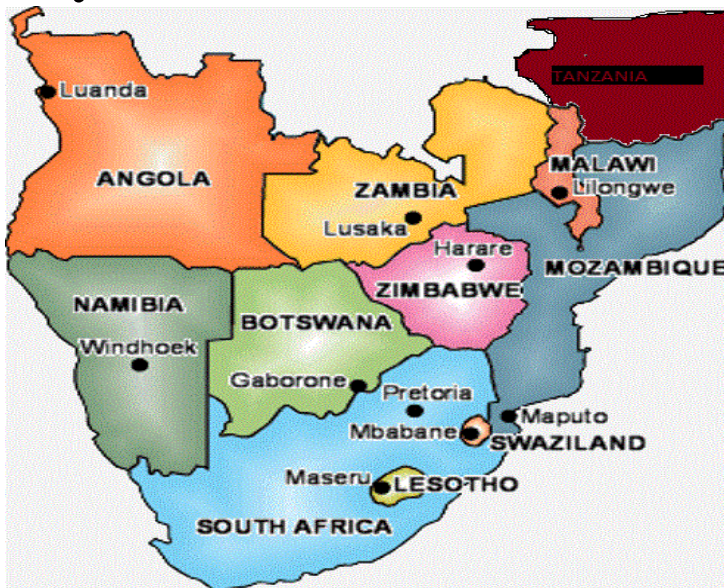
Clause 4.28 (3) (e) entitles a person to claim compensation for the deprivation or acquisition of property. Any law authorising acquisition should permit an affected person to apply to a competent court for the determination of the existence, nature and value of their interest in the property, the legality of the deprivation and the amount of compensation. A person should be entitled to apply to a competent court for an order "directing the prompt payment of any compensation". For the avoidance of doubt, these rights do not apply to agricultural land, which is dealt with very differently and controversially under section 4.29, which we will deal with in the next blog.

By and large, the property rights clause appears to deal with all other forms of property fairly. The rights are extended to all persons and not restricted to citizens. The right to compensation is recognised. The right to approach the courts challenging the deprivation and amount of compensation is recognised. The distinction between deprivation and acquisition has been removed. This would seem to be a pretty beautiful clause on property rights; one that would promote the country as a safe haven that protects property rights. That would appear to be the case until one looks at the next clause, Clause 4.29, on agricultural land, to which we shall next turn our attention.

By Alex T Magaisa

SADC Must Look Beyond A New Zimbabwe Constitution

At the end of next week SADC leaders will meet in Maputo, Mozambique, to consider a number of weighty political problems including the Zimbabwe situation. Mozambique will take over the leadership of SADC for the next twelve months while Tanzania is expected to take over the SADC Troika leadership during the same period that Zimbabwe is expected to hold national, harmonized elections. Of interest to SADC leaders and to the broader international community is whether or not Zimbabwe is making sufficient reform progress towards credible, non-violent, free and fair elections, and for that they will look to constitutional reform progress, among other issues.



be ready for a fresh start that begins with non-violent, free and fair elections. Recent, credible reports indicate that elements from the security forces disrupted the national census program demanding to take part in a process that has traditionally been run by teachers across the country. Until clear mechanisms are developed to remove the security sector for active, partisan participation in Zimbabwe's political affairs, it will be difficult to see how a new constitution alone, will remove violence and level the political field.

Coordinator's Note 86



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The second draft of the Constitutional Select Committee of Parliament (COPAC) is out; both MDC formations have endorsed it while Zanu PF has demanded further amendments to the draft claiming that some of the proposed reforms are unacceptable. President Mugabe has again threatened to call for elections next year under the current constitution.

The Zanu PF position of rejecting the draft constitution in current form conceals the point that, in fact, the draft is not a significant departure from the current constitution in terms of the executive powers enjoyed by the president, particularly. It

is most likely that Zanu PF is pretending to be unhappy with the draft constitution as a brinksmanship strategy to maximise on concessions and compromises from the MDC formations while conceding nothing in return.

Because huge sums of money and an inordinate amount of time has been spent in coming up with the draft constitution, a number of stakeholders are eager to see a new constitution – and this feeds Zanu PF's brinksmanship, knowing that their demands, no matter how unreasonable, are likely to be accepted for the sake of coming up with a new constitution. For this reason, the draft constitution to be subjected to a national referendum is unlikely to contain far-reaching reforms.

In the larger scheme of Zimbabwe politics, a new constitution is therefore, not the game-changer, and, as such, there is need for caution not to invest too much faith in the ability of a new constitution to transform and level the political playing field. The game-changer for Zimbabwe, where SADC leaders must pay close attention to, is the roadmap to credible, free and fair elections to which a new constitution is just but one of the several components. Key elements of that roadmap include the total separation of the security forces from civilian and electoral affairs. The extremely politicized, partisan, and often violent role of the security forces in Zimbabwe's political and electoral affairs must come to an end first before Zimbabwe can be said to

When SADC leaders meet next week, they should focus on how to enforce the implementation of the agreed roadmap to elections that goes beyond having a new constitution. President Mugabe and ZANU-PF should be clear that failure to timeously implement SADC resolutions attracts appropriate action from SADC. If SADC fails to come up with a robust enforcement mechanism for its decisions, and if the MDC formations continue to give in to Zanu PF's brinksmanship through making endless concessions on the draft constitution, Zimbabwe risks going for the next elections under the unfavourable, violent conditions that prevailed in 2008.

Regional Coordinator, Crisis in Zimbabwe Coalition

Position Paper on Media Provision in the Draft Constitution

The Media Alliance of Zimbabwe welcomes provision in the Draft Constitution of Zimbabwe produced on 18 July 2012 which contains an express guarantee on freedom of expression, which includes freedom of the media, artistic expression and academic freedom, as well as guaranteeing the right to access information, in compliance with international standards.

However, MAZ notes several areas of concern that should be amended to adequately guarantee freedom of expression and access to information.

MAZ is concerned by the entrenchment of "state-owned" media in Section 4.18(4). Although the draft protects the independence and impartiality of the state-owned media, the best way forward would be to transform all state-owned media into **public media** that are run by independent boards and are accountable to the public through Parliament. The appointment procedure for board members should be democratic and fully transparent, and allow for public input. In light of this, the Constitution should clearly state and define "public media", as opposed to "state media". State media fall directly under the control of state institution, such as the Ministry of Information and cannot be ex-

pected to be fair, balanced and impartial. Public media on the other hand, are independent institutions established to work in the public interests in line with regional and international standards and principles contained in documents, such as the "Declaration of Principles of Freedom of Expression in Africa" adopted by the AU Commission on Human and People's Rights in 2002. Zimbabwe's national broadcaster, ZBC, is an example of a public media institution that has been hijacked by the state for narrow partisan political purposes.

MAZ is also concerned by the entrenchment of statutory regulation of the media through the Zimbabwe Media Commission (ZMC), created by Section 12.17 of the draft Constitution. This section reinforces the disciplinary powers of the ZMC to "take or recommend disciplinary action against journalists and other persons employed in the press and other media of communication who are found to have breached any law or any code of conduct applicable to them". This provision contradicts a clause guaranteeing media freedom where it refers to the fact that government shall not control or interfere with any media activity, because it allows for continued statutory interference in the

freedom of the media. The existence of a statutory "disciplinary" body for the media runs counter to the Declaration of Principles on Freedom of Expression in Africa. If a media institution breaks an existing law, there is no need for a Commission to usurp the perfectly adequate justice system to enforce any penalties associated with the breach of that law. MAZ believes that codes of conduct should be a matter for the media community to establish and enforce-not a statutory commission. This self regulation, supervised by an independent media council established by the media community, should be guaranteed in the new Constitution as it protects freedom of expression and promotes independent and professional journalism.

MAZ also notes that although access to public information held by the state is specifically guaranteed, it does not protect against subsequent legislation that obstructs the public's right to access contemporary information. For example, the Access to Information and Protection of Privacy Act (AIPPA) allegedly guarantees the public's right to information but then takes the right away by introducing numerous arbitrary and discretionary conditions that have the effect of depriving

the public of their right to information. This section should contain a clause specifically guaranteeing the public's right to access public information contemporaneously.

About the Media Alliance of Zimbabwe

The Media Alliance of Zimbabwe is a partnership of media advocacy and representative groups in Zimbabwe working towards defending freedom of expression and freedom of the media. Since its formation, MAZ has been advocating for media law and policy reform, to ensure a free, fair, independent and pluralistic media.

Members of the Media Alliance of Zimbabwe are:

- Media Institute of Southern Africa (MISA) Zimbabwe Chapter
- Media Monitoring Project Zimbabwe (MMPZ)
- Zimbabwe Union of Journalists (ZUJ)
- Zimbabwe National Editors' Forum (ZINEF)
- Federation of African Media Women Zimbabwe (FAMWZ)
- Africa Community Publishing Development Trust (ACPDT)

UPCOMING EVENTS

6-9 August, 8th Southern Africa Civil Society Forum, Maputo

15-16 August, SADC Council of Ministers Meeting

17-18 August, SADC Summit, Maputo

Inbrief Around Zimbabwe

Zimbabwe Media Commission Issues Newspaper Licences



Zimbabwe Media Commission Chairperson, Godfrey Majonga

The Zimbabwe Media Commission granted two new newspaper licences. The licences have been issued to a new newspaper, The Observer owned by former Zimbabwe Independent deputy editor and a veteran journalist Barnabas Thondhlana. The other licence has been granted to The Zimbabwean. According to the Global Political Agreement, the GNU has to institute media reforms to ensure that there is unbiased news coverage. The ZMC board which consists of ZANU PF loyalists has been criticized for giving a false sense of reforms by selectively awarding licences to broadcasting entities. Barnabas Thondhlana of the new Observer indicated that they are still sourcing funds to run the paper whilst the Zimbabwean has been selling in Zimbabwe being published in the United Kingdom. Pascal Mukondiwa, former editor of the Sunday Mail, Jonathan Maphenduka, former assistant editor of the Chronicle, retired Information Ministry official Alpinos Makoni, Dr Rino Zhuwarara, the head of Media Studies at the University of Zimbabwe and Sephath Mlambo, the principal of the government-run Mkoba Teachers' College. Last year the state-appointed Broadcasting Authority of Zimbabwe (BAZ) licensed 2 radio stations to Zimbabwe Newspapers group and AB Communication owned by Supa Mandiwanzira a ZANU PF loyalist. Zimbabwe Newspapers group is a government-controlled and holding company for all state owned newspapers.

National Census

Zimbabwe is set to undertake a national census on August 17 and 18. Training of the enumerators, which is part of the census preparations was put on hold by the Ministry of Finance which oversees the census on Monday evening amid reports that there was serious friction between security sector personnel and other civil servants over allegations that the security personnel were hijacking the process possibly for ZANU PF's advantage. The Zimbabwe security sector is highly partisan and has openly pledged support for ZANU PF. Its participation in the census process is feared will be used by ZANU PF as a political advantage as results of the census are used for constituency delimitation purposes. Acting Finance Minister Gordon Moyo claimed the security forces, who were also civil servants, had requested to be enumerators clarified that enumerators from the security services would take part in the actual counting of people, but in barracks, police stations and prisons. About 30 000 enumerators will be recruited for the exercise.

ZANU PF Set to Give its Position on the Draft Constitution Today

ZANU PF is expected to publicise its stance on the draft constitution today. The ZANU PF politburo has been meeting the past two consecutive Wednesdays but failing to reach an agreement on the draft constitution. Other parties have expressed their positions with both MDC formations endorsing the draft last week. Job Sikhala's MDC 99 indicated it will urge its voters to go for a NO vote a position that has also been echoed by Lovemore Madhuku's National Constitutional Assembly. According to state media, ZANU PF is

struggling to agree on contentious areas like the national objectives and foundations, the significance of the liberation struggle, the appointment of provincial governors and the establishment of the constitutional court. Other areas of dispute include the deployment of the defense forces outside the country and the proposed restructuring of the Attorney-General's office. There is also debate on the section dealing with the nomination of presidential candidates and their running terms.

ZANU PF spokesperson Rugare Gumbo was quoted by state media saying Zanu-PF members who were part of the Constitution-making process at COPAC level had overlooked some of the critical issues, hence the need for the Politburo to digest these and see how they maybe incorporated in the final document. ZANU PF is thus likely to issue more demands which might lead to more negotiations instead of endorsing the draft.

Why Some Zimbabweans are not Registered Voters

As Zimbabwe prepares for a national election which is hoped will be the decisive factor in Zimbabwe Politics if conducted in a credible, free and fair manner it is sad to note that most Zimbabwean are not registered voters. WOZA consulted its members in Bulawayo, Harare and of 27 areas of Matabeleland North to establish reasons for such situations. In a statement WOZA publicized on the 6th of August, WOZA listed the following as reasons given by its member for not being registered voters:



Leader of Women of Zimbabwe Arise

Many members are Aliens and some who were registered in 1980 were de-registered for allegedly being an alien.

- Do not have the interest in elections
- Ignorance
- Were out of the country for a long time and many found it not necessary to register.
- Some were still under age
- Do not have the necessary documentation e.g. birth certificates and Identity cards.
- Many are not home owners and rent a room from a landlord. So as 'lodgers' they cannot prove residence so cannot register.
- Have got some interest in registering but it's a long and difficult process to renounce the foreign citizenship even though they do not like being classified as alien when they had previously voted as Zimbabweans.
- Have lost interest in voting due to the violence that is associated with voting.

It is imperative for pro-democracy activists and organisations to consider carefully these reasons so that ways can be devised to ensure that the current GNU is pushed into addressing some of the problems mentioned above and also conducting massive voter registration (including mobile registrations) exercises and voter education programs. CSOs can play a major role in voter education as they have presence in communities. Knowledge of the importance of participation in elections is key to having people registering as voters.

Zanu PF's Constitutional Clamours: Sovereignty or Suicide?

The recent clamours for wholesale constitutional changes by ZANU PF on the draft constitution reflect serious shortsightedness on the former liberation movement. It seems ZANU PF is trapped in the fallacy of thinking that Zimbabwe begins and ends with it. More so, ZANU PF acts as if it will never get out of power one day and be in opposition. A lot of misinformation and half truths are peddled in attempt to hoodwink the general populace that Zimbabwe's Sovereignty is at stake. In this case ZANU PF's survival or internal squabbles are equated to Zimbabwe's Sovereignty. Objections on the presidential running mate close, election of provincial governors and limiting of presidential powers, exhibit a lack of foresight on Zimbabwe's founding fathers.

ZANU PF's is trying to swim against the tide of a flooded river despite that history has shown that no man has yet managed to swim against the tide of a flooded river. The reality that ZANU PF is failing to grasp is that it is living on borrowed time and failure to transform itself and embrace a new culture of politics embedded on democratic values and principles will offer it an opportunity to redeem itself with the electorate.

Common wisdom has always dictated that an idea whose time has come will always pass. Ian Smith vowed that never in a thousand years will black people ever gain majority rule. However, he never lived more than 10 years before black people attained majority rule. Similarly ZANU PF is behaving like a spoiled brat, and failing to see the draft constitution like an opposition. There is need for the likes of Rugare Gumbo to begin to imagine an all powerful president, whilst they are in opposition. They need to see the draft constitution like an opposition if they are to fully appreciate some of the advantages that it offers. Lord Acton argued that 'power corrupts, and absolute power corrupts absolutely'. Henceforth the failure by the constitution to evenly balance powers and bunch them in one arm of the state poses grave danger to democracy.

The debate on the constitution needs to be taken outside the context of factional politics and individuals within political parties. ZANU PF is making the mistake of behaving as if it will never get out of office. There is



The late former Zambian President, Fredrick Chiluba

no invention of men that has no end. Fredrick Chiluba and his Movement for Multiparty Democracy (MMD) in 1996 crafted a law barring other Zambians from contesting the presidency if they had parentage with foreign origin. This law was primarily targeted at Kenneth Ka-

ginning and an end), should signal to ZANU PF the laws that they are advocating for will come back to haunt them one day.

There is need to create a constitution that outlives political parties and individuals. A constitu-

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unda who was a Zambian by birth but born of Malawian parents who were missionary teachers in Northern Zambia. The same law came back to haunt the MMD twice, as it was used against Chiluba and Rupiah Banda who had to go to court and fight against a law that they had crafted and campaigned for. ZANU PF needs to act with a bit of hindsight and realize that it does not need bad laws to ensure its regeneration. Their experience in parliament should serve as an example that they can be an opposition and the undemocratic clauses they are clamouring for inclusion into the constitution maybe its curse in the future.

There is need to embrace politics as phenomenon of many possibilities, but interestingly we fail to do so and get overawed by our seeming invincibility. Wisdom from the Shona proverb "*Chinokura chinokotama musoro wegudo chava chinokoro*" (everything has a be-

tion is a social contract where the governed submit their sovereign will. The governors thus, have to govern by the will (generally agreed laws by the citizens). In this case sovereignty lies with the people as observed by Rousseau, and not in the wishes of a political party as advanced by ZANU PF. Politics is a cyclical game and full of many possibilities and that is why it is necessary to have systems that promote and safeguard democratic principles and values. The major contention of ZANU PF is epitomized in Jonathan Moyo's statement, "*This draft is an attack, quite a serious attack on our sovereignty, quite a serious attack on our democracy. It strips the executive of all powers and leaves it as a clerical branch of government*".

An analysis of the draft shows that the executive still wields more powers and only minimal limitations were provided for by this draft. If we are to go by the

people's views the draft falls short in curbing executive powers. More so, wholesale claims are made that curbing executive powers is equal to an attack on Zimbabwe's sovereignty without any substantiation with facts. The thinking is that, the wishes of individuals in ZANU PF translate to Zimbabwe's Sovereignty. Such clamours for sovereignty are misplaced and baseless. Unknown to ZANU PF, is that its clamours for sovereignty may end being clamours for suicide. Sovereignty is about guaranteeing the people's will within the governing matrix.

Sovereignty is concept far much deeper than to be tied to the history and interpretation of ZANU PF. Enabling people to make the executive account through representative bodies such as parliament is a fundamental in ensuring the people's sovereignty. Thus, limiting executive powers, gives people the instruments by which the executive do not do as they please at the expense of the people. The executive in Zimbabwe has proved that given unchecked powers, they can abuse power for selfish reasons.

The circus around Ainjin and Marange diamonds is a case in point where the executive has even resisted parliamentary oversight by baring the parliamentary portfolio committee on mines from visiting Chiadzwa diamond fields to assess the state of affairs. The result has been the Chinese enjoying exploitation of and appropriation of the diamonds whilst the communities of Chiadzwa and Zimbabwe remain largely poor as little or no revenue is remitted to the fiscus. The executive always needs to be reined in at all times. Therefore limiting the executive's powers is not attacking sovereignty but enhancing it.

ZANU PF needs to see the draft constitution from two lenses of an opposition and governing party, and reconcile these positions with various political possibilities. Lessons are bound of political parties that created laws that have retained to haunt them in the future. Zambia's Fredrick Chiluba and the MMD are good examples of this political miscalculation. ZANU PF risks committing political suicide by clamouring for undemocratic constitutional clauses that may one day be used against it. *Tamuka Charles Chirimambowa, Political Scientist*