

## Policy Brief 1/2013

# DEMOCRATIC POLICING OF THE MARCH 2013 GENERAL ELECTION IN KENYA

Nairobi, February 2013

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### About this Policy Brief

This Policy Brief emerges from a consultative process that commenced as a brainstorming meeting<sup>1</sup> in June 2012 on policing Kenya's next election and progressed into an engagement with the National Police Service Commission soon after the appointment of its Commissioners in November 2012 and various groups of civil society actors, working within a coalition known as the Police Reforms Working-Group. CHRIPS, as a partner in the Working-Group, took the lead<sup>2</sup> in developing a set of Guidelines on Policing the 2013 Election, drawing from the lessons of the previous elections and in particular the 2007 elections which spawned Kenya's worst election-related violence and resulted in sharp criticism of the police. This Policy Brief therefore presents policy arguments for the adoption of guidelines for policing the March 2013 elections. It also presents recommendations for measures that will enhance a democratic approach to policing the elections, in view of the lessons from the last elections, the present challenge of low levels of public confidence in the police and the demands of the Constitution and other laws for police accountability and civilian oversight over security organs.

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<sup>1</sup> Convened by the Independent Medico-Legal Unit and CHRIPS, bringing together participants from the Independent Police Oversight Authority (IPOA), African Policing Civilian Oversight Forum (APCOF), Usalama Forum, the Centre for Governance and Development (CGD), the Open Society Initiative for East Africa (OSIEA), and ACT!.

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## Key messages

- How the police manage the 2013 elections will have a lasting impact on Kenya’s democratic development under the new Constitution. An important starting point is to issue a set of Guidelines that communicate what the public should expect from the police and what the police expect from the public and political aspirants.
- Included in this Policy Brief is a highlight of what such Guidelines should cover.
- The strong indictment of the police for their conduct in the 2007/8 post-election violence by the Waki Commission, the Ransley Task Force and various national and international human

rights institutions as well as researchers, makes it clear that one of the key tasks for the police ahead of the elections is to build public trust and confidence in the institution.

- The era of secretive, hostile and unaccountable policing is in the past. The onus is now on the National Police Service to bring the institution in step with the demands of contemporary democratic policing.

## INTRODUCTION

*“National security is the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. ... The national security organs are subordinate to civilian authority.”*

*The Constitution of Kenya, Articles 238(1) and 239(5)*

Kenya’s political and governance landscape is set to change dramatically after the March 2013 elections. At 50 years, the nation is moving from a highly centralised governance and decision-making structure to a devolved system; from an all-powerful and pervasive Executive and law enforcement arm to more independent yet accountable government institutions. Underpinning this momentous transition are “the essential values of human rights, equality, freedom, democracy, social justice and the rule of law,” which are amplified by the new Constitution.<sup>3</sup> The 2013 general elections are the archway that the country will pass through into a new political, social, legal and economic dispensation.

The National Police Service<sup>4</sup> is facing the gargantuan task of securing the election and ensuring a peaceful transition. The responsibility is daunting as the stakes are particularly high in the 2013 elections, given that the Presidency is changing hands,<sup>5</sup> the first county representatives of the devolved government system are being elected, the two-tier Parliamentary system is being put in place and the elections as the first under the new Constitution will set the pace for the subsequent elections. At the same time, the violence and mayhem that tailed the 2007 elections is fresh in the minds of all

<sup>3</sup> See the Preamble of the Constitution of Kenya 2010 (popularly referred to as the New Constitution) which the new Constitution was promulgated in August 2010 and is the culmination of at least 10 years of deliberation. The previous Constitution, which had been amended by successive governments to create a very powerful and unaccountable Executive that controlled the Judiciary and overruled the Legislature, a heavy and often brutal law enforcement arm and a weak bill of rights that left citizens vulnerable.

<sup>4</sup> The 2010 Constitution changes the police institution from a ‘force’ to a ‘service’, based on the recommendations of the National Task Force on Police Reforms of 2009, in a bid to change the relationship and attitudes of the service towards civilians and vice versa.

<sup>5</sup> The 2013 election is also overshadowed by the ongoing criminal trials before the International Criminal Court of two of the aspirants for president and vice president who are facing charges of crimes against humanity emerging from the 2008 post-election violence.

“Even with the intelligence provided by the NSIS and the historical nature of elections in this country, police agencies quite simply failed, and failed badly, in their fundamental requirement of their mandate.”

**Report of the Commission of Inquiry on the Post Election Violence 2008,**

**B. 372**

Kenyans. The severe indictment of the police conduct that was seen to have contributed to the violence and fatalities, was openly partial, and failed to deescalate the situation dealt a heavy blow on the public's confidence in the capacity of the police to be fair, impartial and professional. The National Police Service is therefore going into the election with a sceptical and distrustful public yet with the sensitive responsibility of securing the election and Kenya's democratic transition. In these circumstances, it is paramount that the police take key steps that restore public confidence and public cooperation during the elections, and also set the pace for the police to quickly move into the requirements of democratic and accountable policing in the new dispensation.

## CALL FOR A NEW APPROACH TO POLICING ELECTIONS

The police have had a tense relationship with the public since independence. The colonial mould cast the police into a role of service to the ruling elite and implementation of oppressive directives. This was carried into the structure of the post-independence police institution. The police attitudes and culture crystallised firmly around this mould and they have shaped the hostile relationship between the police and the public. The police are publicly perceived as committed first and foremost to doing the bidding of and protecting a powerful ruling elite, indiscriminate in their use of force and often quick to use excessive, deadly force to achieve their objectives, deeply corrupt and accountable to no one.<sup>6</sup> Their past conduct has demonstrated over and over again that the responsibilities of security, law enforcement and maintaining order for the public were not priorities of the police.

The Police agencies [regard] the term security as synonymous with secrecy. They [fail] to grasp the concept adopted by most contemporary law enforcement agencies that being open and interactive with communities is not only the right of citizens but fundamental to ensuring community support and in developing their trust and confidence.

**Report of the Commission of Inquiry on the Post Election Violence 2008, p. 423**

The extent of the failure in police responsibility to the public was made manifest during the 2007 elections and the ensuing crisis. Some police officers were found to have engaged in partisan activities, distributing leaflets for or against certain candidates, while in some cases police broke up opposition rallies. . The findings of police complicity in the violence through active participation or failure to take action led to heightened focus on the police as an institution and several critical reviews of their role as a neutral security and law enforcement agency during the critical yet fragile process of democratization in Kenya. Reports since 2008 have placed much of

<sup>6</sup> See Commonwealth Human Rights Initiative and the Kenya Human Rights Commission, *The police, the people, the politics: police accountability in Kenya*, 2009, New Delhi, CHRI; National Task Force on Police Reforms (2009) *Report of the National Task Force on Police Reforms*; Mutuma Ruteere, "More than political tools: the police and post-election violence in Kenya," *African Security Review* 20.4, December 2011, 11–20.

the blame for the extent of the violence squarely at the feet of the police and called for specific corrective measures within the police ahead of the next general elections.

## 1. The 2008 Waki Commission reflections on the police and elections

The Commission of Inquiry into the Post Election Violence (the Waki Commission) was appointed in 2008. It reviewed the conduct of security agencies before during and after the 2007 elections and gave the agencies a low score for failing to respond appropriately to the situation and indeed exacerbating the crisis through their conduct.<sup>7</sup> The report highlighted important concerns on policing elections and the potential of police conduct to positively or negatively impact upon democratic efforts.

- The report emphasized that the police **failure to employ pre-emptive and preventative measures** contributed to the violence and anarchy. Such preventative measures ahead of the election would include informing the public on the acceptable and unacceptable actions in keeping with the rights protected in the Constitution, and enforcing the law fairly and impartially for all political parties.
- Significantly, the **police lacked documented plans for managing the elections**, which would have provided a common standard of policing during the elections and ensured that officers were working under the same set of principles. Instead, every region dealt with the situation based on the views of individual officers in command coupled with directives from the headquarters and a clear partisanship that favoured one side of the competing political groups.
- **Heroic acts of individual officers versus overall attitude of the institution.** There were moments of heroic acts by some police officers, but these were based on individual acts and did not reflect the common attitude and approach of the police to the election.
- The police were sharply criticised for **adopting a reactive approach as their main strategy for the elections**, which the Waki Commission labelled “misplaced arrogance” that they could handle any incident that emerged without planning for it.
- The police clamped down on political rallies often in violation of citizens political rights. The Commission particularly faulted the partisan manner in which rallies were cancelled and dispersed.
- The **police were cavalier in their use of force** including using live ammunition to quell riots and demonstrations. It is conceivable that as many as 405 people who died during the post election period from gunshot wounds were killed by the police.

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<sup>7</sup> See the *Report of the Commission of Inquiry into the Post-Election Violence*. Part IV (pp. 355-442) focuses with the acts and omissions of the Security Service Agencies. It discusses at length the attitude of the police force long before the election, the politicization of the institution and the culture of impunity that affected the police responsiveness to the violence. It also includes detailed recommendations on corrective measures for police reform and for securing the next general election.

- The approach to **policing through secrecy, lack of information sharing and lack of public communication** serves only to isolate the police, create uncertainty and is a relic of a previous era that the institution should have left behind. Contemporary policing adopts an open and interactive approach. The police need to ensure the public is regularly informed even as the police expect the public to provide information that supports the work of maintaining law and order.
- Gathering intelligence and interpreting the security implications was done well. However, translating this into action was wanting. The **security agencies did not function cohesively**.

## 2. The 2009 Ransley Report reflections on policing elections

The National Task Force on Police Reforms appointed in 2009 reflected extensively on police reforms and elections. They highlighted the following key issues in their report

- The **demand for police accountability** recognises that police are vested with significant power which they must use in a way that demonstrates awareness of the responsibility that comes with the power; that respects the rights of civilians; that expects the police to ‘justify their decision and actions and bear responsibility for them.’
- **Civilian oversight of the police** has become an important component of contemporary law enforcement across the world.
- The police often view and therefore **resist accountability and civilian oversight** as interference with police work. However, it is a vital mechanism to ensure police actions are in the service of the public and is a basis for building public trust in and cooperation with the police.
- The **absence of communication with the public on policing** contributed significantly to the hostile relationship between the police and the public. Regular briefings to the public are a good starting point for redressing the situation.

## 3. The Constitution of Kenya 2010 and other legislation

- Under Article 1 of the Constitution, **the people of Kenya have sovereign power** within the territory and by means of the Constitution and they have donated the power to State organs, including the National Police Service, to perform very specific functions. This means that the police remain accountable to the people of Kenya in the exercise of their power.
- Article 232 highlights transparency and provision of accurate and timely information to the public as a **value and principle of public service**.
- Specifically, the **principles of national security** found in Chapter Fourteen of the Constitution emphasize that:

- National security must respect the rule of law, democracy and fundamental rights and freedoms (Article 238); and
- National security must not be partisan, affiliated to political parties, or prejudicial to any political interests and causes that are legitimate under the Constitution (Article 239);
- Article 239(5) decrees that national **security organs are subordinate to civilian authority**.
- Further, Article 244 gives the police the responsibility of fostering and promoting **positive relationships with the public**.
- **The Constitution articulates and protects political rights**, which include the rights to participate in political activities, recruit members for political parties, hold and participate in political rallies and the rights to assemble, demonstrate, picket and petition peaceably (see Articles 36 and 37).
- The National Police Service Act of 2011 in the Sixth Schedule includes detailed requirements on **the use of force and the standards of accountability**. Where force is deployed in the execution of police duties and it results in death, the incident must be reported to the Independent Police Oversight Authority.
- The National Police Service Commission Act 2011 and the Independent Police Oversight Authority Act create the two bodies that activate the requirement of **civilian oversight of police actions**.

#### 4. Low levels of public trust and confidence in the police

*“In general, Kenyans regard the Kenya Police as ineffective, and levels of trust in them are low. Kenyans want trust and confidence in police restored, and cooperation with police officers improved to enhance the safety and security of communities.”*

*Report of National Taskforce on Police Reforms, October 2009, xxvi*

Surveys and opinion polls indicate that Kenyans are going to the polls with low levels of trust and confidence in the Police Service’s ability to police the elections professionally, impartially and effectively.<sup>8</sup> The University of Nairobi’s Institute for Development Studies in their *Afro-barometer Survey Report* indicates that as at March 2012 nearly 67% of the members of the public surveyed did not trust the police. South Consulting also reported in October 2012 that while public confidence in the police had improved due to the reform measures instituted, there remained much scepticism about the police conduct in the upcoming elections (South Consulting, 2012, 10-11).

#### 5. Danger of increase in election-related criminal activity

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<sup>8</sup> Consecutive Synovate Africa polls (formerly Steadman Group) between 2008 and 2012, University of Nairobi’s Afro-barometer surveys (<http://www.afrobarometer.org>), and South Consulting electoral preparedness monitoring reports, among others, indicate that Kenyans find the police the least or one of the least trustworthy government institutions. The latest IPSOS Synovate Kenya survey shows that the public confidence in the police has slightly improved to 42% favourability as of January 2013. See IPSOS Synovate Political Barometer 2013.



The incidents of crime, recurring inter-ethnic clashes, cattle rustling and related forms of violence in various parts of the country ahead of the elections are adding to Kenyans' nervousness about the elections. The clashes between the Orma and Pokomo communities in the Tana Delta of the coastal region that have left over 160 people dead by January 2013, the ambush and killing of over 40 police officers in pursuit of cattle rustlers in Baragoi, Samburu county, cases of infiltration of the Police Service by impostors and the ongoing incidents of terror attacks and grenade explosions in Nairobi and other parts of the country give the impression that the police is overwhelmed in the lead up to the elections.

The cost of diminished confidence in the Police Service has been a rise of militias, gangs and armed groups who provide contract violence and 'security' for politicians, and the emergence of 'shadow states' in informal settlements where these groups exact fees for 'security' from the residents.<sup>9</sup> In addition, it is estimated that 530,000 – 680,000 small arms are now in the hands of civilians, majority of which are illegal.<sup>10</sup> All these present a worrying forecast on the potential for violence during the elections if the police are not perceived to be in charge of the situation.

## 6. Lessons from Nigeria and South Africa

Since moving from military to democratic rule in 1999, Nigerian elections, like Kenya, had been marred by extensive rigging, violence, death and the police taking on a partisan role during the elections.<sup>11</sup> The result was widespread cynicism, mistrust and lack of cooperation with the Police. In 2003, working with a broad spectrum of partners, the police developed and publicized *Guidelines for the Conduct of Police Officers on Electoral Duty in Nigeria, 2003*, aimed at, among other things, "assuring institutional credibility" of the police. CLEEN Foundation (2011) reports that as a result of this initiative the Nigerian police were considered more coordinated, accountable, organised and approachable in the 2011 election.

In its transition from apartheid, South Africa recognized the importance of public confidence in the police before the 1994 elections as critical part of securing its democratic transition and the subsequent development of its democracy. The country focused on making a clean break from the previous conduct of the police under apartheid, improving police/community relations, and raising and making clear the standards of police accountability to the society.<sup>12</sup> Today the South Africa Police Service is considered among the most progressive security agencies on the continent with sound experience in democratic policing.

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<sup>9</sup> Patrick Mutahi, 2011.

<sup>10</sup> See Wepundi et al. *Availability of Small Arms and Perceptions of Security in Kenya: An Assessment*, 2012, Geneva: Small Arms Survey, Graduate Institute for International and Development Studies

<sup>11</sup> CLEEN Foundation, *Policing Elections in Nigeria: Assessment of the Role of the Nigeria Police Force in Elections in Nigeria*, 2010, Lagos: CLEEN Foundation

<sup>12</sup> Janine Rauch, 'Police Reform and South Africa's Transition,' 2000, Presented at the South African Institute for International Affairs conference



## **GUIDELINES FOR POLICING THE 2013 ELECTION: KEY ISSUES**

The National Police Service is tasked to secure the 2013 elections and to ensure that the conduct of its officers complies with the constitutional requirements of accountability while policing the elections. Given the state of the public attitude to the police, the internal measures would be inadequate if not communicated to the public so that it is clear what the public can expect from the police and what the police expect from the public. In view of Kenya's history of the conduct of police during elections, the relationship between the police and the public, the experience of the 2007-2008 post-election violence and the contemporary standards of accountable policing, this section highlights key issues that such guidelines for policing elections would contain.

1. ***Individual officer preparedness*** – every police officer on election duty is expected to know of the relevant electoral laws and particularly the electoral offences found in the Elections Act 2011. It is the responsibility of unit commanders to ensure every officer under their command is briefed and ready for policing elections.
2. ***Political impartiality*** – this is a reiteration of the constitutional requirement that officers shall be non-partisan and apolitical in carrying out their responsibilities related to elections. At the same time, the police internal investigative machinery will be invoked where officers are found partisan.
3. ***Transparency in public order management*** – the Police are committed to providing necessary information to facilitate holding of public gatherings and ensure all interested political groups have equal access to the information. The Police also expect those intending to hold public gatherings to provide details on the purpose and venue of the meeting and the details of those responsible for the meeting.
4. ***Adequate communication on public gatherings*** – the police adopt an approach of providing information and ensuring access to enable those seeking to hold legal public gatherings to do so. The communication from the police shall be made in a timely manner.
5. ***Managing public gatherings*** – the police are committing to ensure officers deployed for crowd control are briefed, wear uniform and visible identification, and positioned so as to avoid confrontation with the crowd as much as possible. The responsibility of managing public order at gatherings also requires the police to announce clearly that a public gathering is being dispersed if it becomes unruly and require those attending to leave the area. The key accountability measure here is to avoid the use of force and where force is used to use the minimal force necessary to achieve the objective.
6. ***Media communication to the public*** – the police is committing to have an officer or team of officers managing the information flow to the public to ensure the approach of the police is clear at all times, instructions for public order are clear and conform to the constitutional requirements.

7. *Cancellation of public gatherings* – where the Police find it necessary to cancel public gatherings they will do so with due regard for the constitutionally protected political rights and such cancellation will be in writing and give reasons.
8. *Use of force* – as guided by the Sixth Schedule of the National Police Service Act 2011, the police commit to use the minimal force necessary to achieve the objective. Use of force is taken seriously and the police commit to remaining accountable on how force is used.
9. *Deaths at public gatherings* – the police adopt an approach of disclosure and accountability. Deaths arising at a public gathering as a result of police action will be immediately reported to the Independent Police Oversight Authority and the appropriate police superiors within 24 hours.
10. *Election incidents reporting* – the police commit to noting, recording and reporting electoral incidents that arise during policing or the elections, and particularly at public meetings, rallies, polling stations and tallying stations
11. *Accountability and oversight institutions* – the police inform the public that as per law they are accountable to the Internal Affairs Unit, the National Police Service Commission and the Independent Police Oversight Authority. The police will keep records on electoral incidents, which shall be availed impartially as required.

## CONCLUSION

The National Police Service has a responsibility to secure the 2013 elections and to build public confidence in their capacity to do so, and a small window of opportunity in which to do it. The police management of the 2013 elections will have a profound effect on the success of the elections, the state of security in the country, as well as on Kenya's democratic development.

The proposed Guidelines are an important means of informing political aspirants, political rally organisers, members attending rallies, demonstrators, and the general public what the police expects of them to ensure a credible election and what the public can in turn expect from the police. Adoption of such Guidelines will demonstrate that the police are conscious of the sensitivity of the period, the risk of violence, and the urgency of restoring public confidence in their preparedness to secure the elections and their readiness to embrace democratic policing and accountability.

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