

ZIMBABWE'S PROPOSED CONSTITUTIONAL AMENDMENT 19 – A STEP TOWARDS TRANSITION?

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On 11th September, 2008 the opposition Movement for Democratic Change (MDC) formations (MDC-T[svangirai] and MDC-M[utambara]) and Zimbabwe African National Union – Patriotic Front (ZANU PF) concluded what was touted as a “power-sharing” agreement designed to resolve the political impasse in Zimbabwe. The agreement was officially signed with much fanfare on the 15th September, 2008.

The provisions of the September agreement have been analysed in detail in *Losing Focus: Zimbabwe's Power-Sharing Agreement* (available from Idasa's SITO web site). In order to make the agreed new “inclusive government” part of national law, the agreement stipulated that a constitutional amendment, number 19, would be passed for this purpose.

The September agreement is replete with ambiguities, vague drafting and omissions. This is not simply a result of poor drafting skills but a deliberate means to meet the imperative of concluding an agreement while many issues remain in dispute. In formulating a precise legal document based on the September agreement to be submitted to parliament as constitutional amendment 19, these points of contention required resolution. Since the contentious points were in essence a continuation of the unfinished business of reaching an accord, the negotiations on agreeing a draft amendment were expected to be protracted. The MDC, it was predicted, would attempt to formulate the amendment in a way that would give it some real power. As *Losing Focus* indicated, the letter of the September agreement left Mugabe's powers largely intact, conceded very little to the MDC and made the post of Prime Minister, to be occupied by MDC leader, Morgan Tsvangirai, largely nominal and devoid of any substance.

Talks on amendment number 19 began on 25th November, 2008. Astonishingly, the negotiators reported an agreed draft two days later. The draft was to be submitted to the negotiators principals for signature and consent.

However, during the period of the talks, a cholera outbreak which erupted in Zimbabwe due to the collapse of water reticulation and health care centres, added a new urgency to the Zimbabwean crisis. It appears that both parties thus were placed under extreme pressure to reach a quick agreement on amendment 19. As a result, instead of adopting the tightly drafted and comprehensive document proposed by the MDC, the ZANU PF draft or an amalgam of both, once again resolution of disagreements between the parties was deferred. In essence the parties simply agreed to incorporate the executable part of the September agreement, Article 20, relating to the structure of government into a schedule in amendment 19. This schedule is to apply and override any parts of the Constitution contrary to its contents. It is worth noting here that the incorporation of only

Article 20 of the agreement as a substantive part of amendment 19 is a tacit admission that the other omitted Articles are little more than political posturing, as *Losing Focus* suggests.

Changes to the Constitution other than those introduced by the incorporation of Article 20 of the September agreement are limited.

The first clause of the proposed amendment deals with the question of the attainment and retention of Zimbabwe citizenship. Most importantly, the prohibition on dual citizenship, which the MDC had sought removed, remains in accordance with the ZANU PF draft. A section on “Political Rights” further entrenches ZANU PF's policy in this regard by incorporating the effect of a controversial Supreme Court's decision that removed the right to vote for non-Zimbabwean citizens who are permanent residents.

The amendment also adds a section XB relating to Commissions, introducing a Human Rights Commission, and reducing Mugabe's power to determine the composition of other commissions, including the Zimbabwe Electoral Commission, Zimbabwe Media Commission (brought into the Constitution from the Access to Information and Privacy Act) and Anti-Corruption Commission.

The result of reaching “agreement” on amendment 19 by introducing a few piecemeal changes and then incorporating Article 20 of the September agreement wholesale is a legal “dog's breakfast”. The precise legal document drafted and proposed by the MDC as amendment 19, removed all ambiguities and filled vital gaps left by the agreement. By ignoring these defects and simply incorporating Article 20 of the agreement wholesale into amendment 19, not only do all the gaps and ambiguities of the agreement remain, but, in providing that Article 20 will override the Constitution, which could previously be referred to, to resolve some ambiguities and fill some gaps, the problems are compounded.

There are problems of a minor nature and which are simply the result of hasty or poor drafting. For example, clause 14 of the proposed amendment 19 provides:

“Prime Minister” means the Prime Minister whose appointment is referred to in Article 20.1.4 of the Interparty Political Agreement.

In fact, the post of Prime Minister is established by clause 20.1.6(3).

The draft amendment also proposes to amend the Constitution by inserting a clause which sets out the composition of the Parliamentary Committee on Standing Rules and Orders. Yet a different composition for this Committee is set out in Article 20. It is this latter clause which is to determine the composition of the Committee throughout the “transitional period”, which presumably ends when a new constitution is agreed as stipulated in the September agreement. The new constitution will presumably provide for the composition of this Committee, so the amendment to the current constitution by the proposed clause setting out the Composition of the Committee will never come into

operation. Its inclusion is thus superfluous and a further indication that the agreed draft amendment was signed in haste and without sufficient thought.

Of more significance is the question of Presidential appointments. In legal terminology, the phrases “in consultation with” or “after consultation with” mean that the consulting person needs to consider the opinion of the consultee/s but is not bound by the opinion expressed. The converse is usually expressed by the phrases “acting on the advice of” or “in agreement with”. The Constitution, the proposed amendment 19 and the agreement are replete with instances where the President is obliged to consult before making a decision or appointment. Contrary to the accepted terminology, the MDC argued that the negotiators (most of who have legal training) accepted throughout the talks that “consultation” was intended to mean “after agreement with or acting on the advice of”.

The legally inelegant compromise that emerged in the proposed amendment 19 is that “**after** consultation with” will have its usual legal meaning, whereas “**in** consultation with” means that the agreement of the consultees must first be obtained.

Partly as a result of the peculiar definitions relating to “consultation” the crucial issue of the power of the President to make appointments is obscure and ambiguous. Presidential powers to make key government appointments are central to the question of who wields power and whether any genuine power-sharing will emerge from the negotiations. For example, Mugabe appoints the Commissioner-General of Police, the Commander of the Army and the Governor of the Reserve Bank. He also appoints permanent secretaries, ambassadors, provincial governors, Ministers and the cabinet and persons who comprise the Commissions established under the Constitution.

The appointment of Ministers has proved highly contentious. As a result of the proposed amendment 19 it is now unclear whether Mugabe is required to secure the agreement of the MDC formations before allocating Ministries. Two clauses, almost adjacent to each other, are contradictory in this regard. Clause 20.1.3(l) provides that the President:

***after consultation** with the Vice Presidents, the Prime Minister and the Deputy Prime Ministers, allocates Ministerial portfolios in accordance with this Agreement.*

meaning that the President does not have to act on the advice of the Prime or Deputy Prime Ministers or with their agreement in making Ministerial appointments.

But 20.1.3(p) provides:

***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.*

meaning that the President must reach agreement on these appointments with the Prime Minister. Ministerial appointments are appointments made by the President in terms of the Constitution, thus contradicting 20.1.3(l) and requiring the Prime Minister's agreement before making Ministerial appointments.

Usually, the allocation of a Ministry and the appointment of a Minister amount to the same thing. A Minister is usually appointed to head a particular Ministry, though this may be reallocated during a “cabinet re-shuffle”. However, the September agreement sharpens the difference between the appointment to and allocation of a Ministry. Under Article 20 the MDC is given the power to nominate 16 of the 31 Ministers, but is not given any power to determine the Ministries they are to head. Since such allocation is done by the President “after consultation” with stipulated persons, these person have no final say over the allocations. The MDC-T nominates 13 of the Ministers and the MDC-M 3, but does not appoint them. This is done by the President, both in terms of article 20 and under the current constitution. As these are appointments under the constitution, article 20.1.3(p) comes into play and they are made in consultation with the Prime Minister, and his agreement must be secured before the appointment is made. This suggests that while Mugabe has complete control of the *allocation* of the Ministries, the MDC formations do not have complete control over the *appointment* of Ministers. Since Mugabe appoints Ministers with the agreement of the Prime Minister, the implication is that he has some say in the matter. The clauses also suggest that the MDC-T in the form of the Prime Minister must agree before any ZANU PF or MDC-M nominee is appointed as a Minister. The intention of the September agreement was probably that each of the two MDCs and Mugabe/ZANU PF would have full control over who is appointed as Minister from their respective quotas. That is not what the sum of the clauses in amendment 19 provides.

Adding further to the confusion is the fact that Article 20 will become part of the Constitution. This means that any appointment made by the President under Article 20 is “in terms of the constitution” and must be made in consultation with, i.e with the agreement of, the Prime Minister. There are several clauses in Article 20 similar to the following:

20.1.9 Senate

(a) The President shall, in his discretion, appoint five (5) persons to the existing positions of Presidential senatorial appointments.

(b) there shall be created an additional six (6) appointed senatorial posts, which shall be filled by persons appointed by the President, 4 of whom will be nominated by MDC-T and 2 by MDC-M.

The intention is probably that of the 11 positions five are chosen by ZANU PF, four by MDC-T and two by MDC-M. But in providing that five of the 11 are simply appointed by the President, rather than nominated by ZANU PF, the five become presidential appointments in terms of the constitution and thus require the Prime Minister's, i.e. Tsvangirai's approval.

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.

There is a further and more severe difficulty arising from 20.1.3(p). It is left unstated 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. In this regard, appointments to the Zimbabwe Electoral Commission and the Zimbabwe Media Commission will have a significant impact on Zimbabwe's political terrain and the extent of the MDCs' power.

Hence ZANU PF's proposed draft amendment 19 provided that members of ZEC, appointed by Mugabe, should remain in office until their terms of office expire as originally provided. This 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 MDCs' draft specifically indicates that all incumbents on Commissions, including ZEC, must be reappointed. This vitally important bone of contention is not mentioned in the agreed draft amendment 19, thus simply deferring the dispute on an issue which is central to the question of whether any real power sharing will emerge from the agreement. These disputes may re-emerge if the draft is accepted by the principals and presented for debate in Parliament. If the issues are not resolved during parliamentary debate, it will be left for Mugabe's mostly hand-picked Supreme Court Judges to resolve any dispute.

Mugabe has already exploited the loose drafting of the September agreement. Article 20.1.3(p) requires that the appointment of the vice-presidents, provincial governors and Governor of the Reserve Bank must all be done in consultation with the Prime Minister i.e. with Tsvangirai's agreement. By the simple expedient of not appointing Tsvangirai as Prime Minister until these appointments were made Mugabe could claim compliance as there was no Prime Minister to be consulted. The MDC would, of course argue, that the agreement implies that Tsvangirai must be appointed to the post before the appointments are made. It is much easier to argue one's point from clear and unambiguous provisions than relying on "implication".

Until shortly before Christmas 2008 Mugabe had failed to appoint Tsvangirai as Prime Minister or invite him to take up the office pending the enactment of constitutional amendment 19, as the agreement requires and only appears to have done so under pressure from South Africa. He has chosen rather to emphasise Tsvangirai's lack of any

real power (rather than his dignity of high office) through such petty tactics as ensuring that Tsvangirai's passport is not issued and requiring him to grovel before the Registrar-General for an emergency travel document each time he wishes to leave the country – including on occasions when these trips relate to the negotiation process. While his passport has now been issued, Tsvangirai has declined to accept the offer to be sworn in as Prime Minister, and wisely so. Tsvangirai has been presented with a *fait accompli* in the only area where he is to have any power, to be consulted over constitutional appointments. With many key appointments already made, if he took up the appointment at this juncture, the powerlessness of the post of Prime Minister would be readily apparent to his supporters. Tsvangirai would have nothing to do. And in any event neither the September agreement nor constitutional amendment makes any provision for the Prime Minister to take an oath of office as such.

Conclusion.

It is quite remarkable that having signed an agreement on September 15th which was replete with ambiguities and omissions, that the MDC did not use the opportunity presented by negotiations around amendment 19 to resolve at least some of these in its favour. Having agreed to amendment 19 in a form which compounds rather than resolves the problems, the MDC is left to the whims of a reluctant South Africa to extract some form of power sharing from Mugabe – for very little will be forthcoming from the September agreement or constitutional amendment 19. Hence at present, after nearly two years of intensive negotiations, electoral victory for the MDC and “pressure” on Mugabe from South Africa, the net result for the MDC is a passport for its leader – which ought to have been issued in compliance with a court order in any event. Mugabe has a Presidency.