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# HAKI na USALAMA FORUM: FORUM ON CRIMINAL JUSTICE REFORM

## SUBMISSION: CONSTITUTIONAL REVIEW COMMISSION

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The Haki na Usalama Forum is a coalition of organisations working in Tanzania to bring about reform to the police and prison sectors of the criminal justice system. The founding members of the forum are the Tanganyika Law Society, the Legal and Human Rights Centre, the National Organisation of Legal Assistance, the Lawyers' Environmental Action Team and the Commonwealth Human Rights Initiative.

Below is our submission of suggested amendments to the *Constitution of the United Republic of Tanzania* in relation to the Police and Prison Services.

### 1. The Police

Policing in Tanzania has been the subject of criticism over the past decades, with allegations of police extrajudicial killings, illegal arrest and detention, partiality in policing and corruption.

In September 2012 the Legal and Human Rights Centre released a report documenting 200 police killings since 2004. There have also been allegations of unlawful arrest and detention, torture and inhumane treatment, excessive use of force and partiality in policing of public assemblies.<sup>1</sup> Corruption within the police has been widely documented and is a common grievance of Tanzanian citizens.

Policing in a democratic society should aim to provide a safe and secure environment in which citizens are able to freely exercise their fundamental rights. Constitutional reform represents an historic opportunity to ensure that policing in Tanzania is conducted in accordance with basic principles of good governance and human rights. By defining the principles according to which law enforcement will be conducted; by ensuring that police leaders are able to make operational decisions free from interference outside the chain of command; by establishing new channels for holding the police accountable and strengthening existing channels of accountability, the United Republic of Tanzania can create a legal and institutional environment where the improvement and reform of policing can take place.

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<sup>1</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1, Human Rights Council Working Group on the Universal Periodic Review, 22 July 2011, [17], [18], [43] and [46], A/HRC/WG.6/12/TZA/3.

The Haki na Usalama Forum submits that the *Constitution of the United Republic of Tanzania* should be amended to reflect the points listed below in relation to the police.

### **1.1 Clearly establish the National Police Service of Tanzania**

The Constitution should be amended to clearly establish the Police Service in Tanzania. Enactment of further legislation by Parliament providing for the establishment of the Police Service is also recommended. After the Constitution is promulgated, the legislation governing the police should be reviewed and amended to reflect changes set out in the Constitution.

We advocate that the police are referred to as a 'service' as opposed to a 'force', to emphasise that the responsibility of the police is to provide a service to the public, and for the public.

### **1.2 Clearly define the objectives and functions of the Police**

The Constitution should be amended to clearly set out the primary objectives and functions of the police. Further functions can be identified in subsequent amendments to the policing legislation after promulgation of the new Constitution.

The Constitution should set out the following basic objectives and functions of the police:

- a) Compliance with human rights and fundamental freedoms set out in the Constitution and in international law;
- b) Ensure high levels of transparency and accountability, and prevent corruption;
- c) Ensure members of the police force, through regular training and strong leadership, achieve high standards of professionalism, responsiveness, accountability and discipline; and
- d) Cultivate and maintain relationships of mutual trust and cooperation with the community.

### **1.3 Establish a Police Commission to manage employment, discipline, training and professional standards.**

An independently functioning, effective police commission is required to ensure independence and impartiality in police employment matters, discipline, training and professional standards. We recommend that the Constitution reflect the recommendations set out below:

- a) Establish and entrench a Police Service Commission in the Constitution, similar to that in section 246 of the *Constitution of Kenya, 2010*. Currently a Police Force and

Prison Service Commission exists in Tanzania, however they are neither enshrined in the Constitution nor functioning effectively.

In addition to establishing the Commission, the Constitution should state the broad functions of the Commission as follows:

- a. Recruitment and appointment of members of the police;
  - b. Management of other employment matters, including deciding promotions, demotions, transfers, dismissals;
  - c. Management and oversight of internal discipline of the police service.
  - d. Management and oversight of police training; and
  - e. Oversight and entrenchment of professional standards.
- b) The Commission must be independent, not appointed directly by the President or otherwise controlled by the President. In order to achieve this, the Constitution should specify that the members of the Commission must be appointed with the approval of the Parliament from a short-list provided by an independent commission that appoints public service officials.
- c) We suggest that, similar to the new National Police Service Commission established in the *Constitution of Kenya 2010*, that a new police commission consist of:
- a. A person qualified to be appointed as a High Court Judge;
  - b. Other qualified candidates of integrity who have had a distinguished career;
  - c. The Inspector-General of Police.

#### **1.4 Entrench the independence and impartiality of the police, specifically of the Inspector-General.**

The Constitution should be amended to entrench the independence of the police, and specifically the independence of the Inspector-General. We recommend the following actions to ensure independence and impartiality of the Police Service:

- a) The Constitution should state that the Parliament must approve the candidate for Inspector-General of Police before the person is appointed by the President.
- b) The Constitution should specifically state that the Inspector-General has independent authority over the Police Service. For example, the *Constitution of Kenya 2010* states that the Inspector-General “shall exercise independent command over the National Police Service” (see s254 (2) (b)).
- c) Additionally, the Constitution should specify the way in which the Government may interact with the Inspector-General. For example, “the responsible Minister may provide a policy direction, which must be in writing.”

- d) The Constitution should clearly state that no person may give a direction to the Inspector-General or to the police in relation to: police investigations, police operations including law enforcement against a particular individual, or employment and disciplinary matters.
- e) The new Constitution should clearly set out the grounds upon which the Inspector-General may be removed, to ensure transparency and accountability in any such decision. There should be provision for parliamentary involvement in any attempt to remove the Inspector-General before the conclusion of his or her term of office. In considering appropriate clauses for the Constitution, the Constitutional Review Commission should look to the *Constitution of Kenya 2010* (ss245(7) and (8)).
- f) As well as security of tenure, the Constitution should stipulate a fixed term of office for the Inspector-General of Police. With job security, the head of the Police Service is more likely to prioritize the rule of law and the interests of the Tanzanian people over the demands of powerful individuals outside the regular chain of command. We recommend that the Constitution allow for an initial term of four years, renewable once for a maximum tenure of eight years.

### **1.5 Establish an independent civilian commission to oversee the police.**

There is a worldwide trend toward the establishment of independent institutions that allow citizens from outside the government to participate in overseeing the functioning of their Police Service. These institutions have been embraced by citizens and police officers alike for a number of reasons. Firstly, they can help the police become more efficient and accountable in certain aspects of their operations, such as in the handling of citizen complaints or in the disciplining of officers who engage in misconduct. Secondly, they can assist in making police processes more effective and responsive in relation to the needs of the public. Thirdly, by making police processes more efficient, transparent and fair, they can render the Police more credible in the eyes of the public and thereby improve the relationship between the police and the public. This improved relationship, in turn, strengthens the cooperation of the community with the Police and enhances their capacity to work effectively.

Furthermore, the United Nations Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions found that, in order to create a culture where police adhere to the law properly, independent bodies that are separate from the Police need to be created with strong powers to investigate incidents where officers cause a death or serious injury.<sup>2</sup> One such complaints entity, Kenya's new Independent Policing Oversight Authority (IPOA) is headed by a board of independent civilians. The Chairperson of the IPOA is someone capable of being appointed as a Judge in Kenya's High Court. The

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<sup>2</sup> Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Addendum, Study on Police Oversight Mechanisms*, Human Rights Council, 28 May 2010, A/HRC/14/24/Add.8.

members of the IPOA Board were appointed by a thorough, independent process that is mandated to:

- a) Receive complaints about police misconduct and investigate them.
- b) Initiate its own investigations into suspected police misconduct, even if there is no complaint. The IPOA can continue an investigation even when the victim or witness does not want an investigation conducted.
- c) Investigate all deaths and serious injuries caused in police custody, or which were suspected to have been caused by police.
- d) After investigations, make recommendations for appropriate action, such as prosecution, disciplinary action and/or payment of compensation.
- e) Monitor, review and check on the investigations and recommendations of the National Police Service Internal Affairs Unit.
- f) Review patterns of misconduct and the functioning of internal police disciplinary processes.
- g) Keep a record of all the complaints lodged with both the NPS Internal Affairs Unit and the IPOA.
- h) Monitor and investigate policing operations that affect the public.
- i) Conduct inspections of police premises and police-controlled detention facilities.
- j) Make recommendations to the NPS or other state organs to improve policing.

This submission recommends that the new Constitution establish an independent body, similar to the Kenyan IPOA, to oversee the Police and investigate deaths and serious injuries caused in police custody, or as a result of police action.

## **2. Detention (police custody, pre-trial detention and prison service)**

In this submission, detainees include people arrested and held in custody, those charged and held in detention before their trial and those serving sentences in prison facilities.

All forms of detention - police custody, pre-trial detention and imprisonment - must meet international human rights standards. Unfortunately, there are persistent allegations of arbitrary use of police arrest and detention powers against human rights defenders and members of minority groups.<sup>3</sup> Furthermore, rates of pre-trial detention in Tanzania are high, with those charged with a crime often being detained for long periods before trial.<sup>4</sup> In

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<sup>3</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1, Human Rights Council Working Group on the Universal Periodic Review, 22 July 2011, [18] and [43], A/HRC/WG.6/12/TZA/3.

<sup>4</sup> US State Department of State, *Country Reports on Human Rights Practices for 2011: Tanzania* <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> at 3 January 2012

relation to the final stage of the criminal justice system – imprisonment - there are reports of cruel and inhumane treatment by prison guards, combined with harsh and sometimes life-threatening prison conditions.<sup>5</sup> Misuse of arrest and detention powers, unnecessary pre-trial detention and ill-treatment of detainees clogs up the justice system, disenfranchises citizens and is likely to result in higher rates of criminal activity – resulting in a less safe community.

The Constitution of Tanzania can enshrine basic rights for those held in detention. Impartial, non-discriminatory treatment under the law; humane arrest and detention procedures; minimum basic standards for detention facilities to preserve the dignity of the person; and independent oversight of the police and the prison systems are fundamental ways to ensure that basic human rights standards are met.

## **2.1 Non-discrimination**

The Constitution should specify that every Tanzanian citizen is equal under the law, and that no public officer (which would include a police officer) may discriminate in application of the law. This will strengthen standards of arrest and detention, and prevent discriminatory use of police powers against certain communities or groups, such as ethnic minorities, women, children and political groups.

## **2.2 Detention to be the exception**

Detention should be the exception, rather than the normal practice that police and courts follow in relation to both police custody and pre-trial detention. In this respect, police and Magistrates should only commit a person to detention before a trial or court session if there are compelling reasons to do so.

The Constitution should enshrine the following rights for those arrested or charged with an offence:

- a) To be brought before a court as soon as reasonably possible, but not later than twenty-four hours after the arrest. In the case that the twenty-four hours ends outside of ordinary court hours, the Constitution should state that certain Magistrates must be available for house sittings to rule on whether detention should continue.
- b) At the first court appearance, to be informed of the reason for detention continuing, or to be released.
- c) To not be remanded in custody for an offence that is punishable by a fine only or by a sentence of six months or less.
- d) To be released on bond or bail, with reasonable conditions, pending a charge or trial, unless there are compelling reasons.

## **2.3 Other rights of arrested persons**

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<sup>5</sup> US State Department of State, 'Country Reports on Human Rights Practices for 2011: Tanzania' <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> at 3 January 2012

The current section of the Constitution regarding the right to personal freedom<sup>6</sup> should be expanded to encompass full rights for people detained. The Haki na Usalama Coalition suggests that the drafters consider framing the rights in a similar way to the Kenyan Constitution which distinguishes between rights in relation to arrested persons and general rights of people in pre-trial detention or serving a prison sentence.

Following the lead of Kenya, South Africa and other African nations, specific rights of arrested persons should be enshrined in the new Constitution, in addition to those set out above:

An arrested person has the right to:

- a) Be informed promptly, in a language that the person understands, of:
  - i. The reason for the arrest;
  - ii. The right to remain silent; and
  - iii. The consequences of not remaining silent.
- b) To remain silent, and not be forced to make any confession or admission that could be used in evidence against the person.
- c) To communicate with a legal practitioner.
- d) To communicate with other people who can assist the arrested person.
- e) To be held separately to detainees serving a sentence.

#### Juveniles and women

Additionally, the Constitution should state that women and men should be held in separate detention facilities, and children (defined as under the age of 18) must be held in separate facilities from adults.

#### **Rights of all detainees, including arrested persons**

The rights of all people that are detained, including those held in police custody, those in pre-trial detention and those serving sentences must also be enshrined in the Constitution. Included are the following:

- a) To all the rights and fundamental freedoms contained in the Constitution, including the non-derogable right to freedom from torture and other cruel, degrading and inhumane treatment.
- b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly.
- c) To have a legal practitioner provided to the detained person by the state, and to be informed of this right promptly.
- d) To challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. This includes a petition for an order of habeas corpus.
- e) To conditions of detention that are consistent with the inherent dignity of the person, set out in the section below.

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<sup>6</sup> Section 15, *The Constitution of the United Republic of Tanzania 1977*

## **Conditions for detainees**

It is important that the Constitution provides for detainees to be kept in conditions that are humane and have access to all the rights set out in the law. Both the Constitutions of South Africa and Kenya establish basic conditions for detainees, including that detainees shall have:

- a) Conditions of detention that are consistent with the inherent dignity of the person, including:
  - i. The provision of adequate accommodation, food, clean water, toilet and bathing facilities, sunlight, the ability to exercise, reading material and medical treatment.
  - ii. The ability to communicate with, and be visited by, that person's:
    - Spouse or partner;
    - Next of kin;
    - Chosen religious or other counsellor; and
    - Chosen medical practitioner.
- b) That an independent body will monitor the condition of places of detention to ensure compliance with the above standards. In relation to police custody, this monitoring body could be the independent civilian oversight body discussed above.
- c) That Parliament will enact subsequent legislation to ensure humane treatment of detainees.

## **Oversight body**

Finally, the Haki na Usalama Forum recommends that the new Constitution establish a body to oversee the prison system, to ensure that basic minimum standards have been maintained, and to investigate any complaints of breaches of the law, including allegations of cruel and inhumane treatment. Such an oversight body should consist of qualified civilians appointed to the body through an independent process.