

AN ADVISORY OPINION ON THE PROPOSED RESTRUCTURING OF THE ETHICS AND ANTI-CORRUPTION COMMISSION

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The attention of the Commission has been drawn to the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015, as contained in the Special Issue of the Kenya Gazette Supplement No. 87 (National Assembly Bills No. 33). The Bill, which has since been passed by the National Assembly, seeks to restructure the Ethics and Anti-Corruption Commission (EACC) by changing the terms of the Commissioner from full-time to part-time and increasing their number from Three to Five. We have considered the proposed amendments and noted that they seek to fundamentally change the structure of EACC. In particular, the amendments are likely to concentrate power in the hands of the Commission Secretary which is a departure from the present situation where it is dispersed for accountability and objectivity. We have also noted that the amendments have been introduced in the National Assembly for debate even before the publication and consideration of the report of the Task Force on Review of the Legal and Regulatory Framework for Fighting Corruption of which the Commission is a member.

While the Commission appreciates the efforts by the Government towards strengthening the fight against corruption and promotion of integrity, we have noted that the proposed amendments raise a number of Constitutional and legal issues that relate to the structure of EACC and good governance in general. The above matters are of utmost importance to the public and should, therefore, be considered before making the amendments to not only strengthen EACC, but also ensure that the actions are in consonance with the Constitution. In accordance with our mandate under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion on the matter which we hope will enable you to take appropriate action and guide the debate on the proposed amendments by the National Assembly.

a) Design of the Constitution

The Constitution of Kenya, 2010 was designed to address the over-concentration of state power in the core Executive which had created an imperial presidency in the old constitutional dispensation. The de-congestion of power from the core Executive was done in the following ways:

- i) Reduction of presidential powers in absolute terms and distribution to other State Organs and Offices such as Parliament and County Governments
- ii) Creation of Constitutional Commissions and Independent Offices under Chapter Fifteen to protect the Constitution.
- iii) Adoption of collective exercise of authority as ultimately demonstrated in a collective Cabinet in Article 131(1)(b); the President exercises executive authority with the assistance of Cabinet, not individually as before. This is what is called a collective Cabinet Constitutionally.

The approach of the Constitution, therefore, is dispersal and decongestion of power in contradistinction with concentration of power.

b) Design and Structure of Constitutional Commissions and Independent Offices

The existence of Commissions and Independent Offices in the Constitution was not accidental; it was informed by historical reasons and the need to monitor the core branches of Government in ensuring that they do not act in excess of their jurisdiction. The importance of these institutions is underpinned in Article 249(1)(a-c) of the Constitution that empowers them to protect the sovereignty of the people. It is instructive to note that this power to protect the sovereignty of people has not been granted to other arms of government expressly as it has been granted to Constitutional Commissions and Independent Offices. A clear reading of the Constitution shows that Judicial, Legislative and Executive authority derives from the people of Kenya and exercised in accordance with the Constitution.

Due to the above, the approach of the Constitution is to insulate the Commissioners and Independent Office Holders from any interference to enable them achieve this objective [A. 249(2)]. It is for this reason that the Constitution provides for the appointment of Commissioners with executive powers and security of tenure to discharge the functions of Commissions. The structure of the Commissions, in particular the Constitutional threshold of Commissioners of between three and nine, was informed by the need for collective exercise of power instead of vesting it in one individual or office. This is one elementary and fundamental tenet of the Constitution. In light of the foregoing, it is important that any design or structure that is adopted for EACC must ensure that it remains an independent State Organ as envisaged under Article 249(2) of the Constitution. Having examined the proposed amendments, it is our position that they depart from this tenet and are, therefore, against the letter and spirit of the Constitution.

c) Commissions vis-à-vis Independent Offices

In the design of the Constitution, there is a distinction between between Commissions and Independence Offices. While the design of Commissions is based on a collective exercise of authority, Independence Offices are designed in such a way that only an individual at the apex exercises such authority. This is the case with Constitutional Independent Bodies such as

the Office of the Director of Public Prosecutions, Office of the Controller of Budget and Office of the Auditor General.

In the case of EACC, which is a Constitutional Commission, we have noted that a proposal has been made to change its structure so that the Secretary/Chief Executive Officer would be referred to as the Director General with part-time Commissioners whose role would be merely advisory. This proposal has a number of Constitutional and legal implications. First, it would change the design of EACC from that of Commission as provided for in the Constitution to that of an Independent Office. Second, the terminology 'Director General' is not known in the language of the Constitution. Instead, the Constitution uses the terms Secretary and Chief Executive Officer. In our view, such a fundamental change to EACC cannot be done by legislative amendment since it would violate the letter and spirit of the Constitution. Indeed, such amendment would require a Constitutional amendment.

d) The Place of Commissioners

It is worth of note that the design of Commissions in the Constitution is different from that of state corporations that have boards that sit after a given period and perform only a policy making and oversight role. They are deliberately designed in such a way that Commissioners exercise executive authority hence the independence to enable them perform their duties.

In the first place, the Commissioners play an important role in Commissions. According to Article 250(1) of the Constitution, Commissions are fully constituted when they have at least three Commissioners. It is, therefore, correct to state that a Commission is constituted by Commissioners. Accordingly, the powers and functions granted to Commissions are to be exercised by Commissioners. It is for this reason that the Constitution expects most Commissions to have full-time Commissioners except in special Commissions whose membership comprise other State Officers. In our view, it would be a negation of the Constitution for legislation to transfer the exercise of executive powers and functions from Commissioners to another person such as the Secretary to the Commission or the Secretariat.

Second, the place of Commissioners is further illustrated by the high qualifications, experience and rigorous appointment process prescribed by Parliament. This was intended to ensure appointment of people with competence and integrity as Commissioners to perform the functions of Commissions. Moreover, the Constitution endows the Commissioners with the security of tenure under Article 250 (7-9) as a way of ensuring their independence. We are of the view that the above would not have been necessary if the Commissioners were not to exercise full authority over the Commissions' mandates. Further, the proposal to make the Commissioners part-time while at the same time increasing their number from three to five is a contradiction. Increasing the number while stating that Commissioners have little work, and that they should address only policy matters reflects a contradiction of principles. If they have little work, why add the numbers and cost to the taxpayer?

Third, one of the arguments advanced for part-time Commissioners is the cost. According to the proponents of this view, part-time Commissioners are cheaper to maintain than full-time Commissioners. The reality for the last three years, however, indicates that the converse is true. Part-time Commissioners have been more expensive than full-time Commissioners since they are paid allowances for every sitting, and these are quite frequent. An analysis of audits will show that it is ultimately cheaper to engage a Commissioner full-time, bind their time to the task commissioned and hold them accountable to the people through Parliament on their performance.

Fourth, if the Commissioners are part-time, it would mean that they would be allowed to engage in other gainful employment whether public or private. While we appreciate that the Constitution provides for part-time Commissioners [A. 250(5)], we are of the considered view that the same may not be appropriate for EACC as it would be detrimental to the performance of their duties. This situation may yield ground to conflict of interest or encourage rent-seeking practices leading to loss of public confidence in the institution. The result, as has been with Parliament and other part-time Commissions, is to end up with actively practicing Advocates (or other professionals) taking up cases in defence of persons accused of corruption. The resultant situation will undermine the fight altogether.

e) Public Participation and Appointment of Commissioners

Public participation is at the heart of our Constitutional dispensation. Indeed, it is one of the principles and values of governance under Article 10 of the Constitution. In the context of legislation, Article 118 obligates Parliament to ensure public participation in Parliamentary processes. We have, however, noted that there was little or no public participation in the legislative process leading to the passage of the Bill which clearly violated the Constitutional principles.

Separately, we have noted that the amendments have removed the requirement of a multi-stakeholders panel to recruit the Chairperson and Members of EACC. The Panel comprises bodies such as the Public Service Commission, Office of the Attorney-General and Department of Justice, Association of Professional Societies in East Africa, the National Council for Persons with Disabilities among others. Instead, this role has been granted to the Public Service Commission (PSC). While we appreciate the role of PSC in public service, we are of the view that the proposal would have serious implications on the independence of EACC. The multi-stakeholders' panel was intended to infuse diversity, objectivity and credibility in the recruitment process. In any event, it is doubtful whether PSC can solely recruit the Chairperson and Members of EACC in the absence of disciplinary control over them. Moreover, this would create an inconsistency in that other Commissioners are appointed through a similar multi-stakeholders panel.

f) Designation of the Commission Secretary

The position of Commission Secretary is created under Article 250(12) of the Constitution as the Chief Executive Officer. It is worth noting that the Secretary is not part of the membership that constitutes a Commission under Article 250(1) which provides that *'each Commission shall consist of at least three but not more than nine members.'* The import of the foregoing is that a Commission is properly constituted by Commissioners.

Further, the Constitution by design does not give any powers or functions to the Secretary save for serving as Secretary and Chief Executive Officer to the Commission (read Commissioners). Being an appointee of the Commissioners, he or she is under the direct supervision and control of the

Commissioners. It would, therefore, be an affront to the Constitution to transfer the constitutional powers and functions of the Commissioners to the Secretary. Further, it would result in an unfortunate situation of a Chief Executive Officer vested with full powers and knowledge of the Commissions' activities, but who is neither accountable for the exercise of those powers, and who will be answerable in disciplinary terms to part-time Commissioners without knowledge of the goings-on of the Commission.

We note that if the Bill is passed in its current form, a legal challenge of security of tenure may arise which may hamper the fight against corruption in that a heavy burden will be placed on the Commission Secretary whose benefits, remuneration and tenure are not protected by the Constitution leaving him amenable to external interference.

More fundamentally, any legislative protection as may be accorded to the Secretary would be decidedly inferior as compared to Constitutional protection as exists today. History has shown that such legislative protection is only as secure as the dominant opinion in Parliament at any time, and can be lost in one afternoon.

g) Weakening EACC and Constitutional Commissions

Whereas we are aware that the proposed amendments are in good faith so as to strengthen the fight against corruption and promotion of integrity, we are of the considered view that the same will serve to weaken EACC in particular, and Constitutional Commissions in general, due to the following:

- i) While it may appear to shift power and functions from the Commissioners to the Commission Secretary, it is in truth a shift of power from the Constitutional Commissions to other arms of government since the Secretary would be amenable to control through administrative edicts, or legislative changes.
- ii) The action would shift and redirect accountability from the people to whom Commissions are accountable (A. 1 & 249) to the Executive and Parliament to whom any appointed Chief Executive Officer would be answerable.

- iii) It would undermine the ideals of creating Constitutional Commissions which was to promote national values such as good governance and ensure neutrality and objectivity in the exercise of power hence the Constitutional requirement that the composition of Commissions should reflect the regional and ethnic diversity of the people of Kenya.
- iv) It would undermine the fight against corruption insofar as the activities of EACC are likely to grind to a halt if the Secretary is removed from office noting the absence of Constitutional security of tenure. It is worth of note that the idea of having Commissioners was to create a collective responsibility and protection in numbers which is critical in the fight against corruption.
- v) It would undermine the very reason why Commissioners of diverse backgrounds are appointed to enrich the Commission with their knowledge and experience on a daily basis.

h) Amending Laws on Account of Failure by Individuals

It is our opinion that it is not a sound practice to amend the law by restructuring a State Organ simply because the individuals who held office did not perform or that others who can perform have been differently designated. In our view, there is no problem with the structure of EACC. Historical hitches in appointment, incompatibility of individuals or individual questions of integrity are not reasons to restructure. It should be noted that other Commissions similarly structured have not experienced similar issues.

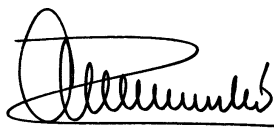
The Ethics and Anti-Corruption Commission has had challenges right from its establishment which was manifested in the appointment of the Commissioners and the challenges in working relationship among the Commissioners *inter-se* and also with the Secretariat. Further, EACC has had challenges in its working relationship with other institutions, for example, the Office of the Director of Public Prosecutions in relation to prosecution of corruption cases. These challenges cannot be attributed to structural framework of the institution.

i) **Way Forward**

On the basis of the foregoing analysis, we specifically advise as follows:

- (i) That while it is important to strengthen the legal framework for the fight against corruption, the process should be done within the Constitution.
- (ii) Any process to bolster the fight against corruption should appreciate the role of the Commissioners, and safeguard the independence and accountability of EACC.
- (iii) The Commissioners of the Ethics and Anti-Corruption Commission should serve on full-time basis to enable them fully discharge their duties, insulate them from any incidences of conflict of interest and make them accountable to the public.
- (iv) To avoid unclarity of roles, the provisions of the Anti-Corruption and Economic Crimes Act, 2003 that appear to confer parallel roles to the Chief Executive Officer should be repealed and it be made clear the full authority vests in the Chairperson. Whoever Parliament deems to be the ideal Kenyan to be crowned the ultimate anti-corruption czar will be so appointed Chairperson of the Commission, and accorded two able Deputies. This is what will cure the problem.

DATED this 9th **DAY** of **July** 2015



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION