

THE IDEAL SCOPE OF THE DOCTRINE OF POLICE INDEPENDENCE IN KENYA

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

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JANUARY 13TH 2017

ACKNOWLEDGMENTS

I would like to express gratitude to my supervisor Anne Kotonya for providing me with guidance as I researched on and wrote my dissertation.

Declaration

I, **MIRING’U HOPE WANGUI** do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Abstract

The doctrine of police independence is a concept that determines the discretion given to the police in carrying out their activities. This research paper focuses on the origins and purpose of this doctrine, how it has been applied in Kenya and the ideal scope of this independence that should be given to the police to ensure effective and efficient service. The objectives of this study are to examine the current scope of police independence, to identify the weaknesses in the current scope of independence and to establish the mechanisms that can be put in place to reshape the level of police discretion. To achieve this, an analysis of the Constitutional provisions as well as other pieces of legislation is used. In addition, the paper covers both internal and external influences over police activities through the use of qualitative research methodology. Particular attention is given to the historical research approach as it is essential to this study to trace the development of the freedoms and responsibilities of the police from colonial times to the present day in Kenya in order to establish the growth and changes of police independence.

The greatest influence over the level of police discretion is the political settlement by the political elite. This can be attributed to the role that the police have played since colonial times when the colonial powers established the institution of the police as a tool to enforce their rule and silence any opposition from the public. The police remained subject to the influence of those in power even after independence and the interests of the public were overridden by the interests of the political elite. The police reform process attempts to depoliticize the police which is paramount in aiding the police in achieving autonomy in their work. Radical changes are required to not only achieve this but to completely transform the perception and role of the institution of the police in Kenya which has been a corrupt and oppressive institution from its genesis.

LIST OF ABBREVIATIONS

AP- Administrative Police

ACPO- Association of Chief Police Officers

CIPEV- Commission of Inquiry into the Post Election

CORD- Coalition for Reforms and Democracy

DCI- Directorate of Criminal Investigations

GCB- Global Corruption Barometer

IAU- Internal Affairs Unit

ICTJ- International Centre for Transitional Justice

IEBC- Independent Electoral Boundaries Commission

IGP- Inspector General of the Police

IPCC- Independent Police Complaints Commission

IPOA- Independent Police Oversight Authority

KNCHR- Kenya National Commission on Human Rights

KPS- Kenya Police Service

NSC- National Security Council

NPS- National Police Service

NPSC- National Police Service Commission

NYS- National Youth Service

OCS- Officers Commanding the Stations

PACE- Police and Criminal Evidence Act

PCA- Police Complaints Authority

PEV- Post Election Violence

PRIC- Police Reform and Implementation Committee

SSP- Senior Superintendents of the Police

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CHAPTER 1: INTRODUCTION

BACKGROUND

The doctrine of police independence is an essential aspect in the maintenance of law and order and is especially paramount in Kenya. Of particular concern to this study is the political independence of the police which refers to the external relations between the police and elected officials and their “political” staff or assistants, and other public servants such a departmental staff.¹ Throughout history, the police have been identified with the suppression of any opposition to those who held positions of political power and have been guilty of numerous violations.² Their impunity has been to the benefit of the political elite but it has also been to the detriment of the general public as has been reported in instances where fundamental rights are abused in instances in which the police exercise discretion in their work.

This paper seeks to look into the origin of the doctrine of police independence and the role that it was created to play as well as how it should be applied in the Kenyan context in defining the freedoms and responsibilities of the National Police Service (NPS).

There is need for an interrogation of the laws in place to establish whether the current reforms are geared towards the proper functioning of the police in Kenya. It is paramount to identify whether the police adhere to the 2010 Constitution which requires them to conduct themselves in a professional and competent manner and in a system of accountability, respecting human rights and fundamental freedoms.³ There is also a consideration to be made on whether the police are acting independently, free from political influences and the old guards that are curtailing the smooth adaptation and use of these reforms.⁴ Addressing these considerations will then enable the identification of the ideal scope of police independence in Kenya.

¹ Stenning P, ‘*The idea of the political “independence” of the police: international interpretations and experiences*’ (2007).

² <https://www.ictj.org/news/kenya-police-reform>. Accessed on 16th February 2016.

³ Article 244, *Constitution of Kenya 2010*.

⁴ <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>. Accessed on 13th August 2016.

Regina v Metropolitan Police Commissioner Ex parte Blackburn

The locus classicus of the doctrine of police independence is the case of *R v Metropolitan Police Commissioner Ex parte Blackburn*.⁵ This case looks into the role of the police in enforcing gaming laws in London. The applicant was concerned with the way in which Big London Clubs were being run. He went to see a representative of the Commissioner of Police and told him that illegal gaming was taking place in virtually all London Casinos. He was told that action would be taken but nothing happened. On March 15th 1967, the applicant wrote to the Commissioner stating the same.⁶ He asked for assistance in prosecuting these clubs. A Mr. Bearman on behalf of the Commissioner spoke with him and explained that there were difficulties in explaining this because the use of police manpower was at the discretion of the Commissioner.⁷ There were also challenges in enforcing the 1963 Act and prosecuting this illegal gaming would be contrary to Section 32 of the Act.

The applicant then made an application to the divisional court requiring the following: assistance in prosecuting gaming clubs, assistance in a particular complaint against a gaming club and reversal of the policy decision.⁸ These grounds for application were rejected in the district court. The applicant then appealed on the third count. The policy that was made by the Commissioner was a confidential instruction to senior officers of the metropolitan police that; “Action would not be taken against clubs for the breach of gaming laws unless there were complaints that were made of cheating or they had become haunts of criminals.”⁹

The rationale behind this was that by virtue of the uncertainty of the law, the expense and manpower involved were not justified unless there were complaints of cheating or if there were reason to believe that the club had become a haunt for criminals.¹⁰ This decision meant

⁵ [1968] 1 ALLER.

⁶ [1968] 1 ALLER, at 763.

⁷ [1968] 1 ALLER, at 763.

⁸ [1968] 1 ALLER, at 765.

⁹ [1968] 1 ALLER, at 766.

¹⁰ [1968] 1 ALLER, at 766.

that clubs could carry out these illegal activities without any interference from the police. The applicant said that it was erroneous of the police to do so.¹¹

Lord Denning outlined the duty of the Commissioner of the Police.

“The duty of the Commissioner had never been defined by statutes or courts; every constable is independent of the executive, he is not subject to orders from the secretary of state unless he is called to give a report, he should enforce the law of the land and he decides who to prosecute. The police constable is a servant of the law alone and the duty of law enforcement lies on him. Therefore he answers to the law and the law alone.”¹²

He then looked at the ways in which the police can be compelled to do their duty since where there is a duty there should be a means to enforce it. This is through an action at the suit of the Attorney General or a prerogative order of mandamus.¹³ Nevertheless, it is the duty of the police to ensure that the intentions of Parliament are effected in the exercise of their duties; the rule of law must prevail.¹⁴

Salmon L.J stated that the duty of the police is to enforce the law though the law states that the Home Secretary cannot issue any order to the police regarding law enforcement which would give the impression that the police are above the law and immune from the control of the court.¹⁵ Counsel to the Commissioner stated that police discretion is absolute and cannot be challenged by a court; he stated that the police owe the public a clear duty to enforce the law and if they do not then the court should have the ability to intervene.¹⁶

Edmund quoted Fuller when he said, “Be you never so high, the law is above you”.¹⁷ He agreed with the applicant that the effect of granting the police this discretion would be placing

¹¹ [1968] 1 ALLER, at 768.

¹² [1968] 1 ALLER, at 768.

¹³ [1968] 1 ALLER, at 769.

¹⁴ [1968] 1 ALLER, at 769.

¹⁵ [1968] 1 ALLER, at 770.

¹⁶ [1968] 1 ALLER, at 770.

¹⁷ [1968] 1 ALLER, at 775.

them above the law. The police owe a duty to the public to carry out duties which are *raison detre* that is, of their existence.¹⁸

The standing in the Blackburn case is that the duty of the police is to enforce the law and these actions in enforcement are to be done at their discretion. The freedom from control from any authority is in order that the police act in an impartial manner. They are to be subject to the law which should also be geared towards the betterment of society.

However, despite the rationale behind police discretion in their activities the question of possible accountability arose. This was raised by Jefferson and Grimshaw; the problem with police discretion is accountability. This was not only in specific matters but also in general matters.¹⁹ Accountability was an important basis for the legitimacy of the police. It was paramount for the justification of police actions. Nevertheless, there was tension between the discretion of police action and the requirement that the police were to be answerable to the institutions that represented communities.²⁰

What was needed was a system of strong legitimation for the police where fully elected authorities could issue policies that would be legally binding on chief officers.²¹ Such policies comprised appointments, dismissals and disciplinary measures of the police. An attempt at this was made by Jack Straw M.P who introduced a private Members Bill that set out general policies that would be determined by the police.²² Other methods of accountability were sought such as Lord Scarman's advocacy of statutory local consultation in his report of Brixton disorders.²³ These orders were diluted by Police and Criminal Evidence Act (PACE) which initially created the Police Complaints Board which unfortunately did not provide independent investigation of the police. Thereafter the Police Complaints Authority (PCA) was created which provided more oversight by creating measures that required the chief

¹⁸ [1968] 1 ALLER, at 775.

¹⁹ Jefferson T and Grimshaw R, *Controlling the Constable: Police Accountability in England and Wales*.

²⁰ Baldwin R, 'Why Accountability?' *The British Journal of Criminology*, Vol. 27, No. 1, *Why Police?: Special issue on policing in Britain* (Winter 1987), pp. 97-117, at 98.

²¹ Baldwin R, 'Why Accountability?' *The British Journal of Criminology*, Vol. 27, No. 1, *Why Police?: Special issue on policing in Britain* (Winter 1987), pp. 97-117 at 98.

²² Baldwin R, 'Why Accountability?' *The British Journal of Criminology*, Vol. 27, No. 1, *Why Police?: Special issue on policing in Britain* (Winter 1987), pp. 97-117 at 99.

²³ Baldwin R, 'Why Accountability?' *The British Journal of Criminology*, Vol. 27, No. 1, *Why Police?: Special issue on policing in Britain* (Winter 1987), pp. 97-117 at 99.

constable to refer all complaints of death or serious injury. However, the issues that arose with this system were:

1. Investigations were still conducted by the police themselves;
2. There were limited cases that were addressed by the authority;
3. The number of cases that were handled did not show a continuing process of oversight;
4. There were evidentiary difficulties;
5. There was the exclusion of the complaints directly influencing the chief officer;
6. Disciplinary measures were internal operations.²⁴

Another system of accountability was by the judiciary. The judiciary could not interfere with the discretion of the police and it was more concerned with fair proceedings than the extent to which the police were exercising their legal powers. The Central government, through the Home Secretary, set guidelines on the taking of statements by the police as well as consultative procedures.²⁵

The PACE rules improved the judges rules and increased Parliamentary oversight of the Police. They also created a package in which broader police powers were balanced by the provision of disciplinary measures rather than legal sanctions thus policing became governed by a system of informal rules.²⁶

There were several measures taken that looked into steps to be taken in the criminal justice process and other methods such as legal advice to detainees and procedures in recording of crimes. Community consultation was also carried out; it was necessary for the public to be seen to be consulted which served as an outward sign that policing was consented to. However, this was coupled with a number of shortcomings including:

- These systems were not well publicized or known and their performance was patchy;
- They were liable to breakdown in times of stress;
- They were based on informing and consulting rather than control;

²⁴ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117, at 100.

²⁵ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117.

²⁶ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117.

- The influence may extend to limited aspects of policing and a limited group of officials;
- They may exclude certain groups of people from participation.²⁷

Moreover, these systems that were adopted demanded openness on the part of the police which was contrary to their training and notions of professionalism. The level of independence of the police was curtailed and their ability to exercise judgment was compromised.²⁸ This shows that the tension between the doctrine of police independence and the system of accountability and oversight by institutions could never quite be dealt with. There was need for a balance where the police could exercise their functions without any external influence while still being held accountable for them especially in instances where their actions affected the interests of the public.²⁹

As a Commonwealth country, the system of governance in Kenya is tantamount to that of the United Kingdom. This is seen in that the post-colonial government of Kenya borrowed heavily from the examples set by the colonial government. This is also applied to the police system that was in place in post-independence Kenya. The police have been charged with corruption and the misuse of force since independence. They are believed to have protected the interests of the small political and economic elite at the expense of other citizens. Therefore, the public perception of the police has been that the force is hostile, corrupt, abusive and ineffective.³⁰ The police have also been characterized with poor infrastructure and equipment and lack of coordination between the two police factions that is, the Kenya Police Service (KPS) and the Administrative Police Service (APS).³¹

This was the way in which the police force was run until the successful push for multiparty democracy in 1990. This created pressure for more reforms especially in law enforcement but

²⁷ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117.

²⁸ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117, at 105.

²⁹ Baldwin R, 'Why Accountability?' The British Journal of Criminology , Vol. 27, No. 1, Why Police?: Special issue on policing in Britain (Winter 1987), pp. 97-117, at 105.

³⁰ <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>.

Accessed on 13th August 2016.

³¹ <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>.

Accessed on 13th August 2016.

this was not brought into effect until after the 2002 General elections when the country came under the rule of its third president His Excellency Mwai Kibaki and The National Alliance Rainbow Coalition Party. This marked the first time when a Task Force on Police Reforms was formulated. This task force looked into measures for reforming the police. The recommendations made were: the creation of a public relations campaign and organizational reforms and institutional restructuring.³² There were no considerations that were made regarding the accountability and professionalism of the police.

Another milestone in the police reform process took place after the 2007 General elections that and shortly after the post election violence ensued. This paved way for the Commission of Inquiry into the Post Election Violence (CIPEV) which pointed out that police killings and violence was rampant during the post election violence.³³ Agenda IV of the National Accord and Reconciliation Agenda made recommendations that focused on constitutional and legal institutional reforms one of which looked into law the enforcement institution³⁴.

This led the government to set up the National Taskforce on Police Reforms headed by the Retired Judge Philip Ransley. The creation of the Police Reform and Implementation Committee (PRIC) followed thereafter. The recommendations made by this Commission aided in formulating the laws provided in the 2010 Constitution. Some of the key changes include;

1. The creation of a National Police Service that merged the Kenya Police and the Administrative Police under the Inspector General;
2. The National Police Service Commission tasked with developing training guidelines, advice on remuneration, overseeing recruitment and disciplinary matters and vetting of the police;
3. The establishment of a complaints body.³⁵

Despite these steps in the reformation of the police force, some top commanders still refer to the police as ‘an institution that is turning into a criminal enterprise where tribalism,

³² <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>. Accessed on 13th August 2016.

³³ <http://www.klrc.go.ke/index.php/our-work/police-reforms-legislation>. Accessed on 13th August 2016.

³⁴ <http://www.klrc.go.ke/index.php/our-work/police-reforms-legislation>. Accessed on 13th August 2016.

³⁵ <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>. Accessed on 13th August 2016.

favouritism, and search for bribes have replaced the motto of providing service to all'.³⁶ There are organizational reforms that are still plagued with corruption and lack of political reform. Transparency International reported that the most corrupt institution in the country was the police which was the view held by 95 percent of the respondents interviewed.³⁷

STATEMENT PROBLEM

The doctrine of police independence is a subject that is essential in defining the authority of the police. The degree of independence of the police, particularly in Kenya, has had a negative effect on the maintenance of law and order and in many instances has led to the suffering of many citizens at the hands of the police. This may be attributed to the colonial period and the political regimes after independence and before the promulgation of the 2010 Constitution. The 2010 Constitution came with changes in the police system which attempt to put a check on the level of police autonomy that they can be granted. The purpose of this paper is to look into the laws governing police autonomy in Kenya and whether the scope of this independence is so broad that it gives them unnecessary immunity or so narrow that it renders the powers of the police ineffective or whether it has remedied the administrative defects that hitherto, plagued the system.

JUSTIFICATION

The justification for this study is the need to clearly define the scope of police independence in Kenya. This ensures that there is transparency and grounds for seeking redress in cases where this discretion is abused.

Therefore, the research questions to be determined in order to establish the effectiveness of this scope of independence are;

1. What is the current scope of police independence?
2. What are the shortcomings of the current scope of police independence?

³⁶ <http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/>. Accessed on 13th August 2016.

³⁷ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

3. What mechanisms should be put in place to ensure that the police use their autonomy for the benefit of Kenyans?

OBJECTIVES

The general objective of this study is to determine the ideal application of the doctrine of police independence in Kenya.

The specific objectives are;

1. To identify the current scope of police independence in Kenya.
2. To understand the weaknesses of the current scope of police independence.
3. To find better methods of ensuring that police discretion is used to better the public.

HYPOTHESIS

The application of the doctrine of Police Independence has prevented the execution of the duties of the police in an efficient and effective manner.

SCOPE AND LIMITATIONS

This study looks into the relationship between the police and external parties with regard to their discretion and the need for police accountability and oversight. The focus will be on the laws and institutions that govern police independence and accountability in Kenya which will be compared to the law enforcement systems that are in place in other countries with a similar governing structure such as commonwealth countries in Australia and the United Kingdom. The purpose of this is to first establish the advantages and shortcomings of the law enforcement policies in place in Kenya and thereafter the best practices that can be borrowed from jurisdictions with similar governing structures.

CHAPTER 2: LITERATURE REVIEW

It is important to first understand the function of the police. Sir Robert Peel, one of the first Commissioners of the Metropolitan Police Department, formulated the nine principles of policing also known as the Peelian principles. These principles reflect on the need for the police to work in cooperation with citizens to promote their welfare. He speaks of the need for public approval, public favour, cooperation with the public and maintaining a relationship with the public.³⁸

With this in mind, the discretion of the police in their activities should work in tandem with ensuring that the needs of the public are addressed and their welfare is maintained. Philip Stenning attempts to understand the origin and the purpose of this doctrine.³⁹ He relies on the obiter by Lord Denning in the Blackburn case where he states that the police are answerable to the law and the law alone⁴⁰. This became one of the most oft quoted statements in Britain and Australia. In one such instance, an English Chief Constable, who had earlier been invited to conduct a review of the administration of the Victoria, Australia, Police Force, reflected on Lord Denning's dicta when he wrote, "In operational matters a Chief Constable is answerable to God, his Queen, his conscience, and to no one else".⁴¹

Stenning traces the development of this doctrine in the United Kingdom and notes the tension that this creates where the extent of police autonomy is brought to question by mechanisms of accountability. This was commonplace during the Thatcher administration where the views of the then labour party were that there was need for more involvement of the community in monitoring police activities and this was disputed by the conservative government which saw these "genuine efforts by reasonable people at local level currently to devise a more meaningful involvement in police affairs as unwittingly preparing the foundations for political

³⁸ http://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html?_r=0. Accessed on 19th August 2016. The nine Peelian principles are: Prevention of crime and disorder, performance of duties dependent on public approval, securing the cooperation of the public in voluntary observance of the law, the degree of cooperation with the public diminishes proportionately to the necessity of the use of force, securing public favour by acting in an impartial manner, use of physical force where it is necessary, maintaining a relationship with the public where the public are the police and the police are the public, police should direct their actions strictly towards their functions and the test of police efficiency is the absence of crime.

³⁹ Professor & Director, Institute of Criminology, Victoria University of Wellington, Wellington, New Zealand.

⁴⁰ Stenning P, 'The idea of the political "independence" of the police: international interpretations and experiences' (2007).

⁴¹ Stenning P, 'The idea of the political "independence" of the police: international interpretations and experiences' (2007). This case soon became known as the 'Police Chief's bible'.

mastery of the police” which, Chief Constable of Greater Manchester, James Anderton wrote, “is now a positive threat”.⁴² This debate later paved way for more oversight mechanisms and special attention was given to the involvement and cooperation of the public which gives credence to the focus of the Peelian principles.

There was also focus that was given to “Operational responsibility” as opposed to “Operational independence”.⁴³ Operational responsibility focuses both police autonomy as well as accountability while operational independence looks more at the former. The application of operational independence should therefore give the police constables a clear line of accountability to directly elected police and crime commissioners while giving them the freedom to act without fear or favour to execute their responsibilities. The main principle behind this is the need to give police the necessary discretion to carry out their duties devoid of any external pressures.⁴⁴ However, a challenge arises as to clearly outlining what amounts to police discretion and when accountability does or does not undermine police activities. Hugh Orde, President of ACPO (Association of Chief Police Officers) states this in relation to the report by Independent Commission on Policing for Northern Ireland chaired by Lord Pattern.⁴⁵ Stenning, in a bid to address this gray area recommends that the ideal scope of the doctrine of police independence should incorporate judicial pronouncements as opposed to constitutional or statutory interpretations.⁴⁶ Therefore, the use of precedent and addressing matters regarding the doctrine on a case to case basis may enable the proper application of the doctrine.

The African Human Rights Journal of 2003, written by Joshua N Auerbach looks at the expectations of the country in the wake of the new government. The police have been at the nexus of the most serious issues that have plagued Kenya; corruption, crime inter-ethnic violence and vigilantism. The needs of the ruling party and the powerful individuals have been

⁴² Stenning P, ‘*The idea of the political “independence” of the police: international interpretations and experiences*’ (2007).

⁴³ <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/511/51106.htm#note73>. Accessed on 19th August 2016.

⁴⁴ <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/511/51106.htm#note73>. Accessed on 19th August 2016.

⁴⁵ Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (1999). It was reported by this Commission that it would be difficult if not impossible to define the full scope of police powers.

⁴⁶ Stenning P, ‘*The idea of the political “independence” of the police: international interpretations and experiences*’ (2007).

set above the needs of the people and the rule of law; they focused more on vested interests rather than public interests. In addition, a good majority of the police have succumbed to corruption as well and have sought to make profits at the expense of citizens. This has led to the lack of confidence or outright fear in the police.⁴⁷

There was need for institutional arrangements that would ensure the accountability of the police and adherence to the rule of law as well as an institutional culture of respect for these values before other reforms could take hold.⁴⁸ Systems to enhance specific police operational capacities to provide fora for engagement between the police and the community and training on HR principles were recommended in this paper. An institutional approach to police reforms which aimed at reforming the management and culture of the police force would not be an easy task but it was nonetheless necessary.⁴⁹

Auerbach saw that the best method to regulate police independence was through democratic policing. This is something that calls for the police to be insulated from political control in two respects;

1. Political control that undermines the rule of law; in this case, the police require to be distanced from political influence in order to promote and protect human rights.
2. Insulation from political control; this is where the police possess expertise that civilians lack. Police command should be afforded the opportunity to make tactical decisions on their own.

This brings us to the distinction between police operations on one hand and policy on the other hand. Elected officials should be in charge of the latter while the police should be allowed to have control over the former.⁵⁰ The concept of political independence of the police is seen here. The police require to be distanced from undue external influence in order that they may be able to carry out their activities with efficiency and effectiveness.

The Pattern Commission of Northern Ireland recognized this distinction. They created a Policing Board that not only insulated the police from political influence but also worked

⁴⁷ Auerbach, J, 'Police Accountability in Kenya' African Human Rights Journal (2003) 3.

⁴⁸ Auerbach, J, 'Police Accountability in Kenya' African Human Rights Journal (2003) 3.

⁴⁹ Auerbach, J, 'Police Accountability in Kenya' African Human Rights Journal (2003) 3.

⁵⁰ Auerbach, J, 'Police Accountability in Kenya' African Human Rights Journal (2003) 3.

towards regularised the police. However, Andrew Goldsmith states that policing in the past has repeatedly shown the inadequacies of an exclusive reliance upon police self-regulation. Therefore, additional methods of regularising police independence may be required.

External mechanisms through which the police conduct was monitored were also considered. There is the formal oversight by the legislature and the judiciary as well as supervisory entities such as the Pattern Commission's Policing Board and South Africa's Independent Complaints Directorate.

Auerbach alludes to the establishment of a system where there is a balance between police discretion in their work as well as police accountability for their actions. These views were made prior to the promulgation of the 2010 Constitution of Kenya.

The provisions in the 2010 Constitution reflect on a number of the issues outlined above. As regards the independence of the police the Constitution of Kenya provides for the establishment of the National Police Service.⁵¹ The command of the NPS is by the Inspector General who has independent command over the Police Service.⁵² The Inspector General occupies an independent office but he remains accountable to the Cabinet Secretary.⁵³ His functions include investigation of any particular offence or offences; the enforcement of the law against any particular person or persons; or the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service which. He exercises these activities independently.⁵⁴

The Constitution also has provisions for the establishment of the National Police Service Commission (NPSC).⁵⁵ It is charged with the responsibility of recruiting officers into the service and determines promotions, carries out disciplinary measures where necessary and carries out any other function that is prescribed by parliament. It also embraces parliamentary

⁵¹ Article 243, *Constitution of Kenya* (2010). This comprises the Administrative Police and the Kenya Police Service.

⁵² Article 245 (2)(b), *Constitution of Kenya* (2010).

⁵³ Article 245(4), *Constitution of Kenya* (2010).

⁵⁴ Article 245(4), *Constitution of Kenya* (2010).

⁵⁵ Article 246, *Constitution of Kenya* (2010). It comprises presidential appointees that is, a person fit to be a judge in the High Court, two retired senior police officers and two persons with integrity that have served the public with distinction. The Inspector General, as well as his deputies, is also members of this Commission.

scrutiny of appointments which shields the police from undue pressure, interference and ethnic manipulation.⁵⁶

There are also institutions that conduct oversight in Kenya which put into practice, the recommendations by Auerbach. The Constitution provides for the National Security Council (NSC) which is the mechanism through which Parliament oversees the police. Its role is to provide annual reports to Parliament on the state of security of the country.⁵⁷ In addition a public oversight institution, the Independent Policing Oversight Authority (IPOA), has been provided by the police. Act No. 35 of 2011. This institution provides for civilian oversight of the Police. It strives to ensure that Article 244 of the Constitution is upheld by holding the police accountable for their actions.⁵⁸ However, as Andrew Goldsmith stated above, this institution is somewhat ineffective; the IPOA may be independent but the body that would otherwise be called upon to take action on the claims of the institution is the police itself. The reliance on the police to catch the police brings impartiality to question. Many cases of police injustice still go unpunished.⁵⁹

The two requirements by Auerbach on democratic policing have been addressed in the 2010 Constitution through the creation of independent offices and the independent functions that have been afforded to the Inspector General. Nevertheless, the level of effectiveness and efficiency of the police has not improved. There is therefore need to investigate beyond simply the laws in order to establish the disconnect within the system and the required scope of police independence.

It is important to note that an African approach to the doctrine of police independence is yet to be defined. Most literature on the police in Kenya as well as in Africa interrogates the oversight and accountability measures in order to solve the ineffectiveness and inefficiencies

⁵⁶ Lumumba, P,' *The Constitution of Kenya, 2010: An Introductory Commentary*'. Parliament being representative of the people, facilitates the public structuring of a supervisory body.

⁵⁷ Article 240 (7), *Constitution of Kenya* (2010).

⁵⁸ Article 244, *Constitution of Kenya* (2010) provides that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability.

⁵⁹ <https://kituochasheria.wordpress.com/2015/06/29/legal-opinion-on-the-law-against-police-torture-in-kenya/>. Accessed on 21st August 2016. There are many cases of police torture that are reported to date. Very little is done to discipline police officers that violate the rights of citizens especially when they are said to be responding to ongoing threats such as terror and demonstrations.

of the police. These approaches look into ways in which external parties such as governments and independent oversight bodies can regulate the activities of the police. The danger in this is that recommendations may be given that encourage further empowerment of the political elite in carrying out their own agenda at the expense of the interests of the public. In addition, oversight bodies may be given more powers of oversight but less power to enforce any mandate over the police. Interrogating the role that the police have to play in society in accordance with their freedoms, responsibilities defined by local statutes and the ideal purpose to which the institution of the police was created has been neglected which is attributable to an outside-in perspective in the place of an inside-out perspective.

CHAPTER 3: THEORETICAL FRAMEWORK

The social contract theory sets the foundation for the doctrine of police independence.⁶⁰ It stipulates that every individual in a state of nature has an interest in getting out of this chaotic state.⁶¹ They may agree to sign a contract with each other in order to create social order enabling people to cooperate and produce social goods.⁶² This is an unwritten contract with multiple aims; it is essential for a society to create suitable atmosphere of safety and in return follow the laws and restrictions and cooperate with the police.⁶³ One of the basics that are necessary for the survival of any society is the protection of life and property. This entails the protection against murder, assault and vandalism which necessitates the need for a police force.⁶⁴

According to the pioneers of the Social Contract Theory, Thomas Hobbes, John Locke and Jean Jacques Rousseau, the essential part of the theory is the correlation between policing and community.⁶⁵ According to Hobbes, security and order can only be achieved through a contract in which all citizens are required to give up their individual power to a sovereign. Citizens are required to obey the sovereign and in return for protection of their life and property.⁶⁶ Locke holds a different view. He believes that all rights and rules are regulated by natural law. The social contract requires individuals to uphold and respect the law and as a result of this, they are protected from wrong actions.⁶⁷ This creates a form mutual agreement between the police and the community.⁶⁸ Rousseau considers the social contract as a

⁶⁰ The Social Contract Theory was propounded by philosophers such as Thomas Hobbes, Jean Jacques and John Locke.

⁶¹ Hobbes states that this is a state of anarchy. Life is poor, brutish, nasty and short. There are no social goods such as farming, industry, education, housing and technology because the social cooperation that is needed to produce these goods does not exist.

⁶² <http://www.csus.edu/indiv/g/gaskilld/ethics/sct.htm>. Accessed on 20th February 2016. Every individual in this state of nature is expected to agree to this.

⁶³ Hamoud, T, “Community Policing “Social Contract for Social Order, ”” University of Teesside, Middlesbrough, Uk , April 2012, at 3.

⁶⁴ Monica M, ‘Improving American Police Ethics Training: Focusing on Social Contract Theory and Constitutional Principles’ (2006).

⁶⁵ Hamoud, T, “Community Policing “Social Contract for Social Order, ”” University of Teesside, Middlesbrough, Uk , April 2012, at 2.

⁶⁶ Hamoud, T, “Community Policing “Social Contract for Social Order, ”” University of Teesside, Middlesbrough, Uk , April 2012, at 2.

⁶⁷ Hamoud, T, “Community Policing “Social Contract for Social Order, ”” University of Teesside, Middlesbrough, Uk , April 2012, at 2.

⁶⁸ Hamoud, T, “Community Policing “Social Contract for Social Order, ”” University of Teesside, Middlesbrough, Uk , April 2012, at 2.

relationship that is based on common responsibilities for the person and the property.⁶⁹ There is need for negotiation and communication between different sides in order to establish social order in society.⁷⁰

The US Declaration of independence as well as their Constitutions is based on John Locke's interpretation of the Social Contract. Officers need to be aware of the contents in the Social Contract Theory because they reflect on the role of the police in society. The authority of police is derived from the people through the social contract. The role of the government is to protect the rights that people naturally possess. This means that in the event that they do not then the people owe them no allegiance. In addition to this the police, as an agent of the government is bound by the social contract meant to uphold the rights of citizens as well.⁷¹

The police ideally are viewed as a politically neutral force that uses its powers to enforce laws within the confines of a defined set of rules. These powers that are conferred upon them are by virtue of the rights that individuals choose to delegate to them.⁷² Their core roles, which include enforcing the law and keeping the peace and protecting life and property, should be exercised with discretion.⁷³ This discretion is based on the considerations of the police thus maintaining social order may be subjective but it cannot cross the limits that are set by laws and customs.⁷⁴

Unfortunately, this theory has been used as a justification for police brutality. Police claim to use force as a necessary instrument to maintain and maximize collective good by maintaining a safer society. Given the widespread belief in the theory, the public supports this brutality

⁶⁹ Hamoud, T, "Community Policing "Social Contract for Social Order,"" University of Teesside, Middlesbrough, Uk , April 2012, at 2.

⁷⁰ Hamoud, T, "Community Policing "Social Contract for Social Order,"" University of Teesside, Middlesbrough, Uk , April 2012, at 3.

⁷¹ Monica M, 'Improving American Police Ethics Training: Focusing on Social Contract Theory and Constitutional Principles' (2006).

⁷² <http://www.activistrights.org.au/handbook/ch01s06s02.php>. Accessed on 20th February 2016. The social contract theory of policing informs mainstream views of policing, which see police as a protective force against crime and social disorder.

⁷³ <http://www.activistrights.org.au/handbook/ch01s06.php>. Accessed on 20th February 2016. The Police are considered the coercive arm of the state. There is the separation of powers between the police and the government and the courts which is an important tenet of liberal democracy.

⁷⁴ Hamoud, T, "Community Policing "Social Contract for Social Order,"" University of Teesside, Middlesbrough, Uk , April 2012, at 4.

even in cases of force and coercion or where it goes beyond the bounds of reasonable force.⁷⁵ This is due to the fact that citizens are understood to voluntarily surrender their power and rights to the state and the police force.⁷⁶ In addition, the relinquishing of these rights to the police without defining the scope of their discretion is detrimental to the public.

With this in mind, Sir Robert Peel, who created the 9 principles of policing, reflects on the tenets of this theory.⁷⁷ These principles generally focus on the prevention of crime and disorder, securing public support and cooperation in their activities, the use of necessary force to maintain law and order and the execution of their duties with impartiality.⁷⁸

As regards the public approval of the actions of the police and the ability of the police to secure and maintain public respect, Thomas Hobbes states that in order that people move from the state of nature, it is essential that they live together under common laws that they agree to and approve of and create an enforcement mechanism for the social contract as well as the laws that are enacted in it.⁷⁹

The sixth principle discusses the responsibility of the police to use physical force to the extent necessary to ensure obedience of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient. The police should use only the minimum degree of physical force which is necessary on any particular occasion in order that their objectives are fulfilled. This is in line with what Locke posits in the Social Contract theory. He states that we give up our right to exact force in the place of internal justice that is coupled with force, albeit force that is necessary. We are able to maintain our life and liberty while still getting the justice we deserve.⁸⁰

⁷⁵ <http://www.activistrights.org.au/handbook/ch01s06s02.php>. Accessed on 20th February 2016.

⁷⁶ Hamoud, T, "Community Policing "Social Contract for Social Order,"" University of Teesside, Middlesbrough, Uk , April 2012, at 2.

⁷⁷ A British statesman and member of the Conservative Party, who twice served as Prime Minister of the United Kingdom and twice served as Home Secretary. He is considered the father of the modern British Police and founded the Metropolitan Police Service in Britain. The principles were formulated by Sir Robert Peel during his service as the Commissioner of the Metropolitan Police.

⁷⁸ Peels Principles Of Law Enforcement.

⁷⁹ http://www.slideshare.net/OhArielle/nature-of-man-state-of-nature-and-social-contract-john-locke-vs-thomas-hobbes?qid=0aae4e53-0c25-4ba6-a8b7-3fc8bdd6c857&v=&b=&from_search=2. Accessed on 20th February 2016.

⁸⁰ <http://www.slideshare.net/OhArielle/nature-of-man-state-of-nature-and-social-contract-john-locke-vs-thomas-hobbes>. Accessed on 10th March 2016.

Sir Robert Peel states that the police should always direct their actions toward their functions and never appear to usurp the powers of the judiciary by attacking individuals or the state or making judgements on those they purport to be guilty or even punishing the guilty. This, Locke states, is a situation when the ruler breaches the Social Contract. In such instances when the police become tyrants, the people have a right to resist this authority. The police have a duty to answer to the people and in the event that they act contrary to their duties and the people have a right to have them supplanted from the force.⁸¹

It remains paramount that the police do not take advantage of their power and abuse people. Their role as agents of the government in enforcing the law means that they have a fiduciary role to play in respect of the citizenry. There is need for them to follow the rules that protect them.⁸²

METHODOLOGY

The research method is qualitative. This is because it seeks to gather an in-depth understanding of the behaviour of the police with regard to their discretion, the shortcomings that it faces and the reasons as to why they face such shortcomings.

In order to comprehend the ideal scope of police independence in Kenya, an analysis of the development of the police from the creation of this institution until the current state of this body is required. The doctrine of police independence has been shaped and re-shaped to fit the ever-changing freedoms and responsibilities that have been accorded to the police. A research method is required that takes into account the historical development of the police in Kenya that comprises its remote and recent past that will establish proof of on-going trends and problems that face the police. Therefore, a historical approach of research will take the above into account as opposed to other approaches such as ethnography which looks into the culture of a community, descriptive research which focuses heavily on the present or ground theory which focuses on the development of a theory through induction.

Historical research:

⁸¹ <http://www.slideshare.net/OhArielle/nature-of-man-state-of-nature-and-social-contract-john-locke-vs-thomas-hobbes>. Accessed on 10th March 2016.

⁸² <http://www.csus.edu/indiv/g/gaskilld/ethics/sct.htm>. Accessed on 20th February 2016.

Historical methods of research look at the process of systematically examining an account of what has happened in the remote or recent past.⁸³ The historical method is employed by researchers interested in reporting events that occurred in the past with the aim of establishing facts in order to arrive at conclusions concerning past events. This information is not only used to predict future events but it is also used to solve contemporary problems.⁸⁴

This method will be used to investigate the activities of the Kenyan Police Force from colonial times until the present day through conducting documentary analysis into news articles, books, journals and case law. In order to understand the present scope of independence of the police, it is essential to trace the historical development of the police. Historical research method is better suited for this paper because it aids in showing patterns in the activities and governance of the police that have shaped police autonomy over time as well as the methods that have been used to resolve the issues facing the police in the past which is an essential aspect to this study. This approach will help in establishing realistic methods that will be applied in resolving the current inefficiencies facing the police.⁸⁵

This method will therefore be used to gain an understanding of the development of police autonomy and inform the study of the use and abuse of the doctrine of police independence throughout Kenya's remote and recent past. It will also provide insight into the purpose for which the different legislations and bodies governing the police and their powers have been enacted. With this in mind, a conclusion can be drawn as to whether the systems in place in the country today provide remedies for past and present ills facing the police and ensure efficient and effective functioning of the police force.

⁸³ http://www.slideshare.net/iamprotik/historical-research-70777794?qid=751afc57-6adb-4fa9-8d1e-d23807c0f8cd&v=&b=&from_search=1. Accessed on 9th January 2017.

⁸⁴ http://www.slideshare.net/iamprotik/historical-research-70777794?qid=751afc57-6adb-4fa9-8d1e-d23807c0f8cd&v=&b=&from_search=1. Accessed on 9th January 2017.

⁸⁵ <http://www.slideshare.net/vaisalik/types-of-research>. Accessed on 9th January 2017.

CHAPTER 4: POLICE PERFORMANCE

The performance of the police in Kenya has been assessed by different bodies. Aspects of effectiveness, efficiency, transparency and accountability are of importance to the police in Kenya. These tie in with police independence since the discretion afforded to the police and their activities affects how efficient, effective and transparent they are.

The mission statement of the Police Service in Kenya is; commitment to providing quality Police service to meet the expectations of our customers; by upholding the rule of law and creating and maintaining strong community partnerships for a conducive, social, economic and political development of Kenya.⁸⁶ Inasmuch as the police force has attempted to play a pivotal role, in propounding the idea of achieving justice and doing so in an effective and efficient manner it has, however, in many instances failed to uphold the purpose for which it was established.

Chris Gitari, the Director of the International Centre for Transitional Justice (ICTJ) office in Kenya, stated the following regarding the police, “The police in Kenya have been used to suppress opposition and are guilty of numerous violations throughout Kenyan history, many of which were clearly documented by the Truth, Justice and Reconciliation Commission.”⁸⁷ The police have been the source of oppression since the period that ensued after independence. The 2010 Constitution brought promising changes to the police force in Kenya but there have been shortcomings in the reform process of the police.

Police Reforms and their Implementation

Police Reforms is the transformation or change of the Kenya Police Force and the Administration Police Force into a professional and accountable Police Service, meeting the needs of the public.⁸⁸ The aim of this is to improve the delivery of service of the police. An audit conducted by The Kenya National Commission on Human Rights & Centre for Human Rights and Peace found that a number of reforms were laid out by the government. Some of these reforms include:

⁸⁶ <http://www.kenyapolice.go.ke/pages/links.html>. Accessed on 1st October 2016.

⁸⁷ <https://www.ictj.org/news/kenya-police-reform>, Accessed on 1st October 2016

⁸⁸ Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 20.

- Legislations which were enacted including: National Police Service Act 2011, National Police Service Commission Act 2011 and the Independent Policing Oversight Authority Act 2011.⁸⁹ The pending bills on the police are; Draft Private Security Industry Regulation Bill 2010, Draft Coroners Bill 2010 and Review of Public Order Management Act CAP 56;
- Administrative reforms include; the Inspector General and the two deputies signed Performance Contracts, Draft National Police Service Standing Orders, sensitization of police officers on the new laws, relocation of the NPS offices to Jogoo House and Review of the Riot Training Manual;
- As regards institutions, several have been established and are currently at various stages towards being fully operational;
- IPOA as well as the Internal Affairs Unit (IAU) was established in order to investigate complaints about the police;
- The development of a new training curriculum for both the Kenya Police and the Administrative police. In addition, the police are working with universities to provide tailor made courses to middle level police officers in order for them to obtain degrees.

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These reforms have been faced with shortcomings:

The operation process of the Kenya Police and the Administrative Police has not yet been harmonized. The two continue to operate as independent bodies and the appointment of county commanders has failed to unify the two institutions since each service continues to operate under its old command.⁹¹ The IAU is yet to be fully operational as it is currently only operating on a national level. The IPOA on the other hand is operational however it lacks sufficient staff to be fully effective.⁹² The recruitment process of the police continues to be

⁸⁹ Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 10.

⁹⁰ Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 11.

⁹¹ Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 10.

⁹² Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 11.

with limited transparency and biased criteria such as disqualifying candidates for having brown teeth.⁹³

Country Profile Kenya 2014

The Global Corruption Barometer (GCB) 2013 reported that some of the most common corrupt institutions in Kenya include the police, judiciary and registry, and permit services.⁹⁴ The police force in particular is seen as the most corrupt institution with an overwhelming 95% of the respondents interviewed endorsing the opinion that the police are extremely corrupt.⁹⁵

Political interference, lack of oversight as well as high levels of corruption coupled with technical deficiencies has resulted in major issues in the country's police.⁹⁶ The Westgate incident gives credence to this. An article in the Wall Street Journal states that corruption is endemic and led to lapses in the efficiency and effectiveness of the police which fuelled the attack.⁹⁷ The police may have aided the terrorists slipping into the country from the Somali border.⁹⁸

The degree of bribery in Kenya along with the lack of accountability of the police and high ranking officers in particular has also led to a sense of impunity.⁹⁹ 77 percent of the respondents of the Global Corruption Barometer indicated that they paid a bribe to the police. The East African Bribery Index of 2013 reported 71.8 percent of the respondents paid bribes to the police. In addition, extortion by traffic police officers is commonplace at roadblocks and transit checkpoints.¹⁰⁰ This has led to the perception of business executives that the Kenya

⁹³ Kenya National Commission on Human Rights & Centre for Human Rights and Peace, *Audit of the status of Police Reforms in Kenya*, at 11.

⁹⁴ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

⁹⁵ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

⁹⁶ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

⁹⁷ <http://www.wsj.com/news/articles/SB10001424052702304384104579141411761111846>. Accessed on 1st October 2016.

⁹⁸ <http://www.wsj.com/news/articles/SB10001424052702304384104579141411761111846>. Accessed on 1st October 2016.

⁹⁹ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

¹⁰⁰ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

police services as unreliable to enforce the law with a score of 3.7 out of 7 which places Kenya at 102 out of 148 countries assessed.¹⁰¹

The Kenya Bribery Index 2013

Transparency International reported in The Kenya Urban Bribery Index of 2013 that the Kenya Police took the first position with 68.7 percent with the second from it being the ministry of public works at 41 percent.¹⁰² The following statistics were gathered; the police were ranked second insofar as the likelihood of encountering bribery in Kenya is concerned with 90.4 percent; they were ranked first with 57.5 percent as the institution where respondents believed bribery was the most prevalent; where the severity of bribes is concerned, the police were ranked third with 62.4 percent. The police also recorded the highest bribery cost in Kenya of Ksh.2070 for every urban adult resident per month.¹⁰³

IPOA Performance Report 2016

The Independent Police Oversight Authority annually reports on the performance of the police in Kenya. This report covers the police performance of their duties, the state of their facilities as well as the technologies that are introduced.¹⁰⁴ There were a total of 6,978 complaints, 303 investigations and 498 inspections which have been completed by the Authority, including follow up inspections.¹⁰⁵

IPOA noted a lack of cooperation from some Officers Commanding the Stations (OCS) during the inspection of the police premises.¹⁰⁶ In other cases, the police would proceed to undertake investigations and make recommendations on inquests before informing IPOA which would legally prevent the authority from conducting investigations.¹⁰⁷

There was particular focus given to the police activities during the Anti-IEBC demonstrations. During this period, there were several arbitrary arrests and rounding up of youths in Mombasa, Nairobi, Siaya and Kisumu, some of the persons arrested were detained for longer than the

¹⁰¹ Transparency International, *Overview of Corruption and Anti-corruption in Kenya*.

¹⁰² Transparency International, *The Kenya Urban Bribery Index*.

¹⁰³ Transparency International, *The Kenya Urban Bribery Index*.

¹⁰⁴ IPOA Performance Report January - June 2016.

¹⁰⁵ IPOA Performance Report January - June 2016, 1t 10.

¹⁰⁶ IPOA Performance Report January - June 2016, at 39.

¹⁰⁷ IPOA Performance Report January - June 2016, at 39.

required 24 hours and their right to a fair trial was violated and there were executions by the police in Kisumu and Homa Bay.¹⁰⁸ It was noted by IPOA that the police were lacking public order and management skills which is essential when dealing with citizens.

The police made complaints about the promotions and trainings and claimed that they were not conducted in a transparent manner and there was also the use of corrupt means.¹⁰⁹ In some police stations, there were cases of arbitrary arrest and demand for bribes as well as extortions and in other instances, the police failed to produce a cash bail book when they were asked to.¹¹⁰

IPOA and Police Recruitment

The IPOA witnessed the police recruitment process in the year 2014 and 2015. The recruitment process is the prerogative of the National Police Service Commission (NPSC).¹¹¹

The findings include:

2014

- The activities went on until late into the night which created room for fatigue and all manner of mischief since the participants were unable to properly keep an eye on the activities taking place;
- There was the lack of a step-by-step process in the recruitment of the police. The lack of standardization created avenues for the abuse of discretion in the process; and
- The presence of the NPS senior officers and Deputy County Commissioners from the police stations within the recruitment area appeared to complicate the exercise. There were reported incidents of influence peddling as well as conflicts of interest.¹¹² IPOA believes that given the manner in which they conducted themselves, it was easy to conclude that the officers could have been easily compromised before the process began.

¹⁰⁸ IPOA Performance Report January - June 2016, at 30.

¹⁰⁹ IPOA Performance Report January - June 2016, at 42.

¹¹⁰ IPOA Performance Report January - June 2016, at 43.

¹¹¹ Article 246 (3) (a), *Constitution of Kenya*, 2010.

¹¹² IPOA Police Recruitment July 2014, at 3.

The authority concluded that the process was not transparent and there was lack of accountability as well. In addition, the officers discriminated against the people being recruited on the basis of their ethnicities as well as unidentified criteria that led to the disqualification of the candidates at the last stage.¹¹³ There were also widespread irregularities thus this could not be considered as a free and fair process and could not encourage public confidence.¹¹⁴

2015

- The team leader of the KPS was not transparent. He dragged the process deliberately in order to receive bribes from recruits.¹¹⁵ A case study reported at a recruitment centre shows that the officers were not open to observers and members of the public. One Senior Superintendents of the Police (SSP), John Kamau locked himself in a room in the National Youth Service (NYS) headquarters and later came out with a list of successful candidates;
- Senior superintendents were reshuffled during the process. This was in a bid to curb corruption and intrusion though it did not take place in all the centres. The local police officers carried out secretarial, logistical management and crowd control;
- Each recruitment centre had a leader from the KPS as well as the APS which indicated that the process was done separately. The KPS and APS ideally should operate under the NPS and therefore should be under one command. This separate process only shows that the harmonization of the two bodies is yet to be fully implemented;
- The recruitment was not conducted in the two phases that were initially stipulated. The two-tier process involves the receipt of applications from applicants and the National Police Service Commission prepares a shortlist of candidates who would then be invited for the physical, aptitude and medical assessment and the verification of the documents. The names of these candidates are then published and the public is invited to send their complaints. The first process of receiving applications was done but the second part was not; and

¹¹³ IPOA Police Recruitment July 2014, at 3.

¹¹⁴ IPOA Police Recruitment July 2014, at 3.

¹¹⁵ IPOA Police Recruitment Monitoring Report 2015, at 8.

- The authority found that there was a bias on the basis of technical physical fitness. There were matters of height, vision tests, flatness of feet, missing teeth, scars and allergies.¹¹⁶ These aspects were left to the discretion of the recruitment officers.

It is trite that despite the police reforms enacted to improve the performance of the police force, negligible progress has been noted. This is evidenced in the harmonization of the Administrative Police and the Kenya Police that is still yet to be fully effected. This one step would have provided sufficient headway in the reform process as a unified police service would lead to better performance of the unit as a whole.

The police are still considered the most corrupt institution in the country and society lacks confidence in them. This is seen in the report by the Global Corruption Barometer as well as the Kenya Bribery Index. As a characteristic that has been a primary defining factor of the police, great efforts are required in order to change this institution. This means that there is need for stringent measures and a strong authority to ensure that these reforms are adhered to.

The presence of the IPOA provides some oversight into the police recruitment as well as the performance of other activities which is a positive development since it provides citizens with a chance to observe this process. However, the authority merely observes and makes recommendations. It plays a role in reporting the progress of these reforms but it lacks the power to enforce the recommendations that it sets. This applies to other bodies such as Transparency International as well as The Kenya National Commission on Human Rights & Centre for Human Rights and Peace. The IAU, as a body that conducts internal oversight operates at a national level but effective oversight would only occur if its reach were to spread to the county level were the root of police actions and corruption is seen.

The body that can ensure that the reforms are implemented is the police under the guidance of the office of the Inspector General. This office is independent save for the functions that are of public interest. The IG therefore has discretionary powers in conducting the affairs of his office. Ideally, such freedom should enable him to exercise the necessary force to streamline the police and to do so without any external pressure to act otherwise than in accordance with the mission of the police. In addition, the reforms of the police are issues that do affect the

¹¹⁶ IPOA Police Recruitment Monitoring Report 2015, at 12.

interests of the public. The 2010 Constitution was approved by the citizens of this country and therefore the reforms that are outlined in Chapter 14 of The Constitution represent issues that affect the public. Therefore the Cabinet Secretary that is in charge of the Ministry should also hold the IG to account in implementing the reform process and should offer guidance on matters regarding policy.

CHAPTER 5: INTERNAL AND EXTERNAL INFLUENCE OVER THE POLICE

The independence of the police is influenced at two levels, the internal and external. The former refers to the control and influence of the police over themselves while the latter refers to parties outside the police that contribute to the activities of the police in one way or another. In addition, the degree to which the police should exercise their discretion ought to be determined by the nature of the work they are doing, the duty they have to other arms of the government and their role in protecting the interests of the public. The activities of the police are therefore affected by several players mainly the government, the people and the police themselves.

External influence over police discretion

The main source of influence over the police has been from the political elite. The police in post-independence Kenya were a mirror image of the police during the colonial period. During the colonial period, the police were used to protect the economic and administrative interests of the British as well as to subdue and police the population.¹¹⁷ The level of police discretion during this period was thus subject to the requirements of the colonialists. This was remedied after Kenya gained independence when constitutional safeguards were put in place separating the police from the executive. One of these measures includes the establishment of the Independent Police Service Commission as well as restrictions on the president's ability to appoint or dismiss the Inspector General.¹¹⁸

However, successive governments prevented these measures and sought to bring the police under the control of the government.¹¹⁹ The security forces were utilized in enforcing the power of the president especially in cases where the senior ranks of the intelligence services, military and police dominated by the president's ethnic community.¹²⁰ They would contain

¹¹⁷ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 11.

¹¹⁸ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 11.

¹¹⁹ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 11.

¹²⁰ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 12.

any parties that attempted to oppose the president through arbitrary arrests, intimidations and disappearances which was commonplace during the one-party rule presidential terms.¹²¹

The end of the one-party rule led to the eventual election in 2002 of the NARC party into power. This set off the reform process in the police that initially took a people-oriented approach.¹²² However, the focus was more on technical inputs as opposed to the culture and politics of policing which failed to address the need to prioritize community-based policing.¹²³

Concept of the Political Settlement

Jonathan Di and James Putzel defined political settlement as ‘a common understanding usually between political elites, where their best interests or beliefs are served through acquiescence to a framework for administering political power.’¹²⁴ This is the approach that the governing powers of the country have used in coordinating their activities and especially where the police are concerned. Political settlement takes on different approaches; it may be open or closed to external participation and democratic and peaceful on the one hand or repressive and reliant on violence on the other.¹²⁵

Insofar as external participation is concerned, the political elite may put in place systems of either horizontal inclusion where the benefits of elite regimes incorporate other, potentially contending elite groups and therefore neutralize external threats or vertical inclusion where focus is given to the value of strengthening state-society relations and promoting the inclusion of marginalised groups in political decision making.¹²⁶

The reform process of the police had effects on the political elites. After the post-election violence in 2007, the reform process became an area of key focus by the government. This is especially in light of the fact that the police were found to have taken part in the violence such

¹²¹ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 12.

¹²² Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 12.

¹²³ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 12.

¹²⁴ Di John J, Putzel J, *Political Settlements*, GSDRC, Birmingham: University of Birmingham (2009), at 4.

¹²⁵ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 8.

¹²⁶ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 8.

as in Western Kenya where the police were found to have been the main cause of civilian deaths.¹²⁷ As a result, the coalition government sought to remedy the defects in the police and this was outlined in item 1 on the Agenda that required the police to take immediate measures to stop the violence and restore security.¹²⁸ In addition, there were structural measures that were to be taken to reform the police. These committed parties to 5 reform processes including:

1. Reviewing the Constitution to establish an independent police commission;
2. Reviewing and defining the role of the Administrative Police;
3. Reviewing laws related to security and policing such as oversight of citizens and an independent complaints mechanism, human resource management and professionalization;
4. Finalizing and implementing a national security policy; and
5. Recruiting and training police officers in order to raise the police-to-population ration to the standard required by the United Nations.¹²⁹

The police reform process was excluded from political negotiations during the formation of the coalition government. Although this aided in the quick resolution of this crisis, it however reduced opportunities for the endorsement by the political elite which contributed to the difficulties that were faced during the implementation period.¹³⁰

From the onset of the coalition government's rule, the reforms were subject to delays for example, the appointment of members of PRIC. Mohammed Ali was removed from office in September of 2009 and other senior police officers were transferred in accordance with the recommendations of the Alston Report to the United Nations Security Council.¹³¹ However, these were mere demonstrations of the commitment of the elite to the police reform process

¹²⁷ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 12.

¹²⁸ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 14.

¹²⁹ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 14.

¹³⁰ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 15.

¹³¹ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 15.

that were made in a bid to hide their lack of commitment to genuine reform. In addition, the power wrangles within the coalition government, particularly the president and the prime minister curtailed the reform process as each side sought to secure influence over the police posts and structure that were politically valuable.¹³² This was seen during the appointment of the IGP and other senior officials which was delayed due to the conflicts from the coalition government. It was also evidenced in the publishing of the National Police Service Act which was passed in August 2011 but was only published in July 2012.¹³³

There were also conflicts that arose during the merger of the KPS and the APS under the NPSC Act. The Administrative Police was seen as an extension of the powers of the political elite since the police reported to the cabinet secretary and not the police commissioner as did the Kenya Police.¹³⁴ The senior Administrative Police Officers were opposed to this merger because they felt that their authority would be undermined.¹³⁵ The KPS, APS and the Directorate of Criminal Investigations (DCI) continue to operate under their former structures and the political elite lack the will to press for such reforms to take place.¹³⁶

The election period that was approaching in 2013 delayed the reform process due to the potential instability of the security sector thus changes that would have threatened police jobs such as vetting were put on hold until after elections. The Jubilee Government headed by Uhuru Kenyatta and William Ruto moved decisively to roll back parts of the reform agenda and bring the police under control.¹³⁷ These were made especially due to the attacks by Al-Shabaab in which the response of the police was criticized such as in the case where the police arbitrarily arrested and harassed Somali Kenyans under operation Usalama Watch.¹³⁸

The Jubilee government made concerted efforts to progress the reform process. One of the initial responses to the Westgate attack by the government was to propose amendments to the

¹³² Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 16.

¹³³ Amnesty International, *Police Reform in Kenya: A Drop in the Ocean*, (2013) at 12

¹³⁴ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 17.

¹³⁵ KNCHR & CHRP, *Audit Of The Status Of Police Reforms In Kenya* (2015) at 30.

¹³⁶ KNCHR & CHRP, *Audit Of The Status Of Police Reforms In Kenya* (2015) at 30

¹³⁷ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 17.

¹³⁸ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 17

NPS Act. These amendments include provisions that allow the president and parliament to oversee the recruitment of the IGP in the event that the office fell vacant.¹³⁹ This effectively gave the president powers to appoint the IGP and thereby put a check on the independence of the police. This went against the recommendations after the PEV to distance the powers of the police from political influence which was a step away from the vision for the police in the 2010 Constitution.¹⁴⁰

Further developments took place in 2014 after the attacks in Mandera County. The Parliamentary Committee on National Security and Administration signed into law new amendments as the Security Laws (Amendments) Act 2014 which increased the powers of the police to include; powers to stop and search terror suspects, extend detention without trial and introduce restrictions on the media's ability to report on security issues.¹⁴¹ These measures were met with strong opposition from the opposition party Coalition for Reforms and Democracy (CORD) and the Kenya National Commission on Human Rights (KNCHR) and they moved to challenge these reforms in court as they believed that these measures contravened the 2010 Constitution.¹⁴² Some measures dealing with the media were thrown out but the President maintained his ability to appoint the Inspector General.¹⁴³

Oversight Bodies

The IAU and IPOA were established in 2012 as the oversight bodies of the police. Initially, both bodies were slow to start in the beginning with the IPOA only investigating 2.5 per cent of the complaints made to it. The IPOA was recently more able to investigate cases of police misconduct and push for prosecutions such as the killing of Kwekwe Mwandaza in Kwale in August 2014 by two police officers who were convicted of manslaughter.¹⁴⁴

¹³⁹ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 18.

¹⁴⁰ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 19.

¹⁴¹ Government of Kenya, Security Laws (Amendment) Act 2014.

¹⁴² BBC, 'Kenya anti-terror law challenged in Nairobi court', 23 December 2014.

¹⁴³ Daily Nation, 'Security laws illegal, declares High Court', 23 February 2015.

¹⁴⁴ Saferworld, *Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya*, at 19.

The IPOA continues to operate with limited funding and staffing which also curtails its ability to reach to areas outside Nairobi. It is important to note that political settlement also captures resources and people needed to deliver services, including security and justice. This political settlement has curtailed civic space and subjected the appointment of the police at the highest levels to political elites as well as the lack of political will in the allocation of resources to the police to ensure the effective and efficient delivery of services.¹⁴⁵

Despite these constraints, the IPOA disciplinary measures have had an effect on the behaviour of the police. A report by a civil society actor states that the younger ones are afraid that they will lose their jobs while the older ones are afraid that they will lose their retirement benefits.¹⁴⁶ However, this has also been seen to prevent the police from freely conducting their duties due to the repercussions of their actions.¹⁴⁷

Nevertheless, these bodies should be seen not only as a mechanism in changing unwanted police behaviours but also as a way in which the public and the police can have confidence in police conduct.¹⁴⁸

The involvement of the Public

The public also acts as an external influence over the police. There have been limited reforms in the process of vetting of the police by the public. The process began after the 2013 elections where investigations of senior police officers were conducted on the basis of their past conduct, integrity, financial probity and human rights. Sixty three officers were relieved from their duties as a result of the NPSC's first phase of investigations.¹⁴⁹ Public participation has been a feature of this as people have been invited to submit evidence of misconduct against the police.¹⁵⁰

¹⁴⁵ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 19.

¹⁴⁶ Saferworld interview with civil society, Isiolo, October 2014.

¹⁴⁷ Op cit KNCHR & CHRP (2015), at 36.

¹⁴⁸ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 20.

¹⁴⁹ Nyamori M, '12,000 Kenya police to be vetted in second phase of police vetting exercise', The Standard, 24 October 2015.

¹⁵⁰ Nyamori M, '12,000 Kenya police to be vetted in second phase of police vetting exercise', The Standard, 24 October 2015.

However, this process has been curtailed by the executive with the president casting doubt on the process by claiming, “The on-going police vetting process has taken too long and is now having a negative impact on the overall reform agenda in the police.”¹⁵¹ The process of police reforms and especially the systems of accountability in place has been slowed down due to interference by the executive and other parts of the political elite which are likely to be due to the unwillingness of parliament or the treasury to release funds needed for these bodies to fulfil their mandates.¹⁵² In addition, there is a limit to how far the executive will allow the reform process to stretch as was seen in the response of the government to the nullification of police recruitment by IPOA.¹⁵³

Internal Influence of the police

The Inspector General of the Police exercises a degree of influence over the activities of the police. In addition to the activities of the DCI, the IPOA and the National Police Service, these bodies conduct any other duty that is assigned to them by the Inspector General.¹⁵⁴ This is the primary oversight body over the activities of the police.

Internal Affairs Unit

The Internal Affairs Unit (IAU) has been established under Section 87 of the National Police Service Act 2011 to provide an internal mechanism to investigate complaints against police by people and the police themselves.¹⁵⁵ The aim of the organization is to promote professionalism, uniform standards of discipline and good order as well as keep a record of the complaints made.¹⁵⁶

¹⁵¹ http://www.the-star.co.ke/news/2015/03/26/president-uhuru-kenyatta-speech-during-state-of-the-nation-address-at_c1108742. Accessed on 7th November 2016.

¹⁵² Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 20.

¹⁵³ Saferworld, 'Politics and Policing; Understanding the impact of post-conflict political settlements on security reforms in Kenya,' at 21.

¹⁵⁴ <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html>. Accessed on 7th November 2016.

¹⁵⁵ <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html>. Accessed on 7th November 2016.

¹⁵⁶ <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html>. Accessed on 7th November 2016.

The IAU conducts itself in an impartial manner. Investigations are initiated on its own, at the direction of the Inspector General or at the request of IPOA and recommendations are given to the Inspector General or to the NPSC.¹⁵⁷

Directorate of Criminal Investigations

In addition to their prerogative to provide criminal intelligence in police matters, under the command of the Inspector General, the DCI conducts investigations on matters that may be referred to it by IPOA.¹⁵⁸

Internal and external influence over the activities of the police has shaped the current scope of police independence. Unfortunately, the greatest influence over the police has and continues to be the political settlement by the political elite. These interests have overridden the interests of the public as a whole thereby undermining the efficiency and effectiveness of the police and especially in implementing the reform process. The reforms recommended aimed at ensuring that the police were depoliticized in order that the body may remain independent which may prove detrimental to the political elite who have utilized the resources of the police for their own betterment over the years. The political elite have frustrated this process at the expense of the proper functioning of the police.

It is possible that reducing the influence of the political settlement could lead to greater improvements in performance of the police. This is especially since police discretion aids officers in conducting their activities to the best of their judgment and not to serve the interests of others. The police should therefore not only look within in remedying its inefficiencies but should also look without to curtail any undue external influences.

A balance between oversight and independence is paramount since it is important that accountability measures are put in place to ensure that the police are working in accordance with their mandate and they should do so in accordance with the duty that they have to the government and government policies as well as the interests of the public. Best practices from

¹⁵⁷ <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html>. Accessed on 7th November 2016.

¹⁵⁸ <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html>. Accessed on 7th November 2016.

states with similar police systems may assist in giving some direction to the ideal scope of independence of the police.

CHAPTER 6: RECOMMENDATIONS

An appreciation of the development of the doctrine of police independence in Kenya is essential in order to determine the measures that should be put in place to ensure that this discretion is utilized to achieve effective and efficient police service. The police are the strong arm of the state and thus it is their duty to enforce laws and policies defined by state institutions.¹⁵⁹ The police are also a service to the public and are expected to be responsive to the needs of the people since they are carrying out their functions on the people's behalf.¹⁶⁰ The effective balance of these two roles of the police requires the police to be impartial in their work. This includes both political impartiality and non-arbitrary professional decision making especially where the use of their powers is concerned. The police must therefore be allowed to use independent professional judgment when responding to particular situations.¹⁶¹

Operational Independence

Police officers usually have some room to manoeuvre when using their powers and decide on matters dealing with the amount of force they could use and on whether to carry out searches and arrests.¹⁶² This concept of operational independence requires the police to exhibit the following:

- A high degree of professionalism and independence from political influences;
- Actions in conformity with the law and established policies;
- Operations on the basis of public consent, within the framework of the law, as evidenced by levels of public confidence; and
- Responsibilities for decisions and operations, accepting liability when required and to exhibit full transparency in decisions and openness to external scrutiny.¹⁶³

¹⁵⁹ United Nations Office on Drugs and Crime Vienna, "*Handbook on Police and Accountability, Oversight and Integrity*," Criminal Justice Handbook Series, 2011, at 6.

¹⁶⁰ United Nations Office on Drugs and Crime Vienna, "*Handbook on Police and Accountability, Oversight and Integrity*," Criminal Justice Handbook Series, 2011, at 6.

¹⁶¹ United Nations Office on Drugs and Crime Vienna, "*Handbook on Police and Accountability, Oversight and Integrity*," Criminal Justice Handbook Series, 2011, at 6.

¹⁶² United Nations Office on Drugs and Crime Vienna, "*Handbook on Police and Accountability, Oversight and Integrity*," Criminal Justice Handbook Series, 2011, at 7.

¹⁶³ United Nations Office on Drugs and Crime Vienna, "*Handbook on Police and Accountability, Oversight and Integrity*," Criminal Justice Handbook Series, 2011, at 7.

Police independence should therefore only be applied in light of the above considerations to ensure that the police are effective, efficient and fair.

Oversight and Accountability

This degree of police independence is defined by establishing the mechanisms of both oversight and accountability. Accountability involves a system of internal and external checks and balances that aim at ensuring the police perform the functions that are expected of them to a high standard and are held responsible if they fail to do so.¹⁶⁴ It serves to prevent the police from misusing their power, politicians from misusing their influence and control and it also aims at enhancing public confidence.¹⁶⁵ The lack of transparency induces corruption and other forms of police misconduct.

Kenya has in place laws and institutions that focus on oversight and accountability. The challenges in these systems include the lack of political will to enforce the legislations made as well as the poor execution or complete disregard of the laws by the police themselves. The effect of this on the people is in seen in the increasing lack of confidence in the police despite the reforms that have been made. There is need for transparency which is seen through mechanisms of openness of the police to public scrutiny which enhances their integrity and further leads to public confidence and legitimacy.¹⁶⁶ It is evident that the police that lack integrity seek to enlarge their operational independence without any willingness to aid the public or to be accountable in a transparent way.

Accountability includes activities before, during and after operations. Effective police accountability involves the following:

- Guidance for the police on what to do and how to do it. This is before the act;
- Supervision of the police and awareness of the need for accountability, during the act;
- Remedying improper police actions and omissions; which occur after the act; and

¹⁶⁴ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 9.

¹⁶⁵ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 9.

¹⁶⁶ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 10.

- Feedback and opportunities to reflect on lessons learned after the act.¹⁶⁷

Their activities are divided into three parts; before police actions and operations; during police actions and operations and after police actions and operations.¹⁶⁸ Before police actions take place, there needs to be a period of direction setting whereby priorities are set and policies are developed to ensure that the police are responsive to the needs of the people they serve.¹⁶⁹ During police activities, there is need for supervision and monitoring of their daily operations. After police actions and operations, there should be a review and evaluation process of police activities, management and administration. There is need for effective complaints and redress procedures to prevent impunity.¹⁷⁰

It is important to note that accountability involves giving directions and preparing police officers for their work. This is not only limited to individual officers but also to supervisors and the police force as a whole.¹⁷¹ The IGP in Kenya has an independent office. His role is to oversee the activities of the police but he remains accountable to the Cabinet Secretary and the Director of Public Prosecutions for his role that he looks to for direction on policy.¹⁷²

Accountability is a conglomerate of processes where different actors share responsibilities. It is unwise to vest all powers entirely on the police, giving them complete operational independence and relying solely on their professional judgment and it is also not prudent to vest a majority of the power of regulation and oversight on one body regardless of whether the body represents the community or is an independent oversight authority.¹⁷³ There are different powers in Kenya that carry out oversight measures over the police but the authority of the arms of the government supersedes the powers of other independent oversight powers such as the IPOA and the IAU.

¹⁶⁷ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 10.

¹⁶⁸ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 10.

¹⁶⁹ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 10.

¹⁷⁰ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 11.

¹⁷¹ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 11.

¹⁷² Article 245(4), *Constitution of Kenya*, 2010.

¹⁷³ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 13.

The oversight bodies and systems are in place thus what is essential is the establishment of mechanisms that strengthen the capacity, capability and competence of existing internal and external accountability structures.¹⁷⁴ In addition to the internal oversight and accountability mechanisms outlined above, the external oversight mechanisms that are put in place include political and civilian oversight. The legislative, judiciary and executive have the duty to develop legislation, policies and guidelines as well as priority setting which occurs before and after the operations of the police.¹⁷⁵ The public play their role by filing complaints when the police fail to carry out their duties efficiently and effectively and independent bodies should review police actions and receive and investigate complaints.

BEST PRACTICES FROM OTHER JURISDICTIONS

Kenya can reflect on the systems that are in place in other Commonwealth jurisdictions. Stringent measures that ensure transparency, oversight and accountability should be enforced and examples from Britain, Australia and Northern Ireland provide practices that Kenya can mirror. This is preferred instead of practices from African countries. Although Commonwealth countries in Africa have similar systems of governance as Kenya and thereby face similar challenges, these countries lack solutions to their own problems and thus cannot aid the Kenyan situation. The National Police Service of Kenya requires radical changes and such changes can only come from jurisdictions with effective and efficient mechanisms such as the countries below.

Britain

The Independent Police Complaints Commission oversees the activities of the police. The IPOA of Kenya can borrow the following practices to improve its efficiency and effectiveness:

- The police have a mandatory duty to report cases to the Independent Police Complaints Commission (IPCC) where persons have died or have been seriously injured.¹⁷⁶

¹⁷⁴ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 16.

¹⁷⁵ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 18.

¹⁷⁶ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 60.

- The IPCC publishes salient recommendations for the improvement of the police service in partnership with the police in a “learning the lessons” bulletin. These bulletins are taken as good advice and implemented by the police.¹⁷⁷ Legislation should be made to ensure that the reports and recommendations made by IPOA should be taken into account and implemented by the Kenya Police.
- The chair of the IPCC leads a team of 12 commissioners, each of whom oversees a particular region.¹⁷⁸ In a bid to improve its reach to the public, the IPOA should endeavour to have a form of representation in every county in Kenya.

Northern Ireland

The Pattern Commission of Northern Ireland came up with the Northern Ireland Police Board as well as the Police Ombudsman of Northern Ireland.¹⁷⁹ The following practices can be borrowed from the above bodies:

- The Board can hold the Chief Constable to account for his actions and decisions including those of his staff. The Board can also set objectives and targets for police performance and monitor their progress in achieving these.¹⁸⁰ Independent bodies in Kenya should have the powers to hold the Inspector General or any police officer to account for their actions.
- The recommendations of the Board are binding on the police. This is a function that should be given to oversight bodies such as the IPOA and the IAU which would aid in improving police service in the country.

Australia:

In Australia, there are different independent agencies that focus on different aspects of police oversight. They include:

¹⁷⁷ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 61.

¹⁷⁸ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 61.

¹⁷⁹ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 61.

¹⁸⁰ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 61.

- In New South Wales, the Police Integrity Commission investigates only serious cases. They supervise investigations and trends and patterns and suggest systemic changes to prevent problems from recurring.¹⁸¹
- In Queensland, there is the Crime and Misconduct Commission is a body that investigates issues on the corruption in the public sector and the police service.¹⁸²
- In Victoria, there is the Office of the Police Integrity is subject to the Police Integrity Act of 2008 and other laws. It investigates matters regarding police misconduct and integrity as well as police policies, practices or procedures.¹⁸³

In Kenya, IPOA oversees all the activities of the police. This reduces its efficiency since it cannot cater to all issues that affect police conduct and therefore the establishment of more independent oversight organisations that focus on specific policing issues may aid in improving oversight in general.

Other Recommendations

1. Cooperation between the government and the police in ensuring that the police reforms are fully implemented. The reforms that are in place in the 2010 Constitution as well as the subsequent legislations are yet to be implemented in full. Harmonizing the Kenya Police Service and the Administrative Police would be an ideal starting point. From this point, the implementation of the rest of the reforms should take place.
2. Education of the public on the role of the police and their contribution through the civilian oversight mechanisms. A great majority of the public do not know the functions of the police especially in light of the provisions of the 2010 Constitution. They therefore cannot hold the police to account for their activities nor are they aware of the mechanisms in place to report the wrongdoings of the police.
3. Reduction of the political influence over the police. The police activities should be free from undue political pressure. In light of the post election violence in 2008 where the

¹⁸¹ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 62.

¹⁸² United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 62.

¹⁸³ United Nations Office on Drugs and Crime Vienna, “*Handbook on Police and Accountability, Oversight and Integrity*,” Criminal Justice Handbook Series, 2011, at 63.

police were used to propagate violence by the political elite, the independent bodies that conduct oversight over police activities should also give special attention to the relationship between the political elite and the police.

4. Remuneration and equipment. The police should be remunerated adequately for their service. This incentive especially through a sufficient basic salary and bonuses and awards where a police officer has performed a task well is a mechanism that should be implemented and aids in preventing the police from abusing their independence or engaging in corrupt activities such as bribery. In addition they should be provided with equipment that enhances their efficiency.
5. A police code of ethics should be created. This would provide guidelines on issues regarding integrity and good conduct of the police when handling civilians who require their assistance as well as perpetrators of crimes.
6. Proper training of police officers. The police should be adequately trained on matters pertaining to their role as officers of law enforcement. This not only covers physical training activities but also education on the level of discretion that they have in their work and how to exercise their discretion in line with the mission statement of the police. As enforcers of the law, they too should be aware of these laws.

CONCLUSION

The current scope of police independence in Kenya is clearly defined in the Constitution and further elaborated in subsequent legislations. However, its adequacy is difficult to determine. This is in light of the lack of fully implemented reforms. The greatest challenge to this is the conversion of the colonial mentality of the police force as a puppet of the political elite and a sect of opportunists that feed off of the helpless citizenry and the establishment of public confidence and public participation in creating an institution that can be trusted.

The ideal scope of police independence is one that takes into account the internal and external parties involved and sets a balance of control and freedom between the two. Kenya is yet to achieve this. Nevertheless, with the reforms already underway, the future is somewhat promising. Cooperation is required among all the stakeholders involved to fully implement the legislations in place. Additional measures following the best practices from other countries would aid in further defining the scope of police autonomy and measures of accountability and

oversight. The following should be done in light of the mission of the police which is to provide quality service to meet the expectations of their customers.