



Police as a service Organisation: *Kenya*
An agenda for change

Nairobi, April 2010

Roundtable Conference
on Police Reform in East Africa
A report



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Police as a service Organisation:
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Roundtable Conference
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organised by
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in collaboration with
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on 24th to 25th April, 2003

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Background paper

Police Accountability in Kenya : Seize the moment

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Police Accountability in Kenya: Seize the Moment

Joshua N. Auerbach¹

Recently the police shot eight gangsters which means that eight of them have been sent out of the streets for life. We believe that law enforcement officers should continue doing the same in a bid to reduce crime.

— Hon. Marsden Madoka, Minister for Internal Security
(Office of the President), April 3, 2000

I have word from the President that there shall not be orders from anywhere else except your immediate superiors.

— Hon. Chris Murungaru, Minister for Provincial Administration and
National Security, February 20, 2003

I

Introduction:

Kenya's Constitutional Moment

According to the legal theorist Bruce Ackerman, constitutional democracy in the United States has evolved along two distinct tracks of lawmaking. On one track, that of “normal politics,” the executive, legislative, and judicial branches of government make decisions on behalf of citizens in the absence of high levels of citizen engagement. During “constitutional moments,” however – moments of sustained citizen engagement and mobilization – a second track of “higher” lawmaking emerges. During these moments, the people themselves assert their supremacy, and sweeping changes in the structure of constitutional democracy are thereby legitimated. When American democracy has functioned on this second, higher track of lawmaking, governing institutions have been fundamentally reshaped.²

In the past year, Kenya has entered its own “constitutional moment.” This is self-evidently true in the sense that Kenyans are in the process of rewriting their constitution. It is also true in the deeper sense that Ackerman describes: Kenyan citizens are reshaping their society through debate, activism, and political participation. The Kenyan people have overwhelmingly elected a new government. For many months, they have also engaged in a robust and spirited debate about the



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²BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993).

David Bayley's conceptual distinction between democratic policing and regime policing can usefully be applied to the Kenyan context. For the past decade, rather than serving the public, the KPF have been "regime police", dedicated ultimately to the preservation of the government in power and to the protection of vested interests.

substance of the new constitution and about the proper structure of the new government. After more than a decade of activism for democratic reform, civic engagement and mobilization are at a peak. There has, in short, been no better opportunity since independence for the people of Kenya to revise the principles underlying Kenyan democracy and to reshape government institutions in accordance with those principles.

The Kenya Police Force (KPF) must be among the institutions that are reshaped during Kenya's constitutional moment. For the past decade, and despite the best efforts of committed reformers within the KPF itself, the police have been at the nexus of the most serious problems facing Kenyan society: rampant government corruption, unacceptably high levels of crime, interethnic violence, and vigilantism.

During this period, the police have not been properly accountable to the Kenyan people. They have often placed the demands of the ruling party and of powerful individuals ahead of the rule of law and ahead of the needs of citizens. The police have established a record, documented by the media and by NGO's, of extrajudicial killings, torture, arbitrary detention, suppression of dissent, and fomenting ethnic violence. In 2002 alone, for example the police killed more than 100 people under circumstances that suggested an extrajudicial execution.³

David Bayley's conceptual distinction between democratic policing and regime policing can usefully be applied to the Kenyan context.⁴ For the past decade, rather than serving the public, the KPF have been "regime police", dedicated ultimately to the preservation of the government in power and to the protection of vested interests.

Through corrupt practices, many police officers have also profited at the public's expense. Thus, the police have not only failed to control corruption but an unsettling number of police force have themselves succumbed to corruption. According to Transparency International (TI) – Kenya, seven out of ten Kenyans report having paid a bribe to the police on the understanding that a failure to pay would result in mistreatment or denial of service. In a survey carried out by TI-Kenya, police officers remain the most frequently bribed officials at 4.5 bribes per respondent per month.⁵ TI – Kenya asserts that the total per capita cost of bribes to police officers alone – the police "bribery tax" — amounts to 1,270 Kenyan shillings (more than US \$15) per person per month.⁶ Here, again, vested interests inside and outside the police force, through extralegal interference with police operations, have apparently prevented the police from developing an effective anti-corruption strategy.

A majority of Kenyans indicate that, at best, they lack confidence in the impartiality and effectiveness of the police, and that, at worst, they fear the police. In a society with one of the highest crime rates in the world, the average Kenyan citizen believes that half of the members of the police force are corrupt and that over one-third of all crime committed in the country is attributable to police criminality.⁷

In an emerging democracy, police reform cannot be accomplished by making slow inroads from the margins of police operations. Rather, institutional arrangements and management systems designed to ensure police accountability and adherence to the rule of law, and to engender an institutional culture of respect for these values,

³ See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2003: KENYA (2003).

⁴ See DAVID H. BAYLEY, PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS (1985).

⁵ TRANSPARENCY INTERNATIONAL – KENYA, KENYA BRIBERY INDEX 2002 7, 10 (2002), available at www.tikenya.org/documents/BribIndex02.pdf.

⁶ Id. at 9.

⁷ UN-HABITAT, CRIME IN NAIROBI: RESULTS OF A CITYWIDE VICTIM SURVEY 35 (2002).

must be put in place before other, more targeted reforms can take hold.⁸ Programs to enhance specific police operational capacities, to provide fora for engagement between the police and the community, to train police personnel on principles of human rights, and to increase the pay of the constabulary – all badly needed — cannot have their maximum impact in the absence of reforms at the institutional level.

Where the police are accountable to vested private interests rather than to the public and the rule of law, these interests will squelch any reform effort that they cannot co-opt. Corruption siphons resources and institutional energy from reform efforts. Just as importantly, corruption undermines the legitimacy of the police in the eyes of the public, which in turn severely limits the ability of the police to do the day-to-day work of law enforcement. Efforts to build strong criminal justice systems by slowly building competent institutions, while postponing any treatment of corruption and other crimes of the powerful, are very unlikely to succeed. Such a piecemeal approach, as Philip Heymann has written, would be “based either on extreme optimism or on deep cynicism.”⁹

What must be acknowledged at the outset, however, is that an institutional approach to police reform – an approach that views institutional accountability as the paramount objective of reform, and as the foundation for further reform – requires that some of the most substantial obstacles to reform be surmounted first. According to Bayley, “the police reforms that are the easiest to achieve . . . have the least effect on democratic development, and the reforms that are the hardest to achieve . . . have the greatest effect on democratic development.”¹⁰ The institutional approach to police reform aims to reform the management and culture of the police force, neither of which can easily be altered even in developed democracies with well-entrenched constitutional traditions.

In view of the difficulty of achieving institutional reform, the importance of acting during this constitutional moment can easily be grasped. During times of normal politics, institutions do not readily reconsider the fundamental principles underlying their operations and do not readily open themselves to increased public scrutiny and accountability. If Kenyans want their police institution to transform from a “force” to a “service,” to practice democratic policing rather than regime policing, now is the time.

This paper is a discussion on police accountability in Kenya. Part II disaggregates the concept of police accountability and suggests that it encompasses at least three core values: popular accountability, legal accountability, and transparency. Part III assesses the institutional arrangements for police accountability that exist in Kenya, which are few in number and generally weak in functioning. Part IV provides brief sketches of the law in five other Commonwealth jurisdictions, focusing mainly but not exclusively on three sets of institutional arrangements that bear heavily on accountability: arrangements for the appointment, dismissal, transfer, and tenure of the head of the police and other top officers; for the supervision and control of the police force; and for the investigation of police misconduct. Drawing on these sketches, Part V identifies four aspects of the trend toward enhanced police accountability in police reform legislation. Part VI concludes.

If Kenyans want their police institution to transform from a “force” to a “service,” to practice democratic policing rather than regime policing, now is the time.

⁸ DAVID H. BAYLEY, *DEMOCRATIZING THE POLICE ABROAD: WHAT TO DO AND HOW TO DO IT* 20-23, 42 (2001).

⁹ Philip B. Heymann, *Principles of Democratic Policing*, in *POLICING IN EMERGING DEMOCRACIES: WORKSHOP PAPERS AND HIGHLIGHTS* (National Institute of Justice, 1995), available at www.ncjrs.org/pdffiles/177024.pdf.

¹⁰ David H. Bayley, *Who Are We Kidding? or Developing Democracy Through Police Reform*, in *POLICING IN EMERGING DEMOCRACIES: WORKSHOP PAPERS AND HIGHLIGHTS*, supra note 9, at 62.

II

THE DIMENSIONS AND LIMITS OF POLICE ACCOUNTABILITY

This paper emphasizes three distinct strands of accountability: popular accountability, legal accountability, and transparency. These three values overlap one another in significant ways and tend to reinforce one another.

The word “accountability” does not lend itself to simple definition in the context of police reform. It refers both to processes – chains of command, complaint procedures, oversight mechanisms, courts of law, freedom of information laws, among others – and to institutional values – openness, responsiveness, responsibility, adherence to the law. Moreover, like democracy, the concept of accountability does not refer to a particular process but to a variety of kinds of processes, and does not reflect the ascension of a particular value within the police force but rather a cluster of related values.

A. Values

This paper emphasizes three distinct strands of accountability: popular accountability, legal accountability, and transparency. These three values overlap one another in significant ways and tend to reinforce one another. Yet they do represent distinct values and, as such, can also be in tension with one another. Together, these three will ensure the practice of democratic policing in a police force. No one of them, by itself, is sufficient to do so.

1. Popular accountability

Popular accountability here means holding the police accountable to the will of the people through electoral processes, through mechanisms that subordinate the police to elected officials, and through regular structured engagement between the police and the community.

No governmental actor in a democracy, and particularly no actor as critical to the physical and material well-being of the people as the police, can operate without the underlying consent of the governed.¹¹ The primary mechanism for gauging consent in a democracy, and for ensuring the sovereignty of the people, is, of course, the electoral process. Therefore, the people’s elected representatives must have ultimate responsibility for making policy with respect to law enforcement. Town meetings and community police forums provide a secondary means of ensuring popular accountability. As will be discussed, an extremely weak form of popular accountability prevails under current Kenyan law: the Commission of Police appears to answer to the President of Kenya on all matters.

Popular accountability is a relative, not absolute value in democratic policing. For good reason, most police leaders in democratic societies are not themselves elected officials, and law enforcement policy is almost never directly subject to popular

¹¹ Jean-Paul Brodeur, *Accountability: The Search for a Theoretical Framework*, in *DEMOCRATIC POLICING AND ACCOUNTABILITY: GLOBAL PERSPECTIVES* 126 (Mendes, et al., eds., 1999).

vote. However, where police leaders are popularly accountable, they are generally appointed by elected officials, subject to removal by elected officials, and accept policy-level guidance from elected officials. Through these mechanisms, as well as through structured engagement with the community, the police are accountable to citizens, albeit indirectly so.

2. Legal accountability

Legal accountability here means ensuring police compliance with legal rules through judicial processes and other enforcement mechanisms. There can be no rule of law in a society where those who enforce the law are not themselves subject to the law. When police can disobey the law with relative impunity, they lose legitimacy as law enforcers, and they become a highly visible and therefore highly corrosive example of law's inefficacy. A police force that does not itself follow the law encourages citizen disobedience of the law.

Human rights enforcement is primarily a matter of legal accountability. Human rights norms are codified in Kenyan law, as in the law of most countries. In a democratic society, processes must exist through which the police are held to account if they violate these norms, and through which citizens whose rights have been violated can obtain redress. These processes must be well-publicized, transparent, fair, efficient, and not prohibitively expensive. If mechanisms for accountability do not exist, then the rights themselves effectively do not exist.

3. Transparency

Transparency here means the establishment of mechanisms through which the police are required, as a matter of course, to provide information about all but the most sensitive areas of operation.

The essence of accountability is openness. Citizens cannot hold police accountable if they do not have information with which to do so. Subject to narrowly-drawn exceptions, the police must make available, among other things, the names and locations of persons they have arrested, the details of incidents involving the use of force, copies of departmental rules, policies, and procedures, the data they compile about the occurrence of crime, and the particulars of budgetary allocations and procurements.

Secret and semi-secret police have fortified authoritarian regimes throughout the world, but they are fundamentally inconsistent with the norms of democratic policing. In Kenya, the task of addressing violent crime apparently has been delegated, at least in part, to secretive units like Flying Squad and Alfa Romeo, whose command structure is shrouded in mystery, who have been given broad but not clearly-defined discretion to use lethal force in carrying out their mandates, and who may have authority to give orders to other police officers regarding the detention of suspects. It is rumored that arbitrary detention, torture, and extrajudicial execution are part of their modus operandi.¹² The existence of these secretive units is only the most dramatic example of how a lack of transparency has contributed to a climate in which citizens fear the police. Too many Kenyans view

When police can disobey the law with relative impunity, they lose legitimacy as law enforcers, and they become a highly visible and therefore highly corrosive example of law's inefficacy.

¹² See, e.g., PEOPLE AGAINST TORTURE, TORTURE IN KENYA: A STATUS REPORT 17, 42-43 (2001); Njuguna Waweru, Flying Squad boss strangled suspect, EAST AFRICAN STANDARD, January 31, 2003.

any interaction with a police officer as an event with unpredictable consequences, and therefore as a thing to be avoided.

Partially overlapping, mutually reinforcing

Popular accountability, legal accountability, and transparency overlap significantly and reinforce one another. Yet they represent distinct values and distinct institutional states of being. All three are necessary for the practice of democratic policing to take root. As the Kenyan situation illustrates, the police cannot be seen as popularly accountable merely because they answer to elected officials. Rather, accountability demands both that the police answer only to the particular elected officials who are identified in law as having a legitimate role in shaping law enforcement policy, and that the police answer to these officials, not through back channels, but through processes that are transparent and set forth in law.

Insulation from illegitimate interference

Police reformers throughout the world have often spoken of the need to insulate the police from “political interference” because adherence to the rule of law is the sine qua non of democratic policing¹³. In fact, the experience of developing democracies bears this out: elected officials and other powerful individuals have often exerted influence over the police that has been extralegal or illegal in nature.

Extralegal political interference here refers to influence exerted by powerful individuals over the police through informal channels. A degree of extralegal influence is probably unavoidable even in the most mature democracies, but too much of it will slowly undermine the rule of law. Illegal political interference refers to influence exerted over the police either through legally proscribed means or for legally proscribed ends. It is acutely corrosive to the rule of law. Notwithstanding the centrality of popular accountability to democratic policing, extralegal interference and illegal interference are not legitimate merely because the person exercising such influence is an elected official. Any accountability regime must take as one of its primary objectives the elimination of illegal interference and the minimization of extralegal interference.

This important objective has sometimes been described as “police independence.” Independence, however, may not be the most accurate description of what is actually sought. “Police independence” may call to mind the American FBI under J. Edgar Hoover, a law enforcement agency that engaged in a campaign of harassment against activists in the civil rights and anti-war movements. Because the FBI under Hoover was able to operate in secrecy and to make itself partially independent of political control – because, in other words, it lacked transparency and popular accountability – the process of fully exposing these patterns of harassment and rooting them out took decades to complete.

Democratic policing does require, however, that the police be insulated from political control in two significant respects. The first respect has already been discussed above. Political control over the police that controverts or undermines the rule of law is, by definition, illegitimate. Protection of human rights sometimes depends crucially on the availability of institutional space for the police to resist political pressure to perpetrate or condone human rights violations.

This important objective has sometimes been described as “police independence.” Independence, however, may not be the most accurate description of what is actually sought.

¹³See, e.g., REPORT OF THE INDEPENDENT COMMISSION ON POLICING IN NORTHERN IRELAND 23 (1999) (hereinafter “Report of the Patten Commission”).

Second, insulation from political control will also be desirable in subject areas where the police as an institution possess operational expertise that civilians lack. Among other things, police know better than civilians how to address issues of tactics and deployment. They generally know better than civilians the relative urgency of various budgetary needs within the police force. Even in the most dysfunctional police forces, police officers themselves often know better than any outsider the causes of institutional dysfunction. Any accountability regime must afford due deference to police operational expertise. This does not mean that the police are allowed total discretion in operational matters. Rather, the police chain of command must have authority to make operational and tactical decisions in the first instance, but must also be required to account for those decisions to the people's elected representatives and to the people themselves.

Insulating the police from interference in regard to operational matters requires that a conceptual distinction be made between operations, on the one hand, and policy, on the other. Elected officials must be responsible for policy. The police leadership must be responsible, in the first instance, for operations. Police and policymakers "should be encouraged to institutionalize the distinction between the making of policy and the conduct of operations, otherwise the rule of law becomes a casualty of politics."¹⁴

B. Processes

I earlier described police accountability as referring both to ends and to means, to a set of values and to a set of processes or mechanisms. Thus far, I have focused mainly on values. The remaining sections of this paper focus on the specifics of processes. In the present conceptual discussion, however, a few preliminary thoughts on accountability processes are warranted.

At the outset, a conceptual distinction must be drawn between external mechanisms and internal mechanisms. Internal accountability mechanisms are the basic building blocks of a disciplined police force – chains of command, standing orders, systems for the enforcement of discipline, procedures for handling internal grievances, procedures for addressing citizen complaints, etc. On their own, of course, these mechanisms can be as supportive of an authoritarian police force as of a democratic police service. Both kinds of police require discipline to function efficiently.

Nonetheless, those who advocate police reform must keep in mind that, in the absence of internal discipline, the basic values of democratic policing – popular accountability, legal accountability, and transparency – cannot take hold. There is little use in creating mechanisms to hold the police leadership accountable to the people's elected representatives when the police leadership, in turn, cannot transmit the policy directions and values of the people's representatives to the lower ranks of the police force. Moreover, where junior police officers do not in practice answer to senior police officers, powerful individuals from outside the police force will tend to fill the power vacuum.

Insulating the police from interference in regard to operational matters requires that a conceptual distinction be made between operations, on the one hand, and policy, on the other.

¹⁴ David H. Bayley, *Who are We Kidding? or Developing Democracy Through Police Reform*, *supra* note 10, at 62.

The trend in the democratic world has been toward establishing accountability through a mix of internal and external mechanisms.

Without understating the importance of internal accountability, it must be recognized that the trend in the democratic world has been toward establishing accountability through a mix of internal and external mechanisms. As Andrew Goldsmith has written,

“the history of policing has shown repeatedly the inadequacies of an exclusive reliance upon police self-regulation. Police internal controls, for very good reason, do not enjoy the confidence or support of many ordinary citizens. The trend to external regulation of police activity has emerged from repeated episodes of police failures to respond adequately, or in some cases, at all, to a variety of forms of police misconduct.”¹⁵

External accountability mechanisms here mean both traditional and non-traditional mechanisms through which the police are held to account by individuals and institutions outside the police force, including formal oversight by the legislative branch, litigation and other judicial processes, human rights commissions, supervisory entities like the Patten Commission’s proposed Policing Board in Northern Ireland, and civilian oversight panels like South Africa’s Independent Complaints Directorate (ICD).

Within this category of external accountability mechanisms, a few additional conceptual distinctions might usefully be drawn. First, one could distinguish between supervisory mechanisms and complaints mechanisms. By external supervisory mechanisms, I mean entities, like the Policing Board in Northern Ireland, that have actual supervisory and disciplinary authority over the police force. Such entities, among other powers, often have significant control over the appointment and dismissal of police officers, and over the terms and conditions of service in the police force.

By external complaints mechanisms, I mean entities, like the ICD in South Africa, that do not have formal authority to command the police force, but that do have the power both to investigate individual instances of police misconduct and to audit police functioning as a whole, particularly with a view to rooting out systemic misconduct and corruption and to rendering police functioning more transparent. These external complaints entities, when properly empowered, adequately funded, and capably led, can often have substantial influence over police functioning despite lacking formal supervisory authority.

The distinction between supervisory and complaints mechanisms is not a neat one. Oversight entities may combine certain supervisory and disciplinary powers with other powers that seek to establish transparency through audit and investigation. Yet, in considering whether certain kinds of accountability mechanisms are appropriate for the Kenya, the conceptual distinction between supervisory and complaints mechanisms will be useful.

¹⁵ Andrew Goldsmith, *Better Policing, More Human Rights: Lessons from Civilian Oversight*, in *DEMOCRATIC POLICING AND ACCOUNTABILITY: GLOBAL PERSPECTIVES*; (Mendes, et al., eds., 1999).

III

ACCOUNTABILITY IN KENYA

No research has been undertaken into the extent of police accountability in Kenya during the past decade. Yet there are certain matters beyond serious dispute. First, the President of Kenya possesses extraordinary power to control police operations. This power is derived in part from key legislative enactments. Second, due to restrictive laws and to a well-entrenched culture of secrecy, it is exceptionally difficult for a citizen of Kenya to obtain almost any information about the most basic aspects of police functioning or the occurrence of crime in Kenya. Third, internal and external mechanisms for holding the police accountable are few in number and weak in functioning. Fourth, powerful outside actors have exerted a substantial illegitimate influence over police operations. Here, I will highlight a handful of legal and institutional arrangements that contribute substantially to this state of affairs. Where possible, I will also document some of the often tragic consequences of these legal and institutional arrangements.

A. Presidential Control

In Kenya, the executive branch of government possesses power disproportionate to that of the legislature and the judiciary.¹⁶ The law regarding supervision and control of the police force both reflects and reinforces this state of affairs. The Kenyan system, which one might call a system of presidential control, effectively vests the President with complete authority over the police force. Presidential control over the police, one of the key coercive arms of the state, in turn strengthens presidential control over all other aspects of government operation.

Under Kenya's Constitution, "[t]he power to appoint a person to hold or act in the office of Commissioner of Police shall vest in the President."¹⁷ The President of Kenya thus possesses unbounded authority both to appoint and to remove the top-ranking officer in the Kenya Police Force.

Three other factors solidify the President's authority over the Commissioner of Police. First, Kenyan law affords Parliament no role whatsoever, even as a consultative body, in appointing or removing the Commissioner of Police. No other body is established for presenting a slate of candidates for the office to the President, for adjudicating the merits of a dismissal, or for consulting with the President regarding appointment or dismissal.

Second, Kenyan law enumerates no criteria that the President must follow in making an appointment to, or ordering a removal from, the office of Commissioner of Police.

Third, The Commissioner serves no fixed term of office and is allowed no security of tenure. Instead, the Commissioner of Police in Kenya serves entirely at

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¹⁶ See S. Kichamu Akivaga, *Towards a National Movement for Democratic Change in Kenya*, in *BUILDING AN OPEN SOCIETY* (Mute, et al., eds., 2002); P.H. OKONDO, *A COMMENTARY ON THE CONSTITUTION OF KENYA* (1995).

¹⁷ CONSTITUTION OF KENYA, § 108(1).

Past Commissioners of Police have found that their job security, and even their personal liberty, depended crucially on the patronage of the President.

the pleasure of the President and can be removed by the President even with an unblemished record of obedience to the law and service to the community.

This constitutional provision seems to ensure that the Kenyan police answer officially only to the single individual who holds the office of President. In a recent interview with the Sunday Nation, Bernard Kiarie Njiinu, a former Commissioner of Police, vividly described the circumstances of his own appointment to the top job in the police force:

The night before his appointment, he [Njiinu] received a call summoning him to State House first thing in the morning. “On arrival, I was abruptly ushered into an empty room and left alone for almost an hour. For once I thought I was under arrest and headed for detention.” Then he was ushered into the President’s office and found the Head of State and Chief Secretary Jeremiah Kierini waiting.

Without any ado, the President handed him a one-paragraph letter that read: “Owing to the confidence I have in you, I have appointed you the Police Commissioner with immediate effect. I hope you won’t betray my trust.”

The air was heavy and the room tense. Mr. Njiinu answered: “Thank you, Sir. I’ll work hard and won’t betray your trust.”

As the new Police Commissioner made to leave, the President beckoned him to sit down. “You are going to wait here until I give you the green light to go to your office,” the President said. Then he turned to Mr. Kiereini and ordered: “From here you go and have Geth (Ben Geth, then the Commissioner of Police) arrested and telephone me to say he is on the way to Kamiti.”

The President and Mr. Njiinu remained silent in their seats. None spoke to the other.

In less than half an hour, Mr. Kiereini telephoned back to say Mr. Gethi had been arrested from his office by Sokhi Singh, head of operations at the CID headquarters, and was on his way to Kamiti Maximum-Security Prison. The President turned to Mr. Njiinu and said: “You will now go straight to the office and start working.”¹⁸

As Mr. Njiinu’s story illustrates, past Commissioners of Police have found that their job security, and even their personal liberty, depended crucially on the patronage of the President.

Another former government minister, speaking anonymously to the press, described the pervasive reach of presidential authority in the Kenyan system as follows:

You are in the office working on something, then you hear on radio that the President, who was out in the field, has announced changes on the thing you were putting together. You had to implement the changes without question. Initially, we had problems telling what was [the President’s] personal opinion from government policy. We learnt late, and at a high cost for some of us.¹⁹

Under the previous government, law enforcement policy appears to have been formulated and transmitted to KPF in the precise manner described above – i.e.,

¹⁸ Kamau Ngotho, Former police chief speaks out on the ‘Mwakenya’ crackdown, SUNDAY NATION, March 2, 2003.

¹⁹ Dennis Onyango, Fear of Moi still grips top officials of the Kanu regime, SUNDAY NATION, June 15, 2003.

through the public pronouncements of the President and his aides. In April 2000, a minister in the Office of the President publicly applauded the killing by police of eight suspected criminals, saying that the suspects had “been sent out of the streets for life,” and that “law enforcement officers should continue doing the same.”²⁰ In August 2001, in the midst of public outcry over an incident in which members of the Kenya Police Reserve shot seven criminal suspects in the backs of their heads, President Daniel arap Moi warned, “All those with hidden agendas who complain when we kill criminals will sooner or later be required to tell Kenyans what they know.”²¹ Kenya Human Rights Commission has found evidence suggesting that there were 143 extrajudicial executions in Kenya in 2000²² and 251 extrajudicial executions in 2001.²³

Kenyan law further ensures presidential control over the police force by empowering the President, solely at his own discretion, effectively to displace the Commissioner of Police and give operational direction to the police force. The vehicles for this further consolidation of presidential control are Section 85 of the current Constitution and the Preservation of Public Security Act. Pursuant to Section 85, “the President may at any time . . . bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act.”²⁴ Part III of the Preservation of Public Security Act, in turn, makes it “lawful for the President . . . to make regulations for the preservation of public security.”²⁵

The range of subject matters upon which the President is explicitly authorized to make regulations is extraordinarily broad and incorporates the entire range of ordinary police functioning. These subject matters include:

- “detention of persons”
- “restriction of movement (into, out of or within Kenya)”
- “compulsory movement of persons”
- “imposition of curfews”
- “censorship, control or prohibition of the communication of any information”
- “prohibition of any . . . meeting”
- “compulsory acquisition . . . of any . . . property”
- “suspending the operation of any law”
- any other “matter . . . expedient for the preservation of public security”²⁶

No standards for presidential invocation of these powers are established other than the President’s own determination that “public security,” as defined by the President himself, necessitates their invocation. When they are invoked, as they have been on numerous occasions since Independence, these powers include the entire range of police functioning – arrest and detention, search and seizure, control of public meetings and assemblies.

Section 85 does provide that a presidential order bringing Part III of the Act into operation shall expire after 28 days without parliamentary approval.²⁷ However, this provision is rendered meaningless in two separate ways. First, the President is empowered to issue a new order bringing Part III of the Act into effect immediately

No standards for presidential invocation of these powers are established other than the President’s own determination that “public security,” as defined by the President himself, necessitates their invocation.

²⁰ KENYA HUMAN RIGHTS COMMISSION, QUARTERLY HUMAN RIGHTS REPORT, Vol. 2 No. 4, I (2000).

²¹ KENYA HUMAN RIGHTS COMMISSION, QUARTERLY HUMAN RIGHTS REPORT, Vol. 3 No. 3, 10 (2001).

²² KENYA HUMAN RIGHTS COMMISSION, QUARTERLY HUMAN RIGHTS REPORT, Vol. 2 No. 4, 2 (2000).

²³ KENYA HUMAN RIGHTS COMMISSION, QUARTERLY HUMAN RIGHTS REPORT, Vol. 3 No. 4, 10 (2000).

²⁴ CONSTITUTION OF KENYA, § 85.

²⁵ Cap. 57, Preservation of Public Security Act, § 4(1).

²⁶ Id., § 4(2).

²⁷ CONSTITUTION OF KENYA, § 85(2).

upon the expiration of any prior order (“The expiry . . . of an order . . . shall be without prejudice . . . to the making of a new order.”).²⁸ Second, the 28-day period does not run during any period in which Parliament has been dissolved,²⁹ and, under the Constitution, the President “may at any time dissolve Parliament.”³⁰ Thus, either by the serial issuance of orders, or by the long-term dissolution of Parliament, the President is empowered to establish himself as the final and essentially permanent authority in the legality of all arrests, all detentions, all searches and seizures, and as the final arbiter of whether any public meeting or assembly can take place. Part III of the Public Security Act was last invoked in 1997, an election year.

Yet, even if these public security provisions were never invoked, their mere existence would be sufficient to ensure presidential control over the police force. In a system where the president has complete authority over the appointment and tenure of the head of the police force, and where the president can, at any time, essentially arrogate command of police operations to himself, presidential control will be, in practice, complete.

B. Official Secrecy

To the extent that institutional accountability flows from KPF to elected officials, it is secret accountability. There is no obligation on the President to consult with other officials in making policy for the police force or to disclose the nature and contents of his instructions to the police. No mechanism exists through which Kenyan citizens can observe the exertion of presidential control.

Moreover, the Official Secrets Act establishes a regime of official secrecy entirely contrary to the practice of transparent government. Under current law, it is a crime, punishable by up to fourteen years imprisonment, to possess a government document, or to transfer a government document to any person, for “any purpose prejudicial to the . . . interests of the Republic,” if that document “might be . . . directly or indirectly useful to a . . . disaffected person.”³¹ In prosecuting an individual under the Official Secrets Act, the government need not show that the defendant obtained or transferred the document for a purpose “prejudicial to the interests of the Republic” if it “appears” that this was the purpose, based on the defendant’s “conduct” or “character.”³² If the government prosecutes one of its officials for making a government document available to another person, the government need not show that the official lacked authority to make that document available. Rather, if the official claims that he had legal authority to make the document available, it is the official’s burden to prove the existence of this authority.³³ Unsurprisingly, under this legal regime, most officials of the Kenyan government, including senior police officers, have been reluctant to reveal even the most basic government documents.

Among other things, the Kenyan government has not made public the annual reports by the police force to the Office of the President, the statistics compiled by the police on the occurrence of crime, and the standing orders under which police operations are conducted. There are, in short, no effective means for an ordinary Kenyan to get official information about the government’s long-term law enforcement policy, about the day-to-day operations of the police, or about the occurrence of crime in Kenya.

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²⁸ Id., § 85(6).

²⁹ Id., § 85(2).

³⁰ Id., § 59(2).

³¹ Cap. 187, Official Secrets Act of 1968, § 3.

³² Id., § 14.

³³ Id., § 16.

The situation is further exacerbated by a proliferation of police agencies both within and without KPF. As discussed above, numerous secretive units apparently exist within the police force who have extensive powers to use force against Kenyan citizens and whose placement within the police hierarchy is deliberately kept secret. Outside KPF, Kenyan law establishes an entirely separate police agency, the Administration Police, who also answer to the President by way of presidentially-appointed District Commissioners, who serve no identifiable purpose other than to bolster the coercive strength of the political executive, and whose functioning is, if anything, even more opaque than that of the Kenya Police Force. Indeed, the various coercive arms of the state are sometimes unable to coordinate among themselves due to internal confusion arising from the lack of institutional transparency. According to press reports, a “bitter row” recently erupted between the Administration Police and KPF’s Criminal Investigations Division when the Administration Police ordered the release of a politically-connected suspect whom the CID had intended to interrogate.³⁴

Mechanisms of internal accountability both prevent the violation of human rights and, enhance the ability of the police to prevent and investigate crime.

C. Internal Accountability Mechanisms

The creation of “effective disciplinary systems within the police should be a first-order priority in democratic reform.”³⁵ When properly functioning, mechanisms of internal accountability both prevent the violation of human rights and, by sustaining productive relations between the police and the public, enhance the ability of the police to prevent and investigate crime. In Kenya, several factors have rendered dysfunctional KPF’s internal accountability mechanisms.

First, the police in practice frequently refuse to give P3 forms, the basic document for filing a complaint of police misconduct, to potential complainants.³⁶ Second, the Force Standing Orders make no provision for the sharing of information with the complainant on the progress of the investigation. The Orders merely require that the complainant be told of the result of the investigation, without “necessarily indicating the disciplinary action that has been taken.” The Orders state that “[w]here a fault or an offence by a police officer has been disclosed, a suitable apology will be made.” In practice, as senior police officers now concede, KPF has not consistently adhered even to this requirement.³⁷ Very few complainants ever learn the outcome of their complaints. Third, the police do not make available to the public even general statistics regarding disciplinary proceedings or the prosecution of police criminality.

In its 2002 Report, the Standing Committee on Human Rights made the following observation concerning KPF’s systems of internal accountability.

Despite public statement from the Commissioner of Police on efforts to reform the Police Department and to deal firmly and effectively with police officers who have committed abuses, the disciplinary sanction imposed on officers found guilty of brutality are frequently inadequate. Officers are rarely prosecuted for using excessive force. Investigations of numerous cases alleging torture . . . revealed that the “Code of Silence,” in which officers fail to report brutality, destroy evidence or threaten witnesses in an effort to cover up abuses, commands widespread loyalty, contributing to a climate of impunity.³⁸

³⁴ Stephen Muiruri, Police row as graft suspect is released from cells, DAILY NATION, February 4, 2003.

³⁵ BAYLEY, DEMOCRATIZING THE POLICE ABROAD, supra note 8, at 40-41.

³⁶ See PEOPLE AGAINST TORTURE, supra note 12, at 38-39.

³⁷ Remarks of Superintendent G.M. Kibunja at “Police as a Service Organisation: An Agenda for Change,” April 24-25, 2003, Nairobi, Kenya.

³⁸ STANDING COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT TO THE APPOINTING AUTHORITY 24 (2002).

D. External Mechanisms of Accountability: The Standing Committee

The Standing Committee on Human Rights was established by presidential order in 1996. The committee reported solely to the president. All of its members were appointed by the President and were removable at his discretion. The Standing Committee's functions and powers were determined solely by the President.

The Standing Committee had the power to investigate complaints of human rights violations, injustices, abuses of power, and unfair treatment by public officers. It could not enforce its own recommendations. For the first five years of its existence, it was prohibited from publishing its findings and reports.

Because the Standing Committee existed only by virtue of a presidential order, it lacked the permanency of a body established by statute or constitutional enactment. Its powers were limited. According to Human Rights Watch, the Standing Committee often seemed to view its role as one of defending the government against allegations of human rights violations, rather than impartially investigating such allegations.³⁹

In March 2003 the Kenya National Commission on Human Rights Act was enacted. The statute establishes the KNCHR as an independent body with the power to investigate instances of human rights abuse and to take action against any person found guilty of human rights violations.

E. Illegitimate Interference with Police Operations

As discussed in Part II above, illegitimate interference with police operations here refers to (1) the exertion of influence over the police, (2) by actors outside the chain of command, (3) (a) through extralegal or illegal means, or (3) (b) for the achievement of extralegal or illegal ends. It is the nature of such illegitimate interference to take place away from public scrutiny, and it is therefore difficult to gauge the precise extent of its exercise. Yet illegitimate interference is believed to be widespread. Minister Chris Murungaru recently acknowledged as much when he formally instructed police commanders to resist pressure from outside the police chain of command. He is reported to have assured the police, "I have word from the President that there shall not be orders from anywhere else except your immediate superiors."⁴⁰

On a regular basis, the Kenyan press has reported irregularities that are likely attributable to illegitimate interference with police operations. Recent examples include: the release of a politically-connected suspect in February by a provincial police chief, who said he ordered the suspect's release on instructions from "above," but who declined to specify from whom these instructions had come;⁴¹ the blocking by the police of opposition political rallies just prior to the elections in December, presumably on orders from the ruling party;⁴² the order given to anti-riot police in October 2002 – again, presumably by the ruling party – to cordon off the venue of the cancelled National Constitutional Conference;⁴³ and the firing of three police officers in October 2002 for stating, while off-duty, that they supported what was then the opposition party.⁴⁴

Illegitimate interference with police operations here refers to (1) the exertion of influence over the police, (2) by actors outside the chain of command, (3) (a) through extralegal or illegal means, or (3) (b) for the achievement of extralegal or illegal ends.

³⁹HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS?: GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA (2001), available at www.hrw.org/reports/2001/africa/kenya/kenya.html.

⁴⁰Mugumo Munene, Better pay and gear for police on the way, DAILY NATION, February 21, 2003.

⁴¹Stephen Muiruri, Police row as graft suspect is released from cells, DAILY NATION, February 4, 2003.

⁴²Police block Narc rally at Uhuru Park, DAILY NATION, December 19, 2002.

⁴³Francis Openda, Police block CKRC delegates meeting, EAST AFRICAN STANDARD, October 29, 2002.

⁴⁴John Kamau, Dismissals a violation of human rights, DAILY NATION, November 1, 2002.

Nowhere have the consequences of illegitimate interference with police operations been more stark than in the ethnic clashes that took place in connection with the 1992 and 1997 elections. According to the Report of the Judicial Commission chaired by Justice A.M. Akiwumi, the Kenyan police repeatedly, consistently, and deliberately failed to take action prior to, during, and in the aftermath of politically-motivated violence throughout the 1990's. The Akiwumi Commission found that the Kenyan police had been ordered by powerful individuals in the ruling party to condone, and perhaps even to help foment the violence.⁴⁵ According to the Kenya Human Rights Commission, 1,500 people were killed and 300,000 were left homeless in politically-motivated violence between 1991 and 1996.⁴⁶ In incidents connected with the 1997 elections, 2,000 people were killed and 400,000 displaced.⁴⁷

These, of course, are only some of the more dramatic and visible examples of the exertion of illegitimate influence over the police. More typically, illegitimate influence manifests itself away from the public eye, on matters that, in isolation, may not be of acute public concern – the solicitation of a small bribe, the arrest and detention of an individual citizen, a decision not to investigate a particular crime. The constant repetition of these small acts of corruption has contributed substantially to the economic stagnation of the country and to the undermining of the public's confidence in the police force.

IV

Accountability Abroad

Making international comparisons between police institutional reforms is a complicated business. Nearly every writer on the subject has cautioned that the effectiveness of a particular law, system, or practice in enhancing police accountability in one country does not guarantee its effectiveness in another country. The success of any particular reform will obviously be dependent on its cohesion with the geography, culture, and institutional context within which it is implemented.

Yet the opposite position has also been rejected. A substantial body of literature supports the notion that the experience of police reform in one society does have relevance to the process of police reform in other societies — even, as Goldsmith has argued, “in societies with very different cultural, political, social, and economic traditions and realities.”⁴⁸

This paper briefly describes the laws of five other jurisdictions as they pertain to the appointment, removal, and tenure of the head of the jurisdiction's police force, and to the establishment and functioning of civilian oversight mechanisms, both external supervisory mechanisms, which have powers of supervision and control over the police force, and external complaints mechanisms, which have the power to audit and investigate allegations of police misconduct.

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⁴⁵REPORT OF THE JUDICIAL COMMISSION TO INQUIRE INTO TRIBAL CLASHES IN KENYA (2002).

⁴⁶KENYA HUMAN RIGHTS COMMISSION, KILLING THE VOTE: STATE SPONSORED VIOLENCE AND FLAWED ELECTIONS IN KENYA (1998).

⁴⁷KENYA HUMAN RIGHTS COMMISSION, INTERNALLY DISPLACED PERSONS AND THE RIGHT TO RETURN IN KENYA (2001).

⁴⁸Goldsmith, *supra* note 15, at 47.

The laws of five jurisdictions are described here: Tanzania, Uganda, Nigeria, South Africa, and Northern Ireland. All are Commonwealth jurisdictions and therefore share a certain similarity in legal architecture.

Though far from a complete prescription for police reform, the focus here on the head of the police force, on external supervisory mechanisms, and on external complaints mechanisms, is not arbitrary. These institutional arrangements bear directly and heavily on accountability. In Kenya, the Nairobi Central Business District Association (NCBDA), among others, has recognized the importance of institutional arrangements in these three areas in establishing the practice and culture of police accountability. It has recommended the creation of an external supervisory mechanism, a Police Service Commission, which would be “independent,” and which would have responsibility for appointments, promotions, and discipline. It has also recommended the creation of an external complaints mechanism, an Ombudsman, who would investigate complaints arising in the course of police work from both police officers and members of the public.⁴⁹

The laws of five jurisdictions are described here: Tanzania, Uganda, Nigeria, South Africa, and Northern Ireland. All are Commonwealth jurisdictions and therefore share a certain similarity in legal architecture. All have experienced significant civil strife in recent decades. In all of these jurisdictions, deep patterns of mistrust exist between the police and some segments of the community.

A. Tanzania

The operations of the Tanzania Police Force continue to be governed by the Police Force Ordinance of 1953, enacted by colonial authorities in the decade before Tanzania secured its independence from Britain, and the Police Force Service Regulations, promulgated by the Police Force and Prisons Service Commission.

In Tanzania, under the Police Force Service Regulations, “[t]he powers of constituting and abolishing offices in the Police Force are vested in the President.”⁵⁰ The President has powers of “appointment, promotion, confirmation and termination of appointment of Police officers of and above the rank of Senior Assistant Commissioner.”⁵¹ No criteria are established according to which the President must exercise these powers. No fixed term of office is established for the Inspector General of Police or for his immediate subordinates.

Throughout Tanzania, but particularly in rural areas, there has been a proliferation of law enforcement groups, distinct from the Tanzania Police Force, existing and operating at the margins of legality. These groups, known generically as *sungusungu*, have generally evolved either from units of the People’s Militia, an organization founded by the ruling party in 1971, a time of heightened political instability, or from traditional rural self-defense groups. According to Issa Shivji of the University of Dar es Salaam, these groups appear to take direction from Chama cha Mapinduzi (CCM), the party that has ruled Tanzania since independence, rather than from the government, despite the fact that Article 147 of the Constitution prohibits anyone other than the government from establishing an armed force of any kind in Tanzania.⁵²

In other respects, Tanzanian law facilitates interference by the political executive and the ruling party in police operational decisions. The Police Force

⁴⁹See Submission of Nairobi Central Business District Association to the Constitution of Kenya Review Commission (2001), available at www.kenyaconstitution.org/docs/11d123.htm.

⁵⁰Police Force Service Regulations, 1995, § A.3.

⁵¹*Id.*, § B.2.

⁵²ISSA SHIVJI, STATE COERCION AND FREEDOM IN TANZANIA 14-16 (1990).

Ordinance requires anyone wishing to hold a meeting in a public place to obtain a permit from the local District Commissioner, an agent of the political executive and the ruling party.⁵³ Thus, it is the District Commissioner, not a police officer, who is charged with determining whether a meeting can be preempted on grounds of “public order.”⁵⁴ These rules have contributed to tense relations between the ruling party and the opposition, whose meetings and rallies are frequently blocked in the permitting process. There have been occasional flare-ups of violence, most tragically in Zanzibar in January 2001, when at least thirty-two people were killed in clashes between the police and protesters supporting the opposition.

In 2001, Parliament created the Tanzania Commission for Human Rights and Good Governance. By statutory mandate, the Commission consists of a member of the judiciary and other individuals “who have knowledge, experience and a considerable degree of involvement in matters relating to human rights, law, government, politics or social affairs.”⁵⁵ A person who accepts appointment to the Commission must vacate any other public office that he or she may hold.⁵⁶ All Commissioners are appointed for three-year terms by the President, upon recommendation of a committee.⁵⁷ The Commission is charged with “investigat[ing] any human rights abuses or mal-administration,”⁵⁸ and it is empowered to issue summons, to examine witnesses under oath, to require persons to provide information, and to inspect premises.⁵⁹ It does not have the authority to order remedies. Instead, it may recommend “to the relevant person or authority such measures . . . as will provide an effective settlement, remedy or redress,” and it may “bring an action before any court and may seek any remedy which may be available from that court.”⁶⁰ The President may prohibit the Commission from investigating any matter but must furnish reasons for doing so.⁶¹

B. Uganda

Under Uganda’s Constitution, both the Inspector General of Police and the Deputy Inspector General are appointed by the President, “with the approval of Parliament.”⁶² Both “may be removed from office by the President.”⁶³ Ugandan law enumerates no criteria for appointment or removal to these positions and establishes no fixed term of office.

The Police Statute of 1994 establishes a Police Authority, the chief functions of which are “to advise the Government on policy matters relating to the management, development and administration of the Force,” “to advise the President on the appointment of the Inspector-General of Police and the Deputy Inspector General,” “to recommend to the President appointments and promotions of police officers above the rank of Assistant Superintendent of Police,” and “to determine the terms and conditions of service in the Force.”⁶⁴ By direction of the Act, the members of the Police Authority are the Attorney-General, the IGP, the Deputy IGP, the police officer in charge of administration at police headquarters, and three other persons appointed by the President.⁶⁵

In 1999, in response to several allegations of high-level police corruption and misconduct, Parliament established the Judicial Commission of Inquiry into Corruption in the Uganda Police Force and named High Court Justice Julie Sebutinde

Tanzanian law facilitates interference by the political executive and the ruling party in police operational decisions. These rules have contributed to tense relations between the ruling party and the opposition, whose meetings and rallies are frequently blocked in the permitting process.

⁵³Cap. 322, Police Force (Principal Legislation), § 40.

⁵⁴See Z.S. Gondwe, Policing Political Campaigns in Tanzania, 20-27 *EASTERN AFRICA L. REV.* 1, 3-4 (2000).

⁵⁵The Commission for Human Rights and Good Governance Act, 2001, § 7(1).

⁵⁶*Id.*, § 9(1).

⁵⁷*Id.*, §§ 7-8.

⁵⁸*Id.*, § 15.

⁵⁹*Id.*, § 25.

⁶⁰*Id.*, § 15.

⁶¹*Id.*, § 16.

⁶²CONSTITUTION OF THE REPUBLIC OF UGANDA (1995), Art. 213(2).

⁶³*Id.*, Art. 213(5).

⁶⁴The Police Statute, 1994, § 10.

⁶⁵*Id.*, § 9.

The Sebutinde Commission recommended the creation by Parliament of a Police Service Commission, which would be composed predominantly of prominent citizens outside of the government, and which would assume many of the present functions of the Police Authority.

as its chair. The Sebutinde Commission, in its May 2000 report, exposed what it described as “institutionalised” corruption in the police force. It found “widespread and flagrant indiscipline” among police officers of all ranks and spoke gravely of “a culture of impunity whereby officers get away with flagrant violations of human rights under their superiors’ noses.”⁶⁶ In the wake of the report, the President replaced most of the top officers of the UPF.

The Sebutinde Commission recommended that the government develop guidelines for the appointment of the IGP and D/IGP, that these guidelines be incorporated into the Police Statute, and that the IGP be appointed on a performance contract of three years, renewable on merit.⁶⁷

The Sebutinde Commission found that the composition of the Police Authority (described above) ensures that it lacks sufficient distance from senior police leadership, on the one hand, and from the political executive, on the other. According to the Commission, this lack of distance results in the Police Authority frequently functioning as a rubber stamp for decisions of the senior police leadership and renders the appointment process within the force vulnerable to tribalism, nepotism, “empire building,” and discrimination.⁶⁸ The Sebutinde Commission recommended the creation by Parliament of a Police Service Commission, which would be composed predominantly of prominent citizens outside of the government, and which would assume many of the present functions of the Police Authority.⁶⁹

The Constitution establishes the Uganda Human Rights Commission, which is empowered to investigate and redress violations of human rights, to inspect detention facilities and make recommendations to the government regarding their functioning, to make recommendations to Parliament regarding promotion of human rights and compensation to victims of human rights violations, and to promote research, education, and civil awareness in the field of human rights.⁷⁰ Like many national human rights commissions, UHRC has extensive powers of investigation.⁷¹ In addition, unlike most of its counterpart institutions, UHRC, upon a finding of “an infringement of a human right or freedom,” may “order the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress.”⁷² The UHRC consists of a judge of the Uganda High Court or a person of equivalent qualification and at least three other persons “of high moral character and proven integrity.”⁷³ They are appointed by the President with the approval of Parliament and serve terms of six years.⁷⁴ The Constitution mandates that “the Commission shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority.”⁷⁵

C. Nigeria

The police in Nigeria continue to be governed by pre-independence legislation, the Nigeria Police Act of 1943.

Pursuant to the Nigerian Constitution, the Inspector-General of Police is appointed by the President “on the advice” of the Nigeria Police Council. Only

⁶⁶ REPORT OF THE JUDICIAL COMMISSION OF INQUIRY INTO CORRUPTION IN THE UGANDA POLICE FORCE 255-56 (2000).

⁶⁷ Id. at 239.

⁶⁸ Id. at 240-41.

⁶⁹ Id. at 241-42.

⁷⁰ CONSTITUTION OF THE REPUBLIC OF UGANDA

(1995), Art. 52.

⁷¹ Id., Art. 53(1).

⁷² Id., Art. 53(2).

⁷³ Id., Art. 51.

⁷⁴ Id.

⁷⁵ Id., Art. 54.

“serving members of the Nigeria Police Force” are eligible for appointment.⁷⁶ Before removing an individual from the position of IGP, the President must also “consult” the Police Council.⁷⁷

In 2001, the Nigerian parliament established the Police Service Commission (PSC), a body composed of civilians, most of whom are not public officeholders. The PSC is, in the terminology of Part II, *supra*, an external supervisory mechanism. The PSC’s functions include (1) making appointments or awarding promotions to all vacant offices in the Nigeria Police Force other than Inspector General of Police, (2) ordering dismissals from any office in the NPF other than IGP, and (3) exercising disciplinary control over all officers other than the IGP.⁷⁸ The PSC is mandated to “formulate policies and guidelines” on personnel matters and on matters of “efficiency and discipline.”⁷⁹ The PSC may also “perform such other functions, which in the opinion of the Commission are required to ensure the optimal efficiency of the Nigeria Police Force.”⁸⁰ In performing these functions, “[t]he Commission may, with the approval of the President make regulations, generally for the purposes of giving full effect to this Act.”⁸¹ The PSC is one of the few civilian oversight mechanisms worldwide with power actually to impose discipline on police officers, rather than merely recommend discipline.

The Act apparently seeks to ensure that the PSC’s membership is broadly representative of Nigerian society and is not dominated by persons closely associated with the ruling party. The membership consists of “a Chairman,” “a retired Justice of the Supreme Court or Court of Appeal,” “a retired Police Officer not below the rank of Commissioner of Police, a representative of “women interest,” a representative of “the Nigerian Press,” a representative of “Non-Governmental human rights organisations in Nigeria,” a representative of the “organized Private Sector,” and a “Secretary.”⁸² All members are “appointed by the President subject to the confirmation by the Senate,” serve four-year terms, and must be “persons of proven integrity and ability.”⁸³ The members of the PSC are subject to removal “by the President if he is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.”⁸⁴

In each Nigerian state, the police are under the direction of a Commissioner of Police, subject to the overall direction of the IGP. Pursuant to the Constitution, the Commissioner in each state is now appointed, not by the President or the IGP, but by the Police Service Commission.⁸⁵

D. South Africa

The South African police are governed by laws enacted in the wake of that country’s transition to democracy. The two principal enactments are the Constitution, adopted in 1996, and the South African Police Service Act of 1995.

Pursuant to the Constitution, a member of the national cabinet must be assigned overall responsibility for policing. This cabinet member “must determine national policing policy after consulting the provincial governments and taking into accounts the policing needs and priorities of the provinces as determined by the

In 2001, the Nigerian parliament established the Police Service Commission (PSC), a body composed of civilians, most of whom are not public officeholders.

⁷⁶ CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), Art. 215.

⁷⁷ *Id.*, Art 216.

⁷⁸ Police Service Commission (Establishment) Act, 2001, § 6(1).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, § 25.

⁸² *Id.*, § 2(1).

⁸³ *Id.*, §§ 2-3.

⁸⁴ *Id.*, § 4(2).

⁸⁵ CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), Art. 215(1)(b).

provincial executives.”⁸⁶ The Police Service Act assigns these responsibilities to the Minister of Safety and Security.⁸⁷

The ranking officer in the Police Service, the National Commissioner, “must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.”⁸⁸ The President holds power of appointment to the office of National Commissioner.⁸⁹

Under the Police Service Act, the President must, at the time of appointment of the National Commissioner, specify a term of office of up to five years for the Commissioner.⁹⁰ The President also has the power to remove the National Commissioner prior to the expiration of the Commissioner’s term, but the President must first establish a “board of inquiry consisting of judge of the Supreme Court as chairperson, and two other suitable persons.”⁹¹ This board must “inquire into the circumstances that led to the loss of confidence” in the National Commissioner, “compile a report,” and “make a recommendation.”⁹² The President may remove the National Commissioner from office only upon receipt of this board’s recommendation.⁹³

As in Nigeria, policing power in South Africa is partially devolved to provincial actors. The National Commissioner, “with the concurrence of the provincial executive,” appoints a Provincial Commissioner for each province.⁹⁴

The Police Service Act creates an external complaints mechanism, the Independent Complaints Directorate (ICD),⁹⁵ which is specifically charged with ensuring that citizen complaints of police misconduct are investigated in an effective and efficient manner.⁹⁶ The Act mandates that the ICD “shall function independently from the [Police] Service.”⁹⁷

The ICD may, upon its own initiative or upon receipt of a complaint, “investigate any misconduct or offence allegedly committed by any member” of the Police Service or “any death in police custody or as a result of police action.”⁹⁸ The ICD may conduct these investigations itself or may, at its own discretion, refer any matter to the police for internal investigation.⁹⁹

Some commentators have argued that the use of the word “complaint” in this context may lead to some confusion about the scope of the ICD’s mandate.¹⁰⁰ In fact, the ICD will not consider any “complaint” against the police, but rather limits its reach to “complaints or allegations relating to: 1. Deaths of persons in custody or deaths which are a result of police action. 2. The involvement of police members in criminal activities such as robbery, theft of motor vehicles and assault. 3. Police misconduct or behaviour which is prohibited by the Police Regulations, such as neglect of duties or failure to comply with the Code of Conduct.”¹⁰¹ Other complaints are generally handled by police internal mechanisms.

Under the Police Service Act, ICD investigators are given the same powers as police officers to investigate allegations of misconduct.¹⁰² The Executive Director of the ICD may “request and obtain information from any police officer as may be necessary for conducting an investigation” and “request and obtain the co-operation of any member [of the police service] as may be necessary to achieve the object of the directorate.”¹⁰³ The Executive Director may also “monitor the progress of,” “set

⁸⁶ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (Act 108 of 1996), § 206(1).

⁸⁷ South Africa Police Service Act, 1995 (Act 68 of 1995), § 1.

⁸⁸ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (Act 108 of 1996), § 207(2).

⁸⁹ *Id.*, § 207(1).

⁹⁰ South Africa Police Service Act, 1995 (Act 68 of 1995), § 7.

⁹¹ *Id.*, § 8(1).

⁹² *Id.*

⁹³ *Id.*, § 8(7).

⁹⁴ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (Act 108 of 1996), § 207(3).

⁹⁵ South Africa Police Service Act, 1995 (Act 68 of 1995), § 50.

⁹⁶ *Id.*, § 53(1)(a); Interim Constitution (Act 200 of 1993), § 222.

⁹⁷ *Id.*, § 50(2).

⁹⁸ *Id.*, § 53(2).

⁹⁹ *Id.*, § 53.

¹⁰⁰ Centre for the Study of Violence and Reconciliation, Submission Regarding the Proposed Independent Complaints Directorate White Paper (1999), available at www.csvr.org.za/papers/papicdsb.htm.

¹⁰¹ About the ICD, available at www.icd.gov.za/about/brochure.htm.

¹⁰² South Africa Police Service Act, 1995 (Act 68 of 1995), § 53(3)(b).

¹⁰³ *Id.*, § 53(6).

guidelines regarding,” and “request and obtain information regarding” any matter referred by the ICD to the police for internal investigation.¹⁰⁴ The Executive Director of the ICD lacks power to compel final police action with regard to any matter the ICD has investigated but may “submit the results of an investigation to the attorney-general for his or her decision” and may “make recommendations” to the appropriate National or Provincial Commissioner, to the Minister for Safety and Security, or to other executive branch officials, regarding any matter investigated by the ICD.¹⁰⁵

The Police Service Act provides that the Executive Director shall submit a report on the activities of the ICD to the Minister on an annual basis. The Minister, in turn, must table the report in Parliament either within 14 days of receiving it or, if Parliament is not in session, within 14 days of the commencement of the next session.¹⁰⁶

The Minister for Safety and Security nominates the Executive Director. If confirmed by the parliamentary committees responsible for safety and security, the Executive Director serves for a renewable term of five years.¹⁰⁷

E. Northern Ireland

In the Police (Northern Ireland) Act of 2000, the UK Parliament re-constituted the Northern Ireland police, which had been known as the Royal Ulster Constabulary, as the Police Service of Northern Ireland.¹⁰⁸ The Act substantially adopts the recommendations of the Independent Commission on Policing in Northern Ireland, also known as the Patten Commission, which had been set up as part of the Good Friday peace agreement of April 1998. In keeping with the Patten Commission’s emphasis on accountability as the cornerstone of police reform, the Police Act of 2000 represents one of the most detailed plans for establishing police accountability enacted into law in any jurisdiction. The following discussion describes many, but not all, of the accountability processes and mechanisms for which the Act provides.

The Act establishes an external supervisory mechanism, the Northern Ireland Policing Board.¹⁰⁹ The Policing Board is empowered to appoint the head of the police force (the “Chief Constable”), “subject to the approval of the Secretary of State.”¹¹⁰ The Board also appoints all other senior officers, “subject to the approval of the Secretary of State and after consultation with the Chief Constable.”¹¹¹ The Secretary of State has power to force the retirement of the Chief Constable. An officer whose retirement is sought has the right under the Act to seek a formal inquiry and have the report of the inquiry considered by the Secretary of State prior to being retired.¹¹²

The Policing Board’s functions are to “secure the maintenance of the police in Northern Ireland” and to “secure that the police . . . are efficient and effective.”¹¹³ In carrying out these functions, the Board is mandated to:

- “hold the Chief Constable to account for the exercise of his functions and those of the police,”
- “monitor” the performance of the police in carrying out their general duties under the Act, complying with the Human Rights Act of 1998, and carrying out the policing plan developed by the Board,

The Northern Ireland Police Board serves as an external supervisory mechanism. Its functions are to “secure the maintenance of the police in Northern Ireland” and to “secure that the police . . . are efficient and effective.”

¹⁰⁴Id., § 53(6)(c).

¹⁰⁵Id., § 53(6).

¹⁰⁶Id., § 54.

¹⁰⁷Id.

¹⁰⁸Cap. 32, Police (Northern Ireland) Act 2000, § 1

¹⁰⁹Id., § 2.

¹¹⁰Id., § 35(1).

¹¹¹Id., § 35(2).

¹¹²Id., § 35.

¹¹³Id., § 3.

The new Act reflects careful attention to the apportionment of responsibility among the political executive, police leadership and the new Policing Board.

- “keep itself informed as to” all aspects of the operations of the police, including the handling of citizen complaints, recruitment of police officers, and the trends and patterns in crimes committed in Northern Ireland,
- “assess” the effectiveness of measures taken to ensure that the membership of the police is representative of the community, the level of public satisfaction with the performance of the police, the effectiveness of community policing programs, and the effectiveness of the code of ethics issued under the Act, and
- “make arrangements for obtaining the co-operation of the public with the police force in the prevention of crime.”¹¹⁴

Upon the devolution of powers to the Northern Ireland Assembly, the Policing Board will consist of 19 members, ten “political members” and nine “independent members.” The “political members” will be members of the Assembly, nominated by their respective political parties, and will serve during their terms of office in the Assembly. Parties will be empowered to nominate “political members” of the Board in rough proportion to the number of seats held by the party in the Assembly.¹¹⁵ The nine “independent members” of the Board will be appointed by the Secretary of State for the Union in consultation with other ministers, local district councils, and other bodies deemed appropriate.¹¹⁶ The Secretary “shall exercise his powers of appointment . . . to secure that as far as is practicable the membership of the Board is representative of the community in Northern Ireland.”¹¹⁷ The appointed members serve terms of not more than four years.¹¹⁸ Police officers are ineligible for appointment.¹¹⁹ The Secretary of State may remove any person from membership on the Board, but only on grounds carefully defined in the Act, for example, if the member “has been convicted of a criminal offence . . . after the date of his appointment” or if the member “is not committed to non-violence and exclusively peaceful and democratic means.”¹²⁰

Prior to devolution, the Secretary of State has authority to appoint the entire membership of the Policing Board.¹²¹

In setting forth the institutional architecture for supervision and control of the Northern Ireland Police Service, the new Act reflects careful attention to the apportionment of responsibility among the political executive (as represented by the Secretary of State), police leadership (as represented by the Chief Constable), and the new Policing Board. As recommended by the Patten Commission, the Act explicitly assigns responsibility for developing long-term objectives and principles to the Secretary of State, for setting medium-term objectives and priorities to the Policing Board, and for making shorter-term tactical and operational plans to the Chief Constable.¹²² The Act requires the Chief Constable, in fulfilling this latter role, to submit on an annual basis a draft “policing plan” setting forth “proposed arrangements for the policing of Northern Ireland.”¹²³ The Policing Board, in consultation with both the Secretary of State and the Chief Constable, may either adopt the Chief Constable’s draft of the policing plan or adopt an amended plan.¹²⁴

¹¹⁴Id., § 3(3).

¹¹⁵Id., Schedule 1, § 7.

¹¹⁶Id., Schedule 1, § 8.

¹¹⁷Id., Schedule 1, § 8(1).

¹¹⁸Id., Schedule 1, § 8(6).

¹¹⁹Id., Schedule 1, § 10(1)(b).

¹²⁰Id., Schedule 1, § 9.

¹²¹Id., Schedule 1, § 3.

¹²²Id., §§ 25-26.

¹²³Id., § 26(4).

¹²⁴Id., § 26.

The Act further provides that the Policing Board shall, on an annual basis, develop a “performance plan” that assesses its own performance and that of the Chief Constable during the previous year according to identified “performance indicators” and that sets performance standards for the coming year.¹²⁵ This “performance plan” shall then be subject to an audit by the Comptroller and the Auditor General, at the conclusion of which the Secretary of State may direct the Board to revise the “performance plan” or take any other action that the Secretary of State considers necessary to ensure improvement in the functioning of the Board or the Chief Constable.¹²⁶

Not later than three months after the end of each financial year, the Chief Constable shall “submit to the Board a general report on the policing of Northern Ireland during that year.”¹²⁷ Not later than six months after the end of each financial year, the Board shall issue and publish a report assessing “the performance of the police” in all of the areas, listed above, for which the Board is mandated to hold the Chief Constable accountable.¹²⁸

The Act directs the Chief Constable to submit to the Policing Board a code of ethics, which shall “lay[] down standards of conduct and practice for police officers” and “mak[e] police officers aware of” human rights and obligations arising in law.¹²⁹ The Board, working in consultation with government and civil society actors, and others, may then adopt the draft code of ethics submitted by the Chief Constable or an amended code.¹³⁰ The Secretary of State shall then “ensure that the provisions of the code . . . are reflected in” police conduct and disciplinary regulations.¹³¹

The new Act strengthens the Office of the Ombudsman, an entity set up by its predecessor statute, the Police (Northern Ireland) Act of 1998. The function of the Ombudsman is to “secure the efficiency, effectiveness and independence of the police complaints system . . . and the confidence of the public and of members of the police force in that system.”¹³² In the terminology of Part II, *supra*, the Ombudsman, like South Africa’s ICD, is an external complaints mechanism.

The Ombudsman has responsibility for overseeing complaints made by or on behalf of members of the public about the conduct of any member of the police force, except for complaints relating to the “direction and control of the police force by the Chief Constable.”¹³³ The Chief Constable must also refer to the Ombudsman “any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person.”¹³⁴ In addition, the Secretary of State may refer to the Ombudsman any other matter in which it appears that a police officer may have committed a criminal offence or “behaved in a manner which would justify criminal proceedings.”¹³⁵

Having received an appropriate complaint, the Ombudsman may, among other things, refer the matter for informal resolution or mediation, refer the matter for initial investigation by the police, or institute a formal investigation by the Office of the Ombudsman.¹³⁶ To conduct a formal investigation, the Ombudsman appoints an “officer of the Ombudsman.”¹³⁷ Such an officer shall have “all the powers and privileges of a constable” in conducting the investigation.¹³⁸ The 2000 Act provides that, in addition, “[t]he Chief Constable and the Board shall supply the Ombudsman

The function of the Ombudsman is to “secure the efficiency, effectiveness and independence of the police complaints system . . . and the confidence of the public and of members of the police force in that system.”

¹²⁵ *Id.*, § 28.

¹²⁶ *Id.*, §§ 29-31.

¹²⁷ *Id.*, § 58(1).

¹²⁸ *Id.*, § 57.

¹²⁹ *Id.*, § 52(1).

¹³⁰ *Id.*, § 52.

¹³¹ *Id.*, § 52(10).

¹³² Cap. 32, Police (Northern Ireland) Act

1998, § 51(4).

¹³³ *Id.*, § 52.

¹³⁴ *Id.*, § 55(2).

¹³⁵ *Id.*, § 55(1).

¹³⁶ *Id.*, § 53-54.

¹³⁷ *Id.*, § 56(1).

¹³⁸ *Id.*, § 56(3).

with such information as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of his functions.”¹³⁹

At the conclusion of an investigation, the officer appointed to investigate the matter, whether a police officer or an officer of the Ombudsman, “shall submit a report on the investigation to the Ombudsman.”¹⁴⁰ The Ombudsman shall then, if appropriate, refer the matter for criminal proceedings and/or disciplinary proceedings. The Ombudsman must refer the matter for criminal proceedings if the report of investigation indicates “that a criminal offence may have been committed by a member of the police force.”¹⁴¹ In all cases, the Ombudsman must make a recommendation to the appropriate disciplinary authority as to whether disciplinary proceedings should be brought and as to any matter relating to the disciplinary proceedings.¹⁴² If, after the Ombudsman has recommended that disciplinary proceedings be brought, the Chief Constable declines to do so, the Ombudsman may direct the Chief Constable to bring disciplinary proceedings.¹⁴³

The Ombudsman also has an obligation under the statutes to provide statistics and other information to the Secretary of State and to the Policing Board to assist them in carrying out their supervisory functions.¹⁴⁴

V

The Accountability Trend

The fact that lawmakers in Kenya and the other Commonwealth jurisdictions described above have devised substantially different institutional arrangements reflects, in part, general differences in the culture, history, and politics of the six countries. Yet the variety of arrangements also reflects the fact that lawmakers in these countries have arrived at substantially different answers to a very particular set of questions: To whom should the police be held accountable? Through what mechanisms?

On what subjects?

Among the six countries discussed, South Africa and Northern Ireland have undertaken the most thorough reforms of their law enforcement sectors. The new institutional arrangements in these jurisdictions for the appointment and removal of top police officers, for the supervision and control of the police force, and for the handling of allegations of police misconduct, reflect the emphasis that lawmakers placed on achieving greater popular accountability, legal accountability, and transparency. I will here highlight four common aspects of institutional change initiated by the police reform legislation in South Africa and Northern Ireland, shared to a lesser extent by legislation in Nigeria and Uganda.

To whom should the police be held accountable? Through what mechanisms? On what subjects?

¹³⁹Cap. 32, Police (Northern Ireland) Act 2000, § 66.

¹⁴⁰Cap. 32, Police (Northern Ireland) Act 1998, § 56(6).

¹⁴¹Id., § 58.

¹⁴²Id., § 59.

¹⁴³Id., § 59(5).

¹⁴⁴See id., § 61A.

First, lawmakers have sought to broaden responsibility for controlling the police force beyond the executive branch of government by carving out significant supervisory and oversight roles for legislators and for other civilians from outside government.

Second, lawmakers have attempted to protect the operational autonomy of the police force and at the same time strengthen and regularize the accountability of the force to civilian leadership on matters of policy and in the handling of police misconduct.

Third, lawmakers have designed external accountability mechanisms that are mandated to work in cooperation with the internal accountability mechanisms in the police force rather than to displace those internal accountability mechanisms.

Fourth, lawmakers have opted to establish police-specific accountability mechanisms rather than to rely on accountability mechanisms with responsibility for general oversight of the entire government.

A. Broadening the Scope of Accountability

The most important common theme that has emerged from police reform legislation in Northern Ireland and South Africa, and to a lesser extent in Nigeria and Uganda, has been the attempt by lawmakers to broaden the range of actors and institutions to whom the police are accountable. In Kenya, the narrow scope of accountability — a single, subterranean flow between the police force and the Office of the President — has facilitated illegitimate interference with police operations and has given rise to a state of affairs in which law enforcement imperatives have been subordinated to the objectives and priorities of the ruling political party.

In all of the jurisdictions whose laws are described above, the political executive has at least partial control over the appointment and removal of the head of the police force and other senior officers. In Kenya, the executive monopolizes this power. Each of the other jurisdictions has moved in the past decade to a system in which the political executive shares powers of appointment and/or removal with other actors or institutions.

With regard to supervision of the police force, civilian entities with supervisory powers over the police and with some measure of independence from the political executive — external supervisory mechanisms — have been established in Northern Ireland and Nigeria. These entities have been established with the intention of broadening the range of actors to whom the police are accountable, insulating the police from illegitimate political interference, supporting police obedience to the rule of law, and increasing transparency. The 2000 Northern Ireland Police Act, for example, empowers the civilian Policing Board, through various mechanisms and processes, to set objectives and make plans for the Police Service, and to hold the police leadership accountable for the overall performance of the Service. In Nigeria, the Police Service Commission has ultimate responsibility for exercising disciplinary control over all officers except the Inspector General of Police.

An external supervisory body that lacks sufficient distance from the executive branch, on the one hand, or from senior police leadership, on the other, cannot

In Kenya, the narrow scope of accountability Office of the President — has facilitated illegitimate interference with police operations.

Any entity tasked with overseeing the investigation of police misconduct depends for its credibility and legitimacy in part on its independence from the political executive, from the police force, and from popular pressure.

substantially enhance police accountability. Such a supervisory body simply functions to reinforce control by the executive. At worst, such a body could function as a mechanism for conferring false legitimacy on the subordination of the police force to the ruling political party. In Northern Ireland and Nigeria, executive branch officials and active duty police officers are ineligible for service on the civilian supervisory bodies.

The trend toward broadening the scope of accountability is most visible in the area of handling allegations of police misconduct. All six countries discussed here have, in the last decade, established external complaints mechanisms – independent institutions that allow civilians to play some role in investigating allegations of police misconduct. In South Africa and Northern Ireland, these new institutions, the ICD and the Police Ombudsman, have mandates that are specific to the police. In Kenya, Tanzania, Uganda, and Nigeria, human rights commissions have been established whose jurisdictions include the investigation of complaints against the police. The establishment of these entities reflects the recognition by lawmakers of at least two separate points: first, that a system in which the police themselves are solely responsible for investigating allegations of police misconduct may not be sufficiently impartial or effective; second, that regardless of its actual impartiality and effectiveness, a system under which only the police are permitted to investigate the police may be perceived by the public as self-interested and as a result may lack legitimacy.

Incidents involving alleged police misconduct are often highly visible and politically sensitive. Any entity tasked with overseeing the investigation of police misconduct depends for its credibility and legitimacy in part on its independence from the political executive, from the police force, and from popular pressure. In all of the jurisdictions described above, the political executive takes a primary role in appointing the membership of the investigative entity, but all jurisdictions at least purport to provide some security of tenure for those who have been appointed. In many jurisdictions, such as Uganda and South Africa, the legislation explicitly stipulates that the investigative entity shall be “independent.”

The importance of institutional independence, even in the context of external mechanisms of accountability, can perhaps be overemphasized, however. According to South African reform advocates, “the ‘independence’ of an oversight mechanism does not necessarily enable it to win public trust.” Rather, “[a]n approach that emphasizes public credibility and public confidence above all else is likely to prove to be counterproductive.” In this view, a complaints entity can best win public respect by demonstrating its “effectiveness” and by developing “a reputation for impartiality which is recognized by both the police and members of the public.”¹⁴⁵

B. Channeling Accountability, Enhancing Operational Autonomy

Another common theme has been the effort to delineate more sharply the division of decision-making responsibility between senior police officers, on the one hand, and civilian leadership, on the other. Police commanders should have responsibility for making operational and tactical decisions and should be insulated from illegitimate external interference in making these decisions. Civilian leaders

¹⁴⁵ Centre for the Study of Violence and Reconciliation, *supra* note 100.

should have responsibility for holding police officers accountable for the consequences of their operational decisions, for setting broad objectives for the police force, and for making law enforcement policy.

The external supervisory mechanisms established in Northern Ireland and Nigeria seek to support and to reinforce this division of responsibility. Northern Ireland's Policing Board and Nigeria's Police Service Commission each supervise the police force at an intermediate level, above that of operations and tactics but below that of policy-making. If these new entities succeed in their mandates, they will insulate police leadership from external interference with operational decisions while at the same time providing a strong, constant, and transparent channel for holding the police accountable to the public and to the rule of law.

Rules governing the appointment, removal, and tenure of senior police officers also play a crucial role in determining whether police leaders are actually insulated from interference with operational decisions and whether they are ultimately accountable to civilian authorities. If these processes are transparent, objective, and impartial, police commanders will be afforded greatly expanded space for operational autonomy and will, at the same time, be more clearly subject to the policy direction and general oversight of civilian authorities.

Security of tenure for the head of the police force increases his or her ability to resist illegitimate political interference, to act in obedience to the law even when doing so might be momentarily unpopular, and to make operational decisions in accordance with his or her own best judgment. In South Africa, the head of the police force serves a fixed term of office. In South Africa and Northern Ireland, the political executive may remove the head of the police force from office only after receiving the recommendation of an independent board of inquiry.

In considering a fixed term of office for the head of the police force, particular attention should be paid to the length of the term. The expiration of each term of office represents the most significant opportunity for evaluation of the police force as an institution by elected officials, policymakers, and citizens and for the initiation of institutional improvement or reform. A term of office that is too long will make these opportunities too infrequent, diminishing popular accountability and hindering institutional change. A lengthy term of office for the head of the police force may also demoralize police officers by ossifying a particular management style and by slowing the process of promotion. If the term is too short, on the other hand, police operations may be hindered by a lack of continuity of leadership.

C. Blending Internal and External Accountability

The external accountability mechanisms established in Northern Ireland and South Africa are not intended to displace mechanisms of accountability already existing within the police force. Rather, the new external mechanisms of accountability are directed to work cooperatively with internal accountability mechanisms. The new Police Act for Northern Ireland, for example, requires the Policing Board and the Chief Constable to share responsibility in a series of areas of decision-making.

Police commanders should have responsibility for making operational and tactical decisions and should be insulated from illegitimate external interference in making these decisions.

The proper handling of allegations of police misconduct requires a particularly careful balance between external and internal mechanisms of accountability.

The proper handling of allegations of police misconduct requires a particularly careful balance between external and internal mechanisms of accountability. External complaints bodies must have sufficient powers and resources to do their work effectively. In particular, external complaints mechanisms with no independent investigative capacity are likely to be weak accountability mechanisms. Goldsmith has argued that the incorporation of an independent investigative capacity ought to be “the paramount consideration” in the establishment of an external complaints body, and that any such body “should be able to reassure citizens that its role can extend beyond the ex post facto review of investigations of complaints undertaken by the police themselves.”¹⁴⁶ South Africa’s Independent Complaints Directorate and Northern Ireland’s Police Ombudsman, unlike many, less-successful agencies of external oversight elsewhere in the world, do have this independent investigative capacity.

On the other hand, charging an external agency with the handling of all complaints against the police, and thereby altogether removing the police from the process of investigating such complaints, may be self-defeating. Such an agency is likely to develop a strictly adversarial relationship with the police, limiting the amount of cooperation it will get from the police and the level of acceptance its recommendations for reform will receive. As Joel Miller has written in a recent review of the academic literature on civilian oversight mechanisms, “[h]ostility by police departments and police officers to civilian oversight is probably one of the most significant factors that helps explain the failures and underperformance that have afflicted civilian oversight agencies.”¹⁴⁷ “Conversely, in some contexts the engagement of police departments with the process of oversight has been an important basis for their success.”¹⁴⁸

Vesting an external complaints body with exclusive investigative jurisdiction may also have the unintended effect of actually reducing internal police accountability. Displacing responsibility for misconduct to an external agency may encourage neglect by the police both of their own complaints management capacities and of the underlying problems that are giving rise to complaints.¹⁴⁹

Moreover, it is unlikely that an independent entity will have the resources or expertise to investigate all allegations of misconduct without any assistance from, or cooperation with, the internal affairs unit of the police force.

For these reasons, both the ICD and the Ombudsman undertake the initial investigation of only a limited and carefully-defined set of serious complaints, leaving the balance of investigative work to the internal affairs unit of the police force.

D. Sharpening the Focus Through Specialized Institutions

A final common aspect of institutional change has been the establishment of accountability mechanisms with an exclusive focus on the police. Rather than relying only on institutions with more general mandates, such as human rights commissions, inspectors general, and public service commissions, lawmakers in South Africa, Northern Ireland, and Nigeria have opted to create entities – the Independent Complaints Directorate, the Policing Board, the Police Ombudsman, the Police Service Commission – with focused mandates and with special competence regarding the police.

¹⁴⁶ Goldsmith, *supra* note 15, at 55.

¹⁴⁷ Joel Miller, *Civilian Oversight of Police: Lessons from the Literature 11* (Vera Institute, 2002), available at www.vera.org/publication_pdf/178_338.pdf.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ See Centre for the Study of Violence and Reconciliation, *supra* note 105.

There are compelling reasons for the establishment of specialized oversight entities for police. Because the police are more present in the lives of ordinary citizens than other agencies of government, the volume of complaints against police is likely to be particularly high. Because, unlike most other agencies of government, the police are authorized to use force against citizens, the nature of complaints against police are often highly sensitive and occasionally explosive. Police officers are regularly called upon to make complex decisions at high speed that must take into account both law enforcement needs and the rights of citizens. Any agency charged with reviewing these decisions must have both expertise in law enforcement practice and legitimacy in the eyes of those whom its actions affect. Finally, if the aim is to reform a police force, as it ought to be in Kenya, then only a specialized entity can provide the constant oversight and flow of instruction that is necessary to implement lasting change.

VI

Conclusion

To whom should the police be accountable? Through what mechanisms? On what subjects? Kenyans now have the opportunity to engage these questions directly. If Kenyans determine that they want to move away from a system in which the police are officially answerable only to the political executive, and in which the police are unofficially answerable to other powerful actors outside the police chain of command, they have a range of possible institutional arrangements to consider, and a substantial amount of international experience from which to draw. The three sets of institutional arrangements upon which this paper has focused – arrangements for the appointment, removal and tenure of the head of the police force; for the supervision and control of the police force; and for the handling of complaints of police misconduct — provide appropriate points of departure.

Yet an institutional approach will encounter determined resistance. There will be constant temptation to ascribe the failures and abuses of the past to individual “bad apples,” and to leave aside the task of institutional transformation.¹⁵⁰ Once Kenya’s “constitutional moment” passes, this resistance will grow only stronger and more determined.

Kenyans must now make some difficult but significant choices. Through the process of law reform, Kenyans can begin to inculcate the values of popular accountability, legal accountability, and transparency in the day-to-day practice of law enforcement and can perhaps initiate a long-deferred renaissance in the relationship between the police and the public.

To whom should the police be accountable? Through what mechanisms? On what subjects? Kenyans now have the opportunity to engage these questions directly.

¹⁵⁰ See Brodeur, *supra* note 11, at 155; REPORT OF THE PATTEN COMMISSION, *supra* note 13, at 26.

Conference Proceedings

**Police as a
service
organisation:
An agenda for
change**

Summary

From the colonial period to the present, the role of the police in Kenyan society has changed remarkably little. Today, as under the colonial regime, the police are subordinated to the demands of those in power and are viewed with suspicion by the Kenyan people.

Citizens, political leaders, and police officers themselves should now begin the process of transforming the Kenyan police from a force to a service.

In view of the ongoing process of constitutional revision in Kenya, participants explored the possibilities of advancing police reform through the process of constitutional review.

Senior police officers acknowledged many facets of police dysfunction like corruption, criminality within the police force, torture etc; but attributed this, at least in some part, to a scarcity of resources.

The Kenyan police are wholly accountable to the office of a single individual, the President of Kenya. Consequently, the police have been vulnerable to interference by powerful individuals outside of the established chain of command.

The President of Kenya has unbounded authority both to appoint and to remove the Commissioner of Police, and no criteria are set forth for the President to follow.

Many police officers, at all ranks, owe their positions not to their academic qualifications or to their performance on the job, but rather to the patronage of powerful individuals outside the police force.

Maintenance of two police agencies, the Kenya Police Force (KPF) and the Administration Police, with overlapping functions has caused some dysfunction. The relationship between the two has not been made clear to citizens and is not understood by them. It makes it more difficult for the citizens to complain about police misconduct.

Civilians can effectively oversee both the handling of complaints of police misconduct and the rectification of police procedural and policy lapses through civilian oversight mechanisms.

Recommendations

- The Constitution should contain a provision imposing an obligation on the state to maintain a police service that operates in conformity with democratic principles and with the rule of law.
- The Constitution should establish clear and appropriate criteria for the appointment and, if necessary, the removal of the Commissioner of Police. Parliament should have a role under the Constitution in both appointment and removal.
- The Constitution should provide for security of tenure and a fixed term of office for the Commissioner of Police.
- Parliament should establish clear and appropriate criteria for recruitment to the police force and for the promotion and transfer of serving officers.

In view of the ongoing process of constitutional revision in Kenya, participants explored the possibilities of advancing police reform through the process of constitutional review.

- The Constitution should establish one or more institutions for civilian oversight of the police, for example a Police Service Commission, which would supervise the performance and conduct of the police and, akin to the Nigeria Police Service Commission, and/or an Ombudsman, which would investigate citizen complaints against police, similar to South Africa’s Independent Complaints Directorate (ICD).

Introduction

Kenya is in the midst of a constitutional moment.¹ The Kenyan people have elected a new government, effectuating the first peaceful transfer of power in the history of post-Independence East Africa. The Constitution, which once ensured the domination of a single political party, and under which widespread human rights abuse were condoned, is now under revision. Ordinary citizens are deeply engaged in the process of revising the principles underlying Kenyan democracy and in reshaping government institutions in accordance with those principles.

One of the institutions that need overhauling is the police force. Kenya Police Force (KPF) has in the past practiced regime policing, focusing substantial institutional energy on sustaining the power of the ruling party. It must now practice democratic policing. It must focus its efforts on providing service to the Kenyan people and on promoting respect for human rights and the rule of law.

On April 24-25, 2003, at the PanAfric Hotel in Nairobi, the CHRI² and the KHRC³ convened a conference on police reform in Kenya: “Police as a Service Organisation: An Agenda for Change.” Among the conference’s ninety participants were police officers, public servants, academics, activists, and journalists from Kenya, Tanzania, Uganda, South Africa, Nigeria, Australia, and India.⁴ The conference proceedings were characterized by lively exchange of ideas, spirited debate, and candid self-assessment on the part of police leaders and government officials.

The CHRI-KHRC conference marked the first time in recent Kenyan history when representatives of the government, the police force, civil society, and the press together openly discussed the problems of policing in Kenya. What was said at the conference may herald a new beginning in the relationship between the Kenyan police and the public.

In his opening speech, Hon. Chris Murungaru, the Kenyan Minister for Provincial Administration and National Security, announced that the government has committed itself to police reform. He said that the government intends to “make democratic ideals of accountability a reality” and to move Kenyan law enforcement “from regime policing to democratic policing.”

Speaking at the valedictory session, Commissioner Edwin J. Nyaseda, Kenya’s new Commissioner of Police, described the task as follows:

What we are envisaging is a change of attitude of Police Officers toward their duties. The Police Service will be oriented towards meeting the needs of civilians and institutions of a democratic society for policing services of a high standard guided by the principles of integrity and respect for human rights, non-discrimination, impartiality and fairness.

The CHRI-KHRC conference marked the first time in recent Kenyan history when representatives of the government, the police force, civil society, and the press together openly discussed the problems of policing in Kenya.

¹Bruce Ackerman, *We the People: Foundations* (1993).

²The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation with its secretariat based in New Delhi, India and with offices in Ghana and London. CHRI’s mandate is to ensure the practical realisation of human rights in the 54 countries of the Commonwealth. In furtherance of this objective, CHRI has developed expertise on police institutions in India and has devoted substantial energy to advocating for police reform in that region. CHRI is currently undertaking a research project into the extent of police accountability in East Africa.

³The Kenya Human Rights Commission (KHRC) is a non-governmental organisation based in Nairobi, Kenya. KHRC was formed in 1991 to promote democratisation, accountability, good governance, and respect for human rights in Kenya. KHRC has consistently monitored and documented human rights violations by the police and other agencies of government.

⁴A complete list of participants appears as Appendix A to this Report.

1

Setting the agenda

Consistent with the theme of the conference, many conference participants spoke of the need to transform the Kenyan police from a “force,” an institution defined by its authority to use coercion and force, to a “service,” an institution whose identity is linked to the quality of service it offers to citizens. “We would like to change the name of the Police Force to the Police Service,” Mr. Edwin Nyaseda, the Commissioner of Police, told conference participants. “The change of name depicts our willingness to change.” Commissioner Nyaseda said that he is “fully committed to reforming the police force in conformity with the Kenyan dream.”

There were similar expressions from civil society representatives. Dr. Willy Mutunga, Executive Director of KHRC, said that the conference represented a potential watershed in the renewal of relations between the state and civil society. Ms. Maja Daruwala, Director, CHRI expressed the hope that the conference would assist police officers, policymakers, and citizens in creating a “new and vibrant” police service in Kenya.

One of the objectives of the CHRI-KHRC conference was the formulation of recommendations for the revision of Kenya’s constitution. As it happened, the National Constitutional Conference (NCC) began its work only two days after the conclusion of the CHRI-KHRC conference, and participants were therefore particularly eager to explore the possibilities of advancing police reform through the process of constitutional revision.

Prof. Ghai, chair of the Constitution of Kenya Review Commission (CKRC) stated that the goals of the constitutional review process could not be achieved without a thoroughgoing reform of the police force. The police need to be reformed “radically,” he said. Prof. Ghai added that the CKRC would welcome a contribution from the conference regarding the establishment of the police under the constitution. In particular, he emphasised a need to include provisions that address the “social role” of the police and that set forth appropriate institutional arrangements.

“We would like to change the name of the Police Force to the Police Service,” Mr. Edwin Nyaseda, the Commissioner of Police, told conference participants. “The change of name depicts our willingness to change.”



E.J. NYASEDA
Commissioner of Police, Kenya Police Force

2

Police dysfunction

A number of research studies and surveys in the past have brought out some dysfunctional aspects of policing as a system: The Kenya Bribery Index 2002 reported that seven out of ten adult Kenyans allegedly paid a bribe to a police officer during the

Superintendent Gideon Kibunja Mwangi said that citizens complain of police brutality, torture, assault, rape, “trigger-happiness,” illegitimate arrest, harassment, incivility, disregard of human rights, disregard of political freedoms, corruption, and extortion, among other things.

past year.⁵ According to UN Habitat, the average Kenyan estimates that half of the police force is corrupt and that over one-third of all crime committed in the country is attributable to police criminality.⁶ The Amnesty International has stated that in 2002 alone, more than one hundred Kenyans were shot and killed by police officers under circumstances that suggest the possibility of an extrajudicial execution.⁷ KHRC, on its part has documented more than 200 potential extrajudicial executions by security agents in each of the two previous years.⁸

Despite the apparent free hand that the police have been given to use lethal force in the fight against crime, levels of crime generally, and violent crimes in particular, are extraordinarily high. Nairobi remains one of the most insecure cities in the world. About 37% of Nairobi residents report having been a victim of robbery in the past year and 22% report having been a victim of theft. Eighteen percent report having been physically assaulted in the past year.⁹

Corruption continues to be an extraordinary problem within the ranks of the police. According to surveys conducted by Transparency International-Kenya, KPF is the most corrupt agency in the government. Transparency’s survey results suggest that the average Kenyan pays 1,270 Kenyan shillings (about 15 US dollars) in bribes to police officers in an average month.¹⁰

According to UN-Habitat, “[r]eporting levels to police are low because victims do not believe that the police can assist them in dealing with the matter – either because there seems to be no chance of them resolving the crime, or because they do not believe that the police are competent enough to help them.”¹¹

At the conference, senior police officers acknowledged both: that the public lack confidence in KPF’s competence and integrity; and that the public’s perceptions are in many respects accurate. In describing KPF’s internal system for processing citizen complaints, Superintendent Gideon Kibunja Mwangi said that citizens complain of police brutality, torture, assault, rape, “trigger-happiness,” illegitimate arrest, harassment, incivility, disregard of human rights, disregard of political freedoms, corruption, and extortion, among other things. He said that citizens also complain about police inaction, about police giving excuses for doing nothing in the face of crime and victimization. Superintendent Kingori Mwangi acknowledged that citizen complaints are “often justified” but attributed this, at least in some part, to a scarcity of resources

Prof. Ghai, chair of the Constitution of Kenya Review Commission (CKRC), briefly described the colonial origins of policing in Kenya and the use of police by the colonial regime to bolster its own authority and suppress dissent. He noted, a “remarkable continuity” from colonial times to the present, in terms of the role and structure of the police force. In the voluminous testimony received by the CKRC concerning the police he said, citizens repeatedly expressed the view that the police had operated as tools of the government, rather than as servants of the public; that the police had turned a blind eye to politically-motivated massacres and ethnic violence; and appeared to be free to violate human rights with impunity. The CKRC heard testimony that the police had neglected developing good detective and forensic investigation methods and had instead increasingly relied on torture as a means of extracting confessions to solve cases.

⁵Transparency International—Kenya, Kenya Bribery Index 2002 7 (2002), available at tikenya.org/documents/BribIndex02.pdf.

⁶UN-Habitat, Crime in Nairobi: Results of a Citywide Victim Survey 35 (2002).

⁷Amnesty International, Amnesty International Report 2003: Kenya (2003).

⁸KHRC, Quarterly Human Rights Report, October-December 2001 (2002); KHRC, Quarterly Human Rights Report, October-December 2000 (2001).

⁹UN-Habitat, supra note 6.

¹⁰Transparency International—Kenya, Kenya Bribery Index 2002, supra note 5.

¹¹UN-Habitat, supra note 6.

According to Prof. Ghai, citizens expressed deep concern about arrests without warrant and illegal search and seizure. They further expressed familiarity with a practice known colloquially as “the Friday collection:” where police make arrests on Friday evening, immediately solicit bribes from those arrested, then tell those who refuse that they cannot have access to a lawyer or magistrate until Monday. They testified to a “total lack of security” in their daily lives because of the involvement of police in criminal activities. Many citizens said that the police routinely refuse requests for P3 forms – the essential document for filing a complaint – in cases of alleged police misconduct or criminality. Such consistent testimony from so many bears out, Prof. Ghai said, that the police have “become a lawless force unto themselves quite apart from acting under an oppressive regime.”

3

Illegitimate interference

No single factor can explain the past failures of policing in Kenya. The problems have been numerous and varied. Yet some of the causes of police dysfunction received particular emphasis at the conference. One of these was the absence of strong institutional mechanisms for holding the police accountable to the people and to the rule of law.

Under the current law, formal mechanisms for holding the Kenyan police accountable do not extend far beyond the office of a single individual, the President of Kenya. The Constitution of Kenya, Article 108(1) effectively ensures a substantial degree of personal control by the President over the decisions and actions of the Commissioner of Police. The Kenyan law further ensures presidential control by empowering the President, solely at his/her own discretion, effectively to displace the Commissioner of Police and give operational direction to the police force. The legal source of presidential control lies in Article 85 of the current Constitution and the Preservation of Public Security Act. Article 85 of the Constitution provides that “the President may at any time . . . bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act.” Part III of the Preservation of Public Security Act, in turn, makes it “lawful for the President . . . to make regulations for the preservation of public security.”

The result of this legal arrangement has been that, in practice, the police, have been vulnerable to interference by powerful individuals outside of formal mechanisms of accountability and the regular chain of command, such as politicians and wealthy business owners. These powerful individuals have been able to use the police for their own political and personal agendas, often in direct contravention of the interests of the



PROF. YASHPAL GHAI,
Chairman, Constitution of Kenya Review Commission
(CKRC)

The police, have been vulnerable to interference by powerful individuals outside of formal mechanisms of accountability and the regular chain of command, such as politicians and wealthy business owners. These powerful individuals have been able to use the police for their own political and personal agendas

Lady Justice Julie Sebutinde of the Uganda High Court also highlighted “intrusion and encroachment on police functions” as one of the chief causes of corruption and abusive policing.



LADY JUSTICE JULIE SEBUTINDE
Uganda High Court

Kenyan people. Dependence for their own career advancement and well being on politicians, has made the police acquiescent to politicians, bureaucrats and their friends even when orders have been in contravention of the law or clearly in the interests of some and unfair to others.

The ethnic clashes surrounding the 1992 and 1997 elections represent the most dramatic example of the consequences of this illegitimate interference. In the 1997 clashes, approximately 800 people were killed and 130,000 were left homeless. According to the Commission of Inquiry headed by Justice A.M. Akiwumi, high-ranking police officers, at the urging of powerful patrons from outside the police force, condoned and perhaps even helped to foment the violence.

No one seriously disputes that police officers have been answerable to powerful individuals outside the police force. Nor is there any serious dispute that this state of affairs has distorted the priorities of the police. In his address to the conference, Minister Chris Murungaru acknowledged that the police are perceived by the Kenyan people as being “politically manipulative.” In February, Minister Murungaru formally instructed police commanders to resist pressure from outside the police chain of command. He is reported to have assured the police, “I have word from the President that there shall not be orders from anywhere else except your immediate superiors.”¹²

In her inaugural address to the conference, Lady Justice Julie Sebutinde of the Uganda High Court also highlighted “intrusion and encroachment on police functions” as one of the chief causes of corruption and abusive policing.

Many of the discussions at the conference centered on the appropriateness and effectiveness of specific legal and institutional reforms intended both to ensure police accountability and to insulate the police from illegitimate interference from outside of the chain of command.

4

Resource scarcity

Another principal cause of dysfunctional policing is the severe scarcity of resources with which the police must contend. Poorly paid police officers are prone to corruption. Police detectives who lack proper investigative training, and access to sophisticated forensic facilities, are more likely to rely on the extraction of confessions through torture. Police forces that lack computers and modern information technology are more likely to be inefficient, to lose files, and to misplace evidence. Police forces that lack vehicles are more likely to be unable to provide a rapid response to crimes in progress. At the most basic level, a police force that is understaffed simply cannot provide adequate service.

¹²“Better pay and gear for police on the way,” Daily Nation, February 21, 2003.

Many conference participants spoke generally about the meagre resources with which KPF must make do and about the particular consequences of scarcity. According to Senior Deputy Commissioner of Police Zebedio Ong’uti, these consequences include limited computerization, inadequate training, particularly in the areas of “customer care” and human rights, and poor housing and office facilities. Mr. Ong’uti particularly emphasized that the lack of resources has posed severe challenges to KPF’s attempts to address sophisticated forms of crime like money laundering, drug trafficking, and terrorism.

Encouragingly, the government’s most recent budget allocates to KPF an additional 400 million Kenyan shillings.¹³ However, two things must be kept in mind: First, an infusion of funds will not solve KPF’s managerial and cultural problems; only serious, sustainable institutional reforms can transform KPF from a “force” to a “service.” Second, an infusion of funds to a repressive police force will only improve the capacity of such a police force to repress.

An infusion of funds will not solve KPF’s managerial and cultural problems; only serious, sustainable institutional reforms can transform KPF from a “force” to a “service.” An infusion of funds to a repressive police force will only improve the capacity of such a police force to repress.

5

Appointment, promotion, transfer, and dismissal of police officers

For many participants, improving the transparency, and fairness of police personnel administration represents a key step toward ensuring accountability and reducing illegitimate interference with police operations.

Appointment & removal of the police head

The President of Kenya has unbounded authority both to appoint and to remove the Commissioner of Police. No other authority has any role in appointing or removing the Commissioner, and no criteria are set forth for the President to follow. Superintendent Mwangi, spokesperson for the Kenya Police Force, acknowledged that, in the past, a Commissioner of Police who wanted to stay in office had to constantly maintain the patronage of the President of Kenya and the ruling party. Mr. Mwangi indicated the levels of insecurity when he jokingly mentioned that the Commissioner had to watch both “the one o’clock news and the seven o’clock news”

¹³“Prisons given \$5.3m more as police get \$4m extra,” Daily Nation, June 13, 2003.

each day to find out if he still held office. For this reason, Mr. Mwangi explained, KPF is now advocating that the law be amended to provide the Commissioner with security of tenure and a fixed term of office.

The Draft Constitution proposed by CKRC attempts to address these issues. According to the draft proposal, appointment of the Commissioner of Police would require an approval of the Parliament. It further provides that the Commissioner may be removed from office only “for good cause.” And it would establish a ten-year term of office for the Commissioner, which would provide a security of tenure.

No conference participant spoke against the concept of a fixed term of office but many argued that the ten-year term as suggested in the Draft Constitution was too long.¹⁴ These participants felt that a term as long as ten-years could suppress the emergence of new ideas, retard the process of institutional change, and demoralize junior officers. Most participants felt that a term of office lasting three to five years, renewable once, would be more appropriate.

There was near-unanimous approval on the broad principles of establishing an appointment and removal process for the Commissioner of Police. The participants raised important issues about specifics and wanted a thorough discussion on the details. Many participants felt that involving Parliament in the appointment process would be a positive step. Some argued that Parliament should also have a role in any attempt to remove the Commissioner. Other participants expressed a concern, however, that involving Parliament in the appointment process would create an opportunity for illegitimate interference by Members of Parliament.

The possibility of establishing an independent Police Service Commission was a subject of sustained discussion at the conference. One of the functions of such a Commission might be to nominate candidates for appointment to the posts of Commissioner of Police and other senior positions.

Several participants suggested a requirement, similar to that under the laws of South Africa and Northern Ireland, that a board of inquiry be convened prior to any attempt to remove the Commissioner of the Police from office before the expiration of his or her term. Professor Chris Maina Peter suggested that such a board be required to be composed of police chiefs from five other Commonwealth countries.

Recruitment & Control

Transparency, regularity, and fairness must be hallmarks of personnel decisions not only at the top of the police force, but at all ranks. Many police officers, at all ranks, owe their positions not to their academic qualifications or to their performance on the job, but rather to the patronage of powerful individuals outside the police force.

Professor Peter, among others, emphasized the need to establish clear and appropriate criteria both for recruitment to the force and promotion within the force. It was also reported that the formulation of policies and guidelines for promotion was among the first acts of the newly established Nigeria Police Service Commission.¹⁵

The possibility of establishing an independent Police Service Commission was a subject of sustained discussion at the conference. One of the functions of such a Commission might be to nominate candidates for appointment to the posts of Commissioner of Police and other senior positions.



CHRIS MAINA PETER
Prof. of Law, University of Dar Es Salaam

¹⁴Assistant Commissioner of Police Mwangi, Lady Justice Sebutinde, Chief Simon Okeke, and Mr. G.P. Joshi of CHRI.

¹⁵Chief Okeke, Nigeria Police Service Commission

In a police force that abides by clear criteria for recruitment and promotion, opportunities for illegitimate interference with police operations will be greatly reduced. Equally important is the selection of appropriate criteria. A police force that promotes officers based, for example, on the number of arrests they have made will provide quite a different kind of service to the public than a police force whose criteria for promotion emphasize, for example, investigative techniques, ability to communicate effectively with civilians, and integrity.

Clear and appropriate criteria for transfer within the police force must also be established. It was reported, that in India, powerful individuals outside the police force have found it particularly easy to “punish” disfavored police officers by effectuating their transfer to undesirable postings¹⁶. The Commission of Inquiry headed by Justice Sebutinde made similar findings with regard to the transfer process in the Uganda Police Force.



G.P. JOSHI
Program Co-ordinator, Commonwealth Human
Rights Initiative

6

Internal accountability

The conference discussed the establishment of fair, efficient, and transparent mechanisms, both inside and outside the police force, for investigating and punishing misconduct.

The present reliance on powerful patrons of necessity leads to widespread impunity.

The chief enemy of accountability is impunity — a state of affairs in which police officers can engage in misconduct, crime and violation of human rights and be confident that they will not be disciplined or held to account for their actions. Impunity exists in the absence of effective mechanisms for investigating and punishing police misconduct. It also exists when powerful individuals outside the chain of command can, through their patronage, shield favored officers from investigation and discipline.

Accountability mechanisms can be broadly categorised under two heads: internal and external. Internal mechanisms of accountability refer to those mechanisms that are located and run within the police administration. Examples of such mechanisms would include a police complaints desk run by the police, mandated to entertain and dispose complaints regarding police misbehaviour or negligence. External mechanisms on the other hand refer to those mechanisms that are located outside of the police. For example, a police service commission that supervises recruitment and other issues of personnel administration as an external independent

Internal mechanisms of accountability refer to those mechanisms that are located and run within the police administration. Examples of such mechanisms would include a police complaints desk run by the police, mandated to entertain and dispose complaints regarding police misbehaviour or negligence.

¹⁶ G.P. Joshi, CHRI



DAVID BRUCE
Senior Researcher, Centre for the Study of Violence and Reconciliation



LAUREAN M. TIBASANA
Commissioner of Operations & Training, Tanzania Police Force



MAJA DARUWALA
Director, Commonwealth Human Rights Initiative

agent of the State. Another example would be a human rights tribunal. Professor Andrew Goldsmith and David Bruce particularly emphasized that accountability can most effectively be achieved through the maintenance of both internal and external mechanisms of accountability that are mandated to work cooperatively with one another.

Mr. Bruce reported that, during the transition from apartheid in South Africa, the institution of external mechanisms of accountability had succeeded in helping to establish a “relative normality” in the relationship between the public and the police, who were despised by the majority of citizens under apartheid. However, he said, the process of police reform in South Africa has been “undermined” by “the neglect of internal systems” of accountability. The failure of internal accountability mechanisms, Mr. Bruce argued, has allowed both corrupt and incompetent officers to remain within the police force.

Commissioner Laurean Tibasana offered an insider’s assessment of the internal accountability mechanisms in the Tanzania Police Force. He said that, under present guidelines, TPF is under no obligations to apprise citizens about the status of a complaint of police misconduct if TPF concludes that, in the incident described, a crime was not committed. As a result, the system is not sufficiently transparent, and undermines its own effectiveness. This lack of transparency is largely attributable to an institutional culture that, in certain respects, still needs to “break with the past.” “We are trying to put new mindsets in place,” he said.

Likewise, Superintendent Gideon Kibunja Mwangi acknowledged that KPF has not been as effective as it could have been in investigating complaints of police misconduct and punishing offenders. However, both he and the Principal Deputy to the Commissioner of Police, Ms. Alice Kagunda, felt that appropriate mechanisms of internal accountability are in place and that the failures of the system have been failures of execution, not of institutional design. Ms. Kagunda said that improving the administration of internal systems of accountability is among the main goals of KPF’s program of reforms.

Several conference participants, including Mr. Bruce and Ms Maja Daruwala, said that the absence of empirical data on police misconduct and the effectiveness of internal mechanisms for addressing such misconduct have hindered the process of developing and improving these mechanisms.

Ms. Daruwala argued that, when the government fails to establish a strong mechanism for investigating and punishing police misconduct, it cannot disclaim responsibility for the misconduct that occurs, even when it can accurately claim that it is not state policy for the police to violate the rights of citizens. When the government fails to provide strong mechanisms of accountability, police violations of human rights reflect “de facto state policy.”

Another main obstacle to internal accountability in Kenya has been the maintenance of two police agencies, the Kenya Police Force (KPF) and the Administration Police, with overlapping functions. Mr. Musasi, Deputy Permanent Secretary in the Office of the President explained that the Administration Police had in the past played an important role, particularly in bandit-prone areas in controlling incidents of banditry and cattle rustling. He said that it acts as a supplement to the KPF.

The relationship between the two has not been made clear to citizens and is not understood by them. Even police officers sometimes find that the two agencies' chains of command are confusingly intertwined.¹⁷ The dual system of policing in Kenya, makes it more difficult for Kenyan citizens to complain about misconduct and, the undermined chain of command within each agency, makes it more difficult for senior police officers to enforce discipline. Superintendent King'ori Mwangi of the KPF added that the Administration Police often lack proper training.

Project coordinator of the CHRI, Ms Michelle Kagari, among others, observed that the institutional placement of the Administration Police within the political executive renders that agency even more vulnerable to illegitimate interference than the Kenya Police Force. She added that, according to the Akiwumi Report, the Administration Police have an even poorer record on human rights than the KPF. Administration Police were founded under the colonial system, and Ms Kagari questioned whether there is a continuing justification for their separate existence.

Defending the value of having an Administration Poolice, Mr. Musasi and Mr Archie Nzano, Administrative Police Commandant argued that there is a continuing need for the maintenance of the dual system of policing in Kenya. They explained that the Administration Police officers receive specialized training for combat situations and for the protection of VIPs and can be deployed more flexibly than KPF officers.

Many criticisms, similar to those directed at the Administration Police, were also directed at certain specialized units of the Kenya Police Force, such as the paramilitary General Services Unit and the anti-carjacking unit sometimes known as the "Flying Squad." Because these units often have an unclear command structure and wide but vaguely defined discretion to use force against the Kenyan people, they have succeeded to a large extent in remaining outside the reach of mechanisms of internal accountability.

7

External accountability

Notwithstanding the indispensability of internal accountability, there is a worldwide trend toward the establishment of independent, external institutions that allow citizens to participate in overseeing the functioning of police.

Civilian oversight

At the conference, Prof. Andrew Goldsmith of Flinders University in Australia presented the case for external civilian oversight. He said that civilians can effectively



MICHELLE KAGARI
Project Co-ordinator, Commonwealth
Human Rights Initiative



PROF. ANDREW GOLDSMITH
Prof. of Law, Flinders University, Australia

¹⁷ "Police row as graft suspect is released from cells," Daily Nation, February 4, 2003.

oversee both the handling of complaints of police misconduct and the rectification of police procedural and policy lapses. Though civilian oversight is no “magic bullet,” it can have a substantial impact on the quality of policing by (1) enhancing public confidence in the fairness and legitimacy of the handling of complaints of police misconduct; (2) improving the quality of communication and the level of trust between the police and the public; (3) re-enforcing police adherence to human rights laws and norms; and (4) providing guidelines, instructions, and statistics that can assist senior police officers in managing the force.

Prof. Goldsmith particularly emphasized that civilian oversight, does not weaken the police force but rather strengthens it. “Repressive police forces are weak police forces,” he explained. Because repressive police forces are feared by citizens, they operate under an illusion of strength, but citizens’ fears actually represent the source of their weakness. People who fear the police tend not to report crime and tend not to cooperate with police investigations. Strong police forces, meanwhile, operate with the consent of the citizens they serve. Civilian oversight allows the police to win and maintain a higher standing with the public. In building strong police agencies, he said, “fear is not an alternative to consent.”

There are, according to Prof. Goldsmith, a number of prerequisites to the achievement of effective civilian oversight. A civilian oversight entity must have an independent investigative capacity, backed by sufficient resources. It must have sufficient independence to develop its own processes and procedures. It must have the flexibility to utilize formal investigative and disciplinary structures for serious lapses and instances of misconduct and informal processes for less serious matters. Provision must be made for direct communication between the oversight body and the legislature, in addition to its communications with police and the political executive. The oversight entity must have budgetary independence and should not be made to compete with the police force itself for funds. And it must have collateral support from other agencies of government. In short, Prof. Goldsmith said, a civilian oversight entity must have “the capacity to deal with the problem of impunity.”

Broadly speaking, two kinds of institutions have been established for the purpose of making the police more directly accountable to the people.

Police Service Commission

The first type of institution exerts actual supervisory power over the police force in certain areas of police functioning. Nigeria’s Police Service Commission represents an example of such a supervisory institution. As described at the conference by its chairman, Chief Simon Okeke, the Police Service Commission has its origin in the Nigerian Constitution. The Commission has disciplinary control over the Nigerian police force, and has power to appoint all of the officers in the police leadership below the rank of Inspector General, the top officer in the force. As a result of the work of the commission, he said, many deserving officers had been promoted, and those wrongly fired during military regimes re-instated shortly after commission’s inauguration.

Civilian oversight, does not weaken the police force but rather strengthens it. “Repressive police forces are weak police forces,” Prof. Goldsmith explained.



CHIEF SIMON OKEKE
Chairperson, Nigeria Police Service Commission

The commission truly reflects the Nigerian diversity in its composition. It includes members representing the women's interest, the Nigerian press, the NGOs and the organised private sector. These members serve fixed terms of office and have security of tenure, which contributes significantly to the Commission's autonomy.

Many speakers at the conference, including Commissioner Nyaseda and Assistant Commissioner Mwangi, advocated the creation of a Police Service Commission that would be roughly patterned on the model of the Nigerian Police Service Commission.

Investigation of citizen complaints against police

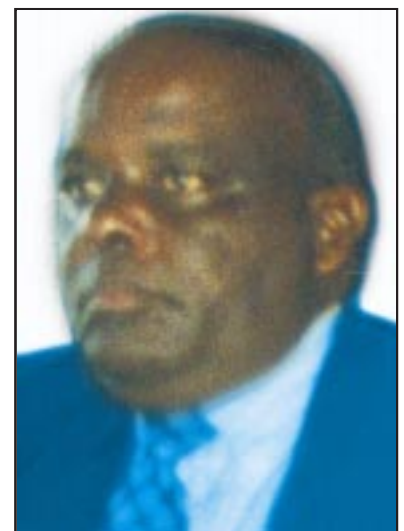
The second type of civilian oversight institution does not have supervisory powers but instead has responsibility for handling the investigation of certain categories of citizen complaints against the police and other allegations of police misconduct. One such complaints entity, South Africa's Independent Complaints Directorate (ICD), has jurisdiction over three types of cases: cases involving the death of a person in custody or a death that allegedly was the result of police action; cases involving alleged criminal activity by a police officer; and cases in which police officers allegedly engaged in conduct explicitly prohibited by South Africa's Police Regulations. The ICD has discretion either to investigate these cases itself or to work with investigators within the police force. It then refers the findings of its investigation to appropriate prosecutorial and/or disciplinary authorities.

Human rights commissions in some jurisdictions have succeeded in curbing police abuses despite lacking a specialized focus on the police. At the conference, Commissioner Karusoke Constantine of the Uganda Human Rights Commission (UHRC) described the activities and successes of one such oversight entity. UHRC receives, investigates, and adjudicates citizen complaints of human rights violations, including those allegedly committed by the police. UHRC monitors the performance of the police and other agencies of government and makes surprise visits to detention facilities. UHRC provides human rights training to police and other security agencies. And UHRC publishes annual reports on the state of human rights in Uganda and also formally reports to Parliament.

According to the UHRC statistics, the most common violations by security officials are torture of suspects and detaining suspects without bringing them before a magistrate beyond the 48-hour time limit allowed by the Constitution. UHRC regularly awards monetary compensation to victims of police excesses. Commissioner Karusoke stated that, since UHRC's inception in 1996, cases of police torture have "drastically reduced," as have cases of the police sabotaging criminal investigations by causing the disappearance of court files.

Few avenues for external oversight currently exist in Kenya. The judiciary has not established a strong record in enforcing police compliance with human rights norms. Prof. Yash Pal Ghai remarked at the conference that the judiciary "may be even more corrupt than the police." Since 1996, the Standing Committee on

Many speakers at the conference, including Commissioner Nyaseda and Assistant Commissioner Mwangi, advocated the creation of a Police Service Commission that would be roughly patterned on the model of the Nigerian Police Service Commission.



C.K. KARUSOKE
Commissioner, Uganda Human Rights Commission

The Draft Constitution proposed by CKRC establishes a single entity for civilian oversight of the entire Kenyan government, rather than specialized entities for oversight of individual agencies.

Human Rights has investigated complaints of police misconduct. However, it was established by presidential order, its members were selected by the President, and its mandate was determined by the President. It did not issue its first public report until 2001, the year in which it was strongly criticized by Human Rights Watch for serving primarily as an apologist for the repressive activities of the government.

The Draft Constitution proposed by CKRC establishes a single entity for civilian oversight of the entire Kenyan government, rather than specialized entities for oversight of individual agencies. Prof. Ghai said that CKRC was concerned that a proliferation of many commissions with specialized jurisdictions could dilute the impact and institutional prestige of each one. However, others at the conference argued for the creation of specialized entities for overseeing the police, pointing to the volume of complaints against the police, the sensitivity and specialized nature of many aspects of police work, and the critical role that the police play in establishing the character of the relationship between the government and the people.

8

A change of culture and attitude

At the conference, police leaders acknowledged the difficulty – and the necessity – of changing the culture of policing in East Africa.

Ultimately, the long-term success of any program of police reform depends to a great extent on the institutional culture that prevails within the police force. Where the prevailing culture is one of corruption and impunity, changing that culture must be one of the central goals of police reform. A transition from a “force” to a “service” is, at root, a fundamental transformation in the way that individual police officers apply themselves to their work and conceive of their relationship to the public, day in and day out.

Yet changing the culture of a large, geographically dispersed institution like a police force is a slow and arduous process. As Justice Sebutinde observed in her inaugural address, the police generally reflect the society from which they come, and “a rotten society will most probably produce a rotten Police and vice versa.”

Ms Alice Kagunda, of the KPF described the task at hand as developing a new “attitude” in the police force. Commissioner Tibasana of the TPF described the needed change as a “break with the past.”

9

Constitutional review process & recommendations

The conference concluded with an open session focused specifically on making recommendations to the National Constitutional Conference (NCC). At the beginning of the conference, Prof. Ghai had warned that some aspects of reform might be more appropriate for legislation from parliament rather than inclusion in the new Constitution. Amidst a host of suggested reforms, which were at times fiercely contested, the participants agreed on basic minimum principles that should find place in the currently on-going constitutional review process. These are:

- i. The Constitution should contain a provision imposing an obligation on the state to maintain a police service that operates in conformity with democratic principles and with the rule of law.
- ii. A police service commission should be established; the commission should monitor the performance and conduct of the police; and, akin to the Nigeria Police Service Commission, it should be independent both from the government and the police force.
- iii. The Constitution should provide for security of tenure and a fixed term of office for the head of the police force. There was a consensus that the ten-year term of office for which the CKRC's Draft Constitution provides would be too long, but there was no agreement on the appropriate length of the term.
- iv. Parliament should have a role under the Constitution in the appointment and removal of the head of the police force.

The new Constitution represents an historic opportunity to break with the past practice of policing in Kenya. By defining the principles according to which law enforcement will be conducted, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by establishing new channels for holding the police accountable, and by strengthening existing channels of accountability, the new constitution can provide the foundation for a new legal and institutional environment – an environment in which deep and lasting reform can take place.



Facilitator of the open session
PHIROZE NOWROJEE
Advocate, High Court of Kenya

The new Constitution represents an historic opportunity to break with the past practice of policing in Kenya.

Appendix A

List of participants

(of those who registered their names and contact details)

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The Kenya Human Rights Commission (KHRC) is a non-governmental organisation based in Nairobi, Kenya. KHRC was formed in 1991 to promote democratisation, accountability, good governance, and respect for human rights in Kenya. KHRC has consistently monitored and documented human rights violations by the police and other agencies of government.



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The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realization of human rights in the countries of the Commonwealth. Sixteen years ago, several Commonwealth associations founded CHRI because they felt that while the member countries had both a common set of values and legal principles from which to work and a forum within which to promote human rights, there was relatively little focus on human rights issues.

CHRI's objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its biennial CHOGM reports and periodic fact finding missions CHRI continually draws attention to progress and setbacks in human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member-state governments and civil society associations. By holding workshops and developing linkages, CHRI's approach throughout is to act as a catalyst for activity around its priority concerns.

The nature of CHRI's constituent groups* - journalists, lawyers, legal educators, trade unionists, doctors and parliamentarians - ensures for it both a national presence in each country and a local network. More importantly, these are strategic constituencies, which can effectively steer public policy in favour of human rights. By incorporating human rights norms into their own work and acting as a conduit for the dissemination of human rights information, standards and practices, their individual members and collectives are themselves capable of affecting systemic change. In addition, these groups bring knowledge of local situations, can access policy makers, highlight issues, and act in concert to promote human rights. The presence of eminent members of these professions on CHRI's International Advisory Commission assures CHRI credibility and access to national jurisdictions.

Originally based in London, United Kingdom, CHRI's headquarters moved to New Delhi, India in 1993. It currently has a Trustee Committee office in London, and a new office in Accra, Ghana.

CHRI presently focuses on issues related to:

- Right to Information
- Police Reforms
- Prison Reforms
- Constitutionalism
- Human Rights Advocacy

* Commonwealth Journalists Association, Commonwealth Trade Union Council, Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Medical Association, Commonwealth Parliamentary Association, Commonwealth Press Union and the Commonwealth Broadcasting Association.

On April 24-25, 2003, at the PanAfric Hotel in Nairobi, the Commonwealth Human Rights Initiative (CHRI) in collaboration with the Kenya Human Rights Commission (KHRC) and the Kenya Police Force convened a conference on police reform in East Africa, *Police as a Service Organisation: An Agenda for Change*. Among the conference's ninety participants were police officers, public servants, academics, activists and journalists from Kenya, Tanzania, Uganda, South Africa, Nigeria, Australia and India.

The CHRI-KHRC conference marked the first time in recent Kenyan history when representatives of the government, the police force, civil society and the press together openly discussed the problems of policing in Kenya.

This publication begins with a background paper titled, *Police Accountability in Kenya: Seize the Moment*. It is suggested that the concept of police accountability encompasses at least three core values: popular accountability, legal accountability, and transparency. The paper assesses the institutional arrangements for police accountability that exist in Kenya. It provides brief sketches of the law in five other Commonwealth jurisdictions, focusing mainly but not exclusively on three sets of institutional arrangements appointment, dismissal, transfer, and tenure of the head of the police and other top officers; supervision and control of the police force; and investigation of police misconduct. Drawing on these sketches, it identifies four aspects of the trend toward enhanced police accountability in police reform legislation and engages questions such as: To whom should the police be accountable? Through what mechanisms? And on what subjects?

This publication includes the CHRI's report of the conference proceedings. The report is not an exhaustive narration of all that was stated; rather the main issues raised at the conference.

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