Press release

16th August 2017

Attacks on the Civic Space by the Defunct NGOs Coordination Board

The Kenya National Commission on Human Rights (the Commission or KNCHR) is an Independent National Human Rights Institution (NHRI) established under Article 59 of the Constitution of Kenya, 2010 and the KNCHR Act, 2011 (revised 2012). The Commission’s mandate is the promotion and protection of human rights in Kenya. The Paris Principles relating to the status of National Human Rights Institutions (NHRIs) require NHRIs to develop relations with Non-Governmental Organizations devoted to promoting and protecting human rights.

The Commission has noted with grave concern the ongoing intensified assault on the civic and democratic space by the now defunct NGOs Coordination Board headed by Fazul Mahamed. The latest attack targets the African Center for Open Governance (AFRICOG) and the Kenya Human Rights Commission (KHRC) two of the leading human rights and governance organizations in the country. Yesterday, the NGO Coordination Board accused the two organizations of financial and regulatory impropriety and called upon the Kenya Revenue Authority (KRA), the Directorate of Criminal Investigations (DCI) and the Central Bank of Kenya (CBK) to take adverse actions against them including freezing of accounts and arrest and prosecution of AFRICOG directors and members. Fazul directed AFRICOG to immediately cease operation and asked the Director of Immigration to deport all foreigners working at KHRC. This morning, officers of KRA accompanied by the police arrived at AFRICOG offices with a questionable court order seeking to conduct an operation pursuant to Fazul’s directive. The operation was called off following protests from AFRICOG and a directive from the Acting Cabinet Secretary for the Ministry of Interior and Coordination of National Government, Dr Fred Matiang’i. KHRC and AFRICOG have told KNCHR that they were not given an opportunity to respond to the accusations which is a breach of the right to fair administrative action and to fair hearing guaranteed under Articles 47 and 50 of the Constitution respectively.

Further, the issues raised against KHRC have already been determined by the High Court in petition 495 of 2015 in which the court found the NGO Board of having violated KHRC’s constitutional rights. The High Court declared that “the adverse actions taken by the respondent (NGO Board) in commencing the deregistration of the Petitioner (KHRC) and further in ordering the freezing of the Petitioners’ bank accounts …. is unconstitutional, null
and void”. By bringing the same accusations already dispensed with by a competent court instead of appealing the decision, the NGO Board is obviously in contempt of court which is illegal and against the principles and values of the Constitution.

KNCHR recalls a similar attack on the International Foundation for Electoral Systems (IFES) in December last year. On 19th December 2016, Mr. Fazul issued a statement purportedly terminating the Kenya Electoral Assistance Program coordinated by IFES on the basis that IFES was not registered and was therefore carrying out its activities in the country illegally. He advised the Central Bank of Kenya (CBK) to freeze all its bank accounts and also advised the immigration authorities to investigate the working status of Mr Michael Yard, the IFES Director. IFES has since proved that it is legally registered in Kenya by the Registrar of Companies and has been operating in Kenya since 2002.

In April 2015 following the terrorist attack on Garissa University, the Inspector General of Police (IGP), Mr Joseph Boinnet, issued a gazette notice listing a number of organizations that he intended to classify as specified entities associated with terrorist groups that included Muslims for Human rights (MUHURI) and HAKI Africa. The government proceeded to freeze their bank accounts thus halting their operations without affording them adequate opportunity to be heard. It’s worth noting that, at the time of this listing, the two organizations were very outspoken in seeking accountability for human rights violations by security agencies in the war against terror. The two organizations filed a petition in the High Court in Mombasa citing violations of their constitutional rights. Just like with the KHRC petition mentioned above, the Court found the actions of the Inspector General of Police (IGP) in gazetting the two organizations and freezing their accounts unconstitutional, illegal and hence invalid and null and void ab initio. The Judge concluded that “the petitioners’ rights to fair administrative action afforded to them by Article 47(1) of the Constitution were violated by the publication of the gazette Notice. …It was tainted with procedural impropriety for failure to afford the petitioners fair administrative process”.

Despite the Judiciary’s pronouncement on the unconstitutionality and illegality of these actions, the NGO Coordination Board, through Mr Fazul continues to issue arbitrary and illegal directives particularly targeted at CSOs perceived to be critical of the government. This is unacceptable impunity for a state agency which is bound by the constitution to abide by the rule of law, transparency and accountability.

The Commission is further concerned by the persistent failure by the government to operationalize the Public Benefits Organizations (PBO) Act that was passed and assented into law in 2013. The High Court in petition 351of 2015 (where KNCHR appeared as Amicus Curiae) declared that “the I respondent’s (Minister for Planning and Devolution) to appoint a date for the coming into operation of the Public Benefits Organizations Act, 2013 is in violation of Articles 1,10,73,94,116 (2), 129 and 153(4) of the Constitution of
Kenya, 2010". Consequently the Court, on 24th November 2016, issued an order of mandamus compelling the minister operationalize the Act within fourteen (14 days).

This order was not complied with and instead the president immediately transferred the function of regulation of NGOs from the Ministry of Devolution and Planning to that of Interior and Coordination of National Government. This transfer was irregular as the Section 2(1) of PBO Act places Public Benefit Organizations under the Ministry of Planning and Devolution. KNCHR views this transfer as a scheme by the executive to frustrate and circumvent judicial orders through administrative powers.

On 20th December 2016, KNCHR together with CSO partners moved to court seeking orders that the Cabinet Secretary for Devolution and Planning and/or the Cabinet Secretary for Ministry of Interior and Coordination of National Government be cited and held to be in contempt of court. On 12th May 2017 The court found that (a) the Cabinet Secretaries for Ministry of Devolution and the Ministry for Interior and Coordination of National Government had wilfully disobeyed a valid court order. The High Court ordered the Cabinet Secretary, Ministry of Interior and Coordination of National Government to comply with the above judgement within thirty (30) days from the date service of this order to comply with the judgment of 351of 2015, in default, he will be liable to be committed for contempt.

Over 60 days have lapsed and the Cabinet Secretary has persisted in defiance of the court orders by refusing to operationalize the PBO Act. This level of impunity by a key Government ministry in the Office of the President is appalling and gravely undermines the rule of law in the country. The rule of law requires that orders of the Court be respected and obeyed. Wilful and flagrant disobedience of court orders undermines the authority and dignity of the Courts.

KNCHR is of the considered view that the NGO Board continues to operate illegally as the NGO Coordination Act is no longer in operation having been replaced by the PBO Act as per Article 116(2) of the Constitution. We call on the Ag Cabinet Secretary for Ministry of Interior and Coordination of National Government, Dr Fred Matiangi operationalize the PBO Act forthwith. Continued delay will only serve to create more uncertainty and disorder in the sector and perpetuate the illegal conduct of affairs by the defunct NGO Coordination Board. KNCHR joins LSK in reminding the cabinet Secretary of the consequences of disobeying a court order. Those in power must lead by example in adhering to the rule of law otherwise they encourage ordinary citizens to defy the law leading to anarchy.

Further KNCHR reiterates our concern that Fazul Mahamed continues to hold public office despite having been declared unfit to hold public office following investigations by the Commission for Administrative Justice (CAJ) for abuse of office and misconduct. CAJ also established that Fazul was irregularly appointed to office having misrepresented about his academic qualifications.
We again call on the government to henceforth desist from harassment of civil society organizations and criminalization of legitimate human rights work.

Thank you.

Kagwiria Mbogori
Chairperson