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## There and Back Again? Police Reforms Through the Prism of the Recruitment Decisions in the High Court and the Court of Appeal

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THERE AND BACK AGAIN? POLICE REFORMS THROUGH  
THE PRISM OF THE RECRUITMENT DECISIONS IN THE  
HIGH COURT AND THE COURT OF APPEAL

FESTUS M. KINOTI\*

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INTRODUCTION

On June 30, 2014, the National Police Service Commission, [hereinafter NPSC or the Commission] in exercise of its powers under Article 246 of the Constitution of Kenya 2010, put out an advertisement in the local dailies seeking to recruit 10,000 suitable

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and qualified candidates as police constables.<sup>1</sup> The recruitment exercise was to be carried out nationwide in all 294 recruitment centres on July 14, 2014.<sup>2</sup> This was to be the largest National Police Service recruitment exercise in the country's history.<sup>3</sup> After the exercise, a plethora of complaints arose regarding the manner in which the exercise was carried out.<sup>4</sup> In particular, allegations of massive corruption were made against the sub-county recruitment committees, which were entities set up by the Commission at sub-county levels to conduct the recruitment exercise at the centres.<sup>5</sup>

Following receipt of these complaints and on the basis of its own observations from monitoring the exercise, the Independent Policing Oversight Authority (IPOA), a state agency established under the Independent Policing Oversight Authority Act of 2011<sup>6</sup> with an oversight mandate over the National Police Service,<sup>7</sup> recommended the Commission cancel the entire exercise and conduct fresh recruitment.<sup>8</sup> The Commission declined to repeat the exercise and instead formed a multi-agency working committee to investigate the claims.<sup>9</sup> The working committee released its report in which it recommended nullification of the exercise in only thirty-six of the 294 centres.<sup>10</sup>

Dissatisfied with the position adopted by the Commission, IPOA filed a petition before the High Court seeking, *inter alia*, nullification of the entire recruitment exercise.<sup>11</sup>

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1. See Cyrus Ombati, *National Police Service Commission to recruit 10,000 police officers*, STANDARD (June 30, 2014), [http://www.standardmedia.co.ke/article/2000126487/national-police-service-commission-to-recruit-10-000-police-officers?articleID=2000126487&story\\_title=national-police-service-commission-to-recruit-10-000-police-officers&pageNo=1](http://www.standardmedia.co.ke/article/2000126487/national-police-service-commission-to-recruit-10-000-police-officers?articleID=2000126487&story_title=national-police-service-commission-to-recruit-10-000-police-officers&pageNo=1) [https://perma.cc/PG4W-H8CW]; CONSTITUTION art. 246 (2010) (Kenya).

2. *Statement By The National Police Service Commission On The Audit Of The Police Constables Recruitment Exercise Held On 14th July 2014*, REPUBLIC OF KENYA NAT'L POLICE SERV. COMM'N (Aug. 12, 2014), <http://www.npsc.go.ke/index.php/latest-news/135-statement-by-the-national-police-service-commission-on-the-audit-of-the-police-constables-recruitment-exercise-held-on-14th-july-2014> [https://perma.cc/AU69-5BD2] [hereinafter *Statement by the NPSC*].

3. *Thousands turn up to join police service*, DAILY NATION (July 14, 2014), <http://www.nation.co.ke/news/Thousands-turn-up-to-join-police-service/1056-2383266-6rnf5z/index.html> [https://perma.cc/S728-H8YX].

4. See *Statement by the NPSC*, *supra* note 2.

5. See *id.*

6. The Independent Policing Oversight Authority Act (2011) Cap. 88 § 3(1) (Kenya).

7. *Id.* § 5.

8. See *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 3 (H.C.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/103031> [https://perma.cc/6J63-SVB8].

9. *Joint Statement On The Police Recruitment Exercise*, NAT'L POLICE SERV. COMM'N, <http://www.npsc.go.ke/index.php/latest-news/132-joint-statement-on-the-police-recruitment-exercise> [https://perma.cc/AE7V-ELP2].

10. See *Statement by the NPSC*, *supra* note 2.

11. See *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 6 (H.C.K.) (Kenya).

On October 31, 2014, the High Court delivered its decision in which it nullified the entire recruitment exercise.<sup>12</sup> The court then directed that a fresh recruitment exercise be conducted in tandem with the provisions of the Constitution and the National Police Service Commission Act.<sup>13</sup> Dissatisfied with the judgment of the High Court, the Commission lodged an appeal before the Court of Appeal.<sup>14</sup> However, before the Court rendered its decision, following pressure from the executive, the Commission conducted another recruitment exercise on April 20, 2015.<sup>15</sup>

The Court of Appeal, on May 8, 2015, rendered its judgement on the 2014 recruitment exercise in which it upheld the High Court decision and dismissed the appeal.<sup>16</sup>

The case before the High Court and the Court of Appeal raised important legal issues that impact police reforms in Kenya, in particular, the High Court considered issues regarding transparency, accountability, public participation, and discrimination of women in the recruitment of police officers.<sup>17</sup> Both the High Court and Court of Appeal considered the question of delegation of constitutional powers and whether recruitment powers constitutionally reposed upon the Commission could be delegated to other entities.<sup>18</sup>

This Article analyzes the courts' determinations on these key legal issues that were canvassed before both the High Court and the Court of Appeal. In light of that analysis, this Article interrogates how the courts' determinations impact police reforms in Kenya, in particular with regard to recruitment of police officers.

The first part of the article, therefore, briefly looks at police reforms in Kenya, focusing on the recruitment of police officers as a key pillar of police reforms and the rationale behind reforms to the recruitment process.

The second part of the article looks at the recruitment case before the High Court and the Court of Appeal. The paper focuses on key legal issues that came up before the courts, impacting police reforms, transparency, accountability, public participation, discrimination,

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12. *See id.* at para.128(b).

13. *Id.* at para. 128(f).

14. *See* Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/109146/> [<https://perma.cc/VD8T-EL8A>].

15. *See* Kenya Police recruitment kicks off countrywide, STANDARD DAILY (Apr. 21, 2015), <http://www.standardmedia.co.ke/article/2000159179/kenya-police-recruitment-kicks-off-countrywide> [<https://perma.cc/2W4Q-P9X6>].

16. *See* Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

17. *See* Indep. Policing Oversight Auth. v. Att'y Gen. (2014) eK.L.R. at para. 47 (H.C.K.) (Kenya).

18. *See* Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya); Indep. Policing Oversight Auth. v. Att'y Gen. (2014) eK.L.R. at para. 47 (H.C.K.) (Kenya).

and delegation of constitutional powers, and how the courts analyzed and dealt with these issues.

The third part considers how the courts' determinations have impacted police reforms with regard to recruitment, especially in view of the subsequent recruitment exercises carried out in 2015, 2016, and 2017.

The last part of the paper concludes by investigating whether the intended entrenchment of the reforms in the recruitment of members of the police service was achieved through the petition or if it was a case of there and then back again.

### I. BACKGROUND: POLICE REFORMS IN KENYA

The Kenyan police, similar to other institutions created during the colonial period, drew its character and *modus operandi* from the dictates of colonialism.<sup>19</sup> The Kenyan police especially was a force designed to aid the colonial administration in crushing civilian resistance to British colonial rule.<sup>20</sup> For instance, the use of the police in the torture and extrajudicial killings of persons perceived to be Mau Mau and their sympathizers is now well documented in the Pulitzer prize-winning book by Caroline Elkins, *Britain's Gulag*.<sup>21</sup> The police were therefore perceived as an appendage of British oppression in Kenya.<sup>22</sup>

The relationship between the Kenyan public and the police, however, did not markedly change post-independence.<sup>23</sup> The successive post-independence governments, instead of engaging in the arduous task of nation-building in a state comprised of multiethnic, multireligious societies, welded together into a state only through an oppressive colonial project; they found it easier to use the police in doing the executive's bidding in a bid to aggrandize and collate power.<sup>24</sup> The use of the police in extrajudicial killings, torture, and other acts of gratuitous violence thus continued to be associated with the police even post-independence.<sup>25</sup> Additionally, similar to any other institution that operates in opacity, corruption also started gnawing at the heart of the police.<sup>26</sup> Soon corruption became the

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19. See PHILLIP RANSLEY, REPORT OF THE NATIONAL TASK FORCE ON POLICE REFORMS 13 (2009) [hereinafter RANSLEY REPORT].

20. See *id.* at 14.

21. See CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA 312–14 (2005).

22. See RANSLEY REPORT, *supra* note 19, at 182.

23. See *id.* at 15.

24. See *id.* at 15–16.

25. See *id.* at 88.

26. See *id.* at 98.

hallmark of the police, with the police force being consistently ranked as the most corrupt institution in Kenya.<sup>27</sup> The police force was thus in dire need of reforms.

K.R. Hope, Sr. notes that global “demands for police reforms and accountability are . . . made as a result of crisis of confidence in the police.”<sup>28</sup> Kenya’s 2007–2008 post-election violence was an event that shattered any remnants of public confidence in the police, and the conclusions by the Commission of Inquiry into the Post-Election Violence [hereinafter referred to as the Waki Commission] on police conduct during the violence were damning.<sup>29</sup> The Waki Commission found that the police had not only fantastically failed to adequately protect Kenyans, but had themselves been involved in the commission of egregious crimes during that period, including rape, murder, and theft.<sup>30</sup> The Waki Commission further found that the policies, system, and procedures meant to respond to complaints against the police themselves and to deal with other perpetrators of violence were outdated and did not work, thus further exacerbating the sorry state of the police in Kenya.<sup>31</sup> The post-election violence was thus not only an event in which policing in Kenya failed catastrophically, but it was also a watershed moment that fully laid bare the rot that had been eroding any remnants of professionalism and accountability in the police since independence and also brought to the forefront the urgent need for wholesale reforms in the police.<sup>32</sup> Inclusion of police reforms as part of the Agenda Four items in the National Accord and Reconciliation Agreement between parties that ended the post-election violence was, therefore, no surprise.<sup>33</sup> The subsequent appointment of the National Task Force on Police Reforms (NTFPR or Ransley Task Force) was the beginning of a badly needed wholesale police reform process.<sup>34</sup> The report that emanated from the task force,

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27. See, e.g., TRANSPARENCY INT’L—KENYA, CORRUPTION IN KENYA: FINDINGS OF AN URBAN BRIBERY SURVEY 6 (2001); TRANSPARENCY INT’L—KENYA, THE KENYA BRIBERY INDEX 9 tbl. 8 (2005); TRANSPARENCY INT’L—KENYA, CORRUPTION IN KENYA: FINDINGS OF AN URBAN BRIBERY SURVEY 9 (2006); TRANSPARENCY INT’L—KENYA, THE KENYA BRIBERY INDEX 12 tbl. 8 (2007); TRANSPARENCY INT’L, THE EAST AFRICAN BRIBERY INDEX 15 (2011).

28. Kempe Ronald Hope, Sr., *In pursuit of democratic policing: An analytical review and assessment of police reforms in Kenya*, 17 INT’L J. POLICE SCI. & MGMT. 91, 96 (2015).

29. See PHILIP N. WAKI, REPORT OF THE COMM’N OF INQUIRY INTO THE POST ELECTION VIOLENCE 416–27 (2008), [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf) [<https://perma.cc/ZZW6-MRKC>] [hereinafter WAKI REPORT].

30. See *id.* at 421.

31. See *id.* at 424.

32. See *id.* at ix.

33. See RANSLEY REPORT, *supra* note 19, at 1–3.

34. See *id.* at 3.

commonly known as the Ransley Report, provided the blueprint for police reforms in Kenya.<sup>35</sup> These reforms would entail structural and legal reforms, as well as policy shifts, to transform what was a force beholden to the executive into a police service beholden to democratic policing ideals.<sup>36</sup>

## II. RECRUITMENT AS A KEY PILLAR OF POLICE REFORMS IN KENYA

The Independent Policing Oversight Authority (IPOA) and the Commission were both born out of these structural and legal reforms.<sup>37</sup> IPOA was created out of a necessity to have civilian oversight over police conduct.<sup>38</sup> The police had previously been remiss to investigate cases of misconduct by fellow police officers, and the issue finally came to the fore during the post-election violence.<sup>39</sup> Many victims of alleged rape and other forms of sexual and gender-based violence and extrajudicial killings by the police were simply turned away from police stations with the police reluctant to investigate the alleged cases of massive criminal conduct by fellow police officers.<sup>40</sup> Consequently, in 2011, following recommendations in both the Waki<sup>41</sup> and the Ransley Reports,<sup>42</sup> the IPOA was established via the IPOA Act of 2011,<sup>43</sup> and the inaugural board took office in 2012.<sup>44</sup> IPOA was thus created to, *inter alia*, investigate cases of misconduct by the police and make recommendations, including prosecution.<sup>45</sup> The mandate of the IPOA is, however, wider than only investigative.<sup>46</sup> It also includes giving effect to Article 244 of the Constitution, which aims at embedding in the police service qualities such as professionalism, discipline, transparency, and accountability.<sup>47</sup>

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35. *See id.* at xxviii–xxix.

36. *See id.* at 97.

37. *See* RELEASE POLITICAL PRISONERS TRUST, YOUR GUIDE TO: THE NATIONAL POLICE SERVICE ACT, THE NATIONAL POLICE SERVICE COMMISSION ACT AND THE INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (2012), [http://humanrightsinitiative.org/publications/police/CHRI%20and%20RPP%20Guide%20to%20the%20new%20Kenya%20Police%20Laws\\_Final.pdf](http://humanrightsinitiative.org/publications/police/CHRI%20and%20RPP%20Guide%20to%20the%20new%20Kenya%20Police%20Laws_Final.pdf) [<https://perma.cc/A7X5-FKVG>].

38. The Independent Policing Oversight Authority Act (2011) Cap. 88 (Kenya).

39. *See* WAKI REPORT, *supra* note 29, at 420.

40. *See id.* at 420–21.

41. *See id.* at 434.

42. *See* RANSLEY REPORT, *supra* note 19, at 246.

43. The Independent Policing Oversight Authority Act (2011) Cap. 88 § 3(1) (Kenya).

44. *See* Independent Policing Oversight Authority, <http://www.ipoa.go.ke> [<https://perma.cc/X263-XAAZ>].

45. *See* The Independent Policing Oversight Authority Act (2011) Cap. 88 § 6(a) (Kenya).

46. *See id.* § 6.

47. *Id.* § 5(b).

The history of political manipulation and executive control of the police, especially through recruitment, transfers, disciplinary processes, and setting other conditions of service, formed the main rationale for the establishment of the National Police Service Commission.<sup>48</sup> The Ransley Report noted that one of the major problems with the police force, as it then was, was that it was beholden to political forces in power.<sup>49</sup> The report noted that the Independence Constitution had sought to insulate the police from political interference by creating a Police Service Commission whose members enjoyed security of tenure and which was responsible for, *inter alia*, salaries, allowances, qualifications, and other conditions of service.<sup>50</sup> However, in 1964, the Constitution was amended, the Police Service Commission was abolished, and the police were placed under the Public Service Commission, thus the police became an extension of the civil service.<sup>51</sup> The report notes that this then was “the beginning of a culture of political manipulation and control of the Police Force by the Executive.”<sup>52</sup>

One of the ways in which this manipulation and control manifested was in the recruitment of police officers.<sup>53</sup> Pursuant to Section 108 of the repealed Constitution, appointment of police officers below the rank of Assistant Inspector of Police was vested in the Commissioner of Police.<sup>54</sup> The Commissioner was himself an appointee of the President and held office at the mercy of the appointing authority.<sup>55</sup> The Commissioner, in turn, delegated recruitment at various levels to his subordinates who were also beholden to the executive and other powerful personalities.<sup>56</sup> Consequently, recruitment exercises of members of the police became synonymous with unethical practices, with tribalism, nepotism, corruption and other malpractice being the popular bywords descriptive of these exercises;<sup>57</sup> yet ironically, those recruited in exercises replete with unethical practices were themselves expected to be the vanguards of the rule of law.<sup>58</sup> The public, thus, lost confidence in the police from the initial process of recruiting members into the force.<sup>59</sup>

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48. See RANSLEY REPORT, *supra* note 19, at 45.

49. *See id.*

50. *See id.*

51. *Id.*

52. *Id.*

53. *See id.* at 47.

54. CONSTITUTION art. 108(2)(b) (2009) (Kenya) (repealed).

55. *See id.* at art. 108(1).

56. *See id.* at art. 108(2)(b).

57. See RANSLEY REPORT, *supra* note 19, at 102.

58. *See id.* at 98.

59. *See id.* at 80.

Consequently, reform of the police had to begin with the recruitment of members of the service, as the Ransley Report rightly noted, “recruitment is the bedrock of a solid and professional police service.”<sup>60</sup>

The proposal for the establishment of the Commission thus drew from the need to de-link the police from political influence and to professionalize it from a force into a service that could reclaim public confidence.<sup>61</sup> One of the major functions of the Commission is to carry out recruitment of members of the National Police Service.<sup>62</sup> Recruitment powers were, therefore, to be entirely removed from the Public Service Commission and the Commissioner of Police and vested on the NPSC.<sup>63</sup>

The NPSC was finally established in the Constitution of Kenya 2010, Article 246 as an independent constitutional commission.<sup>64</sup> Its functions include recruiting police officers, confirming appointments, promotions, transfers within the service, and exercising disciplinary control over police officers.<sup>65</sup> The Commission consists of eight commissioners:

- (i) a person who is qualified to be appointed as a High Court Judge;
- (ii) two retired senior police officers; and
- (iii) three persons of integrity who have served the public with distinction;
- (b) the Inspector-General of the National Police Service; and
- (c) both Deputy Inspectors-General of the National Police Service.<sup>66</sup>

On September 30, 2011, the National Police Service Commission Act was assented to and commenced on October 10, 2011.<sup>67</sup> The intention of the Act was to, *inter alia*, make further provisions for the functions and powers of the Commission.<sup>68</sup> However, as shall be discussed below, the Act expands the powers of the Commission beyond the remits of what Article 246 of the Constitution provides.<sup>69</sup>

Reforms of the recruitment process, however, were not just limited to the entity that would conduct the recruitment exercise, but

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60. *See id.* at 98.

61. *See id.* at 80.

62. *See id.* at 109.

63. *See* RANSLEY REPORT, *supra* note 19, at 109.

64. CONSTITUTION art. 246 (2010) (Kenya).

65. *See id.* § 3.

66. *See id.* § 2(a).

67. The National Police Service Commission Act (2012) Cap. 185C (Kenya).

68. *Id.*

69. *See id.* §§ 10, 11.

also the manner the exercise was to be carried out.<sup>70</sup> The Ransley Report noted that in Kenya the recruitment exercise had become a one-day event characterized by nepotism, political patronage, favoritism, and bribery, thus further casting doubt on the recruiters' abilities to verify and scrutinize the suitability of potential recruits to join the service.<sup>71</sup> The report concluded that there were a large number of police officers who gained entry into the police without requisite qualifications.<sup>72</sup> The effect of this was police officers who were not "professionally loyal to the police services nor patriotic to their calling and country."<sup>73</sup> Following bench marking visits to Botswana, Sweden, and the United Kingdom, the report concluded that in countries with professional police services, the recruitment exercise was a process aimed at getting the best to join the police service.<sup>74</sup> The process also enabled the recruiting agency to be able to sufficiently vet and scrutinize those joining the service, thus ensuring only highly qualified persons joined the police.<sup>75</sup> Consequently, the report recommended that the recruitment exercise be a three stage process that included written applications, oral interviews, and vetting by the Commission.<sup>76</sup>

Reform of the recruitment of police officers was, therefore, an integral aspect of police reforms. Consequently, the question of whether the recruitment exercise of 2014, the largest exercise in the country's history, met constitutional requirements in terms of who actually carried out the exercise and the process through which the exercise was carried out, were important questions placed before the courts.<sup>77</sup> Consequently, the courts' determinations on these issues has an impact on police reforms in Kenya.

### III. THE RECRUITMENT CASE BEFORE THE COURTS

As aforesaid, the recruitment Petition Number 390 of 2014 was lodged by IPOA following the refusal by the Commission to cancel and repeat the entire recruitment exercise carried out in 2014.<sup>78</sup> The Petition sought nullification of the entire exercise and a repeat of

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70. *Id.* §§ 10(1)(e)–(n).

71. *See* RANSLEY REPORT, *supra* note 19, at 101–02.

72. *Id.* at 102.

73. *Id.*

74. *See id.* at 103.

75. *Id.*

76. *Id.* at 109–10.

77. *See* discussion of court cases, *infra* Part III.

78. *See* *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 3 (H.C.K.) (Kenya).

the same in line with constitutional requirements.<sup>79</sup> The Petition was also consolidated by the court with other petitions, which were mostly petitions by successful candidates from the thirty-six recruitment centres whose results were ultimately cancelled by the Commission.<sup>80</sup> These petitioners sought a reversal of the Commission's decision urging, *inter alia*, denial of their rights to fair administrative action in the manner the Commission arrived at its decision.<sup>81</sup> These petitions were therefore all heard together under the parent Petition number 390 of 2014.<sup>82</sup>

### *A. Before the High Court*

With regard to the process of recruitment, there were four main issues raised before the High Court:

- (1) Whether the recruitment exercise was carried out without any guidelines and regulations
- (2) Whether the alleged recruitment guidelines for police constables were made public
- (3) Whether the recruitment guidelines for the police constables were enacted without prior public participation
- (4) Whether there was discrimination of women in the recruitment exercise.<sup>83</sup>

With regard to the entity that actually conducted the exercise, the key issue was whether the Commission acted illegally and in contravention of the Constitution in delegating its powers to sub-county recruitment committees to conduct the recruitment exercise.<sup>84</sup>

#### *1. Transparency, Accountability, and Public Participation*

The first three issues regarding the process of recruitment were analyzed by the court in the backdrop of constitutional requirements set out under Articles 10, 73, 232, and 249.<sup>85</sup> The need to overhaul the governance structure in Kenya brought with it the need to include

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79. *Id.* at para. 6.

80. *Id.* at para. 4.

81. *Id.* at para. 8.

82. *See id.* at para.9.

83. *Id.* at para. 47.

84. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 47 (H.C.K.) (Kenya).

85. *See id.* at para. 13.

principles to guide governance.<sup>86</sup> These provisions require that the overarching principles of transparency, accountability, and public participation bind all state organs, including the NPSC, and must permeate all their actions when making and implementing policies and applying the Constitution.<sup>87</sup> Consequently, conduct of the recruitment exercise was required to meet the Constitutional imperatives of transparency, accountability, and public participation.<sup>88</sup>

Interestingly, while these principles apply generally to all actions by state organs, because of the need to ensure the reformed police service was anchored within these Constitutional imperatives, the drafters of the Constitution specifically included these principles in Article 244 of the Constitution with regard to the National Police Service.<sup>89</sup> The legislature, then borrowing from the Constitution in Section 12 of the NPSC Act, also provided that these principles would specifically apply to the exercise of functions by the Commission.<sup>90</sup>

Consequently, therefore, while these principles generally apply to all actions by state organs, they gain greater significance with regard to the police and the Commission. These principles, therefore, now provide standards with which to gauge whether conduct by the Commission and the National Police Service (NPS) meet the expectations of the new constitutional dispensation.

With regard to the first issue, whether the recruitment exercise was carried out without any guidelines and regulations, the court noted that while enactment of regulations and guidelines was a matter of discretion on the part of the Commission pursuant to Section 28 of the NPSC Act,<sup>91</sup> such regulations and guidelines were an important component of transparency and accountability in any process.<sup>92</sup>

The court found that there were no gazetted regulations enacted by the Commission to govern selection of successful candidates from the many who had sought to join the service.<sup>93</sup> The court drew a distinction between regulations that would govern the process of selecting successful candidates after the application stage from simply the minimum requirements set out in the advertisement put out by the Commission.<sup>94</sup> The court noted:

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86. *See id.* at para. 69.

87. *See id.* at para. 57.

88. *See id.*

89. *See* CONSTITUTION art. 244(a)–(e) (2010) (Kenya).

90. The National Police Service Commission Act (2012) Cap. 185C § 12 (Kenya).

91. *Id.*

92. *See* *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 33 (H.C.K.) (Kenya).

93. *See id.* at para. 65.

94. *See id.* at para. 64.

The issue raised by IPOA however, as I understand it, is that the NPSC did not have guidelines post-application stage to govern the selection of candidates who would join the Police Service out of the many applications made or received by it. To that end, IPOA has raised several questions and in addition, I wish to ask the following questions[:] what was the nature of the recruitment process after the announcement of vacancies[[]]; [w]hat were the requirements of shortlisting after the receipt of applications[[]]; [h]ow was physical and medical fitness to be determined[[]]; [w]hat factors did the NPSC take into account in that regard[[]]; and] [h]ow would complaints arising out of the recruitment be handled[[]]. I do not have answers to the above questions and the reason is obvious; that those answers are supposed to be available in the recruitment guidelines and regulations.<sup>95</sup>

On the second issue, whether there were publicly available guidelines to guide the recruitment process, the court found that whatever guidelines had been developed by the Commission were never made publicly available.<sup>96</sup> The court stated:

It is clear from the above deposition that the information on the guidelines was allegedly made public through newspaper adverts and radio announcements. I have not seen any evidence to that effect and all I have before me are the newspaper adverts calling for applications to join the Police Service and not the actual advertisement of the contents of the recruitment guidelines that would abide that exercise. The onus of proof was upon NPSC to lead the said evidence and in the absence of such evidence and based on the material before me, I am unable to find that the NPSC actually made the recruitment guidelines public and I so find.<sup>97</sup>

Indeed, the lack of publicly available regulations to guide the recruitment process and set objective standards by which the recruitment exercise could be gauged wreaked havoc in the entire exercise.<sup>98</sup> The court observed:

In the absence of such regulations and guidelines, the evidence before me shows that the NPSC was using a criteria known to itself alone. That being the case, it is not surprising that the recruitment was not uniform across the Country and was largely left to the discretion of the Sub-County Recruitment Committees.

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95. *Id.*

96. *See id.* at para. 68.

97. *See id.*

98. *See* *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 65 (H.C.K.) (Kenya).

At this point, I am constrained to ask myself, why could the NPSC not wait for the enactment of the *National Police Service Commission (Recruitment and Appointments) Draft Regulations, 2014* before conducting the exercise. . . . It appears to me that the NPSC knew of the need to have regulations in place before conducting the recruitment but nonetheless went on to conduct the recruitment without such guidelines. Those guidelines were crucial in enhancing accountability and transparency in the manner in which recruitment had to be conducted. Had it enacted the guidelines, perhaps this litigation would have been avoided altogether.<sup>99</sup>

The situation as described by the court is similar to the situation prior to institution of police reforms. Since there were no publicly available regulations setting out in detail the objective standards with regard to which the conduct of a recruitment exercise could be monitored by members of the public, participants in recruitment exercises, and other stakeholders in the policing sector, the criteria for selection of successful candidates and standards to be applied were left at the mercy and arbitrary discretion of the persons conducting recruitment.<sup>100</sup> This then opened avenues for corruption and malpractice during the exercises.<sup>101</sup>

With regard to the third issue, whether the recruitment guidelines were enacted without prior public participation, while the court concluded there were no publicly available regulations to guide the recruitment exercise, the court noted that the Commission had developed some guidelines (not regulations) to guide certain aspects of the exercise.<sup>102</sup> However, as afore stated, the court noted that these guidelines were also never made public and were only circulated to certain government entities.<sup>103</sup> The court was, however, also called upon to consider whether these guidelines were developed with public participation.<sup>104</sup>

The court began by noting that the importance of public participation in the enactment of legislation, regulations, and guidelines as required under Article 10 of the Constitution.<sup>105</sup> The court also,

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99. *Id.*

100. *See id.*

101. For instance, requirements for recruitment into the Kenya Police Service were set out in the Force Standing Orders (FSO) which were never made publicly available. Further, the FSOs merely provided basic, general standards thus leaving a lot of discretion for the recruiters. For members of the Administration Police, on the other hand, there were virtually no guidelines. *See RANSLEY REPORT, supra* note 19, at 99–101.

102. *See Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 68 (H.C.K.) (Kenya).

103. *See id.*

104. *See id.* at para. 69.

105. *See id.*

referring to its previous decisions, noted the importance of public participation in public matters in the archetype of the new governance structure.<sup>106</sup>

Although the court noted statements from the Commission were inconclusive on whether or not there was public participation in the development of the draft regulations, it granted the benefit of the doubt to the Commission on the issue on the basis that the Commission was in the process of developing regulations which were at the time in draft stage.<sup>107</sup>

It is, however, not clear from the court's decision why the court granted the benefit of the doubt to the Commission on the basis that it was in the process of developing regulations which were at the draft stage, yet what had been impugned as having been developed without public participation, were the recruitment guidelines.<sup>108</sup> This decision by the court, in this author's view, was wrong, as the court did not properly direct its mind to the question put to it when ultimately deciding the issue.

The court unfortunately conflated the question of whether draft recruitment regulations were developed without public participation, which was not an issue before the court (since these regulations were still in the process of development and therefore had not been used in the recruitment exercise), with the question of whether the recruitment guidelines (which were actually used in the recruitment exercise) were developed without public participation, which was the proper question before the court.<sup>109</sup> Had the court addressed itself to the proper question, it is difficult to see how it would have reached this conclusion having already found that the guidelines were never made public.<sup>110</sup>

## *2. Whether There was Discrimination Against Women in the Recruitment Exercise*

IPOA had contended in court that the recruitment exercise had discriminated against women in violation of Article 27 of the Constitution, which enshrines the right to equality and freedom from discrimination.<sup>111</sup> IPOA argued that by disqualifying pregnant women

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106. *See id.* at paras. 70–71.

107. *See id.* at para. 75.

108. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 69 (H.C.K.) (Kenya).

109. *See id.* at paras. 74–75.

110. *Id.* at para. 68.

111. *Id.* at para. 76.

from recruitment, the exercise had thus been conducted in violation of Article 27 of the Constitution.<sup>112</sup>

Relying on the European Court of Human Rights cases of *Willis v. United Kingdom*<sup>113</sup> and *Okpiz v. Germany*,<sup>114</sup> the court noted “discrimination means treating differently without any objective and reasonable justification, persons in relatively similar situations.”<sup>115</sup> Applying that standard, the court concluded that discrimination against women who were pregnant was justified by the need to protect the lives of the pregnant women and the unborn children.<sup>116</sup> This was because, according to the court, after recruitment, recruits would undergo rigorous training for a period, and this, according to the court, would imperil the lives of pregnant women and their unborn children.<sup>117</sup> Consequently, the court found there was no violation of Article 27 of the Constitution.<sup>118</sup> Article 27 of the Constitution seeks to ensure equality in treatment and thus ensure the right not to be discriminated is entrenched.<sup>119</sup>

With regard to unequal treatment in terms of gender, the Supreme Court in the majority opinion in *Advisory Opinion No. 2 of 2012*<sup>120</sup> aptly captured the *raison d’être* behind the provision as it noted:

This Court is fully cognisant [sic] of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. . . . Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].<sup>121</sup>

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112. *Id.*

113. See *Willis v. United Kingdom*, App. No. 36042/974, Eur. Ct. H.R.(2002).

114. See *Okpiz v. Germany*, App. No. 59140/00, Eur. Ct. H.R. (2005).

115. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 81 (H.C.K.) (Kenya).

116. *Id.*

117. *Id.*

118. *Id.*

119. See CONSTITUTION art. 27, §§ (1)–(8) (2010) (Kenya).

120. *In re An Application for Advisory Opinion Under Constitution art. 163(6)* (2012) eK.L.R. (S.C.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/85286> [<https://perma.cc/XT5B-XE36>].

121. *Id.* at para. 47.

Article 27, Section 3 provides that men and women have the right to equal treatment, including the right to equal opportunities in all spheres, which includes the economic sphere.<sup>122</sup> Article 27, Section 4 therefore provides that the state is specifically prohibited from discriminating against persons on enumerated grounds, including those of sex and pregnancy.<sup>123</sup> Moreover, specifically with regard to public service, pursuant to Article 232, Section 1(i), one of the values and principles undergirding public service is “affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of . . . men and women.”<sup>124</sup> Recruitment in the police is a means to which men and women access employment opportunities in the public service; therefore, to bar women from recruitment on the basis of pregnancy fetters their opportunities in the economic sphere in the public service. Consequently, any measure that would bar women on the basis of pregnancy from accessing employment in the police service must meet all constitutional requirements on limitation of rights as set out in Article 24 of the Constitution.<sup>125</sup>

Indeed, the court acknowledged that barring women who were pregnant from the recruitment exercise was discriminatory, although, the judge noted that the same was justified.<sup>126</sup> The judge noted, “I am satisfied that the discrimination meted out against women who were pregnant into the NPSC was justifiable as argued by Mr. Ojwang.”<sup>127</sup> The Constitution also envisaged that the rights secured under Article 27 may also be limited,<sup>128</sup> however, for a discriminatory measure to be justifiable under the Constitution, it has to conform to requirements for justifiable limitations of rights under Article 24 of the Constitution.<sup>129</sup> Unfortunately, the court did not interrogate these requirements before reaching its conclusion that the discrimination was justified under the Constitution.<sup>130</sup>

There are two main requirements overlooked by the court that can be drawn from the provision. Firstly, Article 24, Section 1(a) requires any limitation of rights in the bill of rights to be provided

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122. CONSTITUTION art. 27, § 3 (2010) (Kenya).

123. *Id.* § 4.

124. *Id.* at art. 232, § 1(i).

125. *Id.* at art. 24.

126. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 81 (H.C.K.) (Kenya).

127. *Id.*

128. Article 25 of the Constitution does not list rights secured in Article 27 as part of the rights that cannot be limited. *Compare* CONSTITUTION art. 25, §§ (a)–(d) (2010) (Kenya) *with* CONSTITUTION art. 27 (2010) (Kenya).

129. CONSTITUTION art. 24 (2010) (Kenya).

130. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 81 (H.C.K.) (Kenya).

for in the law.<sup>131</sup> Currently, there is no provision either in the National Police Service Act<sup>132</sup> or the National Police Service Commission Act<sup>133</sup> that limits the rights of women who are pregnant from joining the service. Consequently, the Commission could not legally limit the rights of pregnant women from participating in the recruitment exercise, as there is no legal provision on which to anchor the limitation.<sup>134</sup> The failure by the court to interrogate this essential requirement on limitation of rights was glaring bearing in mind the court did in fact refer to Article 24 of the Constitution, though only in passing.<sup>135</sup> Unfortunately, the decision by the court opened the pathway for the Commission to discriminate against women on grounds of pregnancy in subsequent recruitment exercises without need for a legislative predicate.<sup>136</sup>

Secondly, Article 24, Section 1(e) requires that where there is a less restrictive means available to achieve the intended legitimate aim, that means should be adopted instead of a limitation of the right.<sup>137</sup> This, therefore, places an obligation on the state to take reasonable measures that would see to it that it does not limit the right where the intended purpose can be achieved otherwise. This requirement draws from International Human Rights law where measures adopted in limitation of a right under International Human Rights Instruments must not only be in pursuit of a legitimate purpose, but they must in addition be necessary, reasonable, and objective (i.e., proportionate).<sup>138</sup> It is therefore not enough that a distinction in treatment pursues a legitimate aim, it must also be shown that it is proportionate, i.e. suitable, necessary, and reasonable to achieve the legitimate aim.<sup>139</sup> Consequently, where there are other ways of achieving the intended legitimate purpose without

131. CONSTITUTION art. 24, §§ 24(1)–(1)(a) (2010) (Kenya).

132. The National Police Service Act (2012) Cap. 84 § 5 (Kenya).

133. See National Police Service Commission Act (2012) Cap. 185C § 5 (Kenya).

134. *Id.*

135. See *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 81 (H.C.K.) (Kenya).

136. Interestingly, even in the European Court of Human Rights [hereinafter ECtHR], decisions cited by the High Court, the alleged discriminatory measures were predicated on legislation. In *Willis v. United Kingdom*, the discriminatory measures were predicated on the UK Social Security and Benefits Act of 1992. While in *Okpysz v. Germany*, it was the Federal Child Benefits Act. See *Willis v. United Kingdom*, App. No. 36042/974, Eur. Ct. H.R. at 3 (2002); *Okpysz v. Germany*, App. No. 59140/00, Eur. Ct. H.R. at 2 (2005).

137. CONSTITUTION art. 24, § 1(e) (2010) (Kenya).

138. See WALTER KÄLIN & JÖRG KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 352–53 (2009).

139. See *id.*; see also Case “Relating to Certain Aspects of the Use of Language in Education in Belgium” v. Belgium, 6 Eur. Ct. H.R. (ser. A) at 31 (1968); U.N. Hum. Rts. Comm., Comm. No. 983/2001 ¶ 8.2, U.N. Doc. CCPR/C/77/D/983/2001 (2003); *Stec v. United Kingdom*, App. Nos. 6573/01 & 65900/01, 6 Eur. Ct. H.R. 131, 148 (2006).

limitation of a right, the measure will not be considered to be necessary, reasonable, and objective and therefore will not be proportionate and will amount to a violation of the right against discrimination.<sup>140</sup>

Therefore, even if it were true that women who were pregnant and their unborn children would be imperiled in the training program (an assertion for which no evidence was adduced in court),<sup>141</sup> the state would have been required to show that there were no reasonable adjustments that could be made in the training program to accommodate those recruited while pregnant, hence the need to bar all women who are pregnant from recruitment.

For instance, it is not clear why the Commission could not opt to recruit women irrespective of pregnancy, as long as they met all other requirements, including physical and medical requirements, then allow those who are pregnant to attend training at a later time after they gave birth. This could be done either by allowing those pregnant to attend training after giving birth with a later recruitment lot or attend training during special training sessions that could be designed to be conducted during the usual police promotional training course programs. Indeed this proposal was mooted in court, but the judge dismissed it offhand as unreasonable and impractical without any reasons being provided as to how or why the same was impractical and unreasonable.<sup>142</sup>

It ought to be noted, reasonable measures need not be convenient to the state, as long as the adjustments can reasonably be made to avoid limitation of rights.<sup>143</sup> In the case of Kenya where generally social access to employment opportunities has tilted to the detriment of women, owing to the historical unequal power relations between men and women, it is even more imperative that all reasonable measures be exhausted before actions that once again discriminate against women are allowed.<sup>144</sup>

From the foregoing therefore, in the author's view, the court was wrong in holding that the recruitment exercise did not discriminate against women who were pregnant in violation of Article 27 of the Constitution. Unfortunately due to the court's pronouncement, the subsequent recruitment exercise carried out in 2015 also locked out women on account of pregnancy.<sup>145</sup>

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140. See *Stec*, App. Nos. 6573/01 & 65900/01 at 148.

141. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. a paras. 76–81 (H.C.K.) (Kenya).

142. See *id.* at 35.

143. CONSTITUTION art. 24 (2010) (Kenya).

144. See *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at 33.

145. See *Recruitment of Police Constables*, REPUBLIC OF KENYA NAT'L POLICE SERVICE, <http://www.mygov.go.ke/wp-content/uploads/2015/04/ANNOUNCEMENT-OF-RECRUITMENT-OF-POLICE-CONSTABLES-2015.pdf> [<https://perma.cc/B8PH-HPNS>].

### 3. *Delegation of Constitutional Powers*

This was the key issue before both the High Court and the Court of Appeal. As noted by the Court of Appeal “[it was] the cudgel that was used to crush the impugned recruitment.”<sup>146</sup>

The gravamen of IPOA’s contention on this issue before the High Court was that the Commission unlawfully delegated its powers donated to it under Article 246, Section 3 of the Constitution to conduct recruitment of police officers to sub-county recruitment committees, entities unknown in law, and those entities conducted the entire recruitment exercise.<sup>147</sup> IPOA argued that under Article 246, Section 3(a) of the Constitution, the Constitution reserves solely for the Commission the powers to recruit police officers.<sup>148</sup> Section 10(2) as read with Section 10(5) of the NPSC Act allows the Commission to delegate, in writing, the power to recruit police officers below the rank of superintendent only to the Inspector General of the National Police Service.<sup>149</sup> The Commission, therefore, illegally in contravention of Article 246, Section 3(a) of the Constitution delegated its powers to sub-county recruitment committees.<sup>150</sup> The delegation therefore, having been unlawful pursuant to Article 2, Section 4 of the Constitution, rendered the entire recruitment exercise invalid and a nullity *ab initio*.<sup>151</sup>

The Commission, on the other hand, argued that it did not delegate any powers to the sub-county recruitment committees, and on the contrary, these were committees of the Commission established pursuant to Section 13 of the NPSC Act.<sup>152</sup> The Commission argued that under Section 13 it is mandated to establish committees for the better carrying out of its functions.<sup>153</sup> It may also co-opt such persons whose skills and knowledge are necessary for the better carrying out of such functions.<sup>154</sup> The thrust of the Commission’s argument, therefore, was that there was no delegation of powers, and on the contrary, the Commission itself conducted the recruitment exercise through committees of the Commission, of which sub-county committees were such committees.

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146. *See* Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

147. *Id.*

148. *Id.*

149. *See* Indep. Policing Oversight Auth. v. Att’y Gen. (2014) eK.L.R. at paras. 10, 82 (H.C.K.) (Kenya).

150. *Id.* at para. 93.

151. *Id.*

152. *Id.* at paras. 40, 83.

153. *Id.* at para. 85.

154. *Id.* at para. 40.

In its response, IPOA argued that committees of the Commission had to consist of commissioners, who could then co-opt other persons into the committee.<sup>155</sup> Sub-county recruitment committees did not have any membership from the Commission, and they were therefore not committees of the Commission *à la* Section 13 but entities separate from the Commission and were therefore exercising illegally delegated powers.<sup>156</sup>

The court concurred with IPOA's argument.<sup>157</sup> It firstly noted that from the evidence placed before it, the entire recruitment exercise was carried out by the sub-county recruitment committees without any input from the Commission *qua* Commission.<sup>158</sup> Secondly, the court noted that these committees could not be said to be committees of the Commission as they had no membership from the Commission.<sup>159</sup> The court pointedly posed the question, "when a Committee has no membership of the NPSC at all, can it be said to be a Committee of the Commission[?]"<sup>160</sup> The court went on to find that the committees were in fact exercising illegally delegated powers, because under Section 10(2) of the NPSC Act, the Commission could only delegate recruitment to the Inspector General of the National Police Service.<sup>161</sup> In view of that finding, the court held that the NPSC had acted *ultravires* in its mandate by delegating recruitment powers to sub-county recruitment committees. The entire recruitment exercise was therefore invalid and thus null and void *ab initio*.<sup>162</sup>

### *B. The Case Before the Court of Appeal*

The Court of Appeal narrowed down on the question of delegation as the key issue on appeal.<sup>163</sup> The entire appeal turned on the legality of the establishment of sub-county recruitment committees.<sup>164</sup> Therefore, although IPOA as the first respondent had raised a cross-appeal on whether the recruitment exercise discriminated against pregnant women in violation of Article 27 of the Constitution, the question of delegation was the only issue examined by the

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155. *See* *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 82 (H.C.K.) (Kenya).

156. *Id.* at para. 10.

157. *Id.* at para. 93.

158. *Id.* at para. 91.

159. *Id.* at para. 10.

160. *Id.* at para. 91.

161. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 93 (H.C.K.) (Kenya).

162. *Id.*

163. *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

164. *See id.*

court.<sup>165</sup> Unfortunately, therefore, the Court of Appeal missed an opportunity to restate the correct legal position with regards to the issue of discrimination against pregnant women in the National Police Service recruitment.

Before the Court of Appeal, the Commission made four substantive arguments against the High Court's findings on delegation.<sup>166</sup> Firstly, it argued that sufficient evidence had not been placed before the High Court to prove that it had delegated its powers to sub-county recruitment committees.<sup>167</sup> In its oral submissions before the Court of Appeal, the Commission argued that for delegation to exist there had to be an instrument of delegation; and in this case, the Commission argued, there was no instrument of delegation exhibited before the court as evidence that the Commission had in fact delegated its powers.<sup>168</sup>

Secondly, the Commission reiterated its submission before the High Court that the sub-county recruitment committees were in fact committees of the Commission made up of co-opted members and that the High Court had failed to appreciate the difference between co-option and delegation.<sup>169</sup> This time however, the co-option argument was more nuanced.<sup>170</sup> It argued that the Inspector General, who was a member of the Commission, was actually represented in the sub-county recruitment committees by dint of the presence of senior county police officers in the committees.<sup>171</sup> Consequently, the argument went that there was a commissioner of the Commission represented in the sub-county recruitment committees.<sup>172</sup> The sub-county recruitment committees were therefore committees of the commission under Section 13 of the NPSC Act and its members were legally co-opted by virtue of that provision.<sup>173</sup>

Thirdly, the Commission argued, even if the court were to find the sub-county recruitment committees were not committees of the Commission, these committees did not carry out the entire recruitment exercise as posited by the learned judge, but merely undertook certain aspects of the recruitment exercise, which aspects were merely administrative.<sup>174</sup> The thrust of this argument being that the

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

recruitment exercise was a process that would end upon the recruits passing out after training and was not an event that ended upon selection of successful candidates to attend training.<sup>175</sup> Consequently, the Commission argued, there was still a role left to be played by the Commission *qua* Commission later before passing out of the recruits, although it was not clear what exactly that role was.<sup>176</sup>

The fourth argument by the Commission was a novel argument not raised before the High Court.<sup>177</sup> The Commission argued that since the Inspector General was a member of the Commission, by virtue of Article 246 of the Constitution, there was no need for the Commission to delegate any functions to him since the Inspector General as a commissioner was already bound by decisions of the Commission to carry out the recruitment exercise.<sup>178</sup>

With regard to the first argument, IPOA contended that recruitment guidelines, which were developed by the Commission and which the Commission had admitted before the High Court, provided the manner in which the exercise was conducted and clearly showed the recruitment exercise was carried out solely by the sub-county recruitment committees.<sup>179</sup>

Further averments by participants in the exercise evidently showed that the exercise was conducted solely by the sub-county recruitment committees.<sup>180</sup> IPOA, therefore, argued there was no requirement to exhibit an instrument of delegation because whether there was delegation or not was a matter of fact that was proved by facts proved in court regarding the manner the exercise was conducted and which facts had been admitted by the Commission.<sup>181</sup> On the second issue, IPOA maintained its argument before the High Court that committees of the Commission established under Section 13 of the NPSC Act were actually committees made up of Commissioners of the NPSC.<sup>182</sup> There was no Commissioner represented in the sub-county committees, therefore, the committees could not be committees of the Commission.<sup>183</sup> Further, IPOA argued, the recruitment exercise was not a process, but an event that ended when the successful recruits were issued with docket numbers to attend

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175. Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

176. *Id.*

177. Compare discussion of the High Court decision, *supra* Section III.A, with discussion of the Court of Appeal decision's novel argument, *infra* Section III.B.

178. Att'y Gen. v. Indep. Policing Oversight (2015) eK.L.R. (C.A.K.) (Kenya).

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.*

training, and all aspects of that event, from document verification and medical and physical examination to issuance of docket numbers, were done by the sub-county recruitment committees.<sup>184</sup> Consequently, the entire recruitment exercise was in fact conducted by these committees and not the Commission.<sup>185</sup>

On the question of co-option, IPOA argued, persons could only be co-opted into previous legally constituted committees, and persons could not be co-opted to form a committee from scratch.<sup>186</sup> Therefore, IPOA contended, members of the sub-county recruitment committees could not all have been co-opted members as argued by the Commission.<sup>187</sup> Indeed it was contended that if members of the sub-county committees had been co-opted, then pursuant to Section 13 of the NPSC Act, they all did not have powers to vote and make decisions, yet these committees made decisions as to successful candidates to attend training.<sup>188</sup>

On the fourth argument, IPOA contended, the argument merged the Office of the Inspector General established under Article 245 of the Constitution and the Commission established under Article 246.<sup>189</sup> It was IPOA's argument that the Inspector General, as a member of the Commission, did not have powers not enjoyed by other individual members of the Commission, and recruitment of members of the National Police Service was a power that reposes in the Commission as a corporate entity and not on individual members.<sup>190</sup> IPOA thus contended Section 10 of the NPSC Act in acknowledging that distinction allows the NPSC to delegate recruitment of police officers below the rank of sergeant to the Inspector General as a separate office from the Commission.<sup>191</sup>

### *C. The Court's Determination*

As noted above, the issue of delegation was at the core of the court's decision.<sup>192</sup> The entire appeal turned on whether the sub-county recruitment committees had been legally constituted.<sup>193</sup> While IPOA argued that these committees exercised powers illegally

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184. Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Att'y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

191. *Id.*

192. *Id.*

193. *Id.*

delegated, the Commission argued that they were legally constituted committees of the Commission.<sup>194</sup> The Court of Appeal therefore dealt at length with the question of what amounts to delegation.<sup>195</sup>

The court defined delegation as follows:

Delegation is the assignment of responsibility or authority to another person usually one's subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.<sup>196</sup>

The court also noted that where delegation is underpinned by statute, and there is a requirement that delegation must be in writing, and failure to do such would be null and void.<sup>197</sup>

The court first noted that powers to conduct recruitment of police officers was constitutionally reposed on the Commission under Article 246 of the Constitution.<sup>198</sup> However, under Section 10 of the NPSC Act, the Commission was empowered to delegate the function of recruiting police officers under the rank of sergeant to the Inspector General but such delegation had to be in writing.<sup>199</sup> The court held that from the facts it was clear there was no delegation from the Commission to the Inspector General as required by the Act, a fact conceded by the appellants in their submission, and that there was no instrument of delegation.<sup>200</sup>

On the argument that the sub-county recruitment committees were committees of the Commission established under Section 13 of the NPSC Act, the court noted that such committees had to be made up of commissioners to the Commission.<sup>201</sup> Sub-county recruitment committees had no membership from the Commission.<sup>202</sup> On the argument that members of the sub-county committees were co-opted, the court noted that a Committee could not be co-opted from scratch, but there had to be a legally established committee that

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194. *Id.*

195. *Id.*

196. *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

members could be co-opted into.<sup>203</sup> Sub-county recruitment committee members thus could not be said to have been co-opted members of the committee.<sup>204</sup>

The court further noted that, even assuming *arguendo* that power had been legally delegated to the sub-county recruitment committees, to allow such committees to make the decisions as to the successful candidates, as was the case in this instance, amounted to abdication of duty by the Commission and was illegal.<sup>205</sup> The court thus concluded that the sub-county recruitment committees were exercising illegally delegated authority.<sup>206</sup> The court noted from the facts of the case that it was clear that the entire recruitment exercise was carried out by the sub-county recruitment committees.<sup>207</sup> The court thus upheld the High Court's judgement that the entire recruitment exercise was null and void *ab initio*.<sup>208</sup>

#### *D. Analysis of the Court's Determination*

The court's determination that sub-county recruitment committees had illegally exercised delegated powers was indeed grounded on the law and sound legal reasoning.

The rule against illegal delegation draws from the principle in administrative law that power must be exercised by the entity upon which it is reposed and by nobody else unless the entity is allowed by law to delegate power.<sup>209</sup> Even where the power reposed upon an entity is to conduct administrative functions, the courts are rigorous in ensuring power is exercised by the particular entity upon which it is reposed and thus do not hesitate to strike out actions by agents or subcommittees, even where they are expressly authorized by the entity to act on its behalf, if the entity was not allowed by law to delegate power.<sup>210</sup>

In this case, the Commission clearly unlawfully delegated its powers provided under Article 246, Section 3(a) of the Constitution to sub-county recruitment committees. The Article provides that “[t]he 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[.]”<sup>211</sup>

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

209. See SIR WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 259 (2009).

210. *Id.*

211. Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

The power and attendant responsibility to carry out recruitment of persons in the National Police Service clearly repose upon the Commission and the Commission only. Contrary to the contention by the Commission, sub-county recruitment committees could not be said to be committees of the Commission co-opted under Section 13 of the NPSC Act.<sup>212</sup> The committees did not have any membership from the Commission.<sup>213</sup> Section 13 of the Act (Committees of the Commission) provides:

- (1) The Commission may establish committees for the better carrying out of its functions.
- (2) The Commission may co-opt into the membership of committees established under subsection (1) other persons whose knowledge and skills are found necessary for the functions of the Commission.
- (3) Any person co-opted into the Commission under subsection (2) may attend the meetings of the Commission and participate in its deliberation, but shall *have no power to vote*.<sup>214</sup>

Firstly, a literal interpretation of the provision shows it refers to committees made up of commissioners of the Commission. The provision is titled “*Committees of the Commission*.”<sup>215</sup> Article 246, Section 2 of the Constitution sets out who the Commission consists of.<sup>216</sup> This list is exhaustive, and these are the commissioners of the NPSC.<sup>217</sup> Consequently, it logically follows committees of the Commission refers to committees made up of commissioners of the NPSC.

Subsection (2) of Section 13 further buttresses the view that these committees must be made of commissioners of the NPSC as it provides, “[t]he Commission may co-opt into the membership of committees established under subsection (1) other persons whose knowledge and skills are found necessary for the functions of the Commission.”<sup>218</sup>

The ordinary meaning of the word co-opt as per the *Oxford English Dictionary* is to “[a]ppoint to membership of a committee or other body by invitation of the existing members.”<sup>219</sup> Therefore, in order to co-opt, the person co-opting must himself or herself be a member of that committee. The provision envisages the committees created

212. *See id.*

213. *Id.*

214. The National Police Service Commission Act (2012) Cap. 185C § 13 (Kenya) (emphasis added).

215. *Id.*

216. CONSTITUTION art. 246(2) (2010) (Kenya).

217. *Id.*

218. The National Police Service Commission Act (2012) Cap. 185C § 13(2) (Kenya).

219. *Co-opt*, OXFORD DICTIONARY, <http://www.oxforddictionaries.com/definition/english/co-opt> [https://perma.cc/7GED-2QBU].

under subsection (1) are made up of commissioners who may then co-opt other persons with particular expertise into those committees.<sup>220</sup>

In this case, commissioners of the Commission were not members of the sub-county recruitment committees, so consequently, they could not co-opt anyone into the sub-county recruitment committees.<sup>221</sup> Subsection (3) finally puts the issue to rest. It provides that “[a]ny person co-opted into the Commission under subsection (2) may attend the meetings of the Commission and participate in its deliberation, but shall have no power to vote.”<sup>222</sup>

If the provision envisaged that the committee could be made up wholly of co-opted persons, it would be absurd for the provision to provide, as it does, that persons co-opted could attend meetings of the Commission but could not vote. Indeed as posed in court, if these committees could be made up wholly of co-opted members, then how could its members make decisions and yet the provision clearly saves decision-making powers only to commissioners of the Commission and not co-opted members?<sup>223</sup>

It is thus clear from the foregoing that sub-county recruitment committees were entities separate from the Commission. The recruitment exercise was carried out by these entities based on illegal delegation of powers, and the exercise was thus null and void *ab initio*.<sup>224</sup> The courts were, therefore, correct in nullifying the entire exercise.

That said, however, there is an important question on delegation of constitutional powers that the courts did not address that has significant impact on the conduct of subsequent recruitment exercises.<sup>225</sup>

Both litigants and the Court appeared to assume that, pursuant to Section 10 of the NPSC Act, the Commission could lawfully delegate the exercise of recruitment of police officers above the rank of superintendent to the Inspector General of the National Police Service.<sup>226</sup> There was no analysis by the courts as to whether provisions

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220. Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya); *see also* Indep. Policing Oversight Auth. v. Att’y Gen. (2014) eK.L.R. at para. 87 (H.C.K.) (Kenya).

221. Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

222. The National Police Service Commission Act (2012) Cap. 185C § 13(3) (Kenya).

223. *See* Att’y Gen. v. Indep. Policing Oversight Auth. (2015) eK.L.R. (C.A.K.) (Kenya).

224. *Id.*

225. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 6 (H.C.K.) (Kenya) (relating to the Petitioner’s reference to the authorities of Article 246, Section 3 of the 2010 Kenya Constitution and Section 10 of the National Police Service Commission Act, both of which govern delegation of recruitment power).

226. *See, e.g., Att’y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya); *see also* *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 91 (H.C.K.) (Kenya).

of Section 10 of the NPSC Act that allow the Commission to delegate power to conduct recruitment of members of the NPS to the Inspector General are in tandem with Article 246 of the Constitution that reposes that power solely upon the Commission.<sup>227</sup>

As afore stated, the rule against illegal delegation draws from the principle in administrative law that power must be exercised by the entity upon which it is reposed and nobody else, unless where the entity is allowed by law to delegate power.<sup>228</sup> This principle applies even more forcefully where powers to be exercised are constitutionally reposed. Constitutional powers must be exercised by the entities upon which the Constitution reposes such powers, unless where the Constitution itself allows the entity to delegate such powers.<sup>229</sup> This is so because in democracies with written constitutions, the written constitution is supreme unlike states, such as the United Kingdom, where the constitution is unwritten and therefore the legislature and legislative acts are supreme.<sup>230</sup>

In fact, Article 2 of the 2010 Kenyan Constitution declares its own supremacy, which extends not only over legislation but also over all state organs, including the legislature.<sup>231</sup> Further, this supremacy is unimpeachable pursuant to Article 2, Section 3.<sup>232</sup> The Constitution also allocates powers to various state organs.<sup>233</sup> This allocation of powers is not limited to the traditional three arms of government but also includes Constitutional Commissions created by the Constitution.<sup>234</sup> The Constitution, therefore, being supreme and its supremacy being unimpeachable means allocation of powers by the Constitution cannot be tampered with even by the legislature, unless via amendment to the Constitution.<sup>235</sup> Consequently,

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227. To be fair to the courts, the parties also did not raise the issue at the High Court or at the Court of Appeal. *See* *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at paras. 6, 10–13 (H.C.K.) (Kenya). However, this being a matter of law that went to the core of a key issue in the petition, the courts could have raised the matter *suo motu* and then invited parties to submit on the same and thereafter make a determination. For a detailed explication on the court acting *suo motu* or *sua sponte*, *see* *Republic v. Public Procurement Administrative Review Board* (2014) eK.L.R. at para. 57 (H.C.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/103617> [<https://perma.cc/JJ3W-H23H>]; *see also* *Henry Njagi Muruariua v. A.O. Okello* (2014) eK.L.R. at para. 13 (C.A.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/104669> [<https://perma.cc/GUS4-KZBQ>].

228. *See* WADE & FORSYTH, *supra* note 209, at 159.

229. *See, e.g.*, U.S. CONST. art. 1, § 1.

230. *See* MORRIS K. MBONDENYI & JOHN OSOGO AMBANI, *THE NEW CONSTITUTIONAL LAW OF KENYA: PRINCIPLES, GOVERNMENT AND HUMAN RIGHTS* 18–19 (2012).

231. CONSTITUTION art. 2 (2010) (Kenya).

232. *Id.* at art. 2(3).

233. *Id.* at art. 1(3).

234. *Id.* at arts. 248–254.

235. *See id.* at art 249(2) (providing that constitutional commissions are subject only to the Constitution and the law and are not subject to the control by any person or authority).

where the Constitution reposes certain powers on a commission, the legislature cannot via legislation divest such powers from the said Commission and vest them in another entity.<sup>236</sup> Likewise, it cannot via legislation allow the Commission to delegate its Constitutional powers to another entity, unless where the Constitution itself envisages that the powers can be delegated.<sup>237</sup>

Therefore, where the Constitution reposes certain powers on an entity in determining whether such powers can be delegated, the analysis must begin with the Constitution itself, whether the Constitution intended such powers to be delegable and if so to which entity and by what process. Consequently, the court in the recruitment case ought to have examined whether the powers reposed upon the Commission under Article 246 of the Constitution were in the first place intended by the Constitution to be delegable as provided for in section 10 of the NPSC Act.

Article 246, Section 3(a) of the Constitution with regard to functions of the NPSC provides that “[t]he 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[.]”<sup>238</sup> The provision uses the word “*shall*.”<sup>239</sup> Therefore, from the text of the provision, the Commission itself is mandatorily required to carry out those functions set out, and therefore, concomitantly, only the Commission may exercise powers necessary to carry out those tasks. Subsection 246, Section 3(c) only allows the legislature to prescribe additional functions to the Commission, and it does not allow it to vest functions already prescribed in the Constitution to the Commission to another entity or allow the Commission to delegate those functions.<sup>240</sup>

This provision can be contrasted with the prosecutorial powers granted to the Director of Public Prosecutions under Article 157.<sup>241</sup> After setting out the powers of the Director of Public prosecution in subparagraphs 6–8, subparagraph 9 of the Constitution provides that “[t]he powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”<sup>242</sup> The provision, unlike in the

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236. *Id.* at art. 2.

237. CONSTITUTION arts. 249, 252 (2010) (Kenya).

238. *Id.* at art. 246(3).

239. *Id.* (emphasis added).

240. *Id.* at art. 246(3)(c) (stating that the police may only do what is prescribed by national legislation).

241. *Id.* at art. 157.

242. *Id.* at art. 157(9).

case of the Commission, envisages that the powers may be delegated to subordinate officers.

The provision may also be contrasted with Article 234 of the Constitution that sets out the powers and functions of the Public Service Commission.<sup>243</sup> Article 234, Section 5 provides that “[t]he Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.”<sup>244</sup> The Constitution, therefore, envisages that the Public Service Commission may delegate its powers to conduct its functions to other entities.

From a purely textual interpretation of Article 246, unlike in the case of the Director of Public Prosecutions or the Public Service Commission, it is clear the provision does not envisage delegation of the functions placed upon the Commission by the Constitution to any entity, including the Inspector General. However, as noted by the Supreme Court, a holistic interpretation of the Constitution also requires an analysis of the rationale and history behind that provision of the Constitution.<sup>245</sup>

As stated above, the establishment of the NPSC in the Constitution of Kenya 2010 was borne out of a process aimed at reforming and professionalizing the National Police Service.<sup>246</sup> The aim of which was to do away with the culture of political manipulation and control of the police by the executive by insulating the police from such control and by creating an independent constitutional commission vested with certain powers, including powers to recruit police officers.<sup>247</sup> As afore stated, one of the ways in which executive manipulation and control over the police was manifested was in the recruitment of police officers.<sup>248</sup> Pursuant to Article 108 of the old constitution, the Commissioner of Police, an appointee of the President, was vested with powers to recruit police officers below the

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243. CONSTITUTION art. 234 (2010) (Kenya).

244. *Id.* at art. 234(5).

245. *In re Kenya Nat'l Comm'n on Human Rights* (2014) eK.L.R. (S.C.K.) (Kenya), <http://www.kenyalaw.org/caselaw/cases/view/94849> [<https://perma.cc/969M-KJB8>].

But what is meant by a ‘holistic interpretation of the Constitution’[?] It must mean interpreting the Constitution *in context*. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.

246. RANSLEY REPORT, *supra* note 19, at 25, 27 (regarding emphasis on police reforms in multiple drafts of Kenya’s Constitution, functions of the police service commission, and public skepticism of police reform initiatives).

247. *See id.* at 15–16, 18–19, 45.

248. *See id.*

rank of Assistant Inspector of Police.<sup>249</sup> Furthermore, the Public Service Commission, which was vested with powers to recruit officers above the rank of Assistant Inspector of Police, was allowed under that Constitution to delegate all its powers, including its reserved recruitment powers to the Commissioner of Police.<sup>250</sup>

Consequently, the Commissioner of Police ended up with all recruitment powers.<sup>251</sup> The Commissioner in turn delegated such powers to other officers who exercised these powers with wanton disregard for any ethical standards and showed a complete obeisance to executive orders from “above” on who to recruit.<sup>252</sup> Consequently, recruitment exercises of members of the police became synonymous with unethical practices, tribalism, nepotism, corruption, and other malpractice being the popular bywords descriptive of these processes.<sup>253</sup> The process of reform of the police was thus to begin with the manner of recruitment of police officers.<sup>254</sup> Consequently, one of the major functions of the Commission was to carry out recruitment of members of the National Police Service.<sup>255</sup> Ergo, recruitment powers were to be entirely removed from the Commissioner of Police and vested on the NPSC.<sup>256</sup>

That being the case, while Article 245 of the Constitution created the office of the Inspector General to exercise independent command over the National Police Service, with the Inspector General, like in the repealed constitution, being appointed by the President (albeit this time with parliamentary approval), the powers to carry out recruitment of members of the service were vested solely in the National Police Service Commission created under Article 246 of the Constitution.<sup>257</sup> Vesting of recruitment powers on the NPSC and not the Inspector General was thus not a fluke by the drafters of the Constitution, but a purposive choice by Kenyans drawn from the history of the police in Kenya and the urgent need to reform it.

The legislature through the NPSC Act, however, remarkably draws away from this grain.<sup>258</sup> Section 10 of the NPSC Act, in allowing the Commission to once again delegate recruitment of police officers

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249. See CONSTITUTION art. 108 (2009) (Kenya) (repealed).

250. See *id.* at art. 108(2)(b)(i).

251. *Id.*

252. See RANSLEY REPORT, *supra* note 19, at 19, 45.

253. See *id.* at 102, 215–17.

254. See *id.* at 11, 97–98.

255. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 3(1); see The National Police Service Commission Act (2012) Cap. 185C § 10 (Kenya).

256. See RANSLEY REPORT, *supra* note 19, at 48.

257. CONSTITUTION arts. 245, 246(3)(a) (2010) (Kenya).

258. The National Police Service Commission Act (2012) Cap. 185C § 10(2)–(3) (Kenya).

below a certain cadre to the Inspector General, goes contrary to the requirement that recruitment of police officers is conducted by the Commission.<sup>259</sup> Section 10 of the NPSC Act thus goes contrary not only to the letter, but also the spirit of Article 246 of the Constitution.

The question that then naturally follows is how can a nine-member Commission carry out recruitment of 10,000 police officers? And indeed, the gravamen of some of the submissions by the Commission in court were based on the argument that the Commission had to delegate recruitment due to the large number of recruits expected.<sup>260</sup> Therefore, the argument went, the Constitution must have envisaged delegation of such recruitment powers.<sup>261</sup> Despite this being a circular argument, it may resonate with some proponents of delegation. The answer, however, lies in the manner of recruitment. As above-noted, the Ransley Report proposals on the reform of the recruitment of police officers were not limited to just the entity that would conduct the recruitment but also how the exercise was to be carried out.<sup>262</sup> The report recommended the doing away with conduct of recruitment exercise as a one-day event.<sup>263</sup> Instead, recruitment was to be conducted as a process that would be carried out in stages.<sup>264</sup> This would enable the recruiting agency to sufficiently vet and scrutinize those joining the service, thus ensuring only highly qualified persons joined the police.<sup>265</sup> The report, therefore, recommended that the recruitment exercise be a three stage process that included written applications, oral interviews, and vetting by the Commission.<sup>266</sup> Such a phased recruitment exercise enables the Commission to be intimately and directly involved in the recruitment exercise—even where the numbers being recruited are large—without delegating. Therefore, it is very much possible and in accordance with the law for the Commission to conduct recruitment of police officers without delegating to the Inspector General.

Section 10 of the NPSC Act that allows delegation of recruitment powers to the Inspector General therefore reverts back to the position prior to police reforms.<sup>267</sup> Moreover, it is both unnecessary and unconstitutional.

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259. *Id.*

260. *See* *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 92 (H.C.K.) (Kenya).

261. *Id.* at para. 93.

262. *See* RANSLEY REPORT, *supra* note 19, at 109–10.

263. *Id.* at 101, 103, 110.

264. *See id.* at 109–10.

265. *Id.* at 107–10.

266. *Id.* at 109–10.

267. The National Police Service Commission Act (2012) Cap. 185C § 10(2) (Kenya); *see* RANSLEY REPORT, *supra* note 19, at 45.

#### IV. THE IMPACT OF THE RECRUITMENT DECISIONS ON REFORMS IN RECRUITMENT OF POLICE OFFICERS

##### A. *Transparency and Accountability in the Recruitment Process*

As discussed above, the recruitment petition explored questions of transparency, accountability, and public participation in the recruitment exercise.<sup>268</sup> It was contended and upheld by the court that in order to ensure such transparency and accountability, it was imperative that there are regulations available to the public to guide the process and which would provide clear procedures and standards upon which the exercise could be audited.<sup>269</sup> As noted above, at the time of conducting the recruitment exercise in 2014, there were no gazetted regulations guiding the conduct of the recruitment exercise, and further, the skeleton guidelines given to sub-county recruitment committees by the Commission to guide the exercise were never made public.<sup>270</sup>

One of the commendable outcomes of the petition was the development and gazetting of the recruitment regulations of 2015.<sup>271</sup> These regulations were gazetted after the High Court decision and sought to address, *inter alia*, issues raised in the High Court regarding transparency of the recruitment process.<sup>272</sup> The regulations now clearly provide the procedure for carrying out a recruitment exercise in stages (at least where the same is conducted by the Commission), as envisaged in the Ransley Report.<sup>273</sup> The first stage of the exercise entails written applications to the Commission, where the Commission itself short-lists candidates to attend the second stage.<sup>274</sup> The second stage entails physical and medical evaluation, where short-listed candidates attend evaluation which are to be carried out by recruitment panels in accordance with guidelines and manuals issued by the Commission.<sup>275</sup> The panels are then expected to short-list the successful candidates, if possible twice the number required to go to the third stage.<sup>276</sup> In the third and final stage, the Commission then

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268. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at paras. 11–16, 56–59 (H.C.K.) (Kenya).

269. *Id.* at paras. 57, 58, 65–68.

270. *Id.* at paras. 64–67.

271. *See* The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39.

272. *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. (H.C.K.) (Kenya).

273. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 12.

274. *Id.* §§ 11–12.

275. *Id.* §§ 13–14.

276. *Id.* § 14.

selects the final lists of successful candidates from the list provided by the recruitment panels.<sup>277</sup>

That being said, however, one of the main concerns impeaching the transparency and accountability of the recruitment exercise carried out in 2014 was the lack of clear guidelines that set out the required physical and medical standards for eligibility for recruitment.<sup>278</sup> The lack of clear standards provided a *lacunae* for sub-county recruitment committees to exercise a lot of discretion in disqualifying candidates.<sup>279</sup> This wide, unchecked discretion therefore opened avenues for corruption by sub-county committees, where persons were disqualified for flimsy reasons such as having brown teeth.<sup>280</sup> The current recruitment regulations seek to cure this problem by providing for the development of a manual to set physical and medical standards to be used in recruitment exercises.<sup>281</sup> However, to date, no manual has yet been developed to set these important standards.<sup>282</sup>

### *B. Discrimination Against Women on Account of Pregnancy*

As above discussed, while the High Court upheld discrimination against women in the recruitment exercise on account of pregnancy,<sup>283</sup> in the author's view, the court erred in its analysis and conclusion drawn therefrom. The recruitment regulations of 2015, however, do not specifically provide for pregnancy as a ground for disqualification from recruitment.<sup>284</sup> As noted above, the manual to set physical and medical standards is yet to be developed.<sup>285</sup> It is hoped that in the development of the manual, a different position will be adopted by the Commission in regards to disqualification on account of pregnancy. Indeed, as discussed above, in the author's view, it is possible to accommodate recruitment of women who are pregnant.

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277. *Id.* § 15.

278. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at paras. 64–65.

279. *Id.* at 13.

280. *Id.*

281. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 14(8)–(9).

282. See INDEP. POLICING OVERSIGHT AUTHORITY, IPOA MONITORING REPORT ON THE RECRUITMENT OF POLICE CONSTABLES (2015), <http://www.ipoa.go.ke/downloads/images/press/IPOAPoliceRecruitmentMonitoringReport2015.pdf> (discussing how no one knew what the regulations were at the 2015 exercise which indicates there were no guideline manuals) [hereinafter IPOA MONITORING REPORT].

283. *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 81 (H.C.K.) (Kenya).

284. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 3(1).

285. See IPOA MONITORING REPORT, *supra* note 282.

### C. Delegation of Constitutional Powers

As discussed above, delegation of constitutional powers became the key issue in the case both before the High Court and on appeal before the Court of Appeal.<sup>286</sup> Furthermore, as discussed above, in the author's view, it is possible for the Commission to carry out a recruitment exercise without necessarily having to delegate recruitment powers to sub-county recruitment committees or the Inspector General of Police. The key to which is a recruitment exercise carried out in stages. As noted above, the current recruitment regulations reflect this idea of a phased recruitment exercise carried out in three stages, where the Commission is intimately involved in the exercise instead of simply delegating the entire exercise to recruitment panels.<sup>287</sup> However, the second stage of the exercise (physical and medical evaluations) still entails delegation of power by the Commission to the recruitment panels since the panels are expected to determine the successful candidates at that stage.<sup>288</sup> As discussed above, delegation of power entails delegating decision-making powers vested by law to one entity to another entity.<sup>289</sup> Delegation of powers even with regard to administrative tasks is illegal where the same is not provided for in law.<sup>290</sup> In the author's view, it would have been more in tandem with legal principles regarding delegation of power had the regulations provided for the recruitment panels to simply carry out physical and medical evaluation in terms of guidelines issued by the Commission and simply to provide data to the Commission on how each candidate fared.<sup>291</sup> The Commission could then select successful candidates based on the data provided. Decision making powers would, therefore, remain entirely with the Commission and the recruitment panels would not make any decision as to successful candidates at any stage. This would also avoid the current *lacunae* in the regulations where it is not clear what criteria the Commission will use in selecting the final list of successful candidates from the short list provided by the recruiting panels.<sup>292</sup>

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286. See *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya); *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para.82 (H.C.K.) (Kenya).

287. Compare RANSLEY REPORT, *supra* note 19, at 109–10 with The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 10 (Kenya).

288. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 12 (Kenya).

289. See WADE & FORSYTH, *supra* note 209, at 29.

290. See *Att'y Gen. v. Indep. Policing Oversight Auth.* (2014) eK.L.R. (C.A.K.) (Kenya).

291. See *id.* (“The committees could only vet and verify documentation, conduct the physical and medical examination, and then forward the documents and results to the Commission. . .”).

292. As per regulation 12(14), the recruitment panels during the second stage are required to short-list at least twice the number required to get to the third stage. See

That said, the regulations are a marked improvement from the erstwhile scenario, where the recruitment subcommittees carried out the entire recruitment process, from receiving written applications to selecting the final successful candidates. The Commission in this case makes the ultimate decision as to the successful candidates to attend training.<sup>293</sup>

However, the regulations, still drawing from Section 10 of the NPSC Act, reserve for the Commission the power to delegate recruitment of officers below a certain cadre to the Inspector General, and in that case, the Inspector General would be accountable for the recruitment exercise.<sup>294</sup> As afore stated, such a recruitment exercise would fall afoul of Article 246 of the Constitution that does not envisage delegation of recruitment powers by the Commission to the Inspector General.<sup>295</sup>

The regulations therefore provide a choice in the manner of conduct of recruitment: the first one, the manner envisaged in the new constitutional dispensation, seeks to engender police reforms through a new recruitment process carried out in stages by the Commission, or the second one, which entails a return to the old recruitment process carried out as a one-day event by the Inspector General.<sup>296</sup>

The police recruitment exercise in 2015 provided the perfect opportunity where the Commission was required to elect between the two processes and select which process would be used to conduct a repeat recruitment exercise.<sup>297</sup>

## V. POLICE RECRUITMENT EXERCISES IN 2015, 2016, AND 2017: A CASE OF THERE AND BACK AGAIN

### A. *Recruitment Exercise in 2015*

In April 2015, the Commission advertised for a fresh recruitment exercise for police officers.<sup>298</sup> The exercise was meant to recruit 10,000 police officers, and was therefore once again, meant to be the largest police recruitment exercise in the country's history following

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The National Police Service Commission Act, No. 30 (2011) KENYA GAZETTE SUPPLEMENT No. 39 § 12(14) (Kenya). *See id.* §§ 12(4)–(9).

293. *See id.* §§ 12(15)–(16).

294. *See id.* §§ 3(2)–(4).

295. *See Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

296. *See The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 §§ 12(8)–(13)* (stating there are two phases and that the second phase will be on “the” date, which indicates one day).

297. *Att'y Gen. v. Indep. Policing Oversight Auth.* (2015) eK.L.R. (C.A.K.) (Kenya).

298. *Recruitment of Police Constables*, *supra* note 145.

the nullified 2014 process.<sup>299</sup> The exercise also provided an opportunity for the Commission to implement reforms in police recruitment drawing from the High Court decision in the recruitment petition and now articulated (albeit not perfectly) in the recruitment regulations.<sup>300</sup>

Unfortunately however, the manner of conduct of the exercise simply mirrored recruitment exercises in the bygone era prior to police reforms.<sup>301</sup>

Firstly, conduct of the exercise was delegated to the Inspector General.<sup>302</sup> The Inspector General in turn delegated conduct of the exercise in various recruitment centres to his subordinate officers.<sup>303</sup> Therefore, in effect, the exercise mirrored the recruitment process prior to the current constitutional framework and envisaged police reforms that seek to insulate police recruitment from executive manipulation by removing recruitment powers from the Commissioner of Police and vesting them on an independent constitutional commission.

Secondly, the entire recruitment exercise was conducted as a one-day event instead of a phased recruitment exercise envisaged in the recruitment regulations.<sup>304</sup> As afore discussed, one of the key areas highlighted for reform in the Ransley Report regarding the manner of conduct of police recruitment was conduct of the exercise as a one-day event.<sup>305</sup> This practice afforded avenues for unethical practices and corruption during the exercise due to the little opportunity afforded for oversight, handling of complaints, and audit of the exercise.<sup>306</sup> Additionally, in a one-day event, it was doubtful whether the recruiters could actually sufficiently gauge the quality of the recruits.<sup>307</sup> The High Court also alluded to this issue, noting that the NPSC could adopt a policy similar to the Kenya Defense forces, where recruitment is carried out over a period of time as opposed to a one-day event.<sup>308</sup> Consequently, by reverting back to

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299. See *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 1 (H.C.K.) (Kenya); *Recruitment of Police Constables*, *supra* note 145.

300. Compare *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 128 (H.C.K.) (Kenya) with The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 5 (Kenya).

301. IPOA MONITORING REPORT, *supra* note 282, at 8–13.

302. See *Recruitment of Police Constables*, *supra* note 145.

303. The recruitment exercise was conducted by senior police officers at the police divisional level with the Kenya Police Service and the Administration Police Service having different team leaders. See *id.* at 8–9.

304. See *id.* at 10–11.

305. See RANSLEY REPORT, *supra* note 19, at 103.

306. See *id.*

307. See *id.*

308. See *Indep. Policing Oversight Auth. v. Att’y Gen.* (2014) eK.L.R. at para. 92 (H.C.K.) (Kenya).

recruitment as a one-day event, the Commission further whittled down gains made in reforming the recruitment of police officers.

Thirdly, the recruitment exercise was conducted without development of the manual envisaged in the regulations, setting objective physical and medical standards to guide physical and medical evaluations during recruitment.<sup>309</sup> Consequently, once again, the recruiters were left with wide discretion to determine what physical and medical requirements were to be applied in the various recruitment centres.<sup>310</sup> As afore discussed, this then opens avenues for candidates to be disqualified on flimsy physical and medical grounds, and therefore, impeaches the transparency and accountability of the entire recruitment exercise.<sup>311</sup>

Lastly, the practice of barring pregnant women from recruitment continued, undoubtedly buoyed by the High Court's decision on the issue, despite the fact that the regulations do not specifically identify pregnancy as a ground for disqualification.<sup>312</sup>

Consequently, therefore, by failing to take into account the key areas of reforms articulated in the High Court's decision and capitalizing on the weaknesses of the decision, the Commission was able to conduct an exercise that simply replicated recruitment exercises prior to police reforms. It was, therefore, a case of there and back again.

### *B. Subsequent Recruitment Exercises in 2016 and 2017*

Unfortunately, the subsequent recruitment exercises carried out in 2016, and more recently in 2017, have mirrored the exercise carried out in 2015 on all aspects.<sup>313</sup> Both of these recruitment exercises were carried out by the Inspector General on the basis of delegated authority from the Commission.<sup>314</sup> The exercises were also

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309. *Id.* at para. 13; see also IPOA MONITORING REPORT, *supra* note 282, at 11–13.

310. See *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 13 (H.C.K.) (Kenya); see also IPOA MONITORING REPORT, *supra* note 282, at 11–13.

311. See *Indep. Policing Oversight Auth. v. Att'y Gen.* (2014) eK.L.R. at para. 13 (H.C.K.) (Kenya).

312. The advertisement for recruitment clearly stipulated that female candidates were not to be pregnant at the time of recruitment or during subsequent training. See *Recruitment of Police Constables*, *supra* note 145.

313. *Recruitment of Police Constables*, REPUBLIC OF KENYA NAT'L POLICE SERV., <http://www.npsc.go.ke/index.php/2014-03-25-12-08-21/downloads> [<https://perma.cc/4PAL-A64D>]; see also KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *DISSERVICE TO THE SERVICE: REPORT OF THE MONITORING OF THE 2016 RECRUITMENT OF POLICE CONSTABLES TO THE NPS* (2016), <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/disService%20to%20the%20Service.pdf?ver=2016-08-24-100042-787> [<https://perma.cc/Z3UU-SEHU>] [hereinafter *DISSERVICE TO THE SERVICE*].

314. See *DISSERVICE TO THE SERVICE*, *supra* note 313.

conducted as one-day events, instead of phased recruitment exercises.<sup>315</sup> Additionally, the manual setting objective physical and medical standards was not used as it is yet to be developed.<sup>316</sup> Lastly, the practice of barring women from recruitment has persisted.<sup>317</sup> This manner of conducting recruitment now appears to be the favored mode, which is an unfortunate return to the old recruitment process carried out as a one-day event by the Inspector General.

### CONCLUSION

From the foregoing, the petition had significant impact on the reform of National Police Service recruitment exercises. Apart from sending an unequivocal message that recruitment of police officers must be carried out in strict accord with certain constitutional principles postulated, it catalyzed the development of regulations that seek to effect key aspects of these constitutional principles highlighted in the recruitment decisions. The regulations, however, are far from perfect, and there are certain key aspects that still require further work. For instance, development of the manual setting out standards to be used in evaluating physical and medical requirements is crucial to engender transparency and accountability in the recruitment process.

That said, however, the Courts' decisions on certain aspects of recruitment may also negatively impact envisaged reforms. The High Court's position regarding disqualification of women on grounds of pregnancy may further entrench this discriminatory practice in subsequent recruitment exercises as evidenced in the recruitment exercises carried out in 2015, 2016, and 2017.<sup>318</sup> While it is unfortunate that the Court of Appeal failed to take advantage of the opportunity to settle the issue, the same can still be addressed in the development of the manual. It can be set out in the regulations by specifically highlighting that pregnancy is not a ground for disqualification.

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315. See KENYA NAT'L COMM'N ON HUMAN RIGHTS, *ALMOST THERE: THE JOURNEY TO ACTUALIZING PROFESSIONAL POLICERECRUITMENT*, <http://knchr.org/Portals/0/Reports/Exit%20Report-Monitoring%20the%20Recruitment%20of%20Police%20Constables%202017.pdf?ver=2017-05-12-134035-513> [<https://perma.cc/GR8W-W3M9>] [hereinafter *ALMOST THERE*]; see also *DISSERVICE TO THE SERVICE*, *supra* note 313, at 8; Muthoni Waweru, *Hiring of 10,000 police officers kicks off on April 4*, CAPITAL NEWS (Mar. 22, 2016), <http://www.capitalfm.co.ke/news/2016/03/hiring-10000-police-officers-kicks-off-april-4> [<https://perma.cc/F8X5-DYHT>].

316. See *ALMOST THERE*, *supra* note 315, at para. 5.

317. See *id.* at paras. 19–20.

318. See *DISSERVICE TO THE SERVICE*, *supra* note 313; *Recruitment of Police Constables*, *supra* note 145; *Recruitment of Police Constables*, *supra* note 313.

Further and critically, the High Court and the Court of Appeal's failure to evaluate the constitutionality of Section 10 of the NPSC Act that allows delegation of recruitment powers has now entrenched the practice of delegating recruitment of police officers to the Inspector General, as is reflected in the current recruitment regulations.<sup>319</sup> This in effect emasculates the intended constitutional reforms that seek to insulate police recruitment from executive manipulation by removing recruitment powers from the Commissioner of Police and vesting them in an independent constitutional commission. There is an urgent need for the legislature to reconsider Section 10 of the NPSC Act and repeal that provision that allows the Commission to delegate recruitment powers to the Inspector General. In the alternative, stakeholders in the police reforms sector, including IPOA, may file a constitutional petition challenging the constitutionality of that provision that now threatens to render stillborn reforms in police recruitment.

Finally, if an example were needed as to how perilously close we are to rolling back any gains made in police recruitment reforms, the manner of conduct of the recruitment exercises carried out in 2015, 2016, and 2017 provides the unequivocal warning that we are teetering on the edge. It also brings to the forefront the urgent need to quickly address the above highlighted areas of concern, and if not, any gains made in reform of police recruitment are simply going to be a case of there and then back again.

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319. The National Police Service Commission Act, No. 30 (2015) KENYA GAZETTE SUPPLEMENT No. 39 § 3 (Kenya).