

CLEANING UP THE MESS: ALTERATIONS REQUIRED TO THE PROPOSED CONSTITUTIONAL AMENDMENT 19

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Introduction

Following the MDC's victory in the March elections of 2008, and the illegitimate and unrecognised run-off presidential election of June 2008, under pressure from SADC, Morgan Tsvangirai agreed to enter into negotiations with ZANU PF to resolve the political impasse in the country. The negotiations, Tsvangirai stated in an interview on South Africa's *etv*, were “not about power sharing” but “the restoration of democracy and the return of the rule of law”. “No deal” he declared, “is better than a bad deal”. Despite these declarations, and despite the fact that Mugabe's election had not been recognised by SADC, MDC-T nonetheless entered into a power-sharing accord with Mugabe in September 2008.

The key Article in the September agreement was Article 20 which set out the structure of a new government. However, the document had clearly been drafted in haste. It contained gaps and ambiguities in essential provisions. The gaps and ambiguities would need to be filled and resolved by reference to Zimbabwe's existing Constitution. Since the Constitution centralises and vests an enormous amount of power in Mugabe, Mugabe's powers remained largely unaffected by the agreement¹. This meant a return to democracy, a necessary condition before the release of western aid, was unlikely.

The MDC however, had an opportunity to resolve this problem through constitutional amendment 19. The proposed amendment could be drafted in such a way as to fill the gaps in the structure of government and to resolve the ambiguities in a manner which led to a reduction of Mugabe's power and thus a more equitable power sharing arrangement. The negotiations over constitutional amendment 19 were thus expected to be protracted. Instead, presumably once more under pressure from South Africa, which was concerned about spill over of the cholera epidemic which had just taken hold in Zimbabwe, the MDC agreed to the content of constitutional amendment 19 with little debate. The proposed amendment, in the main, simply provided that Article 20 (dealing with the structure of the new government) be incorporated into the present constitution wholesale. As a result the gaps and ambiguities remained and there was little reduction of Mugabe's powers.

1 For details of this see *Losing Focus: Zimbabwe's “Power-Sharing Agreement* available at www.kubatana.net

Furthermore, the amendment when read with the constitution, contains several clauses which contradict each other². The document is not the precise legal document required to amend a constitution, as parliamentary legal or constitutional committees, if in place, would be quick to point out.

Mugabe demonstrated that he remained “in the driver's seat” by unilaterally allocating ministerial portfolios, appointing provincial governors, the Governor of the Reserve Bank and the Attorney-General which he can do without the agreement of the MDC under the September agreement, but not in terms of the proposed amendment 19. That amendment, of course, is yet to become law.

The MDC then belatedly tried to get Mugabe to relinquish some power. In December 2008, the 8th National Council of the MDC resolved that:

The party reiterates that it will not be a part of a government of national unity unless and until there is an amicable settlement of:

- 1. Equitability and fairness in the allocation of Ministerial portfolios and provincial Governors.*
- 2. The constitution and composition of the National Security Council.*
- 3. The enactment of Constitutional Amendment 19.*

On being criticised for making these demands while the humanitarian crisis in Zimbabwe continued, MDC spokesperson Nelson Chamisa stated:

“If we become part of the government now we will have no muscle. We are not yet empowered. We do not want to become an accessory to a government which has not shown any genuine willingness to share power.”

Yet following demands from SADC in January 2009, which echoed Mugabe's position that these issues be addressed after the formation of the new government, the MDC executive again capitulated on Friday 30th January 2008 and agreed to enter a unity government without all these issues being resolved or being “empowered”. Mugabe has undertaken “to look into” the issue of appointments. Since he was unwilling to annul these appointments when the MDC could play the powerful card of refusing to enter into government, it seems unlikely that he will do so now that the MDC has thrown this card away.

However, MDC parliamentarians have one last chance to try and salvage something from the mess,

2 For details of this see *Zimbabwe's Proposed Constitutional Amendment 19* available at www.kubatana.net

due to the concession that constitutional amendment¹⁹ precede the formation of the unity government³. They should ensure that constitutional amendment 19 is altered to reflect real power sharing in accordance with the proclaimed intention of the September agreement.

The parliamentarians are not bound to pass amendment 19 in its present form. The agreement between ZANU PF and the MDC formations provides in 24.1

that the constitutional amendments which are necessary for the implementation of this agreement shall be passed by parliament and assented to by the President as Constitution of Zimbabwe Amendment Act No 19. The Parties undertake to unconditionally support the enactment of the said Constitution of Zimbabwe Amendment No 19

Accordingly, what parliament is obliged to pass are “the constitutional amendments necessary for the implementation of the agreement”. The current proposed amendment 19 does not contain the provisions necessary for the implementation of the agreement. Parliament should ensure that it does so by considering the following aspects:

1. **The Manner of Making Key Appointments:** The September agreement provides that executive authority “shall vest in, and be shared among the President, the Prime Minister and the Cabinet, as provided for in this Constitution and legislation”. In order to ensure genuine power sharing, the key issue of executive authority to make appointments to senior governmental positions and to dismiss people from these positions needs to be clearly, comprehensively, and unambiguously set out in the amendment. The current proposed amendment does not do this and ought not to be passed in its present form.

The September agreement provides that ministerial portfolios are allocated by the president “after consultation with” Vice Presidents, the Prime Minister and the Deputy Prime Ministers and that appointments to Commissions (including the Zimbabwe Media Commission and Electoral Commission) and all key appointments in terms of the constitution are made “in consultation with” the Prime Minister. The power to dissolve parliament must also be exercised “in consultation with” the Prime Minister.

The term “consultation” is unclear and should be abandoned. If there is to be genuine sharing of

³ The September agreement itself by implication requires this. Since governmental posts are filled either after, or in, consultation with the Prime Minister and/or Deputy Prime Ministers, these posts must be created by constitutional amendment before such consultation can take place.

executive power, then the power of appointment, and even more importantly the power to dismiss, should be jointly exercised. ***Accordingly, all provisions relating to the hiring and firing of persons in key governmental posts should be amended so that such powers are exercised “with the agreement of” the Prime Minister.*** This should apply to the allocation of Ministerial portfolios, the reassignment of portfolios and dismissal. Without these powers being shared, the Prime Minister will have no real power over the Ministers that he is supposed to supervise. That power will remain entirely with Mugabe who presently has sole power to dismiss ministers or reallocate portfolios.

The proposed constitutional amendment is a legal “dogs breakfast” in relation to key legislative and constitutional appointments.

Two definitions of “after consultation” and “in consultation” with are introduced as follows:

“after consultation” means that the person required to consult before arriving at a decision makes the consultation but is not bound by the advice or opinion given by the person so consulted;

“in consultation” means that the person required to consult before arriving at a decision arrives at the decision after securing the agreement or consent of the person so consulted;

This is unnecessarily complicated. It also means that in some instances Mugabe must act with the agreement of Tsvangirai, but not in others. Hence, all key presidential appointments must be made with the agreement of Tsvangirai, but the allocation and reassignment of Ministerial portfolios and the dismissal of Ministers need not be with Tsvangirai's agreement, as the agreement in these instances only refers to “after consultation with” or is silent on the issue and one must look to the constitution.

The proposed amendment 19 also leads to results in relation to appointments which could not have been intended by either party. Paragraph 20.1.3(p) provides that the President:

in consultation with the Prime Minister, makes key appointments the President is required to make under and in terms of the Constitution or any Act of Parliament

The agreement in several instances provides a quota for each party for sections of government. For example, ZANU PF *nominates* 15 Ministers, MDC-T 13 and MDC-M 3. But the *appointment* of these Ministers to their posts is done by Mugabe in terms of the constitution. This means they fall

under clause 20.1.3(p) and Tsvangirai must agree before they can take up their posts. Similarly one of the deputy prime ministers is nominated by MDC-M, and three ZANU PF senators are nominated by their respective parties but appointed by Mugabe, thus making them constitutional appointments which must be approved by Tsvangirai as Prime Minister. It is unlikely that the parties intended what the proposed amendment provides, that Tsvangirai must agree ZANU PF and MDC-M appointments.

This is just one example of many similar problems throughout the proposed amendment caused by seeking to incorporate Article 20 wholesale from the September agreement, when Article 20 has not been drawn up by a professional legal drafts person.

If matters were not muddled enough, Article 20.1.7, “Senior Government appointments”, provides:

The Parties agree that with respect to occupants of senior Government positions, such as Permanent Secretaries and Ambassadors, the leadership in Government, comprising the President, the Vice-Presidents, the Prime Minister and Deputy Prime Ministers, will consult and agree on such prior to their appointment.

Yet Permanent Secretaries and Ambassadors are appointments made by the President in terms of the Constitution (sections 77 and 78), suggesting that it is clause 20.1.3(p) that should apply, which only requires consultation with the Prime Minister, and not the Vice-Presidents and Deputy Prime Ministers.

Accordingly, the proposed constitutional amendment 19 ought to be revisited and changed in regard to the manner in which key appointments are made.

2. Key Appointments Already Made: It is left unstated in the proposed constitutional amendment 19 whether those people already appointed by Mugabe will remain in their positions following the constitutional amendment, or whether they will need to be re-appointed to comply with new requirements of appointment. ***The proposed amendment must be changed to require the re-appointment of persons to these posts in accordance with the new constitutional requirements.*** If they are not re-appointed, then Mugabe's exercise of unshared power will carry over into the new government and there will be no proper power-sharing. In this regard, appointments to the Zimbabwe Electoral Commission and other Commissions, the appointment of the Attorney-General, Commissioner-General of Police, Commanders of the

Defence Forces and Governor of the Reserve Bank will have a significant impact on Zimbabwe's political terrain and the extent of power-sharing.

The issues around appointments may explain the peculiar wording in the clauses relating to Constitutional Commissions. Rather than using the standard legal terminology of “there *shall* be a Commission for...” making such clauses both constitutive and obligatory as one would expect, the proposed amendment is phrased “there *is* a Commission for” suggesting that the Commission is already in place together with incumbent office bearers. ***The amendment should be changed to use the usual legal terms.***

Unless it is specifically stated in the proposed constitutional amendment which persons will remain in their positions, if any, and who must be reappointed, disagreement may arise in the unity government over this point. Here and generally, legislators need to take notice of clause 31K in the current constitution.

31K(2) Where the President is required or permitted by this Constitution or any other law to act on the advice or recommendation of or after consultation with any person or authority, a court shall not, in any case, inquire into either of the following questions or matters—
(a) the nature of any advice or recommendation tendered to the President; or
(b) the manner in which the President has exercised his discretion.

This may be interpreted by the Supreme Court to mean that if the President does not act with the agreement of the Prime Minister as required by the proposed amendment, there will be nothing that Tsvangirai can do about it from a legal perspective as the courts cannot consider the matter. Tsvangirai will be left to complain to SADC and the Joint Monitoring and Implementation Committee as at present. ***Amendment 19 should thus address section 31K to ensure that the crucial provisions on “agreement” relating to appointments are not by-passed.***

- 3. The Position of Prime Minister:** ***The post of Prime Minister is established by Article 20.1.6 of the agreement and not, as the proposed amendment 19 states, by 20.1.3 which is the power of the president to appoint someone to that post. This requires alteration.*** It is extremely unwise to draft a constitution, even a transitional one, around an individual. If the proposed amendment is adopted in its current form, the Constitution will not only provide for a Prime Minister but specify that under the constitution the Prime Minister shall be Morgan Tsvangirai.

But that is all it does. As a result, unlike for the positions of President, Vice President, Ministers and members of the cabinet, there is currently no provision for the Prime Minister to take an oath of loyalty and be sworn in – although it appears to be the intention to “swear in” Tsvangirai even without this provision. There are no provisions relating to the Prime Minister's tenure of office, qualification for office and manner of removal. This is presumed unnecessary as the constitution will state that the Prime Minister is to be Morgan Tsvangirai. Accordingly, Tsvangirai would remain Prime Minister indefinitely, even if he loses the support of his own party. There is no provision providing that Tsvangirai's term of office expires with the dissolution of parliament⁴. If Tsvangirai dies while in office, or is otherwise incapacitated (e.g. through imprisonment) he would be replaced by whichever Deputy Prime Minister he has nominated, with the agreement of the President, to act in his place. It would be better to provide that the Prime Minister shall be that person best able to command a majority in the house and to agree, but not as part of the constitution, that such person is Tsvangirai. ***A proper and professionally drafted constitutional amendment should be drawn to provide comprehensively for the office of Prime Minister to fill the gap in this regard in the proposed amendment 19.***

4. **The Powers of the Prime Minister:** While the proposed amendment provides that the Prime Minister “exercises executive authority” and shall “oversee the formulation of government policies by the Cabinet” and shall “ensure that the policies so formulated are implemented by the entirety of government” nothing in the proposed constitutional amendment 19 indicates how he is to do this. ***The amendment needs to be redrawn to spell out exactly what power the Prime Minister has in this regard.*** Currently, all provisions relating to Tsvangirai's executive authority are so vague as to be meaningless. It has already been noted that the sole power to dismiss Ministers lies with Mugabe. This gives Mugabe executive authority over the Ministers and renders them subject to his instructions. The Prime Minister's “executive authority” can be ignored with impunity. True power sharing would give Tsvangirai as much authority over MDC ministers as Mugabe has over all Ministers.

If these provisions remain unaltered Tsvangirai's sole legal powers⁵ will be to make key appointments in agreement with the President, and as Leader of government Business in the House, to set the legislative programme.

4 The same remarks apply to the posts of Deputy Prime Minister.

5 If funding from international donors is given and is channelled through the Prime Minister's office, Tsvangirai may

5. **The Council of Ministers:** Similarly the powers of this council are also so vague as to be meaningless. *Oddly, one of its powers is to “ensure that the Prime Minister properly discharges his responsibility to oversee the implementation of the work of government”, thus suggesting that the chair of the Council, the Prime Minister is subject to the Council rather than vice versa. This should be amended.* If it is not the provision will become important if the Council consists primarily of ZANU PF appointees (see immediately below). The Council also makes and receives various reports and assesses the implementation of Cabinet decisions. However, it is given no actual power. *For this Council to have any real function it should be able to issue directives to Cabinet and Ministers which must be acted upon.* The Council consists of all members of Cabinet.
6. **The Cabinet:** The proposed constitutional amendment makes no mention of how Cabinet is to be composed. It must thus be assumed that the current constitutional provisions apply. This is unsatisfactory and is a gap which the proposed constitutional amendment 19 must be altered to fill. The Constitution provides in section 31G that Cabinet consists of “the President, the Vice-President or Vice-Presidents, as the case may be, and such Ministers as the President may from time to time appoint”. Accordingly, it is wrong to assume that all Ministers will automatically be members of the Cabinet, and Mugabe, if the current position remains, may appoint a solely ZANU PF Cabinet, with the exception of Tsvangirai, who in terms of the agreement is Deputy Chair of Cabinet. If this happens, since the Council of Minister comprises all Cabinet Ministers, that Council may also consist of solely of ZANU PF appointees.

The proposed constitutional amendment 19 should thus be altered to require that all Ministers are part of Cabinet.

Even if Mugabe appoints all 16 MDC Ministers to Cabinet, despite the split of the Ministries 16:15 in the MDC's favour, the MDC is not assured of a majority in Cabinet. The proposed constitutional amendment 19, as read with the current Constitution determines the composition of Cabinet as being 17 members of the MDC (the Prime Minister and 16 Ministers) and 19 members of ZANU PF (the President, two ZANU PF Vice-Presidents, the Attorney-General as a non-voting member and 15 ZANU PF Ministers). There is no provision requiring that the two MDC Deputy Prime Ministers sit in Cabinet.

Accordingly, the proposed constitutional amendment 19 should thus be altered to include a provision that:

informally gain considerable influence through the power to determine the allocation of these funds.

There shall be a Cabinet consisting of the President, the Prime Minister and every Vice-President, Deputy Prime Minister and Minister.

The Attorney-General should not be a part of Cabinet to ensure the independence of this office.

- 7. The Bill of Rights:** The intention of the September agreement was to strengthen democratic freedoms in Zimbabwe. Yet the proposed constitutional amendment 19 is silent on this issue. Most important, is the question of lack of freedom of expression in Zimbabwe, starkly manifested in the fact that there is no independently operated electronic media. Various explanations may be advanced for this, but key is the onerous requirement in the Broadcasting Services Act relating to local content. Not even ZBC and ZTV are able to comply with this requirement. ***This requirement unduly limits freedom of expression and the proposed constitutional amendment 19 should be altered to make such requirements unconstitutional in accordance with Article 19 of the September agreement.***
- 8. The Parliamentary Committee on Standing Rules and Orders:** This committee is vitally important as it presents lists of candidates to the President for appointment to key commissions, such as the Zimbabwe Electoral Commission, the Zimbabwe Media Commission, the Zimbabwe Human Rights Commission and Anti-Corruption Commission. The composition of this committee should reflect the composition of the House of Assembly with the MDC-T having the largest representation. The September agreement both sets out the composition of this committee for the interim period and provides that constitutional amendment 19 should include section 121 of the Kariba draft constitution. Section 121 also establishes a Parliamentary Committee on Standing Rules and Orders, albeit with a different composition. Although the September agreement mandates the inclusion of section 121 of the Kariba draft, the parties should agree to leave this out of Constitutional amendment 19. There is no need to include two different provisions for the establishment of the same parliamentary committee. The provision in Article 20 is to prevail until a new constitution for Zimbabwe is brought into being. The new constitution will presumably include provisions relating to the Parliamentary Committee on Standing Rules and Orders. ***Thus the Kariba draft's section 121 will never have application, unless incorporated into the new constitution, is thus superfluous for the purposes of amendment 19, and should be deleted.***

Conclusion

The wholesale inclusion of Article 20 of the September agreement into the proposed constitutional amendment, and thus into the constitution is ill advised. Article 20 has not been drawn by a skilled legal draft person. An experienced draft person would ensure that the clauses are drawn with appropriate legal precision, are comprehensive and do not contradict other clauses within the amendment itself, the constitution and other relevant legislation. It will also go some way to ensuring that proposed provisions do not violate the Bill of Rights. Parliamentarians would do well to consult the MDC's draft constitutional amendment 19 and note the manner in which the amendment should be effected and the bill drafted and, indeed, the style in which it would probably have been drafted, had urgent political pressures not been brought to bear. Civil society organizations would also do well to lobby parliament in the light of these many ambiguities and contradictions, and properly fulfil their duty as the watchdogs of society.