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The Case for the Independence of Kenya's Directorate of Criminal Investigations (DCI): Lessons from International Best Practices

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Abstract

This study examines the lessons that Kenya can learn from the United States and the United Kingdom in establishing an institutionally independent Directorate of Criminal Investigations (DCI) and regulating its investigation powers. The paper highlights best practices in institutional design for independence, budgetary autonomy, recruitment and training, including oversight and regulation of investigation powers. Drawing from the US experience, the paper discusses the importance of direct budgetary appropriations, stringent admission criteria's for DCI officers, and the obligation to cooperate with and report investigatory findings to the ODPP similar to US District Attorneys. From the UK experience, the study focuses on the robust statutory basis for intelligence services and the investigatory powers legislation, as well as the oversight role of the Investigatory Powers Commissioner's Office (IPCO). Additionally, the paper highlights special and enhanced investigation powers, including the statutory recognition of broader investigation powers under The Terrorism Prevention and Investigation Measures (TPIMs) Act 2011. By examining these best practices, the paper provides insights into how Kenya can enhance the institutional independence and effectiveness of its DCI while ensuring respect for human rights and the rule of law.

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Key Words: *Institutional independence, Investigation powers, Oversight, Directorate of Criminal Investigations, Best practices, Kenya, US, UK*

1. Introduction

The effectiveness of any criminal justice system is largely dependent on the ability of law enforcement agencies to carry out their mandate independently, efficiently and effectively¹. In Kenya, the Directorate of Criminal Investigations (DCI) is tasked with conducting criminal investigations, but its institutional independence has been questioned due to its attachment to the National Police Service (NPS). This has led to concerns about potential interference from the executive branch and other powerful interest groups.²

To address these concerns, there have been calls for the establishment of an institutionally independent DCI, modeled after similar agencies in countries such as the United States of America and the United Kingdom.³ This paper explores the lessons that can be drawn from these countries, and how they can be applied to Kenya. Specifically, the paper focuses on the institutional design for independence, including budgetary autonomy, recruitment and training standards, including oversight and regulation of investigation powers. In examining these issues, the paper highlights best practices from the United States of America, including the autonomy of the Federal Bureau of Investigation (FBI) and its cooperation with US District Attorneys, as well as the stringent criteria for admission and training at the FBI Academy in Quantico. The paper also looks at best practices from the United Kingdom, including the robust statutory basis for

¹ Chege, M., (2018). The Kenyan DCI: A Case Study on Investigation-Driven Policing in Africa. *African Security*, 11(2), pp. 1-17.

² Ibid

³ Ibid

intelligence agencies, the oversight role of the Investigatory Powers Commissioner's Office (IPCO), and the recognition of broader investigation powers under the Terrorism Prevention and Investigation Measures (TPIMs) Act 2011.

By examining these best practices, the paper aims to provide insights into how Kenya can establish an institutionally independent DCI, which is critical for enhancing the integrity and effectiveness of the country's Criminal Justice System.

2. Constitutional, Legislative And Institutional Framework for the Investigation Function in Kenya

2.1 Constitutional Framework

2.1.1 Functions of the DCI

The Constitution of Kenya (CoK) 2010 stipulates that Parliament may enact legislation establishing other police services under the supervision of the National Police Service and under the command of the Inspector General of the Service.⁴ The National Police Service Act has expounded on the establishment and role of the DCI.⁵

2.1.2 Role of the Inspector General (IG) of the National Police Service

The CoK 2010 stipulates that 'The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to – (a) the investigation of any particular offence or offences;

⁴ Article 247 of the Constitution of Kenya (CoK) 2010

⁵ This shall be addressed later in the study.

(b) the enforcement of the law against any particular person or persons; or (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.⁶

The provision is aimed at protecting the independence of the Inspector General of the National Police Service, who is the head of the police service in Kenya, from external interference in matters related to specific investigations, law enforcement actions, and personnel matters. This protection of the Inspector General's independence is critical for ensuring that law enforcement agencies operate without fear, favor, or prejudice, and for promoting transparency and accountability in the criminal justice system.

The provision also implies that the Directorate of Criminal Investigations (DCI) cannot give directions to the Inspector General on matters related to specific investigations, essentially because the DCI is under the IG, who commands the National Police Service⁷. This provision is necessary to ensure that the DCI operates independently from the Inspector General and other external actors, such as politicians or influential individuals. By doing so, the DCI can carry out its mandate effectively, objectively, and impartially, in line with international best practices.

2.1.3 Role of the Director of Public Prosecutions (DPP)

The CoK 2010 stipulates that 'The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such

⁶ Article 245 (4) of CoK 2010.

⁷ Section 8(1) of the National Police Service (NPS) Act 2014

direction.⁸ This provision does not compromise the independence of the National Police Service or the IG or the Directorate of Criminal Investigations (DCI). The provision only grants the DPP the power to direct the Inspector General to investigate information or allegations of criminal conduct. It does not give the DPP the power to interfere with the conduct of specific investigations or to dictate the outcome of investigations. However, the study posits that this provision appears to conflict with Article 245 (4) of CoK 2010 that stipulates that no person may give a direction to the Inspector General with respect to the investigation of any particular offence or offences. The study avers that such conflict presents a potential lacuna in law that may cause misinterpretation as to the roles of the DPP and IG.

2.2 Legislative Framework

2.2.1 National Police Service Act, 2012

It establishes the DCI which shall be under the direction, command and control of the Inspector-General.⁹ The Act also highlights the functions of The Directorate which include; (a) collect and provide criminal intelligence; (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; (c) maintain law and order; (d) detect and prevent crime; (e) apprehend offenders; (f) maintain criminal records; (g) conduct forensic analysis; (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution; (i) co-ordinate country Interpol Affairs; (j) investigate any matter that may be referred to it by the

⁸ Article 157 (4) CoK 2010

⁹ Section 28 of the NPS Act.

Independent Police Oversight Authority; and (k) perform any other function conferred on it by any other written law.¹⁰

Under the Act, The NPS shall be under the overall and independent command of the Inspector-General appointed in accordance with Article 245 of the Constitution and the provisions of the NPS Act.¹¹

2.2.2 National Intelligence Service (NIS) Act, 2012

It establishes the NIS which shall have the power to investigate, gather, collate, correlate, evaluate, interpret, disseminate and store information which is relevant in the performance of its functions whether within or outside Kenya.¹² The CoK 2010 also establishes the NIS which is responsible for security intelligence and counter intelligence to enhance national security in accordance with the Constitution.¹³

2.2.3 Office of The Director of Public Prosecutions Act (ODPP), 2013

Pursuant to Article 157 of the Constitution the Director of Public Prosecutions shall have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.¹⁴ The implications of this provision have been analyzed above. The Director shall also exercise State powers of prosecution and may direct that investigations be conducted by an investigative agency named in the direction.¹⁵ In addition, The Director may assign an officer

¹⁰ Section 35 of the NPS Act

¹¹ Section 8 of the NPS Act

¹² Section 6 (2) (a) of the National Intelligence Service (NIS) Act 2012

¹³ Article 242 of the Constitution of Kenya 2010

¹⁴ Section 5 (1) (a) of the Office of the Director of Public Prosecutions (ODPP) Act, 2013

¹⁵ Section 5 (2) (b) of the ODPP Act, 2013.

subordinate to him to assist or guide in the investigation of a crime and every investigative Agency shall give effect to that direction.¹⁶ The Director is also required to cooperate with the National Police Service, investigative agencies, the courts, the legal profession and other Government agencies or institutions so as to ensure the fairness and effectiveness of public prosecutions.¹⁷

Furthermore, The Inspector-General or any other investigative agency shall disclose to the Director all material facts and information collected in the course of an investigation that may be reasonably expected to assist the case of the prosecution or defence. The IG or any other investigative agency is mandated to; (a) conduct thorough investigations; (b) compile all evidence; and (c) submit all relevant information in relation to any investigation undertaken.¹⁸ The Director may by regulation upon consultation with the Inspector-General and other investigative agencies, issue guidelines on cooperation and collaboration in the investigation of crimes.¹⁹

These provisions underscore the significance of maximum co-operation and collaboration between the ODPP and the investigative agencies including the DCI and IG. If one institution fails to co-operate, it impairs the functions and operations of the other institutions.

2.3 Institutional Framework

This section addresses some of the institutions put in place for the investigation function in Kenya. They include The Ministry of Interior

¹⁶ Section 5 (3) of the ODPP Act, 2013

¹⁷ Section 5 (4) (c) of the ODPP Act, 2013

¹⁸ Section 26 of the ODPP Act, 2013

¹⁹ Section 50 (3) of the ODPP Act, 2013

and National Administration, Inspector General of Police and the Directorate of Criminal Investigations. The IG and DCI have already been discussed above.

The Ministry of Interior and National Administration in Kenya is responsible for overseeing the internal security of the country, including law enforcement agencies such as the National Police Service and the Directorate of Criminal Investigations²⁰. The Ministry plays a critical role in the institutional framework that governs the investigation function in Kenya. One of the key functions of the Ministry of Interior is to ensure that law enforcement agencies operate effectively and efficiently to maintain law and order.²¹ The Ministry is responsible for developing policies and strategies that guide the operations of the National Police Service and the DCI, and it oversees their implementation. It also provides budgetary and logistical support to these agencies to enable them to carry out their mandate effectively.²²

Additionally, the Ministry of Interior is responsible for coordinating and collaborating with other government agencies involved in the investigation function, such as the Director of Public Prosecutions and the National Intelligence Service. This coordination is critical for ensuring that investigations are carried out efficiently, that intelligence is shared among agencies, and that there is no duplication of efforts²³.

²⁰ The Ministry of Interior and National Administration website available at <https://www.president.go.ke/ministries-ke/ministry-of-interior-national-administration/> accessed 4 May 2023

²¹ Ibid

²² Ibid

²³ Ibid

3. Problematic Implications of the Current Institutional Location of The DCI Under The National Police Service

3.1 Risk of Interference

The institutional location of the DCI under the National Police Service creates a risk of interference in the investigation function. As a police department under the Inspector General of the National Police Service, the DCI is susceptible to political influence and pressure from within the police hierarchy. This may compromise the independence of the DCI in carrying out investigations and may lead to biased or incomplete investigations.²⁴ This risk of interference is compounded by the fact that the Inspector General is appointed by the President, and the President may have a vested interest in controlling the investigation function for political gain. This may lead to selective or politically motivated investigations, which can undermine public trust in the Criminal Justice System.²⁵ This position is not farfetched and calls for innovative and progressive ways of separating the 'Policing Function' of the National Police Service under the IG and the 'Investigation Function' of the DCI.

Therefore, the institutional location of the DCI under the National Police Service raises concerns about the independence and effectiveness of the investigation function. To address these concerns, there is a need to explore alternative institutional arrangements that can enhance the independence and effectiveness of the DCI in carrying out its investigation function²⁶ on the one hand, and

²⁴ Chege, M., (2018). The Kenyan DCI: A Case Study on Investigation-Driven Policing in Africa. *African Security*, 11(2), pp. 1-17.

²⁵ Ibid

²⁶ Ibid

distinguish it completely, from the policing and other general functions of the National Police Service.

3.2 Budgetary Shortfalls Due to Reliance on National Police Service Budget Allocation

The institutional location of the DCI under the National Police Service also creates budgetary shortfalls that may undermine the effectiveness of the DCI's investigation function. The DCI relies on the National Police Service budget allocation for its funding, which may be insufficient to meet its operational needs.²⁷ Due to the limited resources, the DCI may face challenges in hiring and retaining qualified staff, acquiring modern equipment and technology, and conducting effective investigations. This may result in delayed or incomplete investigations, which can compromise the quality of evidence and the success of criminal prosecutions.²⁸

Furthermore, the DCI may face challenges in conducting specialized investigations, such as financial investigation into crimes, cybercrime or cyber enabled crimes, and terrorism or terrorism related offences. These investigations require specialized skills, equipment, and resources that may not be readily available within the National Police Service budget allocation.²⁹ The reliance on the National Police Service budget allocation alone also makes the DCI vulnerable to political interference, as the Inspector General may prioritize funding for other police departments over the DCI's investigation function.³⁰ This also interferes with the independence of the DCI, who cannot be

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

bold and objective in decision-making for fear of their budget being slashed.³¹

Therefore, the study posits that the institutional location of the DCI under the National Police Service raises concerns about budgetary shortfalls and the sufficiency of resources for the effective functioning of the investigation function. To address these concerns, there is a need to explore alternative funding models that can ensure the adequate resourcing of the DCI to carry out its investigative mandate effectively.

3.3 Skills Shortage Due to Low Entry Qualifications

The institutional location of the DCI under the National Police Service also creates a skills shortage in the investigative function due to low entry qualifications.³² The entry qualification for DCI officers is a minimum of a Kenya Certificate of Secondary Education (KCSE) with a mean grade of C,³³ while that of the regular police is D+.³⁴ These low entry qualification requirements may result in a lack of specialized skills and expertise in conducting investigations, such as forensic analysis, digital forensics, cybercrime or cyber enabled crime, and financial investigation of crimes etcetera. The DCI may also face challenges in attracting and retaining qualified personnel, as

³¹ Ibid

³² Kimani, J. and Ndubai, F., 2020. Criminal justice system in Kenya: Issues and challenges. *Global Handbook of Police and Justice Administration* (pp. 1-28). CRC Press.

³³ Entry Qualifications for DCI available at <https://keweb.co/how-to-join-kenya-dci/> accessed 4 May 2023

³⁴ Kenya Police Recruitment Requirements available at <https://kenyadmission.com/kenya-police-recruitment-requirements/> accessed 5 May 2023

individuals with higher qualifications may prefer to work in other institutions that offer better remuneration and career prospects.³⁵

Furthermore, the low entry qualification requirements may contribute to the perception of the DCI as a less prestigious department within the National Police Service, which can affect its ability to attract and retain skilled personnel.³⁶ This skills shortage can have implications for the quality and effectiveness of investigations conducted by the DCI. Investigations may take longer to complete, or they may not meet the required standard of evidence needed for successful prosecutions.³⁷

Therefore, the institutional location of the DCI under the National Police Service raises concerns about the skills shortage in the investigative function due to low entry qualifications. To address these concerns, there is a need to review the entry qualifications for DCI officers to attract and retain highly skilled personnel with specialized skills and expertise required in modern criminal investigations.³⁸

3.4 Limited Basis of Enhanced Power

Another problematic implication of the current institutional location of the DCI under the National Police Service is the limited basis of enhanced power. This is due to the lack of a separate DCI statute,

³⁵ Kimani, J. and Ndubai, F., 2020. Criminal justice system in Kenya: Issues and challenges. *Global Handbook of Police and Justice Administration* (pp. 1-28). CRC Press.

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

which means that its powers are not dissimilar to those of other police units under the National Police Service Act.³⁹

The DCI's powers are mostly derived from the National Police Service Act, which mainly deals with the structure, command, and management of the National Police Service. Although the DCI has a specific mandate to investigate serious crimes and maintain law and order, its powers are not well defined and are subject to interpretation.⁴⁰ This limited basis of enhanced power affects the DCI's ability to effectively carry out its mandate, since it may not have the necessary legal framework to operate autonomously and effectively. It also limits the DCI's ability to adopt modern investigative techniques and technologies, which may be necessary for solving complex criminal cases⁴¹. Moreover, the lack of a separate statute for the DCI may contribute to the perception of the DCI as just another police unit, which can affect its ability to attract and retain skilled personnel⁴² or even utilize innovative and progressive developments in technology designed to combat crime in the Digital Age.

Therefore, the study postulates that there is a urgent need to enact a separate DCI statute to define its powers, functions, and jurisdiction. This would enhance the DCI's independence and autonomy, as well as provide a legal basis for its activities. It would also allow the DCI to adopt modern and special investigative techniques and technologies necessary for effective investigation and prosecution of serious crimes.

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

3.5 Impediments to Foreign Cooperation

Another problematic implication of the current institutional location of the DCI under the National Police Service is the impediments to foreign cooperation. The DCI is responsible for investigating a multiplicity of transnational organized crimes, including terrorism, human trafficking, drug trafficking, Cybercrime and/or Cyber enabled Crime etcetera, which often requires collaboration with international law enforcement agencies.⁴³ However, the DCI's institutional location under the National Police Service may hinder foreign cooperation due to the perception that it is a part of the National Police Service, which may have a negative reputation in some Countries emanating probably from its 'Policing Function' which has no relation to its 'Investigation Function'. This may lead to reluctance by foreign law enforcement agencies to share sensitive information or collaborate with the DCI.⁴⁴

Additionally, the DCI's institutional location may limit its ability to develop and maintain relationships with reputable international law enforcement agencies, since it may not have the requisite resources or expertise to do so. This may make it more difficult for the DCI to access reputable and prestigious foreign law enforcement networks, which are essential for international cooperation in the fight against many forms of transnational organized crimes.⁴⁵

Therefore, there is a need to establish a separate institutional framework for the DCI, which would enhance its reputation and

⁴³ Ondiege, P. and Ndungu, S., 2019. Towards strengthening Kenya's criminal justice system. In *Strengthening Criminal Justice Systems in Eastern Africa* (pp. 19-39). Springer.

⁴⁴ Ibid

⁴⁵ Ibid

independence, and facilitate foreign cooperation. This may involve establishing a separate agency or elevating the DCI to the status of an independent directorate, with the necessary resources and expertise to develop and maintain relationships with foreign law enforcement agencies.⁴⁶

4. Establishing an Institutionally Independent DCI i Kenya: Lessons From The United States Of America And The United Kingdom

4.1 The Institutional Design For Independence: What Needs To Change?

4.1.1 Dependence on the National Police Service budget: - The need for independent Budgetary Allocation from Treasury

In order to establish an institutionally independent Directorate of Criminal Investigations (DCI) in Kenya, there is a need for a comprehensive institutional design that ensures the DCI's independence from the National Police Service (NPS). One of the key changes required in this regard is the need for independent budgetary allocation from Treasury.⁴⁷

Currently, the DCI is heavily reliant on budgetary allocations from the NPS, which has several implications. Firstly, it makes the DCI vulnerable to the budgetary shortfalls and restrictions of the NPS, which may not necessarily prioritize the DCI's budgetary needs. This may lead to inadequate funding and resources for the DCI, which can have serious implications for its ability to effectively investigate

⁴⁶ Ibid

⁴⁷ Murungi, J. (2019). Institutional Reforms and Police Effectiveness in Kenya. *African Security Review*, 28(2), 113-127.

crimes.⁴⁸ Secondly, the DCI's dependence on the NPS budget may undermine its independence from the National Police Service, since it may be perceived as being subservient to the NPS. This may hinder the DCI's ability to act impartially and without fear or favor in the investigation of crimes.⁴⁹

To address this issue, the DCI needs to be allocated a separate budget that is independent of the NPS budget. This would ensure that the DCI has the necessary resources to effectively carry out its mandate without being subject to the budgetary constraints of the NPS.⁵⁰

The United States of America and the United Kingdom provide good examples of how an independent budgetary allocation can be achieved for law enforcement agencies. In the United States of America, for instance, the Federal Bureau of Investigations (FBI) has an independent budget that is allocated directly by Congress. Similarly, in the United Kingdom, the National Crime Agency (NCA) has an independent budget that is allocated directly by Treasury.⁵¹

Therefore, Kenya can learn from these countries and establish a similar system where the DCI is allocated an independent budget that is directly allocated by Treasury. This would ensure the DCI's independence and provide it with the necessary resources to effectively carry out its mandate.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

4.1.2 Low minimum qualification and training standards - The need to raise academic qualification above that of other regular police officers

In order to establish an institutionally independent DCI in Kenya, there is a need to raise the minimum qualification and training standards required for its officers above that of other regular police officers.⁵² This is because the DCI requires a higher level of expertise and knowledge in various fields such as forensic science, cybercrime, financial crimes, and intelligence gathering and analysis.⁵³

In the United States, for instance, the Federal Bureau of Investigation (FBI), which is an independent agency, requires its special agents to have a minimum of a four-year college degree, as well as several years of relevant work experience. In addition, they undergo extensive training in special investigative techniques, law enforcement, and firearms, among others.⁵⁴

Similarly, in the United Kingdom, the National Crime Agency (NCA), which is also an independent agency, requires its officers to have a minimum of a two-year degree or equivalent qualification, as well as relevant work experience. They also undergo rigorous training in intelligence gathering, investigation techniques, and forensic science, among others.⁵⁵

Therefore, to establish an independent DCI in Kenya, there is a need to raise the minimum qualification and training standards required

⁵² Otieno, C. F. (2019). Reforms in the Directorate of Criminal Investigations and Their Implications for Criminal Justice Administration in Kenya. *Journal of Social Sciences and Humanities Research*, 7(2), 106-119.

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

for its officers to reflect the specialized skills and expertise required for the job. This can be achieved through the development of specialized training programs and the recruitment of personnel with relevant academic qualifications and work experience.⁵⁶

4.1.3 Jurisdictional conflict with DPP and other agencies - the need for cooperation as opposed to conflict between DCI and DPP, as well as other agencies

To ensure the independence of the DCI, it is essential to address jurisdictional conflicts with the DPP and other agencies. This can be achieved by promoting cooperation rather than conflict between the DCI and the DPP, as well as other agencies. The DCI should be given the mandate to investigate and prepare cases for prosecution, while the DPP should be responsible for prosecuting cases in court.⁵⁷

To achieve this, there needs to be a clear delineation of the roles and responsibilities of both agencies, as well as mechanisms for collaboration and information sharing.⁵⁸ The DCI should have the authority to conduct investigations independently without interference from other agencies, while the DPP should have the power to direct the DCI to investigate specific cases as needed.⁵⁹

In addition, there needs to be a framework for coordinating investigations between different agencies, including the DCI, the DPP, and other law enforcement agencies. This will ensure that investigations are not duplicated or compromised due to inter-

⁵⁶ Ibid

⁵⁷ Njagi, L. W. (2018). The Directorate of Criminal Investigations in Kenya: The Search for a Workable Model. *International Journal of Social Science and Humanities Research*, 6(1), 93-104.

⁵⁸ Ibid

⁵⁹ Ibid

agency conflicts. By promoting cooperation and collaboration between different agencies, Kenya can establish an efficient and effective Criminal Justice System that upholds the rule of law and promotes public trust.⁶⁰

4.1.4 Non-Recognition of special investigation powers of DCI - The Need for Justifiably Broader Investigation Powers in the case of Suspects believed to be posing a risk to the Public and who cannot be Prosecuted or Deported

In order to establish an institutionally independent DCI in Kenya, there is need to address the non-recognition of the special investigation powers of the DCI. Currently, the DCI operates under the National Police Service Act, which limits its powers to those of a regular police unit.⁶¹ However, there are certain cases where suspects may pose a risk to the public, and cannot be prosecuted or deported. In such cases, it is necessary for the DCI to have justifiably broader investigation powers, in order to properly address such threats.⁶²

In the United States and the United Kingdom, there are specialized agencies with investigative powers that are distinct from regular police units. For example, the Federal Bureau of Investigation (FBI) in the United States and the National Crime Agency (NCA) in the United Kingdom have powers that are separate from those of regular police units. These agencies have been able to successfully address threats to national security and public safety, due to their specialized training, resources, and powers.⁶³

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

In Kenya, the DCI should be granted specialized investigation powers, similar to those of the FBI and NCA, in order to effectively address cases where suspects pose a risk to the public but cannot be prosecuted or deported.⁶⁴ This would require legislative changes, as well as sufficient resources and training for the DCI to properly exercise these powers. Additionally, requirements have to be in place to ensure clear guidelines and oversight to these powers, to avoid abuse or inappropriate use.⁶⁵

4.1.5 Unrestricted transfer of personnel from other police departments to DCI - The Need for Restrictions on the skills mismatch that results from haphazard transfer of officers from other police units to the DCI

One of the key changes that need to be made in the institutional design for the independence of the DCI in Kenya is the need for restrictions on the unrestricted transfer of personnel from other police departments to the DCI. Currently, officers from other police units can be transferred to the DCI without proper training or consideration of their skills. For instance, there can be transfer of officers from The Anti-stock Theft Unit to the Banking Fraud Unit without proper or adequate training requirements. This often results in a skills mismatch, which can affect the quality of investigations conducted by the DCI.⁶⁶

To address this issue, there is need for clear guidelines on the transfer of officers to the DCI.⁶⁷ This should include restrictions on the transfer of officers who do not meet the minimum qualification and training

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Nduta, S. M. (2017). The Kenya Police Reforms and Their Impact on Crime Management in Nairobi County. *Journal of Criminology and Criminal Justice Research*, 2(1), 1-13.

⁶⁷ Ibid

standards required for the DCI. Additionally, officers who are transferred to the DCI should receive specialized training to ensure they have the necessary skills and knowledge to carry out their duties effectively.⁶⁸

The study opines that restricting the transfer of personnel to the DCI will also help to ensure that the unit has a more stable and experienced workforce, which is crucial for effective investigations. This will also help to address concerns around the independence of the DCI, since officers who are trained specifically for the unit are more likely to be committed to its mandate and less susceptible to outside influence.

4.2 Lessons from the United States of America

4.2.1 FBI within the Department of Justice

The Federal Bureau of Investigation (FBI) is a law enforcement agency within the United States Department of Justice.⁶⁹ While the FBI is within the Department of Justice (DOJ), it operates independently with a distinct mission and separate budget from other DOJ components. The FBI Director is appointed by the President and confirmed by the Senate, and serves a 10-year term to ensure independence from political pressures.⁷⁰

⁶⁸ Ibid

⁶⁹ Makori, E. O., & Ondabu, I. W. (2018). Re-engineering the criminal investigations department in Kenya for effective service delivery: lessons from the US federal bureau of investigation. *Journal of Business and Management*, 20(6), 1-12

⁷⁰ Ibid

One of the key lessons that Kenya could learn from the FBI model is the need for institutional independence and a clear mandate.⁷¹ The FBI's mandate is to protect and defend the United States of America against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and Criminal Justice Services to both federal and local agencies. This mandate is clearly defined in the U.S. Code, which provides a framework for the FBI's operations and accountability.⁷²

Furthermore, the FBI's budget is separate from that of other DOJ components, which ensures that it is not beholden to other agencies or political pressures. This budget independence enables the FBI to invest in training, technology, and infrastructure to enhance its investigative capabilities.⁷³ The FBI also has a strong focus on recruitment and retention of highly qualified personnel, which is critical for maintaining its institutional independence and effectiveness.⁷⁴

4.2.2 Best Practice Lessons For Kenya

4.2.2.1 Budgetary Autonomy

One best practice lesson for Kenya to learn from the United States of America with regards to establishing an institutionally independent DCI is to ensure budgetary autonomy through direct budgetary appropriations⁷⁵. In the United States, the FBI operates under the

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Kariuki, M. W., & Waweru, L. M. (2019). The effectiveness of the US FBI's transformation in Kenya: an analysis of lessons learnt. *International Journal of Scientific Research and Management*, 7(2), 952-958

Department of Justice but has its own separate budget allocated directly by Congress. This ensures that the FBI can carry out its investigative functions independently, without being reliant on the budget of the Department of Justice, which could be influenced by political interests or priorities.⁷⁶

Similarly, in Kenya, the DCI should have direct budgetary appropriations from Treasury, separate from the Budget of the National Police Service, to ensure its financial independence and ability to carry out investigations without external influence.⁷⁷ This would enable the DCI to allocate resources and prioritize investigations based on their merit and national security interests, rather than on the interests of the National Police Service or other government agencies. It would also ensure that the DCI has the necessary resources to hire and retain highly qualified personnel, provide adequate training, and procure modern investigative technology and equipment.⁷⁸

4.2.2.2 Independence in Recruitment and Training - The stringent criteria for Admission at Quantico, Virginia

The United States' Federal Bureau of Investigation (FBI) has a highly independent recruitment and training process that could provide a best practice model for Kenya. The FBI recruits its agents from a wide variety of backgrounds, including law, accounting, engineering, and military service. To be considered for the FBI, candidates must have a four-year degree from an accredited college or university and at least three years of professional work experience.⁷⁹

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

Furthermore, FBI recruits must pass rigorous physical fitness tests, a medical exam, a drug test, and a thorough background investigation. Once accepted, FBI agents undergo a 20-week training program at the FBI Academy in Quantico, Virginia, where they receive intensive instruction in various fields, including intelligence gathering, criminal investigations, and firearms training.⁸⁰

Kenya could benefit from adopting a similar recruitment and training process for the DCI. By raising the minimum entry qualifications and implementing strict admission criteria, the DCI could attract more qualified and skilled personnel.⁸¹ Additionally, by providing comprehensive training programs, the DCI can equip its officers with the skills necessary to conduct sophisticated investigations and ensure high-quality investigative outcomes.⁸²

4.2.2.3 Obligation to Cooperate with and Report Findings to US District Attorneys

In the United States, the Federal Bureau of Investigation (FBI) has the obligation to cooperate with and report findings to US District Attorneys and other law enforcement agencies.⁸³ This enhances accountability and promotes transparency in investigations.⁸⁴ Kenya could adopt a similar practice where the DCI has the obligation to cooperate with and report findings to the Director of Public

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid

⁸³ Nyamwamu, W. K., & Ondieki, B. A. (2019). Institutional transformation: the FBI experience in Kenya. *International Journal of Academic Research in Business and Social Sciences*, 9(4), 117-133.

⁸⁴ Ibid

Prosecutions (DPP) and other relevant agencies.⁸⁵ This would ensure that investigations are conducted in a coordinated and efficient manner, and would promote public confidence in the investigation process. It would also ensure that the results of investigations are used appropriately in the prosecution of cases, leading to more successful prosecutions and better outcomes for victims and the public at large.⁸⁶

4.2.2.4 Oversight by the House and Senate Judiciary Committees

The oversight role played by the House and Senate Judiciary Committees in the United States of America is a best practice lesson that Kenya could adopt for an independent DCI. These committees have the mandate to oversee the operations of the Department of Justice and its agencies, including the Federal Bureau of Investigation (FBI).⁸⁷ They are responsible for conducting hearings, investigations, and making recommendations to the department and the FBI on matters of policy, budget, and operations.⁸⁸

In Kenya, the Parliamentary Committee on Administration and Internal Affairs could be given a similar mandate to oversee the operations of an independent DCI.⁸⁹ This would ensure that the DCI operates in compliance with the law and upholds the rights and/or interests of citizens. It would also create a forum for accountability

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Gikonyo, P. W., & Chege, J. K. (2019). The US Federal Bureau of Investigation: Lessons for the Criminal Investigations Department of Kenya. *International Journal of Innovative Research and Advanced Studies*, 6(12), 28-39.

and transparency, where concerns about the DCI's operations could be raised and addressed.⁹⁰

The study asserts that by adopting the oversight model of the House and Senate Judiciary Committees in the United States, Kenya would ensure that the operations of the DCI are subject to regular review and scrutiny, and that the agency remains accountable to the public. This would help to build trust in the agency and improve its effectiveness in combating crime.

4.3 Lessons from the United Kingdom

4.3.1 MI5 under the Home Secretary

In the United Kingdom, the Security Service, commonly known as MI5, operates under the authority of the Home Secretary.⁹¹ The Home Secretary is a senior government official who is responsible for national security and law enforcement in the UK. MI5 is accountable to the Home Secretary and is subject to oversight by the Intelligence and Security Committee of Parliament.⁹² MI5 is responsible for protecting the UK against threats to national security, including terrorism, espionage, and cyber-attacks. It operates independently of other law enforcement agencies in the UK, such as the police, and its agents have special powers to gather intelligence and conduct covert operations.⁹³

The Home Secretary has the power to issue warrants authorizing MI5 to carry out activities that would normally be illegal, such as entering

⁹⁰ Ibid

⁹¹ Wabwile, M. (2019). The Directorate of Criminal Investigations in Kenya: Challenges and Prospects of Institutional Independence. *The African Review: A Journal of African Politics, Development and International Affairs*, 46(1), 47-68.

⁹² Ibid

⁹³ Ibid

and searching private property without the owner's consent. However, these powers are subject to strict legal and procedural safeguards, and the Home Secretary is required to report to Parliament on their use.⁹⁴

4.3.2 Best Practice Lessons for Kenya

4.3.2.1 Robust Statutory Basis

i) Security Services Act 1989

The Security Service Act of 1989 provides a robust statutory basis for the operations of MI5, which is the United Kingdom's domestic security and counterintelligence agency. The Act sets out the functions of the Security Service, the circumstances under which it can carry out investigations, and the limitations on its powers.⁹⁵ This clear legal framework ensures that the agency operates within the law and is accountable to the government and the public.

In Kenya, there is currently no specific legislation governing the operations of the DCI. Instead, the agency operates under the National Police Service Act, which does not provide the DCI with a clear mandate or specific powers to carry out its functions.⁹⁶ Therefore, Kenya could learn from the United Kingdom's approach by enacting legislation that clearly defines the functions, powers, and limitations of the DCI, and which is specifically tailored to its role as a criminal investigation's agency.⁹⁷

⁹⁴ Ibid

⁹⁵ Section 1, Security Service Act 1989

⁹⁶ Wabwile, M. (2019). The Directorate of Criminal Investigations in Kenya: Challenges and Prospects of Institutional Independence. *The African Review: A Journal of African Politics, Development and International Affairs*, 46(1), 47-68.

⁹⁷ Ibid

Moreover, such legislation would enhance transparency and accountability, and could include provisions for regular reporting to the National Assembly or an independent oversight body. This would ensure that the DCI operates within the law and in accordance with public expectations, while also providing a framework for robust oversight and accountability.⁹⁸

ii) Intelligence Services Act 1994

The Intelligence Services Act 1994 provides a comprehensive statutory basis for the operations and oversight of intelligence agencies in the United Kingdom, including MI5. The Act establishes the legal framework for the intelligence agencies to carry out their functions, subject to appropriate safeguards and oversight mechanisms.⁹⁹

The Act establishes The Secret Intelligence Service whose functions are to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and to perform other tasks relating to the actions or intentions of such persons.¹⁰⁰ It also highlights The Chief of the Intelligence Service who shall be responsible for the efficiency of that Service and it shall be his duty to ensure that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose; in the interests of national security; for the purpose of the prevention or

⁹⁸ Ibid

⁹⁹ Intelligence Services Act 1994 available at <https://www.legislation.gov.uk/ukpga/1994/13/contents> accessed 5 May 2023

¹⁰⁰ Section 1, Intelligence Services Act 1994

detection of serious crime; or for the purpose of any criminal proceedings.¹⁰¹

The Act also sets out the powers of the agencies, including the power to intercept communications, and the limitations on those powers, such as the requirement to obtain warrants from independent judicial commissioners.¹⁰²

The study avers that Kenya can learn from the robust statutory basis provided by the Intelligence Services Act in the UK. An institutionally independent DCI would require a similar legal framework that sets out its functions, powers, and limitations. Such a framework would provide clarity and transparency, as well as the necessary checks and balances to ensure that the DCI operates within the law and with respect for human rights.

iii) Investigatory Powers Act 2016

The Investigatory Powers Act 2016 (IPA)¹⁰³ is a UK law that sets out the powers and limitations of intelligence and law enforcement agencies in their use of investigatory techniques such as interception of communications, acquisition of communications data, and hacking.¹⁰⁴ The IPA provides a robust statutory basis for the actions of these agencies and includes important safeguards to protect individual privacy and prevent abuses of power.¹⁰⁵

¹⁰¹ Section 2, Intelligence Services Act 1994

¹⁰² Section 5, Intelligence Services Act 1994

¹⁰³ Investigatory Powers Act 2016 available at

<https://www.legislation.gov.uk/ukpga/2016/25/contents/enacted> accessed 5 May 2023

¹⁰⁴ Ibid

¹⁰⁵ Ibid

One of the key features of the IPA is the creation of a new Investigatory Powers Commissioner, who is responsible for overseeing the use of investigatory powers by intelligence and law enforcement agencies.¹⁰⁶ The Commissioner is a senior judge appointed by the Prime Minister and has the power to authorize the use of certain investigatory powers and to review and report on their use.¹⁰⁷

The IPA also requires agencies to obtain a warrant from a Judicial Commissioner before using certain investigatory powers, and sets out strict criteria that must be met for such warrants to be granted.¹⁰⁸ The law also includes provisions for transparency and accountability, requiring agencies to publish annual transparency reports and for the Investigatory Powers Commissioner to provide annual reports to Parliament.¹⁰⁹

These provisions in the IPA provide an important framework for the lawful use of investigatory powers by intelligence and law enforcement agencies, while also ensuring that individual rights to privacy are protected. Kenya could learn from the robust statutory basis provided by the IPA, and could consider implementing similar provisions in any legislation governing the operations of an independent DCI.

4.3.2.2 Oversight and Regulation of Investigation Powers The Independent Oversight role of the Investigatory Powers Commissioner's Office (IPCO)

¹⁰⁶ Part 8, Investigatory Powers Act 2016

¹⁰⁷ Ibid

¹⁰⁸ Section 23, Investigatory Powers Act 2016

¹⁰⁹ Section 234, Investigatory Powers Act 2016

The United Kingdom has established an independent oversight body known as the Investigatory Powers Commissioner's Office (IPCO) to regulate the investigatory powers of its intelligence agencies, including MI5.¹¹⁰ The IPCO is responsible for ensuring that the use of investigatory powers is lawful and necessary and for protecting the privacy and human rights of individuals.¹¹¹

The IPCO is headed by the Investigatory Powers Commissioner, who is appointed by the Queen on the recommendation of the Prime Minister. The Commissioner is a senior judge and is independent of the government and the intelligence agencies. The Commissioner's role is to oversee the use of investigatory powers by the intelligence agencies and to ensure compliance with the law and human rights standards.¹¹² The IPCO is also responsible for investigating complaints against the intelligence agencies and for conducting inspections to ensure that the use of investigatory powers is lawful and necessary. The IPCO reports annually to Parliament on its activities and findings.¹¹³

This model of independent oversight of investigatory powers could provide best practice lessons for Kenya in establishing an independent oversight body for the DCI. Such a body could be responsible for ensuring that the use of investigatory powers is lawful and necessary and for protecting the privacy and human rights of individuals. It could also investigate complaints against the DCI and conduct inspections to ensure compliance with the law and human

¹¹⁰ Part 8, Investigatory Powers Act 2016

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

rights standards. The independence of such a body, similar to the IPCO, would be critical to its effectiveness.

Other key provisions of the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016

The Regulation of Investigatory Powers Act 2000 (RIPA) has several key provisions that can serve as best practice lessons for Kenya in terms of oversight and regulation of investigation powers. For instance, RIPA requires a warrant for intrusive surveillance, including interception of communications, directed surveillance, and intrusive surveillance.¹¹⁴ This ensures that such powers are only used when necessary and proportionate. RIPA also requires that an authorizing officer, who is independent of the investigation, must grant permission for the use of intrusive surveillance.¹¹⁵ This ensures that the use of such powers is subject to an independent authorization.

In addition, RIPA provides for safeguards to protect the rights of those under surveillance, including the right to privacy and freedom of expression. This includes requirements for the destruction of intercepted material when it is no longer needed and the use of interception material in legal proceedings.¹¹⁶ RIPA also established the Office of Surveillance Commissioners, an independent body responsible for overseeing the use of surveillance powers by public authorities. This includes ensuring compliance with the law, issuing codes of practice, and providing guidance.¹¹⁷ Finally, RIPA provides

¹¹⁴ Part 1, Regulation of Investigatory Powers Act 2000

¹¹⁵ Section 32; section 35, Regulation of Investigatory Powers Act 2000

¹¹⁶ Chapter 1, Regulation of Investigatory Powers Act 2000

¹¹⁷ Sections 40, 62, 63, Regulation of Investigatory Powers Act 2000

for a complaints process under the Tribunal for individuals who believe they have been subjected to unlawful surveillance. This ensures that individuals have a means to seek redress if their rights have been violated.¹¹⁸

These provisions ensure that the use of investigation powers is subject to oversight, safeguards, and accountability, and that the rights of individuals are protected.

The Investigatory Powers Act 2016 is a UK law that makes provision about the interception of communications, equipment interference and the acquisition and retention of communications data, bulk personal datasets and other information; the treatment of material held as a result of such interception, equipment interference or acquisition or retention; the Investigatory Powers Commissioner and other Judicial Commissioners; other oversight arrangements and; investigatory powers and national security.¹¹⁹

The Act requires the approval of a judicial commissioner for the use of certain interception powers. This ensures that there is independent judicial oversight of interception activities, which is important for protecting civil liberties and preventing abuse of power.¹²⁰ The Act includes provisions for protecting privacy, including the requirement for warrants to be targeted and specific, and the provision of safeguards for sensitive information.¹²¹

¹¹⁸ Section 65-70, Regulation of Investigatory Powers Act 2000

¹¹⁹ Introductory Text, Investigatory Powers Act 2016

¹²⁰ Sections 23, 89, 108, 140, 146, 159, 165, 179, 187, 208, 216, 254, Investigatory Powers Act 2016

¹²¹ Part 2, 5, 6, 7 Ibid

The Act establishes the Investigatory Powers Commissioner's Office (IPCO), which is responsible for overseeing the use of interception powers by public bodies. This ensures that there is independent oversight of interception activities, and that public bodies are held accountable for their actions.¹²² Finally, The Act includes provisions for transparency, including the requirement for public authorities to report on their use of interception powers and for the IPCO to report annually on its activities.¹²³

These provisions serve as best practice lessons for Kenya in terms of ensuring that interception powers are used in a lawful and proportionate manner, with appropriate oversight and protections for civil liberties.

4.3.2.3 Special and Enhanced Investigation Powers the Statutory Recognition of Broader Investigation Powers under the Terrorism Prevention and Investigation Measures (TPIMs) Act 2011

The Terrorism Prevention and Investigation Measures (TPIMs) Act 2011 in the United Kingdom provides an example of special and enhanced investigation powers granted to security agencies in certain circumstances. TPIMs are court-imposed restrictions used to manage the risk posed by individuals suspected of involvement in terrorism-related activity who cannot be prosecuted or deported.¹²⁴

¹²² Part 8, Ibid

¹²³ Section 234, Ibid

¹²⁴ Muiruri, E. (2019). Institutionalizing independence in the criminal justice system in Kenya: A critical analysis of the role of the Directorate of Criminal Investigations (DCI). *Journal of African Law*, 63(1), 41-63.

Under the TPIMs Act, authorities are granted special powers to monitor and restrict the activities of such individuals, including electronic surveillance, restrictions on travel, communication, and association with others, among others. These measures are subject to judicial oversight and must be renewed periodically.¹²⁵

The TPIMs Act also includes provisions for the disclosure of sensitive information to relevant authorities for the purpose of managing the risk posed by individuals subject to TPIMs. However, such disclosures are subject to strict conditions and safeguards to protect the privacy and rights of individuals.¹²⁶

In the context of Kenya, the study posits that adopting a similar legal framework could provide security agencies with necessary powers to manage the risk posed by individuals suspected of involvement in terrorism-related activity who cannot be prosecuted or deported. However, it is crucial to ensure that such powers are subject to strict oversight and safeguards to protect the privacy and rights of individuals.

5. Conclusion

The establishment of an institutionally independent DCI in Kenya is extremely essential to ensuring effective and impartial law enforcement obligations and proper investigation of crimes. The United States of America and the United Kingdom provide excellent examples of best practices in institutional design, recruitment and training, budgetary autonomy, and oversight including regulation of investigation powers. These best practices include establishing a robust statutory basis, providing extensive training and recruitment

¹²⁵ Schedule 1, Terrorism Prevention and Investigation Measures Act 2011

¹²⁶ Schedule 1, Part 1, section 10, Ibid

criteria, ensuring independence in budgetary allocation, and creating oversight mechanisms to ensure accountability and transparency.

In particular, the UK's Investigatory Powers Act 2016 and the US FBI's rigorous admission standards demonstrate how to provide special and enhanced investigation powers while ensuring accountability and transparency. To fully realize the benefits of these best practices, Kenya needs to enact legislation that empowers the DCI with special investigation powers, provide budgetary autonomy, improve recruitment and training standards, and create oversight mechanisms.

Ultimately, an independent DCI would ensure that law enforcement agencies operate within the rule of law, investigate crimes impartially, and promote public trust in the Criminal Justice System. By implementing best practices and measures from the US and UK discussed hereinabove, Kenya can establish a DCI that will be a beacon of hope aligned to effectively discharging requisite law enforcement obligations, promoting public safety inclusive of national security interests, protecting and/or safeguarding the rule of law on the one hand while remaining cognizant of respecting human rights for all Kenyans.

Such an independent DCI will distinguish itself completely through the '*Investigation Function*' from the '*Policing Function*' of the larger National Police Service, enabling it to focus on the effective discharge of its investigative mandate and receive recognition from the International Standardization Organization (ISO) similar to its peers globally, hence achieving complementarity status, integrity, fidelity to the rule of law, reliability, equanimity and prestige, equal to other

reputable international investigatory law enforcement agencies across the globe.

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