



PUBLIC SERVICE COMMISSION

PRESS STATEMENT

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WHY THE ATTORNEY GENERAL CANNOT BE INDEPENDENT OF THE NATIONAL EXECUTIVE

In recent legislative developments, amendments to the Office of the Attorney General Act, 2012 have attracted both public and media scrutiny. The Statute Law (Miscellaneous Amendments) Bill, 2023, approved by the National Assembly on 20th March, 2024, awaits Presidential assent to become law. Notably, these amendments grant the Attorney General significant human resource powers previously held by the Public Service Commission, particularly in matters of recruitment and appointment, promotion and discipline of the Solicitor General, Deputy Solicitors General, States Counsel and other staff within the Office of the Attorney General.

A key consideration emerging from these changes is whether the Attorney General can maintain independence from the national Executive, akin to the Director of Public Prosecutions (DPP). Currently, the national Executive, as defined by the Constitution, includes the President, Deputy President, Cabinet Secretaries and notably, the Attorney General. The President holds the constitutional authority to direct and coordinate the functions of the national Executive, including the Office of the Attorney General.

Crucially, unlike the DPP, who operates independently according to Article 157(10) of the Constitution, the Attorney General, whose office is established under Article 156 of the Constitution is inherently integrated into the national Executive framework as there is no Constitutional provision that gives the Attorney General independence similar to that of the DPP. This integration precludes complete autonomy from the Executive, as the Attorney General and Cabinet Secretaries are individually and collectively accountable to the President for their actions and functions.

The proposed amendments seek to redistribute human resource management functions from the Public Service Commission to the Attorney General, facilitated by an advisory board. This move challenges the constitutional mandate of the Commission, which is tasked with setting norms and standards for management of human resource in the public service under Article 234 of the Constitution including among others; establishment and abolition of offices in the public service; appointment of persons to hold offices in the public service and confirmation of appointments; ensuring that the public service is efficient and effective; exercising disciplinary control in the public service; developing human resources in the public service; reviewing and making recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service and evaluating and reporting to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 of the Constitution are complied with in the public service.

Delinking the Office of the Attorney General from the mandate of the Public Service Commission carries significant implications for staff and

operations of the office. But what are the practical implications of this separation for the Attorney General's office and its staff? As the Public Service Commission has been portrayed in a negative light hence compelling the Office of the Attorney General to follow the legislative route to separate the two institutions, it is important that the repercussions of such a statutory detachment be provided from the Commission's perspective.

After delinking, all staff of the Office of the Attorney General will initially remain seconded from the Public Service Commission until the office is officially designated as a public service for pension purposes. Subsequently, the Public Service Commission will oversee the transfer of service of all the staff members to the newly independent Office of the Attorney General.

Following this disengagement from the Commission's authority, State Counsel, apart from those within the Office of the Attorney General, will require approval from the Commission for deployment elsewhere within the public service. Staff members currently assigned to the Office of the Attorney General will have to choose between transferring their services to the autonomous Office of the Attorney General or remaining under the Commission's mandate as government employees.

Moreover, State Counsel currently seconded to State Corporations and other agencies will have to choose between returning to the Office of the Attorney General or accepting full-time positions within their current organizations, as their secondment ends upon the delinking of the Office of the Attorney General. Additionally, the Attorney General will lose the authority to second officers to State Corporations and

agencies without prior approval of the Commission, as these entities fall within the Commission's jurisdiction.

The Attorney General's ability to deploy State Counsel to Ministries, Departments, and Agencies (MDAs) will immediately terminate, as positions within MDAs are mandated to be filled through competitive recruitment processes by the Public Service Commission.

Consequently, the Office of the Attorney General will operate akin to a private law firm, responding to Ministry directives through Legal Officers appointed by the Commission. The establishment of a pension scheme for the Office of the Attorney General and the creation of legal departments within Ministries will carry significant financial implications that might necessitate the generation of “a money bill” for the government.

Notably, the proposed amendment strips the President of the authority to appoint the Solicitor General, transferring this responsibility to the Attorney General based on recommendations of the advisory board. This shift alters the Solicitor General's status from a Presidential appointee, equal to a Principal Secretary, to an ordinary public officer appointed by the Attorney General.

Moreover, the proposed changes alter the recruitment process for the position of the Solicitor General, diminishing the President's and the National Assembly's role in the appointment. This shift raises questions about the broader implications for executive and legislative authority and ultimately constitutional adherence.

These developments will further underscore a significant reorganization within the Office of the Attorney General and raise questions about the balance of constitutional functionality between the

Attorney General, the Public Service Commission, and the President's role in the appointment of the Solicitor General.

Initially, the published Bill intended for public participation lacked an advisory board. However, close scrutiny from the Justice and Legal Affairs Committee of the National Assembly regarding the Attorney General's capacity to manage human resource functions necessitated the addition of an Advisory Board, thus reflecting the Constitutional imperative that appointments to the public service ought to be more collaborative than unilateral.

Comparatively, the advisory board for the Office of the Director of Public Prosecutions comprises nine members, including six advocates, ensuring a broader, diverse and more cohesive expertise. In contrast, the proposed Advisory Board for the Attorney General consists of only six members, with only two advocates, namely the Attorney General and the President of the Law Society of Kenya, thereby defeating the consistent critique by the Attorney General that the Public Service Commission lacked the expertise to recruit qualified State Counsel. Moreover, unlike the advisory board for the Office of the Director of Public Prosecutions, which advises the Office of the Director of Public Prosecutions collectively, the Attorney General would chair his own advisory board, potentially exerting influence such as the appointments in the current Gazette Notice No 3228 of 19th March, 2024 which do not exist in the staff establishment indicate.

The looming challenge is whether the amendments will stand the test of time without amending the constitution. More crucially, will the President relinquish the authority to appoint the Solicitor General to the Attorney General? Additionally, what is to prevent such an action creating a domino effect with other Ministries, Departments and

Agencies demanding their own Boards, effectively sounding a death knell to the Public Service Commission. These and other questions underscore the broader implications of the proposed changes and their potential impact on executive authority, accountability and constitutional responsibility and negates the very wish of why the framers of the Constitution desired that the Office of the Attorney General be within the ambit of Executive Power and consequentially under the Public Service Commission.

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CHAIRPERSON, PUBLIC SERVICE COMMISSION