

Participation and inclusion in police reforms in Kenya: Opportunities and challenges since 2008

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Overview

This briefing examines the role of participation and inclusion in the Kenyan police reform processes that followed the National Accord and Reconciliation Act in 2008. The briefing makes the case that reform initiatives arising from the National Accord were very inclusive and allowed the participation of actors from civil society, the private sector and faith-based organisations, as well as ordinary citizens, resulting in a solid legal and policy framework for civilian oversight of policing agencies. However, vested interests, both of the political elite and the police force, have not always favoured greater participation and inclusion. This briefing will outline and analyse the extent of inclusion and participation in different stages of the police reform process since 2008. In particular it will examine opportunities for greater inclusion through commitment to devolution, as well as the role that civil society has played in the reforms process.

The National Accord and Reconciliation Agreement

The National Accord and Reconciliation Agreement (NARA) that brought the 2007–08 post-election violence in Kenya to an end was signed following a 41-day mediation process facilitated by the African Union's Panel of Eminent Personalities. The Kofi Annan-led team made deliberate attempts to make the mediation process inclusive. They adopted a transparent and inclusive process that was reflected in the diversity of stakeholders who were engaged or consulted. From the outset the mediation team's meetings and engagements were not limited to the political protagonists but extended to members of civil society, religious leaders, women's groups, and representatives from the business community; and

kept engaged until the very end. All these 'non-political' groups were pivotal in creating an environment that was favourable for negotiations. For example, the business community, which in Kenya has traditionally tended to keep away from visible political engagement, was particularly outspoken in this period, issuing a joint statement in support of the mediation process.²

However, the violence that followed the 2007 election in Kenya exposed the inadequacies of governance institutions, in particular in the security sector. In the aftermath of post-election violence, Kenya was forced to critically examine its security apparatus after it emerged that security forces had exacerbated the violence, rather than quelled it. The police were implicated in 36 per cent of the deaths witnessed³ and it was evident that members of the police force had facilitated the interests of political elites, rather than public good. ⁴ This was not a new phenomenon as the police force in Kenya had always had a symbiotic relationship with the government of the day. This can be traced back to the colonial period where the police were set up to protect the colonial authority from the people, rather than ensure security and order for all. Even after independence, successive Kenyan presidents maintained firm control over Kenya's police and used them to exercise political control. The use of the police for political purposes deepened in the 1980s under the Moi government, as units were deployed to attack and torture political opponents. Moi ignored calls for police reform after the move to multiparty politics in 1991, using the police to arm

¹ International Peace Institute (2009), 'A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya'.

² Bekoe D (2008), 'Kenya: Setting the Stage for Durable Peace?', *United States Institute of Peace*, 15 April, http://www.usip.org/publications/kenya-setting-the-stage-durable-peace, accessed on 13 March 2016.

³ Commission of Inquiry into the Post-Election Violence (CIPEV) final report, pp 370-380.

⁴ https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis, p 25.

ethnic militias and suppress opposition voter turnout in the violent and flawed 1992 and 1997 elections.⁵

However, in 2002, a government-led police reforms initiative was introduced and a task force appointed, whose membership included the Kenyan Police, the Administration Police, the Nairobi City Council, the Kenya Human Rights Commission (KHRC) and Federation of Women Lawyers in Kenya (FIDA-Kenya) among other civil society groups. 6 However, their report was never made public and the 2002 election brought in the new National Rainbow Coalition (NARC) government whose primary platform was on constitutional reforms. Following these elections, concerns about police reforms were mostly debated within the context of constitutional reforms, though there were attempts at institutional change. Nonetheless, this period was also marked by allegations of torture and extrajudicial killings, which were ultimately investigated by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions. The establishment of the Kenya National Commission on Human Rights (KNCHR) in 2003 as an independent statutory body with the overall oversight of compliance with human rights standards increased the level of exposure and debate on police performance and conduct. KNCHR joined with civil society bodies such as the KHRC, the Independent Medico-Legal Unit (IMLU) and FIDA-Kenya, and made concerted advocacy efforts towards ensuring a more professional and accountable police service by focusing on human rights, gender and the issue of use of torture.8

Police reforms following the National Accord

Commitments to reform the police and the broader security sector were captured in the NARA under agenda item 4. This included establishing an independent police commission, commitments to civilian oversight of the police and to recruit and train more officers to raise the police-to-population ratio to United Nations' standards. These principles embodied the concerns raised by various actors, and their articulation and concise capture evidenced a moment of common purpose among the various stakeholders, including the political elite, on what was ailing the police and what actions were required.

⁵ Noyes A (2013), 'Cleaning House in Kenya's Police Force', Foreign Policy, 30 December, http://foreignpolicy.com/2013/12/30/cleaning-house-in-kenyas-police-force/, accessed on 11 March 2016. However, no drastic measures were proposed regarding the culpability of the police in the violence and none of the top officers lost their jobs. This could be a pointer to either ambivalence of the political elite towards police reforms, or recognition that the security sector was ailing from such deeply entrenched shortcomings that dealing with the top officers alone would not suffice.

Following the National Accord, the Commission to Investigate the Post-Election Violence (CIPEV) was appointed, headed by Justice Philip Waki, a Kenyan Court of Appeal judge (the other two key members were a former police assistant commissioner from New Zealand and a civil society lawyer from the Democratic Republic of Congo). The Waki Commission (as it became known) found that, among other shortcomings, the Kenyan police force suffered from serious internal constraints and challenges including insufficient equipment and funding. However, most significant was the pervasive culture of impunity that had taken root, leading to human rights violations and corruption. This had contributed significantly to the crisis of confidence, which was further deepened by police conduct during the postelection violence. In the face of this, both the National Accord and the Waki Commission started to conceptualise a police service that could be accountable to the citizens it serves. A recurring recommendation from both these processes was the requirement for effective internal and external accountability mechanisms.

As police reform in Kenya gained momentum, a task force was appointed to spearhead the process, headed by a retired judge, Philip Ransley, and mandated to make proposals for police reform in the country. The membership consisted of representatives from the public and private sectors as well as religious leaders and civil society. This inclusive approach mirrored both the National Accord process and the Waki Commission's consultations, which had had similar levels of representation. The task force travelled round the country, met with various stakeholders and also received written memorandums from groups, institutions and individuals. They also participated in trips to Botswana, Sweden and the United Kingdom, including Northern Ireland. Based on these activities the task force presented a report to the president in October 2009 with 200 recommendations focused on improving police efficiency and effectiveness, restoring public confidence in the police and improving police accountability. Following the report's adoption by cabinet, President Kibaki appointed a Police Reform Implementation Committee (PRIC) to coordinate the implementation the report's recommendations. PRIC membership was drawn from the Ransley team as well as the Kenyan Police and the Administration Police.

Both the Ransley task force and PRIC received technical support from the UN, the Swedish Police

⁶ Kenya National Commission on Human Rights & Centre for Human Rights and Peace (2015), *Audit Of The Status Of Police Reforms In Kenya*, p 8.

http://edition.cnn.com/2009/WORLD/africa/02/25/kenya.un.police/index.html?eref=rss_world

http://www.apcof.org/files/Shieldingimpunity.pdf

⁹ Kenya National Dialogue and Reconciliation (2008), *Statement of Principles on Long-term Issues and Solutions*, mediated by H.E. Kofi Annan, Chair of The Panel of Eminent African Personalities, 28 February.

and the US Embassy. Development partners also formed a working group which met regularly with the two teams. After the promulgation of the 2010 constitution, PRIC engaged extensively with the Commission on the Implementation of the Constitution (CIC) regarding draft legislation and policy and administrative actions aimed at enabling, facilitating and fast-tracking police reforms to ensure compliance with constitutional requirements.

Together with the Kenya Institute of Education, PRIC developed a curriculum for police college trainings and oversaw recruitment of the first tranche of Kenyan Police and Administration Police under the new curriculum. These initiatives were conducted under guidelines that required public participation and observation of the process; teams also monitored the newly established mandatory attachment programme before recruits graduated at various police stations. The recommendations of the Waki and Ransley processes, as well those from PRIC, largely informed the wider constitutional review process, which was ongoing at the time, with an unprecedented level of public participation. The desire for democratic and inclusive policing that guided these initiatives is reflected in the constitution.

The 2010 constitution called for the enactment of a legislative framework for police reforms focused around the establishment of three core institutions. The principle of establishing an independent police service was provided for in the establishment of the Office of the Inspector General of Police (IGP), whose appointment by the president must be approved by parliament, and whose security of tenure and independent leadership of the service is protected. This was underpinned by the establishment of the National Police Service Commission (NPSC), whose membership includes civilians and retired police officers. The NPSC has a mandate to oversee appointments, promotions and transfers of police officers, and to address corruption in recruitment and career management. The third core institution was the civilian-led Independent Police Oversight Authority (IPOA). The establishment of these offices moved responsibility for security away from the presidency, and spread it across several institutions, affording the police more autonomy from the executive and other sources of potential political interference.

The first order of business for the NPSC was the recruitment of the Inspector General and two deputies. In accordance with the constitutional requirement for public participation, the interviews were a public exercise and members of the public were invited to provide feedback on the integrity and capabilities of the applicants. However, this exercise had very limited time, and was hurried as the country headed towards the 2013 election. It therefore appeared as though public participation became a mere formality. This was not a good start for an institution that was expected to lay a firm foundation on inclusion and participation in policing at the highest

levels. Their work was, however, supported by the Civil Society Police Reforms Working Group¹⁰ under the leadership of IMLU, which developed vetting tools and also mobilised their members and stakeholders to provide information as well as observe and monitor the process.¹¹ Additionally, the Usalama Reform Forum, which brought together ten civil society organisations (CSOs) to hold agencies accountable for the reforms, also monitored the process.¹²

However, this civilian presence within policing did not go uncontested. Once the Inspector General was appointed, the NPSC and the office of the IGP became engaged in wrangles and turf wars that derailed some of the anticipated reforms. 13 While teething problems are understandable in the move from the previous arrangement - where the IGP's office exercised extensive powers in terms of recruitment, deployment and other appointments some of the issues were unprecedented, considering that the IGP and his deputies are members of the NPSC.¹⁴ And in a clear indication of political involvement in wrangles some members of parliament reportedly expressed preference for the IGP to head the NPSC, contrary to the constitutional underpinnings of civilian oversight of the police. 15 Even more damning was the allegation by a member of parliament that having civilian oversight, managed through the NPSC and IPOA, was bad for the police and that uniformed officers should not be answerable to civilians. 16 These wrangles were indicative of the fact that, notwithstanding constitutional and statutory provisions, the journey to democratic policing and

The PRWG-K brings together ten like-minded organisations which strive to have a reformed police service in the country. They include Centre for Minority Rights (CEMIRIDE), The Legal Resources Foundation (LRF), The International Centre for Transitional Justice (ICTJ), International Commission of Jurists (ICJ) in Kenya, COVAW, Kenya Human Rights Commission (KHRC), Kenya National Commission on Human Rights (KNCHR), The Federation of Women Lawyers (FIDA) Kenya Chapter, Rights Promotion and Protection Centre (RPP) and the IMLU.

http://www.imlu.org/modules-menu/the-police-reform-working-group.html.

¹² The ten member organisations are Kenya National Commission on Human Rights, PeaceNet Kenya, Saferworld, Eastern Africa Institute of Security Studies, Research Triangle Africa, Kibera Community Policing Committee, Socio-Economic Rights Foundation, Chem Chemi Ya Ukweli, African Policing Civilian Oversight Forum and Commonwealth Human Rights Initiative, http://www.the-star.co.ke/news/2013/04/04/wrangles-delay-police-reforms_c757442. The Usalama Reforms Forum; see http://usalamaforum.org/index.php/achievements.

¹³ Leftie P (2013), 'Security risk as police bosses fight for power', *Daily Nation*, 28 May, http://www.nation.co.ke/news/-/1056/1865606/-/view/printVersion/-/1539uwwz/-/index.html.

¹⁴ Maina K (2013), 'Wrangles delay police reforms' *The Star*, 4 April, http://www.the-star.co.ke/news/2013/04/04/wrangles-delay-police-reforms c757442.

¹⁵ Otieno B (2013), 'MPs want Kimaiyo to head police commission' *The Star*, 10 June, http://www.the-star.co.ke/news/2013/06/10/mps-want-kimaiyo-to-head-police-commission_c785769.

Wanambisi L (2013), 'Kavuludi commission bad for police – Nkaissery' Capital News, 27 December, http://www.capitalfm.co.ke/news/2014/12/kavuludi-commission-bad-for-police-nkaissery/.

acceptance of civilian participation in policing would take much longer than hoped.

Reforms following the 2013 election

Under the Jubilee administration that won the election in 2013, police reforms and the relationship between the police and the executive seems to have shifted towards a new issue altogether: terrorism. With a rise in attacks by the Somalian militant group al-Shabaab, the government seems to be keen to once again have direct control over the police in order to address security issues. In May 2014, the Jubilee majority in parliament successfully pushed for the enactment of the National Police Service (amendment) Bill. The bill denied the NPSC exclusive powers to recruit the IGP and deputy, in the event the posts fall vacant, and instead vests the powers in the president and parliament. The amendment was contested by the opposition on the grounds that it was unconstitutional and effectively returned power over the police to the president – something the new constitution had been designed to end.¹⁷

The amendment to section 12 of the National Police Service Act provided for a panel consisting of representatives from state and non-state agencies, ¹⁸ which would identify candidates and put forward names to the president for onward transmission to parliament for approval. Despite the fact that this provision clearly seeks to incorporate different stakeholders in the process (perhaps to appease possible detractors), the NPSC has been sidelined. Upon the resignation of Inspector General David Kimaiyo in December 2014, the president announced the nomination of Joseph Boinet, and transmitted his name to parliament for approval without the input of the panel. ¹⁹

This appointment also came within the context of the Security Laws Amendment (SLA) Act in 2014, which targeted various security laws with far-reaching implications for policing and security in general. The government justified the amendment on the grounds that the threat of insecurity required the executive to have more effective control over security forces and more freedom to make decisions – implying that the current framework was insufficient. These amendments have shown that the new threat to the police reforms agenda may be the reaction of government when faced with security challenges. With the mentality that terrorism requires drastic and

radical actions, which may be hampered by constitutional imperatives as well as legislative and administrative structures, the administration risks eroding gains made. While it is true that such threats require serious action, the argument that this can only be achieved by returning police control to the executive – and not by a wide range of other actions such as better training, increased resourcing and addressing corruption – is flawed. The technical and operational limitations of the wider security sector have been seen in the haphazard responses to the attacks on Westgate, Mpeketoni and Garissa. Rather than seek measures in the existing framework, there have been efforts to rework and weaken it. This does little to instil confidence in existing structures, since they have been declared incapable of delivering change.

County policing in the context of devolution

The 2010 constitution committed Kenya to a process of devolution of power to 47 new county-level governments. While the responsibility for security provision was not devolved and remains with national-level agencies, section 41 of the National Police Service Act established provision for County Policing Authorities (CPAs). These bodies are to be chaired by the County Governors (who lead the new county governments) and their membership is to be comprised of national and county-level officials, representatives of the National Police Service and 'interest groups' from the county. Interest groups should include representatives from the business sector, community-based organisations, women's groups, persons with special needs, religious organisations and youth groups. CPA members are responsible for developing proposals on priorities, objectives and targets for police performance in the county and to facilitate public participation on county policing policy. Below this structure, there will be Community Policing Committees. These committees will work with specific police stations and posts and report to the CPA.²⁰ These initiatives are perhaps the most direct in terms of achieving the principles of community participation.

Seemingly in parallel to these efforts has been the introduction of the Nyumba Kumi initiative, which seeks to create groups of ten houses to monitor potential security threats in their area. This initiative, which has been largely politically driven by the executive, has caused confusion among both the police and public. The slow harmonisation of this concept with other community policing models has taken up a lot of police and the public's time. The lack of structure and current confusion in community

Obala R (2014), 'Parliament passes National Police Service Bill, defies opposition', *Standard Group*, Nairobi, 1 May, http://www.standardmedia.co.ke/article/2000110687/parliament-passes-national-police-service-bill-defies-opposition, accessed on 10 May 2016.

¹⁸ Including the Office of the President, Public Service Commission, NPSC, Independent Policing Oversight Authority, Kenya National Commission on Human Rights, National Gender and Equality Commission and Law Society of Kenya.

¹⁹http://www.standardmedia.co.ke/article/2000146391/president-uhuru-nominates-joseph-boinet-to-be-inspector-general-of-police?

Human Rights Initiative, 'How Do I Get Involved In Community Policing?',

http://www.humanrightsinitiative.org/programs/aj/police/intl/docs/Pamphlet_HOW%20DO%20I%20GET%20INVOLVED%20IN%20COMMUNITY%20POLICING_final.pdf accessed on 11 March 2016.

policing policy caused by the introduction of Nyumba Kumi means that even public-minded officers remain undirected.

This initial period of devolution has also been marked by contestations between the national government and county governments on the role of county governments in policing. As a result, even though CPAs promise to be the greatest stride in the inclusion and participation of citizens at the community level in matters relating to policing, very few counties have established them, and even those that have do not have clear or uniform guidelines.

Civil society and police reforms

While the 2010 constitution guarantees inclusion and participation for all citizens, it is stakeholders who have organised themselves – whether as CSOs, religious organisations or business groups - which usually have a more structured and formalised engagement with the state and its agencies. In the historical context of how Kenyan civil society has engaged with public agencies, one could argue that there have been two types of engagements: those that have primarily sought accountability, transparency and professionalism and have tended to have a more critical approach; and those that have been more conservative, engaging in service delivery, and that therefore have or seek a more collaborative approach. Within the context of police reforms, the first type of engagement historically focused on exposing human rights violations by 'naming and shaming', while their collaborative efforts focused on policy and legislative advocacy and building the capacity of the service on human rights. Those in the second group have offered more technical support concentrating on efforts to improve service delivery. Understandably the police are more comfortable with the second group and uneasy with the first. It is this conflicted position that the police and those engaging with police reforms have to confront squarely in a consistent and credible manner to achieve results. Police services need to be well-resourced and highly efficient, as well as transparent and accountable to the highest constitutional and policing standards. At best the more critical and vocal actors may be treated as unnecessary irritants, while in the worst case scenario the police may view them as 'enemies' and treat them with hostility. On the other hand, the police may give preferential treatment to those more focused on service delivery, and consider them as allies.

Some CSOs, such as the International Commission of Jurists (Kenya), FIDA-Kenya, KHRC and IMLU have observer status at international and regional human rights mechanisms. CSOs have used these leverages to present shadow reports on matters of security. There are also smaller bodies and community-based organisations that engage at the community level. After the post-election violence and the earnest search for police reforms, two major processes

emerged within civil society to work alongside the state initiatives: the Police Reforms Working Group²¹ and the Usalama Forum.²² The main strategy of these initiatives was to provide their members, who were working individually on police reform, a forum to advocate collective positions to reinforce individual member positions. Group members also targeted urgent situations in the sector that could benefit from collective action. Central to their establishment was the need for public participation in police reforms. As already indicated these groups engaged with the police vetting process as well as through advocacy on legislation and policy, including the push for community policing frameworks. While members and groups have had measured success in certain areas, there is concern over shrinking space for engagement, attributed mostly to strong measures taken by the executive regarding counter-terrorism. Most members of these civil society groups have also worked closely with state oversight bodies, such as IPOA and KNCHR, and there is a need for more elaborate, consistent and structured engagement with these public agencies. Furthermore, a strong, wellfunded and functional Internal Affairs Unit as envisaged under the National Police Service Act could be another strategic partner for civil society.

Conclusions and recommendations

The processes that established the agenda for police reform in Kenya – from the National Accord and through the commissions of Waki, Ransley and PRIC – provided a concrete foundation for structured, legitimate citizen participation and engagement in policing. This was through extensive participation in these processes, either through civil society representation and oversight, as well as direct public engagement. It also led to the creation of several institutions that enshrined principles of civilian oversight and public participation. However, in the context of insecurity, particularly since 2013, some of these gains have been clawed back.

²¹ The Police Reform Working Group – Kenya (PRWG-K), started as a civil society police vetting working group initiated by Independent Medico-Legal Unit in November 2011 upon realisation that the much anticipated police reforms were stalling and needed concerted effort to buttress. The group started as a police vetting group with an interest in ensuring a vetting process that can be trusted by the police, and in which the public can have confidence and fully participate.

Usalama Forum is a Kenyan-based public safety research and innovation organisation. Founded as a police reforms lobby in 2008, the forum's mandate has since evolved and is now focused on generating and promoting good practices for community safety and security. It is the hope of Usalama Forum that these community models shall be springboards for generating knowledge on how to build and sustain viable Community Safety Schemes; and consolidate evidence for policy, future legislation and institutional development.

This report therefore makes recommendations to the National Police Service, the government and international agencies that support them.

- Inclusion and participation is beneficial to both the police and the public. Ignoring or failing to institutionalise these principles rolls back advances and could lead to more suspicion among the public of both police and state actions on policing matters.
- Strengthening IPOA and the Internal Affairs Unit could bolster public participation in policing, as the two have a direct mandate to investigate and mediate complaints by the public.
- The greatest opportunity for participation resides in robust, innovate and proactive community policing initiatives. In this regard, there is a need for both the executive and the police to clarify the confusion created by community policing and Nyumba Kumi initiatives, and for the police to take a decisive role in these initiatives.
- The police should invest in enabling officers to have informal interactions with residents of the areas they serve, through patrols as well as joint police and community engagements. The key to community policing is trust, which is built over time and cannot be replaced by legal, administrative and policy frameworks.
- CPAs and wider related structures are instrumental in providing opportunities for police to engage with communities and key stakeholders. Their establishment should therefore be prioritised by the government.
- CSOs that ordinarily deal with accountability may have also been cowed by the onslaught on their members by rigorous attempts to regulate and limit funding through the Public Benefits Organizations Act. Considering the shrinking political space, focused collective and collaborative actions with greater impact such as class actions lawsuits or constructive engagements with bodies such as the Council of Governors to get more counties to establish CPAs are probably more likely to have greater impact.
- While CSOs may have concentrated their attention on policing agencies, it would also be beneficial for them to concentrate some effort on holding the state's oversight agencies accountable to their constitutional and statutory mandates, which are extensive and could be used more proactively to sustain and expand the space for public participation in policing.

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