LOSING FOCUS:
ZIMBABWE'S
"POWER-SHARING" AGREEMENT

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Introduction

The brutal campaign instigated by Mugabe's supporters to reverse his electoral defeat in the 29th March 2008 presidential election resulted in a Pyrrhic victory. Violating all democratic requirements for a free and fair election, even the ZANU PF government's invited observers (limited to those considered friendly and which included the SADC observers) were constrained to report that the run off presidential election of the 27th June, 2008 did not reflect the will of the people. This created a crisis of legitimacy for Mugabe and an embarrassing difficulty for SADC. Botswana unequivocally refused to recognise Mugabe as head of state, and even the Mbeki led government of South Africa, noted within Zimbabwe for its support for Mugabe, prevaricated.

To resolve the problem, Mbeki was mandated to try to gain an accommodation between the two parties. The process was regarded as a continuation of the negotiations between the opposition MDC and ZANU PF that Mbeki had been facilitating since March 2007. While the power sharing arrangement which followed Kenya's elections was uppermost in many people's minds at this point, the MDC leader, Morgan Tsvangirai, said of the post election negotiations: "This is not about power sharing. It is about a return to democracy." Thus phrased, Mbeki faced an intractable problem. Essential support from the Bretton Woods institutions and the donor community to revive Zimbabwe's collapsed economy would not be forthcoming if the negotiation did not result in a return to democracy in Zimbabwe. The MDC thus could not agree anything which did not restore democracy and the rule of law. Mugabe could not agree anything which did. The relatively free, if not totally fair, elections of 29th March had shown conclusively that ZANU PF could not remain in power under democratic conditions. This "either/or" situation did not allow for compromise.

There could only be one winner. As a result, the signing of an Agreement between the political parties on 15th September 2008 led to a peculiar situation. Tsvangirai had stated that: "No deal is better than a bad deal". His supporters were thus entitled to believe that a good deal had been reached, or at least one which opened the democratic door wide enough to allow the entry of donor and balance of payments support and international investment. As the reality of the Agreement began to intrude, the euphoria that had ensued after the signing morphed into a view that Mugabe was reneging on the agreement. The Agreement came to be considered as less than perfect as it gave Mugabe the space to do this, but nonetheless still considered as a way out of Zimbabwe's political impasse. In the face of continued MDC sanguinity, ZANU PF supporters became uncertain as to the content of the Agreement and began to believe the various optimistic versions MDC supporters touted. They cautiously lowered their profiles in areas where they had been wielding what now seemed a hubristic power. This response of ZANU PF supporters provided affirmation for MDC

1 This is the second opinion issued by RAU. The first, SITO (2008), *Some Preliminary Comments on the Agreement.*Compiled for the Research and Advocacy Unit. 16 October 2008, Pretoria: IDASA, critically examined the Agreement and identified some of its fundamental flaws. It did, however, suggest some ways of overcoming the flaws assuming that there was a certain amount of goodwill The current opinion proceeds from the premise that goodwill is unlikely, and hence the difficulties in the Agreement require more careful examination.

supporters that the Agreement was intrinsically good, that a change had been effected in the political terrain and the Agreement “must be made to work.”

Mugabe must have been dismayed by this unnuanced response of his followers. He had not in fact conceded any real power and had emerged the winner. The only concession he had made in exchange for the retention of his extensive powers and recognition of his legitimacy (Article 20.1.6 states that he shall continue as President) was the lessening of his powers of patronage by the reduction in the number of Ministerial posts he could allocate. Yet he could hardly brag about this unequal bargain when the Agreement was presented as one of “power sharing”. His enforced silence led to growing dissention in his ranks, further fuelled by those who felt they would be excluded from Ministerial positions.

Eventually, Mugabe was compelled to point out to his supporters that he “remained in the driving seat”. Unfortunately, misled by Mugabe's propaganda machinery several times too often, ZANU PF supporters were sceptical. Without an awareness of this background, Mugabe's decision, in mid October unilaterally to allocate 30 of 31 Ministries, in the midst of deadlocked negotiations on this issue, appears strange. Mugabe divided the portfolios between ZANU PF and the MDC as the Agreement required, but allotted what are considered to be key portfolios exclusively to ZANU PF and formally Gazetted notice of this allotment on the very eve of the return of Mbeki to Zimbabwe. Mbeki had been asked to return to Zimbabwe specifically to resolve the deadlock between the parties over the allotment of Ministries. Mugabe politely left the Ministry of Finance unallocated so that Mbeki did not arrive to a perfect *fait accompli.*

In this fashion, Mugabe gave a dramatic demonstration to his supporters of the truth of the statement that he remained in charge. The power to allocate Ministerial portfolios remains that of Mugabe under the Agreement. All he is required to do is “consult” with the MDC formations. And that, he pointed out, he had done. Outraged detractors suggested that the action was not in accord with the “spirit” of the agreement.

Unfortunately, “the spirit of the Agreement” is a highly subjective concept and the interpretation arrived at by MDC supporters is largely a chimera born of deliberately ambiguous drafting and their belief that Tsvangirai would not have signed an Agreement which leaves Mugabe's powers unfettered. But that is precisely what he did. Whether the door to democracy is opened thus depends entirely on the positive exercise of these unrestrained powers and Mugabe's goodwill – an inclination and attribute which have been notably lacking in the past. An examination of what is actually in the Agreement, rather than what is hoped or thought ought to be there, proves the point.

An Examination of the Agreement

Generally

The manner in which the Agreement has been drafted sends shudders down any self-respecting lawyer’s spine, from its very layout to its imprecise language, ambiguous and lacunae-riddled Articles. For example, one either uses a paragraphing format of, say, “1(1)(a)(i)” or “1.1.1.1”. The Agreement switches between the two and sometimes uses an amalgam of both. Less on the perhaps obsessive compulsive side, no consideration has been given to the careful legal sequencing required for implementing such agreements.

At the time of writing the parties are deadlocked over the allocation of Ministries. Mugabe has unilaterally decided that this is the first step in the formation of the “inclusive government” and everyone has followed along without objection. In exercising his power to allot Ministries Mugabe

must "consult with the Vice Presidents, the Prime Minister and the Deputy Prime Ministers". Yet the posts of Prime Minister and Deputy Prime Minister do not exist in terms of Zimbabwe's Constitution and will not do so until an appropriate amendment is passed, which the parties undertake to do (Article 24.1). The Agreement that Mugabe appoint Tsvangirai as "Prime Minister" pending the enactment of Constitutional Amendment Number 19, has no effect in law and cannot affect the constitutionally prescribed structure and operation of government. It is little more than a private arrangement for the management of the Ministries within Mugabe's government. He may give whoever he wants any title he deems fit within that arrangement. Mugabe cannot "consult" with a person holding a constitutionally established post of Prime Minister when no such post exists at present. Even within the scope of the Agreement Mugabe has yet to "formally" declare Tsvangirai as Prime Minister. Accordingly, if Mugabe consulted with Tsvangirai before purporting to allocate Ministries it could not have been in his capacity as Prime Minister. The Deputy Prime Ministerships also are not established until Constitutional Amendment 19 is in place. There is not even an arrangement that they be appointed pending the enactment of that amendment. This implies that in order for Mugabe to consult with the holders of these posts, the posts must be created first, that is, Constitutional Amendment 19 must precede the allocation of Ministries.

Even if the acrimonious haggling over the Ministries is ultimately resolved, there will still be enormous problems to be faced when the parties attempt to transform the terms Agreement, which is full of gaps and ambiguities, into a precise legal document in the form of a constitutional amendment.

Nonetheless, the Agreement, so the MDC optimists maintain, "must be made to work". Tsvangirai has asserted that the objective of the Agreement is the restoration of democracy and a return to the rule of law. This being the case, even if the Agreement is implemented, it will not "work" since the Agreement lacks any Articles which can serve as instruments to bring this about. The bulk of the 15 page Agreement comprises pious statements devoid of any practical consequence and which are little more than political posturing. For example, in Article 11.1(b) the parties agree that it is "the duty of all political parties and individuals to adhere to the principles of the rule of law" and in Article 18 (ignoring the fact that ZANU PF supporters have perpetrated the bulk of electoral violence in Zimbabwe[2]) both parties agree to eschew violence as a means of resolving political differences.

The value of these Articles needs to be assessed against the fact that throughout the farm invasions of 2000, throughout operation Murambatsvina in which 700 000 people were forcibly displaced under the guise of "urban renewal" and throughout the electoral violence of 2000, 2002 and the build up to the June 27th 2008 election, po-faced government officials and ZANU PF supporters proclaimed that they were committed to the rule of law and against violence[3]. That violence against MDC supporters continued even as the Agreement was being negotiated indicates that ZANU PF is prepared to continue to make such statements without any change in its behaviour.

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2 See, for example, Zimbabwe Human Rights NGO Forum (2008), *Damn Lies? Gross human rights violations during April 2008.* Report produced by the Zimbabwe Human Rights NGO Forum and the Research & Advocacy Unit. (Harare, 10 July 2008.); Solidarity Peace Trust (2008), *Desperately Seeking Sanity: What Prospects for a New Beginning in Zimbabwe?* (Durban, 29 July 2008.); Zimbabwe Peace Project (2008), *Run up to 27 June 2008 Presidential Run Off Election*. (Harare, July 25, 2008. Harare.).

3 This has all been documented in great detail. See Zimbabwe Human Rights NGO Forum (2001), *Politically motivated violence in Zimbabwe 2000–2001. A report on the campaign of political repression conducted by the Zimbabwean Government under the guise of carrying out land reform*, (Harare, 2001); Zimbabwe Human Rights NGO Forum (2002) *Human Rights and Zimbabwe's Presidential Election: March 2002*, (Harare, 2002); Zimbabwe Human Rights NGO Forum (2005) *Of Stuffed Ballots and Empty Stomachs. Reviewing Zimbabwe's 2005 Parliamentary Election and Post- Election Period*. (Harare, July 2005) Zimbabwe Human Rights NGO Forum (2005), *Order out of Chaos, or Chaos out of Order? A Preliminary Report on Operation "Murambatsvina"*. (Harare, June 2005.)

No adjudicating body is established with the power to determine whether there has been adherence to these undertakings and which can give binding orders to ensure compliance. Instead we simply have an agreement that Mbeki, SADC and the AU shall “guarantee and underwrite the Agreement”, whatever that means (and with no suggestion as to how that should be done) and an “Implementation Committee” with the power merely “to assess the implementation of this Agreement from time to time and consider steps which might need to be taken to ensure the speedy and full implementation of this Agreement in its entirety” - which is hardly an adequate mechanism to determine and remedy any breach. Consisting of representatives of all the parties, all it may do is to endlessly debate whether such a breach has occurred, a continuum of the sort of political conversation between the MDC and ZANU PF since 1999, to no apparent purpose. For all practical purposes Articles of this ilk may be ignored in considering whether the Agreement does anything to restore democracy in Zimbabwe.

Of importance in regard to the restoration of democracy are only the few Articles which refer to the structure of government, the Articles referring to a new constitution for Zimbabwe and the Articles which refer specifically to freedoms associated with democratic practice.

The Structure of Government

Relative Powers of Mugabe and Tsvangirai

The Agreement does not suggest that its provisions on the structure and modalities of governance are to replace all the current constitutional provisions in that regard. If this had been the intention, the Agreement would have had to include specific provisions to this effect. It must thus be assumed that current constitutional provisions will apply except where the Agreement requires that they be amended. And indeed ZANU PF has acted as if this is the case without apparent objection from the MDC.

Article 20 sets out the structure of the government. There are to be 31 Ministerial portfolios divided 16:15 in favour of the MDC formations. In addition to a Cabinet, chaired by Mugabe, which sets government policy, a Council of Ministers is established. This Council's function is, oddly, to ensure that the person who chairs it, the Prime Minister (Tsvangirai), “properly discharges his responsibility to oversee the implementation of the work of government”. The Prime Minister thus seems subject to the Council of Ministers, rather than the converse as one might expect. This peculiar arrangement, which ostensibly establishes the “power-sharing”, unravels under the slightest scrutiny.

The very first Article on the framework for the new government, Article 20.1.1 announces that

> The Executive Authority of the Inclusive Government shall vest in, and be shared among the President, the Prime Minister and the Cabinet.

However, having made this announcement, the subsequent Articles do not in fact invest any executive authority in the Prime Minister. While the Prime Minister “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”, these Articles lack necessary precision. And the Prime Minister is given no authority to execute these provisions, so what they mean and how the Prime Minister interprets them is largely irrelevant. Mugabe's executive authority over Ministers and the Cabinet derives from his powers to hire and fire. In terms of section 31D of the Constitution:

> The President shall appoint Ministers and may assign functions to such Ministers, including the administration of any Act of Parliament or of any Ministry or department …

The Agreement curtails Mugabe's power in this regard quantitatively but not qualitatively. The number of Ministers he may appoint is set at 31. Of these 16 are not only drawn from the MDC, but must also be MDC nominees. In other words, the MDC formations select their 16 Ministers, not Mugabe. However, the portfolios to be administered by these Ministers are determined by Mugabe "after consultation with the Vice Presidents, the Prime Minister and the Deputy Prime Ministers". Since the requirement of "consultation" (a formula for the exercise of Mugabe's powers repeated throughout the Agreement and Constitution) does not require Mugabe to act on any advice or recommendations tendered during such consultations, Mugabe has a free hand to allocate Ministries.

Of even more importance is the power to act against Ministers who fail to carry out their duties competently or in accordance with instructions given by the President or Prime Minister in carrying out their responsibilities of "day-to-day supervision" under section 20.1.2(g) of the Agreement.

This power appears in the Agreement in Article 20.1.6(7) as follows:

> Ministers and Deputy Ministers may be relieved of their duties only after consultation among the leaders of all the political parties participating in the Inclusive Government.

The manner in which this Article is phrased epitomises the general tenor of the Agreement – a 15 page testament to the dissembling, dishonest and cynical approach of ZANU PF to the negotiations with which Mbeki colluded. The schoolboy-like ploy of using the passive voice is intended to disguise agency. The agent is, however, the President, and only the President. In terms of section 31E of the Constitution "the President may remove a Minister from office". The combined effect of the Agreement as read along side the Constitution, is that Mugabe must meet, qua leader of ZANU PF, with the leaders of the MDC formations for consultation with them prior to the dismissal of a specific Minister. Regardless of what emerges from such consultations, Mugabe, qua President, may then dismiss that Minister. Since the vacancy so arising must be filled by a nominee of the party which held the post prior to dismissal (Article 20.1.8), an interesting position will arise if the MDC again nominates the same person as Minister who Mugabe has just dismissed.

Be this as it may be, it is clear that the Prime Minister (Tsvangirai) is powerless in the face of a recalcitrant Minister. On the other hand, Mugabe may exercise authority over Ministers by the threat of dismissal, removal from Cabinet (as will be discussed immediately below), reassignment to a more junior portfolio, or reassignment of the power to administer particular Acts. In view of this, MDC Ministers who become comfortable in the administration of their portfolios may find themselves more beholden to Mugabe than the leader of the MDC party that nominated them. There is a constraint in favour of MDC however. If MDC Ministers begin to regard themselves as so beholden to Mugabe that they start to vote with ZANU PF in Parliament, the leader of the MDC may give notice in the form of a certificate to the Speaker of Parliament that such Ministers, in their capacity as Members of Parliament, no longer represent the interests of the MDC. If the certificate is accepted, it will trigger a by-election in which (during the first year of the Agreement) the Ministers will not be eligible to stand. Since Ministers must be Members of Parliament (section 31E(2) of the Constitution), the Minister will lose the portfolio by this back door route. Such "floor crossing" is considered further at the end of the paper.

In view of Mugabe's powers, Tsvangirai may thus find himself exercising day to day supervision over Ministers who have little interest in paying any heed to his instructions. The anomaly that it is

the Council of Ministers who ensures that Tsvangirai “properly discharges his responsibility to oversee the implementation of the work of government” rather than the converse, has already been noted. This anomaly is compounded by the fact that the Council of Ministers itself comprises of “all Cabinet Ministers” (Article 20.1.5). MDC optimists assume that all 31 Ministers will be Cabinet Ministers in accordance with the “spirit of the Agreement”. The letter of the Agreement, however, does not provide as much. 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”. The Agreement provides in 20.1.4 that the Prime Minister will be the deputy chair of Cabinet. If Mugabe chooses to exclude some MDC Ministers from Cabinet, the Council of Ministers may consist largely of ZANU PF Ministers. The MDC is dependent on Mugabe's *bona fides* for this not to happen.

Clearly, Tsvangirai's position in government under the Agreement is little more than window dressing.

The drafters of the Agreement could confidently insert into the Agreement that Tsvangirai be appointed Prime Minster pending the enactment of Constitutional Amendment 19 without fear of constitutional challenge to the exercise of executive authority by the Prime Minister under a yet to be created post, precisely because the Prime Minister has no such authority.

The Cabinet

As the core of government, is it worth looking at the Cabinet in further detail. Even if Mugabe magnanimously 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 letter of the Agreement as read with the 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 [under Article 20.1.6(2)], the Attorney-General as a non-voting member [under section 76(3b)(a) of the constitution] and 15 ZANU PF Ministers). There is nothing in the Agreement to suggest that the two MDC [under Article 20.1.6(4)] Deputy Prime Ministers will sit in Cabinet, other than perhaps the elusive “spirit” of the Agreement.

The division of power within the Cabinet should not, however, be relevant since Cabinet decisions must be made by consensus [Article 20.1.2(f)]. No part of the Agreement determines the situation if consensus cannot be reached. Given that Cabinet has the responsibility to introduce legislation [Article 20.1.2(3)] this difficulty mirrors the legislative logjam already present due to the combined MDC formations' majority in parliament.

Legislation

Legislative authority vests in Parliament *and* the President under section 32 of the Constitution. The ZANU PF dominated upper House of parliament, the Senate, has the power only to suggest amendments to legislation to the House of Assembly and delay the passage of legislation for 90 days (Schedule 4 of the Constitution). This situation represents a real division of power, as while the MDC may use its majority in the House of Assembly to pass and amend legislation, such legislation does not become law without Presidential assent (section 51(2) of the Constitution). Where the President withholds his assent, it can only be overridden by a two-thirds majority in the House of Assembly, which the MDC cannot muster without ZANU PF support. Section 31H(5) obliges the President, in the exercise of his functions, to “act on the advice of Cabinet”, and not merely to consult Cabinet. This presumably applies to the decision whether to withhold assent to legislation.

However, section 31H(5) must be read together with section 31K(2) of the Constitution:

> 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.

If Mugabe ignores the advice of Cabinet, there is thus no remedy available other than impeachment, which itself requires a two thirds majority (section 29(3) of the Constitution).

The President also has legislative powers in terms of the Presidential Powers (Temporary Measures) Act *[Chapter 10:20]*. Although this power should only be utilised in cases of urgency where it is inexpedient to await the passage of a Bill through Parliament (section 2) Mugabe has repeatedly used the legislation to rule by decree[4] . However, such legislation must be presented to Parliament for approval within eight days of Parliament's next sitting and will lapse without such approval. With the majority in Parliament held by the combined MDC formations such legislation will not be simply rubber stamped as previously. If Parliament is in recess, the legislation continues in force until the eight day provision can apply. The President may not, however, enact legislation relating to budgetary finance and withdrawals from the Consolidated Revenue Fund in this manner.

The effect of the current balance of power in Parliament and the President's legislative power is that the President cannot (while Parliament is sitting) legislate without Parliament and Parliament cannot legislate without the President. The situation arises due to the MDC victory in the March 29th parliamentary election and despite the September 15th Agreement and not because of it. The crucial issue of parliamentary power will be returned to at the end of this paper.

The Ministries

Given that Morgan Tsvangirai has no power, qua Prime Minister, to ensure a return to the rule of law or a return to democracy, the question then arises as to whether this may be achieved through the division of Ministries as provided for under the Agreement.

As indicated at the outset, in mid-October the parties to the Agreement deadlocked over the allocation of Ministries. Although Mugabe demonstrated that his power to allocate Ministries remains unaffected by the Agreement, Mugabe has deemed it politic to enter into dialogue with the MDC on the division of portfolios. Haggling, at the time of writing, continues over what are deemed to be key Ministries - the Ministries of Home Affairs, Finance, Information, Local Government and Foreign Affairs. The MDC has already conceded the Ministry of Defence to ZANU PF.

This dispute is, however, something of a red herring and delaying tactic on the part of ZANU PF. Even if the MDC gained all of these portfolios, the effect on the restoration of democracy would be limited. Mugabe has closed democratic space through deployment of the military, the militia and a

4 See Zimbabwe Human Rights NGO Forum (2001), *Enforcing the Rule of Law in Zimbabwe*. September 2001. (Harare, 2001). By 2001, the President had used his powers under the Act to make 450 separate legislative interventions.

partisan police force which is both unwilling to act against human rights abuses and crimes against humanity as well as a participant in such offences. An extensive web of patronage keeps this system in place. No matter how the Ministries are allocated, this *modus operandi* will be largely unaffected.

The Army, Militia and Cessation of Violence and Crimes Against Humanity

Mugabe is the Commander-in-Chief of the Defence Forces, appoints the Commanders of each branch of the Defence Forces[5] (section 96(4) of the Constitution), and appoints and promotes officers within these branches[6] (section 15 of the Defence Act, *[Chapter 11:02])* giving him considerable influence over the manner in which they carry out their duties.

The militia comprises militant ZANU PF youth, some genuine war veterans, what can best be referred to as part of the lumpen-proletariat and participants in the National Youth Training Programme, referred to colloquially as "green bombers" on account of their uniforms and penchant for violence against MDC members[7]. Because of this violence perpetrated by the green bombers, the MDC has repeatedly called for this programme to be stopped. However, the Agreement specifically keeps this instrument of repression in place [Article 15] merely requiring that the purpose of the Programme be to inculcate such virtues as patriotism and discipline in the youth. ZANU PF has, of course, always stated that this is the purpose of the training, rather than to bolster the strength of the militia. The human resource element of Mugabe's repressive mechanism remains in place.

The Ministry of Home Affairs and Police Oppression

Control of the police and police repression

With a non-partisan police force, however, crimes of political violence and crimes against humanity can be punished and deterred through arrests and prosecution of those committing offences on an impartial basis. The Police Act *[Chapter 11:10]* is currently administered by the Minister of Home Affairs. The MDC has thus placed undue emphasis on gaining this portfolio. Undue, because the belief that control of this Ministry will allow it to rein in police excesses and create a non-partisan force, is naive[8].

The Commissioner-General of Police is appointed by Mugabe (section 93(2) of the Constitution as read with s 5 of the Police Act [*Chapter 11:10*]). Mugabe also determines appointments and promotions to all Commissioned ranks in the police force, while the Commissioner-General controls the appointments and promotions of non-commissioned officers (sections 14, 15 and 16 of the Police Act).

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5 The President appoints commanders after consultation with the Minister of Defence.

6 When appointing or promoting any person , the President must consider the advice of the Minister of Defence tendered after consultation with the Commander.

7 See Solidarity Peace Trust (2003), *National youth service training – " shaping youths in a truly Zimbabwean manner". An overview of youth militia training and activities in Zimbabwe*, October 2000 – August 2003. (5 September, 2003.).

8 See Zimbabwe Human Rights NGO Forum (2003), *Torture by State Agents in Zimbabwe: January 2001 to August 2002*, (Harare, 2003); Zimbabwe Human Rights NGO Forum (2006), *Who Guards the Guards? Violations by Law Enforcement Agencies in Zimbabwe, 2000 to 2006*, December 2006, (Harare, December 2006) ; Zimbabwe Human Rights NGO Forum (2007), *At Best a Falsehood, At Worst a Lie? Shooting Oneself in the Foot? Comments on the Zimbabwe Republic Police Report "Opposition Politics in Zimbabwe. A Trail of Violence*. (Harare, June 2007.)

Although the Minister of Home Affairs will control the budget allocated to his Ministry and thus that of the Police, the extent to which this will give him or her influence has been severely diminished by the fact that the importance of income received by ministerial budgets has been reduced by rampant hyperinflation and the actions of the Governor of the Reserve Bank (discussed below).

It is the Attorney-General who may direct the Commissioner-General to investigate criminal offences, and who has authority over any prosecutions [under section 76(4) and 76(4a) of the Constitution]. The Attorney-General is once again a Mugabe appointee. [section 76(2) of the Constitution[9]]. There is thus very little possibility of extensive prosecutions of ZANU PF supporters who engaged in recent electoral violence or the violence since 2000 and earlier periods.

Under the Police Act, the President has the power to set policy and to give general directions for the Zimbabwe Republic Police which will override any conflicting policy and directions given by the Minister [section 11]. Even the Minister's power to make regulations for Police matters is limited by being subject to the approval of the Commissioner-General who reports directly to the President. Before making such regulations the Minister must also consult with the Police Commission. [section 72 of the Police Act].

Mugabe and the Commissioner-General will dominate the manner in which the Police perform their duties, regardless of which party holds this portfolio. If this proves to be difficult, Mugabe could simply use his power, indicated earlier, to reassign the administration of the Police Act. The opening of democratic space by reforming policing depends entirely upon Mugabe's goodwill.

Control of the Registrar-General

There is also an assumption that the Minister of Home Affairs controls the office of the Registrar-General. This is deemed important as the current incumbent, Tobaiwa Mudede, is perceived as biased towards ZANU PF and has used his powers to manipulate the voters' roll, voter registration and the electoral process generally.

The Minister of Home Affairs administers some 35 Acts, including the Births and Deaths Registration Act *[Chapter 5:02]*, the Citizenship of Zimbabwe Act *[Chapter 4:01]* and the National Registration Act *[Chapter 4:02]*.

The Electoral Act *[Chapter 2:13]* is administered by the Minister of Justice, Legal and Parliamentary Affairs . However, there is no general post of Registrar-General, but each Act creates a post of Registrar-General for each function. Thus the Birth and Deaths Registration Act creates the post of Registrar-General of Births and Deaths, the Citizenship of Zimbabwe Act creates a Registrar-General of Citizenship and the Electoral Act a Registrar-General of Elections. These posts are part of the Public Service and appointments are thus made by the Public Service Commission - a body itself appointed by the President under section 74(1) of the Constitution. Currently Mr. Mudede has been appointed Registrar-General for all these Acts, including the Electoral Act. However, amendments to the Electoral Act and the composition of the Zimbabwe Electoral Commission (ZEC) in 2005 (see section 61 of the Constitution) have had a significant impact on the manner in which the Registrar-General of Elections carries out his duties. Responsibility for the custody and maintenance of the voters' roll has been moved from the office of the Registrar-General of Elections to ZEC (section 20 of the Electoral Act). Furthermore, in terms of section 18(2) "in the exercise of his or her functions, the Registrar-General of Voters shall be subject to the direction and

9 In consultation with the Judicial Services Commission.

control of the Commission". These are powers which ZEC declined to exercise in the March 29th election.[10] However, the same legislation has changed the composition of ZEC which should thus be different for any subsequent election. ZEC is now to consist of a chairperson, who must be a judge appointed by Mugabe, and six other persons appointed by Mugabe from a list of nine candidates submitted by the Parliamentary Committee on Standing Rules and Orders. The majority of the combined MDCs in Parliament should be reflected in this Rules Committee thus giving it substantial control over the selection of nominees. The repercussions of this are elaborated upon at the end of this paper. For the purpose of this section, it is sufficient to note that the Minister of Home Affairs does not control the Register-General of Elections and, through that office, the voters' roll.

The Ministry of Information and Freedom of Expression

Electronic media

The opening up of the electronic media would go a long way towards opening up democratic space within Zimbabwe. Radio, the only medium available to the majority of people in the rural areas, who generally cannot afford newspapers, is the most powerful means of disseminating information nationally. The government thus maintains tight control over this medium and a monopoly over both television and radio broadcasting. It is the only country in the region without independent broadcasters. Such is the government's determination to retain this position, the few radio stations which attempt to broadcast to Zimbabwe from outside the country, such as SW Radio, have had their signals jammed by government.

The Agreement indicates that the parties are desirous of opening up the airwaves and then cynically and disingenuously suggests that this be done by ensuring "the immediate processing by the appropriate authorities of all applications for re-registration and registration in terms of ... the Broadcasting Services Act". Broadcasting licenses are issued by the Broadcasting Authority of Zimbabwe Board (in terms of section 3(2)(e) of the Act *[Chapter 12:06]*). Mugabe determines the initial composition of this Board in terms of section 4(2), not the Minister of Information. The Minister may, however, suspend a member of the Board on specified grounds in terms of section 4A(4) and sets their conditions of service (in terms of the Third schedule). However, the Minister does have the power to fill vacancies on the Board (paragraph 5 of the third Schedule). He may not, however, dismiss the entire Board without the approval of the President. While the Minister of Information has considerable power under the Act, the immediate power to issue broadcasting licenses will remain with Mugabe appointees. But a more significant impediment to an immediate opening of the airwaves than control over the issuance of licenses, is the onerous Sixth Schedule relating to "local content". In the case of a television broadcaster, the licensee must ensure that, during defined prime time periods, at least:

1. seventy *per centum* of its drama programming consists of Zimbabwean drama;
2. eighty *per centum* of its current affairs programming consists of Zimbabwean current affairs;
3. seventy *per centum* of its social documentary programming consists of Zimbabwean social documentary programming;
4. seventy *per centum* of its informal knowledge-building programming consists of Zimbabwean informal knowledge-building programming;

10 See Matyszak. D. M (2008), *Opinion on the legality of the presidential election which took place in Zimbabwe on June 27th 2009, and the legitimacy of any incumbent assuming office on the basis of the result of such an election.* SITO: IDASA;

5. eighty *per centum* of its educational programming consists of Zimbabwean educational programming;
6. eighty *per centum* of its children's programming consists of Zimbabwean educational programming

In the case of a radio broadcaster, the licensee must ensure that during prime time periods:

1. seventy-five *per centum* of the music broadcast consists of Zimbabwean music;
2. ten *per centum* of the music broadcast consists of music from Africa.

These conditions are so onerous that not even the States controlled broadcasters ZTV and ZBC fully comply with them. Apart from the commercial viability of broadcasters controlled in this manner, there are insufficient production houses able to provide the material to meet these requirements and there are not likely to be for some time. The Board, not the Minister, may cancel any licence which does not comply with these conditions.

As the local content conditions form part of a Schedule to the Act, rather than regulations, they cannot be amended by the Minister of Information: only Parliament may do this. In the preamble to the Agreement the parties "acknowledge" recent amendments made to the Broadcasting Services Act, suggesting an acceptance of the Act in its current form. Any further amendment to the Act, as indicated above, would require presidential approval. Regardless, then of who acquires this portfolio, there is unlikely to be any significant opening up of the airways and a plurality of broadcasters established.

Print Media

Amendments to the Access to Information and Protection of Privacy Act [*Chapter 10: 27*] (AIPPA) pursuant to a Bill introduced in December 2007 have greatly reduced the power of the Minister (and the President) in relation to the printed media. The powerful Media Commission (replacing the Media Information Commission) which registers mass media, accredits journalists (section 39) and appoints the Media Council (section 42A) is no longer simply appointed by the Minister subject to the direction of the President. While section 38 has been amended so that the appointments are made by the President, in making such appointments the President must select members from a list of 12 submitted by the Parliamentary Committee on Standing Rules and Orders. Since the combined MDC formations hold a majority in Parliament they should dominate this Committee in the same way that ZANU PF did when it held the majority. This in turn should effect the composition of the new Media Commission and may lead to the re-emergence of independent daily newspapers in Zimbabwe. This opening of democratic space will take place in spite of rather than because of the Agreement, and derives from the MDC's victory in the elections to the House of Assembly, the effect of which will be elaborated upon at the end of this paper. While regulations made by the Media Commission must be approved by the Minister of Information, the question of who holds this portfolio will not affect the opening up of space for the print media significantly, since effective control will lie with the Media Commission.

Freedom of Assembly

There have been repeated calls for the repeal of the Public Order and Security Act *[Chapter 11:17]*(POSA). The provisions of this draconian legislation are regarded as limiting freedom of association and public assembly to an extent which is not justifiable in a democratic society. Although Parliament passed legislation in 2007 making a number of changes to this Act which

somewhat improved its provisions[11], it still remains a repressive instrument in the hands of a repressive police force.

While this call for repeal is thus justified, the main impediment to the opening of democratic space in this regard is not POSA but the behaviour of the police. A report on policing in Zimbabwe produced after a fact-finding mission carried out by the International Bar Association Human Rights Institute in October 2007 determined that:

> Instead of conducting itself as a national security force charged by the Constitution and statute with ensuring public order and security in the country, the ZRP has abandoned its constitutional mandate in favour of an approach to policing which is blatantly partisan. The police repeatedly characterise government opponents and critics and their lawyers as 'agents of the West' or 'enemies of the state' and routinely violate the rights of these persons during policing operations.

The violations referred to include unjustified arrests of persons attending public gatherings, rallies, demonstrations and political meetings. Very few of the thousand of arrests effected by the police and which the police have claimed are authorised under POSA result in a successful or any prosecution. This disproves the police claim in this regard and demonstrates a blatant abuse of police power for political purposes[12]. Since these arrests are not authorised under POSA, amendments to POSA, which would require unlikely Presidential assent in any event, would not affect this situation significantly.

The opening of democratic space allowing freedom of assembly requires a reconstituted and re-oriented police force, which will not come about as a result of the Agreement or the allocation of the Ministry of Home Affairs to the MDC for so long as Mugabe and the Commissioner-General retain their control over the force.

Ministry of Finance and Reserve Bank

Mugabe maintains his undemocratic grip on power not only through his constitutional powers to make all key appointments within government but also through an extensive network of patronage comprising the distribution of seized farms, government contracts, government subsidies and ad hoc largesse. In the case of the latter two, the Reserve Bank plays an essential role. Shortly after the signing of the September 15th Agreement, Mugabe travelled to the United Nations to deliver a 20 minute speech with an entourage of 52 he deemed to be a necessary support group. The generous allowances and luxurious board and lodging were financed with critically short foreign exchange supplied by the Governor of the Reserve Bank. In early September, the Governor of the Reserve Bank arranged a delivery of generators, satellite dishes and receivers and large LCD television sets to all judges – despite the constitutional requirement that the remuneration of judges be set by Parliament and drawn from the Consolidated Revenue Fund (section 88). Such largesse naturally compromises the judiciary's impartiality in the eyes of the public, particularly as the conduct of the Reserve Bank in recent years has been of dubious legality and is itself likely to face numerous legal challenges.[13]

In addition to this sort of largesse, the Reserve Bank plays a key role in propping up the Mugabe Government. Parliament recommenced its sessions on the 14th October. Its last previous session for

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11 Act 18 of 2007.

12 See Solidarity Peace Trust (2004), *"Disturbing the peace". An overview of civilian arrests in Zimbabwe: February 2003 – January 2004.* (July 2004.)

13 See for example *Chapfika v Reserve Bank of Zimbabwe* HH-77-2007

business (excluding the formality of its opening) had been on 16th January, 2008. With inflation currently so rampant that it is impossible to determine with any real accuracy, but officially now stated as 231 million per cent per annum, any amounts determined by Parliament in terms of Appropriation Acts passed by it quickly become irrelevant to the functioning of Ministries.

The Governor of the Reserve Bank engages in what is euphemistically called "quasi-fiscal activities" – using the Bank's power (under section 40 of the Reserve Bank Act *[Chapter 22:15])* to print large sums of money and then to use the power (under section 7(2)(b)) to advance this money to the State. The amount advanced to the State ought not to exceed the equivalent of twenty *per centum* of the previous year's ordinary revenues of the State. The loans must be repaid within 12 months of the end of the financial year in which they were made or the State must issue the equivalent in negotiable bearer securities to the Bank. Such actions also, of course, mean that the receiving Ministry is exceeding the budget set for it by Parliament. However, the Constitution anticipates expenditure by Ministries on occasion in excess of that allowed under an Appropriation Act. In such an event the Constitution, somewhat vaguely, requires "once the extent of the excess has been established" that a Bill is laid before the House of Assembly during one of the 14 days that the House next sits, seeking condonation of such authorised expenditure (section 103(5)). However, the Constitution is silent as to what ought to transpire if such a Bill is not approved. In this way Parliament's control over State finances is by-passed by the Reserve Bank.

Hyper-inflationary conditions usually favour the borrower, particularly where interest rates are artificially capped (as is the case in Zimbabwe) at a level many thousands of percent below inflation. The Reserve Bank's power to make loans generally (section 7(1)(c) of the Reserve Bank Act) thus constitutes an important source of finance to the Mugabe Government and largesse and patronage to ZANU PF supporters and to ZANU PF itself – especially in the provision of resources during election periods.

The Reserve Bank also has control over Zimbabwe's foreign currency reserves (by virtue of the Exchange Control Act *[Chapter 22:05]* and a host of regulations made in terms of that Act). Chronic and severe foreign currency shortages have led to peculiar market distortions. At the time of writing (October 2008) there is an officially set bank exchange rate of around $100 Zimbabwe dollars to one United States dollar. Yet US$1 will fetch $25 000 in cash on the street and approximately $100 000 000 (sic) if paid through a bank transfer. The huge differential between the black market cash rate and transfer rate is due to the fact that the Reserve Bank has limited daily Zimbabwe dollar cash withdrawals from commercial banks to $50 000. An artificial shortage of local currency has been created resulting in a huge premium placed upon cash rather than cheques and bank transfers.

These distortions allow various obvious openings for enrichment and corrupt practices. For example, the Reserve Bank may sell foreign exchange to ZANU PF supporters at the official rate who may then in turn sell money on the black market for a huge profit; or the Reserve Bank may make large amounts of local currency available to selected people in cash who can then take advantage of the premium attached to cash to purchase foreign currency at the cash rate of 25 000:1 - to be resold at the bank transfer rate of 100 000 000:1. The Bank, as official policy, does not apply the daily withdrawal limit of $50 000 to salaries of the Defences Forces and Police, and thus, by allowing access to cash, effectively hugely inflates the salaries of members of these forces. This form of largesse is essential to maintain the support of a crucial and increasingly restless constituency.

Control over these activities of the Reserve Bank is thus essential for Mugabe if he is to maintain the current repressive system of governance.

While the Ministry of Finance is a powerful portfolio, with the Minister responsible for the Administration of some 50 Acts of Parliament (including the Banking Act *[Chapter 24:20]*, the Customs and Excise Act *[Chapter 23:02]*, the Exchange Control Act *[Chapter 22:05]* and the Income Tax Act *[Chapter 23:06]*) the Minister of Finance has some, but insufficient, powers to control the activities of the Reserve Bank.

The Governor of the Reserve Bank, Deputy Governors and Board of Directors are all direct appointees of Mugabe (under section 14 of the Reserve Bank Act) and may be dismissed by Mugabe (in terms of section 17) after "consultation with the Minister".

The Minister does have some powers over the Board, however. In terms of section 38 of the Reserve Bank Act, he may initiate an investigation into the Bank's affairs (though this is something likely to be done by the MDC through a Parliamentary Committee in any event). Also under section 62, if it appears to the Minister that the Bank has failed to comply with any provision of this Act, he may require the Board to remedy the default within a specified time. The Board is then obliged to take all such steps as are necessary to ensure due compliance with any such provision. There is nothing the Minister can do, however, in the face of continued non-compliance, apart from reporting the non-compliance to Parliament.

More importantly, the Minister of Finance has control over the exchange rate. A free rate of exchange would eviscerate many of the Reserve Banks activities and remove an essential component of the Bank's *modus operandi*. Significantly the regulations fixing the rate of exchange are in terms of the Reserve Bank Act (section 47(1) as read with section 64) and not in terms of the Exchange Control Act. This is important as although the Minister of Finance administers this latter Act, regulations thereunder are made by the President and not the Minister. To remove this power from the MDC Minister of Finance would require a reassignment of the administration of the Reserve Bank Act away from the Minister of Finance. However, other effects on Zimbabwe's embattled economy may not allow a free floating exchange rate at present.

Minister of Local Government

This portfolio is the only one which, if secured by the MDC, will have a significant effect on the restoration of democracy in Zimbabwe. This is not because of the powers the Minister has, but to prevent the incumbent (Ignatious Chombo) from exercising power he does not have.

Since its formation, the MDC has consistently won control of the councils in all major urban centres, and, subsequent to the March 29th election has control of the majority of both urban and rural councils. The response of ZANU PF in the past has been to suspend these councils and replace them with ZANU PF appointed "Commissioners" or now, "caretakers". While the Minister purported to exercise powers granted under sections 114 and section 80 of the Urban Councils Act *[Chapter 29:15]*, section 114 allows the Minister to suspend councillors in certain circumstances only and section 80 allowed for the appointment of commissioners for periods of six months only. Several Court rulings have indicated that the Minister's use of these sections to dismiss entire councils and replace them with Commissioners who have then run council affairs until the next elections beyond the upper limit of six months is unlawful. These rulings have been ignored by the Minister. With a properly functioning judicial process, this situation should not arise, regardless of who is Minister. For the present, an MDC Minister of Local Government, may ensure that Urban Councils are run by people who have a democratic mandate to do so[14].

14 Section 80 has been amended slightly. The Minister can now appoint no more than three persons, now referred to as "caretakers" and whose term of office has been reduced to 90 days.

The Minister also has the power to reverse and rescind any resolution of a council if "he is of the view" that the resolution is not in the interests of the inhabitants of the council area or the national or public interest. This vast power in the hands of the Minister allows the views of democratically elected councillors to be overridden, rendering the portfolio one of considerable importance.

Permanent Secretaries

All permanent secretaries are appointed by the president [section 77 of the constitution]. Other members of the Public service are appointed by the Public Service Commission. All the members of the Public Service Commission itself are appointed by Mugabe [section 74 of the Constitution]. However, section 16A of the Public Service Act provides that Public Service Commission has the power to suspend, dismiss or discharge a head of Ministry from the public service with the concurrence of the President. Thus Mugabe could block the removal of such heads.

New Constitution

Article 6 of the Agreement provides for a process to establish a new "people driven" Constitution for Zimbabwe. Various time frames are put into place to govern this process. The first step is the establishment of a "Select Committee" - within two months of the inception of "a new government". This provision is, however, ambiguous. Is a new government established with the appointment of the 31 Ministers, or is the new government established once the revised structures, such as the post of Prime Minister and Council of Ministers are in place?

However, once the constitution making process is complete, the final draft will still need a two-thirds majority to become effective. This implies ZANU PF agreement to whatever is presented to Parliament, which may not be forthcoming, even though the draft Constitution has been approved by the people in a referendum. Accordingly, while it is hoped that a new constitution, reducing Mugabe's powers may create the conditions for the restoration of democracy, ZANU PF MPs still maintain a veto in this regard and are likely to follow instructions from the ZANU PF executive.

Actual Power

Very little power has accrued to the MDC by virtue of the Agreement, regardless of which Ministries they are allocated - with the exception of local government. And it must always be borne in mind that the administration of various Acts can be reassigned by Mugabe. This means they have little influence over the degree to which democratic space is opened.

However, the power the MDC formations do have emanates from their majority in the House of Assembly, provided that the two formations act together on important issues. This power would remain even if the Agreement collapses and is not implemented.

No legislation, including Appropriation Bills, can be enacted without their vote. Section 106(1) of the Constitution requires the Comptroller and Auditor-General to audit all public accounts, except those which he considers it inexpedient or inappropriate for him to examine. But he must examine even those if the House of Assembly directs him to do so. If, therefore, the House wants him to examine "secret" accounts operated by the President's Office and other Ministries, the House should give the Comptroller the appropriate directions. Parliamentary Committees may be established to investigate dubious past governmental practices and the activities of the Reserve Bank. The MDC's control over the Parliamentary Committee on Standing Rules and Orders should

ensure the establishment of an impartial (or MDC biased) Zimbabwe Media Commission and Zimbabwe Electoral Commission. A reconstituted Media Commission should see the re-emergence of non-state controlled daily news papers, thus opening up freedom of expression to some extent. A reconstituted Electoral Commission should result in a thorough audit of the voters' roll and impartial electoral procedures.

These powers of the MDC will cause Mugabe no little discomfort. A likely ZANU PF strategy is thus to wrest the parliamentary majority away from the combined MDC's. Here ZANU PF has a further difficulty due to the (only) other benefit accruing to the MDC under the Agreement[15] in terms of Article 21.1. In the event of a by-election, only the party currently holding that seat may field a candidate. This does not mean that the candidate will necessarily win the seat by default. Simba Makoni, a losing contestant in the Presidential race, is said to be in the process of forming his "Mavambo" party and this group is not party to the Agreement. Space is then left for a deal between ZANU PF and Mavambo to usurp the MDC seat. Or ZANU PF candidates may stand masquerading as "Independents"[16]. Furthermore, the soft under belly for the MDC is that the balance of power in the House of Assembly is held by the 10 Mutambara formation MDC MPs. The current composition of the House is 99 ZANU PF MPs, 1 Independent (Jonathan Moyo), 100 Tsvangirai MPs and 10 Mutambara MDC MPs.

The Mutambara MDC national executive has already shown a willingness to enter into an alliance with ZANU PF when expedient, by instructing its MPs to vote with ZANU PF in the election of the Speaker of the House. Seven of these ten MPs disobeyed this instruction. There is thus clearly tension between the Mutambara MPs and the Mutambara Executive. If the MPs continue to refuse to tow the line and continue to vote with the Tsvangirai formation, the executive may seek to remove them by filing a certificate with the Speaker that they no longer represent the interests of the party (section 41(1)(e) of the Constitution). The Speaker will then be presented with the unresolved question of whether the MDC formations constitute one or two parties. If the certificate is accepted by the Speaker, this will compell a by-election. ZANU PF and the Mutambara formation may agree more compliant replacements for the wayward MPs.

If continuously frustrated by the MDCs majority in the House of Assembly Mugabe may well simply prorogue Parliament for six months periods, as he has the power to do (section 63 of the Constitution)

Conclusion

Since the parliamentary majority is the real locus of the MDC's power, it is here that its focus should lie and energies should be concentrated, and not on the September 15th Agreement. The MDC formations need to take care that in the dispute over the highly symbolic allocation of Ministries, and trying to make "the Agreement work" (when, even if fully functional, it cannot alone deliver a return to democratic governance) there is no loss of focus on the crucial need to preserve its majority in the House of Assembly in the face of ZANU PF machinations.

15 The first benefit being that of the 16 Ministries.

16 The Agreement is sometimes interpreted to mean that there will be no by-elections for a period of one year. Such a provision would violate the Electoral Act. A purported Constitutional Amendment to this effect would probably fall foul of the "essential features doctrine" and itself not be constitutional. It is probably for this reason that the Agreement is phrased as it is, i.e. that only the party holding that seat prior to the by-election shall field a candidate. As stated, this arrangement canot bind persons who are not party to the agreement.