

**THE LAW AS A SAFEGUARD FOR THE OVERSIGHT FUNCTIONS  
OF THE POLICE SERVICE COMMISSION**

**BY  
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**Introduction**

It is my immense honour and privilege to be part of this retreat organized by the Commission on the theme ***“understanding the mandate and operations of the Police Service Commission in the context of Rule of Law”*** at Mic Com Golf Hotels and Resorts, Ada, Osun State from 18<sup>th</sup> – 20<sup>th</sup> August, 2008 and to address this august body on the topic ***“The law as a safeguard for the Oversight functions of the Police Service Commission”***.

Police Service Commission is vested with enormous responsibilities. These responsibilities, termed functions, are spelt out in both the Constitution of the Federal Republic of Nigeria, 1999 and Police Service Commission (Establishment) Act, 2001.

Having established the Commission in Section 153(1) (m) as one of the Federal Executive Bodies the Constitution in Part 1 of the Third Schedule, Paragraph 29 sub-paragraph a-b provides for its functions as follows:

***“The Commission shall have power to –***

- (a) appoint persons to the offices (other than the office of the Inspector General of Police) in the Nigeria Police Force; and***

***(b) dismiss and exercise disciplinary control over persons holding any office referred to in sub-paragraph (a) of this paragraph.”***

These functions in their more elaborate form are set out in S. 6 (1) (a – g) of the Commission’s Act. The Act provides as follows:

***“The Commission shall: -***

- (a) Be responsible for the appointment and promotion of persons to offices (other than the office of the Inspector General of Police) in the Nigeria Police Force;***
- (b) Dismiss and exercise disciplinary control over persons (other than the Inspector General of Police) in the Nigeria Police Force;***
- (c) Formulate policies and guidelines for the appointment, promotion, discipline and dismissal of officers of the Nigeria Police Force;***
- (d) Identify factors inhibiting or undermining discipline in the Nigeria Police Force;***
- (e) Formulate and implement policies aimed at the efficiency and discipline of the Nigeria Police Force;***

- (f) ***Perform such other functions which in the opinion of the Commission are required to ensure the optimal efficiency of the Nigeria Police Force;***
- (g) ***Carry out such other functions as the President may, from time to time, direct.”***

These functions are primarily three: **appointment, promotion and discipline**. These responsibilities of the Commission have been coined and christened oversight functions, perhaps to strip it of legal nuances.

### **Oversight Functions**

**Oversight** is defined in the Oxford Advanced Learner’s Dictionary, 6<sup>th</sup> Edition as ***“the state of being in charge of somebody or something”***. Commentators have tried to identify many forms of oversight but central to this is the oversight of Police misconduct.

The necessity to oversee the affairs of the Police by an authority outside the Police organization is underscored by the desire for fairness, objectivity and accountability. Besides, it is against the principle of natural justice for Police to investigate their own misconduct where it is called into question; ***Nemo debet esse iudex in propria causa***. But the overriding reason is to subordinate the Police to civilian authorities in a democratic setting.

Given this background the questions arise: ***How protective is the law of these oversight functions? Is the law adequate? If not adequate how does the inadequacy hamper the effective and efficient discharge of these responsibilities?*** Addressing these questions is the main focus of this paper.

The statutory functions of the Commission as set out above derive their root from constitutional prescriptions. And except in aid of discharging these functions, any law contradictory to it will be null and void. The adequacy of law setting up the Commission can be looked at from three different levels of relationships. These are: -

1. Relationship of the Commission with the Police.
2. Relationship of the Commission with members of the public.
3. Internal working mechanism of the Commission.

### **Relationship of the Commission with the Police**

What is the relationship of the Commission with the Police? According to Part 1 of the Third Schedule to the Constitution all personnel of Police except the Inspector General of Police, are employees of the Commission. It may not be politically appropriate to say that there exists between the Commission and the Police a Master/Servant relationship. But in law that is what it is. We run away from this expression because ordinarily our minds go to domestic relationships where servants are subservient beings and

the master the awesome stick-wilding personality. But for lawyers and non-lawyers who have been in positions of authority, the expression is no more than the elegant language of the law, meaning one who is overseeing somebody's affairs and the one whose affairs are being overseen.

But since this expression is nowhere to be found in both the constitution and the Act establishing the Commission the matter ends there for the layman. However one has to go beyond what the law expressly states to discover what it does not state so expressly.

The law of Master/Servant is a common law of tort applied to augment statutory provisions to pin liability on a capable person for the benefit of an innocent injured party. The Court of Appeal defines this relationship in a more graphic manner in the case of P.G.S.S Ikachi vs. Igbudu (2005) 12 NWLR (PT.940 at Page 550 ratio 10 as follows: -

***“On nature and extent of liability of the master vis-à-vis wrong of the servant – the master is answerable for every wrong of the servant as is committed in the course of his employment. The law regards both master and servant as joint tortfeasors. Being joint tortfeasors, the person injured is at liberty to sue any of them separately or he may sue both jointly, the liability being joint and several”***

Applying this common law principle therefore, the Commission as the master of the Police Personnel ought to be responsible for such Police misconducts as accidental discharge resulting in either

maiming or outright death; rape; harassment; illegal confiscation of citizen's property, illegal detention etc. Such persons when they find their way into freedom or their surviving relations take up their cases either by way of petition or by law suits, claiming huge sums of money as damages proportionate to the degree of injury suffered. As the law stands today should the Commission be responsible for the payment of damages incurred on account of these Police misconducts?

As earlier stated, statutory provisions are silent on this aspect of the Commission's relationship with the Police. The applicable law is the common law of tort on vicarious liability.

Vicarious Liability is defined in Black's Law Dictionary 6<sup>th</sup> Ed. at page 1566 as

***“the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent”***

However, the situation is more complex than that as the question must be answered: are all the elements that constitute vicarious liability available when considering the relationship of the Commission with the Police? The answer to this question determines whether in all cases of misconduct where the Police is liable the Commission can be sued in a vicarious capacity.

On the relationship of master and servant and the vicarious liability of the master for wrongful acts of a servant, the most frequently cited statement is that of Lord Thankerton in the **Case of Short v. J & W Headerson Limited** where the Law lord said that ***“There are four indicia of a contract of service namely.***

- a. ***The master’s power of selection of his servant***
- b. ***The payment of wages or other remuneration***
- c. ***The master’s right to control the method of the work and***
- d. ***The master’s right of suspension or dismissal...”***

See the case of Mersy Dock and Harbour Board v. Cogging & Griffith Liverpool Limited 1946 Times Law Reports (T.L.R) 427 at 429 (1947) Appeal Cases (A.C) 1, at page 17 cited with approval at page 125 paragraphs 223 and 224 of Clerk and Linsell on Torts Fourteenth Edition by Sweet and Maxwell.

These indicia must be cumulatively present before the relationship of master and servant can be said to exist. Otherwise the issue of vicarious liability cannot arise.

The Commission is a creature of 1999 Constitution (section 153 (i) (m) thereof). The same Constitution established the Nigeria Police Force under section 214. Section 215 (2) of the Constitution specifically enacts that:

**“The Nigeria Police Force shall be under the command of the Inspector General of Police and any contingents of the Nigeria**

**Police Force stationed in a State shall, subject to the authority of the Inspector General of Police, be under the command of the Commissioner of Police of that State.”**

Given the functions of the Commission two elements of vicarious liability, namely the ***control over the employee and payment of wages*** are missing here. While the operational control of the Police resides in the Inspector General of Police remuneration and wages are issues within the jurisdiction of the former Ministry of Police Affairs which has become a Department in the Ministry of Interior.

Appointment and discipline are two important elements of vicarious liability. These are part of the functions of the Commission. However, control over the employee and the payment of his wages are of equal weight. However, these fall outside the jurisdiction of the Commission. Accordingly since all the four indicia of vicarious liability must be cumulatively present, can the Commission be vicariously liable for the misconduct of Police Officers? Arguing in favour of the Commission the answer would be no.

### **Who Applies the Law?**

Another area of contention in the Commission's relationship with the Police is the Police usurpation of the Commission's powers of appointment, promotion and discipline.

When Sunday Ehindero was the Inspector General of Police he promoted a number of Police Officers and retired others, supposedly on the approval of Mr. President. His reason was that at the time of his action there was no Commission. As the Legal Adviser to the Commission I rendered an opinion which I hereby quote as follows:

The Constitution (1999) in its Section **153 (I) (M)** established the Commission. This creation came first before the prescription for membership. Thus the argument that without a Board there is no Commission is infantile.

Secondly **Section 1 (2) (a)** of the Commission's enabling Act provides that the Commission is a body corporate with perpetual succession. This means that it continues to exist until scrapped either through the amendment of the Constitution or its suspension. Besides by virtue of the principle of corporate personality the Commission as a constitutional creation is separate from the members who only direct its mind.

Thirdly the Constitution in its **S.155** makes the Permanent Secretary who is the Secretary to the Commission a member of the Commission. He has the power to take decisions which will be subject to ratification of the Board when in place.

Fourthly, **there is nowhere in our laws, whether the Constitution, the Act or any other law, where it is provided that the powers of the Commission to appoint, promote or dismiss/retire officers and men of the Nigeria Police Force revert to the Inspector General of Police in the absence of the Board.**

*Consequently there is no justification for the action of the Inspector General of Police in screening/interviewing candidates for appointment into the Nigeria Police Force and the retirement of others. For emphasis they are unconstitutional acts which have no effect at all*

This opinion is still valid, given the context in which it was given. Nevertheless it is necessary to still give it a wider consideration because of the legal implication of the assumption that there is no Commission to deal with once the members are not in place.

### **The Corporate Legal Personality of the Commission**

The Act setting up the Commission provides in **S.1 (2) (a)** that the Commission is a body corporate with perpetual succession and a common seal. It also gives it the legal capacity to sue and be sued in its own name. The Commission can therefore be said to be like a Limited Liability Company or a Corporation with a distinct Legal Personality from that of the persons who make up its memberships.

Salami J.C.A. in Kadizi International Limited Vs. Kano Tannery Company Limited & 2 Ors (2005) Vol.3 Investment and Security Law Reports at page 131 paragraphs B-D describes a corporation as follows:-

***“A corporation is a mere abstraction whose action may be directed by somebody who is really the directing mind and will of the corporation”***

An abstraction is a mere concept. It is a thing that can neither be felt nor seen. What gives it life and activity is the person or body of persons behind it.

Between November 2006 when the tenure of the members of the Commission came to an end and April 2008 when the new members were inaugurated - a clear one year and six months interval - what was the legal position of the Commission in relation to its core functions of appointment, promotion and discipline? Was there a Commission or do we regard the vacuum as a lacuna not envisaged by the law makers? Or is **section 2 (1)** of the Act enough transitional provision to obviate the quest for law reform in this direction?

It is necessary to answer these questions because the members of the Commission as prescribed by law are the political embodiment of its legal corporate personality. Where the members are not in place there remains a Commission only on paper as the directing minds (the members) are not there.

It is my humble suggestion that to avoid ambiguity an outright amendment of the law is required here to vest the Permanent Secretary who is the Secretary to the Commission with the power of sole administrator to take decisions which should be subject to ratification of the members when appointed. As the law stands presently there is no such provision. However, it is not an excuse for the Police to perform the core functions of the Commission because the members are not in place.

Comparatively speaking the Companies and Allied Matters Act, which regulates the affairs of limited liability companies provides for

a minimum number of directors below which a company cannot legally function. Where the number falls below the legal requirement and it has crucial decisions to take what happens? The law provides that the remaining director should apply to the Court for permission to take such decisions. See section 248 (2) of CAMA.

Such a gap-bridging provision is required in the Commission's Act given the experience of the recent past.

### **Reinstatement of Police Personnel**

Reinstatement of Police Personnel into the Nigeria Police Force arises either as a result of Court orders or success of Police petitions against Police authorities for alleged wrongful dismissal. In both cases the Commission issues letters of reinstatement to such successful Police officers.

Not infrequently the Police high command does not honour such letters by implementing the reinstatement. The functions of the Commission are very clear: appointment (including reinstatement) promotion and discipline. Also the functions of the Inspector General of Police are clear: command control (including deployment to field of operation) of Police personnel. The law equally makes it clear that the Inspector General of Police does not fall within the realm of legal control of the Commission. Thus in a situation where the Police refuses to deploy a reinstated officer what does the Commission do?

This matter once came before the Federal High Court, Abuja where a Police officer sued the Commission on the ground that the Commission refused to reinstate him. After examining the court

processes the Commission saw that it had already issued a letter of reinstatement to the officer. The Commission therefore filed a Preliminary Objection claiming that it was not a proper party to the case. The reason adduced was that beyond issuing a letter of reinstatement the Commission was not required to do more. The issue of deployment was purely the constitutional responsibility of the Inspector General of Police. The court agreed and struck off the Commission's name from the suit. Out of gratuitous concern for the officer I advised him to come before the court by way of mandamus to compel the Inspector General of Police to perform his public duty. He did and succeeded. But the point is this: need there be a law specifically defining the relationship of the Commission with the Inspector General of Police or should such relationship be left to convention?

### **Relationship of the Commission with the Public**

One important aspect of the Commission's oversight functions is its exercise of disciplinary control over Police personnel. This is where the Commission's relationship with members of the public comes into focus. Members of the public ventilate their anger against Police misconduct through petitions to the Commission.

Allegations are rife against the Police of such offences/misconduct as commission of rape, extortion, illegal detention, torture of suspects, harassments, illegal seizure of property and causing death through accidental shooting.

When any of these incidents happens members of the public have two options: Either complain to the Commission by way of petition or institute an action in court for redress.

A lot of these petitions have been dealt with by the Commission and yet a lot more are pending. How does the Commission satisfy the public by holding Police to account? How has the law assisted?

A petition is an allegation by one party against another. When members of the public petition the Commission against the Police there is always the need to hear the Police side of the story, if only to satisfy one of the rules of natural justice; ***audi altram partem***. Do petitions by the public and the replies by the Police provide sufficient material upon which the Commission can base a reasonable and satisfactory judgment? Sometimes yes but at other times the Commission reserves the power to summon any or both parties for oral clarification of certain doubts. Yet there may be need to know more about the issue thrown up by the petition outside both parties to the matter. ***Can the Commission carry out an investigation?***

In the wisdom of the law makers there was a provision in the Commission's Act for an Investigation Department. But there was no express provision empowering the Commission to investigate Police misconduct.

In view of the clear provisions contained in section 4 of the Police Act, the Commission was left with only powers of administrative investigation of Police misconduct not bordering on crime. Therefore, when the Commission's Departments were restructured in January this year the Department of Investigation disappeared, since administrative investigation can be carried out by any Department in the Commission.

Even a Federal High Court sitting in Abuja has confirmed that the Commission has no powers to investigate criminal offences. By an originating summons, a Non-governmental Organisation based in Lagos – Access to Justice, - instituted an action against the Commission in 2005. Part of the reliefs sought by the Plaintiffs was:

***“AN ORDER OF MANDAMUS directed against the respondent to investigate, within a period of 30 days from the date of the Order, the allegations of extortion, bribery, torture, and other investigative malpractices made by the applicants against the aforementioned police officers.... and exercise disciplinary measures on the officers as may be warranted by the circumstances, and by law”***

The Commission replied on point of law. Citing section 4 of Police Act, the Commission submitted that only the Police is vested with the power to investigate criminal offences. The Commission concluded its argument by stating that since the relief sought by the Plaintiffs was asking the Commission to investigate Police misconduct bordering on crimes the Court should dismiss the suit.

Agreeing with the submission of the Commission the Court held as follows:-

***“From the reliefs sought, the applicant seeks an order of this Court to compel the respondent to investigate the allegations of bribery, extortion, torture and other investigative malpractices made against some named police officers.***

*I have considered the statutes relied upon by the applicant, however, neither of the two statutes empower the respondent to investigate allegations of crime.*

*The duty to detect crime is the statutory duty of the Nigeria Police Force. See Section 214 (1) of the 1999 Constitution and Section 4 of the Police Act Cap 359 LFN 1990. The law empowers the Nigeria Police to detect crime and investigation is only an aspect of crime detection.*

*Certainly the respondent has a statutory duty to discipline erring Police officers, but whenever crimes are alleged and investigation is required, the duty to carry out such an investigation is that of the Nigeria Police Force which is trained and equipped to carry out such a function.*

*For these reasons, I agree with Tijani Mohammed (Esq) that the respondent's duty does not include the investigation of crimes.*

*Having thus found, an order of Mandamus cannot be granted to compel the respondents to perform a duty that is not assigned to it.*

*This application is refused and is accordingly dismissed”.*

See Theophilus Uwalaka vs. Police Service Commission Suit No. FHC/ABJ/CS/570/2006 per Kuewumi J.

But this is not a victory over which the Commission should beat its chest. If it has the power of disciplinary control over the Police the law should empower it to embark on investigation of Police misconduct bordering on criminal offences. This is the position in South Africa where the South African Independent Complaints Directorate, the equivalent of this Commission, has powers of criminal investigation. It even flies in the face of common sense for the Police to investigate themselves. Besides it is against the principle of natural justice that a person should not be a judge in his own cause. The recent Apo Six incident is a clear testimony to this.

### **Internal Working Mechanism of the Commission**

Having examined the Commission and its external relationships it is pertinent at this stage to shift attention to its internal working mechanism.

At inception the Commission had five Departments and three Units as provided for under Section 9 of the enabling Act. These were: -

- (a) Department of Administration and Personnel Management
- (b) Department of Investigation;
- (c) Department of Finance and Supply;
- (d) Department of Planning, Research and Statistics; and
- (e) Department of Legal Services.

- (f) Internal Audit Unit
- (g) Press and Public Relation Unit and
- (h) SERVICOM Unit

However, in January this year the Commission's administrative machinery was restructured resulting in four Departments and three Units. It was a pragmatic approach to link the Departments to the core functions of the Commission of appointment, promotion and discipline. The new structure is now as follows: -

- (a) Department of Admin and Finance;
- (b) Department of Promotion;
- (c) Department of Discipline;
- (d) Department of Recruitment.
- (e) Internal Audit Unit
- (f) Legal Services Unit
- (g) Press and Public Relation Unit and
- (h) SERVICOM Unit

This amendment to the law drew strength from S. 9 (2) of the Act which provides that

***“the Commission may, with the approval of the President, increase the number of Departments as it may deem necessary and expedient to facilitate the realization of the objectives of the Commission”***

It is my humble opinion that the authority to create Departments and Units should have been left entirely at the discretion of the executive from day one instead of naming Departments in the Act and at the same time giving the power of amendment to the executive arm. The amendment of the law is therefore called for to take account of this new structure and in the new amendment the mistake of naming the Departments and Units in the Act itself should be avoided.

### **Secretary to the Commission**

Section 10 (1) of the Act provides for Secretary to the commission who must be a Permanent Secretary in the Civil Service of the Federation. Noble as this provision may be it does not augur well for the necessary independence of the Commission.

The Permanent Secretary is the staff of Head of Service of the Federation. Faced with a simultaneous summons from both the Head of Service and the Chairman of the Commission he would have a higher inclination to answer that of the Head of Service than the one of Chairman of the Commission.

To avoid divided loyalty it has been suggested that the Secretary to the Commission should be appointed from outside the Civil Service. This calls for the amendment of Section 10 of the Act.

### **Staff Salary**

Section 7 of the Commission's Act empowers it to pay such remuneration and allowances as are paid to persons of equivalent grades in the Civil Service of the Federation. It is necessary to

amend this section to enable the Commission pay commensurate wages to staff based on the nature of their jobs.

This suggestion is predicated on the fact that the Commission is more or less a security outfit overseeing the affairs of an organization that has a minimum staff strength of 350,000.

Accordingly adequate remuneration would serve as incentive and encouragement for dedication and commitment to duty given that the lowest paid Police officer earns more than a level 8 officer in the Commission.

### **Staff of the Commission**

Every government agency at creation experiences teething problems. Police Service Commission is not an exception. When an agency is created the take-off staff is always drawn from the main Civil Service. After six years of existence it is suggested that the time has come for the Commission to have its own full complement of staff.

### **Conclusion**

This paper has attempted to look at the functions of Police Service Commission as enshrined in the various laws regulating its affairs. The angle has been the adequacy of the law in the effective discharge of those functions. It was discovered that certain areas of the law required amendment. These include the master/servant relationship of the Commission and the Police; the need to define the relationship of the Commission and the Inspector General of Police; a transitional provision empowering the Secretary to the Commission to carry out the functions of the Commission pending

appointment of new members; Appointment of a Secretary to the Commission from outside the Civil Service; adequate salary and remuneration for the staff of the Commission (S. 7) as well as give legal teeth to the investigative powers of the Commission to investigate Police offences.

Given this litany of areas requiring legal touch the inevitable conclusion to draw is that the law has not sufficiently safeguarded the oversight functions of the Commission.

*Thank You!*