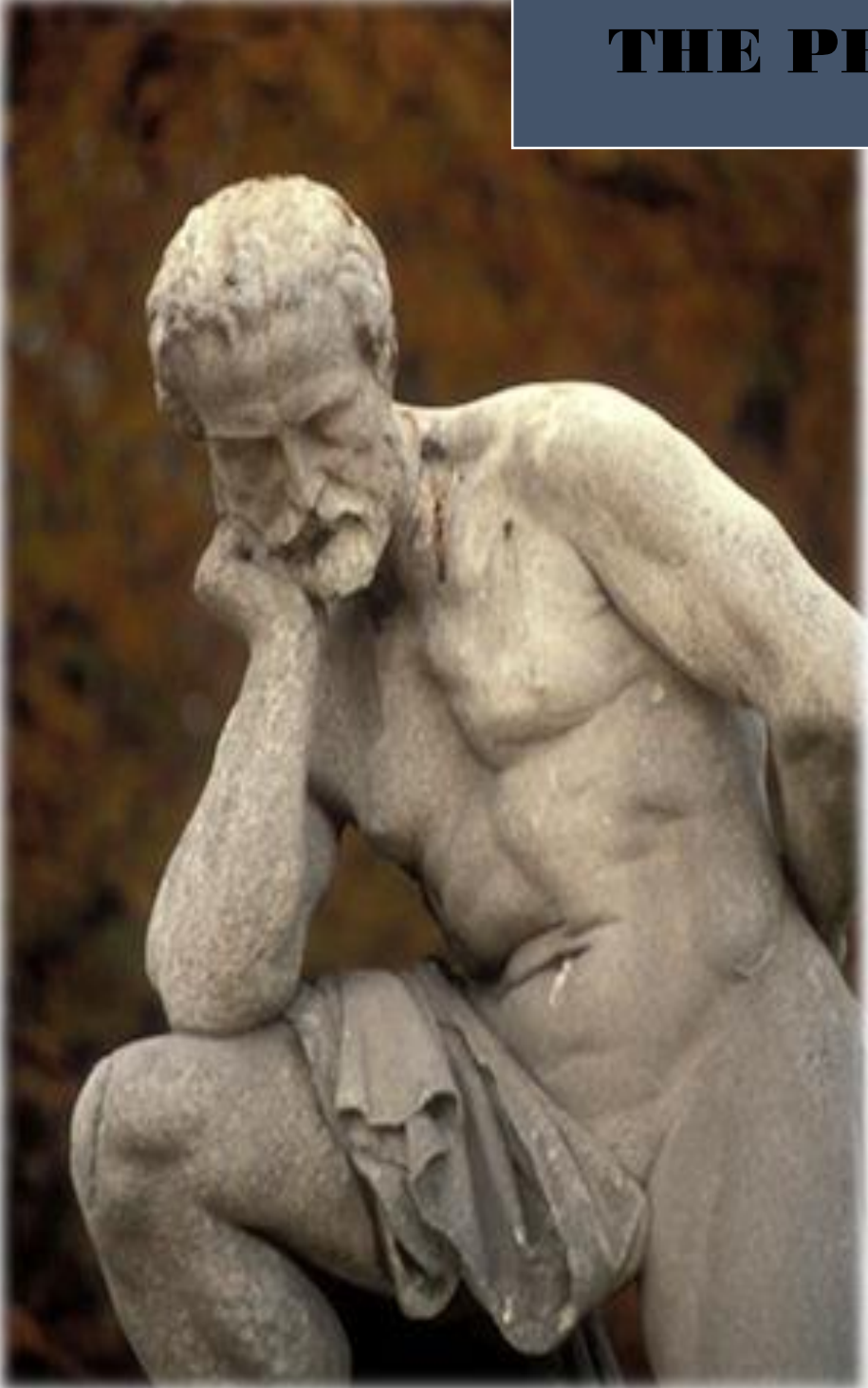


THE PHRONESIS



SALAR EDITORIAL BOARD MONTHLY MOMENTUM

Police Duties and Human Rights; Quest for a Balance

ACKNOWLEDGEMENTS

The SALAR Editorial Board would like to extend gratitude to the following persons and organizations indicated hereunder; The Independent Policing Oversight Authority (IPOA) in specific mention, Mr. Nderitu, for according us the honour of gracing our first ever monthly talk and their generous donation of constitutions and also of their insights; Students from African Nazarene University who braved the tiresome journey just to be part of the discussion; Students from University of Nairobi particularly those who attended the talk; The School for their support; The Student's Association for Legal Aid and Research (SALAR) Governing Council for the effort they channeled towards the success of this talk and the Student's Organization of Law and Diplomacy (SOLAD) for their partnership.

Special thanks to Dale Pascal Onyango, Mbatia Wachira and Roselyne Mugo for their coordination of the talk, compilation and publishing of this momentum.

To all who have faith in us. You have made this work possible.

Asanteni!

INTRODUCTION

"We must not listen to those who advise us 'being men to think human thoughts, and being mortal to think mortal thoughts,' but must put on immortality as much as is possible and strain every nerve to live according to that best part of us, which, being small in bulk, yet much more in its power and honour surpasses all else."

Aristotle, Nichomachean Ethics

The Editorial Board of the SALAR Law Journal which is the publication arm of the Students Association for Legal Aid and Research (SALAR) seeks to introduce the inception of monthly talks which seeks to cultivate debates that touch on legal contemporary issues that affect the society. The talks which are dubbed the '*Phronesis*' from the Greek term which relates to intellectual talks were usually organised by philosophers in a bid to interact and share insights with the public on various matters. We hope that this then serves as a platform for mentoring young intellectuals and also giving the budding writers an avenue to perfect and hone their ability to articulate their opinions clearly on a page. This is then in line with SALAR's vision and the University of Nairobi mission of advancing intellectual debate amongst the academy. It is in this vein that Aristotle then urges us to veil ourselves with the notion of 'immortality' and give the best part of ourselves to all that we do as it is that power and passion that make us human.

In this first edition of the '*Phronesis*', we review the controversial divides that exist between police duties and human rights with a goal of finding the perfect balance. Mr **Alphayo** starts us off by pulling at our nurturing instincts by urging us to seek entrenching reforms to the Police and also to the Independent Policing Oversight Authority (IPOA) through 'S-E-R-V-I-C-E'. In a nod to the various challenges that IPOA faces in executing its mandate, Mr **Mbatia** seeks to showcase on what exactly constitutes the lawful use of a firearm by the police within the legal framework. This is all said with a view of reform still on the back of his mind. Mr **Simba** brings to the fore the issue of IPOA not being 'strong enough' to carry out its mandate and entreats us to start the conversation on what are the possible recommendations that can be made to strengthen IPOA. Miss **Lavender** finally takes a 'battering ram' approach in her bid to awaken IPOA. She clearly articulates the woes that unregulated police actions have had on the public and therefore urges the body to show its relevance not only through its words but also through its works.

To our writers, thank you for the fantastic job that you have done in providing your perspectives and opinions on the matter at hand.

To all those who attended the event, thank you for your presence and also for your lively participation and engagement with the speakers. You are the reason why we brought this momentum into life. Keep coming to more of our events and start honing those writing skills as it is often said that your character more often than not shines through your words.

To our readers, interact with this issue and strive not to agree with all what has been stated but to form your own voice to the matters that have been addressed here. If you do find yourself in agreement with the first article till the last, then strive to find Aristotle's immortality in you and start building your own voice. That voice is what we want to engage with in our next monthly talk event and also in the subsequent '*Phronesis*' issues.

Thank you!

Roselyne M. Mugo,

Editor-in-Chief,

SALAR Law JOURNAL

“Let me be clear – no one is above the law. Not a politician, not a priest, not a criminal, not a police officer. We are all accountable for our actions.”

Antonio Villaraigosa

During the month of September, the Board invited The Independent Policing Oversight Authority (IPOA), to give a talk- “Police Duties and Human Rights, Quest for a Balance”. This talk was held in the wake of widespread blatant police brutality across the country that preceded the repeat presidential elections. The presentation was done by the deputy legal director of IPOA, Mr. Nderitu, who started by giving a brief history of IPOA. He then went ahead to highlight the achievements of the aforementioned body and the challenges that they faced in doing of their work. In his presentation, he affirmed that IPOA is an independent body established under the IPOA Act (No. 35 of 2011) to provide for a civilian oversight over the work of the police in Kenya in line with Article 244 of the Constitution of Kenya. In other words, IPOA is mandated with holding the police accountable in the execution of their duties which should be done with the highest level of discipline and professionalism. Having highlighted the achievements of the independent body, he then went further to point out the challenges that they face including lack of human resource and technical capacity to handle all complaints within a restricted time period.

As always questions were raised and loopholes exploited but due to time constraints, the speaker never managed to answer all the questions. Therefore, it is only prudent to give students another forum to express their opinion and critique the talk. “*THE PHRONESIS*”, this being the first issue, seeks to provide an avenue for those who attended the talk to critique the talk and give recommendations which will also be tabled to IPOA.

Going forward, “*The Phronesis*” is going to be a monthly publication which will help nature and improve writing skills among students. Watch out for the next issue.

Dale Pascal Onyango,

The Managing Editor, Salar Editorial Board.

FUNCTIONS AND DUTIES OF IPOA

The Independent Police Oversight Authority is an independent body established under the Independent Police Oversight Authority Act.¹ IPOA, as it is commonly referred, is established under the IPOA Act (No. 35 of 2011) to provide for a civilian oversight over the work of the police in Kenya in line with Article 244 and Chapter Fifteen of the Constitution of Kenya 2010. Its main aim is to ensure transparency and accountability within the National Police Service bearing in mind the vast amount of power the NPS wields. An abuse of this power will be detrimental to the general public and create a lot of mistrust and impugn on its credibility. IPOA does carry out its mandate by investigating police misconduct and writing of recommendations which if implemented, ensure the proper working of the National Police Service.

The Police Act,² under section 88 outlines that the police are subject to the law and regulations relating to their services.³ The Act further prescribes the offences for which internal disciplinary measures can be taken aside from the usual criminal offences perpetrated by the police.⁴ Police misconduct as per section 2 of the Independent Police Oversight Act,⁵ does not necessarily have to be failures or omissions that are unlawful; as long as the misconduct does not meet the requirements or norms of policing, values and norms applicable to policing in a democratic society or applicable norms and standards provided for under international instruments applicable to Kenya.

The IPOA in carrying out its function is empowered to conduct investigations. This is provided for under section 24 of the IPOA Act of 2011. A citizen may lodge a complaint with the Authority either orally or in writing where the complainant is required to give some specific information in regards to the incident, to aid in investigations as prescribed by the authority. The Authority is also required to initiate inquiries with the relevant government department for additional relevant information. In carrying out its investigations, it looks at circumstances that may have hindered the effectiveness of policing as well as the actions and conduct of the complainant, victim or other people at the scene. This helps in determining if the police officer's actions amounted to

¹ No. 11 of 2011.

² Police Act, Cap 84 of the Laws of Kenya.

³ Act no.11 of 2011, s.88 (2)

⁴ Ibid, Eighth schedule

⁵ Cap. 88 of the Laws of Kenya.

misconduct. If a complaint is considered frivolous, it is not investigated. It should also be noted that police officers may also lodge complaints with the authority. However, the authority has the discretion to refer it to the Internal Affairs Unit of the Service.

It is also important to note that IPOA does not handle cases that are already before a court of law or a tribunal. IPOA's investigations may be halted if the matter is criminal in nature and undergoing proceedings until concluded, after which it may continue or discontinue the investigations. It may also reopen investigations in light of new evidence. If the National Police Service is already internally investigating an issue, the IPOA has the discretion to either adopt their findings or do their own investigation.

To avoid intimidation of police officers while working, the officers will not be merely tried or put at a disadvantage when a complaint is lodged against them and evidence presented. The complainants on the other hand have their details kept confidential at their request unless it impedes justice. All the information achieved during the investigation is kept confidential until the authority states otherwise in writing.

Mang'ich Kateline

2nd Year

ENTRENCHING S-E-R-V-I-C-E IN IPOA AND THE POLICE FORCE

Summary of allegations of extrajudicial and arbitrary executions in Kenya formed the substrata of Albert Alston's⁶ mission to Kenya in the year 2009 at a time that the clamour for Constitutional and Institutional reforms was at their peak. In his detailed report to the United Nations, he, inter alia, recommended for the formation of a civilian body that would hold the police force [as it was called then, now; the National Police Service⁷] to account for its excesses by way of investigations on the various atrocities committed by the force and holding those responsible to account.

The Independent Policing Oversight Authority⁸ is the manifestation of that recommendation. Formed in 2010 the body is tasked, inter alia, with the realization of the highest standards of professionalism, integrity, and respect for human rights, receiving of complaints against members of the Police Service etc., all in an attempt to entrench accountability and transparency in the policing activities of the nation.

On the 28th of September, 2017, Mr. Nderitu⁹ narrated his institution's mandate vis-a-vis its successes and was courageous enough to admit its misgivings but was quick to avail the reasons behind some of the challenges. The hindrances ranged from statutory insubordination¹⁰, the huge number of complaints, the hazardous nature of their task, lack of political good will, and limited resources to realize their mandates. The police have hampered investigations, the servicemen are armed as compared to the civilians conducting investigation thus can harm them, etc.

In the presentation it became apparent that the Police Service has failed to serve its role within the prescribed and hallowed provisions of the Article 244 of the Constitution of Kenya, 2010. The *Kawangware* murders of 6 taxi drivers, the ruthless way of handling peaceful demonstrators and peaceful protesters, the *Kwekwe Mwandaza* murder case, are just but a few of the reported atrocities orchestrated by the people supposed to offer security and protection to Kenyans. The police have misused their weapons contrary to Schedule Six of the National Police Service Act.

⁶ UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions Mission in Kenya, as from the 16th - 25th February, 2009 that focused on a tripartite approach; killings by the police; violence in the Mt Elgon district; and killings in the context of the post-election violence.

⁷ Act No. 11A of 2011, Laws of Kenya that repealed The Police Act and the Administration Police Act CAP 84 & 85, respectively of the Laws of Kenya.

⁸ CAP 88 Laws of Kenya.

⁹ Assistant Legal Officer, IPOA- Kenya.

¹⁰ National Police Service Act, No. 11A of 2011, Laws of Kenya, Section 87.

In the face of all these and many more, it is expected that the *wananchi* will be up in arms against the IPOA. Why? Because it is disheartening to continue being exposed to the brute force of the police and see nobody being held to account by the responsible body which is IPOA. The cliché undertaking that “...investigations will be done...” makes the already horrible situation worse. Blanket answers that are not only unprofessional but also disrespectful to those fallen by being shot aimlessly by live bullets like, “...*the police were from all over Nairobi thus it is difficult to tell which officers were deployed to a particular location...*” in arrogant disregard for the police rules of service have created animosity between the police and the public instead of, “...***fostering and promoting relationships with the broader society.***”

Even with the obtaining situation, we cannot afford to throw the baby away in the water bath. We must have a firm resolve to nurture this child to maturity. While sympathizing with baby IPOA, I am of the opinion that as Kenyans we must once again rise up to the occasion to entrench the remaining bits of reform in the police service, and support the empowerment of IPOA for a better society where the police will offer: quality **S**ervice; will be **E**ffective; all- **R**ound in policing and security functions; highly **V**isible in policing, robust and **I**mmEDIATE in response to emergency; engage in **C**ommunity partnership programs and manifest professional **E**thics.[**SERVICE**]

Alphayo Wycliffe Onger, LJ

4th Year ; alfayolaw@gmail.com

LAWFUL USE OF A FIREARM

Mr. Nderitu from the Independent Policing Oversight Authority (IPOA) discussed the lawful use of force, more specifically the use of firearms, by the police service as prescribed in the Sixth Schedule of the National Police Service Act. He reaffirmed the position that police officers, before employing their firearms, are inter alia mandated to give a warning on their intention to use the firearms. Besides that, they should grant the lapse of sufficient time after they have issued the warning for its observance to be effected. However, I doubt if this is adhered to during demonstrations taking into account the recent occurrences of numerous deaths and injuries which have arisen due to gunshots. This is a clear manifestation that compliance with this schedule is wanting. Nevertheless it raises this important question: how would police officers warn the large masses of people that turn up to exercise their right to demonstrate and picket of their intention to employ the use of their firearms?

It is my view that when the police decide to use their firearms to disperse demonstrators, they should issue an express warning of the same. The use of teargas should not be construed to mean that they intend to fire live bullets at demonstrators. They should come up with a mechanism on how to proceed with the issuance of warnings in situations that involve many people as the law squarely places this obligation on their shoulders. In *Ahmed Mohammed Omar & 5 others v Republic* [2014], the court construed the action of police shooting in the air as an implied warning on their intention to use lethal force hence acquitted the appellants who had been charged with the murder of seven taxi drivers in Kawangware. I disagree with this opinion of the learned judges. I aver that the caution to be issued should be express except in the circumstances listed in the Sixth Schedule.

Secondly, the speaker articulated the challenges that IPOA officers face in their line of duty, among them, intimidation and threats from the police officers. He outlined instances where police officers have denied IPOA officers access to; police stations, useful documents, names of officers involved in certain operations that would play a fundamental role in the fulfillment of their mandate. The most notable example he gave is where IPOA requests for the names of the police officers who participated in an operation and many a times the reply is “Those were police officers drawn from all over Nairobi.” This goes a long way in inhibiting the performance of their roles and their efficacy as a body that has been entrusted by the people and the law to guard public interest in

policing. I empathize with them. They are definitely not in a desirable position. However, they should keep on with the fight for police reforms. They should not cower under the intense pressure. The reforms may not happen overnight but we shall get there one day.

Mbatia Wachira

4th year

A NEUTRAL REVIEW OF THE IPOA TALK

The talk by IPOA representative, Mr. Nderitu was informative. It delved into the role of IPOA and the reason it was established. Mr. Nderitu also talked about some of the challenges that IPOA faces in the performance of its functions with the lack of cooperation from the police commanders standing out. A classical case is where police use unreasonable force on demonstrators and the police commanders then decline to give details of the police officers who were involved in the said operations.

The talk did not address the steps that IPOA is taking to ensure professionalism in the police service. Most of the investigations commenced by IPOA have often ended up in dead ends. A case in point is the investigation into the killing of the six-month-old Samantha Pendo in Kisumu. There are no concrete results to show of police officers prosecuted for their involvement in extrajudicial killings. The lack of prosecution has resulted in the continuation of extra-judicial killings.

The issue of addressing the relationship between the police and members of the public, especially during protests, was also raised. Mr. Nderitu observed that the police face an uphill task in handling demonstrations since in some cases the demonstrators are usually armed. In such instances, the lives of the police officers are then threatened.

On the issue of live bullets; the law allows the police to use live ammunition where their lives or the lives of others are in danger. It also allows them to use live ammunition in the protection of property. The use of live ammunition in the protection of property was the most contentious issue. Mr. Nderitu was of the opinion that live ammunition should not be used in defense of property, considering the sanctity of life. I also hold a similar view to his.

In conclusion, the talk was informative. It brought to fore the issues that currently face our police service. The role of IPOA, however, has not been adequately addressed. Many Kenyans hold the view that IPOA is toothless and cannot help in '*policing*' the police officers. Next talks should, therefore, focus on the reforms that can be implemented to give IPOA more powers.

Felix Simba ,4th Year

AWAKE THOU IPOA, TIME IS FAR MUCH SPENT

We acknowledge for a fact that IPOA has spearheaded and with force has been geared in providing for civilian oversight over the work of the police in Kenya. The body has received much publicity and the general public sensitized on its mandate and functions; however this has only been in word as by looking to the depths, IPOA has continuously been uncommitted, unconcerned and unmoved to perform or be in action for the good of our motherland Kenya. Over the election period a lot of police brutality has been witnessed nationwide; some openly brought under the coverage of the media while some reported by the affected parties with both camps seeking intervention, yet no actions have been taken to ensure justice takes its course.

A key function among the many functions of IPOA is to primarily monitor police operations which affect members of the public, in reality; nothing of this sort is being done. The police have taken advantage of situations affecting the public and rather performed crimes of various sorts and later claimed that it was ‘the *wananchi*’ in action, the question that arises then is where is IPOA in all of this? When police are using excessive force and abusing their given powers; why is IPOA not coming up strongly not only to condemn but also bring the police who have performed such actions to book?

It is indeed high time IPOA awakes from the long slumber they have been in and take up their duty with vigor and rescue the public from the ‘uncontrolled and dangerous’ police actions. IPOA should equip itself to produce results and not just to update the public on the course of actions to be taken to ensure culpable officers are brought to book. Kenyans are hopeful for a future where through IPOA; the police fraternity would be reformed with citizens congratulating IPOA on work well done by the institution and its officers and tax payers’ money used properly to their own benefits. IPOA, The place of words cannot be ignored but it makes more sense when it is accompanied by work. Surely we have known IPOA from its inception by its name and sensitization; we demand to know you by your fruits.

Lavender Awuor Onyango

4th year (lavyawuor@gmail.com)