



THINKING INSIDE THE BOX

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*Should I stay or should I go now
should I stay or should I go now
if I go there will be trouble
if I stay it will be double
so come on and let me know
should I stay or should I go - Mick Jones, The Clash*

Zimbabwe's current "Government of National Unity" (GNU) is established by a transient Schedule appended to its national constitution. Buried in this 8th Schedule is a small but immensely significant legal provision, Article 20.1.10, which 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 posts referred to in 20.1.6 are all executive positions, and include the presidency.¹ This legal requirement may inform much of ZANU PF's current political thinking, particularly in regard to the timing of the next election.

SADC has made it clear that it will not countenance an election held under Zimbabwe's current constitution and in the absence of other democratic reforms.² Yet the repeated delays in developing a new constitution suggest that the process may not be completed much before 2013.³ Given President Mugabe's increasingly frequent trips to Singapore for medical treatment⁴, it is extremely doubtful he will be fit to stand as a presidential candidate in 2013, when he will be 89.⁵ Mugabe's failing health has led to the consideration of alternatives and highlighted the legal complexities and contradictions in Zimbabwe's constitution around the issue of presidential incapacity and a vacancy at the very top of the executive.

In terms of the current constitution, if the President is unable to perform his duties, one of two-vice presidents temporarily assumes this role for an indefinite period.⁶ However, the prolonged incapacity of Mugabe might cause Parliament to initiate procedures for Mugabe's permanent replacement. A motion in the House of Assembly passed by only a third of members is sufficient to establish a committee, comprising members of both the Senate and House of Assembly, which

¹ Those in 20.1.9 are Presidential appointments to the Senate.

² See *Mugabe Concedes Defeat Over Election Date* The Zimbabwe Independent 01.09.11.

³ See *Mugabe Poll Plan Collapses* The Financial Gazette 21.10.11. The article suggests that the drafting process, which has yet to commence, will take two to three months. Thereafter, following the procedures set out in Article VI of the Inter-Party Political Agreement (more commonly referred to as the Global Political Agreement, GPA) the second "all stakeholders" conference must be convened to discuss the document, which is then referred to Parliament. It is not anticipated that this will take place before the second quarter of 2012. Parliament may debate the document for several months before it is referred for a referendum. If approved in the referendum, it returns to Parliament for passage and only then will become the law of the land. This suggests that the referendum is most likely in the latter stages of 2012.

⁴ *Mugabe Travel to Singapore Costs Millions, Figures Show* CNN 02.11.11 <http://edition.cnn.com>.

⁵ A point emphasised by ZANU PF propagandist Jonathan Moyo see: *ZANU PF: An Introspection* Sunday Mail 07.08.11.

⁶ Section 31(1) of the Constitution.

may recommend that the President be removed from office by reason of his physical incapacity. The recommendation is implemented if adopted by the vote of two-thirds of the combined Houses.⁷ If the office of the President becomes vacant in this manner, or due to the sudden death or retirement of the President, one of the two Vice-Presidents will assume office in the interregnum period - which of the two depends upon who last acted as president or whom Mugabe has nominated for this purpose.⁸ For this reason, close attention is paid to who assumes the role in Mugabe's absence. One of the Vice-Presidents, Joice Mujuru, is regarded as a contender for the presidency. While not assuming plenary presidential powers⁹, she would have the power in the interregnum period to dismiss the heads of the security sectors, all of whom are regarded as key players in the issue of determining the successor to Mugabe.¹⁰

The interregnum period cannot be longer than 90 days during which time both Houses of Parliament must sit as an electoral college to appoint a successor to see out the remainder of the presidential term. The Clerk of Parliament will determine the date of the election within this period.¹¹

Although the provisions of the 8th Schedule override any provisions elsewhere in the Constitution "to the contrary"¹², the question arises as to whether the provision which allows a vacancy in the presidency to be filled by a nominee of ZANU PF overrides the requirement of establishing an electoral college, as outlined above, or operates in conjunction with it. The effect of reading the two provisions conjunctively would be that while an electoral college must be convened, only nominees "of ZANU PF"¹³ may stand as candidates.

While ZANU PF has a majority in the combined Houses by virtue of Presidential appointments to non-constituency seats in the Senate, the MDC would be kingmaker were more than one candidate nominated, and any ZANU PF faction entering into an alliance with the MDC would see its candidate appointed.¹⁴ Most speculation has been around the prospect of such an alliance by a faction of ZANU PF centered on Vice-President Joice Mujuru.¹⁵ Those with most to fear from this alliance, factions located within Zimbabwe's powerful security sector, may contend

⁷ Section 29(3) of the Constitution.

⁸ Section 31(1) of the Constitution.

⁹ The Acting President may not (other than with the approval of a majority in cabinet) declare war, enter into international agreements, dissolve or prorogue Parliament, assign or reassign Ministerial functions, or dismiss Ministers – Section 31(2) of the Constitution.

¹⁰ The President is the ultimate authority for all these institutions, and the heads of these institutions in turn wield an enormous amount of power over their subordinates – see *Zimbabwe's Security Sector – Who Calls the Shots* Derek Matyszak, RAU available at kubatana.net.

¹¹ Section 112A of the Electoral Act [Chapter 2:13]

¹² Paragraph 1 of the 8th Schedule of the Constitution.

¹³ This phrasing is infelicitous. The use of the preposition "of" opens the door to the possibility that the candidate need not be "from" ZANU PF and that a compromise candidate may be proposed. If "of" means "belonging to" ZANU PF, i.e. a ZANU PF cadre, this opens the door to the possibility that a ZANU PF cadre may be proposed by the MDC.

¹⁴ Current voting strengths in the Houses are as follows ZANU PF 96, MDC-T 97, MDC-N 8 (of 214 House of Assembly seats) ZANU PF 55, MDC-T 27, MDC-N 8 (of 100 Senate seats), giving totals of ZANU PF 151 against the combined MDC's 140.

¹⁵ See for example *Who Killed Solomon Mujuru?* Robert Rotberg <http://robertrotberg.wordpress.com/2011/09/13/who-killed-solomon-mujuru/>.

that the 8th Schedule allows the nominee chosen by ZANU PF to enter office without the need to convene an electoral college.

This route has its own complications. It will require a faction within the security sector to enforce its favoured interpretation of the constitutional provisions and to impose its desired nominee through ZANU PF's own murky party procedures. It will also require ensuring that the provisions of 8th Schedule are still in effect when the presidential seat becomes vacant. The life of the 8th Schedule is coterminous with the GNU.¹⁶ If Mugabe is able to stand as a candidate he may deem it tactically expedient to withdraw from the GNU (as he may do legally¹⁷) just prior to any election, leaving ZANU PF's advantage of incumbency unfettered by the MDC during the electoral period, but terminating the provisions relating to a vacancy in the presidency in the 8th Schedule, on which one faction may be relying.

It is also implicit in the agreement establishing the GNU that a new constitution is adopted prior to the next elections.¹⁸ The question will then arise as to what will happen to the 8th Schedule and the GNU once the new constitution is adopted.¹⁹ The provisions relating to the procedures on the death or incapacity of the President to be included in the new constitution will also need to be determined. These are not issues which appear to have engaged the political parties involved in the constitution making process to date, though their importance should become increasingly apparent. It may be that the parties will determine that the 8th Schedule is once more appended to the new constitution as a transient provision, to end with the GNU and/or the election. The departure of Mugabe while the provisions of the 8th Schedule are still effective is essential for any faction within the security sector intending to avoid the convention of an electoral college and to impose its nominee as President. For this faction, an early election with the provisions relating to an electoral college still in place, either in a new constitution or under the current constitution, is the worst case scenario²⁰ - their optimal scenario is the departure of Mugabe while the GNU and succession provisions of the 8th Schedule are still in place, preceded by a period of several weeks where the populace can be prepared for the demise of Mugabe, prepared

¹⁶ Section 115(2) of the Constitution.

¹⁷ The GPA does not provide any cut-off date, it being assumed that it will end on the dissolution of Parliament before the next election. Only political, and not legal, considerations prevent the withdrawal by any of the three parties prior to this time. When the GPA is terminated the interim provisions of the 8th Schedule fall away and the provisions of the main body of the constitution apply once more. These provisions would restore Mugabe's plenary power to appoint Ministers exclusively from his ZANU PF party.

¹⁸ It is often assumed by political commentators that it is a specific requirement of the GPA that a new constitution must precede any elections. This is not the case. It is merely the stated intention of the parties (outside of the GPA) and assumed as understood between them.

¹⁹ In fact the adoption of a new constitution prior to the elections raises similar complexities in other areas – what for example is to happen to existing seats in parliament, which may be reduced or increased or fall to be determined by proportional representation rather than the current first past the post system; the currently appointed judges; and other appointments under the constitution.

²⁰ This contradicts the conventional wisdom that the security sector is pushing for an early election – see *Mugabe Backed by Security Chiefs in Push for Elections Next Year* 29.10.10 <http://www.voanews.com/> and *Hardliners in Mugabe's Party Insist On Early Constitutional Referendum, Election* 11.01.11 <http://www.voanews.com>. The press quotes a “Mnangagwa faction”, usually believed aligned to the security sector, as in favour of an early election - see *Zanu PF Digs-in On Elections, Blasts South African Government* The Zimbabwe Mail 11.05.11 <http://www.thezimbabwemail.com/zimbabwe/8036-zanu-pf-digs-in-on-elections-blasts-south-african-government.html>.

for the utilisation by this faction of Article 20.1.10 to impose its nominee and during which the assuefaction of the proposed successor can take place.²¹

If it appears that Mugabe will not be fit to stand as a candidate come the next elections, the Mujuru faction would also like to see Mugabe's departure sooner rather than later. If this occurs before a new constitution is in place the Mujuru faction will not then run the risk of new vacancy provisions which may remove its advantage of the current provisions relating to an electoral college. For both factions the early departure of Mugabe would allow sufficient time for the new incumbent to entrench and secure his or her position ahead of the election which would then almost certainly not be held before June 2013, the last legally competent moment.²²

If, however, Mugabe is able to stand in the next elections, and the current vacancy provisions relating to an electoral college have been retained, the Mujuru faction may seek to secure Mugabe's victory by whatever means necessary, with the intention that Mugabe retire soon thereafter. Should Mugabe refuse to depart, the Mujuru faction might seek to reply upon the provisions in the constitution which can compel his departure if the necessary two-thirds majority in both Houses of Parliament can be mustered.²³ On present numbers, this would require 198²⁴ votes of which the combined MDCs could supply 124 leaving Mujuru to garner 74 votes from within the ZANU PF camp – a fairly tall, but not impossible, order.²⁵

²¹ The successor is likely to be billed as someone who will continue Mugabe's legacy and complete the "empowerment and full liberation" of Zimbabweans – Mugabe could thus, in this way, continue to rule "from the grave". ZANU PF spin doctor, Jonathan Moyo, has already suggested that this person should be drawn from the younger "Generation 40" cadres who do not necessarily have liberation war credentials. The strong suggestion is that Saviour Kasukuwere, the Minister of Youth Indigenisation and Economic Empowerment, is a likely nominee – see *ZANU PF: An Introspection* (fn 5 above). See also fn 34, where a ZANU PF Minister is quoted in a wikileaks cable as stating that the "ZANU-PF leadership was old and that Mugabe's successor would be neither Mnangagwa nor the Mujurus, but would come from the younger, reformist part of the party."

²² It is often stated that the latest date for an election is March 2013 i.e. five years from the date of the last parliamentary election. Although the life of a Parliament is five years, parliamentary and presidential elections must be held simultaneously (section 28(3)(a) of the Constitution) and the five year period commences on the day the President enters into office (section 63(4) of the Constitution). Due to the delay in holding the Presidential run-off election, Mugabe only entered into office on 30th June, 2008.

²³ If the Mujuru faction enters into an alliance with the MDC faction in order to gain a two-thirds majority in Parliament to achieve these objectives, this would be the moment when the parties might seek to negotiate a "GNU II" which is widely seen as the most likely resolution of Zimbabwe's political impasse if this GNU II, unlike the present, were to be a genuine power sharing arrangement. While the MDC would be kingmaker in this scenario, its power should not be overestimated, as the Mujuru faction would be aware that the MDC would have little choice other than to vote with it to prevent the greater evil of its rival assuming office, or continuance of Mugabe. The negotiating power of each may also be contingent upon whether the bargain is struck before or after an election and the result thereof.

²⁴ There are currently 18 (November 2011) by-elections due in both Houses, comprising 314 seats. Mugabe is obliged to call such by-elections with 14 days of being notified of the vacancy in terms of Section 39(2) of the Electoral Act [Chapter 2:13] but has not done so during the life of the current 7th Parliament.

²⁵ The suspicious death of Solomon Mujuru, regarded as the real political force within this faction, has considerably weakened Joice Mujuru's power base – see *Rwodzi Arrest Shows Weakening of Mujuru Faction* 08.11.11 <http://www.swradioafrica.com>. If Solomon Mujuru was murdered, these configurations would suggest a motive. See also, in this regard Rotberg fn 15 supra.

The departure of Mugabe would probably diffuse any international and regional outcry over a flawed election. Constitutional provisions²⁶ would allow who ever took over from Mugabe to serve out the remainder of the term of office until the next election.

Mugabe stated in October 2010 and January 2011 that the GNU could not be extended beyond a few months.²⁷ In February 2011, the press reported that all parties were considering a six month “extension”.²⁸ This was held to mean that elections would be held “sometime” in 2011. More recently Mugabe has stated elections will be in March 2012.²⁹

The announcement of impending elections has on each occasion been followed by a resurgence of political violence and the closure of democratic space. In late October, 2011 in violation of a court order, Prime Minister Morgan Tsvangirai’s scheduled rallies in Matabeleland North Province were disrupted by the police.³⁰ In early November, 2011 militant ZANU PF aligned youths, known as “Chipangano”,³¹ clashed with the MDC at a stadium in Chitungwiza dormitory township just outside Harare, successfully preventing a rally which was to be addressed by Tsvangirai. Tsvangirai alleged that Saviour Kasukuwere (also a possible presidential contender³²) had ensured Chipangano’s presence at the stadium.³³ The result was widespread damage to property with hundreds injured. Two MDC supporters were arrested. This followed the disruption in the previous months of Parliamentary hearings to canvass the views of the public on the proposed Human Rights Commission Bill and the Electoral Act Amendment Bill. Although present, the police did nothing to prevent the disruptions, one of which took place in Parliament itself.³⁴ The inaction of the police during the forcible disruption of these meetings by violent ZANU PF youths and the disruption of MDC meetings by the police themselves, indicate that the tactic of closing democratic space may be part of a co-ordinated strategy between the two.

There are differing suggestions as to the objective of this strategy. One is that, given Mugabe’s statement that elections will be held in March 2012, this is part of a familiar pattern of violence and intimidation directed against the MDC which has always preceded elections in Zimbabwe

²⁶ Section 29(1)(b) of the Constitution.

²⁷ *No GPA or Inclusive Government Extension: President Mugabe* The Zimbabwe Guardian 15.10.10 *Politburo To Discuss GNU Lifespan* Zimbabwe Independent 21.01.11

²⁸ *Elections in August?* Financial Gazette 10.02.11.

²⁹ *Elections To Be Held by March 2012 Says Mugabe* Mail & Guardian Online 04.09.11 <http://mg.co.za/article/2011-09-04-elections-to-be-held-by-march-2012-says-mugabe>.

³⁰ *Police Come Under Fire for Blocking Tsvangirai Rallies* SWradio 31.10.11.

³¹ A ChiShona word meaning “the oath”.

³² See fn 21.

³³ See *PM, Mugabe Face Off* Daily News 08.11.11.

³⁴ Disrupting a public meeting is a criminal offence in terms of section 44 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

since the formation of the MDC in 1999.³⁵ The objective is thus seen as an intention to cow the opposition and force a victory for Mugabe and ZANU PF.

However, this paper suggests that such an objective would be self-defeating. It is clearly being implemented by those in control of the police force. It is only of value to a faction supporting Mugabe's continued governance if one ignores Mugabe's mortality and assumes that he would be fit to govern for five years after 2012.³⁶ If Mugabe falters shortly after being imposed on the electorate in 2012, and the provisions relating to an electoral college are still in place, either through being carried over into the new constitution, or because the new constitution is not in place,³⁷ this would open the door to the Presidency for the Mujuru faction via the Electoral College.

Accordingly, if the premises of this paper are correct, the resurgent violence and closure of democratic space is instigated not in preparation for an election, but rather to prevent such an election. SADC has supported the MDC in its quest that there should be no election unless the conditions for a free and fair election are in place and various legislative reforms have been effected - such as the enactment of the new constitution, an Act governing the Human Rights Commission and an Act reforming the country's electoral laws. The proposed legislation in the latter two instances contains little that ZANU PF supporters might fear – and certainly contains nothing that might motivate them to undertake violent acts to obstruct their enactment. However, if the intention is to delay elections by impeding the enactment of legislation that SADC regards as a prerequisite for elections and to show SADC that conditions are generally wholly inappropriate for a poll, this would certainly be to the advantage of any faction within the security sector which is hoping for the demise of Mugabe while the succession provisions of the 8th Schedule, Article 20.1.10, are still in place.

These configurations may be the reasons Mugabe appears intent on showing that he is a willing and able candidate,³⁸ claiming that he is still fit³⁹ and announcing implausible early election dates.

Questions around Mugabe's health may have compelled ZANU PF to base its political strategy upon legal provisions the ambiguities of which fall on all sides of ZANU PF's factional divides. These legal provisions may change in an unpredictable manner during the constitution making process. With its strategy resting upon such a convoluted, shifting and uncertain foundation, it is easy to see why ZANU PF appears in unusual disarray and the policy statements of its officials themselves increasingly incoherent and contradictory. It must be said, however, that the thesis presented here may assume a rationality and subtleties which, in reality, are entirely absent from Zimbabwe's often merely brutal polity.

³⁵ *ZANU PF in 'Panic Mode' over Electoral Defeat* 09.11.11 <http://www.swradioafrica.com>

³⁶ Several ZANU PF supporters, including Mugabe himself, believe that without Mugabe as President, ZANU PF will implode - see *'Mnangagwa, Mujuru to be Dropped'* 16.09.11 <http://www.financialgazette.co.zw>.

³⁷ The alternate provisions for succession in the 8th Schedule are intended as transient and will certainly not be repeated in the new constitution. They would fall away, as indicated above, ahead of or upon any election.

³⁸ *Mugabe in Elections Dilemma* The Standard 18.09.11.

³⁹ *Mugabe Says He's Still Fit, May Target Swiss Assets* <http://af.reuters.com/article/topNews/idAFJOE79U0DK2011103>.