

Police Reforms: What are the optimal amendments to the National Police Service Act 2011 and the National Police Service Commission Act 2011?

This note is prepared at the request of the Departmental Committee on National Security and Administration.

We hereby provide Parliament and the Departmental Committee on National Security & Administration with specific commentary on the police reform bills before Parliament. We thank the Departmental Committee for their various meetings with stakeholders, including with representatives of Katiba Institute, Independent Medico-Legal Unit, Kenya Human Rights Commission, Commonwealth Human Rights Initiative, Constitution and Reform Education Consortium, USALAMA Forum, and the Rights, Promotion and Protection Centre on 28 August 2013. Arising from that meeting, the Departmental Committee had a number of queries that we address below. We note that various written submissions have already been made¹ and we do not intend to cover issues already canvassed, but rather address a few key concerns arising from the meeting of 28 August 2013.

Understanding the distinctions between Articles 245 and 246 of the Constitution

Article 245 is concerned about the command of the NPS. It provides for the post of the IG and sets out its functions. Article 246 establishes the Police Service Commission and sets out its functions. The issue we have been asked to consider is whether legislation may give the IG the power to appoint, on his/her own, members of the police service. The powers to appoint or discipline or dismiss members of the police service are given to the NPSC, while the sole function of the IG prescribed by the constitution is “independent command over the National Police Service”, but there is provision for giving additional functions by legislation (Art. 245 (2) (b)). The question is whether this provision for “additional functions” justifies the grant of function of appointment or discipline or dismissal of a member of the police to the IG, in face of the grant of such functions to the NPSC.

The general principle for the interpretation of a constitution which has been endorsed by the Kenya judiciary is that each provision of the constitution must be interpreted in the overall scheme of the document. They have frequently cited the formulation of this principle in a Uganda case, “The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution” (*Tinyefuza v Attorney General* (Constitutional Petition No.1 of 1996) [1997] UGCC 3)).

Following this principle, special attention must be paid to national values and principle, and more specifically, the values in and the scheme of Chapter 14 which deals with National Security, and within that with Part 4 (on the National Police Service). Principles which pertain particularly to the police are that national security organs are “subordinate to civilian authority” (Art. 239 (5)), strive for the highest standards of professionalism and discipline among its members (Art. 244) and the NPS shall “foster and promote relationship with the broader society” (Art. 244 (e)).

¹ For instance a submission made to the CIC on 5 July 2013, a petition lodged with Parliament on 31 July 2013 and a written submission handed to the Departmental Committee on 28 August 2013. We understand that the Departmental Committee and Parliament already has copies of all of these documents but we are able to make more copies available should they be requested.

We also have to consider the general principle of transparency and accountability (Art. 10(2) (c)).

The Ransley Task Force which emphasised these values was convinced that the lack of a Police Service Commission in Kenya had contributed to “the unsatisfactory recruitment practices, poor terms and conditions of service, lack of professionalism, poor morale, dismal performance by the police and other innumerable problems that face the police service today”. For this reason it recommended that a Police Service Commission should be established for recruitment, discipline and dismissal of the members of the police. This was also the recommendation of the CKRC, Bomas and the CoE. None of these bodies recommended any role of appointment, discipline or dismissal for the IG. The Task Force in fact set out in detail IG’s functions as follows:

- i) Overall Commander of the Kenya Police Service
- ii) Policing Policy guidance and direction
- iii) Member of the National Police Council
- iv) Monitoring and evaluation
- v) Audit, Supervision and inspection
- vi) Research and development
- vii) Provision of internal oversight (Internal Affairs)
- viii) Benchmarking against best practices.”

As regards the NPSC, apart from its structure, Article 246 deals with the principal task of the Commission. That task is the recruitment, discipline and dismissal of the police service (Art. 246(3)). There is no doubt that the Commission not only has the function of recruitment, promotions, transfers and dismissal, but also that it does all of this on its own.

So what is the argument in favour of giving the IG the power in respect of promotions, transfers and dismissals? We understand that the sole basis of this interpretation is the word “confirm” in Article 246 (3) (a): the NPSC “shall recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service”. It is said that the word “confirm” must mean that appointments are made elsewhere, and then confirmed by the NPSC. This is indeed an extremely slender basis for the power of the IG. If the intention was to give the power to the IG, the drafters of the Constitution would have made this clear, rather than through this roundabout manner.

There are other reasons to conclude that “confirm” cannot mean what some say it does. The IG is a member of the NPSC; it would be rather odd that IG makes an appointment and a body of which the IG is a member that confirms it. But the fact is that “confirm” makes perfect sense in the context of the functions of the NPSC. The Article assumes that some appointments will be on a temporary basis (appoint ‘persons to hold or **act** in offices’). It is often wise to appoint on a temporary basis to determine if the person is fit for the job: in such cases there is provision for making the appointment for a longer period on the evidence of satisfactory performance. It is usual to describe this as ‘confirming’ the appointment as a regular employee. Similarly confirm can be used in the context of a promotion.

Moreover restricting appointments and dismissal only to the NPSC is perfectly consistent with the general principle of civilian control. The Task Force identified many of the problems of the police to the absence of a NPSC for staff affairs. Most bodies which have addressed this issue have recommended that these matters should be given to the NPSC.

Appointment of the Inspector General (IG)

In prior submissions we have outlined our position that the current mechanisms for appointing and removing the IG should be retained. The proposal included in the bills before Parliament would remove the role of the NPSC in the recruitment of the IG, and instead the President would nominate a candidate to Parliament, who could endorse or reject the candidate.

Without the role of the NPSC there would be no advertisement, no public interviews, no independent short-listing of candidates who meet the criteria and no notice in the gazette. The process would not be transparent, which the public has come to expect with institutions that have lost their trust, such as the judiciary. To ensure better policing and therefore security in Kenya, the public must feel comfortable in coming forward and reporting crimes to the police, or acting as witnesses. This means that the public needs to trust the police, or at least have a greater level of trust than what currently exists. Hence it is vital that the public feels confident that the head of the police service is the best person for the job, selected through a thorough, independent process, as outlined in the current NPS Act. For this reason, the NPSC should retain their current role in the recruitment of the IG as detailed the NPS Act.

As well as ensuring a transparent process, it is very important that the process of appointing the IG is independent from political influence. As stressed repeatedly in police inquiries and reports over the years, it is critical that the Police Service is independent from the government, and upholds the law in an impartial way. If the IG were nominated only by the President, as suggested by the NPS Amendment Bill, the President will have a large amount of control over who is the head of the Police Service.

In relation to the removal of the IG, the current system establishes that the NPSC plays a role in investigating and recommending whether the current IG should be removed from office. The police reform bills instead propose that the President can directly recommend removal of the IG. This makes the job security of the IG dependant upon staying in favour with the President and removes the ability of him/her to carry out his job impartially and independently.

In relation to both the appointment and dismissal of the IG, as outlined above, there are many reasons for the process remaining as it is currently in the NPS Act. However, on the other hand, we do not believe there is a good reason to remove the NPSC from these processes. The inclusion of the NPSC in both the appointment and removal of the IG will improve the independence of the police service and the trust of the public in the police service. The removal of the NPSC from these processes will not provide any benefit. Therefore, there is no logical reason to amend these processes as suggested in the Bill.

We understand that a third method of appointing an IG has been proposed; that an independent panel would be commissioned to appoint the IG. We do not believe this to be the optimal approach for several reasons. Firstly, the NPSC has two fundamental areas of expertise that places it in a great position to recommend an IG: in depth knowledge of the police, its operations, functions, limitations, strengths and weaknesses; and knowledge and experience of police HR practices including recruitment. The NPSC has been assembled through a rigorous public process and hence is comprised of individuals deemed to have the best expertise in the area. The

assembly of another panel may not have the same expertise, and very importantly, would involve unjustifiable expenditure of taxpayer's money. Recruitment is a core constitutional mandate of the NPSC. It is simply unnecessary.

The second justification for the establishment of a panel is to avoid any undue influence that the IG may have on the recruitment process, given that the IG and two other members of the NPS form part of the NPSC. However, we are of the view that it is desirable that the NPSC have the input of some members of the NPS as they discuss the requirements for an IG and the merits of the available candidate. The influence of the IG and other NPS members is not likely to pose a problem given that they form a minority, three out of nine members, and therefore the recruitment process will retain the required degree of independence but be informed by the views and experience of senior members of the NPS. Further, it seems contradictory to argue on one hand that members of the NPS should not play a role in recruiting the IG due to questions of the impartiality of the HR process being compromised, whilst simultaneously supporting amendments that would transfer HR powers to the NPS stating that they are better placed to carry out those functions. We note that the rules of the NPSC would deal with any situation where the NPSC was discussing the role of the current IG or deputies. It is likely that the rules would simply state that if a member of the NPSC has a conflict of interest in relation to an issue under discussion, that this member must not take part in the discussion or voting of the matter. This is common practice, and would mean the IG and deputies would not be discussing their own position, or that of a family member etc.

For the reasons outlined above, we strongly believe the current process for the appoint and removal of the IG as outlined in the NPS Act is sufficient, and no amendment is necessary.

Ex Officio appointments

There has been some discussion around the role of ex officio appointments. We understand ex office to mean this:

“ “ex officio” means a member of the National Police Service Commission who has obtained status as a member of the National Police Service Commission by virtue of their office or position in the National Police Service. They hold that status with the National Police Service Commission, on a part time basis, conditional upon their employment with the National Police Service. Their standing as a member of the National Police Service Commission includes the full and equal range of rights and responsibilities held by other members of the National Police Service Commission subject to this Act, the National Police Service Act and the Constitution.”

This definition clarifies that the *ex officio* members hold the same status (subject to the relevant acts and Constitution) as other members of the NPSC, regardless of the fact that they are full time employees of the NPS and may only serve on a part time basis of the NPSC.

We propose that section 4 of the NPSC Act 2011 be amended to delete subsection (2). The section currently reads:

“Membership of the Commission

4. (1) The Commission shall consist of nine members appointed in accordance with the Constitution and provisions of this act.

(2)The Chairperson and the members of the Commission, other than the ex officio members, shall serve on a full time basis.”

In our view, it is logical that full time members of the NPS who sit on the NPSC, namely the IG and Deputy Inspector Generals, will sit on the NPSC on a part time basis given their primary responsibilities to the NPS. Further, we can envision circumstances in which the NPSC may want to attract other experts who hold full time positions, but may be able to contribute on a part time basis to the NPSC. For example, an eminent businessman or lawyer with policing expertise. Accordingly, we propose that section (4)(2) be deleted so that non *ex-officio* members of the NPSC may also be part time members.

We think that there are considerable advantages in having a majority of part time commissioners: saving of costs, recruitment of outstanding candidates who wish to continue their other work, and the elimination of conflicts between commissioners and senior staff as to the division of responsibilities. Commissioners should be concerned principally with questions of policy, leaving its administration to the staff.

The use of force to protect property

One of the more controversial proposed amendments to the police bills has been a suggestion that the police should be authorised to use firearms in the protection of property.

The current law pursuant to Schedule 6 Part B of the National Police Service Act 2011, allows the police to use firearms in the following circumstances:

“1. Firearms may only be used when less extreme means are inadequate and for the following purposes:

(a) saving or protecting the life of the officer or other person; and

(b) in self-defence or in defence of other person against imminent threat of life or serious injury.”

This does not mean that there are no circumstances in which the police are authorised to use firearms when there is a threat to property. It means that if there is a threat to property that creates an “imminent threat of life or serious injury” then the use of firearms is permitted.

By way of example, if an armed suspect is attempting to steal cattle and the circumstances lead the police officer to believe that there is an imminent threat of life or serious injury (either to the police officer himself, witnesses, or even the suspect – i.e. to any person), then the police officer is authorised to use firearms.

If during an attempted property crime there is no imminent threat of life or serious injury, then the use of firearms is excessive and unnecessary and not allowed under the current law. For example, if an unarmed civilian is attempting to break into a car, and his behaviour in no other way poses a risk to life or serious injury (e.g. he is not assaulting anyone), it is unnecessary for the police officer to resort to use of a firearm.

The police have at their disposal a range of escalating powers that they can avail themselves of, rather than responding with firearms. That is the police can use escalating powers that range from a use of non-lethal force to a use of lethal force.

Their powers as outlined in the National Police Services Act 2011 and the Standing Orders include:

- Extensive 'stop and search' powers including of the person, motor vehicles, and other vessels, in some circumstances police officers can search without a warrant;
- Arrest and detain a person (using force including physical force, and if necessary, restraints), including wide powers to arrest a person without a warrant;
- Stop and detain suspects;
- Power to enter and conduct searches of premises, including private property, in some circumstances without a warrant;
- Power to compel the attendance of witnesses to a police station; and
- Powers to take fingerprints, photographs, forensic evidence and other evidence from witnesses and suspects.

It is important to note that the police are empowered to use force under the current Act (Schedule 6, Part A). Hence they can arrest and detain any suspect using such force that is necessary and proportionate in the situation. Such force could include, if necessary and proportionate, the use of a baton, use of restraints for example hand cuffs, use of water cannons, shields or a police officer using physical force.

The current law allows police officers to respond quickly and with lethal force in circumstances where there is a threat to life or risk of serious injury. As stated above, in other situations the police can respond quickly, and with force, although not lethal force, to arrest a person they suspect to have committed a crime. There is no need for police officers to use firearms beyond this.

Prevalence of Extra Judicial Executions

An extra judicial execution is the killing of a person by the police without any judicial or legal process. The practice of extra judicial executions seriously undermines the credibility of Kenyan policing and leads to distrust between the community and the police.

Such deaths by police fire, without any judicial or legal process, is a serious issue facing us today. A 2013 survey by the Nairobi City Mortuary and the Kenyatta National Hospital showed that for Nairobi males under 30, road accidents were the most common cause of death, followed by death by gunshot from a police firearm. These findings are supported by a study conducted by Dr Johanes Odour, chief government pathologist. Dr Odour carried out a survey with Professor Hassan Saidi of the Department of Human Anatomy at Chiromo campus. They investigated deaths where there was an element of violence and found that 35% had been involved in a road accident, 25% suffered gun wounds and 19% had been assaulted. In an earlier study by the former chief government pathologist, Dr Kirasi Olumbe, he had found that the police were responsible for up to 90% of the people shot dead in Kenya.²

On 27 August 2013, in line with the three-year promulgation of the Constitution, the Independent Medico-Legal Unit (IMLU) released a statement that made comment on the proposed police reform bills. Since January 2013 and late August 2013 IMLU had documented 121 cases of extra judicial killings by the police. In a statement

² http://www.standardmedia.co.ke/?articleID=2000091791&story_title=survey-rising-deaths-by-police-bullets .

released by IMLU they said “In almost all cases that we have document the police were either ‘returning fire’ or ‘acting on a tip off’ from members of the public.”³

We cannot know whether the victims of extra judicial executions were innocent or were involved in a crime because they were killed before a proper investigation took place. Even if the person had taken part in a crime, the role of the police is to merely arrest the person, carry out an investigation and bring him or her before a court. It is not the role of the police to decide that perhaps that person has stolen something, therefore they deserve to die.

As Maina Kiai recently argued in the media, this would mean that our own President and Vice-President could be shot dead by the police as they are charged, and therefore suspected, to have committed extremely serious crimes.⁴ Of course, this should not happen and would be a miscarriage of justice. Both the President and Vice-President have a right to a fair trial. They, of course, may very well be innocent – as might the person that the police officer shoots dead instead of arresting. As Kiai wrote “I am not suggesting that the people shot are not criminals. Maybe they are. But if Kenyatta and Ruto are to be taken as innocent until proven guilty, then every Kenyan too should be innocent until proven guilty. Yes, including those alleged criminals. The constitutional protection does not only apply to those who are powerful, wealthy or important.”

There is concern that the police dismiss and cease to justify these extra judicial executions on the grounds of ‘national security’. However without due process being followed, including without the arrest and investigation of a suspect, it is impossible to know whether the suspect had in fact taken part in a crime. In particular there have been several examples of terrorist suspects being shot on the spot by the Anti Terrorism Unit, particularly in the coastal region where a significant percentage of Kenya’s Muslims reside.⁵ If the police do suspect these persons of being terrorist suspects, it its even more critical that they be arrested, charged, and proper investigations carried out so that any intelligence relevant to national security can be gained.

Unfortunately, there is a well-documented history of extra judicial executions by Kenyan police against civilians. Professor Philip Alston, the then UN Special Rapporteur on extrajudicial, arbitrary or summary executions, conducted a thorough investigation throughout Kenya in 2009 where he met with various stakeholders, including police. Professor Alston wrote “Perhaps the most surprising outcome of my visit was the extent to which I received overwhelming testimony of the existence of systematic, widespread, and carefully planned extrajudicial executions undertaken on a regular basis by the Kenyan police.”

It is in this context that we urge Parliament to give careful consideration to the risks posed by allowing the police further authority to use guns on unarmed suspects or those suspects who do not pose a risk to life or serious injury.

³ <http://allafrica.com/stories/201308281462.html>

⁴ <http://www.nation.co.ke/oped/Opinion/This-shoot-to-kill-policy-by-police--is-an-illegal-way/-/440808/1935296/-/pxjkgm/-/index.html>

⁵ For more information see <http://allafrica.com/stories/201306300053.html>

BILLS

We note that in the tables below we only address those sections that we recommend are amendment or deleted. We make no comment (or objection) to the remainder of the amendments. *For the reasoning behind our opposition to the amendments listed below, please see our submission to Parliament made available on 28 August 2013.*

Our objections to amendments focus on three main areas that are critical to police reform: the proposed increase in the political interference with the operation of the National Police Service, the proposed reduction in the role and powers of the National Police Services Commission and the use of firearms.

National Police Service Act 2011 and the National Police Service (Amendment) Bill 2013

Principal Act	Bill	Commentary
		Significant Reduction on the Political Independence of the Police
Section 12	Section 12	Opposed
Section 15	Section 14	Opposed
		Reduced Role of the National Police Services Commission
Section 7	Section 37	Opposed
Section 8	Section 9	<p>Amendment re 'independent command' is opposed.</p> <p>Should the Parliament wish to make reference to / define 'independent command' then, in the alternative, we propose a proper definition of 'independent command' be included. The definition is to reflect internationally accepted standards of policing and the features of 'independent command'.⁶</p> <p>"Section 8A</p> <p>(1) The Inspector General, in relation to Article 245(2)(b) shall have independent command of the National Police Service.</p> <p>(2) Independent command includes:</p> <p>(i) authority and autonomy to exercise impartial judgement; and</p> <p>(ii) independence from political and executive influence; and</p> <p>(iii) acting with professionalism, and</p>

⁶ United Nations Office of Drugs and Crime UNODC Handbook on Police Accountability, Oversight and Integrity, p7, 2011.

		<p>(iv) acting in conformity with the law and established policies; and</p> <p>(v) acting in a transparent manner; and</p> <p>(vi) taking responsibility for the execution of his/her duties.”</p> <p>Note: No objection is taken to Section 8A (2),(3),(4) & (5) as proposed in the amendment bill.</p>
Section 21	Section 21	Opposed
Section 41	Section 26	Opposed
Section 72	Section 32	Opposed
Section 80	Section 34	Opposed
Section 89	Section 39	Opposed
Section 110	Section 43	We are concerned about the inclusion of s110C(a), which states that police reserve officers will be recruited by the Commission on the <i>recommendation</i> and in consultation with the Inspector-General. We submit that the phrase “ <i>on the recommendation and</i> ” be removed, as it sets up that police reserve officers can only be recruited if the Inspector-General recommends it.
Section 126	Section 49	Opposed
		Use of Firearms
Section 109	Section 41	Opposed
Sixth Schedule	Section 54	Opposed
		Transparency and Accountability
Section 128	Section 50	Opposed

National Police Service Commission Act 2011 and the National Police Service (Amendment) Bill 2013

Principal Act	Bill	Commentary
Section 10	Section 3	<p>Opposed</p> <p>In the alternative,</p> <p>Section 3</p> <p>(a) opposed</p> <p>(b) opposed</p>

		(c) opposed (d) "hear and determine appeals from members of the service in relation to disciplinary matters or matters relating to transfers, promotions and appointments." (e) opposed (f) opposed (g) opposed
Section 17	Section 17	Opposed
Section 28	Section 6	Opposed
Second Schedule	Section 7	Opposed