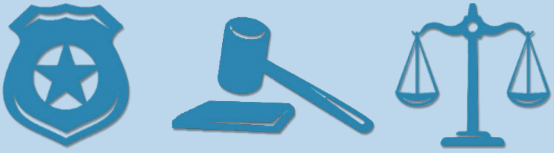
THE POLICE AND THE EXECUTIVE: ROLES AND RESPONSIBILITIES



Democratic policing series

October 2016
HAKI NA USALAMA
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About Haki na Usalama Forum

Haki na Usalama (Justice and Security) Forum was established in December 2012. The Forum has been revived in 2016 to promote criminal justice reform and, in particular, democratic model of policing. The forum now includes a variety of stakeholders, and provides vital space where the stakeholders can have conversation about police reform.

Current members of the Forum include: Tanganyika Law Society (TLS); Commonwealth Human Rights Initiative (CHRI); Children Dignity Forum (CDF); Tanzania Human Rights Defenders Coalition (THRDC); National Organisation of Legal Assistance (NOLA); Legal and Human Rights Centre (LHRC); Women's Legal Aid Centre (WLAC); Tanzania Youth Vision Association (TYVA); Tanzania Media Women's Association (TAMWA); Women Action Towards Economic Development (WATED); Women in Law and Development in Africa (WiLDAF); African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN).

Partners of the Forum are Tanzania Police Force (TPF); Commission for Human Rights and Good Governance (CHRAGG); Open Society Initiative for East Africa (OSIEA); and Hanns Seidel Foundation (HSF).

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We sincerely thank all those who gave their time and shared their insights. Special appreciations go to Tanzania Police Force, the Law Reform Commission of Tanzania and members of Haki na Usalama Forum for their invaluable contribution in informing and shaping the paper during the research and validation sessions.

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Introduction

> *"Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with high degree of responsibility required by their profession"* – UN Code of Conduct for Law Enforcement Officials, art. 1.

> *"In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold human rights of all persons"* – UN Code of Conduct for Law Enforcement Officials, art. 2.

In Tanzania, like in other Commonwealth countries, efforts are being initiated to reform policing laws and oversight mechanisms. This is because existing legal and policy frameworks inherited from the colonial regime are not in accordance with international and democratic standards of policing and do not protect human rights adequately. More and more countries, particularly those making political transitions to democracy and those engaged in genuinely deepening democracy, are adopting a democratic model of policing, which is founded on principles of equity and equality, accountability, transparency, participation, respect for diversity, the accommodation of dissent, protection of individual and group rights, and encouragement of human potential.[1]

Willing to contribute to ongoing reform initiatives, members of Haki na Usalama Forum have conceptualised what would be needed to implement democratic policing in Tanzania. This is the first paper by the Forum and deals with the relationship between the police and the Executive arm of the State.

It is crucial to properly define and condition this relationship, particularly the roles of the police and the executive, to achieve

1 "Police Accountability: Too Important to Neglect, too Urgent to Delay". Commonwealth Human Rights Initiative, 2005, p.12;

truly democratic policing. This paper provides the contours and needed components for a healthy relationship between the police and executive based on democratic norms. In particular, it will explain how this can be achieved in law and policy, why it is needed, and how policing (and democracy more largely) in Tanzania will benefit. In doing so, we will draw on the best practices and legal formulations in Africa and overseas.

1 The contours of the Police-Executive relationship in a democracy and why it is essential for a quality police service

In any democracy, the ultimate responsibility for ensuring public safety and security lies with the Executive, specifically the Minister for Home Affairs or his/her equivalent depending on the jurisdiction. The police are implementers. As such, the police and the Executive are both bound together in the common endeavour of preventing and responding to crime, maintaining law and order and ensuring that the people have a well-functioning police service that protects life, property and liberty.

However, at times, extraneous agenda (political or/and personal) often come to interfere with the daily operations of the police. This manifests itself in a variety of ways including:

- Manipulating police recruitment;
- Promotion and dismissal practices to suit personal and political purposes;
- Bringing political elements into crime control and investigation; or
- Using the strong hand of police to endanger political stability.[2]

This undue interference can be prevented if the relationship between the police and political executive is well-defined in law, supported by a number of safeguards. In practice, this would mean that it is the police chief's right and duty to take operational decisions, and that neither the Executive nor anyone else have the right to direct him/her as to how to conduct police's daily activities. Conversely, the police at all times must remain firm in being accountable to the law and all established oversight processes and mechanisms, both internal and external..

2 "Control & Governance of the police: Commonwealth Innovations in Policy and Practice", Commonwealth Human Rights Initiative, available at http://bit.ly/2bqxIMA;

Police operational independence vs. operational responsibility

A key concept that underpins a strong and genuinely democratic relationship between the police and executive is that of operational independence or functional autonomy for the police. Defining and understanding this concept can be tricky and therefore is usually done by describing its features and elements. Tanzania is not an exception. Police General Order No. 1 describes it the following way:

"Police Officers at all levels must be guided by the laws in the performance of their duties. Undue influence, political, religious or otherwise should not be allowed in police decisions as these may have an adverse effect in delivering justice. Every police officer is encouraged to perform his/her duties without fear or favour when performing within the limits of the law."[3]

This is a succinct, but holistic definition that reaffirms the supremacy of the rule of law, singles out the threats to operational independence, and places the responsibility to maintain a non-partisan role to all members of the Tanzania Police. This is in fact an ideal framework.

Other definitions put emphasis in different areas. . For example, the European Code of Police Ethics stresses the need for the police to be free of political interference.[4] Another widely quoted definition underscores the importance of police leadership by stipulating that operational independence concerns, first and foremost, the authority of the police leadership to decide within the established budgetary and legal framework, how to allocate resources and how to respond to law and order situations.[5] However, this does not mean that operational independence is a sole responsibility of police leadership; it should apply throughout the police organisation

3 Police General Order No.1, para 8;
4 European Code of Police Ethics, p. 41, para 15;
5 Osse, A. (2006). *Understanding Policing*, Amnesty International;

, as the European Code of Police Ethics suggests.[6]

From a human rights perspective, the approach pioneered by the Independent Commission on Policing for Northern Ireland is ideal. The Commission advocated that the term "operational independence" was problematic and should be recast as *operational responsibility*. The Commission explained its rationale the best in its own words:

"No public official, including a chief of police, can be said to be 'independent'. Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of "operational independence" – that it minimises the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters which only he or she has all the facts and expertise needed – are powerful arguments, but they support a case not for 'independence' but for 'responsibility'".[7]

In the Commission's opinion, operational independence may suggest that the head of police's conduct of an operational matter should be exempted from inquiry or review after the event by anyone. By setting operational independence *against* operational responsibility, it is emphasised that the head of police, like any other public official, must be both free to exercise his or her responsibilities but also capable of being held to account afterwards for the manner in which he/she exercises them.[8] This substantive distinction gives the needed priority to maintain accountability of the police at all times – crucial for democratic policing. It is this rationale and conceptual framework that should lay the foundation for understanding the role and powers of a police organisation in a democracy.

6 European Code of Police Ethics, p. 41, para 15;
7 "A New Beginning: Policing in Northern Ireland", Independent Commission on Policing for Northern Ireland, 1999, para 6.20;
8 "A New Beginning: Policing in Northern Ireland", Independent Commission on Policing for Northern Ireland, 1999, para 6.20-6.21.

The general principle is that the police, no less than any other state agency, must be subject to democratic superintendence, control and accountability for their activities, through the usual political, judicial and administrative processes. The areas in which the police should be able to act independently relate to both *law enforcement* and *administration*. Regarding law enforcement, the police should be independent in their decision-making with respect to enforcing the law in individual cases. This includes the important operational decisions about whom to investigate, search, question, detain, and arrest in a particular case.

Governments are not precluded from advising police of their views with respect to police decisions that may have significant public policy or public interest implications (e.g. matters of national security or matters that have repercussions for international relations). However, in all such cases the government:

- Must not seek to exert undue pressure;
- Should acknowledge that the ultimate operational decisions in such cases rests with the police; and
- Must keep a written record of any such intervention which must be made public and available for judicial review as early as possible.

The Executive should craft policies and seek accountability for poor performance or wrongdoing by an essential public service paid for by taxpayers' money. Therefore, a careful balance has to be struck between legitimate 'supervision' of the police by the Executive and illegitimate interference and influence.

When the balance is right and the operational responsibility of police is ensured, the foundation for democratic policing is cemented. Police soon feels the benefits of doing their work without interference from the government, that keeps an eye on police nevertheless to guarantee accountability and transparency. In time, police can expect the public to be more cooperative (*i.e.* intelligence information sharing, coming forward as witnesses, reporting crime e.t.c) since the public perceives the police as being accountable, impartial and acting in public interest.

2 How this can be achieved in practice

There are four key elements to cement and codify the relationship between the police and the executive to prevent illegitimate political interference in policing. These include:

- A legal framework that clearly delineate roles, responsibilities and relationships between the police and the executive;
- Clear and fair procedures for the appointment of the police chief, security of tenure, and guarantees against political meddling enshrined in law;
- Independent, transparent and fair procedures of recruitment, appointment, promotion, transfer and disciplinary control within the police force; and
- Well-defined and adequate sources of financing of the police.

2.1 Appropriate legal framework

For policing to work in an efficient, unbiased, responsive manner, the roles, powers and responsibilities of each entity involved has to be properly articulated in the law. These entities may include the head of the police, minister responsible for home affairs, the head of state and his/her representatives at the regional and district level, parliament etc., but usually it is the head of the police (Inspector-General) and the head of the Executive (President).

There are two important points to be made in regards to the legal framework governing the relationship between police and the Executive.

Firstly, it should be exhaustive, clarifying roles, responsibilities and relationships between police and the executive as much as possible. By regulating this relationship in detail, policy makers leave little space for informal, and potentially unlawful, iterations between police and the government.

Secondly, the legal framework, as meticulous as it may be, may still allow for undue interference, thus making it a legitimate and legal practice. In this regard, a distinction needs to be drawn between *appropriate policy direction* from the government to police and *inappropriate interference* in operational matters. While the former delineates a policy-directing role for the government (preparing police plans, setting standards, defining performance indicators etc), the latter refers to interference with daily operations of police. Examples may include the government sending police to disrupt rallies or a politician directing police to investigate a particular individual.

The law must reflect this distinction and prevent any manner of undue interference in policing. The importance of establishing a policy-directing role for government is crucial to set objective criteria and policy priorities for policing, which above all reflect the safety needs and crime concerns of the public. Setting criteria and establishing clear strategic direction, through policing plans for instance, is integral for government to effectively monitor police performance, be attune to the most pressing crime concerns, build local partnerships, and measure police use of public funds. Prioritising particular public safety and crime areas for special police attention may help police itself to develop specialist expertise in responding to particular types of crime. Most importantly, any measures to direct government's role in relation to police must be put in place with a view to preventing undue interventions into any aspect of policing, and guard against the creation of covert arrangements or mutual dependencies that can shut out public scrutiny.[9]

There are many existing legal formulations to draw from. For example, in Kenya the Minister responsible for the police service may lawfully give a direction to the Inspector-General

9 "Control & Governance of the police: Commonwealth Innovations in Policy and Practice", Commonwealth Human Rights Initiative, available at http://bit.ly/2bqxIMA;

(IG) regarding any matter of the National Police Service's (NPS) policy (and only in writing![10]), but no person may give direction to IG with respect to the investigation of any particular offence, the enforcement of law against any particular person, or the employment, assignment, promotion, suspension or dismissal of any police officer.[11] At the same time, the Constitution of Kenya states that the IG "shall exercise independent command over the National Police Service and perform any other functions prescribed by national legislation".[12]

Likewise, in South Africa the Constitution makes it the political responsibility of the Cabinet Minister responsible for policing to determine the national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces.[13] The Minister may make regulations on a wide variety of issues, such as recruitment, appointment, transfer, promotions, code of conduct, establishment of different units and ranks, physical and mental health requirements etc.[14] In turn, the National Commissioner (the head of the police) exercises control over and manages the police in accordance with these policies.[15] This reflects the *appropriate political direction* that the Executive can exercise towards the police without interfering in its operational matters.

10 Constitution of Kenya (2010), art. 245(5); National Police Service Act (Kenya), 2011, s. 8;

11 *Id*, art. 245(4); *Ibid*;

12 Constitution of Kenya (2010), art. 245(2)(b);

13 Constitution of South Africa, 1996, art. 206(1);

14 Police Service Act (South Africa), 1995, s. 24(1);

15 Constitution of South Africa, 1996, art. 207(2);

Institutional buffers for policy-making on policing

Some jurisdictions make use of "buffer bodies" to issue policy direction to the police. These are specialised civilian bodies that serve as an additional layer of protection against undue interference into police operational matters. For example, in Ghana, the Police Council may, with the prior approval of the President, make regulations for the performance of the Inspector-General's functions and for the effective and efficient administration of the Police Service.[16] These are policy regulations and are similar to the regulations, which a South African Minister responsible for policing may issue. Their subject matter covers such issues as the control and administration of the Police Service; the ranks of officers and men/women of each unit of the Police Service; the conditions of service including those relating to the enrolment, training, salaries, pensions, gratuities and other allowances of officers and men/women; the authority and powers of command of officers and women/men of the Police Service.[17]

Similarly, in Kenya, the National Police Service Commission is the buffer body between the police and the Executive. The Commission defines policing policy with regards to recruitment, appointments, transfers, promotions, discipline and other matters.[18] Setting up this kind of buffer body can go a long way to ensure a safe distance between the police and executive while also providing an independent forum to shape

16 Constitution of Ghana, 1992, art. 203(2);

17 *Id*, art. 203(3);

18 National Police Service Commission Act (Kenya), 2011, s. 28;

and formulate policies for strengthened police administration and functioning.

Other jurisdictions feature numerous good examples of delineating roles between the police and the Executive in their police legislation. For example, New Zealand's Policing Act, 2008 clearly delineates 1) the New Zealand Police's responsibilities to the Executive (through the Minister in charge) and also, importantly, 2) what duties and functions the police are not responsible to the executive to and which must be acted on independently by the police.

Delineation of responsibilities between the Executive and the police in New Zealand

The Commissioner is responsible to the Minister for

a) carrying out the functions and duties of the Police;
b) the general conduct of the Police;
c) the effective, efficient, and economical management of the Police;
d) tendering advice to the Minister and other Ministers of the Crown; and
e) giving effect to any lawful ministerial directions.

The Commissioner is not responsible to, and must act independently of, any Minister of the Crown regarding

a) the maintenance of order in relation to any individual or group of individuals;
b) the enforcement of the law in relation to any individual or group of individuals;
c) the investigation and prosecution of offences; and
d) decisions about individual Police employees.[19]

19 Policing Act (New Zealand), 2008, s. 16;

Furthermore, it is directly stipulated that no police officer may, when exercising any power or carrying out any function or duty, act under the direction, command, or control of a Minister or a person who is not authorised by law to direct, command, or control the actions of a police officer.[20]

Another relevant feature of many legal regimes is political neutrality of the police. Thus, the 2010 Rwanda Police Act prohibits police officers of any rank to be involved in any political parties or any other association of political nature, which constitutes a disciplinary offence.[21] The South Africa Police Service Act, 1995 does not prohibit membership in political parties, but does prohibit police officers to publicly display or express support for or associate himself or herself with a political party, organisation, movement or body; hold any post or office in a political party, organisation, movement or body; wear any insignia or identification mark in respect of any political party, organisation, movement or body; or in any other manner further or prejudice party-political interests.[22]

2.2 Independent police leadership

The exercise of operational direction and daily management usually rests with the Head of Police, and the necessity to insulate this position from being vulnerable to excessive political interference is vital. Serious breaches of law and accountability arise out of inappropriate relationships of patronage that develop where there are no objective procedures and criteria for the appointment and management of senior police officers.

While there are no universal formulas, the power to hire and fire police chiefs must, at minimum, be prescribed by clear and fair procedures. Where possible, the input of additional institutions such as Service Commissions or civilian oversight bodies can be

20 Policing Act (New Zealand), 2008, s. 30;
21 Law Determining the Powers, Responsibilities, Organization and Functioning of the Rwanda National Police (Rwanda), 2010, s. 33(5); Police Code of Conduct (Rwanda), 2010, s. 8;
22 Police Service Act (South Africa), 1995, s. 46;

integrated, adding transparency and civilian participation to this important process. The highest police post must also be protected by secure tenure and his or her removal must be carried out on the grounds clearly spelled out in the law by following due process.[23]

In this respect, one of the best legal formulations comes from Kenya, where the Inspector-General (IG) is appointed by the President with the approval of Parliament and, without reservations, is granted independent command over the National Police Service (NPS).[24] Deputy IGs are appointed by the President with the recommendation of National Police Service Commission, an independent buffer body tasked with management of police.[25] The 2010 National Police Service Act (NPS Act) specifies qualifications that candidates for these posts should have and clarifies technical aspects of appointment procedures.[26] The IG and his deputies are also guaranteed security of tenure, laid down in the NPS Act, and can only be removed from office on the grounds, specified in the Constitution and NPS Act, and following a thorough investigation.[27]

Grounds for IG removal under the Constitution of Kenya

The Inspector-General may be removed from office only on the grounds of:

a) serious violation of the Constitution or any other law;
b) gross misconduct whether in the performance of the office holder's functions or otherwise;
c) physical or mental incapacity to perform the functions of office;

23 "Control & Governance of the police: Commonwealth Innovations in Policy and Practice", Commonwealth Human Rights Initiative, available at http://bit.ly/2bqxIMA;

24 Constitution of Kenya (2010), art. 245(2);

25 *Id*, art. 245(3);

26 National Police Service Act (Kenya), 2010, ss. 11 and 12;

27 Constitution of Kenya (2010), art. 245(7); NPS Act (2011), s. 15, 17 and 18;

d) incompetence;
e) bankruptcy; or
f) any other just cause.[28]

In Nigeria, the Inspector-General is appointed by the President on the advice of the Nigeria Police Council (NPC). The NPC is a federal consultative body, responsible for the organisation and administration of the Nigeria Police Force and all matters other than the use and operational control of the Force or the appointment, disciplinary control and dismissal of police officers.[29] The IG is assisted by a varying number of Deputy IGs and Assistant IGs, who are appointed by the Police Service Commission, a buffer body with broad civilian representation.[30]

Ghana has a similar model of appointment of the Inspector-General. The head of the police is appointed by the President in consultation with the Council of State, a small body of prominent citizens.[31]

The South African Police Service Act provides an exemplary procedure for removal of the National Commissioner and Provincial Commissioners. If the Executive loses confidence in the National Commissioner, the President may establish a board of inquiry consisting of a judge of the Supreme Court as chairperson and two other suitable persons to inquire into the circumstances that led to the loss of confidence, compile a report and make recommendations.[32] A similar board of inquiry is established by the National Commissioner in cases of loss of confidence of Provincial Commissioners.[33] Pending the outcome of inquiry, the concerned Commissioner may be temporarily suspended, but only after a

28 *Id*, art. 245(7);
29 Constitution of the Federal Republic of Nigeria, 1999, art. 215(1)(a) and 3rd Schedule, Part I, art. 28(a);
30 *Id*, 3rd Schedule, Part I, art. 30(a);
31 Constitution of Ghana, 1992, art. 89-92;
32 Police Service Act (South Africa), 1995, s. 8(1);
33 *Id*, s. 8(2);

fair hearing.[34] The inquiry report may recommend that no action to be taken, that the Commissioner in question be removed from the office or that other disciplinary measures short of removal to be taken. The list of the measures is exhaustive.[35]

Upon receipt of a recommendation, the President or the National Commissioner, as the case may be, may remove the Commissioner concerned from office, or take any other appropriate action. If the President or the National Commissioner, as the case may be, postpones his or her decision for a period, he or she must, at the end of such period, request the same board of inquiry, or a similar board established for that purpose, to compile a new report and to make a new recommendation after having considered the conduct of the Commissioner concerned during such period.[36]

Other good legislative examples abound. The established procedures in Northern Ireland and Canada demand and rely to a large extent upon civilian input. In these jurisdictions, local policing authorities (usually made up of both political and non-political locally elected members) are responsible for the appointment of the Head of Police, subject to ratification by the Minister in charge in some cases. The Authorities can call for suspension or early dismissal on public interest grounds. In New South Wales and Queensland (Australia), the process of appointment is also significantly collaborative, requiring input from civilian oversight bodies. The Commissioner of the Queensland Police Service, for instance, is appointed by the Governor in Council, on a recommendation agreed to by the chairperson of the Crime and Misconduct Commission.[37] The agreement of the Minister for Police for the state also has to be sought. In New South Wales, the Governor appoints the police chief on the recommendation of the State Police Minister, after the Police Integrity Commission and internal disciplinary department of the New South Wales Police

34 *Id*, s. 8(3) and (4);
35 *Id*, s. 8(6);
36 *Id*, s. 8(7);
37 Police Service Administration Act, 1990 (Queensland, Australia), s. 4.2(1);

have done a background check on the shortlisted candidate.[38] The Commission and the internal department have to submit a report of their findings to the Minister, and the Minister must then obtain a statutory declaration from the candidate that she/he has not knowingly engaged in any form of misconduct. The Crime and Misconduct Commission and the Police Integrity Commission are both independent civilian oversight bodies with vast powers over the police.

2.3 Independent, transparent and fair management of police

Independent, transparent and fair procedures of recruitment, appointment, promotion, transfer and disciplinary control must be put in place to avoid internal favouritism and external meddling in police administrative affairs.

Police Service Commissions (PSCs), a specific buffer body between the police and executive that exist in many jurisdictions, are often best placed to carry out this kind of *checks-and-balances* management of police. There are different models of buffer bodies, but all are policy-directing independent police oversight bodies to put some distance between the police and the Executive.

A properly functioning PSC is able to function independently, ensured through its representative composition. Police leadership, retired police officers, retired justices, as well as representatives of human rights interest groups, the organised private sector, women and media are usually asked to be members of PSCs. While the membership may be different from country to country, the key is to have a diverse Commission, representative of various societal groups, who are stakeholders in policing, including police themselves.

PSCs are usually responsible for recruitment, appointment, dismissal, transfer, promotion and disciplinary control over police officers. Above, we have discussed the policy-guiding role of these buffer bodies in Kenya and Ghana, but many other jurisdictions

38 Police Act, 1990 (New South Wales, Australia), s. 24(6a);

make this their function too. PSCs develop guidelines, so that police officers know "the rules of the game" and the public is confident in transparency of the procedures. For example, in 2015, the National Police Service Commission of Kenya developed and issued a set of guidelines on recruitment and appointment, transfers and deployments, as well as promotions. By developing guidelines like these, PSCs are contributing to setting higher standards in police as a whole.

Furthermore, some PSCs may have the power and capacity to receive complaints on police conduct, investigate these complaints and enforce any disciplinary measures it deems fit. This presupposes not only sufficient financial and human resources, but it should also have sufficient legal powers to exercise disciplinary control over police. These may include a power to gather and/or compel the production of information from police and government, conduct investigations on any matters within Commission's mandate (including on its own initiative), summon police officers and witnesses, hold disciplinary hearing proceedings, enforce disciplinary measures in court etc.

Kenya again offers a good example of setting up an elaborate legal framework on the management of the police. This task is vested in the independent National Police Service Commission (NPSC) that deals with recruitment, appointment, promotion and transfers within NPS, as well as, observing due process, exercising disciplinary control over and removal of delinquent police officers.[39] The Commission consists of 9 people: the IG and two of his deputies, three persons of integrity who served the public with distinction, two retired senior police officers and a person who is qualified to be appointed as a High Court Judge.[40] As there is a slight tilt in favour of non-police members in the composition of the NPSC, it is hoped this lays a secure foundation for the body's independent functioning.

39 Constitution of Kenya (2010), art. 246(3);
40 *Id*, art. 246(2);

The best example, however, comes from Nigeria. Nigeria's Police Service Commission is a unique hybrid oversight body with the potential to be one of the most powerful and autonomous civilian oversight institutions in the world, if strengthened and allowed to function as an independent organisation as laid down in the 1999 Nigerian Constitution.

The Commission has been in existence since 1960, but was awarded wider powers with a broader membership in the 1999 Constitution of the Federation. The membership of the Commission includes representatives of the human rights community, the organised private sector, women and the media, as well as a retired justice of a superior court, and only one retired police officer. According to the Constitution, the Commission has the power to appoint persons to offices (other than the office of the Inspector General of Police) in the Nigeria Police Force, (NPF) and to dismiss and exercise disciplinary control over persons holding police office.[41] Section 6 of The Police Service Commission (Establishment) Act, 2001 further charged the Commission with the responsibility of formulating the guidelines for the appointment, promotion, discipline and dismissal of officers of the NPF; for identifying factors inhibiting and undermining discipline in the NPF; for formulating and implementing policies aimed at efficiency and discipline within the NPF; for performing such other functions as, in the opinion of the Commission, are required to ensure optimal efficiency in the NPF; and carrying out such other functions as the President may from time to time direct. The power to dismiss and discipline individual police officers, coupled with the statutory obligation to establish an investigative department, provides the Police Service Commission with the ability and legal powers necessary to receive complaints on police conduct, investigate these complaints, and enforce any disciplinary measures it deems fit. It also has the powers to develop and implement policy for the

41 Constitution of the Federal Republic of Nigeria, 1999, 3rd Schedule, Part I, art. 30;

police force, making a significant contribution to setting higher standards in the force as a whole.

Ghana offers another example of a buffer body in the form of the Police Council. The Constitution stipulates that the Police Council exercises direction and control over the Inspector-General.[42] The Police Council plays a paramount role in the appointment of police officers. The Constitution vests this power in the President, who, however, must act in accordance with the advice of the Police Council.[43] The Council consists of the Vice-President, the Minister responsible for internal affairs; the Inspector-General; the Attorney-General; a lawyer nominated by the Ghana Bar Association; a representative of the Retired Senior Police Officers' Association; two members of the Police Service, appointed by the President, acting in consultation with the Council of State, one of whom shall be of a junior rank; and two other members appointed by the President.[44] It should be noted that the composition of Ghana's Police Council does not feature broad representation, a limitation in terms of being a model buffer body.

The power of political will: Kenyan experience

In spite of systemic and holistic reform, Kenya continues to experience concerted political effort to interfere with the functional autonomy of the NPS. For instance, in 2014, a wave of police recruitment was challenged in court and subsequently nullified because of corruption and violations of law and procedure that took place, but the President, in circumvention of his Constitutional mandate and the court order, directed the recruits to present themselves to police colleges anyway. Furthermore, to get more control over the police, the ruling coalition amended police laws twice in 2014 alone. The Security

42 Constitution of Ghana, 1992, art. 202(2);
43 *Id*, art. 202(3);
44 *Id,* art. 201;

Laws (Amendment) Act (2014) did away with independent procedures to appoint and remove the Inspector-General (IG). A new IG was appointed by the President with a nod from the Parliament shortly afterwards.

In another recent development, the President singlehandedly sacked Deputy IG Grace Kaindi in violation of the Constitution and police laws, which led to another court battle against the administration. The outcome is yet to be seen, but the ruling coalition wastes no time – on 1st October 2015 a new Bill was tabled in the Parliament to change police laws again, this time giving the President full powers to appoint and dismiss four senior most police officers – IGP, Deputy IGPs and Director of Criminal Investigations Department. The Bill sought to further entrench the Executive's control over the Independent Policing Oversight Authority (IPOA) by giving the president the power to remove members of the body's governing Board. The Bill was defeated, but it illustrates the length the Executive is willing to go to establish full control over the police.

These developments underscore the importance of political will to respect laws and policies that enshrine measures and processes to help keep the police independent from external interference. They also signal the importance of monitoring by the judiciary, independent oversight bodies, civil society, media and the public at large to ensure the police's and executive's respect of and compliance with newly set legal and policy frameworks.

2.4 Adequate financial resources

Sufficient resources for policing is of major importance to prevent illegitimate interference into police's operational matters. To this end, sources of funds should be well-defined and publicly disclosed, while adequate funds should be allocated to the police by the government. Statutorily secured remuneration levels

should also be ensured, the importance of which was pointed out by South African Constitutional Court in *Glenister v. President of the Republic of South Africa and others*.[45]

This goes hand in hand with the obligation of the police to report periodically on expenditure of funds, usually to the Parliament on a yearly basis. Also, as a state institution police must undergo periodic auditing by an independent office of Auditor General, a practice that is observed methodically and rigorously in Tanzania.

The responsibility of the state to provide the police with adequate financial resources is enshrined in policing laws of many jurisdictions. For example, Kenya's National Police Service Act, 2011 obliges the National Assembly to allocate adequate funds to enable the Service to perform its functions and to have a separate vote to this end. At the same time, the Inspector-General must ensure that every police station, post, outposts, unit, unit base and county authority is allocated sufficient funds to finance its activities.[46]

The Act also defines two legitimate sources of the Service's funds: funds allocated by the National Assembly for the purposes of the Service; and such funds as may be lawfully granted, donated or lent to the Service from any other source, with the approval of the Cabinet Secretary responsible for internal affairs and the Cabinet Secretary responsible for finance.[47] Similarly, in Rwanda, the law exhaustively defines the sources of police's financing. They are the State budget allocation; income from its services; interest from its projects; donation and bequest; State or donors subsidies.[48]

45 *Glenister v. President of the Republic of South Africa and others,* Case CCT 48/10 [2011] ZACC 6;

46 National Police Service Act (Kenya), 2011, s. 116;

47 National Police Service Act (Kenya), 2011, s. 117;

48 Law Determining the Powers, Responsibilities, Organization and Functioning of the Rwanda National Police (Rwanda), 2010, s. 43;

3 Implementation in Tanzanian context

The Constitution of Tanzania establishes and recognises the police though it has grouped it and combined it with the armed forces, which in itself is problematic. Constitutional regulation of police and policing is lacking, leaving it to the Police Force and Auxiliary Services Act (2002, Police Act) and other laws. This is not a preferable arrangement since the law is easier to amend than the Constitution. Therefore, central principles of operational independence should be enshrined in the Constitution and operationalised in the law.

Currently, the Police Force and Auxiliary Services Act vests power in the Minister for Home Affairs to direct and order the Inspector-General of Police (IGP) in matters of "operational control".[49] For clarity, the Section is reproduced below;

> 7.-*(1) The Inspector-General shall,* ***subject to any orders or directions by the Minister as to the operational control of the Force****, have the command, superintendence and direction of the Force.(Emphasis is ours)*

Operational control is not defined in the Act, and so it is possible that the Minister could improperly influence everyday police activities such as investigations or arrests. In addition to the undefined "operational control" which the Minister has over the police, the Minister also has the power to order the police to arrest and detain a person indefinitely underneath section 2 of the Preventive Detention Act, 1962. It has also been pointed out that the independence of the police at the regional and district levels is compromised, as the police can be directed by Security Committees for the relevant region or district, which is chaired by a Regional and District Commissioner respectively who are political appointees.[50]

49 Police Force and Auxiliary Services Act, CAP 322, s. 7;

50 "Tanzania Human Rights Report 2012", Legal and Human Rights Centre and Zanzibar Legal Services Centre, 2013, p. 220.

Presently, the President of the United Republic of Tanzania has the power to appoint, promote and discipline (including dismiss) police officers from the rank of Senior Assistant Commissioner of Police to IGP.[51] There appears to be no selection criteria for appointments, meaning that the President can appoint a person to the senior leadership of the police at his discretion. Additionally, there is no set term of office for the IGP, vesting all power in the President to dismiss or retain the IGP. Ideally, these senior officers should only be removed on disciplinary or incapacity charges after they have had a chance to be heard, however the final authority rests with the President. This Presidential control over the appointment, discipline and removal of the senior leadership of the police reduces the ability of these officers to act independently.

Police officers of the rank of Assistant Inspector to Assistant Commissioner of Police are meant to be appointed, promoted or otherwise confirmed in other postings by the Police Force and Prisons Service Commission.[52] The Commission comprises of ministerial staff, senior officers of the police and prison service, and two members appointed directly by the Minister for Home Affairs.[53] The Commission's functions are of advisory nature,[54] and to become a fully-fledged buffer body it needs more autonomy and broader representation of its membership from other constituencies as shown earlier.

All officers below the rank of Assistant Inspector are appointed, promoted or otherwise confirmed in postings by the IGP, in a manner that the Minister directs.[55] In practice, the junior officers are transferred or promoted in accordance with their performance, which is assessed by their managing supervisor once a year, and approved by the IGP.

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51 Police Force and Prisons Service Commission Act, 1990, s. 6(2) and 7(2);
52 *Id*, s. 6(3);
53 *Id*, s. 4;
54 *Id*, s. 5;
55 *Id*, s. 12;

Consequently, the President, the Minister for Home Affairs, and the IGP control police promotions and transfers of senior officers, and the IGP and senior police officers control the transfer and promotion of juniors. This process is adequate, but it lacks fair and transparent procedures to prevent arbitrary decisions.

Additionally, previously transfers and promotions were not based on standard performance assessments and set criteria, and could be quite a subjective process. The Tanzania Police Force (TPF) Reform Programme that has been instituted has tried to improve these processes, and the TPF has reportedly developed some criteria and guidelines for recruitment and promotion of officers. It is unclear if these guidelines are followed however, or the performance management process overseen in any way.[56] This could lead to abuse of the promotion and transfer system by senior officers who evaluate and confirm the performance of juniors, resulting in incompetent police officers being promoted to the wrong positions.

TPF officers have complained of: non-payment of entitlements; not being promoted for a long time; remaining at one police station without transfer for a long period; not being provided with opportunities to study and raise skills; and that disciplinary measures outlined in the Police Service Regulations are unfair towards junior officers.[57]

56 Ministry of Home Affairs, Tanzania Police Force, "Tanzania Police Force Reform Programme: Medium Term Strategy 2010/11 – 2014/15", May 2010, p. 10;

57 "Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002-2012", Commission for Human Rights and Good Governance, 2012, p. 40;

Greater checks and balances through the Constitutional review process

In the second draft Constitution tabled before the Constituent Assembly, several important proposals to improve the situation with operational independence of the police were made. Thus, IGP's independent command was clearly and unequivocally spelt out in article 246: "*The Inspector General of Police shall implement his functions independently, without fear, favour or bias and in accordance with the provisions of this Constitution and the laws of the country.*"

In the second draft Constitution, the IGP's appointment procedure is similar to the Nigerian model: the head of the police is to be appointed by the President after consultation with the National Defence and Security Council, consisting of top-level government officials in the matters of defence and security.[58] Political neutrality of the police was also codified by prohibiting police officers to promote the interests of any political party or its policies and to sabotage political interests or political programmes,[59] which is alarmingly legitimate under the current Constitution.

The second draft Constitution also envisaged the establishment of a Police Force Service Commission, which is "responsible for overseeing public service in the Police Force".[60] Only recruitment is clearly made a function of the Commission by the draft Constitution, while the Commission's structure and implementation of the Commission's functions is left to subsequent legislation to be adopted by the Parliament.[1561]

58 Second Draft Constitution, art. 237 and 245;
59 *Id*, art. 236(3)(b) and (c);
60 *Id*, art. 247(1);
61 Second Draft Constitution, art. 247(2) and (3);

Unfortunately, the proposed Constitution did away with *all* of these proposals, save for political neutrality.

Situation with adequate financial resources too remains wanting. The Police Force has serious budgetary constraints, which affect their efficiency, effectiveness and overall ability to control crime. These constraints have reportedly led to: inability to respond in a timely manner due to a lack of vehicles; the hiring of personnel with inadequate professional skills; lack of basic equipment at the station level and during investigations; poor morale of police officers owing to inadequate living conditions and low salaries.[62] As an illustration, Legal and Human Rights Centre quotes one Officer Commanding the District, who admits that these constraints "lead to us selling our autonomy to ensure justice prevails and, as such, favour those who donate towards our cause".[63]

This resonates with the findings of the Commission for Human Rights and Good Governance. After inspecting 255 police stations between 2002 and 2012, the Commission found that:

- Most stations do not have reliable means of transport and hence face problems in transporting suspects, attending calls for assistance and investigating crimes;
- There is a shortage of accommodation for police officers, and those that do exist are in need of repair;
- Although there are separate cells for men and women, there are no separate cells for children as required under law, and so children are often detained with adults;
- In some cases, the cells are overcrowded and too small for the number of detainees;
- Some cells had poor ventilation and inadequate lighting, and most cells still used buckets as toilets, and had problems accessing safe drinking water;

62 "Tanzania Human Rights Report 2012", Legal and Human Rights Centre and Zanzibar Legal Services Centre, 2013, p. 221;

63 *Id*, pp. 222-223;

- There was often a shortage of police officers to staff the station, and a lack of sufficient equipment.[64]

4 RECOMMENDATIONS

Provided below is the summary of this discussion as applicable to the Tanzanian context.

Appropriate legal framework

The legal framework must explicitly define the specific roles of the police and the political executive. We recommend the following language to be adopted:

1. The supervision, direction and control of the police throughout the State should, be vested on the Inspector-General of Police (the formulation in the second draft Constitution provides a good example).

2. The Inspector-General of Police should be responsible to the Minister for
   a. carrying out the functions and duties of the Police;
   b. the general conduct of the Police;
   c. the effective, efficient, and economical management of the Police;
   d. tendering advice to the Minister;
   e. giving effect to any lawful ministerial directions.

3. The Inspector-General of Police should not be responsible to, and must act independently of the Minister regarding:
   a. the maintenance of order in relation to any individual or group of individuals;
   b. the enforcement of the law in relation to any individual

64 "Ten Years of the Commission for Human Rights and Good Governance: Reflection of a Journey 2002-2012", Commission for Human Rights and Good Governance, 2012, pp. 39-40.

or group of individuals;
c. the investigation of offences; and
d. decisions about individual Police officers.

4. The Minister may give the Inspector-General of Police directions in writing on matters of Government policy.
5. No direction from the Minister to the Inspector-General of Police should have the effect of requiring non-enforcement of a particular area of law.

6. The Minister or any other person must not give directions to the Inspector-General of Police in relation to the following:
   a. enforcement of the criminal law in particular cases and classes of cases;
   b. matters that relate to an individual or group of individuals; and
   c. decisions on individual members of the police.

Independent police Leadership

The Constitution and police laws must entrench robust checks in the procedure to appoint and remove the Inspector-General of Police, in order to ensure the independence and impartiality of the Police Force:

1. The Constitution should state that the Parliament should approve the candidate for Inspector-General of Police before the person is appointed by the President.

2. Selection criteria must be developed and integrated into the Police Act. We suggest that a person is qualified for the position of Inspector-General of Police if the person:
   a. Is a Tanzanian citizen;
   b. Holds degree from a university recognised in Tanzania;
   c. Demonstrates the length of service and range of experience required;
   d. Meets the requirements of professionalism and

integrity;

e. Has never been indicted in a disciplinary proceeding or convicted of any criminal offence;

f. Has served in the Police Force for at least fifteen years and has knowledge and experience in matters relating to any of the following disciplines:
   i. Criminal justice;
   ii. Policy development and implementation;
   iii. Finance and public administration;
   iv. Strategic management;
   v. Security;
   vi. Law;
   vii. Sociology; or
   viii. Government.

3. The Constitution should clearly set out the grounds upon which the Inspector-General may be removed, to ensure transparency and accountability in any such decision. South African model serves as a good example in this regard, but ideally there should be provision for parliamentary involvement in any attempt to remove the Inspector-General before the conclusion of his or her term of office.

4. As well as security of tenure, the Constitution should stipulate a fixed term of office for the Inspector-General of Police. With job security, the head of the Police Service is more likely to prioritise the rule of law and the interests of the Tanzanian people over the demands of powerful individuals outside the regular chain of command. It is recommended that the Constitution should allow for an initial term of four years, renewable once for a maximum tenure of eight years.

5. Recognistion by the law of newly and recently established departments in the Police Force. Such include the Forensic Bureau among others so as to give their undertakings the

force of law and enforceability and admissibility of their products.

Independent, transparent and fair management of police

An independently functioning, effective Police Force Service Commission is required to ensure independence and impartiality in police employment matters, discipline, training and professional standards. The Constitution should reflect the recommendations set out below:

1. Establish a Police Force Service Commission in the Constitution.

2. A separate law to govern the Police Force Service Commission should be drafted and passed. Alternatively, reform the Police Force and Prisons Service Commission Act, 1990 in line with the recommendations below.

3. Commission's members should be appointed through open, competitive and transparent process by the President subject to confirmation by the Parliament.

4. The Commission should consist of:
   a. A person qualified to be appointed as a High Court Judge;
   b. The Inspector-General of Police;
   c. One junior and one senior police officers in service;
   d. One representative each of
      i. organised women interest groups;
      ii. Tanganyika Law Society;
      iii. Zanzibar Law Society;
      iv. non-governmental human rights organisations in Tanzania; and
      v. organised Private Sector.
   e. Other qualified candidates of integrity who have had a distinguished career;

5. In addition to establishing the Commission, the Constitution should state the broad functions of the Commission as follows:
    a. Oversee the recruitment and appointment of members of the police;
    b. Oversee the management of other employment matters, including deciding promotions, demotions, transfers, dismissals;
    c. Oversee internal discipline of the police service;
    d. Oversee police training; and
    e. Oversight and entrenchment of professional standards;
    6. The public should be confident in the Commission. To this end the Commission should develop internal strategies and mechanisms on how to publicise and otherwise handle the information about Commission's work.

Adequate financial resources

The Constitution or the Police Act should have clear regulations regarding adequate police funding. The law should stipulate sources of police's financing. They should include state budget allocations and lawful donations. They also may include income from police's services and interest from police's projects, following Rwandese model.

At the same time, it should be spelled out that it is the responsibility of the Inspector-General of Police and the Minister for Home Affairs to ensure police headquarters, zonal, regional, units, districts, and stations are allocated sufficient funds to finance its activities.

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