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Police reform in Kenya: a process of ‘meddling through’

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Police operate within the given sociopolitical context of a country. Those working on police reform have to acknowledge the political arena in which it takes place – especially when such an arena is not fully supportive of the reform project. This article argues that implementing police reform in an ‘unwilling context’ may result in the building of new institutions to hold the police accountable, but is unlikely to have a substantial impact on police practice. It uses the reform process in Kenya as a case study. Kenya embarked on a fresh reform process in 2009, which resulted in the adoption of a new legal framework for the police in 2011. However, implementing the new legislation has proved challenging and the failure of both the executive and the police to comply with the new instructions has impeded the progress of the various newly built institutions and their impact on fair and effective policing. Since the reforms serve the interests of those in power only to a limited extent, and the direction provided by the law is ambiguous at times, there is ample space for deliberation over mandates and authorities, thus further diminishing the potential impact of the reforms. The public wants the police to enhance their effectiveness, especially in view of rising crime and terrorism, but is still grappling with the terms that should apply. Civil society needs to claim its position in directing that debate.

Keywords: police reform; police accountability; Kenya

1. Introduction

Policing in Kenya has been afflicted by many challenges.^{1,2} There have been consistent reports of rising crime, including corruption and international and transnational crime (Gastrow 2011), and a consistent failure of the police to respond professionally to policing situations, whether for calls for assistance, criminal investigations, handling traffic, dealing with terrorist threats or managing peaceful protests. Policing in Kenya has been characterised by excessive use of force, extra-judicial killings, torture and corruption (Ruteere and Pommerolle 2003; Akech 2005; Commission of Inquiry into Post-Election Violence 2008; National Task Force on Police Reforms 2009; UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, 2011; ICTJ Briefing paper 2010; Ruteere 2011). Due to systematic underfunding, misallocation of funds provided and regular inappropriate interference in police operations, the police force has been unable to develop into a service that meets international professional standards. As a result, the general public lacks confidence in the police and has limited inclination to report to them or provide them with information (Commission of Inquiry into Post-Election Violence 2008; National Task Force on Police Reforms 2009; UN Special Rapporteur on

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extrajudicial, summary, or arbitrary or executions 2009, 2011; Police Reforms Implementation Committee 2011). It is not just that police violate the rights of others and fail to provide security, *internal* abuses and violations are equally abundant. Police officers are being harassed, intimidated and denied their rights by other police officers, including their superiors (National Task Force on Police Reforms 2009).³

Police in Kenya have rarely been held accountable, internally or externally. For a long time, there was no effective independent police oversight organ,⁴ and disciplinary proceedings were all too often applied in an unjust manner, if at all (National Task Force on Police Reforms 2009). Rather than investigating a case and examining the causes of alleged or proven police misconduct in order to prevent its recurrence, the officer involved was often transferred without further action. Police supervision was sometimes corrupt, fake⁵ or otherwise incompetent. Police regulations were not shared on paper with police officers, but communicated only during training. Members of the public were reluctant to file complaints about police misconduct, believing such complaints would go unheeded.

In order to address the issues listed above, civil society and other stakeholders have consistently and repeatedly called for police reform. The Government of Kenya carried out some reforms, but these had little impact.⁶ Calls for reform gained momentum after the ‘post-election violence’ of 2007/8, when the violence was of such magnitude that Kenyans, as well as the international community, feared for the country’s future stability. During a period of roughly two months over 350,000 people lost their homes and 1133 people were killed. Of these, 405 died as a result of gunshots, generally assumed to be from bullets fired by police (Commission of Inquiry into Post-Election Violence 2008). In order to end the violence, domestic actors and representatives of the international community convinced the leaders of the two major political parties at the time, contesting for Presidency, to sign the ‘National Peace Accord’. Its ‘Agenda item 4’ addressed ‘Long-term issues and solutions’; this included reforming the police because there was ‘a strong feeling that the level of post-election violence and destruction would have been minimized had the Police responded in a professional non-partisan manner’ (National Task Force on Police Reforms 2009, p. 1).

Hence, Kenya embarked on its current police reform process in 2009. In line with the recommendations of the National Task Force on Police Reforms, the key objective of the reform project is to enhance police professionalism and accountability; its goal is to ‘transform the Kenyan Police and the Administration Police Forces into an effective, efficient, professional and accountable security agencies [sic] that Kenyans can trust for their safety and security’ (Police Reforms Implementation Committee 2011, p.5). The reforms have been codified in the 2010 Constitution and subsequent laws, most notably the National Police Service Act (c.11a), National Police Service Commission Act (c.30) and Independent Policing Oversight Authority Act (c.35), all of 2011.

The ultimate litmus test for the success of these reforms is their impact on actual police practice: do they lead to more effective and fairer policing, the two key variables for assessing democratic policing? A good three years down the line, in the context of rising crime and insecurity due to the threat of terrorism, there is a growing sense that the reforms are having little impact and are on the verge of stagnation due to a lack of guidance, direction and political commitment.

This article looks at the reform process as it is unfolding in Kenya.⁷ It starts by exploring the challenges to police reform in Africa in general, then focuses on the reform process in Kenya. It looks at the establishment of three key new institutions handling

police accountability: the (Office of the) Inspector General (IG), the National Police Service Commission (NPSC) and the Independent Policing Oversight Authority (IPOA), and assesses what these institutions have achieved to date⁸: all three are struggling to implement their respective mandates, and their impact on the fairness and effectiveness of day-to-day police practice in Kenya thus far has been minimal. The article closes with an analysis of why the problems faced by police in Kenya over the past decades have persisted, despite the creation of these new institutions. It argues this was because the executive, headed by the President, was not supportive of the reforms and allowed ineffective and unfair policing to continue; and because the new institutions operate in the same political environment as the police, with limited guidance directing the reforms, causing them to struggle to claim their place in the new architecture.

2. Reforming the police: real change or creating a façade?

There is a general consensus that good policing is policing that is both fair and effective and that aims to work for the public good, as opposed to serving the interest of a particular subgroup (whether ethnic, socio-economic, political or otherwise). An effective and meaningful police accountability structure is a prerequisite for creating and sustaining fair and effective policing and involves direction setting (policies, laws and regulations, clear priorities); supervision; review and evaluation of police actions and decisions; and a feedback loop, to ensure lessons learnt feed back into new instructions.

Enhancing police accountability is often an important element of police reform, especially when the reform happens in the context of transition from an authoritarian to a more democratic state (Call 2003; OECD 2007). The assumption is that a more accountable police will be fairer, will gain legitimacy, will be held by more professional standards, will commit fewer violations and will improve its professional conduct, and as a result will become more effective and achieve public confidence. In particular, police reform projects often seek to enhance public accountability and independent oversight,⁹ in response to the observation that police tend to prioritise being accountable to their superiors and political masters over building relations with the general public and being open to independent scrutiny (Hills 2007). The political reality in many countries in Africa is that police are an instrument for those in power rather than a service to the people, and it is not necessarily in the interest of those in power to build a fair and effective police apparatus that is accountable to the public. Hills (2007) takes this even further, arguing that police in Africa tend to be accountable to their Presidents alone, who 'do not want an effective or efficient police answerable to parliamentary committees or judicial enquiries ... but they value the police as a tool for enforcing political decisions, maintaining order, regulating activities and regime representation' (p. 407).

She further notes:

The international policy agenda associated with SSR and policing [therefore] seeks to transform security institutions so that they play an effective and democratically accountable role in providing internal security. However, this approach fails to consider why presidents should accommodate such goals, all of which would reduce their personal power. (p. 405–406)

Hills is not the only author who argues that the primary function of the police in many countries is that of 'regime maintenance' (see, e.g. Ruteere and Pommerolle 2003; Akech

2005; Dehéz 2010). Although it is increasingly acknowledged that political leaders are more restrained now that most have adopted the language of democracy and unchecked abuse of power has become more difficult (Posner and Young 2007), the powerful are still likely to be reluctant to support those aspects of the reform project that weaken their control over the police, such as the installation of an effective accountability structure (but may be willing to support aspects that serve them, such as the acquisition of more effective terrorism-handling tools and skills).

Hills' assertion has been put into context by others (Akech 2005; Ruteere 2011) who claim that police by definition support the regime they are working for (they are, after all, the strong arm of the state) and that every regime, whether democratically elected or authoritatively imposed, has an interest in maintaining order. Ruteere (2011) further claims that Hills' assertion does not take into account that the police context is more complex than merely serving the President. He argues that police, at least in Kenya, are provided with a certain level of discretion and that individual police officers in Kenya take other factors into account as well, when deciding if and how to use their police powers (rather than merely following the orders of the ruling elite). The relevant question, then, is how police use their discretion: do they use it in order to provide fair and effective policing or do they use it to serve their own selfish, partisan or ethnic interests? Although a certain level of discretion is generally seen as a defining element of professional policing, because it is necessary to respond appropriately to situations as they present themselves (Osse 2007), such discretion may not always be used to achieve legitimate policing objectives, but can provide a setting for impunity, where police use lethal force, intimidate and harass members of the public and collect bribes. Mkutu and Wandera (2013) make a similar point, namely that the lack of professional autonomy for the police may serve the interests of the rulers the police serve, as well as their own interests. In other words, although it may be true that police do not only carry out the agenda of those in power – ultimately the President – they are accountable to him and *operate within the boundaries set by him* with very few checks and balances unrelated to the President. Indeed, an effective accountability structure that includes independent oversight would greatly diminish their 'playing field' as well as that of the rulers they serve.

Thus, based on the above, police reform in Kenya is likely to be a slow process of muddling through, and police will use their discretion in deciding what aspects of the reform package (including which recommendations made by the reform institutions) to support and which to ignore – possibly supported, or instructed, by the executive. And secondly, as the rulers will want to avoid any meaningful change, but are increasingly bound to comply with the 'rules of the game', they are likely to adopt 'reform-speak', paying lip service to the reform ideals, implementing only those activities that do not shake up the power dynamics too much. They will create a 'reform-façade', concealing the forces meddling with the process, so as to stabilise the prevailing balance of power and ensure nothing substantial changes.

3. Outline of the police reforms project in Kenya

It is important to state that the police reform project in Kenya is a 'home-grown' project. Though supported by international donors and the UN, it is strongly anchored in the values enshrined by the country's new Constitution, which was drafted through a highly participatory process and adopted by national referendum. The Constitution, and its

values and principles, strongly represents the values Kenyans aspire to. It is a highly progressive Constitution that promotes human rights, accountability and transparency and puts checks and balances on the executive including the President. It calls for ‘public participation’ so as to ensure that the voice of common Kenyans is heard and installs various reporting obligations so as to ensure state institutions account to them. The Constitution also changes the country’s administration structure from a national centralised state structure to a devolved one, involving 47 newly established counties. Police are defined as a ‘national security organ’ and fall under the responsibility of the national government, although the organisational structure of the police is aligned with the county structure and headed by commanders in each county.

The Constitution outlines the accountability infrastructure of the National Police Service (NPS). Overall command of the NPS, consisting of both the Kenya Police Service and the Administration Police Service – each headed by a Deputy Inspector General – is with the IG who has security of tenure for four years. The IG is given independence of command and the Constitution prohibits the Cabinet Secretary (i.e. the Minister), or anybody else, from interfering in police operations, investigations or employment and deployment matters.¹⁰ This means that the Provincial Administration, or its equivalent, can no longer direct the police.¹¹ Secondly, the Cabinet Secretary can give policy guidance only and this has to be in writing.¹² Thirdly, the Constitution establishes the NPSC as responsible for recruitment and appointment and confirmation of promotions and transfers and gives the Commission the authority to observe due process, exercise disciplinary control and remove persons holding or acting in offices within the NPS.¹³ The Commission’s independence is guaranteed under the Constitution, even though, due to its composition, the NPSC is a hybrid of both police and non-police (the IG and the two Deputy IGs are members, and the Commission includes two retired police officers, one from each Service; only the other four members are non-police). Fourthly, the Constitution places all national security organs under civilian authority. Fifthly, the Constitution instructs the police to behave according to well-defined values of integrity and to reach out to the communities.

In line with the new Constitution, key elements of the new legal framework for the police include:

- Clear descriptions of the functions of the Administration Police, Kenya Police, Criminal Investigations Directorate and Reserve Police;
- Establishment of an Internal Affairs Unit to investigate misconduct, which is independent of the two services and reports directly to the IG;
- Vetting of all current police officers on their suitability and competence by the NPSC;
- Clear descriptions of police powers and how they are to be used, including the power to use force and the power to arrest and detain;
- Disciplinary procedures meeting the standards of ‘fair administrative action’ as set out in the Constitution;
- Placement of human resource-related matters (‘hiring and firing’) under the control of the independent NPSC;
- Establishment of the IPOA to register and investigate all deaths and serious injuries resulting from police actions, independently investigate complaints against the police and monitor police operations;

- Requirement to make public the Service Standing Orders and other regulations, in the interests of transparency;
- Improvement of police–community relations by embracing community policing and establishing Community Policing Forums at local level and County Policing Authorities at the county level.

The new legislation recognises the different functions and the different actors required for an effective police accountability structure. The police line of command, headed by the IG, bears prime responsibility for internal accountability and plays a vital role in direction setting, supervision, evaluation and implementation of lessons learnt. The executive, i.e. the Cabinet Secretary, is responsible for outlining policies to which police should adhere. The NPSC and the IPOA both provide independent oversight, can review and evaluate police actions and decisions and make recommendations.

4. Current situation with regards to the reforms

All the three new accountability institutions are in place. IPOA Board Members, NPSC Commissioners and the new IG were all appointed between June and December 2012, following open, competitive recruitment processes; the interviews for the position of the IG were aired live on national television. Despite these achievements, the establishment of each of these institutions suffered from delays and obstructions. The actual publication of the National Police Service Act was delayed for one year¹⁴ and appointment of the Board Members, Commissioners and the IG all faced delays. All three institutions struggled with bureaucratic difficulties, such as acquiring access to funds, offices and staff, further delaying commencement of operations. In some instances, these problems were technical, while in others there were allegations of political interference and foul play (e.g. with the delayed appointments of the members of the NPSC, *Daily Nation* 2012). In addition, the Chair and one Commissioner of the Commission have received several death threats, the most worrying of which involved the delivery of a human head and hands in a box to the doorsteps of the Commission offices in August 2013. Ironically, such cases need to be investigated by the police, but there have been no reports of any such investigation resulting in charges (Muraya 2014).

Another setback stems from the government's decision to retain the Provincial Administration and install County Commissioners – representatives of the national administration – and to task them to play a role in security. This is clearly not in the spirit of the new Constitution, which gives command and operational independence to the IG, and thus blurs the lines of control and accountability.

Inspector general

The IG is responsible for taking the lead in acquainting his staff with the new legislation and ensuring they comply with the new requirements, implementing the new structures in so far as they fall within his mandate and ensuring all the Standing Orders and other (internal) procedures and regulations accord with the new laws and are made public. Since police continue to fail to comply with various new legal requirements, including those on the use of (lethal) force,¹⁵ they are clearly not adequately instructed to obey the new legal regime. Also, the new Standing Orders have yet to be released, jeopardising the principle of transparency. No one has held the IG accountable for these violations of the law.

In addition, there is an ongoing debate about the mandate of the Commission and that of the Office of the IG. It has been suggested (in the media and elsewhere) that the Commission (when appointing, transferring, recruiting, etc., as per its constitutional mandate) is encroaching upon the IG's independence of command and more generally that the various accountability mechanisms make it more difficult for the police to carry out their function, especially in the context of ever-rising crime (Ombati 2013; Some 2014a). Against this background, the deteriorating relations between the IG and the Chairman of the Commission make frequent headlines. The IG continues to appoint, transfer and discipline staff, despite this now being the mandate of the Commission of which he is a member and despite various Court Orders that he has no mandate to do so unilaterally.¹⁶ Moreover, the Cabinet Secretary has publicly supported the IG in these transfers, even since the Court Order (Ndonga 2014), revealing a lack of commitment to (or understanding of) the objectives of the police reform project. What was labelled 'turf wars' culminated in various proposals to amend the NPSC and NPS Acts and uncertainty about the Commission's composition, budget and future in general.

Proposals for amendments to the police Acts started circulating shortly after the key institutions were established, in early 2013. In April 2014, the NPSC Amendment Act (c.3) was published, which further interprets and defines the Commission's constitutional mandate vis-à-vis that of the IG; and in July 2014, the NPS Amendment Act (c.11) was published. The amendments weaken the independent oversight mechanisms, while strengthening the executive's control over the police. The IG's independence is also weakened, as the President now has much more control over the recruitment and removal of the new IG.

Public confidence in the IG is low. In a survey, held in March 2014, IPSOS Synovate (a social and media research agency) found that only 12% of the respondents had confidence in the IG, a drop of 9% from the survey of three months earlier, and there are ever more calls for his resignation, including by the Law Society of Kenya (Law Society of Kenya 2014). One of the problems is the IG's inclination to deal with operational affairs (sometimes at the order of the President or the Vice-President) at the expense of dealing with the more strategic issues, including the reforms. There are doubts about the (operational) independence of the IG. This was particularly evident when the IG was ordered by a Court to arrest the then Principal Secretary, Mr Mutea Iringo, and refused to do so 'because by doing so, it will embarrass him' (*The Star* 2014) (the case was settled when Mr Iringo presented himself voluntarily). Another example was when the IG banned all political rallies in 2014, interpreted by many as an attempt to please the President, but rescinded the ban within 12 hours, allegedly at the order of the President (Some 2014b).

National Police Service Commission

The Commission, a new institution in the Kenyan police architecture, has successfully recruited the IG, the two Deputy IGs and the Director of the Criminal Investigations Directorate, as well as 7000 new police recruits, and has reviewed and advised on numerous transfers and promotions, as per its mandate (NPSC 2014).

One of the key tasks of the Commission, and potentially the most influential intervention the Commission can make regarding the police reforms, is the vetting of all members of the NPS on suitability and competence.¹⁷ The Commission commenced the process in late 2013, starting with the highest ranks. To date, of the first 196 officers

vetted, 170 passed, 13 did not, 11 will need to be re-vetted and 2 cases are pending in Court. In addition, 16 officers have voluntarily decided not to undergo the vetting exercise; they will leave the Service with a retirement package.¹⁸

The vetting exercise unearths a wealth of information about internal functions and proceedings within the police, in particular about management and control, human resources practices and the personal integrity of police officers in the top ranks. In line with what the National Task Force on Police Reforms found in 2009, the vetting reveals incredible negligence, bordering on incompetence, when it comes to leadership responsibilities.¹⁹ However, it is unclear how, if at all, this information will be used, and if and how it will elicit changes to internal procedures within the police in order to prevent their recurrence, or even whether those responsible will be held accountable.

The vetting process appears hurried. Civil society has raised concerns that the exercise focuses heavily on financial impropriety at the expense of the scrutiny of human rights records and that the process leaves too little time for members of the public to come forward with their information (IMLU 2014a; Usalama Reforms Forum 2014). Also worrying is that despite the process, which was meant to empty the police of persons lacking integrity and restore public confidence in the police, certain people who are generally believed to lack integrity passed their vetting and remain in the NPS. The Commission claims it passed people when the information provided was not sufficient to dismiss them; civil society, amongst others, contests this.²⁰

Usalama Reforms Forum conducted a survey, in early 2014, interviewing over 1500 respondents from communities across Kenya and 600 police officers about their perception of the vetting exercise (Usalama Reforms Forum 2014). The survey reveals that 80% of the police, and slightly over half of the non-police respondents, knew about the vetting exercise, but less than 20% of the police had actually read the vetting regulations and tools (despite these being available on the Commission's website). In support of the critique by civil society, about 90% of the community members did not understand or see a role for themselves in the vetting exercise. Only 38% of the community members, and 27% of the police, thought that vetting would help restore public confidence in the police. This could be caused by the lack of confidence respondents had in the fairness of the process: 27% of community members interviewed, and only 12% of the police officers, thought the Commission was carrying out the vetting fairly. In addition, Usalama asked 50 senior officers who had undergone the vetting what they thought of the exercise: of these, 91% believed the process had not been fair and adequate, mostly because they did not trust the members of the vetting panel. They also claimed not to know what qualifications and experience were needed to pass the vetting. This is again an indication of lack of support by the senior police leadership, as it shows they failed to inform themselves about the vetting process and procedures applied.

Independent Policing Oversight Authority

The key tasks of the Authority are to investigate complaints of police misconduct and any case of death or serious injury at the hands of the police and maintain reliable statistics about these. However, it is not clear how many complaints IPOA has received as the data in the various annual and performance reports differ. According to its first annual report (July 2012 to June 2013), the Authority received 594 complaints in its first year and started investigations into four.²¹ In addition, the Authority received 250 complaints in the second half of 2013 and launched investigations into 22 cases, one of which was

completed and forwarded to the Director of Prosecutions (IPOA 2014b). The number of reported cases could have been much higher considering 30% of all Kenyans interviewed for the Authority's Baseline Survey, held in 2013,²² indicated they had experienced police misconduct in the past 12 months, and of these only 30% had reported the misconduct (but not necessarily to the Authority). In addition, 53% of the police officers interviewed said they had experienced misconduct. Hence, although the number of complaints gives an indication of public confidence in the Authority, it could have been twice if not three times as high.

The data regarding notifications of deaths and serious injuries is also inconsistent in the various reports, but is somewhere in the region of 80 notifications per half year, affecting 120–130 victims (IPOA 2013a, 2013c, 2014a, 2014b). Of those killed, roughly 80% were 'deaths in custody', which indicates that police still fail to report many of the deaths that follow shoot-outs and other deaths and injuries resulting from police actions, and subject them to independent scrutiny. This is confirmed by a survey by the Kenya National Commission on Human Rights, which found that police had unlawfully killed 120 people between May and August 2013 under circumstances that could have been avoided and did not report these to IPOA for investigation as required under the law (Human Rights Watch 2014).

The Chairman of the Authority expressed alarm over the lack of compliance with the IPOA Act, including falsifying evidence to avoid being charged with unlawful killings and ignoring summons by IPOA, and threatened to sue the officers who failed to comply (Mukinda 2014). However, to date IPOA has taken only one police officer to Court,²³ and its investigations have yet to result in any disciplinary action or noticeable policy change. Also, the small number of actual investigations has drawn criticism (*Standard Digital* 2014). Indeed, IPOA has prioritised building its organisation, establishing its policies and regulations and acquiring competent staff (IPOA 2014a, 2014b), possibly at the expense of producing results on its mandate.²⁴

On the positive side, some of the Authority's recommendations have been complied with, such as the publication of the NPS Act, the appointment of the NPSC Commissioners and the appointment of the IG and his deputies (IPOA 2014b). Also, the establishment of the Authority has contributed to overall transparency, given the data that are now disclosed, and the organisation's annual and performance reporting, all of which are publicly available on the website.

Its Baseline Survey makes a good start in measuring progress on police reforms. The finding that only 34% of the respondents have confidence in the Authority's ability to hold the police accountable must inspire it to increase its efforts – although 62% of police officers interviewed state they have confidence in the Authority and believe it can deliver its mandate. Yet the expectations of police officers interviewed mainly concern the improvement of police salaries and living conditions, improvement in the handling of their own complaints, and more fairness in disciplinary proceedings – rather than the enhancement of accountability of the police vis-à-vis the public.

5. Impact on enhancing police fairness and effectiveness in practice

Despite the establishment of the various police accountability institutions, and the improved transparency as a result of this, the impact on police practice remains modest. Police are still ineffective, unjust in their operations, actions and decisions, and lacking in accountability (Human Rights Watch 2014; see also Usalama Reforms Forum 2014). In

fact, Usalama found that police officers contribute to crime, rather than to its prevention or detection: ‘since 2011, a Police officer has been involved in 1 out of 7 armed robberies in the country. According to the latest statistics, 2 out of 11 car hijackings involve police officers and 1 out of 14 kidnappings’ (NTV Kenya 2013).

It is hard to assess crime levels in Kenya objectively, as the country does not keep reliable crime statistics,²⁵ but there is a strong sense of declining security and a feeling that the security agencies, most notably the NPS, are not in control.²⁶ This is confirmed by two recent publications. IPOA’s Baseline Survey, referred to above, included an assessment of how effective and efficient the police are in case management, from investigations to arrests and prosecutions (IPOA 2013b). The survey found that 64% of all felony cases reviewed did not meet the minimum evidentiary threshold to charge a person with an offence. And in May 2014, the Budget Estimates released by the National Treasury revealed that of the 1709 murder cases filed in Court in 2013 only 264 ended in a conviction, again raising doubts about the quality of the investigations conducted by the police (*Daily Nation* 2014a).

Police ineffectiveness was probably most clearly illustrated by how the security agencies (not just the police) dealt with the terrorist attack on the Westgate shopping mall in Nairobi, in September 2013, failing to act on intelligence received to prevent the attacks and failing to bring anyone involved to justice (other than some very minor alleged accomplices). The absence of any public – or otherwise independent – evaluation or mechanism (including IPOA) to hold the police, army and National Intelligence Service to account for their failure to prevent the attack or to respond appropriately when it occurred reveals a lack of professionalism and an inability to learn from past mistakes. Despite this, the IG repeatedly made public statements professing how well the attacks were handled without acknowledging the mistakes that were made (Bruzzzone 2014). Similarly, in April 2014, the police started a major operation to find and expel suspected terrorists, ‘Operation Usalama Watch’, detaining thousands while verifying their documents. The operation was seen by many as an operation targeting ethnic Somalis indiscriminately, more concerned with providing an avenue for extortion and harassment than with restoring security (Muhumed 2014).²⁷

The lack of fairness can be derived from police restraint, especially on their use of force (National Research Council 2004). Police in Kenya are renowned for excessive numbers of extra-judicial killings, as demonstrated by the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions (in 2009 and 2011), and the reforms have not slowed this trend. On the contrary, the Independent Medico-Legal Unit found that the number of extra-judicial executions rose in 2013 and again in 2014 (IMLU 2014b). Police are given frequent ‘shoot-to-kill orders’ to deal with crime or ‘finish’ terrorists, despite there being no such provision in law (see, e.g. Mwahanga 2014). Though the IG publicly announced that such orders are not in line with the law and that his officers should not follow such orders (Wabala 2014), police in Kenya receive mixed messages, even from the IG, when it comes to the use of lethal force, and police killing so-called ‘thugs’ seems to have become the crime-handling methodology of choice. It is conspicuous that the ‘thugs’ are seldom injured but rather killed, that police officers are seldom injured or killed and that these killings are rarely independently investigated. Therefore, it is not known whether the use of lethal force was lawful, i.e. took place in order to protect life as is required under international human rights standards as well as under Kenyan law.

Fair and effective policing translates directly into a rise in public confidence in the police. Usalama's report, based on interviews with some 300 respondents in early 2014, indicates that only 36% have confidence in the police in their community: the lowest level since 2008.²⁸ Even lower is the score as measured by IPSOS in March 2014, with only 11% of respondents indicating they had confidence in the police (IPSOS Synovate 2014), a similar result to that found by the Afrobarometer in 2011,²⁹ with only 14% stating they have 'a lot' of trust in the police and 33% having no trust 'at all'.³⁰

Yet on the other hand, and this may be a more important indicator, Usalama found that between 20% and 30% of the respondents find that change is taking place in the NPS and that police are becoming more disciplined, showing more accountability and becoming more professional. This is a positive score, and it will be interesting to see how this develops over the next few years and if and how this will translate into fairer and more effective policing.

6. Analysis

Based on the findings and observations presented in this article, it can be concluded that, all things remaining equal, the police reform project in Kenya is unlikely to achieve its intended objectives, as defined in the introduction of this article, in the near future. Because commitment to the process seems shallow, and there is little guidance to direct the reforms, actions and decisions by key reform actors that challenge the aims of the reforms remain largely inconsequential.

This raises the question: why is commitment to the reform process so limited? As Hills (2007) has argued, those designing police reform processes often misunderstand or underestimate the power dynamics in African contexts, and where independent oversight over the police goes against the interests of those in power, such oversight will not be supported. In Kenya, however, those who designed the process were Kenyans, well aware of the local context, and the outlines of the reform project were captured in the 2010 Constitution of which Kenyans proudly, and rightly, take ownership. Indeed, it is not likely the reform process is being frustrated just because adherence to human rights is seen as an obstacle to effective law enforcement – though that excuse is being vocalised. Nor is it likely that the reforms are being frustrated because fair and effective policing would be an alien notion, incompatible with the Kenyan reality. Although it is true that policing in Kenya is still largely modelled on colonial standards, designed to guard the interests of those in power rather than being a service to the people, by adopting the new Constitution, Kenyans clearly expressed that they wanted to step away from that model and be governed, and policed, in a transparent and accountable manner.

Then why the lack of commitment to the reform process, a reform process that was home-grown and has the support of the Kenyan people and for which the required institutions have all been put in place? Why would Kenya's leadership not want their police to be fair and effective, especially in view of the current levels of crime and the terrorism threat that targets anyone indiscriminately, as demonstrated by the Westgate drama?

There are at least three factors at play, all of which relate to the potential impact police reforms could have on the political and power dynamics in the country.³¹ The first factor is that Kenya, its politics dominated by tribalism (Branch 2011), has a history of a winner-takes-all mentality and 'the quest for the presidency [has become] a zero-sum game' (Truth, Justice and Reconciliation Commission 2013, p. 21). As a result, those

challenging the regime are a direct threat not only to political stability but also to access to wealth. As such, it is useful for the regime to have police who are loyal to them, rather than politically neutral servers of the general public, in order to help quell those challenging the rulers. A second factor concerns organised crime and corruption in a country that has a 'culture of impunity' (Branch 2011). Reports of political involvement in drug trafficking and ivory poaching, and corruption cases involving senior Government officials and businessmen closely related to the political elite (Gastrow 2011; Kahumbu 2014), underscore the fact that it may not be beneficial for the country's elite to have truly professional police that handle crime effectively, since they themselves might be targeted by police investigations. Similarly, an effective police would be more likely to effectively investigate those behind election-related violence, including that of 2007/8. Finally, it is important to note that both leaders of the Kenyan executive, the President and the Deputy-President, are suspects of the International Criminal Court (ICC). It is likely that one of the reasons the (previous) Kenyan Government embarked on police reform was to make a favourable impression on the ICC and more generally on the international community, rather than because of a genuine desire to improve policing. There have been consistent allegations of the lack of cooperation of the Kenyan Government with the ICC, including allegations of withholding evidence and intimidating prosecution witnesses (Bryant 2014), which, if true, are likely to have involved the cooperation of members of the NPS one way or another.

For these reasons, it serves the interests of the leaders of the executive to keep the police under their control and hold them accountable to the executive rather than to the public. However, while the political class and the executive have limited support for the reforms, they prefer to present themselves as reform-minded, so they use 'reform-speak' without corresponding action. The political and police leadership make regular statements about their commitment to improving policing, but often these statements refer only to increasing police numbers, increasing salaries, improving police housing, etc., none of which – although they are undoubtedly important – are likely to have a substantial impact on actual police performance in practice, unless they are accompanied by clearer instructions from an effective line of command that is truly committed to professionalism and competence. As Kramon and Posner (2011) noted some years ago: 'The Kenyan political class has shown great skill at adapting to new conditions while perpetuating the underlying status quo' (p. 99). The guidance and direction needed to implement the reforms effectively is characterised by mixed messages and inconsistent instructions. It is likely this ambiguity is not accidental, for as long as the process remains opaque, it will be difficult to assign responsibility, as it will not be entirely clear what needs to be done, and what not, so there is space for key actors to implement only those aspects of the reforms that suit them, while delaying others, making it more difficult for (external) monitors to scrutinise actual progress (or lack thereof).

It is within this context that the current IG was selected and appointed, and it seems likely that he was expected not to shake up things too much. Being subject to the President and the executive, the IG operates within the space bestowed on him and makes calculated judgements about what to support and when to act as required under the reform agenda.³² This article has discussed some examples of the IG's actions, but probably the most telling is how the IG deals with demonstrations against the regime and rallies organised by the opposition (a right under the new Constitution). Some peaceful demonstrations have been quelled using excessive force (see, e.g. Moore 2014); on other occasions, the IG has issued statements denying people the right to assemble (although

often he later denies the statement, claiming he's been misquoted) (Some 2014a); yet on other occasions, he has facilitated mass rallies challenging the regime (most notably the 'saba saba' rally organised by the opposition on 7 July this year) (Daily Nation 2014b).

Another problem that makes the reform process somewhat unfocused is that the police reform process in Kenya has always been strongly legalistic, with little concern for the underlying policy. But as the Constitution and its subsequent legislation are open to different interpretations, this legal framework gives only limited guidance for its implementation. Rather than the various stakeholders seeking consensus in the *spirit* of the law, those involved dig themselves in as per the *letter* of the law, attempting to impose their interpretation based on their position. This frequently leads to Court cases resulting in incident-based decisions, rather than progress towards a shared comprehensive vision laid down in policy.

In the absence of clear guidance from the top, guidance could come from the bottom – the public – creating a 'push' for reforms. However, the public is also unclear on what it wants from the police. Public opinion of policing standards in Kenya is ambivalent, with members of the public giving mixed messages on, for example, police killings (sometimes supporting these, sometimes condemning these). Although there are general concerns about the police's lack of professionalism and competence in dealing with crime and security, many Kenyans are apologetic about petty police corruption and (are led to) believe strong-arm policing is the best way to deal with 'criminals' and restore order – and this belief seems to have intensified since the recent terrorist attacks. As a result, pressure for police reform has been limited and public support for human rights-based reform cannot be taken for granted. Civil society should be able to bridge this gap and enhance its impact by being more vocal in holding the oversight institutions to account, but currently civil society seems to be struggling to participate in the issue of police reform. Some groups try to engage with the police while others feel more comfortable keeping a critical distance. A joint integrated strategy on how best to approach police reform has yet to be established.

7. Conclusion

This article looked at the practice of reforming the police in a country where political support for reform is ambiguous. Although it is true that Kenya passed into law a legal framework to guide and implement police reforms and established the related reform institutions, the visible impact on police practice has been minimal. Political support seems only to be for those (aspects of the) reforms that do not substantially enhance effective and impartial policing.

It seems unlikely that the impact of the reforms will increase under the current administration. In effect, what is called 'reform' is actually stabilisation. By establishing new institutions, the administration has created a veil of enhanced accountability. Although they have adopted 'reform-speak' and taken on the language of accountability and transparency, the actors involved seem highly conscious of the power dynamics in the country and seem wary of disturbing that balance. The current political situation, the current level of insecurity and the ambivalent attitude of the general public as to what exactly professional policing should encompass further complicate the issue of police reform. As long as there is no clear, shared vision of the reforms' objectives, it is easy for those unsupportive of reforms to delay their implementation and ensure their impact on police practice remains minimal.

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Notes

1. The author is an independent consultant specialising in 'Police and Human Rights' and worked on the police reforms process in Kenya from 2011 to 2013. The insights in this paper are a product of public reports by government agencies and nongovernmental organisations, newspaper articles and interviews.
2. Kenya has two separate Police Services: the Kenya Police Service and the Administration Police Service. Together they form the National Police Service (NPS). Whenever this article refers to 'police' in Kenya what is meant is the NPS. Note that this article will focus on the NPS in general, and will leave out the role of special units, such as the Anti-Terror Police Unit, the Kenya Police Reservists and the General Service Unit.
3. The Task Force, and others, also documented the undignified circumstances in which many police officers live at the police barracks. And IPOA raised alarm over sexual harassment in the Service: '[IPOA] has so far received 759 complaints against individual police officers, most of which are related to sexual harassment' (Ndonga 2013).
4. Apart from the Kenya National Commission on Human Rights and the Ethics and Anti-Corruption Commission.
5. In 2013, the case of 'Joshua Waiganjo' made daily headlines in the Kenya media: a high-ranked police officer (Assistant Commissioner), who was carrying out command functions and even firing junior officers, turned out not to be a police officer at all. For more information, see Wikipedia: http://en.wikipedia.org/wiki/Fake_PPO_Probe (accessed 19 May 2014).
6. In 2003, the Government of Kenya established a Task Force to review the terms and conditions of the policing institutions. The Task Force drafted a 'Strategy Plan 2004–2008', largely focusing on improving salaries and allowances and enhancing budget allocation to address infrastructural, operational and administrative concerns. It also contained elements of the reforms of today, acknowledging objectives such as enhancing accountability and improving community relations. Subsequently, the 'GJLOS programme' (Government, Justice, Law and Order Sector) enabled the police to acquire training, equipment and vehicles.
7. Note that there are aspects of the reform package that are ignored in this paper, such as changes to the police training curriculum, housing and insurance package, etc. This paper focuses on those aspects of the reform package that aim to enhance accountability.
8. Police reform is an ongoing process, with new developments on a weekly, if not daily basis. This paper describes the developments up to early July 2014.
9. Especially those reform projects that aim to enhance respect for human rights and those that intend to build police institutions as part of a democratisation process (see Call 2003).
10. Constitution of Kenya, Article 245.
11. The Provincial Administration used to have control over the Administration Police, leading to frequent interference in police operations.
12. Constitution of Kenya, Article 245.
13. Constitution of Kenya, Article 246.
14. The actual Act was only published in July 2012, almost a year after it was adopted in Parliament and assented to by President Kibaki.
15. As provided for in s41, as well as the 6th Schedule of the NPS Act.
16. See, for example, the judgements by Judge George Vincent Odunga, on 2 March 2014 (Miscellaneous Civil Case 226 of 2013) and 19 December 2013 (Misc. Civil Application 93 of 2013 (JR)). Both are available online, from: http://kenyalaw.org/caselaw/cases/advanced_search/ (accessed 7 July 2014).
17. As per section 7 of the NPS Act.

18. According to the NPSC, available from <http://www.npsc.go.ke> (accessed 4 July 2014). Of the first 30 officers ranked immediately below the IG, 5 did not pass initially. Four of these five officers have challenged the decision in Court, and the fifth officer has appealed through the Commission's review panel. The review panel decided to reinstate the officer, and the Court decided in two cases that the officers needed to be vetted afresh (Muraya 2014). At the time of writing this article, the Commission is in the process of preparing for the next batch, of 1168 officers.
19. Examples are many: the Director of Inspections, who admitted Inspections' recommendations were never followed up; the Head of Community Policing, who admitted Community Policing had failed in Kenya; the senior police officer who drew a salary despite not working for a year; various senior police officers having unexplainable wealth (CHRI and HURINET Uganda 2014).
20. Based on personal communication between the author and members of civil society.
21. Yet according to its second performance report, IPOA received 663 complaints in the first six months of 2013.
22. For which over 5000 respondents across Kenya were interviewed, and another 515 police officers.
23. This was for failing to cooperate with the Authority. The case is believed to have a strong deterrent effect on future obstruction.
24. In addition, the Authority has carried out inspections of 25 police stations and has monitored police operations.
25. 'Most crimes committed in the country are under-reported, making police crime statistics unreliable, investigations reveal. The available data does not give the true picture of the prevalence of serious crimes such as rape, murder and robberies, making it difficult to formulate effective crime control policies. The statistics, which give the nature, extent and trends in crime rates, are under-reported, suppressed, or distorted. Police do not record all crimes reported to them, and have also been accused of using statistics selectively to suggest improvements in security' (*Daily Nation*, 3 November 2013).
26. "'Kenyans have never been as insecure as they are right now, generally speaking," he said. "We've never had less confidence in our government's ability to deal with this insecurity – that is the most serious problem.'" Interview with John Githongo in *The Guardian* (Anderson 2014).
27. This was confirmed when there were several bomb attacks in early and mid-May 2014, in Mombasa and Nairobi, after *Usalama Watch* had been in progress for some weeks.
28. In addition, *Usalama* found that confidence in the ability of the police to provide ordinary day-to-day policing had dropped to 28% (from 34% in 2012); the number of respondents who believed that policing services and standards have improved over the past 24 months had dropped to 30% (from 36% in 2012) and 36% believed services had become worse.
29. Based on interviews with 2400 adults throughout Kenya, in November 2011.
30. Furthermore, the Afrobarometer found that 30% think 'all' police are involved in corruption (and 39% think 'most of them' are involved in corruption; the police scores by far the highest in corruption of all the state agencies and institutions in the survey); 32% indicate it is 'very difficult' to get help from the police, and only 18% say it is easy.
31. It should be noted that there are probably other factors at play that have less to do with the power dynamics of the country and more to do with the discomfort Kenya's leadership may feel about the country's new status of being a terrorist-targeted nation, as any acknowledgement of the necessity of reforms would simultaneously reveal there is a security problem, which would threaten the carefully constructed idea of Kenya being a haven of peace in an otherwise unstable region (Branch 2011).
32. In a certain way, the same can be said about the accountability institutions. Operating in an 'unwilling context', one that does not show clear unequivocal support of the reforms, they also find themselves struggling to implement their mandates and uphold the related authorities and responsibilities. For, like the IG, if these structures are to gain relevance and achieve meaningful change, they need to take a more impartial, independent position, which is not yet customary practice.

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