



A NOTE ON THE RE-APPOINTMENT OF THE SERVICE CHIEFS

Derek Matyszak, Senior Researcher, RAU

The Commanders of the Defence Forces and the Commissioner-General of Police are appointed by the President both under the provisions of the Constitution and in terms of Acts of Parliament. The Constitution provides that the appointments are made “*by the President after consultation with such person or authority as may be prescribed by or under an Act of Parliament.*”¹ Relevant Acts of Parliament (the Defence Act and Police Act²) set out the manner of appointment and persons or bodies to be consulted.

Since the advent of Zimbabwe’s Inclusive Government, and for so long as such “*unity*” Government subsists, an important addendum has been added to these provisions. Article 20.1.3(p) of Schedule 8 to the Constitution³ (which overrides any provisions elsewhere in the Constitution to the contrary⁴) requires that any key appointment made by the President under and in terms of the Constitution, or made by the President in terms of or under any Act of Parliament, be made only after the **consent** of the Prime Minister has been first secured.⁵ The appointments of the Service Chiefs, being made both under and in terms of the Constitution and Acts of Parliament, thus fall squarely within the requirements of Article 20.1.3(p).

Article 20.1.3(p) reads as follows:

*The President **in consultation** with the Prime Minister, makes key appointments the President is required to make under and in terms of the Constitution or any Act of Parliament*

“**in consultation**” is specifically defined in the Constitution to mean:

*that the person required to consult before arriving at a decision arrives at the decision after securing the agreement or consent of the person so consulted;*⁶

¹ Sections 96(4) and 93(2) of the Constitution respectively.

² Chapters 11:02 and 11:10.

³ This provision also appears as the same Article in the Inter-Party Political Agreement (more commonly called the GPA)

⁴ see Paragraph 1 of Schedule 8.

⁵ Schedule 8 to the Constitution, Article 20.1.3(p). Such appointments are to be made “in consultation” with the Prime Minister - “in consultation” is defined in the Constitution to mean “after securing the agreement or consent of the person so consulted” (section 115(1)).

⁶ Section 115(1) of the Constitution. This provision is in contrast to the meaning to be accorded to “after consultation” with which means that the person required to consult before arriving at a decision makes the consultation but is not bound by the advice or opinion given by the person so consulted. The distinction follows precedent in South African case law.

In sum then, this means that the Prime Minister's consent is required before any of these appointments are made.

Zimbabwe's Attorney-General, Johannes Tomana has threatened to arrest anyone who claims that this is the case, maintaining that the legal position is otherwise.⁷ Mr. Tomana's argument is that the requirement to gain the Prime Minister's consent pertains only to appointments and not re-appointments, stating that Commissioner-General Chihuri's case:

*is about reappointment, not appointment. The GPA deals with appointments. The GPA uses specific language, it refers to appointments and not reappointments and the issues considered in appointments are very different from those that are considered in reappointment.*⁸

However, the Attorney-General argument is disingenuous for two reasons. Firstly, he has deliberately referred only to the GPA (the Global Political Agreement, the name by which the Inter-Party Political Agreement signed between the main political players in Zimbabwe on 15th September 2008 is commonly known). This part of the GPA has been incorporated into Schedule 8 of the Constitution. The President's obligation to gain the Prime Minister's consent is thus not merely an undertaking in terms of the GPA, it is, more importantly, a constitutional requirement. Secondly (and perhaps the reason why the AG was anxious to avoid mentioning that the obligation to gain the Prime Minister's consent is a constitutional imperative), Tomana's argument is disingenuous because it deliberately ignores the clear provisions of section 113(5) of the Constitution to the following effect:

In this Constitution, unless the context otherwise requires, a reference to the power to appoint a person to any public office shall be construed as including a reference to the like power—

- (a) to reappoint him to that office;*
- (b) to appoint him on promotion or transfer to that office;*
- (c) to appoint him to act in that office;*
- (d) to fix and vary his conditions of service in that office*

Accordingly, the reference to the provision in Schedule 8 of the Constitution, relating to the appointment of the Commissioner-General (and the other service chiefs), applies equally to the reappointment of the Commissioner-General (and other service chiefs). Article 20.1.3(p) thus applies to both appointments and reappointments.

It is not without irony and significant that the Attorney-General was also appointed unilaterally by President Mugabe, in violation of the same provision of the GPA.⁹

⁷ *AG speaks on Chihuri's Job* The Herald 03.02.12. The threat to arrest persons simply because they express a view on the Constitution which differs from that of the AG is obviously undesirable in a democracy.

⁸ Quoted in *AG Speaks on Chihuri's Job* The Herald *ibid*.

⁹ The appointment was made in December, 2008, and, thus, although in violation of the GPA, was not unconstitutional, the provisions of the GPA only forming part of the Constitution by way of Act 1 of 2009 on 11.02.09.

The legislature seems to have thought it undesirable that a Commissioner-General of Police hold office for an extended period, and that it is preferable that a person in such a key and sensitive post be limited, in the normal course of events, to only one term. The term of office of the Commissioner-General is thus a maximum of four years. This then is intended to be the general position, with departure from this stipulation only in exceptional circumstances. Thus, the four year period may be renewed yearly for no more than 12 months at a time, if the President believes this to be in the “*public interest*”.¹⁰ Mr. Chihuri has held this position since 1991 and the President thus must have deemed his reappointment “*to be in the public interest*” on 16 occasions.¹¹ It is unlikely that this accords with the intention of the legislature.

Furthermore, the Commissioner-General has made statements in the past which give the impression that he intends to carry out his duties in the interests of only one section of Zimbabwean society and not in the public interest generally, declaring:

*"Many people say I am ZANU PF. Today, I would like to make it public that I support ZANU PF because it is the ruling party. If any other party comes to power, I will resign and let those who support it take over."*¹²

It is precisely to prevent such perceptions of partisanship that the Police Act prohibits police officers from actively participating in politics, and they are thus enjoined to maintain a clear division between their duties as police officers and their political affiliations and sympathies.¹³ A member is regarded as in breach of this injunction if he or she joins or associates himself or herself with a political organization; canvasses any person in support of, or otherwise actively assists, a political organization; displays or wears political regalia; attends a political meeting or assembly when wearing the uniform of the Police Force or any part of such uniform likely to identify him or her as a Regular Force member unless as part of his or her duties; asks questions from the floor at a political meeting; publishes views of a political character or causes them to be published in any manner or media; or does any other act whereby the public or any member thereof might reasonably be induced to identify him or her with a political organization.¹⁴ This requirement of the Police Act seems to have escaped the current Commissioner-General and in itself indicates that his reappointment cannot be in the public interest. Many believe that that the Commissioner-General's conduct has been entirely consistent with this declaration of partisanship.¹⁵

¹⁰ Section 6 of Zimbabwe's Police Act Provides as follows:

6. Terms and conditions of service of Commissioner

(1) Subject to this section, the Commissioner shall be appointed for a period of four years.

(2) Whatever the length of his pensionable service and whatever his age, the Commissioner shall retire on completing a period of four years in that appointment:

Provided that, if the President considers that it is desirable in the public interest and the Commissioner is medically fit, the President may, with the consent of the Commissioner, extend the period of his service for periods of not more than twelve months at a time.

¹¹ The last formally gazetted reappointment was in February, 2008 indicating that such reappointments are made in February of each year.

¹² Quoted in *Dogfight for Chihuri's Job Intensifies* The Financial Gazette 29.06.10.

¹³ Paragraph 48(1) of the Schedule to the Police Act.

¹⁴ Schedule 1 Paragraph 48 of the Police Act, Chapter 11:10.

¹⁵ *Chihuri Dossier Chronicles "Chihuri Violations"* The Zimbabwe Independent 20.01.12

The considerations applying to a term limit for the Commissioner-General of Police do not apply to the Commanders in the Armed Services, who are appointed for terms of four years, which are renewable for the same period without limit.¹⁶ The current Commanders were promoted to their current positions in January or February 2008, following the death of Vitalis Zvinavashe, then Commander of the Defence Forces, in December of 2007. Neither the provisions of the Constitution or GPA under discussion here were in force at that time.

There is little doubt that Mugabe will proceed to renew these appointments without complying with the constitutional requirement of securing the agreement or consent of Tsvangirai. In the past he has violated this constitutional requirement by unilaterally appointing and promoting judges, in the appointment of Provincial Governors, and the transfer of ambassadors to different stations.¹⁷ The MDCs will no doubt complain about the manner in which the Service Chiefs are reappointed and the issue will be added to the many other “*toxic issues*” still to be resolved by the parties to the GPA. ZANU PF will also undoubtedly point to the MDCs’ complaint as constituting evidence that the “*Unity Government*” is not working. However, as with many people who return items in the belief that they are dysfunctional, the problem lies in the perverse and stubborn refusal to read and follow the user instructions – in this instance the provisions of the GPA and Constitution.

07.02.12.

¹⁶ Section 8(1) of the Defence Act in respect of the Commander of the Defence Force and section 11(3) of the Defence Act in relation to the Commanders of the Air Force and Army.

¹⁷ See generally in this regard Derek Matyszak *Law, Politics and Zimbabwe’s “Unity” Government* Konrad Adenauer Stiftung, RAU 2010 Chapter 8. Although Mugabe appeared to have violated this provision in relation to the appointment of Permanent Secretaries in the Ministries, Tsvangirai subsequently stated that he had discussed and agreed the appointments with the President.