

**JOINT SUBMISSION**

**NATIONAL POLICE SERVICE (AMENDMENT) BILL 2013 &**

**NATIONAL POLICE SERVICE COMMISSION (AMENDMENT) BILL**

**2013**

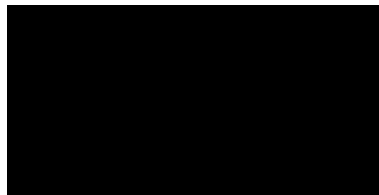


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**NATIONAL POLICE SERVICE (AMENDMENT) BILL 2013 & THE NATIONAL POLICE  
SERVICE COMMISSION (AMENDMENT) BILL 2013.**

**ANALYSIS AND RECOMMENDATIONS**

**Table of Contents**

- 1. Executive Summary**
- 2. Summary of Recommendations**
- 3. About CHRI and Katiba Institute**
- 4. Constitutional Foundations for Police Reforms**
- 5. Submissions Relating to Specific Draft Amendments**
  - a. Amendments relating to the functions of the Inspector General of Police and the National Police Services Commission under the National Police Service Act and National Police Service Commission Act.**
  - b. Amendments Relating to Police Use of Firearms under the National Police Service Act**
- 6. Conclusion**

## 1. Executive Summary

The Constitution of Kenya 2010 was passed in the backdrop of administrative and operational malaise that characterized national institutions and organizations across the country. The National Police Service is one such institution which has since independence been affected by corruption, authoritarianism and political interference. Further, lack of accountability within the institution's command structures has ensured recurrent systemic human rights violations in the country.

It is in this context that the constitutional review process sought to address the shortcomings within the police service by, amongst other mechanisms, establishing legal frameworks that foster civilian authority on matters of national security. The processes envisioned an independent and accountable police service whose powers, functions and composition were buttressed in constitutional and legal principles. The sustained clamor for police reforms has been encouraged by the need for a service that protects the rights of citizens and ensures their safety and security while enforcing the rule of law.

The constitution of Kenya reflects these ideals by amongst other things establishing architecture for the administration and management of the police service. In particular, it establishes a National Police Service, headed by an Inspector-General, with a mandate to preserve national peace, protect the lives and property and maintain law and order amongst other functions. To foster transparency and accountability within the National Police Service, the constitution has established an independent and external National Police Service Commission which has the constitutional mandate to exercise human resource and oversight functions over the National Police Service functions. The commission has been assigned the functions to recruit, appoint and determine promotions, review all matters relating to the welfare of the service and exercise disciplinary control over the service.

In carrying out these distinct functions the constitution, the *National Police Service Act 2011* ("NPS Act") and the *National Police Service Commission Act 2011* ("NPSC Act") have provided avenues for consultation and cooperation between the two institutions. Regardless of the above, the *National Police Service (Amendment) Bill 2013* ("NPS Amendment Bill") seeks to transfer the disciplinary function from the commission to the Inspector-General of police. It further compromises the independence of the commission by requiring that promotions, transfers and disciplinary actions within the service are conducted on the recommendation of the Inspector-General. These constitutional contraventions are mirrored in the *National Police Service Commission (Amendment) Bill 2013* ("NPSC Amendment Bill") which seeks to deter the commission from exercising any disciplinary functions on the police service.

The NPS Amendment Bill also gives the police service a wide latitude in its use of firearms. The bill empowers police officers to use firearms to protect property; stop a person charged with a felony from escaping; and to stop a person attempting to rescue a person charged with a felony. These provisions are in contravention of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement

Officials which provide that lethal use of firearms is only permissible in order to protect life. As it is, the bill provides a skewed basis for justification of extra-judicial killings that continue to plague the country.

While there are other proposed amendments in the NPS Amendment Bill and the NPSC Amendment Bill, the provisions highlighted above constitute the substantive changes intended on the existing constitutional and legal frameworks that govern the National Police Service. Consequently, if these substantive proposals are upheld, they shall not only impede ongoing police reforms but also contravene the constitution and affect its comprehensive implementation. As such there should not be any changes to the existing NPS and NPSC Acts. Other minor amendments, such as the necessary one to the Stop section of the NPS Act, can be undertaken through alternative processes. -

## **2. Summary of Recommendations**

The Commonwealth Human Rights Initiative (CHRI) and Katiba Institute object to substantive amendments to the NPS Act and NPSC Acts.

We reject the following amendments relating to the functions of the Inspector-General and the National Police Service Commission in the NPS Amendment Bill and NPSC Amendment Bill:

- **Reject section 8A (a) of the NPS Amendment Bill**
- **Reject section 8A (b) of the NPS Amendment Bill**
- **Reject section 110(B) of the NPS Amendment Bill**
- **Reject section 10 (2) (g) of the NPSC Amendment Bill**

In relation to amendments regarding Police Use of Firearms under the NPS Act we strongly recommend that Schedule 6 remain the way it is and not be amended. Hence we reject:

- **Reject section 34 of the NPS Amendment Bill.**
- **Reject section 35 of the NPS Amendment Bill.**

## **3. About CHRI & Katiba Institute**

**CHRI** is an independent, non-partisan, non-governmental organisation headquartered in New Delhi, India. CHRI operates in Commonwealth countries including in Eastern and Western Africa and in South Asia.

CHRI's work focuses on the right to information, access to justice, and human rights advocacy.<sup>1</sup> Since 2001, CHRI's Access to Justice programme has been promoting police reform in the Commonwealth East African countries of Kenya, Rwanda, Tanzania and Uganda. Regionally, CHRI has been working in partnership with the African Policing Civilian Oversight Forum (APCOF) and the East African Police Chiefs Cooperation Organisation (EAPCCO) and in collaboration with the East African Community (EAC) to articulate common standards for policing in the region and harmonise police standard

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<sup>1</sup>

For more information on CHRI's activities, please visit [www.humanrightsinitiative.org](http://www.humanrightsinitiative.org)

operating procedures. In Kenya, CHRI undertakes advocacy, public and police education initiatives and legal analysis in relation to the security sector and broader criminal justice field.

**Katiba Institute** (KI) was established to promote the understanding and implementation of Kenya's new Constitution.<sup>2</sup> KI endeavors to enhance the implementation and the realization of the objects of the constitution through research, constitutional education, constitutional litigation and encouraging public participation. KI also works to foster the spirit of Constitutionalism in the East African Region, by promoting exchange of academic discourse on constitutional issues and by working with like-minded organizations to secure greater freedoms in the East African Region.

KI has been active in the area of statutory reforms. In the past, KI has made representations on draft laws, including on laws relating to land, security sector reforms, citizenship and immigration, electoral laws and laws on integrity. KI's interest in statutory reform is motivated by the need to ensure that the new draft laws or any amendments being effected on laws are in conformity with the requirements of the Constitution of Kenya 2010. It is on the same basis that KI is providing these submissions on the proposed amendments to the Kenya National Police Service Commission Act and the Kenya Police Service Act.

#### **4. Constitutional Foundation for Police Reforms**

Kenya's new constitution was not a product of an ad hoc process. It took many years to make the new constitution. In many ways the campaign for a new constitution was motivated by serious incidents of maladministration and bad governance and significant lack of any progressive value system.

Kenyans believed that enacting a new constitution would be a first step in transforming a society through instillation of progressive values in administration, governance and all other aspects of civic life. In this regard, Kenya's constitution is a value-laden transformative document. It prescribes minimum requirements in many aspects of administration and governance, and requires a total transformation of the manner in which our institutions have been administered as well as a complete mental shift in how public services are provided.

The security sector and specifically the Kenya police service were viewed as being badly governed and lacking a value system. Many reasons have been proffered for the poor performance of the security sector, key among them being that the police existed to protect and preserve the interests of the political elite and not the public.

In this regard, the presidency ensured that the police command was highly centralized with the command structure deriving directly from it (the presidency) and with hardly any public participation in the affairs of policing. This lack of independence in the

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<sup>2</sup> For more information about Katiba Institute please visit <http://www.katibainstitute.org/>.

police sector meant that the police officers were too eager to execute even illegal orders issued by their superiors. Discipline was used as a camouflage to ensure that a police officer could not exercise his/her independent mind in performing the duties relevant to his/her work.

The clamour for constitutional change was partly motivated by Kenyans wishes for a police force that would protect and work for the people, and be accountable to them. In a nutshell, the constitution now allows for accountable, democratic policing. This is reflected in the cardinal constitutional principle of Article 1 that *“All sovereign power belongs to the people of Kenya”*. Article 10 sets out the national values and principles of governance which includes such values as rule of law, democracy, participation of the people, human dignity equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. All these values bind the police.

Our constitution visualizes an approach to policing that emphasizes on human security. It is instructive that both the principles of national security in Article 238 and objects and functions of the police in Article 244 are people-centric, focusing more on how national security and policing should work towards fostering human rights and fundamental freedoms and promoting transparency and accountability as opposed to highlighting on command and maintenance of law and order, aspects traditionally associated with policing.

The emphasis in the constitution on people friendly policing was not an accident. Both the content and architecture of draft constitutional provisions relating to police reforms were consistent from the first draft constitution by the Constitution of Kenya Review Commission (CKRC) through to the final constitution promulgated in August 2010. This indicates that the advocates and framers of our constitution were all along clear on the kind of police service Kenya needed. Importantly, all the drafts proposed a broad-based body to oversee the critical aspects related to policing, including within the police service. This body is what is now the National Police Service Commission. This, given our historical context, was intended to root out the abuse that was prevalent from the past police structure which was administered to ensure that the Presidency, through the Commissioner of Police, controlled and manipulated the police service at whim.

It is clear from the constitution and subsequent laws that the National Police Service is charged with the majority of responsibilities including preventing and investigating crime and maintaining law and order. The clear role of the Commission is to ensure that employees of the Police Service are appointed, transferred, promoted and disciplined based on independent, fair and transparent procedures. In our view, the proposed amendments run contrary to this allocation of responsibilities.

The constitution is a powerful tool that facilitates both the National Police Service and the Commission to have their respective roles in the provision of the highest standards of policing. Whilst the two bodies have distinct roles, the constitution and legislation envisages that they will work together in consultation with one another.

### Democratic Policing and Independent Command – Article 245 constitution

As outlined above, the constitution ensures that Kenyans should enjoy democratic policing. Democratic policing means ensuring that the police have sufficient independent powers and authority to carry out their functions, whilst ensuring they are accountable and transparent for their actions and decisions. This is enshrined in Article 245 of the constitution, which sets out that the Inspector-General of the National Police Service has ‘independent command’ over the Service.

Independent command of the police, also known as ‘operational independence’, does not mean that the Inspector-General makes all decisions by himself, without any oversight or accountability. Independent command means that the police service must have the autonomy to exercise impartial judgement in carrying out their duties. Independent command also requires the Inspector-General and the Police Service to:

- Have a high degree of professionalism and independence from political influences
- Act in conformity with the law and established policies
- Operate on the basis of public consent (within the framework of the law), as evidenced by levels of public confidence
- Take responsibility for their decisions and operations, accepting liability when required, and to exhibit full transparency in decisions and openness to external scrutiny.<sup>3</sup>

As the Police Service has very strong powers to impact on a person’s rights and freedoms, such as the power to use force and to arrest and detain, it is very important that there are oversight mechanisms in place to ensure that the Police are using these powers appropriately.

## **5. Submissions Relating to Specific Draft Amendments**

### **a) Amendments relating to powers and functions of the Inspector-General of Police (IGP) and the National Police Services Commission (NPSC)**

As set out above, the constitution establishes that Kenyans should enjoy democratic policing. For the reasons set out above, the Commission was established as part of ensuring that the National Police Service made transparent decisions, and is accountable, in relation to human resource matters and discipline. For these reasons we make the submissions about specific amendments below.

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<sup>3</sup> United Nations Office of Drugs and Crime *UNODC Handbook on Police Accountability, Oversight and Integrity*, p7, 2011.

**Section 8A (a) of the NPS Amendment Bill seeks to amend Section 8 of the Principle Act by providing that:**

*“The Inspector-General shall be responsible for all matters auxiliary to and touching on the command and discipline of the service”*

**This is also reflected at Section 10 clause 2 (g) of the NPSC Amendment Bill and seeks to amend section 10 of the Principle Act and provides that;**

*“Notwithstanding anything to the contrary contained in this Act, the functions of the Commission shall not extend beyond any matter auxiliary to and touching on the command and discipline of the service”*

The suggested amendments run counter to foundational drafting and interpretation principles which deem that the functions of a body include powers that are auxiliary to core functions. Further, they go against the constitutional provisions at article 246 (3) (b) which gives the commission the overall authority to exercise disciplinary control over and remove persons holding or acting in offices within the service.

Disciplinary mechanisms have often been abused, mostly by the top leadership of the police service. Such unorthodox mechanisms included transfer to hardship areas of the country with no allowance and denial of transfers and promotion of deserving officers. This, over the years, promoted patronage, stifled independence and encouraged political interference. It is for this reason that the constitution sought to transfer disciplinary functions to an independent body with civilian authority to establish professionalism and accountability in the service. Passing this amendment shall therefore defeat the spirit and object of the relevant constitutional provision.

**Section 8A (b) of the NPS Amendment Bill further seeks to amend Section 8 of the Principle Act on matters relating to promotion and transfers within the NPS. It provides that:**

*“promotion of, transfer of and disciplinary action taken on a member of the service...shall be on the **recommendation** and upon consultation with the Inspector General.*

**Section 110B of the NPS Amendment Bill also provides that:**

*“Police reserve officers shall be recruited by the Commission upon **recommendation** and consultation with the Inspector General and deployed in such areas as the Inspector General in consultation with the National Security Council may deem necessary.”*

Developing policies that seek to promote consultation between the National Police Service and the Commission should be encouraged. However, the proposed amendments go too far in unconstitutionally reassigning some of the areas of responsibility that should lay with the Commission to the Inspector-General. Any policy changes (which in our view need not be achieved through legislative



amendments) relating to NPS or NPSC Act must be in accordance with the purpose of the Commission as set out in the Constitution. Again, by inserting the term “*upon recommendation...with the Inspector-General*” undermines the Commission's constitutional authority in determining the nature and extent of recruitment, promotion, transfers within the police service.

As noted above any changes to the NPSC Act must be in accordance with the purpose of the Commission as set out in the Constitution. An accountable and transparent service must have both an internal oversight (for example the Internal Affairs Unit) and external oversight mechanism to the police service (the Commission, the Independent Policing Oversight Authority, the Judiciary, Parliament, the Executive, other Commissions and civil society). This oversight includes scrutiny of police actions, especially where there is a serious complaint of police abuse of their powers such as illegal use of force, firearms or torture, as well as oversight of other methods of power within the police service, such as employment and disciplinary matters. A Police Service that is not accountable for its actions will not have the trust of the public, resulting in less cooperation in policing operations and hence more difficulty for the police in carrying out their core duties.

#### **b) Amendments Relating to Police Use of Firearms**

Under the NPS Act the conditions in which police can use force and firearms is set out in the Sixth Schedule. The Sixth Schedule, Part A (1) and (2) encapsulates international norms and practices for democratic, effective and reasonable use of force by the police:

- (1) A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.*
- (2) The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.*

The Sixth Schedule Part B (1) sets out the current law on the conditions which allows police officers to use firearms:

- (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.*

The NPS (Amendment) Bill seeks to add additional sub-paragraphs to the Sixth Schedule Part B (1) of the Principal Bill to also allow the police to use firearms to:

- (c) protect life and property;*
- (d) prevent a person charged with a felony escaping from lawful custody; and*

(e) *prevent a person who attempts to rescue or rescues another person from lawful custody.*

CHRI and Katiba Institute are extremely concerned with these proposed amendments, as they are unnecessary and retrogressive. Our position is set out below.

### Use of firearms to protect property

The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials does not allow the use of firearms to protect property. The Basic Principles state the following in relation to the use of firearms (bullet points, use of bold font and bracketed information is by CHRI and Katiba Institute):

*Law enforcement officials shall not use firearms against persons except:*

- *In self-defence or defence of others against the imminent threat of death or serious injury,*
- *to prevent the perpetration of a particularly serious crime involving grave threat to life,*
- *to arrest a person presenting such a danger (i.e. grave threat to life) and resisting their authority, or to prevent his or her escape*

*and only when less extreme means are insufficient to achieve these objectives.*

***In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.***

In absolutely no circumstance is use of firearms allowed to protect property.

The history of Kenya, right up to 2013, highlights why opposition to the proposed amendments is so important. Time and time again the police have shot and killed people that are committing an alleged property offence (often it is not clear if the person really was committing an offence). The recent Truth, Justice and Reconciliation Report (TJRC) investigated, among many things, the history of violence and human rights violations in Kenya between 1963 and 2008. The TRJC Report strongly recommended that the police not be allowed to use firearms to protect property.<sup>4</sup>

In April of this year, police officers shot and killed Kenneth Kimani, apparently registering the following at the police station: *“On 14th April, shooting incident at Githurai 45 bus stage at 16.30hrs PO (Police Officer) Katitu. Exhibit: One mobile phone Samsung Duos 2222 (valued at less than \$100).”*<sup>5</sup> Witnesses however claim that Kimani did not have anything in his pockets, not even the \$100 mobile phone the police killed him for. If the amendments to the NPS Act pass, these kinds of extraordinarily violent responses to *alleged* property theft will be legal.

The current Schedule 6 allows the police to lawfully use firearms if someone is damaging or stealing property in a way that is threatening to cause serious injury or death. For example, it is likely to cover a car-jacking situation if there is a reasonable

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<sup>4</sup> Report of the Truth, Justice and Reconciliation Commission (2013), Volume IV, p31

<sup>5</sup> NyambegaGisesa, *Githurai Police Hunt Down Three Brothers*, The Standard Kenya, 13 May 2013

belief the suspect is armed. As the current Schedule 6 already allows use of firearms in this situation, any further amendment would act to allow the police to use firearms - lethal force - to stop property damage that isn't posing such a threat. Again, we stress that this is an unacceptable violation of the right to life, and is in violation of international law and standards.

*Use of firearms against persons involved in attempts to escape custody*

Again, we refer to the United National Basic Principles on Use of Force and Firearms set out above. We stress that these international standards only allow use of firearms to be used against a person escaping or assisting the escape of another, if that person is posing a 'grave threat to life'. Again, we note that this is already incorporated in the current Schedule 6 – police officers can use firearms when there is a threat of serious injury or death to another person. No further amendment is necessary. The proposed amendments are not in accordance with international law and principles.

Furthermore, we note that in the recent past there have been allegations against the police that they have carried out extrajudicial killings of civilians. This was supported by a report of the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, who visited Kenya in 2009 and conducted interviews with government, civil society, victims and witnesses from across Kenya. The findings of the report were damning, and were summarized as follows:

*“The Special Rapporteur came to the conclusion that police in Kenya frequently execute individuals and that a climate of impunity prevails. Most troubling is the existence of police death squads operating on the orders of senior police officials and charged with eliminating suspected leaders and members of criminal organizations. Such groups harass and kill Kenyans, and strong policing is required to counter the threat. Carte blanche killing by the police, however, does nothing to eradicate such criminality; rather, it perpetuates the sense that the police are good at killing and bad at law enforcement. For policing to truly create security, it must be conducted with respect for the human rights of all, including those of suspects and victims. A lack of police accountability for killings results from the absence of effective internal or external investigation or oversight mechanisms.”<sup>6</sup>*

The report found that lethal force was used in circumstances where instead the police could have arrested the suspect.<sup>7</sup> In April 2011 a further report was released which analysed the progress made by Kenya in implementing the recommendations of the former Special Rapporteur. This report found that progress had been made in the form of a new constitution and legislation, however, it also found that police killings as a result of excessive use of force continue to be reported, that police employed disproportional use of force and police continued to enjoy impunity for their actions.<sup>8</sup>

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<sup>6</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/11/2/Add.6, 26 May 2009, p2

<sup>7</sup> Ibid p 11.

<sup>8</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/17/28/Add.4, 26 April 2011

Local reports also support these findings, as well as noting that the majority of the victims of extrajudicial killings were poor and their families had restricted means to access legal services and seek justice. It was found that in over 90% of cases the police officer in question was not investigated or prosecuted.<sup>9</sup>

In addition to being contrary to international standards, the proposed amendments would support the culture of extrajudicial killings that has existed in the Kenyan police service. In this context, it is essential that there be clear and humane laws on the use of firearms by police.

***Recommendation: That section 34 of the NPS Amendment Bill be rejected. Schedule 6 should remain as in the NPS Act, as this is in accordance with international law and standards.***

#### *Disciplinary Action about the Use of Force*

The Amendment Bill wishes to delete the following sub-paragraph 2 (1), from Part C of Schedule 6 from the Principal Act:

*2(1)Refusing to carry out orders that include unlawful use of force should not be penalized and should not be a disciplinary offence.*

By deleting this sub paragraph, it allows for junior officers to be penalized for not acting on orders of superiors to illegally use firearms or force. Pursuant to the proposed amendments a junior officer could be penalized by his/her superior officers if he/she refused to beat a suspect who was being questioned, or if he/she refused to shoot an unarmed civilian.

The removal of this provision creates a risk that senior officers will encourage an illegal use of force in junior officers. This is the type of police culture that should be avoided, and that the reforms are meant to address.

***Recommendation: That section 35 of the Amendment Bill be rejected.***

## **6. Conclusion**

The constitutional provisions regarding the discipline, recruitment, promotion and transfer are embedded after years of clamour for an independent, transparent, efficient and effective police service that is responsive to the citizens. Key to this vision is a state that allows for and encourages democratic policing designed to protect and serve the needs of Kenyans. The proposed substantive amendments undermine the accountability the police are required to show to its citizens. The National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013 must be rejected, with minor amendments to take place through alternative processes.

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<sup>9</sup> 'God's Work? Extra Judicial Executions in Kenya Today and the Future of Police Reforms" Rights Protection and Promotion Centre, 2012

CHRI and Katiba Institute is able to answer any queries arising from these submissions.

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