

ZIMBABWE'S NEW ILLEGAL UNITY GOVERNMENT

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If the intention of Zimbabwe's new unity government is to set about restoring the rule of law in Zimbabwe, it could not have had a more inauspicious start. Those currently supposedly occupying Ministerial and Cabinet positions do so in violation of the constitution.

The September agreement between ZANU PF and the two MDC formations has been incorporated into Zimbabwe's constitution as Schedule 8 by virtue of section 14 of Constitutional Amendment 19. Article 20.1.6(5) "Composition of the Executive" of schedule 8 sets the number of Ministers:

There shall be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M. [Of the 31 Ministers, three (3) one each per Party, may be appointed from outside the members of Parliament].

Accordingly, the constitutional limit for the number of Ministers is 31, and the posts must be apportioned between the parties nominees in the ratios required by the constitution.

On Friday 13th February, Mugabe purported to swear in 35 Ministers. The parties apparently agreed to add three additional ministers for ZANU PF and one for each of the MDC formations, bringing the total number of Ministers to 36. One Minister designate was not available for swearing in, ostensibly attending to business in South Africa, but, having been linked with the same allegations which landed deputy minister designate Roy Bennett in prison on the day of the ceremony, had probably decided that discretion was the better part of valour.

Many people have remarked that the swearing in of additional ministers violates the agreement. But it is more important that the attempt to swear in four extra ministers is clearly unconstitutional. The parties cannot simply agree to ignore the constitutionally prescribed limit on ministers.

This raises some interesting questions about the swearing in ceremony itself. Section 31D(2) of the Constitution, dealing with the appointment of Ministers provides:

*(2) Any person appointed under this section **shall, before** entering upon his office, take and subscribe before the President or some other person authorized by the President in that behalf the oaths of loyalty and office in the forms set out in Schedule 1.*

So each prospective Ministerial incumbent is required to take two oaths - one of loyalty and one of office - before they enter office. When both these oaths have been made the person then enters office as a Minister. Once 15 ZANU PF nominees had taken the oaths, any further "swearing-in" became unconstitutional. The same considerations apply once the quota of the MDC formations had been reached. This indicates that the *order* in which the Ministers were sworn in becomes relevant. Those completing the process after the quotas had been reached cannot be regarded as holding their posts in terms of the constitution.

However, the manner in which the oath was actually administered avoids the problem of the order in which it was done and gives rise to a second difficulty. The oath was administered to the Ministers en masse. Hence, since none gave their verbal oath after the quota has been reached, all having done so simultaneously, the **entire process** must be regarded as unconstitutional, thus

affecting the incumbency of all Ministers and not just the surplus four¹. Only 31 Ministers could have taken the oath en masse not 35.

However, it seems that the prospective incumbents then appended their signatures to a written document after having taken the oaths which ZTV reported as being letters of appointment as cabinet ministers. If this is the case, it is arguable that the Ministers did not enter into office until signing these letters, and invalidity attaches to only the last to do so above the quota. The better interpretation of the constitution is that the Ministers enter office immediately after the oath is administered, thus rendering the entire swearing in unconstitutional and thus void.

The en masse method of administering the oath also gives rise to a third problem. Below is the form of the oath of loyalty and the oath of office as prescribed by the constitution.

Oath or Affirmation of Loyalty

I, do swear [or solemnly affirm] that I will be faithful and bear true allegiance to Zimbabwe and observe the laws of Zimbabwe.

So help me God. [To be omitted in affirmation]

Oath or Affirmation of Office

I, do swear [or solemnly affirm] that I will well and truly serve Zimbabwe in the office of.....

So help me God. [To be omitted in affirmation]

The recitation for each prospective incumbent thus requires each to state their names. The oath can hardly be said to have been given if the person making the oath is inaudible to those witnessing it or the president administering it. But that is what happened. Each Minister recited his or her name on top of the other, the result being an inaudible babble. At least five could have said “I, the Easter Bunny etc” and none would have been the wiser. It is worth noting here that when US President Obama's lines were fluffed at his swearing in ceremony, it was deemed prudent to quietly re-administer the oath after the ceremony in the prescribed form to prevent any subsequent challenge to the lawfulness of Obama's incumbency. It is anyone's guess whether the Ministers sworn in on Friday recited the oaths correctly.

Putting all the above together, it is thus clear that none of the Ministers have been properly sworn in and thus cannot lawfully hold office as such.

The Cabinet

It is generally, albeit wrongly, assumed that being a minister automatically means that one is a member of cabinet. This is not the case. The constitution provides in section 31G:

31G Cabinet

(1) There shall be a Cabinet consisting, subject to the provisions of section 76(3b)², 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.

This is somewhat ambiguous in that it could mean that the Cabinet consists of those Ministers that

1 One could hold that the four with the longest names would have finished the recital after the others, and it is they who are in office unconstitutionally.

2 The section provides for the inclusion of the Attorney-General in Cabinet.

the president from time to time appoints to Cabinet, or it could mean those Ministers that the president from time to time appoints as Ministers.

The ambiguity was settled by subsection 3

Every Minister who becomes a member of the Cabinet shall, before entering upon his office, take and subscribe before the President or some other person authorised by the President in that behalf, the oath of a member of the Cabinet in the form set out in Schedule 1.

This made it clear that not all Ministers became members of Cabinet by virtue of their office. However, Constitutional Amendment 19 changed subsection 3 to read as follows:

(3)Every member of the Cabinet, other than the President shall, before entering upon his or her office as such, take and subscribe before the President or some other person authorised by the President in that behalf, the oath of a member of the Cabinet in the form set out in Schedule 1

It could be suggested that this change in wording was made precisely to infer that all Ministers are now to be members of Cabinet. Unfortunately, the rules of interpretation require that such a change will only be held to have been made where it is specifically so stated. Reliance on inference takes second place. Also, if section 31G(1), intended that all Ministers occupy posts in Cabinet *ex officio* (by virtue of their office), it would simply read, for example: “There shall be a Cabinet consisting of the President, Vice-Presidents and Ministers” Period. Not Ministers “that the President shall from time to time appoint”. Schedule 8 to the constitution (the part of the September agreement dealing with the structure of government) also seems to distinguish between Ministers *simpliciter*, and cabinet Ministers. The Council of Ministers, for example consists of “all Cabinet Ministers” rather than simply all Ministers.

Furthermore, there is a separate oath to be taken on admission to Cabinet:

Oath or Affirmation of a Member of the Cabinet

*I, being chosen and admitted to the Cabinet of Zimbabwe, do swear [or solemnly affirm] that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the President of Zimbabwe for the good management of the public affairs of Zimbabwe, that I will not, directly or indirectly, reveal such matters as may be debated in the Cabinet and committed to my secrecy, but that I will in all things be a true and faithful member thereof.
So help me God.*

which suggests that one is “chosen” to be in Cabinet rather than occupying the position *ex officio*.

All of the 35 present, after taking the oath of loyalty and oath of office as Ministers, then purportedly took the oath of office as Cabinet Ministers. However, since none had been validly appointed as Ministers, they could not in accordance with the constitution be appointed as Cabinet Ministers.

Accordingly, there is no lawfully constituted government in place in Zimbabwe at present. The fact that the constitution was violated at the very first attempt to form the government does not augur well for the future. If the new government intends to restore the rule of law, some navel gazing is

required by those who smugly settled themselves into their seats at what purported to be a Cabinet meeting on Tuesday 17th February, 2009.