

The Constitutional Change, Police Reforms and Human Rights Practice in Kenya; 2010-2014

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Abstract

This paper interrogated the police reforms as enshrined in the 2010 constitution and their implications on human rights practice in Kenya up to 2014. A historical design was chosen to guide the enquiry with Lewin's theory of change adopted as the theoretical underpinning. Senior serving and retired police officers, members of the community policing, human rights activists, criminal law professors, county government administrators, retired provincial administrators, political detainees, political scientists and former and present politicians in Kenya constituted the target population. The purposive sampling was adopted to select 166 study participants. Data was collected through focused group discussions, document analysis and interview guide. The qualitative data was analyzed based on the thematic content analysis. It was evident that in the 2010 constitutional dispensation new legislations were enacted to accelerate the implementation of police reforms. However, police brutality, impunity, complicity, extrajudicial and arbitrary executions, corruption and a widening rift between the police officers and the civilians remained the enduring features characterizing the police institution. Legal, economic, electoral and political reforms are recommended if meaningful police reforms can be actualized.

Key Words: Human rights, Police Reforms, the 2010 constitution, human rights practice, NPSC Act, IPOA, IAU

1.0 Introduction

The police institution plays a critical role in the realization of national security. Therefore, it is essential that police officers conform to the goal of law enforcement. This need is informed by the fact that there are many instances when the police officers have contravened the very goals of their existence. This has called for diverse reforms in the police institution which seek to enhance the effectiveness of the police institution. It is in relation to this motive that many countries have initiated structural, legal and institutional changes in the police institution (Furuzawa, 2011).

Despite the various reforms, the operations of the police institution have been replete with excessive and disproportionate application of force and affliction on the innocent and oftentimes unarmed citizens (Savage, 2007). This has raised fundamental questions as to whether the police reform initiatives and the subsequent policy, legal, institutional and constitutional changes have had any significant impact on the way the police officers protected human rights. Lundman (2010) contended that the sociopolitical considerations have made it difficult to realize meaningful changes in the police institution as the police have become less involved in the welfare of the citizens they serve (Rauch & Elrena, 2011).

Globally, there have been unprecedented and persistent adjustments in global policing usually after concerns about infringements on civil liberties became common. This has been evident in most countries that have made efforts to improve the way the police dealt with the emerging security challenges (Savage, 2007). This has occurred not only in the third world countries but also in developed nations which are perceived to be the bastions of human rights advocacy. For instance, in the United Kingdom, significant institutional changes in the police were initiated to engender innovative administration of internal state security in adherence to the enshrined civil liberties. Moran (2015) conceptualized the critical motive for facilitating changes in the police force as being to deliver security services to the citizens.

In addition, the fundamental concept of good governance that eventually became the global yardstick for evaluating the effectiveness of the reforms in the police institutions was pioneered in the United Kingdom (Bislev, 2004). Consequently, the impetus for transformation spilled over to the United States of America (USA) where the incessant occurrence of systemic crimes had significantly widened the gap between the citizens and the police with the police being vehemently accused of complicity in the infringement of rights of the minority groups (Skogan, 1993). In Northern Ireland the police institution was demilitarized and its focus shifted to a human rights-based policing (Skogan, 1993).

Across African states, the deliberate pursuit of transforming the police institutions was accelerated by the perceived ineptness, partiality and inefficiency exhibited by the police force during political turmoil and upheavals. The changes in the police institutions were also informed by the existence of systemic state suppressions of human freedoms akin to the period of colonial rule in Africa (Waller, 2012). For example, Bruce (2003) noted that in the post-apartheid South Africa, the restructuring efforts in the police institution enshrined the need to improve accessibility to security services. This was principally done based on the fact that for a long time black South Africans had endured discriminatory and tribal subjugation perpetrated by the oppressive apartheid regime under the watch of a partisan policing system.

In Kenya, the incidences of violation of human rights have remained widespread mainly in the post-independent period. However, Gimode (2007) observes that the attempts to bring changes in the police institution have remained elusive as the police institution continued to violate human rights. Ironically, human rights violations have continued despite the fact that Kenya ascribes to the formidable ideals of the regional and international human rights conventions and charters (Hartz, 2013). Evidently, the climax of the continued agitation for changes in the police institution was engendered by the 2010 constitution. The 2010 constitutional era saw the introduction of institutional, political and legal policies within the operation of the police institution. The reforms sought to control police malpractices and protect human rights. However, efforts to change the police institution appeared to have failed to achieve the intended constitutional objectives as instances of police brutality have remained widespread. This has raised the concern as to why malpractices have remained commonplace in the police force in spite of the changes initiated to curb such unintended blatant violations. Analysis of previous studies is unanimous on the perceived obligations of the concerned parties. However, past studies have not empirically examined the police reforms after the 2010 constitution and their implication on human rights practice in Kenya. Hence, this paper examined the implications of the police reforms enshrined in the 2010 constitution on human rights practice in Kenya.

2.0 Literature Review

From its inception, the police institution has taken on important roles in the overall governance of the country. This is because security has been considered as a prerequisite condition for development (Ashimala, 2014). However, an important question is whether the police force has been transformed in conformity with the shared common values, ideals and aspirations of the citizens. Scholars have reflected on different roles played by the police institution since colonial times. Most of these scholars have averred that the reforms in the police institution are often influenced by political, sociological and organizational factors. Smith (2004) noted that political and sociological considerations such as the urge for administrative controls shaped the evolutionary trends in the police institution across the world. This implies that the police reforms are often least motivated by the desire to achieve effective law enforcement. Therefore, the prevailing operation and behaviour of the police officers often reflected the state's level of care and concern or lack of it towards the citizenry (Wood, Fleming & Marks, 2008). Bayley (2006) conceptualized reforms in the police institution as being intended to make the police institution dysfunctional and recommended that the changes in the police institution should address the entire system including methods of incentives and rewards. Skogan (1993) reported that the police institution has been unable to comply with the changes within the social contexts and instead condone repressive approaches that derail the fulfillment of their fundamental mission. However, Toch (2008) concurred that the police are sometimes compelled to use limited force depending on the circumstances. However, such scenarios tend to create conditions for violating human rights. Jankowski (1993) argues that policing should be guided by policing models based primarily on collaboration and partnership. Unfortunately, political interests and corruption have been the enduring features hampering the efforts to transform the police (Pierson, 2013). Mwendu (2015) established that the police officers often view human rights practices as an obstacle to their work. However, there is a trend in which the police officers are increasingly embracing reforms especially after the promulgation of the 2010 constitution. This view is embedded in the broader concept of democratic governance which is guided by the constitutional requirement for the police officers to be subservient to the rule of law and respect of the fundamental human rights. In order to enhance the rule of law, the 2010 constitution requires an elaborate parliamentary oversight and control mechanism to implement the required security policy. This is because the quality of policing depends on the extent to which the legislature evaluates the functions of the security agencies. For example, holding police officers

to account is difficult because the 2010 constitution does not provide for thorough disciplinary mechanisms for police officers implicated adversely in human rights violations. It can be observed that although police reforms have been legally achieved as enshrined in the 2010 constitution, the practicality of the reform initiatives need to be addressed. Currently, several policy reforms have been successfully implemented with the aim of establishing an empowered and sustainable police service. However, the reforms have focused on the institutional adjustments without expressed emphasis on integrating civil liberties in the reform considerations.

3.0 Theoretical Framework

While various theories have been advanced to explain police reforms from a historical perspective, this paper was anchored on Kurt Lewin's theory of Change. According to Lewin (1947) change occurs at three phases referred to as Unfreeze, Change and Freeze or Refreeze and each phase is characterized by driving and restraining forces. The urgency to undertake reforms involves weighing up the merits and demerits of the envisioned changes and aptly making a timely decision to change. The theory maintains that there are various forces for and against making change. These forces need to be significantly reviewed in the context of the force field analysis. When the forces for change cannot override those against change, no meaningful change becomes feasible. To realize change there is inner movement called transition that is made in reaction to the change. Once the change has been made and implemented stability is required (freezing stage). This is followed by normalization and formation of new relationships and routines after the acceptance of the changes (Kotter, 1995).

In the context of police reforms, the journey towards police reforms has been characterized by the conflict between the forces agitating for the retention of the status quo and those driving change. The driving forces for change included the need to improve the terms of services, improvement of operational resources, general welfare, bring order and sanity in the police force, among others (Ransley, 2009). However, these forces were countered by restraining forces such as corruption, nepotism and complicity (KNCHR, 2008). To bring change, a lot of efforts need to be put in place to ensure that the restraining forces do not overcome the forces driving change. Without such a situation, the society might be compelled to initiate self-policing a situation that can contribute to even more instances of human rights violations. Nevertheless, the unfreezing stage emerges in which the society drifts into a consideration of police reforms so as to overcome the negative consequences of self-policing. With increased motivation, proper structures are established to jumpstart police reforms (a movement towards the refreezing stage). In reality, the realization of the reforms as postulated in the theory is based on motivation, active involvement and commitment from the concerned parties. This phenomenon can take a long time, thus providing a platform for historical analysis of police reforms and their implications on human rights.

4.0 Methods and Materials

Being qualitative in nature, the study employed the exploratory study design. The study was carried out in Nairobi County because all the major organs of the government in charge of the conduct of the police such as the executive, the legislature as well as human rights bodies are situated in Nairobi. The target population comprised of senior serving and retired police officers, county government administrators, members of community policing, human rights activists and scholars conversant with police reforms and human rights and former political leaders and political activists. The researcher's interest in these groups lied on the fact that they were directly involved in matters pertaining to police operations and human rights advocacy. Owing to the huge number of persons involved in policing in Kenya, it was not possible for the researcher to interview all the informants. Hence purposive sampling technique was used to identify the study informants. The inclusion criteria included willingness to take part in the study and familiarity with the reforms in the police institution in Kenya. The researcher sampled a total of 116 informants; nine FGDs, 19 oral interviews and 34 key informant interviews. Document analysis, interview schedules and focused group discussion were employed in data collection. The data was summarized and sorted according to the objectives and interpreted focusing on the major themes emerging from the interviews and FGDs.

5.0 Results and Analysis

The recommendations of the 2010 constitution played a significant role in police reforms in Kenya. The specific acts that are significant in enhancing police reforms included the NPSC Act (2011), the NPS Act of 2011 and the IPOA Act of 2011. All these are examined in the subsequent sub-sections in relation to their implications on human rights practice in Kenya.

5.1 The National Police Service Commission Act (2011)

With the enactment of the National Police Service Commission Act (2011) an independent commission was established to supervise the appointment of police officers, formulate training programs and screen the serving senior police officers to ensure there was professionalism in policing. The commission was also tasked with the oversight role in the

disciplinary process. Therefore, NPSC Act (2011) sought to ensure that police officers served the public professionally. Article six of the 2010 constitution articulated that the state officers ought to observe the rule of law, discharge their duties indiscriminately and commit to protecting human rights (GOK, 2011). Furthermore, the NPS Act of 2011 harmonized the powers and functions of different security organs which included the KP, the AP and the national intelligence service (GOK, 2011).

What is exceptionally important pertaining to human rights practice is the fact that NPSC Act places limits on the extent of the use of firearms and force an officer is allowed when handling suspects. This implies that NPSC Act is concerned with ensuring accountability by expecting the police officers to be explicitly transparent. However, legal changes to the Act in 2014 which allowed the president to appoint a representative in the selection board for top police chiefs were seen as a threat to the independence of the police as an institution. It was also seen as a reversal effort to depoliticize the force. Having such a presidential representative portended biasness and of course overt political influence and interference in the selection process. This implies that the police is still acting as per the instructions from the presidency.

5.2 Independent Policing Oversight Authority (IPOA) Act 2011

The Independent Policing Oversight Authority (IPOA) Act created a public-led board to oversee the human resource management in the police institution. IPOA was mandated to conduct investigations on the complaints against the police officers and make appropriate suggestions for disciplinary action. A key informant concurred that IPOA has succeeded in restoring sanity in the operations of the police service by addressing the grievances from the public against police officers (K.I.I. Senior serving police officer, 2018). Moreover, a senior serving administrative police officer remarked that;

“With IPOA we are very careful on how we conduct ourselves. In 2015, we witnessed some of our colleagues being probed by IPOA. It is shameful to be brought into the limelight as a police officer being accused of committing crime when you are supposed to be curbing crime (Senior Serving Police officer, K.I.I. 2018).”

From the above verbatim, it is evident that IPOA has been helpful in regulating the operations of the police institution thereby keeping the excesses of the police officers to minimal levels. Although IPOA has been operationalized, many aspects of the act have not been implemented since the police still use force in their interaction with the public. A human rights activist observed that IPOA has never incarcerated any officer involved in violation of human rights. In addition, a senior serving police officer interviewed at Embakasi intimated that;

“Because of IPOA, we are striving to protect human rights but what happens when a police officer is attacked by members of the public. We do not have activists taking to the streets to fight for the rights of officers. People expect us to be human but they do not reciprocate. It is hard to know how to behave when a police officer is attacked. (O.I. Senior Serving Police officer, K.I.I. 2018)”

These remarks indicate that the police officers still feel enough is not being done to protect them. In an interview with a human rights lawyer in Upper Hill, Nairobi, it was evident police officers are supposed to be powerful to not only protect themselves but also the civilians. This presents sharp contradictions regarding human rights violation. This is a challenge for the policy makers who need to devise legal mechanisms that will allow equal protection of police officers in their line of duty to avoid feelings of negligence on their side.

5.3 Office of the Inspector General

This is one of the major developments in the police service with a sole purpose of uniting the various formations of the police service and managing the police officers. The constitution gives the IGP security of tenure with express grounds upon which the person serving as the IGP may be dismissed from the office. This implies that the IGP now has the functioning freedom and free hand to hire and promote officers. The independence of the IGP's office has been strengthened by banning political meddling by allowing the officers to enforce law and disciplinary actions against culpable individuals (Ashimala, 2014).

In a focused group discussion involving members of the KNHRC it was evident that the creation of the office of IGP was timely and relevant as it conglomerated the diverse police formations (Kenya Police and the administrative police). The rigorous process followed in the appointment of the office bearer demonstrated the competitiveness of the office. The open and transparent interview procedure for applicants seeking recruitment as the IG and the deputies seemed to restore the lost public trust and confidence in the person holding the office. This was a positive trend for human rights activists even though the period of time taken to receive and scrutinize the feedback from the public was not adequate. A key informant representing human rights in Nairobi county registered displeasure with the limited time allocated in identifying a suitable candidate to occupy the office of the IGP. In spite of the dissatisfaction with the work of the IGP,

the transparency of the recruitment process was a clear evidence of the accelerated police reforms in Kenya. As a result of public participation, many citizens have become bolder in calling for probes against human rights abuses with a view to ensuring accountability in the police service (Ashimala, 2014).

5.4 Directorate of Criminal Investigations (DCI)

The directorate of criminal Investigation (DCI) is another department in the police service that has undergone major reformations. Following the enactment of the NPS Act of 2011, DCI was established to carry out independent criminal investigations. The DCI is independently funded which has enabled it to carry out quality investigations. However, it is significant to note that the investigation of criminal activities has been in the leading line with regard to human rights violation. Some of the noteworthy evidence involved the investigation and arrest of terror suspects in Kenya and more specifically in Eastleigh and Lamu (Aronson, 2013). Moreover, the DCI has not adequately responded to the complaints raised accusing the police for extrajudicial killings and enforced disappearances. Instead, the human rights groups have continued to be deprived of space for operation as the civil space has been shrinking as the government actively continues to clip them. The police often shoot with explicit mandate to exterminate people, including suspected gang members without the DCI guaranteeing acquiescence as per the enshrined civil order and liberties in its operations.

5.5 The Internal Affairs Unit

The Internal Affairs Unit (IAU) was legally created and assigned the responsibility to receive and investigate complaints against the police officers. To enhance its capacity to fulfill its obligations, the unit operates separately independently. This has helped to restore the glory of the NPS and promoted professional standards. Most human rights group observers contend that the IAU has succeeded in conducting independent, timely and impartial investigations against alleged police misconduct. The IAU has also managed to investigate complaints launched by junior police officers against their seniors. This has enabled the unit to promote uniform standards of discipline in the service as appropriate action has been taken in respect of any police officer found to have violated the code of conduct. While it is not clear whether the code of conduct has been adhered to in the police institution, many police officers appear to have complied with the constitutional standards with regard to civilian freedoms. In a focused group discussion with human rights activists, the respondents noted that the IAU has succeeded in taking care of the internal needs of the police officers through enhanced discipline and welfare of the officers (FGD, human rights activists, 2018). However, the unit can only be effective if more resources are put into the service.

5.6 Change of Operation; Rights of Arrested Persons

The 2010 constitution explicitly describes the rights of an arrested person who is required to be informed in a simple manner and promptly by the arresting officer the reason for being arrested. It is also provided that this person can choose to remain silent if the person feels that is necessary. In these circumstances, the person should not be denied opportunity to communicate with an advocate and significant others who may be available to give assistance. The law also requires that the person should not be placed under duress to involuntarily make unintended confessions or wrong admissions that could later be presented as evidence of liability. After the arrest, the law is clear on the period of time the accused person should be presented for prosecution before a legal judicial institution usually before twenty-four hours have elapsed. This is aimed at safeguarding the rights of the arrested person bearing in mind that an incarcerated person ought to be presumed innocent until irreproachably proved guilty in a court of law charged with the jurisdiction to determine the criminality of the offence committed.

It is in this respect that the nature and mode of operations of the police has significantly changed when the 2010 constitution came into force. With the 2010 constitution incorporating human rights bill, the fundamental liberties have been greatly considered. A senior serving police officer claimed that the provision has improved the performance of the police officers in the context of human rights discourse. The officer remarked that;

“The changes regarding appearance of an accused person in court within twenty four hours have made our work faster than before. Initially, we would take up to fourteen days investigating before a person appeared in court (O.I. Senior Serving Police officer, 2018).”

It can be hypothesized that the change of operation as far as handling of the arrested persons has made police officers to rethink about their work. However, in another interview it was evident that with increased cases of terror attacks, there has been massive violation of human rights during arrest. These violations include extra-judicial killings, arrest without warrant, long period of detention, among others (Human right activist, K.I.I. 2018). This implies that despite the reform that ensured that an accused person appeared in court within twenty four hours, difficulties still continued to emerge on how to handle suspects perceived to present a greater threat to national security.

6.0 Conclusion

This paper has interrogated the implications of the police reforms on human rights practice in Kenya as enshrined in the 2010 constitution. The noticeable changes in the police force that have had immense implications on human rights practice included the vetting of senior police officers, restructuring the hierarchy of the police service, establishment of IAU, establishing the NPSC and the merging of the AP and the Kenya police. The 2010 constitution led to the creation of IPOA and the office of the IGP. These changes engendered human rights concerns more than ever before. Despite the elaborate reforms contained in the 2010 constitution the police have not fundamentally changed but continued to infringe on human rights. As a result, incidences of ineptness have increased with corruption, excessive use of force, extrajudicial killings and complicity remaining common place in the police service.

7.0 Recommendations

Despite the legal, constitutional and policy changes enshrined in the 2010 constitution, the culture of police impunity and complicity has not changed. Hence, police reforms should focus more on the legal, electoral and political systems. In addition, a positive relationship between the public and the police needs to be enhanced because a poor relationship creates bad blood and breeds mutual mistrust.

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