

GOVERNANCE OF CONSTITUTIONAL
COMMISSIONS IN KENYA: EXPERIENCES,
CHALLENGES AND PROSPECTS (2010-2019)

*A Study of the Independent Electoral and
Boundaries Commission and the Salaries and
Remuneration Commission*

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DECLARATION

Declaration by the Student

I declare that this Research Project is my original work and has not been presented for a degree in any other University.

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DEDICATION

I dedicate this study to my dad and late mum without whom my academic dreams would not have been realized. I also dedicate it to my beloved wife Diana and my daughters Audrey, Amanda, and Annabel and my son David for their overwhelming support as I pursued my studies.

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ABSTRACT

This study focuses on the experiences, challenges and prospects facing the governance of constitutional commissions in Kenya. Two Commissions, the Independent Electoral and Boundaries Commission (IEBC), and the Salaries and Remuneration Commission (SRC), were sampled for this purpose.

The specific objectives of the study are focussed on analysing the relationship between the secretariat and the commissioners and its impact on the governance framework of IEBC and the SRC.

This study employs a period-based comparative research design covering ten years, 2010-2019. The research also made use of the qualitative Key Informant Interviews (KIIs) technique to obtain information from the top executives of the two commissions, which could not be captured by the quantitative data collection instruments.

The study found that the enabling legislations differ between the IEBC and the SRC with respect to a key aspect of governance: In the IEBC Act, the legislation specifically provides for the relationship and roles of the secretariat from those of the commissioners unlike the SRC Act that does not have these provisions. Despite its clear provisions, the IEBC experienced multiple and conflicting reporting relationships in contrast to the SRC.

The study also found that the existing organizational structure of IEBC does not reflect a rational process of a lean, flexible and effective structure to deliver outputs envisaged by the constitution. Instead, the IEBC operates under a complex organizational regime characterized by blurred reporting relationships with the secretariat reporting to multiple centres of power within and outside the Commission. In contrast, the SRC is characterized by a simpler, rational organizational structure with clear reporting relationships between the secretariat and the commissioners.

The study recommends that Parliament reviews the IEBC Act to provide for a project-based or function-based, rather than the current, hierarchical organizational structure.

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CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

The Constitution of Kenya Review Commission (CKRC) Act of 2008 identified the need to establish a democratic system of government that was free and enshrined good governance, constitutionalism, human rights, the rule of law and gender equity as one of the objects and purpose of the constitutional review process. Good governance broadly entails promotion of people's participation in governance through free, fair and democratic elections.

The Act required that a provision be made in the Constitution: “...*respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities.*” Additionally, section 4(h) mandated the Commission to provide for the strengthening of national integration and unity.”

Governance is the process of making and implementing decisions. It is applicable in different contexts such as corporate governance, local governance, national governance and international governance (Fernando, 2006). To this end, governance is the practice of transformation where people working together establish associations that foster decision-making and enhance the actions and responsibilities of governing agencies.

Governance is also defined as the governing process where the decisions made seek to influence societal outcomes including but not limited to economic, social and environmental outcomes. Bradway and Shah (2009) define governance as the formulation and execution of collective action at the local level. Thus, it encompasses the direct and indirect roles of formal institutions of local government and government hierarchies, as well as the roles of informal norms, networks, community organizations, and neighbourhood associations in pursuing collective action.”

In this study, governance entails *setting directions*, where the commissioners want the commission to go. It involves *people* who are the commissioners expressing and exercising their attitude, values and beliefs on matters regarding the commission's mandate. It also involves the official means used to attain the goals, manage and direct the activities and operations of the commission, referred to as the *structure and processes*.

Research on perspectives and practices of board or commissioners' governance (Private Sector Initiative for Corporate Governance, 1999) has disclosed several approaches and models each of which is built on the four pillars of good governance. First is *stewardship*: The boards or commissioners act as stewards for others and are entrusted with the organisation's resources on behalf of others. Second is *leadership*: Governance fulfils the society's leadership function. As leaders, boards or commissioners must appreciate the value systems and wishes of the members of the public where they are based. Third is *responsibility*: Having a fiduciary responsibility, boards or commissioners are expected to optimize resources of the organization in an effective and efficient way to accomplish the desired aim. Fourth is *accountability*: Boards or commissioners are ultimately responsible for the actions or inactions of their organization. The duty to discharge the responsibilities accorded and that influence others in different ways is accountability (Private Sector Corporate Governance Trust, Kenya, 1999).

There are four essential components of good corporate governance namely: sound value structures and high moral standards; basic framework of laws and regulations; judicial systems enforcement mechanisms; and separation of ownership from management. Corporate governance seeks to encourage effective, efficient and viable organisations that improve the general wellbeing of the public by generating wealth, providing solutions to emerging challenges, creating employment, production of legitimate organisations that are run with transparency, integrity, probity and recognition of stakeholders rights, and protection and inclusivity in the management of

the organisation based on democratic ideals, legitimate representations and participation.

As envisioned in the Kenyan constitution, a commission is a corporate entity with ability to sue or being sued under its corporate name. Chapter Fifteen of the 2010 Constitution provides that commissions are instituted to uphold values and principles, which promote the spirit of constitutionalism, democracy and defend the power of the people of Kenya. As independent entities, commissions have constitutional and legal power to execute their roles and responsibilities without being interfered with or controlled by external forces (Constitution of Kenya, 2010).

For any chapter fifteen commission to be legally constituted, the 2010 constitution stipulates that it should consist of between three and nine members. While appointing the chairperson and members of a commission, the appointing authority should consider the principles of Article 10 of the Constitution to promote inclusivity, depict regional ethnic balance and uphold national values to promote good governance and leadership (Article 250 (4) of the Constitution of Kenya).

The roles and responsibilities of a chairperson, members, and a secretariat of a commission are stipulated in the constitution and the enabling legislations. The secretariat carries out the administrative roles of a commission. The legal authority to call for meetings is with the chairperson of a commission, and it is mandatory for the commission to hold a meeting at least once in every month for full time commissioners and at least four meetings in a year for part time commissioners. The chairperson presides over all meetings, but the vice-chairperson is obligated to preside over such meetings in case the chairperson is absent.

1.2. Statement of the Research Problem

At independence, the Kenyan constitution borrowed heavily from the British constitution when establishing independent commissions. The members of staff of these commissions were employees either of the government of Kenya, regional

assembly or the region. The salaries and remuneration payable to members of commissions were charged to the Consolidated Fund. This is unlike the post-2010 independent commissions that created strong secretariats that were empowered to execute the commission's mandate. The secretaries have powers to supervise all employees and are responsible for all financial, clerical, and administrative affairs of the commission.

The 2010 Constitution sets out the roles, functions, and objects of commissions and other independent entities. As stipulated in Chapter Fifteen of the 2010 constitution, commissions are established to uphold the sovereign will of the people and ensure that all state agencies support principles and values that enhance democracy and constitutionalism in the country.

It is evident in the constitution that each commission should have a secretariat tasked with the obligation of carrying out the management functions of that commission. The secretary to the commission, who also heads the commission's secretariat, executes other roles provided in the constitution or delegated by the commission. The secretary is mandated with the functions of coordinating, organizing, and implementing plans and affairs of the commission, supervising and assigning duties to staff.

The relationships between the commissioners and the secretariat among certain commissions in Kenya has been characterized by suspicion and power struggles as to who has the executive power in the management of the commission including the power to hire, discipline and sack employees and to whom should employees report.

While reviewing the auditor general's report on IEBC's financial statements for the period ending 30th June 2017, the National Assembly's Public Accounts Committee (PAC) observed cases of absolute conflict in the roles and responsibilities of the chief executive officer, Mr. Ezra Chiloba, and that of the chairman, Mr. Wafula Chebukati (Public Accounts Committee , February, 2019).

PAC further observed that there appeared to be an unending power struggle between the secretariat and the commissioners. It stated that the secretariat operated on their own without clear policy direction from the commissioners. As a result, therefore, the top management of the secretariat, separately and jointly, did not plan and failed to implement the strategies and procedures of IEBC as provided under section 11A(b) of the IEBC Act, 2011 (Public Accounts Committee , February, 2019).

On its part, the Kenyan Senate observed that there was conflict of mandate among or within commissions and that the chairpersons of the commissions are the ones running the institutions, thereby, rendering the chief executive officers, the secretaries to the commissions, irrelevant and seem like they are not performing (Parliament of Kenya: The Senate, October 01, 2014).

These conflicts between the secretariats and the commissioners bring to focus the role of the secretariat in the framework of governance of constitutional commissions in Kenya. Notable is the fact that each of these constitutional commissions has a constitutional and legal framework establishing it. These constitutional provisions for commissions establishing a secretariat with a chief executive officer were drawn from the recommendation of the Independent Review Commission (IREC), also known as Kriegler Commission, to improve the governance of IEBC and was adopted for all independent commissions in the 2010 Constitution.

Are the conflicts, therefore, a result of the constitutional and legal framework of creating commissions alongside the secretariat with a chief executive officer or a practice problem? Does conflict of authority, power and functions exist between the members of a commission and the secretariat? This study, therefore, seeks to explain whether the creation of commissions with a secretariat led by a chief executive officer by the 2010 Constitution has enhanced good governance or impacted negatively on the governance of constitutional commissions in Kenya.

1.3. Research Questions

The study sought to address the following questions:

- a. What is the constitutionally envisaged relationship between the commissioners and the secretariat of the independent commissions?
- b. What accounts for the positive or negative relationship between the commissioners and the secretariat of the Independent Electoral Boundaries Commission and the Salaries and Remuneration Commission?
- c. How do the relationship between the commissioners and the secretariat impact on the governance of these commissions?

1.4. Objectives of the Study

1.4.1. Overall Objective

The purpose of this study is to investigate the relationships between the secretariat and the commissioners in the governance framework of IEBC and SRC and the attendant impact on the respective commission's mandate.

1.4.2. Specific Objectives

The specific objectives of the study are:

- a. To analyze the constitutionally envisaged relationship between the commissioners and the secretariat of the independent commissions with special focus on the IEBC and the SRC.
- b. To describe the positive or negative relationship between the commissioners and the secretariat of the IEBC and the SRC.
- c. To establish the impact of secretariat relationships with the commissioners on the governance of IEBC and SRC.

1.5. Justification of the Study

Studies have shown that most commissions are statutory and not constitutional. The Kenyan independent commissions are constitutional and therefore, differ from most statutory independent commissions. Furthermore, there are very few studies on constitutional commissions. Indeed, studies on the relationship between commissioners

and the secretariats in the framework of governance of constitutional commissions in Kenya have not been done.

1.5.1. Academic Justification

The study will fill knowledge gaps identified from past studies. Ochieng (2019), in his study on the independence, effectiveness and accountability of constitutional bodies and independent authorities in Kenya observed that for these institutions to be effective, they should strictly comply with the findings and recommendations provided by the study . The study did not address the role of the commissioners and secretariat in decision making in these commissions.

In the study of the theory and operation of independent federal authorities, Berger & Edles (2000) observed that the chairs of commissions had power to appoint and supervise staff members, delegate duties and roles to agency staff and administrative entities, and control budget preparation and funds allocation within the commission. The study however did not establish the roles and limitations of the secretariat staff in the governance of the independent agencies, which is a key focus of the current study.

In their review of independence of federal financial regulators, Hogue, Labote & Webel (2014) confirmed in their report that the administrative powers of these regulators were squarely vested on the agency chairpersons, but the absolute powers to formulate and implement policies was with the entire board. It did not establish the powers and responsibilities of the secretariat in the formulation and implementation of strategies and policies.

The Commission on Organization of Executive Branch of the Government, also known as the Hoover Commission (1949), proposed that all administrative powers and roles in multi-member independent commissions or agencies should be vested on the chairperson of an agency or commission. This study will examine the Kenyan independent commissions that have a secretariat headed by a chief executive officer and who exercises all the administrative powers and roles within the commission.

This study, therefore, will be beneficial to academicians and researchers because it will fill the gap of knowledge on the practice of management and governance of constitutional commissions and offer suggestions for further research.

1.5.2 Policy Justification

The study will also provide information, which policy makers and legislators can use in the formulation of policies and legislations relating to governance of constitutional commissions and independent agencies. Specifically, the need for policy direction on the roles and responsibilities of commissioners and the secretariat and whether the same should be legislated, like in IEBC, or not. This is in line with Independent Review Commission (IREC) recommendation for the establishment of a lean supervisory and policy-making board that was recruited and appointed in a competitive and transparent process, and working with a professional and properly trained secretariat. It also recommended the review and clear separation of roles between the commissioners and the secretariat.

Lastly, it will improve the practice of management of other independent agencies and offices as it will provide insights on the relationships between commissioners or boards and the secretariat in their governance framework.

1.6. Scope of the Study

The study sought to find out if there was significant difference between the constitutionally envisaged and the actual relationships between the commissioners and the secretariat of the independent commissions with special focus on the IEBC and the SRC. The study also sought to establish the impact of the relationship between the secretariat staff and commissioners on the governance of IEBC and SRC.

There was need to understand the dynamics of the relationships between secretariat staff, the chief executive officer and the commissioners. This is because of the critical role of the commissions in the country's governance regime and in light of the many conflicts in IEBC that have spilt into the public domain between the secretariat staff and the commissioners, and which have become the subject of investigations as compared to the harmonious working relationships at the SRC. The 2010 to 2019 period is when the 2010 constitution

has been implemented and which the SRC, one of the case study, has been operational. This was reviewed against the IEBC that has been in existence from 1963, though in different forms and names.

Both commissions are more politically-sensitive and highly-visible with IEBC having been in existence for longer period as compared to SRC and has been heavily criticized for many failures in meeting its constitutional mandate leading to challenges in the Supreme Court, removal of its chief executive officer, resignation of Commissioners, and a general feeling among the citizens that the Commission is failing in realizing its responsibilities. The study covers the period 2010, the year the new constitution that established constitutional commissions including the SRC was promulgated, to 2019 when the study was being conducted.

1.7. Definition of Concepts

Independent Commission: is an entity where the head enjoys or is believed to enjoy the for-cause removal protection (Breger & Edles, 2000).

For purposes of this study, it is a corporate entity that can sue or be sued in its corporate name with perpetual succession and a seal. The objects of commissions in Kenya is to uphold constitutionalism and ensure that democratic values and principles are observed by state organs and that the sovereignty of the people is protected. They are independent, subject to the rule of law and cannot be controlled by any individual or authority. (Constitution of Kenya, 2010).

Governance: means the process of making and implementing decisions. It is categorised as corporate governance, local governance, national governance and international governance (Fernando, 2006).

For purposes of this study, it means a governance process where decisions influence societal outcomes, that include environmental, social economic and other crucial outcomes (Shah and Bradway (2009).

Secretariat: is an office with secretarial, administrative and clerical functions of an executive council, legislative body or international organization; the staff and the building where the office is based (Independent Electoral Boundaries Commission Act, 2011).

1.8. Literature Review

This section reviews the literature on the governance of independent commissions and agencies and provides comprehensive evaluation of the findings concerning the governance of constitutional commissions in Kenya. It provides an overview on the governance of independent commissions and agencies from an international, regional and national perspectives and how they inform the current study.

Independent commissions and agencies are organisational mechanisms of administration of government, sometimes referred to as the fourth arm of government after the executive, legislative and the judiciary. They are a popular form of organisation because of the executive and legislative arms of government's competing political interests. That is why the 2010 constitution provided that the mandates of these commissions and the independent offices were to ensure that all state agencies observe the democratic values and principles, encourage constitutionalism and safeguard the sovereignty of the people.

The key feature that distinguishes an independent commission or agency from other executive agencies is independence. This quality of independence is based upon three legal requirements that need to exist: the bipartisan appointment process; serving for a fixed term; and that the removal be limited to express causes only. These qualifications distinguishes executive officials from independent ones. The process of appointment should be objective and transparent that involves the executive and the legislature in the appointment and the approval process. The fixed term of office guarantees continuity and security coupled with assurance that only gross violations of the law can remove them from office and not political reasons. Another key feature of independent commissions is their collegial decision making process. Decision-making is consensual, reflective and pluralistic. They express shared opinions not decrees. They emulate the courts, more so,

the appellate courts whose decision making process involves group deliberation (Verkuil, 1988).

The IEBC and the SRC, based on the above information, are regarded as independent in that the executive and the legislature do the appointment of the commissioners jointly. The president appoints the recruitment and selection panel, nominates the commissioners and appoints the commissioners. The National Assembly approves the nominations and the Judiciary swears them into office.

Unlike courts that decide on various matters, independent commissions have jurisdiction over limited types of subject matter enabling them to develop expertise with the subject. This is shown by the type of independent commissions that have been created in many jurisdictions globally on elections management, human rights, consumer protection, financial markets, transportation, and communications among many others.

Governance of Independent Commissions or Agencies

Every public sector entity needs a governing body, the person (s) or group with the mandate of managing the accountability and strategic direction of the entity. Governing bodies constitute both non-independent and independent members with different subcommittees. Some entities have executive members undertaking particular governing jurisdictions. In others, the management and governing functions should not be confused with the non-executive governing body that oversees the management group. This structure is commonly referred to as two-tier.

The general roles of the non-executive group are: firstly, building strategy by developing wide perspectives to decision making and strategy development; secondly, ensuring that proper management plans and a competent team lead the entity; and thirdly, making the executive liable for fulfilling their delegated responsibilities and performance through scrutiny and purposeful challenging (International Federation of Accountants, 2003).

Centralized (One-tier) Structure

Legally, there exists disparity between the respective power of an agency and agency chairpersons, but in most commissions, agency chairpersons act as the chief executive officers and perform primarily administrative roles of a commission. As chief executive officers, chairpersons of commissions have power to appoint and supervise staff members, delegate duties and roles to agency staff and administrative entities, and control budget preparation and funds allocation within the commission. Although agency chairpersons perform most of the administrative roles, they work in unison with other commission members to deliver the mandate and aspirations of a commission (Breger & Edles, 2000).

In the United States of America, the constitution permits the president to appoint a chairperson to head a commission. Based on this fact, the chairpersons of most commissions are the most powerful figures, considering they are appointed by the president to push for his agenda. Some of the agency chairpersons are not only appointed to advance the president's agenda, but also their own political, economic and social goals. These aspects create an ambiguous relationship between the agency chairpersons and other commission members (Breger & Edles, 2000).

In 1889, the Interstate Commerce Commission was removed by the United States Congress from the department of interior. After its removal, the commission became a substantive governing entity with powers to appoint, supervise and monitor employees, set-out effective strategic procedures and modalities to transform the commission, and procure and purchase resources needed by the commission. During this time, the provisions of the American constitution had not prescribed or outlined powers of the agency chairperson.

Following the enduring leadership challenges that multi-member's agencies experienced during the 1940s, the United States Congress after consulting the office of the president resolved that there was need to establish a separate entity to manage the day-to-day administrative roles of multi-member commissions. After deliberation, the president instituted the Hoover Commission, which, in its 1949 report, proposed that all

administrative powers and roles in multi-member agencies should be vested on the chairperson of an agency or commission (Breger & Edles, 2000).

According to a study done by Breger and Edles (2000) in about thirty multi-member agencies or commissions in America, it was established that the administrative authority is assigned to the chairperson, whereas the general substantive authority is assigned to the agency or commission as stipulated in the reorganization governance statutes. However, the researchers noted that, different statutes employ varied words, especially the term “including” which slightly created variance in terms of role and responsibility delegation between the agency chairs and the commission during the 1950s and 1960s.

In an attempt to address leadership struggles within the commissions in 1960s, the United States Congress resolved that, the chairperson be tasked with the responsibility of executing the daily administrative functions of an agency or commission to avoid what they referred as ‘splintered management’. However, the Congress did not grant the chairpersons of commissions absolute administrative and executive powers. This inferred that, chairpersons were guided by the overall agency policy before undertaking any decision. Additionally, the Congress resolutions directed that the agency or commission would undertake some key responsibilities related to budget preparations and employment of commission’s key employees that impacted on substantive functions of the agency or commission.

Based on a report published by the United States Congress in 2014, certain institutional features make some commissions slightly independent from the Congress, president and other legislative arms of the government. In the report, it emerged that in certain occasions, chairpersons of commissions may not have powers more than other members of a board. However, the report confirmed that administrative powers were squarely vested on the agency chairpersons, but the absolute power to formulate and implement policies was with the entire board (Hogue, Labonte, & Webel, 2014).

The report indicated that the chairpersons of the federal financial regulators were vested with the executive and administrative functions that involved directing the implementation of the agencies' strategies, policies and regulations. These regulators included: the Commodity Futures Trading Commission; the Consumer Financial Protection Bureau; the Federal Reserve Board of Governors; the Securities and Exchange Commission; the Federal Housing Finance Agency; the National Credit Union Administration, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (Hogue, Labonte, & Webel, 2014).

The United States of America regulatory commissions were conceived and intended to let the decision making process in the administrative state being led by experts. They were protected from external influence through specific tenure of office and bipartisan association requirements. During the New Deal period, additional agencies called "independent agencies," were established. By 1960s however, these agencies were suffering from state control and poor decision making like the executive agencies. This resulted into reduction of presidential power and influence in these agencies in order to align with public interest. However, the question arose of whether and to what extent should the president's control be increased in agencies that ought to be protected from such control (Datla & Revesz, 2013).

The United States independent agencies have been protected from president's power to the extent that Article II of US constitution or the agencies' enabling statutes limits that power allows. The other issue is whether the independent agencies can be compelled by the president to obey executive orders governing regulatory review. Eight US presidents have supported regulatory review as a tool the executive can use in its administration but have been reluctant to enforce its compliance by independent agencies. This is because the constitution had insulated independent agencies from such control and that the president could not remove the head or heads of the agency if they failed to comply as it would offend the for-cause removal provision. These examples have ensured that these agencies have continued to offer effective services to their citizens (Datla & Revesz, 2013).

Unlike the US independent agencies and commissions, the Kenyan constitutional commissions have been structured to have a chairperson and commissioners who mainly deal with policy matters and a secretariat that are involved on day-to-day management of the commission, what the US Congress referred to as 'splintered management'.

Decentralized (Two-tier) Structure

Like in any other democratized nation, Britain has embraced the idea of decentralizing administrative power from the executive agencies to independent agencies. This important journey started in 1968 when the Civil Service Committee headed by Lord Fulton recommended in its report the formation of autonomous and semi-autonomous organs to execute administrative roles of government departments (Cabinet Office, 2012).

As independent entities, these autonomous and semi-autonomous bodies are required to carry out their roles effectively as they are not subject to external or political control. However, this does not limit them from being subjected to scrutiny and supervision by ministers, permanent secretaries and the head of the agency.

These bodies are referred to as non-departmental public bodies (NDPBs) or quasi non-governmental entities. An NDPB is a governing body that plays a critical role in national development and may have powers greater or lesser than that of ministers. Basically, these bodies are clustered under different groups based on their formation and modality of operations. The law permits NDPBs to be established under Royal Charter, Companies Act and other enabling pieces of legislations. Most of the established NDPBs are headed by boards which comprise of a non-executive chair and board members. The board members are normally appointed by either ministers or the Queen upon advice of ministers in varied dockets.

The appointed board is granted powers and authority to appoint a chief executive officer tasked with the duty of overseeing the daily management of the roles, duties and mission of the board. The CEO and other staff of the board should not be civil servants. The Arts

Council England and the British Council are some of the NDPBs in Britain (Cabinet Office, 2012).

The fundamental objective of establishing independent institutions is to uphold national values that promote democracy and the spirit of constitutionalism and protection of people's sovereignty. The government of South Africa understands this basic principle and has established six autonomous institutions to promote constitutional democracy. The South African Constitution stipulates in Chapter 9 that the independent institutions should adhere to the law and execute their obligations without fear, intimidation, favour or prejudice. As envisioned in Article 2 and 3 of Chapter 9, all state departments and arms of government are required by law to accord these institutions support to ensure they perform optimally and effectively. The law forbids any person(s) or state organ against interference with the functions, roles and duties of these independent institutions (Murray, 2006).

In the Republic of South Africa, the National Assembly recommends to the President the appointment of the Auditor-General, the Public Protector, Commissioners for Gender Equality Commission, Electoral Commission and the South African Human Rights Commission.

The South African constitution creates the Electoral Commission as one of the six chapter nine autonomous institutions that consists of between three and five persons who serve for a single seven-year term. The commission's chairperson and the vice chairperson are designated by the president from among its members. The commission then appoints the chief electoral officer, who performs all administrative roles and executes other roles assigned to him/her by the commission or other enabling legislations. The chief electoral officer is the commission's accounting officer and also the head of administration.

The Commission on Gender Equality is another independent entity enlisted in the constitution of the republic of South Africa. The commission is mandated by the law to deliberate with the Public Service Commission on the appointment and approval of a qualified individual to perform the role of chief executive officer. The chief executive

officer is tasked with the role of managing daily affairs of the commission and setting out plans for the commission to execute its financial, administrative and clerical obligations effectively (Commission on Gender Equality Act No. 39, 1996).

As an independent institution, the Public Protector is legally allowed to appoint a person deemed suitable, experienced and qualified to assume the role of the chief administrative officer. The Public Service Commission could also appoint or second a chief administrative officer to the Public Protector. The chief administrative officer is required to help the Public Protector in carrying out her clerical, financial and administrative obligations (Public Protector Act No. 23, 1994).

This practice of appointing a chief executive officer in the above commissions and independent offices is replicated in all the chapter nine commissions of South Africa, unlike in the US where the administrative and financial functions of the independent agencies or commissions are done by the chairpersons. It is worth noting, however, that the law is very clear in each of these commissions that the chief executive officer is answerable to the commission.

A report by the International Institute for Democracy and Electoral Assistance (IDEA) on evaluating the performance of South Africa's constitution in 2016 indicated that based on thin compliance definition of the rule of law, the adherence to formal procedures and requirements, the chapter nine independent commissions generally complied with constitutional prescriptions. However, on the basis of thick compliance, observance to the substantive standards of justice and human rights, the independent commissions have varied compliance levels. It identified the funding financial arrangements of SAHRC, Gender Commission and the Public Protector of allocating their budget under the departments of national government reduced the level of independence from the executive and the possibility of undue influence. Another area of underperformance identified was lack of constitutional provision for mandatory public vetting process or public involvement when recommending and appointing of commissioners by the president to such institutions

as the SAHRC or Public Protector (South African Institute for Advanced Constitutional, Public, Human Rights and International Law, 2016).

Similar to most jurisdictions in the world, the constitution of Egypt acknowledges the formation of regulatory, national councils and other autonomous agencies, which exercise absolute technical, administrative and financial independence. Some of the autonomous national councils include; the National Council for Women, the National Council for Human Rights, the National Council for Persons with Disability and the National Council for Childhood and Motherhood. The Administrative Control Authority, Central Bank, the Central Auditing Organization, and the Egyptian Financial Supervisory Authority are some of the regulatory agencies and independent bodies in Egypt.

The Egyptian constitution stipulates that, the president should appoint an individual to head independent and regulatory agencies, but the appointed person should be confirmed by the house of representatives. The law prescribes for such heads to serve a maximum period of four years and only relinquish their positions under circumstances envisioned in the law (Egypt's Constitution, 2014).

The National Council for Human Rights, as an independent entity, consists of public figures not exceeding twenty five persons with experience and interests in human rights related issues. It is headed by a chairperson and a deputy chairperson who work in unison to realize the objectives of the council. The appointed council members serve a maximum term of three years. Additionally, the law allows the council in its wisdom to appoint a secretary general who also serve for a period of three years. The council has discretion to appoint a secretary general from among its members or from outside. In case the secretary general is not one of the council members, he is deprived the right to vote during the council's meeting (The National Council for Human Rights Law No. 94, 2003).

The Federal Republic of Nigeria's constitution has provided for fourteen federal commissions encompassing heads and commissioners vetted by the senate and appointed by the head of state. The commissions include the National Judicial Council, Federal

Judicial Service Commission, Independent National Electoral Commission, National Security Council, Revenue Mobilization Allocation and Fiscal Commission, Federal Civil Service Commission, Code of Conduct Bureau, National Defense Service among many others (Constitution of the Federal Republic of Nigeria, 1999).

The Independent National Electoral Commission, as stipulated in the provisions of the Electoral Act of 2010, is an autonomous body instituted to manage elections and other election related affairs in Nigeria. The commission comprises of a chairperson and twelve national electoral commissioners. The commission is required by law to appoint the chief electoral commissioner, who also acts as a secretary to the commission, to undertake the administrative roles and head the secretariat of the commission (Electoral Act, 2010).

The Revenue Mobilization Allocation and Fiscal Commission, as an autonomous entity, is composed of a chairperson and one member drawn from each federal state and capital territory. The president appoints commission's secretary, who is also the head of its secretariat. The secretary to the commission together with other staff within the secretariat implements decisions of the commission, performs duties assigned by the chairperson or the whole commission and ensures the commission realizes its goals (Constitution of the Federal Republic of Nigeria, 1999).

When a chair and a member are to be removed from office by the president, the principle of two-third majority rule by the senate is applied in all commissions. If the majority of the senators in the senate vote in favor of the chairperson and commissioners of a given commission's removal, the president will be compelled to remove the chairperson and the members.

As one of the developing nations in East Africa, Tanzania's constitution has paved way for the formation of four key independent commissions. These commissions include; the Joint Finance Commission, the Judicial Service Commission and the Electoral Commission. It is imperative to note that, the secretariat of these commissions varies across the spectrum (Constitution of the United Republic of Tanzania, 1977).

The Tanzanian National Electoral Commission comprises of a secretariat whose head is the director of elections. The law empowers the president to appoint the director of election, who is normally selected from names of senior civil servants proposed by the commission. Like in other commissions, the director of election is also the chief executive officer and the secretary to the commission. As a result of this, he is tasked with the obligations of overseeing, supervising and executing all administrative roles and implementing the commission's policy directives (Constitution of the United Republic of Tanzania, 1977).

The Tanzanian constitution requires that the president appoints a qualified individual to head the Judicial Service Commission and perform the role of the secretary to the commission. Like in other commissions, he is obligated by the law and the commission's policy to execute administrative functions of the commission and any other duty assigned under the provisions of the legislations (Judicial Service Act, 2005).

Unlike most of the commissions in Tanzania, the Commission of Human Rights and Good Governance is a unique entity headed by an executive secretary. Like in other commissions in Tanzania, the president after consulting with the members of the commission, appoints the executive secretary. The law requires that, he should have served in senior position in the government and exemplifies outstanding experience in good governance and leadership. The executive secretary is obligated to implement policy decisions and administrative duties of the commission (The Commission for Human Rights and Good Governance Act, 2001).

It is imperative to note that all secretariats in Tanzania have two common features. First, all heads of secretariats are appointed directly by the president and not the commission. However, the president can only appoint such heads after consultation with the commission. Secondly, all heads of the secretariats including their employees are required to either be employees or former employees in the civil service.

The Kenyan 2010 Constitution has established commissions and other independent entities with clear roles, functions, and object of upholding the sovereign will of the people and

ensuring that all state agencies support principles and values that enhance democracy and constitutionalism in the country. It requires that each commission have a secretariat tasked with the responsibility of executing the management functions of that commission. The commission's secretary who also serves as the head of the commission's secretariat, performs other roles provided in the constitution or delegated by the commission. The secretary also coordinates, organizes, and implements plans and affairs of the commission, supervises and assigns duties to the staff of the commission.

Independent Commissions in Kenya

The constitutions on new independent countries in the 1960s were motivated by the need to sever links with the colonial powers, coming with rules for living with different communities that the colonialist had prevented from becoming a nation, and delineation and consolidation of state independence. The colonial state structures were reorganised to present elected forms of representation founded on a new belief of nationality, not always alike or common and qualified by variation and differences explicit in ordinary laws (Ghai, 2005).

The Kenyan 1963 independence constitution provided for four independent commissions; the Electoral Commission (mainly referred as ECK), the Police Service Commission (PSC), the Public Service Commission (PSC) and the Judicial Service Commission (JSC). These constitutional bodies had membership of between five and ten members with Police Service Commission and Judicial Service Commission having five commissioners each, the Public Service Commission had seven, and the Electoral Commission having the highest at 10.

With the fall of communism and the collapse of the Berlin wall, the majority of military or single party governments could not survive and this led to a new wave of democratization. With these pressures, many countries managed a kind of changeover to democratic constitution, in quest of curing the many ills of bureaucratic and corrupt regimes that had existed then. Independent commissions and agencies were established within these democratic constitutions to perform critical and sensitive functions that were necessary to

ensure open administrative and political systems. Thus the delineation of electoral constituencies and supervision of elections were the responsibility of independent electoral commissions, the management of community and public land were done by an independent commission and prosecutorial powers were vested in an independent director of prosecutions to check the abuse of the criminal process (Ghai, 2005).

Kenya was not left out in these developments. The establishment of independent commissions was part of organisational shake-up related to democratic changes. It was an effort to disassemble and ensure that democracy prevails. The legislature, executive and judiciary in Kenya had been blamed for dictatorship, breach of human rights, maladministration, and corruption in the pre-2010 constitution period. A general observation outlined that under the pre-2010 constitution, public officers were subjected to inadequate oversight. Under such conditions, independent commissions were to be created for accountable administrative and political system (Ochieng, 2019).

The Constitution of Kenya 2010 is established on the principle of promoting democracy coupled with good governance. In order to realize this fundamental goal, the constitution has delegated administrative powers to independent agencies, autonomous commissions and the presidency. Existence of these independent agencies has played an integral role in championing for good governance through creation of effective balance and checks within and among government organs.

The Kenyan constitution, which has borrowed heavily from the chapter nine of the South African constitution, postulates that it is mandatory for all commissions to be headed by a secretary to the commission who is also the chief executive officer. The Kenyan constitution further provides that all independent entities and commission have powers to recruit their employees, exercise their powers as conferred in the constitution and other enabling legislations.

Comparative analysis of Kenyan constitutional commissions and independent offices with those of other countries shows that there is no uniform approach in the role of the secretariat

in the governance framework of constitutional commissions and independent agencies, councils and authorities. Each country's constitution has provided specific and sometimes similar roles to the members of the independent agencies and to the secretariats of the commission.

Speculations often arise regarding the independent commission's ability to issue 'mandatory' sanctions or to recommend 'mandatory' corrective actions. The key question is whether the findings, or recommendations made by the independent commission can just be ignored by an organisation, individual, public officer, state officer, or state organ. This will clearly affect the way these commissions perform their roles for which they were created. The effectiveness of independent commissions will depend on how their deliberations, pronouncements, conclusions and recommendations are binding and are adhered to. This will address the disapproval that independent commissions are wasteful and ineffective. These commissions play a key role towards reconstituting the Country's progress towards dependable culture of accountability and constitutionalism. This however depends on the extent to which the independence of independent institutions is upheld and respected (Ochieng, 2019).

The Kenyan constitutional commissions and the role of secretariats are similar with those of the South African constitutional commissions. However, Britain, Egypt, Nigeria and Tanzania's constitutional commissions and independent agencies slightly differ from the Kenyan commissions. In the United States, the chairperson of independent agencies or commissions is also the chief executive officer. In Britain however, the secretariat is part of the mainstream civil service seconded to the independent agencies. In Egypt, Nigeria and Tanzania, the chairs of the commissions or independent authorities do have some executive powers and the secretariats are civil service employees and not of the commissions or independent agencies.

We note from the literature above that the United States of America has adopted the centralized (one-tier) structure of governance, where the chairpersons of independent commissions and agencies act as the chief executive officers and perform primarily

administrative roles of a commission. However, most of the other jurisdictions have adopted the decentralized (two-tier) structure, where the chairperson and commissioners appoint chief executive officers and the secretariat to perform administrative roles of the commission or agencies. The variances in the governance structures in these independent commissions and agencies is what has informed the current study on the governance of constitutional commissions in Kenya with special focus on the IEBC and the SRC.

1.9. The Conceptual Framework

The overall principle of hierarchy of powers within a bureaucratic system ensures that decisions made at higher echelon of leadership trickles to lower levels within the organization, thus enhancing efficiency and productivity. Such systems enable the managers to effectively supervise, monitor and scrutinize performance of junior employees in the organization. Notably, the concept of hierarchical office authority is evident in all bureaucratic systems both in public or private organizations (Shafritz, Ott, & Jang, 2005).

According to classical theories, the gap between those who have power, money or prestige and those who do not is great and inevitable in organizations. Hierarchy is part of the system of authority that is essential for the maintenance of order. Organisation is a system of procedures and guidelines that function with a line of authority that guarantees consistent implementation of top leaders' decisions by those at the bottom. Leaders have the superior knowledge and right to justify their control. Similarly, ordinary members must be managed closely in a tight chain of command if they are to be persuaded to perform in the job as they lack industriousness. This will require rare talent and places great responsibility on leaders. Leaders must therefore be rewarded accordingly, not only as a matter of just compensation but also as a means of assuring that the very best persons are attracted to and remain in positions of leadership (Tannenbaum, Kavcic, Rosner, Vianello, & Wieser, 1974).

A typical hierarchical structure is as shown in Figure 1.1.

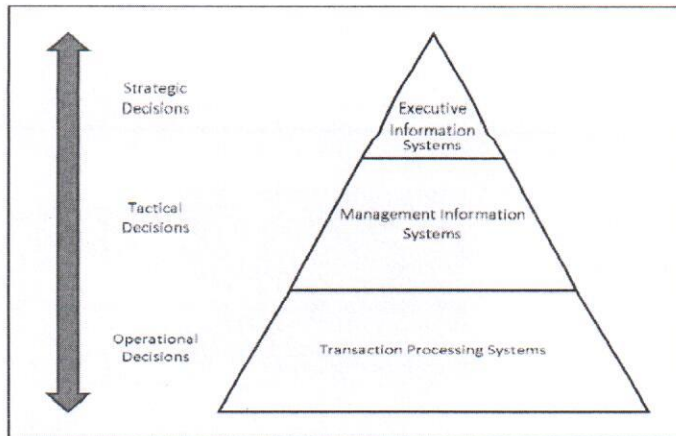
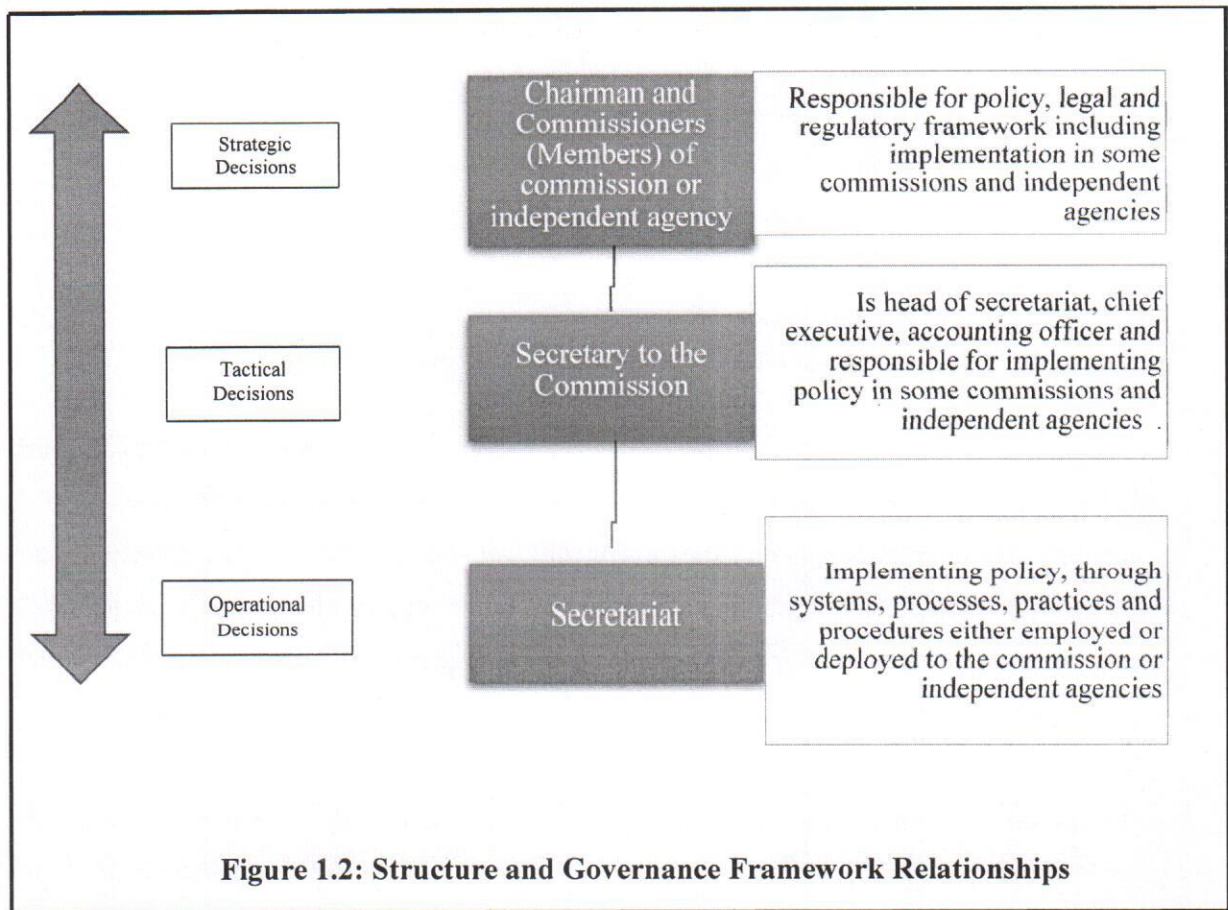


Figure 1.1: Hierarchical Structure Typology

As illustrated in the Figure 1.2, governance involves setting directions: the aim toward which commissioners or members steer themselves and its organization. It involves people: commissioners or members and staff exercising and stating their attitudes, principles and morals on matters pertaining to the mandate of the organization. Finally, it involves structure and processes: the prescribed means to achieve the goal and to manage and direct an organization's operations and activities.

Governance is not a single concept but a multifaceted concept that entails aspects of procedures, practices, and processes, which collectively influence the management of an entity. The success of any organization depends on how these aspects are interlinked to enable a conducive environment for the organization to execute its roles, functions and goals effectively. Additionally, the nature of associations established by these attributes will champion for effective utilization of knowledge, skills and resources in the organization, thus enhancing productivity, accountability and transparency.



The ideal system of relationship between the commissioners and the secretariat should be anchored on the tenet of rationality, hierarchical distribution of authority coupled with logic alignment. The secretariats, under delegated authority, are required to implement the strategies, policies and decisions of constitutional commissions. The chair and members of the commission should provide leadership by formulating policies and providing leadership to the secretariats. In this way, there is order and respect for authority.

This conceptual framework will be relevant as the study focuses on the relationships between the secretariat and the commissioners or members of the commission. These relationships affect the structures and processes of the commissions and consequently the mandate of the commissions.

1.10. Research Hypotheses

The following research hypotheses would be tested:

Hypothesis One:

The creation of commissions with a secretariat led by a chief executive officer that directly draw their mandate from the constitution or legislation has impacted negatively on the governance of constitutional commissions.

Hypothesis Two:

The creation of commissions with a secretariat led by a chief executive officer that directly draw their mandate from the constitution or legislation has enhanced good governance of constitutional commissions.

1.11. Research Design and Methodology

a. Research Design

The study employs a period-based comparative research design where two commissions are studied on the basis on when they were formed, one formed before the promulgation of the Kenyan 2010 constitution and the other after promulgation of the 2010 constitution. This was expected to show the differences on the governance framework of one of the commissions (the IEBC) that was established by the 1963 independence constitution and of a new commission (the SRC) that did not exist before the Constitution of Kenya, 2010.

The period-based comparative research design investigated the relationship between commissioners and the chief executive officer and the secretariat's impact on governance framework of constitutional commissions over the study period. It analyses the relationships between the chief executive officer, the secretariat and the commissioners and establishes the impact of these relationships in order to identify the experiences, challenges and prospects of IEBC and SRC over the period 2010-2019.

b. The Population

The study's target population was all the constitutional commissions in Kenya. These are the commissions established by chapter fifteen of the Constitution and with enabling legislation as indicated in Table 1.1:

Table 1.1: Constitutional Commissions

1. The Commission on Administrative Justice
2. The Commission on Revenue Allocation
3. The Independent Electoral and Boundaries Commission
4. The Judicial Service Commission
5. The Kenya National Commission on Human Rights
6. The National Gender and Equality Commission
7. The National Land Commission
8. The National Police Service Commission
9. The Parliamentary Service Commission
10. The Public Service Commission
11. The Salaries and Remuneration Commission
12. The Teachers Service Commission

Source: Constitution of Kenya, 2010 and Respective Legislations

The constitutional commissions' governance structure has been prescribed in the Constitution and respective enabling legislation. The same commissions have had governance challenges resulting into conflicts and infighting between the secretariat and the commissioners as to their respective roles.

c. The Sample

A sample size of two commissions was selected representing the population using purposive sampling technique to achieve the desired representation. One of these commissions, the IEBC, represented those that existed before the Constitution of Kenya 2010 and the other, the SRC, represented those created by the Constitution of Kenya 2010. This ensured that the governance framework of commissions before and after 2010 Constitution was represented.

The two commissions are very visible and politically sensitive. The IEBC is one of the oldest commissions in the country and has been in the limelight because of suspicions and hostility between the secretariat and the commissioners. The IEBC has been heavily

criticized for many failures in meeting its constitutional mandate leading to challenges in the Supreme Court, removal of its chief executive officers, resignation of commissioners, and a general feeling among the citizens that the commission is failing in realizing its responsibilities. The SRC has equally faced operational challenges from the legislature and labour unions in delivering its mandate but has had smooth operations and harmonious relationships between the commissioners and the secretariat.

d. Data Collection

Both primary and secondary sources of data were used.

(i) Primary Data

The sources of information and data were from key informants who included current and past chief executive officers, members of the secretariat and commission, and the questionnaires administered. Observation and interview were also used while administering the questionnaires from the key respondents to gain first-hand experience and notice any unusual aspects. Semi-structured interviews were held with key informants from IEBC and SRC to obtain further insights on practical governance experiences, challenges and prospects.

(ii) Secondary Data

Document analysis and review on the organizations records was also undertaken to obtain information relevant to the governance framework of the two organizations. These included annual reports, internal reports, audit reports, and other published and publicized reports on the two commissions sourced from both printed and electronic media.

e. Data Analysis

Data and information obtained from the key respondents and records was organized, edited, cleaned, recorded and analyzed through content analysis. The qualitative aspect of data analysis was undertaken by examining the themes emerging from the Key Informant Interviews with top executives of the two commissions. The interviews were supplemented with information obtained from perusing parliamentary reports and newspaper articles

having a bearing on the work of the two commissions. This provided additional information that could not easily be obtained. The research instruments were taken through pilot testing for validity and reliability. Face validity, which represents subjective views on what the instruments measurement cover, was established through expert opinion, consultation with peers and other research experts.

The study analyzed the commissions' hierarchical reporting relationships and the extent the commissions attached to principles of governance in their management. It also analyzed the participation of the secretariat staff in the strategic, administrative and human resources responsibilities of the commissions and established whether the commissions had any formal organisation structures and accountability mechanisms.

CHAPTER TWO

THE EVOLUTION OF CONSTITUTIONAL COMMISSIONS IN KENYA

2.1. Background

A report by the Kenya Constitutional Conference 1962 indicates that the architects of the independence constitution of Kenya had the objective of crafting a united country, capable of economic and social progress in the modern day world and a Kenya where the citizens believe in individual rights and liberties. The purpose of independence constitution therefore, was to improve on the repressive colonial system of government (Ochieng, 2019).

The 1963 constitution established the executive, judiciary, and the legislature as the three arms of government and the offices of the auditor general, controller and the attorney general, with adequate checks-and-balances to power. It also provided for decentralization of power to the lowest level through establishment of semi-federal government comprising of central, regional and local governments (Constitution of Kenya, 1963).

Because of the need for checks and balances and decentralization of power, the independence constitution provided for four independent commissions; the Electoral Commission, the Police Service Commission (PSC), the Public Service Commission (PSC) and the Judicial Service Commission (JSC). These constitutional commissions had membership of between five and ten members with the Judicial Service Commission and the Police Service Commission having five commissioners each, the Public Service Commission seven, and the Electoral Commission having the highest at 10.

A commissioner could only be removed from office when he was unable to undertake the responsibilities of his office, or for misbehaviour from office and only when an inquiry on his removal had been referred to a tribunal that recommended to the governor-general the removal from office for the inability specified or for misconduct. The commissions regulated their own processes and, with the agreement of either the head of government of Kenya, region or a regional assembly conferred powers or imposed duties on officers or

authority for the discharge of its functions. The decisions of the commission required the agreement of a majority of all the members present (Constitution of Kenya , 1963).

One common feature in all these commissions is that their members of staff were either employees of the government of Kenya, regional assembly or the region. The remuneration payable to members of commissions were charged to the consolidated fund.

It was observed by the high court of Kenya that from 1963 to 2004, the constitution had been subjected to thirty eight amendments. It noted that the changes from a colony to a republic status, abolition of bicameral legislature and regionalism, changes on the requirement for majority participation for constitutional amendments, change of executive governance from parliamentary to a presidential system, removal of security of tenure of judges and other office holders, and the making Kenya a one party state were the most significant constitutional changes. By Constitution of Kenya Act. No. 5 of 1969, parliament combined all the preceding amendments, made new amendments and reproduced a revised constitution. The consequence of these amendments was to substantively change the constitution. These changes altered the configuration or structures of the constitution. While the 1963 constitution was a rich document with regulations to authority, this 1969 constitution had clipped off most of these regulations. This resulted into an extremely consolidated structure with greatest powers exuded from the president, suppressing other sources of power, depriving the electorate equitable and orderly processes of access to public goods (Ochieng, 2019).

2.2. The Police Service Commission

The 1963 Constitution established an independent Police Service Commission with the mandate of reviewing all matters concerning to the salaries, allowances, the standards or qualifications required for the police force and their other conditions of service. The commission would also give advice, as may be required, to the Minister, to the Inspector-General of Police and to the Law and Order Committee of any Regional Assembly. The Police Service Commission was also required to advice the Governor-General on the

appointment and removal of the Inspector General of Police from office (Constitution of Kenya, 1963).

The commission was composed of the chairperson of the Public Service Commission and a justice of Appeal or judge of the Supreme Court chosen by the chief justice as *ex officio* members and three other commissioners appointed by the Public Service Commission's chairperson and the chief justice after consulting the Inspector General of Police. The chair of the Police Service Commission was appointed by members from among the three appointed by the commission. A commissioner could only be removed by the Governor-General from office for infirmity, misconduct or any other cause after referral to a tribunal. The tribunal, which is headed by a chairperson and not less than two other members, had to recommend to the Governor-General that the member(s) be removed from office for infirmity or for misbehaviour (Constitution of Kenya, 1963).

The Police Service Commission ensured that independent Kenya had an effective and efficient police force that was accountable to the people and not repressive as the colonial police force.

The Constitution of Kenya (Amendment) Act, No. 28 of 1964 abolished the Police Service Commission and its functions shared between the President and the Commissioner of Police. With the amendment, the president was given exclusive power to appoint and dismiss the commissioner of police. The Public Service Commission was vested with the power to appoint, confirm appointments, discipline, and remove from office specified ranks of officers. By abolishing the Police Service Commission and removing the operational independence of the police and the security of tenure of the Inspector-General of Police, the police force's integrity and autonomy were severely dented. This led to fast politicisation of the police activities and operations and led, especially to the suppression of opposition rights (Constitution of Kenya Review Commission (CKRC), 2005).

Instances of inappropriate decision making by the Kenya police because of external interference and influence became the norm. These included the failure to continue with

and finalize cases of police officers and government employees who were exposed committing crimes, instructions from the Commissioner of Police to release arrested prisoners, and the deliberate use of administration police officers in campaigning activities (Commission for Inquiry into Post Election Violence, 2008).

With the key findings of both the Constitution of Kenya Review Commission and the Commission of Inquiry to the Post Election Violence being the need to reform the Kenya police force, it became an absolute necessity for the drafters of the 2010 constitution to ensure that an independent, effective, efficient and accountable police service was re-established. The Police Service Commission was reinstated by the 2010 constitution with the mandate, like the other Chapter Fifteen commissions, of ensuring that all state organs uphold principles and values that enhance democracy and constitutionalism in the country and protect the sovereign rule of the people (Constitution of Kenya Review Commission (CKRC), 2005).

The Police Service Commission established by the 2010 Constitution is composed of nine members who are either serving or retired police officers as compared to five members in the 1969 constitution commission. The functions of the commission is to employ persons to hold office or act in the service, confirm appointments, promote and transfer officers in the police service, enforce observance of due processes, take necessary disciplinary action amongst the officers and oversee the removal of persons that hold or act in offices within the police service. Unlike the 1963 independence constitution's Police Service Commission, the power to appoint the Inspector General of Police was not expressly given to the Commission by the 2010 constitution but through the National Police Service Act, 2011. Despite this provision in the Act, the commission was also not the only body or membership that made the selection of the Inspector General. There were other parties involved in the process that included the offices of the President, the Ethics and Anti-Corruption Commission (EACC), the Prime Minister, the Judicial Service Commission, the National Gender and Equality Commission and the Kenya National Commission on Human Rights, all appointed by the Commission (The National Police Service Act, 2011).

The lack of express authority for the commission's to appoint the Inspector General in the constitution would come to haunt the commission, when in 2014, the executive through the National Police Service (Amendment) Act No. 11 of 2014, took away that power from the commission and gave it to the president. The commission has now been reduced to only a member of a seven-member selection panel that is appointed by the president to shortlist, interview and shortlist three qualified applicants and submit to the president for nomination and subsequent appointment upon approval by parliament. The inspector general is among the few presidential appointments that require the approval of the national assembly and the senate. The amendment Act also created another oversight body, the Service Board, within the national police service that hived off some of the functions of the National Police Service Commission. Among the functions of the service board is to advise the Inspector General on management, placement and posting of officers within the Service, identify officers to be recruited, promoted, transferred and disciplined and submit to the National Police Service Commission for consideration (The National Police Service (Amendment) Act , 2014).

The 2010 constitution's Police Service Commission is weaker as compared with the 1963 constitution commission. The 2010 commission has less powers and with the amendment of the National Police Service Act in 2014, the police service to some extent, has transformed to become part of the civil service, which may mark the foundation of a culture of political influence and police service control by the executive, similar to pre-2010 period.

2.3. The Judicial Service Commission

The Judicial Service Commission was established in Section 184 of the 1963 constitution and comprised of the chief justice as the chairperson, two members nominated by the governor-general from among the justices of Appeal or the puisne judges of the Supreme Court as advised by the chief justice, and two members from among the commission members nominated by the governor-general as advised by the chairperson of the public service commission (Constitution of Kenya, 1963).

The chief justice was appointed by the governor-general with the recommendation of the prime minister. The constitution required the prime minister to advise on appointment of the chief justice to the governor-general only after consultation with regional assemblies' presidents and concurrence with not less than four. The governor-general did the appointment of members of the public service commission on the advice of the judicial service commission. This twin advises on nomination to either commissions by the two commissions assured them of their independence as they actually determined, to a considerable extent, their own membership (Constitution of Kenya, 1963).

The 1963 constitution's Judicial Service Commission had the power to appoint judicial officers that included court registrars across the country and its decisions was decided by majority vote of its members. It also advised the governor-general on the constitution of the Public Service Commission. The commission, in exercising its functions, was not subject to control or direction of any person. The principal feature of the independence of the judiciary was that it was the final constitutional arbiter. The commission operated with judicial officers who enjoyed security of tenure and appointed through a laborious process that would guarantee that only competent judges were appointed (Constitution of Kenya Review Commission (CKRC), 2005).

The independence constitution was subjected to various amendments that sought to strengthen the institution of the executive and weaken the judiciary and legislature and other institutions of governance. The 1969 constitution, provided in section 68 that the JSC would constitute the chief justice as chair, the attorney-general, a judge of the court of appeal and a judge of the high court, both appointed by the President, and the chairperson of the public service commission. The president appointed all these members directly or indirectly as he appointed the chief justice, the chairperson of the PSC, and the attorney-general to their substantive posts. This is unlike the 1963 constitution provision that the president consults the public service commission in his appointments. The domineering effect of the president in the JSC generated a perception among Kenyans that judges and magistrates lacked real or perceived independence to protect the citizens from the oppression by the government (ICJ Kenya and Authors, 2016).

With the 1969 repealed constitution, the functions of the JSC were reduced to advisory role during judges appointment and undertaking disciplinary action on the registrar of the high court, kadhis, magistrates and other judicial officers and staff. Such crucial roles usually vested in judicial service commissions as strategy and policy decision making for the judiciary, disciplining judges and judicial officers, evaluating and managing performance, and managing courts in some jurisdictions were excluded from the commission. The Amendment Act No. 14 of 1986 of Kenya's constitution further interfered with the functioning of the commission by removing the security of tenure of offices of the controller and auditor-general and the attorney-general. Another amendment of the constitution, Act No. 4 of 1988, lifted the security of tenure of commissioners of the public service commission, the judges of the court of appeal and high court (ICJ Kenya and Authors, 2016).

These constitutional amendments accorded the president vast power over the judicial service commission. This state led to lack of public acceptability of the judiciary as the commission did not implicitly contribute to its independence leading to agitation for judicial reforms and new constitutional order in Kenya.

The Constitution of Kenya Review Commission, in their report of 2005, recommended the establishment of an independent judicial service commission with the mandate of recommending individuals to be appointed judges by the president, appraising and making recommendations on the conditions and terms of service for the judges, magistrates and other judicial officers and staff. It would also among others, formulate and implement training and development programmes for judges, magistrates and paralegal staff receive, examine any petitions on the conduct of judges as per the constitution and advise the government on improving efficiency in the administration and access to justice, including legal aid (CKRC, 2005).

The rule of law and the administration of justice can only be upheld if the judiciary is and is seen to be autonomous, neutral, and competent. It is important therefore, for judicial service commissions to be independent and for their members to have adequate experience

and expertise to evaluate the quality of candidates. It is recommended that not less than fifty percent of the members of the commission should be judges, academic and legal practitioners' to enhance the effectiveness of the commission. It is also proposed as a standard best practise that a commission should include representative of members of the public to offer a public view on the judicial system and contribute expertise in other related disciplines such as finance or human resources. The legislative framework should safeguard the appointment of public representatives from political control and ensure that there is gender parity and minorities are well represented (Smit, 2015).

The advantage of a judicial service commission will be exploited if its mandate covers all the judges, judicial officers and staff and is entrenched in a legal system that guarantees its existence, provides for its structure and operational independence (Bingham Centre for the Rule of Law and University of Cape Town, 2015).

The 2010 constitution's Judicial Service Commission established in Article 172 of the constitution met the standards of best practice set out above. The JSC has eleven commissioners who are representatives of the various stakeholders in the administration of justice sector. The commission is chaired by the chief justice, who is nominated by the judicial service commission and, if approved by the national assembly, appointed by the president. Other members include one elected representative each of the supreme court and court of appeal judges, one representative of the high court and one of the magistrates court elected by the association of judges and magistrates members. The two representatives of the association of judges and magistrates must be of either gender complying with the principle of gender representation. Other members include the Attorney General and one man and one woman, elected by members of the Law Society of Kenya, the statutory body responsible for the professional regulation of advocates in Kenya. This membership brings in practitioners' experience and concerns into the management of the commission. The members representing the public, who are not lawyers, are one man and one woman and are nominated by the president and, after approval by the national assembly, appointed to the commission. Finally, a nominee from of the public service commission completes the list of members to the judicial service commission. The chief registrar of the judiciary is

designated as the secretary to the commission. Apart from the chief justice and the attorney-general, all other members of the commission serve for a renewable term of five years, if still qualified. This intricate arrangement of appointment of members is envisioned to secure the independence of the commission from the executive arm of government (Constitution of Kenya, 2010).

The current Judicial Service Commission has met most of the principles espoused by *the Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth*. Equally, the two term limits ensures that the commissioners do not overstay their usefulness and develop stakes within the administration of justice. The judicial service commission is mandated to uphold and assure the independence and responsibility of the judiciary and ensure efficient, effective and transparent administration of justice. Another key function of the commission is to present a list of those to be appointed as judges to the president. Unlike the judicial service commission of 1969 constitution where the president appointed the chief justice without any consultation, the 2010 constitution confers powers to the president to appoint the chief as recommended by the judicial service commission and after approval by the national assembly. The approval by the national assembly and recommendations by the JSC are intended to avoid superseding party-political considerations in these judicial appointments. The president appoints other judges of the supreme court, the high court and court of appeal as per the recommendations of the JSC without the president circumventing the process (Constitution of Kenya, 2010).

The commission is accountable to both parliament and the executive through the constitutional requirement that each independent commission submit a report to the president, the national assembly and the senate at the end of each financial year or on a particular issue at any time required by the president or by both houses of parliament. With these reports, the executive and the legislature are able to review the performance of the commission and make any resolution thereon. The commission is also required to prepare and present its annual budget to the national assembly for consideration and appropriation and, at the end of its financial year, submit its annual accounts and financial statements to

the auditor general for audit. These forms of reporting are necessary for accountability, transparency and openness of the commission despite their operational independence.

The 2010 constitution has established a judicial service commission that is wide-ranging and more representative in structure compared to both judicial service commissions' of 1963 constitution and 1969 constitution. Further, the structure of the JSC provides for gender diversity in election of members to ensure gender representation. Nonetheless, it is notable that the judiciary representatives take up five seats in the eleven-member commission, and would create an influential lobby in JSC.

2.4. The Public Service Commission

The 1963 constitution's Public Service Commission was composed of a chairperson, a deputy chairperson and five commissioners who were appointed by the governor-general upon recommendation by the Judicial Service Commission. The public service commission made appointments to offices in the public service, confirmed appointments, disciplined officers that held or acted in such public offices and could remove them from office. The commission was represented in all the seven regions of the country existing at independence (Constitution of Kenya, 1963).

The governor-general, as advised by the commission, appointed the attorney-general, the auditor-general, the coast region's liwalis and mudirs, the permanent secretaries and the secretary to the cabinet. The members could only be removed upon investigation and recommendation by a tribunal established for that purpose. The governor-general established the number and kind of offices for the country after which the public service commission supplied the staff (Constitution of Kenya Review Commission (CKRC), 2005).

The 1969 constitution changed the appointment of commissioners of the public service commission to direct appointment by the president unlike before where the governor general made the appointment upon advice of the judicial service commission. Through the Constitution of Kenya (Amendment) Act No. 7 of 1984, its membership increased from

seven to seventeen. The public service commission was also given powers to recruit officers to the local governments. The Amendment Act No. 4 of 1988 of Kenya's constitution eliminated the security of tenure of the PSC commissioners. This meant that the president, without consulting anyone, could dismiss members of the commission and appoint his preferred choices. The security of tenure of the commissioners was however, restored through the Constitution of Kenya (Amendment) Act No. 2 of 1990.

These constitutional amendments took away the principles of public service objectivity, fairness, and independence. There was substantial uneasiness when public officers were unable to freely exercise their powers without political influence, and the blatant abuse of procedures for appointment to the public service. This created an impression of a public service that disregarded meritocracy, competency and experience when undertaking public service appointments. As a result therefore, recruitment processes that were open to public scrutiny and offices that were not only answerable to the people but protecting public interests became necessary. This led to the call for adequate remuneration, security of tenure and strict impartiality during the constitutional review process to restore public confidence in the public service (Constitution of Kenya Review Commission (CKRC), 2005).

The public service commission created by the 2010 constitution consisted of a chairperson, a vice chairperson and seven commissioners appointed by the president upon approval by the national assembly. Its mandate included the establishment and abolishing of public service offices and filling of those offices, confirmation of appointments, removal of persons that hold or act in those offices and disciplinary control of all persons holding public offices. Another key function is the ensure compliance with the principles and values of public service, evaluating and reporting their compliance to the president and parliament (Constitution of Kenya, 2010).

Compared to the pre-2010 constitutions, the 2010 constitution's public service commission has some elements of independence. This independence comes from the appointment and the approval processes together with the fact that they have security of tenure. However,

given the political nature of the nomination process, political and party influence by the incumbent executive cannot be ruled out. This challenge is also being experienced by other authorities like the United States of America, when a vacancy arises with different party is in office.

Through amendment of the Service Commissions Act in 2002, the judicial service commission and the public service commission were given powers to appoint the secretary of the commission, who could be either a public officer or not, and appoint other staff necessary for the discharge of their functions. The appointed secretary however, could serve in more than one commission and was not a member of the commission or have any vote in commission's deliberations (Service Commissions Act, 1955).

2.5. The Electoral Commission

The 1963 constitution established under section 48 the Electoral Commission with the speaker of the senate as the chairperson and the speaker of the house of representatives as the vice chairperson. The governor-general appointed one member according to the advice given by the prime minister. Seven other members were also appointed by the governor-general as advised by the president of the regional assembly to represent each region to make a total of ten members (Constitution of Kenya, 1963).

The mandate of the independence Electoral Commission was to direct and supervise the register of voters and conduct elections of members to the house of representatives, the senate and the regional assemblies. It also determined constituency boundaries and conducted any referendum to alter the constitution (Constitution of Kenya, 1963).

The amendment of the constitution in 1969 saw changes in the composition of the Electoral Commission and the appointment of the commission's chairperson. The president appointed the chairperson and at least four members to the commission. The functions remained the same as stated in the 1963 constitution save for the fact that there were no elections for the senate and the regional assemblies. The mandate to conduct a referendum

was also removed as changes to the constitution became the responsibility of parliament and not the electorates (Constitution of Kenya (Amendment) Act No. 5, 1969).

Though the independence constitution established an electoral commission, it had a passive role as the supervisor of elections, an office within the office of the attorney-general, oversaw the election processes. The supervisor of elections was an extension of the Colony and Protectorate Ordinances that governed the legislative council elections and the election regulations established by the colonial government to govern the Kenyan colony. Upon attainment of independence, these were incorporated in the National Assembly Elections Act, 1960 and National Assembly Elections Regulations, 1964. Subsequently, the supervisor of elections became part of the National Assembly and Presidential Elections Act, Chapter 7 of the laws of Kenya upon attainment of independence.

Despite having broad powers to oversee the elections and register voters, the supervisor of elections was not independent. Its independence from the executive was non-existent and its officers could be removed without cause. The supervisor of elections was tasked with administration of elections. The supervisor of elections was a public servant supported by other civil service officials from the provincial administration. District commissioners, upon appointment as returning officers, were answerable at the constituency level for all electoral operations. These officers were responsible to the president, who was always a candidate in the elections as there existed no term limits on the presidential office holder. As a result, there was no public trust in the electoral processes as they were clearly biased and lacked the independence required. In this period, the electoral body undertook only one of its constitutional mandate of demarcating constituency boundaries. The result was more obvious during the disgraced *mlolongo* (queue-voting) elections of 1988. The parliament removed the supervisor of elections office in 1992 after much campaigning for legal and political changes and with the return of multiparty politics in Kenya, the Electoral Commission was recognised as the only body responsible for conducting elections.

Through the Constitution of Kenya (Amendment) Act No. 6 of 1992, the Electoral Commission, which eventually became the Electoral Commission of Kenya (ECK), was

given additional mandate of registering voters, maintaining and revising the register of voters, and presiding over the local government, the national assembly and the presidential elections. The Constitution of Kenya (Amendment) Act No. 9 of 1997 increased the number of commissioners from a chairperson and not less than four members to a chairperson and not less than four members and not more than twenty-one members. The same amendment provided for all members of the commission to be Kenyan citizens and for the chair and the vice-chair of the commission to be persons qualified under the constitution to hold the office of a judge of the high court or a judge of appeal or to have held such positions in the past. There were no additional qualifications for any commissioner, except the requirement that members of parliament, employees of the public service or members of the armed forces were not allowed to be members of the electoral commission (Constitution of Kenya, Revised Edition 2008, (2001)).

An agreement by the Inter-Party Parliamentary Group (IPPG) was entered in 1997 to appease crusaders for complete overhaul of the electoral management body by increasing the number of commissioners by additional ten persons nominated by political parties represented in parliament. As a result, political parties appointed the additional members to top up the initial eleven appointed by the incumbent president (Independent Review Commission, 2008). The existence of political parties' appointees presented a sense of balance and approval, in spite of the electoral commission internal weaknesses. However, when the positions of commissioners fell vacant for renewal in 2006 and 2007, the president then overlooked the IPPG agreement and singly selected the commissioners leading to dissatisfaction and doubts on the independence of the Electoral Commission of Kenya (Independent Review Commission, 2008).

In the build-up to the 2007 general election, the president without any consultation, reappointed all the commissioners against the IPPG consensus of 1997 that commissioners be appointed by the major political parties. Subsequently, the ECK eventually mismanaged the presidential election, leading to post-election violence and a leadership crisis that was resolved by the Panel of Eminent African Personalities appointed by the African Union. To settle the 2008 post-election dispute, the Independent Review Commission (IREC) was

appointed to examine the conduct of the general election held on 27 December 2007, with more focus on the election of the president. In its report, IREC established several missteps and oversights during the 2007 general election and made various proposals to reform and improve the Kenya's electoral management processes. It established that the public trust and the professional standing of ECK commissioners and staff and its legitimacy had been severely and irreversibly weakened by the way it had mismanaged the general election of 2007.

IREC therefore, recommended fundamental restructuring of the commission, or in the alternative the establishment of a new electoral management body that had a lean supervisory and policy-making board that were recruited and appointed in a competitive and transparent process, and working with a properly trained and professional secretariat. It also proposed that the new electoral body be given a new name, corporate image and new values, and be committed to administrative excellence and electoral integrity in service delivery. Parliament, in late 2008 disbanded the ECK and established the Interim Independent Electoral Commission (IIEC) with improved election management powers and security of tenure for commissioners to succeed the ECK for an interim period of two years, as they concluded the constitution review process. In reconstituting the new IIEC, the former employees of ECK were all re-deployed to the civil service denying the new IIEC the institutional memory essential for its successful set up (Open Society Foundations, 2015).

Other than the Constitution of Kenya and section 3B of the National Assembly and Presidential Elections Act, there was no other law providing for the governance aspects of the ECK's. There was no distinct legislation to provide for the procedure of appointment of commissioners by the president, the powers and tenure of the ECK commissioners, professional requirements for members of the commission and for ensuring diverse interests are represented in the appointments. This gap in the legislative framework became the main challenge of the commission in subsequent years (Independent Review Commission, 2008).

The political players and non-state organizations believed the electoral commission was not independent and impartial because its members were appointed by the president without following any known criteria and with no advice from any person or body. With this situation, the independence of the commission was put in doubt despite the constitutional provision that it should not be directed or controlled by anyone (Constitution of Kenya Review Commission (CKRC), 2005).

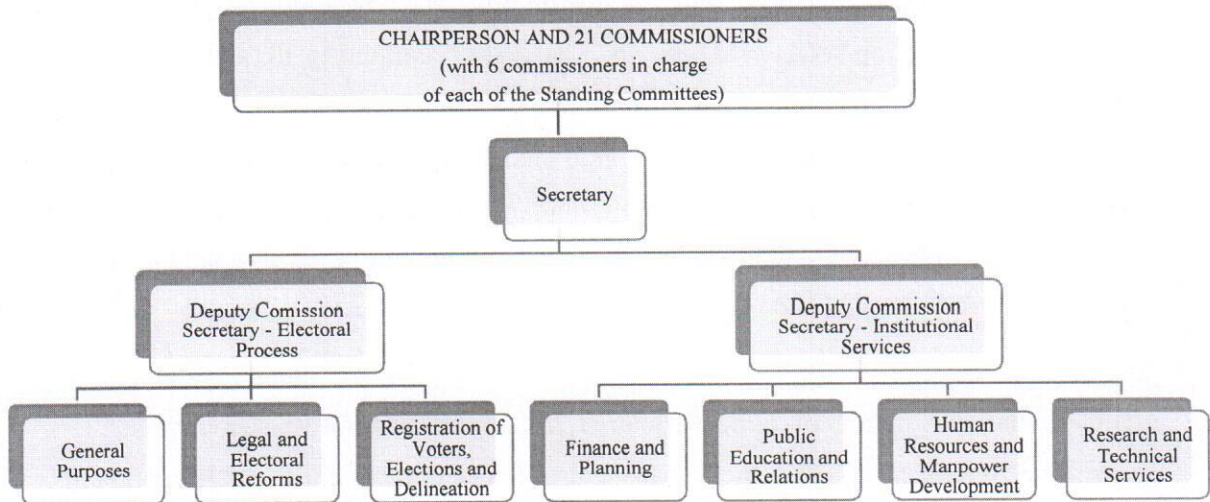
To address these shortcomings, the Constitution of Kenya Review Commission in their report of 2005, proposed various mechanisms that would make the structure and operations of the commission independent and impartial. Among the proposals was that the selection and appointment of commissioners should be done after a competitive process and approval by the national assembly, and vetting by an ethics and integrity commission. It also proposed that the words impartial and independent be used in the constitution to describe the commission. It also recommended that the appointment of commissioners by president without cherry-picking but consider the names as recommended. It also proposed that the commission should be financially independent with an accounting officer and have a legal status of being separate and distinct from its members with the right to bring legal actions and defend them. Additional proposals were that the number of commissioners be between seven and eleven with a competent secretariat doing most of the work. It further proposed that the commissioners serve for at least two terms to enable them oversee two elections with staggered membership (Constitution of Kenya Review Commission (CKRC), 2005).

The ECK was the principal player in the management of electoral processes despite its powers being spread between the constitution and other laws. It was responsible for the demarcation of constituency boundaries, voter education, voter identification and registration, nomination of candidates and the planning and conducting of polls and other election related activities. The ECK recruited its own officers who were involved in the election processes without the support of the executive arm of government. This enabled them maintain some operational independence from government structures (Independent Review Commission, 2008).

Commissioners could only be removed from office as a result of infirmity or from any other cause, or for misbehaviour upon recommendation by a tribunal. Commissioners were setting policy in full commission meetings and the implementation of policy was being done by committees that were chaired by nominated commissioners with heads of departments providing secretariat services. The ECK submitted to IREC when inquiring into the 2007 general election that it had nine committees at the commission namely: finance and logistics; public education and outreach; electoral programmes; general purposes; legal and electoral reforms; audit; human resource and manpower development; electoral research; and administration of political parties (Independent Review Commission, 2008).

The formative structure of ECK secretariat had an administrative secretary, a deputy administrative secretary and the departments of accounts, supplies, personnel, public relations, computer and legal with staff assigned to each department. Subsequently, the administrative secretary was designated as the commission secretary and given the status of an accounting officer when ECK was given its independent vote. The deputy administrative secretary was equally designated as the deputy commission secretary and followed by an appointment of another deputy. Some departments were created and some split and renamed as shown in Figure 2.1. These departments were public relations, information technology, cartography, finance, procurement and supplies, elections training, human resources, registration of political parties, elections and legal with each department being headed by professionals recruited as per the ECK's recruitment procedures (Independent Review Commission, 2008).

Figure 2.1: The Organisational Chart of ECK



Source: Africa Centre for Open Governance (AfriCOG)

The secretariat also had their ‘management standing committees’ like the commissioners that would regularly meet to discuss various matters relating to the commission and ensure their implementation as guided by the commissioners. These committees were the appointments and selection committee, the disciplinary committee, the training committee, the tender committee and the budget committee (Independent Review Commission, 2008).

Overtime, the secretariat kept changing with some of its roles overlapping with those of the commissioners and this resulted into a strained relationship between management and the commission. This was acknowledged by the chairperson of the commission in his submission to IREC and, although it had been played down by senior officers of the commission including the secretary in his presentation to IREC, the tension was real. It resulted from conflicting of roles that occurred when commissioners, who had been managing the affairs of the commission on a daily basis, found themselves with permanent staff who included professionals. IREC recommended that the expanded structure at the top be trimmed radically and reduce the commissioners to a workable number (Independent Review Commission, 2008).

IREC further recommended the review of the commissioners' roles and those of the secretariat to have a clearer separation of roles between the commissioners and the secretariat. Once the lines of authority and responsibility were clear between the commissioners and the secretariat, IREC recommended an increase in investment in staff training to ensure that the institutional memory required to manage a transparent election is vested with the secretariat. It also recommended the delegation of implementation responsibility to the secretariat and the policy-making responsibility being given to the commissioners. It further proposed that the secretary to the commission should have experience in election management, be recruited competitively and have the status of a principal or permanent secretary, among other qualifications (Independent Review Commission, 2008).

2.6. The Interim Independent Electoral Commission and Interim Independent Boundaries Review Commission

The last amendment of the pre-2010 Constitution saw the creation of two commissions as successors of the dissolved Electoral Commission through the Constitution of Kenya (Amendment) Act No. 10 of 2008. These were the Interim Independent Electoral Commission (IIEC), which was the successor to the Electoral Commission of Kenya, and the Interim Independent Boundaries Review Commission (IIBRC). These two commissions consisted of a chairperson and eight other members each. A parliamentary select committee selected the chairperson and other members of the two commissions competitively for nomination by the president and, upon approval by the national assembly, appointed by the president after consultation with the prime minister.

The IIEC's existence was to end three months upon declaration of the new constitution to give way for a permanent electoral management body and initiate election reforms. The IIEC was in existence for a total of twelve months to deliver on its mandate. All privileges, responsibilities, obligations, assets and liabilities of the ECK that existed immediately before the creation of IIEC were taken over by the Interim Independent Electoral Commission (Content: Electoral Institute for Sustainable Democracy in Africa, 2014).

To be appointed the IIEC's chairperson, one had to have qualifications of a judge of the high court and to be a commissioner, one had to possess a university degree and have high ethical character and integrity. The IIEC was tasked under Article 41A (b) of the constitution with the responsibility of establishing a competent secretariat. This was based on the IREC's recommendations that a new lean commission be set up with a strong and effective secretariat (Constitution, Article 41(4), (5)).

As a result of this 2008 amendment of the constitution and the establishment of a new and lean commission, the drafters of the 2010 constitution ensured that IREC's recommendations were considered in establishing a permanent electoral commission. The IIEC was therefore, mandated to implement the IREC's report and establish an efficient and effective secretariat.

The IIEC established directorates and departments with directorates being headed by a director and departments by a manager. The secretariat consisted of a chief electoral officer, two deputy chief electoral officers, nine directors, seventeen managers, seventeen regional election coordinators and two hundred and ten constituency election coordinators. This structure was inherited by the IEBC, upon its establishment.

There were disagreements, in the last days of IIEC's existence in August 2011, between the chairperson and the secretary to the commission that occasioned some divisions. An aide to then IIEC chief executive officer Mr. James Oswago, Mr. Roy Allan Otieno Odongo, was suspected of providing false information to a local newspaper on allegations of nepotism, corruption and infighting at the commission and suspended without pay (Open Society Foundations, 2015).

The IIEC acquitted itself quite well as it undertook several electoral reforms, proficiently and successfully managed several by-elections, with its biggest achievement being the constitutional referendum held on 4th August 2010 that was commended by all stakeholders as transparent, properly managed and well organized (Open Society Foundations, 2015).

2.7. The Parliamentary Service Commission

To strengthen the independence of parliament and enhance its oversight, representation and legislative capacity, the Constitution of Kenya (Amendment) Act No. 3 of 1999 established the Parliamentary Service Commission. The membership of the commission consisted of the speaker of the national assembly as the chairperson; a vice-chairperson elected from amongst the seven members of the commission appointed by the national assembly, four of whom were nominated by the parliamentary political party or the ruling party and three nominated by the parliamentary party, making the opposition; the leader of government business in the national assembly or his deputy and the leader of the opposition party with majority seats in the national assembly or his deputy (Constitution of Kenya (Amendment) Act No. 3, 1999).

The Parliamentary Service Commission had enormous powers given by the constitution with the objective of making Kenya a parliamentary democracy. These included the power to create and abolish parliamentary service offices, employ persons into those offices of the Service and to undertake disciplinary action on holders of those offices. It also determined the scheme of service for parliamentary service office holders and appointed an independent agency to review and recommend salaries and remuneration of members of the national assembly.

One of the key achievements of this commission was the ability to appoint the Justice (Retired) Akilano Akiwumi's commission to review the members of parliament salaries and benefits in 2010. It caused the preparation and laying annually the estimates of expenditure of parliamentary service before the national assembly and enhancing the powers and privileges of parliamentary service members and staff.

The 2010 constitution's parliamentary service commission retained the pre-2010 structure in as far as the membership is concerned. The only difference is that parliament now has the senate and the national assembly. Similar to pre-2010 commission, the commissioners serve for the term of the house, but allowed to continue in office until the next house appoints a new member to replace the outgoing member. The functions of the commission

remained more or less the same with the pre-2010 commission save for the power to influence the setting and reviewing of salaries and remuneration of members of parliament, a function that was given to another constitutional commission, the Salaries and Remuneration Commission (Constitution of Kenya, 2010).

2.8. Conclusion

Independent constitutional commissions are required to defend and apply the constitutional provisions and ensure their implementation. To achieve this, the independent commissions must be completely free from influence by state systems and structures. Independent constitutional commissions have common goals and objectives. Regard must therefore, be given to the principle of independence when considering any given independent constitutional commission. An effective and efficient constitutional commission is one that can act independently of government, party politics, other organisations and of any circumstances that would affect its work (Constitution of Kenya Review Commission (CKRC), 2005).

The independence of a commission is determined by various principles, the first being the manner in which it is established, the appointment and dismissal procedure, and the financial autonomy. The second principle is how it has clearly defined its functions and powers to avoid overlap in the working of the commissions and ensure complementarity rather than competition with one another. The enabling legislations must also support the efficient and effective performance of commission's functions. The third principle is clarity on who may lodge a claim with the commission when establishing the commission. The lodging a claim to the commission must be clear, simple and without technicality. The fourth principle is accountability, which is addressed through reporting requirements. Independent commissions need to submit reports on their performance to the state through the president and or to parliament for consideration. The commission's reports must be open for public scrutiny as part of accountability to the public (Constitution of Kenya Review Commission (CKRC), 2005).

Most of the pre-2010 constitutional commissions did not enjoy complete independence from the executive arm of government despite their powers and functions being defined by the constitution and supported by enabling legislation. The president made appointments, initiated dismissal of members and the commission's finances were controlled by government ministries (Constitution of Kenya Review Commission (CKRC), 2005).

The promulgation of the new constitution in 2010 heralded a new meaning and structure of constitutional commissions in Kenya. The commissions set out in the 2010 constitution are: the Kenya National Human Rights and Equality Commission; The Independent Electoral and Boundaries Commission; the National Land Commission; the Parliamentary Service Commission; the Commission on Revenue Allocation; the Judicial Service Commission; the Salaries and Remuneration Commission; the Public Service Commission; the National Police Service Commission and the Teachers Service Commission (Constitution of Kenya, 2010).

These commissions were established to safeguard the common national values and effective service delivery within the constitutional accountability framework. The commissions are protected from influence and their functional and operational independence guaranteed. They are required, without intimidation, fear, or prejudice, to perform their duties since they are not controlled by any person or authority. They have the option to hire their own personnel and exercise their constitutional power. The constitution sets that all commissions should have a membership not exceeding nine and not less than three commissioners, and that the commissioners have a responsibility to execute their responsibilities as per the law and other enabling national legislations. One unique feature of the 2010 constitution is the provision that each commission shall appoint a secretary who will also be the chief executive officer. It also provides that each commission shall employ its own staff. This is unlike the pre-2010 constitution where it was silent on employment of commission staff (Constitution of Kenya, 2010). This was informed by IREC's recommendation that commissioners' roles and those of the secretariat should have a clearer separation of roles between the commissioners and the secretariat and the

delegation of implementation responsibility to the secretariat and the policy-making responsibility being given to the commissioners.

The establishment of constitutional commission of Kenya was a key milestone by the drafters of the 2010 constitution to redistribute power within the government and ensure that governance is democratized. These independent commissions play an important role in transforming Kenya towards full constitutionalism and accountability in governance which is only possible through accountability, effectiveness and independence of respective commissions (Ochieng, 2019)

CHAPTER THREE
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND
THE SALARIES AND REMUNERATION COMMISSION GOVERNANCE
STRUCTURES

3.1. Introduction

This chapter presents the governance structures of the Independent Electoral and Boundaries Commission (IEBC) and the Salaries and Remuneration Commission (SRC) with specific focus on the relationships between the commissioners and the secretariat. It will also consider the rationale for the establishment of the Salaries and Remuneration Commission (SRC). The IEBC is a pre-2010 constitutional commission whereas the SRC is a post-2010 constitutional commission.

The chapter observes that the IEBC has evolved both structurally and functionally as a constitutional commission from independence in 1963 to its current form. From dealing with boundaries determination only in 1969 to conducting general elections, referendum and demarcation of boundaries in 2019, the IEBC has seen full transformation. The commission started off as Electoral Commission with only ten members and moved to as high as twenty two members before settling down to its current number of seven members. Unlike the IEBC, the SRC took over from the Permanent Public Service and Remuneration Review Board. The PPSRRB had been established in 2003 through a legal notice and given its legality and inability to address the disparity in public service pay, the need for a constitutional commission came up during the constitution review process. The SRC has had a consistent membership of fourteen commissioners since inception with its first commissioners working part time. The subsequent commissioners were appointed on a full time basis save for those working in government.

3.2. The Independent Electoral and Boundaries Commission

The 2008 amendment of the Kenyan constitution saw the formation of the Interim Independent Electoral Commission that replaced the Electoral Commission of Kenya abolished in line with the recommendations of IREC. The IIEC's existence was to end three

months upon declaration of the new constitution to give way for a permanent electoral management body and initiate election reforms. The IIEC was in existence for a total of twelve months to deliver on its mandate. All privileges, responsibilities, obligations, assets and liabilities of the ECK that existed immediately before the creation of IIEC were taken over by the Interim Independent Electoral Commission (Content: Electoral Institute for Sustainable Democracy in Africa, 2014).

Article 88 of the 2010 constitution established a new Independent Electoral and Boundaries Commission. The constitution provided for appointment, on a single six-year term, of between three and nine members of the commission. The IEBC Act of 2011 was passed by the national assembly as the enabling legislation. Whereas the bill had proposed five commissioners with the chairperson, the enacted law provided for a chairperson and eight commissioners. The chairperson and the eight commissioners were later selected in same process as that of the predecessor IIEC. The president and the prime minister appointed a selection panel which then invited applicants, shortlisted, interviewed, and forwarded the successful names of candidates to the president and the prime minister for nomination and forwarding of the nominees for vetting and approval by the national assembly. The president would then appoint the chairperson and the commissioners upon approval by the national assembly and after consultations with the prime minister.

The provisions of the IEBC Act require the chairperson and the commissioners to observe the demarcation of responsibilities between the chairperson and members as the policy makers and the secretariat as implementers of policy and administrative activities. The commission is required to recruit a suitably qualified secretary to the commission through a competitive and transparent process. The Act has also specified the responsibilities of the secretary to the commission to include among others, the chief executive officer, the custodian of all commission records, the secretariat's head, the accounting officer, implementer of commission's decisions; supervisor of all employees of the commission among other tasks as may be assigned by the commission or law (Independent Electoral and Boundaries Commission Act, 2011).

The secretariat of the commission is headed by a secretary and is comprised of officers and support staff who are professionally and technically qualified and appointed by the commission to undertake its mandate under the IEBC Act. The Act also requires the commission to appoint employees as it may determine and to create directorates, field offices, divisions, units or committees that operate as per the mandate approved and given by the commission and the secretary.

A lot of emphasis has been put on professionalism by the IEBC code of conduct. The code provides for integrity, honesty, transparency and professionalism among the employees and members of the commission. All members and employees of the commission are required to perform their duties and responsibilities with integrity, respect, uphold the rights of people they relate with, and to act in a professional, efficient, transparent and effective manner and in line with the rule of law (Independent Electoral and Boundaries Commission Act, 2011).

The IEBC Act also provides the rules and procedures to be followed in the running of the commission to improve its governance, professionalism and credibility. The Second Schedule to the Act regulates the conduct of business at the commission by providing for holding of regular meetings, proper recording of minutes of each meeting, and following of clear rules and procedures by members to avoid conflict of interest and ensure that the commission runs its affairs in a transparent manner (Independent Electoral and Boundaries Commission Act, 2011).

The *Daily Nation* newspaper in 2013 reported that the IEBC led by the chairperson, Mr. Ahmed Issack Hassan and the chief executive officer, Mr. James Oswago was divided down the middle with operations grinding to halt. The commission could not discipline officers implicated in election malpractice for political reasons. A proposed internal evaluation into the election crisis had stalled due to the infighting (Namunane & Ongiri, 2013).

The Public Accounts Committee (PAC), when scrutinizing the auditor general's report on IEBC's financial statements for the period ended 30th June 2017, noted clear conflict in the duties and responsibilities of the chief executive officer, Mr. Ezra Chiloba and that of the chairman, Mr. Wafula Chebukati and an unending power struggle between the secretariat and the commissioners. It observed that the secretariat functioned as if the commissioners did not exist resulting into lack of planning, execution or implementation of policies and strategies of the commission individually and collectively by the senior members of the secretariat (Public Accounts Committee , February, 2019).

Members of the public do not perceive IEBC as a fully independent institution. The IEBC commissioners often work closely with the members of the political class culminating to some form of compromise when solving election disputes (Ochieng, 2019)

There is a need therefore, to reflect on how to balance the responsibilities of the secretary to the commission, those of the secretariat in the daily administration and the executive powers of full-time commissioners. The dividing lines between policy and administrative domains need to be clearly demarcated and institutional guidelines developed for the management of this separation. The core processes of delivering an election that is considered free and fair are not clear and generally understood (Open Society Foundations, 2015).

This is fertile ground for conflicts and managerial inertia that may set in when members of staff are uncertain if and when they have crossed the policy line. There was need therefore, to consider spending more effort to strengthen the separation of the commissioners and the secretariat's roles and to have a smaller number of commissioners such as three whose responsibility is to focus only on policy or have all the commissioners serve on a part time basis (Open Society Foundations, 2015).

3.3. Rationale for the Salaries and Remuneration Commission

The Salaries and Remuneration Commission (SRC), just like the other constitutional commissions in the new constitution of 2010, was an outcome of a people-driven process.

This required that the new organs created under the constitution be the product of a political compromise. Accordingly, the Constitution of Kenya Review Commission (CKRC: 2005), provided as follows:

“The Commission’s guiding principles under section 5 of the Review Act are: to be accountable to the people to ensure that the process accommodates their diversity; Also, to provide Kenyans with an opportunity to actively, freely and meaningfully participate in generating a debate conducted in an open manner and guided by respect for the universal principles of human rights, gender equity and democracy. The outcome ought to faithfully reflect the people’s wishes.

Section 17 (d) also requires the Commission to ensure that the people give consideration to and make recommendations on various issues, including on the compositions and functions of the organs of State, government structure, constitutional commissions, electoral systems, local commissions, the Judiciary, local government, property and land rights, management and use of public finances, citizenship and socio-cultural obstacles, among others. It calls for a consultation between the review bodies and the people.”

Public service compensation had in the past been hampered by uncoordinated initiatives, competing demands on utilisation of public revenues, and weak legal and institutional frameworks, among others before the setting up of the Salaries and Remuneration Commission. This resulted in great disparities in salaries and remuneration and led to discontentment and recurrent industrial unrest, and unsustainable wage bill in the public sector. Attempts at ensuring equitable wage compensation and sustainable public wage bill were unstructured with limited impact on affordability and competitiveness. Various interventions towards ensuring equitable and fiscally sustainable wage bill can be traced back to Kenya’s independence. Several public pay review commissions and committees have been set up since 1960 whose findings and reports resulted into various outcomes. Their findings and reports led to disparities in salaries and wages for similar jobs in the public sector and across the various sectors (Salaries and Remuneration Commission, 2017).

These disparities were confirmed by the reports of the various commissions and committees that were appointed to review, set or determine the public servants' terms and conditions of service. They included Millar-Craig led commission of 1967, E. Vesey led commission of 1969, D.N. Ndegwa led commission of 1970-71, S. N. Waruhiu led committee of 1979-80, T. C. J. Ramtu led committee of 1985, S. H. Ominde led committee of 1988, P. M. Mbithi led committee of 1990-91, I.E.O. Okero led committee of 1992, W. O. Omamo led committee of 1995, P. M. Munene led committee of 1997, B. K. Kipkulei led commission of 1998-99 and H. Mule led commission of 2003-04 (Public Sector Remuneration and Benefits Policy, June 2015).

The scope of some of these commissions and committees was to review the public pay in the public service. The first of such commissions was that chaired by Sir Gilbert Fleming in 1960 that reviewed the salaries and remuneration of the public service of the East Africa Territories and the East Africa Commission. The second review in 1963 was the L. J. Pratt commission report that reviewed the pay for public services, teaching staff and the public sector. The Salary Review Commission of 1967 chaired by H. Millar-Craig reviewed the pay for public service professional and technical personnel. A notable commission that had an overall impact on enterprise management in Kenya was the commission of inquiry into the public service structure and remuneration of 1970-1971 led by D. N. Ndegwa. This commission permitted civil servants to be involved in business when working for the government. The civil service review committee's report of 1978-80, commonly referred to as the Waruhiu Report, looked into public service harmonization with other services and the private sector. The T.J. Ramtu committee report of 1985 reviewed the public service schemes of service for all civil servants. Whereas the S.H. Ominde committee reviewed the pay for the police and prisons officers in 1987-1988, the P.M. Mbithi committee of 1990 reviewed the remuneration for the entire public service (Salaries and Remuneration Commission, 2017).

In 1992, the Eric Kotut led committee inquired into the judiciary's terms and conditions of service and the W. O. Omamo commission of inquiry of 1995 reviewed the operations and terms of service of the local authorities. The Kipngeno Arap Ng'eny led team in 1996-1997

reviewed the terms of the police and national youth service and the Peter Nyakiamo led team reviewed in 1996 the remuneration of the members of parliament. The Peter M. Munene committee of 1997 reviewed the civil servants' terms and conditions of service and the Elijah Mwakio led committee reviewed the terms and conditions of service for the staff of the national universities. The Benjamin K. Kipkulei commission of 1998-1999 inquired into the harmonisation of the salaries and remuneration of the civil service (Salaries and Remuneration Commission, 2017).

These commissions and committees prescribed varied terms and conditions of services to the different sectors of the public service, leading to great disparity. The remuneration rates for the civil service ended up being different from those of the national universities, the judiciary, the police and members of national assembly because of the different commissions and committees recommending them. There was need therefore, to have a single body that would be able to review, set and harmonize the salaries and remuneration for the entire public service.

3.3.1. Permanent Public Service and Remuneration Review Board

In the year 2003, the government of Kenya vide Gazette Notice No. 7941 dated November 7, 2003 addressed the challenge of multiple institutions reviewing and setting salaries and allowances across the public service by establishing the Permanent Public Service and Remuneration Review Board (PPSRRB). This board continuously reviewed and harmonized remuneration in the entire public sector. The objective was to harmonize and institute a remuneration system that was competitive and sustainable in the entire public service thus attracting and retaining the best staff, enhancing productivity and efficiency in the delivery of services and the development of the country.

The board had fourteen members among them the attorney general, the permanent secretary who was also secretary to the cabinet and the head of public service, the permanent secretary in the ministry of finance, the permanent secretary in the ministry of state for public service in addition to a secretary to the board. The board, between 2004 and 2011, presented seven reports to the government on revision of remuneration in the public

service. The reports contained the analysis of the prevailing situation relating to the remuneration in the public service and provided recommendations on how to improve remuneration levels and subsequently service delivery in the entire service (Salaries and Remuneration Commission Report, 2011-2017). However, the PPSRRB could not perform its mandate effectively because it lacked legal backing (Public Sector Remuneration and Benefits Policy, 2015).

The CKRC reported in 2005 that the people of Kenya had asked for a salaries and remuneration commission that will review and set the remuneration of the civil service employees and the entire public service. The commission was also to check on corruption and the frequent labour strikes, review in every three years the remuneration and working conditions of the members of national assembly, manage pensions for retirees and review the local government workers' terms and conditions of service (Constitution of Kenya Review Commission (CKRC), 2005).

The CKRC therefore, recommended the establishment of a salaries and remuneration commission whose object was to review and set the remuneration of holders of constitutional offices and members of constitutional commissions. It also included the remuneration of members of the national assembly, all public service employees as well as employees of state owned enterprises and the retirement benefits of constitutional office holders (Constitution of Kenya Review Commission (CKRC), 2005).

3.3.2. Establishment of the Salaries and Remuneration Commission

Article 230 of the 2010 constitution established the Salaries and Remuneration Commission with the mandate of harmonizing the legal and institutional framework governing the payment of salaries and allowances in the public service. The commission's powers and functions include the setting and regular review of the salaries and allowances of all state officers and advising the county and national governments on the salaries, allowances and benefits of all officers in the public service (Public Sector Remuneration and Benefits Policy, June 2015).

The Salaries and Remuneration Commission Act No. 10 of 2011 was enacted on 27th July 2011 and became operational on 29th July 2011. The commission's powers and functions, the qualifications and procedures for the appointment of the members and chairperson of the commission are clearly provided for in the Act.

The SRC consists of a chairperson and one member each nominated by a joint forum of professional bodies represented by the Association of Professional Societies of East Africa, the Senate, the Defence Council, the National Police Service Commission, the Teachers Service Commission, the Judicial Service Commission, the Parliamentary Service Commission, the Public Service Commission, an umbrella body representing employers, an umbrella body representing trade unions, the Attorney-General and the cabinet secretaries responsible for finance and the public service.

The secretary to the commission convenes meetings of the commission in consultation with the chairperson every three months. The time and place of the meeting is determined by the chairperson and not more than four months should lapse between commission meetings. A seven days' notice is issued to every member to convene a meeting or unless otherwise agreed by three quarters of the member. The chairperson presides over the meetings of the commission and in his absence, a person elected by the commissioners at the meeting (Salaries and Remuneration Act, 2011).

The first team of chairperson and members of the commission served for a single tenure of six years on part-time basis. However, the Statute Law (Miscellaneous Amendments) Act, No.4 of 2018 amended the SRC Act to allow the chairperson and the commissioners to serve for a single six-year term on a full time basis effective 2018 except those nominated by the attorney general and the cabinet secretary responsible for finance. Serving part time by the commissioners required that the secretariat had to do most of the work as the commission was required to meet every three months. Most of the work therefore, was being done by the secretariat. The reality however, was that the commissioners met almost monthly and sometimes weekly to deliberate on the many tasks that they were undertaking in reviewing the remuneration of the entire public service.

This is what informed the amendment of the SRC Act in 2018 to provide for full time commissioners, as it was established that the 'part time' commissioners were actually spending most of their time at the commission. The converse of this is that, with a competent and a professional secretariat, they might be competing duties and responsibilities between the commissioners and the secretariat, if not properly allocated or assigned. The other implication of full time commission is the cost of maintaining full time commissioners, more so, given the high number of SRC's commissioners. Unlike part time commissioners, full time commissioners need to be allocated permanent offices, provided with daily transport and other allowances to facilitate their full time engagement (Salaries and Remuneration Commission, 2017).

The secretary to the commission, as provided in the constitution, is the CEO responsible for implementing the functions of the commission, forming and developing an efficient administration and organizing, controlling and managing staff. The secretary may be removed for physical or mental incapacity, ineffectiveness or neglect of duty, gross misconduct or misbehaviour, or any other allegations that justifies being fired under terms and conditions provided .

In their exit report, the first team of commissioners commended the secretariat as a competent team that they had recruited and stated that it was the bedrock of the commission upon which the incoming commissioners will rely upon as they settled within the commission. They reported that the commissioners and the secretariat had worked as one and stuck together through all the challenges and successes. Unlike in other commissions, the secretary to the commission and the chairperson were never at loggerheads. They created a machine that worked as one with high productivity (Salaries and Remuneration Commission Report, 2011-2017).

3.3.3. SRC's Organisation Structure and Operations

The SRC adopted an organization structure that addressed the key thematic areas of its constitutional mandate to enable it carry out its core mandate and functions. The head of the commission is the chairperson supported by commissioners and they appoint the

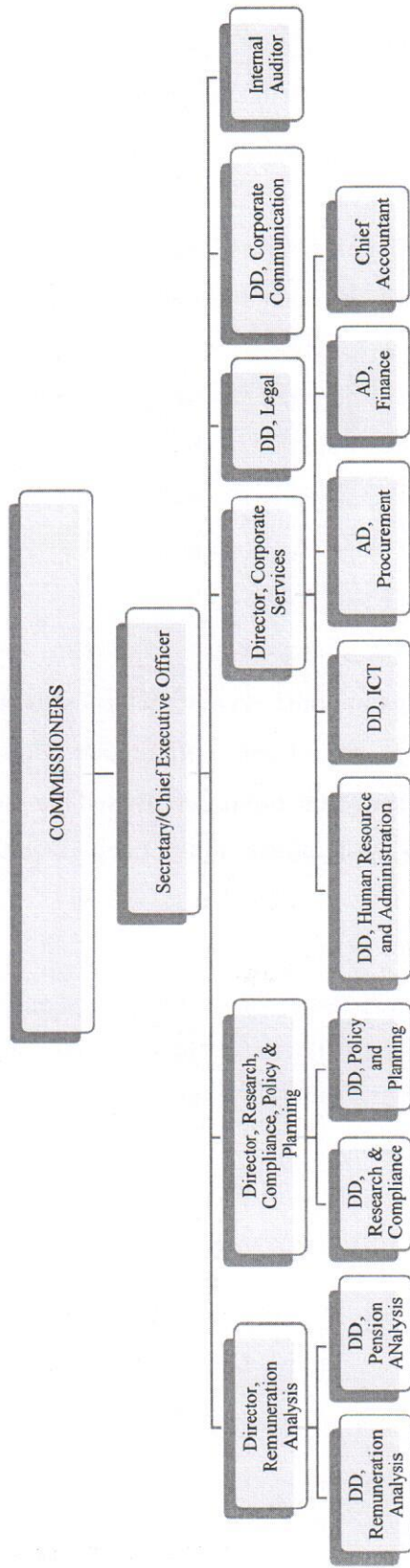
secretary to the commission, who is also the chief executive officer. The commission is the top strategy, policy and decision making body while the secretariat is structured into three directorates namely: research, compliance, policy and planning; remuneration analysis; and corporate services. The commission also has three departments namely; internal audit and risk management; corporate communication; and legal affairs as shown in Figure 3.1.

The functional independence of the salaries and remuneration commission was tested when the national assembly attempted to interfere with its mandate of reviewing and setting the remuneration of state officers. The SRC in 2013 issued the remuneration of different government officers including remuneration of members of parliament who were dissatisfied with the new terms. They approved a resolution to invalidate all the notices and also embarked on changing the constitution to remove members of the national assembly, the senators, members of county assembly, the magistrates and judges from the list of state officers to whom SRC has mandate over (Ochieng, 2019).

However, the high court upheld that any constitutional review that goes to the core of stripping a commission its mandate had to be passed through a referendum, thus affirming the independence of the commission. Subsequently, the high court argued that the national assembly's action of purporting to invalidate the remuneration notices gazetted by SRC was unconstitutional.

The court thus affirmed that the SRC had the exclusive mandate of setting and reviewing the remuneration of all state officers (Ochieng, 2019). Beside the few instances, the SRC has generally operated without much governance controversy since its inception to the time of this study.

Figure 3.1: Administration Structure of the Salaries and Remuneration Commission



**Key: DD - Deputy Director
AD - Assistant Director**

Source: Salaries and Remuneration Commission Report, 2011-2017

3.4. Conclusion

The IEBC has changed both structurally and functionally as a constitutional commission from 1963 to its current form from only determining boundaries in 1969 to conducting general elections, referendum and demarcation of boundaries in 2019. The commission started off as Electoral Commission with only ten members and moved to as high as twenty two members to its current number of seven members, with a possibility even for further changes. This is unlike the SRC, which took over from the Permanent Public Service and Remuneration Review Board. The PPSRRB had been established in 2003 through a legal notice and given its legality and inability to address the disparity in public service pay, the need for a constitutional commission came up during the constitution review process. The SRC has had a consistent membership of fourteen commissioners since inception with its first commissioners working part time. The subsequent commissioners were appointed on a full time basis save for those working in government.

The IEBC has had many leadership and governance challenges as compared to the SRC. The IEBC secretary to the commission and the chairperson, sometimes with the commissioners, have had serious disagreements as to what were the specific roles and responsibilities of the commissioners and that of the secretary and the secretariat. This has led, on certain occasions, to the dismissal of the secretary by the commission. On the other hand, the SRC has had one of the best relationships between the chairperson, commissioners, the secretary to the commission and the Secretariat and pride themselves of being one of those commissions whose chairperson has not been at loggerheads with its secretary. The secretariat of the SRC has been the bedrock of the commission with a solid team of commissioners that developed policy framework, systems and procedures that aided them in their decision-making.

CHAPTER FOUR FINDINGS AND DISCUSSIONS

4.1. Introduction

This section presents the actual relationships between the secretariat, the chief executive officers and the commissioners of IEBC and SRC and the impact of their relationships on the governance framework of the commissions.

Despite the provisions of the constitution on governance of constitutional commission being similar for all the chapter fifteen commissions, the study established that the enabling legislations however, differ for both the IEBC and the SRC. The IEBC Act is the only legislation, of all the chapter fifteen commissions, that has specifically provided for the relationship between the secretariat and the commissioners and the specific roles of both the secretariat and the commissioners. Notwithstanding these clear provisions, the same IEBC is still facing multiple and conflicting reporting relationships as compared to the SRC, which has had an harmonious relationships since its establishment in 2011. This specific statutory provision in the IEBC Act may have created imaginary powers to the secretariat that have led to conflicts with the commissioners.

The constitutional provisions and the enabling legislation guide the governance of constitutional commissions. The culture and practices of the organisation and the operating environment may also influence the governance of these commissions. The Constitution of Kenya 2010 provides in Article 250 that a constitutional commission shall have between three and nine members who would either serve on a full-time or part-time basis. It also provides for the appointment of a secretary in each commission who is the chief executive officer.

The general functions and powers of a constitutional commission, meaning the commissioners, include the power to recruit its own employees and to undertake functions and exercise those powers as set out in the constitution and the enabling legislation. Another important provision of the constitution is that each commission is considered a

separate and legal entity capable of suing or being sued in its own corporate name with perpetual succession and with a seal. The essence of these provisions is to make the commissions independent and not controlled or directed by any person or authority.

4.2. Governance of the Independent Electoral and Boundaries Commission

The IEBC is a creation of Article 88 of the 2010 constitution and the IEBC Act, 2011. The Constitution under Article 88 further provides that a legislation shall be enacted to provide for the powers and the functions of the IEBC. The legislation referred to is the IEBC Act, No. 9 of 2011 that was enacted on 5th July 2011. The Act provides for the operations of IEBC and the appointment of commissioners. As stated earlier, the original bill had provided for five commissioners including the chairperson but the IEBC Act, No. 9 of 2011 provided for a chairperson and eight commissioners. Section 5(4) of the IEBC Act states that the chairperson, commissioners and the secretariat shall execute their functions in line with the constitution, the Act and the directions of the commission. Further, section 10 of the Act provides for the selection in an open, transparent and competitive recruitment process of a secretary to the commission who is responsible and answerable to the commission.

The IEBC Act further provides the functions of the secretary to the commission as the head of the secretariat, the chief executive officer, the accounting officer and the custodian of all commission's records. The secretary is required to implement commission's decisions, assign duties, supervise commission's staff, facilitate, co-ordinate and execute its mandate and ensure staff compliance with its code of conduct and any other duty as assigned by law and the commission. It also provides for the appointment of a commission's secretariat that consists of professionals, technical and administrative officers.

These detailed provisions in the Act of the secretary to the commission's duties and responsibilities at the commission was informed by the relationships between the commissioners and the secretary at the IIEC, the predecessor of IEBC and the Independent Review Commission. The then secretary and CEO, Mr. James Oswago and the chairperson, Mr. Ahmed Issack Hassan had been reported as having disagreements, arising from lack

of clarity on their jobs (Daily Nation, 2011). IREC had recommended the review of the roles of commissioners and those of staff, in order to establish clear and separate roles of commissioners and management. It had also proposed that the responsibility for implementation should be given to the secretariat while that of strategy and policy making within the commission be given to commissioners. It had also recommended that the commission secretary should have experience as an election manager, be recruited competitively through an open process and be ranked at the level of a principal secretary (Independent Review Commission, 2008).

The conduct of affairs of the commission are provided for in the second schedule of the Act. It states that the chairperson presides over the meetings of the commission or the vice-chairperson when absent. Where both are absent, the members in attendance will elect one among them to preside as the chairperson. The secretary to the commission is the secretary at all commission meetings.

The IEBC Act, 2011 has since been amended five times. The first amendment through the Statute Law (Miscellaneous Amendment) Act, No. 12 of 2012 was to remove the employees from having their salaries and remuneration being set by the salaries and remuneration commission among other amendments. This was followed by the Election Laws (Amendment) Act, No. 36 of 2016 that reduced the number of commissioners from nine to a total of seven members. This amendment also removed the requirement for a commissioner to be a Kenyan citizen. It also introduced the circumstances under which the office of the secretary to the commission could become vacant.

Another key provision in the amendment of 2016 was the introduction of a new section 11A providing for the relationship between the members of the commission and the secretariat. This new amendment provided that the chairperson and the commissioners should be responsible for oversight and the formulation of commission's policy and strategy whereas the secretariat will be responsible for the administrative functions and implementing the policies and strategies of the commission. This amendment was

fundamental in ascertaining the nature and structure of relationships between the commissioners and the secretariat within the commission.

The Election Laws (Amendment) Act, No. 1 of 2017 provided for the procedure of delimitation of electoral boundaries among other amendments. Through the amendment Act No. 34 of 2017, the definition of the chairperson was amended to also mean the vice-chairperson or a member of the commission and for the vice-chairperson to exercise the powers and responsibilities of the chairperson until when the chairperson is appointed whenever a vacancy occurred in the office of the chairperson. It further provided for election of a member by the commissioners to act as the chairperson when a vacancy arises in the positions of a chairperson and a vice-chairperson and to exercise the powers and responsibilities of the chairperson until a chairperson is appointed. This amendment suspended the requirement that the holder of the office of a chairperson be qualified as a judge of the supreme court under the constitution.

The amendment Act No. 34 of 2017 was occasioned by infights among the seven commissioners that led to some of them resigning. And to forestall any possibility of crippling the commission if the chairperson was to resign, the Act was amended to provide for the vice chairperson or any member assuming the position of chairperson despite not meeting the qualifications to be a judge of the supreme court. This amendment was also done in between a general election, but was later declared unconstitutional by the High Court in 2018. The latest amendment was through the second schedule of the Data Protection Act, No. 24 of 2019 that provided for management of personal data of voters in compliance with the principles of personal data protection.

Despite these amendments, reports still emerged of internal squabbles at IEBC during the elections. The Election Observer Group reported that quarrels were displayed between the secretariat and the commissioners and amongst the commissioners in the 2017 general elections. The secretariat were blamed by the commissioners for misleading them on the technical aspects of the elections, the improprieties and the indiscretions that the supreme court established during the nullification of the presidential election. These accusations

leaked to the public when the chairperson wrote a memo to the IEBC's chief executive officer seeking responses to specific matters that went wrong during the August 2017 general election. This was evident of the nature of relationship between the secretariat and the commissioners as well as amongst the commissioners (Elections Observation Group, 2017).

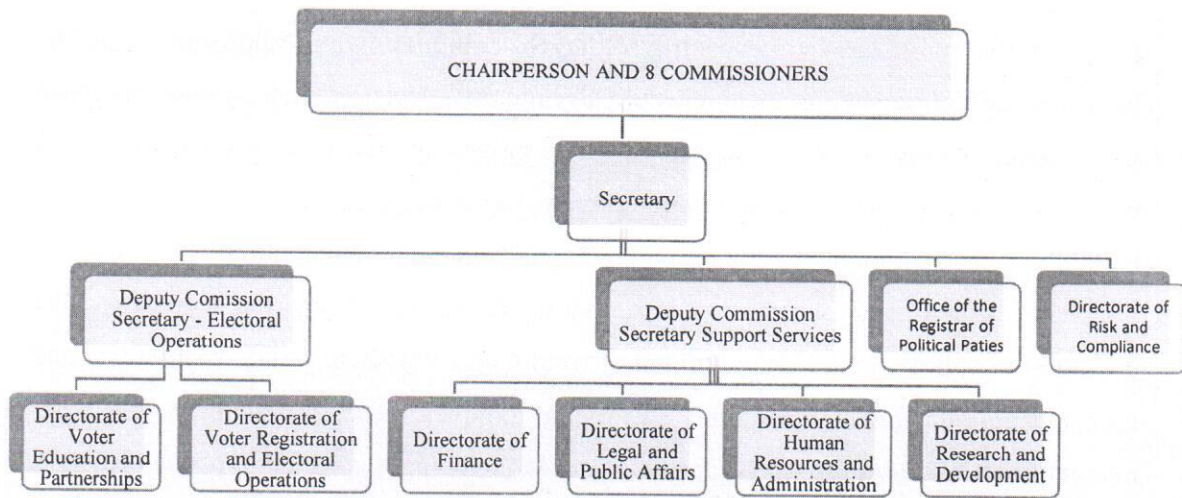
From the foregoing, the study establishes that the IEBC Act has provided for the kind of relationship expected between the secretariat and the commissioners, hence determining the nature and structure of relationship and making it the only commission with such provision.

4.2.1. The Administrative Structure of IEBC

The IEBC established nine directorates and seventeen departments headed by a director and a manager respectively. The secretariat consist of the chief executive officer who is also the commission's secretary, two deputy commission secretary, nine directors, twenty four managers, forty seven county election managers and 210 constituency election coordinators. This structure, as shown in Figure 4.1, was inherited by IEBC from the IIEC.

The IIEC transacted its business through eight committees of finance and procurement, human resource, elections, legal, political parties' liaison and media, information and communication technology, voter education and audit. Each of the committees was chaired by a commissioner, with membership drawn from the directorates. The secretariat had management standing committees that deliberated and implemented various decisions of the commissioners. They included the disciplinary committee, the procurement committee, the tender committee, the disposal committee, the verification and inspection committee as required by the procurement law and the evaluation committee that was ad hoc.

Figure 4.1: The Organisational Chart of IEBC



Source: IEBC Website, www.iebc.or.ke

In their exit report, the IIEC commissioners had developed a draft plenary charter, which sought to formally introduce and set out a clear understanding of the commissioners responsibilities, that of strategy development, policy making, governance, advising on electoral law reform and performance oversight while that of the secretariat was to be that of execution of strategic initiatives and operations. The charter noted that no matter how effective the chairman and commissioners (the commission) might be, it was not possible for it to have hands on involvement in every area of the commission's business. It provided that an effective commission controlled the business but delegated day-to-day administration to the executive management. It further observed that there were various matters, which required to be or, in the interests of the commission, should only be decided by the chairperson and commissioners as a whole and it was therefore, incumbent upon the commission to make it clear what were these matters reserved for the plenary (Interim Independent Electoral Commission, 2011).

The IIEC commissioners proposed several matters that were not considered suitable for delegation to a committee of the plenary and required to be taken by the plenary as a whole.

However, they proposed that a specific committee could be given responsibility for that item although the plenary as a whole would take the final decision. These matters included the division of responsibilities, which was to be in writing, between the chairperson, the commissioners, secretary to the commission, and the directors. It also included receiving reports from commission committees on their activities, undertaking a formal and rigorous bi-annual review of its own performance, that of its committees and the secretary to the commission and directors. The approval of resolutions, draft legislation, regulations and corresponding documentations to be put forward to government or parliament were other matters to be discussed by the plenary as a whole including the selection of the plenary's deputy chair, the chief executive officer, the deputy chief executive officer, the directors and the appointment, removal and determining the remuneration policy of the secretary to the commission and other senior executives (Interim Independent Electoral Commission, 2011).

The IEBC applies a similar committee structure to that of IIEC in implementing its duties and responsibilities. The committee members are commissioners and the directors are co-opted from various directorates to form part of the secretariat and are all nominated on the basis of suitable set of skills and experience. These committees included the audit, risk and compliance; finance and procurement; administration, human resources and training; boundaries delimitation; elections, technical and operations; legal reforms, enforcement of code of conduct and compliance; information and communication technology, research and development; political parties liaison and campaign finance control; partnerships and media and voter education; and dispute resolutions (Independent Electoral and Boundaries Commission, 2018).

Although IEBC has robust structures, the study established that it is characterized by a complex organizational structure with unclear reporting relationships and without an approved plenary charter. Under this structure, the secretariat staff reports to multiple centres of power within the commission, resulting to lack of role clarification and conflicts since communication is constantly hampered.

4.2.2. Practical relationships, experiences, challenges and prospects at the IEBC

From the analysis of both the primary and secondary information collected and interviews held with key informants from IEBC, the following practical governance experiences, challenges and prospects were identified.

The current IEBC Act, 2011 was enacted during the period of transition from IIEC to IEBC. During this transition period, the IIEC commissioners were on their way out and new commissioners for IEBC were being recruited. The import of this was that the secretariat were the key actors in the process of drafting of the law. Of all the enabling legislations of constitutional commissions, it is only the IEBC Act, 2011 that has a provision on the relationship between the secretariat and the commissioners. It is only the IEBC legislation that has such a provision and no other constitutional commission's legislation. Other than providing for the detailed requirements for the recruitment, appointment, removal of the holder of the position of secretary to the commission and responsibilities like in other constitutional commissions as the National Police Service Commission, the IEBC Act went further to prescribe the nature of relationship expected of the commissioners and the secretariat staff. It provides that the members of the commission and chairperson shall be responsible for oversight, policy and strategy formulation of the commission, and the secretariat responsible for the commissions' daily administrative functions and implementing the strategies and policies formulated by the commission.

These distinctive provisions of the law on the functions of the commissioners and the secretariat have created a sense of equality between the secretariat and the commissioners. Despite the constitutional provisions on the role of the commission and commissioners, the action of the drafters of delineating the secretariat roles have contributed to the relationship challenges that the IEBC secretariat has had with the commissioners. The constitution did not envisage a situation where the secretary to the commission, who is an appointee of the commission, could have powers and functions not given by the commission, but by legislation. As observed by the High Court of Kenya in the consolidated petition numbers 305, 324 and 203 of 2015 between *Eng. Michael Sistu Mwaura Kamau & 12 others v.*

Ethics and Anti-Corruption Commission & 4 others, the judges observed that the “membership of a constitutional commission is between three and nine members. In other words, the composition of a constitutional commission ought not to be less than three and not more than nine members. The said members, otherwise known as the commissioners, are empowered to appoint the commission's chief executive known as the secretary. To contend that the secretary, who is an appointee of the commission, is part of the commission would mean that the commission would, where the commissioners are nine, be composed of a membership of ten. We have no hesitation at all in holding that the secretary to the commission is not a member of the commission as contemplated under Article 250(1) of the constitution. We are therefore clear in our mind that the secretary cannot be placed on the same plane as the commissioners. To equate the secretary with the commission when he is an appointee of the commission, is in our view an anathema to the rules relating to employment and defeats common sense. To do so would amount to creating two centres of power, a scenario which would be a recipe for chaos and disorder. The secretary and the secretariat can only carry out the powers vested in their offices when the commission is in place exercising its powers since they implement what the commission has resolved upon.”

The high court's judgement above buttresses the fact that constitutional commissions are made of commissioners, who make up the commission. It also affirms that the secretary to the commission and the secretariat are appointees of the commission, meaning the commissioners, and only implements what the commission has resolved. This sets the minimum standard on the nature and type of relationships between the secretariat and the commissioners. To equate the secretary with the commission when he is an appointee of the commission, is a denunciation to the rules relating to employment and defeats common sense as it amounted to creating two centres of power, a scenario which would be a recipe for chaos and disorder. Chaos and disorder which this study have established existed within IEBC.

The Elections Observation Group (ELOG) observed in their report of the Kenya's general elections of 2017 that there were internal squabbles at IEBC that were reported to the public during the elections. The quarrels were displayed between the secretariat and the

commissioners and amongst the commissioners. The secretariat were blamed by the commissioners for having misled them about the technical aspects of the elections, the improprieties and indiscretions that the supreme court established during the nullification of the presidential election. This was evident of the nature of relationship between the secretariat and the commissioners as well as amongst the commissioners (Elections Observation Group, 2017). The National Assembly's PAC also observed cases of absolute conflict in the roles and responsibilities of the commission's secretary who was also the chief executive officer, Mr. Ezra Chiloba, and that of the chairperson, Mr. Wafula Chebukati. PAC further observed that there appeared to be an unending power struggle between the secretariat and the commissioners. It stated that the secretariat operated on their own without clear policy direction from the commissioners. As a result, therefore, the top management of the secretariat, separately and jointly, did not plan and failed to implement the strategies and procedures of the commission as provided under section 11A(b) of the IEBC Act, 2011 (Public Accounts Committee, February, 2019). The Kenyan Senate on their part observed that there was conflict of mandate among commissions and that the chairpersons of the commissions are the ones running the institutions, thereby, rendering the chief executive officers, the secretaries to the commissions, irrelevant and seem like they are not performing (Parliament of Kenya, 1st October 2014).

This was also affirmed by the inconsistent responses from the respondents on the reporting relationship of the secretary to the commission where majority indicated that the secretary reported to both the chairperson and commissioners and small group indicated that the secretary reported solely to the chairperson of the commission.

The IEBC is required to ensure compliance with Article 38 of the constitution of Kenya. The article provides for the right to free and fair elections for all citizens based on free expression and willingness of the electors for established elective public bodies or offices under the constitution or offices of political parties of which the citizens are members. By this very nature, the operations and activities of IEBC are political. The members of the secretariat and the commission are also free to express their will as electors. These political interests, unfortunately, find themselves in the commission through the process of

appointing the commissioners, and subsequently the appointment of the secretariat. These sectarian interests are always evident during the electioneering period where the political actors would want to influence the decisions of the commission. As a consequence, there arises competing interests amongst the commissioners, amongst the secretariat staff and between the commissioners and the secretariat.

This was evident in the 2017 general election and the fresh presidential election, where there was divisions amongst the commissioners and between the commissioners and the secretariat staff. As observed by Elections Observation Group in their Report on Kenya's 2017 general elections and fresh presidential election, the multi-million shillings 'chicken-gate' scandal tarnished the commission's already questionable image and integrity. It reported that some senior officials and commissioners of the IEBC were allegedly bribed to award a tender to a foreign company in England called Smith and Ouzman to print election material. While authorities in England prosecuted and convicted the implicated officials of the company, the Kenyan authorities were sluggish in concluding investigations on the matter. The EACC was seen to be largely biased in its investigations creating the perception that the IEBC officials enjoyed state and EACC protection. Dr. Roselyn Akombe, then an IEBC commissioner, fled the country over security concerns citing allegations of intimidation and threats. She stated that IEBC commissioners had been politically infiltrated rendering them vulnerable to manipulation by those with political and party interests. Additionally, one of the IEBC staff, Praxedes Tororey who was the head of legal department, had her impartiality questioned and retired in October 2017 upon reaching the retirement age of sixty years (Election Observer Group, 2017).

Whereas the commissioners of IEBC serve for a single term of six years, the secretary to the commission can serve for a maximum of ten years with the secretariat staff being either on contract or permanent basis. In line with recommendations of IREC, the secretariat with skilled staff to manage and implement commission systems and procedures was established in 2009 under IIEC. As a result, a chief electoral officer, a deputy chief electoral officer and eight directors were recruited. These officers were employed on a contract of five years each renewable but only once for the chief electoral officer. All these officers transitioned

to IEBC under the 2010 constitution. Whereas the chief electoral officer and the deputy chief electoral officers' have since changed, most of the directors and managers have continued to serve the commission up to 2019, the period of the study. This is comparable to the number of changes of commissioners from 2009, where there has been three significant changes. When the IIEC's Issack Hassan-led commission term ended in 2011, a new team of commissioners was appointed, though Mr. Issack Hassan was retained as the chairperson (Interim Independent Electoral Commission, 2011).

The 2013 elections casted the IEBC as biased. Coalition for Reforms and Democracy (CORD), the coalition that lost the general election, insisted that the 2013 were rigged by IEBC in favour of Jubilee Alliance, which had won the elections. Aggrieved, CORD petitioned the Supreme Court on the 2013 presidential election results which they lost. There was a political war between CORD and the ruling Jubilee Party as the 2017 elections approached. CORD demanded disbandment of the IEBC as it was unfit to conduct the Kenya's 2017 elections. A report from the two houses of parliament made recommendations including the removal of Mr. Issack Hassan as the commission's chairperson and appointment of seven new commissioners led by Mr. Wafula Chebukati in January 2017. One of the seven commissioners resigned in October 2017 and three others resigned in April 2018 leaving IEBC with the chairperson and only two commissioners (Elections Observation Group, 2017).

These changes in commissioners and their short stay in office allows the secretariat to have institutional memory and organisational image that may outshine the commissioners when appointed, both in experience and expertise. This difference brings in conflicts when the secretariat feels they are knowledgeable and experienced than the newly appointed commissioners, who have to learn as they do the job.

Staggered recruitment of commissioners facilitates transfer of knowledge, institutional memory and growth. All IEBC commissioners have been appointed and exited the commission at the same time. The Mr. Issack Hassan led IEBC commissioners were appointed into office in November 2011 and all exited office in November 2017. The

appointment of seven new commissioners led by Mr. Wafula Chebukati was done in January 2017. With staggering of the commissioners' appointment, the experience and expertise obtained by the outgoing and remaining commissioners can be transferred to the incoming commissioners and therefore, allow the remaining commissioners to provide the necessary leadership to the new commissioners and the secretariat. This seamless transition will avoid possible conflicts between the commissioners and the secretariat. This lack of staggering of commissioners' appointment has largely contributed to conflicts between the secretariat and the commissioners at IEBC.

The operations and activities of the commission are not immune from the society in which it operates. External factors do impact the operations and activities of IEBC. The appointment of commissioners and the secretariat are influenced by political and business interests. As stated earlier, the Joint Committee of the two houses of parliament brokered a political settlement for electoral reforms that included the recommendation for resignation and exit of Mr. Issack Hassan led IEBC commissioners, and appointment of Mr. Wafula Chebukati led commissioners in 2017. The commissioners are appointed upon approval by the national assembly, which comprises of political actors. The president, who nominates and finally appoints commissioners, is a key player in the political processes of the country. On certain occasions, business interests override organisations' interests and this brings in conflicts when the commission fails to deliver on its core mandate of managing the elections. This has been witnessed in the recent past where procurement decisions have been made that are not benefitting the commission but certain suppliers or manufacturers of the equipment as per the ongoing court cases involving members of the secretariat (Public Accounts Committee, February, 2019).

IEBC receives substantial amounts of funds to conduct and manage elections. Between 1991 and 2007, the ECK was allocated a budget of Kes15.8 billion to undertake different electoral activities such as voter education, registration and conduct the elections. A review of ECK audit reports for the same period found the Controller and Auditor General to have taken issue with how the Commission spent over Kes1.9333 billion amounting to approximately 12% of the Commission's disbursement for the period. Since then, Kenya

held three general elections in five-year intervals and several by-elections occasioned by politicians changing parties preceding the 1992 elections (Africa Centre for Open Governance, (March, 2009).

In the 2015-2017 of the Elections Operations Plan period, IEBC was allocated Kes53.53 billion for the 2017 General Election compared to Kes24.266 billion for 4th March, 2013 General Election (Independent Electoral and Boundaries Commission, 2018). These huge resources are available to the commission and are to be used within an election period exposing the commission to many competing business interests. These interests end up at the commission either through the commissioners or the secretariat. As a result of this, conflicts arise between the secretariat and the commissioners as each would want to outdo the other as they front their favourite suppliers or manufacturers despite the existing legal provision on how public resources are to be lawfully authorised and used. This was affirmed by PAC when examining the auditor general's report on the IEBC's financial statements for the period ending 30th June 2017. It noted instances of absolute conflict between the roles of the CEO and the chairperson of IEBC. These conflicts were majorly attributed to procurement matters and specifically during the procurement of the Kenya Integrated Election Management Systems (KIEMS) kits and other election materials, against provisions of section 11A of the IEBC Act. The report stated that there were conflicts of interest in the procurement of KIEMS kits as some commissioners voted for their preferred suppliers (Public Accounts Committee, February, 2019).

The government, especially the executive and the legislative arms, do contribute to the conflicts between the secretariat and the commissioners. The executive, through National Treasury, greatly influence the budgetary allocation and the procurement processes of the commission leading to conflicts between the secretariat and the commissioners. The legislative arm of government, through the Parliament, also has a greater influence on the relationships between the secretariat and the commissioners through legislation, oversight and in the appointment of commissioners. Some members of the secretariat are seconded to the commission by the executive and despite the provisions of the law that they are bound by provisions of the IEBC Act and commission, they still serve the interest of the

seconding agency. The IEBC reported that the exchequer was not released as and when it was required as the funds were released towards the end of the financial year by the National Treasury. These caused late procurement and delivery of election materials and equipment affecting election timelines and therefore, causing unnecessary tension between the secretariat and the commissioners (Independent Electoral and Boundaries Commission, 2018).

The IEBC has the mandate of both managing elections and of enforcing election related laws in the country. It was observed that the commission was not effective in the enforcement of its mandate in the 2017 general election. There were reported cases of misuse of state resources by major political competitors (Independent Electoral and Boundaries Commission, 2018). The Elections' Observation Group also observed multiple registration of voters, use of threats and violence to force people to vote in particular candidates, stopping other people from voting and use of public resources as some of the electoral malpractices and offences relating to the 2017 general elections. In the enforcement of law and the management of elections, the need for a central command or authority cannot be overemphasised. Whereas certain decisions have to be done centrally through plenary and committees, certain law enforcement decisions need to be done through a central command authority for independence, confidentiality and prompt action. The decision to arrest election laws offenders should not wait for plenary and committee decisions but prompt action on the part of the commission. As an election coordinator in charge of a county or constituency, one needs to be fairly independent and objective in decision making and those decisions should not be directed or guided by the commissioners. This in itself, is a management challenge in such organisation as IEBC. There is therefore, need for this appreciation in setting up the structures of such a commission.

The success of any organisation depends on the management style of its leaders and whether these leaders can provide the necessary leadership to achieve the organisation's mission. The character and the leadership styles of the chairperson and commissioners of a commission and that of the secretary to the commission is very critical for the harmonious

working relationship and achievement of the commission's mandate. Where there is a strong-willed secretary and a chairperson, it then becomes difficult for the smooth running of the commission. This was alluded to by the former secretary to the commission Mr. Ezra Chiloba when he reported to the PAC that he was privileged to have worked with IEBC when led by Mr. Issack Hassan and by Mr. Wafula Chebukati. He observed that the leadership approach, the articulation of the role of commissioners and the separation of the roles between the commissioners and the secretariat were different in the two teams in terms of the understanding of the basic principles of risk management and procurement policies in the public sector (Public Accounts Committee , February, 2019). This was confirmed by accusations and counter-accusations leaked to the public via a memo that the IEBC chairperson, Mr. Wafula Chebukati, had written to its chief executive officer, Mr. Ezra Chiloba, demanding answers to critical issues that went wrong during the August 8th 2017 elections, despite the fact that they both were involved in the management of the disputed elections (Elections Observation Group, 2017). The leadership approach therefore, is important within the commission and helps in reducing conflicts between the secretariat and the commissioners.

The study established through questionnaire administered to the secretariat that the secretary to the commission reported to the chairperson of the commission and the commissioners with a few stating that the secretary reported to the chairperson only. This showed that the members of the secretariat did not have correct and consistent information regarding whom their organization's chief executive reports to. It is significant that some members of the secretariat did not clearly know about the hierarchical reporting relationships pertaining to senior secretariat staff and this may point to a potential for role conflicts in the organization.

The study also established that most of the members of the secretariat believed that everyone in the organization should be responsible for entrenching good governance objectives rather than having a single designated individual. This was in recognition that good governance is the work of everybody. The chairperson of the commission was also identified as being crucial in personifying the good governance ethos of the commission.

This is also because the chairperson is the spokesperson and the embodiment of the aspirations of the commission.

In terms of the hierarchical reporting relationships pertaining to senior secretariat staff namely; secretary, deputy secretary, and managers or departmental directors and whom they report to, the study established that majority of the secretariat confirmed that the commission's secretary reported to the chairperson and the commissioners with a few stating that the secretary reported to the chairperson only. This showed that the members of the secretariat did not have correct and consistent information regarding whom their organization's chief executive reports to. It is significant that members of the secretariat did not clearly know about these reporting relationships and this may point to a potential for role conflicts in the organization.

The secretariat staff of the commission demonstrated an understanding of their roles and responsibilities as members of the commission; they fully understand the vision, mission and governance structure as well as reported fully participating in meetings of the commission at the strategic and committee levels. They also reported active participation in monitoring and evaluation of progress and also in taking a key part in policy-related decisions of the commission which guide operational activities. Thus, it was clear that the secretariat were fully engaged in the activities and operations of the commission and were key partners in the strategic decision-making process in their organization.

The secretariat staff also reported that they participated in administrative activities of the commission. The study established that all staff personnel participated in the budgeting and risk management functions of the commission with most of them participating in planning, evaluation and control, personal organization to undertake commission assignments, play a role in complying with ethical standards and commission rules and regulations, and in problem-solving and decision-making. This high level of participation is expected to make them effective and efficient in executing the organization's mandate as provided by the constitution.

The study also established that the organization had a formal structure represented on an organizational chart. The coverage of the organizational chart included such areas as defining staff responsibilities, providing for career growth, defining the chain of command, defining work teams that work together, defining who the decision-makers are, and also clarifying reporting structures.

4.3. Governance of the Salaries and Remuneration Commission

This section presents the findings on the relationships between the secretariat of the Salaries and Remuneration Commission and its commissioners. It shows the constitutional provisions and legislations that guide the governance of SRC. It will report on how these relationships impact on the governance framework and the capacity of the commission to deliver on its constitutional mandate.

The Salaries and Remuneration Commission is a creation of Article 230 of the 2010 constitution established to constantly review the salaries, benefits and allowances of all state officers and advise the county and national governments on the remuneration of all other public officers. Like any other chapter fifteen commission, the constitution states in Article 250 that a constitutional commission shall have between three and nine members who would either work on a part-time or full-time basis. It also outlines that every commission shall appoint a secretary who shall be its chief executive officer.

As stated in the case for IEBC, the general functions and powers of a constitutional commission include the power to employ its own staff and to undertake any functions and exercise those powers as given by the constitution and the enabling legislation. Another important provision of the constitution is that each commission is considered a separate and legal entity with perpetual succession with a seal and can sue or be sued in its own corporate name. The essence of these provisions is to make the commissions autonomous and not being directed or controlled by any person or authority.

To operationalise the commission, the Salaries and Remuneration Commission Act, No. 10 of 2011 was enacted. The Act provided for the chairperson and members to serve on

part-time basis for a single six-year term with the appointment done as per the provisions of Article 230. However, the Act was amended in 2018 to provide for the chairperson and members to serve full time for one six-year term except those nominated by the attorney-general and the cabinet secretary in charge of finance. This was necessitated by the reality that the commissioners met almost monthly or even twice a month to deliberate on the many tasks they were undertaking in reviewing the remuneration of the entire public service.

The Act also provides that the appointment of the secretary to the commission be done competitively and with the approval of the national assembly. Unlike the appointment of IEBC's secretary, the SRC's secretary has to be approved by the national assembly before appointment. As the CEO, the secretary is responsible for implementing the activities and operations of the commission, forming and developing an efficient administration and organizing, controlling and managing of staff. This is unlike the IEBC Act that has provided in detail the roles of the secretary being the chief executive officer, the head of the secretariat, the accounting officer of the commission, and the custodian of all commission's records. It listed the responsibilities of the secretary to include executing commission's decisions, assigning of duties and supervision of all commission's employees, facilitating, co-ordinating and ensuring execution of mandate of the commission, and ensuring staff comply with the recommended ethics and values. It further provides the term of office of the IEBC's secretary of five years renewable once, unlike the SRC Act, which is silent on the same. The meetings of the commission are to be convened by the secretary in with the approval of the chairperson and are held when and where the chairperson determines as per the second schedule of the SRC Act.

4.3.1. The Administrative Structure of SRC

At inception, SRC developed an organisation structure that had the commission as the top policy and decision-making body while the secretariat was structured into three directorates namely: research, compliance, policy and planning; remuneration analysis; and corporate services. The commission also had three departments namely; internal audit and risk management; corporate communication; and legal affairs as shown in Figure 3.1.

The commission in 2019 developed its new strategic plan (2019-2024) in line with its mandate outlined in Article 230 of the Constitution of Kenya and the SRC Act 2011, the Kenya's Vision 2030 and the Third Medium Term Plan (MTP III), the Big Four agenda, Africa 2063 aspirations, Sustainable Development Goals and other prevailing policy and legal documents. The commission adopted the structure composed of the commissioners, office of the commission secretary and chief executive officer, directorates and departments to facilitate efficient and effective implementation of the strategic plan as shown in Figure 4.2.

At SRC, the commission is responsible for policy and strategic guidance whereas the office of the secretary manages and coordinates the affairs of the commission's secretariat, oversees performance management, develops and implements business continuity plan, ensures effective and efficient service delivery, develops staff, mobilizes resources and routine management of the commissions' affairs.

The commission has a structured system comprising of committees that support in the execution of its mandate, responsibilities and obligations. Selected committees are delegated specific functions by the commission, while retaining the ultimate responsibility, with clear formal terms of reference. Matters that are reserved for the full commission and committees are clearly identified in the terms of reference. The recommendations of the committees are presented to the plenary for deliberation and adoption or resolution. The commission regularly reviews the membership and leadership of the committees to include members with sufficient experience and expertise to deliver through their respective committees. The elected chairpersons are required to appraise the plenary sessions of their activities and operations on a regular basis, through oral and/or written reports (Salaries and Remuneration Commission, 2019).

From the foregoing, the study established that the SRC operated in a simpler organizational environment with an approved charter and clarified reporting relationships among the

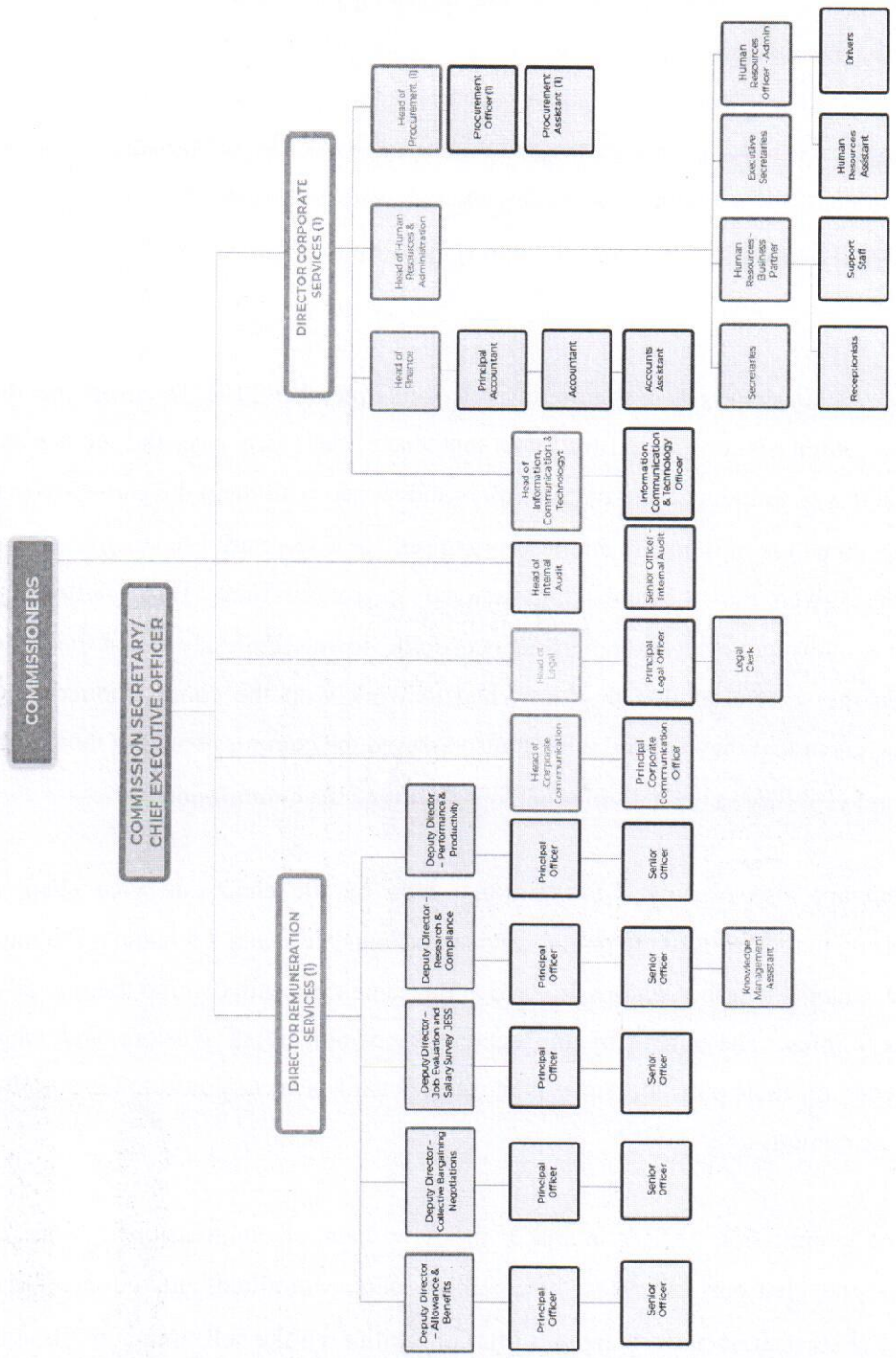
chairperson, commissioners, committees, secretary to the commission and the secretariat. This had led to harmonious working relationships within SRC.

4.3.2. Practical relationships, experiences, challenges and prospects at the SRC

From the analysis of both the primary and secondary information collected and interviews held with key informants from SRC, the following practical governance experiences, challenges and prospects were identified.

Being a creation of the 2010 constitution, the SRC immediately upon establishment was faced with the challenge of coming up with the new remuneration structure for the state officers who were to be elected or appointed after the general election. The commission therefore, had to work overtime, and beyond the scheduled statutory four meetings in every financial year to review and set the salaries and remuneration of state and public officers. Despite being part time, the work of the first commission ended up being almost full time, as the commissioners used to meet every Thursday, and the committees of the commission also met once a week. These committees included audit, risk, and compliance committee; job evaluation task force committee; public administration, governance, energy and infrastructure sector technical services committee; corporate services committee; social, agriculture, security, and environment technical services committee and the legal committee.

Figure 4.2: Organisation Structure of the Salaries and Remuneration Commission



Following the amendment of the Act in 2018 that allowed the chairperson and commissioners, other than nominees of the attorney-general and the cabinet secretary in charge of finance, to work on full-time basis, the secretariat had to change their mode of operations from that which they had with the inaugural part-time commissioners. Despite the change from serving on a part time to full time basis, the relationships amongst the commissioners, the secretary and the secretariat, was not in any way affected. These harmonious relationships continued irrespective of the nature of service the commissioners were serving.

The new commissioners were sworn into office on September 2018. To ensure that the new full time commissioners settled well and appreciated their new role, the secretariat went out of their way to induct them on their roles and shared with them the end-of-term report of the previous commissioners and also organised for a secretariat re-orientation on their new roles, given that the new commissioners were full time. These actions by the secretariat allowed the new commissioners to settle down seamlessly and at the same time informed the secretariat that they now had to work with the commissioners and take guidance given that they are full time. It also assured the commissioners of their authority, power and visibility in the activities and operations of the commission.

The secretary also organised for courtesy calls by the chair and vice chair of the commission to the heads of the public service, the legislature and the judiciary to introduce the new leadership at the commission and at the same time, empowered them to take over their new roles. These acts by the secretariat demonstrated wisdom and emotional intelligence on their part and since then, there hasn't been any information asymmetry within the commission.

With the commission charter in place, the new team of commissioners were able to appreciate the chairperson's roles, the commissioners, committees and the secretariat. The role of the secretariat now changed to that of facilitating the full time commissioners to have their committee and full commission meetings and preparing the agendas for these meetings. The commission also developed a new strategic plan that now considered the

full time nature of commissioners and reviewed their organisational structure to accommodate the new roles.

The secretariat, on their part, ensured that the roles of the commissioners and secretariat are clearly communicated to all so as to avoid any overlap. One of the key attributes of the two set of commissioners was that the two chairs handled their responsibilities in a professional manner and appreciated the role of the secretariat, more so the secretary to the commission, who has also conducted herself in a professional manner. This has led to harmonious working relationship between the secretariat and the commissioners at SRC, notwithstanding that it is the only constitutional commission that has fourteen commissioners, five more than the prescribed maximum number for chapter fifteen constitutional commissions.

This was acknowledged by the chairperson in their end-of-term report and end-of-term ceremony when she reported that what they achieved as a commission was made possible by the critical role and support from the competent secretariat which was the bedrock of the commission. The relationship between the inaugural commissioners and the secretariat was harmonious because of clarity of roles of the chairperson, commissioners, committees, the secretary and the secretariat. This clarity of roles and responsibilities was provided for in the form of a charter.

The secretary to the commission reported to the chairperson, commissioners and committees and that the directors of departments and managers reported to the secretary to the commission. This explains the cordial working relationships within the commission.

Because the inaugural commissioners were part-time, most of the secretariat staff indicated that the work of entrenching good governance in the commission was largely the responsibility of the secretary of the commission with very few indicating that it was the responsibility of the chairperson and the commissioners. The secretariat also reported that their organization had an organizational chart. They also indicated that the chart defined responsibilities, provided for career growth, defined the chain of command, defined the

teams that worked together, identified who the decision-makers in the organization were and also clarified the reporting structures.

From the foregoing, the study established that SRC has harmonious relationship between the secretariat and the commissioners notwithstanding the fact that it has fourteen commissioners, the highest number compared to any other chapter fifteen commission. This harmonious relationship is attributed to proper governance structures that have been put in place by both the secretariat and the commissioners. These structures include the development of a commission charter, clearly providing for the responsibilities of the chairperson of the commission, the commissioners, secretary and the secretariat.

4.4. Summary

This chapter shows the constitutional and legislative provisions on the relationships between the secretariat and commissioners of both IEBC and SRC. It also provides the current administrative structures and the relationships between the commissioners and the secretariat. Through analysis of the both primary and secondary information collected and interviews held with key informants, the chapter has shown the kind of practical relationships, experiences, challenges and prospects at IEBC and SRC.

Whereas the provisions of the constitution on governance of constitutional commission are the same for all the chapter fifteen commissions, the enabling legislations however, differ for both the IEBC and the SRC. The IEBC Act is the only legislation, of all the chapter fifteen commissions, that has specifically provided for the relationship and roles of the secretariat from those of the commissioners. Despite these clear provisions, the same IEBC is still experiencing multiple and conflicting reporting relationships as compared to the SRC, which has had an harmonious relationships since its establishment in 2011. This specific statutory provision in the IEBC Act may have created imaginary powers to the secretariat that have led to conflicts with the commissioners. This finding supports the hypothesis that the creation of commissions with a secretariat led by a chief executive officer that directly draw their mandate from the constitution or legislation has impacted negatively on the governance of constitutional commissions.

As the high court stated in its judgment, constitutional commissions, in our case IEBC, are made of commissioners who make up the commission and that the secretary to the commission is an appointee of the commission, meaning the commissioners, and only implements what the commission resolves. Therefore, any legislation that attempts to give any powers to the secretary to the commission and the secretariat, which has not been donated by the commission is to that extent null and void. There is need therefore, to remove all those legislative provisions that have given the secretary to the commission and the secretariat express powers and affirm that it is the commission, meaning the commissioners, are the only ones who can delegate their powers or authority, and any powers being exercised by the secretariat is donated and can be taken away by the commission at any time.

The results for this chapter show that SRC has had an harmonious relationship between the commissioners and the secretariat despite the fact that it has the highest number of commissioners, fourteen, as compared to any other chapter fifteen commission. This harmonious relationship can be attributed to proper governance structures that has been put in place by both the secretariat and the commissioners. These structures include the development of a commission charter, clearly providing for the responsibilities and roles of the chairperson of the commission, the commissioners, secretary and the secretariat.

The other key factor is the induction and re-orientation of the commissioners and the secretariat respectively on their roles and responsibilities before the commencement of their duties. This act alone, ensured that the commissioners and the secretariat are very clear on their roles and avoided any possible overlaps and conflicts. The study also shows that most of the secretariat staff at SRC felt that the responsibility of entrenching governance principles in the organization rested with the secretary to the commission. This is attributed to the fact that the commissioners were part time and the secretary to the commission was the most notable actor within the commission. However, with the terms of service of the commissioners having been converted into full time, this perception is expected to change, as the commissioners are the ones currently responsible for all the commission activities on a full time basis.

The absence of a commission's charter at IEBC, though it had developed what it called a draft plenary charter, explains the difference in the relationships between the secretariat and the commissioners as compared with the SRC. The SRC has a charter that clearly provides for the roles and responsibilities of the chairperson, commissioners, committees, secretary to the commission and the secretariat. With clarity of roles, the possibility of conflicts is reduced, if not eliminated at the SRC.

The IEBC is a recipient of huge amount of resources to conduct and manage elections in the country, whereas the SRC is among the least funded constitutional commissions. Access to huge resources exposes commissions to competing business interests that if not managed well end up at the commission either through the secretariat or the commissioners. This results into conflicts as the commissioners and secretariat front their favourite suppliers or manufacturers against the legal provisions on management of public funds as confirmed by the PAC's report on the examination of the auditor general's report on IEBC's financial statements for the period ended 30th June 2017. The report established that conflict of interests amongst the chairperson, commissioners and the secretary in the procurement of KIEMS kits.

One other key consideration is that the SRC has been led by the female gender since its inception at both the chairpersons and secretary to the commission's positions, whereas the IEBC has been led by the male gender at both positions since inception. The study however, did not establish whether gender had any contribution to the differences on the relationships between the secretariat and the commissioners between the two commissions and contributes to the conflicts.

The IEBC commission has undergone a lot of transformation from the independence Electoral Commission with ten members, the 1992 ECK with twenty-two members, the 2008 IIEC with nine members and finally the 2010 IEBC initially with nine members but now with seven members from the year 2016. All these changes were informed by the existing and changing political preferences. Unlike IEBC, the SRC has had a stable membership of fourteen commissioners from 2010. This stability, despite the high number

of membership, has contributed to the harmonious and cordial working relationships between the commissioners and the secretariat at the commission.

The SRC's first team of commissioners served on a part-time basis until 2018 when the law was amended to allow the chairperson and all members except those nominated by the attorney general and the cabinet secretary in charge of finance to serve on a full time basis. This amendment was informed by the fact that the commissioners were actually spending most of their time at the commission and therefore, the need to formalise that arrangement in law. Serving part-time required a secretariat that that was competent and professional to do most of the work, which could lead to competing responsibilities and roles between the secretariat and commissioners. For SRC, this was the converse, as there was harmonious relationship between the secretariat and the commissioners. Unlike SRC, IEBC has had a stint of full time commissioners from 1992 with the governance challenges it has had since then.

There is also a significant difference in the two commissions' secretariat understanding on whose responsibility it is in entrenching good governance in their respective organizations. Of significant interest is that most of IEBC secretariat surveyed considered it the responsibility of everyone to entrench good governance in their organization while at SRC, almost half indicated that it was the secretary's role to do this. Thus, it may be concluded that the reporting relationships was more blurred and complex for the IEBC than for the SRC.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This chapter presents the conclusions on the relationships between the secretariat and the commissioners in the governance framework of the two commissions, IEBC and SRC and the attendant impact on the respective commission's mandate based on the key findings of this study. It also presents recommendations that would logically arise from the conclusions and makes suggestions for further study. It also highlights some limitations of the study.

5.2. Conclusions

The study found that in both the IEBC and the SRC, the commissioners and the secretariat essentially agreed that there was a negligible difference in their understanding of the constitutionally envisaged relationships between them. In practice, however, it was found that the reporting relationships between the commissioners and the secretariat at the IEBC was marked with differences leading to blurred roles and subsequently affecting realization of its constitutional mandate. At the SRC, in contrast, relationships were more harmonious and constitutional mandate appeared to be on course to being achieved.

Upon its establishment, the IEBC had a generally good public image. However, it briefly ran into a number of institutional and operational challenges among them disagreements between the secretariat and commissioners ; poor implementation of the law; doubt on the election date; the procurement of the Biometric Voter Registration (BVR) kits; and delayed development and gazettment of election regulations (Open Society Foundations, 2015).

From the legislation creating the IEBC, there seems to be some lacunae about the reporting relationships. This may have led the employees of the commission to perceive a sense of parity between the commissioners and the secretariat. The IEBC Act is the only legislation of all the chapter fifteen commissions that has specific provisions on the relationship between the commissioners and the secretariat, employment of the secretariat, the types of

the secretariat, vacancy in the office of the secretary and the units of the commission. These legislative provisions may have emboldened the secretariat to believe that they are of the same or near status to the commissioners hence the persistent conflicts that have been synonymous with IEBC. On the other hand, the SRC Act and other constitutional commissions' legislations has only made reference to Article 252(1) (c) of the constitution giving them power to recruit its own staff and no details on the type of staff and nature of relationships.

The study found that the existing organizational structure of IEBC do not reflect a rational process designed to be lean, flexible and effective in delivering outputs envisaged by the constitution. Instead, because the commission is a creation of a political process of compromise, their structures reflect political rather than strictly managerial considerations. Accordingly, the IEBC was constituted in such a way that it would not be as effective and efficient as it ought to be arising from the constitutional and the legislative framework establishing it. As of 2017 general elections, the IEBC had ten committees' structure that assisted in the execution of its duties, powers and authorities that included boundaries delimitation, political parties' liaison and campaign finance control, voter education, partnerships and media, dispute resolutions, elections, technical and operations among others. It also had seventeen regional offices, forty-seven county offices, and two hundred and ninety constituency offices (Independent Electoral and Boundaries Commission, 2018). This is in contrast with the SRC, which is the largest chapter fifteen commission in terms of commissioners that had only six committees all stationed at the head office and has had a very stable and good working relationship between the commissioners and the secretariat. Perhaps this is understandable given that organizations are always creatures of political compromises and cannot be expected to be completely utilitarian. Watson (2006) has observed that organisations exist as part of the historical process within which people have struggled with the world and with each other to handle the challenges of scarceness. This is especially true in the case of Kenya's search for a working constitution, which brought forth the two commissions.

The study found that the IEBC, a commission established before the 2010 constitution of Kenya, had better and more robust governance structures and reporting relationships compared to the SRC. This difference might be attributed to the fact that IEBC has existed in one form or other since independence. The IEBC has well-established countrywide structures and boasts of a longer institutional memory compared to the SRC.

The study established that the secretary to the commission and the chairperson are critical in determining the nature of relationships and governance structure that a commission will have. As seen in IEBC, where there are competing roles and personal ego between the chair and the secretary to the commission, it follows that there will be conflict within the commission. However, where the secretary and the chairperson have understood their constitutional and legislative roles and followed them up with a charter explaining those roles like SRC, then there is harmony and cordial working relationships among the chairperson, commissioners, committees, secretary and the secretariat.

Although the IEBC had robust structures, the study found that it was characterized by a complex organizational structure imbued with blurred reporting relationships and without an approved plenary charter. Under this structure, secretariat staff reported to multiple centres of power within the commission, a situation which bred a lack of role clarification and conflicts as communication was constantly hampered. In contrast, the SRC operated in a simpler organizational environment with an approved charter and clarified reporting relationships among the chairperson, commissioners, committees, secretary and the secretariat. This had led to harmonious working relationships within SRC unlike the conflicts reported within the IEBC.

The study also suggests the need for staggered appointment of commissioners to allow for transfer of knowledge and institutional memory to new commissioners whenever appointed. This has been the challenge with IEBC when transitioning as most of the past commissioners have been appointed at the same time for a similar single term. The SRC, because of delay in appointment of some of the commissioners and the presence of

nominees of the attorney general and the cabinet secretary in charge of finance, has had some commissioners available to induct the new ones upon appointment.

The study also found that the number of commissioners in a commission is not a key factor in determining the nature of relationships and governance structure within commissions. The IEBC and its predecessors has had as high as twenty two commissioners and as low as seven whereas SRC has fourteen commissioners. The current IEBC has seven commissioners and it has had conflicts between the secretariat and the commissioners as compared to SRC. The SRC has had harmonious relationship between the commissioners and the secretariat despite the fact that it has the highest number of commissioners, fourteen, as compared to any other chapter fifteen commission. This harmonious relationship is credited to proper governance structures that has been put in place by both the secretariat and the commissioners. These structures include the development of a commission charter, clearly providing for the roles and responsibilities of the chairperson of the commission, the commissioners, the secretary and the secretariat.

It also established that induction and re-orientation of the commissioners and the secretariat respectively on their roles and responsibilities before the commencement of their duties is critical for effective governance of commissions. This act alone, ensures that the commissioners and the secretariat are very clear on their roles and avoids any possible overlaps and conflicts.

The study found that a very small percentage of SRC secretariat staff were given a chance to participate in strategic management and administrative functions of their organization compared to the participation in these functions reported by the IEBC secretariat. In fact, the greatest difference in participation in strategic management activities and roles was seen in the extent to which staff attended commission meetings as only few staff participated in SRC whereas in the IEBC majority of staff regularly and routinely participated.

As a rule, the design of organizational structures and the development of an appropriate culture are supposed to facilitate the implementation of organizational mandate. This study found that the legal structure of the commissions and the blurred roles for the chairperson, commissioners, committees, secretary to the commission and the secretariat as in the IEBC meant that the commissions were not properly positioned to deliver on the required outcomes and greatly impacted on the mandates. The study also found that strategic decisions made were significantly influenced by the type of working relationships between the commissioners and the secretariat and to some extent the working culture and professionalism of the chairperson and the secretary to the commission.

5.3. Recommendations

The study recommends that the IEBC undertakes a review of its law with a view of empowering the commissioners to fully take charge of the operations of the commission without any limitations and reference to the current provisions where the commission and the secretariat have been prescribed what to do and not what to do. This will clarify the role of the commission and that of the secretariat as per the high court ruling in the case of *Eng. Michael Sistu Mwaura Kamau & 12 others v. Ethics and Anti-Corruption Commission & 4 others*, which stated that the secretary to the commission and the secretariat can only implement the commission's resolutions and carry out the powers vested in their offices when the commission is exercising its powers.

The need for a charter providing for the roles and responsibilities of the chairperson, commissioners, committees, secretary to the commission and the secretariat should be a requirement for all constitutional commissions. This will help in clarifying the purpose, authority and roles of each actor within the commission as provided for in the constitution and the enabling legislation, hence reducing potential conflicts and leading to harmonious and cordial working relationships as seen in the SRC.

The need for induction of commissioners and the secretariat any time they take up new roles or appointed is critical and this will ensure that the appointees settle well in their new roles and also give them an opportunity to seek any clarification on their roles and

responsibilities. This was a task done and adopted by SRC and has worked well during the transitioning from part-time to full-time commissioners. Every member of the commission and the secretariat understands their new roles and responsibilities and room for conflicts reduced or eliminated completely.

Staggering the appointment of commissioners will greatly improve the working relationships between the commissioners and the secretariat and enhance the delivery of the mandate of the commission. The newly appointed commissioners will be inducted by the remaining commissioners, ensuring that they understand their new roles and this will avoid any potential conflicts between the secretariat and commissioners.

It is also recommended that commissions design governance structures on rational, rather than political, considerations. It is expected that commissions would become more effective, lean, flexible, and provide value for money to the public. Specifically, it recommends a professionalization of the organizational structures of the commissions along the lines of high performing organizations. This would enable commissions to escape unnecessary managerial conflicts brought about by an unwieldy structure whose only interest is to cater to the political considerations.

A suggested organizational redesign might require that the Commissions be structured along project or matrix teams rather than the current hierarchical format. This would greatly enhance delivery of results as anticipated by the Constitution. The SRC has set up committees of the commission along projects or functions such as allowances and benefits, collective bargaining negotiations, job evaluation and salary surveys, research and compliance, legal, performance and productivity among others.

It is also recommended that the secretariat and the commissioners see their organizations as living entities which grow with the times. This perspective would empower these executives to regularly propose changes to commission structures which would then be introduced to the enabling legislations. This would make the commissions relevant to changing times. An evolving structure that responds to the needs of the social, managerial,

and political forces would best enable these commissions be true to their charters and advance the democratic ideals envisioned in the 2010 constitution.

The study recommends a review to consider whether chairpersons of commissions should be designated as executive chairperson, responsible for the management of the commission. There will be need however, for transparency and accountability of actions taken by the chairperson on behalf of the commission as a chairperson and those taken as the chief executive officer.

5.4. Contributions of the Study

The findings of the case studies suggest that the legislative and regulatory framework of any institution affects its governance. It is important therefore, to develop the legislative and regulatory framework that factors in the relationships of all the stakeholders within the organisation.

Another key contribution is that policy and operational guidelines are critical for harmonious relationship in the governance and practice of management. Policy and operational guidelines such as a charter, induction guidelines, and recruitment and selection process are critical for successful governance of organisations.

5.5. Limitations of the Study

The main challenge of the study that may have impacted on the findings and conclusions were that at the time of the study, the IEBC was not properly constituted as required by law. The commission had only three commissioners against the total establishment of seven provided for in the Act. The commission did not also have a substantive secretary to the commission, with the position held by the deputy secretary. The reported commission's performance and existing relationships may not have fully reflected the commission's as when it is fully constituted.

On the part of SRC, the study was conducted at a time when the commissioners in office had only been appointed for one year. The pioneer commissioners had left office more than

nine months prior to the study and had been in office for six years. Accordingly, the secretariat and the commissioners may not have appreciated the functioning and relationships within the commission, and more specifically their specific roles in the governance of constitutional commissions.

The pioneer commissioners of SRC were appointed on a part-time basis. However, the current commissioners were appointed on a full-time basis. The transition from part-time to full-time commissioners may have affected the way the secretariat staff understood the governance framework of constitutional commissions.

The research also faced the challenge of getting full support from the respondents, mainly from the secretariat, given the challenges that the constitutional commissions have faced in the past and continues to face. The willingness of the respondents to fill or accept the interview and be open and honest was also a challenge experienced during the study.

5.6. Suggestions for Further Study

From the literature, findings and conclusions from this study, it is proposed that future research be undertaken in establishing the organizational challenges facing commissions established under the constitution. Specifically, the researchers should investigate the role and impact of politics on the delivery of their mandates as envisaged under the constitution.

For example, would it be better to insulate such commissions from political forces? Should constitutional commissions focus exclusively on executing their mandate or should they be primarily political tools? Answering these questions would then define the organizational structure of the commissions particularly as regards the appointment of staff, both secretariat and commissioners.

There is need to undertake a study on whether gender plays any role in the leadership of constitutional commissions. As established in the study, SRC has been led by the female gender since inception in 2011 at both leadership positions of secretary and chairperson,

whereas at the IEBC, the male gender has been providing leadership at both positions. The study established that SRC has had an harmonious working relationship between the commissioners and the secretariat whereas the converse was happening at the IEBC. This justifies the need for further study on this.

Future research can also focus on assessing the effectiveness of commissioners who are politically appointed with a view to recommending whether they should act as day-to-day managers of the commissions or they should act in the manner of a board of directors. At the moment, it is not clear whether commissioners in the organizations studied are executives of their commissions or act as the board. Who really is and should be held accountable for the success of the organization? Is it the chairperson, commissioners, the secretariat, or all? The current study did not delve into this and cannot provide guidance on this topic. Future researchers should be able to provide empirically-guided recommendations for adoption by political masters in the nation. Linked to this suggestion is to consider the role of an executive chairperson in an independent commission as it is in the United States of America, and whether governance structures and accountability mechanisms shall be effective.

Finally, it is proposed that a study on corporate governance of state owned enterprises (parastatals) be undertaken on the basis of the findings in this study. Specifically, researchers should seek to address issues of governance principles and how these have been deeply entrenched, involvement of staff in strategic management of these organizations, clarity of reporting relationships, and responsibility for promoting good governance of these state agencies, should it be the line ministries or the parastatals themselves?

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APPENDIX I: QUESTIONNAIRE SCHEDULE

GENERAL OVERVIEW OF THE RELATIONSHIP BETWEEN THE SECRETARIAT AND COMMISSIONERS

1. In your opinion, how can you term/rate the kind of relationship that exists/existed between the commissioners and the secretariat in your Commission?
 - a. Good []
 - b. Bad []

2. If the relationship is **Bad** in 1 above, kindly indicate the extent to which the following factors influence/influenced this kind of relationship within the Commission? Please **TICK** accordingly in the appropriate column Where 1= Not at all; 2= little extent; 3= some extent; 4= large extent; 5= very large extent

Factors	1	2	3	4	5
Lack of clear definition of roles and responsibilities of Commission Members and the Secretariat					
Varied political affiliation among members of the Commission					
External influence from other government quotas (e.g. the Executive arm of Government)					
Constitutional and legal challenge in the separation of powers among the commission members and the secretariat					

3. Do you think lack of clear separation of power between the Secretariat and Chairperson of the Commission in the constitution is a major factor that fuels wrangles and conflicts among the Commission Member and the Secretariat?
 - a. Yes []
 - b. No []
4. If YES in 3 above, what do you think should be done to resolve this legal and constitutional challenge?.....
5. Considering that many commissions experience political and leadership wrangles, does/did your Commission have an Organisation's Chart to resolve this problem?
 - a. Yes
 - b. No
6. If Yes in 5 above, does/did the organization chart highlight the following aspects in an attempt to enhance cordial relationship between the Secretariat and other Commission Members. *(Kindly tick the appropriate response.)*
 - a. Clearly define roles and responsibilities of various Commission Members.

- b. Layout a framework depicting the chain of command and flow of information within the Commission's governance structures.
- c. Define parties within the Commission mandated with the obligation of formulating policies, and implementing decisions.
7. In your Commission, who is/was responsible to carrying out the daily administrative roles of the Commission? *(Kindly tick the appropriate response.)*
- a. Chairperson []
- b. Committee of the Commission []
- c. Secretary to the Commission []
- d. Directors/Managers []
- e. Others
(specify).....
8. In the Commission, to who does/did the Secretary to the Commission (CEO) accountable to?
- a. Commission's Chairperson []
- b. Committee of the Commission []
- c. Commissioners and the Chairperson []
- d. Commission's Chairperson []
- e. Others (specify).....
9. To whom are/were the Directors/Managers accountable to within the Commission's governance structure?
- a. Chairperson []
- b. Secretary to the Commission []
- c. Committee of the Commission []
- d. Commissioners []
- e. Others (specify).....
10. Tick the appropriate box in the table to show the extent to which the Secretariat members are/were involved in the following principles of governance within the Commission. Please **TICK** accordingly in the appropriate column Where 1= Not at all 2= little extent 3= some extent 4= large extent 5= very large extent

Principle of governance	1	2	3	4	5
Accountability					
Upholding rule of law					
Efficacy and effectiveness					
Participation					

11. In your view, who is/was entirely accountable for the general management of the commission's mandate, roles, functions, and responsibilities?
- a. Chairperson []
 - b. Secretary to the Commission []
 - c. Directors/Managers []
 - d. Committee and Commissioners []
 - e. Others (specify).....

12. In your opinion, do you think there is/was a relationship problem between the secretariat and commissioners within constitutional commissions?

13. Do you think the relationship between commissioners and the secretariat has an influence on the general performance of the commission?.....

14. IF Yes in 13 above, explain how it affects the Commission's performance.....

15. What extent to the relationship between the Secretariat and Commissioners influences the involvement of the Secretariat in the following four stages of Commission management. Please **TICK** accordingly in the appropriate column Where 1= Not at all 2= little extent 3= some extent 4= large extent 5= very large extent

Stages of managing the commission	1	2	3	4	5
Planning					
Implementation					
Evaluation					
Monitoring					

16. How does this relationship issue affect the morale of other staff members working in the commission?

17. What are the key constructs responsible for creating relationship conflicts between the commissioners and the secretariat?

18. Based on your experience, is/was the current relationship, and power struggles within commissions a practical or legal question? Kindly elaborate.....

19. As a Commission, which incentives have/did you embrace to promote cordial working relationship between the Secretariat and other commissioners?.....

20. Lack of clear separation of power and duties between the Secretariat and Commissioners is one of the factors causing relationship problem within commissions. What do you think should be done to resolve this issue?
21. As a Commission, what lessons have/did you learn from such relationship and power struggles within the commission?

PREAMBLE

My name is Kipkoech Andrew Tanui. I am a graduate student at the University of Nairobi carrying out a research on *“Governance of Constitutional Commissions in Kenya: Experiences, Challenges and Prospects (2010-2019), A Study of the Independent Electoral and Boundaries Commission and the Salaries and Remuneration Commission”*. I shall be grateful if you kindly spare a little of your time by responding to some questions in this study. Your responses will be treated with confidentiality and purposely for this study.

Name of the Respondent (Optional)	
Name of Commission	
Designation of Respondent	
Date	
Venue	

REPORTING RELATIONSHIPS

1. To whom does the Secretary to the Commission report to?

(Please tick one)

- a) Chairperson
- c) Committee of Commission
- e) Chairperson and Committee
- g) None
- (b) Commissioners
- (d) Chairperson and Commissioners
- (f) Chairperson, Commissioners and Committee
- (h) Other (please state).....

2. To whom does the Deputy Secretary to the Commission (if any) report to?

(Please tick one)

- a) Chairperson
- c) Committee of Commission
- e) Chairperson and Committee
- g) None
- (b) Commissioners
- (d) Chairperson and Commissioners
- (f) Chairperson, Commissioners and Committee
- (h) Other (please state)

3. To whom does the Directors/Managers of the commission report to?

(Please tick one)

- a) Chairperson
- c) Committee of Commission
- e) Chairperson and Committee
- g) None
- (b) Commissioners
- (d) Chairperson and Commissioners
- (f) Chairperson, Commissioners
- (h) Other (please state)

GOVERNANCE OBJECTIVES

4. How important are the following principles of good governance in your organisation?

(Please tick one box for each principle - Rate on a scale of 1 - Lowest to 5 - Highest)

Principle of Governance	5	4	3	2	1
Participation					
Consensus orientation					

Principle of Governance	5	4	3	2	1
Strategic Vision					
Responsiveness					
Effectiveness and efficiency					
Accountability					
Transparency					
Equity					
Rule of law					

5. Who is responsible for the above principles of good governance objectives in your organisation? (Tick as appropriate)

- a. Chairperson
- b. Commissioners
- c. Committees of Commission
- d. Secretary to the Commission
- e. Secretariat
- f. None
- g. Other (please state)

STRATEGIC MANAGEMENT

6. Secretariat's participation in strategic management of the constitutional commission (Rate on a scale of 1 - Lowest to 5 – Highest).

	Considerations	5	4	3	2	1
1	Secretariat has a clear understanding of the vision, mission and governance structure of the commission.					
2	Secretariat has clear understanding of its roles and responsibilities as member of the commission.					
3	Secretariat attends at least 80% of all commission and committee meetings and facilitates focus and progress during commission meetings.					
4	Secretariat participates in policy-related decisions at Commission and Committee level, which effectively guide operational activities of the commission and consequently discharge commission tasks within agreed timeframes.					
5	Secretariat actively participates in the monitoring and evaluation of progress towards strategic goals.					

ADMINISTRATION

7. Do members of the Secretariat get involved in the administrative activities indicated below?

- a. Yes
- b) No

If Yes, please select a number between 1 and 5 indicating your main involvement (5 indicating that main involvement and 1 indicating that you least involvement)).

	Performance Indicators	5	4	3	2	1
1	Planning, evaluation and control of activities					
2	Budgeting and Risk Management					
3	Personal organization to undertake commission assignments					
4	Compliance with ethical standards and commission rules and regulations.					
5	Problem solving and decision making abilities					

HUMAN RESOURCE MANAGEMENT

8. What are the commonly used procedures in the recruitment and appointment of Secretariat staff to the Constitutional Commission? (Please select a number between 1 and 5 indicating your main mechanism (that is, 5 indicating that main mechanism and 1 indicating that you least employed mechanism)).

	Procedure	5	4	3	2	1
1	Advertisement & Competitive selection					
2	Secondment from the National Government					
3	Commissioners Head Hunting (preference)					
4	Others(Specify)					

9. What is the proportion of Secretariat Professional staff to Support staff in the Commission?

1. Above 50%
2. 26-50%
3. 0-25%

ACCOUNTABILITY STRUCTURE

10. Does your organisation have an Organisation Chart? (Tick one)

- a) Yes b) No

11. If yes, does it cover the following matters? (Tick as appropriate)

- a) Define your responsibilities b) Provide for career growth
- c) Define your chain of command (d) Define teams that work together
- e) Define who decision makers are (f) Reporting structures

12. How many staff do you have?

- a) Commissioners (b) Deputy Commissioners
- c) Directors (d) Managers
- e) Support Staff

13. What qualification (s) does your Directorate staff have? (Tick as appropriate)

- a) PhD (b) Masters

- (c) Bachelors
 (e) Other qualification
- (d) Diplomas

PERSONAL AND ORGANISATIONAL PROFILE

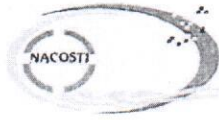
14. What age bracket are you in? (Tick one)
- a) Over 50 years (b) Between 41-50Yrs
 (c) Between 31-40 Yrs. (d) Under 31

15. What is your educational level? (Tick one)
- a) PhD (b) Masters
 (c) Bachelors (d) Diplomas
 (e) Other qualification

16. What type of experience have you got? (Tick one)
- a) Public Practice (b) Financial Management
 c) Private Practice (d) Auditing
 e) General Management (f) Other(s)

Thank you for your time and participation.

APPENDIX II: RESEARCH AUTHORIZATION



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

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NAIROBI-KENYA

Ref. No. **NACOSTI/P/18/39603/25641**

Date: **9th October, 2018**

Kipkoech Andrew Tanui
University of Nairobi
P.O. Box 30197-00100
NAIROBI

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on *“The secretariat’s relationship with commissioners and its influence on governance of constitutional commissions (1997-2017): Study of the Independent Electoral and Boundaries Commission and the Salaries and Remuneration Commission”* I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for the period ending **9th October, 2019**.

You are advised to report to the **Chief Executive Officer, Independent Electoral and Boundaries Commission, the Chief Executive Officer, Salaries and Remuneration Commission, the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit a **copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.


BONIFACE WANYAMA
FOR: DIRECTOR-GENERAL/CEO

Copy to:

The Chief Executive Officer
Independent Electoral and Boundaries Commission.

National Commission for Science, Technology and Innovation is ISO9001:2008 Certified

The Chief Executive Officer
Salaries and Remuneration Commission.

The County Commissioner
Nairobi County.

The County Director of Education
Nairobi County.