

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**ASSESSING THE EFFECTIVENESS AND INDEPENDENCE OF THE KENYA
NATIONAL COMMISSION ON HUMAN RIGHTS: 2003-2010**

BY

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G62/ 71815/08

**A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Masters of
Laws, University of Nairobi**

NAIROBI, SEPTEMBER 2011

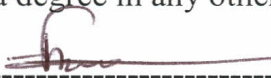
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DECLARATION


I, **Fatuma Adan Dullo**, do hereby declare that this is my original work, and that the same has not been submitted for the award of a degree in any other University.

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This thesis has been submitted for examination with my approval as University Supervisor

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Dated: _____
24th November 2011

DEDICATION

This thesis is dedicated to my children Dullo, Khadija and Jamila for the support and encouragement they gave me and for the sacrifices they had to make while I was undertaking my studies. To my late loving husband Adan, who toiled and supported me throughout my studies, but never lived to join me in my happiness and enjoyment of the benefits and fruits of his support. May the Almighty Allah rest his soul in eternal peace and give him **Janatul Firdhaus** (the best place in heaven).

ACKNOWLEDGEMENTS

The successful completion of this thesis is attributed to the help and cooperation from a number of people and institutions. First and foremost, I thank the Almighty Allah, for the courage, strength and inspiration to come up with this thesis. Without His support and intervention, I would not have managed the long struggle.

I would like to express my heartfelt gratitude to my supervisor for his tireless guidance and continuous encouragement. Without his knowledge of the subject and constructive criticisms it would not have been possible to reach this far. Thank you very much Dr. Kithure Kindiki.

My special thanks go to the University of Nairobi for providing academically stimulating environment and equipping me with the knowledge and skills that enabled me to finish this thesis.

I would like to extend exceptional thanks and gratitude to my colleagues at the Kenya National Commission on Human Rights for their understanding and support throughout the study period.

Last but not least, I wish to express my thanks to all individuals who supported me in one way or another and whom I might not be able to mention by name.

TABLE OF ABBREVIATIONS

CHRAJ.....	Commission on Human Rights and Administration of Justice
CSO.....	Civil Society Organization
HRC.....	Human Rights Commission
ICHRP.....	International Council on Human Rights Policy
KACC.....	Kenya Anti-Corruption Commission
KNCHR.....	Kenya National Commission on Human Rights
NARC.....	National Rainbow Coalition
NCHRR.....	National Commission on Human Rights Rwanda
NHRI.....	National Human Rights Institutions
SAHRC.....	South African Human Rights Commission
SCHR.....	Standing Committee on Human Rights
UHRC.....	Uganda Human Rights Commission
UN.....	United Nations

LIST OF STATUTES

The Constitution of Kenya 2010

Kenya National Commission on Human Rights Act 2003

National Accord and Reconciliation Act 2008

Persons with Disabilities Act of 2003

Suppression of Terrorism Bill 2003

Tobacco Control Act 2007

TABLE OF CASES

- Abbassi v Algeria Human Rights Committee, 89th Session, CCPR/C/89/D/1172/2003
- Centre for Minority Rights Development and Others v. Kenya (2009) AHRLR 75
- Civil Liberties Organization v Nigeria (2000) AHRLR 243
- Gachiengo v. Republic [2000]1 EA 67
- Government of South Africa v Grootboom and Others [2000] CCT /11/00
- Gunme and others v Cameroon (2009) AHRLR 3
- Kaggia v Republic [1969] EALR 451
- Kenya Commercial Bank v KNCHR HCCC Misc Appl. 688/2006 (unreported)
- Kenya Section of the International Commission on Jurists and others v Kenya AHRLR (2004) 71
- Njoya and Others v. Attorney General [2005] 1 EA 194
- Ogolla v. Republic [1970] EALR 277
- O'Reilly v Mackman [1983] 2 A.C. 237
- Uhuru Muigai Kenyatta v KNCHR HCCC Misc Appl. No. of 2009 (Unreported)
- Weth'konda Koso and others v Democratic Republic of Congo (2008) AHRLR 93

TREATIES AND PROTOCOLS

African Charter on Human and People's Rights, 1979

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic and Social Rights, 1966

International Convention on the Rights of Persons with Disability, 2006

Optional Protocol to International Covenant on Civil and Political Rights, 1966

Optional Protocol to International Covenant on Economic and Social Rights, 2008

Universal Declaration on Human Rights, 1948

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CHAPTER 1: INTRODUCTION

1.0. Background

Basic human rights under Kenyan law are specified in chapter IV of the new Constitution¹. Contravention or denial of such rights constitutes a violation enforceable primarily through the High Court of Kenya². Prior to the adoption of the new constitution, there was no express provision in the independence constitution providing for a national institution for promotion and protection of fundamental rights and individual freedoms. It was presupposed that in adjudication on disputes over the scope of human rights, the High Court would also act as a defender and promoter of human rights, but constitutional jurisprudence over the years has been skewed to a narrow rather than a wide and robust judicial approach towards human rights³. Promotion of human rights was subordinated to the preservation of public security and order, which the State used as a justification for derogation from protection of fundamental rights and individual freedoms⁴.

Before 1996, no national institution had been established to spearhead the promotion and protection of human rights in Kenya. In 1996 the Standing Committee on Human Rights (hereinafter referred to as “SCHR”) was established as an institution that would oversee protection and promotion of human rights. It was a non statutory body established by the President in 1996 and which fell under the office of the Attorney General. SCHR, as an ad hoc body, had limited

¹ The Constitution of Kenya.

² Article 23 of the Constitution.

³ *Kaggia v Republic* [1969] *EALR* 45; *Ogolla v Republic* [1970] *EALR* 277

⁴ Ghai, Y. and. Mc Auslan J.P.W.B, *Public Law and Political Change in Kenya* (OUP: Nairobi, 2001) at p.407

powers, a narrow mandate and lacked independence⁵. For instance the committee was required to submit a written report on its findings on human rights violations to the President at the end of every three months⁶. As such SCHR reports for its first four years of operation were never made public.

The Kenya National Commission on Human Rights (hereinafter referred to as the “KNCHR”) is an independent national human rights institution established by the Kenya National Commission on Human Rights Act 2002 in accordance with the UN approved Paris Principles⁷. The principles provide guidelines on the constitution, mandate and independence of national human rights institutions. KNCHR was operationalised in July 2003 when the commissioners were appointed by the President. The Kenya National Commission on Human Rights Act 2002 spells out its key mandate areas and powers which broadly include the protection, promotion, respect and fulfillment of human rights in Kenya. KNCHR is the chief agent of the Government of Kenya in ensuring the latter’s compliance with its obligations under international human rights instruments.⁸ It has a wide mandate to investigate human rights violations, visit prisons and other places of detention, carry out human rights education, and advising government agencies on human rights issues and a broad function of performing “such other functions as the Commission may consider necessary for the promotion and protection of human right”⁹.

⁵ Kithure Kindiki, “Evaluation of the Kenya National Commission on Human Rights”, (KNCHR: Nairobi, 2006) p.15

⁶ Ibid.

⁷ Ibid.

⁸ Section 16(1)(f) of the Kenya National Commission on Human Rights Act.

⁹ Section 16 of the Kenya National Commission on Human Rights Act.

The Commission has therefore been in operation since 2003. Unlike the SCHR, the establishment and institutionalization of the Commission was anchored in statute with a broad mandate with attendant enforcement mechanisms. Hence, it was expected that with such statutory powers, a toothless mundane SCHR had been replaced by a robust and effective KNCHR. Having been operation for over six (6) years, assessment of the Commission's performance is necessary as its effectiveness bears directly on the improvement on the quality of lives of Kenyans in respect to human rights. The position of the KNCHR was further enhanced following the entrenchment of the Commission in the new constitution.¹⁰ Basic human rights under Kenyan law are specified in chapter IV of the new Constitution¹¹. Contravention or denial of such rights constitutes a violation enforceable primarily through the High Court of Kenya¹². Prior to the adoption of the new constitution, there was no express provision in the independence constitution providing for a national institution for promotion and protection of fundamental rights freedoms of the individual. It was presupposed that in adjudication on disputes over the scope of human rights, the High Court would also act as a defender and promoter of human rights, but constitutional jurisprudence over the years has been skewed to a narrow rather than a wide and robust judicial approach towards human rights¹³. Promotion of human rights was subordinated to the preservation of public security and order, which the State used as a justification for derogation from protection of fundamental rights and freedoms of the individual¹⁴.

¹⁰ Article 59 of the Constitution

¹¹ The Constitution of Kenya, 2010

¹² Section 23 of the Constitution

¹³ *Kaggia v Republic* [1969] *EALR* 451 pg. 30

¹⁴ *Supra* note 4

The foregoing profile of the human rights institutions in Kenya and in particular the evolution of KNHRC depicts that it is appropriate and feasible to evaluate the extent to which the Commission mitigate human rights. This study is designed to examine the evolution and performance of the KNHRC. In particular, it focuses on the performance of the Commission in the execution of its mandate in an effective and independent manner.

1.1. Problem Statement

KNCHR as the chief agent of the government in ensuring its compliance with human rights obligations plays an important role in the promotion and protection of human rights. KNCHR operates to safeguard the national conscience for human rights and operates to ensure that the State or any other entity does not violate the rights of its citizens. Therefore, an assessment of the performance of KNCHR for the seven (7) years it has been in operation is necessary thereby contributing to the improvement of the quality of lives of Kenyan citizens.

In examining the Commission's performance, the study will gauge its strategies and activities against the Paris Principles which principles constitute the international normative standards for measuring the effectiveness and independence of NHRIs. The legal framework providing for the establishment and mandate of the Commission is examined as an important factor that determines its operation. Non-legal factors and how they affect the Commission's performance are also explored.

1.2. Conceptual Framework

The study's objective is to evaluate the effectiveness of an autonomous public institution mandated to safeguard human rights of its citizens. The evaluation of such effectiveness is pegged against identified normative standards and the study seeks to assess whether the Commission performance match the set standards.

The thesis is founded on the positivist theory of law. In particular, the study relies on the analytical rather than the classical branch of positivist theory of law which was propounded by theorists like Hart and Kelsen on the normativity of law. The "normativity of law" concerns the understanding of law as rules for conduct and human behaviour¹⁵. However, the analysis adopted in this paper leans towards the Hartian perspective of law which explains the normative value of law and applies it to actual social process rather than the abstract evaluation of law preferred by the Kelsenian approach. It focuses on the justification of one normative claim using other normative claims¹⁶. In reference to this study therefore, the study explores the validation of the claim of the effectiveness and independence of the Commission using the normative claims and standards specified in the Paris Principles.

1.3. Justification of the Study

The study seeks to explore any existing gaps in the legislative framework in providing for the effective operation of the Commission. Indeed, effectiveness and independence are essential

¹⁵ Brian Bix *Jurisprudence Theory and Context* (Sweet and Maxwell: London, 2006)

¹⁶ *Ibid.*

factors to the Commission's performance as a national human rights institution (hereinafter referred to as "NHRI"). As discussed below, existing literature that attempts to analyse the performance of the Commissions in the region, reveals gaps in terms of approach as employment of the Paris Principles as the principal normative standard is overlooked¹⁷. Such analysis involves taking stock of the successes of the Commission on the one hand, and challenges, on the other, without reference to specific benchmarks and/or indicators. Whereas a few commentators have made notable contribution in addressing the issue of effectiveness and independence pegged upon the Paris Principles up to 2006, developments in the Commission from 2007 to date have not been captured.

It is therefore defensible to examine the performance of the Commission from inception to 2008 with specific reference to the Paris Principle in respect to its effectiveness and independence. To that extent the study provides an alternative approach in analysis of the Commission's performance as a NHRI.

1.4. Research Objectives

The research objectives are:

1. To examine the KNCHR Act with a view to establish the extent to which its provisions promote the effectiveness and independence of the KNCHR.

¹⁷ See for example, Margaret Sekaggya, (2008) Value of Human Rights Institutions : Human Rights Commission Processes(Fountain Publishers: Uganda)

2. To enquire into the benchmarks and indicators for effectiveness and independence for NHRIs, against which the effectiveness and independence of the KNCHR is to be assessed.
3. To analyse interpretative literature on effectiveness and independence of NHRIs and link such existing empirical studies to the situation of the KNCHR.
4. To establish the extent to which the KNCHR can be said to have been effective or independent between 2003 and 2010, the period which the Commission has been in operation.
5. To assess the legal and non-legal factors that have impacted on the effectiveness and independence of the KNCHR.
6. To make recommendations on how the effectiveness and independence of the KNCHR can be enhanced through review of the legal framework and other non-legal measures.

1.5. Research Questions

The questions to be answered in the study are;

1. To establish the extent to which provisions of the KNCHR Act promote the effectiveness and independence of the KNCHR?
2. What are the benchmarks and indicators for effectiveness and independence for NHRIs, against which the effectiveness and independence of the KNCHR is to be assessed?
3. How does existing interpretative literature on effectiveness and independence of NHRIs link the situation of the KNCHR?
4. To what extent can the KNCHR be said to have been effective or independent between 2003 and 2010 the period in which the Commission has been in operation?

5. What legal and non-legal factors have impacted on the effectiveness and independence of the KNCHR?
6. How can the effectiveness and independence of the KNCHR be enhanced through review of the legal framework and other measures?

1.6. Hypotheses

The hypotheses to be tested in the study are:

1. While the law establishing the KNCHR fairly provides for the effectiveness and independence of the Institution, improvements on it could enhance further the Commissions effectiveness and independence.
2. The Commission has made significant steps towards effectively discharging its mandate and asserting its independence.

1.7. Research Methodology

The study is descriptive, analytical and prescriptive. The research was largely undertaken through desk review and relied on quantitative methods for collection of data. The study relied on analysis of secondary data obtained from books, journals, articles, reports, conference papers and the internet. Reference was also made to primary data including Acts of Parliament. In part the study also employs qualitative methods to even out the limitations of quantitative methods in evaluating the perceptions and opinions of key actors on the impact of the Commission in human rights

promotion. Such data was obtained from interviews and discussions held with key informants, involved in the human rights field.

1.8. Assumptions and Limitations

The study evaluates the effectiveness and independence of the Commission for the period 2003-2010. The study is limited to employing the Paris Principles recommended by the UN as the principal normative standards for assessing NHRIs and the Guidelines by the International Council on Human Rights Policy as opposed to other guidelines offered by civil society groups¹⁸. The study addresses and qualifies the criticisms that lay against the benchmarks contained in the Paris Principles and that in certain circumstances other guidelines like Amnesty International guidelines and Commonwealth Best Practices offer more specificity on certain aspects of effectiveness and independence. However, the assumption that the benchmarks in the Paris Principles and the ICHRP Report provide the fundamental normative standards for assessing NHRIs was conveniently made in line with the scope of the study. The study identifies public legitimacy; broad mandate; integrity of commissioners, accessibility, open organisational culture, partnership with civil society, power to monitor compliance and effective resolution of complaints, systemic treatment of human rights issues and adequate budgetary resources as benchmarks relevant to effectiveness and independence of NHRIs. In order to delimit the scope of the study not all benchmarks that have been developed by Amnesty International, Commonwealth and other civil society groups could have been utilized for analysis in this study.

¹⁸ For example Amnesty International and the Commonwealth Secretariat. See Amnesty International *National Human Rights Institutions: Amnesty International Recommendations for Effective Protection and Promotion of Human Rights. AI Index: IOR 40/007/2001, October 2001*; Commonwealth Secretariat *National Human Rights Institutions Best Practice* Commonwealth Secretariat: London 2001.

1.9. Literature Review

Pursuant to the adoption of the Paris Principles by the UN General Assembly and subsequent affirmation by the 1993 World conference on Human rights, significant amount of scholarly has been published on elements and essentials of effective and legitimate NHRIs. Secondary data collected that is relevant to this can be broadly classified into three (3) main themes, namely, role, functions and achievements of NHRIs; general minimum standards for establishment of NHRIs; and, impact of social, economic and political factors on performance of NHRIs.

Existing literature has centered on the formal structure, roles and function of NHRIs in society. In particular, commentators have focused on a trajectory of general achievements of NHRIs from inception¹⁹. Similarly, certain works discuss the contribution of human right institutions in the promotion and protection of human rights and emphasize the complementary role played by NHRIs to established organs of State in the human rights field²⁰. Other commentators have examined the utility of systemic approach to human rights promotion through infusion of human rights into policy and legislation²¹. Under this theme, literature has been generated through historical analysis of role of NHRIs regionally and the legislative and constitutional interventions that would enhance their performance. What is common to the works under this theme is the

¹⁹ Jean Marie V. Gashibarake “Achievements of the National Commission for Human Rights of Rwanda, the Rwanda Bill of Rights and Prospects vis-à-vis the East African Community” in Charles M. Peter (ed.) *Protectors: Human rights Commissions and Accountability in East Africa* (Fountain Publishers: Uganda 2008) at p. 152

²⁰ Margaret Sekaggya, Value of Human Rights institutions: Human Rights Commission Processes” in Chris M Peter (ed) *Protectors: Human Rights Commissions an Accountability in East Africa* (Fountain Publishers: Uganda 2008) at p. 72

²¹ Lawrence Mute, “Infusion of Human Rights into Legislation” in Chris M Peter (ed) *Protectors: Human Rights Commissions an Accountability in East Africa* (Fountain Publishers: Uganda 2008) at p. 29

advocacy for addressing legal mechanisms to strengthen NHRIs to achieve their objectives. These works are useful in understanding the successes and challenges faced by NHRIs in discharging their roles²². Further, experiences drawn from NHRIs in other jurisdictions are relevant in comparative analysis of measures that can be introduced to improve performance of the KNCHR.

Secondly, the discourse relating to the role of NHRIs as promoters and protectors of human rights, has also developed around issues concerning application of general minimum standards²³ as yardsticks for the establishment of effective institutions. Much work has been developed on analysis of the scope and content of Paris Principles and their effect on the performance of NHRIs²⁴. Historical analysis as an approach to interrogation of the process of legislative development has been applied to provide an understanding of negotiation process that led to the formulation of such principles. The work also provides reviews of Asian-Pacific countries and assesses the levels of conformity to such standards. The work is relevant in understanding the scope, content and rationale behind each benchmark. It is also useful in comparative analysis of the performance of KNCHR and other NHRIs in other regions.

²² See Marea Beeman (ed.) "Lessons from National Human Rights Institutions around the world for State and Local Human Rights Institutions in the United States" Harvard University Executive Series HRC No. 5 available <http://www.hrccj.org> (Last Accessed: 15 November 2010)

²³ Principles Relating to the Status of National institutions (the Paris Principles) Annex, UN Doc. A/RES/48/134/ANNEX(MARCH 1994) available at <http://www.ohchr.org/english/law/principles.htm>, last accessed July 2, 2009

²⁴ Brian Burdekin *National Human Rights Institutions in Asia Pacific Region* (Martinus Nijhoff: Leiden 2007); Kithure Kindiki, External Evaluation of the Kenya National Commission on Human Rights (KNCHR: 2006)

Significant attention has been directed towards understanding underlying social, political and economic factors that affect the promotion of human rights and their impact on the institutions mandated with realizing such rights. The works comprise an analysis of factors that hinder and facilitate the proper functioning of NHRIs, ombudsmen and hybrid institutions²⁵. Although such work provides a general analysis on several institutions, the compelling discussions and findings are useful and central to the objectives of this study which attributes the performance of NHRIs to both legal and non-legal factors. The focus of the critique in this study is centered on the discussion that the systems of governance and political goodwill alongside a strengthened legal framework are key factors in determining the effectiveness and independence of NHRIs. Further analysis in this area is provided in articles that examines interplay between a number of non-legal factors and the impact on realization of human rights²⁶. In particular, the challenge to realization of social economic and cultural rights at the continental level is attributed to interrelated factors including *inter alia*; absence of deep democratic culture, absence of a strong legitimate State, financial independence of NHRIs and absence of robust civil society. Understanding such factors is useful to this study as a means of interrogating the challenges faced by NHRIs.

Generally, the data collected above is useful in understanding the minimum standards for establishment of NHRIs, social , political and economic factors affecting their performance and

²⁵ Linda C Reif “Building Democratic Institutions: The Role of Human Rights Institutions in Good Governance and Human Rights Protection”, (2000) 13 *Harvard Human Rights Journal* 1

²⁶ Pierre de Vos, Experience of Human Rights in Africa: Challenges of Implementing Economic Social and Cultural Rights” in Charles M Peter (ed) *Protectors: Human Rights Commission and Accountability in East Africa* (Fountain Publisher: Uganda, 2008) at p. 3

the roles and achievement of NHRIs in the region and globally. The existing data though useful in describing formal aspects of NHRIs, little assessment has been undertaken on what obtains in practice in KNCHR and which legal and non-legal interventions should be made to enhance substantial effectiveness and independence.

1.10. CHAPTER BREAKDOWN

Chapter 1: INTRODUCTION

This chapter lays down the background to the research area, states the research problem and formulates the research question and issues. It details the theoretical framework, hypotheses, research methodology, limitations and assumptions

Chapter 2: The Benchmarks for Effective and Independence of NHRIs

This chapter entails a discussion of certain provisions contained in the Paris Principles that are relevant in the promotion of effectiveness and independence. The content and scope of those benchmarks are examined in line with the perspective provided in the International Council on Human Rights Policy.

Chapter 3: The Legal Framework for the KNCHR and Implications for Institutional Effectiveness and Independence

In this chapter, the study examines pertinent provisions in the Kenya National Commission of Human Rights Act that promote the effectiveness and independence of the Commission in line

with the normative standards set out in Chapter 2. The chapter also analyses the strengths and loopholes in the legal framework and the implications it has on the Commission's performance.

Chapter 4: Performance of the KNCHR from Legal and Non-Legal Perspectives: 2003-2010

The chapter discusses the successes, and challenges of KNCHR for the period 2003-2010 and how they have affected the Commission's effectiveness and independence. It also analyses legal and non-legal factors that have contributed to such successes and challenges and their impact on the Commission's effectiveness and independence.

Chapter 5: CONCLUSION AND RECOMMENDATIONS

The chapter concludes that KNCHR Act contributes to the challenges faced by the Commission. Other factors that contribute to challenges the Commission faces include; lack of Executive good will, lack of accessibility of the Commission, co-operation from other State agencies, lack of adequate funding and direct and indirect interference of Executive. It is suggested that the several measures be adopted to strengthen the provisions in the Act. Constructive engagement with the government is recommended to establish a working relationship to enable the Commission effectively discharge its mandate. It is also suggested other non-legal interventions be integrated into the Commission's strategies to improve its performance.

CHAPTER 2: BENCHMARKS FOR EFFECTIVENESS AND INDEPENDENCE OF NHRIS

Introduction

In 1946, the United Nations Economic and Social Council (ECOSOC) recognised the need to establish national organisations to co-operate and liaise with the United Nations Commission on human rights issues²⁷. During the 1960s and 70s the scope of human rights broadened resultant from proliferation of international agreements on human rights standards. The important role of national institutions as active promoters and protectors of human rights was recognised and in 1978, the UN organised a seminar to formulate guidelines on the structure and functioning of national institutions²⁸. Subsequently the guidelines were adopted by the General Assembly. The guidelines were limited to characterising the structure and mandate of NHRIs and did not offer guidance on evaluating their effectiveness. However, the guidelines from the 1978 seminar provided a foundation for the comprehensive evaluation of NHRIs as some of the guidelines were incorporated in the Paris Principles. In 1991 a workshop drawing membership from UN, member states, UN agencies and national institutions was organised to explore ways of improving efficiency of NHRIs was convened in Paris.

In 1992, following recommendations reached at the workshop, the UN Commission on Human Rights endorsed a set of internationally recognized principles concerning the status, power, and

²⁷ Supra note 14 at p.20

²⁸ Ibid.

function of national human rights commissions²⁹. These UN-endorsed principles, now known as the Paris Principles, were adopted by the General Assembly in 1993³⁰. The principles were affirmed at the 1993 World Conference on Human Rights³¹. They provide the basic guidelines for the establishment of a state's human rights commission. The Paris Principles also provided states with model mandates that can be used to define the status and functioning of human rights institutions. The Principles now represent the primary source of normative standards for establishing national human rights institutions in states worldwide. The Paris principles outline four yardsticks to measure the effectiveness and independence of NHRIs, namely; competence and responsibilities, composition and guarantees of independence and pluralism; methods of operation; and, principles concerning status of Commissions with quasi-jurisdictional competence.

Although, the Paris Principles remain most widely accepted and authoritative benchmarks in assessing effectiveness of NHRIs, they have been criticised for several reasons. As stated in the International Commission for Human Rights Policy report, Paris Principles have been found to be too legalistic as they target formal aspects of the effectiveness NHRIs which in turn do not reflect on their performances on the ground. Secondly, whereas Paris Principles set minimum standards to assess effectiveness and independence of NHRIs, they fail to provide indicators to gauge the

²⁹ National Institutions for the Promotion and Protection of Human Rights, GA Res. 48/134, U.N. Doc.A/RES/48/134, available at "<http://daccess-ods.un.org/access.nsf/A/RES/48/134>" (Last accessed July 2, 2009).

³⁰ Principles Relating to the Status of National Institutions, (the Paris Principles) Annex, UN Doc. A/RES/48/134/ANNEX(March 1994), available at <http://www.ohchr.org/english/law/principles.htm> last accessed July 2, 2009

³¹ Vienna Declaration and Programme of Action – adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (a/CONF.157/24; PART 1 Para.36) :

impact of NHRIs work in relation to realisation of human rights. Setting indicators on output, impact and performance of activities of commissions, provide a holistic picture on the effectiveness of NHRIs³². Further, the Principles have been criticised for lacking specificity as they are not tailored to suit the varied typologies of NHRIs and they are therefore too general. Academic commentators have also criticised several aspects of Paris Principles. Okafor and Agbankwa³³ recommend that the Principles should be holistic to create room for greater success and harness NHRIs transformative potential. They suggest that benchmarks should require NHRIs to establish a deeper connection with vulnerable groups of society.

It must be understood that the criticisms leveled against the Principles do not conclude that the standards set therein serve no utility in the evaluation of NHRIs. The Principles are broad and generally applicable to all NHRIs without recognising different contexts that different NHRI operate. In this sense Paris Principles compared to the ICHRP guidelines are limiting because they do not differentiate between factors that affect the formal structure of NHRIs from and those factors that enhance NHRIs substantive independence and effectiveness of NHRIs. In the ICHRP report, fundamental factors affecting independence are accorded more specificity and focus. There are differences in content, scope and terminology between the standards in the Principles and the ICHRP report but several aspects of such standards are similar. For instance, whereas the Paris Principles refers to “pluralistic composition”, the ICHRP report requires that NHRIs should have “diversity in membership and staff”. In terms of the content and scope of the benchmarks, the

³² Supra note 16

³³ O. Okafor and S. Agbankwa, “On Legalism, Popular Agency and Voice of Suffering: The Nigerian National Human Rights Commission in Context”, *Human Rights Quarterly* (2002) 24

ICHRP broadens the scope of operations for NHRIs in order to make them more robust. It is therefore important to note that the recommendations in the ICHRP report in this study are complementary to Paris Principles in the analysis of the performance of the Commission.

In sum, although the provisions are significant in providing general minimum standards that NHRIs should possess, it is not all the benchmarks set out in the Paris Principles that have a direct bearing on the substantive effectiveness and independence of NHRIs. The following fundamental standards have been identified for further inquiry in this study. These are public legitimacy; broad mandate; composition: diversity of commissioners and staff and integrity of commissioners; accessibility, open organisational culture, partnership with civil society, power to monitor compliance and effective resolution of complaints; systemic treatment of human rights issues and adequate budgetary resources. It is argued here that if these standards are met by NHRIs, their effectiveness and independence would be harnessed.

2.1. BENCHMARKS

2.1.1. Public Legitimacy

In order for NHRIs to win public legitimacy, they must strive to advocate for defence of rights of vulnerable groups against interests of the powerful and elite³⁴. Advocacy strategies initiated by NHRIs must be guided by impartiality³⁵. NHRIs are characterised as legitimate institutions where they are established by legislative and/ or constitutional provisions. Public legitimacy of NHRIs

³⁴ supra note 16 at p.12

³⁵ Ibid.

therefore flows from legal personality which is embedded in a statute or constitution rather than an executive decree.

The rationale behind the requirement for public legitimacy was to preclude governments from establishing national institutions by presidential decree which establishment can be rescinded at the Executive's whim³⁶. For example, the Indonesian Human Rights Commission (KomnasHAM) was initially³⁷ established by Presidential decree. The initial commissioners were selected on basis of loyalty to the government and the Commission's membership included military officials³⁸. The Indonesian situation is no different to the process of establishment of the Kenyan Standing Committee on Human Rights (SCHR) as it was set up through an executive decree as an ad hoc committee answerable to the President. It is felt that a national institution's mandate ought to be afforded constitutional protection to ensure that the Commission functions more independently and effectively or at least through legislation. A constitutional provision does not automatically guarantee a better functioning of NHRI but it has been argued that the Constitution secures the independence of NHRIs far better than presidential decrees or acts of parliament as the threshold for constitutional amendments is restrictive³⁹.

The composition and competence of the Commission is specified in the provisions of the Act. Public legitimacy also extends to the narrowness or broadness of the mandate of NHRIs. The Act

³⁶ Ibid. at p.22

³⁷ Its mandate has since been provided for in legislative text following concerns on its independence and effectiveness.

³⁸ CMI "Taking Paris Principles to South East Asia", CMI Report(2007) 3 at p. 17

³⁹ Ibid.

charges the Commissions with an inspectorate, quasi-judicial, advisory, monitoring and educative mandates. Additionally, section 16(i) of the Act gives the Commission discretion to “perform such other functions that the Commission may consider necessary” in achievement of its objectives. Section 18 also provides for the general powers of the Commission and specifies that it is an independent institution which should operate without the control and direction of any person or institution. Sections 16 and 18 effectively give the Commission wide discretion to determine its operational priorities and scope of work.

In so far as normative principles on public legitimacy require that NHRIs should be established through legislation to enjoy public legitimacy, the Commission satisfies that requirement as it is established under the Kenya National Commission on Human Rights Act. As opposed to the predecessor, the Commission is established by an Act of Parliament. According to the benchmarks in place, a legitimate institution is one that stands up for the disadvantaged groups in society. The Act lays a firm foundation in facilitating the Commission to transform the state of human rights in the country. The guiding principles as contained in the Act, require the Commission to pursue its activities on human rights promotion and defence on the basis of impartiality.

2.1.2. Broad Mandate

Under the Paris Principles⁴⁰, it is required that NHRIs should be accorded as broad a mandate as possible. The rationale behind this principle was to prevent certain states from establishing ad hoc

⁴⁰ Article 2 of the Paris Principles

institutions with narrow mandates aimed at deflecting international pressure rather than robust NHRIs that would function to tackle human rights issues comprehensively⁴¹. Practitioners were also concerned that the scope of NHRIs would be limited in countries where national constitutions entrenched certain rights into their national Bill of Rights but omitted important rights set out in international human rights treaties⁴². Following the World Human Rights Conference in 1993, it was declared that a NHRI cannot be considered to have a “broad mandate” if its mandate does not include the protection and promotion of economic, social and cultural rights as well as civil and political rights. The advocacy for promotion of civil and political rights and economic and social rights is based on the principle that human rights are inalienable, indivisible and interdependent⁴³.

The ICHRP also lays emphasis on the need for commissions to be granted a broad mandate which covers realisation of all rights based on the interdependence approach which means that all human rights are indivisible and interdependent in that both civil and political rights as well as economic and social rights should be pursued equally as no set of the rights are superior to the other. It goes further to advocate for a broad mandate that should cover all aspects and issues of immediate concern of a citizen’s life⁴⁴. In the KNCHR Act it is not specified that the interdependence approach is applied in human rights protection and promotion. However, it should be noted that under section 16 1(f) the Commission has wide discretion to determine its sphere of operation. The lack of specificity in legislation on the mandate to cover all rights is remedied in the Commission’s

⁴¹ Ibid.

⁴² Supra note 14 at p.18

⁴³ UN General Comment No. 10. (UN Docs)

⁴⁴ International Council on Human Rights Report at p. 7

Strategic Plan⁴⁵. The Strategic Plan incorporates an Economic, Social and Cultural Rights programme to specifically address violations relating to such human rights. In other jurisdictions like South Africa, the mandate to cover economic, social and cultural rights as well as civil and political rights is specifically captured in its constitutive legislation⁴⁶. It is not seriously contested that the Commission has a narrow mandate under the provisions of the Act. Indeed it is acknowledged by commentators that the mandate specified in the Act is adequately broad and therefore sets an appropriate framework for the realisation of promotion and protection of human rights⁴⁷.

The Commission enjoys a broad mandate as provided for in the Act. Although there are no specific provisions relating to the promotion of economic and cultural rights, the Commission has employed its discretion to provide for implementation of pursuit of such rights under its Strategic Plan⁴⁸. The mandate of the Commission also enjoys a non-restrictive mandate. The Act facilitates the Commission a monitoring and inspectorate function that enables it to inspect detention facilities and make recommendations for their improvement. It is therefore not restricted from exercising oversight authority over organs in the security sector like police and prisons⁴⁹.

⁴⁵ KNCHR *Strategic Plan 2003-2008*

⁴⁶ South African Constitution Act No 108 of 1996, Section 184

⁴⁷ Supra note 21 at p.5: KHRC Audit at p. 38

⁴⁸ Interview with Maina Mutuaruhiu (Programme Manager, Economic Social and Cultural Rights, KNCHR) Nairobi 19 August 2011

⁴⁹ Supra note 16 at p. 3, ICHRP Report states that a Commission with a mandate that includes oversight over security sector is one with a broad and non-restrictive mandate.

To transform, the Commission's broad mandate from mere rhetoric to actionable powers for investigation and sanctioning human rights violations, the provisions of the Act must be fully implemented. Indeed, the incorporation of strong provisions without commensurate powers for implementation devalues the potential of such provisions to promote and protect human rights. The commission's work must have an impact in transforming the lives of the Kenyan citizens by having their human rights respected⁵⁰. As one interviewee⁵¹ contends,

“There is no use if KNCHR, with all the statutory powers that it is granted does not work to improve the state of human rights in the country. It would be no different to the Standing Committee on Human Rights or the Judiciary under the previous KANU regime, which were mandated to safeguard human rights but were dormant institutions”

Although fairly broad in text, the Commission's mandate is restricted due to convergence of several factors. There is under-utilisation of its quasi-judicial function, legislative and educative function while its accessibility is also limited⁵². For example, the Commission's power to summon, fine, cause imprisonment has been often rendered nugatory. Several leaders including former Commissioner of Police and the then assistant minister Ananiah Mwaboza have ignored summons to appear before the Commission⁵³. As such, incorporation of the broad mandate in legislative text serves little or no purpose in realisation of human rights by the public and therefore brings about little impact. It ought to be discernible from

⁵⁰ Interview with Evans Mugwe (Advocate of the High Court of Kenya) Nairobi, 31st October 2011

⁵¹ Ibid.

⁵² Interview with Judith Guserwa (Advocate of High Court of Kenya) Nairobi, 14th October 2011

⁵³ Kenya Human Rights Commission, “The Quest for a Human Rights State in Kenya: An Unfinished Agenda”, KHRC(2006) at p.40

Commission's operations that the broad mandate it has been accorded by legislation is a product of government's goodwill towards promotion and protection of human rights and not merely a public relation exercise to please the international community. In other words KNCHR should not suffer the limitations faced by its predecessor the SCHR. In my view, the political will reflected by the government's promptness in ascension to international treaties committing Kenya to international human rights obligations ought to be applied also in facilitating the Commission's work. The Commission does not enjoy co-operation similar to other Commissions notably the defunct Kenya Anti-Corruption Commission⁵⁴ (hereinafter "referred to as KACC"). In the past, ministers, members of parliament, parastatal chiefs, permanent secretaries and other senior government officials have responded positively to summons issued by the then KACC. However, as one respondent noted⁵⁵, it is not to be assumed that such co-operation was motivated by good-will from the political class but with prevailing political conditions at the time.

2.1.3. Integrity and Quality of Staff and Commissioners

NHRIs are required to ensure that members are appointed according to a procedure that guarantees pluralist representation of social forces of civilian society involved in the protection and promotion of human rights⁵⁶. According to the Principles such composition should be represented by civil society members involved in human rights advocacy and efforts to combat

⁵⁴ Interview with Hassan Omar (Commissioner, KNCHR) Nairobi, 8 October 2010

⁵⁵ Interview with Sam Wanjere (Officer, Ethics and Integrity Commission) Nairobi, 31st October 2011

⁵⁶ Article 4 of the Paris Principles

racial discrimination⁵⁷. It could also include professionals, like lawyers, doctors, journalists, eminent scientists and trade unionists. Membership should also be drawn from qualified academicians, religious leaders or philosophers and Parliamentarians⁵⁸. The principles also provide for the inclusion of members of the Executive in an advisory capacity⁵⁹.

In addition to ensuring the Commission's representativeness, meritocracy must be observed in the recruitment process. Integrity and quality of commissioners is a crucial factor in ensuring its independence. Indeed the Commissioners are the face of the Commission and its credibility would be greatly affected if the Commission comprises commissioners with questionable integrity without relevant or adequate qualifications. Integrity of commissioners would be ensured where proper appointment procedures are followed. This means that appointment process is clear from favouritism, ethnic considerations, nepotism and political patronage. The Commission ought to break away from culture of appointing staff based on ethnicity and nepotism rather than merit⁶⁰. The interviewee⁶¹ sums up his views as follows;

“Job recruitment in public institutions have been always associated with corrupt practices where an applicant is likely to succeed depending on the contacts that one has in government or how much one is willing to part with. A commission charged with defending human rights must distance itself from such practices, otherwise it will lose public confidence”

⁵⁷ Article 4 (a) of the Paris Principles

⁵⁸ Article 4 (b),(c),(d) of the Paris Principles

⁵⁹ Article 4(e) of the Paris Principles

⁶⁰ Interview with Rahma Jillo (Advocate of the High Court of Kenya) Nairobi, 8th October 2011

⁶¹ Ibid.

The membership of the initial Commission was criticised for being made up of Commissioners with low qualifications and inadequate expertise⁶². Composition of the current Commission is fairly satisfactory in reflecting regional balance and expertise hence it meets the requirements set out in Paris Principles in relation to pluralistic representation. Regional balance has been ensured through appointment of the commissioners from different provinces. In an attempt of guaranteeing independence from organs of State and political processes, the Act goes further in restricting and excluding members of Parliament and the Executive from membership to the Commission⁶³. It is recognised that although the Principles allow the involvement of the executive, albeit in an advisory role, such provisions may not be appropriate and may be subject to abuse and Executive whims.

States like South Africa, Ghana and Uganda have established the human rights commission in their constitutions. These constitutional provisions typically provide a strong guarantee for the independence of the commission. Most constitutional mandates provide for both executive and legislative involvement in the nomination and appointment of commission members to ensure political influences do not co-opt the commission. However, this objective may not prevent political influences in operation of the Commission if other factors like financing are not addressed to grant the commissioners increased independence.

⁶² Supra note 21

⁶³ Section 5(2) of the KNCHR Act

The requirement for pluralistic representation is adhered to in the current Commission. Membership is fairly diverse with Commissioners drawn from various professions including lawyers, journalists and scientists although emphasis is placed on attaining a regional balance rather than adherence to requirement for a membership that is diverse with social economic representation of society. Commissioners have also had a wealth of experience in public, private and civil society having worked in the Judiciary, executive and non-governmental human rights organisations⁶⁴. For example in the current commission, five Commissioners are lawyers. The chairperson is a former deputy registrar of the High Court while the former vice-chairman Omar Hassan has a wealth of experience in human rights advocacy having worked in civil society. Other members have a background in media and private sector.

2.1.4. Financial Independence and Adequacy

The funding mechanism must be suitable and adequate for facilitating NHRIs’ operation and activities⁶⁵. Independence in respect to finances refers to the “source” of the funds and “management” of those funds⁶⁶. The rationale behind the requirement for adequate funding is to enable NHRIs to recruit staff and obtain its own premises⁶⁷. Enhancing the financial adequacy of NHRIs is also aimed at ensuring that they are independent of government and not subject to financial control which would impact negatively on their effectiveness to implement its strategic objectives. It is preferred that NHRIs funds are sourced from Parliament directly rather than from

⁶⁴ Interview with Commissioner Winnie Lichuma (KNCHR) Nairobi, 1 October 2010

⁶⁵ Article 3(2) of the Paris Principles

⁶⁶ International Council of Human Rights Policy Report at p. 15

⁶⁷ Ibid.

government through one of its departments headed by a Minister.⁶⁸ Subjecting the Commission's budget to parliamentary approval rather than ministerial approval would ensure that the release of funds is not conditioned upon the Commission being less critical of the government's actions on human rights. Further, NHRIs should be permitted to raise funds from other sources other than public funds. In relation to the "management" aspect of financial independence, NHRIs should be entitled to determine their own spending within their allocated budgets⁶⁹.

In seeking to grant full financial autonomy, it should not mean that NHRIs would have a *carte blanche* in sourcing and spending of funds. NHRIs serve a public function and should be held accountable to the public. Hence NHRIs ought to enjoy financial independence provided that such funds are declared in their annual reports to Parliament.

Budgetary support for the Commission is limited and negligible compared to other commissions like the Kenya Anti-Corruption Commission though the latter's performance record has been dismal⁷⁰. It is submitted that such skewed priority stems from governmental reluctance in improving the state of human rights in the country. There is no real difference in the objectives for the establishment of the KNCHR and the SCHR with prevailing lack of political goodwill from the Executive. The existence of the Commission cannot be perceived to be more than a public relation exercise and promotion of human rights is not prioritised under the current government. With

⁶⁸ Ibid.

⁶⁹ Interview with John Wamwanga (Finance Manager, KNCHR) Nairobi, 15 November 2010

⁷⁰ KHRC "The Elusive Quest for a Human Rights State in Kenya: An Audit of the Kenya National Human Rights Commission" KNCHR (2006) at p.25

financial dependence and inadequacies the Commission's performance and capacity are ultimately undermined as the Commission is hindered from performing its investigatory, monitoring and advisory functions effectively.

2.1.5. Open Organisational Culture

NHRIs should establish mechanisms for addressing the public as a means of ensuring their operations are accountable to society⁷¹. It is required that NHRIs cultivate a culture of transparency in the ways that they implement their objectives and day to day activities. This can be achieved where a commission is self critical and collaborative with other institutions⁷². By highlighting their limitations and proposed measures to address its challenges, NHRIs are likely to be seen as credible and transparent institutions rather than closed institutions that are shrouded in secrecy and reluctant to open up to public scrutiny. Self-critical NHRIs would instill confidence in the public that grievances would be addressed⁷³. Collaboration and partnerships with other public institutions and civil society organisations involved in human rights advocacy is a hallmark of openness and transparency⁷⁴. Indeed, the involvement of such groups in its activities and evaluation of the progress of the commission's programmes would develop a spirit of co-operation in common objective of human rights realisation.

⁷¹ Article 6 (c) Paris Principles

⁷² Supra note 16 at p. 17

⁷³ Ibid.

⁷⁴ Interview with Anne Gathumbi, (Programme Manager, Open Society Institute) Nairobi, 1 October 2010

The Commission does address the public regularly through various fora and publicises its opinion on different aspects of emerging human rights issues. Media is the main tool utilised by the Commission in articulating its position on matters of human rights. In the recent past, the Commission has publicised launching of new programmes, human rights policy, strategic plan and inauguration of regional office in Kitale⁷⁵. In publicising its daily activities, the Commission launched its website to enable the public access day to day happenings at the Commission⁷⁶. The website provides information on its work through monthly magazine, publications and annual reports. It also publishes the rulings of the Tribunal.

The conduct of the Commission's activities has over the years been pursued through transparent means. The Commission has been sufficiently self-critical and opened up to criticism from civil society organisations. In 2006, three years into implementation of its Strategic Plan, the KNCHR commissioned Kenya Human Rights Commission, a leading non-governmental organisation on human rights advocacy to analyse, audit and point out its shortcomings. The resultant report pointed out its weaknesses and its exposure to interference from the government. KHRC gave its recommendations which have since been incorporated into the Commission's programmes and activities. The Commission has also availed its activities to the public through publications and its accountability to Parliament. In addition to inviting criticism from CSOs, the Commission has partnered with such organisations to strategise on the realisation of human rights in the country.

⁷⁵ Interview with William Tengecha (Principal Human Rights Officer-KNCHR Kitale) Nairobi, 12 August 2011

⁷⁶ See www.knchr.org

Nonetheless, there are low levels of direct consultation with other bodies involved in the protection of human rights. In Kenya other state bodies include inter alia; the Standing Committee on Public Complaints, state security agencies, Judiciary and the State Law Office. There is no clear relationship between the two bodies. However, there is interaction, albeit indirect, between the Commission and other national bodies in the governance, justice, law and order sectors under the GJLOS programme⁷⁷.

2.1.6. Accessibility

Under the accessibility requirement, NHRIs should be reachable to all groups especially the disadvantaged throughout the country. This is achieved through the establishment of local offices to boost accessibility of the Commission to the citizenry⁷⁸. Accessibility not only refers to physical aspect but extends to encouragement to people to use the Commission as a means of voicing their grievances and seeking redress for human rights violations. Thus, accessibility would be enhanced where the public are made aware of NHRIs activities. In terms of physical accessibility, the Commission is yet to achieve its potential by ensuring that it has established its offices throughout the country to enable all victims of human rights violations to access it conveniently and cheaply.

⁷⁷ www.gjlos.go.ke (last accessed on November 15, 2010)

⁷⁸ Article 3 of the Paris Principles

In regard to accessibility, the Commission scores poorly⁷⁹. The KNCHR lags behind its counterparts in Uganda, South Africa and Ghana. Further, compared to the National Commission for Human Rights in India which has human rights commissions in each State staffed with enforcement officers and administrative officers, the Commission's offices are barely accessible to the public and especially citizens at the grass root level⁸⁰. The Commission has only three (3) offices in Nairobi, Kitale and Wajir. Although the Act mandates the Commission to establish local or regional offices for "better performance of its functions", the Commission has not fulfilled this responsibility. Establishment of local and regional offices would ensure that the Commission has a wide coverage and easier access granted to the petitioners. Even with the existing established offices, petitioners have difficulty in accessing these offices with minimal cost as they are required to cover long distances because are few and far between⁸¹. For, instance, the nearest office for a petitioner from Mandera would be Wajir, but the distance to be covered is long and would take at least a day⁸². Accessibility is so limited that even at the provincial level there are no branches established to receive complaints on human rights violations⁸³. Simplification of procedures and reducing the cost for accessing NHRIs is an important aspect that they are required to possess in order to be effective. Lack of adequate financial resources have been a hindering factor in facilitating access to the Commission at the grass roots.

⁷⁹ Ibid at p.46

⁸⁰ Marea Beeman (ed.), "Lessons from National Human Rights around the World for State and Local Human Rights Institutions in the United States", Harvard University Executive Series HRC No. 5 available <http://www.hrccj.org> (Last Accessed on 15th November 2010)

⁸¹ Interview with Dominic Rono, (Human Rights Officer, Kitale) Nairobi, 12 August 2011

⁸² Interview with Hassan Abdile (Principal Human Rights Officer, Wajir) Nairobi, 24 August 2011; Interview with Mohammed Jafaar (Human Rights Officer, KNCHR, Wajir) Nairobi, 24 August 2011

⁸³ Interview with Duncan Nyangwara (Student) Nairobi, 2nd November 2011

2.1.7. Partnerships with Civil Society

In its activities, the Commission actively involves civil society organisations to better exercise its promotional and protectional mandate. Through consultative forums, workshops, public forums and training, the Commission and civil society groups have formed alliances and networks in addressing human rights concerns and shared experiences in terms of challenges and advances made in protection of human rights. On certain human rights issues, the Commission has undertaken investigation in conjunction with civil society and stated common position and recommendation in their reports. Such reports covered issues concerning transparency and accountability of use of CDF and the audit of the Commission undertaken in conjunction with Institute of Economic Affairs (IEA)⁸⁴ and the Kenya Human Rights Commission⁸⁵ (KHRC) respectively. The Commission has also adopted a partnership framework with Kenya Human Rights Network (KHURINET). The framework seeks to guide activities in human rights field to prevent duplication between both actors and ensure that there is co-ordination in the sector.

2.1.8. Quasi-jurisdictional Competence

The issue whether NHRIs should be accorded powers to investigate complaint concerning human rights violations was widely contested during the negotiations in 1991 Paris meeting⁸⁶. Human rights advocates considered the power to investigate as an important tool for protecting human

⁸⁴ KNCHR/IEA “Kenya’s Verdict: A Citizen’s Report Card on Constituency Development Fund”, IEA: Research Paper Series No. 7 (2006)

⁸⁵ Supra note 62

⁸⁶ Supra note 14 at p. 24

rights. State officials and human rights advocates were sharply divided on the necessity to include in the Paris Principles the competence of NHRIs to receive complaints and conduct investigations on human rights obligations. A compromise was struck by incorporating “Additional principles concerning the status of commissions with quasi-judisdictional competence”. The section relates to agreement reached between negotiators on the “quasi-judicial” powers Commissions should have.⁸⁷

NHRIs are authorized to hear and consider complaints and petitions concerning individual situations. In exercising their quasi-judisdictional competence such institutions are to be guided by the following principles: amicable settlement through conciliation, binding decisions or confidentiality; informing party of rights, promoting access to remedy and remedial justice; onward transmission to competent authority, power to recommend to competent authority by proposing reform of laws or amendments to them⁸⁸.

⁸⁷ Ibid. The negotiating group working in French mistranslated quasi judicial powers into English as “quasi-judisdictional” and the mistake was not corrected by participants before printing of the final text of the Paris Principles

⁸⁸ Article 3 of the Paris Principles

2.1.9. Independence and Impartiality of Tribunals/National Human Rights Institutions: International Treaties and Case Law

Citizens are entitled to minimum human rights standards set out in international law. These substantive and procedural standards are applied at the national level by implementing institutions charged with decision-making, adjudication, enforcement and promotion of such rights⁸⁹.

International Context

International treaties, namely, Universal Declaration of Human Rights⁹⁰, International Covenant on Civil and Political Rights⁹¹ and International Covenant on Economic and Social Cultural Rights⁹², provide the primary international standards on human rights to be observed by State Parties. These treaties also referred to as International Bill of Rights provide the hard law that set minimum standards that must be realised by State Parties in the protection and promotion of civil political, economic, social and cultural rights. They also contain procedural requirements to be followed by State dispute resolution institutions to safeguard and facilitate the realisation of the rights of citizens in the respective contracting State Parties. The International Bill of Rights permits each State Party to adopt its own dispute resolution and enforcement mechanisms suitable for its local context. Globally, there are varied forms of enforcement including judiciary, ombudsman, NHRIs or hybrid institutions like the Ghanaian CHRAJ which is a NHRI,

⁸⁹ Gerald P. Heckman "Canadian Refugee Status Determination System and the International Norm of Independence"

⁹⁰ U.N. General Assembly Universal Declaration on Human Rights, adopted 10 Dec 1948, 217 A (III)

⁹¹ International Covenant on Civil and Political Rights adopted 16 Dec.1966, GA. Res. 2200 (XXI) UN.GAOR, 21st Sess, UN Doc. A/6316/ (1966) UNTS 171 (entered into force 23 March 1976)

⁹² International Covenant on Economic Social and Cultural Rights adopted 16 Dec1966, GA. Res. 2200 (XXI) UN.GAOR, 21st Sess, UN Doc. A/6316/ (1966) 999 UNTS 3. (entered into force 3 January1976)

ombudsman and ant-corruption authority⁹³. Whatever, institutional mechanism is preferred by a particular state, when such an institution executes its mandate, it is bound by the substantial and procedural requirements set out in the International Bill of Rights. Therefore, NHRIs are required to adhere to the general substantive and procedural standards. This position has been affirmed in jurisprudence and available scholarly work and is to an extent applicable to certain aspects of the mandate of NHRIs like investigative and quasi-judicial mandates. The Human Rights Committee delivered a number of decisions on the interpretation of the scope and content of Article 8 of UDHR and Article 14 of ICCPR which have a direct bearing on the standards expected of any institution sitting as a Tribunal or undertaking any judicial function in relation to implementation of human rights.

For instance, in the case of *Abbassi v Algeria*⁹⁴, the Human Rights Committee upheld the right to fair trial before independent courts as it held that subjecting the author to a military tribunal without affording him full guarantees of fair trial did not amount to proceedings that met the threshold for independent and impartial tribunal established by law as required under Article 14 of the ICCPR. The relevant consideration is not the form that the Tribunal takes but importantly whether the respondent or Accused before such a Tribunal is accorded minimum standards of fairness and equality before the law so as not to prejudice the outcome of the proceedings. The Human Rights Committee underlined the importance of threshold under Article 14 and applied the

⁹³ Bonolo R. Dinokopila, "Beyond Paper-based Affiliate Status: National Human Rights Institutions and African Commission on Human Rights" (2010) *10 African Human Rights Law Journal* 1 at p. 40

⁹⁴ (2007) AHRLR 3; Human Rights Committee 89th Session, 28th March 2007, CCPR/C/89/D/1172/2003, available at www.pup.up.ac.za

position in General Comment No.13 on impartiality of military tribunals which states that⁹⁵, “while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees under Article 14 of ICCPR.

The Human Rights Committee has reiterated its position on Article 14 of ICCPR by placing a duty on State Parties to establish competent, independent and impartial Tribunal’s by Law that entitles all persons a fair and public hearing⁹⁶.

African Context

Jurisprudence on the content of Articles 7 and 26 of the African Charter on Human and People’s Rights support the HRC position on the right to fair trial and independence of Tribunals. Jurisprudence developed in this area directs that dispute resolution institutions must act independently, accord fair trial to all persons and should provide effective remedies to aggrieved parties. In the case of *Wetsh’konda Koso v Democratic Republic of Congo*⁹⁷, the author, an advocate, filed a communication on behalf of five aggrieved citizens of Democratic Republic Congo seeking reliefs against the State Party for alleged human rights violations. The complainants stated that they were tried before a military court, comprising five judges and were found guilty on evidence adduced before the Court and sentenced to death. The judges were drawn

⁹⁵ Ibid. at 15 para. 8.7.

⁹⁶ UN Human Rights Committee, General Comment No. 32, Right to Equality before Courts and Tribunals and to Fair Trial, 23rd August 2007, CCPR/C/GC/32 available at <http://www.unchr.org/refworld/docid/478b2bf2.html> (Accessed 30 Oct 2011) at 5 para.18

⁹⁷ (2008) AHRLR 93

from military with only 1 of them trained in law and decisions of the Military Court could not be opposed or appealed. Complainants stated that the proceedings and decision of the Military Court constituted a violation of Articles 7 (1)(a) and 26 (1) of the African Charter on the right to be heard by impartial courts and Article 14 (1) of the ICCPR on the right to fair trial before impartial and independent court established by law. The African Commission on Human and People's Rights applying its earlier decisions in *Civil Liberties Organisation v Nigeria*⁹⁸ found that the establishment of an emergency military tribunal was a violation of the provisions of the African Charter⁹⁹. It stated that in all cases the independence of the court must be appreciated between the degree of independence of the judiciary *vis-a-vis* the executive. The status of the members of the Tribunal who were men in uniform and not judges, predicted the result of excessiveness and influence from external pressures¹⁰⁰. On the issue of competence of a court or tribunal, the Commission applied its decision in *Amnesty International v Sudan* [2000] AHRLR 297¹⁰¹, reiterating that to deprive the court of qualified personnel to ensure they operate impartially is to deny individuals to have their case heard which constitutes a violation of Articles 26 of the Charter. It stated further that, "the requirements of the right to a fair trial also presupposes that the courts are able to allow persons subject to trial to review the ruling passed"

⁹⁸ [2000] AHRLR 243

⁹⁹ Supra note 95 at 104 para.78

¹⁰⁰ Ibid at para.79

¹⁰¹ Ibid at 104 para.81

In, *Gunme and Others v Cameroon*¹⁰², the issue before the Commission was whether standards of fair trial were observed under Article 7 (1) of the Charter and whether the composition of the Higher Judicial Council of Cameroon satisfied the requirements of Article 26 of the African Charter on independence of courts. The author of the communication had instituted proceedings on behalf of Southern Cameroonian people who are largely Anglophone. He alleged that southern Cameroonian people were subject to criminal proceedings in French, a language they did not understand and they were not afforded an interpreter hence violating Article 7 (1). They also alleged that the composition of the Higher Judicial Council contravened guarantees of the independence of court as set out in Article 26. The Commission found that on the evidence adduced, the State Party had violated Articles 7(1) as claimants were tried in French yet they only understood English and they were not afforded the services of an interpreter. It also found that Article 26(1) of the African Charter had been violated because the Judiciary could not be said to be independent as there was no clear separation between the Judiciary, Executive and Parliament as evidenced by the composition of the Cameroon Higher Judicial Council. The Cameroon Higher Judicial Council which is the appointing and disciplinary authority for Magistrates comprised the President and the Minister of Justice, three members of Parliament, three members of the bench and one independent personality.

¹⁰² (2009) AHRLR 9

Kenyan Context

Pursuant to international norms, Complaints Hearing Panel when constituted as a Tribunal is required to provide fair adjudication and it should be independent in exercising its mandate. Relatedly, it is required to provide effective remedies to petitioners. There is a paucity of local jurisprudence specifically relating to the independence of the KNCHR Tribunal and application of international standards in executing its quasi-judicial mandate when determining the rights of individuals. However, two notable High Court decisions have brought into focus the issue of independence, impartiality and fair trial of the KNCHR Hearing Panel. With no direct reference to international human rights standards, in effect the decisions generally uphold and recognise the standards contained in international human rights treaties. In the first case, the Tribunal's existence and its decisions was challenged through judicial review proceedings instituted in High Court on grounds of impartiality, procedural irregularities and illegality and breach of procedural safeguards¹⁰³. In *Kenya Commercial Bank v Kenya National Commission on Human Rights*¹⁰⁴, Kenya Commercial Bank ("the applicants") had moved to court seeking orders of certiorari to inter alia quash the proceedings of KNCHR ("the respondents") with specific reference to its Complaint Hearing Panel; quash the decision of a Commissioner; quash Kenya National Commission on Human Rights (complaints Procedures) Regulations 2005 for being unreasonable, uncertain and ultra vires the KNCHR Act. The application was supported by grounds that the proceedings of the Panel were in breach of principles of natural justice and there was bias in regard to Panel's decision. Initially, a petitioner, an employee of Kenya Commercial Bank (KCB) had lodged a

¹⁰³ *Kenya Commercial Bank v. Kenya National Commission on Human Rights*, HCCC Misc. Appl. 688/2006 (unreported)

¹⁰⁴ Ibid.

complaint with the Commission stating that he had been dismissed unlawfully by the Bank; which was in violation of his human rights. The Commission then wrote to the KCB discussing the possibility of reinstating and pay compensation to the petitioner failure to which the Commission would proceed to High Court under section 84 of the Constitution on behalf of the petitioner. Instead of instituting proceedings in the High Court having taken the position that the applicant had violated the petitioner's rights, the Commission constituted a Hearing Panel and purported to adjudicate on the complaint against the Bank. The complaint was heard by one Commissioner in contravention of Regulation 27(2) which envisaged a panel consisting of more than one Commissioner and other staff. Applicants raised objections with the Tribunal in issues of bias and lack of jurisdiction of the Tribunal for want of quorum. The Commissioner sitting on the Panel declined to uphold the objections citing that there was no actual bias had been proved. The Applicants then moved to the High Court seeking to quash the proceedings of the Panel and the decision of the Commissioner.

The court held that the Tribunal had breached principles of natural justice as it had not observed requirements for a right to fair trial. The Commission was also found to have made a predetermined position on the rights of parties and it was therefore biased in reaching its decision. The court quashed Regulations 2, 14, 21, 22 and 27 of the Kenya National Commission on Human Rights (Complaints Procedures) Regulations 2005 as they were ultra vires the KNCHR Act. These regulations were found to negate statutory requirements for adherence to principles of natural justice. Regulation 14 in particular was found to be inconsistent with the parent Act as it restricted

the applicant's right to information whereas section 17 of the Act expressly required that the Commission apply principles of natural justice and impartiality.

The High Court recognizes that the Commission "has investigative and adjudicative functions and it is one of the subordinate courts envisaged under 65 (1), section 84 (3) of the constitution"¹⁰⁵.

However, the quashing of jurisdiction of the Panel has had an adverse effect on the Commission's quasi-judicial mandate. Since the delivery of the ruling, the Complaint Hearing Panel has not adjudicated on any petition. The Commission has been unable to make any orders for compensation of petitioners in line with its statutory mandate under section 19 (2) of the Act. Further, no new regulations have been formulated by the Attorney General to ensure that they conform to the provisions of the Act hence facilitating the work of the Commission in performing its quasi-judicial function. In light of new constitutional provisions, competent drafting in regard to new Act and regulations thereto is necessary to obviate future challenges on the jurisdiction and mandate of the Commission.

Following post election violence in Kenya, in 2007, the KNCHR undertook an investigation into the character and scope of human rights violations committed during the skirmishes and documented its findings and recommendations in a report "On the Brink of A Precipice: A Human Rights Account of Kenya's 2007 Post Election Violation". One of its recommendations was that Mr Uhuru Kenyatta be investigated for his role in human rights violation. Mr Kenyatta took issue

¹⁰⁵ Ibid. at p. 24

with the report and instituted proceedings in *Uhuru Muigai Kenyatta v. KNCHR*¹⁰⁶. He sought to expunge his name from paragraph 545 of the report stating that it prejudiced him and brought his character and reputation into disrepute. He also stated that KNCHR had failed to observe the rules of natural justice, failed to follow right to fair hearing and denied him his right to be heard. KNCHR argued that the report was prepared pursuant to its mandate under section 16 of the Act and that the Court ought not to interfere with its statutory mandate. Further the Commission submitted that it had invited the plaintiff to give his opinion but he declined to comment. The Court held that it has a supervisory jurisdiction over KNCHR and therefore it had jurisdiction to review its decisions under the Act. Further, applying the decision in *O'Reilly v Mackman [1983] 2 A.C. 237* it found that rules of natural justice and procedural safeguards had been breached by KNCHR because it had not offered Plaintiff a right to be heard. It stated that a general invitation to the public to reply does not amount to according fair hearing under the rules of natural justice. However, the court declined to grant orders quashing paragraph 545 as the order of certiorari was discretionary and could be declined even where there was a breach of natural justice. The court concluded that the report was in public domain and thus a matter of public interest.

Though the decision in *Uhuru Kenyatta v. KNCHR*¹⁰⁷ criticizes KNCHR for flouting procedural safeguards, the court reinforces its investigatory mandate and recognizes that defence of human rights is in the public interest¹⁰⁸. While it may be too early to conclude with certainty that the judicial attitude will be positive towards KNCHR and human rights defence in general, the little

¹⁰⁶ HCCC Misc. Civil Application 86 of 2009 [unreported]

¹⁰⁷ Ibid.

¹⁰⁸ Interview with Stella Chemutai (Advocate of the High Court of Kenya) 8th October 2011;

jurisprudence developing in interpretation of constitutional provisions and scope of human rights has in the recent years moved away from the narrow approach to the broad approach¹⁰⁹. In determining a constitutional interpretation dispute, the High Court applied a liberal and broad approach, to give effect to constitutional principles of sovereignty of the people and constituent power of the people. As the court stated, “a Constitution must be interpreted liberally and purposively because it is a living instrument with a soul and consciousness. It embodies certain fundamental values like constitutionalism which is a wide term that encompasses separation of powers, limited government, supremacy of the constitution, equality of all citizens and respect for fundamental rights”¹¹⁰

Along with rules developed from case law, scholarly works on the other hand have centered on the point of interaction between international human rights standards and NHRIs with specific emphasis on impact of international human rights treaties in promotion of human rights¹¹¹; causal relationship between democratic governance and effectiveness of NHRIs in human rights promotion and role of NHRIs in implementing international human rights standards in particular

¹⁰⁹ Njoya v. A.G (2004) EA 194

¹¹⁰ Ibid at 201

¹¹¹ Eric Neumayer, “Do International Human Treaties Improve Respect for Human Rights?” (2005) 49 *Journal of Conflict Resolution* at 925

protecting citizens against torture¹¹²; role of NHRIs in regional and international human rights protection¹¹³.

Opinion is divided on whether ratification of international human rights treaties positively impacts on human rights promotion and protection. Opponents of the existence of a causal relationship between the ratification and improved respect for human rights critique State institutions as being the leading violators of human rights. In their analysis, Powell and Staton¹¹⁴ demonstrate that it is not uncommon for domestic institutions themselves to be complicit in human treaty violation. The authors note that the trend cuts across both democratic and autocratic regimes. They state,

“Importantly it is not only autocratic states that violate the Convention against Torture. Democratic states disregard their responsibilities at an alarming rate. Perhaps most disturbing, 81 percent of ratifying states violated the Convention in every year of ratification, including 78 percent of the democratic ratifiers”.

Other opponents like Neumayer¹¹⁵ seek to qualify the incongruence between ratification of treaties and better human rights protection. While there may be no direct cause and effect relationship between ratification of international human rights and improved respect for human rights, better realisation of human rights depends on the level democratic governance of a State Party. In simple

¹¹² Suraina Pasha, “National Human Rights Institutions and Struggle Against Torture” at p.2 available at <http://projects.essex.ac.uk/ehrr/V6N2/Pasha.pdf> (Accessed 19th October 2011)

¹¹³ Bonolo R. Dinokopila, *Beyond Paper-based Affiliate Status: National Human Rights Institutions and African Commission on Human Rights*, *African Human Rights Law Journal* (2010) 10 at p. 40

¹¹⁴ Emilia Powell and Jeffrey Staton, “Domestic Judicial Institutions and Human Rights Treaty Violation” *International Studies Quarterly* (2009) 53, 149-174

¹¹⁵ *Supra* note 95 at p. 926

terms, the more democratic the country, the more likelihood that human rights will be respected in that country.

The level of democratic governance as a significant factor in determining the realisation of human rights has subsequently been applied in the analysis of the different types of environment and modes of engagement that NHRIs operate in throughout the world¹¹⁶. It is acknowledged that contrary to popular belief, NHRIs are not only products of liberal democracies but that they function in other systems of governance. In other words, NHRIs have a role to play in democratic as well as un-democratic regimes. However, their performance will be determined on the expectations by citizenry and level of interference by the State. Where the State is coercive and uncooperative, the success of the NHRI will be diminished. This position is supported by the analysis provided by Powell and Staton that the level of human rights violations is relatively high despite the popular expectation that treaty obligations will be automatically observed.

The place of NHRIs beyond the national level, has been the subject of debate amongst international human rights scholars centered mainly around arguments that NHRIs have an automatic role to play in the international and regional while others have cast doubts on such an assumption. Liberalists contend that NHRIs have a formal international standing as their role is envisaged in the Paris Principles¹¹⁷. Further, they seek to justify the participation of NHRIs in the

¹¹⁶ Thomas Pegram, "Diffusion Across Political Systems; A Global Spread of National Human Rights Institutions" (2010) 32 Human Rights Quarterly 3 at 729

¹¹⁷ Bonolo R. Dinokopila, "Beyond Paper-based Affiliate Status: National Human Rights Institutions and African Commission on Human Rights", (2010) 10 African Human Rights Law Journal 1 at p. 36.

international sphere on similar grounds advanced for the participation of civil society and non-state actors in international human rights advocacy. Those persuaded by the non-liberal approach, argue that the place of NHRIs in international sphere is amorphous and not as apparent as the liberalists would like to assert¹¹⁸.

Compared to ICCPR, jurisprudence is thin on the scope and content of rights under the ICESCR. ICESCR did not create an independent body for monitoring and enforcement of the Treaty at national level whereas the ICCPR created the Human Rights Committee. The Human Rights Committee examines periodic reports that State Parties present on measures adopted to implement civil and political rights and progress achieved so far. This is set to change as a result of coming into force of the Optional Protocol to the ICESCR over a year ago¹¹⁹. As stated by the Commissioner on Human Rights, Navathern Pallay¹²⁰,

“ the ensuing jurisprudence that it will stimulate can offer guidance with the benefit of concrete examples regarding interpretation of economic, social and cultural rights. It will clarify the scope of application of these rights by national tribunals and adjudicating bodies”

However, the lack of a communication system under ICESCR does not excuse the performance of NHRI in pursuing human rights protection available under the Human Rights Committee. The

¹⁸ Ibid at p. 37

¹⁹ Optional Protocol to the International Economic and Social Rights: Missing piece in the International Bill of Rights”, adopted 10 Dec. 2008, UN GAOR, 63Sess., UN Doc. A/63/435 (2008)

²⁰ See Caterina de Albuquerque, “Coming into Life of the Optional Protocol to the International Economic and Social Rights: Missing piece in the International Bill of Rights”, (2010) 32 Human Rights Quarterly 1 at p. 145

available redress mechanisms under the Optional Protocol to the ICCPR¹²¹ have been grossly underutilized by the KNCHR if at all. As noted by one respondent¹²²,

“the Commission should be bold enough to utilise the communication system available under the Optional Protocol to the ICCPR and champion for the rights and freedoms of citizens where the government is reluctant to safeguard its citizens rights. KNCHR could have taken a more proactive role in human rights protection at the international level or regional level similar to civil society organisations in other countries”

As demonstrated by the ICJ-Kenya Chapter¹²³ and the Centre for Minority Rights Development¹²⁴, the civil society has been more active than the Commission in exploiting international and regional avenues for redress in relation to human rights. The Protocol provides that representative suits can be instituted on behalf of individuals to enforce human right before the Human Rights Committee.

Under the Act, KNCHR is granted the powers to investigate handle petitions on human rights violations and provide appropriate remedies. The discussion below examines two main aspects of the Commission’s quasi-jurisdictional competence and whether it has been effective in exercising its mandate.

¹²¹ Optional Protocol to International Covenant on Civil and Political Rights, adopted 16 Dec. GA. Res 2200A (XXI) GAOR, 21st Sess., U.N. Doc. A/6316, 1966, 999 UNTS. 171.

¹²² Interview with Ture Boru (Businessman) Nairobi, 30th October 2011

¹²³ Kenya Section of the International Commission on Jurists and others v Kenya AHRLR (2004) 71

¹²⁴ Centre for Minority Rights Development and Others v Kenya (2009) AHRLR 75

2.2. Power to Monitor Compliance to Its Recommendations

The record of non-compliance to the Commission's decisions and procedural irregularities remain a great challenge to the Commission's capacity to act independently and to grant effective remedies to its citizens. As discussed below, the Tribunal's decisions have constantly been ignored by concerned individuals in the Executive. The Commission lacks the necessary mechanisms to enforce its decisions in the face of non-compliance.

In exercising its quasi-judicial function, the Complaints Hearing Panel (hereinafter referred to as the "Tribunal") has adjudicated on inter alia; *Peter Makori v. Attorney General*¹²⁵ and *Medo Misama v Attorney General and the Registrar of Societies*¹²⁶. While the Commission has applied its jurisdiction in enforcing human rights and providing a redress mechanism for citizens, there have been low levels of compliance from government. In the *Peter Makori* reference, the Tribunal ordered the respondent to pay damages amounting to Kshs. 5 Million. In *Medo Misama* involved dispute on the right of association in respect to rejection of the registration of political party by the Registrar of Societies without granting proper reasons and adhering to due process requirements. It was held that the Registrar of Societies denied the petitioner his basic right to association by refusing to register the party without following rules of natural justice and due process by issuing reasoned decision for such refusal. The Tribunal ordered the Registrar of Societies to register the petitioner's party, Chama Cha Mapinduzi within fourteen (14) days from the date of the ruling.

¹²⁵ KNCHR CHP 2/ 2006 (unreported)

¹²⁶ KNCHR CHP 1/2005(unreported)

Subsequently, the Commission's Order was complied with.

The Commission has faced numerous challenges in the exercise of its power to monitor compliance to its recommendations. Whereas the efficiency of its complaint-handling function was improved after introduction of the Taurus Management System and the simplification of procedures under the Complaint Procedure Regulations, its powers to secure attendance through summons and monitor compliance to its orders has been undermined on many occasions by politicians and government officials¹²⁷. The Commission has been unable to apply sanctions available to it to enforce its powers. Its quasi-judicial mandate has been ineffective largely due to weak enforcement mechanisms under the legislative framework and non-co-operation from the Executive.

2.3. Speedy and Effective Complaint Handling

The Commission receives and handles human rights complaints through its Complaints and Redress programme. It is not doubted that in line with the Paris Principles that the Commission provides for the investigation of individual human rights violations and that the Act accords it powers to investigate pertinent matters on its own volition. However, in discharging its investigatory function the Commission has been faced by several challenges owing to budgetary and structural inadequacies¹²⁸. In the period ending 2006, the Commission had been unable to match the increasing number of petitions. Owing to lack of adequate financial resources to recruit staff, the Commission was unable to deal with complaints effectively. However, with the

¹²⁷ Interview with Victor Lando (Senior Human Rights Officer, Redress, KNCHR,) Nairobi, 29 July 2011

¹²⁸ Interview with John Wamwanga (KNCHR-Finance Manager) in Nairobi, 15 November 2010

introduction of *Taurus* file management system later that year, resolution of complaints improved¹²⁹.

2.4. Conclusion

Seemingly, the establishment, composition and mandate of the KNCHR as provided for in the text of the Act are in line with the Paris Principles. However, in practice the Commission's activities are restricted through several factors mainly non-co-operation from state institutions and insubordination to the Executive in its operation. While legal autonomy is proclaimed in the Act, the Commission has been unable to wrestle its powers from the Executive which clawed back such powers resultant from poor political goodwill.

¹²⁹ KNCHR: *Annual Report 2006*

CHAPTER 3

THE LEGAL FRAMEWORK FOR THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS: IMPLICATIONS ON EFFECTIVENESS AND INDEPENDENCE

3.1. Introduction

The Kenya National Commission on Human Rights replaced the Standing Committee on Human Rights (SCHR) which was an ad hoc body constituted under the Office of the Attorney General to investigate complaints of human rights violations and educate the public on human rights. The SCHR is seen as a creature of the Moi regime established in response to international criticism on the state of human rights in the country at the time. The then president frequently deflected issues by forming weak ad hoc institutions without enforcement mechanisms as a means of countering pressure on criticism of human rights. The SCHR was required to submit to the President quarterly reports on the state of human rights in the country in particular to report on findings on petitions filed by the public on complaints of human rights violations. Save for publicizing its reports in its last 3 years of operation, the SCHR was largely ineffective as it lacked statutory powers and had a narrow mandate¹³⁰. The failures of the SCHR were typical in light of the existing non-democratic governance structures during the Moi regime. Despite its shortcomings, the SCHR is credited with playing a vital role in the development of the KNCHR Act¹³¹. SCHR operated until 2002, when Parliament passed the Act to provide for the establishment of the Commission. The Act was passed following a negotiated process involving CSOs and government. CSOs and the media had played an important role in advocacy against human rights violations where the SCHR had failed.

¹³⁰ KHRC, "The Elusive Quest for A Human Rights State in Kenya: An audit of the KNCHR", (KHRC: 2006) at p. 1

¹³¹ Ibid.

As provided in section 36 of the Act, the SCHR was to operate in the transitional period between the passing of the Act and the institutionalization of the Commission.

The Kenya National Commission on Human Rights was operationalised in July 2003 subsequent to the publication of the Kenya National Commission on Human Rights Act (hereinafter referred to as the Act). The Act provides for the establishment of the Commission¹³². It specifies that the Commission is the successor to the Standing Committee on Human Rights and is a body corporate with attendant characteristics and capacities¹³³ including the right to sue and be sued and the right to own property. Section 3 of the Act effectively provides the legal personality of the Commission and formally lays down the basis for its legal autonomy. In practice the Commission's capacity to sue and be sued or the right to own property has not been seriously challenged or undermined. However, it is important to note that the legal autonomy, albeit vital, of the Commission constitutes a single part of its overall independence. Put it differently, if the Commission's financial and operational autonomy has been threatened, its performance would be affected even if its legal autonomy was intact.

The scope of this chapter is limited to provisions in the Act which relate to promotion or limitation of the substantive effectiveness and independence of the Commission. Other sections on the operational and structural autonomy of the Commission are alluded to where it is felt that

¹³² Section 3 of the Kenya National Commission on Human Rights Act.

¹³³ See Section 3 (2) of the Kenya National Commission on Human Rights Act. Others include the capacity to purchase, hold or dispose property and the capacity to borrow and lend money

reference to those aspects would lend assistance in explaining the content of the fundamental benchmarks that affect its effectiveness and independence.

3.2. 1. Legal Personality of the Commission

For a NHRI to be seen as a legitimate institution its establishment must be through legislation or the constitution hence its mandate must be anchored in law. It must also be seen to stand-up for vulnerable and disadvantaged groups in society and should operate in an impartial manner. Prima facie, the Commission derives legitimacy from provisions in the Act that provide for its legal personality and guiding principles which commits it to champion rights of all groups including the vulnerable groups.

The Act specifies the Commission's legal personality¹³⁴ by stating that *inter alia*: it has the power to sue and be sued in its own name; power to borrow money and perpetual succession. In performing its functions, the Commission is guided by regard to diversity of the Kenyan people, observance of impartiality and gender equity, regard to applicable international human rights standards including indivisibility and interdependence of human rights and adherence to rules of natural justice. The guiding principles under section 17 of the Act seek to ensure that the Commission is perceived as a credible; fair, just, impartial and legitimate institution championing the rights of all Kenyans.

¹³⁴ Section 3 of the Kenya National Commission on Human Rights Act.

3.2.2. Provisions on Diversity and Quality of Commissioners and Staff

Commissioners

The Act provides that the Commission shall comprise a Chairperson and eight (8) Commissioners¹³⁵. For an applicant to be eligible to be appointed as Commissioners, one must be a Kenyan citizen of high moral character and proven integrity with knowledge and experience in the field of human rights. Section 5(2) of the Act specifically excludes certain persons from being considered as suitable candidates for the post of Commissioner namely, members of parliament, local authority and executive members of any political party. The parliamentary committee then recommends to Parliament twelve suitable candidates for nomination as Commissioner. Parliament submits the list of nominees to the President through the Attorney General. Subsequently, the President, guided by consideration of regional balance, economic diversity and gender equity, appoints ten commissioners from the list of twelve nominees. At a meeting convened by the Attorney General, the Commissioners then elect a Chairperson and vice-chair from their number¹³⁶. The Commissioners hold office for a term of five years which is renewable for a second and final term of five years¹³⁷.

¹³⁵ Section 4 of the Kenya National Commission on Human Rights Act.

¹³⁶ The chairperson and vice-chairperson must be of opposite gender

¹³⁷ Pursuant to the provisions of the Act, the Commissioners in the first Commission were recruited following advertisement of the posts by Parliament and short listing by its Committee on the Administration of Justice and Legal Affairs. Accordingly, the Committee forwarded a list of twelve nominees to the National Assembly for scrutiny and submitted the names to the Attorney General for onward transmission to the President. The President appointed the requisite nine commissioners on 29th July 2003¹³⁷. The appointment was duly effected through publication of notice in the *Kenya Gazette* on the same date.

The composition of the Commission is designed to be inclusive, diverse and representative of the societal features of the nation¹³⁸. Section 6(8) mandatorily requires the President to consider Kenya's ethnic, geographical, cultural, political, social and economic diversity in the appointment of Commissioners. The principle of gender equity is to be applied¹³⁹. It is not clear from the initial membership or current membership of the Commission whether economic or social factors were considered in the appointment of the Commissioners. What is discernible is that the principle of gender equity was observed with 5 commissioners were men and 4 commissioners were women.

In response to the requirement of reflecting ethnic and geographical diversity, the aspect of regional balance seems to have been followed in the constitution of the initial Commission, although questions were raised because Eastern province was represented by two Commissioners. However, the issue of regional representation may be difficult to solve as there are eight provinces and with the required number of commissioners set at 9, one region is likely to be represented by two Commissioners¹⁴⁰. With the proposal to increase administrative units to forty seven (47) units, the task of achieving regional balance in the composition of the Commission in future is likely to be complicated further.

¹³⁸ Interview Commissioner Lawrence Mute (Research Policy and Legislation-KNCHR) Nairobi, 6 September 2010

¹³⁹ Section 11 of the Kenya National Commission on Human Rights Act.

¹⁴⁰ Interview with Commissioner Winnie Lichuma (KNCHR) Nairobi, 1 October 2010

Further, there have been proposals for the reduction of the size of the Commission to a number of to 3 or 5 Commissioners¹⁴¹. It has been argued that such reduction would ensure the recruitment of professionals and cushion the Commission from political machinations¹⁴². However, with the risk that certain regions and groups would be excluded from the Commission the case for retention of the current structure remains strong.

In the Act, there is no specification on the qualification, performance or experience for an applicant to qualify as a Commissioner. It is stated that a commissioner must be a Kenyan citizen of high moral character, proven integrity and have knowledge in human rights matters. By implication however, the wording of section on their status and privileges of Commissioners enjoy the status of judges of the High Court of Kenya. Therefore, a Commissioner must have practiced law for at least seven years to be eligible for appointment to the Commission. However, the orientation of the office of Commissioner to the legal profession is inappropriate as the provisions of the Act require that membership is drawn from diverse areas¹⁴³. One way would be to specifically provide the level of education and qualification necessary for applicants to be Commissioners and specify that the Commissioners enjoy status of constitutional office holders in respect to removal proceedings. Academics commentators have criticised the criteria currently provided under the Act as setting a low threshold for persons applying to be Commissioners¹⁴⁴.

¹⁴¹See Kithure Kindiki “External Evaluation of Kenya National Commission on Human Rights”, KNCHR (2006). Such reduction is proposed along the Ghanaian model for the Commission on Human Rights and Administration of Justice.

¹⁴² Ibid. at p. 23

¹⁴³ Supra note 77 at p.15

¹⁴⁴ Ibid at p. 14

The appointment of low calibre Commissioners in the initial KNCHR, who were politically aligned to the government, is attributed to the low standards set by the Act ¹⁴⁵. Therefore other criteria ought to be incorporated for selection of Commissioners requiring the applicants to exhibit demonstrable human rights experience and activities. Further, whereas age is a consideration it should not be fundamental so as to relegate other factors like relevant experience, qualification, integrity and professionalism.

Section 7 of the Act provides for the appointment of a Secretary to the Commission who effectively heads and constitutes the Commission's Secretariat. The Secretary is appointed by the Commissioners. Save for the specification that has comparable status to a permanent secretary in government, there are no other specific requirements for the quality, integrity or moral character of the secretary to the Commission and the determination of terms and conditions of service are at the discretion of the commissioners. The secretary is an ex-officio member of the Commission and cannot therefore vote at the Commission's meetings though he is entitled to attend such meetings. As the head of the Secretariat, one is responsible for daily administration, control of staff and implementation of the Commission's policies.

The Commission has discretion to appoint other officers and staff on terms and conditions it determines. Recruitment of staff is undertaken by the Secretary as head of the secretariat. However such discretion is limited in section 15(2) of the Act as the Commission is required to consult with

¹⁴⁵ Interview with Anne Gathumbi (Programme Officer, Open Society Institute of East Africa) in Nairobi, 12 October 2010

Treasury on such recruitment. Such consultation may not necessarily limit the Commission's independence but may constitute procedural consultation to ensure the availability of funds to cater for its recruitment. In practice the recruitment of other staff is largely at the discretion of the Secretary in consultation with the Human Resource department. Initially the Commission was understaffed with most members undertaking responsibilities and workload two levels above their position¹⁴⁶. The initial structure for the Commission had to be adjusted to ensure that it functioned effectively. The report made recommendations on the improvement of the organization structure, performance management, grading structure and remuneration of staff¹⁴⁷. It was recommended that a new remuneration structure be adopted where proposed salary adjustments would be pegged on performance of staff. The subsequent adoption of performance based remuneration is a laudable step and it has instilled confidence and motivated staff that promotions and mobility is strictly based on merit and performance¹⁴⁸.

3.2.3. The Mandate of the Commission

As discussed above, for NHRI to be effective and independent, it should be accorded a broad mandate that includes competence to cover realisation of all rights including civil political rights as well as economic social and cultural rights. It should have a non-restrictive jurisdiction which covers all national affairs including the security sector. Part II of the Act specifies its mandate to include investigatory, quasi-judicial, advisory, educative and legislative powers.

¹⁴⁶ KNCHR/Deloitte "Kenya National Commission on Human Rights Commission: Human Resources Consultancy Report" (KNCHR, 2006) at p. 33

¹⁴⁷ Ibid at p.39

¹⁴⁸ Interview with Sofia Rajab (Human Rights Officer-KNCHR) Nairobi, 25 August 2011; Samson Omondi (Human Rights Officer-KNCHR) Nairobi, 25 August 2011; Cyrus Maweu (Human Rights Officer-KNCHR) Nairobi, 25 August 2011.

Further, section 16 of the Act enumerates seven specific functions of the Commission. These are: investigation of violation of human rights; assessing and inspecting conditions in detention facilities and making recommendations; informing the public its human rights through research and disseminating information through lectures and symposia; creating civic awareness; advising Parliament on effective measures for promoting human rights; act as chief agent of Commission's obligations under International treaties, facilitating and co-operating with other institutions involved in promotion of human rights; conciliation of complaints where appropriate. Section 16 (i) of the Act mandates the Commission to perform such other functions that it deems fit to pursue in promotion and protection of human rights. In regard of its powers and functions under section 16 of the Act and related provisions, it has been acknowledged that the Commission is empowered with a broad mandate under the provisions of the Act and it enjoys wide discretionary powers compared to other NHRIs in the region and in the world¹⁴⁹.

However, in regard to covering realisation of all rights and covering all aspects of immediate concern to citizens' lives, the provisions of the Act are not specific in providing such mandate to the Commission. The Commission remedies¹⁵⁰ this loophole by integrating the pursuit of economic social and cultural rights in addition to the traditional civil and political rights as a strategic objective in its programmatic framework within its Strategic Plan. It is acknowledged however that the realisation of economic social and cultural rights may prove to be challenging in

¹⁴⁹ Ibid. at p. 11

¹⁵⁰ Interview with Maina Mutuaruhi (Principal Manager, Economic Social and Cultural Rights, KNCHR) Nairobi 19 August 2011

light of comparative jurisprudence like *Government of South Africa v. Grootboom*¹⁵¹ on the scope, content and enforceability of such rights¹⁵². In this case, respondents applied to court for an order requiring the government to provide them with adequate basic shelter until they obtained permanent accommodation. The respondents were squatters who had built temporary structures on public land set aside for low cost housing. They lacked basic sanitation and electricity. The Constitutional Court stated that the issue for determination was whether at the institution of the case, the State had taken reasonable measures to realise right to housing as set out in section 26 of the Constitution. Section 26 (2) defined the measures to be taken to include taking reasonable legislative and other measures to achieve progressive realisation of the right to housing. These measures had to be undertaken within the available resources of the government. The Court held that the Constitution obliges the state to implement a co-ordinated programme to provide housing. Further, it found that the government had not put in place any programme for housing the homeless and had not therefore taken reasonable measures to progressively realise the right to housing. As Yakoob J., stated, “The programme that has been adopted..fell short of the obligations imposed upon the State by section 26 (2) of the Constitution in that it failed to provide any form of relief to those desperately in need of access to housing”. The South African Commission on Human Rights, which had been enjoined as *amicus curiae* invoked its duty under section 184 (1)(c) of the Constitution to monitor implementation of housing programme and report on the progress.

¹⁵¹ 2000 (11) BCLR. 1169. (CC)

¹⁵² Interview with Ann Koross, Nairobi, 1st November 2011

Apart from the implication decision made in Grootboom, another challenge is posed to the KNCHR. Will KNCHR in the future be more proactive and effective by making applications to be enjoined in public interest proceedings as a way of protecting human rights especially the vulnerable? The response is that indeed the KNCHR should be more proactive and utilise its mandate under section 16 of the Act in public interest litigation touching on human rights¹⁵³.

3.2.4. Quasi-Judicial Jurisdiction

The Commission is empowered with quasi-judicial powers in the furtherance of its promotional and protective mandate. Its powers include issuing summonses to secure attendance of witnesses or any other person before the court, question any person in respect to matters under investigation, summonses to secure the production of relevant document during proceedings, require the disclosure of information from person with such knowledge¹⁵⁴. Non-attendance before the Commission pursuant to a section 19(1) (a) order is punishable by a fine not exceeding twenty thousand shillings or imprisonment not exceeding six months or both. The Commission has powers to order the release of person unlawfully detained, payment of compensation or order any other lawful remedy¹⁵⁵. Any order issued by the Commission pursuant to section 19(2) may be filed with the High Court and communication be made to the parties within 30 days of such filing. Any party dissatisfied with the Commission's order shall file an appeal to the High Court within 21 days. Where no appeal is lodged, the successful party may apply for leave to apply for enforcement of the order as a decree and subsequent to the leave being allowed, one may apply

¹⁵³ Interview with James Sitienei, 1st November 2011

¹⁵⁴ Section 19 (1) of the Kenya National Commission on Human Rights Act.

¹⁵⁵ Section 19 (2) of the Kenya National Commission on Human Rights Act.

execution of the decree similar to execution of a High Court decree. A person who refuses to be sworn or make affirmation, refuses to produce any document, commits perjury or is in contempt of the commission during its proceedings is guilty of an offence and is punishable by a fine not exceeding twenty thousand shillings or imprisonment not exceeding six months or both.

To facilitate simplification of procedures and contribute to effective resolution of complaints, the Commission published the Kenya National Commission on Human Rights (Complaints Procedure) Rules in 2005¹⁵⁶. The Complaints Procedure Regulations contain comprehensive rules on the process from the lodging petitions to enforcement of an order under section 19 (1) (a) of the Act. It also contains a schedule which provides prescribed forms for complaint form, release order, summonses and conciliation notice. The Complaints Procedure Regulations are comprehensive and offer practical guidance on the conciliation and adjudication of complaints. However, it may be useful in the future in guiding the public in the working of the Commission on its other functions. For example, the Commission may invoke its powers under section 35 to publish regulations on the establishment, composition and role of regional offices as a means of enhancing the accessibility of the Commission¹⁵⁷.

The Commission has also been successful in speedy and effective resolution of complaints especially since the introduction of the Taurus Management system in 2006. However, it has faced a number of challenges in requiring compliance to its orders mainly from parliamentarians and

¹⁵⁶ Pursuant to powers of KNCHR under section 35 of the Kenya National Commission on Human Rights Act.

¹⁵⁷ Interview with Hassan Abdille (Principal Human Rights Officer, KNCHR Wajir) Nairobi, 24 August 2011

police officers¹⁵⁸. For example, the Commissioner's process server was assaulted by armed bodyguards to then Assistant Minister for Immigration at the Ministry's offices on attempting to serve summonses to appear before the Commission¹⁵⁹.

3.2.5. Partnership with Civil Society Organisations

The Commission as the chief agent of government in the promotion and protection of human right is required to work in collaboration with other institutions involved in similar work. Other non-public institutions in the field of human rights principally include human rights institutions in civil society. The Commission has been actively involved in collaborative initiatives with civil society organisations in the human rights field¹⁶⁰. Such collaborative initiatives have been undertaken through technical support and facilitation which include advocacy programmes, capacity building, undertaking joint research studies and consultative forums. In order to harmonise its efforts with CSOs in the promotion of human rights, the Commission and Kenya Human Rights Network have adopted a partnership framework to guide their respective operations. This marks a laudable initiative which precludes issues of duplication and increased transaction costs.

The Commission is also involved in collaborating with public institutions which play an important role in the human rights field including the police and the Judiciary. The Commission is a member of the Governance Justice Law and Order Sector Reform Programme ("hereinafter referred to as

¹⁵⁸ Interview with Abdulkadir Mohammed (Principal Human Rights Officer, Redress, KNCHR) Nairobi, 25 August 2011

¹⁵⁹ Supra note 21 at p. 45

¹⁶⁰ Interview with Anne Gathumbi (Programme Manager-Open Society Institute) Nairobi, 1 October 2010

“GJLOS”) which brings together over 33 public institutions, civil society and private sector in initiating reforms in the said sector. GJLOS embodies a sector wide approach¹⁶¹ which recognizes the need to incorporate holistic approach in any reform agenda to minimize duplication, costs and information gaps. GJLOS is an effective forum for interaction of the Commission with public institutions especially in the security and justice sectors which are collectively involved in safeguarding human rights of Kenyan citizens.

3.2.6. Statutory Accountability and Reporting Requirements

The Commission is accountable to the executive through annual reporting to the President. Accountability to the President as the appointing authority is not un-procedural but it should be not be utilised to undermine the independence of the Commission. The requirement for an open-organisational culture envisages accountability and transparency to the public. Section 21 of the Act seeks to fulfill this requirement by requiring that the Commission must be accountable to Parliament is appropriate. However, such accountability to Parliament may be undermined as it involves the presentation of the annual report to the Minister who then presents it to Parliament¹⁶². The Minister is allowed the opportunity to go through the document and make comments on the Commission’s report before presentation to Parliament. In the sense that the opportunity to comment gives the Minister a chance to clarify on outstanding issues and areas of concern, section 21 remains an appropriate provision. Indeed, the presentation of the report to Parliament should

¹⁶¹ www.gjlos.go.ke (last accessed on November 15, 2010)

¹⁶² KNCHR/KLRC “Report on Strengthening the Legislative Framework of the Kenya National Commission on Human Rights” Workshop held in Nairobi on 25th June 2007 (Nairobi: KNCHR) at p. 15

not be seen as an exercise of ambushing the Minister on the state of human rights issues in the country. However, such opportunity to comment may not preclude the Minister from devaluing damning reports that implicate the Executive. Therefore the accountability mechanism will be rendered ineffective where it depends on the whims and goodwill of the person of the Minister. In any event, the timeline for presentation set at two months is lengthy.

The Commission also publishes an annual report on its successes, limitations and prospects. Annual reports of the commission's performance are available to the public and form an important mechanism for transparency and accountability on its activities. The commission's self-critical approach in evaluating its own performance instills confidence in the public. Further, the Commission has also engaged civil society organisations to evaluate its performance and give objective analysis of its successes and challenges.

3.2.7. Systemic Treatment of Human Rights Issues

The provisions of the Act satisfy the requirement that NHRIs should approach human rights promotion and protection through a systemic treatment on human rights issues¹⁶³. It entails responding to issues of general concern rather than focusing only on individual complaints and petitions. This requirement advocates for a pro-active approach to human rights advocacy. A systemic approach rather than a case by case approach can be pursued through education and civic awareness. Through its educative role¹⁶⁴, the Commission is responsible for informing and educating the public on human rights. In discharging this function the Commission is expected to

¹⁶³ Article 3(a)(b)(f) of the Paris Principles

¹⁶⁴ Section 16 (c),(d),(e) of the Kenya National Commission on Human Rights Act.

develop further a human rights culture nationally by enhancing the respect for such rights. This educative function is to be conducted continuously through research, publications, lectures and other means to be pursued within the Commission's discretion.¹⁶⁵ The Commission is also responsible for ensuring that there is increased civic awareness and increased appreciation of human rights and obligations amongst citizens and other persons resident in Kenya. The human rights education and capacity building programme spearheads the Commission's educative function¹⁶⁶.

General concerns on human rights can also be addressed through investigations, public inquiries, policy reports, civic awareness, researches and policy reports. The Act provides for inquiry into complaints and appropriate action to be taken in sanctioning violation of human rights¹⁶⁷. It is important to note that the Commission is mandated to commence the investigation process on its own volition and does not need to act solely on the strength of a complaint¹⁶⁸. The Commission has on many occasions conducted investigations on issues concerning human rights violations including corruption, electoral violence and intimidation, misuse of public funds extra-judicial killings, state of human rights and public maladministration culminating in reports like *Living Large*¹⁶⁹ and *Behaving Badly*¹⁷⁰.

¹⁶⁵ Interview with Bernard Kibet (Senior Human Rights Officer, Human Rights Education, KNCHR) Nairobi, 24 August 2011

¹⁶⁶ Ibid.

¹⁶⁷ Section 16 (a) of Kenya National Commission on Human Rights Act.

¹⁶⁸ Ibid.

¹⁶⁹ KNCHR/ Transparency International (2005) "Living Large: Counting the Cost of Official Extravagance in Kenya" (KNCHR, 2005)

¹⁷⁰ KNCHR/ KHRC (2006) "Behaving Badly: Deception, Chauvinism and Waste During the Referendum Campaigns (KNCHR, 2006)

Under the Act, the Commission is mandated to play an advisory role to both the government and parliament. The Commission is responsible for advising Parliament effective measures for the promotion of human rights in the country and recommending compensation to victims of human rights violations¹⁷¹. The Commission through its research, policy and legislation programme liaises with parliamentary committees on the importance of infusion of human rights obligations in existing and proposed legislation¹⁷².

The Commission also advises the government on compliance to international obligations on human rights¹⁷³. The Commission acts as the principal agent in following developments in international human rights law and ensuring that the government adheres to obligations contained in pertinent treaties and conventions. The Act specifically mandates the Commission to visit prisons and detention facilities to assess the conditions under which inmates are held¹⁷⁴. The specific monitoring mandate granted to the Commission is explicable in light of the notoriety of the role of the security sector in the torture and inhuman treatment of prisoners. The Commission's Campaigns and Advocacy programme undertakes monitoring functions in assessing the conditions in detention facilities. In particular it inspects such facilities with a view to making recommendations which would improve the conditions for inmates. In liaison with its research

¹⁷¹ Section 16(d) of the Kenya National Commission on Human Rights Act.

¹⁷² KNCHR *Strategic Plan 2003-2008*

¹⁷³ Section 16(f) of the Kenya National Commission on Human Rights Act

¹⁷⁴ In this regard, the Commission is endowed with wider powers different from other comparable commissions like Uganda, Ghana and South Africa in relation to inspectorate function over detention facilities.

policy and legislation programme, the campaign and advocacy programme recommends penal reform initiatives that would tackle issues on improvement of detention standards in the long term.

3.2.8. Financial Provisions

The funding mechanism must be suitable and adequate for facilitating the Commission to conduct its activities and attain its objectives. Adequate funding enables NHRI to recruit staff and obtain its own premises. Adequate financial resources are also geared towards ensuring NHRIs are independent of government and not subject to financial control which would impact negatively on their independence.

Provisions in the Act that seek to grant the Commission financial independence and adequacy are provided in section 26 of the Act. It specifies that funds for the Commission shall be derived from sums to be appropriated from Parliament as it shall determine. Section 26(2) also specifies that the Commission may receive funds from any other source but such funds are subject to limitations to protect the Commission's independence. Non-public funds shall not be made to influence the independence of the Commission in performing its functions. The Act also provides for the annual review of the Commission's funding sources to increase transparency of the Commission's activities.

However, in practice, the Commission does not experience financial autonomy or financial adequacy. Since inception¹⁷⁵ it has been underfunded thus it has not been able to recruit adequate

¹⁷⁵ Supra note 77 at p.24. In the report written by KHRC, statistics are provided on the sources and management of the Commission's funds for its first three years of operation. In the first year, the Commission received Kshs. 59 Million against a request a budget of Kshs. 150 Million. In 2004, the Commission received Kshs. 80 Million with the donors

staff to effectively carry out its mandate. This is largely due to the financing mechanism in place. The Commission draws its funds from the executive rather than directly from a parliamentary vote as specified in section 26 of the Act. The Commission's finances are derived from the Ministry of Justice and Constitutional Affairs vote rather than directly from parliament.

Ideally, the Commission finances ought to be sourced directly from parliamentary appropriated funds so that only legislative action may reduce or increase funding. Section 26 of the Act is inadequate in this sense in that it does not provide a positive obligation compelling Parliament to allocate funds directly to the Commission. Adoption of financial mechanism similar to Fiji's Human Rights Commission where monetary support is received directly from Parliament would strengthen KNCHR financial independence¹⁷⁶.

3.2.9. Establishment of Regional Offices

In order to ensure that petitioners easily access the Commission's services at the local level, it is important that local and regional offices are established to enable the speedy and efficient handling of complaints. The Act¹⁷⁷ specifies that the Commission may establish local or regional offices for better performance of its functions. The lack of national penetration by the Commission is largely attributable to lack of adequate financial resources to enable it obtain premises for setting up offices, recruit staff and establish complaint handling systems at the local level¹⁷⁸.

providing Kshs. 119 Million. The Commission received a paltry sum compared to the then Kenya Anti-Corruption Commission which received Kshs. 390 Million.

¹⁷⁶ Interview with John Wamwanga (KNCHR- Finance Manger) in Nairobi, 15 November 2010

¹⁷⁷ Section 14 (2) of the Kenya National Commission on Human Rights Act.

¹⁷⁸ Supra note 132.

Conclusion

This chapter has examined the text providing for the establishment, composition, mandate, financial resources and powers of the Commission and the application of pertinent provisions in practice. It is acknowledged that the Act gives the Commission a broad mandate towards achieving its responsibility to protect and promote human rights. However, pertinent to the research objectives in this study is the question whether such broad mandate has been applied effectively and independently of the control and direction of the government and any other institution. Evaluation of whether the Commission's mandate, operations, systemic treatment of human rights have been employed effectively to enhance its performance has been influenced by certain legal and non-legal factors which have in turn contributed to the successes and challenges faced by the Commission. The legal and non-legal factors and their contribution to the Commission's effectiveness and independence are the focus of the analysis in Chapter 4.

CHAPTER 4: PERFORMANCE OF THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS 2003-2010: EVALUATION OF THE COMMISSION'S SUCCESSES AND CHALLENGES FROM LEGAL AND NON-LEGAL PERSPECTIVES

4.1. Introduction

In its seven (7) years of operation, the Commission has yielded success in its performance and it has also faced challenges in execution of its mandate. It is important to take stock of these successes and challenges as they have affected the Commission's effectiveness and independence. These successes and challenges are affected by certain legal factors. The legal foundation of a national human rights institution is an important factor in the assessment of its effectiveness and independence. Though important, the effectiveness of a NHRI should not be limited to its legal foundation alone. Non-legal factors such as the political, financial and social contexts within which NHRIs operate are equally important factors that need to be considered in the evaluation of its effectiveness and independence¹⁷⁹. The legal factors are not mutually exclusive from non-legal factors and it is therefore instructive to consider the extent to which each set of factors affect the performance of the Commission.

The chapter is divided into two Parts. In Part I, this chapter examines in depth how the legal framework and non-legal factors contribute to the advances and challenges of the Commission in discharging its responsibilities. In studying the legal factors, Part I examines loopholes in the law that provides the legislative framework and foundation for the Commission. It examines the strengths and gaps discernible from the drafting of the provisions of the Act. In evaluating the non-

⁷⁹ Supra note 27 at p. 15

legal factors, the chapter studies the importance of: a democratic governance structure; degree of institutional separation and independence from government; implementation and actualisation of broad jurisdiction and powers; national economic policies and poverty; financial adequacy and independence; and, an independent Judiciary, in contribution to the performance of the Commission. Reference is made to analyses of best practices for NHRIs and legal and non-legal factors that have contributed to their successes and challenges are also examined.

Part II of the Chapter examines general measures that can be integrated into the legal and institutional framework to strengthen the functioning of the Commission

4.2. Successes of the Commission

From the findings in Chapter 2 and 3, the following aspects have been identified as the successes of the Commission in meeting the benchmarks that have been applied to harness its effectiveness and independence; namely, public legitimacy, broad mandate, transparency and integrity of commissioners. The legal and non-legal factors that have contributed to the successes of the Commission are discussed below.

4.3. Factors affecting the Commission's Success

4.3.1. Legal Factors contributing to Success of the Commission

The main legal factor contributing to the successes attained by the Commission is attributable to the establishment of NHRI through an Act. It is a marked shift from establishment of SCHR based on presidential decree. The establishment of the Commission through legislation and embedding

its powers, functions and mandate in the Act rather than through an ad hoc procedure provides a basis for an effective and independent institution. However, certain gaps in the provisions of the Act should be sealed in order to strengthen the Act to facilitate the Commission to be more transformative. Provisions that should be amended relating to inter alia; enforcement powers, accountability and tenure of the Commissioners are discussed in Part II of this chapter.

4.3. 2. Non-legal Factors

Political Context

In my view the context of the politics in Kenya may well have determined the urgent need for establishment of a Commission through legislation in June 2003 and such goodwill may have found its way in the drafting of Act which granted the Commission a broad mandate. The Commission was established barely six (6) months into the NARC administration coming into power. Albeit, short lived, the 2002 election had the hallmarks of a democratic transition in Kenya politics. There was a peaceful transition of power from the hitherto anti-reformist and incumbent, Daniel arap Moi to a new coalition government led by the newly elected President Mwai Kibaki. The former President had ruled the country for over 24 years with a dismal record in consolidating democratic governance¹⁸⁰. Academic commentators hold the view that the establishment of the SCHR through a presidential decree by the then President Moi was aimed at deflecting international pressure for addressing human rights and political repression in the country¹⁸¹. The new NARC government on the back of popular mandate and endeavour to fundamental shift from Moi government sought to establish embrace democratic governance through institutional reform,

¹⁸⁰ Interview with Commissioner Hassan Omar (KNCHR) Nairobi, 8 October 2010

¹⁸¹ Supra note 92

for instance, judicial reform, establishment of anti-corruption commission, Department of Governance and Ethics, constitutional review and establishment of commissions like KNCHR. The pace for institutional reforms had gathered steam in the first year of the NARC administration and in my view it was no coincidence that the KNCHR was established in that year with a wider mandate compared to other commissions that were part of the institutional reform programme.

4.4. CHALLENGES FACED BY THE COMMISSION IN RELATION TO EFFECTIVENESS AND INDEPENDENCE

This section briefly outlines instances where the Commission has faced challenges in relation to the requirements for independence and effectiveness as discussed in Chapter 2. It examines in detail the legal and non-legal factors that have contributed to such challenges.

4.5. Legal Factors contributing to the Commission's Challenges

4.5.1. Legislative Provisions on Budgetary Support for the Commission

The need for a strong financial mechanism for granting the Commission adequate budgetary support cannot be overemphasized. Without adequate funding, the Commission's activities like any other institution would be limited if not grounded in legislation¹⁸². With limited implementation in strategic objectives and activities, realisation of human rights throughout the country would stagnate and impact of the Commission's work would be negligible. Inadequate finances also hinder the Commission from decentralizing its functions to enable it to be more

¹⁸² Interview with, John Wamwanga, (Finance Manager KNCHR) Nairobi, 15 November 2010

accessible to the public. It is argued that along with lack of political goodwill, inadequate financial resources for the Commission have greatly contributed to its challenges. Further, it is argued that such financial inadequacies are attributable to gaps in the Act.

Section 26 states that the Commission's finances "may from time to time be appropriated by Parliament for its purposes". As drafted, the provision does not guarantee that the Commission's finances would be availed. In its current form, there is wide discretion on the part of Parliament to control when to appropriate finances to meet the Commission's budget, if at all. The use of the words "time to time" does not restrict Parliament to grant such funds after a certain or regular period. With no time limit MOJCA, ministry responsible for the Commission's administrative issues may delay release of funds in the event it is felt that the Commissioner's are "rebellious"¹⁸³.

A stated and definite period is desirable to enable the Commission budget and plan for its strategic activities which are guided by timelines in its strategic plan.

The Act¹⁸⁴ provides for ministerial approval of the Commission's financial estimates. The approval function of the Minister in regard to the Commission's budget raises questions on the financial independence of the Commission. In cases where the executive is unimpressed with a non-conformist Commission¹⁸⁵, it is likely that the Minister will decline approval of the Commission's financial estimates and seek to reduce its budget as a means of restricting its activities. The current provisions on financial provisions for the Commission violate requirement

¹⁸³ Interview with Commissioner Hassan Omar Hassan (KNCHR) Nairobi 8 October 2010

¹⁸⁴ Section 30(3) of the Kenya National Commission on Human Rights Act.

¹⁸⁵ Interview with Commissioner Winnie Lichuma (KNCHR) Nairobi 1 October 2010

for financial independence in the Paris Principles and the tenets of institutionalisation discussed above. The importance of financial independence to the performance of the Commission cannot be overstated as the Chair of the Ghanaian Commission, Judge Emile Short notes¹⁸⁶. According to Short, inadequate funding is the biggest problem that a Commission faces in performing its duties. He further states that,

“Oversight institutions must have their own budget. Their budget must not be subsumed under that of another Government Department such as the Ministry of Justice. Their budgets should be submitted directly to Parliament and not through the Ministry of Finance, which presently exercises a controlling influence on the level of their budgets”

In light of Short’s analysis, the restrictive provisions in Part III of our Act relating to financial provision can be remedied in several ways. The Act can be amended specifying that the budget of the Commission be submitted directly to Parliament without the need for approval of the executive. Secondly, financial independence can be guaranteed by constitutional provision which specifies that its budget shall be a charge on the Consolidated Fund. Currently, only the salaries of the Commissioners are charged on the Consolidated Fund. In theory, the charge on the Consolidated Fund means that it is mandatory that the Commission’s budgetary allocation must be disbursed. However, in practice, the executive justifies its delayed release of funds by stating that

¹⁸⁶ Emile Short, “Accountability: Oversight Institutions, Media and Civil Society” Paper presented at the Commonwealth Parliamentary Association Workshop held in Trinidad and Tobago (25th July 2005) at p.3

projected targets in revenue collection have not been realised¹⁸⁷. Short also cautions that the Consolidate Fund in developing countries is not a “bottomless pit” hence the Commission has to compete with other national institutions for resources. Lastly, another option is to specify that the Commission’s budget is a fixed percentage of the national budget¹⁸⁸. This method potentially guarantees release of funds but has often been circumvented by the executive. For instance, the release of funds for the Constituency Development Fund has been on a number of occasions been delayed by treasury and when disbursed has been released in small tranches hence affecting projects at the local level.

No particular method is perfect in guaranteeing financial autonomy of the Commission. Each method depends on particular circumstances and it is difficult to predict the support that it may receive from the executive and parliament during the amendment process. What is clear though, is that in order to strengthen financial independence, the Minister’s role ought to be limited or done away altogether in financial matters relating to the Commission. Alternatively, the Commission may have to explore innovative approaches to raising funds from other sources as permitted under section 26 (2) of the Act¹⁸⁹. The Commission should also invoke its powers under section 3(2) (d) as read with section 18 to mobilize resources and pursue prudent investments.

¹⁸⁷ Interview with John Wamwanga (Finance Manager, KNCHR), Nairobi, 15 November 2010

¹⁸⁸ Interview with Ann Gathumbi (Programme Officer, Open Society Institute), Nairobi, 8 October 2010

¹⁸⁹ Interview with Commissioner Lawrence Mute (KNCHR-Research Policy and Legislation) Nairobi, 6 September 2010

4.5.2. Enforcement Powers

Along with a broad jurisdiction, national human rights institutions should be given sufficiently strong powers to enable it discharge its protectional mandate effectively. As discussed above, effectiveness of NHRIs to a large extent depends on exercising its power to monitor compliance to its recommendations. Such power would be effective where it is accorded strong enforcement mechanisms. Thus the broad mandate a Commission is granted in its formal provisions should be able to be implemented in practice to bring about meaningful impact on the state of human rights. Put it differently, the Commission is rendered ineffective where it cannot execute its broad powers because it lacks proper enforcement mechanisms. For instance, where jurisdiction includes monitoring and inspecting detention facilities, the Commission's powers are rendered nugatory when it cannot sanction the police or prison authorities for denying it access to such facilities to assess their state. KNCHR has on several occasions denied access to police and prison detention facilities¹⁹⁰. The police claim that granting access to the Commission constitutes an offence under the Police Act¹⁹¹. The discordance between mandate and exercise or enforcement of its powers limits its performance. In this regard, the Commission's work can be facilitated by amending the Police Act to allow the Commission access to its facilities. The process of amendment is an arduous task as it involves constructive engagement with the Police and lobbying of parliamentarians.

¹⁹⁰ Interview with Edna Nyalote (Principal Human Rights Officer-Reforms Accountability, KNCHR) Nairobi, 24 August 2011

¹⁹¹ Interview with Kamanda Mucheke (Senior Human Rights Officer-Reforms Accountability, KNCHR) Nairobi, 24 August 2011

However, even where the Commission is provided with enforcement powers, the same have been undermined by state officials. Under its quasi-judicial powers, the Commission is empowered to issue summonses, subpoena production of documents. Under section 19(6) of the Act, in order to secure attendance of witnesses or production of documents, the Commission is empowered to fine or order imprisonment of up to six months. In spite of such wide mandate and powers, the Commission has been unsuccessful in securing the attendance of senior government officials including the Police Commissioner and ministers of government. The Attorney General has also been complicit in the frustration of the Commission' work by entering *nolle prosequi* in proceedings brought against members of parliament¹⁹².

4.6. Non-Legal Factors

4.6.1. Governance Structure and Political Goodwill

The mere establishment of a national human rights institution does not guarantee its effectiveness in the protection of human rights¹⁹³. A government's reasons for such establishment provide an appropriate context in understanding its limitations and prospects. NHRIs may be established by existing democratic governments as a means of optimising institutional efficiency while other NHRIs are established by transitional governments adopting a system of democratic governance. Some NHRIs are established by governments which are intent on giving an impression to the international community that they embrace ideals of human right promotion and administrative

¹⁹² See KNCHR "Public Accountability Statement of Successes and Challenges", KNCHR (2006). The Attorney General entered a *nolle prosequi* in proceedings against Titus Mbathi and George Khaniri for their role in the referendum campaigns

¹⁹³ *Supra* note 27

justice but in practice, such NHRIs have little or no impact in improvement of the state of human rights in those countries¹⁹⁴. The establishment of the Standing Committee on Human Rights is an example of an ad hoc body aimed at deflecting pressure from the international community on the dismal state of human rights and nominal democratic governance during the Moi era¹⁹⁵. Conversely, the establishment of the KNCHR came at a time of transition from the Moi era to the NARC government led by Mwai Kibaki. The peaceful transition of power was heralded by the international community as a model to be emulated by other African governments. Apart from the prevailing democratic promise that came with the new NARC government, the Commission was established as part of institutional reform by the new Kibaki administration. Aptly, the Commission was constituted by an Act of Parliament with broad mandate, powers, functions and responsibilities comprehensively provided therein. However, with lethargic reform agenda the democratic process faded midstream as evidenced by the failed constitutional review process in 2005 and eventually dimmed at the 2007 General elections.

Absent the post-election violence, the democratic space has been in marked retreat since the progress made in the first two years of the NARC Administration which was replete with institutional and administrative reforms. In its reform agenda, the NARC Kibaki administration was blighted by the failure to hasten reforms on the Judiciary, land policy, corruption, employment, security, electoral process and the constitution culminating in the violence after the 2007 elections. The minimum conditions necessary for the consolidation of democracy have

¹⁹⁴ Supra note 27 at p. 15

¹⁹⁵ KNCHR/KHCR “Elusive Quest for Human Rights State: An Unfinished Agenda” (KNHCR, 2006) at p.3

therefore progressively been diminished through governmental lethargy in instituting long-term reforms. Therefore, with the prevailing democratic structure, there would be no novel explanation for the performance of the Commission which has been in existence for length of the Kibaki NARC administration and two years into the Kibaki-Raila Administration. With reforms aimed at realising democratic governance at a minimum, the existing structures remain unfavourable to the Commission's work.

Further, as Reif¹⁹⁶ states national human rights institutions cannot fulfill their functions in states that do not adhere to the principle of accountability as embraced in the doctrine of separation of powers. The doctrine of separation of powers forms an integral part of structuring of the organs of state and the relationship to its citizens in the constitution¹⁹⁷. The doctrine envisages separation and autonomy between the executive, legislature and Judiciary. Such separation is a fundamental tenet of constitutional democracy aimed at regulating the exercise of governmental powers. In Kenya, the applicability of the doctrine of separation has been underlined by the courts as "one of the foundations of constitutional democracy¹⁹⁸". The issue before the court was whether it was unconstitutional and contrary to the principle of separation of powers for the then Kenya Anti-Corruption Authority to be headed by a judicial officer. In finding that it was unconstitutional for a judicial officer to hold a position in the executive arm of government, the Court stated that "...the doctrine of separation of powers is an old one. To be attained the role of each government has to be clearly defined...the Judiciary should not be subject to the dictates of either the Executive or the

¹⁹⁶ Supra note 27

¹⁹⁷ Constitution of Kenya

¹⁹⁸ Gachiengo v R[2000]1EA 67 at p.68

Legislature”¹⁹⁹. Therefore, in order for consolidation of democratic governance, independence between the three arms of government should be observed and implemented in real terms and should not remain as a constitutional proclamation²⁰⁰. In this set up, it is envisaged that Parliament is the supreme body with the powers of making law. However, traditionally parliamentary agenda has been hijacked by the executive. In many instances, the legislature has been used by the executive as an instrument for ratification of otherwise blatant breaches of principles of constitutional democracy.

The functioning of parliament and the Judiciary have continually been held hostage by executive interference as the executive still wields enormous powers under the current constitutional framework. For, instance, where there is no effective system of checks and balances, a report by the Commission criticizing the government’s record on human rights would be ignored where the Judiciary or legislature is unable to hold the executive into account. Few events in the eleventh Parliament are encouraging that the accountability mechanism can be functional after all. It may be too early to state with certainty that Parliament’s scrutiny of the Executive will be sustained in the long term as it was during the parliamentary debate on the re-appointment of the then KACC Director Hon. (Rtd.) Justice Aaron Ringera²⁰¹. In my view, the sustained pressure on the executive would depend on emergent political stakes at a given time and currently corruption is perceived as

¹⁹⁹ Ibid. at p. 71

²⁰⁰ Muna Ndulo “Constitutional Making in Africa” Africa Notes (1996)

²⁰¹ During debate, Parliament rejected the process by which the President re-appointed the Chief Executive of the Kenya Anti-Corruption Commission (KACC), Aaron Ringera, citing the Executive’s disregard of the procedures in the Anti-corruption and Economic Crimes Act. Further, Parliament was intent on frustrating the work of the KACC by blocking the voting of funds for its budget unless Ringera resigned. Subsequent to Parliament’s resolution that the re-appointment was irregular and unlawful, Ringera resigned.

a more pressing issue than human rights although both are interdependent. It is argued that although addressing the gaps in the legal framework would strengthen the Commission's mandate and powers, without a shift in the political governance structure, implementation and enforcement of such powers would be diminished.

4.6.2. Rights as Luxuries

Often political elite in Kenya have set to relegate the issue of constitution making by stating that it should not precede national economic plans. The same notion has been extended to the promotion and protection of human rights. It is therefore no surprise that the political elite remain the biggest human rights offenders as evidenced in several reports by the Commission²⁰². They are also the most non co-operative class towards the Commission's work. Conveniently, it has been argued by the political elite that human rights are luxuries that ought to be pursued nominally. Conversely, it has been rightly voiced that poverty and low levels of development should not be used as excuses for relegating efforts of human rights promotion²⁰³. As the then Secretary General to the United Nations, Kofi Annan²⁰⁴ stated, human rights are universal not only because their roots exist in all cultures and traditions. Their modern universality is founded on their endorsement by all 185 members of the United Nations. The Declaration itself was the product of debates between a uniquely representative group of scholars, with the majority of participants from the non-Western world²⁰⁵. In reiterating that human rights are not just a "rich man's luxury" but must be observed

²⁰² KNCHR/KHRC "Behaving Badly: Deception Chauvinism and Waste During the Referendum Campaigns (KNCHR, 2006) at p. 45

²⁰³ Supra note 28 at p. 13

²⁰⁴ Speech at the commemoration of the Human Rights Day (10 December 1997)

²⁰⁵ Ibid.

by all, Mr. Annan pointed out that "...human rights are African rights, they are American rights. They belong to no government, they are limited to no continent, for they are fundamental to humankind itself." Therefore, human rights are not luxuries that are only afforded by the rich. On their own right, human rights are developmental priorities and therefore should not be considered as secondary needs. Similarly, civil and political rights do not count for anything if a people are starving and living in abject poverty.

In my view, the "rights are luxuries" argument is a governmental excuse from shouldering its responsibilities. At the outset, the argument is flawed because the cost of human rights promotion is negligible as the budget of the KNCHR is less than 0.5 % of the GDP²⁰⁶. Diverting attention from promotion of human rights to national economic plans has itself not yielded tangible results. Having prioritised pursuit of economic growth over human rights, there has been no change to the state of economic development throughout the nation. Economic expansion through increased GDP rates in the first three years of the NARC administration did not translate to poverty reduction and increased savings for middle and low income earners²⁰⁷. The real impediment to poverty reduction has not been adherence to human rights principles but the existing poor governance structures that benefit high income earners at the expense of the majority of citizens who are low-income earners. Save for the urban poor, the majority of low-income earners are situated in rural areas which is no surprise as governance structure remains highly centralized. It

²⁰⁶ Republic of Kenya *Economic Survey 2009* (Nairobi: Government Press)

²⁰⁷ Republic of Kenya *Economic Survey 2003* (Nairobi: Government Press) Republic of Kenya *Economic Survey 2004* (Nairobi: Government Press) Republic of Kenya *Economic Survey 2005* (Nairobi: Government Press)

is submitted that developmental efforts can be pursued alongside human rights protection and promotion should democratic devolution be adopted in the proposed constitutional framework. Further, transparency and accountability mechanism should be incorporated if the Fund is to be effective.

4.6.3. Degree of Institutional Separation and Independence from Government

The degree of institutional independence is an important political factor in determining the independence of a NHRI²⁰⁸. According to Polsby²⁰⁹, a public body gains institutional independence when it is: well bounded; relatively complex; and, universalistic. A well bounded institution is one that can be differentiated from its environment. It is an institution with distinct human resource, highly qualified staff and its strategic direction and day to day programmes are led from within the body. Relative complex refers to the internal separation of an institution's functions. Internal separation requires that the different functions of the institutions are not interchangeable but at the same time they are interdependent and work together towards similar objectives. However, internal separation should not mean that the functions conflict each other rather that they have operational independence but at the same work in harmony to achieve one goal. In the case of the State, the Judiciary and parliament are functionally independent but work with the aim of public service delivery. In the same vein the Commission is fully institutionalised where different programmes though independent work towards the promotion and protection of

²⁰⁸ Supra note 27 at p. 16. Linda Reif views maximizing the independence of an institution from government as an important factor for achieving its effectiveness. Such independence she states is attributable to constitutional protection, financial adequacy, strong investigative and enforcement mandate of NHRIs and security of tenure of Commissioners.

²⁰⁹ William Polsby, "The Institutionalisation of the House of Representatives," (1968) 62 *The American Political Science Review* 1

human rights. Universalistic means that the procedures and operation of the organisation are rule-based and adhere to meritocracy. A universalistic institution is not guided by personal preferences or favouritism.

Judging from the organisation of the internal functions of the Commission through its programmes, it is clear that the Commission is relatively complex in line with Polsby's categorization. Each programme executes its function within its scope of work but the ultimate aim of each programme is to work towards the better realisation of human rights. Similarly, the Commission is legally founded by the Act which guides its day to day operations²¹⁰. The Act provides rules which regulate the recruitment of staff, appointment procedures, finances and even the meetings of the Commission²¹¹. In discharging its broad mandate, the Commission adopted a Strategic Plan²¹² to guide its functions within set parameters setting out its strategic objectives and activities with the target of improving the state of human rights in the nation. For instance, in human resource and administration matters, the Plan leaves no room for favouritism but establishes a procedure for hiring staff on merit.

External influence through direction and control of the Commission's leadership by the executive or any other institution falls within the "well-bounded" element of institutionalisation²¹³. It is therefore important to determine whether the Commission is well bounded or not as its

²¹⁰ Section 3 of the Kenya National Commission o Human Rights Act.

²¹¹ Sections 14 and 15 of the Kenya National Commission o Human Rights Act.

²¹² KNCHR *Strategic Plan: 2003-2008*

²¹³ Supra note 144 at p.3

independence and effectiveness largely depends on its success in dealing with external interference. The Commission is prima facie, a well-bounded institution in terms of its highly qualified staff, Secretary and Commissioners²¹⁴. Its strategic guidance as led by the Chair comes from within the Commission as led by the Chair and assisted by other Commissioners who head other programmes²¹⁵. However, the Commission may be affected by non-facilitation by other state institutions thereby undermining the Commission's leadership and weakening its institutionalisation. The relationship between the executive and the Commission has been characterised by inter alia, non-attendance to the Commission's Tribunal, denial of access to detention facilities and non-response to request for information²¹⁶. While state institutions, especially the executive do not directly manage the day to day activities by being un co-operative it effectively restricts the Commission from undertaking all its functions fully by limiting it to activities that do not call for its accountability and transparency.

4.6.4. Accountability to the Executive

The Act²¹⁷ defines "Minister" responsible for the KNCHR as the Attorney General. In the Statutes Miscellaneous Amendment Bill 2007, it was proposed that administrative issues concerning the Commission be transferred to the Ministry of Justice and Constitutional Affairs (MOJCA). In reaction to the proposal in the Bill, the Commission took issue with the proposed transfer. In effect, it meant that administration matters relating to KNCHR would be moved from the Attorney

²¹⁴ KNCHR/ Deloitte, "Kenya National Commission on Human Rights: Human Resource Consultancy Report" (KNHCR, 2006) at p.32

²¹⁵ Ibid.

²¹⁶ Supra note 21

²¹⁷ Section 2 of the Kenya National Commission on Human Rights Act.

General's office (a constitutional office) to the MOJCA (a political office)²¹⁸. Locating the Commission under the jurisdiction of the Executive would have negative implications to the effectiveness of the Commission. The Commission would be vulnerable to control and direction of the Executive as it would control finances and administrative issues that would affect the Commission's operational efficiency in the same way that MOJCA would manage a department in the ministry. Although MOJCA as the ministry responsible for human rights has been the de facto Ministry in matters concerning the Commission, elevating it as the de jure Ministry weakens the Commission's legal framework by subordinating it to the Executive. Interference and manipulation cannot be ruled out under the A.G. but removal of an independent, reformist and non-compromising AG by the Executive is made more difficult due to the high threshold set by the Constitution. The removal of a Minister who is a political appointee only requires a pronouncement to the effect that he/she has been fired.

PART II: TOWARDS STRENGTHENING OF COMMISSION: GENERAL LEGAL AND INSTITUTIONAL MEASURES

The discussion below examines in depth the loopholes in the legal and institutional framework that affect the performance of the Commission. The following evaluation goes further than the analyses in chapter 3 on the form of the Act and structural aspects of the Commission. Rather, it examines the substance and language of certain provisions and the effect on the independence and effectiveness of the Commission. It also outlines the gaps in drafting and explores how re-wording of certain sections and subsection would strengthen the legal and institutional framework and

²¹⁸ Interview with Commissioner Lawrence Mute (Research Policy and Legislation) 6 September 2010

facilitate the Commission to fully realise its powers and mandate. Further, the scrutiny of provisions in the KNCHR Act is important in order to ensure certainty and predictability in interpretation of technical terms, mandate powers and functions of the Commission. Sealing of these gaps would add clarity to the provisions of the Act precluding frivolous interpretational disputes aimed at circumventing human rights standards set out in the Act thereby hampering the human rights promotion and protection.

4.6.5. Constitutional Protection of the Commission

The mandate, powers and functions of the Commission are provided by an Act of Parliament. Although proponents for a less robust Commission would argue that the KNCHR has adequate powers compared to the SCHR, entrenching the Commission as a constitutional institution would make it less amenable to control from the executive or any other institution similar to other commissions like South Africa, Ghana and Uganda lauded as model NHRIs. In South Africa, the South African Constitution enshrines supremacy of the Constitution and rule of law. The South African Human Rights Commission is grounded in the Constitution as an independent institution and its operations and functions are supported by other legislation.

The adoption of the new Constitution intends to inter alia accord the KNCHR desired constitutional protection due to several advantages that constitutional provisions provide. It is hoped that the constitution would enhance its effectiveness and independence. The new constitutional dispensation introduces positive changes geared towards enhancing the Commission's operational efficiency. Article 59 of the new Constitution provides for the

establishment of the Kenya National Human Rights and Equality Commission. By virtue of this provision, the Constitution merges issues relating to human rights and gender parity to be dealt with one institution. The constitution provides for enabling legislation to give full effect of provisions relating to the functions of the commission²¹⁹ and redress mechanisms for citizens²²⁰. Other pertinent issues relating to the reporting requirements, funding, composition and powers are dealt with under chapter XV on Commissions and Independent Office. Appointment and removal from office of commissioners is also contained in general provisions applicable to all constitutional commissions and independent offices.

Embedding the Commission in the constitution makes it difficult from the executive or any other institution from changing its mandate or abolishing it altogether. Under the doctrine of the supremacy of the Constitution²²¹ the threshold for constitutional amendments is to ensure overall independence of the Commission through securing the tenure of commissioners, strengthen financial independence and according it broad mandate that encompasses investigatory and quasi-judicial powers. Importantly, the constitution provides that the Commission is “subject only to this Constitution and the law²²²” and is “...independent and not subject to the direction or control of any person or institution²²³”.

²¹⁹ Article 59(2) of the Constitution

²²⁰ Article 59(3) of the Constitution

²²¹ Articles 2 and 255 of the Constitution

²²² Article 249(2)(a) of the Constitution

²²³ Article 249(2)(b) of the Constitution

Constitutional protection of the Commission covers several issues on its mandate, power and function. Also, it would mean that the Chairperson and Commissioners tenures are secured as constitutional office holders. However, incorporation of the Commission into a new constitutional framework does not mean that the Act would be irrelevant to its effectiveness and independence. In deed the Constitution provides that an enabling legislation be enacted to ensure that the new Commission accords itself to constitutional provisions.

Legal reforms introduced by the constitution constitute significant steps towards strengthening the mandate and independence of the Commission and lay a strong foundation for realisation of its transformative potential. However, it is required that the new enabling provisions that are to be enacted by August 2011²²⁴ seals the loopholes in the KNHCR Act 2002 and strengthen financial mechanism, enforcement powers. If the resultant legal framework for the new Commission is to be facilitative, much will depend on the wording of the provisions of the Act, political goodwill from the Executive and Parliament.

The discussion below examines the gaps in laws that need to be addressed in order to strengthen the Commission's mandate in the new law.

4.6.6. Independence of the Commission

The Commission is granted power to facilitate its performance of its activities. It is specified that the Commission shall be independent from the "direction or control of any other person or

²²⁴ Article 59(4) of the Constitution as read with the Fifth Schedule

authority”. Section 18 is a strong provision which re-affirms the Commission’s independence from other arms of the State and its broad jurisdiction in the promotion and protection of human rights. Further, the new constitutional provision that the Commission is only subject to the constitution and the law under Article 249 is positive in ensuring that there is non-interference from any individual or institution in the performance of its functions.

However, in its performance, the Commission has been affected by uncooperative state institutions and officials thus undermining the state’s broad jurisdiction. While it may be inferred that other state institutions should afford the Commission co-operation to facilitate the Commission’s work, lack of co-operation is not sanctioned under section 18 or in other provisions of the Act. Therefore, an additional requirement for co-operation from state institutions to the Commission in the exercise of its functions under the Act would strengthen provisions in section 18 and contribute to the independence of the Commission.

4.6.7 Removal of Commissioners

Section 11 specifies provisions for the removal and replacement of Commissioners. It also provides the criteria and procedure for removal. However, the section contains numerous gaps that would affect the functioning of the Commission especially in relation to the quorum for meetings, work overload due to lengthy replacement periods²²⁵. Fundamentally, wide discretion granted to the Chief Justice on the conduct of the Tribunal under sections 11(3) and 11(5) have a bearing on

²²⁵ KNCHR/KLRC “Report on Strengthening the Legislative Framework of the Kenya National Commission on Human Rights” Workshop held in Nairobi on 25th June 2007 (Nairobi: KNCHR) at p. 19

the independence of the Commission. Section 11(4) is deficient in adhering to requirements of due process. No provision is made for the procedure for making complaints to the Chief Justice in proceedings for removal of Commissioners. In order to accord the respondent Commissioner a fair hearing, the procedure for making complaints on his/her conduct should be specified in the text of the Act. Inclusion of complaints' procedure would also enable sifting of meritorious claims from frivolous or malicious claims. Whereas it is clear that conviction of a Commissioner for an offence for moral turpitude would form court proceedings, the procedure for commencement of proceedings on account of misbehaviour or misconduct of the Commissioner is unspecified. A complaints procedure would make it clear on how the removal from office of the chairperson or a commissioner "arises" for misbehaviour or misconduct.

Further, under the Act, the Chief Justice enjoys wide discretion on the fate of Commissioners²²⁶. The Chief Justice is mandated to appoint a Tribunal comprising a chairperson and two other persons who are serving or former judges. The Tribunal is charged with making recommendation of the removal or reinstatement of an accused Chairperson or Commissioner. The Tribunal reports to the Chief Justice and recommends whether the Commissioner ought to be removed from office which recommendation is communicated to the President.

Under section 11(5), the President has discretion to suspend the Chairperson or Commissioner facing section 11(4) proceedings. He may revoke such suspension upon receipt of the Tribunal's

²²⁶ Section 11(4) of the Kenya National Commission on Human Rights Act.

recommendation. This provision does not address the issue of the remuneration of a Commissioner for the period he/she is on suspension. The issue of remuneration is important in relation to the principle of presumption of innocence. Disentitlement of a suspended Commissioner of one's remuneration is pre-emptive of such Commissioner's guilt²²⁷. Further, it is open to the President to manipulate or co-opt a suspended Commissioner to toe the line in return of speedy reinstatement.

The privilege and immunities provisions in the Act as currently drafted are inadequate in guaranteeing the independence of the Commissioners²²⁸. There is no statutory definition of "good faith" in the Act hence an interpretational dispute on section 33 would require determination by Court. Having set no limits within the Act, a case by case approach to interpretation of the concept invokes judicial subjectivity. Matters of relevance of evidence are also at the discretion of the court. Commissioners are vulnerable to prosecution where courts may adopt a broad definition of "good faith" in favour of the Executive. In the old constitutional order, where the executive played a central role in the appointment procedure for Judges, objectivity in proceedings against Commissioners was a major concern as judges were political appointees and a likelihood of bias in favour of the appointing authority was high. The Act does not restrict the interpretation of section to an objective standard and such open-ended provisions do not augur well for Commission's independence and effectiveness²²⁹. The court's discretion to interfere with the Commission's work should be in exceptional circumstances. With a change in the funding mechanisms and

²²⁷ Supra note 160

²²⁸ Section 33 of the Kenya National Commission on Human Rights Act.

²²⁹ Interview with Commissioner Winnie Lichuma (KNCHR) Nairobi, 1 October 2010

reconstituted Judicial Service Commission and nominal involvement in the appointment procedure, it is unlikely that provisions on removal of commissioners may be exploited to the Commissioner's disadvantage. However, the new "Human Rights Act" ought to incorporate provisions that ensure that the privileges and immunities of Commissioners are free from executive interference.

The Commissioners ought to enjoy immunity and privileges accorded to Constitutional office holders when acting in their official capacity to preclude any interference from executive, Judiciary and other state bodies to ensure that the Commission enjoys its independence. Hence the "good faith" requirement may be qualified to reflect that Commissioner is immune from prosecution while acting in official capacity. In my view, an amendment, possibly, with the wording similar to new constitutional provisions for privileges and immunities for Judges²³⁰ "a Commissioner is not liable in action or suit in respect of anything done in good faith in the lawful performance of his/her function" should be introduced.

4.6.8. Powers relating to Investigation

The investigative mandate of any national human rights institution is fundamental to its effectiveness and independence. It has been referred to by academic commentators as one of the most important aspects of the mandate of NHRIs²³¹. An investigative mandate serves no utility if is not equipped with powers for implementation and enforcement that ensure that investigations

²³⁰ Article 160(5) of the Constitution

²³¹ Supra note 14 at p.28

are productive and negative actions can be sanctioned²³². Under the KNCHR Act, the investigative mandate of the Commission is provided in sections 19 and 20. Under section 19 (1) of the Act, the Commission has the power to issue summonses requiring the attendance of persons before the Commission, question persons on matters under investigation and require disclosure of information. While such powers are crucial to the investigation process, they are not matched with enforcement mechanisms to ensure that disobedience is sanctioned²³³. The Commission lacks powers to search premises in the event that there is material non-disclosure of information and documents²³⁴. The Commission also lacks powers to seize weapons property or other items that constitute evidence for investigation of human rights violations. The lack of these vital powers has been frustrating in efforts to investigate human rights violations²³⁵.

4.6.9. Exclusion of Jurisdiction Provisions

In so far as the principle of *sub judice* in procedural law applies, the Commission is rightly excluded from investigating proceedings before court or a judicial tribunal. However, the operation of this provision as read with section 32(b) of the Act may disadvantage the Commission where perpetrators seek to abuse the court process to evade investigation²³⁶. Similarly a literal application of section 32 (b) of the Act may limit the Commission from performing important functions as a NHRI. Section 32(b) prohibits the Commission from investigating matters “essentially involving the relations or dealings between the Government and...international

²³² Supra note 160 at p.14

²³³ Ibid.

²³⁴ Interview with Victor Kamau (KNCHR-Complaints and Investigation) Nairobi, 17 August 2011.

²³⁵ Interview with Dona Anyona (KNCHR- Complaints and Investigation) Nairobi, 22 August 2011.

²³⁶ Interview with Hassan Omar (KNCHR) Nairobi, 8 October 2010

organization recognized as such under international law". The wording of section 32 (b) is ambiguous as it may be applied to restrict the Commission from fully co-operating with international human rights organisation. Indeed the jurisdiction of KNCHR should not be limited in matters relating to an international organization such as the United Nation's Office of the High Commission on Human Rights²³⁷. As envisaged in UDHR, promotion of human rights ought to be situated at the national level and their protection led by NHRIs. In so far as section 32 (b) is concerned, in plain terms its interpretation would be inimical to the objects and purposes of the Act as spelt out in the preamble. Although in practice, the Commission has not been limited in its communication to the High Commissioner, the existence of the statutory provision is restrictive to the Commission's collaborative and advisory function as envisaged in sections 16(f) and (g) of the Act. The study recommends the deletion of provisions restricting the Commission from investigating any dealings between the government and international organisations.

4.7. Measures for Strengthening Institutional Framework

4.7.1. Relationship with the Judiciary

The relationship between the Judiciary and the Commission is an important factor in examining the work of the Commission in the promotion and protection of human rights. Both institutions, albeit with different mandates, are primarily involved in the defence of human rights. While the Judiciary interprets the law, the Commission undertakes strategic activities in the promotion and

²³⁷ KNCHR/KLRC "Report on Strengthening the Legislative Framework of the Kenya National Commission on Human Rights" Workshop held in Nairobi on 25th June 2007 (Nairobi: KNCHR) at p.16

protection of human rights through its advisory, investigative, monitoring and educative function. Of importance, is that the performance of the Commission is directly influenced by the efficiency and independence of the Judiciary²³⁸. The efficiency and independence of the Judiciary divides opinion amongst commentators in Kenya. It is beyond the scope of this study to attempt to settle the issue. However, public perception of the Judiciary as a dysfunctional, inefficient and corrupt institution adds little to support the argument that the Judiciary is efficient²³⁹.

In the old constitutional dispensation, the judicial system in Kenya was largely dependent of the Executive. Although the judges enjoy a security of tenure was embedded in the constitution, the realisation of an independent Judiciary had been hindered by several factors. The problems associated with the judicial system stemmed from legitimate institutional concerns on appointment procedures, capacity, flawed purge on Judiciary, slow administration of justice and reliance on executive for funding.

The procedure for appointment of judges rested in the Executive. Although provisions required that the Judicial Service Commission would submit names of judges eligible for appointment, in reality sitting judges were largely political appointees. The Judicial Service Commission largely comprised members of the Executive or its appointees. Parliament played no role in judicial appointments and professional associations like the Law Society of Kenya had no representation

²³⁸ Supra note 27 at p.16

²³⁹ Transparency International Integrity Index 2009 TI Nairobi

on such appointments. The Judiciary's finances were sourced from the Executive curtailing any semblance of independence it may have been accorded by from constitutional provisions.

The new Constitution seeks to bolster the independence of the Judiciary through reforms in appointment procedure, funding, reconstitution of the Judicial Service Commission and provisions on security of tenure. Appointment of the Chief Justice and Deputy Chief Justice is now subject to parliamentary approval²⁴⁰. The composition of the new Judicial Services Commission will be reconstituted to include a Supreme Court judge, two advocates and two other persons who are not lawyers. In the old constitution, membership of the JSC was dominated by presidential appointees, including, the Chief Justice, judges, the Attorney General and the chairman of the Public Service Commission. The Constitution establishes a Judiciary Fund which will be used for administrative expenses of the Judiciary²⁴¹. The Judiciary Fund will get funds directly from Parliament rather than through a government department. Remuneration and benefits payable to judges will be a charge on the Consolidated Fund²⁴².

Ideally, an effective and independent Judiciary enhances the observance of the rule of law and respect for human rights. As reforms to the Judiciary are ongoing and are designed to be long term, it is suggested that in the intervening period certain measures be adopted to improve the relationship between the Judiciary and the Commission. The relationship between the Commission and the courts is therefore a complementary one as both institutions work towards the same

²⁴⁰ Article 166(1)(a) of the Constitution

²⁴¹ Article 173 of the Constitution

²⁴² Article 160(4) of the Constitution

objective. The Commission should not be seen as a competitor but as a partner in human rights protection.

Certain provisions incorporated in the new Constitution have been introduced that lay a foundation for partnership between Judiciary and the Commission. The new provisions facilitate representative actions in enforcement of the Bill of Rights. This means the Commission can institute suit on behalf of citizens whose rights have been infringed. The Judiciary and the Commission should make concerted efforts in human rights promotion by: jointly undertaking human rights training to judges and magistrates; improve access to court through legal aid thereby reducing barriers to human rights litigation.

4.7.2. Centralisation and State Controlled Resources

Democratic devolution is a necessary condition for consolidation of democratic governance²⁴³. In my view it is also an important factor in the realisation of human rights. In a highly centralised governance system, public resources are state-controlled and concentrated at state capital and urban areas. In such systems, decision making on the use of resources exclusive to the political elite²⁴⁴. Any form of decentralisation is minimal and is left to local government leaders and administrative units at the district level. Public financial management in such a centralised system does little to promote cardinal principles of human rights. The lack of inclusivity and lack of incorporation of participatory processes in decision making contravenes citizens' freedom to enjoy

²⁴³ Muna Ndulo "Constitution Making in Africa" Africa Notes (1996) at p.2

²⁴⁴ Ibid.

civil and political rights. Further, the existing governance structure coupled with poor implementation of economic policies has led to higher poverty levels at the local levels hence diminishing the success in progressive realisation of economic social and cultural rights. Economic growth has not been accompanied with greater access to proper health, housing and education. Rather the gap between the rich and the poor has widened. The existing governance structures have contributed to denial of basic economic, social and cultural rights.

The introduction of the constituency development fund (hereinafter “CDF”) though commendable has been largely ineffective as a poverty reduction tool due to lack of adequate transparency and accountability mechanisms²⁴⁵. The Commission and the Institute of Economic Affairs (IEA) jointly undertook research on the effectiveness of the CDF as a poverty reduction tool at the local levels²⁴⁶. It was reported that while there was a general increase in the number of projects at the constituency level, administration of the fund was poor due to lack of participatory processes, transparency and accountability.

4.7.3. Strategic Planning

The process of strategic planning by the Commission has been the subject of criticism for being too ambitious²⁴⁷ and lacking important elements that would assist it in monitoring the progress of its activities better and providing identifiable yardsticks for evaluation hence making it more

²⁴⁵ KNCHR/IEA “Kenya’s Verdict: A Citizens’ Report Card on CDF” IEA Research Paper Series No.7 (2006)

²⁴⁶ Ibid.

²⁴⁷ Supra note 21

effective. Granted, the Commission's Strategic Plan²⁴⁸ lacks qualitative and quantitative indicators that would facilitate the tracking of impact of its work towards the realisation of human rights in the country. Integrating success indicators in the Strategic Plan would enable the Commission and the public to ascertain whether it is making progress or facing challenges in implementation of its objectives and activities. The Strategic Plan also lacks adequate monitoring and evaluation mechanisms to enable the review and evaluation of successes of the Commission's activities within a specific timeline. To this end, the Commission has recently established a monitoring and evaluation unit that seeks to gauge the progress of implementation and any impediments thereto. As an internal unit, it is charged with developing indicators that seek to track strategic activities and evaluate the impact of the Commission's work in transformation of the realisation of human rights throughout Kenya²⁴⁹. It now enables the Commission to categorize strategic objectives in terms of priority areas and quick gains as well as rights that would be realized progressively and address long term concerns such as economic social and cultural rights²⁵⁰. Following the incorporation of monitoring and evaluation tools into the Strategic Plan and overall day to day activities of the commission, it has resulted in: effective delivery of services; proper focus of the planned activities; improved content for Commission's annual reports and development partner feedback complete with indicators for output and impact²⁵¹.

²⁴⁸ KNCHR *Strategic Plan 2003-2008*

²⁴⁹ Interview with Jelime Obure (Manager, Monitoring and Evaluation, KNCHR) Nairobi 15 November 2010

²⁵⁰ Interview with Maina Mutuaruhi (Programme Manager, Economic, Social and Cultural Rights) Nairobi 19 August 2011.

²⁵¹ Interview with Jelime Obure (Manager, Monitoring and Evaluation, KNCHR) Nairobi, 15 November 2010

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

From the findings in the preceding discussion in chapters 2, 3 and 4, this chapter draws conclusions and makes recommendation on areas that would need strengthening and reform. With reference to the first hypothesis of the study, it is generally affirmed that the gaps in the provisions of the KNCHR Act affect the independence and effectiveness of the Commission. It has also been qualified that non-legal factors including *inter alia* the governance structure and lack of goodwill, financial autonomy and relegation of human rights, contribute to challenges the Commission faces. Secondly, it has been ascertained that although notable advances have been made six years since establishment of the Commission in the realization of human rights in Kenya, certain measures if implemented would enable it harness its transformative potential.

It is suggested that the several measures be adopted to strengthen the provisions in the Act including provisions on accountability, finances, removal of commissioners, investigative powers and enforcement powers. It is also suggested other non-legislative interventions be implemented to improve the functioning of the Commission including human rights training of public officials especially Judiciary and security sector, increase public awareness and addressing access to justice issue through provision of legal aid. Constructive engagement of government and other state officials is also an important measure to nurture positive political will towards the work of the Commission

5.1. CONCLUSIONS

5.1.1. The KNCHR Act lays good mechanisms for facilitates the Commission's performance however strengthening its provisions would enhance further its effectiveness and independence

The loopholes in the Act contribute to the challenges and inefficiencies of the Commission. Such gaps have negatively impacted on the effectiveness and independence of the commission. The glaring defects fundamental to the independence of the Commission are mainly contained in Parts III and IV of the Act. These include provisions relating: to the removal and replacement of Commissioners; financial provisions; accountability to the Executive; and, investigative and quasi-judicial powers.

Presently, the provisions on the removal of Commissioners grant the Chief Justice and the President wide discretion in determining the fate of Commissioners. The financial provisions currently in force do not guarantee release of funds to the Commission on a regular basis, if at all. The requirement that the Commission's estimates be approved by the Minister means that the size of the Commission's budget will be dependent on the Minister's discretion which can be abused to frustrate the Commission's work. In performing its investigative and quasi-judicial functions, the Commission is restricted by the provisions in the Act, as it lacks adequate enforcement powers commensurate to its mandate. Whereas it has powers to summon attendance of persons and order for production of documents, it lacks powers of entry, search and seizure to sanction non-disclosure. The accountability mechanism as provided in the Act is flawed as it requires that the annual reports be submitted to the Minister first for onward transmission to Parliament. Secondly

there are no provisions in the Act that require that the annual reports are debated in Parliament hence enabling scrutiny of the executive on the state of human rights in the country.

Further, it is concluded that challenges the Commission faces are not wholly attributable to legal factors but non-legal factors also contribute to challenges the Commission faces. These include the governance structure, institutionalisation of the Commission, financial autonomy, relationship with the Judiciary and relegation of human rights. There was marked progress towards democratic transition evidenced by the government's reform agenda pursued in the infant years of the NARC Administration. The current governance structure in Kenya does not meet the necessary conditions for democratic governance like: rule of law; separation of powers; free, fair and successful elections; transparency and accountability; independent Judiciary and a professional civil service. With most elements missing, the functioning of the Commission is hampered. Typically, the requisite political will to facilitate implementation of strategic activities towards human rights defence has been negligible, if at all. Such political will does not automatically stem from a democratic government but with effective and independent parliament and Judiciary and observance of rule of law, respect of human rights is nurtured and enforcement of such human rights is facilitated. The perception of the Judiciary as an independent and effective institution of the state has been negative with rampant corruption, slow administration of justice, appointment procedure cited as the contributing factors. Settling the dispute on the 2007 presidential elections eroded the little credibility the institution had.

The institutionalisation of the Commission has been undermined due to lack of co-operation from state officials. Its functions and activities have been affected due to denial of access to prison and police detention facilities, non-response to summons and request for information from state officials preventing it from exerting its independence from the government. In proceedings instituted by the Commission against MPs and ministers, the Attorney General has often abused his discretionary powers by entering a *nolle prosequi*. The human rights discourse has been relegated from national developmental policies and strategies in favour of rapid economic growth. It has been justified that as a developing country, national resources should be channeled towards poverty eradication initiatives hence human rights are secondary to such economic policies. However, economic growth has not translated to poverty eradication though the bulk of public funds have been sunk into economic projects. Based on the rights are luxuries argument and lack of political will, the Commission has continually been underfunded and understaffed. Its functions are restricted to certain activities hence implementation of its broad mandate is not fully realised. Due to financial constraints, the Commission has been unable to improve its accessibility by opening regional offices with adequate staff to enhance service delivery at the local levels.

5.1.2. The Commission has made significant steps towards effectively discharging its mandate asserting its independence

The discussion in chapters 2, 3 and 4 confirms that in the period under review, the Commission has made progress in attaining independence and effectiveness especially in relation to its open

organisational culture, integrity of Commissioners, public legitimacy and exercise of its broad mandate.

It is acknowledged that such progress has been hindered by several legal and non-legal factors that have affected exercise of its broad mandate hence eroding its transformative potential. However, in order to give a fair reflection, the context within which the Commission has been assessed in this study should also be taken into account. It ought to be pointed out that the Commission has been in operation for just over six years. The political environment has also not been entirely facilitative to the Commission. In light of findings and conclusions above, the study makes the recommendations below.

5.2. RECOMMENDATIONS

The study makes the following recommendations which, if adopted, would strengthen the independence and effectiveness of the Commission.

5.2.1. Legal Foundation

The Commission's legal foundation ought to be entrenched in the Constitution. Entrenchment into the Constitution adds legitimacy to the Commission work and its protectional and promotional mandate. It also sets a high threshold which makes it difficult to change its mandate and to curtail its powers.

5.2.2. Amendments to the Act

Provisions on tenure of commissioners, financial provisions, accountability need a complete overhaul as they have a great effect on the independence of the Commission. In their current form, they weaken the mandate and powers of the Commission.

5.2.3. Constitutional and Institutional Reform

In order to address the issue of democratic governance, principles of separation of powers, rule of law, democratic devolution, transparency and accountability need to be strengthened in a new constitutional dispensation. Enhancing the independence of the Judiciary should also be addressed in a new constitutional dispensation alongside the adoption of the Judicial Services Bill. While it is not a perfect document, the recently published Proposed Constitution of Kenya is a laudable step by the government towards institutional and governance reform. It lays a legitimate framework for consolidating the necessary conditions for democratic governance.

5.2.4. Political Will

It is acknowledged that political will or lack thereof is a major contributor to the challenges faced by the Commission. In order to nurture political will, the Commission ought to explore constructive engagement and pursue alternative innovative measures in checking the government on issues of human rights and governance. Such innovative initiatives involve dialogue and would help the Executive understand the role of Commission as partner implementers in the promotion and protection of human rights and not as competing state institutions. The classic “activist” approach which involves naming and shaming has done little to improve relations between the Commission and the Executive and other state institutions.

Further, the Commission ought to pursue its educative function as rigorously as its other functions. Educational activities will help in improving public awareness of rights and recourse to justice where they are violated. It should also involve other state agencies and educate them on the role of the Commission targeting co-operation from them. Partnerships with state agencies such as the Police, Prisons would help in the training of officers on the importance of observance of human rights principles in the security sector.

5.2.5. Accessibility

Accessibility of the Commission by the public remains one of its biggest challenges aside from facing non-cooperation from the Executive. The Commission has offices in Nairobi, Wajir and Kitale. It has been difficult to open up other regional offices due to its relatively small budget. Assuming that the proposals on the funding of the Commission above, it is proposed that there should be an initial roll-out of services to the provincial level with gradual decentralisation to district level.

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APPENDIX I: Interview Guide

The questions below are intended to guide interviews with key informants

1. Interviewee Bio data:

Length of interaction with the Commission

Level of responsibility (managerial or supervisory)

If not working with the Commission, what is the nature of interaction with the Commission (e.g. Civil Society Organisation etc)

2. Legislation Regulating the Commission

What are the functions of Commission?

In your view are the provisions of the KNCHR Act and the new Constitution adequate in dealing with challenges facing the Commission?

Are there any proposals on amendment of the KNCHR Act you can give to make the Commission achieve its mandate?

3. The Commission's Programmes:

Finances of the Commission

In your view;

Does the Commission enjoy financial autonomy? Are Commission's funds adequate to enable it implement its activities?

What proposals would you make in regard to funding of the Commission? Are you aware of departures from these laws?

Is there an internal audit department?

Does it have adequate capacity?

Who does it report to?

4. Human Resource System

How is staff recruited?

Does the staff complement reflect the national diversity?

Are merit, qualifications and experience the overriding factors for recruitment?

5. Operational Procedures and Programmatic Work

Does the Strategic Plan adequately cover objectives and activities of the Commission?

Does the Strategic Plan have indicators that facilitate tracking of implementation process and the impact of the Commission's activities?

Are there any monitoring and evaluation mechanisms in the Strategic Plan?

What is the role of Commissioners in programmatic work as compared with staff?

What are the challenges faced in implementing the Strategic Plan?

6. Independence

In your view is the Commission an Independent institution?

What factors affect the Independence of the Commission?

To what extent do the provisions of the KNCHR Act contribute to the Independence of the Commission?

7. Performance of the Commission?

In your view in which area of human rights promotion and protection has the Commission been successful?

What challenges does the Commission face in executing its mandate?

How can these challenges be surmounted?

8. Suggestions for Improvement

What suggestions or comments would you like to offer to improve the performance of the Commission?

APPENDIX II: List of interviews

No.	Name	Designation	Date of Interview
1	Lawrence Mute	Commissioner-KNCHR	6th September 2010
2	Hassan Omar	Commissioner-KNCHR	8th October 2010
3	Winnie Lichuma	Commissioner-KNCHR	1st October 2010
4	Anne Gathumbi	Programme Manager-OSIEA	1st October 2010
5	Jelim Obure	Monitoring and Evaluation officer- KNCHR	15th November 2010
6	Rahma Jillo	Advocate of the High Court of Kenya, Nairobi	8th October 2011
7	Duncan Nyangwara	Student, Nakuru	2nd November 2011
8	Evans Mugwe	Advocate of the High Court of Kenya, Nairobi	31st October 2011
9	Cyprine Boyani	Business Lady	2nd November 2011
10	William Tengecha	Principal Human Rights Officer- KNCHR Kitale	12th August 2011
11	Stella Chemutai	Advocate of the High Court of Kenya- Nairobi	8th October 2011
12	Ann Koross	Advocate of the High Court of Kenya- Nairobi	1st November 2011
13	Sam Wanjere	Officer-Ethics and Integrity Commission	31st October 2011
14	Ture Boru	Self- Employed	30th October 2011
15	Judith Guserwa	Advocate of the High Court of Kenya, Nairobi	14th October 2011
16	Victor Kamau	Senior Human Rights Officer-KNCHR	17th August 2011
17	Dona Anyona	Senior Human Rights Officer-KNCHR	22nd August 2011
18	Edna Nyalote	Senior Human Rights Officer- KNCHR	24th August 2011
19	Kamanda Mucheke	Senior Human Rights Officer- KNCHR	24th August 2011
20	John Wamwanga	Finance Manager-KNCHR	15th November 2010
21	Hassan Abdile	Principal Human Rights Officer-KNCHR, Wajir	24th August 2011
22	Maina Mutuaruhiu	ESCR Manager-KNCHR	19th August 2011
23	Mohammed Jafaar	Human Rights Officer- KNCHR, Wajir	24th August 2011
24	James Sitienei	Officer- Ethics and Integrity Commission	3rd November 2011
25	Linnnet Ndemaki	Self Employed	2nd November 2011
26	Victor Lando	Senior Human Rights officer- KNCHR	29th July 2011

27	Sofia Rajab	Human Rights Officer-KNCHR	25th August 2011
28	Cyrus Maweu	Human Rights Officer- KNCHR	25th August 2011
29	Samson Omondi	Human Rights Officer- KNCHR	25th August 2011
30	Benard Kibet	Senior Human Resource Officer- KNCHR	25th August 2011
31	Dominic Rono	Human Rights Officer- KNCHR, Kitale	12th August 2011
32	William Tengecha	Senior Human Rights Officer- KNCHR Kitale	12th August 2011