

A Strathmore Law Review Initiative: The Legal Implications of the COVID- 19 Pandemic

Constitutionalism and Police Brutality in the Fight against Corona Virus in Kenya

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I. Introduction

Kenya's 2010 constitutional moment was a turning point in the national police reform agenda.¹ The people expressed their demands for a police that respects human rights and can be held accountable.² Reflecting this, the Constitution provides that the functions of the National Police Service (NPS) should comply with the constitutional standards of rule of law, human rights and fundamental freedoms.³ Furthermore, the Independent Policing and Oversight Authority (IPOA) was established in 2012 to ensure external oversight and accountability of police officers. However, these reforms have had limited impact. Police brutality prevails despite constitutional values and institutional changes and police killings, as result of excessive use of force, continue to be reported.⁴

In recent months, the enforcement of the curfew order issued by the Kenyan government amidst the COVID-19 pandemic, has brought police brutality and violation of constitutional rights to the forefront. In March, police officers killed at least twelve people while enforcing the curfew,⁵ a death toll higher than the one reported COVID-19 death that occurred in that month. Many were also injured.⁶ There has been a disregard for rights that may not be limited such as

¹ Independent Policing Oversight Authority, *IPOA board end term report 2012-2018*, 21 May 2018, 28.

² Constitution of Kenya Review Commission, Final Report of the CKRC, 2005, 64. See also, Constitution of Kenya Review Commission, Final Report of the CKRC, 2005, 112.

³ Article 238(2)(b), *Constitution of Kenya*, 2010. See also, Article 244(b), *Constitution of Kenya*, 2010.

⁴ International Center for Transitional Justice, *Failure to Reform: A Critique of Police Vetting in Kenya*, 21 November 2017, 1. United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 26 April 2011, 1.

⁵ Wasike A, 'Kenya Police Kill More during Curfew than COVID-19' Anadolu Agency Website- <<https://www.aa.com.tr/en/africa/kenya-police-kill-more-during-curfew-than-covid-19/1807930>> on 21 April 2020.

⁶ Ombuor R and Bearak M, 'Killing in the Name of Corona: Death Toll Soars from Kenya's Curfew Crackdown' Washington Post, 17 April 2020- <https://www.washingtonpost.com/world/africa/kenya-coronavirus-curfew-crackdown-death-toll/2020/04/15/740a8c4e-79be-11ea-a311-adb1344719a9_story.html> on 21 April 2020.

the freedom from cruel, inhuman or degrading treatment or punishment.⁷ Such abuse has been witnessed in counties like Nairobi, Mombasa and Kwale among others.⁸ It is argued in this article that police brutality in the enforcement of the curfew order is not an isolated incident. It is part of a wider trend in police misconduct. It is further argued that police brutality, which violates essential rights that are protected by the Constitution, represents a failure to adhere to the ideas embodied by constitutionalism and that this failure is strongly premised on the historic role of police officers in Kenya.

This introduction provides a background showing how human rights such as the right to life and dignity have been discarded in police operations and how this has also been witnessed during the pandemic. Part II examines the disregard of human rights by the police during the pandemic. This disregard is contextualised as part of a wider trend in police brutality and harassment. Part III examines the current problem through the lens of constitutionalism. Part IV briefly assesses the effectiveness of the oversight by the Independent Policing and Oversight Authority (IPOA). It is argued that though efforts are currently being initiated to take action, the success of IPOA as an oversight body has, from its inception, been limited. Part V then provides recommendations and a conclusion.

II. The Limitations on Police Power and the Disregard for Human Rights during the Pandemic

In March, during the COVID-19 pandemic, the Public Order (State Curfew) Order, 2020 was issued by the Kenyan government. Public gatherings, processions, or movement during the period of the curfew have been prohibited.⁹ In enforcing this order, the NPS is bound by certain constitutional provisions. Article 244 of the Constitution of Kenya 2010 states that the NPS, in the exercise of their mandate, should comply with and train staff to respect human rights, fundamental freedoms and dignity.¹⁰ The NPS is also expected to foster relationships with the broader society.¹¹ Accordingly, in the exercise of their mandate, the police are also guided by

⁷ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others*(2020) eKLR. See also, Article 25(a), *Constitution of Kenya*, 2010.

⁸ Human Rights Watch, 'Kenya: Police Brutality During Curfew' ,Human Rights Watch, 27 March 2020- < <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew> > on 22 April 2020.

⁹ *Public Order Act* (Legal Notice 36).

¹⁰ Article 244 (c), *Constitution of Kenya*, 2010. See also, Article 244 (d), *Constitution of Kenya*, 2010.

¹¹ Article 244 (e), *Constitution of Kenya*, 2010.

the National Police Service Standing Orders, which regulate the use of force. They state that officers should attempt to use non-violent means and only when these are ineffective, should force be employed.¹² This force should be proportional to the objective to be achieved and the resistance of the person against whom it is used.¹³ Additionally, firearms should not be discharged when it is likely to injure an innocent person.¹⁴

However, the antithetical police conduct, characterized with brutality, has not met constitutional and statutory standards. The indiscriminate violence on men, women and children during the pandemic, has been shocking in its brutality and completely disregards fundamental rights and freedoms,¹⁵ such as the right to life and dignity which are a paramount objective in the fight against the disease. At least 15 deaths have been reported in the enforcement of the curfew order.¹⁶ In most cases, the force used has also been disproportional and on innocent civilians who have not resisted.¹⁷ Furthermore, Article 25 provides that the right from freedom from torture and cruel, inhuman or degrading treatment or punishment, shall not be limited.¹⁸ Despite this authoritative provision, the police have contravened this right through beatings and harassment when enforcing the order.¹⁹

Though the pandemic has provided a more outright instance of police brutality and violation of fundamental rights and freedoms, it is not an isolated incident. Police brutality and harassment during the COVID-19 pandemic is part of a wider trend of police misconduct that continues to be seen after the promulgation of the 2010 Constitution. Despite the robust provisions of the Constitution, there have been abusive police operations that infringe fundamental human rights, with police beating and shooting civilians to death.²⁰ For instance,

¹² Section 3, *National Police Service Standing Orders* (2017).

¹³ Section 4, *National Police Service Standing Orders* (2017).

¹⁴ Section 2, *National Police Service Standing Orders* (2017).

¹⁵ Nation Team, 'Night of the Long Knives for Kenyans' Daily Nation, 29 March 2020 - <<https://www.nation.co.ke/news/Kenyans-brace-brutality-as-police-enforce-curfew/1056-5507772-q0aeq8/index.html>> on 21 April 2020.

¹⁶ Nyabola N, 'Kenyan police 'killed 15' since start of coronavirus curfew' Al-Jazeera, 5 June 2020 - <<https://www.aljazeera.com/news/2020/06/kenyan-police-killed-15-start-coronavirus-curfew-200605184324568.html>> on 7 June 2020.

¹⁷ Mbaka J, 'Police Fear Personal Responsibility for Curfew Brutality' The Star, 29 March 2020 - <<https://www.the-star.co.ke/news/2020-03-29-police-fear-personal-responsibility-for-curfew-brutality/>> on 17 May 2020.

¹⁸ Article 25(a), *Constitution of Kenya*, 2010.

¹⁹ Nation Team, 'Night of the Long Knives for Kenyans' Daily Nation, 29 March 2020 - <<https://www.nation.co.ke/news/Kenyans-brace-brutality-as-police-enforce-curfew/1056-5507772-q0aeq8/index.html>> on 21 April 2020.

²⁰ United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 26 April 2011, 6.

in a survey of 5,082 households from 36 counties in Kenya, one-third of those questioned had experienced police misconduct in the previous twelve months in the form of assault, falsification of evidence, bribery and threat of imprisonment.²¹

In another survey of persons who stated that their rights have been violated, the category of police men as offenders constituted a high percentage of twenty-one.²² Kenyans also viewed police harassment and killings as a major risk to their personal lives and they perceived the NPS to be the most responsible for human rights violations in Kenya.²³ This corresponds to estimates by the Independent Medico-Legal Unit which places the total number of documented killings by police in 2017 at 152, an increment compared to the 144 in 2016.²⁴ The majority of documented killings committed by police from 2013 to 2018 are extra-judicial executions.²⁵ It is not surprising that out of a list of possible institutions that Kenyans trusted to address human rights violations, the NPS was ranked the lowest. The media, human rights activists, religious leaders, the judiciary and business companies were all ranked higher.²⁶

The police, a key institution for the protection of rights has become the cause of major violations of rights.²⁷ To some victims, the brutality experienced during the pandemic is therefore just a new pretext for the violence they are used to.²⁸

²¹ IPOA, *Baseline Survey on Policing Standards and Gaps in Kenya*, 2013, 7.

²² Amnesty International, *Better but still unequal: The state of human rights in Kenya. An opinion on 70th anniversary of the Universal Declaration of Human Rights*, 2018, 11.

²³ Amnesty International, *Better but still unequal: The state of human rights in Kenya. An opinion on 70th anniversary of the Universal Declaration of Human Rights*, 2018, 9-12.

²⁴ Independent Medico-legal Unit, *Deaths by police officers from January to December 2017*, 12.

²⁵ Independent Medico-legal Unit, 'Statement by the Independent Medico-Legal Unit (IMLU) to the Chairperson of the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa' 62nd Ordinary Session of the African Commission on Human and Peoples Rights in Nouakchott Mauritania, 30 April 2018, 1-2.

²⁶ Amnesty International, *Better but still unequal: The state of human rights in Kenya. An opinion on 70th anniversary of the Universal Declaration of Human Rights*, 2018, 9-12.

²⁷ See generally, Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development*, 26 May 2009. See also, United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 26 April 2011, 15.

²⁸ Ombour R and Bearak M, 'Police in Kenya Kill at Least 12 People in Attempt to Enforce Coronavirus Curfew' *The Independent*, 16 April 2020-< <https://www.independent.co.uk/news/world/africa/coronavirus-kenya-lockdown-curfew-police-brutality-deaths-a9468391.html> > on 21 April 2020.

III. Police Brutality and Constitutionalism

As stated earlier, the 2010 Constitution represented a significant turning point in the police reform agenda.²⁹ When contrasted to the repealed constitution, the 2010 Constitution is certainly differentiated by its explicit limitations on police conduct.³⁰ However, the promulgation of a new constitution does not necessarily achieve an optimal balance between the few whom constitutions confer power, and the vast majority for whose benefit that power is to be exercised.³¹ Commitment to constitutional exercise of power encompasses more than merely having a constitution; it relates to the wider concept of constitutionalism. The disregard of those human right norms that limit the NPS members' exercise of their powers in the enforcement of the curfew order is argued to be a failure in constitutionalism in this regard. To make this point clearer, constitutionalism is conceptualized on a general level and contextualized particularly to police conduct and the historical role of police officers in Kenya.

i. Constitutionalism as it applies to Police Conduct

In its most basic sense, constitutionalism entails limited government - the idea that a government 'can and should be legally limited in its powers'.³² However, constitutionalism still implies something grander than the idea of mere 'legality' which only requires official conduct to be in accordance with any existing legal rule. As Barnett writes, an action may be justified under an existing legal enactment but this is not necessarily indicative of whether that action is constitutional.³³ In other words, government action is legitimate in so far as it

²⁹ Independent Policing Oversight Authority, *IPOA board end term report 2012-2018*, 21 May 2018, 28.

³⁰ Article 239(2), *Constitution of Kenya* (2010). See also, Article 244, *Constitution of Kenya* (2010).

The establishment of the National Police Service Commission to manage the discipline of police officers. See, Article 246(2)(b), *Constitution of Kenya* (2010). The Independent Policing Oversight Authority formed under Article 244, to independently investigate serious complaints of police misconduct and recommend action. The merging of the Kenya Police and Administration police under the National Police Service headed by the Inspector- General of Police Service. See, Article 243, *Constitution of Kenya* (2010). See also, Article 245(1), *Constitution of Kenya* (2010). In the repealed Constitution, a disciplined force relates to any of the armed forces or police force. See, Article 86(1), *Constitution of Kenya* (2001).

The Repealed Constitution states that nothing contained in or done under the authority of the disciplinary law of a member of a disciplined force shall be held to be inconsistent or in contravention with the sections of the Constitution related to deprivation of life, slavery and forced labour, torture, inhumane, degrading treatment or other treatment and the Chapter 5 on protection of fundamental rights and freedoms. See, Article 86(2), *Constitution of Kenya* (2001) and Article 86(3), *Constitution of Kenya* (2001). The power to appoint, exercise disciplinary control and remove persons in the Kenya Police force below the rank of Assistant Inspector in the Repealed Constitution lied on the Commissioner of Police. See, Article 108(2)(b), *Constitution of Kenya* (2001).

³¹ Okoth-Ogendo H, *Constitutions without constitutionalism*, 79-80.

³² Stanford Encyclopedia of Philosophy.

³³ Barnett H, *Constitutional and Administrative Law*, 4th ed, Cavendish Publishing Limited, London, 2002, 5-6.

corresponds to a set of articulated constitutional rules.³⁴ There must therefore be commitment to the constitutional exercise of power. To realize this notion of constitutionalism, the Constitution must be firmly established as the fundamental or basic law of the state. There can be no ‘minimum observance of the rules contained in the constitution’ by state institutions and neither can there be a ‘cavalier disregard of constitutional niceties and processes’.³⁵

Paramount to this idea is respect for fundamental rights and freedoms.³⁶ The convergence is well-defined. Constitutionalism requires that government action should correspond to the limitations placed on it and the human rights framework contains limitations on government action.³⁷ Commitment to the former thus institutionalizes and implements the latter.³⁸ Since these rights are part of the rules that embody the values by which a polity has subjected itself to a particular constitutional order, they must be adhered to in whole.³⁹ For this reason, the exercise of power by state institutions must always coincide with the notion of respect for individual rights.⁴⁰

Contextualizing this to police conduct, Maru Bazezew argues that though the police are mandated to ensure peace and order, constitutionalism requires that the exercise of police power must correspond to the fundamental rights and freedoms of the citizenry.⁴¹ Police independence is validated only by their ‘integrity and desire to ensure the preservation of rights’.⁴² Police conduct that contravenes rights such the right to life, dignity and freedom from cruel, degrading and inhuman treatment, is therefore a failure by police officers to embrace this aspect of constitutionalism. The violation of these rights in the enforcement of the curfew order and in other instances of police brutality, can hence be associated with a disregard for constitutionalism. That is to say, a failure to commit to the constitutional exercise of police power.

³⁴ Henkin L, ‘Constitutionalism, democracy and foreign affairs’ 67(4) *Indiana Law Journal*, 1992, 885. See also Waldron J, ‘Constitutionalism: A sceptical view’ *New York University School of Law*, 2010, 4-5.

³⁵ Okoth-Ogendo H, *Constitutions without constitutionalism: Reflections on an African political paradox*, 1 st ed., American Council of Learned societies, New York, 1988, 68, 72.

³⁶ Li B, ‘What is Constitutionalism?’ 1(6) *Perspectives*, 1.

³⁷ Human Rights Commission, *Constitutionalism and human rights perspectives on the judiciary and the police in human rights protection, individuals rights and democratic governance in Zambia*, 2008 11.

³⁸ Human Rights Commission, *Constitutionalism and human rights perspectives on the judiciary and the police in human rights protection, individuals rights and democratic governance in Zambia*, 2008 11.

³⁹ Rosenfield M, ‘Modern constitutionalism as interplay between identity and diversity’ in Rosenfield M (ed), *Constitutionalism, identity, difference and legitimacy: Theoretical perspectives*, Duke University Press, Durham, 1994, 4-5.

⁴⁰ Barnett H, *Constitutional and Administrative Law*, 5-6.

⁴¹ Bazezew M, ‘Constitutionalism’ 3(2) *Mizan Law Review*, 2009, 369.

⁴² Mwalimu C, ‘Police, state security forces and constitutionalism of human rights in Zambia’ 21 *Georgia Journal of International and Comparative Law*, 1991, 222.

This failure is particularly egregious because of the influence of police misconduct on wider perceptions of state legitimacy. Being representatives of the state, police officers, as a highly dispersed, numerous and localized body of street-level bureaucrats, are more likely to be encountered by the citizenry than any other type of official.⁴³ Police performance is therefore often taken by the public to reflect the ‘functions and actions of government’ and studies have shown that the legitimacy of the state in the eyes of citizens can be greatly influenced by the abuse of police power.⁴⁴ Charles Mwalimu goes so far as to say that, on a societal level, police influence the development of sound constitutionalism more than any other agency of the state.⁴⁵

ii. *Constitutionalism, Kenyan Police and Historical Precedents*

Realizing constitutionalism in police conduct is particularly difficult because of the historical legacies of policing in Kenya. As applied to police conduct, constitutionalism requires adherence to those fundamental rights and freedoms contained in the Constitution. Indeed, as established prior, the Constitution requires NPS members to respect these rights and foster relations in society.⁴⁶ It may be argued that a constitutional provision like this aims to protect civilians from police excesses in power. The problem, however, is that the culture of police in Kenya has historically been characterised by a ‘general hostility to, mistrust of, disdain for and disregard of civilians’.⁴⁷

This culture has its origins in the colonial tradition of policing. Control and coercion as opposed to management and persuasion were the hallmarks of the colonial legal order.⁴⁸ During the colonial regime, Africans were compulsorily forced into a state enforced order and excluded from the rights afforded to Europeans in the ‘civilised society’.⁴⁹ With increasing displacement and evictions of indigenous Africans in Kenya by white settlers, the police became a tool to

⁴³Huq A, ‘Constitutionalism, legitimacy and public order: A South African case study’ Public Law and Legal Theory Working Papers, 2017, 2 - https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2109&context=public_law_and_legal_theory > on 8 June 2020.

⁴⁴ Mwalimu C, ‘Police, state security forces and constitutionalism of human rights in Zambia’, 222 .Bradford B, Huq A, Jackson J and Roberts B, ‘What price fairness when security is at stake? Police legitimacy in South Africa’ 8 *Regulation and Governance*, 2014, 259. See also Huq A, ‘Constitutionalism, legitimacy and public order: A South African case study’, 11-13.

⁴⁵ Mwalimu C, ‘Police, state security forces and constitutionalism of human rights in Zambia’, 222.

⁴⁶ Article 244(c), *Constitution of Kenya*, 2010. See also, Article 244 (d), *Constitution of Kenya*, 2010. See also, Article 244(e), *Constitution of Kenya*, 2010.

⁴⁷ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014, 11.

⁴⁸ Okoth-Ogendo H, *Constitutions without constitutionalism: Reflections on an African political paradox*, 1st ed., American Council of Learned societies, New York, 1988, 69.

⁴⁹ Mamdani M, *Citizen and Subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, New Jersey, 1996, 18.

provide security to colonial settlers against indigenous interferences.⁵⁰ As the colonial state was coming to an end and insurgency movements like the Mau Mau arose, brutality became synonymous with police conduct.⁵¹ From 1952-1960, the police played a central role in executing widespread civilian purges and torture.⁵² During this period, excessive force and oppression were cemented as hallmarks of the Kenyan police.⁵³

After independence, the police force in the new Kenyan state resembled that of its colonial predecessor. Although the police service was initially decentralized, powers over the police were soon reinstated to the central government.⁵⁴ As at colonialism, the police became a tool for civilian repression and oppression for the ruling regime. Since they were also only accountable to the ruling regime, impunity and disregard for civilian wellbeing became the norm, even where this disregard was not instigated by the ruling regime.⁵⁵ In these last two decades, more outright instances of police brutality include the extensive extra-judicial executions and tortures that were witnessed against Mt. Elgon residents from 2006 to 2008 and in the 2007 post-election period.⁵⁶ The Waki Report concluded that police killings during the post-election period constituted thirty-six percent, enunciating the problem of impunity and lack of accountability among the police.⁵⁷ This was further evidenced by the failure to prosecute or sufficiently investigate those involved in human rights abuses.⁵⁸

Unsurprisingly, the Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF) have concluded that ‘Kenya’s contemporary

⁵⁰ Commonwealth Human Rights Initiative, *The Police, the people, the politics: Police accountability in Kenya*, 2006, 3-5.

⁵¹ Commonwealth Human Rights Initiative, *The Police, the people, the politics: Police accountability in Kenya*, 2006, 4-5.

⁵² Elkin discusses numerous in her book of the role police played in the suppression of resistance, particularly directed at Kikuyus. See generally, Elkin C, *Imperial reckoning: The untold story of Britain’s gulag in Kenya*, Henry Holt and Company, New York, 2005.

⁵³ Commonwealth Human Rights Initiative, *The Police, the people, the politics: Police accountability in Kenya*, 2006, 5.

⁵⁴ Constitution of Kenya Review Commission, Final Report of the CKRC, 2005, 31.

⁵⁵ Commonwealth Human Rights Initiative, *The Police, the people, the politics: Police accountability in Kenya*, 2006, 5-6.

⁵⁶ United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 26 April 2011, 9. See also, United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 26 April 2011, 10. See generally, Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development*, 26 May 2009.

⁵⁷ Government of Kenya, *Commission into the Inquiry of Post Election Violence(CIPEV) final report*, 2008. see also, Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014.

⁵⁸ Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development*, 26 May 2009, 8.

police are a product of its history'.⁵⁹ If the commitment to constitutional exercise of police power requires adherence to those human rights norms that protect civilian wellbeing, then the historical disdain for civilians signifies a major problem. After all, whether in police conduct or otherwise, constitutionalism is the consequence of social, economic, cultural and political progress and can only become a tradition if it forms part of the shared history of a people.⁶⁰ If historically, the culture of police in Kenya has been that of civilian oppression, then constitutional provisions limiting this oppression are not so easily realized.

IV. Accountability and Effectiveness of IPOA as an Oversight Body

As aforementioned, the culture of disdain towards civilians is highly influenced by the impunity with which the Kenyan police have historically acted. In recognition of the long standing excesses in power and unaccountability characterising police conduct,⁶¹ the Constitution explicitly requires an accountable police service.⁶² Certainly, a supporting pillar of constitutionalism is the existence of well-defined mechanisms that ensure the enforceability of government limitations through institutions that support accountability.⁶³ Accountability measures in instances where police power has been abused has the aim of reducing the impunity characteristic of the Kenyan police.⁶⁴ Therefore, accountable exercise of police power to citizen rights can entrench a stronger commitment to the constitutional exercise of police power since any deviations are likely to be acted upon.⁶⁵

One of the ways in which police accountability has been sought, is through providing civilian oversight over police. IPOA became the first civilian oversight body in Kenya with legislated authority to seek accountability for police misconduct.⁶⁶ It was formed to give effect to Article 244 of the Constitution by holding the police accountable to the public in the performance of their functions.⁶⁷ It has the power to investigate on its own motion or on receipt from the public

⁵⁹ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014, 11.

⁶⁰ Okoth-Ogendo H, *Constitutions without constitutionalism*, 80.

⁶¹ Ransley P, *National Task Force on Police Reforms*, 2009, 83.

⁶² Article 244(b), *Constitution of Kenya*, 2010.

⁶³ Fombad C, 'Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism' *African Human Rights Law Journal*, 2014, 416.

⁶⁴ Auerbach J, 'Police accountability in Kenya' 3 *African Human Rights Journal*, 2003, 280-281.

⁶⁵ Auerbach J, 'Police accountability in Kenya', 281.

⁶⁶ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014, 12

⁶⁷ Section 5(a)(b), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011). Article 244, *Constitution of Kenya*, 2010.

on disciplinary or criminal offences committed by any member of the service.⁶⁸ Civilian oversight ensures police accountability to those whom the police are supposed to protect and also increases the public confidence in obtaining justice where there have been excesses in the exercise of police power.⁶⁹ For Kenyan civilians, who have historically been accustomed to police brutality, a civilian oversight body is therefore highly significant. At the time of this writing, IPOA has been undertaking investigations on cases of police brutality during the pandemic. Out of the 87 complaints lodged at the end of March which documented 21 deaths due to police excesses in enforcing the curfew, six officers have been charged.⁷⁰

However, one wonders how fruitful these efforts will be because the success of IPOA is highly dependent on cooperation from the same police whom IPOA must oversee. At the level of investigation, the police often fail to provide adequate cooperation for IPOA to prosecute police officers allegedly responsible for committing crimes.⁷¹ IPOA released a report stating that police deliberately bungle some of their investigations in order to protect fellow police officers.⁷² A blue code of silence which is the unwritten rule according to which police officers never provide incriminating information about their colleagues thus exists. This has also been established in courts.⁷³ It is therefore unsurprising that since its inception in 2011, less than one percent of the cases that the IPOA has pursued have resulted in convictions.⁷⁴

Even at the reporting level, evidence suggests that most civilians in Kenya are unaware of reporting mechanisms to IPOA and that the overwhelming majority of persons who are aware of these mechanisms happen to be police.⁷⁵ This means that reports to IPOA can be highly reliant on police initiative, even though police officers are often less than willing to make such complaints. For instance, though more than half of surveyed police officers reported witnessing misconduct from their colleagues in the past 12 months, only 32 percent of these officers reported the misconduct.⁷⁶ This is in contravention of the National Police Service Standing

⁶⁸ Section 6(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁶⁹ Ransley P, *National Task Force on Police Reforms*, 2009.

⁷⁰ Wasike A, '6 Police Officers to be Charged' Anadolu Agency, 4 June 2020 - <https://www.aa.com.tr/en/africa/6-kenya-police-officers-to-be-charged/1865112> > on 22 June 2020.

⁷¹ Kenya Human Rights Commission headed, *'Kenya's scorecard on security and justice: Broken promises and unfinished business'*, 2017, 32.

⁷² Independent Policing Oversight Authority, *IPOA board end term report 2012-2018*, 21 May 2018, 93.

⁷³ *Police Constable Samson Muriuki Mbui* (2006) eKLR. See also, *I.P. Veronica Gitahi & another V. R.* (2017) eKLR.

⁷⁴ Independent Policing Oversight Authority, *IPOA board end term report 2012-2018*, 21 May 2018, 18.

⁷⁵ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014, 20.

⁷⁶ IPOA, *Baseline Survey on Policing Standards and Gaps in Kenya*, 7.

Orders which state that ‘Any use of force that leads to death, serious injury and other grave consequences shall be reported immediately by the Officer-in-Charge to another direct superior of the person who caused the death or injury, and to the Independent Policing Oversight Authority who shall investigate the case’.⁷⁷

This article does not suggest that the limited success of IPOA can be wholly attributed to a lack of cooperation on the part of Kenyan police. Some other notable factors such as a lack of funding and understaffing have also been suggested.⁷⁸ Nevertheless, it is highly undesirable that the police, who have traditionally acted with impunity, should hold such a significant influence over the outcome of IPOA’s investigations and complaint system. This may impede efforts to hold police officers accountable for the brutality witnessed in the enforcement of the COVID-19 curfew order.

V. Recommendations and Conclusion

i. Recommendations

A constitution is not a self-operating or self-executing instrument.⁷⁹ The real task of establishing constitutionalism as a tradition, whether in police conduct or otherwise, lies in cultivating it socially and culturally.⁸⁰ This article therefore echoes a key recommendation by the African Policing Civilian Oversight Forum: police reform in Kenya cannot only be achieved through structural, institutional and legal changes. If a sense of accountability and respect for human rights is to be entrenched, then oversight bodies must prioritize the reformation of police attitudes towards civilians through training and education.⁸¹ If attitudes are to be reformed, this must be done gradually and consistently.

In addition to this, measures must be introduced to maximize the success of the IPOA as an independent oversight body and to minimize sabotage by police officers. In the short-term, to

⁷⁷ Section 7, *National Police Service Standing Orders* (2017).

⁷⁸ Commonwealth Human rights Initiative, *A force for good? Improving the Police in Kenya, Tanzania and Uganda by the Commonwealth Human Rights Initiative*, 2014, 28-29.

⁸⁰ Okoth-Ogendo H, *Constitutions without constitutionalism*, 80.

⁸¹ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local Policing Accountability in Kenya Challenges and Opportunities for Action*, 2014, 24-25.

ensure that the IPOA receives complaints by civilians who have been victims of police brutality during the COVID-19 pandemic, it is important for IPOA to raise awareness over its reporting mechanisms. For a civilian oversight body to work, its accountability structures must be accessible to the civilians it protects.⁸² The fact that most civilians are unaware of IPOA's reporting mechanisms is highly detrimental to this function.

Other longer-term measures must also be adopted. One such measure is to introduce more independent forensic assistance.⁸³ The Coroners Service Act is aimed at ensuring that investigations into the cause of death are carried out independently,⁸⁴ and although passed in 2017, it is yet to be implemented.⁸⁵ The Act provides that the service shall have jurisdiction to investigate the cause of death where the deceased person died due to violence, misconduct, while in police custody, a sudden death and in circumstances that require investigations under the law.⁸⁶ Furthermore, Section 25 provides that once a coroner investigates a death occurring in police custody or prison custody, they are to submit a copy of the report to any relevant authority which is broad enough to include IPOA.⁸⁷ This might prevent reliance on questionable police reports thereby enhancing the effectiveness of the IPOA in pursuing convictions.⁸⁸ An additional advantage is that in instances where the death amounts to an offence under any law in force in Kenya, the service is also mandated to forward the said report together with the names and addresses of any witnesses to the Director of Public Prosecutions and Inspector-General of Police.⁸⁹

IPOA must also investigate officers that either frustrate or fail to co-operate with its investigations as this conduct constitutes an offence under the IPOA Act.⁹⁰ Actions can then be recommended to the Office of the Director of Public Prosecutions and the NPSC.⁹¹ In the

⁸² Hope K, 'Civilian oversight of the police: The case of Kenya' 20 (20) *Police Journal: Theory, Practice and Principles*, 2019, 2-3.

⁸³ Cherono S, 'Lack of a coroner's office puts paid efforts to solve puzzling murders' Daily Nation, 20 September 2019 - <

<https://www.nation.co.ke/kenya/news/lack-of-coroner-s-office-puts-paid-to-efforts-to-solve-puzzling-murders-205484> > on 1 July 2020.

⁸⁴ Commonwealth Human rights Initiative, *A force for good? Improving the Police in Kenya, Tanzania and Uganda by the Commonwealth Human Rights Initiative*, 2014, 20.

⁸⁵ Muthuri J, 'Two laws that we must implement in 2019' Daily Nation, 18 March 2020 - <

<https://www.nation.co.ke/kenya/blogs-opinion/opinion/two-laws-that-we-must-implement-in-2019-124044> > on 1 July 2020.

⁸⁶ Section 24, *The National Coroners Service Act* (Act No. 18 of 2017). See also, Section 25, *The National Coroners Service Act* (Act No. 18 of 2017).

⁸⁷ Section 25, *The National Coroners Service Act* (Act No. 18 of 2017).

⁸⁸ Section 32, *The National Coroners Service Act* (Act No. 18 of 2017).

⁸⁹ Section 27, *The National Coroners Service Act* (Act No. 18 of 2017).

⁹⁰ Section 31, 7, 29, *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁹¹ Section 31, 7, 29, *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

words of the Commonwealth Human Rights initiative, doing this would allow the IPOA to ‘demonstrate that failure to meet obligations to report and obstruction of the IPOA work, are serious offences and offenders will be held accountable’.⁹²

ii. Conclusion

With the inception of the 2010 Constitution, strong constitutional and legal provisions exist that establish *inter alia* the constitutional standards of professionalism, discipline, accountability and respect for human rights and fundamental freedoms in police conduct. There is also existing external oversight. In spite of this, the commitment to the idea that police power should be exercised according to articulated constitutional rules has not been easily achieved. The enactment of the 2010 Constitution with its specific limitations on police conduct, did not necessarily coincide with the commitment to constitutional exercise of power. Despite constitutional values and institutional oversight, disregard of the fundamental rights of citizens, is still evident in police conduct.

⁹² Commonwealth Human rights Initiative, *A force for good? Improving the Police in Kenya, Tanzania and Uganda by the Commonwealth Human Rights Initiative*, 2014, 33.