

Police accountability in Kenya

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

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

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

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

Summary

This article examines the Kenya Police Force and how the current 'constitutional moment' may be seized for much needed reform. The police have been at the nexus of the most serious problems facing Kenyan society: corruption, crime, inter-ethnic violence and vigilantism. Institutional arrangements are needed to ensure police accountability. Accountability has the following components: popular accountability, legal accountability and transparency. It is essential that the police be insulated from extralegal or illegal political interference and that internal and external supervisory and complaints mechanisms holding members of the police accountable, exist. The article discusses police accountability in Kenya. Brief comparative sketches of Uganda, Nigeria, South Africa and Northern Ireland are given. These countries have taken steps to broaden the range of actors and institutions to which the police are accountable and to have the executive

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share the power of appointing and removing senior officers of the police. The article ends with six recommendations on how to enshrine popular accountability, legal accountability and transparency as the central values in Kenyan law enforcement.

1 Introduction: Kenya's constitutional moment

According to the legal theorist Bruce Ackerman, constitutional democracy in the United States has evolved along two distinct tracks of lawmaking. On one track, that of 'normal politics', the executive, legislative and judicial branches of government make decisions on behalf of citizens in the absence of high levels of citizen engagement. However, during 'constitutional moments' — moments of sustained citizen engagement and mobilisation — a second track of 'higher' lawmaking emerges. During these moments, the people themselves assert their supremacy, and sweeping changes in the structure of constitutional democracy are thereby legitimated. When American democracy has functioned on this second, higher track of lawmaking — as when the Constitution itself was framed, when the country emerged from its civil war and brought an end to slavery, and when the federal government dramatically expanded its intervention in the national economy during the New Deal — governing institutions have been fundamentally reshaped.¹

In the past year, Kenya has entered its own 'constitutional moment'. This is self-evident in the sense that Kenyans are in the process of rewriting their Constitution. It is also true in the deeper sense that Ackerman describes: Kenyan citizens are reshaping their society through debate, activism and political participation.

The Kenyan people have elected a new government. For many months, they have also engaged in a spirited debate about the substance of the new Constitution and about the proper structure of the new government. After more than a decade of activism for democratic reform, civic engagement and mobilisation are at a peak. There has, in short, been no better opportunity since independence for the people of Kenya to revise the principles underlying Kenyan democracy and to reshape government institutions in accordance with those principles.

The Kenya Police Force (KPF) must be among the institutions that are reshaped during Kenya's constitutional moment. For the past decade, and despite the best efforts of committed reformers within the KPF itself, the police have been at the nexus of the most serious problems facing

¹ B Ackerman *We the people: Foundations* (1993).

Kenyan society: rampant government corruption, unacceptably high levels of crime, inter-ethnic violence and vigilantism.

During this period, the police have not been properly accountable to the Kenyan people. They have often placed the demands of the ruling party and of powerful individuals ahead of the rule of law and ahead of the needs of citizens. In the service of powerful interests, the police have established a record, documented by the media and by non-governmental organisations (NGOs), of extrajudicial killings, torture, arbitrary detention, suppression of dissent and fomenting ethnic violence. In 2002 alone, for example, the police killed more than 100 people under circumstances that suggested an extrajudicial execution.²

David Bayley's conceptual distinction between democratic policing and regime policing can be applied usefully to the Kenyan context.³ For the past decade, the KPF have been a regime police, dedicated ultimately to the preservation of the government's power and to the protection of vested interests, rather than to the advancement of the public interest.

Through corrupt practices, many police officers have also profited during this period at the public's expense. Thus, the police have not only failed to control corruption, a problem so widespread that it appears to be the chief cause of Kenya's economic stagnation,⁴ but an unsettling number of the police force have themselves succumbed to corruption. According to Transparency International, Kenya, seven out of ten Kenyans report having paid a bribe to the police on the understanding that a failure to pay would result in mistreatment or denial of service, and the average Kenyan reports paying 4,5 bribes to police officers per month.⁵ Kenya's survey results put the total *per capita* cost of bribes to police officers alone — the police 'bribery tax' — at 1 270 Kenyan shillings (more than \$15) per person per month.⁶

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

² See Amnesty International *Amnesty International Report 2003: Kenya* (2003).

³ See DH Bayley *Patterns of policing: A comparative international analysis* (1985).

⁴ Kenya's gross domestic product contracted by an average of 0,5% per year from 1990 to 2000. See United Nations Development Programme *Human Development Report 2002*.

⁵ Transparency International — Kenya, Kenya Bribery Index 2002 7, 10 (2002), available at <<http://www.tikenya.org/documents/BribIndex02.pdf>> (accessed 31 July 2003).

⁶ As above, 9.

⁷ UN Habitat *Crime in Nairobi: Results of a citywide victim survey* (2002) 35.

In an emerging democracy, police reform cannot be accomplished by making slow inroads from the margins of police operations. Rather, institutional arrangements designed to ensure police accountability and adherence to the rule of law, and to engender an institutional *culture* of respect for these values, must be put in place before other, more targeted reforms can take hold.⁸ Programmes to enhance specific police operational capacities, to provide fora for engagement between the police and the community, to train police personnel on principles of human rights, and to increase the pay of the constabulary — all badly needed — cannot have their maximum impact in the absence of reforms at the institutional level.

As Philip Heymann has written, efforts to build strong criminal justice systems by slowly building competent institutions, while postponing any treatment of corruption and other crimes of the powerful, are very unlikely to succeed. Such piecemeal approaches are 'based either on extreme optimism or on deep cynicism'.⁹

What must be acknowledged at the outset, however, is that an institutional approach to police reform — an approach that views institutional accountability as the paramount objective of reform, and as the foundation for further reform — requires that some of the most substantial obstacles to reform be surmounted first. According to Bayley:¹⁰

[T]he police reforms that are the easiest to achieve . . . have the least effect on democratic development, and the reforms that are the hardest to achieve . . . have the greatest effect on democratic development.

The institutional approach to police reform aims to reform the management and culture of the police force, neither of which can easily be altered even in developed democracies with well-entrenched constitutional traditions.

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

⁸ DH Bayley *Democratizing the police abroad: What to do and how to do it* (2001) 20–23 42.

⁹ PB Heymann Principles of democratic policing, in *policing in emerging democracies: Workshop Papers and Highlights* (National Institute of Justice, 1995), available at <<http://www.ncjrs.org/pdffiles/177024.pdf>> (accessed 31 July 2003).

¹⁰ DH Bayley 'Who are we kidding? Or developing democracy through police reform' in Heymann (n 9 above) 62.

This paper attempts to provide a starting point for a discussion about reform of constitutional and legislative provisions that govern police accountability. Part two disaggregates the concept of police accountability and suggests that it encompasses at least three core values: popular accountability, legal accountability and transparency. Part three assesses the institutional arrangements for police accountability that exist in Kenya, which are few in number and generally weak in functioning. Part four provides brief sketches of the law in four other Commonwealth jurisdictions, focusing mainly but not exclusively on three sets of institutional arrangements that bear heavily on accountability: arrangements for the appointment, dismissal, transfer and tenure of the head of the police and other top officers; for the supervision and control of the police force; and for the investigation of police misconduct. Drawing on these sketches, part five identifies four common aspects of the trend toward enhanced police accountability in police reform legislation. Part six offers a few concrete recommendations for constitutional and legislative reform during Kenya's constitutional moment.

2 The dimensions and limits of police accountability

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

The objective here is to begin to develop a common vocabulary for discussing police accountability. It is not to undertake the substantially more difficult task of offering a comprehensive definition of accountability. Indeed, Jean-Paul Brodeur, in developing a theoretical framework for accountability, conceded his doubts that 'such a complex notion, which overlaps the meanings of several related concepts, can be encapsulated in one neat formula'.¹¹ Nonetheless, a meaningful call for greater accountability in the police force must take cognisance of the 'intricate conceptual network' from which accountability emerges.¹²

¹¹ J-P Brodeur 'Accountability: The search for a theoretical framework' in Mendes *et al* (eds) *Democratic policing and accountability: Global perspectives* (1999) 129.

¹² As above, 126.

2.1 Values

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

2.1.1 *Popular accountability*

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

No governmental actor in a democracy, and particularly no actor as critical to the physical and material wellbeing of the people as the police, can operate without the underlying consent of the governed.¹³ The primary mechanism for gauging consent in a democracy, and for ensuring the sovereignty of the people, is, of course, the electoral process. Therefore, the people's elected representatives must have ultimate responsibility for making policy with respect to law enforcement. Town meetings and community police forums provide a secondary means of ensuring popular accountability. As will be discussed, an extremely weak form of popular accountability prevails under current Kenyan law: The Commission of Police appears to answer to the President of Kenya on all matters.

Popular accountability is a relative, not absolute, value in democratic policing. For good reason, most police leaders in democratic societies are not themselves elected officials, and law enforcement policy is almost never directly subject to popular vote. However, where police leaders are popularly accountable, they are generally appointed by elected officials, subject to removal by elected officials, and accept policy-level guidance from elected officials. Through these mechanisms, as well as through structured engagement with the community, the police are accountable to citizens, albeit indirectly so.

2.1.2 *Legal accountability*

Legal accountability here means ensuring police compliance with legal rules through judicial processes and other enforcement mechanisms. There can be no rule of law in a society where those who enforce the law are not themselves subject to the law. When police can disobey the law with relative impunity, they lose legitimacy as law enforcers, and

¹³ As above.

they become a highly visible and therefore highly corrosive example of law's inefficacy. A police force that does not itself follow the law encourages citizen disobedience of the law.

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

2.1.3 *Transparency*

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

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

Secret and semi-secret police have fortified authoritarian regimes throughout the world, but they are fundamentally inconsistent with the norms of democratic policing. In Kenya, the task of addressing violent crime has apparently been delegated, at least in part, to secretive units like Flying Squad and Alfa Romeo, whose command structure is shrouded in mystery, who have been given a broad but not clearly defined discretion to use lethal force in carrying out their mandates, and who may have authority to give orders to other police officers regarding the detention of suspects. It is rumoured that arbitrary detention, torture and extrajudicial execution are part of their *modus operandi*.¹⁴ The existence of these secretive units is the most dramatic example of how a lack of transparency has contributed to a climate in which citizens fear the police. Too many Kenyans view any interaction with a police officer as an event with unpredictable consequences, and therefore as a thing to be avoided.

¹⁴ See eg People Against Torture *Torture in Kenya: A status report* (2001) 17 42–43; N Waweru 'Flying squad boss strangled suspect' *East African Standard* 31 January 2003.

2.1.4 *Partially overlapping, mutually reinforcing*

Popular accountability, legal accountability and transparency overlap significantly and reinforce one another. Yet they represent distinct values and distinct institutional states of being. All three are necessary for the practice of democratic policing to take root.

Although legal accountability is the foundation of democratic policing, alone it is not sufficient. Law derives its legitimacy from popular consent, and obedience by the police to a system of laws that were not enacted democratically reflects only an efficient, bureaucratised authoritarianism. Popular accountability, in turn, depends both on political freedom and on institutional transparency. Citizens of a society cannot genuinely be said to hold the police to account if they are prevented from meaningfully taking part in the political process and if they are denied access to information about what the police are doing.¹⁵ A system of laws that does not respect fundamental rights and that shrouds the police in secrecy defeats popular accountability and delegitimises the legal regime under which the police are functioning.

Moreover, as the Kenyan situation illustrates, the police cannot be seen as popularly accountable merely because they answer to elected officials. Rather, accountability demands both that the police answer only to the particular elected officials who are identified in law as having a legitimate role in shaping law enforcement policy, and that the police answer to these officials, not through back channels, but through processes that are transparent and set forth in law.

2.1.5 *Points of tension*

It must be acknowledged here that legal accountability and popular accountability, at least according to simplistic understandings of these concepts, can be seen to be in tension under certain circumstances. Human rights law provides a good example of this apparent, but perhaps illusory, tension. A majority of citizens may, particularly at moments of high public insecurity and low confidence in the judicial sector, support law enforcement policies that violate human rights laws.¹⁶ These might include 'shoot to kill' orders, arrest and detention of 'suspicious' persons without probable cause, the use of third degree methods to extract confessions and the like. In democratic societies, police must obey the law, not the popular mood, and must be held accountable for all human rights abuses.

The apparent tension between legal accountability and popular accountability under these circumstances can be lived with, and arguably resolved at the conceptual level, if one recalls that laws in a democratic society are themselves products of the popular will. Human

¹⁵ See Bayley (n 8 above) 14–15.

rights norms have not been incorporated into positive law by anti-democratic fiat, but rather by the people's own representatives (in the case of legislation and treaty ratification) or by the people themselves (in the case of constitutions). Where laws have been enacted through democratic processes, it cannot be said that obedience to the law, even when momentarily unpopular, represents a rejection of the popular will. Moreover, the laws in a democratic society generally are the product of deliberative processes (town meetings, legislative debates, constitutional assemblies) and therefore can be seen to reflect the popular will more accurately than, for example, opinion polls conducted in the absence of informed debate.

2.1.6 *Insulation from illegitimate interference*

Nonetheless, because adherence to the rule of law is the *sine qua non* of democratic policing, police reformers throughout the world have often spoken of the need to insulate the police from 'political interference'.¹⁷ In fact, the experience of developing democracies bears this out: elected officials and other powerful individuals have often exerted influence over the police that has been extralegal or illegal in nature. *Extralegal political interference* here refers to influence exerted by powerful individuals over the police through informal channels. A degree of extralegal influence is probably unavoidable even in the most mature democracies, but too much of it will slowly undermine the rule of law. *Illegal political interference* refers to influence exerted over the police either through legally proscribed means or for legally proscribed ends. It is acutely corrosive to the rule of law. Notwithstanding the centrality of popular accountability to democratic policing, extralegal interference and illegal interference are not legitimate merely because the person exercising such influence is an elected official. Any accountability regime must take as one of its primary objectives the elimination of illegal interference and the minimisation of extralegal interference.

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

¹⁶ As above, 25 40.

¹⁷ See eg *Report of the Independent Commission on Policing in Northern Ireland* (1999) 23 (Report of the Patten Commission).

accountability — the process of fully exposing these patterns of harassment and rooting them out took decades to complete.¹⁸

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

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

Insulating the police from interference in regard to operational matters requires that a conceptual distinction be made between operations, on the one hand, and policy, on the other. Police and policymakers 'should be encouraged to institutionalise the distinction between the making of policy and the conduct of operations, otherwise the rule of law becomes a casualty of politics'.¹⁹ Elected officials must be responsible for policy. The police leadership must be responsible, in the first instance, for operations.

In developing a blueprint for the reconstruction of the police force in Northern Ireland in the wake of the Good Friday peace agreement, the Patten Commission recognised the necessity of this distinction between policy and operations. To preserve the proper division of labour, the Patten Commission recommended the creation of an intermediate supervisory mechanism, which it called the Policing Board. In the proposed Policing Board, the Patten Commission sought to establish an institutional mechanism that would, on one hand, insulate the police leadership from political interference with operational matters, but that would, on the other hand, strengthen, channel and regularise the police

¹⁸ See eg DJ Garrow *Bearing the cross: Martin Luther King Jr and the Southern Christian Leadership Conference* (1986).

¹⁹ Bayley (n 10 above) 62.

institution's ultimate accountability to political actors. The Commission recommended:²⁰

In essence, we believe that the [political executive] should be able to set long-term governmental objectives or principles; the Policing Board should set medium-term objectives and priorities; and the police should develop the short-term tactical plans for delivering these objectives.

2.2 Processes

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

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

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

Without understating the importance of internal accountability, it must be recognised that the trend in the democratic world has been toward establishing accountability through a mix of internal and external mechanisms. As Andrew Goldsmith has written:²¹

The history of policing has shown repeatedly the inadequacies of an exclusive reliance upon police self-regulation. Police internal controls, for very good reason, do not enjoy the confidence or support of many ordinary citizens. The trend to external regulation of police activity has emerged from repeated

²⁰ Report of the Patten Commission (n 17 above) 28.

²¹ A Goldsmith 'Better policing, more human rights: Lessons from civilian oversight' in Mendes (n 11 above) 35.

episodes of police failures to respond adequately, or in some cases, at all, to a variety of forms of police misconduct.

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

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

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

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

3 Accountability in Kenya

No research has been undertaken into the extent of police accountability in Kenya during the past decade. Yet there are certain matters beyond serious dispute. First, the President of Kenya possesses extraordinary power to control police operations. This power is derived in part from key legislative enactments. Second, due to restrictive laws and to a well-entrenched culture of secrecy, it is exceptionally difficult for a citizen of Kenya to obtain information about the most basic aspects of police functioning or the occurrence of crime in Kenya. Third, internal and

external mechanisms for holding the police accountable are few in number and weak in functioning. Fourth, powerful outside actors have exerted a substantial illegitimate influence over police operations. Here, I will highlight a handful of legal and institutional arrangements that contribute substantially to this state of affairs. Where possible, I will also discuss some of the often tragic consequences of the absence of appropriate mechanisms of accountability.

3.1 Presidential control

In Kenya, the executive branch of government possesses power disproportionate to that of the legislature and the judiciary.²² The law regarding the supervision and control of the police force both reflects and reinforces this state of affairs. The Kenyan system, which one might call a system of *presidential control*, effectively vests the President with complete authority over the police force. Presidential control over the police, one of the key coercive arms of the state, in turn strengthens presidential control over all other aspects of government operation.

Under Kenya's Constitution, '[t]he power to appoint a person to hold or act in the office of Commissioner of Police shall vest in the President'.²³ The President of Kenya thus possesses unbounded authority both to appoint and to remove the top-ranking officer in the Kenya Police Force.

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

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

Third, The Commissioner serves no fixed term of office and is allowed no security of tenure. Instead, the Commissioner of Police in Kenya serves entirely at the pleasure of the President and can be removed by the President even with an unblemished record of obedience to the law and service to the community.

This constitutional provision seems to ensure that the Kenyan police answer officially only to the single individual who holds the office of

²² See SK Akivaga 'Towards a national movement for democratic change in Kenya' in Mute *et al* (eds) *Building an open society* (2002); PH Okondo *A commentary on the Constitution of Kenya* (1995).

²³ Para 108(1) Constitution of Kenya.

President. In a recent interview with the *Sunday Nation*, Bernard Kiarie Njiinu, a former Commissioner of Police, vividly described the circumstances of his own appointment to the top job in the police force:²⁴

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

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

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

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

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

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

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

Another former government minister, speaking anonymously to the press, described the pervasive reach of presidential authority in the Kenyan system as follows:²⁵

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

Under the previous government, law enforcement policy appears to have been formulated and transmitted to KPF in the precise manner described above, that is, through the public pronouncements of the President and his aides. In April 2000, a minister in the office of the President publicly applauded the killing by police of eight suspected

²⁴ K Ngotho 'Former police chief speaks out on the "Mwakenya" crackdown' *Sunday Nation* 2 March 2003.

²⁵ D Onyango 'Fear of Moi still grips top officials of the Kanu regime' *Sunday Nation* 15 June 2003.

criminals, saying that the suspects had 'been sent out of the streets for life', and that 'law enforcement officers should continue doing the same'.²⁶ In August 2001, in the midst of public outcry over an incident in which members of the Kenya Police Reserve shot seven criminal suspects in the backs of their heads, President Daniel arap Moi warned, 'All those with hidden agendas who complain when we kill criminals will sooner or later be required to tell Kenyans what they know.'²⁷ The Kenya Human Rights Commission reports that, according to the best available evidence, there were 143 extrajudicial executions in Kenya in 2000²⁸ and 251 extrajudicial executions in 2001.²⁹

Kenyan law further ensures presidential control over the police force by empowering the President, solely at his own discretion, effectively to displace the Commissioner of Police and give operational direction to the police force. The vehicles for this further consolidation of presidential control are section 85 of the current Constitution and the Preservation of Public Security Act. Pursuant to section 85, 'the President may at any time . . . bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act.'³⁰ Part III of the Preservation of Public Security Act, in turn, makes it 'lawful for the President . . . to make regulations for the preservation of public security'.³¹

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

- 'detention of persons';
- 'restriction of movement (into, out of or within Kenya)';
- 'compulsory movement of persons';
- 'imposition of curfews';
- 'censorship, control or prohibition of the communication of any information';
- 'prohibition of any . . . meeting';
- 'compulsory acquisition . . . of any . . . property';
- 'suspending the operation of any law'; and
- any other 'matter . . . expedient for the preservation of public security'.³²

²⁶ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 2 No 4 (2000) 1.

²⁷ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 3 No 3 (2001) 10.

²⁸ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 2 No 4 (2000) 2.

²⁹ Kenya Human Rights Commission *Quarterly Human Rights Report* Vol 3 No 4 (2000) 10.

³⁰ Para 85 Constitution of Kenya.

³¹ Cap 57 Preservation of Public Security Act, para 4(1).

³² As above, para 4(2).

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

Section 85 does provide that a presidential order bringing Part III of the Act into operation shall expire after 28 days without parliamentary approval.³³ However, this provision is rendered meaningless in two separate ways. First, the President is empowered to issue a new order bringing Part III of the Act into effect immediately upon the expiration of any prior order ('The expiry . . . of an order . . . shall be without prejudice . . . to the making of a new order.'³⁴ Second, the 28-day period does not run during any period in which parliament has been dissolved,³⁵ and, under the Constitution, the President 'may at any time dissolve parliament'.³⁶ Thus, either by the serial issuance of orders, or by the long-term dissolution of parliament, the President is empowered to establish himself as the final and essentially permanent authority in the legality of all arrests, all detentions, all searches and seizures, and as the final arbiter of whether any public meeting or assembly can take place. Part III of the Public Security Act was last invoked in 1997, an election year.

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

3.2 Official secrecy

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

³³ Para 85(2) Constitution of Kenya.

³⁴ As above, para 85(6).

³⁵ As above, para 85(2).

³⁶ As above, para 59(2).

Moreover, the Official Secrets Act establishes a regime of official secrecy entirely contrary to the practice of transparent government. Under current law, it is a crime, punishable by up to 14 years' imprisonment, to possess a government document, or to transfer a government document to any person, for 'any purpose prejudicial to the . . . interests of the Republic', if that document 'might be . . . directly or indirectly useful to a . . . disaffected person'.³⁷ In prosecuting an individual under the Official Secrets Act, the government need not show that the defendant obtained or transferred the document for a purpose 'prejudicial to the interests of the Republic' if it 'appears' that this was the purpose, based on the defendant's 'conduct' or 'character'.³⁸ If the government prosecutes one of its officials for making a government document available to another person, the government need not show that the official lacked authority to make that document available. Rather, if the official claims that he had legal authority to make the document available, it is the official's burden to prove the existence of this authority.³⁹ Unsurprisingly, under this legal regime, most officials of the Kenyan government, including senior police officers, have been reluctant to reveal even the most basic government documents.

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

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

³⁷ Cap 187 Official Secrets Act of 1968 para 3.

³⁸ As above, para 14.

³⁹ As above, para 16.

Criminal Investigations Division when the Administration Police ordered the release of a politically connected suspect whom the CID had intended to interrogate.⁴⁰

3.3 Internal accountability mechanisms

The creation of 'effective disciplinary systems within the police should be a first-order priority in democratic reform'.⁴¹ When properly functioning, mechanisms of internal accountability both prevent the violation of human rights and, by sustaining productive relations between the police and the public, enhance the ability of the police to prevent and investigate crime. In Kenya, several factors have rendered dysfunctional KPF's internal accountability mechanisms.

First, in practice the police frequently refuse to give P3 forms, the basic document for filing a complaint of police misconduct, to potential complainants.⁴² Second, the Force Standing Orders make no provision for the sharing of information with the complainant on the progress of the investigation. The Orders merely require that the complainant be told of the result of the investigation, without 'necessarily indicating the disciplinary action that has been taken'. The Orders state that '[w]here a fault or an offence by a police officer has been disclosed, a suitable apology will be made'. In practice, as senior police officers now concede, KPF has not consistently adhered even to this requirement.⁴³ Very few complainants ever learn the outcome of their complaints. Third, the police do not make available to the public even general statistics regarding disciplinary proceedings or the prosecution of police criminality.

In its 2002 Report, the Standing Committee on Human Rights made the following observation concerning KPF's systems of internal accountability.⁴⁴

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

⁴⁰ S Muiruri 'Police row as graft suspect is released from cells' *Daily Nation* 4 February 2003.

⁴¹ Bayley (n 8 above) 40–41.

⁴² See People Against Torture (n 14 above) 38–39.

⁴³ Remarks of Superintendent GM Kibunja at 'Police as a service organisation: An agenda for change' 24–25 April 2003, Nairobi, Kenya.

⁴⁴ Standing Committee on Human Rights, Sixth Report to the Appointing Authority 24 (2002).

3.4 External mechanisms of accountability: The Standing Committee

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

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

Because the Standing Committee existed only by virtue of a presidential order, it lacked the permanency of a body established by statute or constitutional enactment. Its powers were limited. According to Human Rights Watch, the Standing Committee often seemed to view its role as one of defending the government against allegations of human rights violations, rather than impartially investigating such allegations.⁴⁵

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

3.5 Illegitimate interference with police operations

As discussed in part two above, illegitimate interference with police operations here refers to (1) the exertion of influence over the police; (2) by actors outside the chain of command; (3)(a) through extralegal or illegal means; or (3)(b) for the achievement of extralegal or illegal ends. It is the nature of such illegitimate interference to take place away from public scrutiny, and it is therefore difficult to gauge the precise extent of its exercise. Yet illegitimate interference is believed to be widespread. Chris Murungaru, Minister for Provincial Administration and National Security, recently acknowledged as much when he formally instructed police commanders to resist pressure from outside the police chain of command. He is reported to have assured the police, 'I have word from the President that there shall not be orders from anywhere else except your immediate superiors.'⁴⁶

⁴⁵ Human Rights Watch 'Protectors or pretenders? Government human rights commissions in Africa (2001)', available at <<http://www.hrw.org/reports/2001/africa/kenya/kenya.html>> (accessed 31 July 2003).

⁴⁶ M Munene 'Better pay and gear for police on the way' *Daily Nation* 21 February 2003.

On a regular basis, the Kenyan press has reported irregularities that are likely attributable to illegitimate interference with police operations. Recent examples include: the release of a politically-connected suspect in February by a provincial police chief, who said he ordered the suspect's release on instructions from 'above', but who declined to specify from whom these instructions had come;⁴⁷ the blocking by the police of opposition political rallies just prior to the elections in December, presumably on orders from the ruling party;⁴⁸ the order given to anti-riot police in October 2002 — again, presumably by the ruling party — to cordon off the venue of the cancelled National Constitutional Conference;⁴⁹ and the firing of three police officers in October 2002 for stating, while off-duty, that they supported what was then the opposition party.⁵⁰

Nowhere have the consequences of illegitimate interference with police operations been more stark than in the ethnic clashes that took place in connection with the 1992 and 1997 elections. According to the Report of the Judicial Commission chaired by Justice AM Akiwumi, the Kenyan police repeatedly, consistently and deliberately failed to take action prior to, during and in the aftermath of politically motivated violence throughout the 1990s. The Akiwumi Commission found that the Kenyan police had been ordered by powerful individuals in the ruling party to condone, and perhaps even to help foment the violence.⁵¹ According to the Kenya Human Rights Commission, 1 500 people were killed and 300 000 were left homeless in politically motivated violence between 1991 and 1996.⁵² In incidents connected with the 1997 elections, 2 000 people were killed and 400 000 displaced.⁵³

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

⁴⁷ Muiruri (n 40 above).

⁴⁸ 'Police block Narc rally at Uhuru Park' *Daily Nation* 19 December 2002.

⁴⁹ F Openda 'Police block CKRC delegates' meeting' *East African Standard* 29 October 2002.

⁵⁰ J Kamau 'Dismissals a violation of human rights' *Daily Nation* 1 November 2002.

⁵¹ Report of the Judicial Commission to Inquire into Tribal Clashes in Kenya (2002).

⁵² Kenya Human Rights Commission *Killing the vote: State sponsored violence and flawed elections in Kenya* (1998).

⁵³ Kenya Human Rights Commission *Internally displaced persons and the right to return in Kenya* (2001).

4 Accountability abroad

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

Yet the opposite position has also been rejected. A substantial body of literature supports the notion that the experience of police reform in one society does have relevance to the process of police reform in other societies — even, as Goldsmith has argued, ‘in societies with very different cultural, political, social and economic traditions and realities’.⁵⁴

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

This section focuses particularly on constitutional and legislative arrangements in these jurisdictions for the appointment, removal, and tenure of the head of the police force, and for the establishment and functioning of civilian oversight mechanisms, both *external supervisory mechanisms*, which have powers of supervision and control over the police force, and *external complaints mechanisms*, which have the power to audit and investigate allegations of police misconduct.

4.1 Uganda

Under Uganda’s Constitution, both the Inspector-General of Police and the Deputy Inspector-General are appointed by the President, ‘with the approval of parliament’.⁵⁵ Both ‘may be removed from office by the President’.⁵⁶ Ugandan law enumerates no criteria for appointment or removal to these positions and establishes no fixed term of office.

The Police Statute of 1994 establishes a Police Authority, the chief functions of which are ‘to advise the government on policy matters relating to the management, development and administration of the Force’, ‘to advise the President on the appointment of the Inspector-General of Police and the Deputy Inspector-General’, ‘to recommend to

⁵⁴ Goldsmith (n 21 above) 47.

⁵⁵ Art 213(2) Constitution of the Republic of Uganda (1995).

⁵⁶ As above, art 213(5).

the President appointments and promotions of police officers above the rank of Assistant Superintendent of Police', and 'to determine the terms and conditions of service in the Force'.⁵⁷ By direction of the Act, the members of the Police Authority are the Attorney-General, the IGP, the Deputy IGP, the police officer in charge of administration at police headquarters, and three other persons appointed by the President.⁵⁸

In 1999, in response to several allegations of high-level police corruption and misconduct, parliament established the Judicial Commission of Inquiry into Corruption in the Uganda Police Force and named High Court Justice Julie Sebutinde as its chairperson. The Sebutinde Commission, in its May 2000 report, exposed what it described as 'institutionalised' corruption in the police force. It found 'widespread and flagrant indiscipline' among police officers of all ranks and spoke gravely of 'a culture of impunity whereby officers get away with flagrant violations of human rights under their superiors' noses'.⁵⁹ In the wake of the report, the President replaced most of the top officers of the UPF.

The Sebutinde Commission recommended that the government develop guidelines for the appointment of the IGP and Deputy IGP, that these guidelines be incorporated into the Police Statute, and that the IGP be appointed on a performance contract of three years, renewable on merit.⁶⁰

The Sebutinde Commission found that the composition of the Police Authority (described above) ensures that it lacks sufficient distance from senior police leadership, on the one hand, and from the political executive, on the other. According to the Commission, this lack of distance results in the Police Authority frequently functioning as a rubber stamp for decisions of the senior police leadership and renders the appointment process within the force vulnerable to tribalism, nepotism, 'empire building' and discrimination.⁶¹ The Sebutinde Commission recommended the creation by parliament of a Police Service Commission, which would be composed predominantly of prominent citizens outside of the government, and which would assume many of the present functions of the Police Authority.⁶²

The Constitution establishes the Uganda Human Rights Commission (UHRC), which is empowered to investigate and redress violations of human rights, to inspect detention facilities, to make recommendations

⁵⁷ Para 10 Police Statute 1994.

⁵⁸ As above, para 9.

⁵⁹ Report of the Judicial Commission of Inquiry into Corruption in the Uganda Police Force (2000) 255–56.

⁶⁰ As above, 239.

⁶¹ As above, 240–41.

⁶² As above, 241–42.

to parliament regarding the promotion of human rights and the compensation of victims, and to promote research, education, and civil awareness in the field of human rights.⁶³ Like many national human rights commissions, UHRC has extensive powers of investigation.⁶⁴ In addition, unlike most of its counterpart institutions, UHRC, upon a finding of 'an infringement of a human right or freedom,' may 'order the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress.'⁶⁵ The UHRC consists of a judge of the Uganda High Court or a person of equivalent qualification and at least three other persons 'of high moral character and proven integrity'.⁶⁶ They are appointed by the President with the approval of parliament and serve terms of six years.⁶⁷ The Constitution mandates that 'the Commission shall be independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority'.⁶⁸

4.2 Nigeria

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

Pursuant to the Nigerian Constitution, the Inspector-General of Police is appointed by the President 'on the advice' of the Nigeria Police Council. Only 'serving members of the Nigeria Police Force' are eligible for appointment.⁶⁹ Before removing an individual from the position of IGP, the President must also 'consult' the Police Council.⁷⁰

In 2001, the Nigerian parliament established the Police Service Commission (PSC), a body composed of civilians, most of whom are not public officeholders. The PSC is, in the terminology adopted here, an *external supervisory mechanism*. The PSC's functions include (1) making appointments or awarding promotions to all vacant offices in the Nigeria Police Force other than Inspector General of Police; (2) ordering dismissals from any office in the NPF other than IGP; and (3) exercising disciplinary control over all officers other than the IGP.⁷¹ The PSC is mandated to 'formulate policies and guidelines' on personnel matters and on matters of 'efficiency and discipline'.⁷² The PSC may also

⁶³ Art 52 Constitution of the Republic of Uganda (1995).

⁶⁴ As above, art 53(1).

⁶⁵ As above, art 53(2).

⁶⁶ As above, art 51.

⁶⁷ As above.

⁶⁸ As above, art 54.

⁶⁹ Art 215 Constitution of the Federal Republic of Nigeria (1999).

⁷⁰ As above, art 216.

⁷¹ Para 6(1) Police Service Commission (Establishment) Act 2001.

⁷² As above.

'perform such other functions, which in the opinion of the Commission are required to ensure the optimal efficiency of the Nigeria Police Force'.⁷³ In performing these functions, '[t]he Commission may, with the approval of the President make regulations, generally for the purposes of giving full effect to this Act'.⁷⁴ The PSC is one of the few civilian oversight mechanisms worldwide with power actually to impose discipline on police officers, rather than merely recommend discipline.

The Act apparently seeks to ensure that the PSC's membership is broadly representative of Nigerian society and is not dominated by persons closely associated with the ruling party. The membership consists of 'a Chairman', 'a retired Justice of the Supreme Court or Court of Appeal', 'a retired Police Officer not below the rank of Commissioner of Police', a representative of 'women interest', a representative of 'the Nigerian Press', a representative of 'non-governmental human rights organisations in Nigeria', a representative of the 'organised private sector', and a 'Secretary'.⁷⁵ All members are 'appointed by the President subject to the confirmation by the Senate', serve four-year terms, and must be 'persons of proven integrity and ability'.⁷⁶ The members of the PSC are subject to removal 'by the President if he is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office'.⁷⁷

In each Nigerian state, the police are under the direction of a Commissioner of Police, subject to the overall direction of the IGP. Pursuant the Constitution, the Commissioner in each state is now appointed, not by the President or the IGP, but by the Police Service Commission.⁷⁸

4.3 South Africa

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

Pursuant to the Constitution, a member of the national cabinet must be assigned overall responsibility for policing. This cabinet member 'must determine national policing policy after consulting the provincial governments and taking into accounts the policing needs and priorities of the provinces as determined by the provincial executives'.⁷⁹ The

⁷³ As above.

⁷⁴ As above, para 25.

⁷⁵ As above, para 2(1).

⁷⁶ As above, paras 2-3.

⁷⁷ As above, para 4(2).

⁷⁸ Art 215(1)(b) Constitution of the Federal Republic of Nigeria (1999).

⁷⁹ Art 206(1) Constitution of the Republic of South Africa Act 108 of 1996.

Police Service Act assigns these responsibilities to the Minister of Safety and Security.⁸⁰

The ranking officer in the Police Service, the National Commissioner, 'must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing'.⁸¹ The President holds power of appointment to the office of National Commissioner.⁸²

Under the Police Service Act, the President must, at the time of appointment of the National Commissioner, specify a term of office of up to five years for the Commissioner.⁸³ The President also has the power to remove the National Commissioner prior to the expiration of the Commissioner's term, but the President must first establish a 'board of inquiry consisting of judge of the Supreme Court as chairperson, and two other suitable persons'.⁸⁴ This board must 'inquire into the circumstances that led to the loss of confidence' in the National Commissioner, 'compile a report', and 'make a recommendation'.⁸⁵ The President may remove the National Commissioner from office only upon receipt of this board's recommendation.⁸⁶

As in Nigeria, policing power in South Africa is partially devolved to provincial actors. The National Commissioner, 'with the concurrence of the provincial executive', appoints a Provincial Commissioner for each province.⁸⁷

The Police Service Act creates an *external complaints mechanism*, the Independent Complaints Directorate (ICD),⁸⁸ which is specifically charged with ensuring that citizen complaints of police misconduct are investigated in an effective and efficient manner.⁸⁹ The Act mandates that the ICD 'shall function independently from the [Police] Service'.⁹⁰

The ICD may, upon its own initiative or upon receipt of a complaint, 'investigate any misconduct or offence allegedly committed by any member' of the Police Service or 'any death in police custody or as a result of police action'.⁹¹ The ICD may conduct these investigations itself or may, at its own discretion, refer any matter to the police for internal investigation.⁹²

⁸⁰ Art 1 South Africa Police Service Act 68 of 1995.

⁸¹ n 79 above, art 207(2).

⁸² As above, art 207(1).

⁸³ n 80 above, art 7.

⁸⁴ As above, art 8(1).

⁸⁵ As above.

⁸⁶ As above, art 8(7).

⁸⁷ n 79 above, art 207(3).

⁸⁸ n 80 above, art 50.

⁸⁹ As above, art 53(1)(a); art 222 Constitution of the Republic of South Africa 200 of 1993.

⁹⁰ n 79 above, art 50(2).

⁹¹ As above, art 53(2).

⁹² As above, art 53.

Some commentators have argued that the use of the word 'complaint' in this context may lead to some confusion about the scope of the ICD's mandate.⁹³ In fact, the ICD will not consider any 'complaint' against the police, but rather limits its reach to complaints or allegations relating to (1) deaths of persons in custody or deaths which are a result of police action; (2) the involvement of police members in criminal activities such as robbery, theft of motor vehicles and assault; and (3) police misconduct or behaviour which is prohibited by the Police Regulations, such as neglect of duties or failure to comply with the Code of Conduct.⁹⁴ Other complaints are generally handled by police internal mechanisms.

Under the Police Service Act, ICD investigators are given the same powers as police officers to investigate allegations of misconduct.⁹⁵ The Executive Director of the ICD may 'request and obtain information from any police officer as may be necessary for conducting an investigation' and 'request and obtain the co-operation of any member [of the police service] as may be necessary to achieve the object of the directorate'.⁹⁶ The Executive Director may also 'monitor the progress of', 'set guidelines regarding' and 'request and obtain information regarding' any matter referred by the ICD to the police for internal investigation.⁹⁷ The Executive Director of the ICD lacks power to compel final police action with regard to any matter the ICD has investigated but may 'submit the results of an investigation to the attorney-general for his or her decision' and may 'make recommendations' to the appropriate National or Provincial Commissioner, to the Minister for Safety and Security, or to other executive branch officials, regarding any matter investigated by the ICD.⁹⁸

The Police Service Act provides that the Executive Director shall submit a report on the activities of the ICD to the Minister on an annual basis. The Minister, in turn, must table the report in parliament either within 14 days of receiving it or, if parliament is not in session, within 14 days of the commencement of the next session.⁹⁹

⁹³ Centre for the Study of Violence and Reconciliation, Submission Regarding the Proposed Independent Complaints Directorate White Paper (1999), available at <<http://www.csvr.org.za/papers/papicdsb.htm>> (accessed 31 July 2003).

⁹⁴ About the ICD, available at <<http://www.icd.gov.za/about/brochure.htm>> (accessed 31 July 2003).

⁹⁵ n 80 above, art 53(3)(b).

⁹⁶ As above, art 53(6).

⁹⁷ As above, art 53(6)(c).

⁹⁸ As above, art 53(6).

⁹⁹ As above, art 54.

The Minister for Safety and Security nominates the Executive Director. If confirmed by the parliamentary committees responsible for safety and security, the Executive Director serves for a renewable term of five years.¹⁰⁰

4.4 Northern Ireland

In the Police (Northern Ireland) Act of 2000, the UK Parliament re-constituted the Northern Ireland police, which had been known as the Royal Ulster Constabulary, as the Police Service of Northern Ireland.¹⁰¹ The Act substantially adopts the recommendations of the Independent Commission on Policing in Northern Ireland, also known as the Patten Commission, which had been set up as part of the Good Friday peace agreement of April 1998. In keeping with the Patten Commission's emphasis on accountability as the cornerstone of police reform, the Police Act of 2000 represents one of the most detailed plans for establishing police accountability enacted into law in any jurisdiction. The following discussion describes many, but not all, of the accountability processes and mechanisms for which the Act provides.

The Act establishes an *external supervisory mechanism*, the Northern Ireland Policing Board.¹⁰² The Policing Board is empowered to appoint the head of the police force (the 'Chief Constable'), 'subject to the approval of the Secretary of State'.¹⁰³ The Board also appoints all other senior officers, 'subject to the approval of the Secretary of State and after consultation with the Chief Constable'.¹⁰⁴ The Secretary of State has power to force the retirement of the Chief Constable. An officer whose retirement is sought has the right under the Act to seek a formal inquiry and have the report of the inquiry considered by the Secretary of State prior to being retired.¹⁰⁵

The Policing Board's functions are to 'secure the maintenance of the police in Northern Ireland' and to 'secure that the police . . . are efficient and effective'.¹⁰⁶ In carrying out these functions, the Board is mandated to:¹⁰⁷

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

¹⁰⁰ As above.

¹⁰¹ Art 1 Cap 32 Police (Northern Ireland) Act 2000.

¹⁰² As above, art 2.

¹⁰³ As above, art 35(1).

¹⁰⁴ As above, art 35(2).

¹⁰⁵ As above, art 35.

¹⁰⁶ As above, art 3.

¹⁰⁷ As above, art 3(3).

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

Upon the devolution of powers to the Northern Ireland Assembly, the Policing Board will consist of 19 members, ten 'political members' and nine 'independent members'. The 'political members' will be members of the Assembly, nominated by their respective political parties, and will serve during their terms of office in the Assembly. Parties will be empowered to nominate 'political members' of the Board in rough proportion to the number of seats held by the party in the Assembly.¹⁰⁸ The nine 'independent members' of the Board will be appointed by the Secretary of State for the Union in consultation with other ministers, local district councils and other bodies deemed appropriate.¹⁰⁹ The Secretary 'shall exercise his powers of appointment . . . to secure that as far as is practicable the membership of the Board is representative of the community in Northern Ireland'.¹¹⁰ The appointed members serve terms of not more than four years.¹¹¹ Police officers are ineligible for appointment.¹¹² The Secretary of State may remove any person from membership on the Board, but only on grounds carefully defined in the Act, for example, if the member 'has been convicted of a criminal offence . . . after the date of his appointment' or if the member 'is not committed to non-violence and exclusively peaceful and democratic means'.¹¹³

Prior to devolution, the Secretary of State has authority to appoint the entire membership of the Policing Board.¹¹⁴

In setting forth the institutional architecture for supervision and control of the Northern Ireland Police Service, the new Act reflects careful attention to the apportionment of responsibility among the political executive (as represented by the Secretary of State), police

¹⁰⁸ As above, Schedule 1 art 7.

¹⁰⁹ As above, Schedule 1 art 8.

¹¹⁰ As above, Schedule 1 art 8(1).

¹¹¹ As above, Schedule 1 art 8(6).

¹¹² As above, Schedule 1 art 10(1)(b).

¹¹³ As above, Schedule 1 art 9.

¹¹⁴ As above, Schedule 1 art 3.

leadership (as represented by the Chief Constable), and the new Policing Board. As recommended by the Patten Commission, the Act explicitly assigns responsibility for developing long-term objectives and principles to the Secretary of State, for setting medium-term objectives and priorities to the Policing Board, and for making shorter-term tactical and operational plans to the Chief Constable.¹¹⁵ The Act requires the Chief Constable, in fulfilling this latter role, to submit on an annual basis a draft 'policing plan' setting forth 'proposed arrangements for the policing of Northern Ireland'.¹¹⁶ The Policing Board, in consultation with both the Secretary of State and the Chief Constable, may either adopt the Chief Constable's draft of the policing plan or adopt an amended plan.¹¹⁷

The Act further provides that the Policing Board shall, on an annual basis, develop a 'performance plan' that assesses its own performance and that of the Chief Constable during the previous year according to identified 'performance indicators' and that sets performance standards for the coming year.¹¹⁸ This 'performance plan' shall then be subject to an audit by the Comptroller and the Auditor-General, at the conclusion of which the Secretary of State may direct the Board to revise the 'performance plan' or take any other action that the Secretary of State considers necessary to ensure improvement in the functioning of the Board or the Chief Constable.¹¹⁹

Not later than three months after the end of each financial year, the Chief Constable shall 'submit to the Board a general report on the policing of Northern Ireland during that year'.¹²⁰ Not later than six months after the end of each financial year, the Board shall issue and publish a report assessing 'the performance of the police' in all of the areas, listed above, for which the Board is mandated to hold the Chief Constable accountable.¹²¹

The Act directs the Chief Constable to submit to the Policing Board a code of ethics, which shall 'lay down standards of conduct and practice for police officers' and 'mak[e] police officers aware of' human rights and obligations arising in law.¹²² The Board, working in consultation with government and civil society actors, and others, may then adopt the draft code of ethics submitted by the Chief Constable or an amended code.¹²³ The Secretary of State shall then 'ensure that the provisions of

¹¹⁵ As above, arts 25 & 26.

¹¹⁶ As above, art 26(4).

¹¹⁷ As above, art 26.

¹¹⁸ As above, art 28.

¹¹⁹ As above, arts 29–31.

¹²⁰ As above, art 58(1).

¹²¹ As above, art 57.

¹²² As above, art 52(1).

¹²³ As above, art 52.

the code . . . are reflected in' police conduct and disciplinary regulations.¹²⁴

The new Act strengthens the Office of the Ombudsman, an entity set up by its predecessor statute, the Police (Northern Ireland) Act of 1998. The function of the Ombudsman is to 'secure the efficiency, effectiveness and independence of the police complaints system . . . and the confidence of the public and of members of the police force in that system'.¹²⁵ The Ombudsman, like South Africa's ICD, is an *external complaints mechanism*.

The Ombudsman has responsibility for overseeing complaints made by or on behalf of members of the public about the conduct of any member of the police force, except for complaints relating to the 'direction and control of the police force by the Chief Constable'.¹²⁶ The Chief Constable must also refer to the Ombudsman 'any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person'.¹²⁷ In addition, the Secretary of State may refer to the Ombudsman any other matter in which it appears that a police officer may have committed a criminal offence or 'behaved in a manner which would justify criminal proceedings'.¹²⁸

Having received an appropriate complaint, the Ombudsman may, among other things, refer the matter for informal resolution or mediation, refer the matter for initial investigation by the police, or institute a formal investigation by the Office of the Ombudsman.¹²⁹ To conduct a formal investigation, the Ombudsman appoints an 'officer of the Ombudsman'.¹³⁰ Such an officer shall have 'all the powers and privileges of a constable' in conducting the investigation.¹³¹ The 2000 Act provides that, in addition, '[t]he Chief Constable and the Board shall supply the Ombudsman with such information as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of his functions'.¹³²

At the conclusion of an investigation, the officer appointed to investigate the matter, whether a police officer or an officer of the Ombudsman, 'shall submit a report on the investigation to the Ombudsman'.¹³³ The Ombudsman shall then, if appropriate, refer the matter for

¹²⁴ As above, art 52(10).

¹²⁵ Art 51(4) Cap 32 Police (Northern Ireland) Act 1998.

¹²⁶ As above, art 52.

¹²⁷ As above, art 55(2).

¹²⁸ As above, art 55(1).

¹²⁹ As above, art 53–54.

¹³⁰ As above, art 56(1).

¹³¹ As above, art 56(3).

¹³² Art 66 Cap 32 Police (Northern Ireland) Act 2000.

¹³³ Art 56(6) Cap 32 Police (Northern Ireland) Act 1998.

criminal proceedings and/or disciplinary proceedings. The Ombudsman must refer the matter for criminal proceedings if the report of investigation indicates 'that a criminal offence may have been committed by a member of the police force'.¹³⁴ In all cases, the Ombudsman must make a recommendation to the appropriate disciplinary authority as to whether disciplinary proceedings should be brought and as to any matter relating to the disciplinary proceedings.¹³⁵ If, after the Ombudsman has recommended that disciplinary proceedings be brought, the Chief Constable declines to do so, the Ombudsman may direct the Chief Constable to bring disciplinary proceedings.¹³⁶

The Ombudsman also has an obligation under the statutes to provide statistics and other information to the Secretary of State and to the Policing Board to assist them in carrying out their supervisory functions.¹³⁷

5 The accountability trend

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

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

First, lawmakers have sought to broaden responsibility for controlling the police force beyond the executive branch of government by carving

¹³⁴ As above, art 58.

¹³⁵ As above, art 59.

¹³⁶ As above, art 59(5).

¹³⁷ As above, art 61A.

out significant supervisory and oversight roles for legislators and for other civilians from outside government.

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

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

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

5.1 Broadening the scope of accountability

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

In Uganda, Nigeria, South Africa and Northern Ireland, lawmakers have expanded the process for appointing and removing the head of the police force and other senior officers. Each has moved in the past decade to a system in which the political executive shares powers of appointment and/or removal with other actors or institutions. In Kenya, however, the executive monopolises this power.

Meanwhile, all of the jurisdictions, including Kenya, have established institutions that allow civilians to play some role in overseeing the work of the police. In Northern Ireland and Nigeria, civilian entities have been established with actual supervisory powers over the police and with some measure of independence from the political executive. These *external supervisory mechanisms* have been established with the intention of broadening the range of actors to whom the police are accountable, insulating the police from illegitimate political interference, supporting police obedience to the rule of law, and increasing transparency. The 2000 Northern Ireland Police Act, for example, empowers the civilian Policing Board, through various mechanisms and processes, to set objectives and make plans for the police service, and to hold the police leadership accountable for the overall performance of the service. In

Nigeria, the Police Service Commission has ultimate responsibility for exercising disciplinary control over all officers except the Inspector General of Police.

An external supervisory body that lacks sufficient distance from the executive branch, on the one hand, or from senior police leadership, on the other, cannot substantially enhance police accountability. Such a supervisory body simply functions to reinforce control by the executive. At worst, such a body could function as a mechanism for conferring false legitimacy on the subordination of the police force to the ruling political party. In Northern Ireland and Nigeria, executive branch officials and active duty police officers are ineligible for service on the civilian supervisory bodies.

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

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

The importance of institutional independence, even in the context of external mechanisms of accountability, can perhaps be over-emphasised, however. According to South African reform advocates, 'the 'independence' of an oversight mechanism does not necessarily enable it to win public trust. Rather, '[a]n approach that emphasises public credibility and public confidence above all else is likely to prove to be counterproductive'. In this view, a complaints entity can best win public respect by demonstrating its 'effectiveness' and by developing 'a

reputation for impartiality which is recognised by both the police and members of the public'.¹³⁸

5.2 Channeling accountability, enhancing operational autonomy

A second common theme has been the effort to delineate more sharply the division of decision-making responsibility between senior police officers, on the one hand, and civilian leadership, on the other. Police commanders should have responsibility for making operational and tactical decisions and should be insulated from illegitimate external interference in making these decisions. Civilian leaders should have responsibility for holding police officers accountable for the consequences of their operational decisions, for setting broad objectives for the police force, and for making law enforcement policy.

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

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

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

¹³⁸ n 93 above.

5.3 Blending internal and external accountability

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

The proper handling of allegations of police misconduct requires a particularly careful balance between external and internal mechanisms of accountability. External complaints bodies must have sufficient powers and resources to do their work effectively. In particular, external complaints mechanisms with no independent investigative capacity are likely to be weak accountability mechanisms. Goldsmith has argued that the incorporation of an independent investigative capacity ought to be 'the paramount consideration' in the establishment of an external complaints body, and that any such body 'should be able to reassure citizens that its role can extend beyond the *ex post facto* review of investigations of complaints undertaken by the police themselves'.¹³⁹ South Africa's Independent Complaints Directorate and Northern Ireland's Police Ombudsman, unlike many less successful agencies of external oversight elsewhere in the world, do have this independent investigative capacity.

On the other hand, charging an external agency with the handling of *all* complaints against the police, and thereby altogether removing the police from the process of investigating such complaints, may be self-defeating. Such an agency is likely to develop a strictly adversarial relationship with the police, limiting the amount of co-operation it will get from the police and the level of acceptance its recommendations for reform will receive. As Joel Miller has written in a recent review of the academic literature on civilian oversight mechanisms, '[h]ostility by police departments and police officers to civilian oversight is probably one of the most significant factors that helps explain the failures and underperformance that have afflicted civilian oversight agencies'.¹⁴⁰ 'Conversely, in some contexts the engagement of police departments with the process of oversight has been an important basis for their success.'¹⁴¹

¹³⁹ Goldsmith (n 21 above) 55.

¹⁴⁰ J Miller Civilian 'Oversight of police: Lessons from the literature' 11 (Vera Institute 2002) available at <http://www.vera.org/publication_pdf/178_338.pdf> (accessed 31 July 2003).

¹⁴¹ As above, 12.

Vesting an external complaints body with exclusive investigative jurisdiction may also have the unintended effect of actually reducing internal police accountability. Displacing responsibility for misconduct to an external agency may encourage neglect by the police both of their own complaints management capacities and of the underlying problems that are giving rise to complaints.¹⁴²

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

5.4 Sharpening the focus through specialised institutions

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

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

¹⁴² n 93 above.

6 Recommendations

To whom should the police be accountable? Through what mechanisms? On what subjects? Kenyans have the opportunity to engage these questions directly. The following six recommendations seek to enshrine popular accountability, legal accountability and transparency as the central values in Kenyan law enforcement.

6.1 Define the government's obligation with respect to police service

There is no statement in current law that describes the kind of police service to which Kenyan citizens are entitled or that imposes any particular obligation on the government to provide police service. A new constitutional or legislative provision could correct that deficiency and, in so doing, define the standard against which the police will henceforth be judged. The language might be as follows: It is an obligation of the government of Kenya to maintain a police service that provides security to the people of Kenya, that protects the fundamental rights recognised in the Constitution, and that adheres to the rule of law at all times.

6.2 Establish a broad-based process for the appointment and removal of the Commissioner of Police

The approval of parliament should be required before any individual can be appointed by the President to the office of Commissioner of Police. As in South Africa and Northern Ireland, the President should be required, prior to seeking the removal of a Commissioner before the expiration of the Commissioner's term of office, to convene a commission of inquiry into the performance of the Commissioner and receive its findings.

6.3 Provide security of tenure and a fixed term of office for the Commissioner of Police

With job security, the Commissioner of Police would be able to prioritise the rule of law and the interests of the Kenyan people over the demands of political figures and other powerful individuals outside the regular chains of command and accountability. Kenyan law should establish a fixed term of office for the Commissioner of Police in the range of three to five years, renewable once. During the duration of the term, the Commissioner should be removable by the President only 'for good cause'.

6.4 Establish specialised institutions of civilian oversight

Kenya should embrace the worldwide trend toward the establishment of independent institutions that allow citizens from outside the

government to participate in overseeing the functioning of police force. Kenyan lawmakers should consider the establishment of both an *external supervisory mechanism*, modeled on Northern Ireland's Policing Board or Nigeria's Police Service Commission, and an *external complaints mechanism*, modeled on Northern Ireland's Ombudsman or South Africa's ICD.

6.5 Repeal the Preservation of Public Security Act and the Official Secrets Act

These two parliamentary enactments, at least as currently drafted, are absolute impediments to the achievement of police accountability. The Preservation of Public Security Act has ensured effective domination by the President over all law enforcement matters in Kenya. The Official Secrets Act puts public officials who would share basic government information with Kenyan citizens at risk of criminal sanction.

6.6 Create a unitary police force

Whatever arguments may once have existed for maintaining both the regular Kenya Police Force and the Administration Police, the purpose of the dual structure of policing in Kenya is no longer clear. Not only are most Kenyan citizens uncertain of the relationship between the two police forces, it appears that police officers themselves are often confused about the division of labor and about their answerability to provincial and district authorities. Moreover, it appears that the Administration Police have been more vulnerable to illegitimate political control, and consequently more implicated in past abusive practices, than the regular Kenya police. Kenyan lawmakers should unify law enforcement under the command of the Commissioner of Police.

These recommendations are, of course, only starting points for police reform: I do not mean to suggest that all or even most of the specific objectives of reform can be achieved through legal revision alone. For the short term, even with the enactment of appropriate constitutional and legislative provisions, corruption, brutality, arbitrariness and indiscipline will continue to hamper the practice of law enforcement in Kenya.

All of these problems, however, are hallmarks of a regime police force, of a police force that lacks accountability to the people it serves and to the law it enforces. In Kenya, as in many other developing democracies, the problems of police corruption, brutality, arbitrariness and indiscipline cannot be effectively addressed without first transforming the institutional environment that gave rise to these problems. Institutional values and relationships must be reoriented before managerial changes and capacity-building exercises can have a sustainable impact on the day-to-day practice of law enforcement.

Yet an institutional approach will encounter determined resistance. There will be constant temptation to ascribe the failures and abuses of the past to individual 'bad apples', and to leave aside the task of institutional transformation.¹⁴³ Once Kenya's 'constitutional moment' passes, this resistance will grow only stronger and more determined.

The present moment therefore represents a vanishing opportunity. By defining the principles according to which law enforcement will be conducted in the new Kenya, by broadening the scope of institutional actors to whom the police are accountable, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by strengthening existing channels of accountability, and by establishing new, specialised institutions for holding the police accountable, Kenyans can create a legal and institutional environment within which the day-to-day problems of policing in Kenya can be effectively addressed. In so doing, Kenyans can perhaps initiate a long-deferred renaissance in the relationship between the police and the public.

¹⁴³ Brodeur (n 11 above) 155; n 17 above, 26.