

**A CASE FOR VESTING THE INDEPENDENT POLICING AND OVERSIGHT
AUTHORITY WITH PROSECUTORIAL FUNCTIONS**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Laura Kerubo Ongoto

083887

Prepared under the supervision of

Ms Jerusha Asin Owino

January 2018

Word count (10,977)

Table of Contents

CHAPTER 1 INTRODUCTION	1
1.1:BACKGROUND	1
1.2: STATEMENT OF THE PROBLEM	3
1.3: JUSTIFICATIONS OF THIS STUDY	5
1.4: STATEMENT OF OBJECTIVES	5
1.5: RESEARCH QUESTIONS.....	6
1.6: RESEARCH HYPOTHESIS	6
1.7: ASSUMPTIONS	6
1.8: LITERATURE REVIEW	7
1.9: THEORETICAL FRAMEWORK	8
1.10: RESEARCH METHODOLOGY	9
1.11: LIMITATIONS.....	9
1.12: CHAPTER BREAKDOWN	9
(a) Chapter 1: Introduction	9
(b) Chapter 2: Theoretical and conceptual framework and methodology.....	9
(c) Chapter 3: Legal framework of IPOA in Kenya	9
(d) Chapter 4: Case study and discussion	10
(e) Chapter 5: Conclusion and Recommendations	10
1.13: TIMINGS	10
1.14: BIBLIOGRAPHY	Error! Bookmark not defined.
CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY	11
2.1: THEORETICAL FRAMEWORK	11
2.1.1: The Social Contract Theory	11
2.1.2: Methodology:	13
CHAPTER 3: THE LEGAL FRAMEWORK GOVERNING IPOA.....	14
3.1: THE CONSTITUTION OF KENYA, 2010.....	14
3.2: THE INDEPENDENT POLICING OVERSIGHT AUTHORITY	15
CHAPTER 4: A CASE STUDY OF THE UNITED STATES.....	20
4.1: THE ADOPTION OF SPECIAL PROSECUTORS IN THE UNITED STATES.....	20
4.2: HOW SPECIAL PROSECUTORS CAN BE USED BY IPOA.	24
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	26
5.1: RECOMMENDATIONS	26
5.1.1: Introduction of an Office of a Special Prosecutor of the police that is a branch of IPOA: .	26

5.1.2: Training of personnel who will work at the Office of the Special Prosecutor:.....	27
5.1.3: Encouraging public participation:.....	27
5.1.4: Revision of the IPOA Act and the National Police Service Act:	27
5.2: Conclusion	28

ACKNOWLEDGMENTS

I extend my deep gratitude to my supervisor, Ms Jerusha Asin Owino, for her continual support, guidance and patience throughout this dissertation journey.

Very special thanks to Mr Humphrey Sipalla for his encouragement and resources throughout the study.

My appreciation extends to my colleagues, who have been valuable in their encouragement and providing a positive atmosphere in which to do this study.

Above all, I am indebted to my family for their continuous support, and mostly God.

DECLARATION

I, LAURA KERUBO ONGOTO, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

JERUSHA ASIN OWINO

ABSTRACT

The Independent Policing Oversight Authority (IPOA) is an organ which was formed for the purposes of police accountability through civilian oversight over the work of the police in Kenya. IPOA seeks to provide robust civilian oversight over the police in a way that will promote public trust and confidence in the National Police Service (NPS), and its mandate is to conduct impartial and independent investigations over member of the police service against whom complaints have been lodged and monitoring the NPS to prevent impunity and enhance professionalism in the interest of the public. IPOA is an organ which was formed by an Act of Parliament in 2011, due to the greater demand for police accountability.

IPOA has been given powers and functions under the IPOA Act which enable it to investigate the police, however, it faces challenges when executing these functions because it has not been given enough powers that would make the members of the NPS submit to the powers of IPOA. There have been challenges of non-cooperation from the NPS and even the Office of the Director of Public Prosecution (ODPP) which is mandated to prosecute members of the police who have been recommended to it by IPOA.

In order to curb the issue of impunity in the police service, , it is important to furnish IPOA with more powers over the police for them to execute their functions to their full capacity.

LIST OF ABBREVIATIONS

Independent Policing Oversight Authority- IPOA

National Police Service- NPS

Office of the Director of Public Prosecutions- ODPP

LIST OF CASES

Independent Policing Oversight Authority & another v Attorney General & 660 others
[2014] eKLR

Law Society of Kenya & 3 others v Attorney General & 3 others

Chibungu Sanga vs. Republic [2017] eKLR

Morris vs. Olson, United States Supreme Court 487 U.S. 658(1988)

LIST OF LEGAL INSTRUMENTS

The Constitution of Kenya, 2010.

The Independent Policing Oversight Authority Act (Act No. 88 of 2011)

The National Police Service Act (Act No. 11A of 2011)

The International Convention for the Protection of all Persons from Enforced Disappearance.

The Constitution of the United States of America.

CHAPTER 1

INTRODUCTION

1.1: BACKGROUND

A survey published in 2002 found that most Kenyans estimate that half of the police force is corrupt and that over one-third of all crimes committed in the country can be attributed to police criminality and malpractices. Most of the concerns that are raised about the police tend to be about officers involved in misconduct that goes against their mandate rather than about any omissions, incompetence, negligence, or poor performance in crime control. Accordingly, it is police criminality that seems to be fuelling the most negative perceptions about police. This criminality takes different forms corruption, both in terms of bribery, as well as the perversion of the criminal process, illegal use of force and abuse of due process.¹ This has led to lack a general confidence in the police from the general public because the same body that is mandated to provide security for them is the same body that is letting them down. In order to improve the already existing mechanisms that have been put in place for police accountability, Parliament formed a civilian body known as the Independent Policing Oversight Authority (IPOA) which has been given the mandate to monitor and investigate police malpractices as well as recommend errant police to the Office of the Director of Public Prosecutions (ODPP) to indict them.² The IPOA has been in operation since the year 2011, and has continued to execute its mandate, to date. Some of the instances of police misconduct, include where citizens that have been deemed to be a threat to national security, have disappeared without a trace. In 2016 the Human Rights Watch published an article that highlighted the disappearances of suspected terrorists in Northern Kenya.³ There are legal instruments that have been put in place to ensure that human rights are respected by governmental organs that are in charge of law enforcement. An example is the International Convention for the Protection of all Persons from Enforced Disappearance, which defines enforced disappearance as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place

¹ A joint report by the Commonwealth Human Rights Initiative & the Kenya Human Rights Commission, "*The Police, The Politics, The People: Police Accountability In Kenya*", available in, < <http://www.khrc.or.ke/mobile-publications/civil-political-rights/35-the-police-the-people-and-the-politics-police-accountability/file.html>>, date accessed 11/02/2018.

² Section 6, The Independent Policing Oversight Authority Act, 2011

³ Kenya: Disappearances, Death in the Northeast <https://www.hrw.org/news/2016/07/20/kenya-disappearances-deaths-northeast>, date accessed 28/01/2018.

such a person outside the protection of the law.⁴ The Constitution of Kenya 2010 provides for the right to security of the person under Article 29 which ought to be respected.⁵

An infamous crackdown in Nairobi's Eastleigh area, which was conducted by the Anti-terrorism Police Unit of the National Police Service, led to violations of human rights by the police where the Anti-terrorism police unit went to search for terrorism related materials, after deadly attacks in Mombasa in March of 2014, which ended in an uproar from Human Rights bodies such as the Human Rights Watch.⁶ The crackdown was given the name *Usalama Watch* by the police since it was intended to help them fight against terrorism by pointing clues towards suspected terrorists and capture material that aids the same.⁷ The crackdown went sour when there were claims of human rights violations by the police such as arbitrary arrests, profiling, harassments, extortion, forcible relocation and expulsion and ill-treatment. All this was done in a discriminatory manner targeting the Somali community and the Muslim Community,⁸ an act that goes against the supreme law of the land, the Constitution of Kenya 2010, under article, 27(4). The Article provides that:

The State shall not discriminate directly or indirectly against any person on any grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁹ Kenya has been called out by the Human Rights Watch to ensure that these violations of human rights done by the police should be investigated.

In a report on the Police Brutality in Kenya by the Kenya Human Rights Commission, it was established that police brutality in Kenya remains rampant regardless of the enactment of The Constitution of Kenya 2010 which has outlined the rights that the citizens of Kenya have¹⁰ and also the functions of the National Police Service.¹¹ On many occasions, the Police, armed with AK-47's, tear gas canisters, G-3 rifles and, water cannons have viciously descended on

⁴ Article 2, The International Convention for the Protection of all Persons from Enforced Disappearance.

⁵ Article 29, The Constitution of Kenya, 2010.

⁶ Kenya: Counterterrorism Operations Undermine Rights, <https://www.hrw.org/news/2015/01/29/kenya-counterterrorism-operations-undermine-rights>, date accessed 28/01/2018.

⁷ Article by Amnesty international, "*Kenya: Somalis scapegoated in counter-terror crackdown*", available < <https://www.amnesty.org/en/latest/news/2014/05/kenya-somalis-scapegoated-counter-terror-crackdown/>>, date accessed 11/02/2018.

⁸ Ethnic Somalis Under Pressure in Kenyan Capital <https://reliefweb.int/report/kenya/ethnic-somalis-under-pressure-kenyan-capital>, date accessed 28/01/2018.

⁹ Article 27 (4), The Constitution of Kenya, 2010

¹⁰ Part IV, The Constitution of Kenya, 2010.

¹¹ Article 244, The Constitution of Kenya, 2010.

protestors, beating to death and leaving others severely injured. These techniques employed by the police in managing lawful protests predate the new constitutional regime and have since created a worrying trend similar to pre-independence tactics that Kenyans had become familiar with over the last decades. As a result of this, there is an overwhelming need for IPOA to investigate instances of police brutality and recommend to prosecution members of the police who are involved in these.¹²

These violations on human rights have not only caused cases of insecurity to rise which threaten National Security, but have also weakened civilian confidence in the police. It is the work of Director of Public Prosecution for further action.¹³ IPOA has faced numerous challenges when executing its functions. An example being the lack of co-operation from the NPS in assisting it in its investigations against the police. This was pointed out in the IPOA Performance Report of June-December 2016,¹⁴ and this has given IPOA a reputation of a body that is not fully functional¹⁵, considering that its last performance report was in 2016. One would argue that in as much in as the legal framework behind IPOA has given it the power to be a watchdog and whistle blower over the police, the power is limited to only an investigative and oversight role, a limitation which can be seen as a barrier to the body achieving its full potential.

1.2: STATEMENT OF THE PROBLEM

IPOA has been seen to be a “toothless bulldog” by the media which subsequently affects the opinions of the public and this reflects on its poor performance of its mandate. In a 2014 article that was in *The Standard Newspaper* that was criticising the poor performance by IPOA, a statement made by the Kenya National Human Rights Commission pointed that IPOA was created because the police could not investigate themselves and thus there was the urgent need for an independent body with investigative powers to be formed and ever since the Authority (IPOA) came into being, things have remained the same¹⁶ very few of the police involved in brutality and abuse of police power have been indicted and very few Kenyan’s know of IPOA’s existence. In the same Article, the Chairman of IPOA, Macharia

¹² Martin Mavenjina, ‘Police Brutality in Kenya’, available in <http://www.khrc.or.ke/2015-03-04-10-37-01/blog/603-police-brutality-in-kenya.html>, date accessed 29/01/2018.

¹³ Section 7 (a) (ix), The Independent Policing Oversight Authority Act, 2011.

¹⁴ IPOA Performance Report of June-December 2016, available at <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Performance-Report-July-December-2016.pdf>, date accessed 29/01/2018.

¹⁵ Joe Kiarie in *The Standard Newspaper*, ‘Is the Independent Policing Oversight Authority (IPOA) the new toothless bulldog in town?’ available in <https://www.standardmedia.co.ke/article/2000105207/is-the-independent-policing-oversight-authority-ipoa-the-new-toothless-bulldog-in-town>, date accessed 29/01/2018.

¹⁶ *ibid*

Njeru, painted the picture of a body struggling to realise its capacity to execute its mandate. It was highlighted by IPOA in its performance reports of June-December 2016 that it faces the challenge of non-cooperation from the bodies that ought to aid in carrying out its function of investigating errant members of the police, and in the long run, taking them to prosecution. The key players in this process are the National Police Service, the Director of Public Prosecution and subsequently the Judiciary for further hearing of the cases that have been forwarded by IPOA. These bodies can assist IPOA to carry out its full mandate, if only they strictly operated in a manner that adheres to the various legal frameworks that govern them, without any bureaucracy. IPOA has been executing its mandate of receiving complaints from citizens and investigating the members of the police who have been complained against and recommending them to the ODPP. However, members of the police who have been complained against still lurk in the public, because of non-cooperation from the other bodies.

In the case of Kenya Government Prosecutors, who are meant to prosecute the members of the police whom have been recommended for prosecution by IPOA, there is a paradox presented when reconciling the concept of prosecuting the police and knowledge that the same police are the ones who they work with when carrying out their functions. There is the possibility of a bias being presented because of the close working relations between the police and the prosecutors from the ODPP. It is needless to say that the possibility of corruption arising among the two bodies is almost certain. Further, the National Police Service has been non-coordinative especially when it comes to handing in evidence that will assist IPOA in its investigation of the police. It is therefore prudent for whoever is prosecuting the errant members of the police service to be completely independent with no working relations with any of the two Bodies.

There is an overwhelming need to understand that for IPOA to be fully functional and the issue of accused members of the police must be punished according to the Law. Further, IPOA needs to be given more power when it comes to prosecution because of the above stated bias which has made the organ seem helpless when dealing with members of the Police Service.

1.3: JUSTIFICATION FOR THIS STUDY

The outcome of this Research paper will most likely shed light to the strong suggestion of having an independent Prosecutor who is seconded from ODPP to Office of the IPOA ,The task of this Prosecutor would be one of prosecuting members of the police force, who have been accused of malpractices and abuse of powers bestowed upon them.. The police and the prosecutors who are in the ODPP have for a long time worked together in carrying out their functions in the courts. Prosecutors rely on the police to give them evidence that is relevant for their cases. It is important to note that at some point, some members of the police were prosecutors. It is clear that there is a bias is a result of the close working relations of prosecutors and the police.

Police accountability needs to be done independently and impartially for it to be effective. This Research paper seeks to show the importance of having a function given to IPOA which can enable it to carry out its functions more effectively, by using an independent, Special Prosecutor who is linked to IPOA. The said Officer should be in a position to prosecute members of the police service who have been complained against. This paper may also serve as sufficient proof that having an independent, Special Prosecutor who is part of IPOA will make the whole process of police accountability more effective, given that there are no ties between the police and the Special Prosecutor.

1.4: STATEMENT OF OBJECTIVES

This study seeks to meet the following objectives:

1. To show that the power of prosecuting accused members of the police force lying with the current prosecutors creates a bias on the side of the prosecutors who rely on the police for evidence in their regular cases.
2. To show that IPOA has not been effective because it lacks the power to prosecute police who have been complained against and it has investigated because of the long process of protocol and the poor cooperation from the other bodies it is meant to be in liaison with.
3. To prove that having a Special Prosecutor to prosecute accused members of the police is a more effective police accountability mechanism

1.5: RESEARCH QUESTIONS

1. What is the scope of the Kenya Government's obligation to guarantee that police accountability is looked into with full consideration?
2. What is the nature of the Independent Policing Oversight Authority and its mandate over the police force?
3. How can we merge the concept of having an independent office for a Special Prosecutor of the police within IPOA?
4. Has a developed country like the United States of America been successful in dealing with errant policemen through providing a special office for special prosecutors?
5. Based on the findings of research questions (3) and (4), how can we merge the concept of the Office of the Special Prosecutor of the police into the IPOA act?

1.6: RESEARCH HYPOTHESIS

The concept of strengthening IPOA is fundamental in ensuring citizens that their Constitutional rights are upheld and that whenever their rights are abused, they will always receive adequate restoration and compensation from the systems that ensure abuse of police power is countered. It also gives the Citizens a sense of confidence in the police since members of the police who abuse their police power, who corrupt the National Police Service are eradicated, and the police who genuinely uphold the rights of citizens and carry out their tasks to the letter remain in the National Police Service. IPOA can be strengthened through amending the laws that govern it and giving it more powers when it comes to dealing with errant Police officers. Parliament has got the power to enact sections of the Law that gives IPOA powers that grant it prosecutorial functions of the police, rather than letting the ODPP be the one to exclusively prosecute errant Police officers.

1.7: ASSUMPTIONS

1. That some members of the National Police Service continue to abuse civilians' human rights and abuse of their police powers.
2. That some police who are accused of malpractices end up being acquitted on indictment because of the inefficiency that goes on at the level of prosecution.
3. That there is an existing bias that exists between the ODPP and the National Police Service.
4. That there have been no measures taken by law makers to the IPOA.

1.8: LITERATURE REVIEW

There is limited literature available on the subject of obtaining a special prosecutor to prosecute members of the police who have been involved in human rights violations. However, in some jurisdictions, this concept of having a special prosecutor has been adopted in order to address the issue of police violence against the citizens and put in place effective mechanisms in the whole process of police accountability. These literature materials assert that having a special and independent office to prosecute crimes committed by the police is effective and this has been done through reports by Human Rights Organisations inquiring into incessant police brutality cases.

Police Brutality in Urban Brazil:

This report, *Police Brutality in Urban Brazil*,¹⁷ was compiled by James Cavallaro, Anne Manuel and Human Rights Watch/Americas, which was established in 1981 to monitor human rights in Latin America. The report was came out at a period when police brutality was rampant in Brazil and it focuses on the gravest of violations such as extra-judicial killings, near-fatal shootings and forced disappearances of persons. This report focuses on seven of Brazil's cities.

It is noted in this report police conduct poor investigations into their own colleagues' crimes and once these cases are transferred to prosecutors, little or no priority is given to these cases. Due to this rising concern, government authorities have responded to these violations by putting in place mechanisms that they deem fit to curb this problem of police violence that goes unpunished.

The secretary of Sao Paulo has established an ombudsman office to hear complaints of police violence. In Belo Horizonte, the office of the prosecutor has established a special division that will prosecute police who have participated in human rights violations. This special division has indicted nearly 500 police officers who have taken part in causing grievous bodily injury to citizens. This report concludes that impunity is the major factor for the continuity of police misconduct in Brazil and it recommends ways in which Brazil can

¹⁷ James Cavallaro, Anne Manuel, Human Rights Watch/ Americas, 'Police Brutality in Urban Brazil', April 1997, 1-2

counter the issue of police misconduct and establishing a special ombudsman office to look into the crimes committed by the police is one of them, as is the focus of this study.

1.9: THEORETICAL FRAMEWORK

The State has been granted power by the people to act on their behalf through state organs and this has been stipulated under Article 1 of the Constitution of Kenya 2010¹⁸ which states that all people of Kenya are sovereign and thus their sovereign power is delegated to State organs and entities¹⁹ which will carry out their functions on behalf of the citizens of Kenya. IPOA is an independent civilian body which has been a result of an act of Parliament, where legislators formed it for the purposes of civilian oversight over the work of the police in Kenya. It is needless to say that the National Police Service is an organ which stems from the Executive arm of government for the purposes of enforcing laws and protecting the fundamental rights of citizens. This phenomenon of the sovereignty of the people being delegated to the State and State organs has its roots from the Social Contract theory which was enhanced by renowned philosopher Jean Jacques Rousseau who said that the government represents the will of the people who have entrusted it with the duty to work towards the aim of the common good. In this situation, the people have entrusted the government to employ an effective force to counter abuse of police power and security. More so, the government must take all effective measures it deems necessary to ensure that the force employed is one that will counter all manner of abuse of police power.

Also there is the Hobbesian theory²⁰ which was brought to life by Thomas Hobbes who refers to the hypothetical state of nature of human beings, where he says that man by nature is built to be exclusive to his own self-interests and thus this state left unsupervised would be unbearably brutal and thus there needs to be established a sovereign who will control the people to prevent them from harming each other because of their nature of being inclined to serve their own self-interests. The State shall be the sovereign and rule the people to their best interests and with the achievement of the common good in mind. The State organs in this

¹⁸ Article 1, The Constitution of Kenya 2010

¹⁹ Article 1(3)(b), The Constitution of Kenya 2010

²⁰ Hobbes T, *Leviathan: With selected variants from the Latin edition of 1668*, Hackett Publishing, Indiana, 1994, 76.

scenario have a duty to respect and protect everyone's rights and ensuring that mechanisms have been put in place that the people are protected by all means, and this includes the accountability systems that have been put in place which should be structured in a perfect way that enables their functionality. IPOA was formed by Parliament for the sake of keeping the members of the National Police Service accountable when executing their mandate and ensuring citizens' rights have been protected, including ensuring that errant policemen do not go unpunished. The law ought to give this body enough powers to ensure that it carries out its mandate fully.

1.10: RESEARCH METHODOLOGY

The primary source of this study will be written literature on the topic which includes case studies, publications, statute and scholarly articles on the same.

There will be interviews of staff members of IPOA for insight and lecturers of philosophy to talk more on the nature of bodies mandated with the task of accountability of other bodies.

1.11: LIMITATIONS

There is a possible foreseeability of non-cooperation from government officials and law enforcers in giving out information relevant for this study. There is also scarce legal authority on this subject and material that has been provided to delve deeper into studying IPOA.

1.12: CHAPTER BREAKDOWN

(a) Chapter 1: Introduction

This chapter seeks to give a background to the study, it will identify the problem, highlight the research objectives, Hypothesis and assumptions, literature review as well as the theoretical framework, the justification of the study and the research methodology intended to be used.

(b) Chapter 2: Theoretical and conceptual framework and methodology

This chapter will contain the history and nature of police accountability mechanisms that have been employed in Kenya and the limitations that have been an obstacle to this subject and thereafter bring out the jurisprudential basis of the research by focusing on particular theorists in support of the questions the paper seeks to answer.

(c) Chapter 3: Legal framework of IPOA in Kenya

This chapter will seek to apply the research questions practically and analyse them critically where the discussion of the case study aid in affirming or overthrowing the assumptions of the hypothesis in this paper.

(d) Chapter 4: Case study and discussion

This chapter will highlight how the office of a special prosecutor for the police has been used in the United States and how it has been effective, and marry that idea into the Kenyan context of IPOA.

(e) Chapter 5: Conclusion and Recommendations

This chapter will conclude the research carried out, by concisely stating the finds, and suggesting the way forward.

1.13: TIMINGS

Save for the exceptional circumstances, the research ought to be conducted and submitted not later than the last examination day of the October Examinations of the academic year 2017.

CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1: THEORETICAL FRAMEWORK

To promote the objectives of this study, I will use the Social Contract Theory by Thomas Hobbes and critique the Positivist theory to justify this study:

2.1.1: The Social Contract Theory

The social contract theory is a theory which was advanced by Thomas Hobbes. The concept of this theory is that in primeval times, man lived in a state of nature that was inclined to survival which is a state that is primarily anarchic²¹. The life of man was characterised by hardships and misery. Thus, to overcome this state of nature, the people entered into a social contract that created a sovereign mandated with the responsibility of protecting the people from oppression and in exchange, the governed would surrender some of their rights to the sovereign.²²

According to Hobbes, the state of man was “*solitary, poor, nasty, brutish and short.*”²³. Man’s desire for self-preservation and need for personal security to survive drove him to relinquish all his rights to the sovereign so as to live in a peaceful society since the sovereign would regulate the diverse interests of human beings who had potential to harm each other for their own survival. According to Hobbes, security was the prime right that trampled all other rights because it was a guarantee of all other rights. He brought out that the chosen sovereign had the mandate to choose the most effective way to secure his people and this included decisions that guaranteed the well-being of most people. For Hobbes, the Social Contract was fully functional was through unequivocal obedience from the subjects²⁴.

In relation to this study, the Hobbesian Social Contract Theory supports the state’s power to develop laws that it believes are fully effective and make decisions that will be for the betterment of the society. Parliament is the organ that created the Independent Oversight Policing Authority and thus it has the power to amend the Act in a way that precludes abuse of police power, and perpetuates the authority of IPOA. It is well known that IPOA has been seen to be dysfunctional because it has not been handed enough powers to enable it to carry out its functions.

²¹ Curzon L, *Jurisprudence*, 2 ed, Cavendish Publishing Limited, 1995, 26.

²² Curzon L, *Jurisprudence* 26

²³ Hobbes T, *Leviathan: With selected variants from the Latin edition of 1668*, Hackett Publishing, Indiana, 1994, 76.

²⁴ Curzon L, *Jurisprudence*, 35.

It is needless to say that IPOA has been formed by Parliament which is an organ that has been formed to hold power in trust for the citizens of Kenya. The Constitution of Kenya under Article 1²⁵ states that all sovereign power belongs to the people of Kenya and they may exercise this directly or through their democratically elected representatives²⁶, who make up Parliament²⁷, and they are trusted to carry out the sovereign power of the people in accordance to the Constitution of Kenya 2010. The same Constitution gives Parliament the mandate of making and amending laws and given the current situation, IPOA has not been performing well and this can be attributed to the fact that there is too much abuse of power from the police force and for this to be overcome, in my opinion, IPOA needs to be empowered more by the very act that governs it, and this means a fundamental change in its functions. Parliament granting to IPOA the prosecutorial functions of the police not only empowers the body but also shortens the whole process of having to prosecute a policeman once a complaint has been lodged against them.

On the contrary, taking a legal positivist approach to the Independent Policing Oversight Authority Act which has been established by an Act of Parliament has been futile to the operations of IPOA. The legal positivist theory is the school of thought of analytical jurisprudence largely developed by legal thinkers such as Jeremy Bentham, H.L.A Hart and John Austin. The legal positivism theory was argued by Jeremy Bentham who laid the ground work for a theory of law as the expressed will of a sovereign and he made a distinction between two types of people; expositors and censors²⁸. He explained that expositors were people who explained what the law in practice was and censors were those people who criticised the law in practice and compared it to their notions of what it ought to be. According to him, the philosophy of law, considered strictly, was to explain the real laws of the expositors, rather than the criticisms of the censors. Jeremy Bentham lit the way for John Austin who further advanced the legal positivist theory by acknowledging law as a sovereign command, whose authority is recognised by most members of the society, which is enforced by the use of sanctions²⁹. According to Austin, this sovereign can be an individual or a collective sovereign such as Parliament who makes the laws and creates the sanctions for not obeying those laws. John Austin is also well known for making the statement that “The

²⁵ Article 1, The Constitution of Kenya 2010.

²⁶ Article 1(2), The Constitution of Kenya 2010.

²⁷ Article 1(3) (a), The Constitution of Kenya 2010.

²⁸ <https://en.wikipedia.org/wiki/Legal_positivism>, date accessed 28/01/18.

²⁹ Wilfred E. Rumble, 'Legal Positivism of John Austin and The Realist Movement in American Jurisprudence' (1981)

existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not comfortable is to an assumed standard is, is a different enquiry.” The legal positivist theory dictates that the merits or demerits of law do not determine whether the law or legal systems exist, and thus the law as has been written is how it will be interpreted and applied. According to this theory, legal positivism is synonymous with positive norms in society and thus the law has been written and structured in a way that is compatible with the society’s norms and values. By virtue of this there is no ethical justification needed for the codification of certain laws.

This school of thought and analysis has proved that the current structure of the Independent Policing and Oversight Authority has failed to make IPOA a body that is functional to the letter. IPOA has had a problem carrying out its functions and this, in my opinion, has been because of the limiting powers that the act has granted to it. IPOA has used the legal positivist theory in carrying out the functions granted to it by the act through Parliament and this has only made IPOA an organ that is struggling to carry out its functions completely. On the contrary, Parliament can decide to add more functions for IPOA and these functions can be applied by the body without looking to external catalysis to carry out its function fully.

2.1.2: Methodology:

The research methods employed in this study will entail desktop researches and reviews of secondary sources such as scholarly journals, books, articles, statutes, internet blogs and articles.

CHAPTER 3: THE LEGAL FRAMEWORK GOVERNING IPOA

The Independent Policing Oversight Authority was established through an Act of Parliament³⁰ published in November 2011 to provide for civilian oversight over the work of the police in Kenya³¹. There are different legal frameworks in Kenya that have justified the existence of IPOA.

3.1: THE CONSTITUTION OF KENYA, 2010

The Constitution of Kenya 2010 has been crucial in breathing life into fundamental Government bodies and granting them the authority to act. In the case of IPOA, The Constitution of Kenya, 2010 has justified its formation through an Act of Parliament under Article 95, which gives the National Assembly the power to enact legislation³². The National Assembly which makes up one part of Parliament represents the will of the people and it derives its legislative authority from the people³³. The people of Kenya are sovereign, as has been spelt out under Article 1(1) of the same Constitution. Emphasis has been laid down that this sovereign power has been delegated to State Organs including Parliament³⁴. I argued earlier that the State Organs are entrusted by the people under the Social Contract Theory to make decisions on their behalf that will be beneficial to them.

Under this Constitution, accountability of state organs is vital and this has been provided for under Article 10(2) (c), which states that, the national values and principles of governance include good governance, integrity, transparency and accountability. As I have stated earlier, IPOA was formed for the purposes of civilian oversight over the work of police in Kenya, and this makes the National Police Service accountable to IPOA, through coordination and transparency to the body. Moreover, the Constitution has provided for the National police Service under Article 243³⁵ which consists of the Kenya Police Service and the Administration Police Service³⁶. Article 244 of the Constitution has gone ahead to give the objectives and functions of the National Police Service.³⁷ I would like to bring out that one of the most fundamental duties the police have towards the citizens of Kenya is to comply

³⁰ The Independent Policing Oversight Authority Act Chapter 88 of The Laws of Kenya

³¹ < <https://www.ipoa.go.ke/ipoa-profile/>>, date accessed 27/01/2018

³² Article 95(3), The Constitution of Kenya, 2010.

³³ Article 94(2), The Constitution of Kenya, 2010.

³⁴ Article 1(3) (a), The Constitution of Kenya, 2010.

³⁵ Article 243(1), The Constitution of Kenya, 2010.

³⁶ Article 243 (2) (a) and (b) respectively, The Constitution of Kenya, 2010.

³⁷ Article 244, The Constitution of Kenya, 2010.

with constitutional standards of human rights and fundamental freedoms³⁸. It is paramount to note that the functions granted to the NPS have set the basis for having a separate body that is in charge of ensuring the police adhere to their constitutionally given functions in order to foster a secure environment in Kenya.

3.2: THE INDEPENDENT POLICING OVERSIGHT AUTHORITY

The Independent Policing Oversight Authority (IPOA) is an independent civilian oversight authority established under Section 3 of the IPOA Act, Chapter 88 Laws of Kenya. The preamble to this Act states that it is;

“An Act of Parliament to provide for civilian oversight of the work of the Police, to establish the Independent Policing Oversight Authority; to provide for its functions and powers and for connected purposes”.

Its objectives are set out under Section 5 of the Act and are inter-alia;

To hold the police accountable to the public in the performance of their functions, give effect to the provisions of Article 244 of the Constitution which requires the police to strive for the highest levels of discipline and professionalism; promote and practice transparency and accountability in execution of their duties.

The functions and responsibilities of IPOA have been spelt out under Section 6³⁹ of the IPOA Act and they constitute the following⁴⁰:

1. To investigate deaths and serious injuries caused by police action:

Deaths and serious injuries arising from police action are investigated by IPOA and disciplinary action or prosecution recommended. This is aimed at preventing impunity and enhancing accountability within the National Police Service.

2. To investigate police misconduct:

The Authority receives complaints from members of the public on police misconduct and undertakes independent investigations. The Authority also receives complaints from police officers against fellow officers. IPOA can initiate investigations on its own motion and may refer cases to appropriate bodies including seeking the court's intervention to have its recommendations implemented.

³⁸ Article 244 (c), The Constitution of Kenya, 2010.

³⁹ Section 6, The Independent Policing Oversight Authority Act.

⁴⁰ <http://www.ipoa.go.ke/ipoa-profile/>, date accessed 27/01/18.

3. Monitor, review and audit investigations and actions by Internal Affairs Unit of the police:

IPOA oversees the work of the Internal Affairs Unit (IAU) of the police to independently verify that the internal police system deals with complaints against officers fairly and effectively. The Authority can take over investigations if not satisfied with IAU's intervention.

4. To conduct inspections of police premises :

This seeks to ensure that police premises meet basic predefined standards and that treatment of suspects and detainees is in line with the principles laid down in the Constitution. Police premises include police stations and police posts, detention facilities and officers' residential areas. Inspection reports are prepared and shared with the relevant Authorities.

5. To monitor and investigate policing operations and deployment:

The Authority independently scrutinizes policing operations affecting members of the public to ensure policing is conducted for the benefit of the people of Kenya. Where excessive use of force and abuse of power is detected, independent investigations and remedial action is recommended.

6. To review the functioning of the internal disciplinary process:

The Authority monitors internal police disciplinary processes to ensure fairness and effectiveness and conduct surveys to assess improvement in police internal accountability mechanisms.

7. Reporting:

The Authority is required to prepare a performance report every six months and an annual report to inform the public of its activities and provide recommendations for improvement of the functioning of the National Police Service.

The IPOA Act has gone ahead to stipulate the powers that IPOA has when executing their functions over the police and they are the following⁴¹:

- a) To investigate the service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate

⁴¹ Section 7, The Independent Policing Oversight Authority Act, 2011.

- b) To take over an on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;
- c) Where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income;
- d) Require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body;
- e) Require the Service to within a specified, reasonable time, provide it with information on issues relating to policy, its implementation and its effectiveness, and its response to any recommendation made to it by the Authority.
- f) Subject to the approval of a complainant, and only if it is not a serious complaint, reconcile or mediate on any matter within its mandate
- g) To exercise any other power provided for in this Act or any other law which is necessary for the effective performance of its actions.

It is clear that the functions and powers that have been granted to IPOA are immense; the authority only has to exploit these functions to the fullest in order to ensure that its impact is felt by the citizens. IPOA has not overstretched its capacity fully in carrying out its functions. Even when complaints are not made, the authority has powers to, on its own volition, investigate and make recommendations for prosecution, compensation or other disciplinary action.

However, Justice Lenaola in the case of *Independent Policing Oversight Authority & another v Attorney General & 660 others [2014] eKLR* stated;

It is clear that IPOA does not have a mandate to oversee the work of or even the conduct of the members of NPSC. Its functions are limited to oversight over members of the National Police Service. In any event, the NPSC being an independent Commission is not subject to the direction or control of any other person or authority. It is only subject to the law and the provisions of the Constitution which it is bound, under the provisions of Article 10 of the Constitution, to observe, uphold and respect.

The learned judge added thus that,

The Constitution of Kenya created the NPSC, the NPS and by statute, IPOA, to be both overseers and watchdogs over police processes from recruitment to discipline of errant police officers. It would be a grave error on the part of this Court to allow the said police Service and the Institutions named to revert back to that dark past.

The authority as outlined in the above provisions is tasked with the mandate of ensuring that the police carry out its functions in an accountable manner.

Further the Court in *Law Society of Kenya & 3 others v Attorney General & 3 others* (supra) stated that,

It was clear to this court that part of the difficulty that IPOA had in investigating Mwendwa's complaint was the obvious lack of cooperation accorded to IPOA by the Police Service hierarchy. It seems that the attitude of the Police Service hierarchy is that IPOA is an irritating body, which at best should be ignored and at worst should be obstructed from fulfilling its mandate under the Independent Policing Oversight Authority Act.

It is shocking that members in the Police Service still think that they can operate without civilian oversight or that the Police Service is a closed shop where a civilian authority mandated by law cannot inquire into misconduct by its members. As observed in the two reports cited above, it is to the benefit of the Police Service for members of the public to have confidence that any complaint lodged against a member of the Police Service shall be investigated and accorded the seriousness that it deserves.

It is apparent from the *Mwendwa* case that the police is hardly willing and ready to accord due cooperation to IPOA when it is investigating the complaint lodged by a citizen against its ranks. It will do all it can to perpetuate impunity and cover errant officers within its ranks.

It is clear that the functions and powers that have been granted to IPOA are on oversight and that is the most that IPOA can do when it comes to discipline of errant members of the Service. In as much as the IPOA Act has been clear on the powers that IPOA has with regards to investigations on police who have been complained against, however limited, there has been a clash between the functions and powers of IPOA and the functions of the Criminal Investigation Department which is an arm of the Kenya Police Service, is to investigate members of the Police Service who have been complained against, and they can refer the

same to the Office of the Director of Public Prosecution⁴² just the way IPOA does. This overlap of functions between the two bodies has caused confusion and this was seen in the case of *Chibungu Sanga vs. Republic [2017] eKLR*, where the applicant was a member of the Police Service and was accused of the murder of one Geoffrey Kingori Kanyi. The applicant sought for an order from the courts to disregard the evidence that was given to the Office of the Director of Public Prosecution by IPOA, and instead rely on the evidence that was furnished to the ODPP by the Criminal Investigative Department of the Kenya Police. The applicant argued that IPOA was operating ultra vires by usurping the powers of the Criminal Investigation Department by forwarding its own investigation reports and witness statements against the applicant to the ODPP. The learned judge in this case made the observation that it is at the discretion of the ODPP to decide which evidence it will rely on when there exists a clash between the functions of IPOA and the functions of the Criminal Investigations Department.

⁴² Section 24, The National Police Service Act, 2011.

CHAPTER 4: A CASE STUDY OF THE UNITED STATES

4.1: THE ADOPTION OF SPECIAL PROSECUTORS IN THE UNITED STATES

In the United States, Special Prosecutors are lawyers who are appointed to investigate and potentially prosecute cases where there could be a conflict of interests that exists between the wrong doer and the usual prosecuting authority. This concept of special prosecutors originated from state courts who would appoint special prosecutors in situations where the regular government attorney was disqualified from a case for incapacitation or interest in the case⁴³.

Special prosecutors have been used and approved by congress and it even has a constitutional basis which was established in the case of *Morrison vs. Olson*⁴⁴ which established that the Independent Counsel provision of the Ethics and Government Act⁴⁵ was not a violation of the constitution as it did not go against the principle of separation of powers since the special prosecutor would be part of the executive.

The Constitution further stipulates an Appointment clause⁴⁶ which states that the president shall nominate and appoint public officials with the advice and consent of the United States Senate. This means that the President has the powers to appoint a special prosecutor in instances where a conflict of interest arises with the usual prosecutors.

The United States has had a long history of police brutality on the citizens, more so on African Americans, making it an issue of racial bias. Police brutality in the United States has its antecedents during enslavement, where black lives were seen as a commodity for enriching the white race in America at the time⁴⁷. There have been continued police brutality events that have occurred in different parts of the United States of America and this has led to a public outcry for stricter measures to be taken when dealing with the policemen.

There have been many instances that have tainted the name of the Police Force and even the justice system since most members of the police who have gone to trial have been acquitted

⁴³ https://en.wikipedia.org/wiki/Special_prosecutor#Legal_authority, date accessed 27/03/2018.

⁴⁴ *Morrison vs. Olson*, United States Supreme Court 487 U.S. 658(1988).

⁴⁵ Ethics and Government Act 1978.

⁴⁶ Article II, Section 2, Clause 2, The United States Constitution.

⁴⁷ The Eric Garner Case: Statewide Survey of New York Voters' Response to Proposed Police Accountability Legislation

and this has made the justice system seem ineffective and without the best interests of the citizens as the priority.

One major incidence which caused a public outcry was the Algiers Motel Incidence of 1997⁴⁸ whereby the riot task force who composed the Detroit Police Department Police officers on patrol who heard gunshots from the Algiers Motel. At that time, there was the 12th Street Riots going on because killings of African-Americans had increased and this was seen to be racial bias, since it was mainly the white Policemen who were conducting the killings. The Policemen got into the motel on the night of July 25th 1967 and while they were in there, three black teenagers were killed, nine other black males beaten and two other white females beaten and humiliated by the Policemen. Three police officers and a private security guard were arrested in the slayings at the Algiers Motel and charged with conspiring to deny the civil rights of ten people by threatening and beating them. Detroit police officer Ronald August was charged with premeditated murder. During the August trial in 1998, several black teenagers testified they had been ordered to line up against a hallway wall, while they were questioned and beaten by Officers Robert Paille and David Senak. The federal trial was moved to Flint, Michigan, after defence attorneys argued that Hersey's book could have tainted the jury pool in Detroit. The officers were later acquitted. No charges were ever filed relating to the shooting deaths of Cooper and Temple. This situation weakened the confidence of the public in the justice system and also in the police force.

Bringing it forward to the year 2014, In New York, there was a certain event that happened that caused some authorities to push law makers to legislate for a provision for the office of a special prosecutor of police brutality since the state prosecutors seemed to be lagging behind in this task. In the year 2014, on July 17th⁴⁹, a male African-American by the name Eric Garner was killed by policemen from the New York City Police Department on Patrol who put him on a chokehold for about nineteen seconds, a move that ended up being fatal because Garner suffocated and went into Cardiac arrest, as per his post mortem. The police officers approached Garner on suspicion of selling single cigarettes from packs without tax stamps. After Garner told the police that he was tired of being harassed and that he was not selling cigarettes, the officers went to arrest Garner. One of the police officers tried to take Garner's wrist behind his back, Garner pulled his arms away. The officer then put his arm around

⁴⁸ The Algiers Motel Incident, John Hersey, Paperback , 418 pages ISBN: 9780801857775 November 1997

⁴⁹ https://en.wikipedia.org/wiki/Algiers_Motel_incident, date accessed 22/01/2018.

Garner's neck and took him down onto the ground. After the officer removed his arm from Garner's neck, he pushed the side of Garner's face into the ground while four officers moved to restrain Garner, who repeated "I can't breathe" eleven times while lying face down. Garner lost consciousness and that was when the officers turned him onto his side to ease his breathing. Garner remained lying on the sidewalk for seven minutes while the officers waited for an ambulance to arrive. The officers and emergency medical technicians did not perform cardiopulmonary resuscitation (CPR) on Garner at the scene; according to a spokesman for the PBA, this was because they believed that Garner was breathing and that it would be improper to perform CPR on someone who was still breathing. He was pronounced dead at the hospital approximately one hour later.

As all this was happening, a bystander took a video of the whole incident and this was used as evidence in court against the policemen. Regardless of this video evidence being used in court, the prosecution claimed that there was not enough evidence to charge the policemen and this stalled the whole criminal process.⁵⁰ The family of Eric Garner settled the issue with the New York City Police Department out of court and settled for \$ 5.9 million.

However this case was a high profile typical situation where an unarmed African-American was killed by a White policeman and this has sparked outrage and protests which were a cause for the Black Lives Matter movement, a movement which is meant to advocate for the rights of Black people whose rights have been violated against through racism based violence.⁵¹

The Eric Garner Case stirred public outcry because of the apparent incompetence portrayed by the office of the prosecutor and how they turned a blind eye to an issue that needed more investigations and condemnations. Governor Andrew Cuomo made an executive order number 147, to appoint a special prosecutor of policemen who are involved in police brutality on unarmed civilians. Governor Cuomo signed the executive order for the appointment of special prosecutor on July 8th, 2015. In his speech, he mentioned that the impulse guiding the intuition of the executive order was to restore public confidence in the criminal justice system, since most police officers who were indicted ended up being acquitted and this embittered most of the citizens and the families affected by the ongoing police brutality which seemed to be a plague in the society.

⁵⁰<<http://abcnews.go.com/US/justice-department-review-means-eric-garner-case/story?id=43085124>>, date accessed 22/01/2018.

⁵¹<https://blacklivesmatter.com/about/>, date accessed, 22/01/2018

The other point Governor Cuomo insisted on was that there was an apparent bias between the prosecutors from the Office of the Attorney General and the police because of the close working relations that they had and this brought about a situation where there was conflict of interest which faced the district attorneys who were assigned the task of investigating the policemen and prosecuting them. Advocates and victims' families were pushing for the executive order to be written into law, both for permanence and to broaden the criteria for cases that fall under the Attorney General's jurisdiction.⁵² The Executive Order by Governor Cuomo to obtain special prosecutors for the police has gotten positive reception because of the rising need to have better systems on police accountability. The Executive Order is an indication that laws need to be flexible enough to respond to the trends in society, for the benefit of the citizens of that country.

⁵² <http://www.gothamgazette.com/state/6778-while-cuomo-s-special-prosecutor-order-continues-calls-for-permanency-remain>, date accessed 28/01/2018

4.2: HOW SPECIAL PROSECUTORS CAN BE USED BY IPOA.

As highlighted in the previous chapter, the functions and powers that have been given to IPOA are only limited to oversight and investigations, and recommending evidence against policemen who have been complained against to the Office of the Director of Public Prosecution. The last performance report which was prepared by IPOA for July-December 2016, which is a mandatory obligation as has been provided under Section 30 of the IPOA act⁵³ which states that IPOA shall prepare a performance report at least once in every six months to the Cabinet Secretary and make such recommendations it may consider necessary. The Cabinet Secretary who is being referred to here is the Cabinet Secretary responsible for all matters relating to the police and internal security as has been provided for in the IPOA act⁵⁴.

In the IPOA performance reports, it was highlighted that IPOA faced challenges when it came to cooperation from the National Police Service, whereby the operations of the Authority are compromised. Also of importance to note is that the Authority reported that there is no Memorandum of Understanding between the Authority and some of the key stakeholders such as the Office of the Director of Public Prosecutions to assist with investigations and prosecutions. The Authority just noted as a recommendation that they would follow up with the ODPP. Also, it was noted that police were proceeding to undertake investigations and recommending inquests before informing the Authority and thus legally barring IPOA's investigations, because of the overlap of functions between the Criminal Investigations Department and the Authority⁵⁵.

In as much as the IPOA Act has made it obligatory that the Authority should often prepare performance reports, there has not been any other performance report made since the last one that was for June-December 2016. This is very limiting because there is a lack of information to follow up on the performance of IPOA and to see what challenges they are facing.

This study has looked into the effectiveness of having a Special Prosecutor for the police which has been received well in other jurisdictions such as the United States as has been highlighted above. IPOA only operates within the scope of its mandate as has been written in the act and cannot operate ultra vires in making its operations more effective.

⁵³ Section 30, The Independent Policing Oversight Authority Act, 2011.

⁵⁴ Section 2, The Independent Policing and Oversight Authority Act, 2011.

⁵⁵ <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Performance-Report-July-December-2016.pdf>, date accessed 28/01/2018

The same way that the United States Constitution has the Appointment clause and the provision that allows for special prosecutors is the same way Parliament should add a function under Section 6 of the IPOA act that grants the Authority the legal office and capacity for the investigation and prosecution of the police, those who complaints have been lodged against them or those who on their own initiative, IPOA has investigated and found it necessary to indict.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This chapter looks at the recommendations and the conclusions. The overall objective of this study was to show that the civilian oversight body, which faces numerous obstacles when executing its operations, can be empowered more by the law through an amendment of the IPOA act which governs IPOA. Police misconduct that is unpunished are one of the largest threats to security in Kenya, and it reduces civilian confidence in the police. IPOA has only been given limited powers and functions and this has been detrimental to its operations because of non-coordination from the stakeholders involved in assisting it to execute its mandate. Earlier on it has been argued that applying the act as it is has been futile to the operations of IPOA, thus curbing it from achieving its goal of full oversight and accountability over the police.

5.1: RECOMMENDATIONS

I would like to recommend the following to better the operations of IPOA when it comes to dealing with the police.

5.1.1: Introduction of an Office of a Special Prosecutor of the police that is a branch of IPOA:

There has been the overwhelming need to adopt new laws that will improve the mechanisms that have already been put in place for police accountability. Parliament even went ahead to form IPOA with the aim of providing civilian oversight over the work of the police. The IPOA act has not been subject to amendment. This study recommends that Parliament adds to the functions of IPOA⁵⁶, a provision for the Office of a Special Prosecutor whose work will be to prosecute suspicious police who have been involved in crimes against civilians after other members in the Authority have conducted investigations, which is already a function granted to IPOA. The Office of the Special Prosecutor of the police shall be responsible for investigating the police who have been complained against and come up with evidence against them and proceed to the normal courts to prosecute them on indictment.

The Constitution of Kenya 2010 stipulates under Article 250 that a holder of an independent office shall be appointed by the President and approved by the National Assembly, and he or

⁵⁶ Section 6, The Independent Policing Oversight Authority Act, 2011.

she shall be identified and recommended for appointment in the manner that is consistent with National Legislation⁵⁷.

5.1.2: Training of personnel who will work at the Office of the Special Prosecutor:
Now that it has already been established that there will be such an Office that provides special prosecutors, IPOA shall ensure that the people it recruits into the Office of the Special Prosecutor are competent in terms of their qualifications and capacities to prosecute in a court of law. The Office, being a legal entity shall constitute qualified Advocates of the High Court of Kenya who have a practicing certificate for the purposes of prosecuting suspected police in court. The other investigative functions which have already been given to IPOA will remain and be done by existing members of the Authority.

5.1.3: Encouraging public participation:
Members of the community should continuously be encouraged to participate in lodging complaints against police who have violated their rights, and IPOA should take a step further in letting the public know of their existence and objectives. IPOA noted in its June-December performance report that there was lack of a general understanding of its mandate from the public⁵⁸. IPOA can achieve this by organizing more public forums that create awareness about its mandate. Also, IPOA should carry out civic education at the county level to educate the masses on their rights against the police and to encourage them to complain once their rights have been violated. It will be an added advantage when they have the privilege of knowing that IPOA will provide lawyers for those who complain against a member of the Police Service who is indicted.

5.1.4: Revision of the IPOA Act and the National Police Service Act:
There are overlapping functions between the National Police Service and IPOA, especially when it comes to investigation of misconducted done by the police. Both organs have the powers to do so and recommend the police to the ODPP as was established in the case of *Chibungu Sanga vs Republic*⁵⁹.

⁵⁷ Article 250(2), The Constitution of Kenya 2010.

⁵⁸ <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Performance-Report-July-December-2016.pdf>, date accessed 28/01/2018.0

⁵⁹ *Chibungu Sanga vs Republic* [20170]eKLR

5.2: Conclusion

Useful police accountability is vital in ensuring that the security system in Kenya gets rid of unnecessary flaws and to keep up the wellbeing of citizens. In Kenya, most citizens do not have confidence in the police because of the myriads of instances where the police have violated people's rights and injustices have occurred because of the bureaucracy in the whole system, even when they opt to report about the violations. The main purpose of the police which is a constitutional mandate is for them to protect the rights of citizens, rather than violating them.

Police reforms have been put in place throughout history and their implementation has proved that they are futile. The step towards having an independent civilian oversight authority was the first step to taking police accountability away from the existing system. Ever since the civilian oversight authority was formed, efforts to silence them have been out in place by the already existing stakeholders in the process of indicting suspicious police officers. It is high time the law took a paradigm shift that addresses this historical injustice and went against the status quo and changed things to make them adapt and respond efficiently to the current problem.

This study has tested and proved that it is possible to come up with the Office of a Special Prosecutor for the police who will be within IPOA because the prosecutor is independent from the ODPP and this is more effective when it comes to handling of cases. More so, the study has shown that adopting the concept of a special prosecutor for the police increases civilian confidence in the whole system as was said by Governor Andrew Cuomo who came up with an Executive Order to appoint a special prosecutor for the police, whereby he stated the close working relations between the current prosecutors and the police were too close and this created room for bias.

The Social Contract theory in this study justifies the need for Parliament to grant prosecutorial functions IPOA because of the current failing system when it comes to prosecuting the police. Parliament has been entrusted by the people to come up with laws which will adjust to address the problems that come up in society. It is needless to say that this study is further justified by the legal positivist theory, and through observation one would note that this theory contradicts the practical operations of IPOA and thus Parliament needs to amend the legislation for the legal positivist theory to work.

BIBLIOGRAPHY

a. Books:

James Cavallaro, Anne Manuel, Human Rights Watch/ Americas, 'Police Brutality in Urban Brazil', April 1997,

Hobbes T, Leviathan

Curzon L, *Jurisprudence*, 2 ed, Cavendish Publishing Limited, 1995, 26.

b. Articles:

Kenya: Disappearances, Death in the Northeast

Kenya: Counterterrorism Operations Undermine Rights

A joint report by the Commonwealth Human Rights Initiative & the Kenya Human Rights Commission, "*The Police, The Politics, The People: Police Accountability In Kenya*"

Martin Mavunjina, 'Police Brutality in Kenya'

Article by Amnesty international, "*Kenya: Somalis scapegoated in counter-terror crackdown*"

Ethnic Somalis Under Pressure in Kenyan Capital

Joe Kiarie in *The Standard Newspaper*, 'Is the Independent Policing Oversight Authority (IPOA) the new toothless bulldog in town?'

Wilfred E. Rumble, 'Legal Positivism of John Austin and The Realist Movement in American Jurisprudence' (1981)

The Eric Garner Case: Statewide Survey of New York Voters' Response to Proposed Police Accountability Legislation

The Algiers Motel Incident, John Heresy, Paperback , 418 pages ISBN: 9780801857775
November 1997

c. Reports:

IPOA performance reports 2015-2016.

d. Internet Sources:

https://en.wikipedia.org/wiki/Legal_positivism

<https://www.ipoa.go.ke/ipoa-profile>

https://en.wikipedia.org/wiki/Algiers_Motel_incident

<http://abcnews.go.com/US/justice-department-review-means-eric-garner-case/story?id=43085124>

<https://blacklivesmatter.com/about/>

<http://www.gothamgazette.com/state/6778-while-cuomo-s-special-prosecutor-order-continues-calls-for-permanency-remain>

e. Statutes:

The Independent Policing Oversight Authority Act (Act No. 88 of 2011)

The National Police Service Act (Act No. 11A of 2011)

f. Case Law:

Independent Policing Oversight Authority & another v Attorney General & 660 others [2014] eKLR

Law Society of Kenya & 3 others v Attorney General & 3 others

Chibungu Sanga vs. Republic [2017] eKLR

Morris vs. Olson, United States Supreme Court 487 U.S. 658(1988)