

WK211 Building Effective Human Rights Commissions Maina Kiai, Chairman, Kenya National Commission on Human Rights (KNCHR)

Independent Mandate: Tactics that have been successfully used to achieve and /or maintain Independence of the Kenya National Commission on Human Rights (KNCHR).

Introduction

- The statutory foundation of the KNCHR is the KNCHR Act, 2002.
- KNCHR's Commissioners were appointed by President Kibaki on 29/7/2003.
- KNCHR replaced the Standing Committee on Human Rights (SCHR), which had been established as a department in the Office of the Attorney General, without real monitoring or enforcement powers, and composed largely of political appointees with no track record in human rights.
- Indeed, the SCHR was an obvious attempt by the previous Moi regime at window-dressing and public relations on human rights.
- In contradistinction, the Commissioners in the KNCHR mostly come from civil society, with strong track records in some form of work in human rights.

Ensuring the Independence of the KNCHR

Legal Provisions:

The KNCHR Act, 2002, in consonance with the 1991 UN Paris principles on the establishment and mandate of National Human Rights Institutions (NHRIs), has provisions, aimed at guaranteeing the independence of the National Commission from the Executive. However; it also has weaknesses.

1. KNCHR Act, 2002- STRENGTHS

a) Section 18-Independence of the KNCHR

- This Section is the repository of the independence of the National Commission by providing that: *“The Commission shall have all the powers necessary or expedient for the proper performance of its functions under this Act and shall not be subject to the direction or control of any other person or authority”.*

b) Distinct Corporate Personality.

- The KNCHR has a separate legal personality as enshrined in Section 3(2) of the enabling Act.
- It therefore, has *perpetual succession and a common seal and shall be capable, in its corporate name, of - Suing and being sued; purchasing or otherwise acquiring, holding, charging or disposing of moveable and immoveable property; borrowing and lending money; and doing or performing all such other acts or things necessary for the proper performance of its functions under this Act which may be lawfully done by a body corporate”.*

c) Appointment of Commissioners.

- Section 4(1) of the KNCHR Act provides that the commission shall consist of a chairperson appointed from amongst the commissioners in accordance with

section 6 of the Act; and nine commissioners nominated by the National Assembly and appointed by the President in accordance with section 6.

- Section 5 (1) provides that a person shall be qualified for appointment as a Commissioner if such person is a citizen of Kenya; *is a person of high moral character and proven integrity and has knowledge and experience in matters relating to human rights*; and in the case of the chairperson, is qualified to hold office as a Judge of the High Court of Kenya.
- Under Section 6(1) of the Act, the National Assembly, through the Committee on Legal Affairs and Administration of Justice, shall, within fourteen days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite applications from persons qualified under this Act for nomination as commissioners. Such an application shall be forwarded to the National Assembly within twenty-one days of the advertisement and may be made by any qualified person; or by any person, organization or group of persons proposing the nomination of any qualified person. The National Assembly shall, within seven days of the expiry of the said prescribed period, cause the committee to -consider all the applications so received; and recommend to the National Assembly suitably qualified persons for nomination as commissioners.
- The committee shall, within thirty days, consider all applications received and shall recommend to the National Assembly there from, twelve persons for nomination as commissioners. In the performance of its functions under this section, the committee may co-opt any person who in its opinion possesses the relevant expertise in the field of human rights to assist it in its work.
- The National Assembly shall, upon receipt of the recommendations of the committee, nominate twelve persons for appointment as commissioners and shall submit the list of nominees to the Attorney-General for onward transmission to the President.
- The Attorney-General shall forthwith forward the names of the persons so nominated to the President who shall, by notice in the Gazette, appoint therefrom nine commissioners.
- In nominating or appointing persons as commissioners, the National Assembly and the President shall have regard to -Kenya's ethnic, geographical, cultural, political, social and economic diversity; and the principle of gender equity.
- Thus, the appointment procedure for Commissioners is unique in Kenya.
- In the present case, Parliament advertised in the local media, and got over 800 applications. After lobbying and pressure from human rights groups, the Parliamentary Committee then short-listed about 40 candidates and interviewed them, basing the interviews on the need for gender and geographical representation of Kenya.
- This process ensured that there was a semblance of transparency and probity since the interview results were also declared to Parliament before it endorsed the Committee's recommendations. It ensured that political lackeys were eliminated from the list.
- Section 5(2) of the Act, in a bid to further guarantee the independence to the Commissioners, and prevent conflict of interest, disqualifies the following

persons from being appointed as Commissioners: *A Member of Parliament; a member of a local authority; or a member of the executive body of a political party.*

- *Also, the Commissioners appoint the Chairperson of the Commission from one of their own.*

d) Status of the Chairperson and Commissioners; Security of Tenure and; Removal of Commissioners

- Section 6(10) of the KNCHR Act provides that the Chairperson of Commission enjoys the status of a Court of Appeal judge (the highest judicial office in Kenya), while the Commissioners have the status of High Court judges.
- This is important in guaranteeing the independence of the Commissioners because, as provided under Section 11(1), they enjoy security of *tenure* and can only be vacate their office on the following grounds: *dies; or resigns from office by writing under his hand addressed to the President; or is convicted of an offence and sentenced to imprisonment for a term of three months or more without the option of a fine; or is unable to discharge the functions of his office by reason of physical or mental infirmity as certified by two registered medical practitioners; or is absent from three consecutive meetings of the Commission without good cause; or is declared bankrupt by a court of competent jurisdiction.*
- Even when it is necessary to remove a Commissioner from office, Section 11(4) requires that the Chief Justice must set up a tribunal of three persons who hold or have held offices as judges of the High Court to inquire into the matter and report on the facts to the Chief Justice and recommend whether the chairperson or the commissioner ought to be removed from office and the Chief Justice shall communicate the recommendations of the Tribunal to the President.

e) Salaries and Allowances of the Commissioners

- These, as is the requirement under Section 10 of the Act, are fixed by the Parliamentary Committee in consultation with the Treasury and are drawn directly from the Consolidated Fund.
- This ensures that the executive doesn't financially embarrass the Commissioners so as to impinge on their independence by, for example, delaying their salaries

f) Sourcing Funds from Donors

- Section 26(2) of the Act also empowers the National Commission to receive grants and other donations from other sources, apart from the Government, provided that such grants and donations shall not be made or received for purposes of influencing the decisions or ability of the National Commission and are disclosed in the annual report of the National Commission.
- Indeed, during its first year of operations, the National Commission has received funds from various international donors to facilitate its programmes.
- This fact, to some extent, goes along way to ensure the financial independence of the National Commission from the Government.

g) Issuance of Summons to *any person*

- Pursuant to its investigations and work, Section 19(1) of its Act empowers the National Commission to question and summon for information and/or personal attendance from any person related to that work.
- This power is meant to ensure that the National Commission acts impartially.

Weaknesses in the KNCHR Act

- **Lack of a Separate Vote**
- Even though Section 26(1) of the Act provides that the funds of the National Commission shall be derived from appropriations by Parliament and implies that the National Commission is a wholly separate accounting and auditable unit from the Executive, the fact that there is no express and direct provision mandating the creation of a separate vote for the National Commission has meant that its funds have been budgeted as part of the Ministry of Justice and Constitutional Affairs as a grant from the Ministry.
- In real terms, this has led to some serious delays and obstruction from the Ministry with at one time, some of the funding earmarked for the National Commission was diverted for other uses. The net effect is that we spend a considerable amount of time, energy and resources each quarter, nagging, pleading and pushing to get the money due to us.
- To counter this, we have begun discussions with the Treasury to provide us with our separate vote and also appoint the Secretary to the Commission as an Accounting Officer so that he is able to sit at the table of Accounting Officers who meet once a month to discuss policy and administrative matters affecting the entire government, and who also at the key players at the negotiating table prior to the reading of the Budget each June.
- We also see this as a way to cement relations with different government departments, as a form of raising awareness of our work and role, since the concept of a National Commission is very new and suspect
- To further this cause, we have also recruited the Parliamentary Committee and they have agreed on a strategy to push this agenda which includes writing letters to the Executive explaining the need for a separate vote, and later, summoning key officials in the Executive to explain why they have not done so.

2. Practical Steps Taken to Ensure the Independence of the KNCHR

- No matter the provisions of the KNCHR Act, it is how the Commission exhibits its independence that really matters, particularly to its constituents. In this regard, the Commission has resorted to the following tactics:
- **Reaffirming the Civil Society Backgrounds of the Commissioners:**
- The bulk of the Commissioners came from the Civil Society with solid track records and reputations as human rights defenders.
- Considering that Section 9 of the Act provides that *they serve fixed terms* of 5 years (with an option of re-appointment), it is critical that these reputations are jealously guarded since it is to civil society that most of the Commissioners will return on completion of their duties.

- Currently, half of the 8 Commissioners will serve terms of 3 years, and the others 4 years, while the Chairman will serve for 5 years. This relatively short period of service provides even greater motivation to not only be, but also appear to be, independent.

b) Collaborative Relationships with the Civil Society:

- In the light of the Commissioners' background in the Civil Society, and also as mandated by the Section 16(g) of the Act the National Commission has forged close working relationships with the Civil Society.
- All the National Commission's activities – from the writing of the Strategic Plan, to the hiring of the National Commission's Secretary to undertaking joint programs to participating fully in functions – have been done together with civil society.
- The National Commission determines its working partners on its own, even if some of them may be perceived to be unfriendly to government.
- Moreover, the National Commission has identified as one of its strategic strengths to be the facilitation of access to various government departments and workings to civil society, taking them on visits to Prisons and Police Stations.
- The reaction of the civil society to the National Commission's interest in collaboration has been favourable.
- However, initially, some NGOs were uneasy since they saw the National Commission as their competitor, especially in matters like donor funds, civic education or advocacy.

C) Working with the Media:

- The media is a critical player in enhancing the independence of the National Commission.
- We have issued critical press statements against the government, often speaking out as sole voices on matters that others would find difficult to address.
- The National Commission's statement, for example, taking the Cabinet to task for deciding to take over the personal debts of the late Vice President, was warmly received at a time when it was seen as untoward to raise the matter due to the mourning period.
- The National Commission has also taken up a strong advocacy role on corruption by the new government, leading to editorials praising "the rare courage of government organs challenging the government that appoints them."
- In addition, the Chairman of the National Commission is a regular contributor as a columnist in the print media and appears frequently on radio and television raising critical issues of national concern, often challenging the Executive and Parliament approach to reform.

d) Confronting the Government on Critical Issues:

- The National Commission has not shied away from its primary responsibility of monitoring the government's performance on human rights issues.
- This has included raising issues regarding torture and police brutality, on corruption and mismanagement of taxpayers' resources, and pushing the case for

a Truth, Justice and Reconciliation Commission which the Government committed itself to but now appears to be reneging.

- In the course of this work, comments have been made whether there are two governments in Kenya: one which attacks Kenyans and steals from them, and the other which is committed to justice and rights for all.

e) Enhancing Public Understanding on the Breadth of Human Rights:

- One of the tactics we have adopted that asserts our independence is to address issues that are not commonly regarded as human rights within the context of Kenya.
- These are basically issues of corruption and use of government resources.
- By tackling these matters, the public and the government is slowly coming to understand that economic and social rights are human rights, and as important as political and civil rights.
- Tackling these issues has also been useful since they are at the core of the present government's most important reform pledges.
- Through this work, we are showing the breadth of human rights and the fact that every single aspect of life can be covered through a rights prism.
- And because these are sensitive matters that affect some of the most powerful people in government, the fact that the National Commission is not afraid to tackle and highlight the issues has provided critical support in favour of our independence.

f) Refusal to take part in the parent Ministry's Inter-Departmental Meetings:

- The Commission's line ministry in terms of representation before the Cabinet and Parliament is the Ministry of Justice and Constitutional Affairs.
- Normal practice is for all agencies and departments in the Ministry to attend a monthly meeting, often chaired by the Minister, but after attending a few of the meetings, the National Commission decided that it would not participate since the meetings sent a message that the National Commission was simply a department answerable to the Minister.
- The action was explained to the Minister who argued furiously against it, but we held our ground.

g) Convening of Accountability Forum:

- In a precedent-setting move for public institutions, the National Commission convened a Public Accountability Forum on July 30, 2004 to mark the first anniversary of its operations.
- The objective was to provide the public with an opportunity to judge the National Commission's work and priorities as well as to input to its work with ideas, as a way of creating public ownership.
- The Forum was well received in the media, the public and among reform-minded officers in the Government, and served to highlight the differences between the National Commission and the other parts of the Government.

h) Recruitment of its Own Staff:

i) Control of Seconded Staff:

j)Regulating its Own Procedure and Formulating Own Rules:

- On the strength of Section 14(4) of its Act, the National Commission has developed a set of rules that will govern the operations of its complaints and redress programme, including its tribunal that can award damages and make rulings on human rights issues.
- The rules, as required by law, were forwarded to the Chief Justice and the Attorney General for approval and notification in the official Kenya Gazette in June, but there has been no official action yet.
- To address, the National Commission has asked the Parliamentary Committee for Legal Affairs and Administration of Justice to intervene.

Challenges:

1. The most critical challenge facing the National Commission in its efforts to assert its independence is the **“closing down” of some important doors within Government.**
 - Ironically, the reaction of some government officers to the National Commission in view of its work is to support and facilitate access, but some of the more powerful simply refuse access.
 - This problem is a political one, since the National Commission is one of the new Government’s most important new change agents and highlights the fact that it is impossible to have reform without reformers in key offices in the country.
2. With the **issuances of sub-peona for information**, there is a clear risk that some of these more powerful officers will ignore them and create the impression that the National Commission is toothless.
 - To confront this, the **National Commission is planning to go to court** so that formal court orders can be made, which if in favour of the National Commission, will enhance its reputation and independence.
3. **Lack of political will**, as had been expected, on human rights issues.
 - Government bureaucracy is unbearably slow, and with the Commissioners drawn from civil society, there is sometimes condescension and displeasure from seasoned bureaucrats who know the system and how to delay it.
 - Moreover there was an expectation that the National Commission would play a role similar to the former Standing Committee on Human Rights as a public relations gesture, and there is a general unwillingness beginning from the Head of Public Service to fully appreciate and understand what human rights is all about, and the role of the National Commission.