

NATIONAL POLICE SERVICE (AMENDMENT) BILL 2013 AND THE NATIONAL POLICE SERVICE COMMISSION (AMENDMENT) BILL 2013; PRESENTATION BY KATIBA INSTITUTE AND POLICE REFORMS WORKING GROUP (PRWG) TO THE PARLIAMENTARY COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY, HELD ON TUESDAY, AUGUST 20, 2013 AT CONTINENTAL HOUSE, PARLIAMENT BUILDINGS NAIROBI

1) INTRODUCTION

On 31st July 2013, Katiba Institute, URAIA, Independent Medico-Legal Unit (IMLU), Kenya Human Rights Commission (KHRC), Constitution and Reform Education Consortium (CRECO), USALAMA Forum and Rights Promotion and Protection Centre (RPP) deposited a petition with the Clerk of the National Assembly seeking increased public consultation and participation on the proposed amendments to the National Police Service (Amendment) Bill and the National Police Service Commission (Amendment) Bill. The petitioners prayed that citizens' right to public participation in the development of legislation be upheld and that the National Assembly provides sufficient time for submission of memoranda on the amendment bills.

All seven (7) organizations above, and a partner organisation, the Commonwealth Human Rights Initiative, have human rights and constitutional mandates in different capacities and form part of a national network concerned with the ongoing police reforms in Kenya. The submissions presented today represent their apprehensions relating to the proposed amendments to the police laws.

We are grateful to your committee for giving us this opportunity to address you on our concerns about the proposed Bills. The Constitution requires Parliament to facilitate public participation and involvement in its legislative and other business as well as those of its committees (Art. 118 (1) (b)). This participation is particularly important in this case since the amendments relating to the political independence of the police were not included in the versions of the bills submitted for public debate by the Constitution

Implementation Commission. Rather, these proposed amendments appeared for the first time in the versions of the bills tabled in Parliament.

BACKGROUND TO POLICE REFORM

The objectives and organization of police have been controversial since the negotiations on the independence constitution. The National Task Force on Police Reforms (NTF) noted the low levels of public trust in the police. There are good reasons for the lack of trust, going back to the very introduction of a police force in Kenya by the colonial government. The police were used by the imperialists to oppress and exploit the people and their resources, and to force them into submission to British rule. They performed the role of the military in the conquest of Kenya rather than protecting the rights and freedoms of the people. The NTF notes that “With the police serving primarily as a tool of the colonists’ might from the start, the early Kenya police force has been described as “a punitive citizen contained squad”. To this day the close connections of the police with the military, and of both with the government, have continued. An attempt was made in 1963 to reform and humanize the police and the independence constitution had a lengthy chapter on the police, to ensure its independence, define its responsibilities to protect people, and to decentralize it through regional police forces. An independent police service commission was established, and the operational independence of the Inspector General was established. In many ways its framework was similar to that in the 2010 Constitution.

The lengthy provisions to ensure a fair, decentralized and independent police force were removed by the first anniversary of independence. As the NTF noted, the Kenya state perpetuated a police force whose mission was to oppress the people (and force them into submission). It found that “Members of the public place part of the blame for the deterioration in the security situation and the apparent increase in crime on the shoulders of the police.” Similar views motivated the CKRC and the National Constitutional Conference (“Bomas”) to propose wide scale changes in the objectives and organization of the police force—and changed its designation from FORCE to SERVICE. The violence that followed the 2007 elections in which the police were alleged to have committed terrible atrocities (by the Waki Commission and many observers) led to renewed calls for police reform; and this became

part of the Agenda Four of the Agreement negotiated through the Panel of Eminent Africans. But, as the NTF noted, the government showed little appetite for police reform, and it was not until October 2009 that the Task Force was set up. Chaired by Justice Ransley, formerly of the High Court, and with membership of top government officials (Permanent Secretaries from the Offices of the President and the Prime Minister, and ministries of Finance, Provincial Administration and Internal security, and Justice, National Cohesion and Constitutional Affairs, the Director General of Security Intelligence Service, and Chair of the Law Reform Commission), it was well qualified to protect the national and state interests. The TF read numerous reports on the state of the police and its reforms, and consulted the people and experts widely.

It prepared a wide ranging report. Its approach was similar to that of the Bomas and the Committee of Experts on the constitution. But little was done to implement its proposals. The 2010 Constitution required a very significant reform of the police, and set a time table for its implementation. The National Public Service Act and the National Police Service Commission Act were enacted in 2011, drawing on the principles of the Constitution and the detailed proposals of the TF. .

THE FRAMEWORK OF REFORM

The essential principles governing the responsibilities, organization, and functions of the police are clearly set out in the Constitution. These principles derive from a number of Articles. The most important is Article 10 “National values and principles of governance”), which binds all all state organs and officials (Article 10(1)), The most relevant principles are the rule of law, democracy, participation of the people, transparency, accountability, good governance and human dignity and human rights. Principles more specific to the police are to be found in Chapters 14th (“National Security”) and 15th (“Commissions and Independent Offices”). A fundamental principle of national security is the protection of people’s rights and freedoms (Art. 238 (1)). National security must be promoted and guaranteed in accordance with the Constitution and is subject to its authority as well as that of Parliament (Art. 238(2)). National security must be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms (Art. 238(2)(b); see also Art. 244).

The operational independence of the police is another fundamental principle governing the police (Art. 245). Among other provisions, it limits the authority of the government to direct the operations of the police. The relevant Cabinet secretary can give directions to the Inspector-General (I-G) only “with respect to any matter of policy for the National Police Service”. No person can give directions to the Inspector-General with respect to : (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or (c) the employment, assignment, promotion, suspension or dismissal of the National Police Service”. The security of office of the I-G is protected against arbitrary dismissal by the government (Art. 245) (7)). A suitable distance between the government and the IG is therefore a key element in the governance and operation of the I-G and the police in general.

The independence of the police is also secured through the Police Service Commission (PSC). Its principal functions are; “(a) to recruit and appoint persons to hold or act in offices in the [police] service, confirm appointments, and determine promotions and transfers with the National Police Service”; and “(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service” (Art. 246(3)). This leaves no doubt that the PSC and not the government or the I-G is responsible for the appointment, discipline and removal of the police. The I-G is however not excluded from all say in these matters. The I-G and the two Deputy I-Gs are members of the PSC, and it is in its deliberations that their views are expressed and no doubt considered with appropriate attention—not in collusion with the government.

It is necessary to note that the PSC is one of the commissions whose independence is guaranteed by the Constitution in Chapter 15 (Art. 248(2)(j)). The objectives and authority of all independent commissions are established by Article 249. The objectives are; “(a) to protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism”. The Constitution gives them independence so that they can achieve these objectives regardless of government pressures, and in fact against the contrary policies or practices of the government. Article 249(2) states this clearly, thus:

“The commissions and holders of independent offices—(a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority”. Not even from the I-G or the Cabinet.

Finally Article 249(3) give financial autonomy to independent commissions to assure them their independence. It says that “Parliament *shall* allocate adequate funds to enable each commission...to perform its functions” and through a “separate vote”.

This is the constitutional framework of the police service (fully consistent with widely accepted international values, norms and rules in respect of the police). The two Bills which the National Assembly is asked to vote seek to make fundamental and wide breaches in this framework.

THE CONTEXT OF THE BILLS

The police reform agenda remains a priority in Kenya's pursuit for peace and sustainable development. Key to the realization of a reformed police service are legal and institutional frameworks which promote and protect the rights and liberties of citizens. These include the Constitution of Kenya 2010, the National Police Service Act and the National Police Service Commission Act that provide the powers and functions of the National Police Service (NPS) and the National Police Service Commission (NPSC). The National Police Service has the operational mandate to promote and protect national security whereas the National Police Service Commission is constitutionally responsible for human resource and oversight functions on the operations of the police service. The National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013 currently before the committee however seek to unconstitutionally transform the existing operational, human resource and oversight structures in the police service.

If the proposed amendments are passed into law, the appointment and dismissal of the Inspector General of the Police will be conducted by the executive which inevitably infuses politics in the administration and management of the police service. Further, the

important human resource and oversight role of the National Police Service Commission will be undermined. The proposed amendments, amongst other provisions, seek to bar the Commission from exercising its disciplinary mandate over the police service. They seek instead to establish a 'service board' which will usurp most of the powers and functions of the Commission contrary to the provisions of the constitution. Public participation at the county level in security matters will also be affected if the bills are enacted. In particular, the proposed amendments disregard provisions that empower County Policing Authorities to facilitate public participation on county policing policy. The NPS Amendment Bill gives the police service 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.

Citizens from across the country are concerned about the social, economic and political implications of the proposed amendments. They contravene the Constitution and international law and treaties which Kenya has signed (which are made part of Kenya law by Art.2 (6)). The proposed amendments will wind-back critical reforms already witnessed in the institution of the police. The amendments will establish a close relationship between the Cabinet Secretary and the IG, which the Secretary will dominate. This goes contrary not only to the independence of the IG, but also of the police service generally. Nor will they do anything to curb the rising cases of extra-judicial killings—or the protection of the rights of the people. They will lead us back to the colonial uses of the police, as instrument of the oppression of the people.

SPECIFIC CONCERNS TO AMENDMENT BILLS

Proposed changes to the National Police Service (NPS)

**NPS Act
(Principal
Act)**

NPS Bill

SUBMISSION

Significant Reduction on the Political Independence of the Police and Role of the Inspector General

Section 12

This amendment to section 12 of the *National Police Service Act 2011* (“NPS Act”) will significantly alter the independent appointment of the Inspector-General of Police (“IGP”). The amendment proposes to completely remove the National Police Service Commission (“the Commission”) from the recruitment of the IGP, to instead just allow the President to nominate an IGP to Parliament, who can endorse or reject the nomination. The Commission is completely removed; hence there is no advertisement, no public interviews, no independent short-listing of candidates who meet the criteria, no notice in the gazette.

If the amendments are passed, the appointment of the IGP will no longer be an independent and transparent process. The public also needs to feel confident that the head of the police service is the best person for the job, selected through a thorough, independent process. As stressed repeatedly in police inquiries and reports over the years, it is very important that the Police Service is independent from the government, and upholds the law in an impartial way.

Section 15

Clause 14

This amendment will further reduce the independence of the IGP by reducing the IGP’s security of tenure. This amendment removes the Commissions role in investigating and deciding whether to

recommend to the Parliament the removal of the IGP from office. Under the current Principal Act, if the Commission does recommend this to Parliament, and Parliament agrees, the President has to appoint an independent tribunal to fully consider the matter.

The Amendment Bill proposes to change the Act to remove the investigation and recommendation powers of the Commission, so that the President can directly decide whether to recommend removal of the IGP to the Parliament. This amendment should be rejected as it increases the ability of the President to remove the IGP, implying that the IGP has to stay in favour with the President. The country needs a leader of the police that feels confident to make impartial decisions that are necessary and free from political consideration, without fearing removal from office without a transparent process.

Section 7 Clause 37 This amendment will give control of the vetting of police officers to the Cabinet Secretary as well as the Commission: "*the Commission shall, in consultation with the Cabinet Secretary, develop criteria and Regulations to guide the exercise of vetting of officers under subsection (1)*". This amendment reduces the politically impartial vetting of police officers, by allowing the Cabinet Secretary to have strong input into the criteria and regulations regarding the vetting. This should remain in the discretion of the Commission whose core constitutional mandate includes exercising disciplinary control over and removing persons holding office in the Police Service (article 246). The Commission has expertise in the recruitment, training, discipline and promotion of police officers so it is best practice for their Commission to retain these decision making powers.

Section 8 Clause 9 An amendment to section 8 of the NPS Act, to include a new section 8A, establishes an incorrect

meaning of ‘*independent command*’ of the Service. The amendment states that independent command means that the Inspector-General “*shall be responsible for all matters relating to the command and discipline of the Service subject to the disciplinary control of the Commission*”. We stress that ‘independent command’ of the Police Service, 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 (including freedom from political interference) 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 – refer to point 1 above;
- 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.¹

Independent Command as defined above is an internationally accepted standard of policing.

Section 21 Clause 21

The proposed amendment seeks to establish a “*Service Board*” which would take on the core functions of the Commission. The Service board would have, among other functions, the responsibilities to “*determine the recommendation of the Service on recruitment, promotion, transfers and discipline, for submission to the National Police Services Commission.*”

Section 41 Clause 26

The proposed amendment to ss41(8) of the NPS Act would establish that, instead of the

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¹ United Nations Office of Drugs and Crime *UNODC Handbook on Police Accountability, Oversight and Integrity*, p7, 2011.

Commission, the “*chairperson of the council of governors*” will, in consultation with the Cabinet Secretary, issue and publish guidelines to be followed during the nomination, appointment, removal and vacancy of members of the County Policing Authorities. We note that this should not be a political decision, and that recruitment, appointment and removal should be regulated by an independent public service body – the Commission. This is an attempt to reassign executive functions to the legislature.

Additionally this section of the Amendment Bill proposes to delete ss41(9)(h), which states that one of the functions of the County Policing Authorities is to “*facilitate public participation on county policing policy*”. This subsection should not be deleted as public participation in policy formulation is important, and useful in improving responsive policing and police –public relations.

Section 72	Clause 32	The proposed amendment to s72 of the NPS Act will remove the powers of the Commission to appoint special police officers. Instead it establishes that the Inspector-General and the National Security Council have direct control over the appointment of special police officers, with the Commission required to appoint all officers that the Inspector-General requests. This is not a proper process for the recruitment of public service officers such as special police officers, and contravenes Article 246(3)(a) of the Constitution of Kenya. This proposal obscures the clear delineation of responsibilities between the Commission and the National Police Service that the Constitution establishes.
Section 80	Clause 34	The Amendment Bill proposes the inclusion of a new s80A that establishes a “ <i>Service Examination Board</i> ” made up of members directly appointed by the Cabinet Secretary and the Inspector-General. The functions of the Board are to set examinations for the Police Service, as well as evaluate and

certify these. It also includes “any other function as may be prescribed by Regulations”. This amendment would undermine the Commission, which has the function of recruitment (article 246 of the Constitution), maintaining standards in the Police Service, and reviewing those standards (see s10(1)(a) NPSC Act 2011). These functions are set clearly in the Constitutional mandate of the Commission and there is no need for replication.

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| Section 89 | Clause 39 | The amendments propose to include further penalties for police officers including confinement to barracks or police residential headquarters, reduction of salary and fines. These are more like militaristic punishments that are not necessary for a civilian police force as exists in Kenya. The current list of disciplinary action which includes reprimand, suspension, order of restitution, stoppage of salary for a specified period of time, reduction in rank and dismissal is sufficient. |
| Section 110 | Clause 43 | The Amendment Bill proposed to add new sections regarding the Police Reserve. 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> ” infringes on the constitutionally assigned recruitment role of the Commission as set out in Article 246(3)(a). The assignment of powers of recruitment to the Commission was an intentional move to establish an accountable policing system. For a democratic policing system it is fundamental that the Commission retains this power. |
| Section 126 | Clause 49 | This amendment will establish that the Cabinet Secretary is responsible for “ <i>developing regulations relating to the setting of standards of recruitment, training of police, and use of police services</i> ”. This is not necessary and removes the professional discretion of the Commission, who (and we note that the Commission includes the Inspector-General and the deputies) should prepare the regulations regarding recruitment and training of the police. Additionally, Article 254(4) of the Constitution |

sets out that the Cabinet Secretary may give a direction to the Inspector-General (not the Commission) in relation to policy. Giving the Cabinet Secretary the power to develop regulations for standards of recruitment and training is overstepping this constitutional mandate. It is the core work of the Commission to discharge this function and is therefore inappropriate to require the National Assembly to perform these duties too.

Use of Firearms

Section 109 Clause 41

The proposed amendment would provide the Inspector-General with the power to make regulations regarding the use of firearms by foreign police services working in Kenya. **This is a very dangerous and unnecessary amendment**, which allows the Inspector General great power to decide any circumstance by which these officers can use lethal force. Foreign police officers should be subject to all the laws and regulations of Kenyan police, and hence should follow the laws regarding use of firearms set out in the Sixth Schedule to this Act. Pursuant to current law all foreign police officers operating in Kenya would be operating pursuant to the same standards as Kenyan police.

Sixth Schedule Clause 54

The proposed amendment would change the regulations regarding when the police can use firearms, so that, as well as using firearms to protect a person from death or the imminent threat of serious injury, police officers can use also use firearms to: protect property; prevent a person charged with a felony from escaping custody; and to prevent a person rescuing, or attempting to rescue, a person charged with a felony from custody.

These amendments are unnecessary, dangerous and contrary to international standards. The United Nations Basic Principles on Use of Force and Firearms states that:

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, or to stop an escape – unless it is strictly unavoidable in order to protect life. The current Act already provides that police can use firearms to protect a person (including themselves) from death or serious injury – no further amendment is necessary. It is important to understand that the current law supports the use of force during an escape from custody if there is a threat to life.

If passed, this amendment alone would be a huge step back for Kenya, effectively negate police reforms. The violent history of policing in Kenya, from the police extrajudicial killings in previous decades through to the recent police shooting of human rights defender Hassan Guyo, highlight the need for strict laws regulating when police officers can use firearms. The current Schedule 6, sufficiently empowers the police to use firearms.

Transparency and Accountability

Section 128 Clause 50

This amendment would change the law so that the Police Standing Orders would not have to be gazetted, and hence would not be public knowledge. Additionally, the proposed inclusion of a new subsection (2) and (3) would allow the Cabinet Secretary to classify information as "confidential" and "restricted", which will reduce the transparency and accountability of police actions. It is crucial that the police service is transparent in its decision-making, and held accountable for its actions. This amendment should be rejected.

Proposed changes to the National Police Service Commission (NPSC)

**NPSC Act
(Principal
Act)**

NPSC Bill

SUBMISSION

Section 10

Clause 3

This amendment would change subsection 10(a) of the National Police Service Commission Act ("NPSC Act") so that the following function of the Commission would be deleted "*keep under review all matters relating to standards or qualifications required of members of the Service*" and replaced with "*on the recommendation of the Inspector-General and approval of the Cabinet Secretary, develop and keep under review all matters relating to human resources policies of members of the Service*".

This amendment is a clear attempt to reassign the powers and mandate of the Commission to manage the human resources of the Service, to the Inspector-General of Police (who the amendments want to be appointed and removed by the President) and the Cabinet Secretary. This would mean that the government control the police leadership and "*all matters relating to human*

resources policies” of the police, as the Commission can only develop policies on the “*recommendation*” of the Inspector-General and with the “*approval*” of the Cabinet Secretary. This level of political interference with a public, impartial police service is not appropriate.

Additionally, Article 246(3)(a) of the Constitution mandates that the Commission 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*”. There is no article stating that the Commission can only act on the “*recommendation*” of the Inspector General. Rather, the Constitution ensures that the Inspector General will contribute to the policies of the Commission *as a member of the Commission*.

The proposed amendment to ss10(1)(k) which will limit the Commission to only hearing appeals on “*disciplinary matters relating to transfers, promotions and appointments*”. This is unconstitutional – the Commission has the constitutional mandate under Article 246(3)(b) to “*exercise disciplinary control over the Service*”. This amendment should either be rejected

Lastly, the amendment to ss10(4) should be rejected. This amendment proposed to limit the constitutional mandate of the Commission to exercise disciplinary control over the Service to merely developing and monitoring disciplinary procedures, rather than actually recommending disciplinary measures that the Inspector-General of Police must implement.

Section 17

Clause 17

This amendment would mean that the Commission would require the approval of the Cabinet Secretary prior to appointing officers and staff. This is unnecessary and inefficient, and yet another example of the government, through the Cabinet Secretary, trying to maintain control of all bodies

that related to the Police Service. The Commission is an independent constitutional body, and should not require the approval of a government Minister to appoint its staff.

Section 28

Clause 6

This amendment would delete the power of the Commission to make regulations regarding the vetting of police officers. As the Commission is the body that oversees recruitment it follows that the Commission should have powers to make regulations on the vetting of police officers. This is an attempt to amend the Police Act so that, as previously, the Cabinet Secretary has the power to make regulations regarding this matter, in consultation with the Commission. Again, we stress that the Constitution states the following regarding the role of the Cabinet Secretary:

245(4) The Cabinet secretary responsible for police services may lawfully give a **direction** to the **Inspector-General** with respect to any matter of **policy** for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
(a) the investigation of any particular offence or offences;
(b) the enforcement of the law against any particular person or persons; or
(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

We must ensure the police service remains as independent from the government as possible. It is clear from the totality of the amendments that they seek to legislate over the Constitution and assign all substantive powers of the Commission to the Police and the Cabinet Secretary. This will result in a return to prior police practice that was characterised by political interference, corruption and excessive use of force. In passing the Constitution, the Kenyan people have called for two

independent, powerful bodies the Commission and the National Police Service to ensure an accountable, democratic style of policing.

Second
Schedule

Clause 7

This amendment would increase the number of members required for a quorum to six, instead of five. The total number of members of the Commission is 9, we contend that a majority (5) is sufficient, and the most practical, for a quorum. This is especially important if the other amendment to the Second Schedule passes which will require the Commission to meet six times a year. Given that high powered individuals make up the committee, including the IGP, it is probable that committee members will not be able to attend every meeting. To ensure it is practical for the Commission to carry out its functions a quorum of five should be retained.

CONCLUSION

The negative impact of the above mentioned amendments cannot be overlooked. If passed into law, these amendments have grave social, economic and political ramifications as peace and sustained development of the country will be affected. The public image and confidence of the police has also been affected over the years and with the inevitable reintroduction of a draconian police service the public shall be further alienated from the police. There shall be no respect left for the institution and citizens will take the law into their own hands. Most disturbing is the fact that there shall be politically malleable police service with little or no accountability to its citizens.

RECOMMENDATIONS

1. That the proposed amendments to the National Police Service (Amendment) Bill 2013 & the National Police Service Commission (Amendment) Bill 2013 be rejected in their entirety
2. That the National Police Service Commission and the National Police Service be accorded the support and independence required to fulfil their legal and constitutional mandates.

3. That extensive public discussion be held on the issue of what, if any, police reform should take place. Relevant stakeholders to be engaged include: community members, police, civil society organisations, county governments, prison populations and other interested persons.