



DROP DEAD BEAUTIFUL? LEGAL NOTES ON DEATH AND THE PRESIDENT

"We say to hell, to hell, to hell with them." – Robert Mugabe¹

ZANU(PF) supporters have on several occasions expressed the wish that President Robert Mugabe die in office.² With speculation about Mugabe's ill health rife,³ and more plausible than usual, it is interesting to consider the legal position and what ought to happen in terms of the current constitution if Mugabe were to die today.⁴

Section 29(3)(b) of the constitution provides that if the President becomes incapable of performing the functions of his office by reason of mental or physical incapacity he will cease to hold office if a joint committee of the Senate and House of Assembly formed at the request of one third-of the members of the House of Assembly so recommends and the recommendation is supported by two-thirds of a joint sitting of both Houses. If, however, Mugabe dies suddenly, so that the question of the degree of his debilitation is not an issue, Section 31 of the Constitution provides that the duties and functions of the President shall be assumed temporarily by a Vice-President.⁵ Where there are two Vice-Presidents, responsibility is assumed either by the Vice-President designated by the President for such eventuality or, in the absence of such designation, the last Vice-President who acted as President in the President's absence.⁶

¹ Mugabe, at the burial of his sister Sabina on 1 August 2010, giving instructions to Western powers, perhaps directing them to the most probable venue for his next round of negotiations with them on 'sanctions'. Mugabe is a practising Catholic. The issue of eternal damnation is obviously much on his mind, as he frequently mentions 'hell' in conjunction with the West, aid and 'sanctions'; see, for example, 'To hell with Western aid, says Mugabe', *Zimbabwe Independent*, 9 July 2010, <<http://www.theindependent.co.zw/local/27209-to-hell-with-western-aid-says-mugabe.html>>.

² 'Let Mugabe die in office, says Moyo', *The Standard*, 27 September 2010, <<http://www.thestandard.co.zw/local/21539-let-mugabe-die-in-office-says-moyo-.html>>.

³ 'Mugabe losing cancer battle', *Zim Daily*, 25 August 2010, <<http://www.zimdaily.com/beta/news276244.html>>.

⁴ This word 'ought' has been selected as it is not beyond the bounds of possibility that those interested in assuming power might declare the Constitution suspended and place Zimbabwe under formal military rule.

⁵ Certain presidential functions cannot be exercised by a Vice-President (Section 31(2)), such as the power to declare war or dissolve parliament.

⁶ There are currently two Vice-Presidents, Joice Mujuru and John Nkomo, appointed by the President in terms of section 31C(1) of the Constitution. As constitutional appointments, the consent of Tsvangirai should have been obtained before the appointment of John Nkomo as Vice-President, made after the passage of Constitutional Amendment 19 and introduction of Article 20.1.3(p) which makes this a requirement. Tsvangirai made no attempt to exercise this power.

These provisions were supplemented in 2007 by Section 2 of Constitutional Amendment 18,⁷ drafted specifically with the possibility of Mugabe's sudden death or retirement in mind. Section 28(3)(b) of the current constitution now provides that if the Office of the President becomes vacant by reason of death, resignation or removal from office, the two Houses of Parliament will come together as an electoral college to elect a new President. The new President will remain in office until the next election.⁸ If these provisions are implemented, given the intense jockeying that is likely to take place to fill this immensely powerful post, the procedure to be followed is of some interest.

The election of the President through the Parliamentary Electoral College must take place within ninety days of his death or resignation. The procedure to be followed is set out in the Fifth Schedule to the Electoral Act [*Chapter 2:13*]. The Clerk of Parliament plays an extremely important role in this regard.⁹ He sets the date of the election on not less than fourteen days' notice and simultaneously invites nominations for the post from members of Parliament. Candidates must have at least twenty-five nominators and must signify their acceptance of the nomination in writing. The Clerk of Parliament, whose decision is subject to review by the Supreme Court, may reject any nomination which does not comply with the Act. Where there is more than one candidate a vote then takes place, with the House of Assembly as the preferred venue, and presided over by the Chief Justice. Half the members of the Electoral College constitute a quorum, but, if there is no such quorum, the matter is simply adjourned for an hour and those present thereafter constitute a quorum.

Voting is not secret. The Chief Justice directs persons to gather in blocs in parts of the House allocated to each candidate and for whom they wish to vote. One member of the bloc is appointed to compile a register of number of persons and their names in his or her candidate's bloc. The tally of supporters in each bloc is then given to the Chief Justice, who announces the figures. If no candidate receives an absolute majority of votes, the candidate with the least number of votes is eliminated and the process repeated until such a majority is achieved. If there are only two candidates, who receive an equality of votes, the process is repeated over and over, with such adjournments not exceeding 48 hours as the Chief Justice may determine, until one candidate has attained majority; the Chief Justice announces that candidate as duly elected as President. Lists of those comprising the voting blocs, indicating who voted for whom is entered into the Journals of both Houses.

However, since the enactment of Constitutional Amendment No. 19 (which incorporated, almost verbatim, Article 20 of the appallingly drafted Interparty Political Agreement, now commonly known as the GPA),¹⁰ little is clear and free from ambiguity in relation to the composition of Zimbabwe's government.

One of the most glaring anomalies is that Zimbabwe's Constitution is unique in that it does not merely provide that Zimbabwe is to have a president, but it is a constitutional requirement that

⁷ Constitution of Zimbabwe Amendment (No. 18) Act (No. 11 of 2007).

⁸ Section 29(1) of the Constitution.

⁹ Currently a male, Mr Austin Zvoma.

¹⁰ Constitution of Zimbabwe Amendment (No. 19) Act (No. 1 of 2009).

the President is a specific individual, Robert Gabriel Mugabe.¹¹ On the death of Mugabe there can be no compliance with this provision. It is unusual that constitutional provisions are drafted in such a way that their implementation may be avoided on account of *vis major* (an act of God). However, from this provision it may be inferred that the legislature did not contemplate that the post of presidency would be occupied by any other person during the subsistence of the Interparty Political Agreement (IPA),¹² and thus that no provision was made for the contingency of Mugabe's death. It is then arguable that Article 20.1.10 of Schedule 8 to the Constitution was not intended to apply to the presidency. Article 20.1.10 provides:

In the event of any vacancy arising in respect of posts referred to in clauses 20.1.6 and 20.1.9 above, such vacancy shall be filled by a nominee of the Party which held that position prior to the vacancy arising.

The Office of President is a post referred to in clause 20.1.6. If it is held that this clause does apply to the presidency, any vacancy arising through the death of Mugabe must be filled by a nominee of ZANU(PF). The provisions of Schedule 8 to the Constitution 'shall, during the subsistence of the Interparty Political Agreement, prevail notwithstanding anything to the contrary in [the] Constitution.'

However, a further question arises as to whether 20.1.10 is intended to replace the provisions relating to the Parliamentary Electoral College or to exist alongside them. If they are to replace the provisions, then ZANU(PF) may nominate a replacement for Mugabe, and the nominee is presumably sworn in as President as if elected without further ado. This interpretation should not be accepted lightly. An enormous amount of power is concentrated in the presidency. Section 28 of the Constitution requires that the President is democratically elected either through a national election or through an electoral college comprising primarily democratically elected representatives of the people. The effect of this interpretation is that these democratic provisions are excluded in favour of a provision which allows the President to be selected by a party cabal, and the person so selected may lawfully continue in office until 2013 or the next election.¹³ This clearly subverts normal democratic practice.

However, there is no need to interpret Article 20.1.10 in this manner. There is nothing in the Constitution that is 'to the contrary' of Article 20.1.10, and the Article does not contradict the provisions relating to an electoral college. Reading the provisions together would merely create a requirement that only ZANU(PF) nominees may be submitted to the Clerk of Parliament as candidates for election by the Electoral College to ensure that the vacancy is filled by a nominee of ZANU(PF). While Article 20.1.10 states that the candidate must be 'a nominee of' ZANU(PF), there is no requirement that the candidate be *from* ZANU(PF). Although this is most likely, it is legally permissible for a compromise candidate to be nominated by ZANU(PF) who is not a member of the party.

¹¹ Article 20.1.6(1) of Schedule 8 to the Constitution. The provisions of the Kenyan Constitution establishing a unity government contain no equivalent provision. It is also a constitutional requirement that the Prime Minister is Morgan Tsvangirai, and no one else.

¹² This is the correct term for what is more commonly referred to as the Global Political Agreement (GPA).

¹³ There is considerable speculation as to when the next elections will be held, though there is no legal requirement to hold elections before 2013.

No timeframe is established by Article 20.1.10 and since it is unclear what procedure is to be followed, the timeframe which will be applied is equally uncertain. As indicated above, between the death of Mugabe and the appointment of a new President, a Vice-President is effectively Acting President.

If the provisions relating to the Electoral College apply, this interregnum period (with the Presidency occupied by a Vice-President) cannot be longer than ninety days. If the provisions do not apply, the interregnum may be extended indefinitely by a delay in advancing a ZANU PF nominee in terms of 20.1.10 as no deadline for this is specified. The manner in which the nominee is to be selected is also obscure and likely to be contested, suggesting that the process will be protracted. The ZANU(PF) constitution contains no provisions as to what is to happen on the demise of its President.¹⁴ The President is elected by the National People's Congress.¹⁵ This Congress convenes every five years and the 230-member Central Committee is mandated to act on behalf of the Congress when it is not in session. Fissures with ZANU(PF) might develop into open rifts within the Central Committee, which may be unable to reach consensus on the ZANU(PF) nominee. In any event, there is no constitutional requirement that the nominee submitted by ZANU(PF) for appointment as President is the person who succeeds Mugabe as leader of ZANU(PF) in terms of ZANU(PF)'s party constitution. There is no provision in Zimbabwe's Constitution indicating who has the authority to submit the name of the ZANU(PF) candidate as nominee to fill the vacancy, the assumption being that this would be determined by ZANU(PF) as a party and, more particularly, that Mugabe would represent ZANU(PF) for the purpose of submitting nominations for executive vacancies. Rival groupings may each claim the right to put forward a candidate for immediate appointment as President in terms of Article 20.1.10.

Rather than a delay in submitting a nominee under 20.1.10 as outlined above, it is equally possible that a faction of ZANU(PF) may announce their nominee on the very hour of Mugabe's death, claim the sole right to select the nominee and that Article 20.1.10 implies immediate appointment overriding the provisions for an interregnum period.¹⁶

Article 20.1.10 gives no indication as to who formally appoints the nominee as President, once the nominee has been selected. If the nominee is treated as a President elect, then he or she should be sworn into office by the Chief Justice and this should take place on the day of the nomination or no later than forty-eight hours thereafter.¹⁷

However, it is plausible that an interregnum Vice-President may claim the discretion to determine who within ZANU PF may advance a nominee and when the nominee is to be appointed as President. The Vice-President performing the functions of the President may wish to extend the interregnum period for as long as possible while consolidating his or her position.

¹⁴ The constitution of ZANU(PF) is a skeletal document, bereft of detail, though the constitutional procedures of the party have presumably been elaborated in party resolutions and may indicate who has the appropriate authority to submit the name of a nominee as President.

¹⁵ The composition of which is undefined in ZANU(PF)'s constitution.

¹⁶ Article 20.1.10 is unlikely to be read as overriding the requirement that the President take the oath of office required in terms of the Constitution, and thus the appointment could take place only after the swearing-in by the Chief Justice or other judge of the Supreme Court in terms of Section 28(5) of the Constitution.

¹⁷ Section 28(5) of the Constitution.

To summarize, as the Constitution now stands, it is unclear whether Article 20.1.10 applies to the presidency. If it does not, any Member of Parliament able to muster the endorsement of twenty-five other members may submit nominations for election to the presidency through the Parliamentary Electoral College. During this period, a Vice-President will assume the duties of the presidential office. If Article 20.1.10 does apply, it is unclear whether the law requires simply that a ZANU(PF) nominee is appointed as President without further ado, or whether the law requires that an election is conducted through Parliament acting as an electoral college but with only ZANU(PF) nominees as candidates. In the absence of an electoral college, the manner in which the ZANU PF nominee will be selected is difficult to determine.

This ambiguity in the law to be followed upon Mugabe's sudden death, when considered alongside the uncertainties of ZANU(PF)'s succession politics,¹⁸ has the potential to turn the merely messy into the thoroughly chaotic, as each contender endeavours to apply an interpretation of the law which is most advantageous to him or her. Past displays of ruthlessness by competing factions within ZANU(PF) over the succession issue suggest that this is not a prospect to be welcomed.

In this situation a faction or factions of ZANU(PF) may seek to exploit the ambiguity of the law outlined above, and, if they feel that their favoured candidate will not be put forward under Article 20.1.10 as the sole and most probable electee, may demand that the competing nominees face an election through the Parliamentary Electoral College, arguing, as they would have every right to, that this is the correct and lawful procedure to be followed.

At this juncture it is also worth noting that the provisions of Article 20.1.10 have application only during the subsistence of the IPA. If the IPA has terminated owing to the withdrawal of any party (and there is no legal impediment to a party so doing), then the constitutional requirements of convening an electoral college must be implemented, and nominees will not be restricted to persons from ZANU(PF). If the MDC-T shows morechutzpah than it has hitherto, it may insist that Article 20.1.10 has no application to a vacancy in the presidency, or decide to withdraw from the IPA precisely so that Article 20.1.10 has no application and so that its own nominees might be advanced as candidates to the Electoral College. Once again, matters could get extremely messy juridically. If the MDC-T withdraws from the IPA after the death of Mugabe but before the appointment of a replacement, it is unclear whether Article 20.1.10 should still have effect, or whether it will fall away and the constitutional provisions relating to the Electoral College will have sole, unadulterated application. In other words, does one apply the constitutional provision prevailing at the time of Mugabe's death or at the time of determining the replacement?

Given the current composition of the Houses of Parliament, in the event of an electoral college being convened, the MDCs' position will present possibilities for manoeuvre. The 100-seat Senate comprises sixty elected seats, ten Provincial Governors, twelve appointed seats and eighteen chiefs. Of the twelve appointed seats, four must be nominees of MDC-T and two

¹⁸ 'Zanu must conclude succession debate ASAP', *Zimonline*, 3 September 2010, <<http://www.zimonline.co.za/Article.aspx?ArticleId=6319>>.

nominees of MDC-M. The House of Assembly has 214 seats, 210 of which are elected, while one Vice-President, the Prime Minister and two Deputy Prime Ministers hold seats ex officio.¹⁹

As a result of vacancies arising from the death and suspension of some members, the current (September 2010) party voting strengths in the House of Assembly are MDC-T 96, ZANU(PF) 96, and MDC-M 7 – a total of 199 members. In the Senate, the MDC-T has 27, the MDC-M 8, and ZANU(PF) 29 elected and appointed members. The remainder of sitting members comprise ten Provincial Governors and seventeen traditional chiefs, making a total of 91 sitting members.²⁰ Mugabe has extensive powers over the appointment and dismissal of chiefs,²¹ and all Provincial Governors in the Senate are Mugabe appointees.²² On the basis of their past records, the chiefs and governors can be expected to vote with ZANU(PF). On this basis the combined voting strengths in the two Houses sitting as an electoral college is the MDC formations 138 (15 MDC-M) and 152 ZANU(PF).

ZANU(PF) thus has a narrow margin of a 14-seat majority by virtue of the presence of governors and chiefs in the Senate (and therefore the Electoral College). The significance of the manner in which these appointments are made thus comes to the fore. Article 20.1.3(p) of Schedule 8 to the Constitution and Section 115 of the Constitution together require that any appointments made by Mugabe in terms of any Act of Parliament be made with Tsvangirai's consent. The appointment of both governors and chiefs are made by Mugabe in terms of Acts of Parliament and thus both require Tsvangirai's consent. Mugabe has refused to follow this constitutional requirement in regard to the appointment of governors and Tsvangirai has not attempted to seek compliance in regard to the appointment of chiefs. Leaving the dispute over the appointment of the governors to SADC, rather than testing this in the courts, may thus not be the wisest course of action for MDC-T.

Nonetheless, it is obvious that in a poll by the Parliamentary Electoral College to choose between several ZANU(PF) candidates competing for the presidency, it would be numerically possible for the MDC-T, MDC-M or either party alone to determine the outcome. One would expect the MDC to provide support to one candidate or the other only in exchange for some political concessions relating to the powers of the future President and the governance of the country.

¹⁹ If the persons appointed to these posts already held seats in Parliament, the appropriate party may nominate a non-constituency member to the House where they held a seat (one of the twelve appointed seats in the Senate is such a seat). Only those in these posts who were not members of parliament become ex officio members of the House of Assembly (Article 20.1.8 of Schedule 8 to the Constitution).

²⁰ The figures are from Veritas, *Bill Watch*, 30/2010, 31 July 2010,

<http://www.kubatana.net/html/archive//legisl/100731veritas.asp?sector=DEMGG&year=2010&range_start=31>.

²¹ The President appoints chiefs in terms of Section 3 of the Traditional Leaders Act [*Chapter 29:17*] though 'wherever practicable' he must appoint a person nominated by the appropriate persons in the community concerned and in accordance with customary laws of succession. The eighteen chiefs in parliament comprise the President and Deputy President of the Council of Chiefs and two chiefs from each of the eight non-metropolitan provinces (Sections 34(1)(c) and (d) of the Constitution) chosen by an electoral college comprising the provincial assemblies of Chiefs (Section 40(b) of the Electoral Act).

²² The Provincial Governors were appointed by Mugabe in August 2008 under Section 4 of the Provincial Councils and Administration Act [*Chapter 29:11*]. Their term of office being two years (under Section 6), these posts are technically vacant, and so, too, then, are these Senate seats.

However, these legal niceties are unlikely to find traction in the less subtle realm of Zimbabwe's present political milieu. A powerful political cabal within ZANU(PF) will most probably impose its anointed successor, claiming the authority of Article 20.1.10 to do so. This cabal may have the political power and brute force to swiftly crush any rivals seeking to advance an alternative person or process to determine the succession. And if it has the power to rapidly impose its will in this manner, so too will it have the power to ensure that the advent of democracy in Zimbabwe is indefinitely delayed.